

FAMILY AND MEDICAL LEAVE ACT
29 U.S.C. § 2601 et seq.

Darren A. Feider and Todd R. Sorensen

WILLIAMS KASTNER & GIBBS

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WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600
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FAMILY AND MEDICAL LEAVE ACT DEVELOPMENTS

OVERVIEW OF FMLA

In an attempt to balance a family's needs against the demands of the workplace, Congress designed the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601-2654 ("FMLA"), to provide a security net by setting minimum employment standards for unpaid leave on the basis of medical necessity. The Department of Labor ("DOL"), in turn, issued regulations to implement the statutory provisions of the FMLA. 29 C.F.R. §825.

Employer exposure under the FMLA is typically divided into two categories: Interference and Retaliation. Interference occurs where an employer who is covered by the FMLA fails to grant FMLA-qualified leave to a qualified employee, or where an employer fails to adequately reinstate such an employee after her return from leave. Retaliation occurs where an employer adversely changes the employee's status because of her participation in FMLA-protected conduct.

The following analysis is primarily intended to provide employers with a basic overview of the FMLA, maximizing the employer's ability to comply with the FMLA and, thus, avoid exposure to FMLA interference claims. Throughout this guide, recent decisions from U.S. Federal Circuit Courts of Appeal are included to bring FMLA issues to life and keep employers on the cutting edge of FMLA law. However, the cases discussed may not necessarily be binding in your jurisdiction and should not be used as a substitute for legal advice.

I. ELIGIBILITY

Employers governed by the FMLA are those who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding year, as well as said employer's agents and successors in interest. To determine whether an employer is a successor in interest, courts consider whether there is: (1) substantial continuity of the same

business operations; (2) use of the same plant; (3) continuity of work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery, equipment and production methods; (7) similarity in products and services; and (8) the ability of the predecessor to provide relief.

The definition of an eligible employee is significantly more narrow. The FMLA protects employees who: (1) have worked for at least 12 months, with at least 1,250 hours during those months; and (2) are employed at a worksite within a 75 mile radius of the worksite of 50 or more other employees.

An eligible employee is entitled to 12 “work-weeks” of leave during any 12-month period. Where an employer is the successor in interest to the employee’s previous employer, months of employment accrued carry over to the new employer. Eligible employees are entitled to family and medical leave for the following reasons:

1. the birth of a child, and in order to care for that child;
2. the placement of a child with the employee for adoption or foster care;
3. care of a spouse, child or parent who has a “serious health condition”; or
4. the employee’s own “serious health condition” which makes him or her unable to perform the functions of the job.

Spouses employed by the same employer are jointly entitled to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, placement of a child for adoption or foster care, and to care for a parent who has a serious health condition. Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer’s approval.

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

A. Maintenance of Health Benefits

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken. The insurance must offer the same terms the employee would have enjoyed had they continued work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work upon the expiration of FMLA leave.

B. Unlawful Acts

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice or having any involvement in a proceeding related to FMLA.

C. Enforcement

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

RECENT CASES INTERPRETING ELIGIBILITY

Employer may be bound by initial determination of FMLA eligibility.

Minard v. ITC Deltacom Comm'n, 447 F.3d 352 (5th Cir. April 18, 2006)

Minard requested FMLA leave and her employer issued a memorandum granting her 12 weeks of FMLA leave. During Minard's leave, the employer determined the FMLA did not apply to Minard because there were less than 50 employees within 75 miles of her worksite. On the day that Minard was scheduled to return to work, she was terminated.

Minard brought action alleging that she was denied the FMLA leave to which she was entitled and, in the alternative, her employer was estopped from denying FMLA leave after affirmatively representing that she qualified for such leave. The employer moved for and obtained summary judgment, on the basis that, because there were less than 50 employees within 75 miles of Minard's worksite, the court lacked subject matter jurisdiction.

On appeal, the Fifth Circuit held that the "50 employees within 75 miles" requirement is not jurisdictional. Furthermore, to the extent that Minard reasonably relied upon the employer's representation that she was entitled to FMLA leave, the employer would be estopped from arguing otherwise.

Twelve months continues with successor in interest.

Cobb v. Contract Transport, Inc., 452 F.3d 543 (6th Cir. June 28, 2006)

Byrd trucking held a contract for mail delivery with the United States Postal Service ("USPS"). Since July 2000, Cobb had served as a truck driver along the same routes for Byrd, carrying mail to various transfer points. In June 2003, Contract Transport underbid Byrd for its contract with USPS. The majority of truck drivers Byrd employed for these USPS routes were hired away from Byrd, including Cobb.

In December, 2003, Cobb contacted Contract and reported that he would be unable to work due to an emergency gallbladder removal. Contract terminated Cobb. Cobb brought action alleging interference with FMLA leave. Contract responded by claiming Cobb was ineligible because: (1) He had been employed by Contract for less than 12 months and (2) There were less than 50 employees within a 75-mile radius of the truck stop Contract deemed Cobb's worksite. The district court granted summary judgment in favor of Contract based on its first argument.

On appeal the Sixth Circuit reversed. The definition of "employer" in the FMLA includes "successors of interest." 29 U.S.C. § 2611(4)(A)(ii)(II). The court refused Contract's suggestion that a transfer of assets is a necessary precondition to establishing a successor in interest relationship. Instead, the court looked to the reality of the relationships, reasoning that as Cobb's employment had been continuous and his route, stops and function remain unchanged, Contract was a successor in interest to Byrd.

The Sixth Circuit also refused to accept Contract's characterization of one of Cobb's truck stops as his worksite. While a transportation employee's "worksite" is the terminal to which he is

assigned to report for work, depart and return, 29 C.F.R. § 825.111(a)(2), there was no clear terminal for Cobb. Therefore, the Sixth Circuit defaulted to the Des Moines dispatch center. Because there were more than 50 employees in Des Moines, Cobb qualified as an FMLA-protected employee.

Threats of violence warrant dismissal; no FMLA protection.

Anders v. Waste Management of Wisconsin, Inc., 2006 U.S. App. LEXIS 23184 (7th Cir. September 12, 2006)

Anders was a route driver for Waste Management whose pay was partially incentive-based, depending upon the productivity of his routes. Anders, displeased with the routes he had been assigned, told his supervisor he was not feeling well. But rather than returning home or going to the doctor, Anders left work to drive to an administrative office to confront other superiors regarding his unfavorable routes. Anders became violent with those supervisors and was terminated for his violence.

Anders brought suit alleging, among other things, that he had been terminated for making an FMLA leave request. The Seventh Circuit held Anders merely requested to see the doctor, and that such a request, without more, did not constitute adequate notice of intent to take FMLA leave. Furthermore, Anders' violence was not caused by any purported illness and was sufficient, independent grounds for termination: "The FMLA 'was designed to help working men and women balance the conflicting demands of work and personal life,' it was not intended to excuse violence in the workplace."

FMLA leave may run concurrently with paid leave.

Slentz v. City of Republic of Mo., 448 F.3d 1008 (8th Cir. May 12, 2006)

Slentz was a Missouri police officer who had accrued more than twelve weeks of sick leave as an employment benefit over his years of service. After injuring his shoulder off-duty, Slentz took leave for surgery and recovery. The City notified Slentz that it was designating his leave as FMLA leave and that it would require return to work certification by his physician before he returned. At the end of his FMLA-entitled 12 weeks, Slentz's physician deemed Slentz unfit for work. Because the City refused to grant Slentz additional leave, Slentz resigned and brought suit, alleging the City had interfered with his FMLA rights.

On appeal from the trial court's summary judgment in favor of the City, the Eighth Circuit affirmed. The Eighth Circuit observed that under the FMLA the employer may permit an employee to use FMLA leave and sick leave sequentially or it may require that the two run concurrently. The court reasoned that because twelve weeks of leave is the maximum required by the FMLA, Slentz could not maintain an action for additional time.

Dissenting, Judge Heaney opined that the majority had improperly deprived Slentz of accrued employment benefits, in violation of 29 U.S.C. § 2614(a)(2). Heaney conceded that the first twelve weeks of Slentz's accrued sick leave ran concurrently with the twelve weeks of FMLA leave. However, because Slentz had accrued more than twelve weeks of sick leave, Slentz

should have been entitled to the amount of accrued sick leave remaining after the first twelve weeks.

While the Slentz majority opinion is helpful insofar as it reaffirms the rule that the employer may elect to run an employee's paid sick leave concurrently with his FMLA leave, employers should be careful not to rely too firmly on Slentz. Based upon the language of the FMLA, it appears the dissent may have the more accurate interpretation: Where an employee has more than twelve weeks of accrued paid sick leave, the employer is best advised to allow the employee the sick leave remaining after the first twelve weeks have run.

Vigilant Employers: What happens in Vegas *does not* stay in Vegas.

Crouch v. Whirlpool, 447 F.3d 984 (7th Cir. April 20, 2006)

Whirlpool employee Harold Crouch planned a romantic getaway to Las Vegas with his fiancé, a Whirlpool co-worker. Both Crouch and his fiancé applied for vacation time to allow for the trip. Crouch's application was denied, but his fiancé's application was accepted, based on seniority.

Undeterred, Crouch reported to his employer that he had injured his knee during yard work and requested, and was granted, FMLA leave. Crouch's supervisor noticed that the time for Crouch's FMLA leave corresponded to the dates he had requested for vacation. His supervisor then discovered that Crouch had sought vacation time for the same time the previous year, had his request denied, and, again obtained FMLA leave based on a knee injury.

Whirlpool hired a private investigator who videotaped Crouch performing nearly an hour of yard work during his FMLA leave. The ensuing investigation revealed that Crouch had flown off to Las Vegas with his fiancé during the "FMLA leave." Whirlpool then terminated Crouch for falsely applying for leave of absence in violation of employer's policy.

Crouch sued for violation FMLA rights for not restoring after leave. After the trial court dismissed his claim, Crouch appealed. Affirming, the Seventh Circuit observed that the FMLA's return to work provision applies to employees on leave "for the intended purpose of the leave." 29 U.S.C. § 2614(a)(1).

II. SERIOUS HEALTH CONDITIONS

A serious health condition is defined in 29 C.F.R. § 825.114. The FMLA's definition of the term is very broad and is intended to cover a variety of physical and mental conditions.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either:

1. Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such inpatient care; or

2. Continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:
 - a. A health condition (including treatment therefore, or recovery therefrom) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes:
 - treatment two or more times by or under the supervision of a health care provider; or
 - one treatment by a health care provider with a continuing regimen of treatment; or
 - b. Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence; or
 - c. A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence; or
 - d. A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment; or
 - e. Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

Treatments include examinations to determine if a serious health condition exists, but do not include routine physical, dental or eye examinations. Section 825.1112(g) states that FMLA leave is available for treatment of substance abuse provided that the condition in question is a “serious health condition” within the meaning of the regulations.

“Health care provider” means:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctors practice; or
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray

- to exist) authorized to practice, and performing within the scope of their practice, under state law; or
- Nurse practitioners, nurse-midwives and clinical social workers authorized to practice, and performing within the scope of their practice, as defined under state law; or
 - Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; or
 - Any health care provider recognized by the employer or the employer's group health plan benefits manager.

RECENT CASES INTERPRETING SERIOUS HEALTH CONDITION

“Treatment two or more times” must occur during the period of incapacity.

Jones v. Denver Public Schools, 427 F.3d 1215 (10th Cir. 2005)

Jones worked as a telecommunications employee under the supervision of his father. During that time period co-workers complained of Jones' abuse of the sick leave policy. After his father retired, Jones' behavior continued. On October 1, Jones fell at home and aggravated a pre-existing back injury. Jones called in sick and, on October 4, obtained certification from his doctor, who ordered that Jones remain on leave from October 1 through October 5 due to his back condition.

On Sunday, October 7, Jones' back had improved and was strong enough for Jones to return to work. However, on the same day, Jones came down with the flu, and called in sick again on October 8 and 9. On October 10, Jones was terminated for excessive absences. On October 24, Jones visited his doctor again, who noted the back pain was improving.

Jones brought action under the FMLA, claiming that his back ailment satisfied the FMLA's definition of a "serious health condition" because it resulted in three or more days of incapacity and required "treatment" two or more times. However, the Tenth Circuit noted that the second treatment occurred after Jones' period of incapacity, October 1 to October 7, had expired. Therefore, Jones' ailment did not qualify as a serious health condition under the FMLA.

Inability to perform job at issue is sufficient.

Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286 (11th Cir. 2006)

Hurlbert served as a paramedic at St. Mary's and, in addition, worked full-time with the Rockdale County Fire Department. Due to stress and an existing heart condition, Hurlbert sought FMLA leave from St. Mary's. His supervisors denied the leave and, instead, terminated Hurlbert.

Hurlbert brought action alleging interference with his right to take leave and termination in retaliation for having taken FMLA leave. The trial court held that Hurlbert's condition did not amount to a serious health condition because, during the 30 day period in question, he had continued to work at Rockdale, though he had not worked at St. Mary's. The court reasoned that

the showing of incapacity must be made in accordance with the ADA, which requires one to establish restriction in the performance of a class or broad range of jobs.

On appeal, the Eleventh Circuit held the trial court erred in referring to the ADA for determination of the issue of “serious health condition: “ADA’s ‘disability’ and the FMLA’s ‘serious health condition’ are different concepts, and must be analyzed separately.” Therefore, the fact that Hulbert was able to continue working for Rockdale was not fatal. Under the FMLA, a period of incapacity refers only to the job at issue.

The court also reversed the trial court’s dismissal of the employee’s retaliation claim. The court noted that “close temporal proximity between protected conduct and adverse employment action is generally sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection.” While that same temporal proximity won’t necessarily be sufficient to prove pretext, evidence of pretext was established by the employer’s failure to: (1) clearly and consistently articulate a reason for the employee’s discharge; and (2) abide strictly by its own standard procedures.

Need for frequent restroom breaks not a serious health condition.

Mauder v. Metro Transit, 446 F.3d 574 (April 14, 2006)

Harris County Transit Authority implemented a strict new policy, whereby employees were only permitted to leave their desks during prescribed break times. Months later, Mauder discovered he had diabetes. His doctor prescribed Glucophage, a medication whose side effects included temporary uncontrollable bowel movements. As a result, Mauder required sporadic restroom breaks, often remaining for more than fifteen minutes at a time.

Mauder’s supervisors began noticing his absences outside of break time. While Mauder explained the situation, the supervisors refused to budge. Following a system of progressive discipline, the supervisors met with Mauder multiple times to remind him of policy and issue warnings. Mauder was placed on a one month corrective action plan. Mauder failed to improve. Thereafter, Mauder asked for packet to apply for FMLA leave. One week later he was terminated.

Mauder brought action under the FMLA and ADA. The court noted this was a unique situation in which was not asking for an excused absence, but for “unfettered permission” to take necessary restroom breaks. Assuming the condition qualified as serious, the court observed that the only cases granting FMLA leave based on diarrhea problems involved situations in which the condition was so debilitating that the employee could not physically go to work. Because he was not absent more than 3 consecutive days, was never unable to go to work, and was not incapacitated due to pregnancy or prenatal care and was not incapacitated and did not receive treatment for incapacity due to chronic serious health condition.

FMLA does not provide leave for every family emergency.

Overley v. Covenant Transport, Inc., 178 Fed. App. 488 (6th Cir. April 27, 2006)

Overley drove a roundtrip truck route from Indianapolis to Dayton, Monday through Saturday mornings each week. During the holiday season, Overley’s employer required certain Saturday

trips and refused to grant employee time off, unless the leave was FMLA-qualified. One Saturday, Overley refused to work, insisting that she had to care for her severely disabled daughter, who was in an assisted living facility. Overley later admitted that the primary purpose of her leave was to meet with an individual regarding her daughter's trust and her future home. One week later, Overley was terminated.

Overley brought action alleging her employer interfered with her FMLA rights. The trial court dismissed Overley's claims and the Sixth Circuit affirmed. "The FMLA does not provide leave for every family emergency." Because Overley's leave was not used to care for her child's serious health condition, Overley was not protected by the FMLA.

III. NOTICE

A. Providing Notice to Employees.

Covered employers must post a notice approved by the Secretary of Labor explaining employees' FMLA rights. 29 C.F.R. § 825.301(a).

An employer who does not provide a handbook or other written documentation describing employee benefits and leave provisions must provide written guidance to an employee regarding FMLA rights and obligations whenever an employee requests FMLA leave. The notice should include:

1. the leave will be counted against the employee's 12 weeks;
2. the medical certification requirements;
3. the employee has the right to use paid leave and the employer may or may not require the substitution of paid leave;
4. the requirements concerning payment of health insurance premiums;
5. the requirements for a fitness-for-duty certificate prior to the employee's restoration to employment;
6. the employee's status as a "key employee" and the consequences accompanying such a designation where applicable;
7. the employee's right to restoration to the same or an equivalent job upon return from FMLA leave; and
8. the employee's potential liability for payment of health insurance premiums paid by the employer during the unpaid FMLA leave if the employee fails to return to work after that leave.

B. Retroactive Designation of Leave Issues

It is always the employer's obligation to designate leave, paid or unpaid, as FMLA leave. 29 C.F.R. § 825.208(a)(2). Regulations provide that this designation must take place, absent extenuating circumstances, within two business days.

If the employer has notice that the employee's leave qualifies as FMLA leave and does not designate the leave as such, it may not designate the leave retroactively unless: (1) the employee has been out of work and the employer does not learn of the reason for leave until after the employee returns (in which case the employer must designate the leave upon the employee's return to work); or (2) the employee has provisionally designated leave as FMLA leave and is awaiting receipt of medical certification or other reasonable documentation of the need for leave. By the same token, if the employee gives notice of the reason for the leave later than two business days after returning to work, the employee is not entitled to the protection of the FMLA. 29 C.F.R. § 825.208(e)(1).

If the employee requests FMLA leave after the leave has begun, the paid period may be retroactively counted as FMLA leave as long as qualified.

If an absence does not originally qualify for FMLA leave, but later develops into an FMLA-qualified absence, the portion of the leave that qualifies under FMLA may be counted as FMLA leave.

C. Employee Notice to Employer.

Employees seeking to use FMLA leave are required to provide 30-days advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. Employees need not specifically reference the FMLA, but must provide sufficient information to trigger an employer's belief that the leave might be FMLA-qualified. After the employee provides notice, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-

qualifying. If an employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should ask the employee more questions about her leave.

While an employer may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave, and employee's failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice. 29 C.F.R. § 825.302(d). Where an employee fails to give adequate notice under the FMLA, the employer's potential courses of action are: (1) waive the notice requirements; or (2) delay the employee's leave. 29 C.F.R. § 825.304(a).

Where there is a change in circumstances, the FMLA does allow the employee to take longer or shorter leave than originally anticipated. In such situations, the employer may require that the employer provide reasonable notice of the changed circumstances where foreseeable. 29 C.F.R. § 825.309(c).

RECENT CASES INTERPRETING NOTICE REQUIREMENTS

Indication that employee is "sick" and has seen doctor not always sufficient.

Phillips v. Quebecor World Rail, Inc., 450 F.3d 308 (7th Cir. June 12, 2006)

Under Quebecor's employment policies, any employee with four to seven "chargeable" absences within a twelve month period was subject to termination. Chargeable absences included late arrivals, early departures, unexplained absences, absences related to illness, injury, or non-qualifying personal reasons. Phillips had already accumulated six chargeable absences and received a warning regarding her absenteeism.

On October 15, 2003, Phillips reported to work, but left early, telling her supervisor she was "sick." She submitted a form to her supervisor indicating she had been seen at the Comprehensive Health Center and should be excused from work October 15-19. This was counted as a seventh chargeable absence. After another chargeable absence, Phillips was terminated. She was later diagnosed with a head tumor and brought action against Quebecor for counting her October 15-19 leave as chargeable absences.

After the magistrate judge granted Quebecor's motion for summary judgment, the Seventh Circuit affirmed. Phillips' report that she was "sick" and evidence that she had been seen by a doctor, without more, was not sufficient to put Quebecor on notice that her leave may have

qualified as FMLA-qualifying leave. Had Phillips presented her employer with evidence that she had been seen two or more times within the period of incapacity or that she was under a regimen of ongoing treatment, her notice may have been sufficient. But “[r]equiring employers to determine whether the leave is covered by the FMLA every time an employee was absent because of sickness would impose a substantial and largely wasted investigative burden on employers.” Phillips’ claim failed for lack of notice.

Willis v. CocaCola Enter., Inc., 445 F.3d 413 (5th Cir. March 31, 2006)

Willis, a long-time employee of CocaCola, called in sick on Tuesday and, in the same phone call, indicated she was pregnant. She did not, however, indicate that the illness was serious or related to her pregnancy. The employer placed her on involuntary leave, requiring that she obtain a medical release from a doctor before returning to work. Willis indicated she could obtain such release at a doctor’s appointment on Wednesday.

When Willis said “Wednesday,” the employer interpreted that as the following day, while Willis was attempting to indicate the appointment was a week from Wednesday. Willis failed to return to work and, a week later, the day after her actual appointment, Willis was terminated. CocaCola indicated she had been terminated under its policy that three or more consecutive days of “No Show/No Call” was deemed voluntary resignation.

Willis brought action alleging she was terminated and deprived of her FMLA leave. The Fifth Circuit held that, even in cases of involuntary leave, the employee is obligated to provide notice that explains “the reasons for the needed leave so as to allow the employer to determine that the leave qualified under the Act.” 29 C.F.R. § 825.208(a)(1). Because Willis failed to provide her employer with sufficient information to determine that her leave was FMLA related, she failed to satisfy the FMLA’s notice requirement and had no claim.

IV. MEDICAL CERTIFICATIONS

An employer can require certification of the need for leave from a health care provider if the leave request is based on an employee’s own serious health condition or the serious health condition of an employee’s family member. 29 C.F.R. § 825.305(c). If validity of the certification is in doubt, the employer can require the employee to obtain a second opinion, but at the employer’s expense. If the two opinions conflict, then the employer may pay for a third opinion from a provider who is jointly approved by the employer and employee. The third opinion is considered final.

An employer may not request additional information from the employee’s health care provider. However, a health care provider representing the employer may contact the

employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification. 29 C.F.R. § 825.307(a)

An employer must give notice of a requirement for medical certification each time a certification is required. 29 C.F.R. 825.305(a). When leave is foreseeable, an employee must provide medical certification at least 30 days prior to her scheduled absence. 29 C.F.R. 825.305(b). When such advanced certification is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer which must allow at least 15 calendar days after the employer's request. The FMLA does recognize an exception even to this latter notice requirement where notice is not practicable despite the employee's diligent, good faith efforts.

Medical certification must include certain information (29 C.F.R. § 825.306) including a statement indicating which part of the definition of "serious health condition" applies to the patient's condition, and the medical facts supporting the certification. The certification must also include the approximate date the condition commenced and the probable duration of both the condition, as well as the patient's present incapacity. Also required is some indication as to whether it is necessary for the employee to take intermittent or reduced schedule leave, and if so, the probable schedule of such leave.

If additional treatments are required for the condition, certification must provide an estimate of the probable number of treatments. An employer may require an employee to report "periodically" on her status and intention to return to work. 29 U.S.C. § 2614(a)(5). An employer may also require an employee to "obtain subsequent recertification on a reasonable basis." 29 U.S.C. § 2613(e). However, an employer may not request re-certification more than once in a thirty day period.

If leave is required because of the employee's own serious health condition, the certification must state whether the employee:

1. is unable to perform work of any kind;
2. is unable to perform any one or more of the job's essential functions, and if so, which ones; and
3. must be absent from work for treatment.

If the leave is requested to care for a spouse, child or parent with a serious health condition, the certification must state what needs the patient requires.

Where an employee fails to provide timely medical certification, the employer may delay leave until the required certification is provided.

Verifying Leave Requests and Compliance with ADA and HIPPA.

To achieve compliance with the ADA and HIPPA, certain procedures should be followed when verifying employee leave requests. The following suggestions may be helpful:

1. Written certifications required by employers under the FMLA should be narrowly tailored to secure only the information necessary to verify leave requests. For example, an employer may ask that the physician *only* verify that leave is necessary, and not disclose the medical condition requiring leave.
2. If certification is required to support a request for medical leave, the information required should be job related and consistent with business necessity (e.g., need for the leave, length of the leave and timing of the leave). Seeking more information than necessary to verify the leave request may violate the ADA.
3. Employers should be careful not to inquire into possible future effects of an employee's "serious health condition" during the certification process. For example, if a written certification verifies that an employee has cancer, the employer may not inquire whether the illness is terminal.
4. Supervisors should be instructed not to discuss leave requests or medical conditions with employees. Someone knowledgeable about leave policies and the ADA should be designated as the person responsible for the processing leave requests.
5. The employee's supervisor should be told only that the employee will be taking leave and will return at a specified date.
6. The employer should obtain the necessary HIPPA releases from the employee concerning the handling of the medical information.

RECENT CASES INTERPRETING MEDICAL CERTIFICATIONS

Employer must allow a minimum of 15 days for medical certification and recertification.

Killian v. Yorozu Auto Tenn., 453 F.3d 549 (6th Cir. July 20, 2006) Killian, a welder, requested medical leave for a period of November 29 through December 4. She followed the company's protocol, submitting her request to the company nurse, who passed it along to human resources for processing. Killian's doctor also sent medical certification, providing that Killian could not return to work until December 10. The company approved FMLA leave to December 10.

During surgery, Killian's physician discovered her condition was worse than anticipated. On December 4, Killian contacted the company nurse and requested an extension. The nurse approved the extension and requested new certification. On December 10, Killian's physician submitted new certification, providing Killian could not return to work until December 17. When Killian called to confirm human resources had received the recertification, Killian was terminated.

The Sixth Circuit held that upon the company's demand for recertification on December 4 to support extension of leave, Killian was entitled to at least 15 days to obtain recertification. Therefore, its termination of Killian 6 days later, on December 10, violated the FMLA. 29 C.F.R. § 825.305(b); 29 C.F.R. § 835.311.

On intermittent leave, employer may require physician's opinion as to expected length of leave, and duration and frequency of each episode.

Muhammad v. Indiana Bell Tel. Co., 2006 U.S. App. LEXIS 13511 (7th Cir. May 26, 2006) Having been absent on several occasions in February and March, Rashidah Muhammad returned with a doctor's note, indicating she had been incapacitated due to chronic pelvic pain. After further absences in May and June, Muhammed provided a second certification from the same doctor, explaining she would be incapacitated "from 5/11/04 to 5/15/04" and would require intermittent leave of "1-to-2 days" duration for an "unknown" frequency.

Muhammed was then absent July 1 and July 2. Her employer notified her that her June certification did not cover her July absences. While the employer noted the physician's certification had noted a need for intermittent leave, the physician has failed to indicated how long the need for intermittent leave would continue. It provided Muhammed 15 days to provide such certification, and Muhammed failed. Muhammed was then terminated.

Muhammed brought action under the FMLA. Affirming the trial court's dismissal of her claims, the Seventh Circuit held that the employer was authorized under the FMLA to require a new certification for Muhammad's leave in July and to require the certification to include how long the doctor believed the intermittent leave would continue and the expected frequency and duration of each episode. Because the employer complied with the FMLA's requirement of 15 days' opportunity to comply with its request for certification, Muhammad's termination was lawful.

V. RETURN TO WORK ISSUES

The regulations allow employers to require an employee on leave to report periodically on whether or not she plans to return to work. An employer is required to maintain health benefits and restore the employee to his or her job or an equivalent position until the employee gives unequivocal notice of intent not to return to work. 29 C.F.R. § 825.309.

An employer may require an employee obtain “fitness for duty” certification only if the employer gave the employee notice of such certification prior to leave commencing or immediately thereafter. The policy must be uniformly applied to all similarly situated employees. Certification for fitness to return to work may be requested only with regard to the particular illness that caused the need for FMLA leave. 29 C.F.R. § 825.310. The certification need only be a simple statement that the employee is able to return to work.

A. Checklist for Return-to-Work Certification

Employers should remember the following key points concerning the FMLA’s return-to-work certification requirements:

1. Adopt a uniformly applied policy or procedure requiring return-to-work certification from employees who take FMLA leave for their own serious health conditions.
2. Notify employees of the return-to-work certification policy.
3. Do not request return-to-work certifications from employees taking intermittent leave.
4. Be aware of state laws and collective bargaining agreements that may present special requirements regarding an employee’s return to work (especially those who work with the public).
5. Make sure the return-to-work certification comes from the employee’s own health care provider.
6. Ensure that the return-to-work certification only relates to the particular health condition that caused the employee’s need for FMLA leave.
7. Have the employer’s health care provider contact the employee’s physician only with the worker’s permission and only for clarification of the employee’s fitness for duty. Do not delay the employee’s reinstatement pending contact with his or her doctor.
8. Do not request second or third opinions on return-to-work certifications.

9. Do not require the employee to submit to a fitness-for-duty test before resuming work unless the test is completely unrelated to the worker's reasons for taking FMLA leave.

B. Bonuses

The FMLA provides that taking FMLA leave “shall not result in the loss of any benefit accrued prior to the date on which the leave commenced.” 29 U.S.C. § 2614(a)(2). However, that right is subject to limitations. Specifically, the FMLA’s restriction against loss of benefits does not entitle employees on leave to (1) the accrual of any seniority or employment benefits during any period of leave or (2) any right to which the employee would have been entitled had the employee not taken the leave. 29 U.S.C. § 2615.

Attempting to clear up confusion, the DOL suggests that bonuses that do not depend upon performance, such as bonuses for attendance and safety, shall not diminish as a result of the FMLA leave. However, bonuses depending upon the performance of the employee, such as a monthly production bonus, may be prorated to account for the FMLA leave. See 29 C.F.R. § 825.215(c)(2). In an Opinion Letter, the DOL further explained: “While an employee is not automatically entitled to accrue seniority or benefits during unpaid FMLA leave, an employer cannot use unpaid FMLA leave as a negative factor in employment actions. . . . [However], where the amount of the bonus is calculated from hours worked, the FMLA leave taker would naturally receive a lesser amount than an employee who had not been on leave.” 2000 DOL Opinion Letter.

In summary, a production bonus may be prorated to account for the FMLA leave, while an attendance bonus may not.

RECENT CASES INTERPRETING RETURN TO WORK ISSUES

Two-day delay for fitness for duty certification causes no damage.

Drago v. Jenne, 453 F.3d 1301 (11th Cir. June 27, 2006)

Drago served as a captain in the Bower County Sheriff's Office. Only one month into employment, Drago's supervisors observed and documented the fact that he was not performing adequately. Soon thereafter, Drago was pegged for potential demotion. In September 2001, Drago left work abruptly and without explanation. He returned two weeks later, with a note from his psychologist and a completed application for FMLA leave. The sheriff's office did not challenge Drago's right to FMLA leave, but did require that he present a completed Return to Work Authorization form, which resulted in an additional two-day delay in Drago's return to work. Drago then filed an internal complaint alleging age discrimination and was demoted three months thereafter.

Drago brought action alleging interference with his right to return to work after FMLA leave and retaliation. The court rejected Drago's interference claim, observing the FMLA expressly allowed the sheriff's office to require completion of the Return to Work Authorization Form and that the two days' additional leave caused Drago no damages. Furthermore, Drago presented no evidence to support his claim of retaliation. His demotion came three and a half months after his last protected activity, a temporal proximity that, without more, could not sustain a retaliation claim.

Employer's ambiguous notices as to start and end date of FMLA leave not necessarily fatal.

Grosenick v. SmithKline Beecham Corp., 454 F.3d 832 (8th Cir. July 20, 2006).

The employer granted Grosenick's request for FMLA leave, but sent out conflicting reports as to the dates of the FMLA leave. During her leave, Grosenick performed some work, without the employer's permission. The employee failed to timely return to work and, upon her return, her position was filled and she was relegated to the role of a roaming employee. After she failed to successfully obtain a new permanent position in the company, she was terminated.

The employee brought action under the FMLA, alleging that because the employer sent conflicting notices regarding the dates of her FMLA leave, it violated the FMLA by filling her position. The Eight Circuit disagreed, declaring "an employee cannot get more than twelve weeks of leave based solely on the employer's lack of notice." In this case, despite the employer's ambiguous mailings, in an e-mail the employee herself had affirmatively agreed to the earlier of the potential start dates. While the employee may have performed work during her leave, such work was performed without the employer's knowledge and thus would not entitle the employee to additional FMLA leave.

State law, local law and collective bargaining agreements, may impose stricter return-to-work certification requirements.

Harrell v. United States Postal Service, 445 F.3d 913 (7th Cir. May 4, 2006)

Harrell worked as a clerk at the Decatur, Illinois post office and was covered by a collective bargaining agreement (“CBA”) between the American Postal Workers Union and the Postal Service. In February 2000, Harrell took FMLA leave. In preparation for his return, Harrell submitted certification from his doctor declaring him able to work. However, the Postal Service insisted that, under the CBA, it was entitled to additional medical information before Harrell returned to work. Specifically, the Postal Service required documentation outlining the nature of the illness, dates he was unable to work, medications he was taking, and an additional examination by a Postal Service physician. Harrell refused and was terminated.

Harrell brought action alleging that the Postal Service violated the FMLA by requiring more than a physician’s fitness for duty certification before permitting Harrell to return to work. The Seventh Circuit acknowledged that the FMLA only permits the employer to require “certification from the health care provider.” 29 U.S.C. § 2614(a)(4). However, the same subsection provides that “nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement.” *Id.* Because the CBA provided additional requirements above and beyond certification from Harrell’s health care provider, the Postal Service properly refused to allow Harrell’s attempts to return to work without fulfilling those requirements.

A “stay” or attendance bonus may not be prorated to account for FMLA leave.

Dierlam v. Wesley Jessen Corporation, 222 F. Supp.2d 1052 (N.D. Ill. 2002)

Dierlam had been employed by Wesley for three years before Wesley was acquired by Novartis AG. In an effort to retain employees, Wesley employees were offered a “stay bonus” providing that if the employee remained “employed and actively working” during the transition period. Dierlam remained working through the transition period, but took a twelve week FMLA protected leave for the adoption of a child. Because of that leave, Wesley prorated Dierlam’s stay bonus, reducing the amount according to the twelve missed weeks.

Dierlam later resigned from Wesley and executed a severance agreement waiving any FMLA claims against Wesley. Dierlam then brought suit, alleging Wesley violated the FMLA by prorating her stay bonus. Dierlam and Wesley filed cross motions for summary judgment, with Wesley relying upon the severance agreement.

As to the enforceability of the waiver, please see “Severance Agreements” section below. As to the proration of the bonus, the court observed that 29 C.F.R. § 825.215(c)(2) provides that to the extent a bonus is for perfect attendance or safety, the employee is entitled to continue her entitlement upon return to FMLA leave. The district court equated the stay bonus with a bonus for perfect attendance and deemed the proration illegal. Accordingly, the court granted summary judgment in favor of Dierlam.

A partnership payment based on hours worked is a productivity bonus and, thus, may be prorated.

Sommer v. The Vanguard Group, 2006 U.S. App. LEXIS 21638 (August 24, 2006)

Sommer’s Partnership Plan provided that where a partner failed to meet the minimum annual requirement of 1,950 hours worked, his payment would be prorated by the amount of hours he

was deficient. The agreement specifically declared: “Time spent on leave is not considered time worked for purposes of calculating your Partnership payment.” However, leave taken under the employee benefits for sick and vacation time was considered time worked.

Sommer took FMLA leave and Vanguard prorated his Partnership Payment downward to account for the absence. Sommer brought action alleging Vanguard had unlawfully diminished his benefits. The Third Circuit distinguished Sommer from Dierlam, reasoning that unlike the “stay bonus,” the 1,950 hours requirement was a productivity bonus quantified by hours. “Vanguard’s focus throughout its policy appears to be incentivising employees to contribute to Vanguard’s performance and production.” Accordingly, the proration of Sommer’s Partnership payment was lawful.

Sommer also argued that Vanguard violated the FMLA by treating similarly situated individuals who took not FMLA leave but vacation or sick leave more favorably. The Third Circuit again disagreed, reasoning that requiring Vanguard to extend its practice of not-prorating sick and vacation time to FMLA leave would have the forbidden result of accruing benefits that would not otherwise have been available to him.

VI. EQUIVALENT POSITION

At the conclusion of FMLA-protected leave, employees are to be restored to the same position or an equivalent position. An equivalent position must have equivalent benefits, pay and other terms and conditions of employment. 29 C.F.R. § 825.214(a). A position that is merely comparable or similar is not enough. It must involve “the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.” 29 C.F.R. § 825.215(a). Under the FMLA an employee is not entitled to restoration if, at the end of FMLA leave, she is still unable to perform the essential functions of the job. 29 C.F.R. 825.214(b). However, employers must tread carefully as the ADA requires the same employee to be reinstated if she could perform the job’s essential functions with reasonable accommodation.

The requirement of “equivalent terms and conditions of employment” includes the following:

1. the employee must be reinstated to the same worksite or one that is geographically approximate to that where he or she had been employed;
2. the employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule;

3. an employer may accommodate an employee's request to be restored to a different shift, schedule or position that better suits the employee's personal needs on return from leave, or to offer a promotion to a better position; and
4. the employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

If the employee is unable to perform an essential function of the position because of a physical or mental condition (including the continuation of a serious health condition), the employee has not right to be restored to the position under the FMLA, however, the ADA may dictate further employer obligations.

The DOL has declared that an employer has an obligation to place an employee in the same or an equivalent position even where no vacancy exists. DOL stated, "the statute does not permit an employer to replace an employee who takes FMLA leave or restructure a position and then refuses to reinstate the returning employee on the ground that no position exists." 60 Fed. Reg. 2213 (Jan. 6. 1995).

RECENT CASES INTERPRETING EQUIVALENT POSITION

FMLA does not require an employer to accommodate employee who cannot perform prior job, though employers must comply with the ADA.

Battle v. UPS, 438 F.3d 856 (8th Cir. February 21, 2006)

Battle supervised 600 employees at 11 UPS centers from his Package Division office in Little Rock, Arkansas. When UPS selected a new employee, Dwayne Meeks, to serve as Battle's supervisor, Battle began to struggle on the job. He suffered a nervous breakdown on May 7 and requested FMLA leave for job-related stress on May 7. UPS immediately granted Battle's request.

In July 2003, days before the end of his FMLA leave, Battle sent a letter to UPS outlining various mental impairments that would require accommodation upon his return. Throughout August and in to October 2003, Battle presented conflicting medical opinions from his doctor, some of which suggested Battle had severely impaired abilities to think, concentrate and function at work. Finally, on October 15, 2003, Battle submitted a conclusive medical report declaring Battle had no impairments and could return to work without accommodation. Battle returned to work on October 27, 2003. However, before returning, he filed suit against UPS alleging, among other things, violation of the FMLA and ADA.

After the district court dismissed Battle's FMLA claim on UPS' motion for summary judgment, Battle appealed. Affirming, the Eighth Circuit distinguished between the FMLA and ADA: "Unlike the ADA, the FMLA does not mandate that employers reinstate employees who are unable to perform the essential functions of their positions. . . . Any duty to accommodate is governed solely by the ADA." Therefore, despite the delay in reinstatement, UPS did not violate the FMLA. In light of conflicting reports suggesting Battle may have been unfit to perform tasks essential to his job, UPS was justified in its delay under the FMLA. However, the court also affirmed the trial court's determination that UPS violated the ADA by failing to provide Battle's requested accommodations.

Bloom v. Metro Heart Group of St. Louis, 440 F.3d 1025 (8th Cir. March 16, 2006)

In 1999, Bloom was diagnosed with carpal tunnel syndrome. A year later, Metro hired Bloom as an ultrasound sonographer, a job which required Bloom to grip an ultrasound machine for 95% of her work day. After her condition flared up, Bloom filed a workers' compensation claim. During an IME, Metro's physician again diagnosed Bloom with carpal tunnel and placed severe restrictions on her ability to work. Bloom was only cleared to lightly grip the ultrasound machine for 15 minutes at a time—a restriction that left Bloom unable to complete most ultrasound sessions.

Upon learning of the restrictions, Metro placed Bloom on involuntary FMLA leave. Metro also issued a "fitness for duty certificate," requiring Bloom's completion before her return to work. The form provided that if it were not timely completed "your return to work may be delayed until certification is provided." Bloom never returned the fitness for duty certificate and failed to return to work at the expiration of her FMLA 12 weeks. As a result, she was terminated.

Bloom brought action under the FMLA. After the district court ruled in favor of Metro, Bloom appealed. The Eighth Circuit held that because the fitness-for-duty certificate had been uniformly applied to those seeking FMLA leave, Metro's use of the form complied with the FMLA. Because Bloom could not present evidence that she was fit to perform her job, the termination was appropriate.

Where a position is eliminated during, the employee's FMLA leave, refusal to reinstate is not unlawful, provided the employee is offered an equivalent position.

Yashenko v. Harrah's NC Casino Co., 446 F.3d 541 (4th Cir. April 27, 2006)

During Yashenko's FMLA leave, Harrah's undertook a restructuring which effectively eliminated Yashenko's position. Harrah's contacted Yashenko and invited him to apply for new positions within the company, but Yashenko refused. Upon return from FMLA leave, Yashenko was terminated.

Yashenko brought action for FMLA interference and retaliation. The trial court dismissed Yashenko's claims. On appeal the Fourth Circuit affirmed, noting "an employee has no greater right to reinstatement . . . than if the employee had been continuously employed." 29 C.F.R. § 825.216(a). Because Yashenko's position would have been eliminated regardless of his FMLA leave, and because Yashenko refused an equivalent position, he was not entitled to reinstatement.

As to Yashenko's retaliation claim, the Fourth Circuit found that, by virtue of timing alone, Yashenko presented a prima facie case of retaliation. However, Yashenko was unable to discredit Harrah's legitimate, nondiscriminatory reason for termination: corporate restructuring. Therefore, Yashenko's retaliation claim also failed.

VII. ABILITY TO DISCIPLINE AND TERMINATE

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

An employer may not interfere with or restrain or deny the exercise of any right provided under the FMLA. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid "key" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

The FMLA is also subject to anti-retaliation laws. It is unlawful for any employer to discharge or discriminate against an employee for:

1. opposing any practice made unlawful by the FMLA;
2. filing a charge or instituting a proceeding under the FMLA;
3. giving information in connection with an inquiry or proceeding relating to a right provided under the FMLA; or
4. testifying in an inquiry or proceeding related to a right provided under the FMLA.

The employer should have documentation regarding every personnel decision, and the reasons for such decisions.

1. Ensure that all personnel actions are documented and kept in each employee's personnel file. This should include such things as warnings for unexcused absences and tardiness, performance evaluations, and any other decisions that impact an employee's work performance.
2. Ensure that all persons responsible for supervising employees record all disciplinary actions taken against individual employees.
3. Ensure that personnel documentation is retained for at least three years following the end of the employment relationship with an employee.

RECENT CASES INTERPRETING ABILITY TO DISCIPLINE AND TERMINATE

Retaliation may lie despite absence of viable interference claim.

Colburn v. Parker Hannifin/Nichols, 429 F.3d 325 (November 18, 2005)

Brian Colburn, a utility worker, suffered from debilitating migraines that caused dizziness, shooting pain, blurry vision and nausea, rendering Colburn unable to drive as required on his job. Colburn took intermittent sick leave, missing twenty five days' work over a period of four months. Despite multiple requests for medical certification, Colburn never provided medical information supporting his illness.

Suspicious of the lack of medical information, Colburn's employer hired a private investigator, who observed Colburn on purported "sick leave days" driving to the gym and grocery shopping. Based upon that surveillance video, Colburn was terminated during his FMLA leave. Colburn admitted that he would not have been able to return to work until well after expiration of the FMLA mandated twelve weeks.

Colburn brought action alleging interference with his FMLA rights and retaliation. The First Circuit affirmed dismissal of the interference claim, reasoning that because Colburn would have been unable to perform essential functions of his position upon his return, the employer had no duty to reinstate him. The employer then argued that in the absence of a substantive interference claim, no retaliation claim could lie. The First Circuit rejected that position, holding that an FMLA plaintiff may pursue a retaliation claim even if there is no violation of substantive rights

to leave. Nevertheless, the First Circuit ultimately found the employer's non retaliatory reason persuasive: Colburn was terminated for dishonesty on the days of surveillance. Therefore, judgment in favor of the employer was affirmed.

The importance of comparator evidence to establish pretext.

Hull v. Stoughton Trailers, LLC, 445 F.3d 949 (7th Cir. April 26, 2006)

Hull worked on an assembly line in Stoughton Wisconsin, manufacturing trailers, chassis and containers for large trucks. After reagravating a back condition, Hull was placed on valium and opiates to control the pain. Hull asked his employer to set up FMLA leave paper work, but he continued working until November 10, when Hull's speech became slurred and he appeared confused on the job. The employer sent Hull home, but broke company protocol by failing to administer a drug test.

On November 12, 2003, the employer approved FMLA leave, beginning on November 11, 2003. Unbeknownst to Hull, at this same time the employer had been contemplating termination, based on Hull's documented performance problems and alleged violations of the company's drug policy. On November 20, 2003, the employer terminated Hull.

Hull filed action alleging the employer had retaliated against him for taking FMLA leave. The employer had put itself in a somewhat vulnerable position by failing to follow company protocol and by terminating Hull during his FMLA leave. Nonetheless, Hull was unable to establish that that he had been treated less favorably than similarly situated employees who had not taken FMLA leave. Therefore, Hull's retaliation claim failed.

Employer's failure to consistently apply no cell phone policies opens door to finding of pretext.

Hite v. Vermeer Mfg. Co., 446 F.3d 858 (8th Cir. May 9, 2006)

Hite had suffered from a major depressive disorder for years before coming to work for Vermeer. Soon after she started at Vermeer as a lathe operator, Hite began taking intermittent FMLA leave. Under the terms of her leave, Hite was able to use periods of less than an entire shift for her leave, at times arriving late and leaving early.

Trouble started when Hite was placed under a new supervisor. The supervisor routinely transferred Hite to different machines upon her return from leave and enforced various offices policies more strictly against Hite than against other employees. Two months after her last request for leave, Hite was terminated, purportedly for using her cell phone at work.

The court found that, despite a two month gap between FMLA leave and termination, there was sufficient evidence of causation because: (1) Hite's supervisor had threatened to terminate her if she continued to take FMLA leave and (2) Hite suffered escalating retaliatory action against her after use of the FMLA leave.

Vermeer offered Hite's abuse of the company cell phone policies as a nondiscriminatory reason for termination. However, Hite presented evidence that she had permission to use her cell phone

and that company policies had been enforced more strictly against those who had taken FMLA leave. Therefore, there was sufficient evidence for a reasonable jury to find Vermeer's reason for termination to be pretext. Accordingly, the Eighth Circuit affirmed the verdict and award against Vermeer, totaling \$309,523.19 in damages, attorneys fees and costs.

Burlington Northern and SantaFe Railway Co. v White, 126 S. Ct. 2405 (June 22, 2006)

Sheila White was hired as a track laborer for Burlington Northern. A track laborer performed demanding tasks such as cutting brush and clearing litter and cargo spillage from the right-of-way. After some time, White was moved to forklift operator, a position which required higher qualifications and came with more prestige. Several male employees resented White's ascension to the fork lift operator position.

White complained of inappropriate remarks made by a male co-worker. As a result, the male co-worker was placed on 10 days' suspension, but White was also moved back to the track laborer position. White filed two claims with the EEOC. A few days later, a male employee complained that White had been insubordinate, a claim which resulted in a 37 day suspension for White. After an internal investigation, White was found not to have been insubordinate and was reinstated with back pay.

White brought action under Title VII of the Civil Rights Act, alleging retaliation. Burlington Northern argued that White had suffered no damages, as her return to the track laborer position did not involve a change in pay or benefits, and after her 37-day suspension she had been reinstated with back pay. The U.S. Supreme Court disagreed. The Court held that: (1) an employer may commit actionable retaliation against an employee by taking actions not directly related to his employment or occurring outside the workplace; (2) whether a particular reassignment of duty is materially adverse depends upon the circumstances of the particular case, "judged from the perspective of a reasonable person"; and (3) despite correction of an unlawful suspension, an employer may remain liable for additional damages.

VIII. OTHER RELATED ISSUES

A. Statute of Limitations

The normal limitations for an action by an employee against an employer under the FMLA is two years. 29 U.S.C. § 2617(c)(1). If the employer engages in a willful violation of the Act, however, the limitations period is three years. 29 U.S.C. § 2617(c)(2).

B. Severance Agreements

Employers often offer severance packages in exchange for a severance agreement in which the employee waives any pending or potential claims against the employer. Until recently, it was generally assumed that such severance agreements would be enforceable against

a wide variety of claims, including FMLA claims. However, a recent trend in the courts suggests that provisions of severance agreements purporting to waive FMLA claims may be unenforceable.

While the FMLA statute itself does not address the issue, the DOL regulations provide that “employees cannot waive, nor may employers induce their employees to waive, their rights under the FMLA.” 29 C.F.R. § 825.220(d). As evidenced by the case law below, this provision, long believed inapplicable to post-termination FMLA claims, is now being applied to negate FMLA waivers in severance agreements.

Because this area of the law remains somewhat unsettled, employers are advised to leave FMLA waivers in their severance agreements. However, employers ought to proceed with caution and awareness that the provision may ultimately prove unenforceable. In order to ensure the remainder of the severance agreement remains effective, severance agreements should include a severability clause, providing that if any one clause of the agreement is deemed unenforceable as a matter of law, the remaining provisions shall remain enforceable.

RECENT CASES INTERPRETING SEVERANCE AGREEMENTS

Dierlam v. Wesley Jessen Corporation, 222 F. Supp.2d 1052 (N.D. Ill. 2002)

Dierlam had been employed by Wesley for three years before Wesley was acquired by Novartis AG. In an effort to retain employees, Wesley employees were offered a “stay bonus” providing that if the employee remained “employed and actively working” during the transition period. Dierlam remained working through the transition period, but took a twelve week FMLA protected leave for the adoption of a child. Because of that leave, Wesley prorated Dierlam’s stay bonus, reducing the amount according to the twelve missed weeks.

Dierlam later resigned from Wesley and executed a severance agreement in which attempted to waive any FMLA claims against Wesley. Dierlam then brought suit, alleging Wesley violated the FMLA by prorating her stay bonus. Dierlam and Wesley filed cross motions for summary judgment, with Wesley relying upon the severance agreement. The district court applied 29 C.F.R. § 825.220(d) and deemed the waiver provision of the severance agreement unenforceable as a matter of law.

Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003)

Faris was terminated for poor performance, but accepted \$4,063.32, one month’s salary, in exchange for a release waiving her rights to “all other claims rising under any other federal, state

or local law or regulation.” Faris later brought action against her employer alleging she was terminated in retaliation for exercise of her FMLA rights.

The trial court denied the employer’s motion for summary judgment, insisting the plain language of 29 C.F.R. § 825.220(d) rendered the waiver unenforceable. Reversing, the Fifth Circuit held that the regulation does not apply to post-dispute claims for damages under the FMLA. It applies only to current employees.

Taylor v. Progress Energy, Inc., 415 F.3d 364 (4th Cir. 2005) (Vacated, Pending New Hearing) Upon termination, Taylor signed a severance agreement wherein she agreed to waive all claims against her employer. Taylor argued that 29 C.F.R. § 825.220(d) rendered the waiver unenforceable. The Fourth Circuit agreed, explicitly declining to follow Faris and holding that FMLA claims cannot be waived without court approval. However, on June 14, 2006, the Fourth Circuit vacated its holding and has granted rehearing of the case. Oral arguments are set to take place on October 25, 2006.

Dougherty v. Teva Pharm., (E.D. Pa. August 30, 2006)

Dougherty’s supervisor at Teva pressured her to resume taking medication prescribed for her post-traumatic stress disorder. Dougherty believed this to constitute discrimination and contacted the EEOC. Teva then asked Dougherty to resign and presented her with a severance agreement. Dougherty elected instead to take FMLA leave. Teva responded by sweetening its severance package, which Dougherty signed. Under the terms of the agreement, Dougherty waived all claims against Teva.

Dougherty brought action against Teva under the FMLA and ADA. The trial court relied heavily upon the Taylor decision from the Fourth Circuit, holding that 29 C.F.R. § 825.220(d) rendered the waiver unenforceable. The court also indicated that the enforceability of the remaining clauses of the severance agreement remained in doubt, especially due to the absence of a severability clause.

IX. CONCLUSION

As simple as the regulations may appear, the frequency and variety of FMLA issues in the workplace may prove overwhelming. In addition to following the specific guidelines set forth above, employers are advised to: (1) Communicate early and often with employees regarding FMLA leave; (2) Leave a paper trail, carefully documenting not only the employee’s medical leave, but also evaluations of the employee’s performance; and (3) When in doubt, obtain legal advice regarding your specific concern. Getting your lawyer involved early in the process minimizes your exposure and allows for resolution of your dilemma in the most efficient manner.