



ATTORNEYS AT LAW

FMLA Leave and Inherent Litigation Risks

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Aims of Presentation: Three Themes

1. Address varied audience

- General Counsel to newly-minted lawyers
- Human Resources Directors, Managers, and other professionals with less experience
- Fortune 500 Companies
- Small and mid-size businesses

2. Provide insights into this complicated and extremely ambiguous topic

3. Offer strategies to avoid mistakes and avoid litigation

Litigation Risks with FMLA Cases

DaPrato v. Massachusetts Water Resources Authority upheld a large jury verdict favoring an employee who was terminated after his employer discovered that he vacationed with his family in Mexico while on leave to recover from foot surgery. **\$2 Million Verdict.**

Hazzard v. Raley's Family of Fine Foods, Inc., et al. on behalf of a pharmacist, who was terminated for violation of company pharmacy policies. **\$1.5 million Verdict.**

Lore v. Chase Manhattan Mortgage Corp. Company sought to shove Plaintiff out after he sought to take FMLA leave and ultimately fired him. **\$6.2 million and \$7.6 million recovery** with liquidated damages and attorney's fees.

FMLA: Employer Requirements

Which employers must know about FMLA?

- The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons
- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employee

FMLA: Employer Requirements

- Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs, or
- Public or private elementary or secondary school, regardless of the number of employees it employs

FMLA: Who is eligible?

Not everyone can receive FMLA Leave:

- Works for a *covered employer*
- Has worked for the employer for at least *12 months*
- Has at least *1,250 hours* of service for the employer during the 12-month period immediately preceding the leave
- Works at a location where the employer has at least *50 employees within 75 miles*

FMLA: What does it provide?

12 weeks of unpaid leave for one of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care
- To care for a spouse, son, daughter, or parent who has a **serious health condition**
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status

FMLA: What tends to trip up employers?

Serious Health Condition

- “Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider.”
 - Inpatient care
 - **Conditions Causing Incapacity (short-term; chronic; long-term; or permanent)**
 - Treatments to prevent incapacity (surgery)
 - Pregnancy

FMLA: What tends to snare employers?

FMLA Serious Health Condition: Conditions Causing Incapacity (short-term; chronic; long-term; or permanent)

- Three day hospital stay
- The regulations also provide that a “chronic” condition can be a serious health condition, even if it does not cause a period of incapacity for more than 3 days, as some other definitions of a serious health condition require. See 29 C.F.R. 825.115(f) and (c); 29 C.F.R. 825.114(a)(2)(iii)(A)
 - A “chronic serious health condition” is defined as one which “(1) [r]equires periodic visits for treatment by a healthcare provider, or by a nurse under direct supervision of a healthcare provider; (2) [c]ontinues over an extended period of time; and (3) [m]ay cause episodic rather than a continuing period of incapacity.” 29 C.F.R. § 825.115(c)

FMLA: What tends to snare employers?

Examples of serious health conditions include but are not limited to:

- Heart attacks
- Heart conditions requiring heart bypass or valve operations
- Most cancers
- **Back conditions requiring extensive therapy** or surgical procedures
- Strokes
- Severe respiratory conditions
- Spinal injuries
- Appendicitis
- **Pneumonia**
- Emphysema

FMLA: What tends to snare employers?

- **Severe arthritis**
 - Severe nervous disorders
 - **Injuries caused by serious accidents on or off the job**
 - Ongoing pregnancy
 - Miscarriages
 - Complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth
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- S. REP. 103-3, 29, 1993 U.S.C.C.A.N. 3, 31 (emphasis added)

FMLA: What tends to snare employers?

Notice: The question of what constitutes a “request” for FMLA leave is a tremendous hazard for employers

- There are no “magic words” to satisfy the notice requirement. *Sarnowski v. Air Brooke Limousine No. 06-2144, Third Circuit Court of Appeals (December 12, 2007)*. When notice has been found to be deficient, “it has been because the employee failed to convey the reason for needing leave.” *Id.* at 403.
- In order to receive leave, an employee is not required to invoke the FMLA expressly; however, he or she must give his employer notice of the request for leave, “stating a qualifying reason for the needed leave.” 29 C.F.R. § 825.208(a)(2).

FMLA: What tends to snare employers?

Courts have found the following suffice as requests for FMLA:

- Employee telling employer that she was in a car accident, sustained injuries, was hospitalized and would not be able to return to work due to her medical condition satisfied the notice requirement. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995))
- Leave request specifying medical need and attaching doctor's note satisfied FMLA notice requirement. *Price v. City of Fort Wayne*, 117 F.3d 1022, 1025-26 (7th Cir. 1997)
- A jury could reasonably construe that the two-word message "depression again" was sufficient notice to employer of employee's desire for FMLA leave. *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002)

FMLA: What tends to snare employers?

3 Types of Leave under FMLA

- Three kinds of leave are available to employees with a serious health condition:
 1. One block of leave of twelve weeks or fewer
 2. Intermittent leave, which means “leave taken in separate periods of time due to a single illness or injury. . . and may include leave of periods from an hour or more to several weeks”
 3. Reduced leave schedule, a plan under which the employer reduces the employee’s normal work hours, usually to a part-time basis

29 U.S.C. § § 2612(a)(1), 2611(9); 29 C.F.R. § § 825.800, 825.203(a).

FMLA: Avoiding an FMLA Suit

FMLA Lawsuits Can Often be Avoided

- There are numerous instances of small and mid-size employers that I have seen firsthand of making unforced errors that have led to lawsuits
- FMLA lawsuits tend to resonate with jurors, which can lead to sizeable verdicts
- *Schultz v. Advocate Health*, No. 01C-0702 (N.D. **\$11.5 million** verdict for maintenance worker who took FMLA leave to care for aging parents. (Ill. June 5, 2002)
- *Walker v. Verizon Pennsylvania LLC*, E.D. Pa., No. 15-4031 (Aug. 25, 2017). (**\$619,000.000** jury award to engineer terminated after taking FMLA leave)

FMLA: Avoiding an FMLA Suit

Timing, Timing, Timing

- Do not terminate someone on FMLA Leave or shortly thereafter
- Temporal proximity is only typically a factor at summary judgment, but when the timing is so suggestive summary judgment should automatically be denied. See *e.g. Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989)
- Finding that the plaintiff established sufficient evidence of causation by showing that the adverse action occurred only two days after the protected activity in a retaliation case

FMLA: Avoiding an FMLA Suit

Attendance

- This can be very tricky with someone who has taken FMLA; remember the intermittent leave
- Pursuant to 29 C.F.R. § 825.208(a), “in all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee”
- *Schober v. SMC Pneumatics, Inc.*, WL 1231557 (S.D. Ind. 2000) (Employer's failure to designate time off from work as FMLA-qualifying as required, and counting such absences against employee, warranted denial of summary judgment on employee's FMLA interference claim)

FMLA: Avoiding an FMLA Suit

Ongoing Antagonism

- Complicated word for treating someone differently after FMLA Leave than before, can be manifested in tone, discipline, or most egregiously, change of employment status
- A court should also consider antagonism exhibited towards an employee which might serve to discredit the employer's proffered reason. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir.2000)
- Do not paper the file or negatively alter performance reviews following FMLA Leave. *Haskins v. Christiana Care Health Servs.*, 701 F. Supp. 2d 623, 2010 U.S. Dist. LEXIS 32271, 108 Fair Empl. Prac. Cas. (BNA) 1695 (D. Del. 2010) (stating that negative change in performance reviews can be part of proving a case for discrimination)

FMLA: Avoiding an FMLA Suit

Basic Comparator Evidence

- If you are terminating an employee who has taken FMLA for a certain reason, ensure this policy has been applied evenly to employees who have not taken FMLA.
- Disparate treatment, whereby a plaintiff shows that she was treated less favorably than similarly situated employees who are not in plaintiff's protected class, is the evidence most often used to establish [discrimination or retaliation]. *Iadimarco v. Runyon*, 190 F.3d 151, 162 (3d Cir.1999)

FMLA /Americans with Disabilities Act

Beyond 12 Weeks of FMLA Leave

- If you are unable to return to work by the expiration of leave due to your own medical condition, you may request a leave extension as an accommodation under the **Americans with Disabilities Act (ADA)**
- The only time an employer is not required to provide reasonable accommodations if doing so would be unreasonable, resulting in undue burden or hardship, 42 U.S.C. § 12112(b)(5)(A), or if the employee is a direct threat to the safety of others or the employee. *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002)
- Case law ranges from no time; three (3) months; to six (6) months

Real Life Cases

Issues which have given rise to litigation

- **Eastern District of Pennsylvania:** Plaintiff, a janitor, took 12 weeks of FMLA leave, and several months after that under the ADA, to treat a serious back injury. Court determined that plaintiff had proved basic case of FMLA retaliation and ADA retaliation and discrimination, noting that employee was entitled to leave following FMLA of several months
- **United States District Court of New Jersey:** Plaintiff, an industrial cleaner, was penalized for taking time off to treat his migraines. These absences were FMLA qualifying (intermittent FMLA). Court determined that plaintiff had proved basic case of FMLA retaliation and ADA retaliation and discrimination

Real Life Cases

- **Eastern District of Pennsylvania:** Plaintiff, a nurse, who worked at the hospital for twenty (20) years, was terminated a week after returning from FMLA Leave. Court determined that plaintiff had proved basic case of FMLA retaliation and ADA retaliation and discrimination
- **Western District of Pennsylvania:** Mechanic took time off from work for a serious health condition, which was not designated as FMLA qualifying leave and he was ultimately terminated for his absences. Verdict for the Plaintiff

FMLA: Three Takeaways

Three Things to Remember

- No magic words for requesting FMLA Leave. Mentioning surgery, you will need time off for (insert serious health condition) can be sufficient to *trigger* FMLA rights
- To avoid litigation, focus on timing of FMLA Leave and termination, especially for longtime employees
- Employee is even entitled to time off from work after FMLA leave has been exhausted pursuant to ADA



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Questions?

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Thank you!

