

LEGAL REPORT

PUBLISHED BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

July–August 2003

The Family and Medical Leave Act: 10 Years Later

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It has been 10 years since former President Clinton signed the Family and Medical Leave Act (FMLA) into law on August 5, 1993. To date the U.S. Supreme Court has decided only two FMLA cases, but the act has been fertile ground for controversy. Employer groups have repeatedly criticized its complexity and expensive administration and the courts are often called upon to interpret its regulations.

Despite the sound and fury surrounding the FMLA, employers are slowly coming to grips with the law's stringent demands. It has not been easy and no immediate relief is in sight, despite the courts' attempts to put some judicial dress on the rather bare bones language of the statute. Although not intended to be a detailed survey of all of the FMLA's requirements, this article takes a look back at some of the most significant developments of the last decade, provides some guidance as to how to comply with the FMLA and its cousins the Americans With Disabilities Act (ADA) and state workers' compensation laws, and concludes with some thoughts about what the future may hold.

Developments in FMLA Fundamentals

Although FMLA litigation battles have been fought on numerous fronts, particular attention has been focused on certain aspects of the law. The two most frequently challenged regulations have been those governing eligibility and coverage and those governing the employer's duty to give notice. (The consequences of an employer's failure to designate an employee's leave as FMLA-qualifying specifically were at issue in the Supreme Court's March 2002 decision in *Ragsdale v. Wolverine Worldwide Inc.*, which is discussed later.) The act's "serious health condition" requirement and the various inter-family scenarios that give rise to FMLA protection have also been heavily litigated.

Another area of contention involves the availability of compensatory damages under the FMLA. Nothing in the act expressly

permits the award of compensatory damages. However, in 2002, the 8th U.S. Circuit Court of Appeals awarded an employee damages for pain and suffering in *Duty v. Norton-Alcoa Proppants*. The employer argued that the award was erroneous because the employee did not show any out-of-pocket losses or physical symptoms related to emotional distress. The court disagreed, stating the jury could consider any actual damages suffered by the employee, such as lost wages and fringe benefits, as well as damages for mental anguish and other intangible injuries.

In May 2003, the Supreme Court held in *Nevada Dept. of Human Resources v. Hibbs* that individuals may sue a state for money damages in federal court for violating the family-care provision of the act.

Eligibility and coverage

Although the statutory language is relatively clear on the issues of which employees are eligible for protection and covered under the act, interpretation of that language nevertheless has generated a great deal of litigation. With few exceptions, the FMLA covers employers with 50 or more employees, or 50 or more employees within a 75-mile radius. Employees are eligible for FMLA leave if the employee has worked for the covered employer for 12 months and has worked 1,250 hours during the prior 12-month period.

Courts have expanded FMLA coverage by finding that conduct by an employer (for example, promises in an employee handbook) can give rise to eligibility that would not otherwise

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exist under the plain language of the statute. For example, in *Thomas v. Pearl Vision, Inc.*, the 7th U.S. Circuit Court of Appeals found in 2001 that language contained in an employee handbook extending FMLA protections to employees was enforceable despite the fact that the employer did not have the requisite number of employees.

On July 26, 2002, the U.S. Department of Labor issued an opinion concluding that time spent on active duty by military reservists should be counted toward their eligibility for leave under the FMLA once they return to work. Clarifying its position on the interaction of the Uniformed Services and Employment and Reemployment Rights Act and the FMLA, the opinion notes that returning service members are entitled to all the benefits of employment they would have received if they had been continuously employed.

Notice rules and the *Ragsdale* decision

Employee notice obligations under the FMLA are minimal. An employee requesting FMLA leave need not mention the act by name, and many courts have bent over backwards to find that employee statements such as “I’m depressed”; “My mother has been injured”; “I have chest pains”; and “I need surgery” satisfy the employee notice requirement. In fact, a simple doctor’s note has been held to be sufficient to satisfy the employee’s notice obligations, and one court has held that an employer’s mere knowledge that an employee’s leave was potentially FMLA-qualifying raised an issue of fact sufficient to withstand the employer’s motion for summary judgment on the issue of notice.

In contrast, employer notice obligations are extremely detailed and multilayered. An employer must post FMLA notices, state employees’ FMLA rights in any policy materials given to employees and, within two days of an employee’s request for leave, the employer must give particularized written notice to the employee of all applicable rights and obligations under the act.

Penalties for violating notice requirement can be severe. The regulations initially indicated that if an employee took time off for an FMLA-qualifying reason but the employer failed to designate the time off as FMLA leave, the time off could not be counted against the employee’s 12-week entitlement, and the employee received all FMLA protections. In March 2002, the Supreme Court resolved a significant split among the federal circuits when it struck down those regulations as contrary to the statutory scheme in *Ragsdale v. Wolverine Worldwide Inc.*

In *Ragsdale*, the plaintiff had been diagnosed with cancer and requested medical leave. Under the employer’s leave policy, she was entitled to, and received, seven months of leave. However, the employer did not notify her of her eligibility for FMLA leave. The plaintiff was terminated when she exhausted her available leave and was unable to return to work. Because the employer

never designated her leave as FMLA leave, the plaintiff contended that she was entitled to an additional 12 weeks of leave.

The court held the regulation was invalid for two primary reasons. First, the regulation relieves employees of the burden of showing harm from the failure to designate leave correctly. Second, to the extent the penalty has no substantial relation to the harm suffered by the employee, it amended the FMLA’s most fundamental substantive guarantee: 12 weeks of leave in a 12-month period.

Although *Ragsdale* represents a win for employers, the decision may not be as significant a victory as many commentators have argued. The case does *not* mean that employers can simply ignore their duty to designate leave as FMLA-qualifying. The decision is clear that if an employee is able to show that he/she was harmed by the employer’s failure to designate, then he/she may be entitled to additional leave beyond the 12-week maximum.

Taking advantage of the wiggle room left by the court, some post-*Ragsdale* cases have held that the employer’s failure to designate leave as FMLA-covered can render the employee eligible for additional leave if the employee can show that it was harmed by the employer’s omission. In one such case, a mechanic and welder suffered a work-related injury that resulted in episodes of neck pain and numbness in his hands. Although he began suffering pain in April 1997, and took short-term disability leave and received a check for accrued vacation benefits pursuant to the company’s FMLA policy, it was not until September 15, 1997, that the company formally declared that the leave qualified as FMLA leave. The employee was told he would need to return 12 weeks from the date of the letter. He did not return and eventually filed a lawsuit claiming, among other things, violations of the FMLA.

At trial, the company claimed that the employee should not be able to raise an FMLA claim because his FMLA leave—which it stated started in April—had expired prior to the September letter. The court, however, disagreed and would not allow the company to argue that the employee’s leave was limited to 12 weeks. The court reasoned that the employee reasonably relied upon the September 15 letter as providing him with 12 additional weeks of FMLA leave (for a total of 34 weeks), so the company could not claim otherwise.

On the other hand, some courts have permitted employers to retroactively designate leave as FMLA leave where the employee cannot show prejudice and cannot demonstrate that he/she would have been ready to return to work even after an additional 12 weeks. In one case, for example, a legal secretary suffering from stress-related problems took leave in October, November and December. In January, the firm advised the secretary that her refusal to return to work was tantamount to a voluntary resignation. The letter also stated that the firm considered her leave to have been taken under the FMLA. The court allowed the firm to

retroactively designate her leave as FMLA leave in this manner because the employee presented no evidence of any prejudice resulting from the firm's retroactive designation. She also did not show that even if the firm had given her an additional 12 weeks she would have been prepared to return to work.

Accordingly, employers still should provide written designation of leave as FMLA-qualifying as soon as possible (using the official FMLA forms provided by the DOL) to avoid challenges by employees who claim that they were harmed in some fashion by the employer's failure to provide notice. The act permits employers provisionally to designate leave as FMLA leave pending receipt of a medical certification. There is certainly no downside to making a prompt provisional designation, and it may preclude the aggressive employee from slipping through the cracks left open by *Ragsdale*.

Between February and April 2003, the DOL solicited stakeholder input on possible changes to record keeping and notification requirements associated with the FMLA. At press time the DOL shortly was expected to issue a notice of proposed rule-making on the subject.

Serious health condition

A disturbing trend emerging for employers is the courts' apparent willingness to expand the range of conditions that qualify as "a serious health condition." In stark contrast to the ADA—which requires a covered disability to be near permanent, not amenable to treatment or medication, and substantially limiting of a major life activity—the serious health condition threshold under the FMLA is quite low. Under the act, a "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care at a hospital, hospice or residential medical care facility; or (2) continuing treatment by a health care provider.

Inpatient care means an overnight stay at a hospital, hospice or residential care facility. It also includes any period of incapacity or any subsequent treatment in connection with such inpatient care. Thus, if an employee has an overnight stay at one of the mentioned facilities, the employee will be deemed to have a serious health condition unless an exception applies. Continuing treatment by a health care provider includes any of the following five situations: (1) a three-day absence plus treatment; (2) pregnancy; (3) chronic conditions requiring treatment; (4) permanent/long-term conditions requiring supervision; and (5) multiple treatments for nonchronic conditions.

The regulations strongly suggest that common, less serious conditions, such as the flu, are not covered. But any ailment, under certain conditions, could be considered a serious health condition. The regulations provide that: "unless complications arise," an ordinary "cold, flu, ear aches, upset stomach, minor

ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave." This is, however, an area where the courts are becoming even more pro-employee than the regulations. Some courts have found that conditions traditionally excluded from coverage under the aforementioned regulation—such as the flu, a stress-related stomach ailment and a sore throat (that required antibiotics)—nevertheless may qualify for FMLA protection if the three-day-absence-plus-treatment requirement is met.

Covered family conditions

Another emerging trend is that many courts have expanded the types of family situations that are covered under the FMLA. For example, in one case a father was granted leave to take care of his three healthy children while his wife cared for their hospitalized sick child. In finding this was an FMLA-qualifying event, the court stated that "a literal reading of the FMLA makes it clear that Congress passed it to aid families when faced with a crisis such as the one faced by [this] family when the son became gravely ill." The court reasoned that the employee would have been entitled to FMLA leave had he been at the hospital caring for the child himself instead of using leave to allow his wife to do so. A court also found that there was a question of fact whether a child's high blood pressure was serious enough to result in her mother's leave being FMLA-protected.

Coping With the Triple Threat: FMLA, ADA and State Workers' Compensation Laws

Employees with work-related injuries potentially are covered by three different legal rubrics: those set forth under the FMLA, the ADA and state workers' compensation laws. Published reports indicate that employers often are uncertain about coordinating leave under these three sets of rules. In light of the potential damages available to plaintiffs when employers make incorrect decisions, it is imperative that employers understand the overlap among the FMLA, the ADA and state workers' compensation laws—the triple threat of leave issues.

Line supervisors and human resources staff must work together to monitor all leaves of absence and determine whether they are FMLA-covered. They should exercise particular care in dealing with employees on workers' compensation leave and intermittent FMLA leave. These issues can be so complex that many organizations have created an FMLA coordinator position to ensure compliance with the statute.

When an employee notifies an employer of the need for time off due to an illness or injury, the employer should be prepared to undertake the following steps:

- Review and coordinate leave policies.
- Train managers on the necessity to document all phone calls, informal conversations, employer efforts and research, and employee responses.
- Verify and certify the right to leave.
- Consider the appropriate response to the request for leave.

Employers must consider the big picture for each work-related injury. When dealing with a job-related injury, do not focus solely on obligations under the workers' compensation laws. Remember to consider the impact of all possible laws, including the ADA and FMLA. Realize that returning an employee to light duty may (or may not) create a new reasonable accommodation standard under the ADA. And do not simply rely on the workers' compensation administrator to handle it all.

This area of the law is so complex that it calls for a more in-depth analysis of the "triple threat" in the context of various transactions that arise in connection with an employee's eligibility for, the terms of and the return from leave. Unlike the FMLA and ADA, workers' compensation primarily is a function of state law. As a result, the following overviews of workers' compensation law are necessarily generalized. Employers should consult with counsel to guide their compliance efforts under applicable state laws.

Medical certification requirements

FMLA. Often, the medical basis for an employee's request for medical leave is not apparent, so the employer requests a medical certification/medical exam from the employee before granting the request. Under the FMLA, an employer may require the health care provider's certification of an employee's or family member's serious health condition. The employer can request only the information contained in the DOL's "Certification of Health Care Provider" form, and, upon receipt of a completed form, cannot request additional information from the health care provider.

The employer should include notice of its medical certification requirement and the consequences of failing to provide the medical certification in both its employee handbook and the "Employer Response Form," which the employer must give to the employee after it receives notice of the need for an FMLA leave. Once so noted, only oral notice to the employee of the need for a medical certification need be given. Otherwise, written notice must be given. An employer may require recertification periodically, subject to limitations set forth in the FMLA regulations.

If the requested leave was not foreseeable, then it must be conditionally granted, pending receipt of medical certification. If the need for leave was foreseeable, then the employer may delay leave until certification is granted. If a properly notified

employee ultimately refuses to provide certification, then the leave is not FMLA-approved leave.

ADA. Under the ADA, an employee must cooperate in the interactive process to determine any needed reasonable accommodation. Cooperation may include responding to the employer's request for medical information and/or documentation. An employee's failure to cooperate may preclude a claim that the employer violated the ADA by failing to provide reasonable accommodation.

Under the ADA, the employer may require a current employee to undergo a medical examination when: (1) there is a need to determine whether the employee is still able to perform the essential functions of the job; (2) it is necessary to the reasonable accommodation process; (3) the employee poses a "direct threat" to health or safety because of a medical condition; (4) it is required by applicable federal, state or local law as long as the exam is job related and consistent with business necessity; or (5) the testing is otherwise job related and consistent with business necessity.

However, an employer may not ask for documentation in response to an employee's request for reasonable accommodation when: (1) both the disability and the need for reasonable accommodation are obvious; or (2) the individual has already provided the employer with sufficient information to substantiate that he/she has an ADA disability and needs the requested accommodation.

An employee can be required to verify that the claimed disability exists and that the accommodation is warranted through submitting documentation from the employee's health care provider. According to the Equal Employment Opportunity Commission's (EEOC) Guidance on Reasonable Accommodation, an employer also has the option of providing an employee's health care provider with a list of questions, provided the employee signs a limited release for this purpose. Alternatively, an employer may simply discuss with the employee the nature of his/her disability and its functional limitations. The employer should make it clear to the employee why it is requesting the information.

Workers' compensation. Under workers' compensation, an employer usually has the right to have an employee undergo an evaluative examination at the employer's expense. The employee must be reimbursed for reasonable out-of-pocket expenses incurred in obtaining a second or third opinion. Generally, there are no restrictions on the selection or location of a physician or on obtaining additional information from the employee's physician. Also, state workers' compensation statutes often permit employers to have direct contact with and request information from an employee's health care provider. In addition, with the employee's permission, a health care provider rep-

resenting the employer may contact the employee's health care provider to clarify and authenticate the certification.

Second opinions

FMLA. If the employer questions the certification or results of a medical examination, under the FMLA, it can obtain a second opinion at its expense. If the second opinion differs, then the employer can require a third opinion, which is final and binding. However, the subsequent opinions cannot be from health care providers the employer regularly utilizes or contracts with, and the employee must be reimbursed for reasonable out-of-pocket expenses incurred in obtaining the second or third opinion. Furthermore, an employee cannot be required to travel more than a reasonable commuting distance for the second or third opinion.

ADA. Under the ADA, according to the July 2000 EEOC Guidance on Employment Inquiries and Medical Exams, an employer can require an employee to be examined by a health care provider chosen by the employer *only* if the employer has a reasonable belief based on objective evidence that the employee poses a direct threat or the employee provides insufficient documentation from his/her treating physician to substantiate that the employee has a disability and needs a reasonable accommodation. The guidance further states, however, that before requiring the employee to be examined by the employer's health care provider, the employer should give the employee an opportunity to provide the missing information, and should consider consulting with the employee's doctor (with the employee's consent).

Documentation is "insufficient" if it does not specify the existence of an ADA-covered disability and explain the need for a reasonable accommodation. The EEOC also states that documentation might be insufficient if: "(1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or (3) other factors indicate that the information is not credible or is fraudulent."

According to the Guidance on Employment Inquiries and Medical Exams, an employer may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation as long as the employer has a policy or practice of requiring all employees, with or without disabilities, to do so. Under the guidance, if an employee is on an indefinite medical leave or requests an extension of leave, then the employer can require periodic updates of the employee's medical condition. However, if the employee has been granted a fixed period of leave, then the employer cannot require the employee to provide such updates.

Workers' compensation. Under workers' compensation, the employer may question the results of a medical exam or cer-

tification. However, the employee must be reimbursed for reasonable out-of-pocket expenses incurred in obtaining the subsequent opinions. Generally there are no restrictions on the selection or location of a physician or on obtaining additional information from the employee's physician.

Alternatives to leave

FMLA. A frequent crossover issue among the three sets of leave rules concerns the circumstances when an employer must provide light duty or reassignment instead of leave. Because the right to FMLA leave is absolute, an employee can decline an offer of light duty and take leave. With respect to reassignment, if the employee is taking intermittent or reduced schedule leave that is foreseeable based on planned medical treatment, the employer can transfer the employee temporarily to a similar position with the same pay and benefits.

ADA. The ADA does not require the creation of light duty jobs (that is, those where essential job functions have been removed) as an accommodation, but it may require an employer to transfer an employee to a vacant light duty position if the employer has a policy or practice of creating light duty jobs or reserves light duty jobs for employees with occupational injuries.

Workers' compensation. Under workers' compensation, generally, an employer may not require light duty instead of leave, but an employer may require a return to light duty if the employee is certified as able to return to light duty. Otherwise an employee risks termination of temporary total disability benefits. Many employers encourage light duty.

Job protection

FMLA. The FMLA guarantees job protection. Employees who return from FMLA leave must be restored to their same or equivalent positions with the same or equivalent benefits, absent special circumstances. If an employee is unable to perform the essential functions of the job upon returning to work, and assuming the employee does not have a disability covered by the ADA, the employee can be terminated in accordance with the employer's policies. There are three main exceptions to the reinstatement obligation: (1) an employee's rights to job protection are only those that he/she would have had if he/she had not been on leave; (2) no reinstatement is required if the employee cannot perform the functions of the job due to a continued serious health condition; and (3) "key" employees, as defined by the act, are excepted from reinstatement requirements.

ADA. An employee with a disability who is granted leave as a reasonable accommodation under the ADA is entitled to return to his/her same job unless the employer can demonstrate that holding open the position would impose an undue hardship, according to the EEOC guidance. If the employer can demon-

strate undue hardship, the employee must be considered for all equivalent vacant positions upon his/her return as a reasonable accommodation.

Workers' compensation. Under workers' compensation, job protection generally is not guaranteed, although some states do require job protection for varying lengths of time. Regardless, it is always unlawful for an employer to take adverse action against an employee for exercising rights under a workers' compensation statute.

Benefits protection

FMLA. Are an employee's benefits protected during a leave of absence? The FMLA provides that for group health benefits, an employer must continue to provide coverage during FMLA leave under the same terms offered to employees not on leave. Thus, an employee returning from FMLA leave is also entitled to equivalent group health benefits. A full-time employee who takes FMLA leave on an intermittent basis or on a reduced leave schedule must be afforded the same group health coverage as if full-time. For nongroup health benefits, an employer is not responsible for maintaining coverage during an FMLA leave, but an employer is required to reinstate an employee upon return from FMLA leave to equivalent benefits.

ADA. Under the ADA, an employer cannot discriminate against a qualified individual with a disability with respect to benefit coverage (that is, an employee with a disability must receive the same benefits as an employee who does not have a disability). A full-time employee who becomes part-time because of a reasonable accommodation need only receive whatever benefit coverage is afforded to part-time employees (absent FMLA protection).

Workers' compensation. Under workers' compensation, benefits generally are not guaranteed, although most employers continue benefits while an employee is on a workers' compensation leave.

Time limits

FMLA. Leave has been approved, and benefit protections are in place. But for how long? The FMLA requires employers to allow employees up to 12 weeks of unpaid job-protected leave in any 12-month period for qualifying conditions.

ADA. Under the ADA, there are no hard and fast time limits; the length of a leave of absence is determined by what is a reasonable accommodation. As provided in the EEOC guidance, an indefinite leave of absence is a required form of accommodation, unless the employer can show undue hardship. The EEOC's position in this regard is contrary to several court decisions holding that prolonged or unpredictable absence means an employee is not a "qualified individual with a disability," or that the requested

accommodation is not reasonable. In addition, an employer must hold a job open as a reasonable accommodation unless it can establish that not filling the position would cause undue hardship. If undue hardship would result, the employer must see if there is a vacant equivalent position for which the employee is qualified. Finally, ADA-required leave may extend beyond the 12 weeks required for employees covered by the FMLA.

Workers' compensation. For workers' compensation claims, benefits in some states are subject to a maximum time limit.

Certifications upon returning from leave

FMLA. An issue that frequently comes up with employees returning from leave for medical conditions is whether an employer can require a fitness-for-duty certification or medical exam upon an employee's return to work. Under the FMLA, an employer may require a fitness-for-duty certification upon an employee's return to work from an FMLA leave if: (1) the employer has a uniformly applied practice or policy for all employees, not just those returning from FMLA leave; (2) the notice of a fitness-for-duty requirement is included in the handbook and in the Employer Response Form (if notice is so given, then only oral notice to the employee of need for a fitness-for-duty certification need be given; otherwise, written notice must be given); and (3) the employer seeks certification only with regard to the particular health condition that caused the FMLA leave.

Where necessary, "clarification" of the fitness-for-duty certification can be obtained by the employer's health care provider but only with the employee's consent. In addition, an employee's return to work cannot be delayed pending contact with the health care provider. An employer cannot seek a second or third opinion on a fitness-for-duty certification. Fitness-for-duty certifications cannot be required for a return from an intermittent leave. Failure to provide a timely fitness-for-duty certification can result in a delay of reinstatement or, if it is never provided, the employee may be terminated in accordance with employer policy. A fitness-for-duty certification does not allow the employer to require the employee to submit to a full medical examination, absent some other valid reason for doing so (e.g., ADA).

ADA. Under the ADA, fitness-for-duty certifications upon return to work may be required only when: (1) there is a need to determine whether an employee is still able to perform the essential functions of the job; (2) the employee may pose a direct threat; (3) it is necessary to the reasonable accommodation process; or (4) it is required by applicable federal, state or local law. In all circumstances, the fitness-for-duty certification must be job related and consistent with business necessity.

Workers' compensation. Fitness-for-duty certification upon return to work from a workers' compensation leave may be

(but usually is not) required. Any medical information sought should be related to the injury or illness. There usually are no restrictions on contact with the employee's physician or on obtaining a second or third opinion.

Medical record confidentiality requirements

FMLA. Confidentiality requirements apply to medical-related records "created for purposes of FMLA," including medical certifications, recertification or medical histories of employees or employees' family members. The requirements are stringent and parallel those of the ADA, as discussed next. Medical records must be kept confidential, in a file separate from personnel files and in a separate locked cabinet. Only those with a true need to know should have access.

ADA. Employers must keep any ADA medical information on employees confidential, with a few limited exceptions. The employer may use the information to determine reasonable accommodations for the employee. Medical records must be kept confidential, in a file separate from personnel files and in a separate locked cabinet. Only those with a true need to know should have access.

Workers' compensation. The EEOC maintains that workers' compensation records must be kept in accordance with ADA standards.

A plan for the future: Avoiding the triple threat

In view of the complexities of applying the FMLA, the ADA and workers' compensation laws on a daily basis, it is imperative that human resource professionals join with their legal representatives to audit their company's leave policies to review any employer-provided short-term disability benefits or other paid leave policies. They must revise any less stringent notice standards to conform to the FMLA's notice requirements and consider tightening eligibility standards to require that employees who refuse to accept reasonable accommodation or light duty assignments, where available, are ineligible for short-term disability benefits or other such paid leave. Employers must implement administrative procedures to ensure that FMLA notice and health care provider certification forms are sent at appropriate times, including to any FMLA-eligible employee with a work-related injury that results in an absence from work of longer than three days.

With regard to long-term disability (LTD) leaves and forms, employers should review such policies and leave request forms to make them consistent with the ADA such that reasonable accommodation issues are addressed. Likewise, with regard to workers' compensation leave policies and return-to-work (RTW) policies, employers should implement administrative procedures that ensure that FMLA notice and health care provider certification forms are sent at appropriate times,

including to any FMLA eligible employee with a work-related injury that results in an absence of three days or longer. Just because the employer may have more generous leave policies than the FMLA, it should not overlook the obligation.

Employers must train managers that they cannot use the taking of FMLA leave to support an adverse employment action nor can FMLA leave be counted under no-fault attendance policies. This final tip cannot be overemphasized. Employers must train managers and supervisors about the interplay between the ADA, the FMLA and workers' compensation laws. Employees often give information directly to managers and supervisors that human resource personnel and counsel need to know in order to properly coordinate and apply leave policies. Employers must also make sure managers and supervisors understand that there can be no retaliation against an employee for exercising rights under the ADA, the FMLA or state workers' compensation laws.

Some Musings on the Future of the FMLA

The legendary Hollywood mogul Sam Goldwyn once noted sagely that one should "never make forecasts, especially about the future." It is not difficult to imagine, however, that the FMLA's future will be as controversial as its past.

The FMLA likely will take on increasing importance in future employment-related litigation. There are several reasons for this prediction. First, in contrast to the federal antidiscrimination statutes, it is much easier to bring an action under the FMLA. The FMLA has no administrative exhaustion prerequisite, and it has a much longer statute of limitations (plaintiffs generally have two years to file an FMLA suit, or three years if the employer's conduct is willful).

From a procedural perspective, FMLA lawsuits claiming that an employee was denied leave are not subject to the complicated burden-shifting rules associated with EEO litigation. Courts construing the FMLA have noted that an employee may bring two types of claims under the FMLA. First, an employee can bring a claim that the employer refused to provide an FMLA benefit to which the employee was entitled (e.g., reinstatement to the former position or an equivalent position upon the employee's return from FMLA leave). Second, an employee can claim that the employer discriminated on the basis of leave taken—the FMLA's antidiscrimination provision. In the first type of case, the employer's intent in denying the employee a substantive FMLA right is immaterial. In other words, the FMLA imposes strict liability on employers. Thus, in this type of case, defenses such as the *Ellerth/Faragher* affirmative defense, the business judgment defense, the same actor inference and other affirmative defenses are irrelevant, making it easier for plaintiffs to prevail.


Moreover, FMLA claims are attractive to plaintiffs because, unlike an EEO claim, there is no statutory cap on damages.

Although the statute purports to limit damages to out-of-pocket and economic damages, the logic of the *Duty* case discussed earlier, if followed by other courts, could expose employers to a wider range of damages. In addition, punitive damages (or liquidated damages under the FMLA) are easier to obtain because the statute provides that such awards are available automatically unless the employer can demonstrate good faith. Under Title VII, the plaintiff must prove entitlement to punitive damages.

Finally, if California's recently enacted paid family and medical leave law is indicative of an emerging trend, other states may well go that route. On September 22, 2002, California enacted legislation that requires employers to provide six weeks of paid family leave for every 12-month period. This is the nation's first paid family leave law. It covers all employers, applies to all employees upon the commencement of their employment, and expands the range of covered family members to include domestic partners. Each term, many state legislatures consider various bills providing for paid family leave.

Despite widespread concerns, there is little evidence of employee abuse of the FMLA—at least not yet. According to a DOL report released in October 2001, only 16.5 percent of employees surveyed took leave for a family or medical reason in the 18 months prior to the survey. Similarly, a January 9, 2001, DOL survey of 2,500 individuals and 1,800 employers showed that, although employers reported significant administrative burdens (such as maintaining additional records and coordinating the FMLA with other leave policies), the act ultimately had little or no effect on productivity. In fact, 77 percent of those surveyed reported they experienced no noticeable effect on productivity as a result of compliance with the FMLA, and almost 88 percent said they saw no noticeable impact on either profitability or growth.

Conclusion

At its inception, Congress intended the broadly drafted FMLA legislation to be refined by the DOL and courts. To date, interpretation of the act generally has favored (arguably, expanded) leave entitlement. While *Ragsdale* limited one such interpretation, it does not appear to have triggered a backlash against the traditionally permissive interpretation of leave law. The FMLA's broad interpretation has exacerbated problems associated with overlap of the FMLA, the ADA and state workers' compensation laws, leaving employers with a morass of regulation to weigh through each and every time an employee seeks leave. In the next decade, employers may see more FMLA claims given the lack of administrative prerequisites to bringing such claims and the unexpected availability of uncapped compensatory damages. In addition, states may follow California's lead, mandating paid leave and/or expanding the scope of leave law. Perhaps the next decade will bring a more uniform, standardized approach to leave law. Until then, it is imperative that human resource professionals team with their legal advisors to strategize compliance with the FMLA and related leave laws. 

Stay Current on FMLA Developments

For updates on the status of the Labor Department's proposal to revamp its notice and penalty regulations under the FMLA as well as current court decisions interpreting the act, visit HR News on SHRM Online (www.shrm.org/hrnews).

To keep up with each week's top news stories, read SHRM's *HR Week* e-mail notification service sent as a benefit to all SHRM members.

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