FMLA

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FMLA QUIZ

Experience is a hard teacher because
she gives the test first, the lesson afterwards.

Vernon Sanders Law
Pitcher, Pittsburg Pirates,
Cy Young Award Recipient, 1960

1. The Buck & Brew Company employed 57 employees in Milwaukee, WI at its plant and 49 employees at its Headquarters in Lincoln, Nebraska,

   Q. Is Buck & Brew covered by the FMLA? _____

   Q. Are the employees of Buck & Brew covered? _____

   Q. Does Buck & Brew have to post FMLA posters?_____

   A. No.
   B. Yes, at both locations.
   C. Yes, but only at its Headquarters
   D. Yes, but only where is has the most employees

2. GINA

   A. Turned me down for the senior prom
   B. Never learned how to write small letters
   C. Stands for Genetic Information Nondiscrimination Act
   D. Is often found on Tea Party posters to mean Government Interference with Normal Americans

3. EEOC regulations permit employers to use safe harbor language regarding GINA on its medical inquiries to health care providers. However, when a health care provider nevertheless discloses genetic information, the language protects the employer from:

    A. inadequately dredged docking sites
    B. a violation of GINA
    C. testifying against oneself
    D. having the HR manager disclose personal genetic information to even the score

4. In Loco Parentis means:

    A. God be with you
    B. Out of many, one
    C. What for what
    D. An FMLA covered employee who acts or acted as a parent to a child

5. When determining whether an employee stands in loco parentis to a child requires a consideration of multiple factors, including:

    A. Child's age
    B. Degree of child's dependency on employee
    C. Amount of support employee provides to child
    D. The extent of the normal parental duties performed by employee
    E. The degree the HR manager is moved by employee's kindness
    F. All of the above
    G. A – D above

6. May in loco parentis FMLA leave be given to the child's mother's lesbian partner to provide care during the child's serious health condition?

    A. Yes
    B. No

7. May in loco parentis FMLA leave be given to that same lesbian partner in order to care for her partner during her partner's serious health condition?

    A. Yes
    B. No.

8. Ferdinand and Marlene have a daughter, Dagmar, who is unwed, but has a 3 year old boy, Walter. Walter's father is Gustav. Ferdinand and Marlene care for Walter when Dagmar is working and provide financial support. Gustav cares for Walter every other weekend.

    Each person below and their employers are covered by the FMLA. Which person could qualify for FMLA leave when Walter has a serious health condition?

    A. Gutsav
    B. Dagmar
    C. Marlene
    D. Ferdinand
    E. All of the above

9. Wells Road Enterprises, Inc. has 175 employees in Orange Park, Florida. In its employee handbook, it has an absence control policy which states that:

    If any employee has not returned to work from any form of leave of absence for 180 continuous days, for any reason or cause, such employee will be terminated from employment.

    Can this policy violate the FMLA?

    A. If yes, explain why
    B. If no, explain why

10. Wilma and Fred both work for Blanding Benefits Group (BBG), an 83 employee company headquartered in Jacksonville Florida. Wilma has been a full-time benefits consultant for over 5 years and her husband, Fred has been vice president of the financial advisory section for nearly 12 years. Fred has to closely supervise his 9 financial analysts and be a role model to them. Fred contracted AIDS from a re-used needle the last time he gave blood. He needs significant intermittent leave to treat his worsening condition. His absence from work is resulting in loss of control of his section and plummeting profits. BBG is not happy about it and is tired of the Flintstones and the first time Wilma arrives to work late, she is fired.

    Does the FMLA provide any remedy for Wilma? Explain.

FMLA: Serious Health Conditions and Medical Certification

1 – Types of FMLA Covered:

Overview

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

Twelve (12) workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**

Twenty-six (26) workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Proposed Code of Federal Regulations: Sec.825.112: Qualifying reasons for leave:

(a) Circumstances qualifying for leave. Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (see Sec. 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (see Sec. 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (see Sec. Sec. 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (see Sec. Sec. 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status (see Sec. Sec. 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (see Sec. Sec. 825.122 and 825.127).

2- OVERVIEW OF SERIOUS HEALTH CONDITIONS

The FMLA regulations list the following situations in which an employee (or employee's family member) will be deemed to suffer from a serious health condition:

- When the condition involves *inpatient care*; and
- When the condition requires *continuing treatment* by a health care provider (as described in more detail below).

Most types of serious health conditions will fall under the broad "continuing treatment" category.

Inpatient care. All health conditions that require inpatient treatment or care are considered serious health conditions under the FMLA. "Inpatient treatment" generally means a hospital stay of at least one night. This is true regardless of the underlying reason or condition for which the person is hospitalized.

For example, an employee who is hospitalized for some sort of cosmetic procedure will qualify for leave in spite of the fact that such procedure would not be considered a serious health condition if it was performed on an outpatient basis. Nor does it matter whether a procedure is considered to be elective as opposed to medically necessary.

Continuing treatment. All other categories of serious health conditions fall under the category of "continuing treatment by a health care provider," including:

- Incapacity and treatment
- Incapacity from pregnancy and/or prenatal care
- Chronic health conditions
- Permanent or long-term conditions
- Conditions requiring multiple treatments

Most conditions for which leave is sought will fall under the category of "incapacity and treatment." Unfortunately, this is also the category that tends to be most difficult for employer to evaluate and manage.

Incapacity and treatment. There are two ways for an employee to establish the existence of a serious health condition under this category.

- First, the employee (or employee's family member) must:

  - Be incapacitated for at least three consecutive, full calendar days; ***and***
  - Receive two treatments by a HCP.

  We will refer to this as "***incapacity plus two treatments***."

- In the alternative, the employee (or employee's family member) may:

  - Be incapacitated for at least three consecutive, full calendar days; ***and***
  - Receive one treatment plus a regimen of continuing treatment.

  We will refer to this as "***incapacity plus regimen of treatment***."

Incapacity plus two treatments. The 2008 regulations fine-tuned the requirements for this type of serious health condition, but only a bit. First, they clarify that the word "treatment" in this context means an in-person visit to a health care provider. It does not include, for example, phone consultations or correspondence (either by electronic or traditional means). In addition, the two visits do not necessarily have to be to the same health care provider.

The 2008 regulations also place certain time limits on when the two required treatments must be received:

- The first treatment must be received within the first seven days of incapacity;
- Both treatments must be received within 30 days of the first day of incapacity, unless there are extenuating circumstances (such as the doctor being unavailable until later);
- It is not necessary for both treatments to be received during the period of incapacity.

Finally, whether and when a second treatment is warranted is a decision that must be made by the health care provider, *not* the patient. However, employers should approach this requirement with caution.

What if, for example, an employee visits her doctor for what appears to be a stomach virus, but later goes to the emergency room when the vomiting doesn't subside as expected? Perhaps the employee experienced complications (such as dehydration) that prolonged the initial condition. Or maybe she actually had some other disease that was

causing the vomiting, and it was not a stomach virus at all. In either situation, it is possible that the employee would be justified in seeking emergency treatment without first getting her doctor's go-ahead. The regulations do not address this type of scenario, but we would recommend approving the leave.

Another potential problem could arise if an employee's health care provider certifies that he doesn't need to see her again, but the employee convinces him otherwise. In this situation, employers may want to seek a second opinion regarding the necessity of the second treatment. It would probably be more cost-effective, however, to let this type of issue slide. Employers who are unsure how to proceed should consult their attorney.

Incapacity plus regimen of treatment. In lieu of two visits to a health care provider, an employee may show the existence of a serious health condition with one visit plus a regimen of continuing treatment. The first treatment, as above, must be within the first seven days of incapacity. The "regimen of continuing treatment" means an ongoing prescription medication or therapy that can only be ordered by a doctor – for example, a round of antibiotics or physical therapy. Continuing treatment does not include over-the-counter medications, rest, fluids, exercise, and so on, even if the doctor "prescribed" them.

Common ailments and illnesses. In general, an employee who suffers from the common cold or even the flu is unlikely to be able to establish the existence of a serious health condition. However, it is possible for either of these illnesses to become serious health conditions if they meet the criteria for one of the above categories. For example, an employee who suffers from the flu may or may not be able to meet the criteria for a serious health condition, depending on whether he or she sees a doctor and is prescribed any medication to treat it.

Chronic health conditions. In general, chronic health conditions are long-term ailments that aren't likely to be cured but are only periodically incapacitating. According to the 2008 regulations, a chronic condition:

- Continues over an extended period of time (including recurring episodes of a single underlying condition);
- Requires at least two visits to a health care provider per year; and
- May cause continuing or episodic periods of incapacity.

As with the two treatments required for other serious health conditions, the two annual visits required for a chronic health condition must be in person and at the discretion of the health care provider.

It is not necessary for a chronic health condition to result in three consecutive days of incapacity. Nor is the employee (or employee's family member) required to visit a HCP for every episode or flare-up.

Childbirth and adoption. Giving birth and/or adopting a child are technically a separate qualifying reason for leave. In other words, they are not considered serious health conditions even though the pregnancy itself is considered a type of serious health condition.

Similarly, leave to care for and bond with a newborn or newly adopted child does not fall under the category of a serious health condition. Employees are entitled to such leave regardless of the health status of the new child.

Leave to care for a family member. In addition to establishing that a family member has a serious health condition, the employee must be able to show that he is needed to care for the family member. This does not mean that the employee has to actually provide for the family member's physical needs (such as taking care of basic medical, hygienic, or nutritional needs or safety) although that would certainly qualify the employee for leave. The employee's presence may, for example, be necessary to the family member's psychological wellbeing, such as a wife being there for a husband who is having surgery.

The employee may be needed to care for the family member intermittently, even if the serious health condition is continuous (for example, when an employee takes turns with a spouse in caring for their child). Nor is it necessary for the employee to be the only possible caregiver. Both parents, for example, may stay home to care for a seriously ill child even if one of them could handle the child's physical care by himself. It is important to watch out for gender stereotypes when a male employee requests leave to care for a spouse, child, or parent.

Medical necessity. Employees who request intermittent leave due to a serious health condition (or, for military caregiver leave, a serious illness or injury) must be able to show that intermittent leave is medically necessary. This generally means there must be a medical need for leave that can best be accommodated through an intermittent or reduced-leave schedule.

Examples of medically necessary intermittent leave would be leave for medical appointments, for chemotherapy, or for prenatal examinations or bouts of severe morning sickness. Reduced-schedule leave might also be medically necessary for an employee who is recovering from a serious health condition.

Some types of intermittent leave – for example, qualifying exigency leave and leave to care for a spouse – do not have to be medically necessary.

3 - HEALTH CARE PROVIDERS

The regulations provide a list of the types of health care providers that employers must acknowledge as being qualified to certify the existence of a serious health condition. They include:

- M.D.s, osteopaths, dentists, and optometrists
- Chiropractors in some situations
- Physician assistants, nurse practitioners, and midwives
- Christian Science practitioners
- Others if recognized by employer or its health plan
- Physicians' assistants

Chiropractors and Christian Science practitioners. Chiropractors are considered health care providers under the FMLA, but they are allowed to certify the existence of only certain types of serious health conditions. First, the treatment they provide must consist of manual manipulation of the spine to correct a subluxation, which is when one or more vertebra moves out of position and creates pressure on or irritates spinal nerves. Second, the chiropractor must have confirmed the subluxation with a spinal x-ray.

If there is no evidence that the chiropractor performed a manual manipulation of the spine or that a subluxation has been revealed by an x-ray, then he cannot provide medical certification under the FMLA. For example, employers are not required to accept the certification of a chiropractor who is treating an employee for a soft tissue injury.

Christian Science practitioners may certify the existence of a serious health condition if they are listed as practitioners with the First Church of Christ, Scientist in Boston. However, employers are also entitled to get a second and even third opinion from another type of health care provider – to confirm the serious health condition – unless prohibited from doing so by state or local law or a collective bargaining agreement.

4 - MEDICAL CERTIFICATION

Under the FMLA, you may require employees to submit medical certification for leave to care for their own serious health condition, to care for a covered family member with a serious health condition, or to care for a covered service member with a serious illness or injury. Employees are obligated to cooperate with you in obtaining such certifications.

The employee's health care provider (or the family or service member's HCP) fills out a medical certification form and the answers help you determine if an illness meets the FMLA standards for serious health conditions.

Medical certification becomes essential when faced with an employee who claims you denied her legitimate leave request. The FMLA regulations outline the medical certification process, and with the regs, the DOL has issued optional forms that employers may choose to use. However, employers are allowed to create their own forms as long as they comply with the regulatory requirements.

In addition, because the DOL's forms are currently out-of-date – particularly with regard to military family leave requirements, we have provided updated forms for in the Appendix to these materials.

Medical certification contents. If the certification is for the employee's own serious health condition or that of a covered family member, it must include the following information:

- The health care provider's name, address, phone and fax numbers, and area of medical specialty;
- When the condition began and its probable duration;
- Statement or description of appropriate medical facts on the health condition for which leave is requested, sufficient to support leave. This can include information on symptoms, diagnosis, hospitalization, doctor visits, whether medications have been prescribed, referrals for evaluation or treatment, and any other regimen of continuing treatment;
- Remember to include the GINA Safe Harbor statement with the medical certification, asking that the HCP not provide any genetic information when responding to the request. A copy of the GINA statement for an employee's medical certification in included in the Appendix to these materials.
- If the employee is the patient, the information in the certification must confirm that he is unable to perform essential job functions, how long such inability is expected to last, and any job restrictions;
- If the leave is to care for a family member, the information in the certification must: 1) explain how the employee is needed to care for the family member, and 2) estimate on the frequency and duration of leave;
- If the employee requests intermittent or reduced-schedule leave for planned treatment, the certification must: 1) include sufficient information to establish that the leave is medically necessary, and 2) estimate the dates and duration of the treatment and any periods of recovery from it (ex: chemotherapy);
- If the employee requests intermittent or reduced-schedule leave for the employee's serious health condition (including pregnancy) that may result in unforeseeable episodes of incapacity, the certification must provide: 1) enough information to establish that the leave is medically necessary, and 2) an estimate of the frequency and duration of the episodes of incapacity;
- If the employee requests intermittent or reduced-schedule leave to care for a family member with a serious health condition, the certification must: 1) support the medical necessity of the leave (including helping with the family member's recovery), and 2) estimate the frequency and duration of leave. Also include the GINA Safe Harbor statement with the family member's medical certification, as amended. A copy of the GINA statement for family member medical certification in included in the Appendix to these materials.

How to request certification. Employers must notify employees of the certification requirements in the eligibility notice and accompanying rights and responsibilities notice, the additional requirements for which are discussed in a later session. You may also request additional certification at a later time if you have reason to question the appropriateness of the leave or its duration.

You must request the first medical certification in writing; later requests may be made orally. In your request, you should tell employees the consequences of not furnishing the completed certification. Employees are allowed 15 calendar days to furnish a complete and sufficient certification, but you may need to grant them an extension of time if it wasn't practicable, despite diligent, good-faith efforts, to do so in a timely fashion.

What if the employee returns the certification before the 15 days have passed, but her HCP specifically contradicts the existence of a serious health condition? That question was addressed recently by a federal court of appeals. A receptionist requested leave in excess of what her doctor was willing to certify. Her employer gave her plenty of opportunities to correct the certification, but the doctor refused to change it.

The employer finally gave up and terminated the employee – but it did so ***before*** giving her 15 full days to provide a sufficient certification. The employee got a different HCP to certify the need for leave and returned it to her employer on the 15th day. The court concluded that the first doctor's "negative certification" did not shorten the 15-day time frame for returning a sufficient certification of the need for leave. Since the employer jumped the gun in terminating the employee, the court found it had interfered with her FMLA rights. *Branham v. Gannett Satellite Information Network* , 2010 WL 3431617 (6th Cir. 2010).

You may also allow employees more than 15 days under your policies, but make sure to be consistent in granting any such extensions. It's the employee's responsibility to turn in the certification on time; you're not his parent, and you don't have to issue reminders.

Incomplete or inadequate certifications. Employers are required to inform employees in writing if a certification is incomplete (one or more entries not completed) or insufficient (everything filled in, but answers are vague, ambiguous, or nonresponsive). You also must:

- State in writing what additional information is needed to make the certification complete and sufficient; and
- Provide the employee at least seven calendar days to cure the deficiency.

Again, you may need to give employees more time if it's impracticable for them to fix the problems despite their diligent, good-faith efforts. If the employee doesn't correct the problem on time, you may deny FMLA leave.

Second opinions. You may request a second opinion, by a health care provider that you choose and pay for, if you have reason to doubt the validity of a certification. Validity and reason to doubt aren't defined in the regulation, but you must have more than a hunch or suspicion. While the opinion is pending, you must provide FMLA benefits provisionally. If the certifications don't support FMLA, you may treat leave as paid or unpaid under your established leave policies. You also may deny FMLA leave if the employee or covered family member doesn't release medical information to the doctor who will give the second opinion.

Third opinions are available to break a "tie" in opinions. You pay for the third health care provider, upon whom both you and the employee must agree. The third opinion is binding.

Authentication and clarification. The 2008 regulations offer new procedures for authenticating and clarifying certifications. Authentication involves giving the employee's health care provider a copy of the certification and asking her to verify that the person who signed it actually completed or authorized the information. You – or someone in your organization other than the employee's direct supervisor – may ask the health care provider for authentication without going through a third-party health care provider.

With clarification, you ask the employee's health care provider to help you understand handwriting or the meaning of a response. Similarly, you can now deal directly with the health care provider.

Before you use these provisions, you must give the employee seven calendar days (unless impracticable despite the employee's good-faith, diligent efforts) to obtain the information or authentication. If the employee doesn't correct the situation, you may contact his health care provider either through another provider or directly, with one exception. The employee's direct supervisor may not make any contact with the employee's health care provider. Here and in any contact with health care providers, you must follow HIPAA's privacy rules if they apply to the provider, hospital, etc.

You can't require any information in addition to what's specified on the DOL's Certification of Health Care Provider Form WH-380. If you choose to use your own form, make sure the scope of the information you request doesn't exceed what the DOL's form requires. The alternate form provided in the appendix to these materials meets those criteria.

You may deny leave if an employee fails to turn in a certification on time or correct certification. The FMLA won't protect any leave taken without proper certification.

5 - RECERTIFICATION

In general, employers may request recertification no more often than once every 30 days or however long the certification form stated that the employee would need leave. For example, if the certification states that the employee will be out for three months

due to back surgery, you can't require recertification during that three month period. Requests for recertification should also include the GINA Safe Harbor statement to prevent disclosure of protected genetic information.

However, there are several exceptions to these general rules. First, you may require recertification earlier if:

- The employee requests an extension of leave;
- The circumstances described in the initial certification have significantly changed; or
- You receive information that casts doubt on the validity of the certification.

Be careful about relying on the third example unless you have objective, clear information that the leave or its length is no longer medically necessary. You should avoid making assumptions or relying on rumors that could turn out to be inaccurate.

In addition, regardless of how long the certification says the employee will need leave, you may request recertification every six months in connection with an absence. For example, if a certification state that the employee needs eight months of leave, you may require recertification after six months have passed in spite of the fact that nothing has changed.

You must give employees at least 15 calendar days to provide a completed recertification. You may require employees to bear the cost of recertification unless you have a policy to pay for it. ***No second or third opinions are allowed on recertification***. You may, however, give the health care provider the employee's record of absences and ask whether the absences and the need for leave are consistent with the claimed serious health condition.

Finally, separate and apart from initial certifications and recertifications, you may require new annual medical certifications for serious health conditions that last beyond a single leave year. Since these are actual certifications and not recertifications, you may seek authentication, clarification, and second and third opinions (which are not allowed for recertifications).

6 - RETURN-TO-WORK (FITNESS-FOR-DUTY) CERTIFICATION

Return to work (RTW) or fitness-for-duty certifications address the question of whether an employee is able to resume work, given the health condition that caused him to take FMLA leave. Employers may require employees to provide a RTW before returning from leave if the following requirements are met:

- The leave must have been taken for the employee's own serious health condition.
- You must have a uniformly applied policy or practice requiring all similarly situated employees to furnish a RTW certification.

- The certification must seek information only with regard to the serious health condition for which the employee took leave. For example, an employee who took leave after losing a limb may not be asked to provide a RTW certification that addresses his mental condition.
- You must have provided proper notice of the RTW requirement in your employee handbook and/or Designation Notice.

If you want the certification to address the employee's ability to perform essential job functions, you must: 1) state that in the Designation Notice, and 2) provide a list of the job's essential functions. Employers are advised to provide a list of the essential job functions to the employee once a request for FMLA leave is made so that it can be given to the doctor at the outset.

There is no form for RTW certification, and you may not require the employee to see a particular health care provider. Nor may you require a second or third opinion. Consistent with the Americans with Disabilities Act, however, you may require an employee to take a medical exam at your expense after he has returned from FMLA leave.

Remember, you should also include a GINA Safe Harbor statement on all return-to-work certification forms.

Employee's failure to provide. Employees are required to cooperate in providing this type of certification the same as they would with the initial medical certification supporting leave. Assuming you meet all of the above requirements, you may delay job restoration until an RTW certification is provided. If one has been provided but you need clarification or authentication, you may seek the supplemental information but must restore the employee to his original or equivalent job pending receipt.

If an employee never turns in an RTW certification (or a new certification demonstrating the need for additional leave), you may terminate employment.

Intermittent leave. Employees on intermittent leave may be asked for fitness-for-duty certification when there are "reasonable safety concerns," defined as a reasonable belief of a significant risk of harm to the employee or others, considering the nature and severity of the potential harm and likelihood of occurrence. These certifications can't be required more often than once every 30 days.

7 – OTHER ISSUES

You may require employees on FMLA leave to report periodically on their status and intent to return to work. Your policy requiring periodic check-ins cannot be discriminatory and must consider the unique facts and circumstances in each employee's leave situation. You may also require employees to provide you with reasonable notice (two business days) of changes in circumstances surrounding the leave that would affect the length of the leave. If an employee unequivocally states

she’s not returning to work, your duties under FMLA of job restoration and to maintain health benefits end, subject to your health care continuation duties under COBRA.

As with all medical information, keep FMLA certifications, re-certifications, and RTW certifications in a file that’s separate from employee personnel files and restrict access to those who administer FMLA leave.

FMLA – Military Family Leave

The FMLA's military leave provisions allow eligible employees to take time off to:

- Deal with family emergencies resulting from a covered spouse, parent, or child being called to active military duty (qualifying exigency leave); and
- Care for family members who become seriously ill or injured in the line of duty during active military service (military caregiver leave).

These categories of leave were added as part of military defense legislation passed in early 2008. Final regulations were issued in November 2008 and took effect on January 16, 2009. However, the types of servicemembers for whom leave may be taken were changed in late 2009. DOL's forms have not yet been updated to reflect those changes.

1 - FMLA LEAVE FOR QUALIFYING EXIGENCIES

The FMLA's qualifying exigency provisions allow eligible employees to take up to 12 weeks of FMLA leave for a "qualifying exigency" arising from the fact that their spouse, child, or parent has been called to or is on active duty in a foreign country.

Type of military service. Note that the 2009 amendments ensured employees could take qualifying exigency leave related to any covered servicemember – regardless of whether they are a member of the National Guard, military reserves, or the Regular Armed Forces. Remember that previously, such leave was available only when a family member was in the National Guard or military reserves or called to active duty after retirement from the Regular Armed Forces.

Another change is that qualifying exigency leave is now available only when the employee's family member is called to or on active duty *in a foreign country*. This replaced the requirement that they be called to active duty "in support of a contingency operation."

One easily overlooked ramification of this change is that relatives of reservists who are ***not*** being deployed to a foreign country are not entitled to qualifying exigency leave. The DOL's regulations had provided that this type of leave was allowed in some circumstances when a member of the National Guard or military reserves was called to active duty for service domestically, such as calls to active duty "in the case of insurrections and national emergencies." By replacing the requirement that the servicemember be called to active duty in support of a contingency operation, Congress effectively eliminated the possibility of qualifying exigency leave for calls to active duty that do not entail overseas military service. Note, however, that some state laws do allow for family military leave for in-country calls to service.

Family members. Family members are generally defined broadly. A "son or daughter on active duty" includes an employee's biological, adopted, or foster child, stepchild,

legal ward, or one for whom the employee stood *in loco parentis*. Unlike other types of leave, the age of the "child" who is called to active duty does not matter.

Qualifying exigencies listed. The regulations contain a "specific and exclusive" list of reasons for QE leave, which should not be changed by the recent legislative amendments. They include:

- Short-notice deployment, meaning a call or order that's given seven or fewer calendar days before deployment. The employee can take up to seven days beginning on the date of notification.
- Military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs sponsored by the military and related to the family member's call to duty.
- Urgent (as opposed to recurring and routine) child-care and school activities such as arranging for child care. "Child" is defined more broadly than under the childbirth and adoption leave portions of FMLA to include a biological, adopted, or foster child; a stepchild; a legal ward of a covered military member; or a child for whom a covered military member stands in lieu of a parent. The child must be either under age 18 or, if older than 18, incapable of caring for herself because of physical or mental disability.
- Financial and legal tasks, such as making or updating legal arrangements to deal with a family member's active duty.
- Counseling for the employee or his minor child that isn't already covered by FMLA.
- To spend time with the covered servicemember on rest and recuperation breaks during deployment, for up to five days per break.
- Post-deployment activities such as arrival ceremonies and reintegration briefings, or to address issues from the servicemember's death on active duty.
- Other purposes arising out of the call to duty, as agreed upon by the employee and employer.

Notice. Employees seeking QE leave must give reasonable and practicable notice if the exigency is foreseeable. The notice must inform the employer that a family member is on active duty or call to active duty status, cite a listed reason for leave, and give the anticipated length of absence.

Certification. Employers may require certification for QE leave by requiring the employee to provide a copy of the servicemember's active duty orders, for example. The DOL's certification form, WH-384, is not accurate because it does not reflect the changes made to the types of servicemember for whom leave may be taken.

In general, the certification form may ask employees to provide:

- A description of the reasons leave is needed, plus documentation;
- The date on which the qualifying exigency started or will start;
- An ending date if leave is to be taken in block of time;

- If leave is to be taken intermittently, an estimate of its frequency and duration; and
- If leave involves a third party (*e.g.*, school meetings), contact information and the purpose of meeting.

A condensed and revised version of the DOL's certification form for qualifying exigency leave is available in the appendix to these materials.

If an employee submits a complete, sufficient certification supporting a QE leave request, the employer may not ask for additional information from the employee. Recertification isn't allowed unless the leave requested involves a different call to duty or a new qualifying exigency.

The regulations do, however, allow employers to verify with third parties (such as a teacher) that the employee met with them during QE leave. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer.

An employer also may contact an appropriate unit of the U.S. Department of Defense (DOD) to request verification that a covered military member is on active duty or call to active duty status. No further information may be requested and the employee's permission is not required.

Intermittent leave. By its very nature, qualifying exigency leave is likely to be taken intermittently. However, unlike other types of intermittent leave, employers may not require the employee to try to arrange their leave in such a way that disruption of business operations in minimized.

2 - FMLA LEAVE FOR MILITARY CAREGIVERS

The FMLA allows eligible employees to take ***up to 26 workweeks of leave during a single 12-month period*** to care for a covered servicemember who sustained a serious illness or injury while on active duty in a foreign country. The employee may be a spouse, parent, child, or next of kin of the servicemember.

Similarly to qualifying exigency leave, the FMLA initially required the servicemember to be injured on active duty in a contingency operation. The requirement now is that the serious illness or injury must have been sustained or aggravated when the servicemember was "in line of duty on active duty in the Armed Forces."

Maximum amount of leave. Military caregiver leave is not in addition to other types of FMLA leave. The 26 week limit applies to all categories of leave taken in a single 12-month period (the military caregiver leave year), including:

- Military caregiver leave;
- Qualifying exigency leave; and

- All other types of FMLA leave.

However, it is possible that an employee may take more than 26 weeks of leave in a given calendar year if he takes leave for more than one servicemember or serious illness or injury.

Family members. As in the case of defining a son or daughter, "parent" is defined broadly and includes the servicemember's biological, adopted, or foster parent, stepparent, or other person who stood in loco parentis to the servicemember. "Parent" does not include in-laws. "Next of kin" excludes a servicemember's spouse, parent, or child, and is defined as the following blood relatives, in this order of priority:

- Blood relatives with legal custody of the servicemember by court order or statute
- Siblings
- Grandparents
- Aunts and uncles
- First cousins

The servicemember, however, may designate a specific blood relative as next of kin in writing, and that will control. Employers can ask employees for reasonable documentation of family relationships; a simple statement will suffice.

Serious illness or injury. The servicemember must suffer from a "serious illness or injury" that:

- Was incurred in the line of duty on active duty, as determined by the Department of Defense (DOD); and
- May render him medically unfit to perform the duties of his office, grade, rank, or rating and for which he is undergoing medical treatment, recuperation, therapy, or outpatient treatment or is on temporary disability retired list for a serious injury or illness.

For veterans, they must suffer from a serious injury or illness that was incurred in the line of duty on active duty in the armed forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the armed forces) and that manifested itself before or after the member became a veteran.

A serious illness or injury is not necessarily the same thing as a serious health condition (although it is possible for a condition to qualify as both).

If the serious illness or injury existed prior to the servicemember's military service, the employee may still qualify for leave if that condition was aggravated or worsened during their qualifying military service. In addition, employees may take leave to care for injured *veterans* as long as they served in the military within five years prior to the requested leave and meet the other requirements for leave.

Certification. Employers may require certification of the need for caregiver leave from specific military health care providers. The DOL's certification form, WH-385, is no longer accurate, but we have included an updated version of that form in the appendix.

Employers must accept "invitational travel orders" or "invitational travel authorizations" issued to family members by the DOD as sufficient certification of the need for military caregiver leave, at least until the expiration date of the order or authorization. Employers may seek authentication and clarification of such certifications, but may not seek second or third opinions or recertifications.

Military caregiver leave year. The regulations establish a separate FMLA leave year for military caregiver purposes, beginning with the first date leave is taken and ending 12 months later. This differs from the regular FMLA leave year, which employers are allowed to choose for all types of leave other than military caregiver leave. If an employee takes any other type of leave during the military caregiver leave year, you will have to track them both separately and together.

> For example, the DOL's regulations state that once an employee takes military caregiver leave, he can take a maximum of 26 weeks of FMLA leave for any purpose during that 12 months. If he takes nonmilitary FMLA leave during that time frame, say to care for his own serious health condition, that reduces the amount of military caregiver leave he may take during that 12-month period. At the same time, you have to track the regular FMLA leave he takes to make sure he doesn't exceed the 12 weeks of leave allowed him for non-military caregiver leave.

The maximum of 26 weeks of military caregiver leave may be taken in a single block or intermittently during the employee's military caregiver year. Such leave cannot be carried over from year to year; it's supposed to run in a single 12-month period. It is possible for an eligible employee to take military caregiver leave more than once because this type of leave, according to regulation, applies on a per servicemember, per injury basis. However, employers may require the employee to meet all eligibility requirements (primarily the 1,250 hours of service requirement) in order to take additional military caregiver leave for: 1) a different servicemember, or 2) a different illness or injury.

> For example, Employee Evelyn may take 26 weeks of military caregiver leave for her military spouse's qualifying leg injury in Year 1, and take additional military caregiver leave in Year 2 for her daughter's qualifying injury. These two leave years may overlap. If the employee has not worked the required 1,250 hours in the 12 months prior to taking leave to care for her daughter, she may not be eligible for leave.

Further dual-year complications arise in the case of spouses who work for the same company wishing to take military caregiver FMLA leave.

Finally, it is possible for an eligible employee to use nonmilitary FMLA leave after military caregiver leave has been exhausted to provide additional care for a family member -- perhaps a spouse or parent – whose illness or injury also qualifies as a serious health condition.

Notice requirements. Employees seeking military caregiver leave must follow existing FMLA notice rules, including the requirement to work with employers to schedule leave without unduly disrupting operations.

3 – STATE MILITARY FAMILY LEAVE LAWS

A growing number of states require employers to provide a certain amount of leave to employees who have a spouse or other family member serving in the military. At present, such states include California, Illinois, Indiana, Maine, Minnesota, Nebraska, New York, Rhode Island, Washington, and — most recently — Connecticut and Oregon.

These laws are similar to but not exactly the same as the FMLA's military family leave provisions. Some common differences include that the state laws may:

- Apply to smaller employers than the FMLA;
- Cover different family relationships;
- Have less stringent eligibility criteria for employees;
- Apply to different circumstances in which the employee may desire to take leave; or
- Have different leave requirements, such as longer or paid leave.

Protecting and supporting members of the military and their families is a particularly hot topic in many state legislatures, and as such, the requirements and restrictions imposed on employers in this regard are likely to continue evolving over the next several years. In short, employers should keep an eye out for any new military family leave requirements in their state legislatures.

4 – USERRA

Employers need to keep a clear distinction between the FMLA's military family leave requirements and the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA). While the FMLA allows employee to take leave when a family member is called to active duty, the USERRA applies to employees who join or are called to active duty in the military.

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FMLA: Recent FMLA Developments

In 2012, the Obama administration and the courts have continued to expand the scope and effect of the FMLA, as well as other laws related to medical conditions and liability. Among those changes:

(1) ADAAA. The EEOC issued final regulations implementing the ADA Amendments Act of 2008 (the ADAAA) and reflecting the ADAAA's broader definition of "disability." As a result, more individuals now have covered disabilities and qualify for protection under the ADA. This change also impacts the FMLA-ADA interaction analysis employers must consider when managing leave for an employee's serious health condition and/or disability.

(2) GINA. The Equal Employment Opportunity Commission (EEOC) issued final regulations (29 CFR Sec. 1635.1 et seq.) implementing Title II of the Genetic Information Nondiscrimination Act (GINA)**.** The final regulations, which became effective January 10, 2011, require, among other things, that employers include a "safe harbor" statement in all requests for FMLA medical certification and return to work certification.

(3) *In Loco Parentis*. The U.S. Department of Labor (DOL) issued an Administrator's Interpretation addressing the FMLA and *in loco parentis* qualification under the federal law. In the interpretation, the DOL clarified the definition of the parental relationship under the FMLA – leavings no doubt that all families—including those in the lesbian-gay-bisexual-transgender community—are protected by the family leave laws.

(4) From the Courts. Several recent court decisions have changed the way in which the FMLA will be interpreted and enforced, most notably:

- The EEOC's increased attention to employers obligations to provide more leave than the FMLA requires as a reasonable accommodation under the ADA (*UPS, Supervalu*, and *Sears* cases);
- The extension of retaliation protection to third parties such as close family members and fiancées (*Thompson*); and
- The addition of "cat's paw" liability, holding an employer liable when an unbiased manager bases his or her employment decision on the recommendation of a biased manager (*Staub* and *Blount* cases).

These changes are important to employers in more ways than one. Not only do you need to know about what they do and what they mean for you, they may also be a portent of things to come.

1 – ADAAA Changes to Disability Coverage – FMLA Serious Health Conditions

Effective May 24, 2011, final regulations issued by the EEOC implementing the ADA Amendments Act of 2008 (the ADAAA) reflect the ADAAA's broader definition of the term "disability." As a result of the ADAAA and final regulations, more individuals now have covered disabilities and qualify for protection under the ADA. For employers, this

generally means shifting their approach from one that focuses on verifying that a person has an ADA disability to one that uses the interactive process to see if there's an effective accommodation that will allow an employee to perform the essential functions of his or her job.

According to the EEOC, the primary focus in ADA cases should be whether employers have complied with their obligations under the ADA and whether discrimination has occurred, not whether the individual meets the definition of disability. Determining whether an individual meets the definition of disability under the ADA "should not demand extensive analysis."

Some highlights of the ADAAA regulations are:

- Expanded definition of "disability"
- Nine "rules of construction" to determine whether an impairment substantially limits a major life activity, and the term "substantially limits" will be interpreted broadly
- Some impairments will "virtually always" be a disability when analyzed under the nine rules of construction (e.g., deafness substantially limits hearing, cancer substantially limits normal cell growth, HIV infection substantially limits immune function)
- The concepts of "condition, manner, or duration" may be useful in some cases to evaluate whether an individual is substantially limited in a major life activity

The practical effect of the ADAAA on FMLA compliance is the increased cross-over between ADA-protected disabilities and FMLA-protected serious health conditions. As a result, employers will be called upon to offer not only FMLA leave, but more often now, an extension of leave to accommodate those employees that have both a serious health condition and a disability.

Steps Employers Should Take

If you have not done so already, the following are steps employers should take to address the changes brought about by the recent changes to the ADA:

- Ensure that employees who qualify for FMLA leave due to their own serious health condition are also considered for ADA coverage, additional leave and/or other accommodation.
- Coordinate medical certification process so that the two legal standards (for serious health conditions and potential disability qualification) are met individually and documented sufficiently.
- Review job descriptions to ensure regulatory compliance - detailing the essential functions in a job description will help ensure that applicants and employees with disabilities are not discriminated against because they cannot perform marginal job duties.

- Train supervisors and managers about complying with the amended ADA, in particular about the interactive process, requests for accommodation, and types of reasonable accommodation. Training supervisors not to retaliate in response to disability claims or requests for accommodation is also critical.
- Check recordkeeping processes to ensure adequate documentation of accommodation requests, steps in the interactive process, and reasons for granting/denying an accommodation request.
- Check equal employment/nondiscrimination policies to make sure they comply with the amended ADA and regulatory requirements.

2 – EEOC's Final GINA Regulations – and How They Affect FMLA Compliance

In January 2011, the EEOC's final regulations that interpret and implement the nondiscrimination requirements of the Genetic Information Nondiscrimination Act (GINA) became effective. The final regulations include new information about the obligation of covered employers to avert possible disclosures of genetic information by health care providers, including during the processing of FMLA leave.

Before getting to that, let's have a quick review of what GINA requires and how it interacts with the FMLA.

GINA and FMLA

With some exceptions, GINA prohibits employers from requesting or acquiring genetic information about employees and the family members of employees. It also prohibits employers who obtain genetic information (whether legitimately or not) from discriminating against an employee, job applicant, or former employee on the basis of genetic information.

GINA defines "genetic information" to include much more than genetic testing, such as:

- The mere fact that an employee (or employee's family member) has requested or received genetic testing or counseling;
- Any information or advice received during genetic counseling; and
- An employee's "family medical history."

Potentially, employers could receive all of these types of information in response to medical inquiries under the FMLA. However, the item that should be of most concern to employers is the prohibition against acquiring an employee's family medical history. The regulations say that term includes information about a ***manifested disease or disorder of an employee's family member.*** According to the EEOC, that includes any disease or disorder, not only those that are genetically based.

Needless to say, this type of information could easily be revealed to employers who request medical certification of a family member's serious health condition under the FMLA.

Safe Harbor Language for Medical Inquiries

The GINA statute and regulations recognize that employers may come into possession of some kinds of genetic information legitimately as part of the FMLA certification process. Specifically, GINA provides that it is not unlawful for an employer to request family medical history as part of a medical certification for leave taken under the FMLA or similar state leave laws.

That does not, however, completely lay the problem to rest. What if, for example, you receive genetic information ***other*** than family medical history in response to a proper medical certification request? Similarly, what if you receive genetic information in a fitness-for-duty certification?

In both of those situations, you would arguably be entitled to protection under GINA's exception for inadvertent disclosures. There appears to be some uncertainty, however, regarding whether you need to take any extra steps to avail yourself of such protection. The EEOC's final GINA regulations provide specific "safe harbor" language for employers to use in medical inquiry forms, such as pre- and post-offer medical exams and fitness-for-duty exams.

The safe harbor language (which you can find below and in the Appendix to these materials) warns health care providers not to reveal any genetic information in their response. If a medical provider discloses genetic information to the employer in spite of this warning, such disclosure will be deemed inadvertent and not in violation of GINA.

Alternative Protection

The regulations also provide that even if an employer does not use the safe harbor language, it does not violate GINA if the request for medical information is so "narrowly tailored" that it is unlikely to result in the acquisition of genetic information. Unfortunately, the EEOC's regulations do not discuss how the safe harbor or "narrowly tailored" requirements may apply to requests for medical information under the FMLA.

It is possible that the "narrowly tailored" exception means that an employer that uses a DOL medical certification or one that is substantially similar to it, would not be required to include the safe harbor language. However, prudent employers should always attach the safe harbor language to their forms to make sure they have all their bases covered.

Note: We recommend that employers also include the safe harbor language in requests for fitness-for-duty certification ***and*** in their instructions to any health care provider who is conducting a fitness-for-duty exam at the employer's request.

What to Do with Genetic Information You Acquire

No matter how careful you may be in trying to avoid acquiring genetic information, some is sure to slip through the cracks. When that happens, you have two primary obligations:

- You may not discriminate against the employee on the basis of the genetic information; and
- You must protect the confidentiality of the information. That means both that you need to make sure the information is not passed on to others and that you maintain it in a confidential file.

Genetic information may be kept in the same file as any confidential medical information you are required to maintain under the FMLA and/or ADA.

GINA Safe Harbor Language

> The GINA regulations provide the following language that employers may use in their otherwise lawful requests for medical information:
>
> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

3 – DOL Issues Expansive Interpretation of *In Loco Parentis* Standard

The U.S. Department of Labor (DOL) has released a new "administrator interpretation" that clarifies the circumstances in which an employee may take leave to care for a child toward whom they act as a parent, but are not legally recognized as such. The so-called *in loco parentis* provision also applies to situations where a person or people acted in the place of a parent for the employee when the employee was a child.

As has been pointed out in numerous press reports, the ruling grants expanded Family and Medical Leave Act (FMLA) rights to gay and lesbian employees. However, it addresses much broader issues than that. The general principles set forth in the ruling may be applied to a number of parental relationships, including employees who are raising a grandchild or sibling or caring for the child of a servicemember who has been called to active duty.

What the Ruling Is About

The DOL says that the purpose of the administrator interpretation is to assist employees and employers in understanding "how the FMLA applies when there is no legal or biological parent-child relationship." Specifically, it attempts to explain the term *in loco parentis* – a Latin term that means "in the place of a parent."

From its inception, the FMLA has allowed employees to take leave to care for a child to whom they stand *in loco parentis.* However, it has never been clear exactly what standards employers are supposed to apply in determining whether an employee qualifies for leave under the *in loco parentis* provision.

According to the new administrator interpretation, *in loco parentis* status arises when a person assumes the obligations of a parental relationship without going through the formalities of a legal adoption. Determining whether an employee stands *in loco parentis* to a child requires a consideration of multiple factors, including:

- the age of the child;
- the degree to which the child is dependent on the person claiming to be standing *in loco parentis*;
- the amount of support, if any, provided; and
- the extent to which duties commonly associated with parenthood are exercised.

The key is the employee's *intent* to assume the status of a parent, which can be inferred from the employee's actions with regard to the child. In addition, although the DOL does not come right out and say it, it appears that the most important factor is the extent to which the employee exercises – or intends to exercise, for newborn or newly adopted children – parental duties.

Documentation of Relationships

The FMLA regulations allow employers to require documentation of a family relationship, but do not specifically address the type of documentation that may be required. The administrator interpretation states that "a simple statement asserting that the requisite family relationship exists is all that is needed" when there is no legal or biological relationship between the employee and the child. Although it's a bit ambiguous, we would interpret this to mean that employers may require ***no more*** than a simple statement that the requisite family relationship exists.

Application to Same-Sex Partners

First, employers should note that the DOL declined to expand FMLA coverage to employees who request leave to care for a same-sex partner. From a legal perspective, that makes sense. The FMLA statute defines the term spouse as "a husband or wife, as the case may be." A separate statute, the federal Defense of Marriage Act (DOMA), prohibits federal laws that refer to "spouses" as being interpreted to include same-sex

partners, marriages, or civil unions. Therefore, as the law stands now, the DOL does not have the authority to grant FMLA leave rights to same-sex couples beyond the situations involving their partner's children.

The practical significance of the guidance appears to be somewhat limited as it applies to same-sex partners. The FMLA has long been interpreted as granting leave to employees who are *in loco parentis* to a same-sex partner's child who suffers from a serious health condition. In that respect, the guidance does not add much to the analysis other than to provide a more detailed discussion of how to determine whether an employee satisfies *in loco parentis* standards.

In fact, insofar as it applies to same-sex partners, there are really only a couple of things about this ruling that are truly new. First, it specifically says employees may take leave ***to be with a same-sex partner who is giving birth***. Similarly, it states that the employee in these situations is allowed to take the same bonding period (i.e., up to 12 weeks of leave) as other parents of a newborn or newly adopted child.

The DOL is saying that when an employee's domestic partner adopts or gives birth, it can be inferred that the employee intends to act as the child's parent. In this situation, the employee would not be considered the child's legal parent unless he or she adopts the child, which is allowed in some states but can take some time. In addition, same-sex couples who wish to adopt are sometimes prohibited from doing so by state law as a "couple." Their only option may be for one of them to adopt as a single parent. The other partner typically isn't recognized as the child's legal parent no matter how much care or support they provide. The administrator interpretation allows them to take leave in spite of the lack of a legal relationship.

Remaining questions. Issues are likely to arise regarding the ability of an employee to take leave when a same-sex partner is pregnant with a child that the employee intends to parent. For example, would an employee be entitled to take leave to attend the partner's prenatal appointments? It appears that the answer is no. The regulations regarding an employee's ability to take leave during a spouse's pregnancy use the specific terms "husband" and "wife," which does not include same-sex partners under federal law.

Similarly, it is unclear whether the ruling means an employee must be allowed to take leave relating to a same-sex partner's efforts to adopt a child. For example, is the employee entitled to leave to attend required meetings with a social worker or assist with the adoption process? Although there is no clear answer to that question at this time, we would recommend allowing the leave if the employee's presence is required in order for the adoption to proceed.

Other *in loco parentis* relationships

In addition to same-sex couples, the administrator interpretation also enunciates certain principles that may be applied to other non-traditional family settings. The first principle

is that employees who care for a child on a daily basis will be considered *in loco parentis* even if they provide no financial support for the child. The second principle is that there is no limit to how many people can be considered *in loco parentis* to a particular child.

How might these two principles come into play? Let's take a look at one possible scenario.

Example

> Keith and Debbie are a married couple in their mid-forties. They have three daughters, ages 19, 16, and 14. The 19-year-old – Laura – is the unwed mother of a little boy, and they both live with Keith, Debbie, and their other daughters. The baby's father is involved in his life and keeps him every other weekend. Laura has a job in retail where she works evenings and weekends. She cares for the baby when she is at home during the day. Laura's sisters and parents care for the baby while she is at work. In this example, both Laura and the baby's father would qualify for FMLA leave as the baby's parents, so there is no need to perform an *in loco parentis* analysis. In addition, the baby's grandparents would likely qualify as *in loco parentis* because they care for him on a daily basis while Laura is at work, and more than likely provide some financial support. It is even theoretically possible that the baby's teenage aunts could qualify as *in loco parentis*, although the chance of them requesting FMLA leave is probably slim due to their age.

The DOL appears to be taking the position that *in loco parentis* standing may arise even when the employee has no intent to assume a permanent parental relationship with the child and, in fact, knows ahead of time that she will only be caring for the child for a limited period of time. An example of this would be an employee who takes care of her nieces while their parent is called away to fulfill military obligations.

Finally, FMLA leave is available to employees when they require leave to care for a parent with a serious health condition based on an *in loco parentis* relationship. For FMLA leave purposes, "parent" is defined broadly as a biological, adoptive, step, or foster parent, or an individual who stood *in loco parentis* to an employee when the employee was a child. In-laws are not covered. An eligible employee is entitled to take FMLA leave to care for a person who stood *in loco parentis* to the employee when the employee was a child. The fact that the employee also has a biological, adoptive, step, or foster parent does not preclude a determination that another individual stood *in loco parentis* to the employee when the employee was a child.

Unanswered questions. A number of questions remain. For example, in the case of leave to care for a child, how long must the employee have been caring for a child before *in loco parentis* status arises? The administrator interpretation states that an employee who cares for a child whose parents are on vacation is not *in loco parentis* to the child.

But where is the line to be drawn? For example, what if the child's parent is involuntarily absent for a few weeks or months due to being incarcerated or going into drug rehab? Does it matter whether the parent's absence is voluntary or compelled in some respect? These are issues that employers will have to work through as they arise, preferably with the assistance of employment counsel.

4 – Recent Court Decisions Change the Way in Which the FMLA Will Be Interpreted and Enforced

In the continuing evolution of FMLA law, several recent judicial decisions have changed the way in which the FMLA will be interpreted and enforced. Included in those changes are an employer's obligations to provide more ADA leave than the FMLA requires, the extension of retaliation protection to third parties, and the addition of "cat's paw" liability to discrimination and FMLA cases.

Obligations to Provide Leave

Several cases recently decided or settled address an employer's obligations to provide more leave than the FMLA requires as a reasonable accommodation under the ADA (*UPS, Supervalu* and *Sears* cases). It is becoming clearer that the EEOC has been paying particular attention to employers that have a policy of automatically terminating employees who fail to return to work after they've exhausted FMLA and/or workers' compensation leave. The EEOC, which is responsible for enforcing the employment discrimination provisions of the Americans with Disabilities Act (ADA), has responded by bringing enforcement actions against such employers.

The EEOC's ADA Enforcement Guidance concludes that an employer may not apply a "no-fault" leave policy — under which employees are automatically terminated after they have been on leave for a certain period of time — to an employee with a disability who needs leave beyond the designated leave period. When a disabled employee has exhausted his leave under the FMLA, workers' comp, or the employer's internal policies, the employer may be required to provide him with additional leave as a reasonable accommodation under the ADA. The only exceptions are if:

- There is another effective accommodation that would return the employee to work; or
- Granting additional leave would cause the employer an undue hardship.

This rationale is the basis for several recent enforcement actions brought and/or settled by the EEOC. In each of these actions, an employee was terminated after their legally protected leave had been exhausted. After an employee filed a complaint with the EEOC, the agency's investigation uncovered what it considered to be widespread violations of the ADA due to the employers' policies of automatic termination upon the exhaustion of leave.

UPS Lawsuit

In this case, the EEOC sued United Parcel Service, Inc. (UPS), alleging it violated the ADA by instituting an inflexible leave policy. UPS gives employees up to 12 months off for medical leave, but its policy fails to adequately accommodate disabled employees because it places "arbitrary deadlines" for them to return to work.

The UPS suit arose out of a complaint made by an administrative assistant diagnosed with multiple sclerosis. After taking a 12-month leave of absence, she returned to work on time but continued to experience side effects due to her medication. According to the EEOC, she requested additional time off work, but UPS terminated her rather than extending her leave or finding her another position within the company.

Supervalu Lawsuit and Settlement

One month after filing suit against UPS, the EEOC filed a similar action against the grocery chain Supervalu, Inc. The agency claims that Supervalu violated the ADA by automatically terminating employees with physical or mental restrictions at the end of a one-year paid disability leave period. According to the EEOC, Supervalu's policy prohibits disabled employees from returning to work at the end of their leave period unless they can return without any special accommodations.

The EEOC announced that it had reached a settlement in its lawsuit against Supervalu, Inc., to the tune of more than $3 million and extensive remedial relief. The lawsuit had targeted the employer's alleged practice of terminating employees with disabilities at the end of medical leave rather than allowing them to take additional leave or offering them other reasonable accommodations that would allow them to return to work.

Sears Settlement

Even more impressive (or alarming, depending on how you look at it) is the EEOC's settlement of a class action lawsuit it was pursuing against Sears, Roebuck and Co. The agency sued Sears in 2004 alleging that it violated the ADA by maintaining an inflexible workers' compensation leave policy. The agency asserted that Sears automatically terminated disabled employees after they exhausted a set amount of workers' comp leave. The suit went on to claim that Sears failed to consider whether a reasonable accommodation would have allowed the employees to return to work.

The case was initiated by a service technician who was injured on the job and took workers' comp leave. He claimed that he repeatedly tried to return to his job, but Sears refused to take him back. The EEOC alleged that rather than considering whether a reasonable accommodation would have allowed him to get back to work, Sears fired him when his leave expired. During the EEOC's investigation, additional claimants were identified, resulting in the filing of the class action.

After several years of litigation, the EEOC and Sears settled the lawsuit in September 2009. Sears agreed to pay $6.2 million, the largest ADA settlement in a single lawsuit in the EEOC's history.

EEOC Acting Chairman Stuart J. Ishimaru said that the record settlement "sends the strongest possible message that the EEOC will use its enforcement authority boldly to protect those rights and advance equal employment opportunities for individuals with disabilities." Regional EEOC attorney John Hendrickson went on to note that "the era of employers being able to inflexibly and universally apply a leave limits policy" without considering additional leave as a reasonable accommodation is over.

Bottom Line

These cases demonstrate that the EEOC has its sights firmly set on inflexible fixed-term leave policies. In light of the agency's continued doggedness on this topic, employers are well-advised to take a close look at their leave-of-absence policies – not just those under the FMLA – as well as their procedures in administering and enforcing them. ***That is true even if your policy is more generous than the law requires.***

In addition, you should ensure that your medical leave policies allow for flexibility. Don't automatically terminate workers if they aren't able to return to work after exhausting their leave time. Instead, engage in an interactive dialogue to determine whether a reasonable accommodation – including additional leave –would allow the employee to return to work.

What really stands out about these cases is that the UPS and Supervalu leave policies were more than generous in the first place. Both companies gave employees a full year of leave, and Supervalu at least gave them paid leave (it's unclear whether UPS provided paid or unpaid leave). Yet the EEOC does not appear to consider that relevant to the discrimination analysis. The end result of these lawsuits may be to inadvertently deter employers from enacting or keeping such generous medical leave policies. That would be unfortunate, to say the least.

FMLA Retaliation Protection Extended to Third Parties:

Another notable case applicable to the FMLA came from the U.S. Supreme Court in 2011 in *Thompson v. North American Stainless (NAS), LP*. In the *Thompson* case, Thompson and his fiancée, Regalado were employees of NAS. Regalado filed a sex discrimination complaint with the EEOC, and three weeks after NAS received notice of the charge, Thompson was fired. Thompson then filed his own charge with the EEOC, claiming his termination was in retaliation for Regalado's initial complaint.

The U.S. Supreme Court found that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct, including third-party retaliation. The Court found that Title VII allows a "person aggrieved" to file a civil action, which the Court found Thompson to be. Most notably, the Court found that "injuring him

[Thompson] was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her". In these circumstances, the Court believed Thompson to be well within the "zone of interests" sought to be protected by Title VII. Justice Scalia wrote in his opinion, "[w]e expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

Practical Tip:

The FMLA makes it unlawful for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any right under the FMLA, or to "discharge or in any other manner discriminate against any individual for opposing" any violation of the FMLA. In light of this language, it seems likely that employees' attorneys and the Department of Labor will seek to apply the Court's logic in *Thompson* to third-party retaliation claims under the FMLA.

What does this mean for employers? When deciding whether to terminate or take other adverse action against an employee, it may not be enough to consider whether that employee has recently exercised FMLA rights or engaged in other activities protected by state or federal law. Now, the employer must consider whether the employee has some significant connection to any other employee who engaged in such protected activities. For example, is the employee married to, dating, or good friends with another employee who recently requested FMLA leave or filed a DOL complaint? If so, additional caution may be warranted.

Cat's Paw Liability and the FMLA

Finally, 2011 brought the application of so-called "cat's paw" liability to Title VII discrimination and then to the FMLA. Under the cat's paw theory an employer can be held liable when an unbiased manager bases his or her employment decision on the recommendation of a biased supervisor.

Staub Case:

The U.S. Supreme Court recently upheld "cat's paw" liability in an employment discrimination case. In *Staub v. Proctor Hospital* (2011), the Court ruled that an employer may be liable for an adverse employment action of an unbiased manager if the action is based on the recommendation of a biased, lower-level supervisor.

In *Staub,* the Court ruled that an employer may be liable if all of the following are established:

- A supervisor performs an act motivated by unlawful bias.
- The act is intended to cause an adverse employment action.
- The act is the proximate cause of the ultimate employment action.

Although this case was brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Court noted that USERRA's language regarding a "motivating factor" is similar to Title VII. Therefore, this ruling could open the door for courts to apply "cat's paw liability" in cases brought under Title VII, the ADA, and FMLA.

Blount Case: FMLA and the Cat's Paw:

More recently, in the case of *Blount v. Ohio Bell Telephone Co*., No. 1:10-CV-01439 (U.S. Dist. Ct., N.D. Ohio 2011), a district court applied the cat's paw theory of liability to a FMLA case. In *Blount*, the employer's performance management system resulted in discipline to employees for failing to meet their goals. However, managers were able to decide whether employees should actually be disciplined and/or terminated for failure to meet their goals.

Two employees who had taken FMLA leave claimed that they were selected for discipline and termination based on their FMLA status and not on their failure to meet their goals. The employer claimed that the decision to terminate the employees came from upper-level management, not the employee's direct supervisors. Therefore, the employer argued that any alleged biases had no bearing on the ultimate decision to terminate the employees. Unfortunately for the employer, the district court disagreed, citing the Supreme Court's decision in *Staub*.

Bottom Line: Cat's Paw

The application of the cat's paw theory to FMLA cases means that the person making the ultimate decision regarding employment action should not rely solely on the content of any employee's personnel file or the recommendation of an employee's immediate supervisor before acting. Instead, he or she must conduct an independent investigation to confirm that there is a legitimate nondiscriminatory reason for the adverse employment action.

I'M SUPPOSED TO BRING IN A DOCTOR'S NOTE EVERY TIME??

San Jose Industries (SJI) fired Final Processor, Damien Noteworthy ("DN"), because, while on intermittent FMLA leave, he failed to follow the Company's attendance policy requiring him to obtain a doctor's excuse for each absence of two consecutive days or more. DN sued SJI as a result, alleging that SJI interfered with his use of FMLA leave.

SJI's attendance policy states:

> An absence is defined as any scheduled work day, including weekends, when the employee does not report to work. No distinction is made between excused and unexcused absences. However, if an employee is off for medical reasons, a Doctor's excuse is required after two (2) consecutive days. If no excuse is provided, each day will be considered a separate absence. SJI counts multiple day absences as one instance, so long as the employee provides a Doctor's excuse. Each instance of absence is equal to one point. At 5 points, the employee will be issued a written warning; at 8 points, a second written warning; at 12 points, a three-day suspension without pay, and at 14 points, termination. FMLA absences are not counted as instances so long as the employee provides the Doctor's excuse.

The chronology of facts is as follows:

Since 2003 DN suffers from weakness and pain in left wrist and hand

8/3/04 DN had 1st surgery on wrist and hand

8/4-10/24 FMLA leave for surgery and therapy (no points assessed)

Since 10/04 DN continues to suffer pain

8/28/05 DN applied for intermittent leave for 1 year, signing document stating that, documentation must be presented with each absence for the absence to be applied against the FMLA status"

8/28/05 DN's physician completes FMLA medical certification stating DN was permanently restricted from lifting over 20 lbs. would be off for two weeks for surgery and post-operative therapy and would required extensive physical therapy.

9/12/05 SJI approved intermittent leave beginning 9/29/05

8/29-2/6 DN absent for 88 days due to FMLA certified condition and DN provided doctor's note

11/7/05 DN has 2nd surgery

11/16/05 SJI HR Manager informed DN he needed to provide documentation to support post-surgery absences and provided DN with copy of SJI's attendance policy; DN argued that FMLA certification already provided that information

12/1/05 DN relents and provided notes explaining absences through 2/2/06

2/6/06 DN supplies note stating he can return on 2/6 to light duty as he cannot lift over 10 lbs

2/6/06 DN returns to work; has 4 points from past 12 months

2/7-3/8 DN absent 4 more times due to wrist/hand, d/n bring in doctor's note, assessed 4 points

4/3-4/10 DN absent 6 more times due to wrist hand, d/n bring in doctor's note, assessed 6 points, 1 point from 2005 rolled off, total assessment, 13 points

4/12/06 SJI HR Manager met with DN and gave DN until 4/13 to provide doctor's note, assess 3 day suspension without pay

5/2/06 SJI HR Manager wrote letter to DN stating DN had been absent since 4/24 and gave DN until 5/8 to provide doctor's note

5//5/06 DN provided doctor's note attributing absence to chest pain, assessed 1 point, 1 point from 2005 rolled off, total assessment, 13 points

5/10-5/13 DN absent due to wrist/hand and provided doctor's note, assessed no points

6/9&6/22 DN absent due to wrist/hand, d/n provide doctor's note, assess 2 points, total assessment 15 points

6/29/06 DN terminated for excessive absenteeism

Does the FMLA protect employees from having to document each episode of intermittent leave by advising of the medical reason for the medical leave? Did SJI violate the FMLA?

Based on: Jackson v. Jernberg Industries, Inc. 677 F.Supp.2d 1042 (N.D. Ill. 2010)

I'M NOT PARTYING WHILE ON FMLA LEAVE, THAT'S NECESSARY SOCIALIZATION PRESCRIBED BY MY DOCTOR!

HR Troubleshooting Software, Inc. (HR) fired Betty-Lou Beanhead because they believed she had abused her FMLA leave status. She says she was engaged in necessary medical treatments.

The chronology of facts is as follows:

2/26/96: HR employed Betty-Lou as call service representative at its call center.

1999: Betty-Lou was diagnosed with PTSD stemming from childhood abuse; from the PTSD, Betty-Lou would suffer debilitating panic attacks, symptoms of depression and physical pain.

2001: Betty-Lou's psychiatrist recommended 2 – 48 hours of intermittent leave/month when Betty-Lou experienced symptoms; Betty-Lou periodically requested the leave.

2003: HR approved 45 of 50 FMLA requests by Betty-Lou, totaling 232 work hours.

2004: Betty-Lou exhausted all 12 weeks of FMLA

2005: HR approved all of Betty-Lou's FMLA requests

2006: HR approved 79 FMLA requests, totaling over 400 hours

7/06: HR's attendance manager suspected that Betty-Lou was misusing her FMLA leave to extend her weekends.

11/15/06: HR approved formal investigation after reviewing pattern of absences.

12/12/06: HR conducted four days of surveillance on Betty-Lou

12/12-13/06: No conduct observed inconsistent with PTSD condition

12/14/06:

10:28am: Drove to dentist office 41 miles from home.

2:36pm: Departed dentist and drove two miles to Ya-Ya's Flame Broiled Chicken restaurant.

3:30pm: Drove to Starbucks 21 miles away and purchased a peppermint mocha coffee, then drove 21 miles to beauty salon. Had hair cut and colored.

8:23pm: Departed beauty salon and followed another woman 10 miles to Senior Lucy's Cantina.

Later: Drove 53 miles to home. Morning's dental visit found to be pre-scheduled.

12/14/06: HR denied leave request because it believed that Betty-Lou abused FMLA leave to address pre-planned personal matters inconsistent with her PTSD affliction.

12/20/06: HR obtained opinion of own psychiatrist who concluded that Betty-Lou's condition, when severe, required her to rest at home and to not operate a vehicle due to the potential for blackouts; and that she should not conduct home maintenance or undertake recreational activities.

12/20/06: Betty-Lou's treating psychiatrist and social worker stated Betty-Lou's treatment depended on the symptoms and that social interaction may be healthy for her.

1/19/07: HR terminated Betty-Lou for FMLA abuse

Is this a case of abuse? Retaliation? Interference?

Based on: Hyldahl v. AT&T, 2010 U.S. Dist LEXIS 63108 (E.D. Mich. 6/25/10)

When It Rains, It Pours

Captain Mark Tomoka was a member of the Florida Air National Guard, but his regular work was as a corporate jet pilot. His wife, Linda, worked for a large bank, who was covered by the FMLA. The bank uses a calendar year method of counting FMLA leave.

Mark was suddenly called up to active duty to deal with a developing contingency regarding the Strait of Hormuz. His deployment orders were to report to an air force base in Turkey for at least 1 year. His assignment was classified "Top Secret," and Linda would not be able to have communications with Mark for a long time.

Mark was like a stay-at-home dad, when he wasn't flying commercially. Mark had no will, Mark controlled all the assets and checking accounts, and Linda did not know how she could take care of things all by herself. She requested FMLA for intermittent leave due to Mark's military qualifying exigency, which the bank granted. In all she had to take 3 weeks of leave.

Mark's sudden departure lead Linda to see a psychiatrist who diagnosed her with a severe form of bipolar depression. She first needed 4 weeks of steady treatment at a mental hospital and then again needed and was granted intermittent leave, for which she used 1 day a week for the next 15 weeks.

Mark returned a few months ahead of schedule, but with injuries to his knees and lower back, both requiring surgery. He was paralyzed from the hips down, which the surgery was expected to repair. Linda sought military caregiver leave and took off work continuously for 4 weeks as they prepared for the surgery.

Meanwhile, their daughter, Hayla, contracted rubella fever, which was not improving and required hospitalization, significant testing, and keeping away from others, especially Mark who needed to be completely virus free for his surgery. A friend of Mark's was willing to stay with Mark, and Linda cared for Hayla living out of Linda's parent's house. Linda sought non-military caregiver leave to take care of Hayla and the doctor predicted it would be 6-8 weeks before Hayla could go home or back to school.

What is Linda's FMLA status?

HR that "Rolls Along" Smoothly

It's another great day in HR. As the head of HR, you went to all the slick seminars in the 1990's and wisely adopted the "backward rolling year" as your FMLA policy. That keeps anyone from taking advantage of the system.

Ashley, your Accounts payable supervisor, calls HR to confirm that one of her employees does not have any FMLA time available. Her employee, Ted, took 4 weeks of FMLA leave to have his stomach stapled the day after the New Years holiday. Ted's surgery was on January 2nd. As a result, Ted did not come back to work until early February.

The surgery didn't sit well with Ted and problems developed. As a result Ted was off work and used 3 weeks of FMLA in June and, still having problems, used 5 more weeks of FMLA beginning on September 1.

Ted's always proud of the "wild parties" that he goes to most weekends. Ted has been late/tardy to work 12 times since last September. Ashley has given Ted verbal and written warnings about his tardy problem. He just can't seem to get to work on time. In November, after 3 days when Ted was late, Ashley put Ted on a Performance Improvement Plan.

In early December, Ted came in to tell Ashley that he is now planning to reward himself with a "tummy tuck" operation. The "tummy tuck" is planned for, you guessed it, January 2nd!! Ted has asked Ashley for 4 more weeks of FMLA leave starting January 2nd. When she heard of Ted's plan, Ashley's reaction was to look at Ted incredulously. Then she said right out loud, "Ted, who do you think you are? You've been late to work 15 times and have only been back for two months! And now you want another month off?" Remembering her supervisory training, Ashley told Ted that he had used up his FMLA time and would have to apply for a Personal Leave. Ted can't take a month-long FMLA leave until February. Correct??

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Publications
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Mr. Harper has practiced in Labor Relations and Employment Law for over 30 years. He is Board Certified by the Florida Bar in Labor and Employment Law. He is also a Florida Supreme Court Certified Circuit *Civil* and *Appellate Mediator*.

For the past 20 years, Mr. Harper has served as the editor of the ***Florida Employment Law Letter***, a monthly newsletter subscribed to by over 850 lawyers and human resource professionals. He is currently the Chair of the Labor and Employment Law Committee for the Jacksonville Bar Association.

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