The FMLA

# When an Employer Must Offer an Unrequested Leave of Absence

By Emily E. Schnidt

**For any attorney advising a covered employer on its duties under the law, this is a significant obligation that cannot be overlooked.**

The Family and Medical Leave Act (FMLA) was enacted in 1993 to help employees balance work and family obligations by allowing eligible employees of a covered employer to take job-protected, unpaid leave for up to 12 workweeks in a 12-month period for a qualifying medical or family reason. While most employers are familiar with the FMLA, many are unaware that under regulations enacted by the Department of Labor, there are certain circumstances where an employer is required to advise an employee that his or her leave may be FMLA-eligible, even when an employee does not request FMLA leave.

This regulation is often overlooked, and is one that can expose an employer to significant damages should an employee later claim the employer violated his or her FMLA privileges. This article provides a summary of the FMLA and the Department of Labor regulations, highlights case law interpreting these issues, and offers practical considerations for defense attorneys representing covered employers.

## Traditional Considerations for FMLA Leave

The FMLA was enacted in 1993 to help employees "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." The FMLA also seeks to "entitle employees to take reasonable leave for medical reasons," including the birth or adoption of a child or to care for family members. 29 U.S.C. §2601(b). The United States Supreme Court has recognized that the FMLA's purpose is aimed at combating gender discrimination because the FMLA was originally created to guarantee, without singling out women or pregnancy, that pregnant women would not lose their jobs when they gave birth. *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012).

Employers subject to the FMLA are generally those that employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year. Additionally, public agencies are covered employers under the FMLA, regardless of the number of employees. A "qualify-

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ing health condition" includes the birth of a child or the need to care for a newborn child, the need to care for a family member with a serious health condition, the employee's own serious health condition, or any qualifying exigency arising out of the active military duty of an employee's child, spouse, or parent. When FMLA leave is complete, the employee has a right to return to either the same position or an equivalent position with equivalent pay, benefits, and working conditions.

**By and large,** these courts have held that whether an employer has acquired knowledge that the employee may be FMLA-eligible is a fact-based inquiry.

Generally, the FMLA exists to cover incapacity for three or more consecutive days, or a condition that requires periodic medical treatment over an extended period. It is not intended to cover short-term conditions for which the treatment and recovery are brief; traditionally, employers have sick-leave policies to cover short-term illnesses. Under the FMLA, employees can take both foreseeable and unforeseeable leave. Where leave is foreseeable, an employee is required to provide at least 30 days' advance notice of the need for FMLA, or as soon as is practicable if less than 30 days. 29 U.S.C. §2612(e). Circumstances may arise where the need for FMLA leave is immediate and notice is not possible. But generally, if an employee is eligible for FMLA, then the employer must provide the protected leave once all qualifying prerequisites are met.

## Secretary of Labor's Regulations over Employers and FMLA

When the FMLA was enacted, Congress directed the Secretary of Labor to create regulations to carry out the FMLA's purpose and enforce its provisions. 29 U.S.C. §2654. As such, the Department of Labor created regulations that are codified in the Code. The problem for the unrepresented employer is that it may not know it has notice requirements without carefully reviewing the Code and the Department of Labor's fact sheets.

### Code of Federal Regulations Requirements for Employers

The Code contains eight subparts that regulate employees and employers under the FMLA, one of which pertains to employers' responsibilities. The Secretary of Labor created 29 C.F.R. §825.300 to regulate the notice that employers are required to provide employees regarding their entitlement to FMLA. There are four types of notice that an employer must provide, but for the purposes of this article, we will only discuss the second notice type, which most employers are not aware of and significantly impacts employers in civil lawsuits.

### Eligibility Notice to Potentially Qualified Employee

While the FMLA does not expressly require employers to advise employees of their rights under FMLA or to instruct employers to offer FMLA leave even if an employee does not ask, the Department of Labor does by creating an affirmative duty for employers. Pursuant to the Code, when the employer "acquires knowledge" that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. 29 C.F.R. §825.300(b)(1).

The Code does not state how an employer can acquire knowledge that an employee's leave may be for an FMLA-qualifying reason. In practical application, this often comes into play when an employee seeks to use paid time off for medical treatment and later claims he or she would have taken unpaid, job-protected leave.

### Fact Sheets Explaining Employer's Notice Obligations

Even if an employer is familiar with the FMLA, it is safe to assume that the traditional unrepresented employer is not familiar with the Code and all of its subparts. Consequently, when an employer does not have employment counsel on retainer, it typically turns to the Department of Labor's topic pages and the fact sheets on its website to determine its obligations to employees. These fact sheets provide employers and employees with general advice and direction on complying with the FMLA. Unfortunately, the employer's obligation to advise an employee of his or her potential FMLA eligibility is hidden in the text and easily overlooked. The topic page does not even address the requirement.

The fact sheets are slightly more helpful. In the general fact sheet (Fact Sheet #28: "The Family and Medical Leave Act") explaining the FMLA to employees and employers, there is a brief reference halfway through the page, stating, "When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA-qualifying reason," the employer must "provide the employee with notice concerning his or her eligibility for FMLA leave and his or her rights and responsibilities under the FMLA." In the fact sheet specifically designed for employers' obligations (Fact Sheet #28D: "Employer Notification Requirements under the Family and Medical Leave Act"), hidden within bullet points and text, the Department of Labor advises employees to provide an eligibility notice. However, the fact sheet is particularly confusing in that it implies that an eligibility notice should be sent only once eligibility is determined.

## Impact of Secretary of Labor's Regulations on Employers in Practice

The United States Supreme Court has not dealt directly with this notice requirement of the FMLA and, in fact, has declined to decide whether this provision in the Department of Labor's regulations was constitutional. In *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81 (2002), the Supreme Court recognized that the Secretary requires employers to give notice to employees of their rights and responsibilities under the FMLA, but declined to decide whether the notice requirement was consistent with the text and structure of the FMLA. *Id.* at 87–88.

Therefore, employers are left to wonder when they have obtained notice of a poten-

tial FMLA-qualifying reason, assuming they even know that they have an eligibility notice requirement.

### When Employer "Acquires Knowledge" of Qualifying Condition

Various appellate and district courts throughout the nation have provided some direction for employers regarding their obligation to notify employees of their FMLA-qualifying leave. By and large, these courts have held that whether an employer has acquired knowledge that the employee may be FMLA-eligible is a fact-based inquiry. The Sixth Circuit has held that "the critical test for substantively sufficient notice is whether the information that the employee conveyed to the employer was reasonably adequate to apprise the employer of the employee's request to take leave for a serious health condition that rendered him unable to perform his job." *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004). While this is not a standard utilized in all courts, it does provide a good starting point for employers questioning whether they must provide notice after learning of an employee's health condition and need to take a leave of absence.

The Seventh Circuit has held that an employee's providing a leave request form, indicating that the leave was for a medical reason, was sufficient to trigger the city's notice that it should advise the employee of her FMLA eligibility. *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997). Moreover, the fact that the employee in *Price* requested only paid leave was not enough to relieve the city of its obligations to advise the employee of her rights under the FMLA. The court relied upon 29 C.F.R. §825.303(b), which states that an "employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means." That regulation controls an employee's obligation to provide an employer with notice of his or her intent to take FMLA leave, but the *Price* court used the same standard when applying to an employer's obligations.

Generally, if an employer is aware of an employee's need for leave because of any medical condition, then the employer should advise the employee that they may be eligible for unpaid, job-protected leave. The courts do not look favorably on an employer that decides for the employee that he or she would rather use paid sick time.

### Failure to Notify Equals Interference with FMLA Rights

Recently, the Fourth Circuit upheld a lower court's decision finding that an employer violated its employee's FMLA rights by failing to notify the employee that he was eligible for FMLA leave and failing to advise him of all his rights under the FMLA. In *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016), the plaintiff took various leaves of absence for depression. When his doctors recommended a thirty-day rehabilitation program, the plaintiff applied for short-term disability and included a doctor's statement recommending that he remain off work for thirty days. The employer approved the short-term disability and claimed to have also mailed notice to the employee advising him that he was eligible for leave under the FMLA. The plaintiff claimed he did not receive the FMLA notice. Nevertheless, the employer admitted that the notice did not advise the plaintiff that his job was protected during his leave. The plaintiff subsequently testified that he returned to work before his doctor's recommended thirty days because he was concerned that he would lose his job. He further testified that had he known his job was protected while he was on leave, he would have continued his medical treatment. The Fourth Circuit found that the employer interfered with the employee's FMLA rights and violated the FMLA.

In ruling that the employer violated the employee's FMLA rights, the court noted that the purpose of the employer notice requirements "is to ensure that employers allow their employees to make informed decisions about leave." *Id.* (citing *Conoshenti v. Pub. Serv. Elec. and Gas Co.*, 364 F.3d 135 (3rd Cir. 2004)). When an employee is not fully advised of the conditions of his leave and his return upon his leave, that purpose is thwarted. The court found that the employer did not properly notify the employee of his rights under the FMLA to take leave and to return to his job upon the completion of his medical treatment, and therefore found that the employer did not comply with the regulatory notice requirement.

Similarly, the Second Circuit has held that an employer was equitably estopped from maintaining a defense that an employee was ineligible for FMLA leave because it did not provide an employee with notice that her leave could qualify for FMLA. In *Kosakow*, the employer failed to post a general notice of FMLA rights and failed to advise the employee that if she worked 50 more hours before her leave of absence, she would be FMLA-eligible. While on leave, the plaintiff was terminated. She subsequently sued for violations of the FMLA and argued that the employer should be equitably estopped from arguing that she was ineligible for FMLA protection. The court ruled it was the employer's obligation to inform her that she could be FMLA-eligible before taking the leave. Reading the language of the FMLA and the interpreting regulations together, the Second Circuit found that an employee can "generally assume that she is protected by the FMLA unless informed oth-

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erwise." Accordingly, where the employer remained silent about the employee's ability to take FMLA if she worked more hours, the employer was effectively misleading the employee, and the silence was construed as an affirmative misrepresentation under the principles of equitable estoppel. The court then went on to consider whether the employer had reason to believe the employee would rely on the misrepresentation by silence.

**If an employer learns** that an employee is on leave or plans to take leave for any medical condition, as a matter of practice, that employer should issue an eligibility notice and provide its employee with the various Department of Labor forms that must be executed to obtain unpaid FMLA leave.

These cases support the conclusion that when an employee takes or plans to take a leave of absence for more than three consecutive days for any potentially serious health condition, an eligible employer should immediately notify the employee that his or her leave may be eligible for FMLA leave. Regardless of whether an employee would like to take paid leave, it should be incumbent on the employer to issue an eligibility notice to the employee and to allow the employee to decide whether he or she would like to take FMLA leave. It is important to note that any allowed FMLA leave does not negate an employer's paid leave policies, and an employer may be able to elect to have the paid leave run concurrently with the employee's unpaid FMLA leave depending on the company's policy.

### Damages from Failure to Notify: First Prove Harm

If an employer does not provide an employee with his or her eligibility notice after acquiring knowledge that the employee's leave may be FMLA eligible, the employer is subject to damages. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. 29 C.F.R. §825.300(e). An employee can also recover liquidated damages equal to the amount described in the foregoing, interest, attorneys' fees, and equitable relief such as employment or reinstatement. 29 U.S.C. §2617(a)(1)(A)(ii), (iii); 29 U.S.C. §2617(a)(1)(B); 29 U.S.C. §2617(a)(3). Importantly, if the employer demonstrates that the interference was in good faith, then the court can reduce the amount of the liability. 29 U.S.C. §2617(A)(iii).

However, the Code contemplates the situation where granting leave would not have changed anything. In other words, if the employee could not have returned to work even if the employer had notified the employee of his or her eligibility and FMLA had been granted, then the employee did not suffer harm as result of the employer's actions. 29 C.F.R. §825.300(e); *Mora*, 16 F.Supp.2d 1192. The FMLA "provides no relief unless the employee has been prejudiced by the violation." *Ragsdale*, 535 U.S. at 89.

In *Franzen v. Ellis Corp.*, 543 F.3d 420, 424 (7th Cir. 2008), the Seventh Circuit upheld the district court's finding that the plaintiff did not suffer damages even if there was a violation of FMLA. The court did not award the *Franzen* plaintiff any damages because he was unable to prove that he could have returned to work upon the expiration of his FMLA leave.

In *Vannoy*, the court found not only that the employer violated the plaintiff's notice rights, but also that the plaintiff was prejudiced as a result of the employer interfering with the plaintiff's FMLA rights. The plaintiff testified that he would have taken leave differently if he knew he had a right to return to his same position once his medical treatment completed. 827 F.3d at 303. *See also Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007) (prejudice suffered where employee would have postponed knee surgery to a time when she was FMLA eligible); *Dorsey v. Jacobsen Holman, PLLC*, 476 Fed.Appx. 861 (D.C. Cir. 2012) (plaintiff did not show prejudice where she never would have returned to work or where she could have structured her leave differently).

All is not lost, however, for the employer who fails to provide this notice. The question will remain whether the employee will admit that he or she was not harmed by the failure to provide notice. In most circumstances, the well-informed employee and his or her attorney would not make such an admission. It is therefore in the employer's best interest to advise and document that it complied with the Secretary of Labor's regulations as soon as the employer learns of the employee's potentially qualifying medical condition.

### Conclusion

As these cases and several others throughout the circuits demonstrate, many employers do not know their obligations to notify employees of their FMLA rights. Indeed, this is a rather novel concept. Where the law traditionally expects citizens to know their privileges and obligations, the FMLA seeks to protect the unknowing employee. Whether this regulation will be ruled unconstitutional by the Supreme Court remains to be seen. Nonetheless, it is a subject many circuit courts have reviewed, upheld, and enforced against employers.

For any attorney advising a covered employer on its duties under the law, this is a significant obligation that cannot be overlooked. If an employer learns that an employee is on leave or plans to take leave for any medical condition, as a matter of practice, that employer should issue an eligibility notice and provide its employee with the various Department of Labor forms that must be executed to obtain unpaid FMLA leave. Even if the employer and its supervisors believe an employee would prefer paid leave, this notice should always be sent. The courts do not forgive an employer who, in good faith, fails to provide an eligibility notice once the employer acquires knowledge that the employee may qualify for FMLA.