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Jeanne M. Vonhof

Martin H. Malin
Chicago-Kent College of Law

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Illinois Public Employee Relations

REPORT

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What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans

by Jeanne M. Vonhof & Martin H. Malin

I. Introduction

President Clinton signed the Family and Medical Leave Act (FMLA) into law on February 5, 1993.[1] The FMLA has changed the way in which labor, management and arbitrators approach attendance plans. In this process, the law may be encouraging subtle shifts in labor arbitration itself and in the relationships among the parties, arbitrators and the courts.

In the past, some parties negotiated attendance control plans and, in some cases, incorporated them into their collective bargaining agreements, but many employers unilaterally designed and imposed attendance plans. Grievances challenging overall plans generally have not met with much success in arbitration. Although occasionally, an arbitrator has struck down features of an attendance plan that were inherently unreasonable,[2] typically arbitrators called upon to examine these plans have employed broad standards of reasonableness, in the absence of express contractual limits. Arbitrators have relied upon management rights clauses or management's traditional role in scheduling the workforce and making reasonable rules. Perhaps one reason for such broad standards of reasonableness is that application of the attendance control plan in any specific case remains subject to the contractual requirement of just cause for discipline and discharge. As one of the authors of this article wrote in an unpublished award:

> [E]ach attendance plan challenge must be evaluated on the contract and the facts and circumstances peculiar to the particular case.... [I]n making that evaluation, it must be realized that no plan is guaranteed to produce perfect results. The application of an attendance plan is not a substitute for the contractual requirement of just cause for discipline or discharge. Thus, whenever discipline is to be imposed for accumulation of a specified number of points, the Company is contractually obligated to review the particular circumstances of the employee involved to ensure that the discipline is supported by just cause.[3]

Consequently, unions have focused on challenging the application of attendance plans to specific disciplinary actions taken against individual employees under the just cause standard. In the arbitration of these cases, a union may argue that the union never negotiated or approved the attendance plan, and/or that imposing discipline based upon the plan, especially a no-fault plan, does not necessarily establish that just cause existed for any particular discipline.

The FMLA has prompted two significant changes in this pattern. First, in the wake of the FMLA, there is more bargaining going on over attendance issues and more contract language resulting from that bargaining. Second, the FMLA provides a new independent basis for challenging the application of an attendance plan to a specific disciplinary action, a challenge that in many cases may be raised in the arbitration hearing. These changes may result in an increase in grievances, and are already raising new issues, arguments and questions in the arbitration of grievances over attendance discipline.

This article addresses these developments. First, we provide an overview of the FMLA. Second, we explore ways in which the FMLA has stimulated bargaining related to attendance issues. Third, we explore challenges raised by the FMLA to traditional arbitral doctrine.

II. An Overview of the FMLA

The Family and Medical Leave Act applies to employers who employ at least fifty employees in each of twenty or more weeks in the current or preceding year.[4] It covers facilities at which at least fifty employees work or work within a seventy-five mile radius.[5] Employees are covered if they have worked for the employer for at least one year and have worked at least 1250 hours in the preceding year.[6]

Covered employees are entitled to up to twelve weeks of unpaid leave within a twelve month period for any of the following reasons: within twelve

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months following the birth or the adoption of a child, for the employee's own serious health condition, and to care for a parent, spouse or minor or disabled child who has a serious health condition.[7] While on leave, an FMLA-covered employee has a right to continue to be covered in the employer's health insurance plan under the same terms as if the employee were not on leave.[8] Upon returning from leave, the employee has a right to be restored to the same or an equivalent position from which the employee took leave.[9] The United States Department of Labor (DOL) regulations define an equivalent position as "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[10]

Jeanne M. Vonhof is an arbitrator, mediator and attorney with offices in Chicago, Gary, Indiana, and Minneapolis, Minnesota. She serves as a permanent arbitrator in the airlines, steel, communications, mining, education, transit, manufacturing sectors and for the federal government. She also serves as an adjunct professor at Indiana University, teaching courses in arbitraiton practice, and a wide variety of courses affecting labor and employment, including courses on sexual harassment, labor law, the Family and Medical Leave Act, and the Americans with Disabilities Act. Ms. Vonhof also serves as the neutral in neutrality agreements between labor and management, and helps parties design dispute resolution systems. She is former Chairperson of Region 11 of the National Academy of Arbitrators, and former President of the Chicago Chapter of the Industrial Relations Research Association.

Martin H. Malin is Professor of Law and Director of the Institute for Law and the Workplace at Chicago-Kent College of Law, Illinois Institute of Technology, where he has taught Labor Law and related courses since 1980. From 1984-86, he served as a consultant to the Illinois public sector labor relations boards and drafted the regulations implementing the public sector labor relations statutes. He has been an arbitrator and mediator since 1984 and is a member of the National Academy of Arbitrators and a fellow of the College of Labor and Employment Lawyers. He has published three books and numerous articles. His most recent published work is Public Sector Employment: Cases and Materials (West 2004), coauthored with Joseph Grodin and June Weisberger.

The primary impetus for enactment of the FMLA was the need to enable employees to take time off from work following the birth or adoption of a child without worrying about job security or health insurance. In practice, however, leave following birth or adoption of a child accounts for a small minority of FMLA leaves that are taken. Table 1 presents the most recent data available, as reported in the DOL's 2000 Survey.[11]

As Table 1 shows, more than four out of five of all FMLA leave takers take leave in connection with their own or a family member's serious health condition.There are significant differences between childbirth and adoption leave on the one hand and serious health condition leave on the other.

First, determining whether a requested leave will fall within twelve months of the birth or adoption of the requester's child is a straight-forward inquiry. Determining whether the requester has a serious health condition is far more complicated.

TABLE 1

Reasons for Taking Leave Across All Leaves Taken in Previous 18 Months: 2000 Survey

Reason for Leave	Percent of Leave-Takers
Own health	52.4%
Maternity-disability	7.9%
Care for a new born, newly adopted or newly placed foster child	18.5%
Care for ill child	11.5%
Care for ill spouse	6.4%
Care for ill parent	13.0%

The FMLA defines "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[12] The DOL's regulations elaborate that continuing treatment by a health care provider arises where there is an incapacity for at least three consecutive days and direct treatment on at least two occasions by a health care provider or direct treatment on one occasion and a regimen of continuing treatment under the supervision of the health care provider.[13]

Under the DOL and statutory definitions, open heart surgery clearly qualifies as a serious health condition while a skinned knee clearly does not. However, some of the most common illnesses are difficult to evaluate. For example, under some circumstances an ear infection or the flu may be a serious health condition,[14] while under other circumstances they will not be.[15] One court has held that a case of eczema was not a serious health condition,[16] while another held that an ulcer was.[17]

Second, the FMLA provides for reduced leave, where an employee

works a reduced schedule, and intermittent leave, where an employee takes time off but not in a consecutive block, in cases of childbirth and adoption only with the consent of the employer. However, the FMLA does not require employer consent for reduced or intermittent leave for serious health conditions where such leave is medically necessary.[18] Third, employees have a right to substitute and employers have a right to require substitution of accrued paid vacation, personal leave or family leave for unpaid FMLA leave following birth or adoption of a child, but the substitution rights expand to include accrued paid sick leave or medical leave when the FMLA leave is for a serious health condition.[19] In light of the predominance of employees using FMLA leave for serious health conditions, it is not surprising that the FMLA has had a significant effect on many collective bargaining relationships.

II. Bargaining in the Wake of the FMLA

Certain provisions of the FMLA or its regulations seem to invite the parties to bargain contract language. Whereas the statute provides for up to twelve weeks of leave in a twelve-month period, the regulations leave it to the employer to specify how the twelve-month period will be calculated, such as on a rolling or calendar year basis.[20] Many collective bargaining agreements contain a provision specifying the method of calculating the twelve-month period.

Perhaps the most common contractual provision arising in response to the FMLA is contract language that simply echoes the language of the law. For example, a provision in one contract states that "[a]n employee shall be entitled to unpaid leave of up to twelve (12) weeks in connection with the employee's own serious health condition as set forth in the FMLA . . ." An interesting question arises for arbitrators in relation to this practice. Where the parties include only part of the FMLA in their labor agreement, how should the arbitrator consider the included and, more importantly, the excluded portions of the law? For example, in the contract quoted above, should the arbitrator conclude that the parties intended to treat leave for one's own serious health condition as receiving more protection under the labor agreement than leave for other purposes mentioned in the FMLA?

In other cases, the parties are treating the FMLA as a bargaining floor, and agreeing to contract provisions that provide broader benefits and rights for employees than the law requires. The DOL regulations specifically state that if a collective bargaining provision provides greater rights than the FMLA, then the labor agreement controls.[21] For example, some unions have bargained for broader definitions of "family," than are contained in the Act. One Illinois contract defines family, for purposes of family leave, as a "group of two or more individuals living under one roof, having one head of the household and usually, but not always, having a common ancestry, and including the employee's spouse," and also as "such natural relation of the employee, even though not living in the same household, as parent, sibling or child." The definition goes on to include "adoptive, custodial and 'in-law' individuals when residing in the employee's household." Not everyone living under the same roof qualifies as family, however, since the contract excludes "persons not otherwise related of the same or opposite sex sharing the same living quarters but not meeting any other criteria for 'family.'"

This contract also expands the situations in which family leave is granted beyond those situations covered by the FMLA. For example, it includes, as reasons for granting leave, the need "to furnish special guidance, care or supervision of a resident of the employee's household or a member of the employee's family in extraordinary need thereof," or "to settle the estate of a deceased member of the employee's family." It even permits an employee to take leave "to respond to the temporary dislocation of the family due to natural disaster, crime, insurrection, war, or other disruptive event."

One of the major issues affecting collective bargaining agreements arises because the FMLA permits an employee to substitute paid leave for unpaid FMLA leave, but also permits the employer to require employees to substitute. Some arbitrators have interpreted leave provisions of collective bargaining agreements to require employers to allow employees to use sick days when their children are ill or to use personal days for family emergencies.[22] Others have refused to interpret the FMLA as restricting rights or benefits under a collective bargaining agreement. For example, arbitrators have interpreted the leave of absence provisions of collective bargaining agreements to require employers to grant leave to employees who would not qualify under the FMLA.[23] Some arbitrators also have interpreted the vacation provisions of collective bargaining agreements to preclude employers from forcing employees to substitute paid leave for FMLA leave even though the statute gives employers that option.[24] However, not all arbitrators are in agreement with this approach.[25] In other cases, unions have bargained language limiting the employer's option. One local contract, for example, states, "An employee may designate a complete current year vacation period to run concurrent with a Family Medical Leave . . . The Company shall not require an employee to use either her/his vacation

or sick leave in any instance."

Although parties are negotiating more specific contract provisions in light of the FMLA, the parties cannot anticipate every situation that may possibly arise. Indeed, it is in recognition of such inability that parties usually negotiate a general just cause limitation on an employer's authority to discipline and discharge. The parties agree on such general language against a backdrop of traditional arbitral doctrine. However, as discussed in the next section, the FMLA is calling traditional arbitral doctrine into question.

IV. The FMLA and Traditional Arbitral Doctrine

What constitutes just cause for discipline in any given case depends, in part, on the relationship between the parties to the collective bargaining agreement, on how they view just cause, and on the specific facts giving rise to the discipline. The FMLA forces arbitrators to consider the impact of external law on this relationship-specific, fact-specific inquiry. The FMLA confronts arbitrators with such questions as whether discipline or discharge can be for just cause under the contract if it is based, in part, on FMLA-protected absences. The role of external law in grievance arbitration is not a new issue. The issue is often referred to as the "Meltzer-Howlett Debate," after the well-articulated divergent views of Bernard Meltzer and Robert Howlett.[26]

The United States Court of Appeals for the Seventh Circuit appears to have given arbitrators a green light to read the FMLA into most collective bargaining agreements. In *Butler Manufacturing Co. v. United Steelworkers of America*,[27] the employer discharged an employee pursuant to a negotiated attendance control plan embodied in a memorandum of understanding between the employer and the union. The arbitrator determined that three of the absences for which the grievant had been charged were FMLA-protected and ordered the grievant reinstated with half back pay.[28] The employer sued to vacate the award.

The union argued that the award drew its essence from the contract and cited a provision of the agreement that stated, "Butler Manufacturing Company offers equal opportunity for employment, advancement in employment, and continuation of employment to all qualified individuals in accordance with the provisions of law and in accordance with the provisions of this Agreement for the represented employees covered by it."[29] The district court, however, determined the quoted language to be "nothing but boilerplate anti-discrimination commitments that did not necessarily pull the FMLA into the agreement,"[30] and held that the arbitrator exceeded her authority by relying on the FMLA. The Seventh Circuit reversed. The court reasoned:

> If there was some kind of "clear statement" rule that applied to CBAs and to the match between a CBA and an arbitrator's authority perhaps [the district court's analysis] would have been right. But there is no such rule. Instead . . . the standard asks only whether the arbitrator's interpretation can rationally be linked to the CBA. Here, a broader look . . . demonstrates that the arbitrator's award did draw its essence from the parties' agreement. Article 2, paragraph 13 . . . does not say only that there will be "equal opportunity for employment . . . in accordance with the provisions of this Agreement . . ." . . . In the ellipsis between the word "employment" and the last phrase comes the phrase "in accordance with the provisions of law." We have no reason to think that this reference to external law is either surplusage or "mere boilerplate." . . . We find that Article 2, paragraph 13 conferred on the arbitrator the authority to consider the FMLA.[31]

The DOL regulations expressly provide: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions . . . nor can FMLA leave be counted under 'no fault' attendance policies."[32] Regulations such as this one, coupled with the Seventh Circuit's green light in *Butler Manufacturing* may call into question well-established arbitral doctrine and procedures.

For example, consider a situation where an employee accumulated sufficient points under the attendance control plan to warrant a verbal warning. Then the employee accumulated additional points and received a written warning. After accumulating further points, the grievant was suspended and issued a final warning. Although the points leading up to the verbal warning, written warning and suspension included absences that were FMLA-protected, the employee grieved none of this discipline. The employee then accumulated additional points for absences that were not FMLA-protected and was discharged.

Under traditional arbitral doctrine, arbitrators do not examine past absences that resulted in discipline that was not grieved. Under this practice, a grievance over the employee's discharge would be confined to the absences that took the employee from the suspension level to the discharge level under the attendance plan. Although other factors, such as the employee's length of service and overall work record, may also be considered in the just cause determination, the validity of the points assessed for the absences that led to earlier stages of progressive discipline would not be open to review.

The traditional approach, however, would appear to fly in the face of the DOL regulation. Moreover, the

FMLA's statute of limitations is two years, and is extended to three years for willful violations.[33] It is quite likely that the earlier discipline and the assessment of points leading to the earlier discipline will have occurred less than two years before the discharge and less than two years before the filing of the grievance challenging the discharge. In such a case, should the arbitrator follow the traditional approach and refuse to consider the earlier discipline or should the arbitrator make an exception and consider evidence and arguments that some of the points that led to the earlier discipline violated the FMLA?[34]

The question is further complicated by conflicting signals from the courts. For example, in *Morgan v. Hilti, Inc.*,[35] the plaintiff, who had worked for the defendant since 1984, developed attendance problems in 1993 and was counseled about them in August and December of that year. Her pattern of absenteeism and tardiness continued into the following year and the employer counseled her again on February 1, 1994. She took an FMLA leave from March 29 through May 13. Upon her return from leave, the defendant sent her a letter stating that it would monitor her attendance daily and that absenteeism beyond her remaining paid sick days would result in discipline and possible termination.[36]

On December 6, the defendant gave plaintiff a final warning, advising her that she would be fired if she had any unscheduled absences that month or more than one unscheduled absence in any month the following year. When she accumulated more than one unscheduled absence in January 1995, the defendant discharged her.[37]

Morgan sued claiming that Hilti subjected her attendance record to heightened scrutiny and fired her because of her disability, because she had filed a charge of disability discrimination with the Equal Employment Oppotunity Commission (EEOC), and because of her FMLA-protected leave.[38] The court found that she established a prima facie case of "FMLA retaliation" because of the disciplinary letter that Hilti gave her upon her return from leave.[39] However, it found that Hilti's overall concern with Morgan's attendance provided a legitimate non-discriminatory reason for her termination and affirmed a grant of summary judgment for defendant because "Morgan has offered no evidence that Hilti was not actually concerned about her attendance."[40]

In *Bachelder v. America West Airlines, Inc.*,[41] the plaintiff had been a passenger service supervisor when the defendant discharged her in April 1996. She had taken FMLA leave in 1994 and 1995. On January 14, 1996, she had a corrective action discussion with her manager at which she was advised to improve her attendance. FMLA-protected and non-protected absences were cited.[42]

In February 1996, Bachelder was absent for three weeks for medical reasons. On April 9, she called in sick for one day to care for her child. She was terminated shortly after the last absence for being absent sixteen times since the January counseling, failing to carry out certain job responsibilities and for below par on-time performance.[43]

Bachelder sued alleging that her discharge interfered with her FMLA rights. The Ninth Circuit agreed. The court held that an FMLA plaintiff "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave was a negative factor in the decision to terminate her."[44]

A provision that was included in the collective bargaining agreement before the passage of the FMLA may conflict with the law's provisions under certain circumstances. The FMLA is changing the traditional view that the employer generally may impose any reasonable requirement on employees returning from leave, absent express contractual limitations. For example, take a provision in a contract which states that an employee who returns from medical leave must accept whatever position is available. If an employee returns from a medical leave that falls under the FMLA the employee is entitled to return to his or her job or an equivalent position, not just any available position. The parties may decide to drop the old language from the contract, to retain it but not apply it in cases covered by the FMLA, or to bargain new language that reflects both situations covered by the FMLA and those that are not.

The FMLA may also affect the traditional approach of allowing employers to determine "fitness for duty" requirements for employees returning from leave. The FMLA regulations expressly provide: "As a condition of restoration . . . for an employee who has taken [serious health condition leave], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supercede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees."[45] But in *Routes v. Henderson*,[46] the court found that the provision in the collective bargaining agreement that the employer relied upon to require an employee to take a fitness for duty examination was too vague and general to take precedence over the more specifically-worded FMLA requirements. The court read the

employer's return to work requirements against the FMLA's proscription that the rights established under the FMLA shall not be diminished by any collective bargaining agreement and said that "the right of restoration is a substantive statutory right that is guaranteed to eligible employees by the FMLA. As such, it cannot easily be diminished or abrogated by a collective bargaining agreement."[47]

The FMLA may also challenge traditional views of the arbitrator's passivity at the arbitration hearing. Traditionally, because arbitration is a process designed and controlled by the parties, arbitrators do not raise issues that the parties themselves have not raised. However, consider the following case in which an employee is discharged for excessive absenteeism. The employer presents evidence of the employee's absenteeism record that includes a period of hospitalization. The employee never requested leave of any kind for the period of hospitalization, but her supervisor knew that she was hospitalized. The employee had exhausted her sick leave and was not paid during the period of the hospitalization. The employer considered the period in terminating the employee.

The union files a grievance, takes the case to arbitration, but does not argue that the period of hospitalization was covered under the FMLA, and in fact does not raise the FMLA at all during the hearing. Nevertheless, because the grievant was hospitalized, her underlying condition was a serious health condition under the FMLA. Furthermore, the DOL regulations place on an employer an affirmative duty to inquire when the employer has reason to believe that an absence may be FMLA-covered.[48] Should the arbitrator overcome her reluctance to raise any issue that the parties have not raised, and raise the potential FMLA issue on her own in this case?

In addition, the FMLA may affect other areas of the contract not directly related to attendance, such as job bidding or promotions. Consider the following case in which the contract language provides that in bidding on vacancies, where qualifications are relatively equal, seniority shall govern. An employee is a mechanic at a facility where the employer has five mechanics and a lead mechanic on duty on a typical day shift. The employee's child has a serious chronic health condition that requires that the employee take frequent intermittent leave. The employer always has granted the leave, and it has been taken in compliance with all the terms of the FMLA and the employer's rules.

The employer posts a vacancy for a lead mechanic at a facility 100 miles away. The facility is small and this is the only mechanic position at this location. The employee bids on the job but it is awarded to a junior bidder who has had perfect attendance. The employer contends that because there is only one mechanic at this location, reliable attendance is extremely important. The employer argues that the senior bidder's "sporadic attendance" and need to take leave on little or no notice justify finding that the two bidders' qualifications are not relatively equal.

Traditionally, arbitrators have been receptive to employer arguments that, when consistent attendance is a critical qualification, a senior bidder's inconsistent attendance rendered the senior bidder's qualifications relatively unequal to the junior bidder's.[49] However, the union may raise the issue that the employee's absences were protected under the FMLA, which prohibits the employer from taking negative actions against an employee based upon use of the leave. How should an arbitrator rule if this case comes to arbitration?

It is not surprising that arbitrators are being forced to interpret the FMLA, sometimes in areas that lack solid judicial precedent. For example, in *ATC/Vancom*,[50] the arbitrator dove through the murky waters of what constitutes a serious health condition and concluded that the grievant's absences for bronchitis were not FMLA-protected. In *Electrolux Home Products*,[51] the arbitrator had to determine whether to count hours not worked due to illness and accidents toward the statutory requirement that an employee have worked at least 1250 hours to be covered.

In *Chicago Tribune Co.*,[52] an employee whose poor attendance had brought her to the brink of discharge was terminated for another incident of tardiness for her 6:00 a.m. shift. The employee was the primary care giver for her mother who had a serious health condition. The previous night, the employee was with her mother, monitoring her mother's medication because the mother's blood pressure was out of control. She was with her mother past midnight, returned home to find her child was having difficulty sleeping and fell asleep rocking her child in a rocking chair. She awoke at 5:50 a.m., called in and arrived at the plant at 6:20 a.m., twenty minutes late.

The case turned on whether the employee's tardiness was protected by the FMLA. The employer argued that the employee was not caring for her mother at the time she was tardy and, therefore, her tardiness was unprotected. The arbitrator rejected the argument, reasoning that the employee's oversleeping was an FMLA-qualified event because it resulted from her exhaustion from spending the day and night caring for her mother.

Under the FMLA, courts are finding themselves closely examining, applying and interpreting collective bargaining agreements more frequently than in the past. Several of

these cases arise from a DOL regulation which states that "[a]n employer may . . . require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave."[53] In *Gilliam v. United Parcel Service, Inc.*,[54] the court interpreted a provision in the collective bargaining agreement stating that an employee who fails to report to work for three consecutive days and does not notify the company is subject to discharge. The employee thought he was on indefinite leave under the FMLA, while his supervisor believed that he had given the employee permission to take leave for only a few days. When the employee failed to return within three days, he was discharged. The court found that "[o]ne of those usual and customary' requirements at UPS is that the employee let his supervisor know, no later than the beginning of the third working day of leave, how much more time will elapse before the employee returns to work. . . . Nothing in the FMLA or the implementing regulations prevents an employer from enforcing a rule requiring employees on FMLA leave to keep the employer informed about the employee's plans."[55] The court held that the employee's discharge therefore did not violate federal law.[56]

In *Diaz v. Ft. Wayne Foundry*,[57] the employee was on approved FMLA leave in Mexico. After several extensions of the leave, the employer requested that the employee submit to an examination by a doctor for a second opinion, as is permitted by the FMLA regulations.[58] The employer sent the notice of the request to the employee's address in Indiana, which the employee had provided as required by the collective bargaining agreement. The court held that the FMLA does not tell employers how to send notices, and employers safely may use the method prescribed by the collective bargaining agreement, even though the evidence showed that the employer knew that the employee was in Mexico.

V. Concluding Remarks

All of these are examples of areas in which the passage of the FMLA is prompting labor and management to bargain new language in collective bargaining agreements, and requiring the parties, arbitrators and courts to reconsider contract language, attendance plans, and traditional ways of dealing with these issues that have been in existence for years. Changes in the attendance area, which is a common basis for discipline, and which may affect other rights, provide fertile ground for grievances. Arbitrators will continue to make every effort to determine the intent of the parties in making these interpretations, as the arbitrator's reading of the contract, through arbitration, becomes a part of the contract itself.

Finally, in determining intent, arbitrators will not permit the FMLA tail to wag the dog. The contract is still the contract, and in many cases traditional standards will previal over an argument based upon the FMLA. For example, consider an employee who was discharged and then reinstated pursuant to a last chance agreement which provided that violation of any work rule in the twelve months following reinstatement would be grounds for discharge. The employee's mother was hospitalized in another state, was being released from the hospital and the employee was needed to care for her. The employee traveled to his mother's location on his day off. The following day, the employee called in sick. The supervisor asked the employee if he was too sick to work and he answered yes. The employee spent the next two days caring for his mother and then arranged for alternate care and returned home. On both days, the employee called in sick, was asked if he was too sick to work, and answered yes. Upon returning to work, the employee was confronted with a printout from the Internet showing the employee's plane ticket which he had inadvertently left at the workplace and management had found. The employee confessed that he was not sick and that he was out of town taking care of his mother. The employer discharged the employee pursuant to the last chance agreement and for violating a work rule prohibiting misrepresentations of any kind to obtain time off.

Two things are clear about this case. First, the employee was caring for his mother who suffered from a serious health condition and, assuming the employee met all of the other statutory qualifications, he would have been entitled to FMLA leave. Second, the FMLA issue is a complete red herring. The employee was discharged not for caring for his mother but for lying to his supervisor when he called in sick and was asked whether he was too sick to work. The FMLA is simply irrelevant to the grievance.

Nevertheless, in many other grievances the FMLA will be highly relevant. Therefore, we can expect unions, employers and arbitrators to be trying to straighten out the mess for many years to come. ◆

Notes

1. Pub. L. No. 103-3, 107 Stat. 6 (1993). (codified at 29 U.S.C. §§ 2601-54 (2000)).
2. *See, e.g., Chanute Mfg. Co.*, 101 LA 765 (Berger 1993).
3. *Bakery, Confectionary, Tobacco Workers and Grain Millers Local 16G and Archer Daniels Midland Co.*, FMCS No. 01-13896 (Malin Apr. 20, 2002).
4. 29 U.S.C. § 2611(4).
5. *Id.* § 2611(2)(B).
6. *Id.* § 2611(2)(A).
7. *Id.* § 2612(a).

8. *Id.* § 2614(c).
9. *Id.* § 2614(a).
10. 29 C.F.R.§ 825.215(a).
11. DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE § 2.1.2, tbl. 2.3.
12. 29 U.S.C. § 2611(11).
13. 29 C.F.R. §825.114.
14. *See Miller v. A. T. & T. Corp.*, 250 F.3d 820 (4th Cir. 2001) (flu); *Caldwell v. Holland of Texas, Inc.*, 268 F.3d 671 (8th Cir. 2000) (ear infection).
15. *See Henderson v. Central Progressive Bank*, 83 Emp. Prac. Dec. (CCH) ¶ 41,215 (E.D. La. 2002) (flu); *Seidle v. Providant* Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994) (ear infection).
16. *Beal v. Rubbermaid Commercial Prods., Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997).
17. *Victorelli v. Shadyside Hosp.*, 128 F.3d 184 (3d Cir. 1997).
18. 29 U.S.C. § 2612(b)(1).
19. *Id.* §2612(d)(2).
20. 29 CFR § 825.200.
21. *Id.* § 825.700.
22. *See, e.g., Princeton School Dist.*, 101 LA 789 (Paolucci 1993); *Social Security Admin.*, 93 LA 751 (Feigenbaum 1989); *Independence School Dist.*, 83 LA 66 (Gallagreh 1984).
23. *See, e.g., Enesco Corp.*, 107 LA 513 (Berman 1996).
24. *See, e.g., Union Hosp.*, 108 LA 966 (Chattman 1997); *Grand Haven Stamped Prods.*, 107 LA 131 (Daniel 1996).
25. *See Vie de France Yamakazi, Inc.*, 116 LA 1518 (Cook 2001).
26. See Robert G. Howlett, *The Arbitrator, the NLRB and the Courts, in* PROC. 20TH ANN. MEETING, NAT'L ACAD. ARBITRATORS 67 (1967); Bernard D. Meltzer, *Ruminations About Ideology, Law and Arbitration, in id.* at 1.
27. 336 F.3d 629 (7th Cir. 2003).
28. *Id.* at 632.
29. *Id.* at 633.
30. *Id.*
31. *Id.* at 633-34 (citation omitted).
32. 29 C.F.R. § 825.220(c).
33. 29 U.S.C. § 2617(c).
34. *See Southwestern Bell Tel. Co.*, 114 LA 1131 (Fowler 2000) (rejecting argument that prior steps of progressive discipline were tainted by counting FMLA-protected absences as unsupported in the record).
35. 108 F.3d 1319 (10th Cir. 1997).
36. *Id.* at 1322.
37. *Id.*
38. *Id.* at 1322-23.
39. *Id.* at 1324.
40. *Id.* at 1325.
41. 259 F.3d 1112 (9th Cir. 2001).
42. *Id.* at 1121.
43. *Id.*
44. *Id.* at 1125.
45. 29 U.S.C. § 2614(a)(4).
46. 58 F. Supp. 2d 959 (S.D. Ind. 1999).
47. *Id.* at 994.
48. 29 C.F.R. § 825.302(c).
49. For a general discussion of the role of attendance records in job bidding cases see ELKOURI & ELKOURI, HOW ARBITRATION WORKS 906-07 (Allen Miles Ruben ed. 6th ed. 2003).
50. 111 LA 268 (Ruchman 1998).
51. 117 LA 46 (Befort 2002).
52. 119 LA 1007 (Nathan 2003).
53. 29 C.F.R. § 825.302(d).
54. 233 F.3d 969 (7th Cir. 2000).
55. *Id.* at 971-72.
56. For a similar case regarding a three-day notice rule, see *Lewis v. Holsum of Ft. Wayne*, 278 F. 3d 706 (7th Cir. 2002).
57. 131 F.3d 711 (7th Cir. 1997).
58. 29 C.F.R § 825.307.

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Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes.

IELRA Developments

Duty to Bargain

In *Granite City Federation of Teachers, Local 743, IFT/AFT v. Granite City Community School Dist. No. 9*, Case Nos. 2002-CA-0014-S and 2002-CA-0021-S (IELRB 2004), the IELRB found that the school district breached its duty to bargain in good faith by engaging in regressive bargaining. The parties began negotiations in May of 2001 in anticipation of their collective bargaining agreement's expiration on September 12, 2001. The union went on strike on September 17, and both sides came to an agreement on everything but dock days by September 28. The mediator chose two representatives from each side to meet and try to iron out this sticking point. As a result of that effort, a tentative oral agreement was reached which included more duty assignments for teachers in exchange for no dock days. When the two sides reconvened the next day to write up the agreement, the employer backed away from the agreement, and proposed additional changes to issues previously agreed upon by the parties.

The IELRB rejected employer arguments premised on the School Code and the common law of contracts. The IELRB held that the IELRA trumps the School Code when the two statutes conflict. The IELRB further held that common law contract rules do not apply in determining the existence of a collective bargaining agreement. The IELRB stated, "The existence or non existence of a collective bargaining agreement is a question for the IELRB."

ULP Procedure

In *Laura Meyers-McGee v. Alton Community Unit School District No. 11*, Case No. 2003-CA-0027-S (IELRB 2004), the IELRB held that a complainant's motion to amend her complaint did not extend the fifteen day period in which the respondent had to answer pursuant to 80 Ill. Adm. Code Section 1120.30(d). The IELRB found that the amendment to complainant's complaint was non-substantive, and thus did not allow the respondent extra time.

The complainant, a non-tenured teacher in the respondent school district, alleged that the respondent fired her for union activities. The IELRB issued the complaint and notice of hearing on August 13, 2003. The complainant filed a motion to amend the complaint on August 27, 2003. The respondent filed its answer on September 4, 2003, the same day that complainant's motion to amend was granted. The complainant subsequently filed a motion to have its allegations deemed admitted because the respondent's answer was not timely filed. The ALJ agreed.

In upholding the decision of the ALJ, the IELRB recognized that notice pleading satisfies the IELRA and due process requirements, and was all that

was required in this case. The amendment proposed by the complainant merely corrected the identification of a party, and thus was not a substantive change. The respondent, thus, had been on notice of the complaint against it since August 15, 2003, the date the certified mail return receipt showed its counsel received the complaint. The IELRB calculated that fifteen days from August 15 rendered the respondent's answer due on September 2, 2003, because August 30 fell on the Saturday of Labor Day Weekend. Because the answer was not filed until September 4, 2003, the allegations in the complaint were admitted by the respondent.

The respondent argued that its answer was actually due on September 5th because 80 Ill. Admin. Code § 1100.30(c) provides for an additional three days when service is effected by first class mail. The IELRB rejected this argument, pointing out that it has repeatedly differentiated between first class mail and certified mail. The additional three days is allowed for regular mail because there is no record of the date of actual delivery.

The respondent also argued that it showed good cause for the late filing. The IELRB found that the late filing was due to a miscalculation of the date the answer was due, and, "An attorney's misrecording the date the complaint was served is not good cause for failure to file a timely answer."

IPLRA Developments

Arbitration

In City of Rockford v. Unit Six, Policemen's Benevolent and Protective Association of Illinois, 351 Ill. App. 3d 252, 813 N.E.2d 1083 (2d Dist. 2004), the Second District Appellate Court held that a grievance over the denial of workers' compensation benefits for earnings lost from off-duty employment was not arbitrable.

Two members of the association were injured in the line of duty. At the time of their injuries, both held jobs outside of the Rockford Police Department when they were off duty. The city was aware of their secondary employment. Because of their injuries, the two members sought workers' compensation benefits. The city did not provide the two members with workers' compensation benefits for the portions of their earnings attributable to their off-duty employment, causing the association to file grievances on behalf of the two members. The association argued that the city had a past practice of providing workers' compensation benefits for the loss of secondary employment wages when members were unable to work off-duty as a result of injuries sustained while serving as police officers.

The court observed that the IPLRA provides that all disputes concering the administration and interpretation of a collective bargaining agreement (CBA) are arbitrable unless the parties agree otherwise. The court held that the association and the city intended to exclude from arbitration the subject of workers' compensation benefits for wages attributable to concurrent employment. The court reasoned that the CBA limited the arbitrator's authority to "interpreting, applying and determining compliance with [the CBA]" and prohibited the arbitrator from "adding to, subtracting from, or modifying in any way [the CBA's] terms and provisions." The CBA did not mention workers' compensation benefits for association members who work for other employers during their employment with the city. Consequently, the parties implicitly agreed that the matter would not be arbitrable. In other words, the court concluded that neither the arbitrability of workers' compensation benefits nor whether there was an agreement established by past practices of the city in awarding benefits for outside employment was subject to arbitration under the CBA.

Contract Bar

In Board of Trustees of the University of Illinois at Chicago and Metropolitan Alliance of Police, University of Illinois at Chicago Police Officers, Chapter 381, and University Police Association, Case No. S-RC-04-037 (ILRB State Panel 2004), the ILRB State Panel reversed the Acting Executive Director's decision to dismiss the representation petition filed by the Metropolitan Alliance of Police, University of Illinois at Chicago Police Officers, Chapter 381 ("MAP") and directed an election for the existing bargaining unit composed of police officers employed by the Board of Trustees of the University of Illinois at Chicago ("UIC"). MAP and UIC entered into a collective bargaining agreement effective from September 1, 2000 through August 31, 2005. The agreement was signed in July of 2001, at which time Section 9(h) of the IPLRA, 5 ILCS 315, provided that a collective bargaining agreement would not bar an election where more than three years had elapsed since the effective date of the contract. On August 5, 2004, Public Act 93-0427 became law and Section 9(h) now provides that "where more than 4 years have elapsed since the effective date of the agreement, the agreement shall continue to bar an election, except that the Board may process an election petition filed between 90 and 60 days prior to the end of the fifth year of such an agreement, and between 90 and 60 days prior to the end of each successive year of such agreement." MAP filed the election petition at issue on September 15, 2003, after the end of the third year of the agreement and after the amendment to Section 9(h) became effective. In determining whether the election petition was timely filed, the State Panel had to decide whether the agreement should be governed by the amended language in Section 9(h) or the original language

of Section 9(h), which was in effect when the contract was signed.

In reaching its decision, the State Panel compared *Landgraf v. USI Film Products*, 511 U.S. 24 (1994), in which the U.S. Supreme Court held that it should apply the law in effect at the time it renders its decision, and *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 749 N.E.2d 964 (2001), in which the Illinois Supreme Court held that retroactivity is not favored in the law unless the legislature intended the law to be retroactive. The State Panel continued its analysis by examining *Caveney v. Bower*, 207 Ill. 2d 82, 787 N.E.2d 596 (Ill. 2003), in which the court stated that either the legislature clearly expresses in the actual amended language of the statute the temporal reach of the statute or the legislature does not express its intent at all, and Section 4 of the Statute on Statutes, 5 ILCS 70/4, applies. Section 4 states that procedural amendments may be applied retroactively, while substantive amendments may not. Under this analysis, the State Panel decided that the amendment to Section 9(h) cannot be applied to a five-year contract that was signed prior to the amendatory language because the legislature did not clearly indicate its intent as to its temporal reach and because the amendatory language was not procedural but created a substantive right of a five-year contract bar.

Joint Employers

In *AFSCME Council 31 v. Illinois Labor Relations Board State Panel*, 351 Ill. App. 3d 707, 814 N.E.2d 601 (5th Dist. 2004), the Fifth District Appellate Court held that, under the IPLRA, the Illinois Department of Corrections (DOC) was the joint employer of the employees of Wexford Health Services, Inc., working at the DOC. The court reversed the decision of the State Panel and remanded the case for further consideration.

The Union argued that the DOC possessed authority to control labor relations in regard to the work it contracted for with Wexford. According to the terms of the vendor contract and the DOC's actual exercise of control in regard to the work it contracted, the union reasoned, there was sufficient control to confer employer status to the DOC.

The court agreed with the Union, stating that Wexford's status as an employer did not preclude a finding that the DOC was also an employer of the Wexford personnel who worked in the health care units of the DOC. The court considered the following factors: role in hiring and firing; promotions and demotions; setting wages, work hours, and other terms and conditions of employment; discipline and the actual day-to-day supervision and direction of employees on the job; and the authority to tax and raise funds and to improve the budgets and grant financing. However, the court went on to state that the key consideration in determining employer status is the extent to which an entity is necessary to create an effective bargaining relationship. The court concluded that the DOC and Wexford shared authority over the training, retention, daily direction, rules compliance, discipline, and discharge of employees. The court further found that the DOC and Wexford each exercised significant control over the same employees and therefore both were necessary to create an effective bargaining relationship, making the DOC and Wexford joint employers under the IPLRA.

Managers & Supervisors

In *County of Cook v. Illinois Labor Relations Board and Service Employees International Union, Local 74-HC*, 351 Ill. App. 3d 379, 813 N.E.2d 1107 (1st Dist. 2004), the First District Appellate Court affirmed the ILRB Local Panel's decision that attending physicians employed by Oak Forest Hospital were not managerial employees under the IPLRA and that attending physicians in the hospital's rehabilitative medicine department were also not supervisory employees under the IPLRA; therefore, the attending physicians in both departments were eligible to participate in the collective bargaining unit and vote in the representation election.

The county argued that the Board erred because the attendings engaged predominantly in executive and managerial functions and were therefore managerial employees pursuant to section 3(j) of the IPLRA. The county also argued that the rehabilitative attendings were supervisory employees pursuant to section 3(r) because they directed and evaluated the residents in their department.

In April 2002, the union filed a representation/certification petition with the ILRB seeking to represent a bargaining unit of all full and regular part-time attending physicians employed by the hospital. The county argued that the attendings were managerial or supervisory employees and should be excluded from collective bargaining.

The ILRB determined that the attendings were not managerial employees because they were not charged with the responsibility of directing the effectuation of management policies and practices and were not predominantly engaged in executive and management functions. The court agreed.

First, the court found that, although the attendings served on committees which made recommendations that were sometimes accepted, the recommendations made were thoroughly examined through a multi-layered approval process. The employees lacked independent authority and final authority to effect goals or means

of achieving those goals. Their role in running the departments was completely advisory rather than managerial. The court concluded that the attendings had "no independent authority to do anything besides practice medicine."

Assuming *arguendo* that the attendings' work on the committees did constitute managerial work, the court found that the attendings did not engage predominantly in these activities, as required under the IPLRA. Rather, they engaged predominantly in patient care. Although patient care was the business of the hospital, the attendings' interests could be separated from those of the county.

The ILRB also determined that the attendings in the rehabilitative unit were not supervisory employees because they did not have the "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions." 5 ILCS 315/3(r). The court agreed with the ILRB, stating that the attendings' direction of the residents must be in the interest of the employer in areas which are likely to be addressed by the union, and in an area in which the interests of the employer and the employees are likely to diverge or create a conflict of interest. The attendings did not have the authority to direct and discipline the residents or effectively recommend such action; therefore, there was no conflict of interest created and they are not supervisory employees under the IPLRA. ◆

Further References

Due to the retirement of Margaret Chaplan as Librarian at the University of Illinois Institute of Labor and Industrial Relations, Further References will not be published in this issue.

Beginning with the Winter 2005 issue, Yoo-Seong Song, Ms. Chaplan's successor as LIR Librarian,at University of Illinois at Urbana-Champaign will write Further References.

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Faculty Editors:
Peter Feuille and Martin Malin
Production Editor:
Sharon Wyatt-Jordan

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