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The Family and Medical Leave Act: Current Legislative Activity

Abstract

[Excerpt] Congress passed the Family and Medical Leave Act (FMLA) as a means of helping individuals more easily balance their family and work obligations. Over the past few decades, married mothers with young children increasingly have strived to fulfill both workplace and child-rearing obligations. With the enactment of welfare reform legislation, greater numbers of single parents also have had to meet the challenge of caring for their children while holding down jobs. Further, the aging of the population and lengthening life spans have made it more likely that workers will assume caregiving duties for elderly relatives, friends, and neighbors.

This report begins with a brief overview of the major features of the FMLA and its regulations. The various proposals made to amend the act since its inception are then categorized and discussed. It closes with a review of legislative activity.

Keywords

Family Medical Leave Act, FMLA, legislation, Congress, health care, employee benefits, public policy

Comments

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The Family and Medical Leave Act: Current Legislative Activity

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Summary

Time off to care for one's own health problems or those of family members is not a job-protected entitlement. Thus, employees sometimes have jeopardized their continued employment to be away from the workplace to address health-related matters. With passage of the Family and Medical Leave Act of 1993 (FMLA, P.L. 103-3), Congress mandated in Title I that private employers with at least 50 employees and public employers of any size provide *job-protected unpaid* leave for 12 workweeks in a 12-month period to employees who meet the length-of-service and hours-of-work eligibility requirement in order to care for their own, a child's, spouse's, or parent's serious health condition; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child. Employees in the federal government's executive branch generally are covered under Title II of the FMLA, which is administered by the Office of Personnel Management (OPM).

The Department of Labor, which administers Title I of the act, replaced its 1995 regulation effective January 16, 2009. The final rule contains many changes and addresses regulatory issues raised by enactment of amendments to the FMLA in the National Defense Authorization Act (NDAA) of FY2008. The NDAA provided (1) 12 workweeks of FMLA leave to Title I FMLA-eligible employees dealing with issues arising from family members in the Guard or Reserves being called to active duty as a result of a qualifying exigency and (2) 26 workweeks of FMLA leave to Title I and Title II FMLA-eligible employees and next of kin caring for seriously injured or ill service members in the Armed Forces, Guard, or Reserves. Relatedly, in August 2009, OPM proposed regulations about military family caregiver leave for eligible civil service employees.

In October 2009, the President signed into law the NDAA for FY2010, which contained further changes to the FMLA. P.L. 111-84 extends qualifying exigency leave to FMLA-eligible family members of regular and reserve members of the Armed Forces deployed to a foreign country and extends military family caregiver leave to eligible family members and next of kin of recent veterans of the Armed Forces, Guard, or Reserves. These provisions apply to employers covered by Title I and Title II of the FMLA.

The Airline Flight Crew Technical Corrections Act was the only other bill to amend the FMLA that advanced beyond committee referral in the 110th Congress. The 111th Congress approved the reintroduced bill, which the President signed in December 2009 (P.L. 111-119). The law recognizes that because the work hours of flight attendants and pilots were for the purpose of FMLA eligibility being calculated based on in-flight time only, full-time flight attendants and pilots usually work less than 1,250 hours and were therefore unable to take leave under the act.

Other bills introduced during the 111th Congress would, among other things, effectively increase the number of employees eligible to take FMLA leave by such means as changing the hours-of-work requirement, adding new reasons for time off, and increasing the groups of eligible employees. Bills include H.R. 389, H.R. 626/S. 354, H.R. 824, S. 3680, H.R. 2776, and H.R. 5944.

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Introduction

Congress passed the Family and Medical Leave Act (FMLA) as a means of helping individuals more easily balance their family and work obligations. Over the past few decades, married mothers with young children increasingly have strived to fulfill both workplace and child-rearing obligations. With the enactment of welfare reform legislation, greater numbers of single parents also have had to meet the challenge of caring for their children while holding down jobs. Further, the aging of the population and lengthening life spans have made it more likely that workers will assume caregiving duties for elderly relatives, friends, and neighbors.

Time off to care for one's own health problems or those of family members is *not* a job-protected entitlement. That is to say, employees sometimes have jeopardized their continued employment to take time away from work to deal with health-related matters. According to data of the U.S. Bureau of Labor Statistics, as recently as March 2008, 61% of employees in the private sector had access to paid sick leave and 8% to paid family leave that employers voluntarily included in their fringe-benefit packages.¹

With passage of P.L. 103-3 in 1993, Congress mandated that some employers provide eligible employees *job-protected unpaid leave* to attend to their own serious medical problems as well as those of certain family members; to care for a newborn, newly adopted, or newly placed foster child; and upon the birth or placement of an adopted or foster child. More than a decade later as part of the FY2008 and FY2010 Department of Defense (DOD) authorization bills, Congress further required FMLA-covered employers to give eligible employees leave under the act for reasons connected with certain family members serving in recent military actions.

The FMLA prescribes a minimum benefit. Employees in jurisdictions that have enacted more comprehensive family and medical leave statutes (e.g., provide leave for additional reasons) and those who work for employers that offer more expansive family and medical leave (e.g., provide a longer period of absence) are entitled to the more generous benefits.

This report begins with a brief overview of the major features of the FMLA and its regulations. The various proposals made to amend the act since its inception are then categorized and discussed. It closes with a review of legislative activity.

The Act's Major Provisions and Regulations

This section of the report describes the FMLA and its regulations at 29 C.F.R. Part 825. Select features of the revised final rule the Department of Labor (DOL) issued on November 17, 2008, which became effective on January 16, 2009,² are specifically noted (e.g., those related to court decisions rendered after FMLA regulations were first issued in January 1995, amendments to the FMLA contained in the NDAA of FY2008).

¹ U.S. Bureau of Labor Statistics, data from the National Compensation Survey.

² Department of Labor, "The Family and Medical Leave Act; Final Rule," 73 *Federal Register* 67934, November 17, 2008.

Coverage and Reasons for Leave

Title I of the act requires employers in the private sector (1) who have had 50 or more employees on their payrolls for at least 20 workweeks in the current or preceding calendar year, and (2) who are engaged directly or indirectly in commerce, to extend job-protected,³ unpaid leave to employees who have worked for them

- at least 12 (not necessarily consecutive) months,
- a minimum of 1,250 hours (excluding paid or unpaid leave time) in the 12 months preceding the start of their FMLA leave, *and*
- at a facility where 50 or more persons are employed by the employer within 75 miles

for the following reasons:

- the birth of a child of the employee and to care for the newborn child;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child;
- to care for an immediate family member—spouse, child under age 18 (or of any age if incapable of self-care due to an activity-limiting disability), or parent—with a “serious health condition”;
- to care for the employee’s own serious health condition (including maternity-related disability) that makes them unable to perform the functions of their position;⁴
- a qualifying exigency related to an employee’s family member in the National Guard or Reserves or retired from the regular Armed Forces or Reserves being called (or notified of an impending call or order) to active duty in support of a contingency operation;⁵ or
- to care for current members of the regular Armed Forces, National Guard, or Reserves and members of the regular Armed Forces, National Guard, or Reserves on temporary disability retired lists who incurred a serious injury or illness if the employee is the spouse, child,⁶ parent, or next of kin⁷ of the service member.⁸

³ Generally, employees returning from FMLA leave must be restored to their original jobs or to jobs equivalent in pay, benefits, and other terms/conditions of employment. An exception exists for “key employees.”

⁴ The definition of a serious health condition is discussed later in “Clarifying or Tightening the FMLA.”

⁵ Qualifying exigencies are defined in the final rule to include short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

⁶ Because the FMLA’s definition of a child would have severely limited the availability of leave, DOL developed a separate definition for this type of leave: a child of a covered service member can be of any age.

⁷ Next of kin is the service member’s nearest blood relative other than the member’s spouse, parent, or child in the following order: blood relatives who have been granted legal custody, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the service member designated in writing another blood relative as his or her nearest blood relative.

⁸ DOL did not explicitly require temporal proximity between the covered service member’s injury or illness and treatment, recuperation, or therapy. It reasoned that limiting the provision of care to current service members and those (continued...)

Title I of the FMLA also requires employers in the public sector (e.g., state and local governments, including local education agencies) to provide leave to eligible employees regardless of the size of their organizations. To be eligible for leave, public employees must fulfill the act's requirements concerning length of service; hours of work; and proximity to the employer's other facilities, at which at least 50 employees must work.

Federal employees in the government's executive branch generally are covered under Title II of the act. The Office of Personnel Management (OPM), rather than DOL, administers Title II. OPM issues separate regulations at 5 CFR Part 630, Subpart L. While the National Defense Authorization Act (NDAA) of FY2008 (P.L. 110-181) entitled employees covered under Title I of the FMLA to the two above-described military-related reasons for leave, the NDAA entitled civil service employees only to military family caregiver leave. On August 26, 2009, OPM proposed regulations about military family caregiver leave for eligible civil service employees and requested comments on whether it should pursue legislation to extend P.L. 110-181's exigency leave to employees covered under Title II of the FMLA.⁹ The comment period ended on October 26, 2009.

FMLA coverage of legislative branch employees, excluding those at the Government Accountability Office (GAO) and the Library of Congress (LOC), is provided by the Congressional Accountability Act of 1995. The Office of Compliance administers the act for these individuals. (Although GAO and LOC employees are covered under Title I of the FMLA, the Comptroller General and the Librarian of Congress administer the act for their respective organization's employees.)

Breaks in Service

The First Circuit Court of Appeals held in *Rucker v. Lee Holding Co.* that the complete separation of an employee from his or her employer does not prevent the employee from counting earlier periods (here five years) toward the FMLA's 12-month length-of-service requirement. In its December 2006 opinion, the court urged DOL to decide whether it is permissible under the act to count a continuous break of longer than five years. DOL determined, but for two exceptions, that employment periods prior to a break in service of seven or more years need not be counted toward the length-of-service requirement.

One exception involves an employee fulfilling his or her National Guard or Reserve service obligations.¹⁰ Because the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 entitles returning service members to the rights and benefits they would have had if they had been continuously employed, the number of hours and months they would have worked for the employer if they had not been absent for National Guard or Reserve service must be counted toward their eligibility for FMLA leave.¹¹ In other words, the time members of the

(...continued)

on the temporary retired disability list (where they can remain for no more than five years) had that effect.

⁹ Office of Personnel Management, "Absence and Leave; Family and Medical Leave," 164 *Federal Register* 43064, August 26, 2009.

¹⁰ The second exception is existence of a written agreement (including a collective bargaining agreement) specifying the employer's intention to rehire the employee after a break in service taken, for example, to further the employee's education or for childrearing purposes.

¹¹ U.S. Department of Labor, "Uniformed Services Employment and Reemployment Rights Act of 1994; Final Rules," (continued...)

National Guard or Reserves spend absent from their civilian jobs due to military service is not deemed a break in employment.

Substitution of Paid Leave for Unpaid FMLA Leave

Employees may elect, and employers may require, substitution of accrued paid leave (vacation, personal, sick) for the unpaid leave mandated by the statute. If substitution occurs, the paid leave accrued by the employee runs concurrently with the unpaid FMLA leave.

When accrued paid leave is substituted for unpaid FMLA leave, the employer must inform the employee that he or she must satisfy any customary notice and procedural requirements of the employer's paid leave policy. For example, in the case of sick leave, the employee must call a specific phone number or contact a specific person; in the case of vacation leave, the employee must take the time off in full-day increments if that is the employer's usual policy.

Length and Form of Leave

The maximum leave that can be taken under the statute is 12 workweeks in any 12-month period for every reason for leave but one. The exception is to care for an eligible service member with a serious injury or illness. Leave for this purpose can total up to 26 workweeks in a single 12-month period.¹² The 26 workweeks of unpaid leave to care for a service member is calculated on a per-covered-member, per-injury basis. Thus, an employee may take more than one military caregiver leave period if he or she is caring for different service members, or caring for the same service member who subsequently incurs another injury.

When there is a medical need to do so, employees are entitled to take their leave time intermittently or work a reduced schedule (e.g., part-time) to care for their own or an eligible relative's serious health condition, or to care for a covered service member with a serious injury or illness. The employer's agreement is required when the employee wants to take leave intermittently or on a reduced schedule after the birth, placement for adoption, or foster care of a healthy child.

The employer must provide FMLA leave using increments no longer than the shortest period used to account for other forms of leave provided the increment is one hour or less. In those instances when it is impossible for an employee on intermittent leave or working a reduced schedule to start or end work part-way through a shift (e.g., a flight attendant or pilot is scheduled to work on an airplane), the entire period the employee is forced to be absent is counted against the employee's leave entitlement. If an employee on intermittent leave or working a reduced schedule would customarily be required to work overtime but cannot because of an FMLA-qualifying reason, the overtime hours not worked are counted against the employee's leave entitlement.¹³

(...continued)

70 *Federal Register* 75308, December 19, 2005.

¹² A single 12-month period begins on the first day the employee takes leave to care for a service member.

¹³ The final rule incorporates discussion from the preamble to the 1995 regulations about counting against the FMLA entitlement overtime hours employees would have been required to work but for use of leave under the act.

Employers may require employees on intermittent or reduced-schedule leave to transfer temporarily to another position for which the employees are qualified that better accommodates their new hours. The alternative position must afford the employee equivalent wages and benefits. Employers transferring employees to discourage them from taking leave or otherwise create a hardship for them will be considered to have committed a prohibited action. When an employee no longer needs to continue on FMLA leave, they generally must be placed in the same job or one equivalent to the position which he or she left.

Notifications

When the need for leave is foreseeable, employees must provide employers with at least 30 days' verbal notice or, if that is not possible, such notice as is practicable. If the need for leave is unforeseeable, employees must provide such notice as is practicable. In neither instance does the 2009 regulation retain the 1995 regulation's reference to "practicable," ordinarily meaning within one or two business days. Instead, it is generally expected to be practicable for employees to give notice within the customary time prescribed by the employer's leave policy. Employees also are generally expected to follow the employer's established procedures for requesting leave (e.g., contacting a specific individual within the firm). As noted in opinion letter FMLA-2009-1-A,

[t]o the degree that Wage and Hour Opinion Letter FMLA-101 has been interpreted to create a flat "two-day rule," the Department is hereby rescinding it. ...It is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer's policy, the employer may deny FMLA leave for the absence.

Whether the request for leave is foreseeable or unforeseeable, employees should provide employers with sufficient information to allow them to determine whether the leave is for an FMLA-qualifying reason. As in the past, employees do not have to refer to the FMLA when notifying employers. In the case of unforeseeable leave, calling in "sick" without providing more information will not trigger an employer's responsibilities under the statute.

Employers must, within five business days of receiving an employee's notice of need for leave,¹⁴ inform them whether they are eligible for leave under the act. Similarly, employers now have five (rather than two) business days from the time they receive adequate information from the employee to provide him or her with written notice stating that time-off will be counted against the FMLA entitlement; to detail whether the employee must furnish medical certification; and, among other things, to explain the employee's right to substitute accrued paid leave and whether the employer is requiring such substitution, the employee's status as a "key employee" and how they might be denied job restoration upon returning from leave, and the employee's obligation to continue making their share of premium payments for maintenance of employer-provided group health insurance. (Health coverage is the only benefit that employers are required to continue providing to FMLA leave-takers.)

If employers fail to provide notice, it may constitute interference with the FMLA rights of employees. Employers may be liable for such things as compensation and benefits lost due to the violation and for equitable relief tailored to the harm suffered (e.g., employment reinstatement or promotion of employees). As a result of the Supreme Court's decision in *Ragsdale v. Wolverine*

¹⁴ Until the final rule went into effect in January 2009, employers had two business days within which to provide this notice to employees.

Worldwide Inc., which was issued in March 2002, DOL deleted provisions in the 1995 rule that allowed it to deem employees who did not meet the length-of-service and hours-of-work requirements eligible for FMLA leave when an employer failed to provide the required notice or correct information.¹⁵

Medical Certifications of Serious Health Conditions

In light of the Fifth Circuit Court of Appeals' decision in *Urban v. Dolgencorp of Texas* issued in December 2004, DOL solicited comments in its proposed rule¹⁶ on whether to require employers to notify employees if medical certifications are not returned by health care providers within 15 days and to give employees seven additional calendar days to provide the certification. The final rule states that if employers require employees to obtain medical certifications of their own or a family member's serious health conditions, employees must do so within 15 calendar days after the request. If employers consider the certification to be incomplete or insufficient, based on the definitions of these terms in the rule, the firm must give employees seven calendar days to cure any deficiency in resubmitted certifications.

After employers have given employees an opportunity to cure any deficiencies, employers may contact health care providers of the employees or their family members for purposes of clarification or authentication. This contact must be made through another health care provider, a human resources professional, a leave administrator, or a management official—but not the employee's direct supervisor.

Employers may require employees to obtain and pay for recertifications no more often than every 30 days, or after the minimum duration of the condition indicated on the original certification has expired if it is longer. If health care providers indicate on the original certification that employees have conditions expected to last longer than six months (e.g., a lifetime), employers are permitted to request recertifications every six months. Employers may require employees to obtain recertifications in less than 30 days in the following circumstances: the employee requests an extension of leave, circumstances described in the original certification change, or the employer receives information that casts doubt on the employee's reason for absence or the validity of the certification. The following language in the 2009 final regulation incorporates a 2004 opinion letter:

As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

¹⁵ The divided court ruled that the appropriate remedy for an employer's failure to designate leave as falling under the FMLA is not the automatic provision of an additional 12 weeks of absence under the act. The Supreme Court held that employees must prove they were harmed by the employer's failure to notify them that their absence would be subtracted from their FMLA entitlement. The court noted that the duration of FMLA leave was a carefully balanced compromise which the regulation would have extended for some employees, and that a contrary ruling might have prompted employers with more generous leave policies to curtail them, which would have been antithetical to the stated intent of lawmakers.

¹⁶ Department of Labor, "The Family and Medical Leave Act; Notice of Proposed Rule Making," 73 *Federal Register* 7876, February 11, 2008.

Enforcement

If private sector, state and local government, and some federal employees believe their employers have violated the law (e.g., denying them leave under the statute or retaliating against them for having taken FMLA leave), they may file a complaint with DOL's Wage and Hour Division. If, after investigating a complaint, the Wage and Hour Division cannot resolve the matter to its satisfaction, the Department's Office of the Solicitor may seek to compel compliance through the courts.

Private sector, state and local government, and some federal employees may bring a private civil action without filing a complaint.¹⁷ (The right of state employees to sue their employers for violations of the FMLA was affirmed by the Supreme Court in May 2003, when it decided that state governments are subject to the act due to their history of sex discrimination.)¹⁸ A suit must be filed within two years after the last action that the employee contends was a violation of the FMLA, or three years if the violation was willful.

FMLA Policy Issues

Since its inception, proponents and opponents of the FMLA have suggested ways to change the statute to make it more employee-friendly or more employer-friendly. Some of the proposals are examined below.

Expanding the FMLA

Coverage and Eligibility

DOL last surveyed employees and employers about their experience with the FMLA in the 1999-2000 period. According to the surveys, almost 90 million out of 144 million public and private sector employees worked at covered establishments and met the act's eligibility criteria in 1999-2000.¹⁹ That left 33.6 million who did not work at covered establishments and 21.5 million workers who, although working for covered employers, did not fulfill P.L. 103-3's hours-of-work and length-of-service requirements. In other words, almost two out of every five employees were not entitled to leave under the FMLA during the survey period.

Proponents of the FMLA's approach to work-family balance would like to extend it to additional workers. To make the leave entitlement an option for more employees, it has been suggested that the threshold for coverage of private sector employers be lowered from at least 50, to at least 25, employees. Other suggested ways to afford more employees the opportunity to take FMLA leave include (1) eliminating the requirement that employees must have worked 1,250 hours in the

¹⁷ Federal executive branch employees are not entitled to sue and can only obtain appellate judicial review of Merit Systems Protection Board decisions in the federal circuit.

¹⁸ For more information, see CRS Report RL31604, *Suits Against State Employers Under the Family and Medical Leave Act: Analysis of Nevada Department of Human Resources v. Hibbs*, by Jody Feder.

¹⁹ U.S. Department of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*. A summary of the results appears in CRS Report RL30893, *Explanation of and Experience Under the Family and Medical Leave Act*, by Linda Levine.

preceding 12 months, (2) prorating the 12-week leave entitlement based on the number of hours worked by part-time employees, and (3) eliminating or reducing the requirement that employees must have been on an employer's payroll for 12 months.

Reasons for Leave

Broadening the situations for which FMLA leave can be taken could well increase what some view as the law's low utilization rate. According to the DOL survey of employees, those who took FMLA leave in 1999-2000 accounted for 11.7% of all leave-takers and 1.9% of all employees.²⁰ The rate of leave-taking under P.L. 103-3, according to DOL's survey of employers, was 6.5 FMLA leave-takers per 100 covered employees.

A health-related problem was the explanation most often provided by employees in one study who took time off to care for family members. Nonetheless, the reason accounted for a minority (29%) of employees' absences associated with family caregiving.²¹ Another 26% of caregiving absences from work was related to the provision of transportation or other instrumental support for family members; 22%, to school/child care problems; 15%, to the provision of emotional or other support for family members; 5%, to the provision of elder care; and 3%, to coping with a family member's death. Thus, some members of the public policy community have suggested that employees be able to use FMLA leave for such reasons as attending parent-teacher conferences, participating in children's educational and extracurricular activities, taking children or elderly relatives to routine medical or dental appointments, and participating in activities that result from domestic violence.

Care Recipient Groups

According to the same study by Heymann, 15% of employee absences resulted from caring for parents; 12% for spouses or partners; 7% for grandchildren; and 24% for other family members. The remaining 42% of employee absences were linked to caring for not only a child's health, but also for a child's educational, childcare, and other needs.²² Reflecting the broad range of individuals to whom employees provide assistance, it has been proposed that the care recipient groups under the statute be extended to include elderly relatives besides the employee's own parents (e.g., a parent-in-law or grandparent), domestic partners, and non-disabled children age 18 or older.

Employers could well oppose loosening firm coverage or employee eligibility requirements, broadening the qualifying reasons, or increasing the care recipient groups. If these expansions were to increase utilization of the statute, it would impose a greater administrative and operational burden on more employers (e.g., determining whether leave qualifies under the FMLA and arranging for leave-takers' duties to be accomplished while they are absent).

²⁰ Leave-takers were defined as individuals, regardless of their status under the FMLA, who took leave during the survey period for FMLA-qualifying reasons.

²¹ Jody S. Heymann, *The Widening Gap: Why American Working Families are in Jeopardy and What Can be Done About It* (New York: Basic Books, 2000). (Hereafter cited as Heymann, *The Widening Gap*.)

²² Ibid. Note: "Children" included those of preschool and school age as well as adult children.

Paid Leave

About two-thirds of employees who took leave for FMLA reasons received some compensation during their absence, principally through an employer's sick leave plan, according to the DOL employee survey. Most paid leave-takers (72%) received their full paychecks for the whole period, but 58% of leave-takers who received no or partial pay reported difficulty making ends meet. "Lack of money" was the reason offered most often by those who needed but did not take leave in 1999-2000 for FMLA reasons.

Three approaches have been advanced to provide employees with paid time off for all or some FMLA-qualifying reasons. The approaches are briefly described below but not discussed further in this report because they do not involve the FMLA.

- One approach would require employers to provide leave with pay to employees caring for their own health and the health of other eligible individuals. Two different methods have been proposed: one mandating employers to offer their employees a paid sick leave benefit (broadly defined); the other imposing a payroll tax to establish a trust fund from which the government would compensate eligible employees while on leave for FMLA-qualifying reasons. (See H.R. 2460/S. 1152, The Healthy Families Act; and H.R. 1723, The Family Leave Insurance Act.)
- Another alternative would initiate a grant program to assist states interested in supplementing the income of individuals who take leave for family-related reasons. (See H.R. 2339, The Family Income to Respond to Significant Transitions Act, and the Labor Department's FY2011 budget request for \$50 million for a paid leave fund.)
- A third approach would amend the Fair Labor Standards Act of 1938, which requires private sector employers to pay an overtime premium to hourly employees who work more than 40 hours in a week. Instead of giving employees their overtime in cash, private employers would be allowed to offer them compensatory time off that employees could use for whatever reasons they saw fit. (See H.R. 933, The Family-Friendly Workplace Act.)

Clarifying or Tightening the FMLA

Serious Health Condition

A "serious health condition" is defined as an illness, impairment, injury or mental/physical condition that involves

- inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential mental facility; or
- continuing treatment by (or under the supervision of) a health care provider, which includes (1) a period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity due to the

same condition;²³ (2) any period of incapacity due to pregnancy or for prenatal care; (3) any period of incapacity or treatment due to a chronic serious health condition that requires visits at least twice a year for treatment by (or under the supervision of) a health care provider, continues over an extended period, and may cause episodic (rather than continuing) periods of incapacity (e.g., asthma, diabetes); (4) a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's disease, terminal stages of a disease); and (5) any period of absence to receive multiple treatments (including any period of recovery there from) by a health care provider for a condition that likely would result in incapacity of more than three consecutive days absent medical intervention (e.g., chemotherapy, physical therapy for severe arthritis, dialysis for kidney disease).

Some have argued that DOL expanded the meaning of the term beyond the kinds of health problems envisioned by lawmakers.²⁴ At a February 15, 2000 oversight hearing of the House Government Reform Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, it was asserted that a DOL opinion letter effectively said that the underlying medical condition (e.g., a cold or an earache) did not matter if other requirements were met. It has been claimed that, as a result, employees are able to use their FMLA entitlement for minor health problems and to thereby abuse their employer's sick leave policy.²⁵

In recognition of the charge that employees may take FMLA leave for something other than a serious condition, DOL's employee survey asked individuals who gave health-related reasons for taking leave under the act (excluding disability due to pregnancy) whether their condition required care from a doctor or an overnight stay in a hospital. Virtually all (99%) those who took leave in 1999-2000 to deal with their own or a family member's illness responded that a doctor's care was required. About two-thirds reported that they or a family member had to be hospitalized overnight.

To remedy the perceived problem—which allegedly permits abuse of the act, increases employers' administrative burden, and sparks litigation—it has been proposed that the regulation be clarified. One idea that has been advanced would explicitly state in the statute that an illness, injury, impairment or condition for which treatment and recovery are brief (e.g., fewer than seven or 14 days) does not constitute a serious health condition.

It further has been suggested that the law be revised to list specific examples of serious health conditions. In responding to questions posed during a hearing held by the Subcommittee on Children and Families of the Senate Committee on Health, Education, Labor, and Pensions on July 14, 1999, the Deputy Administrator of the DOL's Wage and Hour Division expressed concern that such a list might imply that illnesses that "everyone would agree are normally not serious conditions" could never warrant FMLA leave. He pointed out that the flu—an often-used

²³ The meaning of continuing treatment is clarified in the final rule issued in November 2008. It must involve treatment by a health care provider at least twice within 30 days of the first day of incapacity (unless extenuating circumstances exist) or at least once if it results in a continuing regimen of care, provided that the first (or only) visit is an in-person visit which occurs within seven days of the first day of incapacity.

²⁴ Deborah Billings, "Business Groups Tell OMB Manufacturers Would Benefit From Overhaul of FMLA Rules," *Daily Labor Report*, August 5, 2004. (Hereafter cited as Billings, *Business Groups Tell OMB*.)

²⁵ Cindy Skrzycki, "The Regulators: Businesses Sore About Medical Leave," *Washington Post*, February 4, 2003. (Hereafter cited as Skrzycki, *The Regulators*.)

example of a non serious condition for which FMLA leave currently can be taken if it lasts more than three days and requires the continuing treatment of a health care provider—kills tens of thousands of people each year. He also mentioned that examples of serious health conditions are included in the regulations.

Intermittent Leave

As previously noted, the DOL regulation states that employers must account for intermittent leave in the smallest increment that their payroll systems use to account for other absences, as long as it is 1 hour or less. It has been argued that keeping track of such short segments of time is burdensome, particularly if the firm's payroll and attendance systems are not integrated or if the system for recording leave is not automated. However, a minority of employees take leave on an intermittent basis under the statute: according to the DOL's employee survey, about one-fifth of FMLA leaves were taken on an intermittent basis in 1999-2000. And, HR professionals reported a statistically significant decline between the SHRM's 2000 and 2003 FMLA surveys in the degree of difficulty scheduling intermittent leave in minutes.²⁶

In order to lessen the record-keeping burden, a suggestion has been made to extend the minimum increment of leave under the act.²⁷ Others have countered that lengthening the increment would substantially penalize leave-takers by withholding, for example, half a day's pay when the employee only needed to be absent for 30 minutes. The size of the penalty could potentially discourage some employees from taking leave intermittently.

One argument that has been put forth against intermittent leave—particularly when employees provide little notice—is that it deprives employers of the ability to mitigate work disruptions, and consequently, can have significant negative effects on the duties and schedules of a leave-taker's co-workers who typically must pick up the slack. This, in turn, could adversely affect labor productivity and the morale of a leave-taker's co-workers. HR professionals who participated in a SHRM survey noted that fewer than half of FMLA leave-takers scheduled it in advance (48%),²⁸ but DOL's employee survey found that co-workers of leave-takers generally did not think the act adversely affected them. If the use of intermittent leave remains unchanged despite extension of the minimum increment and instead, leave-takers were absent for four hours rather than 30 minutes, for example, then the act's reported burden on co-workers might worsen.

Unscheduled intermittent leave continues to be one of its most controversial features of the law, according to comments made by business and employee representatives during a June 2005 roundtable discussion convened by the Senate Health, Education, Labor, and Pensions Committee. A hospital's HR director stated that “on any given day, 25 people [medical assistants who had obtained certifications from doctors that their chronic conditions required use of intermittent leave] could call in, and there's nothing you can do about it,” and a manufacturer's representative asserted that employees utilized the FMLA to circumvent disciplinary procedures in their collective bargaining agreement.²⁹ In contrast, an employee described how her ability to take intermittent leave for the years during which her child was being treated for cancer also

²⁶ Communication between CRS and SHRM about its 2000 and 2003 surveys.

²⁷ Billings, *Business Groups Tell OMB*.

²⁸ Society for Human Resource Management, *SHRM 2003 FMLA Survey*.

²⁹ Fawn H. Johnson, “‘Roundtable’ Panel Debates Usefulness of ‘Intermittent Leave’ in Family Leave Law,” *Daily Labor Report*, June 24, 2005, p. A-10.

enabled her to continue working and receiving paychecks. Jody Heymann, Director of Harvard University's Center for Society and Health Policy, noted that with the prevalence of chronic health conditions increasing and hospitalizations decreasing, access to intermittent leave "allows the worker to miss as little work as possible."³⁰

On the basis of surveys conducted by SHRM in 2006 and 2007, it appears that HR professionals continue to have difficulty administering the act and report negative consequences more often when leave is taken intermittently for chronic health conditions as opposed to catastrophic health conditions or when leave is taken to care for a newborn or newly placed adopted or foster child. The short notice (less than one week) employees often give for taking time off for episodic conditions—which reportedly makes it difficult for companies to deal with absences—may partly be the cause of these findings.³¹ The employer community also raised these issues in their responses to DOL's request for information, issued in December 2006, on the need for possible changes to the act.³²

Employer Response Time to Notification of Need for Leave

Under the 1995 regulations, employers had to respond in writing within two business days to an employee's notification of the need for leave. Some asserted that this was an extremely short period in which to determine whether the leave falls under the FMLA and to provide further guidance to employees, particularly as employees do not have to mention the FMLA in their notification and especially if employees informally tell their immediate supervisors rather than directly informing the employers' HR personnel who process the paperwork.

It was suggested that employer's response time be lengthened. As previously discussed, the regulations that became effective in January 2009 extend the employer response period to five business days. DOL also has been urged to require employees to request FMLA leave specifically.³³

Legislative Activity

In the 110th Congress

Foreign military operations involving members of the National Guard and Reserves conducted in the last several years prompted congressional interest in modifying the FMLA. In May 2007, the House included in the FY2008 DOD authorization bill (H.R. 1585), at Section 675, an FMLA amendment that would enable employees already eligible under the act to take leave to deal with matters arising from the call to duty (e.g., making child-care arrangements). In contrast, the leave

³⁰ Ibid., p. A-11.

³¹ Society for Human Resource Management, *FMLA: An Overview of the 2007 FMLA Survey*, May 2007. See also *Family Medical Leave*, SHRM Weekly Online Survey, January 9, 2007, and *Leave Administration under the FMLA*, SHRM Weekly Online Surveys, November 7 and 15, 2006.

³² "Request for Information on the Family and Medical Leave Act of 1993," 71 *Federal Register* 69504, December 1, 2006.

³³ Skrzycki, *The Regulators*.

programs mandated temporarily in H.R. 1585, as passed by the Senate in October 2007, did not amend the FMLA.

The conference report (H.Rept. 110-477) included Section 675 and substituted a slightly modified S. 1975 for the language contained in the Senate-passed version of H.R. 1585. S. 1975 was one of several bills to amend the FMLA introduced in response to a recommendation of the President's Commission on Care for America's Returning Wounded Warriors (Dole-Shalala Commission). One of the recommendations contained in the commission's report was to lengthen the FMLA leave period from 12 workweeks to 6 months for otherwise FMLA-eligible spouses and parents caring for seriously injured or ill service members.

President Bush vetoed H.R. 1585 in December 2007. The following month he signed a revised National Defense Authorization Act (NDAA) of FY2008 (H.R. 4986) into law. P.L. 110-181 contained both military-related amendments to the FMLA at Section 585. Specifically, the NDAA of FY2008 provided

- 12 workweeks of unpaid leave to eligible employees covered under Title I of the FMLA (i.e., employees at private sector firms with at least 50 employees and at public agencies) who are dealing with issues arising from family members in the Guard or Reserves being called to active duty as a result of a qualifying exigency, and
- 26 workweeks of unpaid leave to eligible employees (and next of kin) covered under Title I and Title II (i.e., civil service employees) of the FMLA who are caring for seriously injured or ill service members in the Armed Forces, Guard, or Reserves.

In the 111th Congress

The NDAA for FY2010 (P.L. 111-84), which the President signed into law on October 28, 2009, makes further amendments to the FMLA. Included in the NDAA for FY2010 (H.R. 2647) that the House passed in June 2009 were provisions that extended qualifying exigency leave to eligible family members of regular and reserve members of the Armed Forces deployed to a foreign country and extended military family caregiver leave to eligible family members and next of kin of recent veterans of the Armed Forces, Guard, or Reserves; the provisions applied only to employees covered under Title I of the FMLA. (The NDAA passed by the Senate on July 23 did not contain FMLA amendments.) Introduced on July 30, the Supporting Military Families Act (H.R. 3403/S. 1543) would have applied the FMLA amendments in H.R. 2647 not only to employees of private sector firms with 50 or more employees and public agencies (Title I), but also to civil service employees (Title II).³⁴ P.L. 111-84 does just that, namely, it enables eligible employees covered under Title I and Title II of the FMLA to take

- qualifying exigency leave in connection with regular and reserve members of the Armed Forces deployed to a foreign country; and

³⁴ As previously noted, OPM included in its proposed regulations about military family caregiver leave for eligible civil service employees a request for comments on whether it should pursue legislation to extend P.L. 110-181's exigency leave to employees covered under Title II of the FMLA.

- military family caregiver leave in connection with veterans who were members of the Armed Forces (including those in the Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy.

The Airline Flight Crew Technical Corrections Act was the only other legislation to amend the FMLA that advanced beyond committee referral in the 110th Congress. Because a flight crewmember's work hours are based on in-flight time despite their spending more time at work (e.g., between flights), a full-time flight attendant or pilot usually works less than the 1,250 hours required for FMLA eligibility. The House again approved the reintroduced bill (H.R. 912) early in the 111th Congress. In July 2009, a very similar bill of the same title, S. 1422, was introduced in the Senate. The Senate passed S. 1422 in November, and the House passed it by voice vote on December 2, 2009. Later that month, the Airline Flight Crew Technical Corrections Act was signed into law as P.L. 111-119. The amendment to the FMLA states that airline flight crewmembers who have worked or been paid for not less than 60% of their total monthly guarantee for the prior 12 months and who have worked or been paid for not less than 504 hours in the prior 12 months (excluding personal commute time and vacation, and medical or sick leave) will be considered to have fulfilled the FMLA's hours-of-work requirement. On July 29, 2010, H.R. 5944 was introduced to apply provisions like those in the Airline Flight Crew Technical Corrections Act to railroad employees subject to the hours of service laws under chapter 211 of title 49, United States Code.

Other bills introduced during the 111th Congress would, among other things, effectively increase the number of employees eligible to take FMLA leave by such means as changing the hours-of-work requirement, adding new reasons for time-off, and increasing the groups of eligible employees.

- H.R. 389 would eliminate the hours-of-service requirement, thereby entitling to 12 workweeks of FMLA leave both part-time and full-time employees who worked for a covered employer for at least 12 months.
- H.R. 626/S. 354 would (1) allow federal employees to substitute paid leave for unpaid leave available for the birth of a child or the placement of a child for adoption or foster care, and (2) amend the Congressional Accountability Act as well as the Family and Medical Leave Act to allow the same substitution for covered congressional employees and employees of the Government Accountability Office and the Library of Congress.
- H.R. 824 would allow employees to (1) take "parental involvement leave" to participate in or attend their children's and grandchildren's educational and extracurricular activities sponsored by schools and community organizations, and (2) take "family wellness leave" to meet routine family medical care needs (e.g., medical appointments of the employee's son, daughter, spouse, or grandchild) as well as attend to the care of elderly relatives (e.g., visits to nursing homes). FMLA leave taken for these reasons would not exceed four hours in any 30-day period, and not exceed 24 hours in any 12-month period.
- H.R. 2132/S. 3680 would extend leave under the FMLA to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition.

- H.R. 2515 would allow FMLA leave for the purpose of addressing domestic violence, sexual assault, or stalking and their effects. It would include domestic partners and same-sex spouses under the statute as well.
- H.R. 2776 would amend the FMLA to permit leave to make organ donations.
- Among the provisions in H.R. 3047 are amendments to the FMLA. These include lowering the size threshold for employer coverage to those with 15 or more workers, reducing the hours-of-work requirement to 1,050 in a 12-month period, extending the eligible groups for whom leave could be taken to care for serious health conditions (see H.R. 2132), and authorizing parental involvement and family wellness leave (see H.R. 824) as well as domestic violence leave (see H.R. 2515).

H.R. 2161 focuses on the DOL regulations which became effective in January 2009. It would repeal changes made to the original regulations regarding, for example, paid leave substitution, employee notice requirements for leave, and clarification of medical certification; in those cases, the bill would reinstate the provisions promulgated in 1995. Regarding the frequency of a medical recertification, the bill would permit employers to require one only after the expiration of the period indicated in the original certification, or one year after obtaining the original certification if it indicated the medical condition would last longer than one year. Regarding the frequency of visits to a health care provider when the employee has a serious health condition or a chronic condition, the bill would delete the specific number of visits stated in the rule.

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