FMLA: Top Trends and Issues

Presented by the
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AMERICAN BAR ASSOCIATION

FMLA TOP TRENDS AND ISSUES

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FMLA PRACTICE AND PITFALLS: TRENDS IN 2012

1. Caring for an Adult Child who is Incapable of Self-Care: Is It On the Increase?

Employers are increasingly faced with questions such as:

- Can a grandparent take leave to care for her adult daughter after the birth of her baby?
- Can an employee take leave to care for an adult child suffering from depression?
- Can an employee be absent from work to sit bedside with an adult child after the child is hospitalized for several days due to injuries sustained in an automobile accident?

The answer is not always an easy one. Under the FMLA, an employee is entitled to FMLA leave to care for a child with a serious health condition. As described by the regulations, “child” is defined as a son or daughter who is: 1) under the age of 18; or 2) age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence. 29 C.F.R. § 825.122(c).

Therefore, two factors must be present before an employee can take FMLA leave to care for his/her son or daughter: the adult child must be incapable of self-care and have a physical or mental disability.

A. Incapable of Self-Care

Under the regulations, the adult child must require active assistance or supervision to provide daily self-care in three or more activities of daily living or instrumental activities of daily living. The regulations define these activities as follows:

Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. 29 C.F.R. § 825.122(c)(1)

Temporary conditions, such as minor pregnancy-related conditions, a bout with the flu, a broken bone or routine surgeries, typically would not result in being incapable of self-care. On the other hand, plenty of others would: an adult child with Down syndrome, brain damage, serious illnesses or other developmental disabilities that are long term in nature. It also may include a child who is involved in a catastrophic accident that impacts activities of daily living. Notably, a federal trial court recently refused to dismiss an FMLA lawsuit when the evidence showed that the employee’s adult daughter had learning disabilities, was unable to cook, got lost easily and might have been harmed at birth by an oxygen shortage. Salas v. 3M Co., 2009 U.S. Dist. LEXIS 75265 (N.D. Ill. Aug. 25, 2009).
B. Physical or Mental Disability

The regulations also require that the adult child have a physical or mental disability as defined by the ADA regulations. Under the EEOC’s recently expanded interpretation of disability under the ADA Amendments Act of 2008 (ADAAA), an employee’s burden to establish a disability is much lower, and the “new” ADA allows for the possibility that a short-term impairment lasting fewer than three to six months may very well be considered a disability. Put another way, it has become a whole lot easier to establish that an adult child has a disability. In turn, it arguably will be easier for an employee to take FMLA leave to care for an adult child.

As to the common conundrum of whether pregnancy-related complications constitute a disability, see Serednyj v. Beverly Healthcare, LLC, 2011 U.S. App. LEXIS 17810 (7th Cir. Aug. 26, 2011). In Serednyj, the plaintiff—who planned, coordinated, and conducted activities for nursing-home residents—became pregnant again shortly after having a miscarriage. She continued to perform her duties, some of which were strenuous, for about two months. When she began to experience spotting and cramping, however, her physician restricted her activities to the point that she was unable to perform many of her duties. Due to her short tenure with the nursing home, she was not eligible for FMLA leave, and her employer let her go. She sued, contending among other things that her employer had failed to provide her with a reasonable accommodation and had otherwise discriminated against her in violation of the ADA.

Citing the EEOC’s Interpretive Guidance and various district court decisions, the Court held that while a normal pregnancy is not a “physical impairment” within the meaning of the ADA, pregnancy-related complications such as spotting, cramping, and an increased risk of miscarriage for which medical treatment is prescribed (here, progesterone suppositories and bed rest) may be. However, such an impairment may not be “substantially limiting.” The Court wrote: “Pregnancy is, by its very nature, of limited duration, and any complications which arise from a pregnancy generally dissipate once a woman gives birth. Accordingly, an ADA plaintiff asserting a substantial limitation of a major life activity arising from a pregnancy-related physiological disorder faces a tough hurdle.” In this case, the plaintiff’s physical restrictions were in place for only four months, and her long-term ability to reproduce was not impacted. Accordingly, the Court found that she was not disabled within the meaning of the ADA.

Consider also Novak v. MetroHealth Medical Center, 503 F.3d 572 (6th Cir. 2007). There, a federal court found that the two weeks the adult child suffered from a bout of postpartum depression failed to establish that she had a disability. Although the Novak decision predates the ADAAA, it nevertheless is helpful guidance when determining the conditions that potentially fall in and out of the ADA. See also Cohen v. CHLN, Inc., 2011 U.S. Dist. LEXIS 75405 (E.D. Pa. July 13, 2011) (applying the ADAAA and a broader definition of disability where the employee suffered from back and leg pain for four months prior to his termination; summary judgment denied).

FMLA Tip: Conditions that may appear short-term but serious can be a trap for employers. Take, for instance, Patton v. Ecardio Diagnostics LLC, 2011 U.S. Dist. LEXIS 61757 (S.D. Tex. June 9, 2011). In Patton, an adult child was in a car accident, causing two broken femurs, a
small hole in her lung, and a small hole in her bladder. She recovered, but required a wheelchair to ambulate for more than one year. The employer did not have the benefit of knowing what the child’s prognosis would be long term. It had to make the decision to designate FMLA leave (or not) within the first few weeks when the child was in the hospital. In these situations, employers are wise to look closely at the child’s current medical condition and take an extremely broad view as to the possibility that a court might later find the child to have been disabled during the FMLA period.

2. Caring for a Family Member – Where Do Employers Draw the Line?

In recent years, courts have expanded the scope of the “caring for” FMLA leave entitlement, often finding new and, at times, creative ways to afford employees FMLA leave. For employers, it pays to listen closely to the reason for which an employee requests time off, since the reason may not always be covered by the FMLA.

A. Direct v. Indirect Care

In Lane v. Pontiac Osteopathic Hospital, 2010 U.S. Dist. LEXIS 61003 (E.D. Mich. Jun. 21, 2010), the plaintiff was a medical technologist for Pontiac Osteopathic Hospital. The plaintiff, who lived with his mother, sought and was granted FMLA intermittent FMLA leave for six months to care for his mom, who suffered from diabetes, high blood pressure, weight loss and arthritis. He needed leave from time to time to provide her food and transport her to doctors’ appointments, which he did without issue for the next four months. During the time he was caring for his mother, her basement flooded. The plaintiff was absent for four consecutive days and, in violation of the Hospital’s personnel policies, he failed to call in his absences. Thereafter, he informed the Hospital that he would need additional time off to clean up flooding in his mom’s basement. He claimed that the “flood cleaning days” should be excused because his mother had hepatitis and the stagnant water was a “breeding ground” for the disease. The Hospital disagreed and fired him.

Putting aside the plaintiff’s failure to previously mention his mom’s hepatitis, the court in rejected his FMLA interference claims for a number of reasons:

1. Cleaning the flood was not listed among his enumerated duties in the medical certification form;

2. He had not established that cleaning mom’s basement met the definition of “caring for” a family member with a serious health condition;

3. He could not show that his mom’s hepatitis was in danger of being aggravated if he did not clean the basement immediately; and

4. In any event, his request for leave to clean his mom’s basement failed to put the employer on notice of the need for FMLA leave.
The Impact of the Court Ruling

The *Lane* ruling draws more of a distinct line between those activities that provide “direct” care to the family member (e.g., providing a meal or transport, or sitting bedside) and those that provide “indirect” care (e.g., salvaging mom’s basement). Although the former regularly qualify for FMLA leave, the latter typically do not.

The *Lane* decision reminds employers to seek answers to the following when determining whether an employee is “caring for” a family member under the FMLA:

- Has the employee put the employer on notice of the need for FMLA-qualifying leave (as opposed to a general leave of absence, which may not be protected by law)?
- Are the “caring for” responsibilities identified by the employee in this instance enumerated on the latest medical certification on file? If not, does the employer have an obligation to seek recertification?
- What is the harm to the family member if this assistance is not provided?
- Can the family member perform these “caring for” duties him/herself?
- Are the responsibilities to be performed on this occasion so intertwined with other duties in which the employer previously has allowed FMLA leave?

B. Travel to Care for Family Member

Very few courts have provided guidance as to whether travel time itself (to care for a family member with a serious health condition) qualifies as part of the FMLA leave allotment. *My quick take:* If it’s clear that the employee will be required to care for the family member beginning on Day “X,” then a court likely would find that the travel necessary to get to the destination by Day “X” is so intertwined with the need for leave that it should be considered part of the protected leave as well.

But consider *Tayag v. Lahey Clinic Hosp.*, 677 F. Supp. 2d 446 (D. Mass 2010), aff’d 2011 WL 241968 (1st Cir. Jan. 27, 2011), in which the court upheld a denial of FMLA leave and the plaintiff’s termination because a significant portion of a trip to meet with a “faith healer” actually was spent visiting socially with family. The court held that the employee failed to notify the employer of these activities and in any event, the FMLA “does not permit employees to take time off to take a vacation with a seriously ill spouse, even if caring for the spouse is an ‘incidental consequence’ of taking him on vacation.”

3. How Employers Lose on Summary Judgment

As in many cases where employers fail to dismiss a lawsuit on summary judgment, the employer often regrets the manner in which the employee’s situation was handled. Whether it is negative comments made about an employee after FMLA leave is requested or taken or rating performance differently as a result of FMLA leave (when there is no evidence to indicate as such), employees fail to obtain summary judgment typically for the most obvious of reasons.
A. Loose Lips Sink Ships!

In *Makowski v. SmithAmundsen*, 662 F.3d 818 (7th Cir. 2011), Laura Makowski was employed as Marketing Director by SmithAmundsen LLC, a Chicago-based law firm. In December 2007, during the massive economic downturn, Makowski took maternity leave. One month later, during a firm retreat in January 2008, the firm’s executive team decided to eliminate the positions held by Makowski as well as the firm’s IT Director. The Executive Committee charged Molly O’Gara, Director of Human Resources, with the task of consulting outside counsel on the termination decision. O’Gara considered herself the “boss” with respect to HR policies and compliance and was regularly consulted on termination decisions. According to Makowski, when she returned to pick up her belongings in early February after being terminated, O’Gara met her at the elevator. Makowski claimed that O’Gara told her that she “was let go because of the fact that [Makowski] was pregnant and took medical leave” and that Makowski was one of several at the firm who were let go because they were pregnant or took medical leave. O’Gara allegedly didn’t stop there, suggesting that Makowski should consult with an attorney, since there “might be the possibility of a class action.”

A federal appellate court in Chicago ruled that Makowski’s FMLA interference and retaliation claims (as well as a pregnancy discrimination claim) would not be dismissed, and that a jury must determine whether O’Gara’s comments help establish that the firm interfered with Makowski’s FMLA leave and ultimately terminated her because of her pregnancy and the use of FMLA leave.

**FMLA Tips:**

1. Whenever possible, involve senior management in RIFs and other employment terminations. This should include your senior HR executive. It is unclear from the case whether O’Gara was involved in the actual decision to terminate (or whether her sole task was obtaining employment counsel’s blessing). However, when senior executives are not consulted on significant business decisions, it can breed resentment. Resentment manifests itself in a variety of ways, such as a manager who blows off steam about the decision in public or to the affected employee.

2. *Loose lips sink ships.* After the debate has ceased and management has made the personnel decision, it is critical that any dissenters support the decision of the whole or that of the decisionmaker. The public front should be collective, and the message consistent. Clearly, we don’t know all of the facts at issue in Makowski’s situation. However, if O’Gara’s comments are true, she obviously allowed her personal opinion to become public. In turn, it created a tremendous risk of liability for the firm, a decision that now will be placed in the precarious hands of a jury.

3. A *no-brainer reminder* to HR professionals: Be exceedingly careful when discussing with the employee the reasons for his/her termination, as this conversation will be dissected over and over again.
and used by the employee’s attorney as evidence of alleged discrimination or retaliation. Whenever possible, seek the guidance of employment counsel in framing the reasons communicated to the employee so that you ultimately reduce the risk of liability.

B. Supervisor’s Inadvisable E-Mail Creates a Basis for FMLA Claim

Employers should be wary of suddenly eliminating the position of an employee who announces days earlier that he will need several weeks off for surgery. When the evidence shows that the employee was not targeted for the layoff before he requested FMLA leave, but only after, it may well be enough to allow him to present his claims to a jury.

In *Shaffer v. American Medical Association (AMA)*, 2011 U.S. App. LEXIS 20978 (7th Cir. Oct. 18, 2011), William Shaffer was the Director of Leadership Communications for the AMA. In 2008, when the economic downturn was taking shape, the AMA cut internal budgets. When initial cutbacks were not enough, the AMA slated various staff positions for elimination. Shaffer’s boss indicated that it would be an “obvious choice” to eliminate the position of another employee in Shaffer’s Department because this employee’s duties had changed significantly and, in any event, the AMA had stopped work on one of his core campaigns. When Shaffer’s boss was asked on October 28 whether Shaffer should be slated for layoff, he did not believe cutting additional positions was necessary, including Shaffer’s position. The decision appeared to make sense.

However, the boss suddenly had a changed of heart. On November 20, Shaffer asked for FMLA leave for knee replacement surgery. Four to six weeks, to be exact. By November 30, Shaffer’s supervisor changed his tune, recommending now that Shaffer’s position be eliminated. Specifically, he stated in an email to his superiors: “The team is already preparing for Bill’s short-term leave in January, so his departure should not have any immediate negative impact.”

Shaffer filed suit shortly after his termination. In reversing the decision to grant summary judgment to the employer, the Seventh Circuit Court of Appeals held that the supervisor’s “11th hour” decision to terminate Shaffer, as well as the inconsistent decisionmaking as documented (e.g., shredded handwritten notes, notes that were dated months before they were written), could have created a “paper trail” that acted as a cover up to unlawful conduct. As a result, the court decided that a jury should hear Shaffer’s FMLA retaliation claim.

FMLA Tips: 1. When an employer shifts course and decides to terminate an individual not initially slated for layoff (and especially after they request protected leave), the thought process and documentation must be precise and well reasoned.

2. When an employer actually documents, it must be consistent, thorough and careful. What was convincing to the Court here was the supervisor’s email – a missive that specifically referenced Shaffer’s request for FMLA leave. Although Shaffer’s request for leave may have had nothing to do with his actual layoff, the
content of the email put Shaffer in a good position to argue that a jury should decide whether the need for leave was a motivating factor in the decision to eliminate the position. This is another example of the importance of FMLA training for supervisors and employees who manage employees with medical conditions.

C. Failing to Return Employee’s Telephone Calls May Be FMLA Retaliation

Employers should maintain regular contact with an employee while he or she is on FMLA leave. Failing to do so may increase the employer’s risk of an FMLA retaliation claim. In *Hofferica v. St. Mary Medical Cntr.*, 2011 U.S. Dist. LEXIS 106844 (E.D. Pa. Sept. 20, 2011), a federal court in Pennsylvania found that an employer’s failure to return an employee’s telephone calls while she was on FMLA leave is evidence of retaliation. Here, the plaintiff was a registered nurse who was approved for intermittent FMLA leave for an unusual medical condition that involved tinnitus, hearing loss and vertigo. In September 2008, she took extended FMLA leave to undergo treatment for the condition. She expected to return by November 6, 2008. The employee claimed that, during her leave, she and her husband regularly provided her direct supervisor with leave updates. However, her supervisor often failed to return the calls. In early November, she provided a return to work certification clearing her return for November 13. She also contacted her supervisor to ask for a “modest” extension through November 13, but the supervisor again did not return the call. Instead, the Medical Center sent the employee a letter informing her that her employment had been terminated because she failed to return to work on November 6 when her FMLA leave allotment had been exhausted.

The employee filed suit claiming, among other things, that the Medical Center retaliated against her for taking FMLA leave. In refusing to dismiss the employee’s retaliation claim, the trial court found that the supervisor’s failure to return phone calls was evidence of “an antagonistic attitude toward the employee, particularly where - as here - such refusal began after the employee initiated FMLA leave, and continued despite regular communications from the employee.” As such, it could be used as evidence of retaliation.

**FMLA Tips:**

1. As this decision makes clear, it is imperative that employers maintain contact with employees on FMLA leave. Why go weeks or months without talking with an employee on leave? If you are communicating with them for the first time on the eve of their return to work, you are only inviting trouble. Your FMLA policy and forms should make clear that you expect the employee to check in at appropriate intervals, and that you will be contacting them, too!

2. Don’t let the supervisor off the hook – issue discipline if necessary (if they failed to manage this situation properly) and provide additional training. In Hofferica’s case, it appears as though the supervisor completely dropped the ball in (not) communicating with the employee. Training on FMLA responsibilities is critical.
D. The Importance of Clear, Accurate Notices

Two 2010 federal appellate court decisions highlight the importance of providing employees with clear, accurate information about their FMLA rights. First, the U.S. Court of Appeals for the Eighth Circuit held in *Kobus v. The College of St. Scholastica, Inc.*, 608 F.3d 1034 (8th Cir. 2010), that a painter employed by the college could not prevail on his FMLA claims because he failed to return a completed medical certification form confirming that he had a serious medical condition. The court focused on the fact that the college’s policies and the plaintiff’s supervisor clearly advised the plaintiff of the certification requirement.

On the other hand, the U.S. Court of Appeals for the D.C. Circuit ruled in *McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1 (D.C. Cir. 2010), that a plaintiff could proceed on her claim that her employer interfered with her FMLA rights by giving her incorrect information about the amount of FMLA leave she had used.

The employee claimed that because of this incorrect information, she opted not to take additional FMLA leave to care for her ailing husband and instead had to pay her sister to provide the needed care. Although the district court ruled for the employer, finding that the employee was never denied FMLA leave that she requested, the Court of Appeals reversed, holding that a jury could find that the employer’s alleged inaccurate statements interfered with the employee’s ability to exercise her FMLA rights.

**FMLA Tips:**

1. **Make sure you clearly inform employees of their responsibilities.** Employees must be told what they are expected to do when they need to take FMLA leave. Repeated notices through multiple channels - all well documented - are an employer’s best defense against an employee’s claim of ignorance or confusion. At a minimum, the necessary information should be published in an employee handbook or policy manual, and key requirements, such as whether an employee must return a medical certification, when and how they must check in while on leave, etc., should be included in the eligibility and designation notices provided to employees in response to requests for leave. Supervisors and HR personnel should be trained on these requirements and should be able to either answer any questions employees may have or refer employees to the proper resources.

2. **Make sure you provide accurate information.** The FMLA rules require employers to provide employees information regarding their eligibility for leave and the amount of leave they have used. As *McFadden* makes clear, getting this information right is vital because mistakes, even innocent ones, can interfere with an employee’s ability to use FMLA leave. This could give rise to an FMLA claim even if an employer never denies an employee’s request for leave.
4. Interpretation of Serious Health Condition

The concept of serious health condition under the Family and Medical Leave Act is key to obtaining several types of leave under the FMLA. An employee is entitled to FMLA leave when the employee is unable to perform the functions of the job as a result of the employee’s own serious health condition or when the employee is required to care for a spouse, child or parent with a serious health condition.

Although the definition of “serious health condition” appears to have been intended by Congress to be read broadly, the Congressional reports explain that the term was not meant to include minor or short-term ailments. Both the House and Senate reports state that the term was not intended to cover “short-term conditions for which treatment and recovery are very brief,” “minor illnesses which last only a few days,” or “surgical procedures which typically do not involve hospitalization and require only a brief recovery period,” unless complications arise. H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 28 (1993). For all such conditions, the committee reports noted that for most employees, such leave would be provided by “even the most modest sick leave policies.” Id.

A. General Provisions

A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider.

1. Inpatient care is defined as an overnight stay in a hospital, hospice, or residential medical care facility, or any period of incapacity or subsequent treatment connected with such in-patient care. 29 C.F.R. § 825.114.

2. Continuing Treatment covers a wide range of scenarios, five scenarios in all, which are discussed in detail in the regulations. 29 C.F.R. § 825.113. A serious health condition involving continuing treatment by a health care provider includes the following:

i. Incapacity and treatment.
Incapacity and treatment requires a period of incapacity of more than three consecutive, full calendar days (and any subsequent treatment or period of incapacity relating to the same condition) that also involves:

a. Two treatments: One in-person treatment by a health care provider, a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., a physical therapist) under orders of, or on referral by a health care provider, followed by a second in-person treatment visit that occurs (absent extenuating circumstances) within 30 days of the first day of incapacity; or

b. “Treatment plus one”: One treatment plus regimen of treatment by a health care provider, a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., a
physical therapist) under orders of, or on referral by a health care provider, that results in a regimen of continuing treatment (e.g., physical therapy or prescription drugs) under the supervision of a health care provider.

The two treatments referred to in (a) above and the initial treatment referred to in (b) above must be an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. 29 C.F.R. § 825.115(a)(3).

Lee v. U.S. Steel Corp., 2012 U.S. App. LEXIS 64 (11th Cir. 2012). The employee informed his supervisors that he injured his back and would need leave for three days. Thereafter, he provided medical certification indicating that he had visited with physician on June 18 and another certification indicating that he had visited with a physician on June 24, at which time he could return to work. The certifications only noted that he had been seen by a doctor. The employee’s medical records also indicated that his back pain was “mild,” “constant” and “tight.” The Court found that the documentation provided by the employee was insufficient to establish that he was incapacitated for more than three consecutive days. The certification failed to show that he was unable to perform the essential duties of his job or undergoing treatment during the time he was absent.

Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998): The court held that “treatment” of a “serious health condition” under the FMLA includes “visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined.” Therefore, an employer who discharges or takes an adverse action against an employee who later claims protection from the FMLA for absences related to this condition bears the risk that the health condition at issue will develop into a serious health condition covered by the FMLA.

FMLA Tips: 1. In-person treatment or the regimen of continuing treatment may take place after the period of incapacity has ended and the employee has returned to work. Beware: an absence that may not have qualified as FMLA leave at the time it was taken may later meet the requirements of FMLA leave (since the second treatment may occur within 30 days).

2. Handling “cosmetic” surgery: Can an employee take leave for cosmetic surgery? If the procedure is related to a medical condition that otherwise qualifies as a “serious health condition” under the FMLA, the answer is definitely yes. So, for example, reconstructive surgery following a serious injury or illness would very likely qualify for FMLA leave.
The regulations provide that “conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ‘serious health conditions’ unless inpatient hospital care is required or unless complications develop.” Thus, FMLA leave is generally not available for purely outpatient cosmetic procedures. However, the rule suggests that FMLA leave would be available for a purely cosmetic procedure if the procedure involves an overnight stay in the hospital or results in complications that otherwise meet the definition of “serious health condition.”

*Morris v. Family Dollar Stores of Ohio, Inc.*, 320 F. App’x 330 (6th Cir. 2009):

Plaintiff’s mother underwent an needle biopsy of a lump in her breast and later was hospitalized. On release from hospital, the mother was bedridden for at least four consecutive days and plaintiff “had to take care of her every day needs” during this period. In a follow-up visit with the mother’s doctor ten days after the biopsy, the health care provider confirmed that the lump was benign. The Sixth Circuit found that an outpatient procedure with a follow-up appointment “is not a regimen of continuing treatment” nor “does it constitute treatment two times or more by a health care provider.” Notably, the Sixth Circuit opined:

As the district court commented, “the Court has serious doubts as to whether an outpatient needle biopsy with one follow-up visit two weeks later would constitute a ‘serious medical condition’ for purposes of the FMLA...(citation omitted). We agree. The outpatient needle biopsy involved neither inpatient treatment nor continuing treatment by a health care provider and simply does not satisfy the plain meaning of “serious health condition” in the relevant statutory and regulatory language.”

The Plaintiff’s lawsuit was dismissed on summary judgment because he failed to establish that his mom had a serious health condition under the FMLA.

*Stimpson v. United Parcel Service*, 2009 WL 3583466 (6th Cir. Nov. 3, 2009): The Sixth Circuit affirmed the district court’s finding that the plaintiff did not suffer a serious medical condition after being hit by a car and suffering contusions and mild to moderate back pain. Although the employee provided a note from his doctor, the court held that the plaintiff did not suffer a serious health condition (the medical records indicating only “mild to moderate” back pain and none of the medical documentation suggested that the plaintiff’s back pain significantly limited his movement or lifting ability). Moreover, the Plaintiff declined to follow the doctor’s treatment regimen by not filling a prescription he received from an emergency room doctor.
ii. **Pregnancy.** Any period of incapacity due to pregnancy or prenatal care. 29 C.F.R. § 825.115(b); 29 C.F.R. § 825.120.

Quick notes on pregnancy:
- Entitlement to FMLA for the birth expires at the end of the 12-month period beginning on the date of the birth. 29 C.F.R. § 825.120(a)(2)
- Covers morning sickness which renders the expectant mother unable to perform her job duties. 29 C.F.R. § 825.120(a)(4)
- Prenatal visits to the doctor are covered. 29 C.F.R. § 825.120(a)(4)
- Only a spouse is entitled to take FMLA leave to care for the expectant mother. 29 C.F.R. § 825.120(a)(5)
- Intermittent leave after the birth for bonding leave only allowed with employer’s permission. 29 C.F.R. § 825.120(b)

iii. **Chronic Condition.** Any period of incapacity due to a chronic condition that: a) requires periodic visits (at least twice per year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider; b) continues over an extended period of time; and 3) may cause episodic rather than a continuing period of incapacity (for example, asthma, diabetes, epilepsy, etc.). 29 C.F.R. § 825.115(c).

iv. **Permanent or long-term conditions** for which treatment may not be effective, but for which the employee or covered family member is under the continuing supervision of (but need not be receiving active treatment by) a health care provider (e.g., Alzheimer’s, severe stroke, terminal stages of a disease). 29 C.F.R. § 825.115(d).

v. **Multiple Treatments.** Conditions requiring multiple treatments that qualify as a serious health condition require either:

a. a period of absence to receive multiple treatments by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for restorative surgery after an accident or other injury; or

b. a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) or kidney disease (dialysis).

29 C.F.R. § 825.115(e).
B. What is Incapacity?

An employee is eligible for FMLA leave for his or her own serious health condition only when the employee is incapacitated. The regulations define “incapacity” as the inability to work, attend school, or perform other regular daily activities due to the condition, treatment for the condition, or recovery from treatment. 29 C.F.R. § 825.113(b).

The regulations provide that an employee is “unable to perform the functions of the position” if a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee’s position within the meaning of the Americans with Disabilities Act. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. 29 C.F.R. § 825.123(a).

1. Absence From Work “Necessary”

Hood v. City of Cleveland, 2011 WL 533676 (N.D. Miss. Feb 15, 2011): The Plaintiff was terminated for her lack of dependability, and later sued, attacking some of the absences that led to her termination. One of the absences included leave for bronchitis, during which time she was under a doctor’s care and could not return to work. The Court found this fact alone did not rise to the level of “incapacity” under the FMLA. Citing an earlier Fifth Circuit decision in Ford-Evans v. United Space Alliance, 329 F. App’x 519 (5th Cir. 2009), the Court noted, “FMLA coverage applies only to health conditions that cause or threaten to cause ‘incapacitation’ and where absence from work is ‘necessary.’” Here, the Court found that Plaintiff simply had a mild to moderate impairment, which was insufficient to meet the threshold of “incapacitation.”

2. Ability to Perform Some Job Duties

Branham v. Gannett Satellite Info. Network, 619 F.3d 563 (6th Cir. 2010): The Sixth Circuit reversed summary judgment in favor of the employer where the Plaintiff did some work from home and after hours in her office on the days she claimed to be incapacitated. The Court held that a plaintiff’s ability to perform some of her job duties does not preclude her from establishing incapacity because she may still be unable to perform various essential functions of her job.

3. Ability to Perform Regular Daily Life Activities

Meadows v. Texar Federal Credit Union, 2007 WL 192942 (E.D. Tex. Jan. 22, 2007): The Plaintiff was granted FMLA leave for stress and depression. During her FMLA leave, based on the recommendation of her psychologist, the plaintiff went shopping, spent time with her children, drove them to and from school, and attended school and family functions. The employer argued that the Plaintiff was not “incapacitated” because she was able to perform other regular daily life activities during her leave. The Court disagreed. The Plaintiff had demonstrated she was
unable to perform her work at Texar, and according to the Court, the Plaintiff’s ability to engage in regular daily activities while on leave, “was not dispositive of Plaintiff’s ability or inability to perform her work at Texar because of the alleged stress she felt from her job there.” The Court denied the employer’s motion for summary judgment.

C. What is Treatment?

The regulations provide guidance as to what “treatment” is required to establish a serious health condition under the FMLA. The Department of Labor defined “treatment” to include both an examination to diagnose or evaluate a serious health condition and a “regimen of continuing treatment” (e.g., a course of prescription medication such as an antibiotic, or oxygen therapy, etc.). However, the definition of treatment does not include routine physician examinations (including eye and dental) and treatment regimens that can be initiated without a visit to a health care provider (e.g., taking of over-the-counter medication, bed rest, drinking fluids, exercise, etc.) which are not, by itself, sufficient to constitute a regimen of continuing treatment. 29 C.F.R. § 825.113(c).
D. Conditions Not Ordinarily Serious Health Conditions

Although the FMLA regulations do not list ailments that are categorically excluded from the definition of serious health condition, they do state that the following conditions will not ordinarily qualify as a serious health condition: common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontic problems, periodontal disease, etc. 29 C.F.R. § 825.113(d).

However, if any of the above criteria in subsections A-C are met, the condition is a serious health condition. For example, if an employee has the flu, is incapacitated for more than three days, goes to the doctor, and gets a prescription, then the condition is a serious health condition under the FMLA. See generally DOL Op. FMLA-86 (Dec. 12, 1996); Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000); Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001).

5. Managing the Medical Certification Process

A. General Requirements

Under the FMLA, an employer may request certification (and recertification) of the existence of a “serious health condition” from an employee’s (or family member’s) health care provider. However, employers must do so in a timely manner. 29 U.S.C. § 2613(a). The statute itself sets forth the information that the certification must include when leave is needed for the employee’s own “serious health condition” or to care for an immediate family member with a “serious health condition,” or when intermittent leave is needed. 29 U.S.C. § 2613(b). Moreover, in 2008, the National Defense Authorization Act was enacted to provide, among other things, family military leave. As such, certification now is available in these instances as well.

In most cases, employers are not obligated to approve FMLA leave based simply on an employee’s representation that he or she needs leave. While the type and extent of certification required varies depending upon the type of leave, when an employee seeks FMLA leave due to his or her own serious health condition, that of a family member with a serious health condition, a qualifying exigency, or to care for a covered servicemember, the employer may require the employee to obtain a medical certification from a health care provider setting forth certain information to help the employer determine whether an employee’s absence(s) should be classified as FMLA leave. 29 C.F.R. § 825.305(a).
B. Notice and Timing

If certification will be required, the employer should notify the employee of the requirement in its FMLA Policy and in the Eligibility and Rights and Responsibilities Notice, and it should provide the employee a copy of the appropriate certification form. If this notice is not provided in the Notice of Eligibility, the employer must provide written notice of the medical certification requirements each time certification is requested.

The employee must be given at least 15 calendar days from the date the certification is received by the employee to return the completed form to the employer, unless it is not practical to do so under the particular circumstances, despite the employee’s “good faith efforts.” Thus, if the employee is unable to provide the certification within the specified time period due to circumstances beyond the employee’s control (for example, because the only doctor able to provide the certification is out of town or because the employee is lying unconscious in a hospital bed), the employer must allow additional time. 29 C.F.R. § 825.305(b).

It is the employee’s responsibility to provide a complete and sufficient certification form within the time period specified in the employer’s request (or such extended time as is reasonable under the circumstances). 29 C.F.R. § 825.305(b). The employee is responsible for the cost of obtaining the initial certification.

An employer may require a medical certification every year in conjunction with an absence, whenever the reason for the leave changes or if there is a request for extension of leave. 29 C.F.R. § 825.305.

*Branham v. Gannett Satellite Info. Network, 619 F.3d 563 (6th Cir. 2010)*: The Sixth Circuit reversed summary judgment in favor of the employer where it found that the employer did not effectively provide the employee with notice that she was required to submit a medical certification. The employer’s office manager told the employee over the phone to come into the office and sign a leave of absence form, but she never discussed FMLA leave with the employee. As a result, the court found that the employer failed to request a medical certification in writing, notify the employee that the certification was due within 15 days, and inform the employee of the consequences of failing to submit an adequate certification. The employer could therefore not deny the employee leave on the basis of the employee’s failure to provide a certification.

**FMLA Tip:** Before terminating an employee who fails to return to work despite a “negative certification” confirming that he or she is not incapacitated, employers should carefully review all of the relevant facts and circumstances to ensure that the employee has received all of the appropriate FMLA notices and had an adequate chance to provide a proper medical certification. It is far better to delay a termination by a few days than to spend the next several years defending a lawsuit.
Clark v. Macon County Greyhound Park, 727 F. Supp. 2d 1282 (M.D. Ala. 2010): The court denied the employer’s summary judgment motion on the employee’s FMLA interference claim where the employee alleged that the employer told her to send her FMLA paperwork to the insurance company rather than returning it to the employer. The employer terminated her for job abandonment, but the employee believed she was on FMLA leave pursuant to the certification from her doctor and the conversation with her employer. The court held that where an employer has failed to offer evidence that it told the employee the deadline for returning the certification or that it advised the employee of the consequences for failing to return the certification in a timely manner, the employer cannot be entitled to judgment as a matter of law on an interference claim.

C. Complete and Sufficient Certification vs. Authentication and Clarification

1. Incomplete or Inadequate Certification

A certification is considered incomplete if the employer receives a certification but one or more applicable entries are not completed. A certification is insufficient if the form is returned but the information provided is vague, ambiguous or non-responsive. 29 C.F.R. § 825.305(c).

If a certification is incomplete or insufficient, the employer must provide the employee with written notice as to what additional information is needed to make the certification complete and sufficient, and must give the employee seven calendar days to cure the deficiency. If additional time is needed despite the employee’s diligent good-faith efforts to correct the deficiencies, the employee must be given additional time. If the employee fails to cure the deficiencies specified in the written notice from the employer, the employer may deny the employee’s request for FMLA leave. 29 C.F.R. § 825.313.

Verkade v. United States Postal Service, 378 F. App’x 567 (6th Cir. 2010): The Court rejected the determination of the trial court that the USPS was entitled to rely on prior incomplete medical certifications as “negative” certifications to deny Verkade’s request for FMLA leave. The Court found that an “incomplete” medical certification is not the same thing as a “negative” certification, which is significant because an employer may rely on a negative certification to deny an employee’s request for FMLA leave (as opposed to an incomplete one, which requires that the employer work with the employee to cure the certification). The Plaintiff’s certification was not invalid, but rather, was incomplete and lacked sufficient information to make a determination whether the condition was FMLA-qualifying. However, the Court ultimately affirmed summary judgment for the employer because the Plaintiff failed to cure the deficiencies in his certification within the time period (five days) provided by USPS. The Court found five days reasonable in light of the extensive “history of Verkade’s interaction” with USPS’ FMLA Office, including multiple prior notices detailing the deficiencies with the prior certifications he submitted to USPS.

Wellman v. Sutphen Corp., 2010 WL 1644018 (S.D. Ohio Apr. 23, 2010): The Plaintiff took intermittent leave from work due to arthritis. The employer gave him FMLA
paperwork, including a blank medical certification form. The employee claimed to have returned the form but the employer denied receiving the form, and could not locate a copy in the Plaintiff’s FMLA file. Two months later, the employer sent the Plaintiff a letter demanding that he return a completed FMLA certification form just five days later. The same day, his supervisor issued him a written warning for insubordination because he failed to return the FMLA forms as instructed. The Plaintiff sent three strongly-worded e-mails to the Company’s president, in which he asserted that: 1) the employer’s threat to discharge him if he failed to return a certification violated the FMLA, 2) he did not understand what information the company was requiring, and 3) he would not be able to provide the information by the deadline. When the Plaintiff failed to return the form by the deadline provided, the employer suspended and ultimately fired the Plaintiff for insubordination.

The employer claimed that, because the Plaintiff provided an incomplete medical certification, it had the right to deny the employee’s request for FMLA leave because the employee failed to cure the incompleteness after specific notice from the employer and a reasonable opportunity to cure the defect. The Court rejected this defense, holding first that a certification does not become “incomplete” merely because an employer cannot find it. Thus, if a jury believed the Plaintiff’s claim that he provided the completed certification, the fact that the Company later could not locate it does not undermine the validity of the certification or entitle the company to demand a new one. Further, even if the “incompleteness” rule applied, the court held that a reasonable jury could find that the company failed to provide the Plaintiff a reasonable opportunity to turn in a new certification, in that it provided him just five days to do so, and failed to provide any clarification after he complained that he did not understand what was required.

**FMLA tips:**

1. Set a clear, written deadline (at least 15 days after receipt) for an employee to return an FMLA certification. If the employee fails to meet that deadline, follow up immediately with a written notice to the employee providing a reasonable period (e.g., seven days) to return the certification and asking the employee to explain why he or she failed to do so within the original deadline.

2. If an employee claims he or she provided a certification, but you have no record of it, document that fact. Unless you can definitively prove that the certification was not provided, give the employee a reasonable time period to re-submit the form. If the employee cannot comply by the deadline despite diligent good-faith efforts to do so (e.g., the doctor is out of town), the deadline may need to be extended.

3. If an employee provides an incomplete or insufficient certification, the employee can be required to correct the deficiencies. However, the employee must be given specific, written notice of the deficiencies, and must be given at least seven days to provide a corrected notice. If the employee needs more
time despite diligent good faith efforts, additional time should be granted.

2. Authentication and Clarification

If an employee submits a complete and sufficient certification signed by a health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarifying or authenticating the certification.

a. “Authentication” is limited to providing a copy of the certification to the health care provider who signed it and asking the provider to verify that he or she completed or authorized the certification. 29 C.F.R. § 825.307(a).

b. “Clarification” means contacting the health care provider to understand the handwriting on the certification or to understand the meaning of a response. Employers may not ask for additional information beyond that required by the certification form. 29 C.F.R. § 825.307(a).

An employer need not obtain an employee’s permission to contact a health care provider for purposes of authenticating a certification. However, before contacting a health care provider for clarification, the employer must obtain the written authorization of the employee or the employee’s family member, as applicable, on a form that complies with the Health Insurance Portability and Accountability Act (“HIPAA”). If an employee or the employee’s family member refuses to provide such authorization or otherwise clarify the certification, the employer may deny the request for FMLA leave on the basis that the certification is unclear. 29 C.F.R. § 825.307(a).

Contact with an employee’s health care provider for authentication or clarification of a medical certification may be made by a health care provider hired by the employer, a human resources professional, a leave administrator, or a management official. However, the employee’s direct supervisor may not contact the health care provider. 29 C.F.R. § 825.307(a).

**FMLA Tip:** An employer should only take the step of contacting the employee’s health care provider only after attempts to clarify through the employee have been made.

*Jordan v. Beltway Rail Co. of Chicago, 2009 WL 537053 (N.D. Ill. Mar. 4, 2009)*: The employer violated the FMLA by requesting the employee to sign its standard HIPAA authorization form which sought authorization to obtain medical records beyond the employee’s serious health condition for which leave was taken, and sought permission for a wide range of the employer’s management to receive the information rather than a health care provider employed by the employer. The court granted the employee’s motion for summary judgment on his FMLA interference claim.
Rhynes-Hawkins v. Potter, 2009 WL 5031312 (W.D. Tenn. Dec. 15, 2009): An employer is not required to give the plaintiff or her provider an opportunity to cure or explain the certification form where the issue was one of authenticity, rather than incompleteness or insufficiency.

D. Second and Third Opinions

If an employer “has reason to doubt” the validity of a medical certification, it may require the employee to obtain a second opinion. 29 C.F.R. § 825.307(b). There is very little guidance in the case law as to what constitutes a reason to question the validity of a certification, but some situations arguably are contemplated:

- The frequency and/or duration is inconsistent with or disproportionate to a general understanding of the serious health condition;
- The health care provider is not a specialist in the area relating to the employee’s serious health condition;
- The employee has submitted inconsistent leave requests;
- The employer receives reliable information casting doubt on the validity of the certification;
- The employee has exhibited a suspicious pattern of absences in conjunction with the serious health condition;
- The health care provider has a track record of submitting dubious certification forms.

The employer may choose the health care provider, but may not select a provider that it employs or contracts with on a regular basis, unless the employer is located in an area where access to health care is extremely limited, such as a rural area with only one or two doctors practicing in the relevant specialty. 29 C.F.R. § 825.307(b).

If the second opinion confirms the employee’s need for FMLA leave, the employer must grant the leave. If the second opinion differs from that of the employee’s health care provider, the employer may require the employee to obtain a third opinion. The employer and employee must agree in good faith on a health care provider to provide the third opinion. The third opinion is final and binding. 29 C.F.R. § 825.307(c).

The employer must pay the cost for both the second and third opinions, and must reimburse the employee or the employee’s family member for reasonable “out of pocket” travel expenses incurred in obtaining the opinions. 29 C.F.R. § 825.307(e).

An employee is provisionally entitled to FMLA leave pending receipt of the second or third medical opinion. In addition, if an employee or employee’s family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition in order to facilitate the second or third opinion, the employer may deny leave. 29 C.F.R. § 825.307(b)-(c).
There is no right to a second/third opinion when an employee is seeking injured servicemember leave. 29 C.F.R. § 825.310(d). Similarly, there is no right to a second/third opinion in connection with a recertification or a fitness for duty certification. 29 C.F.R. § 825.308(f), 825.312(b).

Courts are split on whether an employer’s failure to obtain a second or third opinion waives the employer’s right to contest the employee’s alleged serious health condition.

- **Waiver:** *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir.), *cert denied* 531 U.S. 871 (2000) (employer could not contest absences relating to employee’s stomach illness because it did not seek a second opinion through medical certification process); *Smith v. Univ. of Chicago Hospitals*, 2003 U.S. Dist LEXIS 20965 (N.D. Ill. Nov. 20, 2003) (when employer granted leave for depression it waived right to challenge serious health condition because second opinion never utilized)

- **No Waiver:** *Novak v. MetroHealth Ctr.*, 503 F.3d 572 (6th Cir. 2007) (because second opinions are “permissive” and not mandatory, employers need not seek second and third opinion to contest serious health condition at a later time).

**FMLA Tip:** What do you do when the employee’s “family doctor” provides the certification instead of a specialist? The FMLA rules say that an employer can ask for a second medical certification if it “has reason to doubt the validity of a medical certification.” The rules do not specify what type of “reason” will suffice. It may be that you simply do not trust the employee, that the doctor has a reputation for writing dubious medical certifications, that the leave the employee is asking for is disproportionate to the condition, or any other reason. That the doctor providing the certification is not an expert in the relevant field could also be a legitimate reason to ask for a second opinion.

This does not, however, mean that employers should make a practice of asking for a second opinion every time an employee seeks FMLA leave. First, second opinions are always at the expense of the employer. This includes not only the cost of the evaluation itself, but also the employee’s reasonable out of pocket travel expenses. Second, even if the second opinion conflicts with the initial certification, the issue will not be resolved. Rather, the employer must pay for yet a third opinion, which is final and binding.

In light of the costs and the likelihood that a second or third opinion will, in most cases, simply confirm an employee’s entitlement to FMLA leave, the second opinion option should generally be reserved for particularly questionable leave requests.
6. Curbing Intermittent Leave Abuse

Keep the following strategies in mind to fight intermittent FMLA leave abuse:

A. Require that Employees complete a written leave request form for all absences. Although an employer cannot deny FMLA leave if the employee verbally puts the employer on notice of the need for FMLA leave, requiring the employee to actually write out his/her request tends to deter them from gaming the system.

B. Prepare a list of probative questions asked of all employees when they call in “sick.” Under the FMLA regulations, employers have the right to obtain information from the employee about their need for leave. Employers should create a script with questions that they can (and should) ask their employees when they call in an absence:

- What is the reason for the absence?
- What essential functions of the job can they not perform?
- Will they see a doctor for the injury/illness?
- Have they previously taken leave for this condition? If so, when?
- When did they first learn he/she would need to be absent?
- When do they expect to return to work?

C. Enforce usual and customary call-in procedures. Absent an unusual circumstance, employers may deny FMLA leave if the employee fails to follow the employer’s call-in procedures. For example, if the call-in policy requires the employee to call in one hour before their shift starts to report an absence, and the employee fails to do so, the employer can deny FMLA leave (and discipline the employee) absent an unusual circumstance.

D. Check in on the Employee. A practice in which employers calls the employee during the absence (or where the employer’s policy requires the employee to periodically call in) can go a long way to curbing FMLA abuse.

Case in point: In Righi v. SMC Corporation of America, 2011 WL 547364 (7th Cir. Feb. 14, 2011), a federal appellate court upheld the dismissal of the plaintiff’s FMLA claim because he failed to respond to his supervisor’s telephone calls inquiring about his need for a leave of absence. The plaintiff, a salesman for SMC Corp., was the primary caretaker for his mother, who regularly suffered complications from diabetes. As a result, he often took FMLA leave to care for her. On the occasion at issue, however, he asked for time off after his mother accidentally overdosed on her medication.

After leaving work mid-shift on July 11, he sent an e-mail to his supervisor the morning of July 12, stating: “I need the next couple days off to make arrangements in an intermediate care facility for my Mother. . . . I do have the vacation time, or I could apply for the family care act, which I do not want to do at this time. I hope you can understand my situation and approve this emergency time off. I will be very busy the next couple of days . . . so I might be slow getting back to you.”
On receipt of the e-mail, his supervisor made numerous attempts to contact him over the following seven days (in fact, well over ten times during that period). On July 19, the employee finally returned his calls, admitting that he turned off his cell phone for a week. The employee subsequently was terminated for violating SMC’s call-in policy. The employee sued, alleging that SMC interfered with his right to take FMLA leave.

The Court addressed two issues, both of which should be of interest to employers:

1. **When an employee states that he does not want to take FMLA leave “at this time,” is he affirmatively declining a request for FMLA leave?** Here, the court said no. Although an employee may waive his FMLA rights if he “clearly expresses to his employer that he does not wish to use the protections of the FMLA,” this was not necessarily the case here, since the employee simply stated that he did not want to use FMLA at this time. The court reasoned that this phrase could be interpreted to imply that he might change his mind and opt to exercise his FMLA rights after all. In these instances, it is necessary for the employer to inquire further “through informal means” to understand the circumstances of leave request and determine whether the FMLA is applicable. 29 C.F.R. § 825.303(b). This is precisely what SMC Corp. did here.

2. **Given Righi’s initial (ambiguous) notice to SMC, does his failure to respond to his supervisor’s telephone calls affect his right to FMLA leave?** Here, the court said Yes! The employee has an obligation to respond to an employer’s questions that are designed to determine whether an absence is potentially FMLA-qualifying. When an employee does not respond, it may result in denial of FMLA protection. According to the court, the employee’s failure to respond to any of his supervisor’s calls for more than seven days “doomed” his FMLA claim.

**E. Certify . . . and Recertify**

1. **Certification**

   Clearly, one of the best tools employers can use to fight FMLA abuse is the medical certification form. Unfortunately, all too many employers fail to obtain (or fail to do so in a timely manner) from the employee the medical information necessary to determine whether the employee suffers from a serious health condition and even is entitled to leave. Keep your employees honest -- require them to certify their absence and seek recertification at the earliest opportunity. Require medical certification to initially verify the serious health condition, upon the first absence in a new FMLA year, and when the reason for leave changes.

   A medical certification is generally valid for the duration of the 12-month leave period for which it is provided for purposes of the condition described in the certification. The employer may request a new initial certification for each new 12-month period in which the employee seeks FMLA leave for the same condition. 29 C.F.R. § 825.305(e).
2. **Recertification**

During a single 12-month leave period, an employer may generally request recertification of an employee’s need for FMLA leave for a given condition no more than once every 30 days, and only in connection with an absence. If the original certification specified that the minimum duration of the serious health condition for which the employee needs leave is more than 30 days, the employer may not request certification until the minimum duration expires, or until six months have elapsed since the prior certification. 29 C.F.R. § 825.308(b).

However, an employer may request a recertification at any time if:

- The employee requests an extension of leave.
- The circumstances described by the original certification have changed significantly (for example, with respect to the duration or frequency of absences, the nature or severity of the illness, or complications).
- The employer receives information casting doubt on the employee’s stated reason for the absence or the continuing validity of the prior certification.

The employer may request the same type of information for purposes of a recertification as that permitted for the original certification. The employee is responsible for the cost of the recertification, unless the employer provides otherwise. 29 C.F.R. § 825.308(e)-(f).

An employer may also provide the employee’s health care provider with a record of the employee’s absence pattern and ask the provider if the serious health condition and need for leave are consistent with the pattern of absences. 29 C.F.R. § 825.308(e).

F. **Use the “cure” process when seeking adequate, complete medical certification.** Where the medical certification form does not sufficiently answer the questions posed on the form or the health care provider’s responses tend to raise doubts, employers should immediately communicate with the employee to cure the deficiencies and/or shed light on any suspect information provided in the form. In your correspondence, specifically list the unanswered or incomplete questions and provide the employee with a deadline of at least seven calendar days to fix the deficiencies. Here, you might consider asking questions that probe further into the information you find particularly suspect.

Also, as noted above, seek clarification whenever the employee has failed to cure and the certification remains incomplete or insufficient. Additionally, consider using a physician or a nurse to contact the employee’s health care provider on the employer’s behalf.

G. **Require that employees make a reasonable effort to schedule medical treatment around the employer's operations.** 29 C.F.R. § 825.203. Similarly, consider a temporary transfer to an equivalent position that better accommodates intermittent leave for planned medical treatment. 29 C.F.R. § 825.204(a).
7. Keep your Forms up to Date and Be Mindful of the Genetic Information Nondiscrimination Act

A. “New” DOL Forms – Out with the Old, In with the . . . Old?

The Department of Labor has been working with the Office of Management and Budget to extend the life of its model FMLA forms, which expired on December 31, 2011. In February 2012, the Department received approval to use its model FMLA forms through February 28, 2015. Unfortunately, the DOL made no changes to the forms to incorporate the changes to military family leave and the GINA safe harbor provisions.

At a minimum, employers should make the following changes to the DOL’s FMLA forms:

1. Incorporate the 2010 amendments for military family leave. The forms do not account for the changes to exigency leave, which now is possible as a result of a family member’s call to duty in a foreign country (as opposed to the confusing “contingency operation” language originally used). Indeed, the “contingency operation” language remains. They also do not contain any reference to a servicemember’s past service, since caregiver leave now can be taken up to five years after the servicemember leaves the military.

2. Reference to use of genetic information under the Genetic Information Nondiscrimination Act. See section B below.

B. Impact of the Genetic Information Nondiscrimination Act on the FMLA

The Genetic Information Nondiscrimination Act (“GINA”), signed into law in May 2008 by President Bush, prohibits discrimination and harassment based upon genetic information, bars employers from acquiring genetic information except in certain narrow circumstances, and requires employers to keep any genetic information they may have confidential.

1. “Genetic information” under GINA includes:

- Information about an individual’s genetic tests;
- Information about genetic tests of an individual’s family members;
- Information about the manifestation of a disease or disorder in an individual’s family members (i.e., family medical history);
- An individual’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; and
- Genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.
2. Impact on FMLA Medical Certification

Recognizing that employers routinely collect medical information in response to an employee’s request for FMLA leave or a reasonable accommodation request under the ADA, the EEOC regulations implementing GINA carved out several exceptions to GINA’s general prohibitions. Specifically, if an employer acquires genetic information in response to a lawful request for medical information, the acquisition will generally be considered “inadvertent” provided that the covered entity directs the individual and/or health care provider not to provide genetic information. 29 C.F.R. § 1635.8(b).

The regulations also make an exception for requests for family medical history in response to an employee’s request for FMLA leave to care for a family member. 29 C.F.R. § 1635.8(b). Employers requesting fitness for duty certifications must instruct health care providers not to collect or provide any genetic information. In light of the above, employers should considering adding language to the FMLA medical certification form for an employee’s serious health condition and when an employee is seeking to care for a family member with a serious health condition.

i. Employee Serious Health Condition

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic Information” as defined by GINA includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

ii. Family Member’s Serious Health Condition

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic Information” as defined by GINA includes the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.* Please
provide medical history information regarding your patient only to the extent necessary to fully respond to all relevant items below.

This language should be added to the FMLA medical certification form or other written documentation that accompanies the form, and should be used when a fitness for duty certification is requested.

8. Proposed FMLA Regulations Regarding Military Family Leave

On January 30, 2012, the U.S. Department of Labor announced proposed changes to Family and Medical Leave Act regulations in three specific areas: 1) Military Family Leave; 2) Flight Crew FMLA Eligibility; and 3) the manner in which employers calculate increments of FMLA leave. Rules for the first two have been expected for some time, but the proposed rule on calculating increments of FMLA leave is a bit unexpected and essentially seeks to revert back to pre-2009 regulations on this issue.

The proposed regulations also comment on the DOL’s model FMLA forms as well as an employer’s obligations under the Genetic Information Non-Discrimination Act (GINA).

A. Military Family Leave

1. Caregiver Leave

Under the National Defense Authorization Act of 2010 (NDAA), eligible employees can take up to 26 weeks of FMLA leave (“caregiver leave”) in a single 12-month period to care for a covered service member or veteran with a serious injury or illness. Under the NDAA and the proposed regulations, caregiver leave now can be taken up to five years after the service member leaves the military and for an injury or illness that results from a condition that predates the individual’s active duty but that was exacerbated by the military service. Prior to the NDAA, caregiver leave was available only to employees caring for current service members, not veterans.

Interestingly, the DOL is proposing that caregiver medical certification also may be completed by health care providers who are not affiliated with the military or Veterans Administration. The same would apply to second and third opinions, so long as the initial certification was conducted by a HCP not affiliated with the military or Vets Administrations. Under the current regulations, second and third opinions are not allowed for caregiver leave. The DOL has specifically sought feedback on this issue, suggesting that it is open to even further changes to the proposed rule.

2. Exigency Leave

The NDAA and the proposed regulations also allow employees to take up to 12 weeks of FMLA leave for a “qualifying exigency” due to a family member’s call to active duty in a foreign country. Qualifying exigencies naturally encompass a wide range of activities associated
with a service member’s deployment, such as attending to legal, financial, family, child care, school and other matters.

Prior to the NDAA’s enactment, exigency leave only was available to family members of Reserve and National Guard members, and not regular service members. The latter group specifically was excluded in the original statute. At that time, the DOL rationalized that the lives of regular service members were not disrupted in the same manner as Reserve and National Guard members; hence, no exigency leave for “regular” freedom fighters. However, the NDAA and proposed regulations reverse that position and now make clear: FMLA leave is available to family members of regular armed service members, as well as family members of Reserve and National Guard members.

Finally, the proposed regulations seek to expand from five to 15 days the amount of FMLA leave an employee can take to be reunited with a service member during “rest and recuperation” periods.

**B. Airline Flight Crew Eligibility**

The Airline Flight Crew Technical Corrections Act (AFCTCA) ensures that more employees are eligible for FMLA leave. Enacted in 2009, AFCTCA closed a loophole in the “hours worked” eligibility requirements for airline pilots and flight attendants whose unique schedules often left them short of the hours required to qualify them for FMLA leave. Under the FMLA, employees must work at least 1,250 hours in the previous 12-month period, which equates to 60 percent of a typical 40-hour workweek.

AFCTCA applies the same concept to airline flight crews. In short, the Act provides that the hours flight crew employees work or for which they are paid – not just those hours working in flight – count as hours of service for purposes of FMLA eligibility. Under AFCTCA and the proposed regulations, an airline flight crew employee (as defined by FAA regulations) will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months. This calculation would not include personal commute time, or time spent on vacation, medical or sick leave.

The rules proposed by the DOL provide specific instruction on how to implement this technical correction and apply the standards for flight crew benefits.

**C. Calculation of Increments of FMLA Leave**

1. **Smallest Increments of Leave**

In an interesting add on, the DOL also proposes to change the manner in which employers calculate increments of leave. Before the regulations were changed in January 2009, employers were required to track intermittent or reduced schedule FMLA leave in the smallest increments used by their payroll systems to account for such leave, so long as it was one hour or
less. Thus, if an employer tracked employee time worked in 6-minute increments, the FMLA regulations required employers to also track FMLA leave in the same manner.

In a move that was heralded at the time by the employer community, the DOL amended the regulations in 2009 to allow employers to track FMLA leave time in the same manner they track other forms of leave. For instance, if the employer required employees to exhaust sick or vacation leave in one-hour increments, they also could require employees to exhaust FMLA leave in one-hour increments so long as the employee wished to use paid leave for the absence.

In short, the DOL proposes that we revert back to the pre-2009 regulations, reasoning that “an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave.” Thus, the DOL favors reverting back to the principle that employers must track FMLA leave in the shortest increments of leave at any time.

2. Physical Impossibility Provisions

Finally, the proposed regulations also seek to roll back a 2009 regulatory change that allowed employers to delay reinstatement where it is physically impossible for the employee to return to his or her job in the middle of their shift. For example, if a flight attendant required two hours of intermittent leave because of a migraine headache, but also missed his scheduled flight as a result, the airline could delay returning him to work on that day because it was physically impossible for him to join his flight (since it already took off!). As a result, the employer could designate a larger block of time as FMLA leave in that instance.

According to the DOL’s FAQs on the proposed rules, the DOL “is concerned that some employers may have misinterpreted the concept of physical impossibility to apply to circumstances where it is merely inconvenient to reinstate the employee mid-shift.” Therefore, the proposed rule would apply the physical impossibility provision “only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his or her same position or to an equivalent position at the time the employee no longer needs FMLA leave.”

D. An Employer’s GINA Obligations

The DOL also proposes adding a standard record keeping provision that would confirm employers’ obligations to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). The DOL reminds employers that, “to the extent that records and documents created for FMLA purposes contain ‘family medical history’ or ‘genetic information’ as defined in GINA, employers must maintain such records in accordance with [GINA’s] confidentiality requirements.”

E. The DOL’s FMLA Forms removed as appendices?

The DOL also intends to remove from the Regulations’ Appendices all of the required FMLA model forms and notices. If the rule is approved, these forms and notices would only be available on the DOL’s wage and hour website.
9. The Boundaries of Obtaining Sufficient and Reliable Medical Information

A. Employees Who Refuse to Provide Sufficient Medical Information do so at Their Own Peril

One the biggest FMLA headaches for employers is when an employee fails or refuses to provide information to cure insufficient or incomplete medical certification. When the employer does not have the information to determine whether an absence qualifies as FMLA leave, it is left with a true dilemma: Try and obtain permission to talk to the health care provider? Delay or deny the leave and face possible litigation? Or simply approve the leave and go on with your day (after all, it’s easier to avoid the confrontation, right)?

In a recent case decided by the Ninth Circuit, in Lewis v. United States and Donley, 641 F.3d 1174 (9th Cir. 2011), an employer has the right to deny FMLA leave where the employee refuses or fails to provide adequate certification to support the need for leave under the Family and Medical Leave Act.

In Lewis, the plaintiff was the director of a child development center on a U.S. Air Force Base. After she was not selected for a promotion, she requested FMLA leave. In response, the Air Force asked her to return a completed medical certification form. After the Air Force gave her additional time to submit medical certification, Lewis provided certification stating that she was “diagnosed with Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work.” Shortly thereafter, Lewis’ supervisor informed her that the information she provided was insufficient to support the need for FMLA leave. Lewis refused to provide additional information. As a result, the Air Force immediately converted the leave to Absence Without Leave (AWOL) and later terminated her employment as a result.

Lewis contested her termination internally and filed a lawsuit claiming that the Air Force interfered with her FMLA rights when it refused to provide FMLA leave. The Court disagreed. Strike One: First, the court found that the employee failed to provide medical certification that showed she suffered from a serious health condition that rendered her incapable of performing the duties of her job. Take note of what was significant to the Court:

The form, however, fails to provide a summary of the medical facts that support [Lewis’] diagnosis . . . [and] contains no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition.

Strike two: Interestingly, the employee argued that the Air Force should have sought a second opinion if it questioned the adequacy of the certification and desired additional information. The Court quickly rejected this argument, holding that an employer clearly has the right to obtain information from an employee when it questions the sufficiency of the medical certification. Only when an employer doubts the validity of the certification is a second opinion appropriate.
Strike three: Finally, on a related but separate issue, the Court found that the Air Force’s willingness to provide Lewis 22 days to return medical certification (instead of the customary 15 days) was reasonable under the circumstances. Thus, the employee could not argue she did not have enough time to return sufficient medical certification.

Takeaways from Lewis:

What an outstanding win for employers and, frankly, a vindication to those employers and HR professionals who wisely follow the regulations and appropriately ask for additional information when an employee’s certification is insufficient or incomplete. This case provides a great practical guide for employers when dealing with a difficult or non-responsive employee during the medical certification process:

1. Employers should take note of what basic information the Court found they are entitled to: medical facts supporting the employee’s serious health condition; explanation from the health care provider as to the reasons why the employee could not perform the job in question; and whether additional treatments would be required. Under the regulations, the employer has the right to ask these questions and more of an employee to determine whether the FMLA is at issue, and to insist upon complete and sufficient medical certification.

2. Use the DOL model FMLA forms or forms properly modified by your employment counsel. Using these forms can help avoid liability, as evidenced by this decision, where the Court specifically adopted the requisite inquiries contained in Form WH-380E.

3. Don’t be so quick to think that your only recourse is a second opinion. As the Court pointed out, when an employer questions the sufficiency of certification, it has the right to obtain the information first through the employee. The employer is not (yet) required to proceed directly to a second opinion.

4. Keep communicating with your employee. Where certification is insufficient, tell your employee precisely what information is missing/insufficient and give them time to cure (at least seven days). Where they fail to cure the deficiency, considering obtaining their permission to talk directly with their health care provider to obtain the information. In this situation, the employee has two choices: either cure the certification or grant permission for the employer to contact the health care provider.

B. Employers Who Ask for Too Much Information May do so at Their Own Peril

In E.E.O.C. v. Dillard’s, Inc., No. 08cv1780-IEG(PCL) (S.D. Cal. Feb. 2012), a federal district court in California ruled that a retail chain’s attendance policy, which required employees to provide a doctor’s note identifying the nature of a health-related absence for such absences to be excused, violated the Americans with Disabilities Act.
Corinna Scott, an employee at one of Dillard’s stores, was absent from work from May 29 to June 3, 2006 for health-related reasons. To excuse her absence, Scott gave the assistant store manager a note from her doctor stating “off work this week return 6/5/06.” The manager did not excuse Scott’s absences because the note failed to state the nature of the condition being treated, as required by Dillard’s attendance policy. Scott refused to provide any further information regarding the health reasons for her absence, and was terminated on June 6 for absenteeism.

Scott filed a charge of discrimination with the EEOC. After investigating the charge, the EEOC brought suit against Dillard’s on behalf of Scott and other similarly situated employees. Among other things, the EEOC claimed that Dillard’s attendance policy violated the ADA’s prohibition against disability-related inquiries. The ADA provision at issue prohibits covered employers from “mak[ing] inquires of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). The EEOC, in its enforcement guidance, has interpreted “disability-related inquiries” within this provision to include questions that are likely to elicit information about a disability.

The court held that Dillard’s attendance policy was unlawful on its face because it permitted supervisors to conduct disability related inquiries in violation of the ADA. Adopting the EEOC’s interpretation of the ADA provision, the court reasoned that the policy invited intrusive questions regarding employees’ medical conditions that would tend to elicit information about an actual or perceived disability. Dillard’s argued that the policy was necessary to verify the legitimacy of medical absences and to ensure that employees can safely return to work without posing a threat to themselves or others. The court rejected these arguments, opining that Dillard’s did not need to know the nature of an employee’s medical condition to accomplish these goals.

The Dillard’s decision exemplifies the challenges for employers when managing health-related absences and leave in an ever-changing legal environment. Employers have a legitimate interest in curbing excessive absenteeism and abuse of their sick leave policies. Though it may seem natural for a supervisor to ask about the circumstances of a health-related absence to verify the validity of the absence, such inquiries may run afoul of the ADA. The court’s ruling is troubling for employers because it suggests that seemingly innocuous questions about an employee’s reasons for taking sick leave, even well-intentioned questions of concern, may be construed by a court as an improper inquiry into an employee’s disability. It is therefore imperative for management and human resources personnel to limit health-related inquiries to the employee’s ability to perform his or her job responsibilities.

The decision is noteworthy for several other reasons. First, it is one of few opinions interpreting the ADA’s prohibition on disability-related inquiries. As the court noted in its decision, only two federal circuits—not including the Seventh Circuit (which covers Illinois)—have addressed this issue in depth. As previously reported, recent legislative and regulatory amendments expanding the definition of “disability” are expected to result in many more ADA cases being decided on the merits. Second, the fact that the EEOC chose to prosecute this case
reflects the agency’s current enforcement priorities, which are heavily focused on disability claims.
**Actions for Retaliation under FMLA – The Statutory Scheme**

What are the statutory and regulatory provisions pertinent to finding a cause of action under the FMLA?

FMLA Section 105, 29 U.S.C. §2615, provides:

**Sec. 105. Prohibited acts**

(a) Interference with rights

(1) Exercise of rights
It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination
It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries
It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

The 1995 DOL Regulations at 29 C.F.R. §825.220(c) explicitly prohibit discrimination:

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies.

How have the courts viewed a cause of action for retaliation?

 Courts recognize two causes of action under the FMLA – interference and retaliation:

An interference action arises under Section 105(a)(1), and generally is used for entitlement actions – where an employee alleges he or she has been deprived of a right under the FMLA, such as the right to
FMLA leave, to health benefits, and to restoration to the same or an equivalent position at the end of FMLA leave.

Every circuit recognizes a cause of action for retaliation against an employee for exercise of rights under the FMLA, but circuits are split regarding which provision of the law applies to retaliation actions because the retaliation provisions do not literally encompass an action for retaliation against an employee for taking or seeking FMLA leave.

The First, Second, Third, Ninth, and Eleventh Circuits find a cause of action under Section 825.220(c) of the Regulations, alone or in combination with the interference provision at Section 105(a)(1):

- Potenza v. City of N.Y., 365 F.3d 165, 167 (2d Cir. 2004)
- Conoshenti v. Public Serv. Elec. & Gas Co., 364 F.3d 135, 141, 146 n.9 (3d Cir. 2004)
- Bachelder v. America W. Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001)
- Strickland v. Water Works & Sewer Bd. of Birmingham, 239 F.3d 1199, 1206 (11th Cir. 2001)

The Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits find a cause of action under Section 105(a)(2), which prohibits discrimination for opposing any practice made unlawful by the Act:

- Yashenko v. Harrah’s NC Casino Co., 446 F.3d 541, 546 (4th Cir. 2006)
- Haley v. Alliance Compressor LLC, 391 F.3d 644, 649 (5th Cir. 2004)
- Bryson v. Regis Corp., 498 F.3d 561, 570 (6th Cir. 2007)
- Kauffman v. Federal Express Corp., 426 F.3d 880, 844 (7th Cir. 2005)
- Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006)
- Metzler v. Home Loan Bank of Topeka, 464 F.3d 1164 (10th Cir. 2006)

Subsequent to these decisions, the DOL revised 29 C.F.R. §825.220(c) to explicitly state its view that a cause of action for discrimination or retaliation is found in the Act’s prohibition against interference.

What analysis do the circuits apply in FMLA retaliation actions?

All of the circuits except the Ninth apply a traditional burden-shifting analysis to retaliation actions, such as that in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–06 (1973), or, in the Seventh Circuit, a variation thereof.

In the Seventh Circuit, an employee can establish retaliation through either a “direct” or “indirect” method. Under the direct method, the plaintiff can utilize either direct or circumstantial evidence to show improper motive; if this evidence is contradicted, the case must be tried unless the employer presents unrebutted evidence that it would have taken the adverse action even if it had no retaliatory motive. Thus, under the direct method, if a plaintiff makes a sufficient showing of cause, through direct or circumstantial evidence, the McDonnell Douglas burden-shifting framework does not come into play. The indirect method requires the plaintiff to provide evidence that similarly situated employees who did not take FMLA leave were treated more favorably, and utilizes the McDonnell Douglas burden-shifting framework. See Lewis v. School District 70, 523 F.3d 730, 741-42 (7th Cir. 2008); Burnett v. LFW, Inc., 472 F.3d 471, 481-82 (7th Cir. 2006); Buie v. Quad/Graphics, Inc., 366 F.3d 496, 503, (7th Cir. 2004).
In the Ninth Circuit, plaintiff need only prove by a preponderance of the evidence that taking FMLA leave was a negative factor in the employment action. See Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001).

Does the mixed-motive analysis apply to FMLA cases?

What is the impact of Gross v. FBL Financial Services, 129 S. Ct. 2343 (2009), on the FMLA?

Prior to Gross, the Fifth Circuit held that the mixed-motive framework applied equally to FMLA retaliation cases. See Richardson v. Monitronics International, Inc., 434 F.3d 326, 336 (5th Cir. 2006). Other courts have applied the mixed-motive framework without analysis or found it unnecessary to reach the question.

In Gross the Supreme Court held that ADEA actions are not governed by Title VII decisions such as Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), because Title VII was specifically amended to allow suits which alleged an improper consideration was a motivating factor in an employer’s actions.

Therefore a plaintiff in an ADEA disparate-treatment action must prove by a preponderance of the evidence that age was the “but-for” cause of the adverse employment action. The burden does not shift to the employer to show that it would have taken the action regardless of age, even when plaintiff produced evidence that age was a motivating factor in the decision.

The approach of the various circuit courts of appeals to the question of whether a Title VII mixed-motive analysis applies to FMLA actions may be influenced by the statutory basis in the circuit for finding a cause of action for retaliation under the FMLA. The text of the ADEA and Section 105(a)(2) and 105(b) of the FMLA are similar, although not identical, in including a “because of” clause or similar language as part of the prohibited conduct. On the other hand, Section 105(a)(1)'s broad prohibition against “interfer[e][n]g with, restrain[e][n]g, or deny[e][n]g the exercise of, or the attempt to exercise, any right provided under the Act” contains no language similar to that in the ADEA. Furthermore, Section 220(c) of the Regulations prohibits discrimination or retaliation for the exercise of FMLA rights, and also prohibits using “the taking of FMLA leave as a negative factor in employment actions,” thus suggesting a mixed-motive analysis.

Since Gross, the Sixth Circuit has addressed the issue and held that the burden-shifting analysis of Price Waterhouse applies to FMLA actions. See Hunter v. Valley View Local Schools, 679 F.3d 688, 692 (6th Cir. 2009). Although the Sixth Circuit finds a cause of action for retaliation claims in Section 105(a)(1) of the Act, the court based its decision on Section 825.220(c) of the Regulations. The court held that the “negative factor” language in the Regulation “envisions that the challenged employment decision might also rest on other, permissible factors.” The court analogized Section 825.220(c) to the provision in Title VII that authorizes claims where a protected characteristic is a “motivating factor” in the adverse action.

It remains to be seen how the other circuits will resolve the question.
FMLA: Top Trends and Issues

Wednesday, September 12, 2012 | 1:00 PM Eastern
Sponsored by the ABA Center for Professional Development

Speakers

• Jeff Nowak, Franczek Radelet, P.C., Chicago, IL
• Gail V. Coleman, US Department of Labor, Alexandra, VA
• Sarah Crawford, Director of Workplace Fairness, National Partnership for Women & Families, Washington, DC
• Tamika Lynch, In House Counsel, Siemens Industry, Inc., Chicago, IL
Caring for An Adult Child

• Child:
  – Under the age of 18; or
  – Age 18 or older and “incapable of self-care because of a mental or physical disability” at the time FMLA leave is to commence

• Active assistance/supervision to provide daily self-care in three or more activities of daily living or instrumental activities of daily living
Activities

• Activities of daily living
  – caring appropriately for one’s grooming and hygiene
  – bathing, dressing and eating

• Instrumental Activities
  – cooking, cleaning
  – shopping
  – taking public transportation
  – paying bills
  – maintaining a residence
  – using telephones and directories
  – using a post office

Capable of Self-care?

• Typically DO NOT indicate incapable of self-care
  – minor pregnancy-related conditions
  – a bout with the flu
  – a broken bone or routine surgeries

• Typically DO indicate incapable of self-care
  – Down syndrome
  – brain damage
  – serious illnesses
  – developmental disabilities that are long term in nature
  – catastrophic accident
Must be Disabled

- ADAAA
  - Easier to establish disability
  - Easier to take FMLA leave?


Caring for Family Member (generally)
Caring for Family Member

• “Caring for”
  – Physical or psychological care
    • Unable to care for basic medical, hygienic, or nutritional needs or safety
    • Unable to transport to the doctor
    • Providing psychological comfort & reassurance

  – Where does it end?

Caring for Family Member

• Joe, medical technologist
• Asks for leave to care for mom (diabetes, high blood pressure, weight loss and arthritis)
• Intermittent leave for 6 months to provide food and transport her to doctor appointments
• Later absent for four days to attend to flooding in mom’s basement. Asking for several more. Covered by FMLA?

Caring For: What Do the Courts Say?

- **Is Proximity Required?:** Baham v. McLane Food Serv., 2011 U.S. App. LEXIS 13620 (5th Cir. 2011) (prepping for daughter’s arrival)

- **Travel:** Tayag v. Lahey Clinic Hosp., 677 F. Supp. 2d 446 (D. Mass 2010)

“Caring for” Best Practices

- Has the employee provided notice of the need for FMLA-qualifying leave?

- Look to the information contained in the medical certification – what does it say?

- Harm to the family member if not provided

- What can the family member do?

- “Intertwined” responsibilities
Serious Health Condition

• What is a serious health condition (SHC)?
• (29 CFR 825.113, 825.114, 825.115)

• Inpatient treatment, or

• Continuing treatment by a health care provider (HCP)
## Serious Health Condition

- **What is continuing treatment by a HCP?**
  - 1) **Incapacity and treatment:**
    - More than 3 consecutive days of incapacity and
    - 2 or more treatments within 30 days of the first day of incapacity (unless extenuating circumstances), or
    - 1 treatment resulting in a regimen of continuing treatment
  First visit must be within 7 days of first day of incapacity

- **2) Pregnancy or prenatal care:**
  - Any period of incapacity due to pregnancy, including severe morning sickness, or
  - Prenatal care visits
  - Employee is not required to receive treatment during period of incapacity and need not be absent more than three consecutive days
  - Special rules for leave after birth of a child (29 CFR 825.120)
Serious Health Condition

• **3) Chronic conditions**: Any period of incapacity or treatment due to a condition which:
  – Requires periodic visits (at least 2x per year) for treatment by a HCP, and
  – Continues over an extended period of time, and
  – May cause episodic periods of incapacity
• **Employee is not required to receive treatment during period of incapacity and need not be absent more than 3 consecutive days**

Serious Health Condition

• **4) Permanent or long-term conditions** for which treatment may not be effective
  Must be under continuing supervision of HCP, but need not be receiving treatment
• **5) Conditions requiring multiple treatments**
  – Due to restorative surgery after an injury or
  – Due to condition that would likely result in period of incapacity of more than 3 days without treatment
  Does not require incapacity
Serious Health Condition

- **Treatment**: includes examinations to determine if a SHC exists and evaluations;

- **A regimen of continuing treatment**: includes a course of prescription medication or therapy requiring special equipment, but not over-the-counter medication.

Serious Health Condition

- **Incapacity** means inability to work, attend school, or perform other regular daily activities due to the SHC, treatment for the SHC, or recovery.
Serious Health Condition

- **Unable to perform the essential functions of the position** (29 CFR 825.123)

- The HCP must find the employee is unable to work at all, or list the essential functions of the job that the employee is unable to perform.

- An employee can be unable to perform his/her position with the employer, even if able to work generally.

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Serious Health Condition

- **Light duty**: What if the doctor certifies that an employee is able to return to work in a light duty position? (29 CFR 825.207(e), 825.702(d))

- Regs provide that if employee is unable to perform essential functions of the job, employee cannot be required to take “light duty” position but must be permitted to take FMLA leave.
Serious Health Condition

• **Minor conditions** such as flu, ear aches, upset stomach, etc., are not ordinarily SHCs unless there are complications

• **But** minor conditions are SHCs even if there are no complications if all the other requirements of the rule are met

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Serious Health Condition

• **Cosmetic treatments** such as for acne or plastic surgery are not SHCs unless inpatient hospital care is required or complications develop

• But restorative dental or plastic surgery is a SHC if conditions of the regulations are met
### Serious Health Condition

- **Substance abuse** may be SHC if requirements for SHC are met (29 CFR 825.119)
- Absences covered by FMLA only if they are for treatment, not because of use of substance
- Employer may not terminate employee because employee took FMLA leave for treatment
- Employer may terminate employee because of substance abuse pursuant to established, nondiscriminatory policy

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### Serious Health Condition

- How does employer know employee has SHC? (29 CFR 825.302, 825.303)

  - Employee is required to provide notice sufficient for employer to be aware employee needs FMLA leave and anticipated timing and duration;
  - Employee need not mention FMLA
  - Employer must inquire further if additional info is required to determine if FMLA leave
Medical Certification

Notice and Timing of Certification

• Employer must provide notice of a request for medical certification within five business days of the employee’s request for leave or after leave commences, in the case of unforeseen leave.
• The employee must be given 15 calendar days to return the completed form, or longer in certain circumstances.
Medical Certification

Employer Failure to Provide Notice of Process

• *Branham v. Gannett Satellite Info. Network*, 619 F.3d 563 (6th Cir. 2010) (employer never discussed FMLA leave or medical certification with the employee).
• *Clark v. Macon County Greyhound Park*, 727 F. Supp. 2d 1282 (M.D. Ala. 2010) (employer failed to advise as to when certification was due, to whom it was to be submitted, and consequences of failure to do so).

Medical Certification

Second and Third Opinions

• *Tayag v. Lahey Clinic Hosp., Inc*, 632 F.3d 788 (1st Cir. 2011) (employer had grounds to seek a second opinion where the certification differed from earlier certifications and did not explain the reason for a seven-week leave).
• *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008) (employer that bypasses the second opinion procedure "risks denying FMLA leave to an employee who is entitled to the leave, rendering the employer liable for lost wages, benefits, interest, attorney's fees, costs and other damages.")
• Courts are split on whether employer’s failure to obtain a second or third opinion waives the employer’s right to contest the employee’s alleged serious health condition.
Medical Certifications

Recertification

2009 regulatory changes to Section 825.308:

• For “lifetime,” “indefinite,” or “unknown” conditions, employers may request recertification of a medical condition every six months in connection with an absence.

• General rule: An employer may request recertification no more often than every 30 days only in connection with an employee’s absence.

• Employers must give the employee 15 days to provide recertification.

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Smith v. Calltech Communications, LLC, 2009 WL 1651530 (S.D. Ohio June 10, 2009) (employer was required to provide plaintiff with more than 3 days to comply with request for recertification; it did not matter that the employee was aware of the employer’s policy of requiring a doctor’s note for all instances of sick leave).
Medical Certification

Incompleteness/Clarification

- Verkade v. UPS, 378 Fed. Appx. 567, 574 (6th Cir. 2010) (employer cannot rely on an incomplete or insufficient certification to deny leave).

Medical Certification

Authentication

- Smith v. Hope School, F.3d 694 (7th Cir. 2009) (where employee altered certification form, employer had no obligation to seek a second opinion).
- Rhynes-Hawkins v. Potter, et al., 2009 WL 5031312 (W.D. Tenn. Dec. 15 2009) (employer not required to give the plaintiff an opportunity to cure or explain a certification form where the issue was one of authenticity, rather than incompleteness or insufficiency, and the employer is not required to contact the employee’s doctor regarding the allegedly fraudulent certification).
Medical Certification

Disregarding Certification: A Cautionary Tale


Medical Certification

Military Leave

• The National Defense Authorization Act of 2008 and 2010 amended the FMLA to provide two important leave entitlements that benefit military families:
  – Qualifying exigency leave
  – Military caregiver leave
Medical Certification

Military Leave: Caring for a Covered Service Member

Eligible employees:
• Spouse, son, daughter, parent or next of kin of a covered service member

Length and purpose of leave:
• Up to 26 weeks of FMLA leave during a single 12-month period to care for a service member with a serious injury or illness incurred or aggravated in the line of duty.

Medical Certification

Military Leave: Qualifying Exigency Leave

Eligible employees:
• Spouse, son, daughter, or parent of a military member

Length and purpose of leave:
• Up to 12 weeks of leave during any 12-month period to address the common issues that arise when a military member is deployed to a foreign country, such as attending to legal, financial, family, child care, school, and other concerns.
Medical Certification

Optional Certification Forms for Military Leave

• WH-384: Optional Form for Certification of Qualifying Exigency for Military Family Leave

• WH-385: Optional Form for Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave

Intermittent Leave
Intermittent Leave

Communication

• Why is the employee absent?
• Has the employee received medical treatment?
• How long does the employee anticipate being out of work?
• Has the employee previously been absent for the same reason?
• Is the employee eligible for FMLA leave?
• What are the employer’s and the employee’s responsibilities?

Notice

• 29 C.F.R. §825.302 Employee Notice Requirements for Foreseeable FMLA
  - 30 days advance notice if foreseeable
  - As soon as practicable
  - Timing & Duration
  - An employer may require an employee to comply with the usual & customary notice and procedural requirements for requesting leave, absent unusual circumstances
  - Reasonable effort to schedule treatment so as not to disrupt operations
Intermittent Leave

Communication

• What is the employee’s responsibility?

Notice

• 29 C.F.R. §825.303 Employee Notice Requirements for Unforeseeable FMLA Leave
  – As soon as practicable
  – Notice by employee or spokesperson
  – Timing & Duration
  – Calling in sick w/o more info insufficient
  – Comply with the usual & customary notice and procedural requirements for requesting leave, absent unusual circumstances
  – Reasonable effort to schedule treatment so as not to disrupt operations

Intermittent Leave

Communication

• What is the employee’s responsibility?

Notice

• Righi v. SMC Corporation of America, 632 F.3d 404 (7th Cir. 2011)
  – FMLA does not authorize employees to keep their employers in the dark
• Ballato v. Comcast Corp., 676 F.3d 768 (8th Cir. 2012)
  – Employee had a responsibility to attempt to request FMLA leave, show up for shift, or contact employer regarding status
  – Claim of interference fails
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<th>Intermittent Leave</th>
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<td><strong>Communication</strong></td>
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<td>• What is the employer’s responsibility?</td>
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29 C.F.R. §825.301 Designation of FMLA Leave

- Information received from employee or spokesperson
- Employee does not need to expressly assert rights
- Retroactive designation
**Employer’s Options**

- 29 C.F.R. §825.204 Transfer of an Employee to an Alternative Position
  - Foreseeable for planned medical treatment
  - Birth or placement of a child for adoption or foster care
- Equivalent pay & benefits
- Reinstatement

**Americans with Disabilities Act**

- Disability v. Serious Health Condition
- Is intermittent leave a reasonable accommodation?
Retaliation

• Section 105, 29 USC 2615, Prohibited Acts:
  • (a) Interference with rights
  • (1) Exercise of rights: It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this Act.
  • (2) Discrimination: It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this chapter.
• DOL Regulations, Sec. 825.220(c) prohibit discrimination and state:

• By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies.

• Interference or entitlement actions under Section 105(a)(1):

• Employee alleges he /she has been deprived of a right under the FMLA
  – Right to FMLA leave
  – Right to health benefits
  – Right to restoration to the same or equivalent position at the end of FMLA leave.
Retaliation

• Retaliation actions – Circuits are split
• The First, Second, Third, Ninth, and Eleventh Circuits find a cause of action under the §825.220(c), alone or in combination with the interference provision at FMLA Sec. 105(a)(1)
• The Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits find a cause of action under FMLA Sec. 105(a)(2)

Retaliation

• All Circuits except the Ninth apply Title VII case law to FMLA retaliation cases.

• In the Ninth Circuit plaintiff need only prove by a preponderance of the evidence that taking FMLA leave was a negative factor in the employment action – no burden shifting.
Retaliation

• Does the mixed-motive analysis apply to a cause of action for retaliation under the FMLA?

• What is the impact of *Gross v. FBL Financial Services* – holding mixed-motive analysis does not apply to ADEA cases?

Retaliation

• Answer may be influenced by the statutory basis for finding a cause of action for retaliation:
• The text of ADEA and Sec.105(a)(2) are similar, although not identical
• ADEA contains no language similar to Sec. 105(a)(1)’s broad prohibition against interference or §825.220(c)
Retaliation

• Hunter v. Valley View Local Schools, 679 F.3d 688, 692 (6th Cir. 2009):
  • held that the mixed-motive burden-shifting analysis applies to FMLA actions
  • based its decision on Section 825.220(c) of the Regulations

Retaliation

Evidence of Retaliatory Intent

Makowski v. SmithAmundsen, 662 F.3d 818 (7th Cir. 2011) (admitted HR Director's statements regarding employer's retaliatory intent where worker was terminated after taking FMLA leave before and after the birth of a child).
Retaliation

Restructuring, elimination, layoffs etc.:
Legitimate, nondiscriminatory reason or pretext?


Retaliation

Timing of Adverse Employment Decision

- Temporal proximity can establish causation.

- *Beekman v. Nestle Purina Petcare Co.*, 635 F. Supp. 2d 893 (N.D. 2009) (temporal proximity sufficient to prove causation where plaintiff was terminated six days after request for FMLA leave).
Retaliation

Statements Suggesting Retaliatory Motive

• *McArdle v. Dell Prods., L.P.*, 293 Fed. Appx. 331 (5th Cir. 2008) (supervisor’s email expressed concern over employee’s time off)

• *Cavender v. Sunbelt Rentals, Inc.*, 2008 U.S. Dist. LEXIS 78910 (S.D. Ind. Oct. 22, 2007) (supervisor stated, “[M]y only concern is getting loads in and out of here, and I need [you] here to get these loads out of here. Your concern is your son. That’s not my concern.”)

Retaliation

Protection from retaliation for requesting leave before eligibility to take leave

• *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012) (employee protected from retaliation for requesting FMLA leave, even though she was not eligible for leave at time of request).

• *Reynolds v. Inter-Indus. Conf. on Auto Collision Repair*, 2009 U.S. Dist. LEXIS 4686 (N.D. Ill. 2009) (“It would be illogical to interpret the notice requirement in a way that requires employees to disclose requests for leave which would, in turn, expose them to retaliation, or interference, for which they have no remedy.”)
Retaliation

Maintaining Contact While Employee is on Leave

• *Hofferica v. St. Mary Medical Cntr.*, 2011 U.S. Dist. LEXIS 106844 (E.D. Pa. Sept. 20, 2011) (employer’s failure to return the employee’s telephone calls while she was out on leave is evidence of retaliatory discharge)

FMLA and GINA
• Genetic Information Non-Discrimination Act (GINA)
  – Prohibits employment discrimination on the basis of “genetic information” and
  – Restricts employers access to such information
• FMLA context
  – Safe harbor language
  – Correspondence with health care providers generally