The Family and Medical Leave Act

Almost two decades ago, the Family and Medical Leave Act (FMLA) was the first piece of legislation signed by then-President Clinton. It was promulgated in 1993 to protect employees from having to choose between being able to take time off to care for themselves or their family members and losing their jobs. That same year, I graduated from law school and began my legal career at a small plaintiffs’ firm specializing in representing employees. I thought that I was going to save the world. After three seemingly long years, I realized that I was not saving the world and decided to join the defense bar. It has been a happily-ever-after story for me ever since, but the same cannot be said for the FMLA. While its mission is a lofty and albeit necessary one, the FMLA can become a nightmare for employers, particularly large employers, who want to promote family values.

The purpose of this article is to provide you with the fundamentals of the FMLA, potential employer pitfalls under the FMLA, information on the most recent amendments to the FMLA, and a nationwide comparison of state laws that have expanded the rights under the FMLA, as well as comparable laws from U.S. territories, so that you can decide whether the FMLA is a friend, a foe, or a frienemy.

The Fundamentals of the FMLA

The FMLA applies to public agencies, including state, local, and federal employers, local education agencies, and private-sector employers who employ 50 or more employees within a 75-mile radius of the worksite. The FMLA entitles eligible employees to:

- Up to twelve workweeks of leave in a 12-month period
  - For the birth of a child and to care for the newborn child within one year of birth;
  - For the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - To care for the employee’s spouse, child, or parent who has a serious health condition;
  - For a serious health condition that makes the employee unable to perform the functions of his or her position.

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form the essential functions of his or her job;
— For any qualifying exigency arising from the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty”; or
- Up to 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin, referred to as military caregiver leave.

This brings us to the question of who qualifies as an eligible employee. To qualify for FMLA leave, an employee must have worked for an employer for a minimum of 12 months and a minimum of 1,250 hours in the 12 months preceding the request for leave.

If an employer happens to employ spouses, the spouses are limited in the amount of family leave that they may take. Specifically, spouses who are employed by a single employer are limited to a combined 12 workweeks of family leave for the birth and care of a newborn child, for placement of a child for adoption or foster care, or to care for a parent who has a serious health condition, or 26 workweeks if leave to care for a covered service member with a serious injury or illness is also used. Moreover, leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement.

Pitfalls Under the FMLA
Masked behind the remedial provisions of the FMLA, employers often encounter several pitfalls. It is important that employers know of these pitfalls to avoid liability for violating the provisions of the FMLA.

Posting Requirements
The initial hurdle under the FMLA for an employer to overcome involves the posting requirements. Employers are required to display in a conspicuous place for all employees to see a U.S. Department of Labor poster that identifies the major provision under the FMLA and the complaint procedure. The U.S. Department of Labor poster is available online at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf (last visited June 27, 2012). You also should advise employers to include their FMLA policies in their employee handbooks.

Notice Requirements
The next hurdle involves identifying what triggers further notice requirements. Under the FMLA, an employee is not required to make a specific request for FMLA leave; rather, the employer bears the burden to provide notice to employees when leave may be FMLA qualifying. Although not specifically stated, to administer FMLA leave successfully, an employer has to engage in the same type of “interactive process” that the Americans with Disabilities Act (ADA) requires.

When an eligible employee makes a request for leave, the employer must inquire whether the employee seeks the leave due to the employee’s or the employee’s close family member’s medical condition.

Defining a Serious Health Condition
The third hurdle often encountered by employers is identifying what constitutes a “serious health condition.” For the purposes of the FMLA, a “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

According to the FMLA guidelines, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care. The guidelines state that a serious health condition involving continuing treatment includes any one or more of the following:

(a) Incapacity and treatment. 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:
    (1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of,

or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means 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.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term “extenuating circumstances” in paragraph (a)(1) of this section means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care.

(c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
    (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
    (2) Continues over an extended period of time (including re-
curing episodes of a single underlying condition); and
(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(d) Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

(e) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) 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:

(1) Restorative surgery after an accident or other injury; or
(2) 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.), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

When an eligible employee seeks a medical leave, the employer should advise the employee of his or her FMLA eligibility and provide the employee with a health care provider certification form so that the employer can determine whether the employee or the employee’s family member has a serious health condition. You should encourage employers to use the form created by the U.S. Department of Labor, available at http://www.dol.gov/whd/forms/WH-380-E.pdf (last visited June 27, 2012). It is the employer’s responsibility to ascertain whether the leave may be due to a “serious health condition” based on information provided by an employee and certified by an attending physician.

Employees must receive a minimum of 15 days to return the certification form. This 15-day deadline is not rigid, and employers must be flexible when the 15-day deadline is impractical. For instance, employers should extend the 15-day deadline when the medical condition is obvious or if the employee is in the hospital. In such circumstances, an employer should provide leeway to prevent liability for retaliation under the FMLA or liability for a denial of reasonable accommodation under the ADA.

### Intermittent Leave and Reduced Schedules

Perhaps the biggest hurdle that an employer faces is when an employee requests intermittent leave or a reduced schedule. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee’s usual number of working hours per workweek or hours per workday. A reduced leave schedule also can take form as a change in the employee’s schedule for a period of time, normally from full time to part time.

According to the FMLA guidelines, examples of intermittent leave would include leave taken on an occasional basis for medical appointments or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. As to a reduced leave schedule, an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule, for example, could take leave on a reduced leave schedule.

Intermittent leave can become particularly difficult to administer and keep track of, and some employees may abuse it. For instance, an employer may notice that an employee who is in treatment for allergies seems prone to allergy attacks on Fridays in the summer. It is imperative that when an employer approves intermittent leave for an employee, those in the employee’s chain of command are notified of the need to keep the human resources department informed of the employee’s use of leave. Otherwise, without that notice, in situations where an employee needs to leave early due to the employee’s or the employee’s family member’s serious health condition, an employer won’t have a way to track that employee’s use of FMLA time. This reporting and tracking process often slips through the cracks with larger employers.

### Most Recent Amendments to the FMLA

Congress has amended the FMLA twice since 2009, and the president signed those amendments making them law.

### National Defense Authorization Act

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA). A portion of the NDAA served to amend the FMLA and expand the military leave provisions that were added to the FMLA in 2008 when Congress and President George W. Bush amended the FMLA with the 2008 NDAA that added military leave provisions to the FMLA.

The 2010 NDAA amendments to the FMLA specify that eligible employees may take FMLA leave for any qualifying exigency arising from the fact that the employee’s spouse, son, daughter, or parent is on or has been notified of an impending call to “covered active duty” in the armed forces. “Covered active duty” for members of a regular component of the armed forces means duty during deployment of the member with the Armed Forces to a foreign country. “Covered active duty” for members of the reserve components of the armed forces—members of the U.S. National Guard and Reserves—means duty...
during deployment of the member with the armed forces to a foreign country under a call or order to active duty in a contingency operation. Before the 2010 NDAA amendments, qualifying exigency leave did not apply to employees with family members serving in a regular component of the armed forces, and the law didn’t require that members of the U.S. National Guard and Reserves be deployed with the armed forces to a foreign country.

The 2010 NDAA also expanded the military caregiver leave provisions of the FMLA. Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a “covered service member” to take up to 26 workweeks of FMLA leave in a single 12-month period to care for a “covered service member” with “a serious injury or illness.” Under the 2010 NDAA amendments, the definition of “covered service member” has expanded to include a veteran “who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness” if the veteran was a member of the armed forces “at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.” Previously, military caregiver leave was limited to care for current members of the armed forces, including the regular components and the U.S. National Guard and Reserves.

In addition, the 2010 NDAA amended the FMLA’s definition of a “serious injury or illness.” For a current member of the armed forces, the definition includes not only a serious injury or illness that a member acquired in the line of duty on active duty but also a serious injury or illness that “existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces” that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating. For a veteran, a serious injury or illness is defined as “a qualifying injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.”

The Airline Flight Crew Technical Corrections Act
On December 21, 2009, President Obama signed the Airline Flight Crew Technical Corrections Act (AFTC), which serves as an amendment to the FMLA. The AFTC established special hours-of-service eligibility requirements for airline flight attendants and flight crew members.

The amendment specifies that an airline flight attendant or flight crew member meets the hours-of-service requirement if, during the previous 12-month period, he or she (1) has worked or been paid for not less than 60 percent of the applicable total monthly guarantee or its equivalent, and (2) has worked or been paid for not less than 504 hours, not including personal commute time or time spent on vacation, medical, or sick leave.

Survey of State and U.S. Territory Leave Laws
The FMLA sets the minimum bar for employee leave entitlements, but some states have raised the bar and have enacted state laws which further expand an employee’s leave entitlement. Some states have expanded leave benefits for employees of educational institutions public employees, or both, while others have expanded leave benefits for employees of private employers as well.

Expanded Leave for Educational Institution Employees and Public Employees
The following states have expanded coverage for public employees, employees in educational institutions, or both: Alabama, Alaska, Arkansas, Califonia, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Montana, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia.

Expanded Leave for Employees of Private Employers
Other states have taken things a step further and have provided expanded coverage for those employed by private employers. These states include California, District of Columbia, Hawaii, Maine, Maryland, Minnesota, Mississippi, Nevada, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. A few states, such as New Jersey and Washington, even have established paid insurance benefits during leave.

No Expansion of Leave Under the FMLA
Yet other states have not expanded coverage. They include Iowa, Kansas, Michigan, Missouri, New Hampshire, New Mexico, North Carolina, Pennsylvania, Utah, and Wyoming.

Family and Medical Leave Laws in U.S. Territories
The United States territories of Guam, Puerto Rico, and the U.S. Virgin Islands have enacted statutes similar to the Family and Medical Leave Act. A number of countries other than the United States provide employees with family and medical leave benefits as well.

Foe, Friend, or Frienemy?
As a defense attorney, I clearly view the FMLA as a frienemy. According to the Urban Dictionary, a frienemy is defined as “a person who you treat and whom treats you as a friend but if they are given a chance would ‘cut your throat’ or get one over on you/put themselves first if it would benefit themselves, or they would gain an advantage over you.”

On its face the FMLA seems a helpful way to allow employees to balance family and medical needs while retaining job security. From an administrative perspective, however, the FMLA creates minefields for employers. It is imperative that you educate your clients on both the federal and state leave acts that apply to them and encourage larger employers to train supervisors to have direct communication with Human Resources when it comes to employees calling in sick, otherwise employers can quickly run afoul of the FMLA. You need to encourage and to remind employers of the posting requirements under the FMLA and of the need to keep their existing policies current with the newer amendments to the FMLA.