Potential Employer and Employee Pitfalls under the Federal Family and Medical Leave Act

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In my work with non-profit organizations, there has been no shortage of issues that arise in the employment law setting. These matters range from negotiating executive contracts to responding to claims of discrimination or workplace harassment, questions about the application of the wage and hours laws, interpretation of non-competes, and so on and so forth.

However, one federal employment statute that on occasion requires a "deeper dive" when it comes to carefully applying the facts to the law is the Federal Family and Medical Leave Act, more commonly referred to as the FMLA.

In this short article, I want to point out a few provisions of the statute and FMLA regulations that may be overlooked and thus create avoidable liability exposures.

Summarizing the FMLA

In a nutshell, the FMLA provides qualified employees with up to 12 weeks of unpaid, job-protected leave per year with their group health benefits being maintained while on such leave.

The Act was designed to help employees balance their work and family responsibilities by permitting them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

The FMLA impacts public agencies and businesses with 50 or more employees. Employers falling under the FMLA must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

- for the birth and care of the newborn child of an employee;
- for placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

Employees are eligible for FMLA leave if they have worked for their employer at least 12 months, at least 1,250 hours over the preceding 12 months, and work at a location where the business employs 50 or more employees within 75 miles of the location. Time taken off work due to pregnancy complications can be counted against the 12 weeks of family and medical leave.

Also, and more recently, the FMLA provides 26 workweeks of leave during a single 12-month period for the care of a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice or a residential care facility. The definition also includes continuing treatment by a health care provider.

What is an eligible employee entitled to receive under the FMLA? According to the Act, reinstatement to the same or a substantially similar job upon his or her return, as well as the continuation of medical benefits.

Note that some states have their own version of a family and medical leave act, which may provide even greater coverage to the qualified employee or cast a wider net to include a greater number of employers and employees. For example, the District of Columbia Family and Medical Leave Act (DCFMLA) requires employers with 20 or more employees to provide eligible employees with 16 weeks of unpaid family leave and 16 weeks of unpaid medical leave during a 24-month period. Thus, it is critical to examine

how the state where your business is located addresses the topic of family and medical leave.

Potential Interpretative Pitfalls

When being presented with a request for leave under the FMLA, there are some elements of the Act that can be overlooked or easily misinterpreted. I'm going to talk about just a few of these in this article. As always, when you and/or your human resources director have any questions about the FMLA (Federal and/or applicable state), please be sure to consult with your general counsel or outside employment counsel.

A) Who counts toward the 50-employee threshold?

First, the employer must employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year. An employee is treated as being employed each working day of the calendar week if he or she works any part of that week. For clarity, the workweeks do not have to be consecutive.

Under the FMLA, the following employees are to be included in the 50 employee count: 1) any employee who works in the US or any territory or possession of the US; 2) any employee whose name appears on the company's payroll records, whether or not any compensation is received for the workweek; 3) any employee that is on paid or unpaid leave, including FMLA, suspension or other forms of leave of absence, but subject to the reasonable expectation that he or she will resume active employment; 4) an employee of foreign firms operating in the US, and 5) employees who are full-time, part-time, seasonal and temporary.

For example, if Company A is headquartered in DC with 35 employees physically working in the office and has a plant location in Roanoke (more than 75 miles away) that employs another 20 employees at that site, does the FMLA impact Company A under this scenario? The answer is no, as the 20 employees working in Roanoke fall outside of the 75-mile covered radius of the DC office.

However, what about remote employees? How do they fit in the above fact pattern? The short answer is that remote employees must be counted toward the DC HQ numbers, even when they are working more than 75 miles away from the DC HQ site. Under the applicable Federal Regulation, 29 C.F.R. Section 825.111, "an employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel within a particular sales territory and who generally leave to work and return to their personal residence, or employees who work at home under a telecommuting policy. Rather, their worksite is the office to which they report and for which assignments are made."

So, if your company has remote employees working from home and they report to and receive their assignments from the HQ office, they are to be counted toward the number of employees working at the HQ site for purposes of determining FMLA applicability. Just because they are not on site or within 75 miles of the office does not mean you can assume they will not apply toward the 50-employee threshold.

Whether you are talking about the FMLA or the applicability of any other federal or state statute that requires a specific number of employees to trigger applicability, if you are close to that figure, don't guess and don't assume! Take the time to consider any remote employees and above all, re-examine your payroll records for the previous two years and add up the number of actual employees you had on the payroll during that period.

B) What about the case of an employee's absence from work due to the effects of substance abuse as opposed to an absence for treatment of the same?

The FMLA provides that an employee may take FMLA leave related to substance abuse, for example, alcoholism, only if the employee requests leave for the purpose of seeking and obtaining treatment for the condition or to care for a relative who is seeking or obtaining such treatment. 29 C.F.R. Section 825.119(a). If the same employee misses work resulting from his or her use of the substance (alcohol or otherwise) as opposed to the treatment for the same, such employee will not qualify for leave under the FMLA.

C) What happens when a representative of the employee calls in to report the employee's absence due to an accident and hospitalization, however, the representative does not make any reference to FMLA leave and instead asks for the forms needed for the doctor to complete for the employee's medical leave? Does the FMLA apply? What are the duties of the employee and employer in such case under the FMLA and applicable regulations?

First, under the applicable FMLA regulations, notice may be given by an "employee's spokesperson," which may include the employee's spouse, an adult family member, or another responsible party, where the employee is unable to do so personally. Translation, the employee does not need to be the person to provide notice of FMLA leave where he or she is unable to do so and instead has a responsible party or family member provide the employer with a notice on his or her behalf.

Furthermore, the applicable FMLA regulations provide that in the case where an employer learns that an employee's leave may be for an FMLA qualifying reason, the employer is required to provide notice to the employee of his or her

eligibility to take FMLA to leave within 5 business days, absent some extenuating circumstance. The bottom line – an employee does not have to specifically request FMLA leave to be entitled to it initially.

Generally, where an employee knows about the need to take FMLA leave in advance and it is practical to so notify the employer, he or she must provide at least 30 days advance notice. If 30-days notice is neither possible nor practical because of the circumstances, the regulations provide that the employee should provide notice of the need for FMLA leave as soon as possible and practical.

D) What happens where an employee on FMLA leave continues to voluntarily perform work? Can and should the employer request that the employee stops working?

The short answer is yes. An employer can and should request that the employee on FMLA leave discontinue working while out on such leave. It is important for the employer to do so and document such instruction in case the employee at some later date comes back and alleges that the employer interfered with his/her FMLA rights.

E) *What if the employee's manager continues to call an employee out of FMLA leave inquiring about work-related matters? Does that violate the FMLA and the employee's rights under the FMLA?*

It could. An employer cannot require the employee out on FMLA leave to work while on leave. The FMLA does not specifically define what constitutes "interference with an employee's exercise of his or her FMLA rights." Thus, minimal work-related contact, or contact unrelated to work, will not likely rise to the level of violating the FMLA. If you are calling the employee to ask about a contact in his or her Rolodex or to update them on things in the office, that likely will not be deemed to rise to the level of "interference with the exercise of employee rights under the FMLA." Just don't ask them to do work!

If, however, the employee continues to perform work voluntarily while on leave and has been advised to stop, be sure to document the instruction and the fact that any work that was performed was entirely voluntary.

The above are simply a few examples of some of the unusual circumstances that may arise from time to time within the context of the FMLA, each of which can be dealt with by reviewing the applicable FMLA regulations or the language of the statute and case law construing the same. If you are unclear about the proper response to an FMLA related situation you have not previously experienced, sit down with your HR director and/or your employment counsel and talk it over thoroughly. Don't assume anything – get the right answer.