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Handling Difficult Issues Under the Family Medical Leave Act

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"FMLA" refers to the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 et seq.; "ADA," to the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.; "FLSA," to the Fair Labor Standards Act, 29 U.S.C. §201 et seq.; "Title VII," to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; and "PDA," to the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k).

A. Introduction

1. The FMLA has significantly revised employment law, not only because of the rights it confers on many employees, but also because of its interplay with other employment discrimination laws.

2. In addition to questions concerning its relationship to other laws, questions also arise concerning the status of contingent workers under the statute.

3. This outline addresses these issues and questions and provides answers that should help workers understand their rights and responsibilities, as well as employers who are formulating their employment policies.

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B. The Intersection of the FMLA, Title VII, and the ADA

1. Section 2651(a) of the FMLA provides that employers covered by the FMLA must still comply with applicable antidiscrimination law, most notably Title VII, as amended by the Pregnancy Discrimination Act, and the ADA. *See also* 29 C.F.R. §825.702(a) (1995). Indeed, Title VII and the ADA cover a broader range of employers (those with 15 or more workers) and employees (no minimum eligibility requirements).

2. For example, any leave in excess of the 12-week FMLA entitlement or any paid leave must still be provided in a manner consistent with Title VII – i.e., in a manner that is both gender-neutral and that treats pregnancy disability the same as any other temporary disability.

3. In addition, when an eligible employee's health condition is both a disability under the ADA (a physical or mental impairment that substantially limits a major life activity) and a serious health condition under the FMLA (an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider), both statutes apply. In general – but not always – the FMLA reaches a broader range of health conditions, including temporarily disabling conditions such as surgery for tonsilitis, pregnancy, and childbirth.

4. Section 2651(a) of the FMLA makes clear that it does not "modify or affect" any federal or state antidiscrimination law. This means that when provisions of both laws apply simultaneously, the provision more generous to worker rights is controlling.

   a. For example, the FMLA, unlike the ADA, contains no concept of undue hardship or reasonable accommodation. A covered employer must provide an eligible employee with up to 12 weeks of job-guaranteed leave with continued health insurance coverage. If a worker cannot perform her job as a result of a serious health condition, she is not required to accept a reasonable accommodation (except where the worker has requested to take the leave on an intermittent basis – *see* section 2612(b)(2) of the FMLA; 29 C.F.R. §825.702(d)).

   b. Even after a worker has exhausted the 12-week leave entitlement under the FMLA, the worker still may be entitled to an additional accommodation under the ADA. Such an accommodation could include additional leave, flexible scheduling, and restructuring. Although some

questions remain, it may well be relevant – but not dispositive – for an employer to point to the fact that it had already provided 12 weeks of FMLA in arguing that a proposed reasonable accommodation created an undue hardship.

c. Other areas of overlap between the FMLA and the ADA involve medical certification requirements. For example, both laws require that any medical information obtained by the employer must be kept confidential. To be safe, an employer should keep medical information obtained under the FMLA in files separate from that information obtained under the ADA.

d. Employers should also be careful that any attempts to obtain medical certification of an employee's serious health condition under the FMLA do not run afoul of the ADA's limits on medical inquiries. In other words, when the employer decides to seek medical certification or fitness-for-duty confirmation under the FMLA, it should ensure that its inquiries are job-related and consistent with business necessity.

C. Relationship of the FMLA to State and Local Laws

1. Section 2651(b) of the FMLA provides that: "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."

2. So, employers must comply with both federal and any state or local law. All in all, 34 states, the District of Columbia, and Puerto Rico have some type of leave guarantee. Of these, 23 apply to both private and public employees. The remaining 13 have laws that apply to public employees only. For a summary of various state leave law provisions, *see* the Women's Legal Defense Fund's *State Laws and Regulations Guaranteeing Employees Their Jobs After Family and Medical Leaves.*

3. Federal and state leave requirements may vary in a variety of ways: length of leave required, size of employers covered, the standards for determining eligible employees, the family or medical circumstances that trigger leave entitlement, the circumstances under which intermittent leave is available, the circumstances under which paid leave can be substituted for unpaid leave, notice and certification requirements, statute of limitations, and available remedies.

4. If any simultaneously applicable provisions are inconsistent, the provision providing more generous leave rights to the employee prevails. 29 C.F.R. §825.701(a) (1995).

   a. For example, Minnesota law provides for six weeks of parental leave (leave to care for newborn or newly adopted children only) for employers with 21 or more employers. Thus Minnesota employers with 21 to 50 workers must provide six weeks of parental leave to eligible employees. *See* Minn. Stat. Ann. §§181.940 to 181.944 (West 1993).

      i. Employers of 50 or more must provide the more generous federal leave provisions to eligible employees, which also provide leave to care for a seriously ill family member, as well as for the worker's own serious health condition.

      ii. Employers of 50 or more must provide six weeks of parental leave to those employees who are eligible under state, but not federal, law (e.g., those who work 12 months at 20 or more hours per week, as required by Minnesota law, but who have not amassed 1,250 hours over the last 12 months, as required by federal law).

   b. If simultaneously applicable federal and state laws provide leave for the same reason, leave taken for that reason runs concurrently against both the federal and state entitlements.

      i. If, however, a state provides leave for a wider range of circumstances, leave taken under state law for reasons not covered by federal law does not draw against the federal 12-week entitlement.

      ii. For example, two weeks of leave taken under state law to care for a seriously ill parent-in-law, grandparent, or domestic partner does not deplete any of that worker's 12-week federal leave entitlement, since the federal FMLA does not provide leave for such situations.

D. Coverage of Contingent Workers

1. As the American economy increasingly relies on contingent workers – part-time, seasonal, temporary, and leased workers, and independent contractors – several questions arise about the FMLA's treatment of those workers. For example:

a. Are part-time, temporary, and seasonal workers included in determining whether an employer has the requisite 50 workers sufficient to trigger coverage under the FMLA?

i. The FMLA covers employers who employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." §2611(4)(A)(i).

ii. This definition is borrowed from Title VII, where "to employ" has been interpreted generally as "to maintain on the payroll." The FMLA's legislative history and the final regulations explain that this includes any employee whose name appears on the employer's payroll for each working day of the calendar week regardless of whether compensation is received for each day of the week. 29 C.F.R. §825.105(b).

iii. In other words, part-time workers who work three days a week – thus receiving pay for only three days of the week yet appearing on the payroll for the entire week – will count towards the 50-worker threshold. On the other hand, employees who start or end employment midweek – and thus appear on the payroll for only part of the week – will not be included in the count. 29 C.F.R. §825.105(d).

iv. Once an employer has been found to have the requisite 50 employees for each of 20 calendar weeks in a given year, it remains covered under the FMLA for that year and the next calendar year regardless of whether it later dips below 50 during that time. Thus, fluctuations in workforce size due, for example, to the use of seasonal workers will not relieve an employer from coverage under the FMLA. 29 C.F.R. §825.105(f).

b. Are leased employees, or workers provided by a temporary help agency, counted in determining whether the employer has the requisite 50 employees?

i. The final regulations rely on principles of joint employment as developed under the FLSA. 29 C.F.R. §825.106(a) (1995). Where two or more businesses exercise some control over the work or working conditions of a worker – as is generally the case with workers provided to a business by a leasing or temporary help agency – the businesses may be joint employers under the FMLA.

ii. This determination carries significant implications in determining an employer's coverage under the FMLA. Workers who are jointly employed by two employers must be counted by both employers in determining whether each is covered. 29 C.F.R. §825.106(d).

iii. For example, a temp would be counted by both the temp agency and by the employer leasing the temp in determining whether each business has the requisite 50 workers. This means that an employer who has 40 permanent employees and 10 workers from a temp agency on its payroll for 20 calendar workweeks in the current or preceding year is covered.

iv. In a joint employment relationship, the obligations of each employer vary, depending on whether it can be characterized as the "primary" or "secondary" employer. Only the "primary" employer is responsible for posting notice, providing leave, maintaining health benefits, and ensuring job restoration.

v. In general, the "primary" employer will have the authority and responsibility to hire and fire, make payroll, and provide benefits (the placement agency thus most commonly would be the primary employer for temporary and leased employees). 29 C.F.R. §825.106(c),(e).

vi. Although the "secondary" employer is not responsible for providing the major substantive rights under the FMLA, it is prohibited from discriminating or retaliating against employees who assert leave rights. For its "regular" (non-temporary) workforce, of course, a covered secondary employer must comply with all responsibilities under the FMLA. In the scenario described above, the employer would be considered a secondary employer of the 10 workers it leases from a temp agency, but would still be the primary employer – with all attendant responsibilities for compliance with the FMLA – for the 40 workers on its permanent payroll.

c. Are part-time, temporary, or seasonal workers "eligible" for leave under the FMLA? To be eligible for leave under the FMLA, a worker must be employed by an employer covered under the act (as discussed above) and must also satisfy three additional requirements:

i. The worker must have been employed by the covered employer for at least 12 months by the date the leave commences. These need not be

the 12 months immediately preceding the leave or even 12 consecutive months – just 12 months at some point. In determining whether this 12-month threshold has been reached, count any full or partial week during which an employee has been maintained on the payroll as a week of employment, with 52 weeks of employment equalling 12 months. 29 C.F.R. §825.110(a) and (b).

ii. The worker must have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the beginning of the leave. This breaks down to an average of 25 hours per week over a year's time. In determining how many hours have been worked, the statute makes clear that we should look at the number of hours an employee has worked for the employer within the meaning of the FLSA – that is, not limited by an employer's methods of recordkeeping or compensation that do not accurately reflect all of the hours an employee has worked for the employer (e.g., airline pay practices that count only hours flight attendant or pilots actually spend in the air – excluding hours worked before, between, and after flight – as hours worked for pay purposes). 29 C.F.R. §825.110(a) and (c).

iii. The final regulations also make clear that employees who are exempt under the FLSA – such as bona fide executive, administrative, and professional employees – for whom no hours-worked records are kept, will be presumed to have worked at least 1,250 hours during the last 12 months. At all times the employer has the burden to prove that an employee did not work 1,250 hours in the last year before denying leave. 29 C.F.R. §825.110(c).

iv. The employer must employee 50 or more employees within 75 miles of the worker's worksite. This provision was designed to ensure that an employer has some backup in the immediate geographic area to absorb the temporary loss of an employee on leave. In making this determination, the final regulations require the inclusion of all employees maintained on the payroll on the date that the employee requests leave – not just eligible employees. 29 C.F.R. §825.110(a)(3). If, at that time, according to the final regulations, an employee is determined eligible, his eligibility will not be terminated by subsequent changes in the number of employees within 75 miles. 29 C.F.R. §825.110(f).

E. Conclusion

1. The FMLA does not modify or affect any federal antidiscrimination law. Employers must still comply with such laws as Title VII and the ADA.

2. The FMLA does not modify or affect any state or local antidiscrimination law. Thus employers must comply with both the FMLA and any applicable state and local law.

3. Generally, part-time and seasonal workers will count toward the 50-employee threshold of the FMLA. Jointly employed workers, such as temps, also may count toward the threshold.

4. Employers must carefully construct their employment policies around these statutory requirements.