

UNINTENDED CONSEQUENCES OF THE FMLA AND ITS REGULATIONS

Introduction

Both employers and employees benefit from workplaces that encourage health and safety and support an appropriate balance between work and family demands. The Family and Medical Leave Act (“FMLA”) was enacted in 1993 on those principles.

Employers and employees have now had 15 years of experience with the FMLA and nearly 15 years’ experience with the Department of Labor’s regulations prescribing rules for putting the FMLA in practice. It’s time to reflect and evaluate how it has worked in practice and how effective the regulations have been. Although various aspects of the FMLA and its implementing regulations operate well, others serve to undermine the spirit of the FMLA and are inconsistent with Congress’ intent in enacting the law. Simply put, there have been serious unintended consequences that have become clearer with greater experience of how the regulations have worked in actual practice, in actual workplaces.

Many unintended consequences of the FMLA result from FMLA leave being used intermittently for chronic health conditions. Intermittent leave taken for chronic conditions almost always involves what have become known as “unscheduled,” “unannounced,” “unforeseen,” or “unpredictable absences.” For convenience, this paper will refer to them as “unscheduled” absences.

The unintended consequences of these intermittent, unscheduled absences are significant. Employers, employees, customers, and the public are all adversely affected by unscheduled absences in numerous ways that were not contemplated when the Act and its implementing regulations were adopted. A better balance is now needed between the original, laudable purposes of the FMLA and the way the current regulations have operated in practice.

Unintended Consequences

The following list outlines some of the major unintended consequences of the FMLA and its regulations with respect to intermittent absences for chronic health conditions. They underscore the need for FMLA regulations to be modified in a manner that benefits all stakeholders, employees and employers alike and ensures FMLA protections are available to all employees for decades to come.

1. Excessive Absenteeism With Impunity for an Employee’s Entire Work Life

Under the FMLA, an employee is entitled to 60 work days of leave per year for qualifying reasons, including the employee’s own serious health condition and the serious health conditions of a spouse, child, and parent as well as other major life events such as the birth or adoption of a child. For most employees, there are 260 work days in a year. With a medical certification for a chronic health condition, the FMLA permits an employee to be absent on 60, or nearly 25%, of those days with impunity. At its outer limits, an employee could work a 4-day work week every

single week during a year, year after year, and never be disciplined or dismissed for unacceptable absence. The FMLA has rendered meaningless no-fault attendance policies because employers are legally prohibited from disciplining or discharging employees who have excessive absenteeism year after year due to unscheduled intermittent FMLA absences. The FMLA was intended to provide leave for serious health conditions and emergency medical situations of a temporary nature. It was never intended to allow an employee to work as little as 75% of the time on a permanent basis.

2. Decreased Productivity and Disruption/Shutdown of Operations (“Domino Effect”)

The FMLA was intended to provide leave “in a manner that accommodates the legitimate interests of employers.” Employers have a clear interest in maintaining a productive and financially sound operation. When an employer’s business is productive and financially sound, both employees and customers benefit. Employees benefit in the form of job security, pay increases, a variety of benefits, and an enjoyable work environment. Customers benefit through better and more reliable service from the company.

However, in cases where there are an unreasonable number of unscheduled absences due to FMLA leave, productivity is disrupted, sometimes with serious effects. If multiple employees have unscheduled absences at the same time, the disruption to operations is compounded. In some cases, production or services have been shut down or substantially delayed. In others cases, employers find it difficult or impossible to meet legally required staffing ratios (such as those of nurses to patients, flight crew composition, teachers to students, or prison guards to prisoners).

Certain operations and industries are particularly prone to the disruptive effects of FMLA leave:

- a. *Sequential, module, and interdependent operations* are those in which each employee assigned to the operation is critical to the goods or services produced. The absence of one employee means the goods or services cannot be produced or made available at that time. Examples include assembly line operations, team module assembly, air transportation (where a plane cannot leave without the entire crew), and medical services (where a surgeon, anesthetist, surgical nurse, and others are essential to perform the services).
- b. *Time-sensitive and critical service operations* are those in which goods or services must be immediately available or delivered by critical deadlines to those in need or to protect the public. The absence of one employee who is responsible for delivery of the goods or services means that critical goods or services may not be available to those who need them when they need them or the quality of services may be compromised because of understaffing or utilization of less qualified substitutes. In some cases, the law dictates minimum staffing requirements. Examples include transportation (buses, commuter trains, airlines, trucking), health services (hospitals, clinics, nursing homes, long-term care facilities), utilities (electric, gas, water, and sewer), telecommunications (phone service), law enforcement (police, dispatchers), fire and health protection (firefighters, paramedics, ambulance personnel), and jails and correctional institutions.
- c. *Peak demand operations* are those in which goods and services must be available during periods of high demand. The absence of even one employee who is needed during peak demand periods means that critical goods and services may not be available to those

who need them. Examples include utility power outages, call centers that have committed to be available on a 24/7 basis, and emergency services needed after accidents or natural disasters (such as police, firefighters, and medical personnel).

3. Employee Self-Certification of Medical Necessity (“Leave At Will”)

When a health care provider certifies that an individual has a chronic medical condition and an employee will need to be absent on an unscheduled basis because of that condition, under the current regulations, the health care provider effectively delegates responsibility to the *employee* to determine when it is medically necessary for the employee to be absent. This permits the employee to make determinations of “medical necessity,” when such decisions should rightfully reside with a medical expert.

With respect to any particular unscheduled absence, the employee “self-certifies” the medical necessity of the absence and simply calls in absent (with no advance notice required) stating that he or she is medically unable to work. This allows the employee to be absent “at will” on an unscheduled basis. Furthermore, the FMLA provides no useful tools for an employer to verify if a particular unscheduled absence is really for an FMLA purpose, since the employee is not required to actually see or even call his or her doctor regarding the medical necessity of an unscheduled absence so long as the employee has the original medical certification. In addition, an employer is prohibited from requesting verification of the medical need for the absence except in very limited circumstances. Yet the FMLA was not intended to allow employees to make medical determinations or to control the medical determination process, as they do not have the requisite medical expertise to do so.

4. Employee Self-Determination of Work Schedule and Work Assignments

Because of these provisions for self-certification of absences, an employee on intermittent leave resulting in unscheduled absences can essentially establish his or her own work schedule. He or she can work a shortened work week on a regular basis and can avoid working required overtime, weekends, and holidays. In addition, an employee can avoid working certain portions of his or her job that are distasteful to the employee by timing an unscheduled absence when he or she would otherwise be required to perform the distasteful duties. Further, an employee can even time an absence to be available for higher paid portions or days of the job and not work portions at his or her normal wage rate.

For example, an employee may have unscheduled absences during normal working hours, but still decide to work premium rate hours, weekends, and holidays which may be paid at 1-1/2 to 2 times his or her normal rate. Or a housekeeping employee, for instance, may have an established set of duties that are performed in a certain order and which might include cleaning of restrooms, floors, or equipment. An employee with a medical certification can simply report to work late to avoid distasteful duties that occur early in the sequence or can leave work early to avoid distasteful duties that occur later in the sequence. However, the FMLA was not intended to deprive employers of the right to make staffing and work assignment decisions nor to allow employees the right to customize their own work schedules and duties or maximize their pay at premium rates as they so choose.

5. Conversion of Full-Time Jobs to Permanent Part-Time Jobs with Full-Time Benefits

Similarly, a full-time employee who is eligible to take 60 work days of FMLA leave (which can be taken in increments as small as one hour) can work a shortened work week each week of the year or a part-time schedule. At the same time, an employer is prohibited from reducing that employee's benefits to the level available to all other employees regularly working a similar short work week. This means that a full-time employee on intermittent FMLA leave can permanently work a part-time schedule and still receive full-time benefits, while a part-time employee who is not on intermittent leave is only entitled to part-time benefits, leading to a significant internal inequity. The FMLA was intended to preserve full-time status and benefits on a temporary basis, but it was not intended to provide permanent protection of full-time status and benefits when an employee is only working a part-time schedule.

6. Morale Problems

When an employee is absent because of unscheduled FMLA intermittent absences, the employer faces a productivity problem. The employer could hire a temporary employee, but frequently no qualified temporary employee is available on such short notice. The employer could allow the absent employee's work to remain undone, but this is impossible if the employee's work is part of an interdependent, time-sensitive, peak demand, or critical services operation. The employer could overstaff at all times in anticipation of unscheduled absences, but in an era of lean operations necessary to compete in a global marketplace, overstaffing is a luxury that most employers simply cannot afford.

In most cases, the employer has no alternative but to reassign the absent employee's work to others or to require the employee's co-workers to work overtime. Co-workers generally do not mind lending a hand on an occasional basis when another employee has a legitimate reason to be absent. But if the absent employee is regularly absent or working less than a full schedule on a permanent basis, his or her co-workers can become resentful when they are too often burdened with the absent employee's job duties. This resentment results in adversarial work relationships among co-workers, hostility, workplace tension, and internal complaints by those who pick up the slack against those who appear to not be carrying their own responsibilities. The FMLA was intended to help employees achieve a better balance between work and family demands. It was not intended to jeopardize work relationships and produce an antagonistic environment.

7. Inability of Co-Workers to Balance Their Own Work and Family Demands

One main purpose of the FMLA was to support employees' need for a reasonable balance between work and family demands. When co-workers are repeatedly required to cover an absent employee's workload, those co-workers must work harder, ("doing more with less"), working longer hours under stress. It also means that the co-workers are inconvenienced and required to forego their own personal needs. They end up with less time to tend to their own families, being required to work holidays and weekends, and forced to rearrange their personal lives to accommodate employees who frequently take unscheduled intermittent FMLA leave. The FMLA was intended to give all qualifying employees an equally effective opportunity to balance their lives. It was not intended to benefit only some employees unfairly at the regular expense and sacrifice of others.

8. Leave Contagion ("Ripple Effect")

The use of intermittent FMLA leave for chronic conditions that result in unscheduled absences is increasing at an alarming rate. This type of FMLA leave has certainly had a ripple effect. It is not unusual for work groups, departments, and certain job classifications to have multiple employees with intermittent FMLA leave certifications on file (in extreme cases, as high as 75% of employees in that group) at the same time and for multiple employees to incur unscheduled absences at the same time.

There may be two reasons for this leave contagion. First, co-workers who are constantly called upon to cover the work of an employee who regularly takes advantage of unscheduled FMLA leave may decide to level the playing field by seeking their own intermittent FMLA leave certifications even if these employee would not otherwise do so or need such leave. Second, the added stress of performing additional duties and working additional hours and the inability to balance work and family needs may itself cause chronic medical problems for employees who are burdened too frequently with other employees' job duties. In such cases, they may legitimately need their own FMLA leave certification. In either situation, the number of intermittent FMLA leaves increase, which exacerbates the already existing problems caused by unscheduled FMLA absences. One purpose of the FMLA was to help employees successfully deal with medical issues so that the workforce as a whole would be healthier and more productive. It was not intended to generate FMLA leaves as a result of other employees' unscheduled absences.

9. Increase in Employer Costs and Decrease in Compensation/Benefits

When unscheduled absences occur, employers incur increased staffing costs through overstaffing, hiring temporary employees at a higher rate than the absent employee is paid while continuing to provide paid time off benefits to the absent employee (if such benefits have not been exhausted), and paying overtime to other employees. Employers also incur additional costs just to manage and administer FMLA leaves, which involve a great deal of paperwork and a considerable amount of time to evaluate and manage. Further, an employer's health insurance costs increase when FMLA leave is used because of higher utilization by employees for doctors' appointments, treatments, and completion of paperwork. These increased costs affect the employer's ability to provide increases in compensation and benefits. One very specific consequence of the FMLA has been employers' inability to provide true perfect attendance bonuses to employees; most employers have eliminated perfect attendance awards and bonuses because of the FMLA.

10. Adverse Effect on Turnover

Although some contend that the FMLA reduces turnover, this may be true only with respect to employees who regularly use intermittent FMLA leave year after year for chronic conditions. As pointed out earlier, these employees can work a part-time schedule on a permanent basis with few if any consequences. They are unlikely to resign and seek employment with a different employer where they will not be eligible for FMLA leave until they satisfy the one-year waiting period.

However, their co-workers may not have the same sense of loyalty if they are constantly required to work harder and longer at the expense of family and personal matters to cover for absent co-

workers. An increasing number of co-workers have become demoralized by the toll others' unscheduled absences take on them. They do not understand why employers cannot discipline or fire employees with excessive absenteeism. These once loyal and dedicated employees who maintain acceptable attendance records are thus more likely to resign to find more favorable working conditions. In addition, employers now tend to impose stricter attendance rules during the first year of employment before an employee becomes eligible for FMLA leave. Under the current FMLA regulations, employers understandably believe that they need to manage attendance problems early on to avoid having an excessive absenteeism problem later when they cannot impose disciplinary action. As a result, there is an increase in turnover during the first year of employment.

11. Adversarial Relationships with Health Care Professionals Because of the Restricted Ability of Employers to Communicate With Them

The FMLA prohibits employers (and their medical experts) from communicating directly with an employee's health care provider without the employee's consent. In many cases, the employee refuses to provide consent, erroneously believing that the medical privacy provisions of the Health Insurance Portability and Accountability Act prohibit these communications. For their part, many busy health care professionals do not understand the complexities of the FMLA and do not have sufficient facts at hand about an employee's absences or job duties. Consequently, they may certify a condition under the FMLA without really knowing whether it actually constitutes a condition that the FMLA is designed to cover. Many disputes about FMLA medical certifications, the medical necessity for an FMLA leave, and the reasonableness of absences could be resolved if employers, employees, and the medical community were encouraged to partner and cooperate with each other. Instead, the current FMLA regulations promote adversarial relationships among these three groups of interested parties.

12. Negative Impact on Customers, Loss of Business, and Resulting Job Losses

Unscheduled FMLA absences for chronic conditions impair an employer's ability to meet customer needs and demands. As discussed above, the unscheduled absences of even one employee on a repeated basis can result in delays to deliver goods and services and lower the quality of goods and services. When an employer cannot deliver goods and services as promised, it strains relationships with customers and hurts the employer's reputation. The ultimate cost is the loss of that customer's business. Loss of business then affects the employer's financial position and may result in workforce reductions. Although the FMLA was intended to provide job security, it may have just the opposite effect if excessive absenteeism jeopardizes an employer's relationships and business with customers.

13. Proliferation of Disputes and Litigation to Resolve Interpretation and Application Issues

The FMLA and its implementing regulations are very complex with no easy resolution of many issues. As a result, the law and regulations have generated a substantial number of cases regarding the interpretation, application, and legal validity of the FMLA regulations. The courts have found various FMLA regulations to be invalid and unenforceable in approximately two-thirds of the cases where they have been challenged. Employers incur substantial costs in time and attorney's fees trying to comply with the FMLA's requirements; these resources could be put to better use in improving workplaces, compensation, and benefits. When the FMLA was enacted and the regulations adopted, the amount of litigation that resulted from this well-intentioned law was simply not anticipated.