The Family Medical Leave Act Diaspora: Evolving Challenges for Public Employers

By Larry Lee and Dan Perkins



Introduction

Major Developments

The year 2013 saw some major activity with the Family Medical Leave Act by courts and the Department of Labor. Court decisions recognizing the potential for same sex marriages, new regulations clarifying employer obligations to employees with military associations and those with adult children, and a renewed effort by the DOL to focus its compliance and investigatory efforts on FMLA issues have placed public and private employers in the unenviable position of taking on the arduous task of reassessing their leave policies to ensure they are up to date and in compliance with the changing FMLA landscape.

Same Sex Partners

In June 2013, the U.S. Supreme Court struck down the Defense of Marriage Act, leaving it up to the individual states to define the term "marriage."[1] While the decision is not specifically about the FMLA, the holding will have a profound impact on FMLA leave rights among private and public employees alike. Shortly after the decision, the DOL updated its FMLA "fact sheets"[2] to include same sex marriages in its definition of "spouse" under the Act.[3] In late June 2014, the DOL published its official Notice of Proposed Rulemaking on the definition of "spouse," indicating the new regulations reflecting (and perhaps expanding on) the *Windsor* holding and confirmed same sex marriages as part of its definitions of a "spouse."

These changes signal new issues for public and private employers looking to ensure that their FMLA policies meet federal guidelines. Employers in states where same-sex marriage is legal have it easier – under the present DOL position, same-sex spouses are entitled to take FMLA leave to care for spouses with serious health conditions. However, at the time of this writing, neither *Windsor* nor the current DOL rules address the impact on FMLA eligibility in situations where same sex couples legally wed in one state, but move to a state where same sex marriages are not recognized. The proposed new rule would extend FMLA protections to same-sex partners in *all* states by premising eligibility on the laws of the state in which the marriage was celebrated, not the state of residence.[4]

Public Employer Takeaways

In light of the changes sparked by *Windsor* and the subsequent DOL move to codify and expand those rights, all employers (including public employers) should diligently review their FMLA policies to ensure compliance. State and local public employers in states where same-sex marriage is not legal face the greatest challenge, particularly in light of the possible changes to the DOL's regulations incorporating "state of celebration" rather than state of residence in defining the term "spouse." While the current state of the law may permit such government employers to decline to extend FMLA leave to same-sex partners today, the DOL's proposed rules may soon change that. Of course, all public employers should also ensure that their FMLA policies do not run afoul of their state's specific family leave laws (if any), even where those laws may differ from the FMLA protections provided.

2. DOL Regulations and Notices

In addition to its recent notice to the public concerning rulemaking on same-sex partnerships, in early 2013, the DOL released final FMLA regulations clarifying and expanding a number of important FMLA provisions that could have wide-ranging effects on public and private employers alike. Additionally, the DOL provided updated notices and model forms to assist employers in their compliance obligations under the Act.

a. Clarifications to the Increment Rules.

Although not prominently discussed, the DOL's changes to the rules govern-

ing how FMLA leave is accounted are significant. Previously, it was unclear what increments of leave could be designated under the FMLA, resulting in confusion in many instances of how much leave was used in a particular request. The new Final Rule addresses this issue and limits employers to using the same increments of leave permitted for other non-FMLA leave; however, employers may not use increments greater than one hour. If an employer allows employees to take sick or vacation leave in increments of quarter hours, the employer must allow FMLA leave to be taken in similar increments. This clarification allows the regulations to further the Act's restrictions against forcing employees to take more leave than is necessary to accommodate the employee's serious health condition.

The increment rule clarifications may see most applicability in situations concerning intermittent leave (a subject that could consume an entire article on its own). In a sense, however, these new rules may actually *help* employers by standardizing the way leave is granted and removing uncertainties that can make tracking intermittent leave difficult. Practically speaking, employers should review their FMLA policy to ensure that leave increments for FMLA match the increments permitted by other non-FMLA leave policies such as sick, vacation, holiday, and compensatory time policies. While the obligation is not onerous, an employer's failure to ensure and apply consistent leave rules could result in penalties in a DOL investigation, or worse, a lawsuit from an aggrieved employee.

b. Updates to Military Exigency Leave

Since 2008, the FMLA has permitted employees to take leave because of a "qualifying exigency" that arises out of active duty or a call to active duty of the employee's spouse, parent, or child who is a member of the Reserves or National Guard. The Act was amended again in 2010 to extend the same protections to employees whose spouse, parent, or child was a member of the Regular Armed Forces. The Final Rules issued by the DOL in February 2013 clarifies these provisions and expands them in several ways. Most importantly, the regulations creates new circumstances under which employees may exercise their right to exigency leave, such as now permitting leave to care for the parent of a military member when the parent is incapable of self care and the need for leave arises out of the military member's covered active duty. Employers must be aware of this expanded coverage to ensure that employees who qualify for exigency leave are given their full leave rights under circumstances where they previously were not permitted.

The new regulations impose significant obligations on all employers to understand the interaction between the Americans with Disabilities Act (ADA) and the FMLA when dealing with leave requests by employees with disabled adult children.

c. Expansion of Military Caregiver Leave Requirements

Coverage for veterans[5] with serious injury or illness was included in the 2010 amendment of the FMLA, and the recently released Final Rules clarify the rights of veterans under the Act's military caregiver leave provisions. The Final Rule defines serious injury or illness to include injury or illness incurred by the veteran in the line of duty on active duty or previous to active duty that was aggravated by the veteran's active service. The range of potential qualifying injuries and illnesses has been expanded significantly and are too numerous to mention; however, the takeaway for employers is quite simple: Careful scrutiny of a veteran's (or other service member's) request for Military Caregiver Leave is essential to ensure compliance with these obligations. Employers are encouraged to seek guidance from in-house or outside counsel before denying leave under these provisions.

d. New Requirements Regarding Adult Children

The new regulations impose significant obligations on all employers to understand the interaction between the Americans with Disabilities Act (ADA) and the FMLA when dealing with leave requests by employees with disabled adult children. The FMLA permits employees to take leave to care for children 18 years and older who have a disability under the ADA, are incapable of self-care, have a serious health condition under the Act, and where circumstances create a need for the parent to provide the care.[6] To clear up confusion among employers, the DOL's Final Rule now states that the "disability" requirement includes all disabilities, regardless of when they may have commenced."[7] The rule further clarifies that parents of

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children who meet this definition as a result of a wound incurred during military service are entitled to FMLA leave beyond that which is guaranteed by the military caregiver provisions of the Act.

The practical impact of this new regulation is that, due to the ADAAA's expanded definition of the term "disability," more employees with disabled adult children will be eligible to request leave that previously was not available. Human resources and employment counsel should thoroughly review their FMLA policies to ensure that employees previously excluded are now provided their full panoply of rights. In addition, training for HR professionals tasked with understanding and ensuring FMLA compliance is recommended to ensure best practices are followed. Employee handbooks and online policy statements that are accessible to employees should be updated to ensure employees who may now qualify for such leave understand their right to request it.

3. Increased DOL Investigations of FMLA Complaints and Compliance. In April 2013, new DOL FMLA Branch Chief Helen Applewhaite announced that the DOL would step up its on-site investigations in 2014. Ms. Applewhaite called 2014 a "pivotal year" in FMLA enforcement and promised a renewed emphasis with on-site reviews and complaint investigations. To date, those promises have come true with on-site investigations and compliance reviews up dramatically (primarily in the private sector) since April of last year. The focus has been on systemic FMLA issues characterized by broad and burdensome requests for documents spanning years. Likewise, employee interviews have become a standard on-site review tool in most audit and compliance review situations.

Take away and best practices note: To increase chances for a favorable outcome, employers are encouraged to thoroughly review FMLA policies, forms, and notices. At a minimum, all changes reflected in the February/March 2013 DOL regulation revisions should be reflected in these documents because any DOL investigation will review them. Employers should review all forms and FMLA correspondence to ensure they are legally compliant. Even if non-compliance does not lead to a future claim made by an employee, technical violations of the FMLA can be expensive and lead to increased federal government scrutiny.

Perhaps no provision of the FMLA has given employers, their counsel, and even the courts themselves more trouble than the term "serious health condition." This is as true for government employers as it is for those in the private sector. Determining whether an employee or family member has a serious health condition is the cornerstone for most FMLA leave requests – after all, if there is no serious health condition, there is no right to leave under the FMLA and no obligation to approve it.

Pristine record-keeping is essential when addressing DOL investigations. Best practices require accurate accounting of leave granted and supporting documentation in each individual employee's case. An FMLA file separate and apart from an employee's personnel file is helpful for ensuring all important documentation is maintained. Documentation should be kept for at least three years, or longer, depending on your agency's record-retention policies and state laws. Most importantly, employees – in particular, managers – should receive comprehensive training on FMLA rights to ensure that requests are forwarded to the appropriate responsible departments/authorities and unnecessary delays or hindrances are minimized.

What Employers Can Learn From These Changes

Comprehensive review and revision of existing FMLA policies are a critical step to ensure up-to-date compliance with FMLA requirements. The DOL regulation changes and the *Windsor* decision are more than one year old now, and although not extensive, they may have wide-ranging impact on a public employer's approach to FMLA requests for same-sex marriage topics, and in light of the growing number of veterans and employees with parents, children, or spouses in active or reserve military duty. Employers who have not yet reviewed their policies in light of these changes face significant perils – litigation, investigation, and penalties – if their policies do not reflect these important updates. Public employers are not immune from these perils, and in fact, may face as many or more challenges as private employers. Compliance is tedious and often difficult, but significant risks can be reduced or eliminated by undertaking this review sooner rather than later, with the assistance of well-versed FMLA employment counsel.

Serious Health Conditions

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On its face, the term seems simple enough, and the Act sets forth a seemingly straightforward definition:

> (11) SERIOUS HEALTH CONDITION. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves,
> (A) inpatient care in a hospital, hospice, or residential medical care facility; or
> (B) continuing treatment by a health care provider.[8]

The implementing regulations echo this definition and go on to explain that cosmetic treatments, the common cold, the flu, earaches, upset stomachs, nonmigraine headaches, and other similar minor conditions will not qualify as a serious health condition unless the illness requires inpatient care (an overnight hospital stay) or complications develop.[9]

The trouble with this definition is obvious, and in fact, one need only read these three implementing regulations to see the issue – every definition contains terms that need and have clarifying definition of their own. The result is a mass of generic definitions and vague language that can leave even the most experienced FMLA attorney scratching his head. Similarly, every example of *non-serious* medical conditions comes with a disclaimer that the condition could, in some circumstances be considered a serious medical condition under the definitions in the statute and its implementing regulations. To make matters worse, federal courts in different jurisdictions have reached polar opposite decisions concerning whether or not some conditions are "serious" enough to trigger FMLA provisions. It is enough to cause seasoned HR representatives to throw up their hands in exasperation.

1. What is "Serious" and What Is Not?

Fortunately for employers, many, if not most requests for FMLA leave are "easy" calls. If the condition requires a hospital stay, it is deemed "serious" and triggers FMLA rights.[10] Likewise, incapacity resulting from pregnancy or prenatal care, chronic conditions, and permanent long-term conditions also trigger FMLA rights.[11] The tougher calls involve conditions that do not *seem* to be serious, but which meet the technical definitions in the implementing regulations, or those conditions that are cited by the regulations as *not* qualifying under ordinary circumstances. In other words, the danger lies in the details of the implementing regulations.

For instance, the regulations state that the common cold and typical bouts of the flu are not generally considered serious health conditions giving rise to FMLA obligations under typical circumstances.[12] Therefore, an employee ordinarily would not be entitled to take FMLA leave for a simple case of the flu, or to care for a child who is diagnosed with a typical case of strep throat.[13] However, if the employee or child was hospitalized due to the illness, or sought treatment and was unable to attend work or school for three consecutive calendar days, the FMLA would apply providing the employee with the full panoply of rights.[14]

So what is the diligent employer supposed to do?

2. Best Practices for Assessing Employees' FMLA Requests.

The FMLA provides employers with some protections and procedures to insulate you from liability. They aren't foolproof, but exercising a strong, rational, dispassionate, and *consistent* review of every FMLA leave request you receive will help you get it right more often than not on the tough calls.

> a. Use a clear, concise FMLA Leave Request Form and a comprehensive medical certification form to gather as much data as you are permitted to request under the law.

Many problems with FMLA leave requests arise because employers lack sufficient information to adequately determine whether or not the Act applies. In most cases, either the medical certification is incomplete or unclear concerning diagnosis, treatment, duration of the expected incapacity, and prognosis, or the employee is unable/unwilling to provide sufficient information. The US Department of Labor maintains several government-approved, standardized forms (WH 380 Forms), which may be used to obtain significant information about the employee's (or family member's) condition. Be sure to follow up with providers who provide incomplete, illegible, or unhelpful information. **Practice note:** *Any contact with the health provider to authenticate the form or verify a signature are permitted; however, if you intend to contact the provider about the substance or content of the medical certification (such as clarifying a statement) you must obtain a HIPAA-compliant release from the employee first.*

In addition, the DOL regulations permit employers who have reason to doubt the validity of a medical certification to require a second opinion from a provider of the employer's choosing (so long as the provider is not employed by the employer on a regular or routine basis.) If the second opinion differs from the original certification, a third (and final) opinion from a provider selected by both the employee and employer may be requested and must be used as the basis for the grant or denial of FMLA leave. **Note:** *The employer will be required to pay for any second or third opinions.*

Use of these procedures – where appropriate – significantly enhances your ability to obtain full, complete, and accurate information about the employee's condition and increase your odds of making the right call on FMLA applicability.

> b. Use the FMLA regulations to develop a checklist or flow chart and then use that checklist with the completed medical certification to determine whether the employee's request fits any of the definitions of "serious medical condition."

Although complex and wordy, the FMLA regulations do contain a significant amount of information that can guide your agency, department, or

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government office in making difficult decisions on borderline FMLA requests. Start with the obvious qualifiers and work your way through the definitions, checking their applicability to your employee's facts. Was the employee (or family member) hospitalized? Has she seen a doctor, obtained a prescription, or been ordered to therapy of some sort? Has the employee missed (or will he/she miss) three or more consecutive days? Drafting a simple, but straightforward chart or checklist and tracking the answers during the process can help you make a more informed decision

c. Rely on your in-house or outside counsel to help you assess the risks of denying FMLA leave in the close calls.

Smart HR professionals know when they need help making a tough call. Most government entities have access to in-house or outside counsel to assist them to interpret medical certifications to determine FMLA applicability. Use those resources on the tough calls, even if it might cost your entity a small fee for the consultation. An hour of your outside counsel's time costs significantly less than a lawsuit will. Use the employment counsel to help you make the right decision.

d. When in doubt, err on the side of caution.

Sometimes, even after studying the regulations, applying your knowledge of the facts gleaned from the medical certification, and consulting your lawyer, the call is still very close as to whether an employee's request invokes FMLA leave. In such cases, it is almost always better to grant the leave than deny it. While it is true that having an employee on FMLA leave can costs your agency in productivity and money, those costs are a drop in the bucket compared to the lost time, attorney fees, and document production costs from litigation and administrative charges. The key to effectively managing these requests is to do the work and put in the effort to fully and completely analyze the circumstances to make the most informed decision.

3. Summary

Managing FMLA requests and analyzing employees' claims of serious health conditions is not easy. Diligence, persistence, and careful deliberation are the keys to maximizing efficient management of FMLA requests and minimizing the chances of litigation due to an improper denial. Public entities have an obligation to taxpayers to avoid wasting public dollars on unnecessary litigation that could be avoided by doing the legwork up front. In order to meet these obligations, it is imperative that all public entities exercise best practices in the FMLA process.

Concluding Remarks

Keeping up with the ever-changing landscape in FMLA compliance is not easy, and the DOL's stepped up efforts do not portend any relief in the near future. Therefore, all employers – public and private – must strive to create a strong systematic approach to properly assessing FMLA leave requests. Consider changes in your employment policies and employee handbook for compliance in substance and for better processes.

Notes

1. United States v. Windsor, 133 S.Ct. 2675 (2013).
2. The DOL posts "fact sheets" on it's website to assist employers as well as employees to understand their rights and responsibilities. They are essentially informal statements of DOL policy.
3. It should be noted that the definition of spouse includes same sex partners only in states where same sex marriages are legally recognized, since the *Windsor* decision leaves it up to the states to decide what marriages will be recognized.
4. In addition to extending to same-sex partners the right to take FMLA leave to care for a spouse with a serious health condition, the proposed rules also would extend equal rights to same-sex partners with respect to the FMLA's caregiver and exigency leave benefits for employees with military ties.
5. Applies only to veterans who were active members in the military within the five-year period before first taking military caregiver leave.
6. *See* the DOL Interpretation Letter at http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm
7. *Id.*; *see also* 29 C.F.R. § 825.122(c)
8. 29 U.S.C. § 2611(11).
9. *See* 29 C.F.R. §§ 825.113 – 823.115
10. 29 C.F.R. § 825.114.
11. 29 C.F.R. § 825.115.
12. 29 C.F.R. §825.113(d); *see also* S. Rep. No. 103-3, at 28 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 30 (Senate Report stating that "routine, commonplace illnesses of short duration" simply are not covered by the statute).
13. *See* King v. The Permanente Medical Group, Inc., No. 2:13-01560, 2013 U.S. LEXIS 134388 (E.D.Cal. Sept. 19, 2013); *see also* Michaels v. Norton Healthcare, Inc., No. 3:10-CV-00383 (W.D.Ky, July 14, 2014).
14. *See* Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001). ML

IMLA's 79th Annual Conference
Baltimore, Maryland
September 10 -14, 2014

