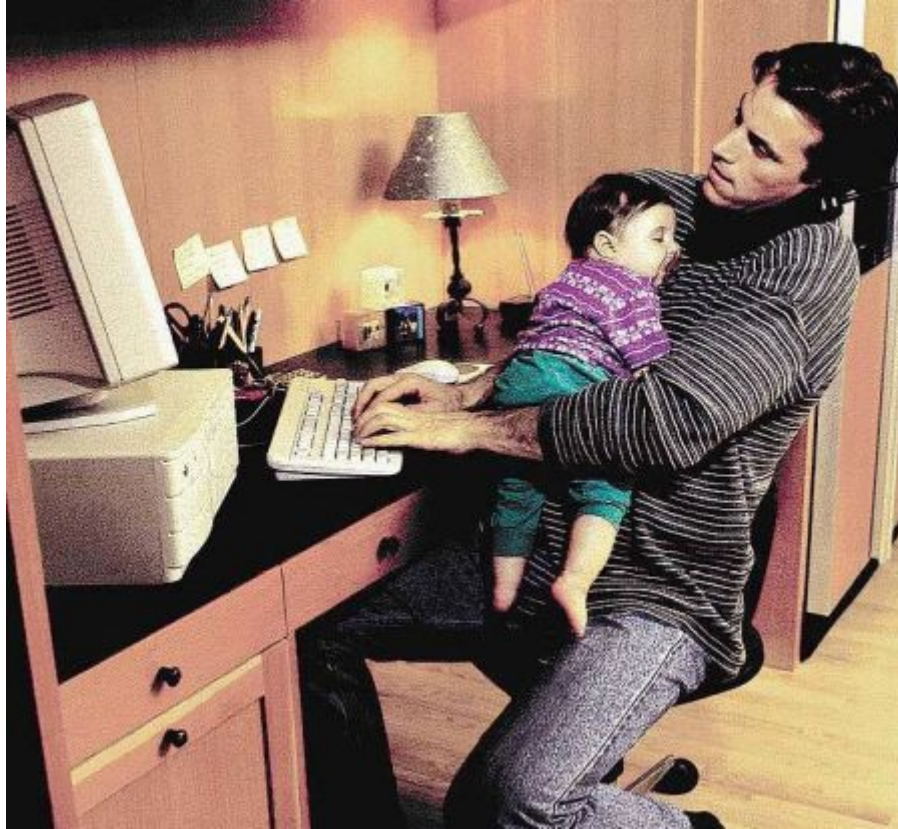


IDEAS FOR FMLA DECISION-MAKING



Sydney E. Rab, Senior Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA. 23219

E-mail: SRab@oag.state.va.us

Telephone (804) 786-1109

Fax (804) 371-2087

October 2007

Disclaimer

This presentation is designed to train Human Resource professionals employed by the Commonwealth of Virginia, by presenting general problems and standard rules and interpretations on the subject area. This information is designed to be accurate and authoritative, but the author by this publication is not rendering legal or other professional services. Particular questions should be addressed to the Dept. of Human Resources Management or to the Office of the Attorney General.

TOPIC ONE FMLA's Origin and its Nature

Congress in 1993 gave us a federal statute providing for the first time national legislation addressing the absences of workers for family illness and childbirth. The new law recognized the disparity in the workplace resulting from the established pattern: women were disproportionately serving the family by staying home when a child, a parent, or another family member was ill. Furthermore the American family, with the increasing prevalence of two working parents, sought a better balance between the needs of children and the needs of the workplace. These problems could be address by providing the *right* to take such an absence without penalty at work to care for family members.

These interests were coupled with an expansion of the working employee's right to be absent because of his or her own serious illness.

Rights recognized by the Family and Medical Leave Act ("FMLA")¹ may be summarized as these: 1) the employee's right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition, for a new child, or to care for an illness in the family; 2) the right to take such leave on an intermittent basis, or on a reduced work schedule when medically necessary; 3) the right to reinstatement following such leave; and, 4) the employee's right not be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the FMLA.

Today the FMLA addresses the opportunity to be absent. FMLA does not require the absence be paid. The regulations state that "[g]enerally, FMLA leave is unpaid." *See* 29 C.F.R. § 825.207 (a). As the Labor Secretary explains, "FMLA allows 'eligible' employees of covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it." *See* § 825.100 (a).

The Commonwealth of Virginia has many forms of leave for its workers. Practical problems in administration of FMLA often stem from the employee's desire for paid leave and our inability to *remember* the difference between the Commonwealth's leave programs and an absence that falls within the protections of the FMLA. Agencies must have separate accounting of FMLA leave² (to tally the twelve weeks); conceptually separate FMLA from various types of Virginia leave benefits³ to better analyze FMLA issues. The question

¹ The FMLA appears in Title 29 of the United States Code. The abbreviation used in this training program, "29 FMLA §__" means the indicated section is part of the FMLA and within Title 29. Similarly, the Code of Federal Regulations, Volume 29, contains the FMLA regulations from the United States Department of Labor, headed by the Labor Secretary, currently Elaine Chao. Those regulations will be cited as "29 C.F.R. § ___."

² You will not see twelve (12) weeks of leave on any employee's statement of benefits. Twelve weeks is a job preservation allowance. Employers are obligated by federal law to respect absence for exactly twelve weeks in a year.

³ The Virginia Sickness and Disability Program ("VSDP") permits participants 32 hours annually, renewed on the 10th day of January, for family and personal leave. This benefit

whether leave is paid in the Commonwealth is always a *second question*; the first inquiry is whether you have to apply the rules of the federal FMLA.

A Commonwealth employee may certainly be entitled to enjoy the benefits of both the FMLA and leave under VSDP.⁴

TOPIC TWO Recognition of the FMLA Claim for the Employee’s “Serious Health Condition”

FMLA 29 § 2611 (11) requires “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.”

“Inpatient care” means a period at least overnight stay in a hospital, hospice or residential medical care facility. Related subsequent treatment will also qualify the stay.

“Continuing treatment” should involve a healthcare provider and one or more of the following:

- periods with incapacity lasting greater than 3 consecutive calendar days where the individual cannot attend work, and involving multiple treatments by a health care provider *or* by a single provider including a regiment of continuing treatment under supervision;
- periods of incapacity due to pregnancy or prenatal care;
- chronic serious health conditions;
- multiple treatments (for episodic conditions); and
- treatment for long-term conditions that is not fully effective or curative.

These criteria are found in § 825.114 (a) (2).

must be used within the year that follows. This family and personal leave should not be confused with federal FMLA.

⁴ Ruling #2006-1302 of the Dept. of Employment Dispute Resolution (June 26, 2006) notes at page 3 that “DHRM Policy 4.20 grants an employee up to 12 weeks of family and medical leave per calendar year if they have worked at least 1250 hours during the twelve month period immediately prior to the start of that leave. Further, under DHRM Policy 4.57, FMLA leave runs concurrently with VSDP leave.”

Section 825.114 (c) excludes common cold, flu, earaches, upset stomach, minor ulcers, headaches (not migraine), routine dental or orthodontia problems, periodontal disease - these are ordinarily not “serious health conditions.” But exceptions may exist. *See Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001).

<i>Serious Health Condition</i>	<i>Not Serious Health Condition</i>
Cancer	Acne or another skin condition
Stroke, heart disease	Common cold, flu
Asthma	Ear aches
Diabetes	Upset stomach
Epilepsy	Minor ulcers
Kidney disease	Periodontal disease
<i>This box chart is brief because there is an exception to most every rule. The courts have struggled and not succeeded in simplifying those conditions which require continuing treatment and involve a period of incapacity. Too often, an individualized assessment is required.</i>	

TOPIC THREE Caring for Others

FMLA promotes the welfare of the family by allowing the worker to care for a loved one without loss of a job or its benefits and entitlements.

The statute and the regulations provide a delineation of family members who may be the object of this federally protected period of care:

“Spouse” refers to a husband or a wife.

“Parent” means a biological or replacement parent but does not include “in laws.”

“Son or daughter” means either a) a person who is a child under 18 years of age, or b) an adult “incapable of self-care because of a mental or physical disability.”

See 29 FMLA § 2611 (7), (11) and (12)

Congress has not by its legislation protected the extended multi-generation family and has not addressed the care of persons living at home not related to the employee as described above.

The FMLA is particularly stringent about caring for the adult “son or daughter.” A person is not “incapable of self-care” unless unable to perform 3 activities of daily living. *See* § 825.113 (c) (1). Examples are daily grooming and hygiene, bathing, dressing, and eating; or instrumental activities such as cooking, cleaning, shopping, travel by public transportation, paying bills, upkeep of the residence, or using the telephone or the post office. A person is not enduring a “physical or mental disability” unless he or she has an impairment which “substantially limits one or more major life activities,” meaning he or she has an ADA (Americans with Disabilities Act) disability.

Accordingly, when an employee seeks FMLA protection to care for an adult child, the child must meet these criteria (be “incapable of self-care because of a mental or physical disability”)

TOPIC FOUR Designation and Notice

<i>Scenario 1</i>

If the employee is ready and medically able to designate his or her entitlement it is possible to do so without great formality.

When an emergency situation arises, an employee should give notice "as soon as practicable under the facts and circumstances of the particular case." *See* § 825.303(a). This notice must be given by person, telephone, telegraph, fax, other electronic means (presumably e-mail), or by the employee's spokesperson if the employee cannot do so himself. *See* § 825.303(b).

Requesting unpaid leave under the FMLA the employee need not mention the FMLA. *See* § 825.303(b). In fact, the employee can be completely ignorant of the benefits conferred by the FMLA. It is sufficient notice if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. Employees need not complete any form to trigger application of the FMLA.

Because the requirements upon the employee are meager, each Agency must teach supervisory staff⁵ to recognize the instances in which the FMLA might apply to an employee's absence. The supervisor may not simply use a standard Commonwealth leave form and process it in the ordinary course. Agencies may not react by sending information or forms to the affected employee and waiting for his or her response.

The question of FMLA designation requires the involvement of Human Resource professionals. Error should be in the direction of tentatively designating the condition as FMLA qualified. Act promptly and investigate further.

Use these forms, available from the U. S. Dept. of Labor:

*****CERTIFICATION OF PHYSICIAN OR PRACTITIONER (FORM WH-380).**

*****NOTICE: EMPLOYER RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE (FORM WH-381).**

⁵ In this respect, the FMLA notice requirements resemble the Civil Rights Act's notice of sexual harassing conduct. The Agency's duties and liabilities commence when a supervisor has knowledge and the matter must be recognized and reported and action taken. Human Resource staff must teach all Agency supervisors to appreciate a “serious health condition.”

Notice must be confirmed by the employer in writing within two days of receipt of information indicating a qualifying condition.

Employers should not wait and designate FMLA leave after the employee returns to work; this is only permissible in two situations: 1) employer's ignorance of the reason for the employee's absence, or 2) employer's inability to get medical confirmation of the reason for the absence.

Scenario 2

Employer learns of the qualifying condition from another source. The employer's option to designate FMLA under such circumstances is a valuable right.

Designation should be made on the basis of additional information about the absence provided by the worker or his spokesman. When the Agency has reasonably adequate information that FMLA would apply, but has not received a request in any manner from the employee, it is in the Agency's interest to designate the absence of the employee as FMLA-covered.

By making the designation, as soon as practicable, the Agency starts the commencement of the twelve-week period. Employee's FMLA leave entitlement begins to be reduced and the Agency clarifies the responsibility of the employee, once able, to provide a certificate of his physician supporting the employee's serious medical condition or the need to care for a family member.

DHRM, Policy 4.20, V. (A), "The Agency must notify the employee of this designation within two working days of the agency's deciding to designate paid leave as family and medical leave." Thereafter, well-documented discussions leading to a documented decision are useful.

TOPIC FIVE Verification and Monitoring the Leave

An employer may require that leave requested under § 2612(a) (1) (D) of the FMLA be supported by a certification issued by the health care provider of the eligible employee. *See* 29 FMLA § 2613(a). And the employer, at its expense, may request a second opinion if it doubts the employee's health care provider. *See* § 2613(c). A binding third opinion must be gotten to resolve a conflict between the first and second opinions. *See* § 2613(d).

The employer is looking for *clarification* and *authentication* in the medical certificate of need for FMLA absence. *See* 29 C.F.R. § 825.307 (a).

Built into the FMLA is an insulation of the employee from constant medical scrutiny. An employer may require an employee on leave to obtain subsequent recertifications "on a reasonable basis," 29 FMLA § 2613(e). Recertification must occur only where there is sufficient basis for new medical review and evaluation. Regulation § 825.308 requires that more than 30 days elapse before medical recertification of pregnancy, chronic or permanent conditions under continuing supervision. *See* § 825.308 (a). This is modified in instances of dramatic change in circumstances and suspected doubt of the employee's reasons.

If the original certification is for medical absence of longer than 30 days, or the certification is for intermittent leave or a reduced leave schedule, the rules are as follows: employer must wait that stipulated 30 days, unless employee requests an extension of leave, circumstances have changed significantly or employer receives information that places the validity of certification in doubt. *See* § 825.308 (c).

Yet a requested FMLA absence does not last forever. The DOL states that the employer may reinitiate medical certification process with the first absence in a new 12-month leave year. *See Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998).

TOPIC SIX: Intermittent Leave

Use of "intermittent leave" presents every employer difficult problems. Intermittent leave acknowledges the continuing treatment needs and seriousness of those conditions that cannot be cured in a single period of absence, or cannot be cured at all. Intermittent leave is leave used in separate blocks of time or separate periods due to a single qualifying reason. *See* § 825.203.

The following should help the employer in dealing with the "unpredictable" nature of intermittent use of FMLA.

First, the rules that apply in the Fair Labor Standards Act ("FLSA") when determining overtime apply for the FMLA. Does the Agency keep time for FLSA purposes by the nearest quarter-hour (15 minutes) or by some other measure? Measurement used for purposes of the FLSA is appropriate when accounting for absence under FMLA. Accordingly, FMLA time may involve even a small increment.⁶

Second, the rules against the transfer of the employee are liberalized for intermittent leave. If the nature of the position makes it inappropriate for intermittent absence, it is permissible for the employer to utilize a transfer. However, this exception to the requirement of an "equivalent position" restoration may only be used in a way that does not work a hardship on the employee and does not discourage the use of leave or appear to retaliate against the use of FMLA leave.

⁶ Attempts in Congress to adopt a longer minimum time increment (for example, the half-day) for FMLA intermittent use by workers nationwide have failed.

Agencies should that intermittent FMLA medical certifications are thorough and complete and act vigorously to prevent employees from “moonlighting” while enjoying the benefits of the reduced hours of work. Periodic house calls (whether in person or simply by phone) are reasonable monitoring of intermittent leave.

Intermittent leave may also apply to the care of others. For example, the care for a loved one may include psychological comforting and reassurance rendered by the employee to his or her family member with a chronic illness. It may be that this special care is needed intermittently. Employers would be wise to explore, understand, and define the nature of the care to be rendered in an initial certification process.

TOPIC SEVEN: Performance Evaluation, Reinstatement and Non-Discrimination

The Department of Labor explains on its web site: “Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ‘no fault’ attendance policies.” (Fact Sheet #28, Job Restoration, <http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm>)

This means that care must be taken where employees’ performance is evaluated by benchmarks of accomplishment. Those benchmarks that are time-sensitive should be relaxed to reflect an FMLA absence, unless the employee is in a position that simply does not tolerate intermittent absence (in which event a transfer must be considered).

Performance evaluations which place an employee in a bad light because of his/her FMLA absences tend to substantiate retaliation or discrimination claims.

After the completion of a period of absence designated as FMLA protected, the restored employee is entitled to every “right, benefit, or position of employment...which the employee would have been entitled had the employee not taken the leave.” FMLA 29 § 2614(a) (3) (B). Restoration generally means the employee after the absence is treated just as before.

Returning employees are to regain “the position” or “an equivalent position.” See § 2614 (a). The Labor Secretary considers an “equivalent position is one that is *virtually identical* to the employee’s former position in terms of pay, benefits and working condition, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.” 29 C.F.R. § 825.215 (a).

However, such similar duties and responsibilities “does not extend to *de minimus* or intangible, unmeasurable aspects of the job.” 29 C.F.R. § 825.215. Examples of the latter might be work schedules or place of work. The concrete and measurable aspects of the job must remain the same. See *Csicsmann v. Sallada*, 2006 U.S. App. LEXIS 30490 (4th Cir. 2006) (Per curiam, unpublished.)

Should there be an intervening layoff by the Agency, the absent employee's reinstatement may be affected thereby and FMLA protections diminished without violating the law. *See Yashenko v. Harrah's NC Casino Co. LLC*, 446 F.3d 541 (4th Cir. 2006).

RESOURCES

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT POLICIES AND PROCEDURES MANUAL, Family and Medical Leave, Policy 4.20 (9-16-93)

DEPT. OF LABOR "REQUEST FOR INFORMATION ON THE FAMILY AND MEDICAL LEAVE ACT OF 1993," PUBLIC COMMENTS IN ADVANCE OF POSSIBLE REGULATORY CHANGES

United States Department of Labor, Employment Standards Administration:
<http://www.dol.gov/esa/whd/fmla/index.htm>

Thompson's Family and Medical Leave Handbook (by subscription). Go to Thompson.com and click on "Human Resources."

Jessica Beckett-McWalter, NOTE: The Definition of "Serious Health Condition" Under the Family Medical Leave Act, 55 Hastings Law Journal 451 (December 2003).

Kenza Bernis Nelson, NOTE: Employer Difficulty in FMLA Implementation: A Look at Eighth Circuit Interpretation of "Serious Health Condition" and Employee Notice Requirements, 30 Iowa Journal Corp. Law 609 (Spring 2005).

Megan E. Hladik, COMMENT: Can I Go to Chemo?: Protecting Employee Rights to Intermittent and Reduced Leave Under the Family and Medical Leave Act, 29 Hamline Law Review 378 (Spring 2006).