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Four Things You May Not Know About … the Family and Medical Leave Act

Law and the Workplace on **July 5, 2023**

Welcome to the first in a series of blogs examining often overlooked or misunderstood provisions of common employment law topics. Today we will be covering four pitfalls that employers may inadvertently encounter when navigating the federal Family & Medical Leave Act ("FMLA").

The FMLA applies, with limited exception, to employers with 50 or more employees during 20 or more calendar weeks in the current or preceding year. It in turn provides eligible employees with up to 12 weeks (or, in limited instances involving care of a military servicemember, 26 weeks) of unpaid, job-protected leave for reasons including an employee's own serious health condition; caring for a parent, spouse or child with a serious health condition; bonding with a newly born or placed child; and needs relating to a family member's military service.

Covered employers have very specific obligations under the law when it comes to determining employee eligibility for FMLA leave, communicating an employee's rights and responsibilities, and designating leave as covered under the law. The FMLA is a technical law governed heavily by an extensive set of regulations issued by the U.S. Department of Labor ("DOL"). As such, the FMLA regulations (29 C.F.R. 825.100 *et seq*.) should be the first stop when considering nuances in interpreting and applying the law to common scenarios. However, the DOL, which enforces the FMLA, has also addressed many nuanced issues in non-binding, yet still informative opinion letters.

1. **Determining FMLA Eligibility for Remote Employees**

In today's world of "work from anywhere," employers must take note of the FMLA regulations when it comes to determining a remote employee's eligibility for leave under the law.

As a general matter, an employee will be eligible for FMLA leave if they satisfy three criteria: (i) they have been employed by the employer for at least 12 months (which generally need not be consecutive); (ii) they have worked at least 1,250 hours during the 12-month period immediately preceding the start of the leave; and (iii) they are employed at a worksite where 50 or more employees are employed within 75 miles of that worksite. It is this third criterion that frequently trips up employers when considering whether a remote employee is eligible for FMLA leave, particularly where the remote employee may be one of only a handful of employees (or perhaps the only employee) working in a particular state or locality.

Section 825.111(a)(2) of the FMLA regulations provides, in relevant part:

For employees with no fixed worksite . . . the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. . . . **An employee's personal residence is not a worksite in the case of employees . . . who work at home**, as under the concept of flexiplace or telecommuting. Rather, their worksite is **the office to which they report and from which assignments are made.**

As such, when considering the "50+ employees within 75 miles" eligibility criteria for remote employees, employers should be looking to the office to which the employee reports and from which assignments are made, rather than the employee's place of residency or other designated remote working location.

2. **Delaying or Broadening the Designation of FMLA Leave**

Let's consider next a situation where an employer offers generous paid leave for bonding with a new baby, caring for a seriously ill family member, or other reason that may also qualify as FMLA leave. Can the employer require an employee to take such available paid leave first before designating any continued leave as FMLA-covered? What if the employee requests to "save their FMLA" until after the paid leave period? Or what if the employer assures the employee that all leave taken – even if it exceeds the 12 (or 26) week period – will be designated as FMLA?

In a 2019 opinion letter, the DOL stated that an employer may not delay the designation of FMLA-qualifying leave, even where such delay is at the employee's own request. In so concluding, the DOL points to Section 825.220(d) of the FMLA regulations, which states: "Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA," as well as to case law providing that an employer may not choose whether an employee's FMLA-qualifying absence is, or is not, covered by the law.

The same opinion letter also states that employers may not designate more than 12 (or 26) weeks of leave as FMLA-protected. While employers may offer benefits that provide for additional family or medical leave beyond that provided under the FMLA, providing such additional leave "cannot expand the employee's 12-week (or 26-week) entitlement under the FMLA."

Similarly, employers should take note that the FMLA only covers care of specific family members, which generally includes only an employee's spouse, parent or child (some additional categories apply to military-related leaves). Employers should not count leave to care for other categories of family members (such as siblings or grandparents) as FMLA leave, even if the employee is entitled to take leave to care for such a family member under a company policy or a state or local leave law. While the employer may think they're being generous in designating such time as FMLA, it could inadvertently lead to risk if that employee later needs time off for an actual FMLA-covered reason and is told they have exhausted their available leave.

3. **Factoring in Holidays During FMLA Leave**

What happens when a company holiday falls during an employee's FMLA leave period? Employers may be inclined to think that the designation of time as FMLA leave trumps any holiday considerations, but they may do so at their peril.

Section 825.200(h) of the regulations speaks specifically to holidays occurring during FMLA leave periods and sets forth differing approaches depending upon whether the FMLA leave is being used in one week increments or intermittently for periods of less than one week. The regulation states that, for purposes of determining the amount of FMLA leave used by an employee taking *weekly* increments of leave, the fact that a holiday occurs within a week taken as FMLA leave has no effect – that is, the entire week is counted as a week of FMLA leave despite the occurrence of the holiday.

However, if an employee is using FMLA leave in increments of *less than one week*, a holiday falling during a week in which FMLA is designated does not count against the employee's FMLA entitlement *unless* the employee was otherwise scheduled and expected to work during the holiday. For example, an employee who is designated for intermittent leave every Friday for medical treatments cannot have a Friday holiday counted against their total FMLA allotment unless that employee would otherwise have been scheduled and expected to work on that holiday.

Further, if an employer's business activity temporarily ceases for a period in which employees generally are not expected to report for work for one or more weeks (such as a weeklong closing for the end-of-year holidays), the days the employer's activities cease do not count against the employee's FMLA leave entitlement, whether or not the employee is taking FMLA on a weekly or intermittent basis.

The above approaches were recently reiterated by the U.S. Department of Labor in an opinion letter addressing FMLA allotments and company holidays.

4. **Calculating Intermittent and Reduced-Schedule FMLA Leave**

Managing FMLA leave being taken on either an intermittent (leave taken in less than full-workweek increments) or reduced-schedule (leave reducing an employee's usual number of working hours per workweek or hours per workday) basis is one of the biggest challenges for many employers to navigate, both from an administrative and a practical perspective. The employer has the burden of ensuring that such FMLA leave is administered and tracked correctly to avoid potential legal risk.

Section 825.205 of the FMLA regulations highlights a few key considerations when calculating and designating leave of these types.

First, an employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided that the increment can in no case be greater than one (1) hour.

Second, employees cannot be required to use more FMLA time than is necessary to address the need at issue, subject to the minimum increment requirement. So an employee who requests and certifies the need for two hours of FMLA leave during a shift cannot be required to use a half-day or full-day of leave. The only exception is where it is physically impossible for the employee to commence or end work during a shift (such as a flight attendant or a train conductor), in which case the entire time the employee is unable to work may be counted as FMLA.

Third, the leave entitlement is based on the actual workweek of the employee. Therefore, if an employee who would otherwise work 40 hours a week uses eight hours of FMLA leave, the employee would use one-fifth (1⁄5) of a week of FMLA. If an employee who would otherwise work eight hour days works four hour days under a reduced leave schedule, the employee would use one-half (1⁄2) week of FMLA leave. If a part-time employee who would otherwise work 30 hours per week only works 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1⁄3) of a week of FMLA leave.

It's also important to remember that FMLA leave does not "accrue" and is not subject to reduction based on an employee's classification – that is, all eligible employees, whether full-time or part-time, are entitled to up to a total of 12 (or 26) workweeks of leave. However, the total number of hours contained in those workweeks is dependent on the specific hours the employee would have worked but for the use of leave. So a part-time employee regularly scheduled to work 30 hours per week would have their intermittent or reduced-schedule allotment calculated on that 30-hour basis, as in the example in the prior paragraph.

Fourth, voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement. However, if an employee would normally be *required* to work overtime, but is unable to do so because of a FMLA-qualifying reason, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight (8) hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1⁄6) of a week of FMLA leave.

Finally, employers often overlook the fact that they have the ability to require an employee taking intermittent or reduced-schedule to *temporarily* transfer to an available alternative position for which the employee is qualified and which better accommodates the needed periods of leave than does the employee's regular position, so long as the position has equivalent pay and benefits to the employee's regular position. However, employers must be aware that while the alternative position does not have to have equivalent duties to the employee's regular position, it must not be intended to discourage an employee from taking FMLA leave or "otherwise work a hardship on the employee." The regulations provide the examples that a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; and an employee may not be reassigned to a work location a significant distance away from the employee's normal job location. And when the employee no longer needs to continue on intermittent or reduced-schedule leave, the employee must be placed in the same or equivalent job as the job that they left when the leave commenced. Once again, an employee may not be required to take more leave than is necessary to address the circumstance that gave rise to the need for leave.

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We hope this provides some useful insights into several common issues that trip up employers regarding FMLA leave. Proskauer attorneys are available to provide in-depth guidance on these and other common questions regarding FMLA and other leave laws.

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