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Family And Medical Leave Act Of 1993 -- A Practical Analysis- -¹

By: Gerald L. Maatman, Jr.* and Andrew J. Boling**²

Introduction

President Clinton signed the Family and Medical Leave Act of 1993 ("FML Act") into law on February 5, 1993.³ The FML Act is the third member of a triumvirate of revolutionary employment law legislation that will significantly impact many employers. Along with the other two members of the triumvirate -- the Civil Rights Act of 1991 and the Americans With Disabilities Act -- the FML Act represents the most dramatic change in federal employment law since the passage of the Civil Rights Act of 1964. The FML Act will require affected employers to carefully review existing employment policies and procedures to ensure that they are prepared when the FML Act takes effect on August 6, 1993.⁴ The effect of the FML Act is to establish a minimum labor standard for leave based on the same principle as child labor laws, the minimum wage, pension and welfare benefit laws, and social security.⁵

The law's stated purpose is to balance the demands of the work place with the needs of families, and to promote family integrity and security in a manner that accommodates the interests of an employer. Efforts to enact the family leave legislation began in Congress in the mid-1980's. The two proposals which eventually made their way to President Bush's desk were vetoed in 1990 and 1992. As a result, the issue of family and

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³Act of February 5, 1993, Pub. L. No. 103-3

⁴ For employers covered by the FML Act and collective bargaining agreements, the statute's requirements will go into effect at the expiration of the Union contract, or February 6, 1994, whichever is sooner.

⁵H.R. Rep. No. 8, 103d Cong., 1st Sess., pg. 21 (1993) [hereinafter H.R. Rep.].

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medical leave was the focus of sharp debate during the 1992 Presidential Election. The Democratic Congress placed the law on a fast track at the opening of the 103rd Congress. Republican-sponsored amendments to modify the law were rejected in their entirety.

According to Federal Government sources, the FML Act applies to approximately 44 million private-sector workers. Most businesses will be required to change their personnel policies and benefit programs to comply with this statute. This article will review the landmark law, its application to the leave of absence process, and the strategies that employers should consider to avoid litigation under the FML Act.

Businesses Covered By The Law

The FML Act applies to any employer with 50 or more workers during 20 or more calendar weeks in the current or preceding calendar year.⁶ Government statistics indicate that the statute will apply to approximately five percent of businesses in the United States, although these companies employ over 50 percent of all private sector workers. Some employers will continue to be covered by state and local laws that require more generous leave.⁷ This is because the FML Act does not supersede or preempt State or local laws if they offer employees additional leave rights. Rather, the FML Act simply provides a minimum "safety net" for eligible employees nationwide.

⁶FML Act § 101(2)

⁷Approximately thirty states, the District of Columbia, and Puerto Rico have adopted some form of family or medical leave. *See* H.R. Rep. at pp. 32-33.

Small Office Exemption

The FML Act also contains what might be termed a "small office" exemption.⁸ Employees of a business are ineligible for guaranteed family or medical leave if they work in an office that has less than 50 employees, so long as any other sites of work of the same employer within a 75 mile radius do not employ a total of more than 50 employees when the additional offices are combined for counting purposes. Thus, if an employer has three work sites-and employs 100 employees at site A, 20 employees at site B, and 20 employees at site C, and sites B and C are more than 75 miles away from site A -- the employees at site B and C are not covered by the FML Act.⁹

Requirements Of The Statute

General Leave Mandated

Under the FML Act, eligible employees are entitled to 12 work weeks of unpaid, job protected leave per year to take care of a newborn or adopted child, to care for a sick child, spouse, or parent, or where an employee cannot work due to their own serious health condition.¹⁰ The law's family leave provisions apply equally to all employees regardless of sex.

Employee Eligibility Standards

A business is allowed to impose service requirements to determine eligibility for leave. The statute gives rights to workers who have been employed by the company for at

⁸FML Act § 101(2)(B)(ii)

⁹Employers cannot find protection in arrangements under which they lease employees from a leasing agency. The FML Act seemingly extends its scope to such arrangements by covering "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." FML Act § 101(4)(A)(ii)(I)

¹⁰FML Act § 102(a)(1)

least one year, and for at least 1,250 hours during the previous 12 months (an average of 25 hours per week).¹¹ Accordingly, new employees and part-time workers are excluded from the benefits and protections of the FML Act. If an employer provides paid leave already (or in the future) for fewer than 12 weeks, the additional leave period necessary to attain the mandated 12 work weeks of leave may be provided without compensation.¹² In addition, employers may require employees to substitute any accrued paid vacation leave, personal leave or family leave as part of the 12 week period of such leave.¹³

Employee Obligations

During an employee's leave, an employer is obligated to continue the worker's health insurance coverage on the same terms as conditions as when the person was on the job.¹⁴ An employer may recover the cost of insurance premiums paid on behalf of the employee while they were on leave if the worker fails to return from the leave.¹⁵ As a practical measure, the employer's ability to obtain compensation from the employee who does not return from leave on a timely basis is limited. If, for example, the employee does not return from his or her leave on a timely basis because of a "continuation, reoccurrence, or onset of a serious health condition" that would entitle the employee to take leave in the first instance, or to "other circumstances" beyond the control of the employee, no reimbursement will be authorized.¹⁶

¹¹FML Act § 101(2)(A)(I)(ii)

¹²FML Act § 102(c) 102(d)(I)

¹³FML Act § 102(d)(2)(A)

¹⁴FML Act § 104(c)(I)

¹⁵FML Act § 104(c)(2)

¹⁶*Id.*

Upon expiration of the leave, the employer must reinstate the worker to their same job or to an equivalent position.¹⁷ In the case of highly compensated employees (the top 10 percent of wage earners at the company), an employer need not reinstate such workers if it is "necessary to prevent substantial and grievous economic injury to the employer's operations."¹⁸ Furthermore, it is illegal under the statute for an employer to interfere with any right provided to an employee by virtue of the law or to discriminate against an employee for exercising their rights under the FML Act.¹⁹ Finally, the statute requires employers to make, keep, and preserve records pertaining to compliance with the law, and to submit upon demand their books and records to the department of labor at least once per year to verify compliance with the FML Act.²⁰ In general, if an absence is foreseeable due to planned medical treatment, an employee is obligated to give their employer 30 days notice of their intention to take a leave.²¹ Moreover, workers are required to make a reasonable effort to schedule the treatment so as not to disrupt the operations of the employer.²² Where an employee faces emergency medical conditions, or unforeseen changes in their health, the law will not preclude a worker from taking leave if they are unable to give 30 days' notice.²³ In the case of birth or adoption, or placement of a foster child, an employee is required to give

¹⁷FML Act § 104(a)(1)

¹⁸FML Act § 104(b)

¹⁹FML Act § 105

²⁰FML Act § 106

²¹FML Act § 102(e)

²²*Id.*

²³*Id.*

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30 days' advance notice before the date the proposed leave would begin.²⁴ If this is impractical, the FML Act simply obligates the employee to provide as much notice as possible.²⁵ For example, employees who are waiting to adopt a child are often given very little notice of the availability of a child.²⁶ In these situations, the law recognizes that it is often impossible for a worker to give 30 days' advance notice.²⁷ The statute is silent as to what penalty, if any, an employer can impose if an employee fails to give the required notice in a timely fashion.

An employer also may require an employee to exhaust any paid sick leave or vacation time for any part of the 12 week mandated leave.²⁸ Thus, the FML Act does not obligate an employer to increase the amount or types of paid leave it offers to its work force. For example, a business affords employees four weeks of paid sick leave per year, an employer can require an employee taking leave under the FML Act to combine the sick leave and mandated leave so that four weeks of the 12 week leave is paid, while the remaining eight weeks of leave is unpaid. An employer is required only to provide enough unpaid leave to total 12 weeks when considering all types of leave.

Certification Procedures

By requiring a certification procedure, the FML Act attempts to protect employers from potential abuses by workers. The law allows employers to demand proof that an

²⁴Id.

²⁵Id.

²⁶Id.

²⁷Id.

²⁸FML Act § 102(d)

employee, child, spouse, or parent is ill before a proving leave.²⁹ Thus, where a worker requests leave on account of a serious health condition, an employer can require an employee to provide a certification from the physician of the employee, child, spouse or parent. The certification must include the date of the employee's proposed leave, its probable duration, the appropriate medical facts supporting the need for leave, and a statement to the effect that an employee should take the leave for medical reasons or is unable to perform their work.³⁰ If an employee desires an intermittent leave -- such as, for example, for periodic physical therapy or chemotherapy -- the certification must state the dates upon which the treatment is to be given and the duration of the treatment.³¹ The FML Act is silent as to when a certification must be provided; the law requires only that a worker provide it in an unspecified "timely manner."³²

If an employer is unsatisfied with the certification provided by the employee, the FML Act allows an employer to require a second opinion.³³ The employer must pay for the second certification.³⁴ The doctor selected to provide the second opinion cannot be employed by the company on a regular basis.³⁵ If the second opinion results in a conflict between the opinions of the two doctors, an employer has the option at its expense of then securing a third physician's opinion. The third physician must be approved jointly by the

²⁹FML Act § 103

³⁰Id.

³¹FML Act § 103(b)(6)(7)

³²FML Act § 103(a)

³³FML Act § 103(c)

³⁴Id.

³⁵Id.

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company and the worker, and the opinion of the third physician is binding.³⁶ In addition, after leave is taken, an employer is within its rights under the statute to request subsequent re-certifications on a reasonable basis.³⁷ Likewise, when an employee is ready to return from sick leave, an employer can require a return-to-work certification.

Legal And Monetary Exposure For Violations

An employer denied leave or any other right under the FML Act can bring an action against their employer in Federal or State Court.³⁸ Violations of the law are serious matters. With respect to the law's statute of limitations, an employer can be liable for up to two years for non-willful violations of the law, and three years for willful violations.³⁹ If successful in proving the violation of the FML Act, an employee can recover damages equal to the compensation denied or loss on a count of a violation of their rights under the statute.⁴⁰ In addition, an employee can cover his damages the actual losses sustained such as cost of medical care; these damages are limited, however, to a sum equal to 12 weeks of wages or salary.⁴¹ A worker is also entitled to interest on the judgment at the prevailing rate, and liquidated damages equal to compensatory damages and interest.⁴²

³⁶FML Act § 103(d)

³⁷FML Act § 103(e)

³⁸FML Act § 107(A)(2)

³⁹FML Act § 107(c)

⁴⁰Fml Act § 107(a)(1)(A)(i)(I)

⁴¹FML Act § 107(a)(1)(A)(i)(II)

⁴²FML Act § 107(a)(1)(A)(iii)

Employers are allowed to assert a good faith defense to a claim for liquidated damages.⁴³ A court is also empowered under the law to award equitable relief such as reinstatement and promotion.⁴⁴ Finally, attorney's fees and costs will be awarded to a prevailing plaintiff.⁴⁵ These costs and expenses also include reasonable expert witness fees.⁴⁶

Special Issues For Employers - Administration Of The Law

The U.S. Department of Labor (DOL) is the agency designated to administer and enforce the FML Act. The statute requires the Secretary of Labor to prescribe regulations to carry out the law no later than 120 days after its date of enactment.⁴⁷ It is anticipated that the DOL will therefore issue regulations on the statute by June 5, 1993. It is hoped that the DOL's regulations will provide guidance to employers on key terms under the FML Act, compliance questions, and on issues that remain unclear.

"Equivalent" Positions

A controversial aspect of the FML Act is its requirement that a business restore an employee to the same job he or she had prior to the leave or to an "equivalent" position if their old job is unavailable.⁴⁸ An "equivalent" position is defined by the law as one having

⁴³Id.

⁴⁴FML Act § 107(a)(1)(B)

⁴⁵FML Act § 107(a)(3)

⁴⁶Id.

⁴⁷FML Act § 404

⁴⁸FML Act § 104(a)(1)

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equivalent "compensation, benefits, working shift, hours of employment, and other terms and conditions of employment."⁴⁹ The phrase "other terms and conditions of employment" is not defined in the law.

Legislative history of past family and medical leave proposals in the U.S. Congress envisioned that it would not always be possible for an employer to restore an employee to the precise position held before taking a leave. For instance, the employee's department may have reorganized in his or her absence so that the precise job assignment no longer exists. The legislative history cites to a parallel standard in Title VII of the Civil Rights Act of 1964, which prohibits discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment. This signals that employers will more than likely be held to the strict standard of equivalence in Title VII when restoring an employee to an "equivalent" position under the FML Act. This will undoubtedly be an area of concern to employers.

Wisconsin is one of the various states that has its own family and medical leave statute. The Wisconsin statute has identical "equivalent employment position" language as the FML Act. On December 16, 1992, the Wisconsin Supreme Court issued a precedent setting ruling on this very issue. In a case entitled Kelley Company, Inc. v. Marquardt⁵⁰, the Wisconsin Supreme Court found that an employer had violated the statute when it had restructured the job of an employee on leave, and upon her return to work, assigned her to another job with the same pay and benefits as her former job, but with reduced status, authority, and responsibility. In Marquardt, an employee was assigned to a new job created by her company's reorganization. Prior to her leave, the employee's position involved supervising four employees, evaluating financial risks, and overseeing accounts receivable. Her new job after the reorganization involved supervising one employee, performing

⁴⁹*Id.*

⁵⁰172 Wis. 2d 234, 493 N.W.2d 68 (Wis. 1992)

accounting functions, and performing clerical duties 25 percent of the time. The Wisconsin Supreme Court held in Marquardt that the employer had violated the law -- despite the fact that the job had the same pay and benefits -- because the decreased responsibilities and authority were aspects of employment intended to be included within the statute's requirement that the employee be restored to a position equivalent in terms and conditions of employment.⁵¹

A recent decision from a New Jersey state appellate court also construed the issue of an equivalent position under the similarly worded New Jersey Family & Medical Leave Act.⁵² In D'Alia v. Allied-Signal Corp.⁵³, plaintiff took a maternity leave under the New Jersey Family & Medical Leave Act. Her employer reorganized her department during her leave. As a result of the reorganization, the plaintiff was relieved of her responsibility for handling executive compensation matters and had supervisory responsibilities over fewer employees.⁵⁴ In addition, as a result of a staffing change during the course of her leave, the plaintiff was to report to an employee who had previously been under her supervision.⁵⁵ The New Jersey appellate court ruled that this change in job status precluded summary judgment for the employer, since there was a question of fact as to whether the plaintiff had been returned to an equivalent position.⁵⁶

⁵¹493 N.W.2d at 77

⁵²N.J.S.A. 34: 11 B-1 - 16

⁵³260 N.J. Super. 1, 614 A.2d 1355 (N.J. Super A.D. 1992)

⁵⁴614 A.2d at 1357

⁵⁵Id.

⁵⁶614 A.2d at 1360

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The decisions in Marquardt and D'Alia, when coupled with identical language in the FML Act, require employers to take account of employees on leave when effectuating job restructuring or company reorganizations. If the position is newly created for an employee on leave, an employer must be prepared to explain how this new position is equivalent in terms of job responsibilities and authority.

Reductions In Force

The FML Act is silent on the issue of reductions in force or lay-offs. It is not difficult to envision that there will be situations where a business will find it necessary to include employees off on leave in a reduction in force or lay-off. What is clear in the law is that an employee is not entitled to any right, benefit, or position to which the employee would not have been entitled to had the employee not taken leave. The language in Congress' reports of earlier congressional bills discussed this concern, and stated that if an employee would have been laid off as part of a larger reduction in force, an employee off on leave has no special right to retain his or her job by virtue of having taken leave under the FML Act before the lay off occurred. This construction of the FML Act is consistent with state law statutes which expressly address the reduction in force issue.⁵⁷ The employee's entitlement to be rehired would be on whatever terms it would have been had the employee not been on leave. Business groups hope that the DOL regulations clarify this issue further.

Which "Health Care Providers" Can Determine Whether A Leave Is Medically Necessary

An important issue that hopefully will be resolved in the DOL regulations is who can determine whether a leave is medically necessary. The FML Act's definition of "health

⁵⁷The New Jersey Family & Medical Leave Act, for example, permits the inclusion of an employee on leave in a reduction in force during the leave period where the employee would have lost his or her job in any event. N.J.S.A. 34:11 B-7

care provider" creates considerable ambiguity. The FML Act defines "health care provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which the doctor practices or "any other person determined by the secretary [of labor] to be capable of providing health care services."⁵⁸ The latter prong of the definition is expected to cause considerable confusion and controversy. For example, it is unclear as to whether chiropractors, naturopaths, or any other alternative care givers would be qualified as a health care provider. It is conceivable that the FML Act could serve as a forum for those who are seeking to legitimize areas of treatment which had heretofore been on the "fringes" of traditional medicine. The DOL has signaled that this is an issue of concern and has invited public comment on this issue.

Overlap With The Americans With Disabilities Act

Confidentiality Concerns

Employers must be careful that in complying with the FML Act they do not simultaneously violate the Americans With Disabilities Act ("ADA"). One potential problem posed by the FML Act is dealing with the documents generated by processing requests for leave. The ADA specifically requires employers to keep confidential information regarding an employee's medical history in a separate area apart from his or her personnel file. Access to confidential medical information must be carefully restricted to ensure the employee's confidentiality.

The extent to which the FML Act may work at cross purposes to the ADA is unknown. Prior to the FML Act, it was much easier for an employee to limit the dissemination of information about his or her medical condition to his employer. Under the

⁵⁸FML Act § 101(6)

FML Act, however, the certification procedures virtually mandate that an employer will learn about the employee's medical condition or that of a family member.⁵⁹

Until this issue has been resolved, hopefully by the promulgation of DOL regulations, employers should treat all documents generated during the course of complying with the FML Act in the same confidential manner afforded to other medical information about the employee. Information about the specific nature of an employee's medical condition should be disseminated on a "need to know" basis only. For example, a supervisor may need only be told that an employee's work schedule needs to be readjusted. Unless the nature of the medical condition which prompts the restructuring or leave is essential to performing that restructuring, the specific medical condition should not be disclosed.

**Does Compliance With The FML Act Amount
To A Reasonable Accommodation Under The ADA?**

Another area of potential overlap between the FML Act and the ADA is whether providing 12 weeks of leave by itself constitutes a reasonable accommodation for a disabled employee under the ADA. The ADA expressly requires employers to attempt to provide reasonable accommodations to a qualified individual with a disability, if the individual can perform the essential functions of a job with or without reasonable accommodations. Compliance with the ADA is independent of compliance with the FML Act. The EEOC, which is responsible for enforcing the ADA in the employment context, has made it clear that job restructuring, including reduced work schedules, will be considered reasonable accommodations. The ADA does not place any limits on the extent to which an employee's work schedule may be reduced to allow for a reasonable accommodation. Employers should not assume that they have fulfilled their ADA obligations by offering a disabled employee 12

⁵⁹The ADA also prohibits discrimination against an employee on account of his or her association with a person with a disability.

weeks of leave -- intermittent or otherwise. This is another area that may be clarified in the forthcoming DOL regulations.

Definition Of Serious Health Condition

Just how sick does a worker or their spouse, child, or parent have to be to take leave under the FML Act? The statute provides that an employee is allowed medical leave whenever they have a "serious health condition" that renders them unable to perform their job or if their spouse, child, or parent has a serious health condition.⁶⁰ This term is defined in the law as "an illness, injury, or impairment, or a physical or mental condition that involves in-patient care at a hospital or continuing treatment by a health care provider."⁶¹ As written, one might argue that a "serious health condition" could include a long-standing bout with the flu that requires periodic visits to a physician. The House of Representatives report on the FML Act offers numerous examples of serious health care conditions, including heart attacks, cancer, strokes, severe arthritis, injuries caused by serious accidents on or off the job, back conditions, nervous disorders, and respiratory disorders.⁶² Most would agree that such an interpretation would result in an abuse of leave rights. Business groups hope that the DOL regulations will provide further definition to the "serious health condition."

⁶⁰FML Act § 102(a)

⁶¹FML Act § 101(11)

⁶²H.R. Rep. p. 40

Intermittent And Reduced Leaves

In certain circumstances, the FML Act envisions that employees may take reduced or intermittent leaves. As an act, the statute allows employees to take leave intermittently or on a reduced schedule when medically necessary.⁶³ An employer cannot withhold this right so long as the employee complies with the applicable certification procedures. In contrast, when the leave is to care for a newborn or newly adopted baby, an employer can deny a worker's request for intermittent or reduced leave; the FML Act allows such leave in the circumstances only if the employer agrees to the arrangement.⁶⁴ In addition, the FML Act envisions that a business can reassign employees on intermittent and reduced leave schedules to alternative positions provided they receive equivalent pay and benefits.⁶⁵ Employer groups should pay close attention to the expected DOL regulations and their definitions of "medically necessary" in the context of intermittent and reduced leave.

Strategies To Comply With The New Law Suggestive

Leave Of Absence Policies For Employers

The FML Act begins affording rights to workers as of August 6, 1993. On that date, any employee who has worked for a covered employer for at least 1,250 hours since August 6, 1992, is eligible for a leave. Businesses need to review their own practices well prior to that date to avoid litigation.

Employers should adopt new strategies to comply with this landmark statute. First, an employer should audit its existing leave programs to determine if they meet these new federal requirements. At a minimum, a company should review its existing policies on sick

⁶³FML Act § 102(b)

⁶⁴*Id.*

⁶⁵FML Act § 102(b)(2)

leave, vacations, short and long term disability, maternity leave and general leave of absence procedures. Most employers will not have comprehensive leave policies which meet all of the requirements of the FML Act.

To prevent abuses, employers should identify the types and amounts of leave each company is willing to afford its workers consistent with the requirements of the FML Act. This includes a decision with respect to the issue of intermittent or reduced leave for care of a newborn or newly adopted baby -- either a blanket denial, allowance, or case-by-case review of workers' request for such leave. Employers with operations in multiple states will need to comply with a patchwork of different laws, as the FML Act does not preempt state or local leave laws. A business should then select the most effective leave policies that fit its operations.

New policies reflecting the employer's choices on leave roles should be formulated and communicated to the work force. A sample leave policy prepared by the author is included as an appendix to this article. In turn, supervisors need to be educated as to the law's requirements and the company's new policies. This will avert the potential for later misunderstandings between an employee and their boss and minimize litigation exposure.

Leave of absence application forms should be written, and a company should be prepared to put into place mechanisms for acquiring, evaluating, and maintaining certification opinions in connection with medical leaves. In addition, an employer will need to set up its own administrative procedures to handle the payment of health insurance premiums for workers off on leave.

Conclusion

The potential impact of the FML Act on covered employers cannot be overstated. Employers should move quickly to ensure that their policies and procedures will be in compliance with the FML Act when it goes into effect on August 6, 1993.

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