

Louisiana Employment Law Letter

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FAMILY AND MEDICAL LEAVE

Taking the 'medical' out of the Family and Medical Leave Act

A Louisiana federal court recently interpreted the scope of the Family and Medical Leave Act (FMLA) and, in our view, expanded the statute beyond its intended reach. Adhering to what the court considered the "spirit" of the FMLA, it decided that the Act's protections are broad enough to require leave for an employee to care for healthy children while the other parent cares for a sick child.

If you're questioning this decision in light of everything you know (and everything we've been telling you) about the FMLA, you're not alone. We, too, think this sounds like federally protected babysitting. Not surprisingly, the employer disagrees with this decision and has been given permission to immediately appeal to the U.S. Fifth Circuit Court of Appeals in New Orleans. We'll closely follow the progress of this case and keep you updated. In the meantime, we thought you'd like to know a little more about this decision and how it conflicts with the FMLA and the U.S. Department of Labor's (DOL) regulations interpreting it.

Honesty is the best policy

A father of four children worked evening shifts at an auto parts distribution center making deliveries and working in the warehouse. The employee's 16-month-old son became gravely ill and required hospitalization. The infant's mother remained at the hospital with him. The employee missed work to care for his three healthy children in their mother's absence.

In accordance with the company's policy, the employee called his supervisor before 11:00 a.m. each day he missed work. After missing two scheduled shifts, his immediate supervisor called and asked to speak with him, but his mother answered the phone and reported that he wasn't home. The company said the employee called the office from somewhere else claiming to be at home at the same time his supervisor was on the other line with his mother. When the employee reported to his shift the next evening, the company fired him for violating its honesty policy. The company claimed the employee wasn't at home caring for his healthy children, which was the reason he gave for his absences from work.

The employee claimed that he called his employer later that day and specifically requested FMLA leave but was asked to resign. He filed a lawsuit in federal court, claiming he was unlawfully denied leave and fired for exercising his rights under the Act.

Who's telling the truth?

The employer filed a request to dismiss the employee's claims. It said he wasn't entitled to any FMLA leave because the Act doesn't protect staying home to care for healthy children. The employer also said it terminated him for dishonesty, not because of his absences. It believed he was dishonest when he called work and suggested he was at home because his supervisor was simultaneously on the phone with his mother, who said he wasn't at home.

The employee, on the other hand, stated for the first time that he spent time at the hospital with his sick child during the day and couldn't function as a driver at night. According to him, the fact that his three children were home with him at night didn't matter because his visits to the hospital during the day entitled him to FMLA leave. Thus, he put a new twist on his case by claiming that he did in fact take leave to "care" for a child with a serious health condition.

The court, however, focused on the reason the employee originally provided for his absences to determine if he was eligible for FMLA leave. It pointed out that he told his employer he needed leave to care for his three healthy children while his wife cared for his sick son. In fact, he had previously admitted that he remained at home with his healthy children during the time he would otherwise have been at work.

Federally mandated babysitting or protected FMLA leave?

The court acknowledged that numerous courts have concluded that absences to care for a child who doesn't have a serious health condition aren't considered FMLA-qualifying absences. Further, the court recognized that the Act requires an employer to provide up to 12 weeks of unpaid leave to an eligible employee who must care for a spouse, parent, or child *if* the person suffers from a "serious health condition." The court, however, reasoned that under the specific circumstances, characterizing the employee's request as simply babysitting his healthy children made the inquiry too narrow.

Instead, the court noted that the employee would have qualified for FMLA leave if he had been absent to care for his child in the hospital and not his healthy children. The court apparently wasn't persuaded by the fact that the employee admitted he hadn't actually visited the sick child during hours he otherwise would have been working. Although there wasn't any clear legal precedent that the FMLA applied to the employee's absences, the court refused to dismiss the case. As for the employer's position that it actually fired the employee for dishonesty, not his absences, the court said a credibility determination was required and would be better made at trial. *Briones v. Genuine Parts Co.*, 2002 U.S. Dist. Lexis 15741 (E.D. La. 8/12/2002).

FMLA 101

This case raises questions about one of the most basic provisions of the FMLA: The leave must be based on the employee's own "serious health condition" or the employee's need to care for a spouse, parent, or child with a "serious health condition." Not surprisingly, the employer has expressed its intent to appeal the ruling, and the trial court has already granted the special permission needed to appeal the ruling before trial. We'll closely monitor the appeal of this decision and report the outcome.

Meanwhile, we thought a refresher on the FMLA's requirements might help you minimize the risk of other types of FMLA claims. Initially, when an employee asks for time off or is absent for his own or a family member's medical condition, it's your responsibility to determine if the reason is FMLA-qualified. The employee need only give you sufficient information to put you on notice that the absence may be covered by the Act; he doesn't have to mention the FMLA by name. If his own medical condition or that of a family member is the reason for the absence, the next step is to determine whether he's eligible for FMLA leave.

To be eligible for FMLA leave, the employee must have worked for you at least 12 months and logged at least 1,250 hours of service during the preceding 12-month period. If he's eligible for FMLA leave, the next step is to determine whether the medical condition is a "serious health condition" under the Act.

A serious health condition means an illness, injury, impairment, or physical or mental condition that involves any of the following:

- an incapacity or treatment in connection with or consequent to inpatient care (an overnight stay) in a hospital, hospice, or residential medical care facility;
- an incapacity requiring absence from work, school, or other regular daily activities for more than *three consecutive calendar days* that also involves *continuing treatment by a health care provider* (or any subsequent treatment or period of incapacity relating to the same condition);
- any period of incapacity due to *pregnancy or prenatal care*, regardless of treatment or days out;
- any period of incapacity or treatment for such incapacity due to a *chronic serious health condition* (e.g., asthma, diabetes, epilepsy), regardless of treatment or days out;
- a period of permanent or long-term incapacity due to a condition for which treatment may not be effective (e.g., Alzheimer's, strokes, or terminal illnesses); and
- any period of absence to receive or recover from multiple treatments by a health care provider for *restorative surgery* after an accident or for a *condition likely to result in a period of incapacity* of more than three consecutive calendar days if not treated (e.g., cancer (chemotherapy), severe arthritis (physical therapy), or kidney disease (dialysis)).

Under the FMLA, "incapacity" means the inability to perform one or more essential functions of a job or a family member's inability to pursue normal daily activities. "Continuing treatment" means two or more visits to a health care provider or other medical personnel and/or one visit to a health care provider and a regimen of supervised treatment, including prescription medication.

If you're uncertain whether an employee's absence is for a "serious health condition" of his own or that of an eligible family member, you can require, in writing, that he return a completed "Certification of Health Care Provider" form (available from the DOL's website, www.dol.gov) within a reasonable time, but not less than 15 days. If there's any uncertainty about whether the leave is covered, you can require second and third opinions under the rules set forth in the DOL's regulations.

You'll never know that an absence is potentially FMLA-qualifying, however, unless you train your "frontline" supervisors to notify your human resources or benefits personnel of leave requests or absences. By training your supervisors about your notification procedures and

requiring your employees to provide such notice, you can determine whether you have any obligations under the FMLA and whether your employees' absences should be counted toward any annual FMLA allotment.

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