Personnel Notebook

For Your Most Important Resource -- The Human Resource

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FAMILY AND MEDICAL LEAVE ACT (FMLA)

Part I: The Good, The Bad and The Ugly

The Family and Medical Leave Act (FMLA) became law on August 5, 1993 even though it was not written until February 5, 1995, approximately 18 months later. How ever you view the FMLA, the fact is that very little knowledgeable thought went into it before it was voted into law. That is why it has created so much confusion and in some cases, so much abuse.

The FMLA is a law that no one can vote against. Whether ill conceived or badly written, it is the icon of the 1990s family-sensitive, politically-correct work environment. Who can be against allowing mothers to have time off from work for the birth of a child and to be able to return to their job afterward?

But the same law that allows that worthy benefit also makes the incredible leap, through the slippery slide of legal interpretation, to allow a man 6 weeks off for constipation, a 7 week absence for a woman's ingrown toenail, a case of hemorrhoids and a 4 day leave for the death of a cat!

What Is The FMLA?

The FMLA applies to all employers, with 50 or more employees within a 75 mile radius. It requires then to provide up to 12 weeks of unpaid leave per year to each eligible employee for:

- the birth or adoption of a child,
- to care for the employee's spouse, child or parent who has a serious health condition,
- to undergo medical treatment for their own serious illness.

The job, the group health benefits and all employee benefits that were accrued prior to the leave must be protected and returned to the employee after the leave.

To be eligible, an employee must:

- have been employed by your company for at least 12 months and must have worked at least 1,250 hours during that time,
- give 30 days notice of leave "if foreseeable,"
- provide physician's certification, if requested,
- pay their normal share of benefit policy premiums during the leave.

Either party, employer or employee, can decide to apply any accrued vacation time, sick leave, personal leave or any other applicable paid leave during that time off. Doing so does not increase the allowable time off the job, it merely allows the employee to receive pay during this period. If neither side decides to apply the paid leave allowances toward the FMLA leave, the employee is allowed to take the 12 week unpaid FMLA leave in addition to any paid sick leave, vacation time, etc. The purpose of allowing the employer to require the employee to use up his or her paid time off is to limit the total time the employee will be off the job. *(See page 7 for a copy of the required posting.)*

Overall this doesn't seem to be too complicated. So what is all the commotion about? Well, let's stick to our theme and first proceed to the good in the FMLA.

The Good

Prior to the FMLA, maternity leave was for women only, for the birth of a child. Maternity was treated as sick leave. When your doctor recommended that you no longer work due to the pregnancy, you were eligible for sick leave. When the doctor said you were medically able to return to work, your leave was up. You could use all your accumulated paid sick leave, vacation or personal days during that time off. You were expected to "bank up" your leave time during the preceding 9 months. You were generally allowed to stretch out the paid hours of leave resulting in a reduced pay check for the entire duration of your leave which was usually 6 weeks. Your job was held for you as long as "the demands of business allowed." A small percentage of companies did not offer this much. A small percentage of companies offered more.

Under the FMLA the time off is 12 weeks. It can cover a woman and her spouse. The job and benefits must be secured and returned intact after the leave. No longer can an employee lose his/her job or benefits due to a birth.

The FMLA extends this leave benefit to also include adoption as well as the medical necessity of the employee or his/her direct relatives.

Employees now are offered flexibility, family considerations and other allowances for the new two wage-earner family.

To qualify for the 1,250 hours requirement, employees can count all paid time including vacation and overtime (not just hours worked). Even part-time employees can qualify.

A federal commission reviewed the effect of the FMLA on employers. They reported that employers found it "easy to implement" and "has not been a burden to business and has succeeded in replacing the employers' voluntary leave policies." At a press conference, the chairman of the commission reported virtually no (or only minimal) costs associated with the FMLA. Their recommendations included finding ways to expand the benefits and finding ways to pay employees for the time off.

Former Secretary of Labor, Robert Reich, reported that the few problems that occurred were so easily fixed that it's clear the FMLA has provided no financial boon for lawyers.

The FMLA supports a national concern for family integrity, stability and security. A worker can better balance the stressful demands of raising a family and performing his/her job.

It is suggested that over the long run, employers may gain from reduced employee turnover and decreased hiring and training expenses and a more motivated, stable and productive work force.

The Bad

Marsha Laurence, a vice president for Bell Atlantic in Maryland, attended the FMLA conference where federal officials were there lauding the praises of the Act. She informed them that in the first year of the FMLA, their absentee rate jumped 65%. The company estimated their costs at $475 annually per employee just for the FMLA. She said that, "employees no longer have an incentive to come to work, (when) they're merely uncomfortable because of their medical condition."

Hallmark's (the greeting card company) HR Director, Theresa Hupp, said that their average absentee rate increased 50% since the FMLA. That translates to more than $4 million in lost time.

Libby Sartain, Vice President of HR at Southwest Airlines, was applauded when she disputed the federal commission's glowing, self-serving report on their FMLA survey. "Have I been on the same planet for the past three years?," she asked. She reported that her FMLA costs included payroll software, increased training of all supervisors and employees, more temporary help, lower employee productivity, increased administration of absence and attendance policies and the complications of coordinating FMLA policies with the Americans with Disabilities Act (ADA) and Workers' Compensation.

Too many politicians she said, assume that all employees are desk-bound, bureaucratic, paper-oriented and 9 to 5. "How do we let

someone off 3 hours (for FMLA) when they're flying in a Boeing 747 on a 3 day trip?" Due to FMLA related absenteeism, Southwest Airlines, for the first time in its 22 year history, has had to cancel flights.

The Society for Human Resource Management (SHRM), which represents 80,000 HR professionals, reported that their survey showed that 75% of the respondents said that the FMLA creates administrative problems every day. SHRM's Deanna Gelak, who heads up a coalition opposing the expansion of the FMLA, said that in order to enforce this type of leave, the government is going to become "Big Brother."

The complaints, problems and attacks regarding the FMLA are coming from all sources *Personnel Journal Magazine*, The National Association of Manufacturers, the National Association of Women Business Owners, SHRM and a broad spectrum of opinion surveys.

A surprising backlash from employees who use FMLA the least resulted in the creation of an organization calling itself "The Child Free Network." This organization from California cites statistics showing that workers are using their children to avoid overtime and weekend work, to get additional time off, to select the most desirable vacation periods and to come in late, leave early and take off Mondays and Fridays for long weekends. They restrict their travel time and take off 2 to 3 hours on many afternoons for child care. They miss days of work every month that cannot be counted as absences, says one of the organization's publications. Companies design their benefits, leave schedules, workloads and culture around those employees with children and we are being stiffed on all fronts, they say. We have a larger share of late nights, weekend work, emergency calls, last-minute travel assignments and a smaller share of the benefits, said approximately 80% of their surveyed respondents. "Whenever a company begins showing favoritism to anyone or to any group, others are going to react," said the organization's representative. The Child Free Network has 33 chapters nationwide with more than 2,500 members and is growing.

On <u>principles</u>, employers found two things bad from the start:

1. Absenteeism is costly and disruptive. It places heavy demands on other employees, the supervisor, the company and productivity. It is difficult to hire replacement workers for jobs they will not be allowed to keep. It's also more expensive to hire temps. It usually requires other workers to pick up that slack or put in the extra hours. While historically employers have tried to keep absenteeism to a minimum of 5 to 10 days per year, they now were faced with absences of 60 days per year. You can't make money from an employee who isn't at work. Performance evaluations were often centered on attendance and lateness.

2. The FMLA was created, written and is administered as if employers were the enemy and employees were victims. That philosophy created some of the bizarre, complicated, costly and litigious situations that businesses dread.

But, beyond those issues of principles, there are functional problems with this regulation that need to be examined. Most of these emanate from two provisions in the Act:

1. The interpretation of a "serious health condition," and

2. The ability to take "incremental leave" in time chunks as small as six minutes.

<u>Serious Health Conditions</u>

Initially a serious health condition was considered to be serious! For a dependent it was thought to be someone who was bed-ridden or had undergone a surgical operation, an accident, a broken leg, someone in need of intensive care similar to a full-time nurse.

The "serious health condition" of the employee was considered to be the total incapacity to work. It meant an injury, serious illness, being under a doctor's immediate care, a debilitating, incapacitating condition that required doctor or hospital care.

However, the philosophy of the FMLA is one of gradually interpreting and reinterpreting the elements of the Act to add layers of entitlement. The first major step is to broaden the use.

A Chicago Transit Authority (CTA) employee took 6 weeks of FMLA leave because he was constipated. A CTA clerk who had recently been suspended for excessive absenteeism, now avoids further discipline by

claiming FMLA coverage for premenstrual cramps.

The Westlake Polymers Corporation spent over $50,000 fighting a termination case for a woman who claimed 7 weeks FMLA leave for an ingrown toenail and for 4 days when her cat died. The case was more than 3 years in litigation when the company finally settled out of court.

According to an editorial in the Dow Jones publications library, reports across the nation show FMLA leave for hemorrhoids, allergies, earaches, bronchitis, anxiety and backaches. When employers attempt to terminate problem employees for excessive absenteeism, the employee often demands rights under the FMLA claiming they had previously informed their supervisor of the FMLA application before the absence occurred. Under the regulations, an employer is not allowed to count any FMLA leave as an absence. So when Mary takes 2 months off in 3-day increments of FMLA leave, you cannot use that on her annual performance evaluation. Originally the common cold was not covered, however, in an opinion issued by the U.S. Department of Labor they said that it might now be. What is a "serious health condition" as it now exists?

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

- any period of incapacity or treatment with inpatient care (an overnight stay) in a hospital, hospice or residential medical care facility;
- any period of incapacity requiring absence of more than 3 calendar days from work, school or other regular, daily activities that <u>also</u> involves continuing treatment by (or under the supervision of) a health care provider; or
- continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than 3 calendar days, and for prenatal care.

Although this latest interpretation is considered to be a further refinement, like so much we find in this period of over-regulation in employment, we now have more questions and, I suspect, more confusion than before. How many minor ailments, for example, could result in 3 days off if we don't allow 3 days off now? Most likely we will need further interpretation and legal translation as we proceed.

A few more points on serious health conditions.

- You may decide to generously allow an expanded use of the FMLA. Let's say, for example, you decide to allow an employee to take FMLA time off for a hair transplant, cosmetic surgery, visiting a child's school, attending a class reunion or any other purpose not yet covered by the FMLA. You may be opening a Pandora's box of problems. First, you may then have to allow other employees that same allowance. Next, if the employee uses up the FMLA 12 weeks leave and then comes back asking for more, you may have to allow the extra leave because you cannot deny a person's right to any legitimate use of FMLA if <u>those specific</u> rights have not been used up. In other words, you can allow all the extra leave you want, for any additional purposes you choose, but those additional purposes cannot replace the specific allowances given by the FMLA.

<u>Incremental Leave</u>

In the beginning it was thought that FMLA leave would be taken all at one time or in weekly increments. After all, the initial concept was to accommodate maternity and related medical purposes or "serious health conditions."

Upon the inception of the regulations, however, it became clear that <u>one-day</u> leaves would become an issue. The discussion then turned to when and for what purpose would you allow 1/2 day off and how would this affect exempt employees who could not be docked for 1/2 day absences?

But as the broadening interpretation of the Act began to cover minor maladies, uncomfortable conditions and the need for short

rest periods, it became clear that there was almost no restriction on the application of time increments. The end result came down to two answers. At a minimum, you cannot refuse to allow a smaller increment of leave for FMLA purposes than you now allow for any other type of leave. So, if you allow employees to charge off 30 minutes to sick leave or vacation, then you must also allow FMLA leave in 30 minute increments.

However, there has already been significant enforcement of a tighter standard. You can be required to allow FMLA leave in time increments as small as your time keeping system can measure. It has already been enforced at 6 minute increments.

On the other end of the spectrum, an FMLA leave for a pregnancy cannot be dispersed intermittently over the course of a year. A new mother, for example, cannot take 6 weeks off now and 6 weeks later in the year for one pregnancy. She may, however, take off intermittent leave for prenatal care or for an illness of the infant separate from the normal pregnancy. Although this all requires significant record keeping activities, you should certainly not be measuring elements of time differently than you do for any other type of leave.

The Ugly

In this time of employee empowerment, team management and employer/employee cooperativeness, many companies have created a "no fault" leave plan. Such plans are controlled by the employee. They are generous and do not require the company to question the need or use of the time or to impose itself into the personal lives of its employees. Such "no fault" plans, which have been previously expanding, cannot be used under the FMLA. "No fault" plans usually lump all paid leave together in a pool. This pool of time includes vacation, holidays, sick leave, etc. The employee can use it freely for whatever he/she chooses without explanation to the employer. Under the FMLA, the employer is mandated to probe the purpose of the leave to identify the employee's use or need of the FMLA whether the employee requests coverage under the FMLA or not! You, the employer, are mandated to identify the employee's need unless the employee, knowing fully of his/her rights under the Act, still refuses to give you a reason for the leave. You can then decide not to probe further into the reason. Under such circumstances, however, you do not have to grant the leave or if you do, you do not have to offer the FMLA protection of job and benefits rights (whichever you do, you must so inform the employee in writing within 2 days of the leave). An employee is no longer able to take leave without dealing with FMLA demands.

Companies are abandoning their attendance reward programs. When one employee, who has not missed a day of work in a year, is given an award or bonus for her outstanding efforts sees the same award being given to another employee who missed 57 days that year, it's clear that the program is no longer an incentive.

A survey by SHRM showed that 50% of the respondents are forced to rely on a lawyer or consultant to ensure FMLA compliance. SHRM's President and CEO said, "What's really disturbing is that many HR professionals now view family leave as a negative rather than a positive benefit for employees."

Theresa Hupp, Director of HR for Hallmark Cards says she sees gynecologists giving mental health opinions and general practitioners signing off on stress leaves. But under doctor-patient privacy laws she cannot ask the doctor how long the employee should be out. The expense of investigating these issues and the distasteful need to dig into an employee's personal life add to the already time consuming, paper work burden of the FMLA.

Summary

With a lot more thought, public input and better motives, this could have been a better law. The purpose of the law was to gain political votes with a popular issue at the expense of employers. With that same theory in mind, a law requiring you to give free meals and transportation to all workers with families earning less than $10 per hour would pass, but would this be a good law? What is now being planned is that the FMLA is going to be expanded to cover more situations (school visits, day care visits, community events, etc.), more companies

(50 employee requirement reduced to 25), more people (temps, independent contractors) and to find ways to pay for the FMLA time off (company pays, Workers' Comp, state unemployment funds, etc.). As one association spokesman commented, "If we can pay farmers for not growing crops, and we can pay people 40 years of pension for 20 years of service, why not pay workers for not working?"

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The opinions expressed in this publication are those of the author and do not necessarily reflect those of this organization. The information contained herein should not replace the advice of your attorney.

In The Next Issue: FMLA Part II: Making It Work. We will cover the step-by-step procedures, the final rules update, present the needed forms and provide a question and answer section with some surprises (did you know your employees could work at another job while on FMLA leave?).

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Appendix C to Part 825 – Notice to Employees of Rights Under FMLA

YOUR RIGHTS
under the
FAMILY AND MEDICAL LEAVE ACT OF 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

REASONS FOR TAKING LEAVE: Unpaid leave must be granted for any of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

UNLAWFUL ACTS BY EMPLOYERS: FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

ENFORCEMENT:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FOR ADDITIONAL INFORMATION: Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor, Employment Standards Administration
Wage and Hour Division, Washington, D.C. 20210
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