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W A G E A N D H O U R

## Surge in FMLA Lawsuits Creates Challenges for Employers

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*Special to the Legal*

While this column generally focuses on another statute enforced by the Wage and Hour Division of the U.S. Department of Labor (the Fair Labor Standards Act), employers should be aware of the dramatic increase in the number of cases being brought under the Family and Medical Leave Act (FMLA). According to the U.S. Courts' Public Access to Court Electronic Records (PACER) system, 951 FMLA cases have been filed in the first 10 months of 2014, making it all but certain that the number of FMLA cases filed this year will be the highest on record. While nearly 1,000 FMLA cases were filed in calendar year 2013, less than half that number (406) were filed in 2012. The reason for the burgeoning number of FMLA lawsuits is multifaceted, and the number of FMLA lawsuits most likely will continue to increase at a significant rate.

### INCREASING FMLA AWARENESS

Enacted in 1993 to "balance the



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demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity," the FMLA provides for 12 workweeks of leave during any 12-month period in certain qualifying circumstances (like the birth or adoption of a child or a serious health condition of the employee or certain family members) and 26 workweeks of leave during any 12-month period for an employee to care for a servicemember who is a spouse, child, parent or next of kin.

In a report commissioned by the U.S. Department of Labor in 2012, Abt Associates sampled both employers and employees on various subjects regarding FMLA use and

administration. The data revealed that 13 percent of all employees took leave for a qualifying FMLA reason in the past year, more than half of which was related to an employee's own illness. The report also found that 66 percent of all employees are aware of the FMLA and 71 percent of employees at covered worksites have an awareness of the act. Increasing awareness of the FMLA and its protections certainly has contributed to the rise in FMLA claims.

### THE LEGAL LANDSCAPE

The FMLA prohibits employers from interfering with the rights of employees to exercise or attempt to exercise their rights under the FMLA. It also prohibits employers from discriminating against employees who oppose a practice that is unlawful under the FMLA or from discriminating against employees for engaging in certain conduct (like filing a complaint or testifying in an inquiry or proceeding relating to any FMLA right). Employees generally seek FMLA leave either as a block of time or on an intermittent

basis, to use as needed with respect to their own serious health condition or the condition of a covered family member. Of course, the administration of intermittent leave can create significant operational challenges for employers in running day-to-day business operations.

The Department of Labor has issued a regulation that provides that the FMLA's "prohibition against interference prohibits an employer from discriminating or retaliating against an employee ... for having exercised or attempted to exercise FMLA rights. ... 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."

Courts generally have separated FMLA claims into two subtypes: interference claims and retaliation claims. Interference claims generally involve allegations that an employer prevented an employee from taking leave, otherwise obstructed his or her taking of leave or failed to reinstate an employee following the taking of FMLA leave. In contrast, claims of retaliation allege that an employer took an adverse or materially adverse employment action because an employee took FMLA leave. Importantly, courts in the Third Circuit apply a strict liability standard to interference claims whereas claims of retaliation are analyzed under a more onerous burden-shifting framework. While the U.S. Court of Appeals for the Third Circuit in *Ross v. Gilhuly*, 755 F. 3d 185 (2014), provided a welcome clarification to employers as to the distinction

between claims of interference and retaliation under the FMLA, finding that the plaintiff in that case confused the two claims in arguing that the defendant interfered with his entitlement to take FMLA leave free from "later discrimination," employees have an incentive to assert interference claims to benefit from a far more plaintiff-friendly standard. As with other employment statutes, the FMLA provides for the award of attorney fees.

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FMLA lawsuits also can be filed in court immediately, and do not require employees to take the additional step of exhausting administrative remedies through agencies like the U.S. Equal Employment Opportunity Commission as they are required to do when asserting claims of discrimination, retaliation and harassment under other employment discrimination laws like the Americans with Disabilities Act. Moreover, while employees in Pennsylvania need to file a charge of discrimination within 300 days of an adverse or materially adverse action in order to assert claims of discrimination or retaliation under statutes like Title VII and the Age Discrimination in Employment Act, employees have two years (or three years for alleged willful violations) to file suit under the FMLA.

## INDUSTRY-SPECIFIC CHALLENGES

In a report issued in 2013, FMLA leave request processor FMLASource found that certain industries experience a far higher rate of FMLA absences, including health care, call centers, casinos, government and manufacturing. A large percentage of the FMLA leaves in those industries were intermittent leaves of absence, which can be far more challenging to administer. Correspondingly, the higher rate of FMLA usage in those industries presents increased opportunities for employees to file lawsuits.

## ASSESS CURRENT PROCESS

Given the increased societal awareness of the FMLA, the strict liability standard for asserting claims of interference, and the less tedious process for asserting a claim as opposed to traditional employment discrimination statutes, it is no wonder that FMLA lawsuits have increased at such a rapid rate. Employers should assess their current process for administering FMLA and consider whether modifications to that process could better steel their organization from the increased risk of FMLA litigation. Moreover, employers should train their human resources professionals and managers as to how to address the day-to-day challenges of administering FMLA leaves of absence, including those challenges created by intermittent use of FMLA leave. •