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An Overview of the Family and Medical Leave Act of 1993

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Beginning August 5, 1993, North Carolina governmental employers, like their public and private counterparts nationwide, will have a new obligation—to grant, for any one of three reasons, up to twelve weeks of unpaid leave per year to their employees. A leave request may be based on (1) an employee's medical condition; (2) the birth or adoption of a child to an employee-parent; and (3) an employee's need to care for a child, spouse, or parent who has a serious health condition. On February 5, 1993, President Clinton signed H.R. 1, the Family and Medical Leave Act of 1993,[1] to take effect in six months. This article summarizes the major provisions of the act.

Covered Employers and Employees

Both private and public sector employers are covered by this legislation. Section 101 of the act defines covered private employers to include "any person engaged in commerce or in any industry affecting commerce," and public employers to include the federal government, state governments, and political subdivisions of the states (for example, municipalities and counties).[2] Section 108 of the act extends the act's coverage to private and public elementary and secondary schools.

Not all employers, however, are covered by the act: only those that employ at least fifty or more employees for at least twenty weeks a year. Thus, many small towns in North Carolina, like many small businesses will not be subject to the act's requirements.

Similarly, not all employees are covered by the act, even if they work for employers who have fifty or more employees. The act's leave provisions are mandated only for employees who have worked for the employer for at least twelve months and have, in the previous twelve months, rendered at least 1,250 hours of service.

Leave Entitlements

The basic thrust of the act is a guarantee of a right to leave without pay. An eligible employee is entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following reasons:[3]

- The birth of a son or daughter of the employee, in order to care for such son or daughter
- The placement of a son or daughter with the employee for adoption or foster care
- The need for the employee to care for the spouse, child,[4] or parent of the employee, when such spouse, son, daughter, or parent has a serious health condition

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1. ___ U.S.C § ___.

2. The definition specifying what public employers are covered is borrowed from section 3(x) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(x) (1938, as amended).

3. § 102(a)(1).

4. The words used in the statute are "son or daughter," which are defined to include a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis if the child is under eighteen or incapable of self-care because of a mental or physical disability. § 101(12).

- An employee's serious health condition that makes the employee unable to perform the functions of his or her position

A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves hospitalization or continuing treatment by a doctor.[5]

The entitlement to leave for birth or child placement expires one year after the date of childbirth or placement. Childbirth or placement leave is to be taken in one block of time up to twelve weeks, unless the employee and the employer agree otherwise.[6]

An employee's entitlement to leave for a serious health condition is a little different. In that case, when medically necessary, leave may be taken intermittently or on a reduced-time schedule—that is, on a schedule that reduces the regular workday or workweek. If the employee requests intermittent leave or leave on a reduced-time schedule that is foreseeable because the employee has a planned medical treatment, then the employer may transfer the employee temporarily to another position for which the employee is qualified. The employer may place the employee in an alternate job that would better accommodate the recurring periods of leave than would the employee's regular job, but may not reduce the pay and benefits of the employee in the alternate job.[7]

To illustrate, a county health department could temporarily transfer a receptionist who was going to be on intermittent leave for medical reasons to a clerk-typist position for the duration of the leave, as long as the employee continued to receive the same pay and benefits. In this way, the health department could assure coverage at the busy receptionist desk during the employee's absence.

In cases in which the need for leave is foreseeable, such as an expected birth or planned medical treatment, the employee is required to provide the employer with at least thirty days' notice before the date the leave is to begin. When circumstances prevent the employee from giving the thirty days' notice, the employee is to provide notice as soon as practicable. In cases of leave for planned medical treatment, the employee is required to make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations.[8]

5. § 101(11).
6. § 102(a) and (b).
7. § 102(b).
8. § 102(e).

If a husband and wife both work for the same employer, they are limited to a total of twelve weeks of leave in a twelve-month period for childbirth, placement, or caring for a sick parent.[9]

Verifying Leave Requests

The act permits an employer to require an employee to verify the need for leave due to a serious medical condition of the employee or a member of the employee's family.[10] In general, requests for leave must be granted based on a certification issued by a health-care provider.[11] The employee is required to provide upon request and in a timely manner a copy of such medical certification to the employer.

Section 103(b) of the act describes sufficient certification. All certificates must contain three statements: (1) the date when the serious health condition began; (2) the probable duration of the condition; and (3) the appropriate medical facts known by the health-care provider regarding the condition. If the leave request is to care for a family member, the certificate must contain a statement that the employee is needed to provide such care.[12] If the leave request is for the employee with a serious medical condition, the certificate must include a statement that the employee is unable to perform the functions of his or her position.

If the leave request is for planned medical treatment and the employee wants intermittent leave or leave on a reduced-time schedule, the certificate must state the dates when the treatment is to begin and the duration of the treatment. If the intermittent leave request is necessitated by a serious medical condition of the employee or a member of the employee's family, the certificate must state that there is a medical necessity for the intermittent leave and how long the leave will be needed.

An employer who doubts the validity of the leave request may require the employee to obtain a second opinion from a second health-care provider of the employer's choice. The employer bears the cost of obtaining the second opinion. If the second opinion conflicts with the original medical opinion,

9. § 102(f).
10. § 103.
11. Generally speaking, a doctor. § 101(6).
12. It is not clear whether the certification must be simply that the ill family member needs care by *someone* or that the family member needs care by *this employee.*

then the employer may require a third opinion. The act provides that the opinion of the third health-care provider is final and binding on the employer and the employee.

Employment and Benefits Protection

The basic thrust of the act is guaranteed leave; an essential element of that guarantee is the right of the employee to return either to the position he or she left when the leave began, or to an equivalent position with the same benefits, pay, and other terms and conditions of employment. Section 104(a) specifies that right and requires the employer to maintain coverage for the employee under any group health plan for the duration of the leave. The employer may subsequently recover premiums paid if the employee fails to return to work (unless the employee suffers a continuation of the serious medical condition). The employer may require the employee to furnish medical certification that the employee is able to resume work.

Section 104(b) creates an exception to the general rule of full restoration of employment and benefits. An employer may deny reinstatement to a salaried employee who is among the highest-paid 10 percent of the employer's workforce.

Prohibited Acts and Means of Enforcement

Section 105(a) makes it unlawful for an employer to interfere with, restrain, or deny the exercise of any right under the act, or to discharge or otherwise discriminate against an employee who opposes practices made unlawful by the act. The act further provides, at Section 105(b), that it is unlawful to discharge or otherwise discriminate against an employee because the employee files a charge under the act or otherwise participates in any inquiry or proceeding under the act.

Investigative authority, as set forth in Section 106 of the act, is vested in the United States Department of Labor (DOL). Employers are to maintain records demonstrating compliance with the act; the records may be inspected as often as once a year by DOL, and more often if DOL has reasonable cause to believe a violation of the act has occurred. DOL is given authority to investigate complaints and to issue subpoenas.

Section 107 gives employees the authority to enforce their rights under the act by suing the employer. An employee may file an action against any employer, including a public agency, in any federal or state court of competent jurisdiction. The employee has two years to file, unless there is a willful violation of the act, in which case the employee has three years.

As a general rule, if the employee prevails in the lawsuit, he or she may be awarded an amount equal to lost wages, salary, employment benefits, or other compensation lost by reason of the violation (including interest), as well as any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care. The total award, however, cannot exceed the amount equivalent to twelve weeks' compensation plus actual loss. In cases of willful violation, the act provides for "liquidated damages," doubling the award. In that case, the employee would be entitled to twice the amount of twelve weeks' compensation, plus interest.

The act also authorizes DOL to bring a civil action for enforcement.

Special Rules for School Employees

Section 108 of the act sets forth special rules for employees of public and private elementary and secondary schools.

Section 108(c) provides that in any case in which an employee "employed principally in an instructional capacity"—that is, as, a classroom teacher—requests leave for planned, foreseeable medical treatment and will be on leave for more than 20 percent of the total number of working days in the leave period, the school may require the employee to either take the leave during particular times or transfer temporarily to another position with equivalent pay and benefits.

In addition, Section 108 contains special rules for leave requests for periods near the end of an academic term. If an employee begins the leave *more than five weeks before* the end of the term, the school may require the employee to continue taking leave until the end of the term if the leave is of at least three weeks' duration and the employee would otherwise return before the end of the term. If an employee begins leave *five or fewer weeks before* the end of the term, the school may require the employee to continue taking leave until the end of the term if the leave is of at least two weeks' duration and the employee would otherwise return before the end of the term. Finally, if the

leave begins *less than three weeks before* the end of the term and the leave is for five working days or more, the school may require the employee to continue to take leave until the end of the term.

Conclusion

The last section of the Family and Medical Leave Act provides that employers may provide greater benefits than those mandated by the act, but the clear impact of the bill is to require employers who do not now provide at least twelve weeks of leave for family and medical reasons to do so. For some employers, the effect of this legislation will be minimal, as their leave policies provide benefits comparable to those in the act; for others, the effect will be significant. The long-term effects of this legislation remain to be seen, but all employers of fifty or more employees need to be ready to comply with the act by August.

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