

NOTIFICATION REQUIREMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993

I. Introduction.

A. In General.

In order to claim their rights under FMLA, employees are required to afford their employer notice of their intention to take a leave pursuant to the Act. There are two essential different applicable notice requirement situations: Those in which the employee's upcoming need for FMLA leave is foreseeable, and those in which the need is not foreseeable. Both situations carry with them a requirement for the employee to give the employer notice, but the specific notice requirements are different for each.

An employee does not necessarily need to submit a written notice including an explicit request for FMLA leave. Although the employee must both relate the factor of a serious health condition and the need for time off, notice may be indirect, such as a phone call relating the occurrence of an accident, and need not make reference to the FMLA or express the intention of exercising rights under the Act.

The FMLA statute also imposes certain notice requirements on employers covered by the act. These relate primarily to the employer's duty to make the employee aware of his or her rights to leave under the terms of FMLA. These employer notice requirements provide for further communication between employer and employee to schedule FMLA, and if applicable, non-FMLA leave consistent with the employers as well as employees needs.

B. Foundation for FMLA's Notice Requirements.

The notice requirements incumbent upon employees and employers pursuant to FMLA are derived and interpreted from three primary sources. First, the statute itself sets forth certain requirements. Second, the United States Department of Labor has promulgated administrative regulations ("Regulations") under the Act which serve to interpret its provisions as well as spell out various fact-specific examples of circumstances under which notice is required and the manner in which that notice must be given. Third, both the Act as well as the Regulations have been the subject of numerous interpretations by federal as well as state courts at both the trial and appellate levels.

II. Statutory Requirement of Initial Employee Notice.

A. Situations in Which the Requirement for Leave is Foreseeable.

If the need for leave is foreseeable, the employee must give the employer at least 30 days' advance notice.¹

B. Situations in Which the Requirement for Leave is Unforeseeable.

Less than 30 days' advance notice is acceptable if the employee lacks knowledge of when the leave needs to begin, there is a change in circumstances, or a medical emergency occurs.² In these cases, notice must be made "as is practicable".³

Births and adoption placements are examples of foreseeable events explicitly mentioned in the statute. When the need for leave is foreseeable for the birth or placement of a child, an employee must give at least 30 days' advance notice of the need for leave; however, if the birth or placement of a child is to occur in less than 30 days, the "as practicable" standard applies.⁴

III. Particular FMLA Provisions Relating to Notice Requirements.

A. The Required Contents of FMLA Notices By Employees.

An employee need not describe a requested leave arising under the FMLA or refer to the FMLA in any way; rather, the employee need only state that a leave is necessary for any of the circumstances covered by the FMLA. At that point, the burden shifts to the employer to inquire further whether FMLA leave is being requested.⁵

Some courts have afforded the permissible scope of the employee notice content requirements comparatively broad scope, such as was illustrated in *Divizio v. Elmwood Care, Inc.*, 1998 WL 292982 (N.D. Ill. 19998), where an employee brought an action under FMLA alleging that her employer had violated the Act by terminating her at the expiration of her medical leave rather than restoring her former position or an equivalent position. The court concluded that the employee's allegations were sufficient to withstand dismissal. The plaintiff alleged that she was entitled to FMLA leave commencing December 18, 1996, because she experienced signs of early labor, indicating that she was about to give birth to her child. The employer argued that the employee's allegations were insufficient because she did not specifically state that her pregnancy and early labor qualified as a "serious health condition" or the "birth of a son or daughter." The court found that the employer's argument lacked merit, because the employee's statements sufficed to put the employer on notice as to her claim that she was eligible for FMLA leave.

But there is also case law which suggests that employees would be wise to "go the extra mile" in giving FMLA leave notices, if for no other reason than that possible circumstances not covered by FMLA may overlap the employee's FMLA rights. An example is the holding in *Gilliam v. United Parcel Service, Inc.*, 233 F.3d 969 (7th Cir. 2000), in which a former employee sued his former employer alleging that his termination for his failure to comply with a collective bargaining agreement provision relating to notice involving sick leave met with the court's admonition that the employer did not violate FMLA, since FMLA did not provide for leave on short notice when longer notice readily could have been given, and FMLA does not authorize employees on leave to keep their employers uninformed of when they will return. The *Gilliam, supra* holding

seems to suggest that even if the original notice's contents are sufficient under FMLA, the employee may still retain a subsequent duty to keep the employer informed, at least regarding the anticipated date of his or her intended return to work.

And, just like in every other area of the law, not all courts have been as generous as was the holding in *Divisio, supra*. For example, in *Holmes v. The Boeing Co.*, 166 F.3d 1221 (10th Cir. 1999), the employer terminated an employee after he had taken medical leave for treatment of an ulcer. The court held that the employee had failed to allege that his physical condition was such that he could not comply with the employer's reasonable notice requirements. Only in emergencies are an employer's advance written notice requirements precluded by 29 U.S.C. § 2614(a)(5), according to the court, which also held that the "no more than" one-to-two day delay in notifying an employer is the outer limit of reasonable notice. Even though the Regulations appear to be quite liberal when they indicate that the employee's notice need not be in any particular form or even mention FMLA,⁶ holdings such as *Holmes, supra*, should impress upon employees the necessity of conveying to the employer in the notice the fact that the condition being alleged does indeed fall into one of FMLA's permissible categories for the granting of mandatory leave, as well as the importance of giving the notice in as timely a fashion as is practicable.

B. Intermittent Leave or Leave on a Reduced Schedule.

Intermittent or reduced schedule leave are situations in which initial employee notice may not suffice in isolation, as specified in the regulatory guidance: "...an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider."⁷ Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee must advise the employer as soon as practicable if dates of scheduled leave change are extended, or were initially unknown.⁸

Department of Labor advisory opinions clarify that it is the employee's need, not the employer's dictates, that determines the terms of FMLA leave.⁹ In August, 1994, the Wage and Hour Division of the DOL issued an advisory opinion regarding intermittent leave in response to a series of inquiries from an employer.¹⁰ One of the questions the advisory opinion addressed involved a flight attendant who requested intermittent FMLA leave to care for a seriously ill parent.¹¹ The employee needed three hours off every other Friday for two months.¹² The three-hour absence caused the employee to miss her flight assignment for that day. The employer wished to know how much leave to charge against the employee's twelve-week entitlement for these absences. In response, the DOL stated that the employee should be charged only three hours of FMLA leave per absence.¹³ The opinion cited regulations providing that an employer may only charge an employee taking intermittent leave with the amount of leave actually taken for the FMLA-qualifying reason.¹⁴

The DOL issued a second advisory opinion on this topic in July 1997.¹⁵ In that case, the DOL examined intermittent FMLA leave for salaried executive, administrative, and professional employees who are exempt under the Fair Labor Standards Act. The agency again concluded that requiring exempt employees to take a full day of leave in circumstances where the employee does not need a full day to attend to an FMLA-qualifying need violates FMLA regulations.¹⁶ These two opinions affirm that employers cannot require employees to take FMLA leave beyond what is necessary to meet the employee's FMLA-qualifying need. Implicit in each of these opinions is that the employee's notice to the employer, when initially requesting intermittent leave under FMLA, must specify the specific terms of the leave schedule actually being sought.

An employer is entitled to require a new initial notice should the condition underlying an already scheduled FMLA absence cause a situation requiring intermittent leave.¹⁷ An employer that agrees to intermittent leave or a reduced schedule may require the employee to transfer to another alternative position temporarily, to accommodate the reduced schedule.¹⁸

At least one court has expressed the view that the taking of intermittent leave, as opposed to uninterrupted leave, must be demonstrated by the employee to be a medical necessity. In *Mosley v. Hedges*, 1998 WL 182479 (N.D. Ill. 1998), an employer terminated an employee after alleging that she had fraudulently used her sick leave benefits. The court held that although an employee may take intermittent leave or reduced schedule leave when medically necessary, FMLA does not protect an employee who is absent excessively beyond the original intermittent leave she had requested in connection with her foot surgery.

C. Extenuating Circumstances Under Which the Employee is Unable to Give the Required Notification to the Employer.

It seems likely from a reasonable construction of the case law that under certain circumstances, valid notice can be effected after the initial employee absence. For example, an employee involved in an unforeseeable accident, rendered unconscious, and taken by ambulance to the hospital after first slipping into a coma could hardly be expected to give either advance notice or, indeed, any notice at all.

Actually, much of the reported case law indicates that if an employee fails to give the notice required, or on a timely basis, or in some other manner which is defective, FMLA benefits will not be available. See, e.g., *Mullin v. Rochester Manpower, Inc.*, 204 F.Supp.2d 556 (W.D. N.Y. 2002), in which a former employee's actions in informing her supervisor that she was pregnant and was due over seven months later did not provide sufficient notice of intent to take maternity leave to satisfy the requirement that the employee request a leave of absence under FMLA, despite the employee's contentions that she mentioned that she would take maternity leave. But holdings such as *Mullin, supra*, usually involve factual circumstances that are much less favorable to the employee's ability to comply and degree of compliance with the applicable notice requirements than the example of the unforeseeable accident cited in the text. See, e.g.,

Mincey v. Dow Chemical Co., 217 F.Supp.2d 737 (M.D. La. 2002), in which the court held that an employee did not put her employer on reasonable notice that she required FMLA leave due to her fibromyalgia, and, thus, did not establish a prima facie case of FMLA discrimination arising from employer's failure to grant leave, where she missed nearly half of her scheduled work hours during her last five months of employment and attributed these absences to flu, various infections, her daughter's illness, school parties for her daughter, the birth of a niece and other unspecified illnesses.

In the hypothetical example cited above, no extenuating circumstances such as these exist that would militate against affording the employee the full benefits entitled by Congress to be conferred when it enacted FMLA in 1993. "Injuries caused by a serious accident" were one of the scenarios that was debated by Congress during the course of FMLA's passage, and nothing in the legislative history suggests the draconian result that the hypothetical in the text would otherwise bring about. *See*, S. Rep. No. 103-3, 103 Cong., 1st Sess. 3 (1993) at 29. But even employees involved in something resembling the above-described hypothetical fact situation must take care to comply with FMLA's notice requirements, at least to the extent they are able to communicate their circumstances to their employer either themselves or through third parties, such as family members. In *Neide v. Grand Court Lifestyles, Inc.*, 38 F.Supp.2d 938 (D. Kan. 1999), an employee who was unable to work due to injuries sustained in an automobile accident failed to provide his employer with the requisite notice of need for unpaid leave and subsequent reinstatement under FMLA. The court held that absent any discussions with the employer or coworkers concerning his condition, absence, or expected return date, nor compliance with the employer's procedures for requesting leave set forth in the employee handbook, the employee had waived his right to FMLA leave. Note, however, that the employee in *Neide, supra*, was neither unconscious, in a coma, or otherwise unable to communicate with others.

Additionally, 29 C.F.R. § 825.302 expounds on the notice provisions for unforeseeable leave and its exception from the 30 day requirement, providing, in relevant part, "If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement of a child with the employee for adoption or foster care.¹⁹ Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change, are extended, or were initially unknown."²⁰

The regulation goes on to define "as soon as practicable" as meaning as soon as "both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days' notice, 'as soon as practicable' ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee."²¹

D. Expectations That Employers and Employees Will Mutually Cooperate Under Certain Conditions.

Nothing within the text of FMLA, nor in the Regulations, expressly requires employers and employees to jointly cooperate in making discretionary decisions relating to the scheduling of FMLA leaves or any other matter covered by FMLA. But the statute does give room for the parties to agree to treat leave requests in a manner that would ordinarily not be consistent with the law's literal requirements so long as the agreement is mutual. In the case of the birth or placement of a child, for example, an employee is not entitled to take intermittent leave or leave on a reduced schedule, *unless* the parties mutually agree otherwise.²² It is also contemplated by the statute (see *infra*) that where an employee provides a medical certification to the employer with which the employer is for some reason not satisfied; and the employer thereafter exercises its right to procure a second opinion; and a difference between the two opinions leads the employer to request yet a third opinion; that the parties will mutually cooperate in connection with the selection of the health care provider to be tasked with the rendition of the third opinion.²³

E. Employer Waiver of Notice Requirement.

The Regulations allow for conditions for when an employer may waive the notice requirements, stating, "An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (see Sec. 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay."²⁴

F. Methods by Which Notice May be Given.

The Regulations specify how notice is to be given, stating, "The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ('fax') machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally."²⁵ The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for any of the circumstances covered by the FMLA. At that point, the burden is on the employer to inquire further to determine whether FMLA leave is being requested.²⁶ "The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation."²⁷

G. Medical Certification Requirements.

If an employee asks for leave due to his or her own serious health condition or that of a family member, the employer may require that the request be supported by certification by the health care provider, allowing the employee at least 15 days to obtain certification after making such a request.²⁸ In most cases, the employer should request such certification at the time the employee gives notice of a need or within two business days thereafter.²⁹ In the case of an unforeseen leave, the request should be made within two business days of the start of the leave. In addition, the employer may request additional certification later if there becomes some reason to question the leave's appropriateness or duration.³⁰ The requirement of certification should be in writing and must state the consequences of failing to submit the certification.³¹ If the employee fails to provide a certification within the time established by the employer, the leave may be delayed until certification is provided.³² If the need for leave does not permit this timing, certification should be provided reasonably soon after the leave begins.³³

If the employer has reason to doubt the first certification, the employer may require, at its own expense, the opinion of a second health care provider, as long as the provider is not regularly employed by the employer.³⁴ If the second opinion differs from the first opinion, the employer may require, at its own expense, the opinion of a third health care provider designated or approved jointly by the employer and employee.³⁵ The employer's request for a second (or third) certification need only be made verbally.³⁶ The third opinion is final and binding on the employer and employee.³⁷

An employer may also require that an employee obtain subsequent recertification on a reasonable basis, allowing at least 15 calendar days from the date of the request.³⁸

A certification is sufficient if it states the date on which the serious health condition began; its probable duration; appropriate medical facts (but not a diagnosis); and that the employee is needed to care for a son, daughter, parent, or spouse, with an estimate of the amount of time that the care will require, or that the employee is unable to perform the functions of the job.³⁹

When an employee provides notice of the need for FMLA leave, the employer should provide the employee with notice detailing certain matters, including any requirements to provide medical certification and the consequences of failing to do so and any requirement for a fitness-duty certificate upon returning to work.⁴⁰ The Colorado Court of Appeals has held that an employer violated the notice requirements of the statute by failing to inform an employee of his obligations under the FMLA and failing to give written notification regarding the medical certification requirement.⁴¹

H. Reemployment and Benefit Rights.

After taking an FMLA leave, an employee must be restored to the position he or she held at the time leave began, or to an equivalent position, with equivalent benefits, pay, and other terms and conditions of employment.⁴² If an employee cannot perform the essential

functions of the original position due to a physical or mental medical condition, the employee has no right to be returned to the original position under FMLA; however, the employer may have certain obligations to accommodate the employee under the Americans With Disabilities Act (“ADA”).⁴³

An employee is entitled to any unconditional pay increases that might have occurred during the leave, such as a cost-of-living increase.⁴⁴ Benefits must be resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the FMLA leave.⁴⁵ However, where changes in employee benefit plans depend upon seniority or accrual during the leave period, the employee may lose these benefits if the hours requirements are not met due to the FMLA leave.⁴⁶ Significantly, an employee cannot be required to requalify for any benefits the employee enjoyed before leave began.⁴⁷ Detailed requirements govern maintenance of health benefits while on leave, and applicable Regulations and case law should be consulted before taking action.⁴⁸

I. The Consequences To Employees Who Fail To Meet FMLA’s Notice Requirements.

There have been literally dozens of judicial decisions describing facts under which employees have been held to forfeit their rights under FMLA, and a large percentage of these holdings involve either the failure of the employee to give proper notice of his or her intention to claim FMLA leave rights, or some other notice-related defect in following the procedures described in the FMLA statute and in the DOL Regulations which interpret it. An illustrative example, and a brief recapitulation of some of the myriad of rules relating to notification requirements incumbent upon employees to which they must adhere in order to prevail on an FMLA claim, includes:

- Where a former employee who had been a teacher brought an action against her former employer for a violation of her rights under FMLA, the court in *Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51 (2d Cir. 2001), decided that the interval between the employee's request for family leave under FMLA and the employer's notice to the employee was sufficient to satisfy the requirement that the employer's notice be given as soon as practicable, and thus the former employee was not entitled to reinstatement.
- An employee bringing an action under FMLA must establish, by a preponderance of the evidence, that he or she is entitled to the benefit claimed.⁴⁹ To establish a prima facie case for a FMLA violation, an employee must show that: (1) the employee is protected under FMLA; (2) the employee suffered an adverse employment decision; and (3) either the employee was treated less favorably than an employee who had not requested FMLA leave, or the adverse decision was made because of the employee's request for leave. Implicit in these requirements is the foundational fact that the employee must have given the employer the requisite notice of the employee’s intention to avail himself or herself of FMLA’s

leave provisions, in the manner and within the time frames prescribed by the statute and the Regulations.⁵⁰

IV. Duties Incumbent Upon Employers Relating to Giving of Applicable FMLA Provisions to Employees.

A. Employee Handbooks and Employer Policies.

Employees alone do not bear the sole responsibility for complying with notice requirements under FMLA. Various notice requirements are also incumbent upon employers under the regulations.

If an employer maintains an employee handbook or other written guidance to employees, information concerning the FMLA must be included in that handbook or document.⁵¹ If an employer does not maintain an employee handbook, it must provide written guidance to an employee concerning rights under the FMLA when the employee requests leave under the statute.⁵² This may be accomplished by handing the employee a copy of the Department of Labor's Fact Sheet.⁵³

B. Requirement That Employer Inform Employees of Certain Effects of Taking FMLA Leave.

When an employee provides notice of the need for FMLA leave, the employer should provide the employee with notice detailing certain matters, including whether the leave will be counted against the employee's annual FMLA leave entitlement; any requirements to provide medical certification and the consequences of failing to do so; the employee's right to substitute paid leave, or whether the employer will require substitution; any requirements concerning maintaining health insurance premiums; any requirement for a fitness-duty certificate upon returning to work; the employee's status as a "key employee" and potential for not being restored to work; the right to restoration; and potential liability for the employer's share of health premiums if the employee does not return to work.⁵⁴

C. Posting of Applicable FMLA Requirements At Place(s) of Employment.

Additionally, each employer must post conspicuously a notice prepared or approved by the Secretary of Labor in setting forth pertinent provisions of the FMLA's general leave requirements. The DOL has provided a sample notice that may be obtained from local offices of the Wage and Hour Division.⁵⁵

V. Illustrations Of Interpretation of FMLA Notice Provisions by the Federal Courts.

A. Notable United States Supreme Court Cases.

Since the statute's enactment in 1993, the United States Supreme Court has heard only two cases dealing with FMLA. The first tangentially involved the notice provisions of the statute and somewhat limited what up until the case was heard were assumed to be well-founded employee rights; the second was unrelated to the notice provisions of FMLA.

In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Court considered the validity of an FMLA regulation which provided that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken would not count against the employee's FMLA entitlement. Wolverine World Wide maintained a leave plan that permitted its employees up to seven months of unpaid sick leave. Ragsdale was terminated after her request for additional leave beyond the seven-month allowance was exhausted, and she was unable to return to work. Because Wolverine World Wide never informed Ragsdale that 12 weeks of leave under the leave plan would count as her FMLA leave, Ragsdale sought relief based on the FMLA regulation. The Court held that the regulation could not stand if it was "arbitrary, capricious, or manifestly contrary to the statute."⁵⁶ The Court ultimately found the regulation to be invalid because it altered the FMLA's cause of action in a fundamental way: "[The regulation] transformed the company's failure to give notice – along with its refusal to grant her more...leave – into an actionable violation..."⁵⁷ The Court further held that to prevail under FMLA's enforcement provisions, an employee must prove, as a threshold matter, that the employer interfered with, restrained, or denied the exercise of FMLA rights. And even when an employer has engaged in such misconduct, the Court held that the FMLA does not provide relief unless the employee has been prejudiced by the violation.⁵⁸

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court concluded that state employees could recover money damages from a state in federal court for violation of Section 102(a)(1)(C) of the FMLA. The thrust of the action involved primarily questions of federal supremacy versus circumstances under which states are immune from federal lawsuits. Since it did not deal in any fashion with the notice provisions of FMLA, it is not further discussed here.

B. Other Notable Federal and State Court Cases.

Both federal and state appellate courts have interpreted the notice provisions of FMLA in numerous cases. An exhaustive list or analysis of these holdings is beyond the intended scope of this Memorandum. By way of illustration only:

- **Federal Courts.** A federal Court of Appeals has held that an employee is not required to specifically mention the FMLA in order to receive its benefits, so long

as the notice given provides a qualifying reason for leave.⁵⁹ For example, in one case, an employee gave timely notice of the need for leave and information sufficient to show the qualifying nature of his condition, and thereby satisfied the notice requirement without mentioning the FMLA specifically.⁶⁰ The Fifth Circuit found that adequate notice was given where the employee called to say she was seriously injured in an auto accident and was in the hospital.⁶¹ In another case, the court found that where the employee mentioned he was suffering from a migraine headache, sufficient notice was given for the employer to inquire whether the employee wanted FMLA leave.⁶²

- **State Courts.** The fact that FMLA is a federal statute does not preclude claims by employees arising under it from being heard by state courts. For example, the Colorado Court of Appeals held that an employer violated the notice requirements of the statute by failing to inform an employee of his obligations under the FMLA, by failing to give written notification regarding the medical certification requirement, and by failing to inform the employee how the 12-month period for determining leave was calculated.⁶³

VI. FMLA-Based Provisions of State Laws and Concurrent Application of State Laws With FMLA.

A. Overview.

Both before as well as after the adoption of FMLA in 1993 by Congress, numerous states had already, or subsequently have, adopted family-, parental-, or medical-leave statutes similar to the federal law. As of this writing, 22 of the 50 states have enacted such legislation, including Arkansas, California, Connecticut, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia, and Wisconsin.

The federal statutory scheme, FMLA, neither supersedes nor preempts any provision of a state or local law that provides greater family- or medical-leave rights than the FMLA provides.⁶⁴ State laws often differ from FMLA in a number of different respects.⁶⁵ Four of the most significant are: (1) state coverage may extend to smaller employers; (2) the amount of leave required may be different; (3) eligibility, such as less time in service, may be different; and (4) leave may be allowed for other purposes.⁶⁶

Some state law provisions provide only administrative remedies with no corresponding private right of action, such is found in FMLA.⁶⁷

If a state has a more generous provision than the FMLA, the rules that must be followed with regard to a mandated leave are those of the state, not the FMLA.⁶⁸ For example, if a state act requires only 6 months' employment for a leave, which is more generous than the 12-month service requirement of the FMLA, an employee who has worked less than 12 months may be eligible for a leave under the state act.⁶⁹ If the state act, however,

requires an employer to grant only 6 weeks of leave, then the employer need not grant that employee more than 6 weeks, since the employee is not eligible for leave under the FMLA.⁷⁰

B. Examples Of Recent Judicial Interpretations of State Law Provisions.

As a general proposition, the state courts have tended to construe the scope of the state family-, parental-, or medical-leave statutes in a broad manner.⁷¹

¹ 29 U.S.C. § 2612(e)(2)(B).

² 29 C.F.R. § 825.302(a).

³ 29 U.S.C. § 2612(e)(1).

⁴ 29 U.S.C. § 2612(e)(1).

⁵ 29 C.F.R. §§ 825.302(c) and 825.303(b).

⁶ 29 C.F.R. §§ 825.302(c) and 825.303(b).

⁷ 29 C.F.R. § 825.302(e).

⁸ 29 C.F.R. § 825.302(a).

⁹ See 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997); 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

¹⁰ 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

¹¹ 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

¹² 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

¹³ 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

¹⁴ 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994), citing 29 C.F.R. § 825.205(a) (1994).

¹⁵ 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997).

¹⁶ 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997) (citing 29 C.F.R. § 825.203(d) (1997)).

¹⁷ *Muhammad v. Indiana Bell Telephone Co., Inc.*, 182 Fed.Appx. 551 (C.A.7 Ind. 2006).

¹⁸ 29 C.F.R. § 825.204(a).

¹⁹ 29 U.S.C. § 2612(a)(1)(A) and (B).

²⁰ 29 C.F.R. § 825.302(a).

²¹ 29 C.F.R. § 825.302(b).

²² 29 U.S.C. § 2612(b)(1).

²³ *See*, 29 U.S.C. § 2613(d).

²⁴ 29 C.F.R. § 825.302(g).

²⁵ 29 C.F.R. § 825.303(b).

²⁶ 29 C.F.R. §§ 825.302(c) and 825.303(b).

²⁷ 29 C.F.R. § 825.303(b).

²⁸ 29 U.S.C. § 2613(a); 29 C.F.R. § 825.305(b).

²⁹ 29 C.F.R. § 825.305(c).

³⁰ 29 C.F.R. § 825.305(c).

³¹ 29 C.F.R. §§ 825.305(a) and (d).

³² 29 C.F.R. § 825.311.

³³ 29 C.F.R. § 825.311.

³⁴ 29 U.S.C. § 2613(c).

³⁵ 29 U.S.C. § 2613(d).

³⁶ 29 C.F.R. § 825.305(a).

³⁷ 29 U.S.C. § 2613(d).

³⁸ 29 U.S.C. § 2613(d); 29 C.F.R. § 825.308(d).

³⁹ 29 U.S.C. § 2613(b).

⁴⁰ 29 C.F.R. § 825.301(b).

⁴¹ *DeLong v. Trujillo*, 1 P.3d 195 (Colo. App. 1999), *cert. granted* (May 30, 2000).

⁴² 29 U.S.C. § 2614(a)(1).

⁴³ 29 C.F.R. § 825.204(b).

⁴⁴ 29 C.F.R. § 825.215(c)(1).

⁴⁵ 29 C.F.R. § 825.215(d)(1).

⁴⁶ 29 C.F.R. § 825.215(d).

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- ⁴⁷ 29 C.F.R. § 825.215(d)(1).
- ⁴⁸ 29 C.F.R. § 825 *et seq.*
- ⁴⁹ See, *Tardie v. Rehabilitation Hosp. of Rhode Island*, 6 F.Supp.2d 125 (D. R.I. 1998), *aff'd* on other grounds, 168 F.3d 538 (1st Cir. 1999), citing *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997).
- ⁵⁰ See, *Mejias Miranda v. BBII Acquisition Corp.*, 120 F.Supp.2d 157 (D.P.R. 2000).
- ⁵¹ 29 C.F.R. § 825.301(a).
- ⁵² 29 C.F.R. § 825.301(a)(2).
- ⁵³ 29 C.F.R. § 825.301(a)(2).
- ⁵⁴ 29 C.F.R. § 825.301(b).
- ⁵⁵ 29 C.F.R. § 825.300(a).
- ⁵⁶ 535 U.S. 81 at 86, quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).
- ⁵⁷ *Ragsdale*, 535 U.S. 81 at 91.
- ⁵⁸ *Ragsdale*, 535 U.S. 81 at 89.
- ⁵⁹ *Harmon v. DHL Airways, Inc.*, 165 F.3d 441 (6th Cir. 1999).
- ⁶⁰ *Ozolins v. Northwood-Kensett Community Sch. Dist.*, 1999 WL 16990 (N.D. Iowa 1999).
- ⁶¹ *Viereck v. City of Gloucester*, 961 F.Supp. 703, 707 (D. N.J. 1997). See also, *Manwell v. Westlake Polymers Corp.*, 66 F.3rd 758 (5th Cir. 1995); *McClain v. Southwest Steel Co.*, 940 F.Supp. 295 (N.D. Okla. 1996).
- ⁶² *Hendry v. GTE North, Inc.*, 896 F.Supp. 816 (N.D. Ind. 1995). See also, *McGinnis v. Wonderchem Co.*, Wage & Hour Cas.2nd (BNA) 71 (E.D. Pa. 1995).
- ⁶³ *DeLong v. Trujillo*, 1 P.3d 195 (Colo. App. 1999), *cert. granted* (May 30, 2000).
- ⁶⁴ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.
- ⁶⁵ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.
- ⁶⁶ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.
- ⁶⁷ See, e.g., *Kettner v Albertsons, Inc.*, 839 F.Supp. 1432 (1993, DC Or.) (applying Oregon law).
- ⁶⁸ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.
- ⁶⁹ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.
- ⁷⁰ 3 Employment Coordinator, Parental Leave ¶ B-15, 401.50.

⁷¹ See, e.g., *Essex Crane Rental Corp. v Director, Div. on Civil Rights*, 294 N.J. Super. 101, in which the court held that the term "employer" as used in New Jersey's Family Leave Act, N.J. Stat. Ann. §§ 34:11B-1 through -16, applies to employers with 50 or more employees without regard to the geographic distribution of the employees. The court rejected a company's argument that the act did not apply to it because it had fewer than a dozen employees in New Jersey, although it employed a total of approximately 164 persons in six states. See further, Employment Coordinator ¶¶ B-15, 401.50-to-B-15, 426; see also, Employment Discrimination Coordinator ¶¶ 34,223, 34,195, 34,296, 34,297, and 80,198.