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FMLA Knockout With COBRA as Opponent

By Juli Hanshaw

When employers step into the COBRA ring, many do not realize their opponent may be a widely known regulation called the Family and Medical Leave Act (FMLA). FMLA's passage a decade ago was a bout won to ensure fair and appropriate treatment of workers. For employers, the sucker punch came as it also opened the door to administrative and legal nightmares — including how it works with COBRA.

FMLA Requirements

FMLA has had quite a workout over the years since its enactment. The original intent was to provide employees with unpaid leave for up to 12 weeks to care for a child after birth, adoption or placement for foster care; to care for a spouse, son, daughter or parents with a serious health condition; or to care for their own serious health condition that prevents them from performing their job.

With a right hook comes the reality that not all employers have to comply. This law applies only to employers with 50 or more employees within a 75-mile radius. The left hook brings information on the requirements an employee has to meet to be eligible for FMLA. Employees must be employed for at least 12 months and have worked at least 1,250 hours during the 12 months before the start of the FMLA leave.

The National Defense Authorization Act (NDAA) provided two additional military-related reasons for FMLA leave: qualifying exigency leave and caregiver leave for a seriously injured or ill covered servicemember. A qualifying exigency exists when the servicemember is called to “covered active duty,” which requires deployment to a foreign country. This applies not only to reserve military called to active duty, but also members of a regular component of the Armed Forces. The term *covered servicemember* includes a veteran who is

undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was a member of the Armed Forces within the prior five years.

In late December 2009, President Obama signed into law the Airline Flight Crew Technical Corrections Act, which should make it easier for airline flight crews to qualify for FMLA leave. Work schedules for flight attendants and crewmembers are unusual.

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Because of industry practice, calculation of work hours for overnights, layovers and on-call time caused most flight crews to be on the outside looking in when it came to FMLA. Under the new law, the 1,250-hour requirement is satisfied when a flight attendant or crewmember works or is paid for at least 60 percent of a full-time schedule during the previous 12 months.

COBRA & FMLA

Before an employer throws in the towel and offers COBRA, the first thing to remember is that COBRA regulations make it clear that FMLA *is not* a COBRA qualifying event. When an employee takes FMLA leave there is not an event for COBRA purposes until the employee fails to return to work at the end of the FMLA leave. Another scenario could be if the employee notifies the employer before the end of the FMLA period of no intent to return to work. This would cause the group coverage to end and the COBRA qualifying event would occur on the date of that notification.

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What is clear is the employee must have been covered on the health plan before the leave. Employers are required to maintain coverage during FMLA under the same conditions as before the leave, including the same arrangements for payments of coverage. If the employee fails to pay his or her portion of contributions during the leave, the employer can remove the employee from the plan. Once the employee returns to work, he or she is allowed back on the plan without being subjected to any waiting periods or insurability criteria, such as pre-existing condition exclusions.

Some employers may think they are then saved by the bell. They removed the employee from the plan during FMLA because of nonpayment of their contribution; therefore, when the employee fails to return to work at the end of the FMLA leave they would not need to offer COBRA — this is incorrect! Any lapse of coverage under a group health plan during FMLA is irrelevant in determining whether there is a COBRA qualifying event. Additionally, if the employer paid the employee's health plan premiums during the leave period, COBRA coverage may not be conditioned on reimbursement of those premiums. The employer needs to take a punch and offer COBRA as if the employee had been covered during the FMLA leave.

Before the match is over, another combination hit is whether any of these reasons following FMLA would qualify the employee to be subsidy eligible under the American Recovery and Reinvestment Act of 2009 (ARRA). This answer depends on how the qualifying event comes in to play. If the employee notifies the employer prior to the end of the FMLA leave of the intent not to return to work, that would be similar to a voluntary termination of employment and there would be no eligibility for the ARRA subsidy.

However, if the employer or the end of the FMLA leave (due to company policy) terminates the employee causing the qualifying event, this would be similar to an involuntary termination and the employee would be ARRA subsidy eligible for reduced COBRA rates.

One other thing to consider before the final bell is an employee that could be eligible for full-pay sick leave following the end of the FMLA leave. Would this be considered a qualifying event? The question was brought before a court system, in *Mehmen vs. Collin County, Texas*, that determined it was a qualifying event — even with the employee on full-pay sick leave. The court concluded that Congress' intent with COBRA was

to provide coverage to eligible employees and not for employees to be covered by employers for long periods and not be actively at work. The court viewed the inability to return to work as a reduction in hours based upon the employee not actively working; therefore, it was a qualifying event. The employee was eligible for COBRA — which was offered — and would be required to pay the COBRA premium during this period of full-pay sick leave.

Be Proactive

The thud could be deafening as an employer hits the mat with just one FMLA bout. On average, the cost to defend an FMLA lawsuit (regardless of outcome) is almost \$80,000. Jury awards for FMLA cases include one for approximately \$12 million, of which \$450,000 was for fines against two supervisors held personally liable. To avoid a knockout, organizations would do well to take a proactive approach to FMLA administration.

FMLA is an issue with very real downsides for covered companies that are not in compliance with the act's provisions. However, companies need not be on the receiving end of grievances, investigations or lawsuits if they take a proactive approach to FMLA by becoming aware of the act, educating their employees, managers and supervisors, and leveraging the advances in technology before they are hit below the belt. 📌

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