FORMERLY EXEMPT MIDSIZE LAW FIRMS MAY FIND THEMSELVES SUBJECT TO FMLA IN 2010

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I remember when the Family and Medical Leave Act ("FMLA") was passed into law back in 1993. I and thousands of my fellow law firm administrators across the nation waited anxiously for final passage and clarifying guidelines to find out which firms would be affected, and how. It turned out my firm had sufficient employees under the guidelines to require our compliance.

Penalties for non-compliance were severe, so I found myself aggressively seeking information wherever I could get it, in order to ensure our firm was in compliance in all regards. Policies and procedures were quickly amended. Education to supporting management staff was provided. As employees were informed of their rights under this new law, I silently steeled myself for what might lay ahead.

From a societal perspective, FMLA was to be applauded. It was the first sweeping piece of social legislation designed to address the growing needs of balancing family, work, and related obligations, and provided numerous protections to qualifying workers. From an employer perspective, it was an administrative nightmare which introduced additional landmines into the employer's landscape.

Determining who was eligible to take FMLA leave was difficult at best. People felt all sorts of conditions should qualify for protected leave, from migraines to allergies to pregnancy to back pain. Obtaining the necessary documentation to determine if leave qualified as FMLA leave was one of the hardest tasks. First, the employer has to balance the employee's right to privacy, and the requirements to keep any medical information under separate lock and key, with the need to know whether the leave in fact qualifies at all. If the leave does qualify, the employer must determine when the employee (or immediate relative if the leave is for caring for a member of the immediate family) will be certified as medically able to return to work. Will it qualify for intermittent leave? If so, for how long and on what schedule?

As with any employee benefit, there will be those who deserve it, and those who abuse it, those who take it for granted, and those who cannot avail themselves of the benefit at all. I experienced all those vagaries over the years at different law firms. Because FMLA provides for unpaid leave, some employees could not take advantage of this job protection benefit, even though their circumstances called for it. Simply put, they could not afford to lose the time from work. Others took advantage of FMLA – avoiding termination for far exceeding time off policies by hiding behind the sometimes vague and confusing regulations.

Many an employer was undone by some of the fine points which were defined better only under the spotlight of litigation. For example, did the leave extend beyond other leave policies of the firm? Well, until this was clarified, an employee could take all their vacation, sick, personal and even an unpaid leave of absence, only to then tell their employer they were going to start their FMLA leave. Employers who said no paved the way in court for those of us who scrambled to once again rewrite our policy handbooks to say that those paid or unpaid leaves were running concurrently, not consecutively, and in no way would extend the total leave beyond that guaranteed under FMLA.

Uncooperative doctors who refused to complete and return the certification forms dragged out retention/discharge decisions indefinitely. And employees who skirted around the notification for leave provisions under the "as soon as practicable" wording made FMLA an outright nightmare on occasion.

The example which always comes to mind occurred at one firm when I hired a staff member with excellent references, who I had interacted with at her former place of employment. I was impressed with her in all regards, and her performance upon arrival only reinforced that impression. Unfortunately, it didn't take long for a large cloud to appear on the horizon. Our new employee suffered one after another medical condition which made her attendance problematic from her very first week of employment. And it worsened from there.

At first it was hard to fault someone because every diagnosis was serious: pneumonia, gall stones, you name it. One after another serious condition brought this otherwise beautiful and vigorous young woman in her twenties to the very brink of extinction.

After several months— when the probationary employment period had expired— I began to suspect something was seriously amiss.

No one could keep going from vivacious party person to medical disaster month after month. And the recuperation times were getting longer. There were rumors of extensive vacation trips with her new hubby. My attempts to contact her when she was "home sick" were always met with answering machines and returned calls many hours later.

I stepped up my requests for medical verification, and return to work certifications. There were a million excuses, although eventually some paperwork would usually be produced. To make a very long and painful story short, it was not until after a full year, when she was then covered under FMLA, that I found out her husband was a doctor, most of her family members were doctors, and she probably knew better than anyone how to obtain documentation and protect her employment under FMLA.

The disruption her absences caused was eclipsed by the impact on the morale of those in the office who repeatedly had to suffer the indignation of covering her job in addition to their own. Likewise, those employees could not understand why the abuse was not being dealt with by the firm. From the perspective of all but management, it was favoritism. From a management perspective, it was pure fear. I was at a firm in which many lawyers practiced defense employment litigation, and had witnessed and read about the worst case scenarios. They were determined not to become one of the employers they read about or defended.

Over the years, cases have made their way through the courts and provided much-needed clarification. Although there will always be some abuses under FMLA, for the most part, abuse is proactively prevented through well-written policy manuals and enlightened management procedures. Plus, of course, there are an abundance of additional online resources available to employers, large and small, especially blogs of employment law attorneys.

Although FMLA is not the horror my peers and I envisioned it might be back in the early 90's, it's no piece of cake from an employer perspective, for many of the administrative reasons discussed above. But at least trying to address the absence of an employee for an extended period, whether consecutive or intermittent, was not disastrous for most of the employers covered by FMLA. Most employers covered by the Act have staffs large enough and sufficiently cross-trained to enable other people to pitch in for an absent employee. Lacking that, they can afford to hire a temporary employee, even though the pay rate is often higher and the productivity is lower.

With the likelihood that FMLA will be significantly expanded in 2010 and apply to employers of much smaller size, I worry about the cost. The proposed cost of insurance which will be borne by employers in order to make FMLA leave a paid leave is not as problematic as it would seem. So the cost I'm talking about is not one of benefit payments such as sick leave pay.

The reality is that the vast percentage of employees who did not assert rights under FMLA for economic reasons previously, will be able to do so under the proposed expanded regulations. That's because it will be paid or partially paid leave, instead of unpaid leave. If the goal of increasing those employees who take qualified FMLA leave is achieved, it will create a much greater administrative burden for the employer.

The fact that employers subject to FMLA may now face a reality of more people out under job-protected leave simultaneously, creates a real need for many things which mid-size employers have historically ignored:

- Adequate staffing to cover "gaps" in personnel
- Cross training for all skill sets
- Use of temporary workers and vigilant attention to make sure this resource is available upon short notice and for extended periods, and/or improved utilization of software readily available at the firm
- Carefully written procedures and policies
- Adequate training for everyone working in human resources, including any partners who are involved in managing this area
- Careful attention to employee privacy rights and properly segregating and safeguarding of confidential medical information

It is currently anticipated that some or all of the following five new employment law bills will pass in some form in 2010. The result would significantly expand FMLA and change how you manage your paid and unpaid leave procedures. All of these bills have a good chance of becoming law under comprehensive family and medical leave legislation known as **The Balancing Act of 2009 (**see H.R. 3047 at http://tinyurl.com/HR3047).

- The ***Healthy Families Act*** —could dramatically change paid sick leave policies, and could also give employees paid time off for a doctor's appointment (See H.R. 2460 at http://tinyurl.com/HR2460)

- The ***Family Leave Insurance Act of 2009*** —could end up requiring employers to provide eight weeks of paid leave to employees who need to care for a sick family member or new child. It would also grant FMLA leave to employees who need to care for an ill domestic partner or the child of a domestic partner --thereby affording the protections of the FMLA to lesbian, gay, bisexual and transgender (LGBT) employees, who have been excluded from FMLA coverage to this point. (See H.R. 1723 at http://tinyurl.com/HR1723)

- The ***Family and Medical Leave Enhancement Act of 2009*** —could expand the current FMLA to include employee leave for attending a child's extracurricular activities. Perhaps the most significant impact of this Act would be the expansion of who would be considered an employee "eligible" to take FMLA leave. Under this legislation, the FMLA would apply to employers with 25 or more employees within the prescribed radius, not 50 as is the current law. (See H.R. 824 at http://tinyurl.com/yan7apm)

- The ***Family and Medical Leave Act*** (FMLA) could be amended through ***The Domestic Violence Act*** —to give victims of domestic violence FMLA-protected leave

- The ***Military Family Leave Act*** might amend USERRA by granting temporary annual leave to the military families of service members (See H.R. 3257 at http://tinyurl.com/HR3257)

The fact that mid-size firms are often woefully understaffed and undertrained where human resource management is concerned will exacerbate the pain of getting up to speed and implementing proper procedures and policies in the event that any of this new legislation passes. If your firm is one of those which is currently covered by FMLA, or one which is likely to become covered by an expansion of FMLA, you will want to keep track of the progress of this legislation.

This article does not constitute legal advice. There are many qualified members of PBA who can assist you, many of whom will no doubt be publishing blog posts and mailing client alerts. You may want to subscribe now so you remain

ahead of the learning curve.

I will continue to offer updates and information on this and many other topics on my own Law Practice Management Blog at http://www.PA-LawPracticeManagement.com.

Yes, it's probably another thing many of you will have to deal with administratively on the business side of your practice that you didn't have to worry about before. Just remember that there are resources available to help. Be sure to avail yourself of them.