

THE INTERSECTION OF FMLA AND PAID SICK LEAVE ACTS AND UNEMPLOYMENT COMPENSATION

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OVERVIEW OF SICK LEAVE ACTS

What is a Sick Leave Act?

Is it different from federal and state Family and Medical Leave Acts?



FMLA VS. SICK LEAVE ACTS

FMLA

Generally unpaid unless employee elects to use paid sick leave or employer requires employee to use paid vacation or sick leave first.

Leave is for an extended period (up to 12 weeks in a calendar year under federal FMLA).

SLAs

Generally paid.

Generally short term: maximum leave of 5 to 7 days per year.

FMLA VS. SICK LEAVE ACTS

FMLA

Covers birth/adoption/foster care; serious health condition of employee, spouse or parent.

Requires certification from health care provider.

SLAs

Covers illness of employee or family member; sometimes domestic partners.

Employer may not require medical documentation unless the employee is absent part or all of three consecutive work days.

OTHER PAID SICK LEAVE ACT PROVISIONS

- ◉ Some SLAs include paid leave for “safe care” of victims of domestic violence;
- ◉ SLAs differ as to whether time accrues immediately or after a defined period; also differ as to when the leave may be taken;
- ◉ SLAs differ as to what categories of employees are included or excluded - the Connecticut SLA applies only to designated categories of service workers (e.g., social workers, nurses, food service employees, janitors).



WHO HAS PAID SICK LEAVE ACTS?

◎ STATES:

- CT (eff. 1/2012); MA and CA (eff. 7/2015); OREGON (eff. 1/2016).
- Proposed in AZ, HI, IL, MI, MN, NE, NH, NJ, NY, SC, VT, and WA.
- CA, NJ and RI have paid family leave insurance programs, funded by withholdings from employee wages.

CITIES INCLUDE:

WASHINGTON, D.C.; SEATTLE and TACOMA, WA.;
PORTLAND and EUGENE, OR; NEW YORK CITY; JERSEY
CITY and NEWARK, N.J.; PHILADELPHIA, PA.

FEDERAL - Healthy Families Act 2015, in committee.

Also, in January 2015, Obama ordered federal agencies to advance up to 6 weeks of paid sick leave to parents of newborns and individuals caring for ill family members.

THE SICK LEAVE ACT DEBATE

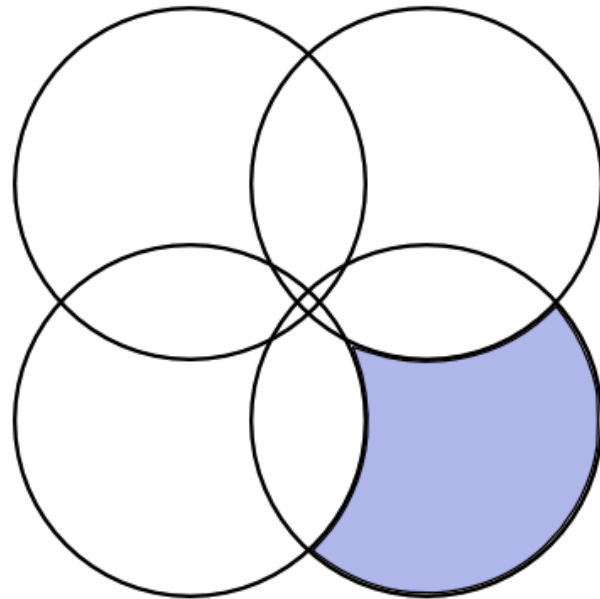
Pros cited

- Increases productivity of employees;
- Reduces the spread of illness in the workplace;
- Improves public health.

Cons cited

- Increases cost of doing business;
- Results in decreased wages;
- Results in increased costs of goods and services.

INTERSECTION BETWEEN FAMILY AND MEDICAL LEAVE ACTS AND UNEMPLOYMENT COMPENSATION CASES



UC/FMLA - DISCHARGE CASES

- ◎ **Claimant is discharged for failing to provide medical documentation requested by the employer to support the need for leave under state or federal FMLA:**
 - **Analysis:**
 - Did the request for documentation exceed that permitted by the FMLA, such that the employer's request was unreasonable/constituted interference with the claimant's FMLA rights/violated the FMLA?

WHAT ARE THE FEDERAL FMLA REQUIREMENTS/LIMITS ON REQUESTS FOR MEDICAL CERTIFICATION?

- ◉ 29 C.F.R. §§ 825.303 through 825.312



FEDERAL FMLA REQUIREMENTS

- ◉ The first request for medical certification must be in writing; subsequent requests may be verbal.
- ◉ The employer may require medical certification to be provided before a foreseeable leave, but in most cases must allow at least 15 calendar days from the date of the request.
- ◉ The employee must be advised of the anticipated consequences of an employer's failure to provide adequate certification.
- ◉ If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent, and the employee is using paid leave, only the less stringent requirements may be imposed.

FEDERAL FMLA REQUIREMENTS

- ◉ The employer may only request the information found on Form DOL-FM1; but can seek additional information for clarification and authenticity;
- ◉ If the employer has reason to doubt the validity of the medical certification, it may require the employee to obtain a second opinion at the employer's expense;
- ◉ The employer may require subsequent certifications on a reasonable basis but no more than once during a thirty-day period.
- ◉ The employer may require certification that the claimant is able to resume work if the leave was occasioned by the claimant's own serious health condition. The employer may require a fitness for duty certification every 30 days for intermittent leave.

UC/FMLA CASE HYPOTHETICALS

** The employer discharges the claimant for not providing medical documentation each time the claimant is absent from work during a thirty-day period due to the kidney condition for which he has been granted intermittent leave under the FMLA. Did the claimant commit wilful misconduct?

**The employer discharges the claimant for failing to comply with its request for medical documentation mailed January 2, 2015, giving the claimant a deadline of January 9, 2015. The claimant was in a motorcycle accident on December 31, 2014. Did the claimant commit wilful misconduct?

UC/FMLA - DISCHARGE CASES - ATTENDANCE

- ⦿ **Claimant is discharged for absenteeism or tardiness and contends that the absences or incidents of tardiness were attributable to the claimant's medical condition, or the claimant's needing to care for a spouse, parent, child or spouse's parent who suffers from a serious health condition.**
 - **Example:** Claimant says he is repeatedly late to work because of his mother's medical needs.
 - **Example:** Claimant "points out" under the employer's attendance system.
- **Analysis:**
 - **Is the absenteeism or habitual tardiness protected under the FMLA?**

IS THE ABSENCE OR TARDINESS PROTECTED BY THE FMLA?

- ◉ Is the employer a covered employer? Is the employee eligible for FMLA? 29 C.F.R. §§ 800, 825.104, 825.105 and 825.110
- ◉ Did the employee provide enough information to the employer such that the employer should have provided the employee with leave, intermittent leave or a reduced schedule under the FMLA? 29 C.F.R. §§ 825.208; 825.302
- ◉ Is the condition a serious health condition for which the relative needs care? 29 C.F.R. §§ 825.800(u); 29 C.F.R. § 116

UC/FMLA - DISCHARGE CASES

- Claimant is discharged because she did not return to work at the end of the time the employer provided for maternity leave following the birth of her child.



- Analysis:
 - Was the claimant eligible for FMLA? Was the employer covered by the FMLA? Did the employer provide the claimant the full number of weeks to which she was entitled under both the federal FMLA and any state FML Act?

ADDITIONAL FMLA /UC - DISCHARGE ISSUES

- ◉ Was the discharge in retaliation for exercising rights under the FMLA?
- ◉ Did the claimant provide false information to the employer to obtain a leave under the FMLA, such that he or she committed wilful misconduct?
- ◉ Did the claimant's refusal to meet with the employer during a leave under the FMLA constitute wilful misconduct?
- ◉ Other?

FMLA/UC - VOLUNTARY LEAVING CASES - RETALIATION

- ◉ A claimant may have good cause to leave work where the employer retaliates against a claimant for taking FMLA.
 - ◉ Analysis:
 - ◉ Is there direct evidence of the employer's discriminatory intent?
 - ◉ Shifting burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
 - **Prima facie case:** (1) claimant exercised her rights under the FMLA; (2) employer took an adverse action against the claimant, such as demoting the employee; (3) causal connection exists between the exercise of the claimant's rights under the FMLA and the respondent's adverse employment action.
 - Employer has to state a legitimate nondiscriminatory reason for taking the adverse employment action;
 - Claimant must prove the reason provided by the employer is a pretext and the claimant's exercise of her FMLA rights is the real reason for the adverse action.



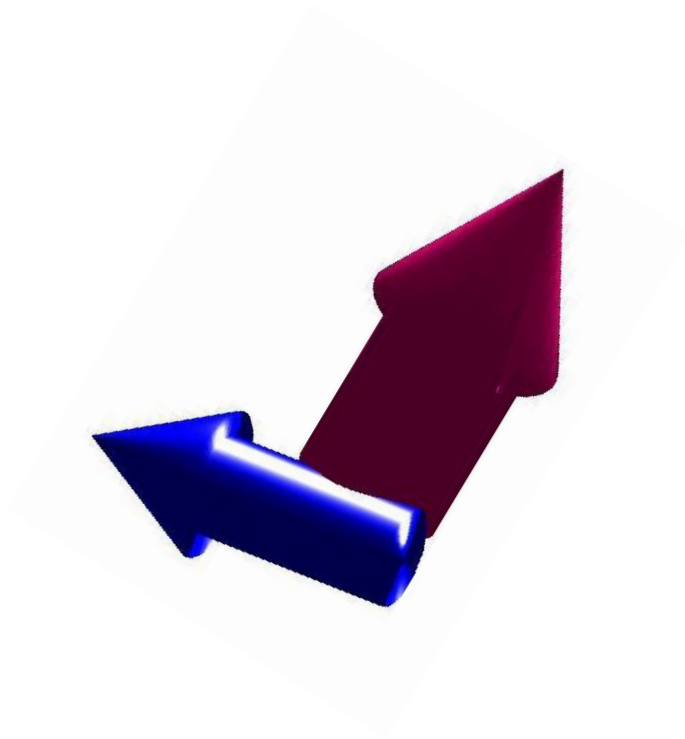
UC/FMLA - VOLUNTARY LEAVING CASES

- A claimant may have good cause to leave work where a covered employer interferes with the eligible claimant's FMLA rights.
 - Possible grounds for interference:
 - Employer imposed discipline for FMLA protected absences or tardiness;
 - Employer covered under the FMLA refused to grant leave to an eligible employee;
 - Employer requested that the claimant provide medical documentation beyond what the FMLA allows, when the claimant sought leave under that Act.
 - Other?

UC/VOLUNTARY LEAVING CASES

- If your state has a requirement to explore alternatives, did the claimant adequately explore alternatives to leaving work as the result of a serious medical condition?
 - Was FMLA offered as an alternative to leaving the job?
 - Did the claimant give the employer enough information such that the employer should have offered FMLA?
 - Was claimant capable of providing that information to the employer?
 - Would FMLA be a suitable alternative to leaving the job?

INTERSECTION BETWEEN PAID SICK LEAVE ACTS AND UNEMPLOYMENT COMPENSATION CASES



UC/PAID SICK LEAVE CASES

○ Analysis:

- Similar to FMLA-related cases, analyze the individual state law that provides for paid sick leave against the standards set out in that state's unemployment compensation statute.
- What constitutes “misconduct” for purposes of denial of benefits?
- Does the state have an exception for illness when a claimant leaves work voluntarily for personal reasons that are related to illness?

UC/PAID SICK LEAVE - DISCHARGE CASES

- How does the employer's policy compare to the paid sick leave statute?
- If the employer's policy is not as protective of the employee's rights, the paid sick leave statute will take precedence.
- If the employer's policy is more generous than the statute's requirements, the employer's policy will govern.

MASSACHUSETTS PAID SICK LEAVE ACT

- ◉ If employer has 11 or more employees, employer must allow employees to earn and use up to 40 hours of paid sick leave per year;
- ◉ If employer has fewer than 11 employees, employer must allow up to 40 hours of unpaid sick leave per year;
- ◉ Employee earns one hour for every 30 hours worked, starting from date of hire (or July 1, 2015, which is the date the law goes into effect, whichever is later);
- ◉ Employee may use the sick leave for illness of self, child, spouse or parent (or spouse's parent).

MASSACHUSETTS PAID SICK LEAVE ACT, CONT'D

- ⦿ Employee can use the sick time for medical appointments;
- ⦿ Employee can use the sick time to address the effects of domestic violence;
- ⦿ Employer cannot require the employee to work additional hours to make up for the hours taken for sick leave;
- ⦿ Employer cannot require the employee to find a replacement worker to cover the hours taken for sick leave.

MASSACHUSETTS, CONT'D

- Employer may require certification when the employee has used earned sick time for a period that is longer than 24 consecutively scheduled work hours.
 - “Any reasonable documentation signed by a health care provider indicating the need for earned sick time taken shall be deemed acceptable certification for absences.”

MASSACHUSETTS, CONT'D

- “When the use of earned sick time is foreseeable, the employee shall make a good faith effort to provide notice of this need to the employer in advance of the use of the earned sick time.”
- Unlawful for the employer to restrain the employee’s right to use the sick time, including using it as a “negative factor in any employment action such as evaluation, promotion, disciplinary action or termination.”

DISCHARGE UNDER THE MASSACHUSETTS STATUTE

- Massachusetts misconduct standard:
 - After the individual has left work “by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit’s interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence.”

UC/PAID SICK LEAVE UNDER MASSACHUSETTS LAW

○ Analysis:

- Must look to the employer's policy on sick leave - does it meet the requirements of the Massachusetts earned sick time law?
- For example, in *New England Wooden Ware v. Commissioner of Dept. of Employment and Training*, 811 N.E.2d 1042 (Mass. 2004), the employer's policy on excessive absenteeism called for two written warnings and then if there was a third instance within a one-year period, discharge.

MASSACHUSETTS, CONT'D

- ⦿ Employer had an exception to this policy: “The Company will consider, on a case by case basis, proven illness as an absence which may fall outside the disciplinary procedure. Senior employees with exemplary, long term records of attendance will not, in all cases, be held to a strict interpretation of policy.”
- ⦿ Court held that this policy was not reasonable because it was too discretionary and had not been uniformly applied.

MASSACHUSETTS, CONT'D

- Applying the new earned sick time law, this employer's policy would not be enforceable. The employer would have to allow the employee to take up to 40 hours of earned sick time.
- The employer's discharge of the claimant for using sick time could be a violation of the earned sick time law.
- The employee would be allowed to collect benefits if otherwise eligible.

MASSACHUSETTS, CONT'D

- What if the employee left employment because of illness?
- Massachusetts law provides that an employee “an individual shall not be disqualified from receiving benefits ... if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.”

HOW WOULD IT PLAY IN MAINE?

- Maine's definition of misconduct includes an exception for illness.
- "Misconduct" may not be found solely on "absenteeism caused by illness of the employee or an immediate family member if the employee made reasonable efforts to give notice of the absence and to comply with the employer's notification rules and policies."

MAINE, CONT'D

- Maine's voluntary quit provision also contains an exception for illness: "The leaving was caused by the illness or disability of the claimant or an immediate family member and the claimant took all reasonable precautions to protect the claimant's employment status by promptly notifying the employer of the need for time off, or a shift change and being advised by the employer that the time off or change or reduction in hours or shift change cannot or will not be accommodated."