

# **THE FAMILY AND MEDICAL LEAVE ACT: NEW AMENDMENTS, NEW PROPOSED REGULATIONS, AND MYTHS ABOUT THE FMLA**

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## **I. INTRODUCTION**

The Family and Medical Leave Act of 1993 (“FMLA”) entitles certain workers the right to take up to 12 weeks of unpaid leave every 12 months for qualifying conditions such as a serious health condition, the birth or adoption of a child, or to care for a family member with a serious health condition. This leave entitlement affects most of the workforce and is widely used. According to the U.S. Department of Labor (“DOL”), over 95 million employees work for firms covered by the FMLA. In 2005, over 77 million workers were eligible for leave, and over 7 million took FMLA leave, with over 1 million taking intermittent (as opposed to a continuous) leave.<sup>1</sup>

On January 28, 2008, Congress amended the Family and Medical Leave Act of 1993 (“FMLA”) by adding two new types of leave related to members of the armed forces.<sup>2</sup> On February 11, 2008, the Department of Labor (“DOL”) published new proposed regulations interpreting the Family and Medical Leave Act of 1993 (“FMLA”).<sup>3</sup> The DOL also published new draft forms for use in processing FMLA leave requests. The DOL expects to release final regulations before President Bush leaves office.

This article highlights the amendments and the new proposed regulations. It then identifies some common misconceptions about the FMLA. Test your knowledge: can you identify why all the Myths below are wrong?

## **II. FMLA AMENDMENTS ASSIST FAMILIES OF ARMED FORCES SERVICE MEMBERS**

Congress amended the FMLA as part of the National Defense Authorization Act of 2008. Two new types of leave were created, both of which impact families of armed forces service members.

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<sup>1</sup> 73 Fed. Reg. 7877 (2008).

<sup>2</sup> H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181, section 585 (January 28, 2008).

<sup>3</sup> 73 Fed. Reg. 7876 (2008) (to be codified at 29 CFR Part 825).

The first type of leave creates a new entitlement to 26 weeks of leave (rather than 12) in a single 12 month period. It permits a “spouse, son, daughter, parent, or next of kin” to take up to 26 weeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”<sup>4</sup> A “serious injury or illness” is one that was incurred while “on active duty that may render the service member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”<sup>5</sup> This type of leave is effective immediately.

A second amendment permits an employee to take FMLA leave for “any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”<sup>6</sup> This type of leave will not become effective until the DOL issues regulations defining the term “qualifying exigency.”<sup>7</sup> It is expected that a “qualifying exigency” will encompass absences to deal with personal matters such as childcare and finances, as well as military matters such as meetings, and “send-off” and “welcome home” ceremonies.

### **III. NEW PROPOSED REGULATIONS**

The new proposed regulations are designed to solve problems that have arisen since the first set of regulations were published in 1995, and to address issues arising from the new amendments for service members. Some of the more significant changes include:

Employer Notices and Rights: Employers will be required to send out an annual notice to employees of their FMLA rights, if FMLA information is not already in a handbook.<sup>8</sup> Employers will have five days, rather than two, to respond to leave requests with eligibility and designation notices.<sup>9</sup>

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<sup>4</sup> 29 U.S.C. § 2612(a)(3).

<sup>5</sup> 29 U.S.C. § 2611(19).

<sup>6</sup> 29 U.S.C. § 2612(a)(1)(E).

<sup>7</sup> 27 Fed. Reg. 7927-28 (2008).

<sup>8</sup> 27 Fed. Reg. 7978 (2008).

<sup>9</sup> Id.

Employee Notices and Rights: The proposed regulations are more explicit that employees will be required to follow the employer’s usual call-in procedures if they are going to be absent, except in unusual circumstances.<sup>10</sup>

Serious Health Condition: The proposed regulations continue to set forth a number of different ways to meet the definition of a “serious health condition,” which creates entitlement to FMLA leave. The Tenth Circuit, which has jurisdiction over Colorado employers, previously interpreted one of the alternatives based on “continuing treatment” to require two visits to a health care provider within a period of incapacity lasting at least three days.<sup>11</sup> The proposed regulations would “overrule” this decision, because the two visits would only have to occur within 30 days of the period of incapacity.<sup>12</sup> Not only could this proposed regulation greatly expand entitlement to leave, but as a practical matter, it will be much more difficult to determine if the FMLA applies, because an absence might qualify for FMLA protection 30 days after it occurs. Also, for chronic conditions, “periodic visits” to a health care provider must occur at least twice per year.<sup>13</sup>

Medical Certifications: If an employer determines that a medical certification is incomplete or insufficient, the employer will be required to specify in writing what information is missing, return the certification to the employee, and allow seven days for the employee to correct the problem.<sup>14</sup> Also, employers will be able to directly contact medical providers to clarify or authenticate certifications, as long as HIPAA privacy requirements are satisfied.<sup>15</sup> Employers will be able to seek annual certifications for long term conditions.<sup>16</sup> Employers may require that fitness for duty, or return to work, certifications address the employee’s ability to perform essential functions of the job, and will be permitted to require fitness for duty certifications for intermittent leave if reasonable job safety concerns exist.<sup>17</sup>

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<sup>10</sup> 27 Fed. Reg. 7980-82 (2008).

<sup>11</sup> Jones v. Denver Public Schools, 427 F.3d 1315 (10<sup>th</sup> Cir. 2005).

<sup>12</sup> 27 Fed. Reg. 7966 (2008).

<sup>13</sup> Id.

<sup>14</sup> 27 Fed. Reg. 7982 (2008).

<sup>15</sup> 27 Fed. Reg. 7983 (2008).

<sup>16</sup> 27 Fed. Reg. 7983 (2008).

<sup>17</sup> 27 Fed. Reg. 7985 (2008).

Waivers of FMLA Claims: The proposed regulations permit employees to waive FMLA claims as part of releases with employers, but employees cannot prospectively waive FMLA rights.<sup>18</sup> This is a controversial issue, as the Fourth Circuit (which is located in the southeastern part of the country and does not have jurisdiction in Colorado) interpreted the FMLA to prohibit waivers unless they were supervised by the DOL or a court.<sup>19</sup>

New Forms: The proposed regulations include new draft forms for notices to employees of FMLA rights, eligibility, designation, and medical certification.<sup>20</sup>

#### **IV. COMMON MYTHS ABOUT THE FMLA**

##### **A. FMLA ADMINISTRATION**

*Myth 1. A Private Employer Subject To Other Federal Employment Laws Is Also Subject To The FMLA.*

A private sector employer is only subject to FMLA if it has 50 or more employees on the payroll for at least 20 weeks during the current or preceding calendar year.<sup>21</sup> This 50-employee threshold is much higher than other federal employment laws. Title VII of the Civil Rights Act of 1964<sup>22</sup> (prohibiting race, color, national origin, religion, and gender discrimination) and the Americans With Disabilities Act (“ADA”)<sup>23</sup> (prohibiting disability discrimination) have a 15-employee threshold, while the Age Discrimination in Employment Act (“ADEA”)<sup>24</sup> (prohibiting age discrimination) has a 20-employee threshold. A worker is “counted” under these rules determining coverage as long as they are on the payroll, regardless of whether they are part-time or on leave.<sup>25</sup>

*Myth 2. Because Leave Under FMLA Is A Statutory Right, Employer Leave Policies Aren’t Relevant.*

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<sup>18</sup> 27 Fed. Reg. 7978 (2008).

<sup>19</sup> Taylor v. Progress Energy, 493 F.3d 454 (4<sup>th</sup> Cir. 2007), petition for cert. filed, 76 U.S.L.W. 3226 (U.S. Oct 22, 2007) (No. 07-539).

<sup>20</sup> 27 Fed. Reg. 7994-8001 (2008).

<sup>21</sup> 29 U.S.C. § 2611(4)(a).

<sup>22</sup> 42 U.S.C. § 2000e(b).

<sup>23</sup> 42 U.S.C. § 12111(5)(a).

<sup>24</sup> 29 U.S.C. § 630(b).

<sup>25</sup> Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 212, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997).

The FMLA is unique among federal civil rights statutes in that employer policies play a large role. There is a requirement to have a published policy. More significantly, employers also have the right to make choices about how to implement policies that impact the FMLA.

There are several requirements. First, if the employer has written rules about leaves of absence or employee benefits, such as a handbook, then it must include a FMLA policy in the handbook. If it does not have written rules, it must provide written guidance to employees about the employee's rights under FMLA.<sup>26</sup>

Second, a covered employer must post in the workplace a notice about FMLA rights, including how to file complaints with the Department of Labor.<sup>27</sup> This rule applies regardless of whether any employees are eligible. Failure to post the notice can result in a civil penalty.<sup>28</sup> The Wage and Hour Division of the Department of Labor has sample notices and guidance that can be provided.

The FMLA also permits employers to make many choices about how to implement and even limit the FMLA. For example, FMLA leave does not have to be paid. Employers also can require employees to exhaust accrued paid leave (*e.g.* vacation or sick leave) before taking additional leave as unpaid.<sup>29</sup>

Perhaps one of the most significant aspects of the regulations concerning employer policies is employers can require employees to comply with attendance policies that require notice if an employee is going to be absent, in situations where the need for leave is foreseeable.<sup>30</sup> (If the need for leave is not foreseeable, employees have to give notice as soon as practicable, and no more than within one or two working days.<sup>31</sup>) In other words, just because a situation arises that may qualify for FMLA leave, the employee is not free to disregard the company's attendance policy.

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<sup>26</sup> 29 C.F.R. § 825.301(a).

<sup>27</sup> 29 U.S.C. § 2619; 29 C.F.R. § 825.300(a).

<sup>28</sup> 29 C.F.R. § 825.300(a).

<sup>29</sup> 29 U.S.C. § 2612(c)(d); 29 C.F.R. § 825.207(a).

<sup>30</sup> 29 C.F.R. § 825.302 (d) (“[a]n employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave.”).

<sup>31</sup> 29 C.F.R. § 825.303 (a).

This issue has arisen in several cases, and the Tenth Circuit has taken a consistent approach. That Court has stated, “[t]he FMLA does not prohibit an employer from requiring its employees to give notice to specific company supervisors on the day the employee is going to be absent in a non-emergency situation.... Thus, only in emergencies are an employer's advance written-notice requirements precluded by this section, and the ‘no more than’ one-to-two day delay in notifying an employer is the outer limit of reasonable notice.”<sup>32</sup> For this reason, if an employee fails to comply with an absence notification policy, a FMLA claim based on the related absence should be dismissed.<sup>33</sup>

This rule that the FMLA does not prevent employers from enforcing their policies has other applications as well. Because the FMLA does not give employees greater rights than they would have otherwise (except for those rights specifically provided by the FMLA), courts have rejected FMLA claims when employers can show the employee violated policies unrelated to their FMLA leave.<sup>34</sup>

For example, in a recent unpublished decision, the Tenth Circuit affirmed the dismissal of an FMLA interference claim brought by an employee who was fired the day she began a leave to provide medical treatment for her daughter. The Court noted that even if the employee was entitled to leave, it was clear that the termination occurred as a result of her performance problems, culminating in her failure to attend required meetings the day before she left. Therefore, the termination was not caused by her leave request, and the claim was properly dismissed.<sup>35</sup>

*Myth 3. Every Employee Of An Employer Subject To The FMLA Is Eligible For FMLA Leave.*

Even if an employer is subject to the FMLA, not every one of its employees may be eligible for FMLA leave. The FMLA creates four conditions that must be met before an employee has the right to FMLA leave, and being “eligible” is merely one. These four conditions are : (1) the employee must work for an employer that is large enough to be subject to FMLA (a requirement discussed in “Myth 1” above); (2) the employee must be “eligible;” (3) the

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<sup>32</sup> Holmes v. The Boeing Co., 166 F.3d 1221 (10<sup>th</sup> Cir. 1999) (unpublished).

<sup>33</sup> Bones v. Honeywell Intern., Inc., 366 F.3d 869 (10<sup>th</sup> Cir. 2004).

<sup>34</sup> McGinnis v. Employer Health Services, No. 06-3238 (10<sup>th</sup> Cir. July 20, 2007) (unpublished) (collecting cases).

employee must have a qualifying reason entitling him to leave, and (4) the employee must not have already used all the leave available.

As this list indicates, whether an employee is “eligible” is different than whether the employee is “entitled” to leave. To be eligible, an employee must have worked at least 1,250 hours and been employed for at least 12 months. Also, the employee must work at a worksite that has at least 50 employees within 75 miles.<sup>36</sup> Thus, even many employees of large companies may not be eligible, such as most new employees, those who do not work at least half-time, and those who work in smaller offices far from other offices.

The 75-mile rule concerning eligibility has been the subject of a recent decision.<sup>37</sup> The regulations state this distance is measured by road distances (surface miles), not “as the crow flies” (linear miles).<sup>38</sup> This distinction became important in a case when the surface mile measurement showed the distance was just slightly over 75 miles. The employee argued that the regulation should not be enforced because it was contrary to the purpose of the statute, but the Tenth Circuit held the statute did not address this issue and the regulation was reasonable.<sup>39</sup>

Not every FMLA regulation has survived attack. In 2002, the Supreme Court invalidated a FMLA regulation that prohibited employers from counting FMLA leave in certain situations, on the regulation impermissibly enlarged the statutory entitlement set by Congress.<sup>40</sup>

*Myth 4. An Employee Can Take 12 Weeks Of FMLA Leave Every Year.*

The FMLA creates a limited right to 12 weeks of leave during a 12-month period (or 26 weeks under the new amendment for families of armed forces services members with a serious illness or injury), but that 12 month period may not necessarily be a calendar year. The FMLA gives employers the right to choose any of four types of methods to calculate the 12-month period during which eligible employees may be entitled to leave. The four methods are: (1) the

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<sup>35</sup> Id.

<sup>36</sup> 29 U.S.C. § 2611(2).

<sup>37</sup> Hackworth v. Progressive Casualty Ins. Co., 468 F.3d 722 (10<sup>th</sup> Cir. 2006).

<sup>38</sup> 29 C.F.R. § 825.111(b).

<sup>39</sup> See note 17, above.

<sup>40</sup> Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 87, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002).

calendar year; (2) any fixed 12-month period, such as the employee's anniversary date or the employer's fiscal year; (3) a 12-month period measured forward from the first time leave is taken; or (4) a 12-month period measured backward from when leave is used.<sup>41</sup>

Each method has its own advantages and disadvantages. For example, the calendar year method may be easy to remember and administer. On the other hand, it may lead to a situation where an employee can take off the last 12 weeks of the year and then the first 12 of the next year, for a total of 24 consecutive weeks.

The third and fourth methods avoid this potential problem, but can be more difficult to administer and cause confusion for employees. For example, under the third method, if the employee first uses FMLA leave on May 1, that is when the twelve month period starts. If the employee uses the entire 12 weeks during the May 1 – December 31 period, she is not able to take additional leave under the FMLA until May 1 of the following year.

Using the fourth method requires a retrospective analysis. If the employee requests FMLA leave beginning May 1 for a certain period of time, the employer must determine how much leave the employee used in the prior 12 months. If the employee has used less than 12 weeks, and has at least as much time remaining as requested, then the employee may take the FMLA leave.

Employers must choose which method to use and stick with it. If an employer decides to change methods, a complicated process ensues that includes providing advance notice to employees.<sup>42</sup>

*Myth 5. An Employee Has To Specifically Request FMLA Leave In Order To Be Entitled To It.*

An employee does not have to mention “Family Medical Leave” or “FMLA” in order for the leave to be protected under the FMLA, and written requests are not necessary. The employee merely has to provide verbal notice about the need to be absent, and merely has to provide information that entitles them to leave under the regulations. It is then the employer's

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<sup>41</sup> 29 C.F.R. § 825.200(b).

<sup>42</sup> 29 C.F.R. § 825.200(d).

responsibility to determine if the FMLA applies and the length of the leave, based on information provided by the employee or his health care provider.<sup>43</sup>

Whether an employee has provided adequate notice is a common dispute under the FMLA. Often, an employer will not learn of an allegation of verbal notice until the employee brings a FMLA lawsuit, and by that time it is often too difficult to resolve the dispute.

Recent cases have held that if the employee did not provide sufficient information to establish entitlement, then the absence may not be protected and a FMLA claim should be dismissed.<sup>44</sup> For example, in one case, the employee claimed she told the employer she needed to be absent and had an appointment to meet with a doctor. Affirming dismissal of case on summary judgment, the Seventh Circuit ruled this explanation was insufficient under the regulations to establish entitlement, and “[a]s a matter of law, the information available to [the employer] did not require further inquiry.”<sup>45</sup>

*Myth 6. A Note From A Medical Provider Is Sufficient To Create Entitlement To FMLA Leave.*

The FMLA requires leave in only six basic situations. The six are: (1) the birth and care of a child; (2) placement of a child for adoption or foster care; (3) care for an immediate family member (spouse, son/daughter, parent) with a serious health condition; (4) the employee’s own serious health condition that makes the employee unable to perform the functions of his job; (5) care for a family member who has a serious injury or illness and is in the armed forces; and (soon to be effective ) (6) “qualifying exigencies” (soon to be defined) for family members of armed services personnel arising from their active duty.<sup>46</sup>

Thus, many absences due to a minor illness may not be protected by the FMLA. Employers and employees should not assume an absence qualifies for FMLA leave merely because the employee mentions the FMLA or provides a note from a medical provider.

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<sup>43</sup> 29 C.F.R. § 825.302(b).

<sup>44</sup> Phillips v. Quebecor World RAI Inc., 450 F.3d. 308, 312 (7<sup>th</sup> Cir. 2006).

<sup>45</sup> Id.

<sup>46</sup> 29 U.S.C. § 2612(a)(1); (3).

Probably the most common situation for the FMLA to arise is the employee's own "serious health condition" that renders the employee unable to perform the functions of his job. The statute defines "serious health condition" to include only "inpatient" care or "continuing treatment" by a "health care provider."<sup>47</sup>

There are separate regulations<sup>48</sup> that further explain these terms in great detail. For example, one definition of "continuing treatment" requires incapacity of at least three consecutive days, during which the employee must have at least two treatments by a health care provider, or one treatment and a regimen of continuing treatment (such as prescription medication).

A recent Tenth Circuit case addressed this regulation.<sup>49</sup> The dispute arose when the employee took time off and had one visit with a doctor, returned to work, and then took more time off and had another visit a few days later. He was fired for poor attendance, and then brought a FMLA claim, claiming the absences were protected under the FMLA. The Tenth Circuit affirmed the dismissal of the case on summary judgment. The employee did not have a "serious health condition" because his return to work in between the two treatments meant the two treatments did not occur during a single period of incapacity.<sup>50</sup> (It should be noted that the proposed regulations would change the definition of continuing treatment so that the two visits would not need to take place during the period of incapacity, but rather within 30 days of the period of incapacity.)<sup>51</sup>

Another example of the complexity of the regulations involving a "serious health condition" concerns appropriate medical providers. Not surprisingly, medical doctors and dentists are considered health care providers.<sup>52</sup> However, treatment by a physician's assistant or nurse may not qualify, unless it was under the direct supervision of a doctor or someone else who does qualify as a health care provider.<sup>53</sup> Thus, a note from an unsupervised physician's assistant

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<sup>47</sup> 29 U.S.C. § 2611(11).

<sup>48</sup> 29 C.F.R. § 825.114.

<sup>49</sup> Jones v. Denver Public Schools, 427 F.3d 1315 (10<sup>th</sup> Cir. 2005).

<sup>50</sup> Id.

<sup>51</sup> 27 Fed. Reg. 7966 (2008).

<sup>52</sup> 29 C.F.R. § 825.118.

<sup>53</sup> 29 C.F.R. § 825.114(a)(2)(i)(A).

may not establish a “serious health condition” creating the right to FMLA leave. (This also would change under the proposed regulations, as physician assistants would be recognized as health care providers.)<sup>54</sup>

The lesson from these examples is clear: employees or employers who assume that the FMLA applies or not do so at their peril. Employers must have staff or other expertise available to determine whether each absence qualifies for FMLA coverage.

*Myth 7. If An Employee Is Entitled To FMLA Leave, An Employer Cannot Do Anything About It.*

Even if an employee is entitled to FMLA leave, the employee’s rights are not unlimited. As noted above in section 2, employers can still enforce policies applicable to all employees. In addition, the FMLA permits employers to request foreseeable medical leave be scheduled to not unduly disrupt the employer’s operations.<sup>55</sup> Also, employers can transfer employees who have requested intermittent leave to available alternative positions that better accommodate regular absences.<sup>56</sup> Finally, salaried employees who are among the top 10% in compensation within 75 miles of a worksite may not be entitled to reinstatement following the end of their leave.<sup>57</sup>

## **B. FMLA LITIGATION**

*Myth 8. A FMLA Claim Must Be Asserted Promptly, And A Charge Must Be Filed Before Going To Court, Just Like Claims Under Title VII, The ADA, And The ADEA.*

Perhaps the most common FMLA dispute involves an employee fired for violating an attendance policy, and the employee claims at least some of the underlying absences were protected by the FMLA. An employer might expect to receive a claim right away in this situation. However, while there is no prohibition on an employee’s ability to complain right away, an employee in this situation may wait three years after termination to assert a FMLA claim.

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<sup>54</sup> 27 Fed. Reg. 7969 (2008).

<sup>55</sup> 29 U.S.C. § 2612(e)(2)(A).

<sup>56</sup> 29 U.S.C. § 2612(b)(2).

<sup>57</sup> 29 U.S.C. § 2614(b).

The reason for this potential delay is the statute of limitations for FMLA claims is two years, and three years for willful violations.<sup>58</sup> Also, unlike Title VII, the ADA, and the ADEA, there is no requirement to file a timely charge (usually within 300 days) with the EEOC or another government agency before filing a lawsuit.<sup>59</sup> Employees, however, may choose to file complaints with the U.S. Department of Labor, just as they can file complaints about wage and hour violations.<sup>60</sup> Obviously, the longer an employee waits, the greater the chance that the employer will lose access to information about the decision being challenged. Employment records should be kept a minimum of three years after termination for this reason.

*Myth 9. Because The FMLA Only Requires 12 Weeks Of Leave, Which Can Be Unpaid, The Potential Liability For A FMLA Violation Is Not Significant.*

Even though the right to leave under the FMLA is limited to 12 weeks (or 26 weeks for the new leave for family members for care of armed forces personnel with a serious injury or illness), violating the FMLA can lead to liability far in excess of 12 weeks pay. FMLA liability includes reinstatement, back pay, liquidated damages, and interest, as well as expert witness fees, attorneys' fees, and costs.<sup>61</sup>

Consider the common situation of an employee fired for violating attendance policies who asserts a violation of FMLA, but does not assert the claim for over a year after his termination. By the time the case gets to trial, the back pay alone (ignoring the possibility of reinstatement and the value of that component of damages) is likely to be several years rather than 12 weeks, unless the employee was able to obtain a comparable job soon after termination. The liquidated damages remedy doubles this relief, and then interest on that amount further increases liability. An employer may be able to avoid liquidated damages if it convinces the court that the challenged action was done in good faith and that the employer had reasonable grounds to believe the action was not a violation.<sup>62</sup> Thus, FMLA remedies are similar to those

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<sup>58</sup> 29 U.S.C. § 2617(c).

<sup>59</sup> 29 U.S.C. § 2617(a)(2).

<sup>60</sup> 29 U.S.C. § 2617(b)(1).

<sup>61</sup> 29 U.S.C. § 2617(a).

<sup>62</sup> Id. .

provided by the ADEA<sup>63</sup> and the FLSA,<sup>64</sup> and can quickly exceed hundreds of thousands of dollars.

*Myth 10. An FMLA Claim Is Analyzed Similar To A Title VII Or ADEA Discrimination Claim.*

The statutory text of the FMLA actually creates two different claims. One claim is known as an interference claim<sup>65</sup>, and the other is referred to as a retaliation claim.<sup>66</sup> The following discussion is intended only as an overview of these two separate claims; not a detailed analysis.

A recent Tenth Circuit decision described these two different claims.<sup>67</sup> The case arose when an employer reduced a worker's hours and then fired her shortly after she returned from FMLA leave. The employer provided evidence that it had suffered financial problems and discovered errors with the employee's work during her absence. The employee asserted both types of FMLA claims, but the employer argued, and the district court agreed, that only a retaliation claim was appropriate. The Tenth Circuit disagreed, ruling that both claims could be asserted, although it still affirmed summary judgment against the employee on both claims.

An interference claim is typically asserted if the employer denies permission for leave, prevents the employee from taking the full amount of FMLA leave, or denies reinstatement following leave. However, in the situation where an employee is terminated following her return for leave, an interference claim can still be brought if the employer bases its decision on information it learned during the employee's leave. This is significant because unlike Title VII or ADEA discrimination claims, proof of an FMLA interference claim does not require any showing of a discriminatory motive by the employer. To establish an interference claim, the employee must show: (1) the employee was entitled to FMLA leave; (2) some action by the employer interfered with the right to leave, and (3) the employer's action was related to the exercise of FMLA rights. If the employee establishes a claim, the employer can only defend

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<sup>63</sup> 29 U.S.C. § 216.

<sup>64</sup> 29 U.S.C. § 626(b).

<sup>65</sup> 29 U.S.C. § 2615(a)(1).

<sup>66</sup> 29 U.S.C. § 2615(a)(2).

<sup>67</sup> Campbell v. Gambro Healthcare, Inc., 478 F.3d 1282 (10<sup>th</sup> Cir. 2007).

this claim by proving that it would have taken the same action regardless of the request for FMLA leave.<sup>68</sup>

In contrast, a FMLA retaliation claim occurs if some adverse action occurs after the employee took leave and returned to work.<sup>69</sup> This claim is analyzed like retaliation claims under Title VII, the ADEA, or the ADA: courts apply the same model in which the employee retains the burden of proof. The employee must first establish a prima facie case, by showing: "(1) she engaged in a protected activity; (2) [the employer] took an action that a reasonable employee would have found materially adverse; and (3) there exists a causal connection between the protected activity and the adverse action."<sup>70</sup> If the employee can establish this, the employer must articulate a non-retaliatory explanation for its action, which the employee must prove is a pretext for retaliation.

*Myth 11. Evidence About An Employee's Medical Condition After Her Request For Leave Is Not Relevant In FMLA Litigation.*

Consider the common FMLA dispute arising after an employee is fired for being absent. She contends the absence was due to a serious health condition, and, therefore protected under FMLA, and she asserts an interference claim. Obviously, whether she had a serious health condition will require analysis of her medical records as of the time she made the request. However, subsequent records might be relevant as well.

Recent court decisions have involved the situation where subsequent medical evidence shows the employee still would not have been able to return to her job at the end of the FMLA leave period.<sup>71</sup> Because the purpose of the FMLA is to provide a limited leave for employees who can then return to work, the Sixth Circuit has held that in this situation, an FMLA interference claim would be barred. However, the analysis is different with respect to a retaliation claim, because that claim depends on a showing of a retaliatory motive. In that situation, the evidence about the employee's subsequent medical condition is not relevant to determining the employer's motive. Therefore, while it will not bar a claim, that evidence creates

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<sup>68</sup> Metzler v. Federal Home Loan Bank of Topeka, 464 F.3d 1164 (10<sup>th</sup> Cir. 2006).

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Edgar v. JAC Products, Inc., 443 F.3d. 501, 512-514 (6<sup>th</sup> Cir. 2006).

an “after acquired evidence” defense that should cut off the right to back pay no later than the end of the FMLA leave period.<sup>72</sup>

*Myth 12. Providing FMLA Leave Can Be Used Against An Employer To Support An ADA Claim.*

Both the FMLA and the ADA can be involved in cases where an employee’s health interferes with her ability to work. However, a recent decision by the Tenth Circuit emphasized that these are separate statutes with separate analysis, and whether someone has a disability under the ADA is a different question from whether she has a “serious health condition” under the FMLA.<sup>73</sup> Affirming summary judgment against an employee who asserted an ADA claim, the Court held the mere fact that an employer provided FMLA leave to an employee did not establish the employer “regarded the employee as disabled,” for purposes of her ADA claim.

**V. CONCLUSION**

This article identifies the new amendments to the FMLA, new proposed regulations, and several areas of FMLA administration and litigation that commonly arise but may not be well understood, leading to unnecessary disputes. Lawyers advising employers or employees about FMLA issues should understand the intricacies of this law, including the new amendments, regulations and developing case law.

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<sup>72</sup> Id.

<sup>73</sup> Berry v. T-Mobile USA, Inc., 490 F.3d 1211 (10<sup>th</sup> Cir. 2007).