The Family and Medical Leave Act of 1993 (FMLA) provides eligible employees leave from work for a variety of reasons, including the birth or adoption of a baby, the employee's serious health condition, or the serious health condition of a family member. Recent statutory amendments expanded the FMLA to include leave for a variety of situations related to military service, including care for service members with a serious illness or injury, and situations arising from a call to active duty or deployment.

This article primarily highlights recent FMLA decisions at the federal appellate level. First, it addresses cases enforcing employer's rights under the statute or otherwise limiting the scope of the FMLA. Second, cases favorable to employees are discussed. Within each case discussion, practical advice is provided to guide those who advise employers and employees about FMLA rights and obligations. Finally, the article identifies highlights of recently proposed FMLA regulations.

Decisions Enforcing Employers' Rights or Limiting the FMLA

Federal appellate courts have issued several recent decisions that limit employees' rights under the FMLA. Some of these are discussed below.

State Sovereign Immunity

In Coleman v. Court of Appeals of Maryland, a March 2012 decision limiting the scope of the FMLA for state employees, the U.S. Supreme Court held that state sovereign immunity bars FMLA claims based on the employee's own serious health-care condition. By its terms, the FMLA applies to state governments, as well as to private employers with at least fifty employees. In 2003, the Supreme Court ruled that Congress validly abrogated state government immunity with respect to the FMLA's provision for care of family members with a serious health condition. The basis for that decision was that a historical record of sex discrimination in state leave policies provided a Fourteenth Amendment rationale for extending the family care provision to the states. In Coleman, in contrast, the Court ruled the self-care provision of the FMLA had no similar justification and, therefore, was an invalid exercise of congressional authority. The Coleman decision is consistent with a 2003 decision by the Tenth Circuit, Brockman v. Wyo. Dep't of Family Servs.

Absence Control Policies

Emphasizing the right of employers to require employees to comply with absence control policies, the Tenth Circuit held in Twigg v. Howard Beachraft Corp., that even if an underlying absence were protected by the FMLA, violation of a company's notice of absence policy is a legitimate reason for discharge. In that case, the company had an absence notification policy that required employees to call in before their shift, every day of their absence, until they were notified their FMLA leave was approved. The company also had a policy that three consecutive days of failing to report was a violation for which termination was appropriate. Due to a variety of circumstances, an employee's leave initially was approved for only a week, and then was extended for several weeks. The employee, however, thought her leave had been approved for a

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longer period of time. When the employee failed to report or call in to work after the extension, the company terminated her employment. She asserted a variety of claims, including FMLA retaliation and interference claims.

Retaliation claims require a showing that the employer was motivated by a retaliatory motive, while FMLA interference claims do not require a showing of intent. The district court dismissed both claims on summary judgment, and the court of appeals affirmed. The FMLA retaliation claim failed because the employee did not show the company’s decision was motivated by retaliation for using FMLA leave. The FMLA interference claim failed because an employee’s violation of an absence notification policy is a legitimate basis for termination, even if the absences that the employee failed to report were protected by the FMLA.

Violation of “no call no show” policies or other absence control policies also defeated FMLA claims in several recent decisions by the Eighth Circuit. In Lovland v. Employers Cas. Co., the employee already was subject to a corrective action for excessive absenteeism, and the employer fired her for violating its policy after she failed to call in two days in a row after the death of her father. She argued that the corrective action was based in part on absences that were FMLA protected; therefore, the termination was unlawful. However, the court ruled that there was evidence the FMLA-protected absences had been removed from the corrective action consideration, and that the violation of the policy was an independent reason justifying termination.

In Ballato v. Comcast Corp., the employee mistakenly believed he had been fired and stopped showing up at work. The company then terminated him for violating its three-day “no call no show” policy. He claimed that he had called in the first day, requesting FMLA leave. However, he did not follow the instructions the company gave him, or respond to messages. The Eighth Circuit affirmed summary judgment, concluding that the company had not interfered with the employee’s FMLA rights by enforcing its attendance policy against him.

The Eighth Circuit also upheld summary judgment against an employee in a case based on an attendance policy that imposed points for violations, when the employee accumulated too many points because he failed to comply with instructions. In Chappell v. The Bilo Co., the employee claimed multiple instances of interference with his FMLA rights, because the company assessed points for what he considered to be FMLA qualifying absences. However, in the first absence, he failed to call in to his supervisor as required by the policy. The second absence did not qualify for FMLA protection because the employee failed to provide the required FMLA certification. The final absence was only partially protected by the FMLA, because he could have worked part of the day, and he was told to come in, but he chose not to do so.

Practical advice. No call no show termination rules are permissible, but may lead to disputes in the FMLA context. Employers should have a clear and firm absence control policy, as well as an FMLA policy. An absence control policy may require employees to provide reliable contact information and to call in daily unless informed otherwise in writing, even if the employee believes the absence qualifies under the FMLA. If employers have reason to believe lines of communication are not working, employers may choose to suspend an employee pending further investigation, rather than to proceed directly to termination.

Exacerbation of Medical Condition

Rejecting a proposed expansion of the FMLA, the Seventh Circuit ruled in Brenneisen v. Motorola, Inc., that the FMLA does not recognize a cause of action for “exacerbation of a medical condition” that prevents an employee from returning to work. There, an employee took several medical leaves. The first was protected by the FMLA, and the company reinstated him after that leave. He then took a second leave. That leave was not protected by the FMLA, because he had exhausted his annual FMLA leave during his first leave. He claimed that a supervisor’s harassment after his return from his second leave exacerbated his medical condition, leading to a third leave, from which he was not able to return to work. The court ruled that because the employee was not able to return to work, he could not recover under the FMLA, even if the employer’s harassment caused the condition that required the leave.

Practical advice. Supervisors must be trained to avoid conduct that could be construed as harassment against an employee who has engaged in protected activity, such as FMLA leave. The result in this case may have been different if the harassment had occurred after the first, protected leave.

Employee Unable to Return to Work

Several courts of appeals have ruled the FMLA does not provide protection to an employee who was not able to return to work after twelve weeks of leave. For example, in Hearst v. Progressive Foam Technologies, Inc., an employee extended his medical leave several times for additional medical procedures. The company stated he initially was covered by the FMLA, but contended his
FMLA protected leave eventually ended. He was fired for job abandonment. The employee claimed his FMLA leave should have been calculated differently, so that his absence still was covered by the FMLA at the time of his termination.

The Eighth Circuit upheld the dismissal of his claim, because it was undisputed that he would not have been able to return to work at the end of his FMLA leave, regardless of how it was calculated. Accordingly, he was not prejudiced at all by his termination. The Tenth Circuit also recently held, in _Degraw v. Exide Technologies_, that an employee who was not able to return to work after his FMLA expired did not have an FMLA claim.11

Practical advice. Disputes about calculation of leave time and application of absence control policies often lead to FMLA disputes. Sometimes, such disputes can be resolved by determining whether the employee would have been able to return to work after the termination date. Evidence of an employee’s health after taking leave may be relevant to whether the employee could have returned to work within the period covered by FMLA.

**Health Condition of Family Member**

In _Tayag v. Lahey Clinic Hosp. Inc._, a decision limiting the ability of employees to take FMLA leave due to the serious health condition of a close family member, the First Circuit ruled FMLA leave to provide “psychological comfort” to a family member requires that the family member be receiving medical care.12 The FMLA does not require leave to accompany a spouse on a “faith healing trip” that did not involve medical care.

In _Tayag_, an employee took occasional FMLA leave to care for her ailing husband. However, she then requested seven weeks of leave to accompany him on a faith healing trip to the Philippines. The company sent the husband’s doctor a certification form, but it did not indicate that a seven-week leave was required, justifying a second certification. The second doctor stated that the husband was not incapacitated and the employee did not require leave. The company then sent the wife letters notifying her that the leave was unapproved, but by that time she already had left with her husband to the Philippines. After she failed to respond to the letters, the company terminated her employment.

The court noted that the only reason leave for the wife would be permitted under the FMLA’s psychological care and comfort provisions would be if the trip were related to medical care. Faith healing does not qualify as medical care. The court noted that the initial doctor’s certification did not indicate how much leave was necessary, justifying the second certification. That doctor’s note did not support her claim that the leave should have been protected.

Practical Advice. Prompt involvement by human resources staff can help to determine whether a foreseeable absence qualifies as FMLA leave. This may prevent the situation where an employee starts his or her absence before leave is approved or denied.

**Arbitration Provisions**

Continuing the trend of enforcing arbitration provisions against statutory claims in a variety of contexts, the Eighth Circuit ruled in _Thompson v. Air Transport Int’l LLC_ that an arbitration provi-
sion of a collective bargaining agreement (CBA) can require arbitration of FMLA claims. The case involved a pilot who missed eight weeks of work for surgery. He alleged he was never informed of his FMLA rights. Soon after his return, after twelve hours of flight time, he was fired for violating an operational procedure. The pilot claimed that other pilots who had not taken medical leave were not fired for this reason. He brought an FMLA claim in federal court. The employer argued that the case should be dismissed because the pilot was covered by a CBA that required arbitration of FMLA claims.

Based on 14 Penn Plaza LLC v. Pyett, a 2009 Supreme Court decision permitting CBAs to require arbitration of statutory claims, both the district court and the court of appeals ruled the claims were subject to arbitration. The CBAs arbitration provision specifically referred to claims under state or federal law, in addition to claims arising under the CBA. The courts interpreted language in the arbitration provision that such claims were “waived” as requiring arbitration, as opposed to litigation.

Practical advice. Unionized employers that wish to arbitrate statutory claims can negotiate for this. Such provisions, though, should be carefully drafted to avoid unnecessary litigation regarding whether such claims have been waived or are merely subject to arbitration.

Retaliation and Temporal Proximity

In Sisk v. Picture People, Inc., a decision addressing how to analyze the temporal proximity between the protected activity and the adverse action in an FMLA retaliation claim, the Eighth Circuit ruled that the timing analysis depends on when the employer was put on notice of the need for leave, not the date the employee returned to work. There, an employee with hip pain needed a week off from work and was given FMLA leave. While she was gone, her condition worsened, requiring surgery. She missed eleven weeks of work. Three days after her return, she met with her supervisors. They commented that other employees said she could not perform all of her job duties, and that she should consider quitting, getting more care, and reapplying when she was healthier. She claimed that she was fired at the end of the meeting, but the employer claimed she quit.

At trial, she asserted an FMLA retaliation claim. She argued that she established a prima facie case because she was fired only three days after her return, showing a temporal proximity between her protected activity (her leave) and the adverse action (her alleged termination). The district court dismissed her case, and the court of appeals affirmed, because she had not established a prima facie case. Although her leave was protected, the temporal proximity analysis for purposes of her prima facie case began with her intention to take leave, which was several months before the date she returned. That delay precluded a prima facie case.

Practical advice. This case was resolved on the basis of a rule about measuring temporal proximity. Although putting the employer on notice of the need for leave would establish protected activity, it seems that returning from leave and promptly being fired also should establish a prima facie case of retaliation. Careful employers will make sure there are no miscommunications with an employee on his or her return to work; here, confusion about what was said led to a claim that could have been avoided.

Insufficient During FMLA Leave

In Sabourin v. University of Utah, the Tenth Circuit upheld the dismissal of FMLA retaliation and interference claims by an employee who was selected to be laid off in a reduction in force (RIF), and then fired while he was on FMLA leave before the RIF took place. The decision to lay off the employee could not be considered retaliation for seeking FMLA leave because it was made days before he requested FMLA leave. His insubordination and vindictive behavior toward his supervisor while he was out on FMLA leave justified his termination before the effective date of the RIF, even if his absence was otherwise protected under the FMLA.

Practical advice. The employer prevailed on the RIF claim because it had documentation to show the decision was made before the employee’s FMLA request. Similarly, documentation of the employee’s misconduct while on leave provided the defense to that claim. Employers can require cooperation from workers on leave; documenting the absence of such cooperation can provide a defense to claims of unlawful discipline.

Employer’s Honest Good Faith Belief Defense

Courts have recognized that an employer’s honest good faith belief of misconduct by an employee may be a defense to FMLA claims. In Seeger v. Cincinnati Bell Telephone Co., LLC, the company placed an employee on paid disability leave, rather than light duty, for an FMLA-qualifying medical condition affecting his leg. However, while he was on leave, employees saw him attending an Octoberfest Festival, apparently walking without difficulty. The employer conducted an investigation, including an interview of the
employee, and then concluded that he had engaged in disability fraud by over-reporting his symptoms to avoid light duty. The Sixth Circuit affirmed summary judgment against the employee because he could not show the employer's good faith belief was a pretext for FMLA retaliation.

Decisions Expanding or Enforcing Rights Under the FMLA

Federal appellate courts have issued several recent decisions that expand or enforce employees' rights under the FMLA. Some of these are discussed below.

Pre-Eligibility Leave Requests

Expanding the scope of protected activity under the FMLA, the First Circuit held that employees who are not yet eligible for FMLA leave are protected from interference and retaliation for making pre-eligibility requests for post-eligibility leave. In *Pereda v. Brookdale Senior Living Community*, a pregnant employee informed the company that she would need maternity leave in six months, which would be after she finished her first year of employment. She claimed that as soon as she informed the company, she was harassed and put on a performance improvement plan. She then used non-FMLA leave for pregnancy complications, and was fired while she was on leave.

The district court dismissed her FMLA claims on the ground that she was not an “eligible employee” under the FMLA at the time of her termination, because she had not worked sufficient time and had not yet had her baby (the FMLA-qualifying event). The court of appeals disagreed, ruling that the FMLA provides protection for employees who make pre-eligibility requests for FMLA leave to take place when they become eligible. Thus, the employee could assert both FMLA interference and retaliation claims.

Practical advice. Employees requesting foreseeable leave are protected from FMLA interference or retaliation from the time of the request, not merely once the leave takes place. Although employees requesting leave are not immune in the meantime from workplace rules, employers should be prepared to defend FMLA claims if an adverse action is taken before the leave commences.

Absence Policies Stricter Than the FMLA

In a decision limiting employers' discretion in drafting absence policies, the Second Circuit ruled a notice of absence policy that is stricter than what the FMLA permits will support a jury verdict of FMLA interference. In *Millea v. Metro-North R. Co.*, a store-room clerk, who was a Gulf War veteran with posttraumatic stress disorder, needed unforeseen leave for a panic attack after an argument with his supervisor. He asked a co-worker to inform the supervisor rather than telling the supervisor himself. The next day, he again told the co-worker he needed leave, and the co-worker relayed the message to the supervisor. The company's internal leave policy required employees to communicate directly with their supervisors, because the clerk had not done so, the leave was considered non-FMLA leave. The clerk asserted claims for FMLA interference and retaliation after a notice of discipline was placed in his file for the absences.

A jury ruled in his favor, and the court of appeals affirmed. The FMLA specifically permits employees to have other people pro-
vide notice on their behalf if the employee is unable to do so. Although the FMLA permits companies to implement absence notification policies, those policies cannot be more strict than what the FMLA permits.

Practical advice. Companies should check their policies to confirm that they do not go beyond what is permitted by the FMLA. In addition, before disciplining an employee for failing to comply with an absence notification policy, companies may choose to confirm that the employee’s conduct was not permitted by the FMLA.

Calculating FMLA Leave

In another decision focusing on employer’s administration of absence policies, the Sixth Circuit criticized a company that did not disclose the method used for calculating the twelve-month period for FMLA leave, noting that if companies change the method for calculating FMLA leave entitlement, they should be able to provide proof that they gave notice to employees of the change. In Thom v. American Standard, Inc., a thirty-six-year employee sought FMLA leave for surgery, which the company approved. Although he planned to return to light-duty work earlier than his approved return date, the company told him light-duty work was not available. He suffered a setback, and was unable to return to unrestricted work when he thought he would be. The company terminated him after he did not return to work, even though that date was before the company initially had approved.

The company explained that it calculated the FMLA leave under the “rolling-backward” method, even though the calendar method would have covered the entire absence. However, the company had not advised the employee it would use the rolling-backward method, and the amount of leave it initially had approved was past the deadline for this method. The first time the company notified the employee it was using the rolling-backward method was after he filed suit.

The court of appeals concluded the employee was entitled to rely on the initial letter with the approved end date. In addition, the court ruled that the employer’s after-the-fact defense could be considered a pretext that justified an award of liquidated (or double) damages, because the employer could not show a good faith honest intention to follow the FMLA.

Practical advice. Employees often assume that the annual twelve-month FMLA leave period is governed by the calendar-year method. Companies should identify and publish the method in their policy, and correspondence to employees taking FMLA leave should note the method used. If a company decides to change its method, it also must provide sixty days notice to employees, and changes should not be applied to employees on leave if it works to their detriment.

Reduction in Force After FMLA Leave Request

Criticizing an employer’s decisions implementing a RIF in the context of FMLA claims, the Seventh Circuit ruled that changing RIF selection criteria after an employee’s leave request, and then backdating a memo supporting the RIF decision, permits an inference of FMLA interference and retaliation. In Shaffer v. American Medical Ass’n, a department manager was under pressure to reduce his budget due to the economic downturn. He suggested one candidate for layoff, but resisted laying off a second employee. Less than a month later, the second employee notified the manager he needed FMLA leave for knee replacement surgery. A few days later, the manager decided the second employee should be the one laid off, and he was let go soon before his leave had been scheduled to start. After the laid-off employee retained counsel, a human resources (HR) manager typed handwritten notes he had made of his previous conversations with the department manager. He dated the notes months earlier—from before the layoff decision was reconsidered—and destroyed the original notes.

The court of appeals ruled that a jury could find that the change in the RIF selection was motivated by the request for FMLA leave. A jury also could find that backdating the memo and destroying the original notes was done to create a paper trail to make it appear the decision was not influenced by the leave request.

Practical advice. The rationale for employment decisions should be documented, and the documentation should be preserved. Changes in those decisions also should be documented, particularly when the timing of the decision coincides with leave requests by an affected employee.

Out-of-Court Statements by Managers

In an FMLA case hinging on application of the hearsay rule, the Seventh Circuit held an HR director’s comments to an employee that she was terminated in a RIF because she was pregnant and took medical leave are admissions. In Makowski v. SmithAmundsen LLC, a law firm marketing director took leave due to pregnancy and childbirth. While she was out on leave, executives at the law firm decided to eliminate her position and one other position. After the executives called to inform her about the decision, she came to the office to get her belongings. There, she claimed the HR director, who had not been involved in the executives’ decision to eliminate her position, made a series of admissions. She claimed the HR director told her she was let go because she had been pregnant and taken medical leave, that other people had been discriminated against because they were pregnant or had taken medical leave, that she should speak with a lawyer, and that the firm had been advised by outside counsel to label both terminations a RIF—even though the other person was being let go for performance reasons. The HR director denied making any of the statements.

The district court excluded evidence of the statements on the ground that they were hearsay, because the HR director was not involved in the decisions, and then dismissed the marketing director’s FMLA claims on summary judgment. However, the court of appeals reversed. The statements were non-hearsay admissions by a party opponent, because they concerned a matter within the scope of the HR director’s employment, even if she was not involved in the decision. Because the statements were admissible, summary judgment was inappropriate.

Practical advice. Out-of-court statements by management about the rationale for challenged actions may be admissible, even if the managerial employee denies making them. To minimize the risk of claims based on such statements, companies should control who has knowledge of the rationale for employment decisions and what is said about those decisions.

Health Condition of Family Member

In Romans v. Michigan Dept of Human Servs., the Sixth Circuit ruled that refusing to permit an employee to leave his shift to visit his dying mother in the hospital, and then terminating him for doing so, creates FMLA interference and retaliation claims.
There, a security officer was terminated as a result of a number of incidents, which included a suspension for abandoning his post. The officer claimed he told his supervisor he needed to leave to visit his dying mother in the hospital and to discuss with his sister whether to keep the mother on life support. He claimed he also arranged for someone to cover his post while he would be away. His supervisor claimed the officer never told him why he needed to leave and that if he had known, he would have permitted the officer to leave. The employer still argued, however, that the leave was not protected, because the officer’s sister was available to provide care for their mother.

The Sixth Circuit ruled the officer had FMLA claims for interference and retaliation. Accepting the officer’s version as true, he provided adequate notice of his need for FMLA leave. The regulations explain that leave is available to provide psychological comfort and physical care to seriously ill family members. This encompasses care related to decisions about treatment, and the employee does not need to be the only family member available.

Practical advice. It is the rare employer who would object to an employee seeking leave to visit his or her dying mother. Indeed, in this case, the employer claimed the officer did not provide any explanation for why he needed to leave his shift, either at the time or when he was suspended. It was only after he was terminated, based on a series of incidents that included consideration of the suspension, that he claimed this absence was FMLA protected. To avoid this situation, a careful employer may check to make sure that any absence that could be the basis for discipline is not protected, whether by the FMLA or some other right, before implementing discipline.

Individual Liability of Supervisor

In a decision addressing who can be a defendant in an FMLA dispute, the Third Circuit held that the FMLA permits individual liability against supervisors with sufficient control over an employee’s work. In *Hayburger v. Lawrence County Adult Probation and Parole*, an employee with continuing health problems that required regular absences for work was placed on a six-month probation for poor work performance. Six months later, her supervisor concluded her performance had not improved and recommended that her employment be terminated. She brought a variety of claims, all of which were resolved or settled, except for her FMLA claim against her supervisor individually.

The FMLA applies to employers, but it also includes in the definition of “employer” “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” FMLA regulations state that individuals, such as corporate officers acting in the interest of an employer, can be personally liable for FMLA violations. The court stated that individual liability may be imposed if the person has supervisory authority over the employee and was responsible in whole or in part for the violation while acting in the employer’s interest. This “economic reality” test depends on the totality of the circumstances, and includes factors such as the authority to hire and fire, supervision and control of work schedules and conditions of employment,
determination of the rate and manner of pay, and maintenance of employment records.

In light of this standard, the supervisor might be personally liable. He acted in the interest of the employer by supervising her and recommending her termination. His supervision and control over her work permitted a finding that he could be her employer for purposes of FMLA liability.

**Practical advice.** Claims against individual supervisors are relatively rare, but certain statutes, such as the FMLA and the Fair Labor Standards Act, expressly provide for individual liability. This should provide supervisors an incentive to check with HR staff before implementing adverse actions against an employee who has engaged in protected conduct such as FMLA leave.

**Proposed Regulations Implementing Statutory Amendments to FMLA**

In 2009, President Barack Obama signed into law two sets of amendments to the FMLA. One set expanded previous changes to the FMLA that created two types of leave applicable to military service. The second set of amendments are specific to eligibility for airline flight crews, such as pilots and flight attendants. On February 15, 2012, the U.S. Department of Labor (DOL) published proposed regulations concerning these amendments and sought public comments. The DOL website has links to the fact sheets and explanations about the proposed regulations and changes to the FMLA.27

**Military Leave Entitlement Changes**

Military caregiver leave is available for up to twenty-six weeks (rather than twelve) for care of servicemembers with a serious injury or illness. Eligible employees include a servicemember’s spouse, son, daughter, parent, or next-of-kin. This leave now covers not only current active servicemembers, but also veterans discharged within five years. There are several definitions of what is a “serious injury or illness.” The proposed regulation also covers prior conditions that were aggravated in the line of duty, in addition to injuries incurred in the line of duty.

Leave for a “qualifying exigency” also was modified. It now applies to members of the regular armed forces, in addition to the national guard and reserves. However, it applies only to deployments to foreign countries. Also, the amount of leave time for “rest and recuperation” was extended from five to fifteen days.

**Airline Flight Crew Eligibility Changes**

Typically, employees must have worked 1,250 hours over the previous twelve months to be eligible for FMLA leave. That standard was difficult to apply in the airline industry, so special eligibility requirements have been enacted. Those employees must have worked or been paid for not less than 60% of the total monthly guarantee, and have worked or been paid for not less than 504 hours during the twelve months before their leave.

**Other Proposed Regulatory Changes**

The proposed regulations also make a few other changes to the current regulations. For example, leave should always be calculated using the employer’s shortest increment of leave permitted by payroll systems (typically six minutes). Also, the proposed regulations narrow some of the exceptions on an employee’s right to reinstatement after leave.

**Conclusion**

The FMLA continues to generate significant litigation on a number of legal issues. Federal appellate courts are deciding cases that limit the FMLA in some ways and expand it in others. Many decisions highlight practical issues that create client counseling opportunities for practitioners in this area. Anticipated regulations should provide additional rights and obligations for employees and employers subject to this statute.

**Notes**

1. 29 USC §§ 2601 et seq.
21. Shaffer v. American Medical Ass’n, 662 F.3d 439 (7th Cir. 2011).
26. 29 CFR § 825.104(d).