THE BIG FOUR IN EMPLOYMENT LAW
The Family and Medical Leave Act

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OVERVIEW

- Nuts and bolts of the FMLA
- Recent FMLA cases discussing interference retaliation claims
- FMLA and COVID

Nuts and Bolts of the FMLA

The FMLA "allows 'eligible' employees of a covered employer to take job-protected leave for up to a total of 12 workweeks in any 12 month period because of 1) the birth of a child and to care for the newborn child; 2) because of the placement of a child with the employee for adoption or foster care; 3) because the employee is needed to care for a family member (child, spouse, parent) with a serious health condition; or 4) because the employee's own serious health condition makes the employee unable to perform the functions of his or her job." The FMLA also provides 26 workweeks of leave during a single 12 month period to care for a covered servicemember with a serious injury or illness.

Leave may be taken all at once, on an intermittent basis or on a reduced schedule basis.

Nuts and Bolts of the FMLA

Protections:

- The FMLA prohibits employers from interfering with or denying the exercise of rights protected by the Act.
- The FMLA also prohibits employers from retaliating against employees who exercise their rights under the Act.

Nuts and Bolts of the FMLA

Governing Agency:

- The FMLA is enforced by the Department of Labor. **See www.dol.gov.**

- No requirement to file with DOL before filing in court.

Nuts and Bolts of the FMLA

Covered Employers:

- Private employers with 50 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year.
- Public agencies (no number requirement). All State, Local and Federal employers.
- Public and private elementary and secondary schools (no number requirement).

Nuts and Bolts of the FMLA

Eligible Employees:

- Employed at a worksite where 50 or more employees are employed or for an employer who has 50 or more employees within a 75 mile radius of a worksite.
- Has been employed for the employer for at least 12 months.
- Has been employed for at least 1,250 hours during the 12 month period immediately prior to the date leave commences.

Nuts and Bolts of the FMLA

Conditions that Trigger an Employees Right to Take Leave:

An eligible employee has a right to take up to 12 weeks of <u>unpaid</u> leave in each 12 month period for the following conditions:

- Employee has a “serious health condition” that makes the employee unable to perform essential functions of the job; or
- Employee has to care to a spouse, child, or parent with a “serious health condition”; or
- Employee has to care for a child after birth or placement for adoption or foster care; or
- 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember’s spouse, son, daughter, parent, or next of kin (military caregiver leave).

Nuts and Bolts of the FMLA

What is a Serious Health Condition?

For purposes of the FMLA, "Serious Health Condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

- *Inpatient Care;* or
- *Continuing treatment by a HCP; or*
- *Chronic conditions requiring treatment.*

Nuts and Bolts of the FMLA

What is Notice?

Employee Notice: An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. The employee does not need to expressly assert his or her rights under the FMLA or even mention the FMLA to give notice.

- Foreseeable leave – 30 days “as soon as practicable.”
- Unforeseeable leave – “as soon as practicable” under the facts and circumstances.

Nuts and Bolts of the FMLA

Employer Notice:

- Employers are required to give the employee FMLA information when employees request leave.
- Notice is required even if an employee does not explicitly refer to his request for time off as FMLA leave.
- If the employer knows the worker is sick and that the employee could qualify for FMLA leave, the employer must give the notice.

Nuts and Bolts of the FMLA

Verifying FMLA Rights: Requesting a Medical Certification

Under the FMLA, an employer may require medical certification of an employee's or family member's serious health condition by the treating health care provider.

(a)The employer can only request the information contained in the DOL "Certification of Health Care Provider" form and upon receipt of a completed form, the employer cannot request additional information from the health care provider.

(a)With the employee's permission, a health care provider representing the employer may contact the employee's health care provider to clarify.

Validity of Certification: the employer may obtain a second opinion at its expense if it doubts the validity of the medical certification form. If the second opinion differs from the employee's health care provider, then the employer can require a third opinion, which is final and binding.

Nuts and Bolts of the FMLA

Types of FMLA Leave:

- **Unpaid Leave:** Employee is entitled to 12 weeks unpaid leave per year.

- **Intermittent or Reduced Scheduled Leave:** Under the FMLA, an employee has the absolute right to an intermittent leave or leave on a reduced schedule for the employee's serious health condition or to care for a family member with a serious health condition, if medically necessary.

- **Paid Leave:** An employer may require or an employee may elect to substitute paid vacation, personal, or medical or sick leave for unpaid FMLA leave. An employer may also designate short-term disability or workers' compensation leave as FMLA leaves. If an employee substitutes paid leave under an employer's policy for FMLA leave, the employer's notification requirements for the particular paid leave apply.

Nuts and Bolts of the FMLA

Alternatives to Leave:

- ***Light Duty:*** Right to FMLA leave is absolute. An employee can decline an offer of a light duty job and take FMLA leave if she cannot perform the duties of her regular job.

- ***Reassignment:*** if an employee is on intermittent or a reduced schedule leave that is foreseeable based on planned medical treatment, the employer can temporarily transfer the employee to a similar position with the same pay and benefits.

- ***Work at Home:*** Under the FMLA, if an employee who has requested FMLA leave works at home, the time spent working does not count against their leave entitlement/allowance. However, the FMLA does not require an employer to allow employees to work at home.

Nuts and Bolts of the FMLA

Job Protection: Employees who return from FMLA leave must be restored to their same or equivalent position with the same or equivalent benefits.

> ***Equivalent Position:*** An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.
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> ***Bonuses:*** An employee cannot be disqualified from performance related bonuses (i.e. attendance) for taking FMLA leave.
>
> ***Equivalent Pay:*** An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period. (i.e. cost of living increase).
>
> ***Exceptions to Reinstatement:*** employees rights to job protection are only those that he would have had if he had not been on leave.

Nuts and Bolts of the FMLA

Returning from Leave:

Under the FMLA, a fitness-for-duty certification upon a return to work from an FMLA leave may be required as long as the following are met:

- Employer must have a uniformly applied practice or policy for all employees, not just those returning from FMLA leave;
- Employer must provide notice of a fitness-for-duty requirement;
- Employer may seek certification only with regard to the particular health condition that caused an FMLA leave; and
- “Clarification” of the fitness-for-duty certification can be obtained by an employer’s health care provider but only with the employee’s consent.

Nuts and Bolts of the FMLA

How are employees protected?

No Interference: the FMLA prohibits interference with an employee's rights under the FMLA. An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

"Interfering With" means, for example, refusing to authorize FMLA leave, or even discouraging an employee from using such leave. Would also include transferring employees from one worksite to another to keep worksites below the 50 employee threshold; reducing an employee's hours, or changing the essential functions of the job.

Nuts and Bolts of the FMLA

How are employees protected ?

No Retaliation: an employer is prohibited from discharging or in any other way retaliating against any an employee for opposing or complaining about any unlawful practice under the Act.

An employer cannot retaliate against employees who have taken FMLA leave.

Nuts and Bolts of the FMLA

What can employees do?

Secretary of Labor: the employee can file, or have another person file on his or her behalf, a complaint with the Secretary of Labor; OR

Private Lawsuit: the employee can file a private lawsuit in federal court. if an employee files a private lawsuit, it must be filed within 2 years after the last action which the employee contends was an FMLA violation, or 3 years if the violation was willful.

**no administrative exhaustion requirement.

Nuts and Bolts of the FMLA

Damages:

- Lost wages;
- Employment benefits or other compensation denied or lost by reason of the violation;
- Any actual monetary loss sustained by the employee as a result of the violation;
- Interest on the sum, calculated at the prevailing rate;
- Liquidated damages if the employer's violation was willful;
- Where appropriate employee may obtain equitable relief, such as, reinstatement, promotion, etc., and
- If violation if found, the employee can also recover attorney's fees, expert witness fees, and other costs of the action from the employer.

Overview of Burden of Proof

Interference:

To prevail on an FMLA interference claim, Employee must establish:

(1) Employee was eligible for the FMLA;
(2) Employer was covered by the FMLA;
(3) Employee was entitled to take leave under the FMLA;
(4) Employee provided notice of the intent to take leave; and
(5) Employer denied employee of FMLA benefits to which Employee was entitled.

Overview of Burden of Proof

Retaliation:

Employee must establish:

(1)Employee engaged in statutorily protected activity;
(2)Employer took an adverse action against Employee; and
(3)The protected activity caused the adverse action.

**To succeed, Employee only needs to show that the protected conduct was a substantial or motivating factor in Employer's decision, not the "but for" cause.

Recent FMLA Cases

Anderson v. Nations Lending Corp., -- F.4th – (7th Cir. 2022), 2022 WL 701807

Cloutier v. Gojet Airlines, LLC, 996 F.3d 426 (7th Cir. 2021)

Hickey v. Protective Life Corp., 988 F.3d 380 (7th Cir. 2021)

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

Valdivia v. Township High School District 214, 942 F.3d 395 (7th Cir. 2019)

Riley v. City of Kokomo, 909 F.3d 182 (7th Cir. 2018)

Anderson v. Nations Lending Corp.,
-- F.4th – (7th Cir. 2022), 2022 WL 701807

Decided: 3/9/2022. Employee's appeal of grant of summary judgment. Affirmed.

Claims: Interference and retaliation.

- Employee worked remotely reviewing loan applications.
- To ensure compliance, Employer randomly selected 10% of loans for an internal post-funding audit.
- During Employee's first year of work, she exhibited performance issues. Not disciplined, but counseled and provided additional training.
- In January 2018, supervisor notified Employee about additional performance issues and required training before Employee audited more files.

Anderson v. Nations Lending Corp.,
-- F.4th – (7th Cir. 2022), 2022 WL 701807

- In February 2018, more errors were discovered and the supervisor created a spreadsheet to keep track of the performance issues.
- March 2018, Employee applied for FMLA leave. Employee claimed that her supervisor made comments to her about being “sick a lot” and about needing “a full team there to run her department.”
- Employee was on FMLA leave from March 19, 2018 to June 11, 2018.
- Shortly after Employee started her FMLA leave, the Employer’s audit system flagged several more errors in Employee’s work, two of which were determined to be of the highest deficiency.
- Supervisor recommended to HR that Employee be terminated.

Anderson v. Nations Lending Corp.,
-- F.4th – (7th Cir. 2022), 2022 WL 701807

- As a result of the recommendation, HR conducted investigation.
- Prior to the completion of the investigation, Employee returned to work.
- Following the typical process, supervisor told Employee to review her emails, review updated policies, and catch up on training modules before she began auditing files again.
- HR completed its investigation on June 14, 2018 and terminated Employee on June 15, 2018.
- Employee sued claiming interference and retaliation under the FMLA.

Anderson v. Nations Lending Corp.,
-- F.4th – (7th Cir. 2022), 2022 WL 701807

Interference:

- Interference claim was based on the alleged failure to restore to same or equivalent position.
- Court found that "no rational finder of fact could conclude that asking employee to catch up on missed emails and catch up on directives and training missed during absence amounts to the sort of 'make-up' work that might indicate an intent to sideline or 'warehouse' an employee permanently."
- Court also stated Employer had sufficient grounds to not assign Employee any loans to review until it completed its investigation into what appeared to be significant errors.
- Court noted employee was not entitled to return to her prior position if she would have been terminated regardless of whether she took FMLA leave. Employee did not contest the errors or dispute the Employer's representations about the quality of her work. She could not provide any evidence Employer exaggerated the errors or falsified the errors. Nor did she provide any evidence there was impropriety or shortcoming in the Employer's investigation.

Anderson v. Nations Lending Corp.,
-- F.4th – (7th Cir. 2022), 2022 WL 701807

Retaliation:

- Employee claimed that her FMLA leave was a substantial or motivating factor in Employer's decision to terminate her and that the timing of her termination was suspicious.
- She also pointed to the comments made by her supervisor to support her retaliation claim.
- Court found that Employee failed to present a causal connection between her protected activity (asking for or taking FMLA leave) and her termination.
- Court noted that Employee was terminated after her work performance deficiencies came to light while she happened to be on leave. Supervisor also started tracking the performance issues **before** Employee requested leave.
- Although supervisor recommended termination, HR investigated and determined Employee should be terminated. Employee did not put forth any evidence that the HR investigator had any animus towards her for taking leave. Employee was unable to demonstrate that Employer terminated her for taking FMLA leave.

Cloutier v. Gojet Airlines, LLC, 996 F.3d 426 (7th Cir. 2021)

Decided: 4/29/2021. Employer's appeal of denial of motion for judgment as a matter of law or for new trial. Affirmed.

Claims: Interference.

- Employee was a pilot for Employer airline.
- June 2, 2014, Employee was notified by his physician that he had type II diabetes and was prescribed Metformin. Employee's physician told him that the FAA physician would determine whether he could fly.
- Employee did not have any scheduled flights between June 2 and June 9.
- June 10, Employee met with FAA physician who told Employee that he would have to take leave for 60 days while he adjusted to medication.
- June 10, Employee attempted to notify scheduling that he needed to take medical leave.

Cloutier v. Gojet Airlines, LLC, 996 F.3d 426 (7th Cir. 2021)

- June 12, Employee emailed the base manager informing her of his need for leave and that he would need 60 days. Base manager told Employee to return medical certification form in 5 days and to get the paperwork from Employer's website.
- Base manager did not tell Employee the consequences of an untimely medical certification or discuss any FMLA requirements with Employee.
- June 17, Employee submitted his formal request for leave and on June 18 his physician submitted the medical certification support the leave through July 31.
- Employee contacted VP of Operations regarding the need for leave beyond July 31. VP of Operations did not respond to Employee.
- Instead, he sent an email to the base manager and the chief pilot telling them not to communicate with Employee and that after the expiration of Employee's medical leave he would be terminated.

Cloutier v. Gojet Airlines, LLC, 996 F.3d 426 (7th Cir. 2021)

- Employer did not communicate with Employee until July 31 when it told Employee he had been scheduled to resume flying.
- Prior to July 31, Employee tried at least 4 times to communicate to Employer that he could not return on July 31.
- Employee checked his email on August 1 and there was no response from Employer. Later on August 1, Employer emailed Employee that he would have to get a recertification from his physician no later than August 15.
- Employee did not see the email until August 19. Employee submitted recertification on August 25.
- Employer sent out resignation notification to Employee on August 16 stating that they considered Employee to have resigned on August 15.
- August 22, Employer sent a letter to Employee stating that he voluntarily resigned for failing to return from leave.

Cloutier v. Gojet Airlines, LLC,
996 F.3d 426 (7th Cir. 2021)

- Employer argued that it did not interfer with Employee's FMLA leave because no reasonable jury could have found that Employee could have returned to work within 12 weeks of taking leave.
- Employee's FMLA leave started June 11 and expired September 3.
- FAA tests took place in mid-August and he was approved to return to work on September 4.
- Employee argued that had he been given the proper notice from Employer he would have had the FFA testing done earlier in August and would have had FAA approval by September 3.
- Employer also cut off communication with Employee in mid-June.
- Court found that a reasonable jury could have found that Employee could have returned by September 3, but for Employer's conduct.

Hickey v. Protective Life Corp.,
988 F.3d 380 (7th Cir. 2021)

Decided: 2/12/2021. Employee appealed grant of motion for summary judgment. Affirmed.

Claims: Interference

- Employee worked for Employer in its asset protection division.
- November 2016, Employee requested FMLA leave for anxiety and depression.
- Employee was granted leave through February 17, 2017.
- While Employee was on leave, Employer acquired a new division. Account executive in the new division reached out to Employee and told him that he would like to add Employee to his team and that he would be looking for Employee's application.

Hickey v. Protective Life Corp.,
988 F.3d 380 (7th Cir. 2021)

- Employee met with his supervisor on February 20 regarding return to work.

- Supervisor told Employee he would have a territory closer to home, he would no longer be servicing certain accounts, and would need to build up his own book of business.

- Supervisor also told Employee that his compensation would remain the same for 6 months, but it could change thereafter.

- March 3, Employee received his 4th quarter evaluation and year end evaluation for 2016 at the same time and was rated inconsistent.

- Supervisor said the inconsistent rating reflected Employee's performance prior to leave.

Hickey v. Protective Life Corp., 988 F.3d 380 (7th Cir. 2021)

- March 2017, Employee attended a conference with other employees.
- Employee spoke to at least one other attendee at the conference about his desire to transfer to the new division. The VP of Sales learned of the conversation and told Employee to refrain from discussing the possibility of a transfer at the conference.
- After meeting with Employee, the VP of Sales thought it was clear that Employee did not want to be in his current position and he contacted HR for options. Same day, VP of Sales told Employee that a transfer was not an option and offered him a severance package. VP of Sales told Employee to keep the severance offer confidential.
- Same evening, VP of Sales learned that Employee mentioned his desire to transfer and the severance package to another employee. VP of Sales had another follow up meeting with Employee in which he again reiterated not to talk about the possibility of transfering or the severance offer.

Hickey v. Protective Life Corp., 988 F.3d 380 (7th Cir. 2021)

- After this meeting, VP of Sales again spoke to HR and then again with Employee.

- VP of Sales decided to terminate Employee because it was his perception that Employee lied to him; having denied conversations about the transfer and severance offer with other employees.

- VP of Sales also terminated Employee because Employee had no desire to work in his current position.

- On summary judgment, Employee conceded that his termination was not retaliatory, and that Employer was entitled to judgment on the retaliation claim, so only interference claim remained. (not sure why)

Hickey v. Protective Life Corp.,
988 F.3d 380 (7th Cir. 2021)

- Employee argued that Employer interfered with his FMLA rights by downgrading his performance reviews—that his FMLA leave negatively impacted his performance reviews.
- He also argued that he was not reinstated to his prior or an equivalent position because he had to prospect for clients, which was more difficult than working with existing clients.
- Court noted that in order to survive summary judgment, Employee had to come forward with evidence from which a jury could conclude that he suffered damages attributable to one of these adverse actions.

Hickey v. Protective Life Corp., 988 F.3d 380 (7th Cir. 2021)

- Court found when Employee returned to work, he received same compensation and benefits he had received prior to leave.
- Although compensation could have changed after 6 months, Employee was terminated 3 weeks after returning from leave for reasons unrelated to his FMLA leave. (Employee conceded this on SJ).
- Court explained that although Employee eventually may have suffered damages had he remained employed, he had not suffered any compensable damages at the time his employment was terminated.
- Court concluded that Employee did not suffer any loss of wages or benefits prior to his termination. Record did not establish that Employee had been offered, or had accepted, a different position prior to the termination of his employment. Employee had no basis for relief under the FMLA.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

Decided: 1/27/2020. Employee appealed grant of motion for summary judgment. Affirmed in part (on retaliation claim), vacated in part (on interference claim), and remanded.

Claims: Interference and retaliation.

- Employee injured his ribs on July 3, 2015.
- Went to the hospital the following day and diagnosed with fractured ribs. He continued to feel pain and returned to the ER 6 days later.
- Employee's first scheduled day back to work following the holiday was July 6. He was unable to work because of his ribs. He called in to report his absence.
- On the days Employee was scheduled to work over the next 2 weeks, Employee or his spouse called in his absences according to the Employer's attendance policy. Employee called off work on July 6, 7, 8, 14 and 16. Employer's call-in log for July 6 listed "rib" as Employee's reason for his absence that day.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

- Spouse testified that at some point in early July she told Employer that Employee fractured his ribs and would not be at work for a while.
- Employer claimed that after the July 6 call, neither Employee nor spouse provided any further explanation for Employee's absences.
- Spouse also testified that she and Employee called the supervisor and told him about the fractured ribs and the need for time off to recover.
- Employee's physician recommended that Employee not return to work until early August.
- After 2 weeks of not being able to work, Employee stopped reporting his absences.
- He did not report his absences on July 20, 21, 22, or 23.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

- Employee accrued too many attendance points and Employer terminated him.

- At the time of his termination, Employer had not asked for any information regarding Employee's fractured ribs or informed Employee of his ability to take FMLA leave.

- Employee argued that Employer interfered with his entitlement to FMLA because Employer did not provide Employee with the required leave information before he stopped reporting his absences.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

Interference:

- Court examined whether Employee was injured by Employer's FMLA violation noting that violation of the FMLA is not enough to establish injury.
- Instead, Employee has to show he was prejudiced by the violation.
- The only evidence in the record was spouse's statement that had Employee known about FMLA leave he would have taken it.
- Court noted that the district court did not address whether Employee was prejudiced, and it should consider that matter on remand.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020)

Retaliation

- Court affirmed summary judgment on the retaliation claim.
- Court found that Employee failed to establish any causal connection between his alleged attempt to seek relief under the FMLA and his termination.
- Only evidence is suspicious timing, which by itself is rarely enough.

Valdivia v. Township High School District 214, 942 F.3d 395 (7th Cir. 2019)

- Employee claimed Employer interfered with FMLA rights by not providing notice or information about her right to take FMLA leave.
- Jury entered verdict in Employee's favor. District court denied Employer's motion for judgment as a matter of law. Employer appealed. Seventh Circuit affirmed.
- Employee's mental state deteriorated after transferring to a new school. On multiple occasions, she described what was happening to her supervisor—sleeplessness, uncontrollable crying, weight loss, racing thoughts, exhaustion, etc.
- Employee even asked for a 10 month position as opposed to a 12 month position.
- Under pressure from supervisor she submitted letter of resignation.
- Court found that the record before the jury had enough evidence to conclude that Employee put Employer on notice of her need for leave.

Riley v. City of Kokomo, 909 F.3d 182 (7th Cir. 2018)

- Employee suffered from seizures, anxiety disorder, post-traumatic stress disorder, bipolar disorder and depression.
- She alleged Employer interfered with her FMLA rights and retaliated against her.
- District court granted Employer's motion for summary judgment. Employee appealed and Seventh Circuit affirmed.
- It was undisputed that Employer decided to terminate Employee prior to her request for FMLA leave.
- Therefore, no reasonable jury could find that Employee was terminated because of her request for FMLA leave or that Employer interfered with Employee's request for FMLA leave.

FMLA and COVID

Can an employee who is sick with COVID-19, or who is caring for a family member who is sick with COVID-19, take FMLA leave?

- An employee who works for a covered employer, is eligible for FMLA, and is sick, or is caring for a family member who is sick, with COVID-19 may be entitled to leave under the FMLA under certain circumstances.

FMLA and COVID

Can an employee stay home under FMLA leave to avoid getting COVID-19?

• No. The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with COVID-19 in some instances, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee solely for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA.

FMLA and COVID

Can parents or other care givers take time off from work to care for a child whose school is closed or whose care provider is no longer available due to COVID-19 reasons?

- There is currently no federal law covering non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for a child whose school is closed or whose care provider is unavailable due to COVID-19 reasons.

FMLA and COVID

May my employer require me to submit a doctor's note to use FMLA leave if I am sick and unable to work because of COVID-19?

• Yes, a doctor's note may be required in order to take FMLA leave. Under the FMLA, an employer may require a certification by a health care provider when an employee requests leave because of a serious health condition. The certification allows the employer to obtain information related to the FMLA leave request, and verify that an employee has a serious health condition. Leave when you are sick with COVID-19 may be an FMLA serious health condition under certain circumstances.

FMLA and COVID

I am unable to work because I need to take care of sick family members. Can my employer terminate or lay me off for this reason?

- If an employee is **covered and eligible** under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. An employer is prohibited from interfering with, restraining, or denying the exercise of an employee's rights under the FMLA. Employers are also prohibited from discriminating or retaliating against an employee for having exercised or attempted to exercise any FMLA right.

FMLA and COVID

I am unable to work because I have COVID-19. Can my employer terminate or lay me off for this reason?

- If an employee works for an FMLA-**covered employer and is eligible** under the FMLA and is unable to work because of a serious health condition, then the employee is entitled to up to 12 weeks of **job-protected**, unpaid leave during any 12-month period. In some cases, COVID-19 may be a serious health condition.

FMLA and COVID

Will a telemedicine visit count as an in-person visit to establish a serious health condition under the FMLA?

- Yes. Telemedicine visits are considered to be in-person visits for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider; be permitted and accepted by state licensing authorities; and, generally, should be performed by video conference.

FMLA-COVID Cases

- No appellate cases addressing FMLA and COVID.
- A lot of the district court opinions on the topic address motions to dismiss.

Scott v. City of Lake Station, Indiana, 2022 WL 294622 (N.D. Ind. Jan. 31, 2022).

Nuttall v. Progressive Parma Care Center, LLC, 2021 WL 5920312 (N.D. Ohio Dec. 14, 2022).

Gomes v. Steere House, 504 F. Supp. 3d 15 (D. Rhode Island 2020).

Scott v. City of Lake Station, Indiana, 2022 WL 294622 (N.D. Ind. Jan. 31, 2022)

Decided: 1/31/2022. Motion to dismiss. Granted in part, denied in part.

Claims: Interference and retaliation.

- Employee was terminated on 2/23/2021, several months after testing positive for COVID and after missing a number of work weeks due to COVID related symptoms. Employee kept Employer updated and provided doctor's notes. Employer never offered FMLA leave.
- Filed a complaint against multiple parties, including his Employer. Employee did not file interference and retaliation claims against his Employer, filed them against Union. Court dismissed the claims against the Union.
- As of March 23, 2022, Plaintiff has not filed a third amended complaint.

Nuttall v. Progressive Parma Care Center, LLC, 2021 WL 5920312 (N.D. Ohio Dec. 14, 2022)

Decided: **12/15/2021.** Motion for Summary Judgment granted.

Claims: Interference

- Employee was an activities director for a residential skilled nursing facility.
- March of 2020, Employee was exposed to a patient who had contracted COVID. Employee began experiencing COVID symptoms and was examined by her physician on March 30, 2020.
- Physician diagnosed Employee with a viral upper respiratory tract infection and advised her to stay home for 10 days.
- Employee was not prescribed any medication and was never tested for COVID. Physician instructed Employee to monitor her symptoms and take over-the-counter medications as needed.

Nuttall v. Progressive Parma Care Center, LLC, 2021 WL 5920312 (N.D. Ohio Dec. 14, 2022)

- After doctor's visit, the board of health issued an order of isolation to Employee advising her that she was to quarantine until she was deemed "non-communicable."
- Same day Employee told Employer that she was instructed to quarantine for 10 days.
- April 10, Employee emailed Employer her concerns about contracting COVID and returning to work. Employee asked if any of her duties could be performed from home.
- April 16, Employee notified Employer that she had not yet been cleared to return to work and had a follow up appointment with her physician scheduled.
- April 17, Employee was advised by her physician that she could return to work.
- April 21, Employer told Employee that a replacement for her position had been found. Employer suggested that Employee apply for the role of director's assistant.

Nuttall v. Progressive Parma Care Center, LLC, 2021 WL 5920312 (N.D. Ohio Dec. 14, 2022)

- Employee filed an interference claim against Employer alleging that she suffered from a serious health condition entitling her to leave and Employer failed to provide her the required notice, which directly resulted in her termination.
- Employer filed for summary judgment arguing that Employee did not suffer from a serious health condition and Employee did not request or give notice of an intent to take FMLA leave.
- Court found that even if Employee's March 2020 illness qualified as a serious health condition under the FMLA, Employee did not provide Employer with sufficient notice of an intent to take FMLA leave.
- Court noted the record did not show that Employee ever provided Employer with any degree of detail or specificity; she did not allege her symptoms were atypical, particularly severe, or that she would have to remain home past the quarantine period.
- Employee even testified she was able to perform some duties while working remotely.
- The record also showed that Employee was provided with FMLA paperwork in 2019 and was familiar with the process of completing FMLA paperwork.

Gomes v. Steere House,
504 F. Supp. 3d 15 (D. Rhode Island 2020)

Decided: 11/2/2020. Motion to dismiss. motion denied.

Claims: Retaliation

- Employee was an LPN for a nursing and rehabilitation center.
- April or May 2020, Employee was exposed to COVID on the job and contracted the virus.
- Unable to work for a period of time. After contracting COVID, Employee requested FMLA leave.
- On May 22, 2020, Employer terminated Employee.
- Employee brought a claim for retaliation against Employer alleging that she was terminated for requesting FMLA leave.
- Court denied Employer's motion to dismiss finding that Employee pled facts sufficient to support a prima facie case for retaliation.

Thank you!

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