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**LEAVES OF ABSENCE**

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## I. INTRODUCTION

The requirement that employers provide leaves of absence from work to employees with medical conditions (or in some cases, when their family members have medical conditions), has become a way of life for employers in every jurisdiction. Yet when compared to other areas of labor and employment law, the development of leave of absence jurisprudence is relatively new, with the FMLA and ADA not being passed by Congress until the early 1990s. This paper provides an update on some of the most recent developments in the leave of absence arena, focusing primarily on the federal FMLA (and the DOL's enforcement of same), but also touches on the continually evolving and developing area of law regarding leave as an accommodation under the ADA.

## II. REGULATORY AND LEGISLATIVE DEVELOPMENTS

### A. THE DOL IS PUBLISHING AGAIN

Beginning in 2009 under President Barack Obama, the Department of Labor stopped issuing the detailed opinion letters we had all come to know and love. No longer were we getting weekly quips from the DOL about the various minutia of the FMLA regulations. From 2009 through 2017, the DOL occasionally issued interpretations and guidance on certain issues, but not the specific, factual nitty gritty we had grown accustomed to. Then, in 2018, the flood gates opened again and between January and April 2018, we already had 19 new DOL opinion letters, all under the FLSA (but at least one so far with leave implications under FMLA).

**FMLA-Required Rest Breaks NOT Compensable Time under FLSA.** Wage and Hour Opinion Letter, FLSA2018-19 (Dep't of Labor Apr. 12, 2018). In this Opinion Letter, the Department concluded that employers are not required to compensate non-exempt employees under the Fair Labor Standards Act for 15-minute rest breaks, taken every hour, pursuant to a health care provider's orders for a FMLA-qualifying serious health condition. The usual rule is that short rest breaks of 20 minutes or less are primarily for the employer's benefit, and thus, constitute compensable time under the FLSA (i.e., they are paid breaks). *See* 29 C.F.R. § 785.18. However, in limited circumstances, rest breaks are considered primarily for the benefit of the *employee*, and are therefore not compensable. The DOL concluded that hourly, 15-minute breaks to treat an FMLA-qualifying medical condition are primarily for the employee's benefit, so they may be unpaid without running afoul of the FLSA, provided that the employee still receives as many paid rest breaks as his/her coworkers. While the DOL relied heavily on the employer/employee benefit distinction to arrive at this answer, it also drew on specific language in the FMLA Regulations about the permissibility of unpaid breaks. This may leave open the question about whether such similar breaks, requested and granted as a reasonable accommodation under the ADA instead of FMLA, would be subject to the same analysis, without analogous "unpaid break" language under the ADA itself.

## B. OTHER RECENT AND RELEVANT DOL PUBLICATIONS ON FMLA

During the DOL's quasi-hiatus in publishing prior to 2018, we did see some FMLA activity.

- May 2016: DOL issued *The Employer's Guide to the Family and Medical Leave Act*, available at <https://www.dol.gov/whd/fmla/employerguide.pdf>. The Employer's Guide is a relatively user-friendly walk through administering the FMLA, and includes several graphics and flow charts which some may find useful. But largely, the Guide answers common questions about FMLA and, perhaps not surprisingly, does not address some of the trickier and more frustrating issues employers face in administering FMLA. There are, however, a few nuggets of creative interpretation by the DOL worth taking a look at.
- April 2016: DOL published a **new FMLA poster**—its WH-1420, *Employee Rights Under the Family and Medical Leave Act*. The poster is a reorganized and somewhat more visually appealing version of the old poster, which sets forth basic leave protections and focuses on an employee's ability to file a complaint with the DOL. The new poster, which can be found on the DOL's website at <https://www.dol.gov/whd/regs/compliance/posters/fmla.htm>, is required to be posted prominently by all covered employers in each location where they have employees, even if no employees at that location are actually eligible for FMLA. 29 CFR § 825.300(a)(2). Also, as a reminder for covered employers who have at least one eligible employee at any location, all of the contents of the poster must also be included “in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.” 29 CFR § 825.300(a)(3)-(4).
- January 2016: DOL published **Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act**, available at <https://www.dol.gov/whd/regs/compliance/whdfs28n.pdf>. In Fact Sheet #28N, the DOL reinforced that the analysis for determining joint employment for FMLA purposes is identical to the analysis it uses under the FLSA. From an FMLA perspective, understanding joint employment issues is critical to answering certain coverage and eligibility questions, but also in determining who is responsible for which FMLA obligations. The DOL's new Fact Sheet explains the roles of primary and secondary employers under the FMLA and gives examples and a chart of obligations for each type of employer. As employers continue to rely more heavily on contingent workforces, ensuring they are meeting their legal obligations even for workers in non-traditional roles will become increasingly important. This Fact Sheet is still active and available on the DOL's website and seems to have survived the 2016 rescinding of an Administrator's Interpretation on similar joint employment issues in other contexts under FLSA, and as such, may be viewed simply as memorializing the existing state of the law under FMLA.

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