Practical Guidance

Family and Medical Leave Act (FMLA) Litigation Defense Strategies

A Practical Guidance® Practice Note by
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This practice note identifies strategic considerations when defending lawsuits brought under the Family Medical Leave Act (FMLA).

Specifically, this practice note addresses the following steps for responding to FMLA litigation claims:

- Step 1: Determine the FMLA Theory of Liability Alleged in the Complaint
- Step 2: Respond to the FMLA Allegations
- Step 3: Plan a Discovery Strategy
- Step 4: Position Your Case for Summary Judgment Success
- Step 5: Prepare for Trial
- Step 6: Consider Possible Remedies Available to the Plaintiff
- COVID-19: Additional Litigation Considerations regarding the Emergency Family and Medical Leave Act (EFMLA)

For information on the FMLA, see FMLA Leave: Guidance for Employers and Employees. For additional information on FMLA interference and retaliation claims, see FMLA Interference and Retaliation Claims.

For additional information on the FMLA, see the Family and Medical Leave practice note page and the Family and Medical Leave forms page. See also the U.S. Department of Labor's (DOL) Employer's Guide to the Family and Medical Leave Act. For information on state family and medical leave laws, see the "Family, Medical, Sick, Pregnancy, and Military Leave" column of Attendance, Leaves, and Disabilities State Practice Notes Chart.

For guidance on a wide variety of employment litigation issues, see Employment Litigation practice notes page. For guidance on civil litigation generally, see the Civil Litigation practice area.

For tracking of recent agency guidance on employer's obligations under the FMLA and other key federal, state, and local Labor & Employment legal developments, see Labor & Employment Key Legal Development Tracker.

Step 1: Determine the FMLA Theory of Liability Alleged in the Complaint

The first step in strategically responding to an FMLA complaint is to identify the plaintiff's theory of liability. To pinpoint the theory of liability, it is critical to understand the employer's coverage and administrative responsibilities under the FMLA as well as the nature of rights that the FMLA provides employees. The FMLA contains two distinct provisions. First, the FMLA creates a series of entitlements or substantive rights. 29 U.S.C. § 2614; Dotson v. Pfizer, Inc., 558 F.3d 284, 294 (4th Cir. 2009); Mauder v. Metro. Transit Auth. of Harris Cty., Tex., 446 F.3d 574, 580 (5th Cir. 2006). Second, the FMLA protects employees from retaliation for exercising their rights under the FMLA. 29 U.S.C. § 2615(a).

Substantive Rights

The FMLA creates a series of entitlements that employers must provide to employees subject to coverage requirements discussed in the section below entitled "Potential Defenses." An employer must honor these entitlements. That is, defenses such as lack of knowledge or that the employer treats all employees identically by not providing leave are improper. See Mauder, 446 F.3d at 580 ("Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.") (internal citations omitted).

Employer Requirements under the FMLA

Employers must provide employees with:

- Up to 12 workweeks of leave during any 12-month period in qualifying situations
- Continuation of health benefits and other employment-related benefits during leave –and–
- Reinstatement of employees to their previous position or an equivalent position at the end of the leave

29 U.S.C. § 2614.

Separately, the FMLA also provides "military caregiver leave," which allows an eligible employee to care for his or her spouse, child, parent, or next of kin who is a covered service member with a serious injury or illness. 29 U.S.C. § 2612(a)(3). Employees eligible for military caregiver leave are entitled to take a total of 26 workweeks of leave in a 12-month period. Id.

Employers that are covered by the FMLA must post a notice explaining the FMLA's entitlements and procedures for filing FMLA complaints. 29 C.F.R. § 825.300(a).

Qualifying Reasons for Leave under the FMLA

Eligible employees are entitled to take unpaid leave for the following qualifying reasons:

1. Birth of a child and to care for a newborn child
2. Adoption or foster care placement of a child with the employee
3. To care for the employee's spouse, child or parent who has a serious health condition
4. Because the employee has a serious health condition that makes the employee unable to perform the functions of the job –and–
5. Due to a "qualifying exigency" arising from the fact that the employee's child, spouse, or parent is a military service member called to covered active duty

29 U.S.C. § 2612(a)(1).

If any of the reasons listed in parts (1) through (4) apply, FMLA leave is capped at a total of 12 workweeks of leave in a 12-month period. Accordingly, if an employee needs to take FMLA leave for more than one qualifying reason in a 12-month period, the employee is limited to a total of 12 workweeks of leave for that period. See 29 U.S.C. § 2612(a)(1).

If, however, one of the qualifying reasons is military caregiver leave, then the employee may take up to 26 total workweeks of leave, as long as no more than 12 weeks are taken for reasons other than military caregiver leave. 29 U.S.C. § 2612(a)(3), (4).

Employee Requirements under the FMLA

Employees must take certain affirmative steps to trigger an employer's duties under the FMLA. As an initial matter, employees must provide employers with enough information for employers to determine that the leave requested may be covered by the FMLA. 29 C.F.R. §§ 825.302, 825.303.

Employer Responsibilities upon Employee Request for Leave under the FMLA

When an employer receives information from an employee regarding their request for leave, the employer must:

- Notify the employee of the eligibility rules for FMLA leave
- Designate the leave as FMLA-qualifying –and–
- Notify the employee of this designation

29 C.F.R. § 825.300.

An employer may require employees to provide medical certification when leave is taken for medical reasons, including if the leave is due to the serious health condition of the employee's covered family member. 29 U.S.C. § 2613(a); 29 C.F.R. §§ 825.100(d), 825.306.

In accordance with the Genetic Information Nondiscrimination Act regulations adopted by the Equal Employment Opportunity Commission, an employer has the additional duty to warn healthcare providers responding to FMLA requests that they should not provide any information regarding an employee's genetic tests, genetic services, or the manifestation of disease or disorder in the employee's family members. See U.S. Dep't of Labor, Wage & Hour Div., Certification of a Healthcare Provider, Forms WH-380E and WH-380F (June 2020).

Once the employer has enough information to determine that the requested leave is for a qualifying reason under the FMLA, it has five days to notify the employee of such determination. 29 C.F.R. § 825.300(b)(1). In most cases, an employee is not required to take FMLA leave consecutively, but rather may take leave intermittently or in the form of a reduced schedule. For example, an employee taking FMLA leave due to the employee's own serious health condition or to care for a seriously ill family member may take leave intermittently or on a reduced schedule if medically necessary. 29 U.S.C. § 2612(b)(1).

Employers are not required to provide intermittent leave if the sole reason for the leave is due to the birth or adoption of a child. Id. But if an expectant mother needs leave due to a serious health condition connected with the birth of a child, or an employee needs leave to care for a newborn with a serious health condition, the employer's agreement is not required for intermittent or reduced schedule leave. Id.

Employers may seek documentation from employees to support their request for intermittent, or reduced schedule, leave. 29 U.S.C. § 2613(b)(5)–(7). Employers may request:

- Certification of the dates for planned medical treatment
- A statement of the medical necessity for the intermittent leave and expected duration –and/or–
- A statement that the employee's intermittent leave is necessary to care for the family member

Id.

For additional guidance on the FMLA, see FMLA Leave: Guidance for Employers and Employees.

Proscriptive Rights

The FMLA also creates proscriptive rights prohibiting employers from denying or interfering with an employee's entitlement to FMLA benefits (29 U.S.C. § 2615(a)(1)), and also prohibits employers from discriminating or retaliating against employees for requesting or taking FMLA leave (29 U.S.C. § 2615(a)(2)). An aggrieved employee can, therefore, assert two types of claims under the FMLA:

- An **interference claim**, in which the employee asserts that his or her employer refused to provide him or her with the rights granted under the FMLA –and–
- A **discrimination/retaliation claim**, in which the employee alleges that his or her employer retaliated against him or her for exercising his or her rights under the FMLA or for opposing activity made unlawful under the FMLA.

Interference

An employer cannot interfere with, restrain, or deny an employee's substantive rights under the FMLA. 29 U.S.C. § 2615(a)(1). Examples of actions that may constitute interference include:

- **Refusing FMLA leave.** Refusing to authorize FMLA leave. 29 C.F.R. § 825.220(b).
- **Discouraging FMLA leave.** Discouraging an employee from taking FMLA leave. Id.
- **Manipulating factors.** Manipulating factors to avoid coverage under the FMLA.
  - Such as transferring employees between worksites to keep each site below the 50-employee threshold
  - Redefining the essential functions of an employee's role to preclude them from taking leave –or–
  - Reducing the employee's hours to avoid employee eligibility
- **Not providing health benefits while on leave.** Failing to maintain health benefits while the employee is out on leave. 29 C.F.R. § 825.100(b).
- **Not providing similar job upon return.** Failing to restore an employee to the same or equivalent position on his or her return from leave. 29 C.F.R. § 825.100(c).

- **Not notifying employee of incomplete certification forms.** Failing to inform an employee that the submitted certification is incomplete or deficient.
  - This includes failing to state in writing what additional information is necessary to make the certification complete and sufficient. 29 C.F.R. § 825.305(c).
- **Failing to alert employee of the consequences of an inadequate certification.** Failing to advise the employee of the potential consequences of failure to provide an adequate certification. 29 C.F.R. § 825.305(d).
- **Denying an extension of leave.** Refusing to grant an employee's request for extension of leave. Liu v. Amway Corp., 347 F.3d 1125, 1134 (9th Cir. 2003) (summary judgment record demonstrated "clear interference" with employee's rights to take FMLA leave where supervisor refused to grant extensions to which plaintiff was entitled).
- **Inaccurately characterizing FMLA leave as personal leave.** Mischaracterizing FMLA leave as personal leave. Liu, 347 F.3d at 1134–35 ("mischaracterization of [employee's] FMLA leave as personal leave qualifies as 'interference'" under the FMLA).
- **Not explaining FMLA leave benefits.** Failing to explain FMLA benefits and leave rights in an employee handbook or at the time the employee requested leave. Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 564–65 (D.S.C. 1997).
- **Proposing alternative leave dates.** Suggesting that an employee take different dates of leave to accommodate the employer. Shtab v. Greate Bay Hotel & Casino, Inc., 173 F. Supp. 2d 255, 267–68 (D.N.J. 2001).
- **Not responding to employee's questions.** Failing to respond to an employee's inquiries and inform the employee of eligibility for leave. Saroli v. Automation & Modular Components, Inc., 405 F.3d 446, 454 (6th Cir. 2005).
- **Asking employee to perform work while on FMLA leave.** Requiring an employee to perform work while on FMLA leave. Simmons v. Indian Rivers Mental Health Ctr., 652 F. App'x 809, 818 (11th Cir. 2016) (telephone calls from employer did not rise to the level of interference where employee did not suffer consequences for refusing to respond to occasional calls while she was on leave).

For more information about the substantive rights under the FMLA that may give rise to an FMLA interference claim if denied or restrained, see FMLA Interference and Retaliation Claims.

Retaliation/Discrimination

Courts treat FMLA discrimination and retaliation claims interchangeably. See Seeger v. Cincinnati Bell Telephone Co., 681 F.3d 274, 282 (6th Cir. 2012) (explaining that the second theory of recovery under the FMLA, besides interference, is "the 'retaliation' or 'discrimination' theory arising from § 2615(a)(2)").

A plaintiff asserts a retaliation claim when he or she presents evidence that his or her employer subjected him or her to an adverse employment action and intended to retaliate or discriminate against him or her for having exercised his or her substantive rights under the FMLA. See 29 U.S.C. § 2615(a)(2) (it is "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter").

Unlike a plaintiff asserting a claim of interference, a plaintiff bringing a retaliation claim under the FMLA faces the increased burden of showing that the adverse employment action was either "motivated by" an impermissible retaliatory or discriminatory animus, or was the "but-for" cause. See the section below entitled "The Adverse Employment Action Was Not Caused by the Employee's Use of FMLA Leave."

Examples of actionable retaliation under the FMLA include the following:

- **Denial of benefits.** Denying benefits to an employee out on unpaid FMLA leave if the employee is otherwise entitled to full benefits. 29 C.F.R. § 825.100(b); 29 C.F.R. § 825.220(c).
- **Using FMLA leave as a negative factor in hiring, promotion, or discipline.** Considering an employee's requesting for or taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. 29 C.F.R. § 825.220(c).
- **Using FMLA leave toward no-fault attendance policies.** Counting FMLA leave under no-fault attendance policies. 29 C.F.R. § 825.220(c).

In some cases, employees may have direct evidence of retaliatory or discriminatory intent by the employer. More commonly, though, employees lack direct evidence and must therefore establish their claim under the *McDonnell Douglas* framework that applies to Title VII retaliation claims. See Martin v. Brevard Cty. Pub. Schs., 543 F.3d 1261, 1268 (11th Cir. 2008).

To establish a prima facie case of an FMLA violation, the plaintiff must demonstrate all of the following elements:

- The plaintiff availed himself or herself of a protection under the FMLA.
- The plaintiff suffered an adverse employment action.
- There is a causal link between the exercise of plaintiff's rights under the FMLA and the adverse employment action.

Salem v. City of Port St. Lucie, 788 F. App'x 692, 696 (11th Cir. 2019) (quoting Martin, 543 F.3d at 1268).

If the plaintiff meets this burden, the defendant must come forward with a legitimate, nondiscriminatory reason for its action. The burden then shifts back to the plaintiff to demonstrate that the asserted reason is pretextual. Id.

Unlike under Title VII, most courts do not recognize an FMLA cause of action based on hostile work environment. See Frizzell v. Delta Air Lines, Inc., 2019 U.S. Dist. LEXIS 186699, at *25–27 (N.D. Ga. Aug. 29, 2019) (granting 12(b)(6) motion to dismiss because "a claim of retaliatory hostile work environment is not cognizable under the FMLA"); Elder v. Elliott Aviation, Inc., 2016 U.S. Dist. LEXIS 127789, at *12–13 (C.D. Ill. Sept. 20, 2016) (granting 12(b)(6) motion to dismiss, in part, because of the court's refusal to apply a hostile work environment type claim to the FMLA).

For more information on FMLA discrimination or retaliation claims, see FMLA Interference and Retaliation Claims. For information on discrimination, harassment, and retaliation generally, see Discrimination, Harassment, and Retaliation practice notes page.

Certain Sets of Facts Can Give Rise to Both Interference and Retaliation Claims

In assessing the plaintiff's theory of liability, you should keep in mind that the FMLA's provisions are "imperfect" regarding what constitutes interference versus retaliation since these two claims are often closely intertwined. See Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 301 (3d Cir. 2012). Notably, courts sometimes find that the same set of allegations support both claims. Erdman v. Nationwide Ins., 582 F.3d 500, 509 (3d Cir. 2009) ("[F]iring an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee."). Therefore, it is common for plaintiffs to assert claims for both interference and retaliation based on the same facts. See id.

In some cases, the claims can be neatly categorized into the two separate theories of liability. For example, plaintiffs may allege that employers disciplined them after returning from leave, but may not dispute that they received all of the benefits to which they were entitled under the FMLA. See Downs v. Winchester Med. Ctr., 21 F. Supp. 3d 615, 616 (W.D. Va. 2014) (granting motion to dismiss as to interference claim but denying motion to dismiss as to retaliation claim where plaintiff "admit[ted] that she [has] not alleged that she was denied FMLA leave").

In other cases, the allegations may support both theories of FMLA liability. For example, an employee may allege he or she requested, but was wrongfully denied, FMLA leave (interference) and then suffered an adverse employment action based on the same request (retaliation). Such cases typically involve an employee's termination. See Erdman, 582 F.3d at 509. An employee alleging an employer terminated him or her after requesting FMLA leave, but before the FMLA leave actually began, may bring claims under both the interference and retaliation provisions. See id.

Example of claim alleging both interference and retaliation. In *Erdman*, the defendants argued that the plaintiff could not recover on a retaliation theory because she did not actually take FMLA leave. Id. The court, however, reasoned that "it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins." Erdman, 582 F.3d at 508. Accordingly, the court held that "firing an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee." Erdman, 582 F.3d at 509.

Courts' Varying Approaches to Determine the Plaintiff's Theory of FMLA Liability

Some courts base the theory of liability on the cause of action pled in the complaint. See Lichtenstein, 691 F.3d at 301 (noting that the "gravamen of [a plaintiff's] claim sounds in retaliation," but nonetheless considering the allegations under both the interference and retaliation frameworks because both were alleged in the complaint).

Other courts examine the substance of the plaintiff's arguments without relying on how the plaintiff actually pled the claim. The First Circuit, for example, has stated that, "whatever label a claim is given, what matters is whether the plaintiff is, at bottom, claiming that the employer denied his or her substantive rights under the FMLA or that the employer retaliated against him or her for having exercised or attempted to exercise those rights." Mellen v. Trustees of Boston Univ., 504 F.3d 21, 26–27 (1st Cir. 2007) (internal quotations omitted). Similarly, the Ninth Circuit has "previously applied the FMLA interference section where a plaintiff has mistakenly alleged retaliation." Rexwinkel v. Parsons, 162 F. App'x 698, 700 (9th Cir. 2006).

Note, however, that when a plaintiff alleges a single set of facts that supports both interference and retaliation claims, damages should not be duplicative even if the plaintiff wins on both claims.

Step 2: Respond to the FMLA Allegations

Once you have identified the plaintiff's theory of liability, you should begin your fact investigation to determine the strengths or weaknesses of the case.

Determine Whether the Employee Is Covered by the FMLA and Whether the Employee Meets the Eligibility Requirements

First, determine whether the employer is covered by the FMLA and whether the employee meets the FMLA eligibility requirements. See the section entitled "Potential Defenses" below. Assess the employer's corporate structure and number of employees at the plaintiff's location, and review the plaintiff's FMLA file, attendance, and payroll records to determine the employer's position on these threshold issues. The plaintiff's FMLA file will provide a timeline of events and the nature and communications regarding the leave of absence request and approval.

Attendance records will help determine whether the employee meets the FMLA eligibility requirements for length of employment and number of hours worked. For salaried employees without hourly attendance records, payroll records can be used to determine length of employment and the approximate number of hours worked. Payroll records will also be useful in assessing the employer's potential exposure and making strategic decisions early on about mediation or settlement discussions.

Assess the Merits of the Claim

Next, to assess the merits of the claim, begin by interviewing witnesses and reviewing communications from management and human resources regarding the employee's leave request and, if applicable, return from leave. Focus on uncovering the communications that demonstrate whether the employer and employee satisfied their respective obligations under the FMLA.

For an employer, such communications might include:

- Notifications to the employee of FMLA rights
- Requests for medical certifications
- Communications regarding incomplete FMLA documentation and/or medical certifications –and–
- Determinations of FMLA coverage for the leave

For employees, such documents might include communications from the employee to the employer or third-party benefits provider submitting information about the employee's need for the leave, and the employee's completion and submission of FMLA paperwork and medical certifications (or lack thereof).

Explore the Circumstances of Adverse Employment Action in Discrimination or Retaliation Claims

If an employee alleges discrimination or retaliation, explore the circumstances of the adverse employment action by talking to the decision-maker(s) and reviewing the discipline or termination documents. Focus on assessing whether the employee actually experienced an adverse employment action, who made the decision to take that action, and whether the employer had a legitimate business reason for the action.

Example. If an employer terminated an employee shortly after returning from leave, consider interviewing those involved in the termination decision and reviewing documents related to that decision (such as performance-related documents, emails, or other documents that support a misconductbased termination decision). This will help determine whether a legitimate reason for termination exists and was communicated to the plaintiff, or whether there were any potentially problematic conversations or documents you should be aware of in preparing the defense. You should also review personnel and pay data of similarly situated employees to identify whether the company treated the plaintiff the same as, or less favorably than, other employees who did not request or take FMLA leave.

Potential Dispositive Motions

The initial fact investigation you conduct will inform litigation strategy. As the fact investigation progresses, continue to assess how the employer should approach the lawsuit in the most effective and efficient way. For instance, the initial fact investigation will inform whether to file a Fed. R. Civ. P. 12(b)(6) motion to dismiss or file an answer to the complaint. It will also inform the viability of the employer's potential affirmative defenses.

For general information about motion practice in federal court, see Motion Practice: Making and Opposing a Motion (Federal) and Motion Practice: Making and Opposing a Motion Checklist (Federal)

Motion to Dismiss

Before filing an answer, consider whether your client has grounds to seek dismissal at the pleading stage. At this stage, the complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* evidentiary framework to survive a motion to dismiss. However, if your client has grounds to dismiss based on the statute of limitations, the employee has released all claims against the employer in a separation agreement, or the employee's claims should have been brought in arbitration, these may be grounds for a viable motion to dismiss at this stage. In addition, if the facts pled in the complaint show no coverage or employee eligibility under the FMLA, you may also have grounds for an early motion to dismiss.

Below are examples of decisions granting motions to dismiss at the pleading stage in FMLA cases:

- **The employee is not covered under the FMLA.** See Hill v. Walker, 737 F.3d 1209, 1215 (8th Cir. 2013) (affirming dismissal under 12(b)(6) of FMLA claims where employee had worked for the employer for less than 12 months and was therefore not covered under the statute).
- **The claim is barred by the statute of limitations.** See Shulman v. Amazon.com, Inc., 2013 U.S. Dist. LEXIS 76975, at *7 (W.D. Wash. May 30, 2013) (granting 12(b)(6) motion to dismiss because plaintiff's complaint was filed outside the two-year statute of limitations).
- **The plaintiff fails to plead facts sufficient to support a reasonable inference that the defendant discriminated against him or her for exercising his or her FMLA rights.** See Downs, 21 F. Supp. 3d at 620 (where plaintiff asserted claims for both interference and retaliation, dismissing the interference claim under 12(b)(6) because "this is not a case where an employee was allegedly denied FMLA benefits").
- **The plaintiff waived and released FMLA claims in a separation agreement.** See Butler v. Merrill Lynch Bus. Fin. Servs., 570 F. Supp. 2d 1047, 1054 (N.D. Ill. 2008) (converting motion to dismiss to summary judgment motion and dismissing FMLA claim where employee released FMLA claims in severance agreement).
- **The plaintiff's FMLA claim is subject to a mandatory arbitration agreement that precludes the plaintiff's civil suit.** See Thompson v. Air Transp. Intern., L.L.C., 664 F.3d 723, 725–27 (8th Cir. 2011) (affirming dismissal of complaint under Fed. R. Civ. P. 12(b)(1) where plaintiff's claims were subject to mandatory arbitration provision in collective bargaining agreement).

Determining whether to move to dismiss requires a case-by-case assessment. In evaluating whether you should move to dismiss, you should also consider certain states' procedural rules that require courts to award all costs to a prevailing party on a motion to dismiss. For example, Rule 91a of the Texas Rules of Civil Procedure states that "the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court."

For information on motions to dismiss, see Motion to Dismiss for Failure to State a Claim: Making the Motion (Federal).

Summary Judgment Motion

If there is no viable option to dismiss the complaint at the pleading stage, proceed with discovery with the goal of setting your client up for success at summary judgment. Depending on the facts, you may make the strategic decision to engage in targeted discovery to support an early summary judgment motion, especially if the grounds are clear but your client needs to introduce facts outside of the complaint to support dismissal.

Example 1. If the plaintiff filed the complaint two years after the allegedly retaliatory action and there is no evidence of willful misconduct to extend the limitations period to three years, develop the record with undisputed facts to support dismissal based on the complaint being time-barred. See Bass v. Potter, 522 F.3d 1098, 1102, 1107 (10th Cir. 2008) (claim barred by the FMLA's two-year limitations period where the summary judgment record did not contain any evidence that the employer acted "willfully" as necessary to extend the limitations period to three years under 29 U.S.C. § 2617(c)(2)).

Example 2. Another example is where the employer did not employ 50 or more employees for any week in the two years preceding the plaintiff's request for medical leave and, therefore, was not covered under the FMLA. See Coldiron v. Clossman Catering, LLC, 2015 U.S. Dist. LEXIS 173311, at *49–50 (S.D. Ohio Oct. 27, 2015) (granting summary judgment as to plaintiff's FMLA claim because defendant "produced evidence that it did not employ 50 or more employees for any week in the 2 years preceding plaintiff's request for medical leave and termination").

Interference Claims

In the interference context, courts commonly grant summary judgment where the undisputed facts demonstrate the employee took leave at or beyond the 12-week FMLA

entitlement. See, e.g., Thurston v. Cherry Hill Triplex, 941 F. Supp. 2d 520, 529–30 (D.N.J. 2008) (the plaintiff failed to state a claim for interference as a matter of law where she used her 12-week FMLA entitlement and was not, therefore, denied her statutory benefit under the FMLA); Valdex v. McGill, 462 F. App'x 814, 819–20 (10th Cir. 2012) (affirming summary judgment where the employer provided the plaintiff with more than 12 weeks of FMLA leave and thus, "there was no interference").

Courts also grant summary judgment motions where, for example, the undisputed facts demonstrate an employee did not give the required notice. See DeVoss v. Sw. Airlines Co., 903 F.3d 487, 491 (5th Cir. 2018) (affirming summary judgment on FMLA interference claim and finding that the plaintiff failed to make a prima facie showing of interference because she had not shown that she gave her employer the required notice of her intent to take FMLA leave).

Retaliation Claims

In the retaliation context, courts often grant summary judgment in favor of the employer where the undisputed facts show that the plaintiff failed to establish that the employer's reasons for the adverse decision were pretextual and that the real reason was discrimination. See Janczak v. Tulsa Winch, Inc., 621 F. App'x 528, 535 (10th Cir. 2015) (affirming summary judgment where plaintiff's arguments concerning pretext "consist only of a restatement of his temporal proximity argument . . . and conclusory allegations that [the employer's] motivations were retaliatory."); Furtado v. Standard Parking Corp., 820 F. Supp. 2d 261, 280–81 (D. Mass. 2011) (granting summary judgment where the temporal proximity argument was "eviscerate[d]" because the defendant offered evidence that it had taken an adverse action before the plaintiff ever requested leave, and the plaintiff otherwise "fail[ed] to establish that the adverse decision was made because he sought protection under the FMLA").

If the employer terminated the employee for performance-related issues, consider focusing on developing a summary judgment record that shows the plaintiff had well-documented performance issues that predated any request for FMLA leave. See Metzler v. Federal Home Loan Bank of Topeka, 464 F.3d 1164, 1179–80 (10th Cir. 2006) (affirming summary judgment where documented performance issues indicated the plaintiff "was terminated for her failure to meet deadlines and other poor job performance, poor attitude, and failure to maintain adequate job-related skills").

For more information on summary judgment in federal court, see Summary Judgment Motions for EEO Claims: Drafting and Filing Tips and Summary Judgment: Making the Motion (Federal).

Potential Defenses

There is no one-size-fits-all approach to pleading affirmative and other defenses in the answer or determining the issues on which your client should move for judgment. You must identify such defenses on a case-by-case basis. Some of the more common FMLA defenses are discussed below.

The Employer Is Not Covered by the FMLA

Only those employers that meet the FMLA's size and length-of-employment requirements are covered by its provisions. Subject to certain exceptions, the FMLA only applies to employers that have 50 or more employees on payroll for 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. § 825.104. Note that the FMLA provides separate coverage rules for public school and airline flight crew employees. 29 C.F.R. §§ 825.801, 825.601.

The FMLA does not require that the 20 weeks of 50 or more employees on the payroll be consecutive. You should review payroll records for the relevant years in the lawsuit to determine whether the employer meets the requirements of a covered employer under the FMLA. When making this assessment, you should consider whether two or more entities (joint- or single-employers) might be combined to reach the 50 employee threshold. For information on joint employment, see Joint Employment Relationships: Best Practices and Risks. See, e.g., Cuff v. Trans States Holdings, Inc., 816 F. Supp. 2d 556, 564–66 (N.D. Ill. 2011) (holding that plaintiff was eligible for FMLA leave because he performed work for three companies that had common ownership and that operated under the same trade name, and the three companies could be combined to meet the 50employee threshold under the "joint employment" test).

The Plaintiff Is Not a Covered Employee

Employees must satisfy certain duration of work and worksite requirements to be covered by the FMLA. To be eligible for leave under the FMLA, an employee must work for the employer at a covered facility for at least 12 months and 1,250 hours during the 12 months before the first day of requested leave. 29 U.S.C. § 2611(2)(A).

To determine whether an employee is covered by the FMLA, you should review an employee's personnel file and any payroll or attendance records that indicate the employee's number of hours worked. Additionally,

employees must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. 29 C.F.R. §§ 825.110, 825.111. When assessing this requirement, determine whether the employer operates multiple worksites that warrant separate consideration, and how many employees are at the location.

In determining whether an employee is covered by the FMLA, you should consider whether the employee previously worked for another entity that is controlled by the employer or another entity that serves the employer (such as a temporary staffing agency) and whether, for purposes of the FMLA, those two entities may be found to constitute one "employer." 20 C.F.R. § 825.106(a), (b). For information on joint employment, see Joint Employment Relationships: Best Practices and Risks. If this is the case, such employment may qualify the employee as a "covered employee" even if the employee has been working for the employer for less than 12 months. See, e.g., Miller v. Defiance Metal Prods., Inc., 989 F. Supp. 945, 946–47 (N.D. Ohio 1997) (holding that a plaintiff could combine the time period spent working as a temporary employee employed by a staffing agency and the time period she was employed as a permanent employee for purposes of meeting the 12-month threshold for an "eligible employee" under the FMLA).

The Plaintiff's Complaint Is Not Timely

FMLA claims are barred if filed beyond the limitations period in the statute. The FMLA requires employees to bring claims within "two years after the date of the last event constituting the alleged violation for which the action is brought." 29 C.F.R. § 825.400(d). This timeline is extended to three years if the alleged violation was willful. Id. To show "willful" conduct, a plaintiff must generally "demonstrate that his employer 'knew or showed reckless disregard' for whether its conduct was prohibited by the FMLA." Bass, 522 F.3d at 1104.

The Employee Was Not Entitled to the Benefits Claimed

The FMLA does not automatically guarantee covered employees any amount of unpaid leave, and there are many reasons an employee may not be entitled to any part of, or the entire, 12-week period of FMLA benefits. A non-exhaustive list of reasons an employee may not be entitled to FMLA benefits includes:

- **The requested leave is not for a permissible reason.** See Brown v. E. Maine Med. Ctr., 514 F. Supp. 2d 104, 110–11 (D. Me. 2007) (granting summary judgment because plaintiff was not eligible for FMLA leave since plaintiff "did not require leave from work for the duration of an attack of some sort in the morning (such as morning sickness or low blood sugar), ending when it was over or treated; what she needed was immunity for her perennial lateness of a few minutes, caused by a medical condition that made her resist getting out of bed to go to work. Lateness is not leave.").
- **The medical condition does not qualify as a serious health condition under the FMLA.** See 29 C.F.R. § 825.113 (the term "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider . . ."); see also, e.g., Cruz v. Brennan, 2020 U.S. Dist. LEXIS 44096, at *31 (N.D. Cal. Mar. 13, 2020).
- **The circumstances of the medical condition as certified do not warrant intermittent or reduced schedule leave.** 29 C.F.R. § 825.202(b).
- **The circumstances of the medical condition as certified only warrant intermittent absences and not full leave.** See Elliot-Leach v. New York City Dep't. of Educ., 201 F. Supp. 3d 238, 244 (E.D.N.Y. 2016) (dismissing a claim for FMLA interference where plaintiff's doctor "would not approve full leave, allowing for only intermittent absences" and "[a]ccordingly, [p]laintiff received all the benefits to which she was entitled").
- **The employee fails to submit a medical certification as requested by the employer.** 29 C.F.R. §§ 825.305(d), 825.313.
- **The employee submits medical certification that is incomplete and fails to supplement the certification after a proper request by the employer.** 29 C.F.R. § 825.305(c); Porter v. Potter, 2010 U.S. Dist. LEXIS 145243, at *3, *8 (E.D.N.Y Jan. 20, 2010).
- **The employer properly requests, and the employee fails to provide, a fitness-for-duty certification to return to work.** 29 C.F.R. § 825.313(d); See Dykstra v. Fla. Foreclosure Attorneys, P.L.L.C., 183 F. Supp. 3d 1222, 1225–26 (S.D. Fla. 2016) (employee properly provided fitness-for-duty certification).
- **The employee does not comply with the FMLA's notice requirements.** Golez v. Potter, 2012 U.S. Dist. LEXIS 107681, at *5–6 (S.D. Cal. July 31, 2012) (entering judgment for the defendant as to plaintiff's FMLA interference and retaliation claims because an employer may "require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, and may deny FMLA leave and discipline an employee who violates [notice]

requirements and fails to give timely notice of the need for FMLA leave").

- **If the employee seeks leave to care for another person and that person does not meet the FMLA's requirements for a "covered family member."** 29 U.S.C. § 2611(15).
- **Military leave is not sought for a qualifying exigency.** 29 U.S.C. § 2612(a)(1)(E).
- **The employee meets the requirements for a "key employee" and is therefore not entitled to reinstatement.** 29 C.F.R. § 825.219; Oby v. Baton Rouge Marriot, 329 F. Supp. 2d 772, 782 (M.D. La. 2004) (granting summary judgment as to FMLA claim because plaintiff was the Executive Housekeeper of the hotel, the third highest paid employee, and was relied upon to keep the facilities clean).
- **The employee has already taken the maximum amount of leave allowed under the FMLA and therefore received all of the benefits to which he or she is entitled.** See Coker v. McFaul, 247 F. App'x 609, 619 (6th Cir. 2007) ("The evidence shows that plaintiff exhausted his FMLA leave, used more leave time than he was entitled to, kept no account of leave time used, and did not consider the consequences once his FMLA leave time was exhausted.").
- **The employee fails to timely seek reinstatement.** See DeGraw v. Exide Techs., 462 F. App'x 800, 803 (10th Cir. 2012) (affirming summary judgment as to plaintiff's FMLA retaliation claim alleging employer failed to reinstate him after his return from leave because employee's FMLA leave expired in September but he did not seek reinstatement until November).
- **The employee is unable to return to work at the end of the FMLA period.** See 29 C.F.R. § 825.216(c); Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 784–85 (6th Cir. 1998) (affirming summary judgment on FMLA claim in favor of employer because the plaintiff "was clearly unable to return to work within the period provided by the FMLA").

If any of the above situations applies to your case, the FMLA was either not triggered or the employer complied in full with its obligations under the FMLA and dismissal may be warranted.

The Plaintiff Was Not Prejudiced by an FMLA Violation

A plaintiff generally cannot succeed on an interference claim if he or she has not suffered any prejudice from the employer's FMLA violation. See Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002) ("[FMLA] provides no relief unless the employee has been prejudiced by the violation"). This defense is usually appropriate where:

- **The plaintiff received all the benefits under the FMLA to which he or she was entitled.** See Pereda v. Brookdale Senior Living Communities, Inc., 666 F.3d 1269, 1274 (11th Cir. 2012) ("A Plaintiff claiming interference must demonstrate by a preponderance of the evidence that she was denied a benefit to which she was entitled.").
- **The plaintiff was not harmed despite the employer's technical violation of the FMLA.** See Sarno v. Douglas Elliman–Gibbons & Ives, Inc., 183 F.3d 155, 161–62 (2d Cir.1999) (assuming that the employer did not provide proper notice to an employee of his FMLA rights, but nonetheless finding no right to reinstatement where undisputed evidence demonstrated that employee was unable to return to work at end of leave period).

The Plaintiff Did Not Suffer a Materially Adverse Employment Action

In response to a plaintiff's retaliation claim, the facts may demonstrate that the employee did not suffer an adverse employment action. Circuit courts that have addressed what constitutes an adverse employment action in the FMLA context have applied *Burlington*, which requires that the employee experience a "materially adverse action." See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). A "materially adverse action" is any action that is likely to dissuade a reasonable worker in the plaintiff's position from exercising the employee's legal rights. See Burlington, 548 U.S. at 68 ("[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (citations omitted); see also Crawford v. JP Morgan Chase & Co., 531 F. App'x 622, 627 (6th Cir. 2013) (applying the *Burlington* standard to FMLA claims); Millea v. Metro-N. R.R. Co., 658 F.3d 154, 164 (2d Cir. 2011) (same); Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th Cir. 2008) (same); McArdle v. Dell Prods., L.P., 293 F. App'x 331, 337 (5th Cir. 2008) (same).

Employer Actions That Are Clearly Materially Adverse

Some employment actions plainly fall within the definition of a "materially adverse action," including termination, demotion in role or pay, and failure to promote. See Malin v. Hospira, Inc., 762 F.3d 552, 562 (7th Cir. 2014) ("Failing to promote an employee is a materially adverse employment action for purposes of the FMLA, and the same is true of a demotion."); Wierman v. Casey's Gen.

Stores, 638 F.3d 984, 999 (8th Cir. 2011) ("Unquestionably, termination is an adverse employment action.").

Employer Actions Generally Not Considered Materially Adverse

There are also employment actions that most courts find do **not** rise to the level of a "materially adverse action." These include, for example:

- **Failure to reinstate an employee who was on FMLA leave but not yet cleared to return to work.** Curtis v. Costco Wholesale Corp., 807 F.3d 215, 223 (7th Cir. 2015).
- **Failure to provide an employee with cross-training and/or transferring an employee from one machine-operator position to another where the pay and benefits remain unaffected.** Chappell v. Bilco Co., 675 F.3d 1110, 1117 (8th Cir. 2012).
- **Verbal disciplinary warnings.** Brown v. ATX Group, Inc., 2012 U.S. Dist. LEXIS 129123, at *30 (N.D. Tex. July 16, 2012).

Employer Actions That May Be Materially Adverse Depending on Specific Circumstances and Jurisdiction

And still other employment actions may in some circumstances be considered materially adverse but in others fall short, depending on the unique circumstances of the case and jurisdiction. Two examples are written behavioral warnings and poor performance reviews.

Written behavioral warnings. For written behavioral warnings, the Second Circuit found a formal letter of reprimand to be an adverse employment action under the FMLA because such a letter could deter reasonable workers in the plaintiff's position from exercising their FMLA rights. Millea, 658 F.3d at 165 (concluding that an issue of fact existed as to whether the plaintiff suffered a materially adverse employment action by receiving a formal disciplinary letter even though it did not result in loss of wages or benefits and does not remain in the employment file permanently); but see Harris v. Potter, 310 F. Supp. 2d 18, 21 (D.D.C. 2004) (finding that a "Letter of Warning" did not constitute an adverse employment action where plaintiff "failed to allege that the discipline directly affected his job title, duties, salary, benefits or work hours in any material matter. Moreover, the disciplinary Letter of Warning was rescinded shortly after it was issued.").

Negative performance reviews. For poor performance reviews, courts consider the issue of whether negative performance evaluations can constitute materially adverse actions to be an issue of fact. See, e.g., Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008) ("In the instant case, we have no doubt but that Crawford suffered a materially adverse action in the form of the unfavorable performance review she received (that affected her eligibility for a merit pay increase) after she complained of racial discrimination."); but see Hasenwinkel v. Mosaic, 809 F.3d 427, 434 (8th Cir. 2015) (finding there was no materially adverse employment action where employee alleged that her supervisor held "her to a higher standard than other nurses, subject[ed] her to a negative performance evaluation, scrutinize[ed] her work more closely, and declin[ed] to invite her to lunch"); Langenbach v. Wal-Mart Stores, Inc., 988 F. Supp. 2d 1004, 1018 (E.D. Wis. 2013), aff'd, 761 F.3d 792 (7th Cir. 2014) ("The Seventh Circuit has stated that negative performance evaluations, standing alone, cannot constitute an adverse employment action, 'but could constitute, under the right circumstances, evidence of discrimination.'").

Whether such employment actions are materially adverse will require a highly fact intensive inquiry, and may vary by court. When developing your argument, explore the reasons why the action at issue would not dissuade a reasonable worker from exercising his or her FMLA rights.

The Employee's FMLA Activity Did Not Cause the Adverse Employment Action

In response to a plaintiff's FMLA retaliation claim, employers commonly argue that they had a legitimate, non-retaliatory business reason for the adverse employment action, and that they did not take the action because of the employee's request for, or use of, FMLA leave. The causation element of a prima facie case is a highly litigated issue.

No Causation Due to Too Much Time between FMLA Activity and Adverse Employment Action

Employers often successfully argue a lack of causation between the protected FMLA activity and the adverse employment action because the temporal distance between these two events is too long. Courts frequently consider temporal periods of greater than two months to be too remote to infer the employer took adverse action against the plaintiff due to his or her FMLA activity. See, e.g., Murray v. Visiting Nurse Servs. of N.Y., 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) ("[D]istrict courts within the Second Circuit had consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation."); Alexander v. Bd. of Educ. of City Sch. Dist. of N.Y.C., 107 F. Supp. 3d 323, 328–29 (S.D.N.Y. 2015) (finding no causal link between a request for FMLA leave and a termination where an 8-month gap

occurred between the events); Kennedy v. Bank of Am. Nat. Ass'n, 2011 U.S. Dist. LEXIS 43411, at *26 (N.D. Cal. Apr. 21, 2011) (a 15-month gap negated any inference of retaliation).

Does But-For Causation Apply to FMLA Claims after Univ. of Texas Sw. Med. Ctr. v. Nassar?

Department of Labor (DOL) regulations provide that "employers cannot use the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). Prior to the U.S. Supreme Court's decision in Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013), courts generally held that with respect to FMLA retaliation claims, like Title VII claims, the plaintiff need only show that the protected activity was a "motivating factor" in the adverse action. See, e.g., Wallner v. Hilliard, 590 F. App'x 546, 552–53 (6th Cir. 2014); Twigg v. Hawker Beechcraft Corp., 659 F.3d 987, 1004–05 (10th Cir. 2011). In Nassar, the Supreme Court held that a plaintiff bringing a retaliation claim under Title VII must establish that his or her protected activity was a "but-for" cause of the alleged adverse action. 570 U.S. at 362.

Courts holding but-for causation applies to FMLA claims. Since *Nassar*, some courts, including the Fourth Circuit and various district courts, have held that the "but-for" causation standard—and not the "motivating factor" standard—applies to FMLA retaliation claims. See, e.g., Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 187, 194–95 (D. Mass. 2017) ("This Court now concludes that retaliation claims brought under the FMLA must be proved according to a but-for causation standard."); Fry v. Rand Constr. Corp., 2018 U.S. Dist. LEXIS 143886, at *21–22 (E.D. Va. Aug. 22, 2018), aff'd, 964 F.3d 239 (4th Cir. 2020) ("[A] plaintiff must show that her employer would not have taken the adverse employment action but for her protected activity."); Sparks v. Sunshine Mills, Inc., 2013 U.S. Dist. LEXIS 125756, at *45–47 n.4 (N.D. Ala. Sept. 4, 2013) ("[T]he Supreme Court's determination that the 'but for' causation standard applies where an employee alleges discrimination because he engaged in some protected activity also applies in the FMLA context.").

Courts holding but-for causation does NOT apply to FMLA claims. Post-*Nassar*, many courts, including the Second, Third, and Sixth Circuits, continue to allow a plaintiff to succeed on an FMLA retaliation claim if the plaintiff demonstrates that his or her exercise of FMLA rights was a motivating factor in the adverse action, rather than the but-for cause of it. See, e.g., Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 166 (2d Cir. 2017) ("FMLA retaliation claims of the sort Woods brings in this case are grounded in 29 U.S.C. § 2615(a)(1) and a 'motivating factor' causation standard applies to those claims."); Egan v. Delaware River Port Auth., 851 F.3d 263, 273–74 (3d Cir. 2017) ("[T]he DOL's use of a mixed-motive framework is not inconsistent with *Nassar* and *Gross*, and the regulation's mixed-motived approach is a permissible construction of the statute . . . a mixed-motive jury instruction is available for FMLA retaliation claims."); Stein v. Atalas Industr., Inc., 730 F. App'x 313, 321–22 (6th Cir. 2018) ("Stein 'need not show that the employer's sole purpose was to interfere with [his] entitlement to benefits' or to retaliate, but instead that a reasonable jury could find that unlawful considerations were a 'motivating factor' in its actions.").

Courts holding whether but-for causation applies to FMLA claims is an open question. The Seventh Circuit and federal district courts in the First and Fifth Circuits have acknowledged this open question without resolving the issue. See, e.g., Malin v. Hospira, Inc., 762 F.3d 552, 565 n.3 (7th Cir. 2014) ("Our circuit has not addressed . . . whether but-for causation should apply to FMLA retaliation claims in light of *Gross* and *Nassar*. We need not resolve the question here, however, because Malin can avoid summary judgment on both claims even if but-for causation applies to her FMLA retaliation claim."); Gallagher v. Dart, 2020 U.S. Dist. LEXIS 41985, at *15 (N.D. Ill. March 11, 2020) (slip copy) (stating that "the Seventh Circuit has not addressed whether but for causation applies in FMLA retaliation claims."); Navarro v. Via Metro. Transit, 2020 U.S. Dist. LEXIS 136118, at *24 n.1 (W.D. Tex. July 31, 2020) ("[T]he Fifth Circuit has not explicitly decided whether, post-*Nassar*, the 'but for' causation standard applies or the more malleable 'motiving factor' causation standard is sufficient to establish the causal link between FMLA-protected activity and an adverse employment action. [. . .] Navarro does not argue his case under the motivating-factor framework, and so the Court need not decide this issue here.") (internal citations omitted); Swenson v. Falmouth Pub. Sch., 2020 U.S. Dist. LEXIS 134421, at *34 (D. Me. July 29, 2020) ("[I]t is an 'open question' whether a 'but-for' or 'negative or motivating factor' causation standard applies [. . .]. Because the Court concludes that Plaintiff cannot establish a causal connection even under the lower 'negative factor' standard, it need not resolve this issue.") (internal citations omitted).

Mixed-Motive Framework: Best Practices

If you are in a jurisdiction where the more plaintiff-friendly motivating-factor standard applies (also commonly referred to as the "mixed-motive framework"), a plaintiff may succeed on a retaliation claim even if other legitimate factors played a role in the employer's decision to take the

adverse employment action. Often, courts deny summary in cases involving mixed-motives and sent them to a jury. For example, in Wallner, 590 F. App'x at 553–54, the court held that the plaintiff "may succeed on her FMLA retaliation claim even if multiple factors contributed to [the defendant's] decision to discharge her; [the plaintiff] is entitled to a jury so long as a reasonable one could find that both permissible and impermissible factors motivated the termination decision."

If you are facing a retaliation claim in a mixed-motive jurisdiction, consider arguing that the employer would have made the same decision even if the employee had not exercised his or her rights under the FMLA. See, e.g., Lushute v. Louisiana, 2011 U.S. Dist. LEXIS 136463, at *9–10 (M.D. La. Nov. 29, 2011) (pre-*Nassar* decision granting summary judgment for the defendant where the record contained "ample" evidence that the employer would have made the same decision based on documented performance issues and an admission from the plaintiff that she struggled to manage her caseload).

Defenses Addressing Legitimate Reason for Adverse Action and No Pretext

Regardless of what causation standard applies, the nature of the defense and the evidence necessary to establish that the employer had a legitimate reason for the adverse action are similar.

Employee's Poor Job Performance

To begin, employers may demonstrate that an employee's poor job performance motivated the adverse employment action. This is a particularly strong defense if the employer is able to proffer evidence demonstrating that the plaintiff's job performance was poor before the plaintiff's protected FMLA activity. See, e.g., Di Giovanna v. Beth Israel Med. Ctr., 651 F. Supp. 2d 193, 207 (S.D.N.Y. 2009) (granting summary judgment for an employer and finding that the employer's proffered reason for termination—poor performance—was not pretextual where the employer could show records of documented poor performance both before and after the employee took leave). To establish this defense, employers may utilize documents that set forth job performance, such as:

- Disciplinary records
- Performance reviews
- Interview notes –and–
- Termination memorandums

Decision-Makers Unaware of Employee's Request for FMLA

A second defense employers may assert in this context is that the decision-makers involved in the adverse employment action were unaware of the employee's request for and/or taking of FMLA leave. For example, in Burriz v. Brazell, 2008 U.S. Dist. LEXIS 100855, at *7–8 (N.D. Tex. Dec. 15, 2008), the court granted summary judgment on a retaliation claim where the defendant established that the individuals who terminated the plaintiff's employment had no knowledge of the plaintiff's request for medical leave. Accordingly, your fact investigation should explore whether the decision-makers were aware of the request for and/or taking of FMLA leave.

Comparator Evidence to Rebut Employee's Argument

Employers should consider offering comparator evidence to rebut a plaintiff's argument that the legitimate, non-discriminatory business reason for the adverse action is pretextual. Specifically, employers may adduce evidence demonstrating that the plaintiff and similarly situated employees who did not request and/or take FMLA leave were treated the same.

Example 1. In Jajoura v. Ericsson, Inc., the court concluded that the employer's proffered reason for the plaintiff's termination—that the plaintiff had misused the company credit card—was not pretextual because the employer had terminated another employee, who had not requested FMLA leave, for the same conduct. 266 F. Supp. 2d 519, 532–33 (N.D. Tex. 2003).

Example 2. Similarly, in *Kinsella v. Am. Airlines, Inc.*, the court granted summary judgment as to the plaintiff's retaliation claim where the plaintiff "admit[ted] that she [did] not know of any other employee who engaged in the same conduct she did and was not discharged." 685 F. Supp. 2d 891, 903 (N.D. Ill. 2010).

Prior FMLA Leave Was Approved for Employee

Relatedly, employers can also point to evidence demonstrating that a plaintiff previously requested and/or took FMLA leave and suffered no adverse employment action.

Example 1. In *Jajoura*, the court concluded that there was no "nexus" between the plaintiff's current FMLA leave and termination for misconduct because the employee previously took FMLA leave without experiencing any adverse employment actions. Jajoura, 266 F. Supp. 2d at 530.

Example 2. Similarly, in *Di Giovanna*, the court found that in preceding years, the employer had freely allowed the plaintiff to take many days of leave to care for his father without subjecting the plaintiff to any adverse employment actions. Di Giovanna, 651 F. Supp. 2d at 208. Thus, the court held that the circumstances did not support an inference of retaliation and granted summary judgment on that claim. Id. (concluding that to "accept [the plaintiff's] claim then one would have to believe that, [defendant] after having no problem 'at all' with [plaintiff] taking [] roughly twenty-seven days to care for his father before May 17, decided to punish [plaintiff] for taking one day of FMLA leave").

Step 3: Plan a Discovery Strategy

The fact investigation that formed the basis of your initial response to the FMLA complaint will also inform your strategy on whether to seek an early resolution—perhaps to avoid negative publicity and/or the publication of sensitive documents. The fact investigation will also inform the discovery plan, including:

- What witnesses to depose
- Declarations to collect
- Third parties to subpoena

For discovery resources in employment litigation, see Employment Litigation Discovery Resource Kit. For additional discovery resources, see Civil Litigation — Discovery practice notes page and Civil Litigation — Discovery templates page.

The Discovery Strategy

After you have completed your initial fact investigation, you should carefully develop a discovery strategy:

- **Evaluate.** First, evaluate which discovery strategy will best develop and support the employer's defenses.
- **Assess.** Second, assess how to utilize discovery to poke holes in a plaintiff's claims and develop case themes.
  - To do so, identify potential witnesses who can corroborate the employer's defenses and case themes, as well as any witnesses who can undercut the plaintiff's allegations.
- **Implement.** Third, assess how to implement discovery to develop undisputed facts that can assist you in prevailing on a dispositive motion or at trial.
  - **Evaluate and refine.** Discovery is of central importance in FMLA matters because it not only helps develop the record for summary judgment and trial, but also minimizes the risk of surprise allegations or smoking guns arising late in the lawsuit. To further these goals, seek discovery that is tailored toward the allegation in the complaint and your client's defenses. As you proceed through discovery, continue to evaluate and refine your litigation strategy based on the developing evidence.
- **Review rules of civil procedure, court's local rules, and individual practice rules.** Finally, before serving discovery requests or deposition notices, best practice is to review:
  - Applicable rules of civil procedure
  - Court's local rules
  - Individual practice rules for the judge assigned to the case –and–
  - Case-specific orders to ensure compliance with procedural nuances

Requests for Production

Considerations for document requests in the FMLA context are described below.

Serious Health Condition

It is advisable to include a request for all documents related to the serious health condition at issue—whether the plaintiff's own or the plaintiff's covered family member. As discussed in the section entitled "Substantive Rights" above, to qualify for FMLA leave, an employee or his or her covered family member must suffer from a serious health condition, which is defined to mean "an illness, injury, impairment, or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider . . .". See 29 C.F.R. § 825.113.

Request Medical Records

As such, it is best practice to request medical records and psychotherapy notes (if applicable), from both the plaintiff and the plaintiff's healthcare providers relating to the serious health condition. Once you have the plaintiff's signed authorization (or the signed authorization of the plaintiff's family member depending on the circumstances)—see HIPAA Authorization for Release of Plaintiff's Medical Information—serve a third-party subpoena on the healthcare provider to obtain those records—and potentially testimony—directly. See Discovery Subpoenas: Drafting, Issuing, Serving, and Enforcing (Federal).

Request Other Documents Showing the Plaintiff or Family Member Did Not Have a Serious Health Condition

In addition to medical records, it is also good practice to request other documents that may demonstrate that the plaintiff (or plaintiff's family member) did not actually have a serious health condition.

Photographs and social media posts. For instance, photographs or social media posts may show that, at the time of the requested leave, the individual went on vacation or participated in sports or other physical recreational activities. Indeed, in addition to requesting social media posts, it is a good practice to independently review the plaintiff's (or the plaintiff's family member's) publicly available social media for posts that may indicate the individual was not suffering from a serious health condition.

Written communications between plaintiff and others discussing the leave or serious health condition. You should also request copies of all written communications—whether by email, text message, or direct message on social media—between the plaintiff and any individuals with whom the plaintiff discussed the requested leave and/or the serious health condition. Such communications may include:

- Admissions from the plaintiff that the health condition was not incapacitating
- Communications indicating the plaintiff was seeking to fraudulently obtain leave
- Communications indicating plaintiff engaged in some other form of misconduct

Documentation of other employment while out on leave. To the extent the employee or family member was engaged in some form of employment while the plaintiff was out on leave, these documents may be helpful to the employer's defense. However, courts do not always hold that, as a matter of law, a plaintiff is not incapacitated if he or she continued to work a second job. See, e.g., Hurlbert v. St. Mary's Healthcare Sys., Inc., 439 F.3d 1286, 1296 (11th Cir. 2006) (rejecting the defendant's argument that, as a matter of law, the plaintiff "could not have experienced an 'inability to work' (in his position [with the defendant]) within the meaning of § 825.114(a)(2)(i) when he continued to perform similar duties for [a second employer]"); Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 861 (8th Cir. 2000) ("[W]e hold that a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one that the employee is unable to perform.").

Ultimately, courts often conclude that questions regarding a plaintiff's incapacity are fact issues best left for a jury but develop all of the evidence possible to undercut the plaintiff's position.

Interference and Benefits Denial Claims

When defending against claims that the employer denied or interfered with the employee's FMLA benefits, you should request:

- Documents relating to any forms of notice the employee provided regarding his or her need for leave
- Any FMLA paperwork the employee completed and submitted –and–
- Any medical certifications and/or records that the employee provided with his or her request

Also request any communications that the employee received from the employer, third-party benefits administrator, or healthcare provider regarding his or her request for leave. These documents will be critical in establishing the timeline of communications and to determine any inconsistencies or gaps in the plaintiff's theories.

Discrimination and Retaliation Claims

Similarly, request documents from the plaintiff that he or she may have received from the employer regarding job performance, disciplinary issues, and separation (if applicable). This includes a request for emails, text messages, or other writings that the employee may have received from his or her supervisor or coworkers regarding the allegedly adverse employment action and the employee's request for FMLA leave. Such documents will be essential in establishing any defense to a discrimination or retaliation claim.

Damages

Include a request for documentation supporting the alleged damages at issue. If the employer terminated the plaintiff and he or she seeks backpay and/or front pay, you should request documents relevant to damages mitigation or lack thereof, including any documents showing the plaintiff's efforts to obtain or obtainment of new employment and wages from such new employment. See Mitigating Damages in Employment Discrimination Cases. Emotional distress and punitive damages are not available under the FMLA. See 29 U.S.C. § 2617(a)(1).

Plaintiff Credibility

Finally, another means by which you can defend against a plaintiff's claim is to attack the plaintiff's credibility by

demonstrating that he or she is a serial plaintiff or has ulterior motives for bringing the case. Accordingly, consider including a request for documents related to previous civil suits and bankruptcy filings by the plaintiff. It is also good practice to conduct a docket search in jurisdictions where the plaintiff has resided to find any prior civil suits or bankruptcy filings.

For resources on interrogatories in employment litigation, see Employment Litigation Discovery Resource Kit — Document Requests and Employment Litigation Discovery Resource Kit — Objections and Responses to Document Requests.

Requests for Interrogatories

Considerations for interrogatories in the FMLA context are described below:

Serious Health Condition

Consider serving interrogatories that seek information regarding the nature of the health condition and extent to which the condition incapacitated the employee. This includes a request seeking:

- The date of the injury and initial diagnosis
- Duration of the condition
- Whether the health condition improves and/or relapses periodically
- The manner in which the health condition incapacitates the plaintiff and/or prevents the plaintiff from working
- What medical treatment the employee has received to treat the health condition –and–
- The names and contact information for the employee's medical care providers

The interrogatories should elicit information confirming whether, and to what extent, the plaintiff was unable to work due to the health condition. For instance, consider including a request for information regarding any other activities the plaintiff engaged in during the period of alleged incapacity—such as travel, exercise, physical activity, and/or secondary employment the employee engaged in at the time of the requested leave.

Finally, you should submit interrogatories requesting the names and contact information of all individuals with whom the employee or employee's covered family member discussed the serious health condition and/or the requested FMLA leave, and the content of such conversations. The plaintiff's responses to these interrogatories may assist you in determining whether any of the witnesses may be able to provide testimony helpful to your defense.

Discrimination and Retaliation Claims

If the plaintiff is asserting an FMLA discrimination and/or retaliation claim, you should include an interrogatory requesting that the plaintiff identify each adverse employment action upon which the plaintiff bases the allegations.

Damages

As with document requests regarding damages, it is important to include interrogatories that assist you in assessing—and challenging—the plaintiff's damages calculations. Include a request for the plaintiff's damages calculation broken down by type of damages and amount claimed.

In discrimination and retaliation cases where the plaintiff seeks back pay and/or front pay, request information related to:

- The employee's efforts to obtain new employment
- Obtainment of new employment
- Wages from such new employment –and–
- Supplemental earnings

As stated above, emotional distress and punitive damages are not available under the FMLA. See 29 U.S.C. § 2617(a)(1).

For resources on interrogatories in employment litigation, see Employment Litigation Discovery Resource Kit — Interrogatories and Employment Litigation Discovery Resource Kit — Objections and Responses to Interrogatories.

Taking Depositions

There are numerous considerations to keep in mind when preparing for and taking depositions in an FMLA lawsuit.

Selecting Witnesses to Depose

As an initial matter, select the individuals who you want to depose by creating a list of admissions you need in support of summary judgment and for trial. In FMLA lawsuits, it is often useful to not only depose the plaintiff, but also to depose the plaintiff's family members and medical providers. Consider deposing the third-party benefits administrator responsible for administering the plaintiff's FMLA leave or, alternatively, seeking a declaration

from that entity. To the extent the plaintiff had secondary employment, consider deposing the secondary employer.

Drafting Deposition Outlines

Once you have determined which individuals to depose, properly notice the depositions and prepare outlines. The outlines should focus on:

- The case themes you have developed
- The admissions you seek for summary judgment –and–
- The facts that require confirmation or further development

Example. If you plan to argue that the plaintiff did not suffer from a serious health condition, develop a module of questions that will result in facts demonstrating that the plaintiff was not incapacitated at the time of the requested leave. Review all case documents related to the witness and identify the facts that you want the witness to testify about and/or documents that you want the witness to authenticate.

Preparing for and Taking a Plaintiff's Deposition

In addition to the steps outlined above, when preparing to take a plaintiff's deposition, you should focus on discrediting the plaintiff's story by establishing inconsistencies and/or impeaching the plaintiff's credibility.

To establish inconsistencies, prepare for the deposition by compiling a list of the plaintiff's prior admissions, including:

- Statements made in the complaint
- Interrogatory responses
- Documents created prior to litigation –and–
- Previous deposition testimony

Familiarize yourself with these admissions and keep this list with you during the deposition so that you are able to identify and question the plaintiff about inconsistencies in the plaintiff's testimony. To impeach the plaintiff's credibility, compile documents that can be used to impeach the plaintiff's credibility and bring these documents with you to the deposition. Determine what documents you want the plaintiff to authenticate, and present the documents to plaintiff for authentication during the deposition. Finally, when deposing the plaintiff, exhaust each topic by asking the plaintiff whether he or she has anything else to add, and only move on when the plaintiff confirms this is so. This type of questioning will prevent the plaintiff from introducing additional evidence through declarations at the summary judgment stage.

Deposing an Expert Witness

Expert depositions are of particular importance in FMLA matters because the issue of whether the plaintiff has a "serious health condition" qualifying the plaintiff for FMLA leave is often at the center of these cases. Strategically focus your questions on the nature of the plaintiff's health condition and the extent to which the condition incapacitated the plaintiff. For more information on preparing for and taking expert witness depositions in employment discrimination cases, see Employment Discrimination Class and Collective Actions: Special Issues and Considerations — Expert Witness Depositions, which contains guidance on deposing expert witnesses that is relevant to single-plaintiff and FMLA cases.

For additional information and guidance on taking depositions in employment litigation, see Depositions in Employment Cases Resource Kit.

Defending Depositions

Best practices for defending FMLA depositions are not dissimilar to best practices in defending witnesses in other types of employment cases. For guidance on defending depositions in employment litigation, see Defending Depositions of Employer Witnesses in an Employment Litigation and Depositions in Employment Cases Resource Kit.

Third-Party Discovery

Consider what third-party discovery is necessary or beneficial to defending your FMLA case. Common types of third-party discovery in FMLA cases include:

- **Medical records.** It is important to obtain the plaintiff's medical records, if relevant to the allegations, defenses, or damages in the case. To obtain the plaintiff's medical records, the plaintiff must first authorize his or her healthcare provider to release the same. See HIPAA Authorization for Release of Plaintiff's Medical Information.
- **Personnel records from past or present employers.** These documents may be helpful in impeaching the plaintiff's credibility if the plaintiff has had difficulty maintaining employment or was terminated from or engaged in misconduct at prior jobs. The documents also may indicate whether the plaintiff previously took FMLA leave with the serious health condition as issue in your case or for other reasons.
- **Recruiters or headhunter records.** It is important to obtain records from recruiters or headhunters who the plaintiff allegedly used with efforts to mitigate damages.

See Mitigating Damages in Employment Discrimination Cases.

Step 4: Position Your Case for Summary Judgment Success

There are multiple strategic decisions involved in preparing a successful summary judgment motion in FMLA cases. As an initial matter, it is important to evaluate the possibility of summary judgment early in the litigation and to continue to assess the viability of a summary judgment motion as discovery progresses and themes develop. Understand the law applicable to your case and how it applies to plaintiff's claims, your client's defenses, and the parties' burdens of proof. It is also critical that you have a firm grasp on the factual record and whether you can proffer the admissible evidence needed to succeed on summary judgment. After each deposition, analyze the record to determine whether any material facts are in dispute and close the loop on any dispute to better position your client for summary judgment success.

In the motion, tell the employer's story and emphasize the undisputed material facts that support why the employer wins. Many of the same arguments that support a motion to dismiss may also be successful at summary judgment. Explanations of these defenses are set forth above in the section entitled "Potential Defenses."

For more information on potential arguments for summary judgment motions in FMLA cases, see the section above entitled "Summary Judgment Motion."

For more information on summary judgment in federal court, see Summary Judgment Motions for EEO Claims: Drafting and Filing Tips and Summary Judgment: Making the Motion (Federal).

Step 5: Prepare for Trial

If the case proceeds to trial, the outcome will frequently depend on the themes and narrative of your case. For that reason, best practice to prepare for trial is to:

- **Anticipate the plaintiff's story.** Anticipate the story that plaintiff intends to tell, including the evidence and witnesses that the plaintiff intends to present.
- **Create a compelling narrative.** Prepare your client's compelling narrative and call witnesses who will best bring that narrative to life.
- **Determine order of evidence.** Determine what evidence to introduce and the order in which you will present witness testimony and other evidence.
- **Motion in limine.** Consider whether to file motion in limine to preclude any testimony the plaintiff plans to offer.
- **Review the law underlying the claims.** Understand the law underlying the claims, defenses, and burdens of proof.
- **Understand the procedural and evidentiary rules.** Refamiliarize yourself with the applicable procedural and evidentiary rules and comply with pretrial orders and deadlines.

If you are preparing for a jury trial, conduct jury research to test your themes and gauge a jury's reaction to potential witnesses before trial. Plaintiffs who were terminated for taking medical leave or leave to care for a family member may be sympathetic to a jury—independent of the merits of plaintiff's case. Likewise, juries may be sympathetic to a plaintiff who brings a lawsuit alleging that he or she suffered an adverse employment action after taking leave for a serious health condition. Employers may be portrayed as callous to the employee, regardless of the FMLA's legal mandates. Test various approaches and see which ones resonate best with the jury. These considerations become increasingly important if the plaintiff is also bringing common law claims for emotional distress along with the FMLA claims. Ensure the jury instructions properly reflect the employer's defenses and the burdens of proof.

For information on trials in employment cases, see Trial Strategies in the Courtroom for Discrimination, Harassment, and Retaliation Cases and Trial Strategies in the Courtroom for Wage and Hour Cases. For general information on trials, see Civil Litigation — Trial & Post-trial.

Step 6: Consider Possible Remedies Available to the Plaintiff

At the outset, it is important to be aware of the potential damages available to a successful plaintiff. A wide variety of potential damages are available to plaintiffs under the FMLA.

See 29 U.S.C. § 2617(a)(1)(A), (B).

The FMLA provides for damages in the amount of:

- Any denied/lost wages, salary, benefits, or other compensation

- Actual costs or losses sustained by the employee
- Interest –and–
- Liquidated damages

See 29 U.S.C. § 2617(a)(1). See Cooper v. Fulton Cty., Ga., 458 F.3d 1282, 1287 (11th Cir. 2006) ("[L]iquidated damages are awarded presumptively to an employee when an employer violates the FMLA, unless the employer demonstrates that its violation was in good faith and that it had a reasonable basis for believing that its conduct was not in violation of the FMLA.").

The statute also allows for "equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617 (a)(1)(B).

Notably, most courts hold that the statute does not provide for punitive damages. See, e.g., Reid v. SmithKline Beecham Corp., 366 F. Supp. 2d 989, 1000 (S.D. Cal. 2005); Feliz v. United Parcel Services, Inc., 2017 U.S. Dist. LEXIS 223010, at *9 (S.D. Fla. May 10, 2017).

Likewise, the FMLA does not permit recovery for emotional distress damages. See, e.g., Rodgers v. City of Des Moines, 435 F.3d 904, 909 (8th Cir. 2006) ("[T]he FMLA does not permit recovery for emotional distress damages."); Montgomery v. Maryland, 72 F. App'x 17, 19–20 (4th Cir. 2003) ("[The plaintiff] alleged no lost wages or cost of care, focusing instead on emotional distress, which, along with nominal and consequential damages, is not covered under the [FMLA]."); Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1277 (10th Cir. 2001) ("[C]ourts have consistently refused to award FMLA recovery for [. . .] emotional distress damages.") (internal citations omitted).

Defendants may consider several theories in arguing for damages limitations. In particular, if a plaintiff in a termination case failed to take reasonable steps to secure subsequent employment, you can argue that he or she failed to mitigate their damages. See Mitigating Damages in Employment Discrimination Cases.

After-Acquired Evidence Doctrine

Another potential avenue to limit damages is the after-acquired evidence doctrine. Under this doctrine, an employer discovers the employee's misconduct after the adverse employment action has been taken. In this situation, the employer can argue that it would have taken the same adverse employment action in response to such wrongdoing. Miller v. AT&T Corp., 250 F.3d 820, 836–37 (4th Cir. 2001) (applying the Supreme Court's decision in McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995), and noting that an employer "may limit an award of back pay (and disentitle an employee to front pay and reinstatement) when the employer establishes 'that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge'").

For more information on the after-acquired evidence doctrine, see Defenses to EEO Claims: Key Considerations, Back Pay Awards in Employment Discrimination Cases (Federal), and Front Pay Awards in Employment Discrimination Cases (Federal).

Avoiding Monetary Damages in Mixed-Motive Cases

In jurisdictions that utilize the mix-motived causation standard, courts may deny monetary damages if the employer demonstrates that it would have made the adverse employment decision regardless of the employee's protected FMLA activity. See Wallner, 590 F. App'x at 552–53 ("[T]he employer may avoid liability 'by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the plaintiff's exercise of her rights] into account.'") (quoting Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 173–74 (2009)).

COVID-19: Additional Litigation Considerations regarding the Emergency Family and Medical Leave Act (EFMLA)

Note: The EFMLA, discussed below, sunset on December 31, 2020 (29 C.F.R. § 826.10(b)), but there is still pending litigation regarding the EFMLA.

This practice note primarily addresses litigation strategies for cases brought under the traditional FMLA. The Family First Coronavirus Response Act (FFCRA), enacted on March 18, 2020, expanded the FMLA to include the temporary Emergency Family and Medical Leave Expansion Act (the EFMLA). The EFMLA applies to employers that employ fewer than 500 employees. 29 C.F.R. § 826.40(a). Certain employers with fewer than 50 employees may qualify under an exemption. 29 C.F.R. § 826.40(d).

The EFMLA requires covered employers to provide covered employees with 12 weeks of leave, of which the first 2 weeks are unpaid and the subsequent 10 weeks are paid. 29 C.F.R. §§ 826.23(a), 826.24. Employers must pay employees taking EFMLA leave at two-thirds of the

employee's average regular rate, except such pay is capped at $200 per day and $10,000 in the aggregate. 29 C.F.R. § 826.24. Covered employees may take EFMLA leave if they are unable to work (or telework) because:

- They need to care for a minor child, or a child age 18 or older who is incapable of self-care because of a mental or physical disability
- The child's school or place of care has closed, or child care provider is unavailable, for reasons related to COVID-19

29 C.F.R. §§ 826.10, 826.20(b).

An employee is eligible for EFMLA leave only if the employee is unable to telework and no other suitable person is available to care for the child. 29 C.F.R. § 826.20(b).

On August 3, 2020, the U.S. District Court for the Southern District of New York invalidated four provisions of the DOL's final rule implementing the FFCRA in response to the State of New York's challenge to the final rule. State of New York v. U.S. Dept. of Labor, et al., 2020 U.S. Dist. LEXIS 137116 (S.D.N.Y. Aug. 3, 2020). These provisions concern employee eligibility for paid leave when work is unavailable. (State of New York, 2020 U.S. Dist. LEXIS 137116, at *13–22), the definition of "healthcare provider" (State of New York, 2020 U.S. Dist. LEXIS 137116, at *22–26), the prohibition on intermittent leave without employer consent (State of New York, 2020 U.S. Dist. LEXIS 137116, at *26–31), and documentation requirements (State of New York, 2020 U.S. Dist. LEXIS 137116, at *31–33). While this decision is only controlling authority for employers located within the court's jurisdiction, it may have larger implications if cited as persuasive authority outside of the Southern District of New York.

For more information on the EFMLA, see Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response. For a resource kit covering additional COVID-19 issues for the Labor & Employment and Employee Benefits & Executive Compensation practice areas, see Coronavirus (COVID-19) Resource Kit: Return to Work. To keep up with key federal, state, and local COVID-19 Labor & Employment legal developments, see Coronavirus (COVID-19) Federal and State Employment Law Tracker. Also see state and federal COVID-19 legislative, regulatory, and executive order updates from State Net, which are available here.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

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