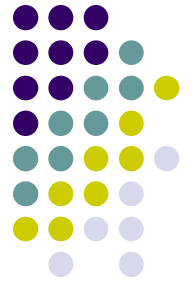


FMLA Regulations: Then and Now



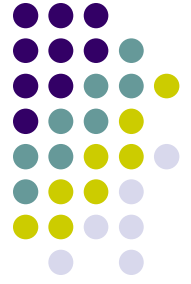
G. Robert Ryan, Jr.

Moore, Clarke, DuVall & Rodgers, P.C.

Albany • Valdosta • Atlanta

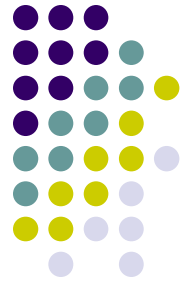


Family and Medical Leave Act of 1993 (FMLA)



- In 1993, Congress found that:
- The number of single parent households and two parent households in which both parents worked was increasing significantly
- The lack of employment policies to accommodate working parents was forcing individuals to choose between job security and parenting
- There was inadequate job security for employees with serious health conditions preventing them from working for temporary periods of time
- President Bill Clinton signed the FMLA into law, February 5, 1993

Stated purposes of FMLA



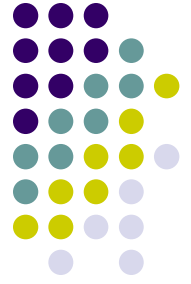
- To balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity
- To entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition

Stated purposes of FMLA



- To accomplish its goals in a manner that accommodates the legitimate interests of employers
- To accomplish its goals in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring that leave is available on a gender-neutral basis

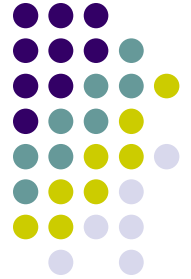
Stated purposes of FMLA



- To promote the goal of equal employment opportunity for women and men



Basic Framework of FMLA



- Leave Requirements (29 USC §2612):
 - Any “eligible employee” shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
 - Birth of child of the employee
 - Placement of child of the employee for adoption or foster care
 - To care for the spouse, child, or parent of the employee if such person has a “serious health condition”

Basic Framework of FMLA



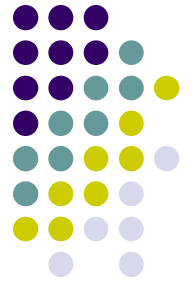
- Leave Requirements (continued)
 - Any “eligible employee” shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
 - Because of a “serious health condition” that makes the employee unable to perform the functions of the position of such employee

Basic Framework of FMLA



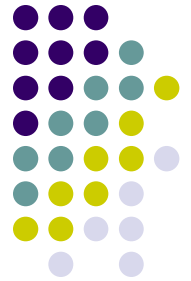
- Leave Requirements (continued)
 - Any “eligible employee” shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
 - (NEW January 28, 2009): Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation

Basic Framework of FMLA



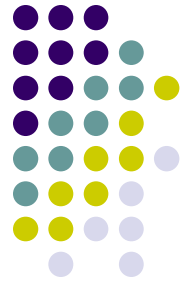
- Leave Requirements (continued)
 - Leave may be paid or unpaid. 29 USC §2612(c)
 - Leave may be intermittent if used for employee's or family member's serious health condition or if used for new military leave provisions. 29 USC §2612(b)
 - Employee may elect, or employer may require, to substitute paid vacation, personal or family leave. 29 USC 2612(d)

Basic Framework of FMLA



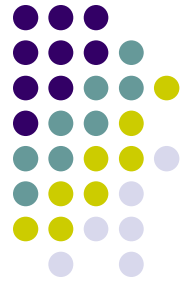
- Employment and Benefits Protection (29 USC §2614)
 - Any employee who takes FMLA shall be entitled, upon return from leave:
 - To be restored to the position of employment held by the employee when the leave commenced or
 - To be restored to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment

Basic Framework of FMLA



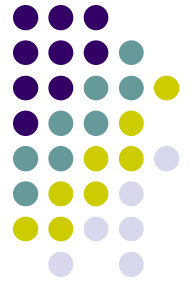
- Employment and Benefits Protection (29 USC §2614)
 - The taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced
 - Employee is not entitled to accrual of additional seniority or benefits during the period of leave

Basic Framework of FMLA



- Employment and Benefits Protection (29 USC §2614)
 - Health benefits: the employer shall maintain coverage under any group health plan for the duration of FMLA leave at the level and under the conditions coverage would have been provided if the employee had continued working

Basic Framework of FMLA



- Certification (29 USC §2613)
 - An employer may require that a request for leave for serious health condition (or for the new provision allowing for care for service members) be supported by a certification issued by the employee's health care provider. The employee shall provide, in a timely manner, a copy of such certification to the employer.

Basic Framework of FMLA



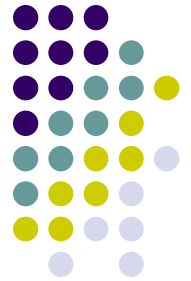
- Prohibited Acts (29 USC §2615)
 - It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title
 - It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title

Basic Framework of FMLA



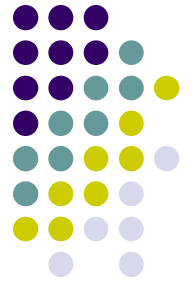
- Prohibited Acts (29 USC §2615)
 - It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual: has filed a charge or instituted a proceeding related to this title; has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right under this title; or has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title. (RETALIATION)

Basic Framework of FMLA



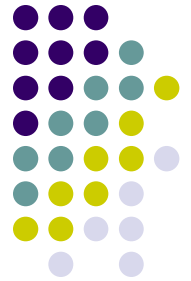
- Enforcement (29 USC §2617)
 - Subsection (a) allows for a private civil action to be filed by aggrieved employees to remedy a violation
 - Damages may include:
 - The amount of any wages, salary, benefits or other compensation denied or lost
 - Actual monetary losses incurred by the employee
 - Interest
 - An additional amount as liquidated damages equal to the sum of the actual damages and interest (double damages) unless the employer can prove it acted in good faith

Basic Framework of FMLA



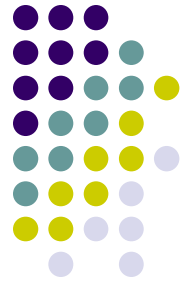
- Enforcement (29 USC §2617)
 - Subsection (a) allows for a private civil action to be filed by aggrieved employees to remedy a violation
 - Damages may include:
 - Equitable relief including reinstatement and promotion

Basic Framework of FMLA



- Code of Federal Regulations
 - Statutory authority to administer the Act is given to the United States Secretary of Labor (29 USC 2654)
 - 29 CFR Part 825 contains the regulations interpreting FMLA
 - 762 pages!!

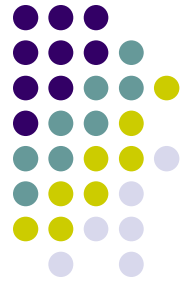
Who is a Covered Employer?



- All public agencies and local education agencies (public and private schools)
- All private employers with 50 or more employees each working day during at least 20 calendar weeks in the current or preceding calendar year



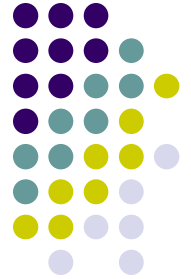
Who is an Eligible Employee?



- Employed by a covered employer
- Have worked for the employer for at least 12 months (but employers do not have to count periods prior to a break in service of seven years or more)
- Have worked for at least 1,250 hours in the previous 12 months
- Work at a location where at least 50 employees are employed within a 75 mile radius



FMLA: Then and Now



- From 1993 until 2008 there were no significant statutory changes, amendments or expansions of FMLA
- From 1995 to 2008 there were no significant regulatory changes to the CFR

FMLA: Then and Now



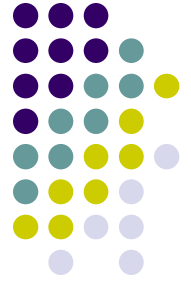
- January 28, 2008, President George W. Bush signed into law the first significant expansion of FMLA as part of the National Defense Authorization Act of 2008
- The amendments provide for two new types of FMLA coverage: 12 weeks of leave for a “qualifying exigency” and 26 weeks of leave for care for a covered servicemember

FMLA: Then and Now



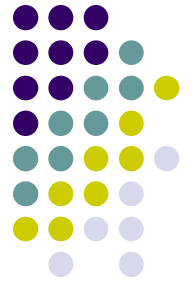
- “Qualifying Exigency” (29 USC §2612(a)(1)(E))
 - Purpose is to help families of Guard and Reserve members manage their affairs
 - Available only to employees who are the spouse, child or parent of a member of the National Guard or Reserves called to active federal duty (does not apply when called to duty by the State)
 - Allows for 12 weeks of FMLA leave for such covered employees for a “qualifying exigency” which is defined by the CFR

FMLA: Then and Now



- “Qualifying Exigency” (29 USC §2612(a)(1)(E))
 - Qualifying exigency is defined as any of the following:
 - Short-notice deployment (called to active duty within 7 days of deployment)
 - Military events and related activities
 - Childcare and school activities
 - Financial and legal arrangements
 - Counseling
 - Rest and recuperation
 - Post-deployment activities
 - Additional activities agreed upon by the employee and employer

FMLA: Then and Now



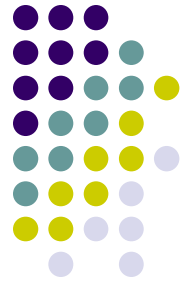
- Servicemember Family Leave(29 USC §2612(a)(3))
 - While “qualifying exigency” can be viewed as just another reason that will allow the standard 12 week FMLA leave, the Servicemember Family Leave provision creates an entirely new type of leave for up to 26 weeks
 - An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember shall be entitled to a total of 26 weeks leave during a 12-month period to care for the servicemember. The leave shall only be available during a single 12 month period

FMLA: Then and Now



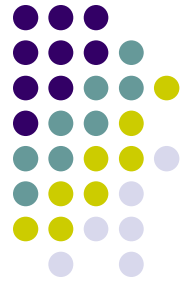
- Servicemember Family Leave(29 USC §2612(a)(3))
 - “Covered Servicemember” includes a member of the Armed Forces, Guard or Reserves who are current members are on the “temporary disability retired list”
 - Former members and members on permanent disability retired list are not covered

FMLA: Then and Now



- Servicemember Family Leave(29 USC §2612(a)(3))
 - Leave may be used to care for covered servicemember with a “serious illness or injury” incurred in the line of duty on active duty (as determined by the Department of Defense)
 - Leave may be in one block or intermittent
 - Leave is cumulative and not in addition to other FMLA – i.e., covered employee cannot use this plus regular 12 week leave to obtain 36 weeks in one 12 month period

FMLA: Then and Now



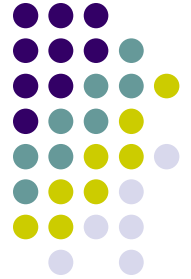
- Servicemember Family Leave(29 USC §2612(a)(3))
 - Note that this provision is broader than the regular 12 weeks to care for a serious health condition of family member because in addition to spouse, child, or parent, this provision extends to “next of kin”
 - CFR defines “next of kin” as servicemember’s nearest blood relative (other than a spouse, parent or child) up to and including first cousins

FMLA: Then and Now



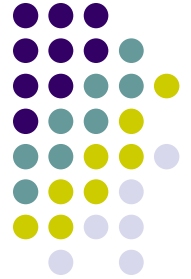
- CFR Final Rule (Effective January 16, 2009)
 - In December, 2006, DOL began receiving comments on proposed revisions to the CFR
 - By 2008 over 19,600 public comments were received
 - The Final Rule revising 29 CFR Part 825 was published on November 17, 2008 and became effective on January 16, 2009

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - Broadly speaking, the Final Rule contains regulations to implement the new servicemember leave provisions and contains extensive revisions of the existing regulations regarding FMLA leave

FMLA: Then and Now



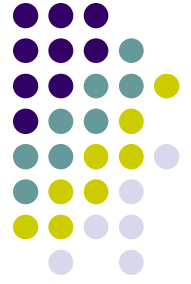
- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 1.
 - Eliminates so-called “categorical” penalties and requires a showing of individualized harm
 - Reaction to U.S. Supreme Court decision in Ragsdale v. Wolverine Worldwide, Inc, 122 S.Ct. 1155 (2002).

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 2.
 - New health care visit requirements for serious health condition involving more than three consecutive days of incapacity
 - Employee must make at least two visits to health provider within first 30 days
 - First visit must be within 7 days of the first day of incapacity

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 3.
 - For serious health condition involving chronic health condition, employee must make at least two visits per year to health care provider

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 4.
 - Medical certification and HIPAA
 - Specifies that the employer may contact the health care provider, but, limits contact both in terms of who may make contact and the contents of such contact

FMLA: Then and Now



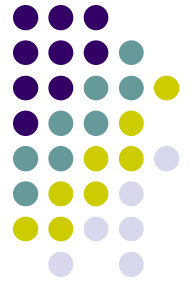
- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 4.
 - Contact may be made by: HR professional, leave administrator, or other management official, but cannot be made by the employee’s direct supervisor
 - May only ask for information required for certification (see WH-380-E; WH-380-F; WH-385)

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 5.
 - Medical Certification Fitness for Duty
 - Employers may require medical certification to include certification that the employee can perform his essential job functions and may require fitness for duty certification before allowing employee to return from intermittent leave where “reasonable job safety concerns” exist

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 6.
 - Waiver of Rights
 - Clarifies that regulations do not prohibit an employee from deciding to voluntarily settle or release their FMLA claims without court approval
 - Regulations do prohibit waiver of prospective (future) rights under FMLA

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 7.
 - Light duty
 - Time spent performing “light duty” does not count against FMLA leave
 - Right to reinstatement is held in abeyance while employee is working light duty but only until the end of the applicable 12 month FMLA leave year

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 8.
 - Employer Notice Requirements
 - General notice required to be posted and delivered through employee handbook or at time of hire
 - Time for employer to provide notice of eligibility upon receipt of request for leave is increased from two to five business days
 - Seven new or revised model forms have been included and may be downloaded from DOL website

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 9.
 - Employee Notice Requirements
 - Where leave is foreseeable, employee should give 30 days notice
 - Where leave is not foreseeable, employee must use the employer’s “usual and customary” call-in procedures for reporting an absence

FMLA: Then and Now



- CFR Final Rule (Effective January 16, 2009)
 - With apologies to *Sportscenter*, here are the CFR revisions “Top Ten Plays of the Day”:
 - 10.
 - Perfect Attendance Awards!!!!
 - Yes, folks, this is what it has come to – the United States government now dictates when you can and cannot hand out perfect attendance awards!
 - Final Rule allows employers to deny a perfect attendance award to an employee who has taken FMLA leave as long as employees taking non-FMLA leave are treated identically



QUESTIONS?

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