OOC BROWN BAG LUNCH SERIES
FAMILY AND MEDICAL LEAVE ACT
JUNE 22, 2016

I. Introduction

The Congressional Accountability Act of 1995 ("CAA") applies the rights and protections established by sections 101 through 105 of the Family and Medical Leave Act of 1993 ("FMLA") (29 U.S.C. 2611 through 2615) to covered employees in the Legislative Branch who satisfy specified eligibility requirements. In general, the FMLA, as applied by the CAA, provides eligible employees the right to take unpaid leave for specified family and medical reasons, and for specified circumstances relating to a family member's military service. In addition, the FMLA, as applied by the CAA, requires employing offices to preserve the employment benefits of employees who take FMLA leave, and to restore covered employees to their original job, or an equivalent job, upon the conclusion of the leave. The FMLA, as applied by the CAA, also generally prohibits employing offices from interfering with or denying the exercise of FMLA rights, and from discriminating against any person who either opposes a practice made unlawful by the FMLA or participates in a proceeding relating to the FMLA.

II. Coverage

Employer – The term "employer" as used in the FMLA means any employing office. 2 U.S.C. § 1312(a)(2)(A).

Employing Office – The term "employing office" means: (A) the personal office of a Member of the House of Representatives or of a Senator; (B) a committee of the House of Representatives or the Senate or a joint committee; (C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or (D) the Office of the Congressional Accessibility Services, the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. 2 U.S.C. § 1301(9).

Eligible Employee – The term "eligible employee" means a covered employee who has been employed in any employing office for twelve months and for at least 1,250 hours of employment during the previous twelve months. 2 U.S.C. § 1312(a)(2)(B). If an employee worked for two or more employing offices sequentially, the time worked will be aggregated to determine whether it equals twelve months. OOC FMLA Reg. § 825.110(b)(3). Additionally, if an employee was employed by two or more employing offices, either sequentially or concurrently, the hours of

service will be aggregated to determine whether the minimum of 1,250 hours has been reached. OOC FMLA Reg. § 825.110(c)(1).

a) *Briscoe v. Costco Wholesale Corp.*, 61 F. Supp. 3d 78 (D.D.C. 2014) – In order to be eligible for FMLA leave, an employee must have been employed for at least 1,250 hours of service during 12-month period immediately preceding leave. In this case, the plaintiff was unable to meet this burden because he was unable to ascertain his hours of work and only a full-time employee for 6-7 months.
b) *Davis v. George Washington Univ.*, 26 F. Supp. 3d 103 (D.D.C. 2014) – Calculation of 1,250 working hours is made at the commencement of the FMLA leave.
c) *Duckworth v. Pratt & Whitney, Inc*., 152 F.3d 1 (1st Cir. 1998) – "Employee" refers to current, former, and potential employees.
d) *Coulibaly v. Kerry,* 130 F. Supp. 3d 140 (D.D.C. 2015) – Plaintiff was employed as a French Instructor for the Department of State and filed an EEO complaint after less than 12 months in the position. The court found triable issues as to whether or not he had the requisite 12 months of service to be eligible for FMLA leave because he had worked as a contractor for 13 years in substantially the same role prior to his new job. The court found that whether an employee is eligible for FMLA leave depends on "economic reality" rather than job titles.
e) *Caporicci v. Chipotle Mexican Grill*, *Inc.*, No. 8:14-cv-2131-T-36EAJ, 2015 WL 1612014 (M.D. Fla. Apr. 9, 2015) – Plaintiff had been working at place of employment for 11 months and requested upcoming medical leave under the FMLA. The same day she requested leave she was terminated because her employer believed she was under the influence of illegal drugs when she was suffering from a reaction of medication. The plaintiff filed a lawsuit alleging interference and retaliation because of her request for FMLA leave. Citing recent Eleventh Circuit precedent, the court denied the defendant's motion, holding the plaintiff could go forward with her claims because she was terminated following a notification to the defendant that she would be seeking post-eligibility FMLA leave, or leave following reaching at least 12 months of employment with the employer. *See also Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269 (11th Cir. 2012).

III. Entitlement of Covered Employees to Leave

Qualifying reasons for leave – Employing offices covered by the FMLA, as made applicable by the CAA, are required to grant leave to eligible employees: (1) For the birth of a son or daughter, and to care for the newborn child; (2) For placement with the employee of a son or daughter for adoption or foster care; (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; (4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job; (5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty

status); and (6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. *See* OOC FMLA Reg. § 825.112.

(1) Leave for pregnancy or birth – Both parents are entitled to FMLA leave to be with the healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. OOC FMLA Reg. § 825.120.

a) Spouses who are eligible for FMLA leave and are employed by the same employing office may be limited to a combined total of 12 weeks of leave during any 12-month period. This restriction would apply even though the spouses are employed at two different work sites of an employing office.
b) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of a child.
c) *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53 (D.D.C. 1998) – Pregnant employees are always eligible for FMLA leave regarding issues of pregnancy, birth, and prenatal care that interfere with the ability of a woman to do her job. This includes severe morning sickness. A woman does not have to seek medical help or certification for the issue. Employers can ask for certification if they believe that there is abuse, but employees are not required to get it otherwise.

(2) Leave for adoption or foster care – Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care. OOC FMLA Reg. § 825.121.

a) *Bocalbos v. Nat'l W. Life Ins. Co.*, 162 F.3d 379 (5th Cir. 1998) – "Placement" of a child in a home refers to when children come to a home before the adoption is finalized, not after. In this case, the plaintiff's 12-month window to take FMLA leave began when he finalized the adoption of the children, not when they arrived at his home three years later.
b) *Kelley v. Crosfield Catalysts*, 135 F.3d 1202 (7th Cir. 1998) – FMLA leave can be taken in order to go through the process of adopting a child; however, FMLA leave cannot be used when the individual is already the child's parent of record (e.g., custody disputes).

(3) Leave for care of employee's spouse, son, daughter, or parent with a serious health condition – A serious health condition means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. OOC FMLA Reg. § 825.113.

a) *Stewart v. Office of the Architect of the Capitol*, No. 07-AC-25 (DA, FM, RP), 2009 WL 8575130 (OOC Board July 30, 2009) – Complainant had insufficient evidence to establish that his son had a serious health condition because he was not in hospital or hospice care and did not receive any treatment by a doctor; thus there was no continuous

treatment. Although a diagnosis is not needed to establish a serious health condition, an actual medical evaluation or visit is required.

b) *Miller v. AT & T Corp*., 250 F.3d 820 (4th Cir. 2001) – Common ailments like the flu will rarely meet the requirement for a "serious health condition" under the FMLA, but they can sometimes meet the regulatory requirements and therefore qualify.

c) *Sharpe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 483 (E.D.N.C. 1998) – While caring for a terminally ill family member qualifies for FMLA leave, grieving for the passing of a family member does not.

d) *Dillon v. Md.-Nat'l Capital Park & Planning Comm'n.*, 382 F. Supp. 2d 777 (D. Md. 2005) – In order to qualify for FMLA leave to care for a grandparent, the grandparent must have stood *in loco parentis* for the employee. The same is true for taking care of grandchildren, *see Martin v. Brevard Cnty. Pub. Schs.*, 543 F.3d 1261 (11th Cir. 2008).

(4) Leave for own serious health condition

a) *Hodges v. District of Columbia*, 959 F. Supp. 2d 148 (D.D.C. 2013) – Continuing treatment can be established by showing incapacity and treatment, chronic conditions, or conditions requiring multiple treatments. Complainant qualified as having a serious health condition because he was incapacitated for over three consecutive days for disk herniation when his doctor stated he was on a six-day work restriction and he received four medical treatments for 6-8 weeks.

b) *Bonkowski v. Oberg Indus., Inc.,* 787 F.3d 190 (3d Cir. 2015) – The Third Circuit found that the plaintiff did not have an overnight stay after being in the hospital from a little after midnight until 18 hours later, and therefore did not have a serious health condition. They rejected the strict sunset-to-sunrise approach of the district court. Instead, the Court found that an overnight stay meant a stay for a substantial period of time from one calendar day to the next calendar day, as measured by the individual's times of admission and discharge.

c) *Johnson v. Wheeling Mach. Prods.,* 779 F.3d 514 (8th Cir. 2015) – The court found that the plaintiff was not an eligible employee because he did not fall under the definition of having a serious health condition, as he could not demonstrate that he was treated twice for the same condition in a thirty-day period. Also, the clinic did not "supervise" the plaintiff's treatment because it did not "oversee, watch, or direct" any part of the treatment, but "simply prescribed [plaintiff] medication and sent him on his way."

(5) Leave because of a qualifying exigency – Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). OOC FMLA Reg. § 825.126.

a) Qualifying exigencies include short-notice deployment, military events and related activities, child care, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

(6) Leave to care for a covered servicemember – Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury. OOC FMLA Reg. § 825.127.

a) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.
b) Other types of FMLA leave taken during the 12-month period are subtracted from the 26-week total.

IV. Length and Scheduling of Leave

Amount of Leave – Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period. OOC FMLA Reg. § 825.200(a).

Intermittent Leave

a) *Hansen v. Fincantieri Marine Grp.*, 763 F.3d 832 (7th Cir. 2014) – For chronic health conditions that are episodic, intermittent FMLA leave can be requested. A doctor's estimate for how long an employee will be incapacitated does not create any limit on how long or frequently an employee can take intermittent FMLA leave.
b) *Koshko v. U.S. Capitol Police*, Nos. 11-CP-136 (CV, DA, FM, RP), 12-CP-02 (RP), 12-CP-19 (CV, DA, FM, RP), 12-CP-27 (DA, FM, RP), 2014 WL 2169027 (OOC Board May 14, 2014) – Although OOC FMLA Regulation 825.204 allows employing offices to transfer employees to accommodate intermittent leave, there is no authority that requires an office to transfer an employee to an alternative position.

Substitution of Paid Leave

a) *Strickland v. Water Works & Sewer Bd. of Birmingham*, 239 F.3d 1199 (11th Cir. 2001) – If an employer offers paid sick leave and an employee requests FMLA leave, the employer can either require the employee to take both leaves simultaneously or allow the employee to take each leave at separate times.
b) *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) – Regulation providing that paid or unpaid leave taken by employee does not count against employee's FMLA entitlement if employer does not designate the leave as FMLA leave was contrary to the FMLA.

Right to Reinstatement

a) *Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43 (D.C. Cir. 2011) – When evaluating if a reinstated position is equivalent to one before FMLA leave, unmeasurable aspects should not be taken into account. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including

privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

b) *Hatchett v. Philander Smith Coll.*, 251 F.3d 670 (8th Cir. 2001) – An employee who wishes to return from FMLA leave but cannot perform essential job functions is not entitled to his or her former position, even on a reduced schedule or intermittent leave.
c) *Bellone v. Southwick-Tolland Reg'l Sch. Dist.*, 748 F.3d 418 (1st Cir. 2014) – Employers are not required to hold a position open for an employee beyond the 12-week requirement if the employee cannot perform the required duties of the job.
d) *Porfiri v. Eraso*, 121 F. Supp. 3d 188 (D.D.C. 2015) – The plaintiff alleged in his complaint that during his FMLA leave the defendant modified his position description to include a requirement that he provide "deployment support in the field," a newly-created essential function he could not perform due to his disabling medical conditions. The court denied the defendant's motion to dismiss because the defendant failed to argue that he interfered with his FMLA leave by changing the duties of the job such that the plaintiff could not be reinstated following injury.
e) *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861 (8th Cir. 2015) – The court found a dispute of material fact existed as to whether the plaintiff was restored from leave before he was discharged because, on the day he returned to work, the plaintiff was not permitted to work and was recommended for termination.

V. Employee and Employer Rights and Obligations under the Act

Employer Notice Requirements – The FMLA, as incorporated by the CAA, requires employing offices to provide covered employees with: (1) an eligibility notice; (2) a rights and responsibilities notice; and (3) a designation notice. OOC FMLA Reg. § 825.300. The eligibility notice requires that when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employing office must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. This notice must state whether the employee is eligible for FMLA leave, and if the employee is not eligible, the notice must state at least one reason why the employee is not eligible. The rights and responsibilities notice requires that an employing office provide written notice "detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." This notice must include specific requirements as proscribed by OOC FMLA Regulation 825.300(c)(1)(i-vii). The designation notice requires the employing office to give notice to the employee of whether the leave is FMLA-qualifying.

a) *Dube v. J.P. Morgan Investor Servs.*, 201 Fed. Appx. 786 (1st Cir. 2006) – Employers must make FMLA information available at work, but they do not have to make it available to employees at home. In this case, a posting on an intranet website only accessible at work was acceptable.

b) *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005) – Ignoring an employee's request for FMLA leave or offering them less time than they are due is a violation of the employer's obligation to notify the employee of their right to leave.
c) *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135 (3rd Cir. 2004) – The failure to inform an employee of his rights under the FMLA gives rise to liability only if the employee can show prejudice, i.e., that the failure caused him actual harm. In this case the employee raised a genuine issue of material fact as to whether he would have structured his leave differently if his employer had provided proper notice, allowing him to preserve the protections of the FMLA. *See also Fink v. Ohio Health Corp.*, 139 Fed. Appx. 667 (6th Cir. 2005) (employer was not liable for failing to inform employee of the ability to request intermittent leave, because she was not eligible for intermittent leave with her condition).

Employee Notice Requirements – An employee must provide at least 30 days of advance notice before FMLA leave is to begin if the need is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. OOC FMLA Reg. § 825.302. If the need for leave is foreseeable but the 30-day period is not practicable – for instance, because of a lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, or a medical emergency – notice must be given as soon as practicable. As to the content of the notice for foreseeable leave, the employee must provide "at least verbal notice sufficient to make the employing office aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." Provisions for notice regarding unforeseeable leave require that when the need for leave is not foreseeable, an employee must provide notice to the employing office as soon as practicable under the facts and circumstances of the particular case. OOC FMLA Reg. § 825.303. With regard to the content of the notice for unforeseeable leave, the employee must provide "sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request."

a) *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950 (7th Cir. 2004) – Unless the employer knows that the employee has grounds for FMLA leave, the employee must provide enough information to create probable cause that he or she is entitled to FMLA leave. The duty is then shifted onto the employer to either grant the leave or investigate further.
b) *Manuel v. Westlake Polymers Corp*., 66 F.3d 758 (5th Cir. 1995) – Employees do not have to reference the FMLA by name in order to invoke its protections or request time off that the FMLA would protect.
c) *Deloatch v. Harris Teeter, Inc.*, 797 F. Supp. 2d 48 (D.D.C. 2011) – Plaintiff's mother had a serious health condition when she received radiation treatment spanning several months, but the plaintiff did not satisfy the notice requirement. Although the plaintiff

stated he needed some time off to help his mother, he never asserted the reasons for his requested time off.

d) *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188 (11th Cir. 2015) – The plaintiff's need for FMLA leave was not foreseeable and she was therefore excused from certain FMLA notice provisions set forth in § 825.303(b) and § 825.302(c). The court noted that, despite the fact that the plaintiff had originally suffered her knee injury in April of 2010 and that surgery had been contemplated at that time, the plaintiff had worked on her injured knee for eight months thereafter and the need for surgery was therefore not foreseeable.

e) *Cundiff v. Lenawee Stamping Corp.*, 597 Fed. Appx. 299 (6th Cir. 2015) – The plaintiff, a welder suffering from anxiety, depression, and reflux, was discharged after not complying with a collective-bargaining agreement, which required employees to call off thirty minutes before their shift. The court of appeals held that the plaintiff was required to comply with the employer's "usual and customary notice and procedure requirements… absent unusual circumstances."

Certification – The employing office may require that leave be supported by a certification issued by a health care provider of the employee or of the employee's family. OOC FMLA Reg. § 825.305. In most cases, the employing office should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter. The employing office shall advise an employee whenever the employing office finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient.

a) *Katsouros v. Office of the Architect of the Capitol*, Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 484744 (OOC Board Jan. 21, 2011) – There can be no cause of action for violation of FMLA rights when medical certifications specify leave is not required by the medical practitioner and ability to perform one's work duties are not impaired by illness or injury.

b) *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149 (3d Cir. 2015) – The plaintiff was entitled to a cure period because the certification she submitted was insufficient, rather than negative on its face. In other words, because the request was "vague, ambiguous, or non-responsive," as opposed to one that was clear that the employee was not entitled to leave, the employer was required to give the plaintiff an opportunity to provide additional information to cure the deficiencies in her initial request.

Waiver of FMLA Rights – Employees cannot waive, nor may employing offices induce employees to waive, their rights under the FMLA. OOC FMLA Reg. § 825.220.

a) *Stewart v. Office of the Architect of the Capitol*, No. 07-AC-25 (DA, FM, RP), 2009 WL 8575130 (OOC Board July 30, 2009) – An abeyance agreement, which provided that complainant could be terminated without a formal hearing in the event that he failed to

comply with AOC's leave policy and guidelines, does not constitute an unlawful waiver of FMLA rights.

VI. Enforcement

Interference Claims

a) *Hodges v. District of Columbia*, 959 F. Supp. 2d 148 (D.D.C 2013) – To state an FMLA interference claim, a plaintiff must allege facts sufficient to show, among other things, that (1) he was entitled to take leave; (2) he gave his employer adequate notice of his intention to take leave; and (3) his employer denied or otherwise interfered with his right to take leave.

b) *Badwal v. Bd. of Trustees of the Univ. of the Dist. of Columbia*, 139 F. Supp. 3d 295 (D.D.C. 2015) – Plaintiff sufficiently supported a claim for interference when he alleged his employer failed to send him a designation notice after he sought FMLA leave and received provisional approval, and as a result, the plaintiff failed to return to his job due to his ignorance that his leave was being designated as FMLA leave.

c) *Tadlock v. Marshall Cnty. HMA,* 603 Fed. Appx. 693 (10th Cir. 2015) – Plaintiff, as part of her prima facie case, must establish that she was entitled to leave, not that she merely attempted to request it.

Retaliation Claims

a) *Koshko v. U.S. Capitol Police*, Nos. 11-CP-136 (CV, DA, FM, RP), 12-CP-02 (RP), 12-CP-19 (CV, DA, FM, RP), 12-CP-27 (DA, FM, RP), 2014 WL 2169027 (OOC Board May 14, 2014) – To establish a *prima facie* case for retaliation, a complainant must show that: (1) he engaged in an activity that is protected under the CAA; (2) the employing office's action is reasonably likely to deter protected activity; and (3) there is a causal connection between the two. The complainant was unable to establish a causal connection between her activity (giving her immediate supervisor a publication on diabetes in regards to her child's disease) and the employing office's action (failure to give her a transfer in order to care for her daughter), because credible witnesses established that there must be a permanent vacancy to allow a transfer, and no such vacancy existed in this instance.

b) *Britton v. Office of the Architect of the Capitol*, No. 02-AC-20 (CV, RP), 2005 WL 6236944 (OOC Board May 23, 2005) – Defines adverse action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."

c) *Joyce v. Office of Architect of the Capitol*, 106 F. Supp. 3d 163 (D.D.C. 2015) – Plaintiff could not show that the AOC changed the employee's shifts *because of* the protected activity, and therefore could not satisfy the third prong of the *prima facie* case of retaliation. The shift change would have occurred regardless of the sick leave request, because the employer planned the shift change prior to the request.

d) *Gordon v. U.S. Capitol Police*, 778 F.3d 158 (D.C. Cir. 2015) – The court noted that a captain's statements that a manager was "mad" about plaintiff's FMLA requests and had vowed to "find a problem" with them would, if proven, constitute direct evidence that a fitness-for-duty examination and temporary revocation of police powers were motivated by the FMLA requests. Furthermore, these actions met the *Ragsdale* "any monetary loss" and *Burlington* "material adversity" standards for adverse actions.