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Primer on What the Family and Medical Leave Act Covers

Litigating FMLA Claims

Michael D. Homans
Flaster/Greenberg P.C.
Four Penn Center, Suite 200
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 279-9379
michael.homans@flastergreenberg.com

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I. Introduction

This paper focuses on litigation under the Family and Medical Leave Act ("FMLA" or the "Act"), with special emphasis on the issues most commonly disputed in court, as well as unique procedural and jurisdictional issues under the FMLA.

This is not a comprehensive survey of FMLA litigation or substantive provisions of the Act, but rather provides many of the "basics" and trends in FMLA litigation. Other papers being presented for this session summarize the key provisions of the Act. In addition, the author highly recommends the ABA Section of Labor and Employment Law's treatise, *The Family and Medical Leave Act* (Michael J. Ossip & Robert M. Hale, eds., 2006) and its 2009 supplement, for a complete survey of the law. References to other helpful materials are included in the text below.

II. Starting Points for Litigating Claims

A. Jury appeal

One of the first issues any attorney representing a party in FMLA litigation should consider is the jury appeal of the case. An employee who is fired or otherwise suffers an adverse action for taking medical leave or leave to care for a sick loved one can present an especially sympathetic case.

For a plaintiff who took leave for his or her own serious health condition, a termination by an employer can be seen as "kicking a man when he's down." If the illness or injury is real, and the plaintiff can show that he or she recovered and could have returned to work, the employer can be portrayed as callous to the employee's suffering and indifferent to the legal mandates of the FMLA. Moreover, if the employee can combine other statutory common law claims that include emotional distress damages, the employer risks runaway jury verdicts of millions of dollars.

Likewise, if the employee is taking FMLA leave to care for a family member, he or she can be portrayed as a hero – sacrificing his or her own income to comfort and assist a needy family member with a serious health condition. The employer that denies an employee that right, or punishes the employee for taking such leave, risks a severe reprimand from the jury.

Examples of high-dollar FMLA judgments and verdicts include:

- In 2002, a Chicago jury awarded **$11.65 million** to an employee who claimed he was retaliated against and fired for taking time off under the FMLA to care for his ailing father. The case included a state law claim for intentional infliction of emotional distress. *Schultz v. Advocate Health*, No. 01C-0702 (N.D. Ill. 2002) reported in *The National Law Journal*, Nov. 11, 2002.

- In 2008, a jury awarded **$2.2 million** (with damages rising to a total of between **$6.2 million** and **$7.6 million** once prejudgment interest and liquidated damages were applied, according to the plaintiff's lawyer) in a case involving a bank executive who was repeatedly denied FMLA leave and then terminated, allegedly in retaliation for insisting on such leave. *Lore v. Chase Manhattan Mortgage Corp.* (N.D. Ga. 2008) (reported in *Fulton County Daily Report* and *American Lawyer Media*).

But these high verdicts are the exception, and many FMLA cases go the other way. Common reasons for defense judgments include situations in which (1) the employee was seeking the leave in reaction to impending discipline; (2) the employee had chronic attendance problems and seemingly used any excuse to avoid consistently working; and/or (3) the employee (or her family member) did not actually have a serious health condition or give notice of same, and therefore the leave at issue did not qualify for FMLA protection. If the employer can document or otherwise prove any one of these points – especially that the employee was a malingerer or outright fraud – the employer stands a great chance of obtaining summary judgment or a defense verdict at trial.

Although an employee's history of absenteeism, discipline, contradictory statements, etc., arguably is often not relevant at the summary judgment stage, the casebooks are filled with decisions in which the judge recounts such negative facts about the plaintiff. Like it or not, judges will be influenced by such evidence – even if it primarily goes to credibility, which the court supposedly does not weigh at this stage. Litigators, therefore, should not hesitate to include such background evidence – good or bad, depending on which side the attorney is on -- in summary judgment papers.

As in other types of employment litigation, defense counsel generally varies the intensity of its attack on the plaintiff's credibility depending on the stage of the case and the strength of the evidence. Initially, in discovery, defendants aggressively pursue all angles to impugn the plaintiff's credibility, including his or her claim of injury or illness, work history, performance, finances, etc. There is virtually no limit to such discovery, it is often fruitful, and counsel can later pare down the attacks, based on the evidence revealed. At the summary judgment stage, defense counsel can similarly be aggressive with such attacks, as a judge is unlikely to punish the defense, even if the judge finds the evidence non-dispositive (and there is always the significant chance, as noted above, that the judge will find the evidence persuasive, even if not relevant). In front of a jury, defense counsel must be extremely careful and deliberate about using such evidence. If the evidence against the plaintiff's credibility and integrity is compelling and can be proven – preferably with documents or the plaintiff's own contradictory statements – then one can aggressively push such evidence at trial, trusting that the jury will make the right call. If, however, the negative evidence about the plaintiff is less than convincing, seems petty and remote, or has only marginal relevance, counsel should consider dropping such arguments, as they may come across as mean-spirited and retaliatory, and simply give the jury more motivation to award one of those multi-million-dollar verdicts.

B. Statute of Limitations

A civil complaint for a violation of the FMLA must be filed within **two years** of the "last event constituting the alleged violation," or within **three years** if the violation is willful. 29 U.S.C. § 2617(c)(1)-(2). A violation is willful if the employer knew or showed reckless disregard for whether its conduct was prohibited by the law.

Some states have shorter limitation periods for their state leave laws, and therefore counsel should check the applicable state statute for same.

C. Potential Defendants

The FMLA covers private and public employers with 50 or more employees. In addition, a plaintiff must establish that he or she works at a worksite where the employer employs at least 50 employees within 75 miles. 29 U.S.C. § 2611(2)(B)(ii). When the count is close, the regulations and case law provide substantial guidance for determining whether the employer is covered. Claims also may be brought against responsible individuals, as noted below.

Individual liability. An important aspect of the FMLA that is often ignored by counsel for plaintiffs is that it provides that individual employees can be liable for violations. *See, e.g.*, *Nardodetsky v. Cardone Industries, Inc*., *et al*., No. 09-4734 (E.D. Pa. Feb. 24, 2010) (holding human resources manager, CEO, plant manager, director and representative can be liable as "employers" based on evidence that each of the individual defendants exercised control over plaintiff's employment and the decision to terminate). *See also The Family and Medical Leave Act*, § 11.II.A.2. (2009 supp. at 275).

Public employers and sovereign immunity. The FMLA also defines "employer" to include a "public agency," consistent with the definition in the Fair Labor Standards Act. As a result, claims generally can be brought against state and municipal employers, with the exceptions noted below. However, sovereign immunity may shield some state entities, and their employees, from liability under the FMLA, depending on the contours of the FMLA claim at issue. *See generally The Family and Medical Leave Act* § 11.II.A.2.

Employees of the federal government are covered by Title II of the FMLA, 5 U.S. § 6381, which provides separate remedial provisions. In particular, federal employees do not have a private right of action, and therefore federal court actions on behalf of federal employees should not be brought in court. *See, e.g.*, *Burg v. United States Department of Health and Human Services*, 2010 WL 2842858 (3rd Cir. July 21, 2010).

D. Remedies available

The FMLA provides most, but not all, of the panoply of relief provided in most federal employment laws.

- ***Reinstatement*** is the primary form of relief recognized under the Act.

- Practice pointer -- If an employer determines that it has violated an employee's FMLA rights, one of the quickest ways to cap exposure is to offer reinstatement. *See, e.g., Knox v. Cessna Aircraft Co.*, 2007 U.S. Dist. LEXIS 71528, at *34-35 (M.D. Ga. Sept. 26, 2007). This can be an attractive tactic because many employees who take FMLA leave and complain of a technical violation of the statute are unable or unwilling to return to work for the employer. Thus, the offer of reinstatement not only caps wage loss damages, it can also undermine the employee's claim of loss and/or a willingness to return to work. An offer of reinstatement also may diminish the plaintiff's ability to argue that the employer has ongoing animus toward the terminated employee because he or she sought FMLA leave. On the other hand, employers should only make such an offer in good faith, and if they are willing to take the chance that the employee accepts the offer and returns to work. Employers should ensure – and communicate same to the employee – that the returning employee will not be retaliated against if he or she accepts the offer to return to work. An employee also could argue that an offer of reinstatement is an admission of liability.

- ***Back pay*** and the value of lost benefits also can be awarded.

- ***Front pay*** can be awarded when reinstatement is not feasible.

- ***Liquidated damages*** are available to a prevailing plaintiff, doubling the total amount of compensation awarded, including pre-judgment interest. Under the statute, there is a strong presumption in favor of awarding liquidated damages. A court may reduce such an award, in its discretion, if the employer proves both that its actions were in good faith and that the employer had objectively reasonable grounds to believe that the act or omission did not violate the FMLA.

- ***Emotional distress damages not available.*** The FMLA specifically lists the damages available for recovery and does not include any provision for emotional distress damages, pain and suffering, and other non-economic compensatory damages. The Supreme Court has emphasized that damages recoverable under the FMLA "are strictly defined and measured by actual monetary losses." *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 739-40 (2003). Lower courts have consistently refused to award emotional distress damages under the FMLA.

- ***Limiting damages through after-acquired evidence.*** Employers may be able to use "after-acquired evidence" of other conduct by the employee that would have warranted termination to limit damages in an FMLA claim. *See, e.g., Edgar v. JAC Products, Inc.*, 443 F.3d 501, 513-14 (6th Cir. 2006) (*citing McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359-61 (1995)). Such evidence, if compelling, not only limits damages but can undermine the credibility and force of the plaintiff's claim. On the

other hand, an employer that overplays a weak case of after-acquired evidence may be seen as making unfair claims and retaliating against the employee through the litigation.

III. Types of FMLA Claims: Interference/Denial and Discrimination/Retaliation

Two theories of recovery are available under the FMLA: an interference/denial of rights claim (also known as an "entitlement" claim), and a discrimination or retaliation claim.

Interference. The FMLA provides that an employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise" FMLA rights. 29 U.S.C. § 2615(a)(1). To prove an interference/denial of rights claim, a plaintiff must show only (1) that he was entitled to benefits under the FMLA and (2) that his employer illegitimately prevented him from obtaining those benefits. *See, e.g., Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 401 (3d Cir. 2007). These claims are especially appealing to plaintiffs because they do not require proving any intent by the defendant. Because of the simplicity of these claims, plaintiffs sometimes seek and obtain summary judgment on interference claims.

Retaliation. In contrast, to prove a retaliation claim, a plaintiff must show that:

(1) he invoked his right to FMLA benefits;

(2) he suffered an adverse employment decision; and

(3) the adverse decision was causally connected to his invocation of those rights.

See, e.g., Hayduk v. Johnstown, 2010 WL 2650248 (3d Cir. July 2, 2010).

Proving the third element of a retaliation claim is subject to the familiar *McDonnell Douglas* burden-shifting analysis, although modified in some circuits. Litigants should check the jurisdiction at issue for the exact standard to be used.

Interference and retaliation claims are not mutually exclusive and plaintiffs often bring both claims in the same complaint.

Importantly, an ultimate adverse action is not required to bring an FMLA claim. Employers can be found liable under an interference or retaliation claim for acts short of termination, even if the employee's FMLA termination claim ultimately fails. *See, e.g., McFadden v. Ballard Spahr Andrews & Ingersoll*, 124 DLR A-15 (D.C. Cir. June 29, 2010) (summarizing case holding that law firm could be liable for an interference claim where legal secretary testified that human resources manager told her it was "going to be a problem" if she missed any more work days to care for her sick husband, which led her to pay her sister to care for her husband).

IV. Commonly Litigated Issues Under the FMLA

Interference and retaliation claims often share similar factual disputes on key elements under the FMLA. This section highlights several of the most commonly litigated factual issues.

In all events, due to the complexity of the statute and the multiple requirements to prove any FMLA claim, litigators should go through a step-by-step analysis of each element of an FMLA claim to determine whether a plaintiff can meet his or her proof.

A. Serious Health Condition

Whether an employee truly has a "serious health condition" that qualifies him or her for FMLA leave is perhaps the most often litigated issue under the Act. A good survey of cases on the issue is provided at 169 A.L.R. Fed. 369 (orig. publication 2001).

For example, as a recent case illustrates, not all "conditions" that relate to physical or mental health qualify as serious health conditions. In *Stroder v. United Parcel Serv. Inc.*, 123 DLR A-3 (M.D.N.C. June 10, 2010), the court held that a mother-employee's request for FMLA leave to care for her son, who needed speech therapy and behavioral care, did not qualify as protected leave because her son's condition did not constitute a serious health condition. The employee lacked evidence that the condition incapacitated her son, required continuing treatment by a health-care provider, or necessitated absences during the employee's work schedule.

Litigators also should be careful about pushing too hard on an employee's understanding of the word "incapacitated." In *Branham v. Gannet Satellite Information Network, Inc.*, 2010 WL 3431617 at *5 (6th Cir. Sept. 2, 2010), the court quoted this exchange in the deposition transcript of the plaintiff on the issue of whether she was incapacitated due to a serious health condition:

Q: And then on the 15th you say you worked from home, true?

A: True.

Q: But you were not incapacitated, true?

A: *I still wasn't feeling well.*

Q: I understand, but you weren't incapacitated. You obviously were able to do *some* work, true?

A: True.

The court noted that, under the federal regulations, "incapacity" can mean being "unable to perform any one of the essential functions of the employee's position." 29 C.F.R. § 825.115 (2006) (amended 2009). Reasoned the court, "a person can be incapacitated despite being able to do some of her regular work." *Id.* at * 5.

Adding to the potential for litigation on this issue, the Third Circuit recently ruled that in determining whether an employee was incapacitated by a health condition, the jury is not limited to the representations of an employee's healthcare provider, but also may rely on the lay testimony of the employee as to his or her incapacity. *Schaar v. Lehigh Valley Health Services, Inc.*, No. 09-1635 (3rd Circuit 2010).

B. Did You Ever Notice?

The FMLA, its regulations and the case law contain extensive guidance on the types of notice that employees and employers must provide to each other in order to trigger FMLA protections and comply with the law. These notice obligations are covered in detail in Catherine Williams' article, which is part of the materials for this session.

In litigating notice issues, the general theme that emerges from the regulations and court decisions is that an employer generally has a higher burden to prove it has strictly complied, in writing, with FMLA notice obligations. Employees have a lighter, but still substantial, duty to put the employer on notice that he or she needs FMLA-covered leave and to provide medical certification of same, if required by the employer.

If an employer fails to provide timely notice and designation of FMLA rights to an employee, all is not lost, however. Under the Supreme Court's ruling in *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 88 (2002), an employee's leave may still count as FMLA-covered, even if the employer's designation and notice of same is retroactive, if the employer's lapse did not prejudice or harm the employee. Since *Ragsdale*, courts have consistently held that a violation of the regulatory notice obligations is not actionable unless the employee can show that he or she has been prejudiced by the violation.

1. Employer notice issue

When the sufficiency of employer notice of FMLA rights is at issue, counsel for both sides will want to explore the issue of whether the employer provided the employee with appropriate written notice, and the employee's response to same.

For example, in *Branham v. Gannett Satellite Information Network, Inc.*, 2010 WL 3431617 (6th Cir. Sept. 2, 2010), the Sixth Circuit reversed summary judgment for the employer, despite a medical note from the employee's doctor that she was able to return to work several days before she did return, because the employer failed to ever make a formal request for FMLA medical certification of the need for extended leave, pursuant to 29 C.F.R. § 825.301(b)(1)(ii) and 825.305(d) (2006) (amended 2009).

In addition, per *Ragsdale*, *supra*, a key issue will be whether the employee can establish that he or she was harmed or prejudiced by the notice violation. Common ways in which plaintiffs prevail in such an argument is through testimony and evidence that he or she could have returned from work earlier, restructured the leave, or re-scheduled surgery, treatment or care for a family member in order to retain employment. Defense counsel, on the other hand, will look for admissions and testimony from the plaintiff or the plaintiff's healthcare provider (often provided on a

silver platter at deposition) that the plaintiff was so disabled during the leave time in question, that the absence was unavoidable and it was not within the employee's power to return to work.

2. Employee Notice Issues

The question of whether the employee gave the employer sufficient notice of his or her need for FMLA is one of the most frequently litigated issues. Under the FMLA, in any case in which the need for FMLA is foreseeable, the employee must provide the employer with at least 30 days notice before the date the leave is to begin, or as soon as practicable if such notice is not feasible. 29 C.F.R. § 825.302(a) To fulfill the notification requirements of the FMLA, an employee does not need to expressly assert rights under the FMLA or even mention the Act, but need state only that leave is needed because of a serious health condition. The critical question in determining whether an employee has given notice is whether the employee (or her agent), orally or in writing, gave the employer sufficient information to notify the employer that she is requesting time off for a serious health condition.

Illustrative cases include:

- ***Employee not feeling well, to see doctors, requests additional leave.*** *Branham v. Gannett Satellite Information Network, Inc*., 2010 WL 3431617 (6th Cir. Sept. 2, 2010). On November 15, 2006, at the end of one leave period, the employee asked employer "about taking leave, because [she] still wasn't feeling well and had numerous doctors' appointments scheduled for" next two months. This was sufficient notice of the potential need for extended FMLA-covered leave, and employer was not entitled to rely on single certification that employee could return to work full-duty by November 14, 2006.

- ***Refusing to fill out FMLA forms.*** *Kobus v. College of St. Scholastica Inc*., 608 F.3d 1034 (8th Cir. June 21, 2010), in which the employee complained of "stress" and "anxiety" but refused to fill out FMLA forms offered by the college, and said it "might be some trouble" to obtain medical certification for his leave, and therefore he did not pursue FMLA leave and was terminated. Summary judgment for defendant affirmed.

    - Practice pointer -- An employer is in a much stronger position if it can demonstrate at trial that the employee refused to cooperate with requests to provide a medical certification or other necessary information to make a determination as to FMLA coverage. Employers should exhaust this point and details of same in discovery and trial. In contrast, counsel for employees will want to be able to explain why the employee did not provide the requested information, and be prepared to cite and argue all of the things that the employer could have or should have done if it really needed the requested missing information and/or that the employer took the adverse action without regard to whether any information was missing. *See, e.g., Saenz v. Harlingen Med. Ctr*., 149 DLR A-11

(5th Cir. Aug. 2, 2010) (summarizing decision in which circuit court reversed summary judgment where employee's mother had repeatedly notified and updated employer as to employee's psychiatric problems and need for hospitalization and medical leave, and rejecting employer's contention that employee's failure to contact employer within two days of her leave, per company policy, disqualified her from FMLA leave protections).

- ***Calling in intoxicated.*** *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781 (8th Cir. 2009). Employee failed to give adequate notice of need and reason for FMLA leave, where he called in multiple times during several-day absence, including once while intoxicated, telling his employer he was having a nervous breakdown.

- ***Calling in "sick" may not be enough.*** *Brown v. Kansas City Freightliner Sales, Inc*., 2010 WL 3258301 (8th Cir. Aug. 19, 2010). This is a challenging case in which the evidence showed plaintiff left work due to a back injury and called in sick daily for four days, and then was terminated upon his return to work. Circuit court upheld summary judgment, finding that employee did not notify employer of reason or need for FMLA leave because employee did not complete an actual injury report on day of injury and did not specifically inform his employer that his sick leaves were due to the back injury.

    - *Query*: The court seems unusually hostile to FMLA claims – in another circuit or with another panel, the emphasis might have shifted to whether the employer had met its duty to provide the employee with formal notice of FMLA rights and obligations (including the 15-day period to certify his need for leave), after the circumstances clearly suggested that he was out due to his back injury. The position of the court in *Brown* that the employee's claim is fatally flawed because he merely called in "sick" after leaving due to a back injury at work, and did not give express notice that his absence continued to be for the back injury, seems extreme. *Lesson to litigators* – be sure to develop favorable testimony at depositions and other evidence as to your client's position on notice. And if your client's case is weak on the point, go on the offense and attack the other side's compliance with its notice obligations.

- ***Be careful with mental conditions.*** Courts generally show lenience toward requiring an employee to comply with heightened reporting requirements of an employer FMLA policy, if the employee can show that his or her leave was due to a psychiatric condition that may have impaired the employee's ability to timely comply. *See generally Saenz v. Harlingen Medical Center, L.P*., 2010 WL 2992081 (5th Cir. Aug. 2, 2010) (summary judgment reversed where employee provided employer with enough information to make clear she was requesting FMLA leave, and employee

argued she was suffering from a severe psychiatric episode at time she failed to comply with notice obligations in employer policy). The court in *Saenz* noted that the employer also failed to allow the employee the 15-day period to provide FMLA certification before terminating her, which could itself violate the FMLA. *Id.* at n.7.

C. Is Leave to "Care for" a Family Member

Employers also frequently challenge whether claimed FMLA leave is actually to "care for" a covered family member who is sick or injured. An employee may obtain such leave both to provide "direct care" (such as providing meals, transportation or sitting bedside) to a family member, and "indirect care" in support of such a leave. The latter category tends to generate the litigation.

For example, in *Lane v. Pontiac Osteopathic Hospital*, 2010 WL 2558215 (E.D. Mich. June 21, 2010) (slip op.), the employee applied for and was granted intermittent FMLA leave over a six-month period to care for his mother, who suffered from diabetes, high blood pressure, weight loss and arthritis. However, when the employee notified his employer that he missed four days of work to clean up flooding in his mother's basement and argued that such time was to "care for" his mother's illness, because a flooded basement could be a "breeding ground" for disease, the employer and the court disagreed and denied his claim.

The Department of Labor's expansion of the definition of "son or daughter" in an interpretation letter issued this year is expected to generate more litigation on the issue of whether the familial relation is covered under the FMLA. Under its much-publicized interpretation, the DOL has taken the position that "[e]ither day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child." Administrator's Interpretation No. 201-3, issued June 22, 2010, by Wage and Hour Division Deputy Administrator Nancy J. Leppink. Determining "whether an employee stands *in loco parentis* to a child will depend on the particular facts," according to the DOL, leaving the issue open for active litigation. The letter also makes clear that the interpretation is designed to include nontraditional families, such as those headed by gay, lesbian, bisexual or transgender parents, and that nothing in the regulations restricts "the number of parents a child may have under the FMLA."

D. Attendance Violations

Plaintiffs' attorneys carefully scrutinize terminations for violation of "no fault" attendance policies to determine if the decision was based, in whole or in part, on FMLA-protected absences. If FMLA-protected absences were used as a basis for discipline, then the Act likely has been violated.

This issue arises frequently when employers have "no fault" point systems for attendance, which lead to discipline or termination once an employee accumulates a certain number of points for absences, regardless of the reason for the absence. Employers who cannot defend the decision except by relying on absences during an

FMLA-protected leave generally lose an interference claim, regardless of the intentions of the decision-makers.

However, an employer can defeat such claims if it can show that the same decision would have been made even if the FMLA-protected absences were not counted. *See, e.g., Estrada v. Cypress Semiconductor (Minnesota),* 2010 WL 3220363 (8th Cir. Aug. 17, 2010) (affirming summary judgment where employer demonstrated that it consistently terminated employees for exceeding point limit and that this employee exceeded points warranting termination, even if the claimed FMLA-protected absence was not counted).

E. Equitable Estoppel

In cases where an employer or its agents have leniently approved a request for FMLA leave, only to challenge it later in litigation, counsel for plaintiffs should argue an equitable estoppel defense. This theory has been recognized repeatedly in FMLA cases, and bars an employer from "gotcha" tactics that lead an employee to take leave, and then punish him or her for not complying with all of the technical requirements of the Act. *See, e.g., Murphy v. FedEx Nat'l LTL Inc.*, --- F.3d ----, 2010 WL 3341233 (8th Cir. Aug. 26, 2010) (recognizing estoppel theory in FMLA case, but requiring new jury instructions on same).

F. Layoffs During FMLA-Covered Absence

The FMLA does not entitle a covered employee to any better treatment than he or she would have received absent the leave. Therefore, when a general layoff or reduction in force occurs and results in the termination of an employee who is on an approved FMLA leave, the issue arises as to who must prove what.

FMLA regulations provide that the employer has "the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration." 29 C.F.R. § 825.216(a)(1). Despite this regulation, the circuit courts are split on the issue of who bears the burden of proof. (At last count, the 8th, 10th and 11th circuits have held that the employer bears the burden of proving it would have taken the job action regardless of the employee's FMLA status; the 6th and 7th have refused to shift the burden of proof to the employer; the 5th has adopted a hybrid standard, and the 4th Circuit has observed the split, but not ruled on the issue.)

Given this split, litigators facing this situation must determine the law in the applicable circuit to determine who will bear the burden of proof.

V. Proving Discriminatory Intent

In retaliation/discrimination claims, the employee asserts that that the employer discriminated because he or she engaged in activity protected by the FMLA. As with any claim that involves an element of intent, the focus of litigation is often on whether the plaintiff can prove that the employer acted "because of" the prohibited factor – in this case retaliation or discrimination because the employee exercised rights under the Act.

Case law has fleshed out the burden of proof beyond the prima facie case noted above. A plaintiff does not need to establish "but for" causation, but rather a showing that an employer's retaliatory motive "played a part in the adverse employment action" is sufficient. *Wisbey v. Lincoln*, 612 F.3d 667, 676 (8th Cir. 2010); *Sumner v. United States Parcel Serv*., 899 F.2d 203, 208-09 (2d Cir. 1990).

One strong indicator of how often the issue of discriminatory intent is litigated is the fact that the American Law Report summary of cases on this issue, 190 A.L.R. Fed. 491 (orig. published in 2003), prints out at 137 pages. For litigators looking for a survey of cases, broken down by particular positions, this is an excellent resource with blurbs on nearly 350 court decisions.

Burden-shifting analysis. Lawyers who litigate traditional employment discrimination claims (race, sex, age, disability, etc.) will be quite comfortable with the analysis courts undertake with such claims, as it follows the traditional *McDonnell Douglas* burden-shifting analysis, with some variations.

Knowledge of protected conduct. One frequent defense to FMLA claims is that the employer's decision-maker(s) were not aware of the FMLA request. Defense counsel should be careful to preserve such ignorance during discovery and pre-litigation counseling. Plaintiffs' counsel, on the other hand, should push hard in discovery and in examination of their own clients, to uncover evidence that will establish that the decision-makers did in fact know of the request for, or the taking of, protected leave.

Sequencing. A common scenario in FMLA claims is that the employee claims FMLA leave during or after the employer initiates discipline against the employee, creating a "chicken and egg" question of which came first.

> Practice point – Defense counsel should work in discovery and at trial, if needed, to document that the disciplinary decision came first (even if implementation comes later), and/or obtain an admission from the employee that undisputed facts existed which justified termination. If this can be accomplished, the employer may be able to defeat an opportunistic and belated FMLA claim. *See, e.g., Gipson v. Vought Aircraft Industries, Inc*., 2010 WL 2776842 (6th Cir. July 13, 2010) (where employee admitted that he "flatly disobeyed" a "direct order" of his supervisor, which was indisputably grounds for termination, his subsequent filing for FMLA leave did not insulate him from discipline).

Plaintiffs often try to use timing to establish causation. Extremely close timing may establish causation by itself, where the adverse action comes immediately "on the heels of" protected conduct under the FMLA. Mere temporal sequencing, however, generally is not enough to establish a causal connection, and the plaintiff will need to produce additional evidence of a causal nexus. *See, e.g., Wisbey*, 612 F.3d at 676.

Other evidence of causation. Other evidence of the causal connection includes direct statements of discriminatory intent (which are still somewhat common in FMLA cases, unlike other discrimination cases), hostility and antagonism following protected conduct, and pretext in the stated reason for the challenged adverse action.

Stray remarks relating to FMLA leave also may be used to show a causal connection or discriminatory intent.

Treatment of comparators also is commonly cited by both plaintiffs and defendants on the issue of causation and/or pretext. The plaintiff, of course, will seek out evidence of disparate treatment of similarly situated persons, and/or discrimination against others who took sick leave or FMLA leave. The defense, in contrast, can often cite repeated approvals of FMLA leave for the plaintiff or other employees to disprove claims that it discriminates against employees who take FMLA leave.

VI. Other Laws and Their Interaction with FMLA Lawsuits

FMLA suits often include claims under other state or federal laws.

A. State Claims

At least 23 states have their own family leave laws, and plaintiffs' counsel should research those laws – and their applicable statutes of limitation – to determine if they provide additional relief and/or have different substantive or procedural requirements.

Employees also may be able to bring state tort claims, such as intentional infliction of emotional distress.

State anti-discrimination laws also may be applicable, including those that protect employees based on disability, pregnancy, gender and family status.

Finally, plaintiffs' counsel should consider workers compensation claims, including potential retaliation claims. The positions taken by the parties in such claims may contradict or undermine any position taken in the FMLA litigation.

B. Federal Claims

Federal laws that may provide overlapping protection include:

- ***The Americans with Disabilities Act.*** Litigators should analyze and attack such claims independently, element by element, realizing that many conditions that qualify as a "serious health condition" do not rise to the level of a "disability" under the ADA. In addition, the ADA requires an initial filing with the U.S. Equal Employment Opportunity Commission within 180 days (or in cases in which a state anti-discrimination law applies, 300 days). The ADA also has an "undue hardship" defense that does not apply to FMLA claims.

- ***The Pregnancy Discrimination Act.***

- ***Title VII of the Civil Rights Act for sex discrimination.***

- **ERISA.**