Teacher's Manual
Developing Professional Skills: Workplace Law
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Chapter 9: Family Medical Leave Act and Pregnancy

Problem: Customer service company wishes to terminate a pregnant employee due to attendance problems
Legal Rule(s): The Family Medical Leave Act and Pregnancy Discrimination Act
Skill(s): Counseling
Assignment: Research applicability of the FMLA to client's situation and prepare email advising client
Practice Norm(s): Regulatory compliance
Professionalism Concept(s): MRCP 1.2: Fees; MRCP 1.13: Organization as Client
Optional Extension Assignment: Role-play orally counseling client

Legal Rules

FMLA Coverage and Triggering Events

The Family Medical Leave Act (FMLA) requires employers to provide up to twelve weeks of unpaid, job-protected leave per year for qualifying medical and/or family needs. To be subject to the FMLA, employers must have fifty or more employees. To be eligible for FMLA benefits, employees must have worked at least 1250 hours in the preceding year (i.e., more than part-time). It is worth walking students through these threshold questions before moving to the substantive analysis. Although the latter is the primary focus of the exercise, coverage issues are of critical importance in practice. If you are in a jurisdiction with a state leave law, this is a good place to compare the two.

The next question is whether there is a qualifying event. FMLA leave is available for the birth/adoption of a child, the employee's or a family member's serious health condition, or for military exigencies. 29 U.S.C. § 2612(a)(1). Although Benson is pregnant, she will not qualify for leave under subsection (A) until she gives birth. Therefore, she is only protected by the FMLA if her pregnancy-related illness is a "serious health condition" under subsection (D).

Serious health condition (SHC) is a term of art defined under several statutory and regulatory provisions, and the key lawyering skill taught by the exercise is the ability to locate, interpret, and synthesize these provisions. The definitional section of the statute defines SHC as "an illness, injury, impairment, or physical or mental condition that involves -- (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). Whether Benson's pregnancy qualifies thus depends on the meaning of "continuing treatment," which requires examination of the interpretive regulations.

The FMLA regulations contain a definition of SHC in two places, 29 C.F.R. § 825.102 and § 825.113, as well as a definition of "continuing treatment." 29 C.F.R. § 825.115. Most relevant to the problem is subsection (b) of § 825.115, which provides that "a serious health condition involving continuing treatment by a health care provider includes …[a]ny period of incapacity due to pregnancy, or for prenatal care." Per the general definition of SHC under 29 C.F.R. § 825.113, "incapacity" means the "inability to work, attend school or perform other regular daily activities."

Benson is clearly entitled to FMLA leave for her pregnancy-related absences under these provisions, and an attempt to terminate her would constitute interference and/or retaliation under 29 U.S.C. § 2615. The attorney should advise the client to re-designate Benson's absences as authorized FMLA leave, retract or suspend any warnings or disciplinary action taken, and notify Benson accordingly.

Intermittent Use of FMLA Leave

The FMLA also protects Benson's tardiness and other attendance issues (like clocking out early). Where an employee is entitled to leave for a serious health condition, the employee may take the leave "intermittently or on a reduced leave schedule when medically necessary." 29 U.S.C. § 2612(b)(1). According to the regulations, "medical necessity" means "there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule." 29 C.F.R. § 825.202(b). Intermittent and reduced leave are commonly used to address situations like Benson's, where symptoms manifest intermittently, as well as to accommodate medical appointments for employees who require a continuing treatment regime. The regulations specifically note that a "pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness." 29 C.F.R. § 825.202(b)(1).

The significance of intermittent leave for an employee is that he or she need not take unnecessary full-day absences, which may be unpaid and will count against the employee's twelve-week entitlement. The employee can use intermittent leave for periods of as little as one hour. 29 C.F.R. § 825.202(b)(1). This is especially significant to an employee like Benson, who likely wishes to reserve as much of her twelve-week entitlement as possible for use post-partum.

For the employer's part, it may temporarily transfer the employee to a different position "which better accommodates recurring periods of leave." 29 C.F.R. § 825.204. The position must have equivalent pay and benefits. This might be a good option for the employer in this situation if, for instance, there are positions in which last-minute staffing switches are less disruptive.

Notice and Designation of FMLA

A covered employee who is eligible for leave has a duty to notify the employer thirty days in advance of the need for leave, provided the leave is foreseeable. 29 U.S.C. § 2612(e)(1). Where the leave is unforeseeable, however, the employee need only give such notice as is practicable under the circumstance. 29 C.F.R. § 825.303. An employee does not need to explicitly invoke the FMLA if it is the first time they are seeking leave for an FMLA-qualifying reason. He or she need only "provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." 29 C.F.R. § 825.303(b). Here the fact that the supervisor knows that Benson is pregnant is sufficient to put the company on notice that Benson's absences are FMLA-qualifying.

The Pregnancy Discrimination Act (PDA) and Title VII

The problem does not contain any facts explicitly suggesting a basis for pregnancy discrimination under Title VII. However, a proactive management attorney should always consider and advise about the PDA when counseling an employer about a pregnancy-related personnel issue. The problem is also an opportunity to compare the different legal rights/obligations created under the two relevant federal statutes. The FMLA imposes a minimum labor standard: employers must provide twelve weeks of leave

to any qualifying employee. The PDA is an anti-discrimination provision: it prohibits differential treatment of pregnant and non-pregnant employees who are similarly situated in their ability to perform their job. This means the employer cannot respond more harshly to Benson's attendance problems than it would to comparable attendance problems by a non-pregnant employee, but it is free to treat both employees equally "badly." *Troupe v. May Dep't Stores*, 20 F.3d 734, 738 (7th Cir. 1994).

On its face, it appears that Spencer, Benson's supervisor, is legitimately (albeit unsympathetically) responding to Benson's attendance problems as opposed to her pregnancy. At the same time, the problem does not explain the company's policy regarding poor attendance; we know only that the company gives significant discretion to front-line supervisors. This can be problematic because too much discretion can create opportunities for unconsciously biased decision-making. At a minimum, the attorney should ask the client what the company's usual practices are in responding to attendance problems such as these and advise the client not to treat Benson any differently than it would any other employee. This includes granting any special requests Benson might make if the employer has made similar accommodations for other workers. *See Young v. UPS,* 135 S. Ct. 1338 (2015).

Practice Norms

Regulatory Compliance

Regulatory compliance work is a staple of management-side employment practice. In this chapter, students are tasked with ensuring compliance in the context of a developing personnel matter. Management lawyers also typically audit and review clients' general policies and practices for compliance purposes and to identify and mitigate future liability risks. (Chapter 2, involving the revision of an employer's personnel manual, presents this practice context.) In both contexts, lawyers are working preventatively to avoid disputes and liabilities before they occur.

Providing Unfavorable Advice

The problem places the student in the position of having to tell a client what they don't want to hear: In this case, the employer will have to tolerate Benson's sporadic and unpredictable attendance for the foreseeable future (at least until she uses a cumulative total equaling twelve weeks). It can be difficult and uncomfortable to convey this message, particularly when dealing with powerful or important clients.

The professor can discuss the importance of understanding and demonstrating understanding of the client's predicament. Being sympathetic when talking to a client is not always intuitive to students, who are quick to focus on the law, particularly when the client is a corporation. One can encourage the students to imagine the frustration and practical challenges Benson's supervisor is likely to experience in trying to comply with the student's advice.

Another point to make is that business clients seek an attorney who is a constructive problem solver. Business clients want to know what they *can* do, not what they cannot. At the end of the day, the client has no choice but to accommodate Benson, yet it is important that the attorney explain to the client its rights under the law, including the company's ability to transfer Benson to another position. The client might also be comforted to know that Benson's FMLA time can be counted consecutive with

any paid or unpaid leave that the employer provides as a matter of its own personnel practices, including any paid maternity time, assuming the employer has drafted its policies accordingly.

Professional Ethics

Model Rule 1.5 – Fees

The problem puts students under pressure to find an answer quickly and avoid expensive legal fees. The legal question posed is one that most experienced employment lawyers would be able to answer off the cuff, but it can be time consuming for one not accustomed to working with the regulations. A common student misstep is to spend time analyzing whether the employee's pregnancy-related illness satisfies the highly technical definition of "incapacity and treatment" under 29 C.F.R. § 825.115(a) before discovering that continuing treatment explicitly includes "any period of incapacity due to pregnancy" under subsection (b). This error is easy to make in an on-line research environment where students (and lawyers) frequently forget to "scroll down."

MRPC 1.5 prohibits an employer from collecting an "unreasonable fee" and lists several factors by which to judge what is reasonable. This is an opportunity to talk about a variety of issues related to attorneys' fees for management-side work. (Note Chapter 1 provides an vehicle for discussing fees in employee-side representation.) Possible points for discussion include how fees are set (rate hierarchy from paralegal to equity partner), fee structures (hourly versus fixed), and the common practice of "writing off" junior attorney time. On the subject of reducing fees, one can discuss how to develop and improve research efficiency and weigh the benefits of a phone call in lieu of an email as a time saving (and relationship management) device.

Model Rule 1.13 – Client as Organization

In any exercise in which students are put in the role of management attorney it is worth reminding them who their client is. What is salient in this problem is that the interests of the front-line supervisor, and perhaps the HR manager as well, both of whom are agents of the employer, do not align with the entity's larger goal of avoiding legal liability. The professor can ask what the attorney should do if the HR manager insists on going forward with the plan to terminate Benson despite advice to the contrary. Under MRPC 1.13(a), if an attorney for an organization knows that an agent of the organization intends to commit "a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization." Terminating Benson would certainly be a violation of law imputable to the organization; but it seems unlikely that the termination of a single rank-and-file employee, however unlawful, would "result in substantial injury" to the company. The rule continues: "unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization." Regardless of the whether MRPC 1.13 actually compels the attorney to go up the chain of command, it is useful to explore with students how they would handle the situation given the choice. It can be difficult for the attorney to satisfy his or her duty to the organization without tarnishing his or her relationship with the organizational agent, the HR manager, who provides the attorney with the company's business.

Add-on Exercise

One can build on this problem by having the students role-play advising the client. Prudence dictates that the attorney follow up his or her email response with a phone call to ensure that the client understands and abides by the law. A follow-up call is also an opportunity to assuage concerns and reinforce the relationship following the delivery of advice that the client is loath to hear. Students should anticipate the client's possible questions or reactions and plan how they will respond both in terms of the law and the relationship. Encouraging the person who plays the client to express negative emotions (e.g., skepticism, frustration, dismay) can create an effective teaching moment.