Intermittent Concerns

Leave Law Leaves Employers Wanting Changes

By Rebecca Patrick

While it may not have the sizzle of boxing’s “Thrilla in Manilla,” the outcome of a bout brewing over one of the most talked about federal labor laws could pack a punch that’s felt for decades down the road.

Employee advocates and business groups have taken to their respective corners over the Family Medical Leave Act (FMLA) signed into law by President Clinton in 1993. Employers term their stance as fine-tuning a law that is too open for interpretation and possible employee abuse. Employees fear that the law’s basic intent – offering protection to working families in time of a health crisis – will diminish.

At the heart of the debate: the section on unscheduled intermittent leave, which can be as little as one hour depending on the company’s pay practices, and the definition of “serious illness.”

Since FMLA was enacted, more than 50 million Americans have benefited from job-protected leave. On the flip side, in 2004, adhering to the Act cost U.S. businesses $21 billion in lost productivity, continued benefits and net labor replacement, according to the Employment Policy Foundation.

Weighing experiences from both sides, the U.S. Department of Labor (DOL) will determine what, if any, revisions are ultimately made. Possible proposals for amending sections of the law are expected from the DOL this summer, with a subsequent comment period for public input.

Discussing FMLA’s benefits and challenges, its impact on Hoosier companies, as well as suggested possible revisions are:

ABCs of FMLA

The FMLA umbrella covers serious illnesses and other life events. Eligible employees of companies with over 50 employees have the right to take up to 12 weeks of unpaid leave for their own serious health condition, that of a parent or child, or for family leave including maternity, adoption or newborn care. The law further requires that employers restore a worker to his or her previous job upon their return from covered leave.

When Congress brought forth this statute more than a decade ago, the intent was “to try to balance the needs of employees with their family and also recognizing employer concerns,” recounts Siepman. The content was straightforward, but the enacted provisions from DOL were not.

“The result was more broad sweeping and ambiguous in certain areas than many employers had anticipated,” Siepman asserts. “Straightforward requests for maternity leaves or other types of leaves related to medical conditions – while obviously causing some disruption to the employer – typically are fairly workable.

“The intermittent leave requests and the dynamics of various employers do create a lot more of a burden,” he declares.

Just how heavy is the load?

The 2004 Employment Policy Foundation FMLA employer survey, released this spring, provides a snapshot of usage trends:

• Multiple episodes of leave are sharply on the rise with 35% of workers who used FMLA doing so more than once annually, compared to 25% in 2000
• In total, survey respondents reported 14.5% of employees took FMLA in 2004
• Those in health care, manufacturing, utilities and telecommunications industries were more likely to take FMLA time than workers in other industries

Rising claims are of no surprise, Siepman says. “Unlike many of the other labor issues, everybody at some time may well fall under the FMLA.” At his firm – Ogletree Deakins, which specializes in labor and employment law – Siepman puts the ratio of FMLA questions to all other labor employment topics at 2 to 1.

Pile knows firsthand how overwhelming FMLA activity can be. This year he expects Deaconess Health System, which employs approximately 3,400 workers, to have more than 1,000 FMLA requests – both intermittent leave and the more traditional longer-term periods.

“I have two people that do nothing but administer our FMLA policy for employees, so the cost is huge to us.”

Beyond the specific industries noted above, individual users of FMLA are seen across the spectrum from entry-level personnel to those in executive positions. “Whether I’m making $10 an hour or $30 an hour, if I need to use the benefit, I’m probably going to,” Siepman notes.

All about intermittent leave

Regardless of who’s using FMLA, the portion of it that has been taken full advantage of, reports the group, is the right for intermittent leave.

“When they first talked about the FMLA, the intermittent was always the example of someone who had scheduled cancer treatments once a week or every other week. So in my mind I always thought of it as just being for those exceptional kind of circumstances,” Pile says.

“But I think it’s just become more liberally interpreted, whether it’s case law or regulations, plus I think as an employer, we are concerned about making a liberal interpretation, so we err on the conservative side.”

“By far it’s the portion that causes the most problems and where instances of abuse occur,” declares Raymond, who handles the Indiana Chamber’s employment law helpline for its members. “It’s to the point where half-seriously I refer to the FMLA as the Friday-Monday Leave Act because I hear from employers, ‘we get an awful lot of migraine headaches and so forth on Fridays and Mondays.’ ”

Unlike other forms of FMLA – like maternity leave or recovery period for a major illness – the timing of intermittent leave is abrupt, which can wreak havoc on scheduling and as Raymond puts it, “is what really drives employers wild and batty.”

Perhaps nowhere is that more true than a hospital. “When employees call in with virtually no notice and say they’re taking an intermittent FMLA day and/or leave before their shift is up, saying they’re taking an intermittent FMLA, it puts us in a very difficult situation to have adequate patient care when your staff can change that quickly for you,” Pile asserts.

“Many of our department managers will actually schedule people for mandatory overtime in anticipation of someone calling in on FMLA leave. So now you have somebody sitting at home having to wait by the phone to see if they’re going to be called to work. So, it’s actually changing how we would treat our own staff to accommodate the law for the people that are going to be using it.”

Breedlove, while acknowledging that intermittent leave can prove problematic, believes it needs to remain broad-based because medicine is not an exact science and people and circumstances are different.

“An office worker gets an inner ear infection, does that affect his work and his duties as it would an ironworker that’s working on a building project and getting ready to walk on an 8-inch beam up 22 floors? “Probably not, so I think there has to be some scope or a range of scope for the individual and the type of work he’s doing at the time and related to the illness,” he offers.

Employees can’t take most forms of intermittent leave without doctor’s authorization.

“You know, it’s always been the case I think that somebody could get a doctor to write a note that he/she was sick on Friday. Doctors want to be able to help their patients,” Siepman elaborates.

“One of the more troubling developments we’re starting to see now are requests for employees who are in exempt positions – whose normal work week is 50 to 60 hours – and now they’ve got a doctor saying they can work only 40. Well, how do we (as employers) deal with that?

A few years ago, Raymond advised an Indianapolis company that had 85 employees; 17 of them were on FMLA, eight from the same doctor for migraine headaches.

Adds Pile, “Doctors take the employees side of this. They’re not really concerned about our side of it because guess what? They’re exempt from the law. They never have to experience it; they don’t have to live with it.”

Questionable circumstances

Pile has one case in particular – in which he double-checked with the doctor for verification – that seemingly tests the boundaries of intermittent leave and what Congress intended.

“We had an executive secretary with obsessive compulsive disorder, so the doctor gave her an intermittent leave to be off and to arrive at work any time, any day, as late as she needed to. For almost a year, the director of that department had to cope with never knowing when her employee was going to show up,” he relays.

That instance aside, Pile wouldn’t necessarily say there is a lot
of abuse regarding intermittent leave – though what does happen reverberates throughout a company – rather “it’s broadly interpreted and folks see it as an entitlement, and I think that’s the mentality that permeates our organization and I think a lot of health care.”

He likens the attitude to a period when workers had to take sick days or lose them. “I’ve got my 12 weeks every year, and if I don’t need the money necessarily, I will take my FMLA and I will continue to get my benefits and work when I want to work,” Pile claims.

The frustration for healthy employees who come to work can be quite evident.

“Employees know who is using it and who is abusing it long before management knows that, and that’s hard to deal with. We have a hotline – an anonymous number – that employees can call in on with questions, and we’ll frequently get questions about how unfair it is that they are working over extra when others are off.

“People have called in and said: How can they be off on (intermittent) leave and working as a cashier at Wal-Mart? How do you address that with that employee? The one on leave is going to say, ‘Well, my migraine cleared up so I went to my other job,’ ” Pile states.

For the healthy employee, it can lead to the prerogative, ‘Well I might as well have it (FMLA), too. I’m tired and so forth,” he notes.

When employers suspect a problem with the system, what can they do?

“Typically, the first thing to do after you’ve determined the employee is eligible for leave is the certification process. The FMLA specifically allows the employer to get a second opinion (from an independent doctor), and I think it’s particularly important that an employer be vigilant in the intermittent and reduced schedule leave to exercise that right if it appears warranted,” Siepman explains.

“If you get to the issue where you’re hearing from the co-workers that Joe was seen doing this or that while on FMLA, then at some point the employer needs to think about whether it’s going to engage in investigative activities. That also may give reason to get a recertification. If an employer is not vigilant in going about doing those things, then it allows greater opportunity,” Siepman states.

Definition and education

Intertwined with intermittent leave is the whole idea of what constitutes a “serious illness,” which triggers an employee to obtain leave under FMLA.

Many employers like Pile feel the definition needs to be narrowed down to truly serious health conditions to reduce the number of people who take advantage.

At the other end is Breedlove who asserts, “every illness or injury could affect the employment or the employee differently depending on what he does for a living,” making it difficult to issue any blanket classifications.

Raymond understands both sides. “Particularly in a health care situation if you’ve got people that are sick, having them come to work and maybe spread something … you don’t want them in a hospital around patients who may be in a weakened condition.”

Breedlove concludes. “I hope it doesn’t get too restrictive to where it no longer becomes applicable for an employee to use it.”

Vagueness in the FMLA is matched by its complexity. Therefore, those who understand it – typically those in a more sophisticated/educated workforce – use it more.

“Our staff knows it very, very well and uses it to its fullest. We have employees on the Internet, reading cases. It’s just amazing the education that is out there for people who want to find out about it,” Pile offers.

On the employer side, large companies know the varied facets, but there is a particular lack of knowledge among the smaller companies, observes Raymond.

“For a small company of 50, 60, 70 employees that doesn’t have a full-time HR person, there’s a lot of confusion. That’s where the bulk of my calls are from, these size companies that know something about it but not a whole lot. You see a lot of interplay that gets very confusing between worker’s comp leave, the ADA (American with Disabilities Act) and so forth.”

Siepman concurs. “There are so many different nuances to take into account. Is it a certification
or a recertification? What can you do in that circumstance? What type of leave is the employee requesting? Is it for them or for someone else? Although you typically can get to an answer, for a company’s in-house staff to be prepared to deal with these issues it is very, very difficult.”

As a lawyer whose job is knowing all the ins and outs of FMLA, Siepman admits, “I still have to go back and pull the regulations or look at issues and consult with people at times to be able to give solid answers and help to guide the clients. It’s a difficult statute with which to try to make certain you’re doing the right thing.”

Final hits

Raymond would like to see two timing issues amended. One is the total length of annual absences allowed under FMLA. “I don’t know where they came up with 12 weeks. That’s almost a fourth of a year that you can take off, so I would maybe cut it back to eight weeks.”

Regarding intermittent leave, he proposes an increase in the leave minimum from one hour to four hours. “If I’m at work and decide I want to take off at 3:00 p.m. for something because now I have a headache, I’d get charged four hours rather than an hour or two,” he describes.

Pile agrees that the one-hour threshold is low but worries that a shift to essentially a half-a-day threshold could backfire and actually be more of a burden to employers.

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Breedlove would like to see paid leave – which was introduced, but died, a few years ago at the Statehouse. Currently, California has the nation’s only paid family leave law, which was passed in July 2004.

“I think we’ve isolated here on the negatives and haven’t looked at the positives to where we are trying to be a nation of family-orientated values and that if somebody becomes ill – be it themselves or within the family – that they’re treated with some respect and dignity,” Breedlove contends.

Meanwhile, Pile wonders when enough is enough. “I mean you provide benefits, you provide pay, you follow the FMLA, you do all those things. At what point does that stop? I think you start looking at paid leave and saying, ‘is that the employer’s responsibility or is that the individual’s responsibility to plan for those times – maybe save – rather than making the employer the one.’”

“Healthy people are the ones who continue to work and continue to make up the difference for the people that are off. I think at some point in all of this (with FMLA), you’ve got to look at a fairness issue from that employee side too,” Pile asserts.

Despite the legitimate problems, Siepman believes, “At the end of the day, most people use FMLA appropriately, and employers, most of the time, frankly, are happy to be able to provide the benefit.”

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