LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

FEBRUARY 5, 2024

Little-Known FMLA Facts, Part II:

Lesser-Known FMLA Traps

This is the second installment of a two-part series on little-known FMLA facts. The prior installment covered under-utilized FMLA tools. This segment covers FMLA traps that can catch even experienced HR personnel.

Lesser-Known FMLA Trap #1: Missed *In Loco Parentis* Family Connection

The FMLA allows eligible employees to take leave to provide care for a parent, spouse, or minor (or qualifying disabled adult) child. The parent/child relationship may be established by birth, adoption, foster placement, step-relationship, legal ward status, or an *in loco parentis* relationship. An adult acts *in loco parentis* to a child when they assume child-rearing burdens like providing housing, making schooling decisions, cooking meals, transporting the child, buying clothes and other necessities, and providing emotional support for the child. There is no strict legal test or legal certificate an adult can obtain to prove the existence of such a relationship. While many times the adult acting *in loco parentis* will be a relative stepping in for an absent parent, an *in loco parentis* relationship can exist without a prior familial relationship and without the need for a parent to be absent. There is no limit on the number of adults who may qualify for *in loco parentis* status for a child at any given time or over the duration of childhood. *In loco parentis* FMLA rights apply both to defining who an employee regards as a parent and who may be regarded as the employee's child. The DOL updated its *in loco parentis* guidance in 2023 to emphasize these points and to suggest that while an employer may ask an employee for information about the basis of the claimed *in loco parentis* relationship, the employee does not have to go further than asserting that such a relationship exists/existed. *See* Fact Sheet 28B (with respect to an employee's seeking leave for a child whom they are acting *in loco parentis*) and Fact Sheet 28C (with respect to an employee's seeking leave for adults who acted *in loco parentis* to an employee during their childhood).

Lesser-Known FMLA Trap #2: Failing to Calculate FMLA Based on the Workweek

FMLA is a 12-week, 480-hour entitlement, right? Not quite. The first part, the 12 weeks part, is mostly right (it's 12 workweeks if you want to be exacting). Four-hundred-eighty hours, though? Well, that only applies to folks scheduled to work 40 hours a week. Now, when someone takes a block of FMLA leave, this is a distinction without a difference. However, when someone is using leave intermittently, especially for partial day absences, the potential for errors abounds. For instance, if an employer is using 480 hours to calculate when a 50-hour/workweek employee exhausts the leave entitlement, that's going to result in a premature claim of exhaustion and a virtually indefensible FMLA interference claim. Additionally, the leave allotment is to be

calculated based on what the employee's schedule *would have* been, if not for the leave use. If an employee's schedule is variable but predictable (e.g., the employee's schedule follows a cycle, or is subject to predictable seasonal ebbs and flows), the employer must use this as a basis for its projection. If the employee's schedule is truly unpredictably variable, the employer is to determine the hourly workweek equivalent by taking a 12-month average of the employee's worktime, including any leave hours.

Lesser-Known FMLA Trap #3: Conflicting Calendars

Do you have the same employment policies in multiple places and formats? (Don't feel bad, everyone should answer yes, because you have to have certain policy and policy equivalents in multiple places like physical bulletin boards, handbooks, intranets, etc.). Are these all revised simultaneously in an organized way? (Don't feel bad, you're not alone). Your company's FMLA year (rolling back, rolling forward, calendar year, based on employee's anniversary date, or some other fixed 12-month period) is required to be posted, in policies, and included in employee notices specific to their FMLA use. If an employer has not been consistent in expressing its FMLA year or has failed to designate an FMLA year at all, then the employee is entitled to any designated FMLA year most advantageous to them. Further, when the employer gets its ship in order or any time it changes its FMLA year or designates its FMLA year for the first time (if it's failed to do so once it became large enough to qualify), it must give 60 days' notice to all employees, and any employees currently on FMLA leave get the benefit of whatever FMLA year is the most beneficial to them.

Side note: what year do we recommend? Rolling forward, with rolling backwards a close second. Although the use of the 26-week allotment of FMLA military caregiver leave is rare, an employer does not have the choice of designating any other type of FMLA year for this type of leave, though employees using military caregiver leave may be eligible for and use the other types of FMLA. So, if an employer consistently uses the rolling forward FMLA year (the year begins on the first instance of employee FMLA use), it eliminates the possibility of juggling multiple calendar methodologies. The rolling back calendar year is the most equitable and intuitive, at least in my humble opinion, because an employee's entitlement to FMLA is calculated each day based on a 12-month lookback.

If your company has any questions or concerns regarding FMLA topics, we at Lehr Middlebrooks Vreeland & Thompson, P.C. are happy to help. Please contact Whitney Brown at (205) 323-9274 or wbrown@lehrmiddlebrooks.com.