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## Impact of the Family and Medical Leave Act of 1993 on the Transit Industry

*This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Laura D'Auri and Margaret Hines. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.*

### THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

### APPLICATIONS

Transit officials have expressed concern that the requirements of the Family and Medical Leave Act of 1993 could seriously affect transit operations. Also, these officials believe that there are difficulties making determinations on employees' claims of "serious medical conditions."

This report presents information collected from transit agencies, and gives the researchers' analyses of the perceived legal issues.

The report should be helpful to attorneys, administrators, human resources officials, labor specialists, managers, and supervisors.

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## IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993 ON THE TRANSIT INDUSTRY

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### I. INTRODUCTION

This survey study was commissioned due to concern expressed by some transit officials that problems related to implementation of the Family and Medical Leave Act of 1993 (FMLA) could impact the ability of transit agencies to meet transit schedules, and that errors on the part of agencies in complying with the Act's many complex provisions could lead to time-consuming administrative burdens<sup>1</sup> and litigation, with resulting compensatory damage awards and attorneys' fees. In extreme cases, punitive damages may be awarded in a suit under the FMLA.<sup>2</sup>

In 1996, an early commentator on the FMLA stated that "an entirely new cottage industry of litigation" has been created.<sup>3</sup> Another view found that the number of FMLA lawsuits was "likely to rise dramatically,"<sup>4</sup> which has only partially been borne out by the ever-increasing number of leaves taken and filings under the Act.<sup>5</sup>

When the Commission on Family and Medical Leave submitted its findings to Congress on April 30, 1996, as provided for by the Act, the impact of the FMLA on employers was assessed according to factors related to the size of an employer (i.e., the number of employees) rather than the type of industry affected. The only substantive distinctions as to types of industry concerned educational providers.

The effectiveness of the public transit industry is greatly dependent upon its ability to properly regulate and manage human resources. One of the goals of the present study was to determine whether the transit industry is encountering problems, of scheduling re-

straints and other factors peculiar to the industry, that should lead to some distinction for the industry under the FMLA.

Other problems that were perceived were 1) the difficulty that transportation managers experienced in interpreting the "serious health condition" that forms the basis for an employee request for FMLA leave; 2) the related difficulty of verifying the validity of the employee's leave request; and 3) the difficulty of integrating the law into the requirements of union contracts. Based on the survey results, by far the greatest of these problems for transportation managers was the first, interpreting the parameters of "serious health condition."

### II. UNDERSTANDING WHAT THE LAW REQUIRES

The Family and Medical Leave Act<sup>6</sup> is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, or for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.<sup>7</sup>

The Act requires federal and state agencies and private employers to provide up to 12 weeks<sup>8</sup> of unpaid, job-protected leave during any 12-month period to eligible employees. The provision of leave requirement applies to employers with 50 or more employees within

<sup>1</sup> For an interesting early article on the FMLA, see Robert J. Aalberts and Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?* 80 MARQ. L. REV. 135 (1996).

<sup>2</sup> See, e.g., *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 765 (1998), vacated and remanded 527 U.S. 1031 (1999); *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988). "Punitive damages are only recoverable for conduct exhibiting malice, an evil motive, or recklessness or callous indifference to a federally protected right." *Lowery*, at 765-66.

<sup>3</sup> Susan A. Bocamazo, *Absent Workers Are Now Suing Under Federal Law*, LAW WEEKLY USA, May 6, 1996, at 16.

<sup>4</sup> Corey E. Fleming, *Family Leave Act: Plaintiff Wins \$58,000 Jury Verdict*, LAW WEEKLY USA, Nov. 4, 1996, at 18.

<sup>5</sup> See, Rochelle Sharp, *Workplace Epidemic: Absenteeism Rises for Third Year in a Row*, WALL ST. J., Feb. 27, 1996, at A1.

<sup>6</sup> P.L. 103-3 (Feb. 5, 1993) 107 Stat. 6, codified at 29 U.S.C. 2601 *et seq.* The Department of Labor regulations implementing the Act appear at 29 C.F.R. 825.100 *et seq.* (1998). On the Internet, the quickest way to access the regulations is through the DOL's Web site, <http://www.dol.gov/dol/asp/public/programs/handbook/fmla.htm>; click on "29 CFR 825."

<sup>7</sup> 29 U.S.C.A. § 2601(b)(4), 29 C.F.R. § 825.101(a).

<sup>8</sup> There is no provision for longer than 12 weeks of FMLA leave, even in the case of "emergencies." Wage-Hour Opinion Letter, FMLA-40, July 25, 1994; *Santos v. Shields Health Group*, 996 F. Supp. 87 (D. Mass. 1998).

a 75-mile radius<sup>9</sup>; however, all public agencies are required to post notice of the Act.<sup>10</sup> Eligible employees are those who have worked for a covered employer for more than 1250 hours during the preceding 12 months.<sup>11</sup> Leave must be granted under the FMLA for any of the following purposes:<sup>12</sup>

1) For birth or adoption of a child of the employee, including foster care<sup>13</sup>;

2) To care for a spouse, child, or parent with a serious health condition;

3) Because of the employee's own serious health condition.

The intent is that each eligible employee is entitled to have 12 weeks of leave for use for the enumerated purposes;<sup>14</sup> however, the Act is not intended to supersede provisions of state or local law or collective bargaining agreements or employer policies that prescribe greater or more generous leave than that required by the FMLA.<sup>15</sup>

It is unlawful for any employer to restrain, interfere with, or deny the exercise of any of the rights granted to employees under the Act.<sup>16</sup> It is also unlawful for any employer to discharge or discipline any employee who files a charge, gives information, or testifies to alleged violations under the FMLA.<sup>17</sup> Most cases seem to arise when an employee is terminated for excessive leave and

files a claim under the FMLA.<sup>18</sup> An employer "shall be" subject to damages equal to wages, salary, compensation or benefits lost, or actual monetary losses sustained by the employee, including interest. Unless the employer can show good faith in the violation (that is, had good reason to believe it was not a violation), an additional amount of liquidated damages may be awarded by the court.<sup>19</sup>

FMLA leave can be taken intermittently or on a reduced leave schedule by an employee who suffers from a covered chronic condition or who is receiving ongoing treatment for a serious health condition.<sup>20</sup> An employee who is taking foreseeable leave based upon planned medical treatment may be asked by the employer to transfer temporarily to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave than the employee's regular position.<sup>21</sup> The employer may not transfer an employee to discourage taking leave or to work a hardship on the employee.<sup>22</sup> The FMLA does not entitle an employee on FMLA leave to any greater rights than employees who have not taken such leave, and nothing in the Act prevents an employer from terminating an employee on FMLA leave, as long as taking the leave is not the cause of the termination.<sup>23</sup>

### Who Is an Eligible Employee?

In order to be eligible, an employee must have been employed for a period of 12 months preceding commencement of the leave<sup>24</sup> and must have worked at least 1250 hours during that period. Vacation, paid or unpaid leave, sick time, and FMLA leaves are not counted toward the 1250-hour requirement, but may be counted toward the 12-month requirement.<sup>25</sup> An employer must be able to clearly demonstrate that such an employee did not work the requisite hours during the previous 12 months to claim that he is not "eligible" for FMLA leave.<sup>26</sup> Part-time employees are covered under the Act, as long as the hourly and 12-month requirements are met, and are considered to be employed each working day of the calendar week as long as they are on

<sup>9</sup> 29 U.S.C. § 2611; 29 C.F.R. 825.104 and 825.105. In order to be eligible, an employee must work within 75 miles of where 50 or more employees are employed. 29 U.S.C. § 2611(2).

<sup>10</sup> 29 C.F.R. 825.108(d) provides in part that "all public agencies are covered by FMLA regardless of the number of employees" as far as the mandatory posting requirements of the FMLA are concerned. The notification requirements are addressed further in the following discussion.

<sup>11</sup> 29 U.S.C. 2612(a); 29 C.F.R. 825.110.

<sup>12</sup> 29 U.S.C. 2612(a).

<sup>13</sup> However, a child custody proceeding may not be covered. See *Kelley v. Crosfield Catalysts*, 962 F. Supp. 1047 (N.D. Ill. 1997).

<sup>14</sup> 29 U.S.C. 2612(c) and (d); 29 C.F.R. 825.100 and 825.207. See also, H.R. REP. No. 103-8, 103d Cong., 1st Sess. (1993) and 139, pt. 2 CONG. REC. H1997 (daily ed. Feb. 3, 1993).

<sup>15</sup> 29 C.F.R. 825.700 and 825.701; see also testimony of Congressman Becerra, 139, pt. 2 CONG. REC. H1997 (daily ed. Feb. 3, 1993). Further, the Act did not apply to employees under a collective bargaining (CBA) agreement in effect on the effective date of the Act until the CBA expired or February 5, 1994, whichever was first. 29 C.F.R. 825.102(a) and 825.700.

<sup>16</sup> 29 U.S.C. 2615(a).

<sup>17</sup> 29 U.S.C. 2615(b). After a district court dismissed an action for failure to state a claim, the First Circuit considered the issue of eligibility of a prospective employee and declared that the FMLA protects both prospective and former employees (judgment for job applicant who claimed employer refused to hire him due to his having taken FMLA leave in the past). *Duckworth v. Pratt & Whitney*, 152 F.3d 1 (1st Cir. 1998). But see cases herein (Sec. IV) on former employees where employer has no notice while employee is on the job.

<sup>18</sup> See, for example, cases cited in Sec. IV herein.

<sup>19</sup> 29 U.S.C. § 2617. A 2-year statute of limitations applies but if the violation is willful, the statute of limitations is 3 years (29 U.S.C. § 2617(c)).

<sup>20</sup> 29 U.S.C. § 2612(b).

<sup>21</sup> 29 U.S.C. § 2612(b)(2).

<sup>22</sup> 29 C.F.R. 825.204(d).

<sup>23</sup> 29 U.S.C. § 2614(a)(3); 29 C.F.R. 825.216(a); *Santos v. Knitgoods Workers Union*, 1999 WL 397500.

<sup>24</sup> The 12-month period need not be consecutive. 29 C.F.R. § 825.110(b).

<sup>25</sup> 29 C.F.R. 110; *Robbins v. Bureau of National Affairs, Inc.*, 896 F. Supp. 18 (D.D.C. 1995); *Wage-Hour Letters FMLA-18*, Nov. 15, 1993; *FMLA-46*, Oct. 14, 1995, and *FMLA-70*, Aug. 23, 1995.

<sup>26</sup> 29 C.F.R. 110(d).

the payroll.<sup>27</sup> The amount of leave for a part-time employee is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule.

Leave is limited for each employee to a total of 12 weeks during any 12-month period. A husband and wife employed by the same employer may be limited to an aggregate of 12 work weeks for birth or adoption of a child, or to care for a spouse, child, or parent.<sup>28</sup> The 12-month period may be calculated by the calendar year, or by any fixed 12-month "leave year," such as a fiscal year. The 12-month period can also be measured forward from the date any employee's first FMLA leave begins, or a "rolling" 12-month period can be measured backward from the date an employee uses any FMLA leave.<sup>29</sup>

### Intermittent Leave

Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason; for example, continuing treatment for a single illness or injury.<sup>30</sup> An employer may limit leave increments to the shortest period of time used by the payroll system to

<sup>27</sup> 29 C.F.R. § 825.110.

<sup>28</sup> 29 U.S.C. 2612(f). However, this restriction does not apply to unmarried couples working for the same employer. Wage-Hour Opinion Letter, FMLA 66. July 19, 1996.

<sup>29</sup> 29 C.F.R. 825.200(b). An explanation of the calculations allowable to determine what constitutes a 12-month period is given under 29 C.F.R. 825.200(c):

Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after the completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken 8 weeks of leave during the past 12 months, an additional 4 weeks of leave could be taken. If an employee used 4 weeks beginning February 1, 1994, 4 weeks beginning June 1, 1994, and 4 weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to 4 weeks of leave, on June 1 the employee would be entitled to an additional 4 weeks, *etc.*

Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements. 29 C.F.R. §825.200(d)(1).

<sup>30</sup> 29 C.F.R. 825.203(a); *see, also*, *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998).

account for absence or leave.<sup>31</sup> Intermittent leave may be taken when medically necessary for planned or unanticipated medical treatment for, or recovery from, a serious health condition of the employee or a family member.<sup>32</sup> In the case of leave taken after birth or placement of a child, intermittent leave may be taken only with the agreement of the employer.<sup>33</sup>

In order to qualify, the employee who is aware of the need for leave in advance must provide 30 days' notice and a "statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule."<sup>34</sup> The required notice by the employee is addressed in more detail in the following sections.

### Required Notice by Employer

Covered employers must post notice of the rights afforded to employees under the FMLA, and failure to do so results in a penalty of \$100 per violation.<sup>35</sup> The final regulations clarify that "all public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year." However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer "employ 50 employees at the worksite or within 75 miles." Therefore, a public agency must comply with the mandatory posting requirement of the FMLA, even if the agency has no eligible employees.<sup>36</sup>

Employers must explain the rights available to the employee, which can be accomplished through the employee handbook,<sup>37</sup> or can be given in writing at the time the leave is designated. In the case of intermittent or reduced schedule leave, only one such notice from the employer is required unless the circumstances

<sup>31</sup> 29 C.F.R. 825.203(d); Wage-Hour Opinion Letter, FMLA-42 August 23, 1994.

<sup>32</sup> 29 C.F.R. 825.203(c); *see also* 29 C.F.R. 825.117.

<sup>33</sup> 29 C.F.R. 825.203(b). Agreement is not required in the event the mother or child has a serious health condition following birth or placement.

<sup>34</sup> 29 U.S.C. § 2613(b)(6).

<sup>35</sup> 29 U.S.C. § 2619(b).

<sup>36</sup> 29 C.F.R. 825.108(d).

<sup>37</sup> 29 C.F.R. 825.301. 825.301(a)(1) clearly states that if the employer *has* a handbook, FMLA rights must be included. However, *see Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560 (D.S.C. 1997) [summary judgment for employer in spite of failure to give notice, as employee had received all the benefits offered by the Act—he was permitted to take leave for his knee injury until being certified by doctor to return to work without restrictions, he was allowed to maintain medical and other company benefits while on leave, and was reinstated to his former position.] If the employer does not have a handbook, notice can be accomplished in writing. 825.301(a)(2). The notice must be in a language in which the employee is literate. 825.301(b).

change.<sup>38</sup> The notice of employee rights and obligations, which must be provided to employees requesting FMLA leave, is described in the regulations, and a sample is given in the appendix to the regulations.<sup>39</sup> A requirement for medical certification of a serious health condition, the right or requirement to substitute paid leave, a statement that the requested leave will be FMLA leave, and the right to restoration to the same or similar position upon return from leave are among the most important enumerated items in the notice (there are others).

It is the responsibility of the employer to designate leave, whether paid or unpaid, as FMLA-qualifying, and to give notice to the employee of the designation. An employee taking leave must explain the reason for the leave so the employer can make this determination, but the employee need not mention FMLA specifically; the employer has the duty to inquire further when necessary.<sup>40</sup> In a Tennessee case, the court found that an employee's notice to the employer that "her daughter was sick" was sufficient to give notice that the leave potentially qualified under the FMLA.<sup>41</sup> Verbal notice, given twice, was found sufficient by the court where the employer was well aware of the employee's condition in *Rhoads v. Federal Deposit Insurance Corporation*.<sup>42</sup>

Failure by the employer to designate leave as FMLA-qualifying cannot be corrected by designating the leave retroactively.<sup>43</sup>

It is vital that employers meet the posting and notice requirements; failure to do so means the employer cannot take action against the employee for noncompliance with any provisions required to be set forth in the notice, or for failure to furnish advance notice of the need for FMLA leave.<sup>44</sup>

### Substitution of Paid Leave

FMLA leave is generally unpaid, although the employer may require or the employee may elect substitution of accrued paid leave for part or all of the FMLA leave period. This paid leave may be vacation, personal leave, or medical or sick leave.<sup>45</sup> An employer may require substitution of accrued vacation time before sick time to which the employee is entitled under the FMLA

as long as employees are treated consistently,<sup>46</sup> and an employer may require an employee to use all accrued paid leaves before making unpaid leave available.<sup>47</sup> The employee must be notified within 2 business days of giving notice of the need for leave that the paid leave is designated and will be counted as FMLA leave. The notice may be oral or in writing, but oral notice should be confirmed in writing no later than the following payday.<sup>48</sup> However, workers who are receiving workers' compensation or short-term disability benefits during an FMLA leave cannot substitute other paid leaves in order to be made "whole."<sup>49</sup>

### Obligations of the Employee

In the case of foreseeable leave, such as for the birth or adoption of a child, or for planned medical treatment, the employee must give at least 30 days' advance notice.<sup>50</sup> In the event such notice is not "practicable" because of a "lack of knowledge of approximately when leave will be required to begin, a change of circumstances,<sup>51</sup> or a medical emergency," notice must be given "as soon as practicable." This means "as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case."<sup>52</sup>

### Notice of Foreseeable Leave

In the case of foreseeable leave, it is the employee's responsibility to consult with the employer in order to make a "reasonable effort" to schedule medical appointments so as not to unduly disrupt the employer's operations.<sup>53</sup> Where the employee makes "no effort whatsoever" to cooperate with the employer in sched-

<sup>46</sup> See *Haggard v. Farmers Insurance Exchange*, 3 WAGE AND HOUR CASES 2d (BNA) 339 (D. Ore. 1996); Charles T. Passaglia, *The FMLA at Four: Insights and Ideas for the Employer Lawyer*, *Labor Employment Review*, 26 COLO. LAW. 102 (1997).

<sup>47</sup> Wage-Hour Opinion Letter, FMLA-33 (March 29, 1994).

<sup>48</sup> 29 C.F.R. 825.208(b)(2) and 825.208(c).

<sup>49</sup> 29 C.F.R. 825.207(d).

<sup>50</sup> 29 U.S.C. § 2612(e) and 29 C.F.R. 825.302(a); see *Baily v. Amsted Industries Inc.*, 172 F.3d 1041 (8th Cir. 1999) and *Satterfield v. Wal-Mart*, 135 F.3d 973 (5th Cir. 1998) for examples where the employer has prevailed because of the employee's failure to give notice for foreseeable leave.

<sup>51</sup> The Fifth Circuit has found a "change in circumstances" need not be medically related or constitute a medical emergency to entitle the employee to give less than 30 days' notice. See, *Hopson v. Quitman County Hospital and Nursing Home*, 119 F.3d 363 (5th Cir. 1997). Plaintiff maintained that a "change in circumstances" was satisfied by her change in insurance coverage. The district court granted summary judgment for the employer as evidence showed that Hopson intended to be absent despite their lack of approval, and therefore the leave was without notification. The Fifth Circuit reversed, finding that what constitutes a "change in circumstances" was a matter for the jury.

<sup>52</sup> 29 C.F.R. 825.302(b).

<sup>53</sup> 29 U.S.C. § 2612(e)(2); 29 C.F.R. 825.302(e).

<sup>38</sup> 29 C.F.R. 825.208(a).

<sup>39</sup> 29 C.F.R. 825.301(b) and Appendix D to pt. 825.

<sup>40</sup> 29 C.F.R. 825.207–208 and 825.302. A New York district court has ruled that an employer "is not required to be clairvoyant," however. *Johnson v. Primerica*, 3 WAGE AND HOUR CASES 2d (BNA) 109, 113 (S.D. N.Y. 1996).

<sup>41</sup> *Bannon v. Oshkosh B'Gosh*, 897 F. Supp. 1028 (M.D. Tenn., NE 1995).

<sup>42</sup> 956 F. Supp. 1239 (D. Md. 1997).

<sup>43</sup> 29 C.F.R. 825.208(c).

<sup>44</sup> 29 C.F.R. 825.300–301.

<sup>45</sup> 29 C.F.R. 825.207–208; Wage-Hour Opinion Letter, FMLA-33, March 29, 1994.

uling medical appointments, his violation of the requirement precludes his prevailing on an FMLA claim.<sup>54</sup> In the case of intermittent or a reduced schedule leave for a foreseeable condition, the employee should advise the employer, upon request, of the reasons for the intermittent leave and the schedule of treatment.<sup>55</sup>

### *Medical Certification Required*

When leave is taken for a serious health condition of the employee, a spouse, child, or parent, the employer may require that medical certification be provided, including the approximate duration of the required care period.<sup>56</sup> This request for certification must be in writing whenever that is required by the notice provision discussed above (29 C.F.R. 825.301). The certification is provided by the health care provider of the person who is suffering from the “serious health condition,” whether that is the employee or a spouse or child.<sup>57</sup> Where intermittent leave or a reduced leave schedule is requested for an employee’s own serious health condition, the certification must state that the employee is unable to perform the functions of the job, and the employer may require that the dates and approximate duration of treatments be certified.<sup>58</sup> When leave is foreseeable and 30 days’ notice has been given, the certification may be required prior to the leave commencing; however, if doing so is not possible despite the employee’s good faith efforts, certification should be provided within the time frame provided by the employer, which must be at least 15 days.<sup>59</sup> Absent 30 days’ notice, the employer should request that medical certification be provided within 2 days of notice of leave or, for unforeseen leave, within 2 days of taking leave.<sup>60</sup> In addition, when requesting certification, the employer must advise the employee of the consequences of failure to provide certification.<sup>61</sup>

If the employer has reason to doubt the veracity of the certification, the employer may request a second opinion from a health care provider representing the

employer, at the employer’s expense.<sup>62</sup> An employer may not directly contact the health care provider, unless the leave is being taken concurrent with workers’ compensation leave and the workers’ compensation statute allows direct contact with the workers’ compensation health care provider, in which case the employer may follow the workers’ compensation provisions.<sup>63</sup> If the certifications from the employee’s and employer’s providers do not agree, the employer may require a third certification from a neutral health care provider, again at the employer’s expense. The third opinion shall be binding. The employee must be furnished copies of the second and third opinions, upon request, and must be reimbursed for out-of-pocket expenses relating to the additional certifications.

Recertification may be requested at a later date if the employer has reason to question the appropriateness of the leave or its duration. However, recertification may be requested only every 30 days unless circumstances described by the previous certification change significantly. For FMLA leave taken intermittently or on a reduced leave schedule, the employer may not request recertification during the period specified on the original certification unless a leave extension is requested, circumstances change significantly, or the employer has reason to doubt the veracity of the certification. The employee must provide the recertification within the time frame set by the employer but no sooner than 15 days following notice of the need for recertification. The recertification is at the expense of the employer, and no second or third opinions may be required upon recertification.

Recertification (“fitness for duty” certification) may also be required upon the employee’s return to work. Notice to employees must be given of this requirement, generally through the employee handbook. However, fitness for duty certification may not be requested prior to return to duty when the employee takes intermittent leave as described in 825.203.

### **Post-Employment Diagnosis or Treatment of Health Conditions**

In the Sixth Circuit, an action based on the FMLA will not lie where plaintiff is diagnosed with a health condition or receives treatment only after employment ends and the employer had no notice of the condition. In *Brohm v. J.H. Properties*,<sup>64</sup> an anesthesiologist was terminated for sleeping during surgery. Although he had sleep apnea, he was not diagnosed until after his termination. Since the record showed that he had not requested leave while he was employed, the Circuit Court affirmed the district court’s judgment for the hospital. In a 1999 case, *Hammon v. DHL Airways, Inc.*,<sup>65</sup> the District Court for the Southern District of

<sup>54</sup> *Kaylor v. Fannin Regional Hospital*, 946 F. Supp. 988 (N.D. Ga. 1996), where the court rendered judgment for the employer after a bench trial on plaintiff’s claim of discriminatory discharge. The court also discusses the strict liability imposed on employers for FMLA violations, and the three methods by which an employee may prove discrimination, in its decision.

<sup>55</sup> 29 C.F.R. 825.302(f).

<sup>56</sup> 29 U.S.C. § 2613; 29 C.F.R. 825.305.

<sup>57</sup> 29 C.F.R. 825.305(a).

<sup>58</sup> 29 U.S.C. § 2613(b)(7); 29 C.F.R. 825.306. See Appendix B of the regulations for an optional form developed by DOL for requesting certifications and second and third opinions from health care providers.

<sup>59</sup> 29 C.F.R. 825.305(b).

<sup>60</sup> 29 C.F.R. 825.305(c).

<sup>61</sup> 29 C.F.R. 825.305(d).

<sup>62</sup> 29 C.F.R. 825.307(a)(2).

<sup>63</sup> 29 C.F.R. 825.307(a)(1).

<sup>64</sup> 149 F.3d 517 (6th Cir. 1998).

<sup>65</sup> 165 F.3d 441 (6th Cir. 1999).



Ohio found that plaintiff failed to establish an FMLA claim, where he was diagnosed and notified his employer of a nervous condition after he had resigned his position as a pilot. He sought but was denied reinstatement, then sued under the FMLA, claiming that DHL had violated his FMLA rights. The District Court held that no FMLA claim will lie where the employer had no notice of the condition during plaintiff's employment, and the Sixth Circuit affirmed.

### Restoration to Position

Upon return to work, the leave employee is entitled to be restored to an equal or equivalent position with equal pay, benefits, and other terms and conditions of employment even if the employee's former position has been restructured or filled.<sup>66</sup> If the employee is unable to perform an essential function of the job due to a physical or mental condition (including a continuing serious health condition), the employee has no right to another job under the FMLA, although the Americans with Disabilities Act (ADA)<sup>67</sup> or workers' compensation statutes may apply.<sup>68</sup> If FMLA leave is taken by a "key" employee as defined in the Act, and the return to work would cause "substantial and grievous economic injury" to the employer, the employee may be denied restoration.<sup>69</sup> One agency commented, in response to the survey, that it is "virtually impossible" for the employer to meet the required threshold.

### Health Benefits

Health benefits must continue to be paid by the employer,<sup>70</sup> and the employer may require the employee to continue to pay his or her share but must inform the employee of the method of payment.<sup>71</sup> In the event of termination of health benefits for nonpayment by the employee, written notice of termination of health benefits must be given 15 days in advance of termination.<sup>72</sup>

### Serious Health Condition

Under the Department of Labor's final rules, a "serious health condition" is defined as follows.<sup>73</sup>

<sup>66</sup> 29 U.S.C. § 2614(a); 29 C.F.R. 825.214(a).

<sup>67</sup> According to the EEOC and several courts, a leave of absence may be a reasonable accommodation, if taking the leave would allow the disabled employee to return to work and perform the essential functions of the job. See *The FMLA and ADA Puzzle: Putting the Pieces Together*, HR MATTERS, December 1998 (Personnel Policy Service, Inc., 4965 U.S. Highway 42, Louisville, KY 40222), www.ppspublishers.com.

<sup>68</sup> 29 C.F.R. 825.214(b).

<sup>69</sup> "A salaried eligible employee who is among the highest paid 10 per cent" of employees within 75 miles is a key employee. 29 U.S.C.A. § 2614(b), 29 C.F.R. 825.217 & 825.218.

<sup>70</sup> 29 C.F.R. 825.210(a).

<sup>71</sup> 29 C.F.R. 825.210(c) & (d).

<sup>72</sup> 29 C.F.R. 825.212(a)(1).

<sup>73</sup> 29 C.F.R. 825.114.

a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

1) *Inpatient care* (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or 2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

i) A period of *incapacity* (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than 3 consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

ii) Any period of incapacity due to pregnancy, or for prenatal care.

iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.<sup>74</sup>

(e) Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than 3 days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

The responses to surveys indicated that applying this definition to the FMLA leave requests of employees is the most difficult problem transportation agencies face in dealing with the FMLA. Therefore, a separate section of this paper is devoted to examining how "serious health condition" has been defined by the courts and by

the Department of Labor (DOL). This section follows the discussion of survey results.

### III. SURVEY RESULTS

In August 1998 a survey was mailed by the Transportation Research Board (TRB) to 400 transit agencies nationwide. The survey covered the period between 1994 and 1997, and sought a variety of information pertaining to the operation and scheduling of the transit agencies, and the impact of the FMLA. A copy of the survey is included in this report as Appendix A.

Eighty-five surveys were returned, one of the highest number of responses ever received on any survey conducted by the Legal Studies Program of the TRB. Many of the surveys returned expressed concern about the complexity of the FMLA provisions and their implementation and about the potential for legal action resulting from agency errors.

The 85 responding agencies maintain approximately 2842 transit routes, primarily bus and commuter rail, serving the varying needs of all sectors of the traveling public (commuters, pleasure travelers, shoppers, senior citizens, school attendees, medical visits, service to the disabled and economically disadvantaged, rural travelers, and miscellaneous categories).

All but eight of the returned surveys came from public agencies. The largest agency represented in the survey response employs over 40,000 full-time employees; four of the agencies reporting employ 10 or fewer employees, and therefore are subject only to the posting requirements. The employee count reported by the 85 agencies totals 89,267 full-time employees, of which 42,842 have direct contact with the public. Part-time employees account for only 3,275 of the total.

Leave requests received by the reporting agencies totaled 5,581, with 5,142 qualifying leaves taken. Of all leaves reported, only 42 employees were defined as "key" employees under the Act, only 216 gave the required 30-day notice for foreseeable leave, 81 requested extensions, and 55 never returned to work.

There were so few statistics regarding replacement of those who never returned to work and whether they were replaced, that no analysis on those issues is contained in this study.

The FMLA-related difficulties mentioned most frequently by the reporting agencies will come as no surprise to the rest of the transit industry: the difficulty in defining "serious health condition," "continuing treatment," and "chronic illness," the reporting requirements for tracking intermittent leave as well as the conditions that make an employee eligible for such leave, and efforts to verify whether employees are abusing the FMLA provisions due to the restrictions on obtaining medical information.

Comments that agencies included on their surveys indicated that the largest number of employees utilizing FMLA come from the operational and maintenance areas, and used the leave primarily for their personal illnesses. Such leave would have been allowed by most

<sup>74</sup> See, *e.g.*, *Jeremy v. Northwest Ohio Development Center*, 33 F. Supp. 2d 635 (N.D. Ohio 1999).

of the reporting agencies regardless of the FMLA requirements. The length of leave taken under the FMLA provisions ranged from several days to the full 12 weeks allowed by statute.

A number of agencies indicated on the survey that they have had no experience with the FMLA and therefore are looking forward to the result of this analysis. One agency reported that as employees learn more about FMLA, leave requests have increased. Another reported 40 weeks of leave time taken by employees in the first 8 months of 1998, compared to 9 weeks during the entire previous year.

The New York Metropolitan Transit Authority (MTA) commented that “[a]s more employees avail themselves of FMLA leaves for conditions heretofore not classified as ‘serious,’ the negative impact on our employee availability is increasing.”

In an early article in *HR Fact Finder*,<sup>75</sup> “Family and Medical Leave Act - Larger Employers are Having Problems,” the Joint Association of Labor Management Committees reports that

Larger employers are bearing the brunt of the compliance burden. Asked about 20 areas of family leave compliance that could be seen as causing problems, organizations with more than 250 employees reported more serious problems than smaller employers in every single area...The data indicate that nearly half the employers in the sample are incurring additional administrative costs as a result of FMLA. Only a few of the 900 respondents reported hiring additional personnel to attend to FMLA, but four percent said they were planning to do so.

From the statistics provided, it appears that at the beginning of the Act’s effective period, most agencies were either not clear that they needed to keep accurate records or employees were not requesting FMLA leave because they were not conversant with the Act’s provisions. The information provided for 1994-1995 was substantially lacking, while more detailed information was provided for 1996 and 1997. Most of the responses show an ongoing and definite increase in the number of leaves requested and taken as employees become more familiar with the leave requirements and availability.

Several agencies noted that, due to extensive necessary training, the agencies cover leave-employees’ routes with current employees who then are compensated by overtime, resulting in a fiscal burden on the agency. One agency reported working on the “bid” system: when an employee is out on FMLA leave, the agency received a trained replacement worker from the union lists. The only additional cost incurred during the leave period is the amount of the health benefits paid out for the leave employee. One agency uses only part-time employees not covered by the FMLA, and another uses only independent contractors.

In answer to question 37 of the survey regarding fraudulent claims or abuse, the New York MTA re-

sponded that “DOL regulations preclude the employer from active investigation of FMLA leaves. Only health care providers can access and verify leave.” If the response implies that health care providers are not concerned with abuse of the FMLA provisions and are routinely providing medical certification even when not justified, a partial solution may lie in education of medical personnel.

Perhaps because of the difficulty of investigation, only two agencies reported verified abuses. In one case an employee requested leave to care for his “wife,” who turned out to be his sister. In another an employee forged a medical certification. Both employees were terminated without adverse effects on the transit agencies. A number of agencies reported that employees sometimes abuse the FMLA provisions as an excuse for absenteeism and consider the FMLA to apply to an extended family. Several agencies noted that operators and station agents make up their time off by working premium overtime.

### The Largest Agencies Reporting

The 30 largest agencies responding to the survey all employ over 200 individuals. The employee count used is the number of employees (full-time and part-time) who qualify for FMLA leave according to the hours worked indicated on the survey, and assumes that the part-timers were employed for the required 12-month period.

The 30 largest agencies (including eligible part-time employees) responding to the survey were:

**CA:** Omnitrans, San Bernardino (461); Riverside Transit Agency, Riverside (251); San Francisco Bay Area Transit District, Oakland (3,325); San Mateo County Transit District, San Carlos (632); Santa Cruz Metropolitan Transit District, Santa Cruz (270); Santa Monica’s Big Blue Bus, Santa Monica (268); SunLine Transit, Thousand Palms (207), **CO:** Regional Transportation District, Denver (2,040); **CT:** The Arrowline, East Hartford (266); **DC:** Washington Metropolitan Area Transit Authority, Washington, D.C. (8,363); **FL:** CFRTA-LYNX, Orlando (700); **HI:** Oahu Transit Services, Inc., Honolulu (1,605); **IL:** Northeast Illinois Regional Commuter Railroad Corp., Chicago (2,375); **IN:** Northern Indiana Commuter Transportation District, Michigan City (270); **LA:** Regional Transit Authority, New Orleans (1,256); **MO:** Bi-State Development Agency, St. Louis (1,951); **NC:** Transit Management of Charlotte dba Charlotte Transit System, Charlotte (423); **NJ:** Path Corporation, Jersey City (1,002); **NV:** Regional Transportation Commission, Reno (279); **NY:** Capital District Transportation Authority, Albany (465); Long Island Railroad, Ja-

<sup>75</sup> August 1996, published by Joint Association of Labor-Management Committees (JALMC), P. O. Box 819, #340, 1093 East Second Street, Jamestown, NY 14702-0819.

maica (6,026); MTA New York City Transit, Brooklyn (43,122, the largest); MTA Long Island Bus, Garden City (1,033); Triboro Coach Corporation, Jackson Heights (407); **OH**: The Greater Cleveland Regional Transit Authority, Cleveland (2,868); **TX**: Via Metropolitan Transit, San Antonio (1,678); **VA**: Peninsula Transportation District Commission, Hampton (295); Tidewater Transportation District Commission, Norfolk (620); **WA**: Pierce Transit, Tacoma (710); **WI**: Milwaukee Transport Services, Inc., Milwaukee (1,434).

A chart of the FMLA leaves requested and granted as qualifying is given on the following pages.

**NUMBER OF FAMILY MEDICAL LEAVE ACT (FMLA) LEAVES REQUESTED AND TAKEN  
FOR AGENCIES WITH MORE THAN 200 EMPLOYEES  
(arranged by number of employees)**

Agency	Total EEs*	1994			1995			1996			1997		
		Requested	Taken	% of total EEs	Requested	Taken	% of total EEs	Requested	Taken	% of total EEs	Requested	Taken	% of total EEs
New York MTA, Brooklyn, NY	43,122	131	110	.3	222	195	.45	370	326	.8	534	397	.9
Washington Metro Area Transit Auth., DC	8,363	0	0	--	24	24	.3	276	248	3	556	461	5.75
Long Island Railroad, Jamaica, NY	6,026	26	23	.38	25	25	.38	43	42	.7	26	4	.07
San Francisco Bay Area Transit District, CA	3,325	unk	unk	--	unk	unk	--	40	38	1	180	175	6
Greater Cleveland Regional Transit Authority, OH	2,868	unk	unk	--	unk	unk	--	unk	unk	--	83	83	3
Northeast Illinois Regional Commuter Railroad Corp., Chicago, IL	2,375	9	8	.3	19	18	.8	44	42	1.7	60	58	2
Denver Regional Transportation District, CO	2,040	unk	unk	--	unk	unk	--	unk	unk	--	48	48	2
St. Louis Bi-State Development Agency, MO	1,951	4	4	.2	6	6	.3	13	13	.76	unk	unk	--
Via Metropolitan Transit, San Antonio, TX	1,678	0	0	--	0	0	--	2	2	.09	10	10	.6
Oahu Transit Services, Inc., HI	1,605	3	3	.019	1	1	.018	6	6	.037	12	12	.075
Milwaukee Transport Services, Inc., WI	1,434	unk	unk	--	unk	unk	--	unk	unk	--	588	317	22
New Orleans Regional Transit Authority, LA	1,256	0	0	--	2	2	unk	unk	unk	--	7	7	.56
Path Corporation, Jersey City, NJ	1,002	5	5	.5	5	5	.5	5	5	.5	4	4	.45
MTA Long Island Bus, Garden City, NJ	1,033	0	0	--	1	1	.1	21	18	unk	15	15	1.5

**NUMBER OF FAMILY MEDICAL LEAVE ACT LEAVES REQUESTED AND TAKEN FOR AGENCIES WITH MORE THAN 200 EMPLOYEES (continued)**

Agency	Total EEs*	1994			1995			1996			1997		
		Requested	Taken	% of total EEs	Requested	Taken	% of total EES	Requested	Taken	% of total EES	Requested	Taken	% of total EES
CFRTA-LYNX, Orlando, FL	700	unk	unk	--	unk	unk	--	unk	unk	--	unk	unk	--
San Mateo County Transit District, San Carlos, CA	632	40	39	6	27	27	4	46	46	7	54	54	8.5
Pierce Transit, Tacoma, WA	710	21	21	2.9	68	65	9	63	58	8	80	77	11
Tidewater Transportation District Commission, Norfolk, VA	620	0	0	--	10	9	1.5	44	41	6.6	56	54	8.7
Capital District Transportation Authority, Albany, NY	465	1	1	.2	2	2	.4	3	3	.65	2	2	.4
Charlotte Transit System,** NC	423	205	205	48.5	310	310	73	267	267	63	300	287	67.9
Omnitrans, San Bernardino, CA	461	unk	unk	--	unk	unk	--	8	4	.9	56	29	6
Triboro Coach Corp., Jackson Hts., NY***	407	0	0	0	0	0	0	0	0	0	0	0	0
Regional Trans. Comm., Reno, NV	279	unk	unk	--	unk	unk	--	unk	unk	--	8	8	2.8
Santa Cruz MTD	270	0	0	--	0	0	--	0	0	--	2	2	.7
No. Indiana Commuter Transp. District. Michigan City, IN	270	0	0	--	0	0	--	0	0	--	4	4	2
Santa Monica's Big Blue Bus, CA	268	0	0	--	0	0	--	0	0	--	4	4	2
Peninsula Transportation District, Hampton, VA	295	2	0	--	4	4	1	8	7	2	6	6	2
The Arrow Line, Inc., CT	266	unk	unk	--	unk	unk	--	unk	unk	--	11	11	4
Riverside Transit Agency, CA	251	unk	unk	--	unk	4	1.6	unk	33	1	unk	37	14.7
SunLine Transit Agency, Thousand Palms, CA	207	1	1	.05	0	0	--	1	1	.05	1	1	.05

\* FMLA-eligible employees. Number of employees is calculated using the full-time employee figure plus part-time employees who are covered under the FMLA by having worked the requisite number of hours. For purposes of this study, it is assumed that qualifying part-time employees have been employed for the required 12 months.

\*\* Highest percentage of FMLA leaves among the larger agencies.

\*\*\* Lowest percentage of FMLA leaves among the larger agencies.

**BREAKDOWN BY LEAVE TYPE FOR  
AGENCIES WITH MORE THAN 200 EMPLOYEES\***

<b>Leave Type</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>
Birth/Adoption	40	21	19	45
Serious health condition/Self	255	379	366	446
Serious health condition/Spouse	12	11	19	45
Serious health condition/Parent	12	15	31	46
Serious health condition/Child	21	19	39	24
<b>TOTALS</b>	<b>340</b>	<b>445</b>	<b>474</b>	<b>606</b>

\*Twenty-five agencies broke down the figures by leave type. Of those, 15 reported statistics for the entire survey period, 7 reported statistics for 1997 only, and 3 reported statistics for 1996-1997.

The largest transit agency to respond to the survey, MTA New York City Transit, covers more than 224 routes in five boroughs, 7 days a week, 24 hours a day. The agency employs a total of 43,122 full-time employees, of whom 38,810 are unionized, 20,397 have direct contact with the public, and 6413 are in-house administrative and support staff.

In addition to the comments stated above related to the increasing impact of FMLA as more employees request leave under the Act and the difficulty of investigating and verifying reasons for the leave, MTA New York further commented that the “provisions for intermittent leave present a significant burden to schedule-driven operations.” The MTA also noted that the “conditions for denying restoration due to ‘substantial and grievous economic injury’ are virtually insurmountable for employers.” However, only “key” employees may be denied restoration due to “substantial and grievous economic injury”; therefore, the determination should be made that reinstatement will be denied to a key employee, when possible, prior to the time leave is taken, so that the employee has ample notice. It is important to remember that the “substantial and grievous economic injury” pertains to *reinstating* the key employee, not to the *absence* of the employee. None of the survey responses indicated that key employees were denied restoration.

The Washington Metropolitan Area Transit Authority (WMATA) employs over 8000 full-time employees, 5200 of whom have direct contact with the public. There are also 345 part-time eligible employees. Approximately 7500 employees are working on any given day. WMATA operates 7 days a week, 365 days a year, covering 326 routes in Maryland, Virginia, and Washington, D.C.

Of the employees taking FMLA leave, only 2 percent gave adequate notice and over 90 percent gave less than 1 week’s notice due to an “emergency situation.” Nevertheless, WMATA commented that “no specific hardships have been encountered” in administering the Act. This may be because the “largest number of employees utilizing FMLA leave come from the operational and maintenance areas and used the leave for their personal illnesses. This leave would have been allowed and taken regardless of FMLA requirements.” No conflicts with state laws are incurred by WMATA, as they are subject only to federal laws.

The Long Island Railroad (LIRR) also commented that no specific hardships were encountered by mandated FMLA leave, as the “company allow[s] for [them]”; the company “policy has always been to grant up to a 4-month leave of absence. Most of these leaves have been for maternity, so the implementation of FMLA was not really anything new.” The LIRR employee unions work under a bid system, where any worker out on temporary leave is replaced through the existing workforce by another worker bidding for the temporary vacant position. The LIRR therefore does not incur any additional cost for replacement except for the cost of paying for the benefits of the leave personnel.

The San Francisco Bay Area Transit District (BATD) has over 3,000 full-time employees and 150 part-timers. It operates between 4:00 a.m. and midnight and primarily serves daily commuters. The BATD was one of several agencies reporting that the provisions for “intermittent leave” are “abused by train operators and station agents, who make up their time by working premium overtime.”

Among the particular difficulties encountered by other agencies responding, the one most frequently identified was defining a “serious health condition.” Others that were included in a number of responses were the problems associated with FMLA intermittent leave, including recordkeeping and anticipating staffing needs because of employees taking intermittent leave. An example is the response of Northeast Illinois Regional Commuter Railroad Corporation (NIRCRC). In answer to question 39 regarding specific hardships, NIRCRC reported difficulties “anticipating staffing needs for intermittent leaves due to a chronic serious health condition that may cause episodic rather than a continuing period of incapacity.” Several agencies also reported difficulty defining a “chronic” condition.

The highest proportion of employees taking FMLA leave was reported by Transit Management of Charlotte dba Charlotte Transit System. This agency employs 423 full-time workers, of whom 302 have direct contact with the public. None of its part-time employees is eligible for FMLA leave. Charlotte Transit reported that in 1994, 205 or 48.46 percent of its employees took FMLA leave; the percentage was higher in each of the next 3 years, with 67.85 percent taking FMLA leave in 1997. In spite of the very high numbers of leaves taken, the agency reports that no fraudulent claims or abuses by employees were discovered and that there were no specific hardships aside from normal coverage problems. In response to question 40 regarding difficulties in defining specific provisions of the Act, however, the agency comments: “Difficulties are mainly a result of physicians not being knowledgeable of FMLA guidelines. Physicians do not indicate when conditions are one-time occurrences or ongoing conditions.”

At the other end of the spectrum is Triboro Coach Corporation, a private agency that operates 24 hours a day, 7 days a week, offering 19 bus routes in Northwest Queens, NY. Triboro employees 406 full-time and 1 part-time workers who are eligible for FMLA leave. No employees took FMLA leave during the 1994 to 1997 reporting period.

The figures reported by the agencies responding to the survey show that, for most agencies, the majority of leave requests (and FMLA leaves taken) were for the employees’ own “serious health condition.”

### The Smaller Agencies

For purposes of this study and survey, a “smaller agency” is one with 200 or fewer employees, including eligible part-time employees. The agencies in this category who responded to the survey are as follows:



**AL:** Ryder/ATE, Inc., Birmingham (154); **AR:** Pine Bluff Transit (23); **CA:** Montebello Bus Lines (154); San Joaquin Regional Transit District, Stockton (172); South Coast Area Transit (SCAT), Oxnard (121); **CO:** Pueblo Transit (27); **CT:** The New Britain Transportation Co., Berlin (37); Housatonic Area Regional Transit (68 employees, including eligible part-time); Estuary Transit District, Old Saybrook (all contract employees); The Greater Bridgeport Transit District (140); Greater Hartford Transit District (6); The Kelley Transit Company, Inc., Torrington (5); Middletown Transit District (4); Milford Transit District (26); Northeast Transportation Co., Inc., Waterbury (67); Northwestern CT Transit District, Torrington (3); Norwalk Transit District (88); Post Road Stages, Inc., Windsor (17); Valley Transit District, Derby (16); **FL:** Votran, So. Daytona (190); **IA:** Des Moines MTA (201); KeyLine, Dubuque (11); Metropolitan Transit Authority, Waterloo (43); **IL:** Rockford Mass Transit District (97); **IN:** Fort Wayne Public Transportation Corporation (86); Gary Public Transportation Corporation (121); Greater Lafayette Public Transportation Corporation (93); Topeka Metropolitan Transit Authority (62); **KS:** Wichita Transit (109); **MA:** RTA Transit Services, Worcester (200); **ME:** Greater Attleboro Taunton Regional Transit Authority (76); **MI:**

Bay Metropolitan Transportation Authority, Bay City (112); Capital Area Transportation Authority, Lansing (179); Detroit Transportation Corporation (89); **MO:** City Utilities of Springfield (47); Columbia Transit (47); **MS:** Coast Transit Authority, Gulfport (111); **NE:** City of Lincoln, StarTran (120); **NV:** Economic Opportunity Board of Clark County (19); **OH:** Ohio Valley Regional Transportation Authority/Eastern Ohio Regional Transit Authority, Bridgeport (45); **PA:** Capitol Area Transit, Harrisburg (165); County of Lackawanna Transit System (COLTS), Scranton (70); Lehigh and Northampton Transportation Authority, Allentown (150); **SC:** Pee Dee Regional Transportation Authority, Florence (200); **TX:** Amarillo City Transit, Amarillo, (47); City Transit Management Co., Inc. dba Citibus, Lubbock (137); Laredo Municipal Transit System, Laredo (185); Regional Transportation Authority, Corpus Christi (190); **VA:** Jaunt, Inc., Charlottesville (55); Greater Lynchburg Transit Co. (61); Southwestern Virginia Transit Management Co., Roanoke (86); Waco Transit System, Inc., (40); **WA:** Whatcom Transportation Authority, Bellingham (122); **WI:** Valley Transit, Appleton (48); Waukesha Metro Transit (54).

See following pages for chart of leaves requested and taken.

**NUMBER OF LEAVES REQUESTED AND TAKEN FOR  
55 AGENCIES WITH FEWER THAN 200 EMPLOYEES  
(arranged alphabetically)**

Agency	Total EEs*	1994		1995		1996		1997	
		Requested	Taken	Requested	Taken	Requested	Taken	Requested	Taken
Amarillo City Transit, TX	47†	0	0	0	0	1	1	0	0
Bay Metropolitan Transportation Auth., Bay City, MI	112	0	0	7	7	19	17	33	24
Capitol Area Transit, Harrisburg, PA	165	0	0	0	0	0	0	0	0
Capital Area Transit Auth., Lansing, MI	179	0	0	0	0	0	0	0	0
City Transit Mgmt. Co., Inc., (Citibus) Lubbock, TX	137	0	0	0	0	0	0	1	1
City Utilities of Springfield, MO	47†	--	3	--	6	--	7	--	6
Coast Transit Authority, Gulfport, MS	111	0	0	0	0	0	0	0	0
Columbia Transit, MO	47†	0	0	0	0	0	0	--	5 †
Des Moines Metropolitan Transit Auth., IA	201	1	1	1	1	2	2	2	2
Detroit Transportation Corp., Detroit, MI	89	0	0	0	0	3	3	1	1
Economic Opportunity Board of Clark County, NV (Las Vegas)	16†	unk	unk	unk	unk	unk	unk	unk	unk
Estuary Transit District, Old Saybrook, CT	contract only	unk	unk	unk	unk	unk	unk	unk	unk
Fort Wayne Public Transportation Corp., IN	86	0	0	0	0	0	0	3	2
Gary Public Transportation Corp., IN	121	unk	0	0	0	0	0	1	1
Greater Attleboro Taunton Regional Transit Auth., MA	76	0	0	0	0	1	1	0	0
The Greater Bridgeport Transit District, CT	140	0	0	4	4	2	2	4	4
Greater Hartford Transit District, CT	6†	unk	unk	unk	unk	unk	unk	unk	unk
Greater Lafayette Public Transportation Corp., IN	93	0	0	0	0	3	3	16	16
Greater Lynchburg Transit Co., VA	61	5	5	8	8	10	10	8	8
Housatonic Area Regional Transit, Danbury, CT	68	0	0	5	5	3	3	4	4



**NUMBER OF LEAVES REQUESTED AND TAKEN FOR 55 AGENCIES WITH FEWER THAN 200 EMPLOYEES (continued)**

Agency	Total EEs*	1994		1995		1996		1997	
		Requested	Taken	Requested	Taken	Requested	Taken	Requested	Taken
Rockford Mass Transit District, IL	97	0	0	0	0	0	0	0	0
Regional Transportation Authority, Corpus Christi, TX	190	16	16	34	34	0	0	20	20
RTA Transit Services Worcester, MA	200	0	0	0	0	1	1	1	1
Ryder/ATE, Inc., Birmingham, AL	154	0	0	0	0	0	0	3	3
San Joaquin Reg. Trans. Dist., Stockton, CA	172	0	0	0	0	1	0	2	2
South Coast Area Transit, (SCAT), Oxnard, CA	121	3	3	5	5	7	7	7	7
Southwestern Virginia Transit Mgmt. Co., Roanoke, VA	86	0	0	0	0	4	4	4	4
Topeka Metropolitan Transit Auth., KS	62	0	0	0	0	0	0	--	8
Valley Transit, Appleton, WI	48†	--	--	--	7	--	12	--	8
Valley Transit District, Derby, CT	16†	unk	unk	unk	unk	unk	unk	unk	unk
Votran, S. Daytona, FL	190	1	1	1	1	7	7	5	5
Waco Transit System, Inc., TX	40†	unk	unk	unk	unk	unk	unk	unk	unk
Waukesha Metro Transit, WI	54	3	3	1	1	2	2	1	1
Whatcom Transportation Authority, Bellingham, WA	122	22	22	26	26	19	16	33	33
Wichita Transit, KS	109	--	--	1	1	1	1	0	0

\*FMLA-eligible employees. Number of employees is calculated using the full-time employee figure plus part-time employees who are covered under the FMLA by having worked the requisite number of hours. For purposes of this study, it is assumed that qualifying part-time employees have been employed for the required 12 months.

† The Act is not applicable to employers with fewer than 50 employees within a 75-mile radius. The 6th Circuit has held this to be true even though an employer's handbook adopts the FMLA.<sup>76</sup> However, a public agency must still post standard information on FMLA benefits.

<sup>76</sup> See Douglas v. E.G. Baldwin & Associates, 150 F.3d 604 (6th Cir. 1998).

The average length of leave for the 30 agencies (question 26) was 7.5 weeks.

A number of agencies included comments in response to question 40, regarding difficulties encountered in defining provisions of the Act, and in the general “Comments” section at the end of the survey. For a summary of these comments, see Appendix B.

#### IV. DEFINING “SERIOUS MEDICAL CONDITION”: A PROCESS RATHER THAN A SPECIFIC DISEASE

In the survey responses, the definition of “serious medical condition” was the most frequently mentioned problem with applying the FMLA. The definition, from the federal regulations,<sup>77</sup> was set forth in Section II of this report. Significantly, it includes two distinct categories: 1) Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity; or 2) Continuing treatment by a health care provider involving incapacity for more than 3 consecutive days; incapacity due to pregnancy or prenatal care; incapacity due to a chronic serious health condition; incapacity that is permanent or long-term because treatment is ineffective (terminal illness, for example); or, absence to receive restorative treatments after an accident or injury or for treatments for a condition that may otherwise become incapacitating (such as kidney disease or cancer).

When Congress considered the language in enacting the FMLA, they recognized the difficulty in defining precisely what constitutes a “serious health condition.” One member of the House of Representatives, in opposing the legislation, stated,<sup>78</sup> “One of the first concerns I have is the lack of a clear and concise definition of what a serious health care condition is...Absent a clear definition in the legislation, we are opening the door for fraud and abuse.”

The minority view, set out in the House Report on the bill being considered, was stated as follows: “The criteria provided for leave for a ‘serious health condition’ under [the legislation] is so broad and general that it would apparently allow leave for many less serious conditions....”<sup>79</sup> In discussing the definitions of “serious health condition” and “health care provider” the House Report states:<sup>80</sup>

Despite the key role that these two concepts play in the implementation of this legislation, they are defined in grossly broad, general terms which will lead to misunderstandings between employers and employees as to

when leave is appropriate, to resultant litigation, and frequently, to abuse of the rights provided by this bill.

A General Accounting Office (GAO) Report on estimating the cost of implementing the legislation pointed out “the need to clarify the definition of serious health condition...Currently there is substantial room for varying interpretations.”<sup>81</sup> The testimony of witnesses on the predecessor legislation (with essentially the same definition) also recognized the difficulty of providing a precise definition.<sup>82</sup>

The majority view, however, was that the definition of “serious health condition” should be “intentionally broad” and was intended to cover “various types of physical and mental conditions.”<sup>83</sup> The provisions for requiring medical certifications and a second and third medical opinion were viewed as sufficient controls on taking FMLA leave. These provisions “have been included to ensure that the leave provided by this legislation is not abused.”<sup>84</sup> Further, “in any case where there is doubt whether coverage is provided by this act, the general tests set forth in [the legislation] shall be determinative.”<sup>85</sup> The term “serious health condition” was “not intended to cover short-term conditions for which treatment and recovery are very brief . . . [since] such conditions would fall within even the most modest sick leave policies.”<sup>86</sup>

The majority view seemed to be that broad coverage was intended for conditions not otherwise covered by the “most modest sick leave policies” that employers were already providing. Any problems in determining whether a particular condition is within the definition should be resolved by looking at the criteria provided, and abuse would be prevented by the requirements for medical certifications. As the legislation and the legislative history make clear, the intention was to provide employees with time off from their work under a certain set of circumstances that involved the immediate family or the employee: the birth or adoption of a child; the need to care for a sick or injured parent, child, or spouse; or the incapacity of the employee because of injury or illness (mental or physical).<sup>87</sup>

<sup>81</sup> Report signed by Richard L. Fogel, Assistant Comptroller General, reported at Congress. 139, pt. 2 CONG. REC. S1730 (daily ed. Feb. 2, 1993).

<sup>82</sup> See, for example, the testimony of Dr. Jerome A. Paulson of the American Academy of Pediatrics, reported at p. 15 of H.R. REP. No. 103-8, 103d Cong., 1st Sess., pt. 2 (1993).

<sup>83</sup> See H.R. REP. No. 103-8, 103d Cong., 1st Sess., pt. 1, at 40 (1993); S. REP. No. 103-3, 103d Cong., 1st Sess., at 30 (1993).

<sup>84</sup> H.R. REP. No. 103-8, 103d Cong., 1st Sess., pt. 2, at 20 (1993).

<sup>85</sup> S. REP. No. 103-3, 103d Cong., 1st Sess., at 28 (1993).

<sup>86</sup> *Id.*

<sup>87</sup> H.R. REP. No. 103-8, 103d Cong., 1st Sess., pt. 1, at 40 (1993); S. REP. No. 103-3, 103d Cong., 1st Sess., at 30 (1993); 139, pt. 2 CONG. REC. S2255 (daily ed. Feb. 4, 1993) (Testimony of Senator Harkin), and 29 U.S.C. 2601(b)(1): The pur-

<sup>77</sup> 29 C.F.R. 825.114.

<sup>78</sup> See testimony of Congresswoman Fowler, printed at 139, pt. 2 CONG. REC. H1997 (daily ed. Feb 3, 1993).

<sup>79</sup> Minority Views on H.R. 1, H.R. REP. No. 103-8, 103d Cong., 1st Sess., at 62 (1993).

<sup>80</sup> H.R. REP. No. 103-8, Minority Views, 103d Cong., 1st Sess., at 68 (1993).

Problems arise with application of the definition because it is based on a set of circumstances or events rather than a “laundry list” of diseases. Managers and their attorneys who are accustomed to thinking about a list of diseases as a serious medical condition have been forced to think otherwise. Quite understandably, they are having trouble doing so. Although the legislative history includes mention of a variety of conditions that are illustrative of those for which the FMLA provides leave, it is also clear that the list is not meant to be exhaustive or all-inclusive. The following ailments are identified: heart attacks; heart conditions requiring heart bypass or valve operations; most cancers; back conditions requiring extensive therapy or surgical procedures; strokes; severe respiratory conditions; spinal injuries; appendicitis; pneumonia; emphysema; severe arthritis; severe nervous disorders; injuries caused by serious accidents on or off the job; ongoing pregnancy; miscarriages; complications or illnesses related to pregnancy, such as severe morning sickness; the need for prenatal care; childbirth and recovery from childbirth.<sup>88</sup> The final regulations, as well, fail to include a “laundry list” of serious health conditions; the DOL determined that “such a list might cause employers to make incorrect decisions in applying the FMLA.”<sup>89</sup>

One result of the definition provided by statute and regulation (or not provided) has been a plethora of litigation, as predicted by the minority view in the House Report. In making the necessary determinations, case by case, as to which circumstances do and do not qualify for FMLA leave, court decisions have been fact-driven. In accordance with the statutory definition and the legislative history, courts are bound to determine factually whether the set of events or circumstances presented meets the requirements to qualify as a “serious health condition.”

Most of the cases arise in the context of a suit for wrongful termination after leave is taken, sometimes with a related claim for denial of FMLA-qualifying leave. An examination of the case law shows that the outcome turns on the employee’s presenting evidence to show facts that support a claim for FMLA leave: that the employee was incapacitated; the incapacity lasted 3 or more consecutive work days; the employee was undergoing continuing treatment by a health care professional; or the employee was caring for a parent, spouse, or child who had a serious health condition. In other words, the qualifying circumstances must be shown. As the Seventh Circuit said in one case, “We have explained that in the context of the substantive statutory rights contained within the FMLA, an employee must

demonstrate by a preponderance of the evidence that he is entitled to the disputed leave.”<sup>90</sup>

As to particular conditions that may qualify, chronic serious health conditions such as asthma, diabetes, and epilepsy may qualify for leave even if treatment from a doctor is not required. Other conditions that may qualify as potential “chronic” conditions are migraine headaches, chronic back pain, diabetes, epilepsy, chronic fatigue syndrome, and periods of incapacity due to pregnancy.<sup>91</sup> However, in a case where the facts show a chronic health condition (a lung condition) but also unequivocally show chronic tardiness and absenteeism not linked to the disability, the Fifth Circuit has ruled that an employee’s chronic condition cannot save him from termination.<sup>92</sup>

Some conditions which courts have determined not to be a “serious health condition” under the FMLA, based on the facts before them, are as follows: food poisoning,<sup>93</sup> shortness of breath and chest pains,<sup>94</sup> stomach virus,<sup>95</sup> sinobronchitis,<sup>96</sup> gastroenteritis and upper respiratory infection,<sup>97</sup> routine pregnancy discomfort and distress,<sup>98</sup> work-related stress and anxiety,<sup>99</sup> and a brief episode of flu-like symptoms.<sup>100</sup> Chicken pox and degenerative back disease have been found to be “serious” enough to merit FMLA protection.<sup>101</sup>

<sup>90</sup> *Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, at 499, (7th Cir. 1999), citing and quoting *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) “We shall continue to resolve suits under the FMLA. . . by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims.”

<sup>91</sup> 29 C.F.R. 825.114(b); *see also McClain v. Southwest Steel Co.*, 940 F. Supp. 295, 298–300 (N.D. Ok. 1996); *Hendry v. GTE North, Inc.*, 896 F. Supp. 816, 827–28 (N.D. Ind. 1995); *Allan N. Traffet, Family [and] Medical Leave Act 5 Years Later*, N.Y. L. J. 1 (1997).

<sup>92</sup> *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998). The evidence showed that employee Hypes regularly came to work as late as 10:30 a.m. to 1:00 p.m. and just as often failed to show up at all.

<sup>93</sup> *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss. 1995), 74 F.3d 91 (5th Cir. 1996).

<sup>94</sup> *Boyce v. New York City Mission Society*, 963 F. Supp. 290 (S.D. N.Y. 1997).

<sup>95</sup> *Kaylor v. Fannin Regional Hospital*, 946 F. Supp. 988 (N.D. Ga. 1996).

<sup>96</sup> *Hott v. VDO Yazake Corp.*, 922 F. Supp. 1114 (W.D. Va. 1996).

<sup>97</sup> *Brannon v. Oshkosh B’Gosh*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

<sup>98</sup> *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465 (D. Kan. 1996).

<sup>99</sup> *Boyd v. State Farm*, 158 F.3d 326 (5th Cir. 1998).

<sup>100</sup> *Procopio v. Castrol Industrial North American, Inc.*, 3 WAGE AND HOUR CASES 2d (BNA) 1130 (E.D. Pa. 1996).

<sup>101</sup> *George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio 1996) [chicken pox]; *Kaylor v. Fannin*, *supra*; *Cf. Reich v. Midwest Plastic Eng’g*, 934 F. Supp. 266 (W.D. Mich. 1996) [Chicken pox did not constitute “serious health conditions”

poses of the FMLA are to “balance the demands of the workplace with the needs of families” and “entitle employees to take reasonable leave for medical reasons.”

<sup>88</sup> H.R. REP. No. 103-8, 103d Cong., 1st Sess., pt. 1, at 40 (1993).

<sup>89</sup> *See* 60 Fed. Reg. 2180, 2195.

It must be emphasized, however, that there is no “list” that definitively includes or excludes and therefore determines whether a particular ailment or condition will be determined to be a “serious health condition” by the courts. Rather, the courts have consistently applied the legislative history directive that in cases of doubt (or dispute) the “general tests set forth in the legislation shall be determinative.” Even though the DOL regulations may appear to exempt or include some conditions, that is not determinative. For example, the DOL regulation<sup>102</sup> defining a “serious health condition” provides in part that a serious health condition “involving continuing treatment by a health care provider includes any one or more of the following...[a]ny period of incapacity due to pregnancy, or for prenatal care.” Plaintiff in *Gudenkauf v. Stauffer Communications, Inc.*<sup>103</sup> claimed that the employer violated her rights under the FMLA when it discharged her instead of giving her requested leave to work part-time because of her pregnancy. The court found that the evidence did not support a “serious health condition,” since although she was getting continuing care from a doctor, there was no medical certification that her condition “incapacitated” her for performance of her job. Her own testimony was not sufficient. Therefore, the court found that plaintiff was unable to prove as a matter of law that her request for leave was protected by the FMLA. The employer’s motion for summary judgment as to that claim was granted.

On the other hand, in *Thorson v. Gemini, Inc.*,<sup>104</sup> the district court had concluded that plaintiff’s “illnesses were best described as an upset stomach and a minor ulcer and reasoned that because such conditions are explicitly listed as examples that ordinarily do not meet” the regulatory definition of “serious health condition,” they would not qualify even if they would otherwise meet the regulatory criteria (incapacity for more than 3 days, continuing treatment, etc.).<sup>105</sup> Summary judgment was granted for the employer, and the employee appealed. In the meantime, the DOL issued an opinion letter in which it discusses the “excluded examples,” and stated:<sup>106</sup>

Ordinarily, we anticipate that these health conditions would not meet the definition in 825.114(a)(2) as they would not be expected to last for more than 3 consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also in-

because neither patient received inpatient care, and one girl’s visit to health care provider not sufficient.]

<sup>102</sup> 29 C.F.R. 825.114(a)(2).

<sup>103</sup> 922 F. Supp. 465 (D. Kan. 1996).

<sup>104</sup> 123 F.3d 1140, 1141 (8th Cir. 1997).

<sup>105</sup> These criteria are listed in 29 C.F.R. 825.114.

<sup>106</sup> Opinion FMLA-86, Wage and Hour Manual (BNA) 99-3091, 99-3091-92 (Dec. 12, 1996), reversing an earlier DOL opinion letter, FMLA-57 (Apr. 7, 1995).

volves qualifying treatment, then the absence would be protected by the FMLA....

On the basis of this new interpretation of the regulations by the DOL, the Circuit Court remanded the case to the District Court for a re-determination of whether the plaintiff had a serious health condition.<sup>107</sup>

As in the *Gudenkauf* case discussed above, the evidence must show that the employee is incapacitated for the job, and this is usually presented in the form of a medical certification.<sup>108</sup> The employee’s testimony or allegations in the complaint are not enough to survive a motion for summary judgment by the employer. For example, in *Brannon v. Oshkosh B’Gosh, Inc.*,<sup>109</sup> the employee took leave because she suffered from gastroenteritis and upper respiratory infection, which the district court found was not qualifying for FMLA leave where the evidence that she was incapacitated was her own testimony. The doctor’s testimony showed that he never advised her to remain off work, and although he stated that her absence from her job was “reasonable” this was insufficient to prove that it was necessary. Summary judgment for the employer was granted on her claim that her termination was a violation of her rights under the FMLA.

In another case where plaintiff claimed that her termination violated the FMLA, *Hott v. VDO Yazaki Corp.*,<sup>110</sup> plaintiff provided an FMLA certification form which showed she was suffering from sinobronchitis that would likely last for 7 to 10 days and that she was able to perform the functions of her job. Since the certification failed to show that she was incapacitated, and she offered no evidence that showed that, if untreated, her condition would result in a period of incapacity of more than 3 days,<sup>111</sup> she did not show that the leave qualified for FMLA. The court granted the employer’s motion for summary judgment on this claim.<sup>112</sup>

In a 1999 case, *Haefling v. United Parcel Service*,<sup>113</sup> the employee had a neck injury that he claimed was a serious health condition that required him to take FMLA qualifying leave. After his termination for absenteeism, he filed suit under the FMLA. The Seventh Circuit affirmed the district court’s grant of the employer’s motion for summary judgment on the grounds that plaintiff failed to show that he suffered from a “serious health condition.” Plaintiff failed to “make a threshold demonstration” that his injury resulted in an incapacity lasting more than 3 consecutive days during which he was unable to perform his job or “perform

<sup>107</sup> 123 F.3d at 1141.

<sup>108</sup> For other cases discussing “incapacity” of employee and of family member, see *Martyszenko v. Safeway, Inc.*, 120 F.3d 120 (8th Cir. 1997), and cases cited at 120 F.3d 123.

<sup>109</sup> 897 F. Supp. 1028 (M.D. Tenn. 1995).

<sup>110</sup> 922 F. Supp. 1114 (W.D. Va. 1996).

<sup>111</sup> This would meet the requirements of 29 C.F.R. 825.114(a)(2)(v).

<sup>112</sup> 922 F. Supp. 1127, 1128.

<sup>113</sup> 169 F.3d 494 (7th Cir. 1999).

other daily activities.” He also failed to meet the second prong of the test by showing that his injury involved “continuing treatment by a health care provider for a chronic or long-term health condition” that would result in incapacity for more than 3 days if untreated; he did not present any evidence, other than his own testimony, that his injury required any treatment. There was no statement from his doctor. Therefore, the court determined that he failed to show that the absences for which he was terminated were protected by the FMLA.

In *Price v. City of Fort Wayne*,<sup>114</sup> the Seventh Circuit vacated summary judgment for the employer, and found that several medical conditions, none of which would constitute a serious health condition on its own, if taken together can constitute a serious health condition for purposes of the FMLA. Plaintiff saw her doctor on 3 days in August and on 5 days in September. She received a thyroid ultrasound, a thyroid scan, an excision of a mass, needle biopsy of her thyroid, and a CT scan of her brain, brain stem, and sinuses. In determining that the multiple diagnoses taken together could constitute a “serious health condition,” the court focused on the issue of “incapacity” and commented,<sup>115</sup>

After all, it is not the disease that receives leave from work; it is the person. And how can one’s ability to perform at work be seriously impaired by a single serious illness but not by multiple illnesses having a serious impact? The answer, of course, is that it cannot if the disability is related to the cumulative impacts of illness on one’s body and mind.

Plaintiff had submitted evidence showing that her doctor concluded that there was “no way” plaintiff could have performed her job due to her mental and physical state and that for her to attempt to work in her condition would be seriously detrimental to her health.<sup>116</sup> The Circuit Court vacated summary judgment for the employer and remanded the case.

In *Murray v. Red Kap Industries*,<sup>117</sup> plaintiff brought suit under the FMLA after being discharged for missing 8 days of work due to a respiratory tract infection. The district court granted summary judgment for the employer, and the Fifth Circuit affirmed. The Circuit Court reviewed the case under DOL’s final regulations and summarized the procedure as follows:<sup>118</sup>

<sup>114</sup> 117 F.3d 1022 (7th Cir. 1997).

<sup>115</sup> 117 F.3d at 1025.

<sup>116</sup> *Id.* On the issue of notice, the court found that filling out a city-provided leave request form indicating the cause was medical need, and attaching a doctor’s note requiring her to take time off, was sufficient information to put the city on notice that this was possible FMLA leave. Contrast this with *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997), where a telephone call from employee’s husband to employee’s supervisor stating that his wife was “sick” was found by the court not to constitute sufficient notice to the employer, so that the duty to investigate further was triggered.

<sup>117</sup> 124 F.3d 695 (5th Cir. 1997).

<sup>118</sup> 124 F.3d at 698; 29 C.F.R. 825.114.

Thus, under the regulation, where an employee alleges that he has a serious health condition involving continuing treatment by a health care provider, he must first demonstrate a period of incapacity (i.e., the inability to work) for at least 4 consecutive days. Next, he must show that he received subsequent treatment or had a period of incapacity, in which he was either seen at least two times by a health care provider (or a qualified provider of health care services) or obtained a regimen of continuing treatment under the supervision of a health care provider.

The court analysis found that much of the evidence was “immaterial, conclusory, and/or hearsay,” especially since plaintiff’s doctor had given her a note stating that, following her justified 1-week absence due to a medical condition, she could return to work on Monday, March 27. However, plaintiff informed her supervisor she would return to work when she stopped feeling “weak.” Evidence showed plaintiff stayed out an extra week and did not contact her supervisor until Friday of that week, during which time plaintiff did not bother to inform her supervisor<sup>119</sup> as to the reason for her absence. The court held that no reasonable jury would believe that Murray was unable to work during the second week, and therefore no serious health condition existed during the second, unexcused, week of absence.

A showing of continuing medical treatment must also be made by the employee. This may be especially important in determining cases where the employee is claiming a chronic ailment. In *Bauer v. Dayton-Walther Corp.*,<sup>120</sup> the court concluded that plaintiff’s condition of rectal bleeding was not “chronic” because he sought medical attention on only one occasion and no treatment was ever administered, and there was no support for the proposition that plaintiff received multiple treatments. The medical certification form must also be presented in a timely way. In *Boyd v. State Farm*,<sup>121</sup> the Fifth Circuit upheld the termination of an employee who suffered from work-induced stress and anxiety, but

<sup>119</sup> Courts are in dispute as to whether supervisors who exercise sufficient control over an employee’s working conditions may be held personally liable for violations of the FMLA. See *Freeman v. Foley*, 911 F. Supp. 326 (N.D. Ill. 1995); *Norris v. North American Pub. Co.*, 3 WAGE AND HOUR CASES 2d (BNA) 1479 (E.D. Pa. 1997); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996); *Waters v. Baldwin County*, 936 F. Supp. 860 (S.D. Ala. 1996); *Johnson v. A.P. Products, Ltd.*, 934 F. Supp. 625 (S.D. N.Y. 1996). Cf. *Frizzell v. Southwest Motor Freight, Inc.*, 906 F. Supp. 441 (E.D. Tenn. 1995), disagreeing with *Freeman*. For a succinct analysis of supervisor liability, see Donna R. Mooney and Leonid M. Zilberman, *Are Supervisors Individually Liable Under the FMLA?* L.A. DAILY J., May 4, 1998, at 5. One recent federal district court decision on supervisor liability agreed with *Frizzell* that no personal liability attaches, as with Title VII cases. See *Carter v. Rental Uniform Service of Culpepper, Inc.*, 977 F. Supp. 753 (W.D. Va. 1997). The DOL regulations provide that individuals acting in the interest of the employer are individually liable under the FMLA, as they are under the FLSA. 29 C.F.R. § 825.104(d).

<sup>120</sup> 910 F. Supp. 306 (E.D. Ky. 1996).

<sup>121</sup> 158 F.3d 326 (5th Cir. 1998).



failed to provide sufficient certification. 29 C.F.R. 825.305(b) requires that the employer allow 15 days after requesting certification. Boyd was fired 11 days after certification was requested; however, the court found that since Boyd responded to the request but provided insufficient certification within that time, the firing was valid, and the employer did not have to wait for the 15-day period to run out before termination.

The plaintiff must be prepared to show that the condition necessitating leave meets the criteria of the regulations. But even before he gets that far, his pleading must set forth, in nonconclusionary terms, sufficient allegations to avoid a motion for summary judgment or motion to dismiss. This is extremely important from the employer's point of view. Many of the cases are disposed of on the basis that the employee has failed to plead or prove that necessary procedural steps were taken by the employee.<sup>122</sup>

An example of failure to plead sufficiently is given in *Boyce v. New York Mission Society*,<sup>123</sup> where plaintiff claimed that she suffered shortness of breath, anxiety, and humiliation due to mistreatment by a supervisor. The court dismissed the complaint, finding that "it is unclear from the Complaint [sic] whether her employment is even covered by the Act," and that plaintiff "fails to specify what 'serious health condition' rendered her unable to continue working. Plaintiff merely states that she left work due to 'shortness of breath and chest pains.'<sup>124</sup> The court then goes on to say that "it is clear from the examples provided [in the legislative history] that Congress intended 'serious health condition' to mean serious illnesses and not minor health conditions. Congress intended minor health conditions to be covered by an employer's sick leave policy." The "test" is then set forth by the court: "If an employee is 1) incapacitated for more than three days, 2) seen once by a doctor, and 3) prescribed a course of medication, such [as] an antibiotic, she has a 'serious health condition' worthy of being covered by the FMLA."<sup>125</sup>

Even if the employee can show that the condition claimed qualifies for FMLA leave, some cases are won by the employer because there is evidence of a valid reason for the termination not related to FMLA leave. For example, a chronic lung condition did not save the employee's job in *Hypes v. First Commerce Corporation*,<sup>126</sup> where there was chronic absence and tardiness not linked to the disability.

<sup>122</sup> See, for example, Haefling, *supra* n.113 (failed to show incapacity of more than 3 days or requisite continuing treatment); *Satterfield v. Wal-Mart Stores*, 135 F.3d 973 (5th Cir. 1998) (failed to give sufficient notice of need for FMLA leave before absence.)

<sup>123</sup> 963 F. Supp. 290 (S.D. N.Y. 1997).

<sup>124</sup> 963 F. Supp. at 298.

<sup>125</sup> 963 F. Supp. at 299, citing and quoting *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn., N.E. 1995).

<sup>126</sup> 134 F.3d 721 (5th Cir. 1998).

In *Hodgens v. General Dynamics Corporation*,<sup>127</sup> the First Circuit analyzed plaintiff's arterial fibrillations and high blood pressure conditions and found that they constituted a "serious health condition" as plaintiff was absent for more than 3 days due to the condition, and received continuing treatment from a health care provider. However, the court affirmed the district court's summary judgment for the employer, finding that the nondiscriminatory reason for termination was not pretextual. Plaintiff failed to make the required causal connection, as his excessive absenteeism could not be sufficiently linked to his termination, even though some leave time was FMLA-qualifying.<sup>128</sup>

In a Seventh Circuit case, *Kariotis v. Navistar International Transportation Corporation*,<sup>129</sup> the court found that the employer's "honest belief" that plaintiff had fraudulently accepted disability benefits following knee replacement surgery justified termination, and the district court's grant of summary judgment for the employer was affirmed.

## V. RECORDKEEPING REQUIREMENTS

In the survey responses, a number of the agencies indicated that one of the major problems they encountered with the FMLA was the recordkeeping requirements, especially keeping the records of intermittent leave.<sup>130</sup>

The FMLA provides that covered employers shall make, keep, and preserve records<sup>131</sup> pertaining to their obligations under the Act "in accordance with the recordkeeping requirements of Section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations."<sup>132</sup> Section 11(c) of the Fair Labor Standards Act requires that every employer subject to that Act keep records of every employee, and of the "wages, hours, and other conditions and practices of employment maintained by" the employer, except that such records need not be kept for workers who perform "substitute work."<sup>133</sup> The DOL may require any employer or plan, fund, or program to submit books or records not more than once during any 12-month period unless the Department has reasonable cause to believe

<sup>127</sup> 144 F.3d 151 (1st Cir. 1998).

<sup>128</sup> See also *Kaylor v. Fannin Regional Hosp., Inc.*, 946 F. Supp. 988 (N.D. Ga. 1996) where the Court found that the employee was rightly discharged for lying and misleading the employer about his job attendance.

<sup>129</sup> 4 WAGE AND HOUR CASES 2d (BNA) 1168 (1997).

<sup>130</sup> During the course of research for this report, computer software for tracking FMLA leave was found at <http://www.fmla.com>.

<sup>131</sup> No particular order or form of records is required, and the regulations establish no requirement that an employer revise its computerized payroll or personnel records systems to comply. 29 C.F.R. 825.500(b).

<sup>132</sup> 29 U.S.C. § 2616(b); 29 C.F.R. 825.500.

<sup>133</sup> 29 U.S.C. § 211(c).

a violation of the FMLA exists or the Department is investigating a complaint.<sup>134</sup>

Employers must keep the records specified by these regulations for no less than 3 years and make them available for inspection, copying, and transcription by representatives of the Department upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.<sup>135</sup>

Covered employers who have eligible employees must maintain records disclosing the following:<sup>136</sup>

- 1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid;<sup>137</sup>
- 2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under state law or an employer plan that is not also covered by FMLA;
- 3) If FMLA leave is taken by eligible employees in increments of less than 1 full day, the hours of the leave;
- 4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see 825.301(b)). Copies may be maintained in employee personnel files;
- 5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;
- 6) Premium payments of employee benefits;
- 7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers in a joint employment situation<sup>138</sup> must keep all the records required by this subsection with respect to any primary employees, and must keep the records required in paragraph 1 with respect to any secondary employees.<sup>139</sup>

If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 C.F.R. 516.2(a)(7)), provided that: 1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and 2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with 29 C.F.R. 825.500(b).

Records and documents relating to medical certifications, recertifications, or medical histories of employees or their family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/record from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements<sup>140</sup> with these exceptions:

- 1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- 2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- 3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

The DOL may require any employer or plan, fund, or program to submit books or records not more than once during any 12-month period unless the DOL has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint. However, no distinction in recordkeeping is required regarding a requested "ex-

<sup>138</sup> See 29 C.F.R. 825.106.

<sup>139</sup> 29 C.F.R. 825.500(e).

<sup>140</sup> 29 C.F.R. 1630.14(c)(1) sets out the confidentiality requirements for ADA records. As to the confidentiality of FMLA records, 29 C.F.R. 825.600(g) provides that FMLA records shall be "maintained as confidential medical records" separately from usual personnel files. These records would not, therefore, be subject to public disclosure laws of most states or the federal government. Most state public records laws, like the federal law (5 U.S.C. 552) contain clear exceptions for records protected from disclosure "by other statutes or laws." Where there is no such statutory exclusion, it has been read into such laws by court decisions. See ORRIN F. FINCH & GARY A. GEREN, FREEDOM OF INFORMATION ACTS, FEDERAL DATA COLLECTIONS, AND DISCLOSURE STATUTES APPLICABLE TO HIGHWAY PROJECTS AND THE DISCOVERY PROCESS at pp. 8-9 (TRB Research Report No. 33, 1995).

<sup>134</sup> 29 C.F.R. 825.500(a).

<sup>135</sup> 29 C.F.R. 825.500(b). For a source of software for record tracking, see n.130 above.

<sup>136</sup> 29 C.F.R. 825.500(c)(1)-(7).

<sup>137</sup> For covered employers with no eligible employees, only the records in this subsection must be maintained. 29 C.F.R. 825.500(d).

tension” of leave beyond the requirement that a covered employee not be denied the full 12 weeks of leave for an FMLA-qualifying condition.

Employees experience particular difficulty in keeping track of intermittent FMLA leave, which may be taken in the smallest increment used by the employer’s payroll system to account for absences or leave, provided it is 1 hour or less.<sup>141</sup> It is important to bear in mind also, that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, it does not count against an employee’s entitlement under the Act.

The survey comments on the burden of tracking leave were anticipated in an early article:

The FMLA unquestionably imposes burdens on covered employers. They may, for example, be compelled to reconstruct current absence-control policies that ignore the consequences of a serious health condition. Similarly, they may be compelled to maintain more detailed attendance records...In addition to the known burdens, other provisions in this relatively new legislation await judicial construction, leading practitioners and managers to wonder if anyone can get them right.<sup>142</sup>

## VI. RELATIONSHIP TO OTHER LAWS

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.<sup>143</sup>

A number of states have enacted family and medical leave laws, some of which provide greater amounts of leave and benefits than those provided by FMLA or provide benefits to employees who are not eligible for FMLA leave. In those situations where an employee is covered by both federal and state FMLA laws, the employee is entitled to the greater benefit or more generous rights provided under the different parts of each law.<sup>144</sup>

FMLA’s legislative history explains that FMLA is not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to

eligible employees and employers within its coverage, and not to limit already existing rights and protection.<sup>145</sup>

When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes.<sup>146</sup>

### Americans with Disabilities Act

If an employee is a qualified individual with a disability within the meaning of the (ADA), the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA.<sup>147</sup> At the same time, the employer must afford an employee his or her FMLA rights. ADA’s “disability” and FMLA’s “serious health condition” are different concepts, and must be analyzed separately.<sup>148</sup> FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain the employee’s group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period,<sup>149</sup> whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees.<sup>150</sup> However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 work weeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee’s present position and an accommodation is not possible in the employee’s present position, or an accommodation in the em-

<sup>141</sup> 29 C.F.R. 825.203(d).

<sup>142</sup> Robert J. Aalberts and Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?* 80 MARQ. L. REV. 135, 138 (1996).

<sup>143</sup> 29 C.F.R. 825.702(a). Such as Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

<sup>144</sup> 29 C.F.R. 825.702(a).

<sup>145</sup> S. REP. No. 103-3, 103d Cong., 1st Sess., at 38 (1993).

<sup>146</sup> One district court found that double relief may not be awarded for the same loss, but when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

<sup>147</sup> 29 C.F.R. § 825.702(b).

<sup>148</sup> *See, e.g.*, *Rhoads v. FDIC*, 956 F. Supp. 1239 (D. Md. 1997).

<sup>149</sup> 29 C.F.R. § 825.209.

<sup>150</sup> 29 C.F.R. § 825.702(c)(1).

ployee's present position would cause an undue hardship.<sup>151</sup>

If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave.<sup>152</sup>

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<sup>151</sup> The following examples demonstrate how the two laws would interact with respect to a qualified individual with a disability.

A qualified individual with a disability who is also an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the 2-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodation to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship. *Id.*

<sup>152</sup> 29 C.F.R. § 825.702(d). *See also* § 825.220(b).

## Title VII of the Civil Rights Act of 1964

Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities.<sup>153</sup> Title VII does not require a minimum employment period, and an employee therefore may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities, even though the employee would not qualify under the FMLA.

Employers can expect to be subjected to a Title VII analysis in a retaliatory discharge claim under the FMLA.<sup>154</sup>

## Workers' Compensation

A workers' compensation leave should be treated under the FMLA if the employee is eligible and the injury is considered a "serious health condition."<sup>155</sup> The FMLA does not distinguish between work-related and non-work-related injuries. Therefore, an injury on the job that requires an employee to take leave for inpatient care or continuing treatment will probably qualify under the FMLA. If the employer does not run concurrent leaves under the FMLA and workers' compensation statutes, the employee may be entitled to take 12 weeks of FMLA leave following the leave under workers' compensation. Only a few states require reinstatement from workers' compensation leave.<sup>156</sup>

At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position.<sup>157</sup> As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.<sup>158</sup>

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<sup>153</sup> 29 C.F.R. § 825.702(f).

<sup>154</sup> 29 U.S.C.A. § 2615(a)(2); 42 U.S.C.A. § 2000e *et seq.*; 29 C.F.R. § 825.220(c). *See also* McGarity v. Mary Kay Cosmetics, 1998 WL 50460 (N.D. Tex. 1998), and Dodgens, *supra*.

<sup>155</sup> *Id.*

<sup>156</sup> *Navigating the FMLA and Workers' Compensation Maze: A Guide for Employers*, HR MATTERS, Personnel Policy Service, Inc., 4965 U.S. Highway 42, Louisville, KY 40222-6374, tel.: (800) 437-3735, fax (800) 755-7011, <http://www.ppspublishers.com>.

<sup>157</sup> 29 C.F.R. § 825.220(d).

<sup>158</sup> 29 C.F.R. § 825.702(d)(2).

If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness-for-duty physical examination be job-related and consistent with business necessity.<sup>159</sup>

Employees are not required to designate whether the leave they are taking is FMLA leave or leave under state law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under state law, the leave used counts against the employee's entitlement under both laws.<sup>160</sup>

As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable.

However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job". As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable

<sup>159</sup> 29 C.F.R. § 825.310(b).

<sup>160</sup> Examples of the interaction between FMLA and state laws include: 1) If State law provides 16 weeks of leave entitlement over 2 years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year. 2) If State law provides half-pay for employees temporarily disabled because of pregnancy for 6 weeks, the employee would be entitled to an additional 6 weeks of unpaid FMLA leave (or accrued paid leave). 3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law. (4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law. 5) If State law provides 6 weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent." 29 C.F.R. 825.701.

and either the employee may elect or the employer may require the use of accrued paid leave.<sup>161</sup>

Disability leave for the birth of a child would be considered FMLA leave for serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.<sup>162</sup>

### Collective Bargaining Agreements

The provisions of the Act did not apply to employees' family or medical leave benefits under a collective bargaining agreement (CBA), whether greater or less than those under the Act, until February 5, 1994, or the date the agreement terminated (whichever was first). For CBAs subject to the Railway Labor Act and other CBAs that do not have an expiration date for the general terms but which may be reopened at specified times, e.g., to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA and the effective date of the FMLA.<sup>163</sup>

Nothing in the FMLA prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, provisions of CBAs that do not meet the FMLA requirements are superseded: for example, a provision of a CBA that provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides less pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA) to the additional leave period not covered by FMLA.

An agreement to arbitrate under a CBA has been found enforceable for claims under the FMLA.<sup>164</sup>

### The Employee's Right of Action/The *Prima Facie* Case

A suit to recover damages or equitable relief may be maintained against any employer, private or public, in any state or federal court of competent jurisdiction by one or more employees on behalf of themselves and other employees similarly situated.<sup>165</sup> In addition to the

<sup>161</sup> 29 C.F.R. 825.207(d)(2).

<sup>162</sup> 29 C.F.R. 825.207(d)(1).

<sup>163</sup> 29 C.F.R. 825.700(c)(1). As discussed in § 825.102(b), the period prior to the FMLA's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

<sup>164</sup> O'Neil v. Hilton Head Hospital, 115 F.3d 272, 275 (4th Cir. 1997); Brown v. TransWorld Airlines, 74 Fair Empl. Prac. Cases (BNA) 1675 (4th Cir. 1997).

<sup>165</sup> 29 U.S.C. § 2617(a)(2).

judgment, the court “shall allow” reasonable attorneys’ fees, expert witness fees, and “other costs of the action,” and may award liquidated damages unless good faith is shown by the employer. The employer’s liability has been determined by the courts to be strict liability.<sup>166</sup>

The Secretary of Labor may bring an action for injunction in Federal District Court. An action filed by an employee shall terminate when an action is filed by the Secretary.<sup>167</sup>

Neither the Act nor the regulations set forth guidelines for establishing a *prima facie* case for wrongful termination or discrimination under the FMLA. Two district courts have analogized to Title VII cases in finding that “plaintiff must produce evidence that he or she is protected under the FMLA, that he or she suffered an adverse employment decision, and either that the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA, or that the adverse decision was made because of the plaintiff’s request for the leave.”<sup>168</sup>

The First Circuit has held that a *prima facie* case of retaliation under the FMLA requires that an employee show that 1) a protected right under the FMLA was invoked; 2) the employee was adversely affected by an employment decision (but did not have to be treated less favorably), and 3) there is a causal connection between the employee’s protected activity and the employer’s adverse employment action.<sup>169</sup> The court analyzed the “series of substantive requirements and procedural hoops” through which an employee must pass in order to be granted FMLA leave.

As to the establishment of discrimination, the District Court for the Northern District of Georgia, in *Kaylor v. Fannin*,<sup>170</sup> citing *McDonnell Douglas*<sup>171</sup> and *Hazelwood School District v. United States*<sup>172</sup> set forth the “three methods by which an FMLA plaintiff may establish a *prima facie* case of FMLA discrimination: by direct evidence of discriminatory intent; by circumstantial evidence of discriminatory intent...or by establishing a pattern of discrimination through the use of statistical evidence.”<sup>173</sup>

Once the employee has established a *prima facie* case of FMLA discrimination, the burden of production then shifts to the employer to show a legitimate nondiscriminatory reason for the challenged employment action.<sup>174</sup> One district court had held that where an em-

ployer satisfies the burden of proof of wrongdoing (even through after-acquired evidence) “of such severity that the employee in fact would have been terminated on those grounds alone,” an affirmative defense is established.<sup>175</sup>

## VII. CONCLUSIONS

The hypothesis underlying this informal study was that transit agencies might require special consideration under the FMLA, particularly with regard to intermittent leave. This hypothesis is based on the problems that transit and transportation agencies face because of scheduling constraints and the common problem of scheduling 24-hour coverage of transit routes. The responses to surveys do not appear to indicate an impact that is any harsher than that experienced by other business and government entities, although it cannot be denied that the recordkeeping requirements are burdensome.

In 1996, the Secretary of Labor concluded that the FMLA “is a pretty easy Act to comply with.”<sup>176</sup> However, on August 5, 1998, the 5-year anniversary of the law, the DOL released a report on the experiences of the Wage and Hour Division. During the period from October 1, 1997, through the end of June 1998, the DOL received 2831 complaints, more than had been received during the entire 1997 fiscal year (10/1/96 through 9/30/97), when 2670 complaints were lodged.<sup>177</sup>

According to the Society for Human Resource Management,<sup>178</sup> the problems encountered in administering the FMLA were brought to the attention of Congress through Congressional hearings and debate during 1997.<sup>179</sup>

“The problem with the FMLA,” one author sums up, “is that it’s not user friendly. Even good faith attempts to comply can easily fall short of the legal requirements. The only way to truly protect yourself is street-wise training—light on theory and heavy on practical content.”<sup>180</sup>

It is important that agencies educate management-level personnel regarding the mandatory provisions of the FMLA. In addition, since notice of a potentially FMLA-qualifying condition often is given to operations personnel, rather than to management, all supervisory

<sup>175</sup> See *Rhoads v. FDIC*, 956 F. Supp. 1239 (D. Md. 1997).

<sup>176</sup> See Susan A. Bocamazo, ‘Absent’ Workers are now Suing Under Federal Law,’ LAW WEEKLY USA, May 6, 1999, at 16.

<sup>177</sup> See Howard Fields, *MLA Anniversary Passes Quietly: Supporters, Critics Consider Next Steps*, HR News OnLine, <http://www.shrm.org>.

<sup>178</sup> 1800 Duke Street, Alexandria, VA 22314, (703) 548-3440, fax: (703) 836-0367.

<sup>179</sup> SHRM Washington Insider, <http://www.shrm.org>, Dec. 31, 1997.

<sup>180</sup> Mark McQueen, writing in LABORWATCH, September 1998, Berens & Tate P.C., 10050 Regency Circle, Suite 400, Omaha, NE 68114, reported in HR FACT FINDER, JALMC, Inc., P. O. Box 819, Jamestown, N.Y. 14702.

<sup>166</sup> See, for example, *Kaylor v. Fannin Regional Hospital*, 946 F. Supp. 988 (N.D. Ga. 1996).

<sup>167</sup> 29 U.S.C. § 2617.

<sup>168</sup> *Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 565, citing *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (D. Miss. 1995).

<sup>169</sup> *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).

<sup>170</sup> 946 F. Supp. 988 (N.D. Ga. 1996).

<sup>171</sup> 411 U.S. at 796, 93 S. Ct. 1821.

<sup>172</sup> 433 U.S. 299 (1977).

<sup>173</sup> 946 F. Supp. at 1000.

<sup>174</sup> *Id.*

staff should be familiar with the Act and the regulations. It might also behoove resource managers to hold periodic sessions or workshops for all personnel to explain how the FMLA provisions are implemented. Although some employees may be more likely to take advantage of the FMLA the more they know about it, others undoubtedly would be deterred by an emphasis on the notice and certification requirements, and its primary unpaid leave status.

Carefully studying the provisions for certification and recertification of a serious medical condition should be of assistance to any agency in assuring that an employee's condition qualifies for FMLA leave.

Managers and supervisors who are responsible for granting requests for FMLA leave, or for designating FMLA leave, may continue to wish for a definition of "serious health condition" that is easier to implement. If each request is looked at in relation to the qualifying factors found in the regulations (as outlined in Section II and discussed in Section IV of this report), their task may be made easier. One of the practical suggestions in an article intended to help employers avoid "some of the FMLA's traps for the unwary" is that,<sup>181</sup> when an employee requests leave but the employer cannot confirm that it is FMLA qualifying, it should be designated provisionally as FMLA leave, and the employer should reserve the right to make a final decision once it receives the necessary information.

As we have emphasized in this report, if the denial of FMLA leave results in a lawsuit against the employer, the determination as to whether an employee has a "serious health condition" will be made by a court based on the facts in each case. As the cases show, however, the facts found often turn on whether the requisite procedural steps have been followed by the employee and by the employer.

Where intermittent leave or a reduced leave schedule is requested for an employee's own serious health condition, the certification must state that the employee is unable to perform the functions of the job, is unable to perform an essential function of the job, and whether the employee must be absent for treatment. If the serious health condition is of a family member, the certification should state whether the person requires assistance for his/her condition and whether such assistance will be on an intermittent basis. The employee should provide an estimate of the time required for the care, and specify the type of care to be given. The employer may also require that the employee report periodically on his or her status and intent to return to work. The use of certification forms that specifically request this information should be helpful in this regard (See, for

example, the forms provided by DOL in Appendix B of the regulations).

One district court has analyzed the "series of [statutorily imposed] substantive requirements and procedural hoops" through which an employee must pass in order to be granted intermittent leave, as follows:

1) The leave must be "medically necessary" for a "serious health condition," 29 U.S.C. §2612(b)(1).

2) The employee must make a reasonable effort to schedule the treatment so as not to "disrupt unduly the operation of the employer," 29 U.S.C. §2612(e)(2)(A); and

(3) The employee must give at least thirty (30) days notice to the employer, 29 U.S.C. §2612(e)(2)(B).<sup>182</sup>

Agencies may find it useful to put into practice a three-step process based on these requirements for their employees who request intermittent leave.

In any case where an agency believes there is fraud or abuse relating to FMLA leave, the agency has recourse to the second and third opinion options of the FMLA provisions. If the agency believes a second opinion is warranted, that opinion can be sought by a doctor selected by the employer; if the second opinion differs from the first, a neutral third opinion can be sought.

As to recordkeeping requirements, computer software that is available should go a long way toward alleviating the attendant problems. Since no particular form of recordkeeping is required under the Act and regulations, agencies should be able to make full use of such computerized forms. (See the discussion under Section IV above). In the end, there is no question that many agencies will be compelled to maintain more detailed attendance records than they have at present.

This report has made clear the detailed nature of employer obligations under the law. There is no question that the law is burdensome for employers and difficult to apply because of the way in which "serious health condition" has been defined in the statute and regulations. It is likely to become applicable to more smaller employers in the future. Fortunately, as the case law develops and with the help of technology, meeting the requirements of the law will become less onerous for all employers, including transit agencies.

<sup>181</sup> David Sheehan and Katherine Nukk-Freeman, *Avoiding Violations in the FMLA Maze*, N.Y.L. J. 9 (May 26, 1998). See also practical pointers in Mark A. Spognardi, *Conducting a Human Resources Audit*, 23 (1997), EMPLOYEE RELATIONS L. J. 105, and *Typical Mistakes Employers Make*, 12 HR FACT FINDER, (1998), published by JALMC Inc., P. O. Box 819, Jamestown, NY 14702.

<sup>182</sup> *Kaylor v. Fannin Regional Hospital*, 946 F. Supp. 988 (N.D. Ga. 1996).

## APPENDIX A

### SURVEY ON THE IMPACT OF THE FAMILY AND MEDICAL LEAVE ACT ON TRANSIT AGENCIES

The Family and Medical Leave Act (FMLA) allows eligible employees of a covered employer to take unpaid leave in the event of a birth or adoption of a child, or for their own or a family member's serious health conditions. The Transportation Research Board's Transit Cooperative Research Program, Continuing Legal Research Project, is conducting a survey of transit agencies to determine the fiscal impact of the federally-mandated requirements of the FMLA, and to ascertain any problems with legal interpretation of that Act.

Your cooperation in completing the following survey is appreciated. Please return the completed survey by September 21, 1998, to:

James B. McDaniel  
Counsel for Legal Research Projects  
Transportation Research Board  
2101 Constitution Avenue, NW  
Washington, D.C. 20418

Results of the survey and an analysis of the issues unique to the transit industry will appear in a forthcoming edition of *Legal Digest*, published by the Transportation Research Board.

1. Agency Name \_\_\_\_\_
2. Agency Address \_\_\_\_\_
3. Name, Title, Telephone and Fax Numbers of Person Responding to Survey  
\_\_\_\_\_  
\_\_\_\_\_
4. Public Agency  Private Agency
5. Type of Transit: Bus  Commuter Rail  Subway   
Other: \_\_\_\_\_
6. Days and Hours of Operation \_\_\_\_\_
7. Geographical Area Served \_\_\_\_\_
8. Number of Routes \_\_\_\_\_
9. Consumer Demographics (if available) \_\_\_\_\_  
(business/commercial, industrial, agricultural, pleasure, daily commuters, etc.)



10. Number of Full-Time Employees \_\_\_\_\_
11. Of full-time employees, how many are unionized? \_\_\_\_\_
12. Of full-time employees, how many have direct contact with the public (such as transit operators) \_\_\_\_\_
13. Of full-time employees, how many are in-house administrative and support staff \_\_\_\_\_
14. Approximate number of hours worked per 12-month period per employee \_\_\_\_\_
15. Number of Part-Time Employees \_\_\_\_\_
16. Of part-time employees, how many are unionized? \_\_\_\_\_
17. Approximate number of hours worked per 12-month period per part-time employee \_\_\_\_\_
18. Number of Holiday Employees (if different than Part-Time Employees) \_\_\_\_\_
19. Approximate number of hours worked per specialized holiday period  
 Holiday: \_\_\_\_\_ Hours: \_\_\_\_\_  
 Holiday: \_\_\_\_\_ Hours: \_\_\_\_\_
20. Approximate or average number of employees working each day \_\_\_\_\_  
 Day Shift \_\_\_\_\_ Night Shift \_\_\_\_\_ Graveyard \_\_\_\_\_
21. Number of employees who applied for FMLA leave  
 1994 \_\_\_\_\_ 1995 \_\_\_\_\_ 1996 \_\_\_\_\_ 1997 \_\_\_\_\_
22. Of those who applied, number who were found eligible:  
 1994 \_\_\_\_\_ 1995 \_\_\_\_\_ 1996 \_\_\_\_\_ 1997 \_\_\_\_\_
23. How many were "key" personnel?  
 1994 \_\_\_\_\_ 1995 \_\_\_\_\_ 1996 \_\_\_\_\_ 1997 \_\_\_\_\_
24. Of those found eligible, how many gave adequate notice (at least 30 days)?  
 \_\_\_\_\_
25. Of those found eligible, how many gave little (less than 1 week) or no notice due to an "emergency" situation? \_\_\_\_\_
26. Of those who took leave, average length of leave \_\_\_\_\_

## 27. Purpose of leave, by category:

1994:

Birth/Adoption of Child \_\_\_\_\_

Serious Health Condition/Self \_\_\_\_\_ Serious Health Condition/Spouse \_\_\_\_\_

Serious Health Condition/Parent \_\_\_\_\_ Serious Health Condition/Child \_\_\_\_\_

1995:

Birth/Adoption of Child \_\_\_\_\_

Serious Health Condition/Self \_\_\_\_\_ Serious Health Condition/Spouse \_\_\_\_\_

Serious Health Condition/Parent \_\_\_\_\_ Serious Health Condition/Child \_\_\_\_\_

1996:

Birth/Adoption of Child \_\_\_\_\_

Serious Health Condition/Self \_\_\_\_\_ Serious Health Condition/Spouse \_\_\_\_\_

Serious Health Condition/Parent \_\_\_\_\_ Serious Health Condition/Child \_\_\_\_\_

1997:

Birth/Adoption of Child \_\_\_\_\_

Serious Health Condition/Self \_\_\_\_\_ Serious Health Condition/Spouse \_\_\_\_\_

Serious Health Condition/Parent \_\_\_\_\_ Serious Health Condition/Child \_\_\_\_\_

## 28. Of those who took leave, average length of leave

Those directly serving public \_\_\_\_\_

In-House/Administrative Staff \_\_\_\_\_

## 29. How many positions were filled by temporary help during the leave?

Those directly serving public \_\_\_\_\_

In-House/Administrative Staff \_\_\_\_\_

## 30. Total employee payroll: 1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

Cost to transit agency due to FMLA leave:

Salary for replacement personnel:

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

Salary for leave personnel (if applicable)

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

Health benefits for replacement personnel:

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

Health benefits for leave personnel:

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

Other costs (explain):

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

31. Of those who took leave, how many requested extensions \_\_\_\_\_

32. Average length of extension \_\_\_\_\_

33. Of those who took leave, how many never returned to work \_\_\_\_\_

34. How many of those who never returned to work were *not* replaced? \_\_\_\_\_

35. Of those who never returned to work, average time required to replace employee

Those directly serving public \_\_\_\_\_

In-House/Administrative Staff \_\_\_\_\_

36. For permanent replacement staff, cost of training (if any)

1994 \_\_\_\_\_ 1995 \_\_\_\_\_

1996 \_\_\_\_\_ 1997 \_\_\_\_\_

37. Has your agency documented any fraudulent claims or abuses by employees of FMLA conditions? (explain)

\_\_\_\_\_  
\_\_\_\_\_

38. If the answer to 37 above is "yes," cost of any legal action, and year(s) in which action was initiated \_\_\_\_\_

\_\_\_\_\_

39. Please explain briefly any specific hardships encountered by mandated FMLA leave, especially with regard to scheduling \_\_\_\_\_

\_\_\_\_\_

40. Please explain briefly any difficulties encountered in defining specific provisions of the Act (who is an eligible employee, "serious health condition," what constitutes "continuing treatment," when restoration of employee position may be denied due to "substantial and grievous economic injury" to employer's operations, etc.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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41. Please explain briefly any conflict with State or local laws which you have encountered in applying the FMLA provisions \_\_\_\_\_

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Other comments:

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Direct questions about this survey to:

Laura D'Auri, Esq.  
FMLA Survey  
Post Office Box 3213  
Culver City, CA 90231-3213  
Telephone: (310) 204-1261  
Fax: (310) 204-2780  
e-mail: gdaniels98@earthlink.net

Return the survey to:  
James B. McDaniel  
Counsel for Legal Research Projects  
Transportation Research Board  
2101 Constitution Avenue, N.W.  
Washington, D.C. 20418

RESPONSE REQUESTED BY SEPTEMBER 21, 1998

**APPENDIX B**  
**COMMENTS FROM AGENCIES**  
**REGARDING PROBLEMS ENCOUNTERED**  
**IN IMPLEMENTING THE FMLA**

**The Arrow Line Co.**, a private agency, commented that they did not start tracking FMLA leave until 1997, but that “we grant LOA all the time.” As indicated in this study, recordkeeping is mandated by the Act and regulations.

**Capital Area Transportation Authority** commented that they have a generous leave program and therefore do not resort to the FMLA provisions.

**Columbia Transit** reported a “total” of 5 leaves. All claims received benefits under workers’ compensation. The agency commented that because training is so extensive for replacements, they did not hire temporary personnel and had permanent staff fill in.

**Detroit Transportation Company** commented “[d]ue to the extensive training necessary to replace the workers on FMLA leave and our small staff size, there were some critical situations that required extensive overtime by other employees.” A supposition of “critical situations” in scheduling operations is what initially prompted this study. However, overall the surveys did not indicate critical situations on an ongoing basis.

**The Greater Bridgeport Transit District** commented that “[e]mployees have a hard time understanding the definition of a ‘serious health condition.’” After reading this study, presumably readers agree that courts, lawyers, and doctors also have a hard time understanding the definition! The problem is that there is no definition that suits all circumstances, and many of the cases turn on other factors, such as the employee’s failure to give proper notice or certification, even where the employee’s condition is serious.

**Greater Lafayette Public Transportation Co.** commented that in the case of intermittent FMLA leave, the situations are often “spur of the moment” and therefore cause scheduling problems and hardships. The agency should refer to the regulations regarding the requirement that 30 days’ notice be given an employee with a foreseeable condition on intermittent leave.<sup>183</sup> The agency further comments on the difficulties in defining “serious health condition” for back trouble. Again, the cases show that all the surrounding circumstances (eligibility, notice, certification, etc.) must be taken into consideration.

The agency has evidently tried to educate employees about the FMLA provisions and requirements, but states that “there is much misinformation. Many people think they can take off under FMLA for most any reason at any time. As people become more informed, FMLA use continues to increase. Through the first 8 months of 1998, we have had over 40 weeks of FMLA leave.”

Most of the surveys showed that FMLA leaves are on the increase. Especially in the case of a small agency such as this one (65 full-time employees, 25 part-time employees), it is unavoidable that rescheduling results in an administrative burden to the agency, as well as delays and inconveniences for the public.

**Greater Lynchburg Transit Co.** commented that they designate as FMLA leave all requests of more than three days. Doing so will certainly avoid some of the “traps” into which human resource personnel can fall regarding implementation of the Act, but it also fails to take advantage of the few protections afforded employers regarding abuse by employees. This agency reported only eight FMLA leaves in 1997, however, their total eligible staff numbers only 61.

In answer to question 39 regarding hardships, **Housatonic Area Regional Transit** commented that no specific hardships were encountered and that they consider FMLA leave part of the cost of doing business.

**County of Lackawanna Transit System (COLTS)**, commented in response to question 39 that employees on FMLA leave present the same hardship to the agency as “someone taking vacation.” Presumably, then, COLTS has not had many employees taking unforeseeable leave, since an employee taking vacation usually gives sufficient notice, while an employee on unforeseeable leave may give no notice at all, depending on the circumstances.

With regard to an employee who actually goes on vacation while on FMLA leave, one commentator had this to say: “It may seem odd that someone could drive to Florida for vacation and still be covered by FMLA, until you realize that people with disabilities go on vacation all the time and yet may not be able to work. A friend of mine broke her leg and couldn’t drive, so she couldn’t work, but she went ahead with a planned trip to Hawaii. As she said, ‘If I’m going to sit around all day, I might as well be sitting in Hawaii.’”<sup>184</sup>

**City of Lincoln, StarTran**, commented that it does not operate on holidays and that “due to extensive necessary training, all hours were covered as overtime by current employees.”

**Middletown Transit District** commented generally that they contract for drivers and mechanics with a private company, thereby sustaining no FMLA leaves (as such leave would impact the contractor, rather than Middletown).

<sup>183</sup> 29 C.F.R. § 825.302-304. The employee can also be asked to explain why the intermittent leave is necessary. 29 C.F.R. § 825.302(f).

<sup>184</sup> Rita Risser, www.fairmeasures.com. Reprinted with permission.

**Milford Transit** commented that they have not had any experience with the FMLA and will appreciate the information provided in this study.

**Montebello Bus Lines** commented in response to question 39 that they have encountered a hardship maintaining “an adequate pool of part-time replacements. Our primary FMLA employees are on approved intermittent leave, which is difficult to schedule.”

**PeeDee Regional Transportation Authority** commented that “[a]ll FMLA leave taken was by drivers or dispatchers. This caused a disruption of services and increased overtime due to scheduling problems.” The agency further comments, in response to question 41 regarding conflict with state and local laws that “we do not run FMLA concurrent with paid leave or with leave for workers’ compensation claims, which means that an employee can be out for a considerable period of time.”

Pee Dee’s policy is in conformance with the Congressional policy of encouraging generous leave.<sup>185</sup> The agency does acknowledge, however, that there is a problem when employees do not request FMLA in advance, although only one employee has done so (apparently referring to unforeseeable leave), and that some wait until they are out to request leave (again, presumably referring to unforeseeable leave).

**Pine Bluff Transit** commented that they experience difficulty in interpreting “required procedures.” Pine Bluff should not feel left out, as so does everyone else.

**Post Road Stages, Inc.**, a private agency of 17 employees, commented that they have not encountered a situation where any employees have been eligible. Post Road Stages is correct that with 17 employees, and being a private agency, they are not subject to the Act.

**Rockford Transit** states that there were no FMLA leaves during the survey period, although the agency comments that during 1998 it designated several leaves as FMLA-qualifying leaves even though employees hadn’t asked for it. It is correct that it is “in all circumstances” the employer’s duty to determine and designate what constitutes an FMLA leave.<sup>186</sup>

**RTA Transit Services**, a private agency, comments that “employees on ‘warning’ cling to FMLA as an excuse. It makes it difficult to reprimand employees for absentee problems.”

RTA is encouraged to make full use of the notice and certification requirements, as well as recertification upon reinstatement.

**Ryder/ATE** commented that no difficulties have been encountered and that operators are cross-trained and are capable of extra duties.

**South Coast Area Transit** commented that FMLA leaves constitute “substantial paid overtime,” and that there is “stress on office and clerical staff to piece together personnel able to perform work when scheduled employees are off for any reason.” South Coast also commented that they do not specifically document FMLA leaves because FMLA is a “mandated requirement,” but also comments that employees assume that the FMLA applies to “extended relatives.”<sup>187</sup>

There was no indication in the survey that South Coast has attempted to rectify the misunderstandings of employees with regard to the Act, and some clarification may be necessary. A FAQ sheet (frequently asked questions) may benefit this agency.

**Southwestern Virginia Transit Management Co.** commented that there are some difficulties in explaining what constitutes a serious health condition, and the agency suggests that provisions in the Act be more specific about definitions. As has been discussed throughout this study, such clarification is unlikely to occur, and even though specific definitions could assist in designation of leave, having such clarification would not necessarily preclude lawsuits by employees who feel they have been unfairly treated.

The agency commented that they have the DOL book on the FMLA, but would appreciate any additional information. Two of the most helpful personnel resources located during the course of this study were the Personnel Policy Service, Inc., 4965 U.S. Highway 42, Louisville, KY 40222, www.ppspublishers.com, and The Society for Human Resource Management, 1800 Duke Street, Alexandria, Virginia 22314, (703) 548-3440, fax: (703) 535-6490, HR Answerline: (800) 437-3735, www.shrm.org.

**SunLine Transit** commented that when bus operators are absent, the part-timers are scheduled, and that when administrative personnel are on leave, “telecommuting is available.” SunLine also comments that they interpret the FMLA leave provisions broadly, “especially when coordinating with California disability (pregnancy) terms.”

**Valley Transit** commented that “intermittent leave is especially burdensome as operators typically must take a full shift when requesting off work. Intermittent leave allows them to take small increments of time off in the middle of a

<sup>185</sup> 29 U.S.C.A. § 2653.

<sup>186</sup> 29 C.F.R. § 825.208(a).

<sup>187</sup> Grandparents or siblings with a serious health condition are not normally covered. Wage-Hour Opinion Letters, FMLA-21, Dec. 7, 1993, and FMLA-73, Oct. 26, 1995; *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306 (E.D. KY. 1996). Leave for placement of child must take place within the first year after the child is placed with the employee. 29 U.S.C.A. § 102(a)(2); *Bocalbos v. Nat’l. W. Life Ins. Co.*, 1998 WL 846839 (5th Cir. 1998).

shift requiring extra report and relief pay.” Valley Transit also comments that “serious health condition combined with continuing treatment seems to allow people with cold and influenza symptoms to qualify for FMLA.”

Colds, flu, and sore throats are listed in DOL regulations as examples of conditions that ordinarily would not be covered by the FMLA because they are not of the length of duration, 3 days, and usually do not require treatment by a health-care provider.<sup>188</sup> Valley Transit further commented that by combining Wisconsin and federal laws, employees have the “best of both worlds,” which may likely have been the intent of the creators of the Act.

**Waco Transit System, Inc.** commented that the act does not apply to them, as they have under 50 employees. However, as a public agency, Waco Transit is required to post notice of FMLA rights, even if they have no eligible employees.

**Waukesha Metro Transit** commented that all FMLA leave to date has been by operators and that their labor agreement “limits the number of part-time employees to full-time ratio of 1.125.” Extended leave therefore “promotes increased overtime pay to cover existing schedules.”

**Whatcom Transportation Authority** commented that there are a number of employees who are eligible for ongoing intermittent leave. “They frequently give no notice and this results in schedule and overtime issues. We also have part-time employees waiting to become full-time who are temporarily promoted to full-time while individuals are on leave. Part-time [employees] resent having to wait indefinitely and often quit.”

In response to question 41 regarding conflict with state or local laws, the agency responded that they “have been able to work within the differences.”

With regard to employee conditions, Whatcom said that some employees balk at telling supervisors what their condition is, which they feel is a violation of their privacy. Whatcom also said that tracking intermittent leave is a “major concern,” and that their staff spends a lot of time tracking sick leave, vacations, and unpaid FMLA leave. While this is undoubtedly true, an agency that fails to track FMLA leave time may later find itself in a murky soup of litigated issues. A risk balance analysis may find in favor of expenditures in accounting and management personnel and procedures, rather than legal costs.

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<sup>188</sup> 29 C.F.R. § 825.114(c).

## APPENDIX C

### FUTURE LEGISLATION

It has been anticipated that future legislation in this area may compound problems for employers rather than alleviate them. In particular, the FMLA's small business exemption may be lowered from 50 employees within a 75-mile radius to 10–25 employees within the same distance, which would increase the burden on small transit agencies. During the 105th Congress, the House did not vote on the FMLA Clarification Act (HR 3751) introduced by Rep. Harris Fawell (R-IL) in April 1998. However, members of both houses of Congress proposed changes to the FMLA only days after doors opened on the 106th session. In the House, Rep. Clay (D-MO.) introduced HR 91, which would decrease from 50 to 25 the number of employees required for an employer to be covered by the leave law, purportedly extending the FMLA's protection to an additional 15 million workers. In the Senate, Senator Dodd (D-CT) introduced SB 201, which would extend coverage to employers of 25 or more workers. Unlike Clay's bill, Dodd's bill does not include parental involvement leave (children's school activities, etc.) or elder care.

The managing editor of the *Business & Legal Reports* newsletter,<sup>189</sup> Stephen Fournier, in referring to a study commissioned by the Department of Labor reporting negligible effects on business, commented: "Overall, the findings present a less rosy compliance picture than has been painted by the government." Fournier concluded that "[t]he problems noted by [the Human Resources] population could hardly be characterized as negligible...Some felt resentment at the way the government took over family leave, forcing organizations, in some cases, to scrap their own, more generous leave policies." Many reported frustration with the FMLA provisions that provide protection for malingerers. "There is a small contingent of unscrupulous employees who seem to have gained immunity from discipline through this law, despite serious attendance problems. This is a demoralizing prospect and one that detracts from the popularity FMLA might otherwise enjoy among HR practitioners."

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