Out of Sight But Not Out of Mind:
Untangling Employer Obligations Under FMLA and Other Leave Statutes

Tuesday, September 13, 2011
Foster Pepper PLLC
Seattle, Washington
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OUT OF SIGHT
BUT NOT OUT OF MIND:
Untangling Leave of Absence Requirements
What is protected, concerted activity when employees post job-related comments on social media?

- *Protected:* conversations among coworkers about wages, hours or working conditions
- *Protected:* post tries to initiate action, brings “truly group complaints” to management or is a “logical outgrowth” of collective employee concerns
- *Not protected:* communications solely on behalf of employee or “mere griping”
Seattle Mandatory Paid Sick Leave Ordinance

- Requires “paid sick and paid safe time” leave
- Covers employers with 4 or more Seattle employees
- Amount of leave depends on size of business (5 to 9 days per year); unused time must be carried over
- Excludes work study students and employees who work fewer than 120 days per year in Seattle
- Employees at large employers (250+) can’t take leave in first 180 days
- Effective in 180 days to 1 year, depending on employer size
Make Room In The Kitchen: New NLRB Posting

- Applies to all private employers covered by NLRA
- Requires employers to post a notice (available at nlrb.gov) of employee rights
- Must post by November 14, 2011
- Must also post on intranet site if personnel rules customarily posted there
Medical Marijuana Decision Favors Employers

- Despite Medical Use of Marijuana Act (MUMA), employer may discharge for using prescribed medical marijuana.
- Employers need not permit use of medical marijuana on the job or accommodate use away from work.
- Employers should:
  - Review drug policies; zero tolerance for prohibited substances
  - Consistently apply the drug policy
  - Be prepared to respond to medical marijuana issues
Missed Break Compensation Payable At Straight Time

- WSNA sued Sacred Heart Medical Center seeking overtime pay for missed meal and rest breaks.
- Court of Appeals clarifies that missed break compensation is to be paid at straight time (as opposed to overtime) rates.
- Employees must be provided with their meal and rest breaks, and employers must document that meal and rest breaks are being provided.
OUT OF SIGHT
BUT NOT OUT OF MIND:
Untangling Leave of Absence Requirements
THE ISSUE:
Company fired a pregnant employee in order to avoid giving her maternity leave and retaliated against her.

VERDICT:
Plaintiff, $82,024
THE ISSUE:
A female sued the defendant insurance company claiming wrongful discharge in violation of the federal Family Medical Leave Act.

VERDICT:
Plaintiff, $275,000
Burchfiel v. Boeing Corp.

THE ISSUE:
Company discriminated against an employee after he took a medical leave of absence for leukemia.

VERDICT:
Plaintiff, $1,007,000
Suit says RTA denied FMLA leave
Plaintiffs say company required multiple exams, trips to doctors.

By Thomas Gnau, Staff Writer
11:46 PM Tuesday, August 9, 2011

Employees of the Greater Dayton Regional Transportation Authority have filed a class action lawsuit against their employer in Dayton’s federal court, alleging that the bus service has ignored or violated the Family and Medical Leave Act (FMLA).

Eight people, filing for themselves and “all similarly situated persons,” contend in their suit that the RTA denied employees their rights under federal rules governing time off for workers dealing with family or health issues. The FMLA allows certain workers up to 12 weeks of unpaid, job-protected leave each year to deal with family and medical responsibilities.
OUT OF SIGHT
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Today’s Topics

- FMLA compliance
- Special issues with intermittent leave
- Pregnancy/maternity leave under federal and state law
- Medical insurance benefits during leaves of absence
- Impact of federal and state disability laws on leaves of absence
- Reminder about veterans’ benefits
- Managing employee leave
PART 1:
FMLA Basics
FMLA – What Does It Do?

- In some circumstances, FMLA provides eligible employees of covered employers
  - up to 12 or 26 weeks of unpaid leave in 12-month period
  - ability to continue health benefits during leave
  - right to be returned to same or equivalent position
What Reasons Justify FMLA Leave?

- Birth and care of child
- Placement of child for adoption or foster care
- Care for spouse, son, daughter, or parent with “serious health condition”
- Employee’s “serious health condition” - unable to perform job functions
- Qualifying military exigency*
- Care for an injured service member*

* 26 weeks per 12 months
What is a “Serious Health Condition”?

- Illness, injury, or condition that involves either *inpatient care* or *continuing treatment* by a health care provider.
- “Inpatient care” requires an overnight stay in a hospital, hospice, or residential medical care facility.
- “Continuing treatment” definition
What is “Continuing Treatment”? 

- Incapacity for 3+ days and two later treatments, or regimen of continuing treatment by health care provider 
- Incapacity due to pregnancy or prenatal care 
- Chronic serious health condition 
- Conditions requiring multiple treatments
What is Military Caregiver Leave?

- Care for a family member in the armed forces
  (or on temporary disabled list)
- Serious illness or injury incurred in line of duty
- Covers more extended family members than other
  FMLA leaves
Who Qualifies for Military Exigency Leave?

- Employee’s family member (spouse, child of any age, parent, “next of kin”) is called to active duty (or notified of impending call to active duty) in support of a contingency operation

- “Qualifying exigency”
What are “Qualifying Exigencies”? 

- short-notice deployment
- military events and related activities
- child care and school activities
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities
- other activities as agreed
The FMLA Minuet

- Request for leave
- Medical certification
- Eligibility notice
- Qualification notice
- Insurance benefits during leave
- Reinstatement rights
PART 2: Intermittent Leave
Oh, intermittent #FMLA. You make me want to stab myself in the eye with a fork. Except then I'd be on FMLA, and still have to track it. #HR
**What is “Intermittent” Leave?**

- FMLA leave on intermittent basis or to work reduced schedule
  - Intermittent leave taken in separate blocks of time (from an hour to several weeks) due to a single qualifying reason
  - Reduced schedule leave lowers usual number of hours worked
Why Would An Employee Get Intermittent Leave?

- To care for spouse, child, or parent with a serious health condition
- Due to employee’s own serious health condition
- Due to a qualifying military exigency
- To care for an injured service member
How Does Employee Qualify for Intermittent / Reduced Schedule Leave?

- Eligibility is established when leave begins
- Considered single leave for eligibility purposes
- Employer may require initial medical certification, but not for each later absence
- Employer may not require firm schedule of when intermittent leave will be used
How Do We Schedule Intermittent / Reduced Schedule Leave?

- Employee must make “reasonable effort” to schedule planned medical treatment so don’t “disrupt unduly” employer operations
- But medical necessity for particular schedule prevails
Can Employer Transfer Employee on Intermittent Leave?

- If foreseeable due to planned medical treatment, may require temporary transfer to better accommodate recurring leave
- Must have equivalent pay and benefits, not equivalent duties
- Can’t transfer to deter employee from taking leave
- Place employee in original job or equivalent when leave no longer needed
How Do We Pay Someone on Intermittent Leave?

- Pay nonexempt for time worked
- Can deduct from exempt employee’s salary for time taken as intermittent/reduced schedule FMLA leave without risk to exempt status; applies only to FMLA
PART 3:
Pregnancy and Maternity Leave
Enterprise Bargaining

I'd like paid maternity...

Leave

horacek
Leave for Pregnancy and Childbirth

- Family and Medical Leave Act
- Washington Family Leave Act (WFLA)
- Pregnancy Disability Regulation (WPDL)
WHEN’S THE BABY DUE?  ANY MINUTE NOW.

THIS COMPANY HAS NO MATERNITY LEAVE POLICY, SO I’M GOING TO DELIVER BY THE XEROX MACHINE AND KEEP WORKING.

THAT DOESN’T SEEM FAIR.

YEAH, ESPECIALLY IF YOU NEED TO MAKE COPIES.
Washington Pregnancy Disability Leave

- Leave for time that woman is sick or temporarily disabled due to pregnancy or childbirth
- “Pregnancy” includes potential to become pregnant, related medical conditions, miscarriage
- Amount based on medical need; can request certification
- Treat women on pregnancy disability leave same as employees on other disability/sick leaves
- Allow return to same or similar job (at least same pay)
Alice, I noticed you gave birth by the Xerox machine this morning...

We don't have a maternity leave policy here, but if you need some time, I'm sure we can find somebody less fertile to fill your job.

Thank you, sir, but I don't expect any special treatment.
Pregnancy Leave – Stack and Credit Approach

- Pregnancy disability leave available *in addition to* FMLA leave — *stacks* on top of FMLA
  - Employer designates leave for pregnancy-related disability as FMLA leave
  - Once FMLA leave is exhausted, pregnancy-disability leave continues until no medical need
  - After disability ends, employer *credits* employee with additional unpaid leave for child care equal to amount of FMLA leave exhausted because of pregnancy-related disability
Pregnancy Leave Stack and Credit Example 1

- Jane works up to the moment of birth, then is temporarily disabled for 6 weeks. How much bonding time?
- Employer designates first 6 weeks after delivery as FMLA leave
- After disability ends, employer *credits* her with those 6 weeks of FMLA leave
- 12 weeks of bonding time available
Pregnancy Leave Stack and Credit Example 2

- Beth has complicated pregnancy (bed rest 12 weeks before birth; recovers 12 weeks after birth)
- Employer designates 12 weeks before delivery as FMLA leave
- Pregnancy disability leave continues for another 12 weeks after birth.
- Disability ends: employer *credits* her with 1st 12 weeks of FMLA leave
- 12 weeks of bonding time available
PART 4: Benefits Issues
FMLA Insurance Continuation Requirements

- Employees may continue health insurance coverage while on FMLA leave.
- Employee responsible for any employee-paid premiums.
  - Employer’s duty to provide coverage ends if employee 30+ days late, but employer must provide 15+ days written notice.
- If employee fails to return to work, employer may collect premiums paid during leave.
ERISA and COBRA

- **ERISA**: federal law governing benefit plans, including health insurance.

- **COBRA**: federal law allowing participation in group health plan after “qualifying event” that ends coverage (including termination of employment, reduction of hours).
COBRA and FMLA

- Employer required to notify employee of right to elect COBRA after qualifying event.
- FMLA leave is not a qualifying event; employees continue coverage during leave.
- No need to offer COBRA to employee on FMLA.
- Date of employee’s failure to return to work is a qualifying event.
Health Coverage Under WA Leave

- Federal law (ERISA and COBRA) trumps state law
- WA can’t force benefit plans to continue coverage during leave
- Reduction in hours could disqualify employee from plan – a qualifying event
- Pregnancy leave
- Check your plan
PART 5: Disability Leave
@kaycey55
kerri marie

just got the call. Did u find a perm position she says. I say no. She says I have to terminate u for failure 2 return from leave of absence

1 Sep via Twitter for Windows Phone
Duty To Reasonably Accommodate

- ADA: duty to provide reasonable accommodation for known disabilities unless undue hardship
- WLAD: duty to remove the sensory, mental or physical impediments to ability to perform the job
- Duties arise when aware of disability or physical limitations; no formal notification required
Reasonable Accommodation

- Remove impediments to employee’s ability to perform the essential functions of the job
- Accommodation required if medically necessary
- No duty to grant “most reasonable accommodation” or accommodation of employee’s choice
Attendance, Work Schedule as Essential Job Functions

- Determine essential job functions case-by-case
- General attendance an essential function of most jobs; uninterrupted attendance probably not
- Full-time work may be essential function
- Overtime may be essential function
- Ability to work a particular schedule may be essential function
Work From Home

- Duty to accommodate may require employer to permit employee to work from home
- Employer must consider work from home where
  - Existing policy permits work from home
  - Home work would accommodate employee and not cause undue hardship
Leave as Reasonable Accommodation

- Duty to accommodate may require time off, even if employee exhausted all statutory and policy leave
- Leave may be required if plausible chance of enabling employee to perform essential job functions
- Indefinite leave *not* required
- Not required where undue hardship
- Time off may be required even if employee does not request it
@livininacubicle
livininacubicle

I get great enjoyment telling a Fake Sick person that their disability pay is now down to half pay!! Muuuuhahahaha

#NFTC
RCW 51.32.090:

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages:

PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.
PART 6:
Other Leave Laws Of Interest To Washington Employers
UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)
USERRA

- Covers nearly all employers
- Regulates leaves of absence for military service
- Prohibits discrimination or discharge based on military obligations
- Provides right to re-employment after military service
- Protects health insurance coverage
**Employer Support of the Guard and Reserve (ESGR)**

- Primary initial point of contact
- National Committee for Employer Support of the Guard & Reserve
  
  1555 Wilson Blvd, Suite 200
  
  Arlington, VA 22209-2405

- Phone: 1-800-336-4590

- Website: [www.esgr.org](http://www.esgr.org)
Department of Labor – Veterans’ Employment and Training Service (DOL-VETS)

- U.S. Department of Labor
  Frances Perkins Building
  200 Constitution Avenue, NW
  Washington, DC 20210

- 1-866-4-USA-DOL

- Website: www.dol.gov/vets
Washington Veterans Employment & Reemployment Act

- Covers private employers, Washington state and municipalities
- Protects state-activated reserve and national guard personnel
- 12 weeks leave per year for state-ordered active duty
- Employee may participate in benefits offered to employees on comparable leaves
- Public employee service members have special COBRA-like rights to health insurance coverage.
Washington Paid Military Leave for Public Employees

- Covers public sector employers
- Up to 21 days of paid leave per year for involuntary military service
- Does not apply to voluntary service
- Reinstatement rights as provided by USERRA or Washington law
Washington Military Family Leave Act

- Covers all employers (except federal)
- 15 days of unpaid leave per deployment to employees who are spouses or domestic partners of armed forces members notified of impending call to duty, deployment, or leave from deployment
- Employee must work at least 20 or more hours per week
- Employee may substitute paid leave (employee choice)
- May have concurrent FMLA leave for “qualifying exigencies” related to deployment
Washington Family Care Act

- Applies to all Washington employers

- Employees who have sick leave, PTO or other accrued paid leave may use it to care for (1) child with health condition requiring treatment or supervision, or (2) qualifying relative with serious health condition or emergency condition
Other Washington Leaves

- Washington Domestic Violence Leave
- Jury Duty Leave
- Seattle Paid Sick Leave Ordinance
- Voting Leave
- Employer-specific leaves (contract, handbook or practice)
PART 7: Managing Employee Leaves
@iRawkMac

Dan Williams

I am seriously considering taking a leave of absence from my job to catch up on Breaking Bad so I can tweet about it with you guys.

5 hours ago via Twitter for Mac
FMLA in the News…

Probe finds MBTA drivers may be abusing FMLA

Updated: Friday, 12 Aug 2011, 6:34 AM EDT
Published: Friday, 12 Aug 2011, 6:27 AM EDT

BOSTON (FOX 25 / MyFoxBoston.com) - An investigation has found some MBTA drivers have been abusing the Federal Medical Leave Act, forcing the debt ridden agency to spend millions of dollars in overtime to cover missed shifts.

A study found instead of sick days -- which require a doctor's note -- some T bus drivers were citing the FMLA, which allows workers up to 12 weeks of medical leave to care for themselves or a close family member.

...instead of sick days... some bus drivers were citing the FMLA
Strategies For Managing Leaves

- Know the law
- Coordinate all leaves
- Maximize FMLA protections
  - Adopt FMLA rolling twelve month calendar
  - Require simultaneous paid leave and FMLA leave
  - Promptly issue FMLA notices
  - Require medical certifications
Strategies For Managing Leaves

- Review and consider changes to leave policies
- Adopt and enforce attendance policies
- Beware of exceptions and interactions to policies
- Review and update job descriptions
OUT OF SIGHT
BUT NOT OUT OF MIND:
Untangling Leave of Absence Requirements

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Practices
Employment and Labor Relations CHAIR

Industries
Emerging Companies and Venture Capital

Practice Summary
Steve’s practice covers the gamut of employment and labor law. His advice practice is dedicated to helping employers solve problems such as employee discipline and discharge, leaves of absence, discrimination and harassment claims, and threats of employee violence. Steve enhances employee handbooks and prepares and negotiates employment, confidentiality and non-compete agreements. He also counsels executives and professionals on employment and separation agreements, and assists with corporate transactions such as purchases and sales of businesses.

On the litigation side, Steve represents public and private employers in lawsuits claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

Experience
Foster Pepper PLLC
Member, 2010-Present

K&L Gates LLP
Partner, 1998-2010

Georgia-Pacific Corporation
Senior Counsel, 1996-1998

Altheimer & Gray, Chicago, IL
Partner, 1986-1996

Isham Lincoln & Beale, Chicago, IL
Associate, 1983-1986

U.S. District Court for the Western District of Wisconsin
Law Clerk for Hon. John C. Shabaz, 1982-1983
Bar Admissions

Washington, 1999
Illinois, 1983

Representative Cases

Won a jury trial for an employer accused of age discrimination by laid-off union employee.

Prevailed in a hearing before the United States Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.

Co-counsel in class action claiming pay for commuting in company vehicle; certification defeated and individual claim resolved promptly.

Co-counsel for large employers in two US Department of Labor collective actions claiming that employees worked off the clock; summary judgment obtained in one case, and the other was settled favorably.

Won summary judgment on discrimination/harassment claim for financial services company.

Obtained temporary restraining orders in two cases where employees removed and refused to return computerized documents and information.

Won summary judgment on sex bias claim by male employee of performing arts client.

Convinced OSHA that a safety whistleblower on a construction site was not subject to a hostile work environment.

Obtained anti-harassment orders against former employees.

Defended company in ERISA case brought by former executive seeking payments under a Supplemental Executive Retirement Plan.

Representative Transactions

Employment and labor counsel in sales of business, including drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.

Assistance to client in reductions in force.

Counseling of clients facing threat of workplace violence.

Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.

Preparation on policies such as travel pay, use of cell phones and blogging.

Management training on employment law topics, including avoiding harassment and discrimination, performance management and hiring.

Activities

Seattle Theatre Group
  Board of Directors
  Executive Committee

University Preparatory Academy
  Chair of Personnel Committee
Publications

Steve Peltin is a contributor to Foster Pepper’s Washington Workplace Law blog. Check out the latest news in this fast-changing area at: www.washingtonworkplacelaw.com.

Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults
Author, Washington Journal

Telecommuting: Legal and Management Risks For Employers
Author, Corporate Counsel Magazine

Reducing Telecommuting Management Risks
Author, National Underwriter Magazine

How To Reduce Workplace Violence
Author, National Underwriter Magazine

Whose Workforce Is It Anyway? The Worker Adjustment and Retraining Act in the M&A Context
Author, Preston Gates & Ellis LLP E-Alert

50-State Survey of Employment Libel and Privacy Law, Washington Chapter
Author, Media Law & Resource Center

Hiring Employees: Disability Questions and Medical Exams
Author, Realty & Building

Workplace Sexual Harassment
Author, Realty & Building

Department of Labor Expands FMLA Leave Rights for Non-traditional Families
Author, K&L Gates Labor and Employment Alert

Your Office Away from the Office
Quoted in Utah CEO Magazine

Keeping violent employees out of the workplace
Quoted in Risk Management Magazine

10 Considerations in Developing Telecommuting Policies and Agreements
Quoted in HR.COM - July 1, 2005

Presentations

FMLA and Leave Law
Speaker, 14th Annual Labor & Employment Law Conference, The Seminar Group

What is Social Media? / Issues Arising From Workplace Use of Social Media / Drafting and Enforcing Policies
Speaker/Moderator, Social Media in the Workplace, Foster Pepper Client Briefing

Payroll Management
Speaker, Lorman Educational Services

Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays
Speaker, Lorman Educational Services

When Hand Washing is Not Enough: Legal Challenges Presented By the Flu Pandemic
Speaker, K&L Gates Breakfast briefing
Recent Developments under the Family and Medical Leave Act  
Speaker, National Council of State Housing Agencies

10 Scary Issues You Need to Know About Your Employees  
Speaker, ASTRA Women’s Business Alliance

New Developments in Employment Law  
Speaker, Seattle CFO Arts Roundtable

Best Practice in FMLA Administration  
Speaker, Council on Education in Management

Conducting Effective Investigations Into Employee Complaints  
Speaker, PUD and Municipal Attorneys Association

Cyberstalking: The Washington Employer’s Perspective  
Speaker, King County Bar Association

Blowing the Whistle: Policies & Procures under Sarbanes-Oxley  
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Workplace Investigations  
Speaker, Council on Education in Management

Email and the Internet – Legal Challenges for Employers  
Speaker, PUD and Municipal Attorneys Association

Minimizing Risks When Upsizing, Downsizing, and Using Alternative Work Arrangements  
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Negligent Hiring Liability, Pre-Hire Investigations and the Fair Credit Reporting Act  
Speaker, Preston Gates & Ellis LLP Breakfast Briefing

Honors & Awards


Education

Cornell Law School, J.D., cum laude, 1983

University of Wisconsin-Madison, B.A., with distinction, 1978  
Phi Beta Kappa

Personal / Interests

Raised in Milwaukee, Wisconsin

Investor and part-time employee in Nena, Steve’s wife’s gift and vintage shop in Seattle’s Madrona neighborhood

Enthusiastic traveler, dog owner, and poker player
P. Stephen DiJulio

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Fax: 206-749-1927

Practices
Municipal Government
Land Use
Litigation and Dispute Resolution
Employment and Labor Relations
Environmental
Real Estate

Industries
Right-of-Way CHAIR
Energy and Utilities
Infrastructure
Construction
Education and Schools
Sustainable Development / Green Building
Transportation Industries
Sports and Sports Facility

Practice Summary
Areas of Concentration:
Appellate Team
Condemnation and Eminent Domain
Design-Build
Public Disclosure Team
Real Estate Litigation
School Law

Steve’s practice focuses on litigation involving state and local governments; civil service and public employment; and, land use and environmental law. His particular experience includes representation of jurisdictions on eminent domain, utilities (water, wastewater, storm water, solid waste systems), local improvement districts, facility siting and contractor litigation.

Experience
Foster Pepper PLLC
Member, 1990-Present
Associate, 1986-1990
City of Kent - Kent, Washington
   City Attorney, 1982-1986

City of Seattle - Seattle, Washington
   Assistant City Attorney, 1977-1982

Bar Admissions
   United States District Court, Eastern District of Washington, 1993
   United States Court of Appeals for the Ninth Circuit, 1980
   Supreme Court, State of Washington, 1976
   United States District Court, Western District of Washington, 1976

Representative Cases

Brower v. State/Football Northwest
   137 Wn.2d 44, 969 P.2d 42 (1998) (Successful defense of public-private stadium project and legislative referendum).

Central Puget Sound Regional Transit Authority v. Miller
   156 Wn.2d 403, 128 P.3d 588 (2006) (successful defense of Sound Transit eminent domain action)

HTK v. Seattle Popular Monorail
   155 Wn.2d 612, 121 P.3d 1166 (2005) (successful defense of municipal condemnation authority)

Servais v. Port of Bellingham

Klickitat Citizens v. Klickitat County

Rabanco v. King County

Wong, et al. v. City of Long Beach

Washington Waste Systems, Inc. v. Clark County

Barnier v. City of Kent

Tiffany Family Trust v. City of Kent

Grant County Fire District No. 5 v. Moses Lake
   Supreme Court, 150 Wn.2d 791, 83 P.3d 419 (2004) (Court reconsidered and unanimously reverses earlier ruling; affirms city annexation authority)
Jensen v. Torr

Prater v. City of Kent

Babcock v. Mason County Fire Dist. No. 6
144 Wn.2d 774, 30 P.3d 1261 (2001) (amicus for Fire Commissioners Association regarding public duty doctrine)

Little Deli Marts, Inc. v. City of Kent

City of Seattle v. Auto Sheet Metal Workers Local 387

Leonard v. Civil Service Commission of City of Seattle

Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.

Petersen v. City of Seattle

City of Seattle v. Platt

City of Seattle v. Shepherd
93 Wn.2d 861, 613 P.2d 1158 (1980) (upholding crime victims’ rights to recovery of stolen property)

Activities

Municipal League
  Board of Trustees, 2010-Present

Washington State Association of Municipal Attorneys

International Municipal Lawyers Association

American Bar Association
  Member, State and Local Government Law and Labor and Employment Law Sections

Washington State Bar Association
  Member, Environmental and Land Use Law and Administrative Law Sections
  Member, Amicus Brief Committee

Featured in 2009 Foster Pepper Pro Bono Annual Report
  Pro Bono in Action - Advocating for Victim’s Rights

King County Bar Association
  Trustee, 1986-1989
South King County Bar Association
Trustee, 1986-1988

South King County Legal Clinic
Attorney Coordinator, 1985-1986
Volunteer, 1978-1989

University of Washington
Lecturer / Affiliate Professor, Evans Graduate School of Public Affairs
Winter Quarter 2001, "The Law of Public Administration"

Publications

Steve DiJulio is a contributor to Foster Pepper's Local Open Government Blog.
Check out the latest news in this fast-changing area at: http://www.localopengovernment.com.

2011 Washington Real Property Deskbook: Causes of Action, Taxation, Regulation
Editor

Council Meeting Conduct and Citizen Rights under the First Amendment
Author, Municipal Research and Services Center of Washington - November 2009

News

Breaking Down Freedom of Information Laws
The Willis Report, FOX Business News - July 29, 2010

Honors & Awards

The Best Lawyers in America® - Appellate Practice, 2012

Washington Super Lawyers®, 2002-2011

2010 Top Lawyer, Seattle Metropolitan magazine

Martindale-Hubbell AV rating

Education

Seattle University, J.D., 1976

University of Washington, B.A., 1973 (Oval Club Scholastic Honorary)
Marco J. Magnano, Jr.

E-mail:  magnm@foster.com
Tel:    206-447-8901 / Seattle
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Practices
Litigation and Dispute Resolution
Employment and Labor Relations
Business
Financial Institutions

Industries
Emerging Companies and Venture Capital
Retail
Infrastructure

Practice Summary
Practice emphasizes trials of complex securities and construction disputes, banking and defense of class actions in wage and hour claims, employment discrimination and wrongful termination cases.

Experience
Foster Pepper PLLC
Member, 1978-Present
Associate, 1974-1978

Deputy Prosecuting Attorney - King County, Washington
1970-1974

Bar Admissions
U.S. Supreme Court, 1984
U.S. District Court
Eastern District of Washington - 1976
U.S. District Court
Western District of Washington - 1972
U.S. Court of Appeals
Ninth Circuit - 1972
Washington, 1970
Admitted to practice
Representative Cases

Kratz v. Apple American Limited Partnership of Washington
We defended a multi-site restaurant against wage and hour and off-the-clock class action claims in Snohomish County Superior Court. Significantly, we were successful in dividing up the class into subclasses thereby reducing the exposure to the “off the clock” claims. The case was settled in late 2002 on very favorable terms for our client. The Court entered the order approving the settlement in January, 2003. Putative class members approximated 900 employees.

Bulman v. Safeway Inc.
Washington Supreme Court Cause No. 68670-0, August 2, 2001 was a significant “wrongful termination” case in which the Court explained the quantum of proof required for an employee to demonstrate that s/he relied on a promise of specific treatment in a specific situation. The Court said that mere “awareness” of a specific policy does not mean “justifiable reliance” under the standard first articulated in 1984 in Thompson v. St. Regis Paper Co. and clarified in Bulman v. Safeway. The Court specifically rejected the “atmospheric test” adopted by the Court of Appeals and the “presumed reliance” theory described in the dissenting opinion in the 1988 case Stewart v. Chevron Chem. Co.

Thurston County, Washington, Superior Court. Served as Special Assistant Attorney General for the State of Washington in securities fraud and breach of fiduciary duty case arising out of improper real estate investment management, obtaining the State of Washington’s largest-ever settlement ($142 million) and the first significant litigation success against any advisor to a public pension fund. A related case is In re New England Mutual Life Insurance Co. Litigation (MDL 988), 841 F. Supp. 345 (W.D. Wash. 1994).

Cottam, et al., v. Northwestern Restaurants, Inc.
A class action lawsuit in King County Superior Court involving approximately 3400 present and former employees of a restaurant franchise with multiple locations in Washington state. The lawsuit alleged claims for “off-the-clock,” overtime, uniform and related wage and hour issues. Following limited discovery, the lawsuit was settled on a favorable basis for our client and for reduced costs and legal fees.

Three cases consolidated for trial arising out of the insolvency of Westside Savings and Loan. Insolvency was allegedly caused by hundreds of bad real estate loans and shoddy real estate lending and appraisal practices. We defended the senior lending officer against state and federal securities claims brought by individuals and class plaintiff shareholders and FSLIC as receiver. It was an eight-week jury trial before the Honorable Barbara Rothstein, U.S. District Court for the Western District of Washington (1987-1988).

First Interstate Bank of Washington v. American Funding Co., et al.
King County Superior Court, was an eight-week jury trial before the Honorable Sharon S. Armstrong. We defended the guarantors of the Company’s loans who asserted lender liability counterclaims, including breach of fiduciary duty, breach of contract, negligent misrepresentation and fraud. The case was successfully settled following trial immediately prior to closing arguments and submission of the case to the jury in February 1990.

Ahern v. Gaussoin
611 F. Supp. 1465 (D. C. Or. 1985) were securities lawsuits brought against the former officers, directors, lawyers and accountants for TRADEX, Co., Inc., a company which financed its operations through the issuance of 30-day variable rate demand notes. We defended the 12 members of the Board of Directors against claims by approximately 75 individual shareholder plaintiffs. The case settled shortly before trial following completion of discovery and rulings on cross-motions for summary judgment.
Muckleshoot Indian Tribe and Suquamish Indian Tribe v. Colonel Philip L. Hall, et al.
U.S. District Court, Western District of Washington No. C88-384 C (Dec. 1989) was an action seeking to enjoin
the development by our client of the Elliott Bay Marina, a 1200-slip marina, located just North of Downtown
Seattle. The tribes were attempting to protect their treaty fishing rights under the Boldt decision. The case was
resolved after intensive discovery and settlement negotiations with the assistance of Chief Judge Barbara
Rothstein. The Marina has been completed and is successfully operational.

103 Wn.2d 111, 691 P.2d 178 (1984) was an action in which we represented the school district in its claims
against the contractor and design professionals for design and construction defects. The trial court dismissed
the case on summary judgment based on the six-year statute of limitations on construction contracts. The
Washington Supreme Court reversed and remanded for trial based on our argument that the statute of
limitations did not run against the school district as an arm of the state. The case was settled prior to trial, and
the legislature later amended the statute to include school districts, thereby mooting the Supreme Court’s
opinion in the school district’s favor.

Hollingsworth v. Washington Mutual Savings Bank
37 Wash. App. 386, 681 P.2d 845 (1984) was an action by a former employee against the bank for retaliatory
harassment and discharge and for tortuous outrage. Jury returned a verdict for the bank after a six-week trial
and the verdict was affirmed by the Court of Appeals. The case is often cited in wrongful termination cases by
Washington appellate courts.

Pentagram Corporation v. The City of Seattle, et al.
28 Wash. App. 219, 611 P.2d 892 (1981) involved issuance of a building permit for construction of the facilities
at the 100’ level of Seattle’s Space Needle. The court ruled that the City Council acted arbitrarily and
capriciously in denying the permit to our client, the owner of the Space Needle.

Seattle School District No. 1 of King County v. State of Washington
90 Wn.2d. 476, 585 P.2d 71 (1978) was a ten-week trial which successfully challenged the state’s reliance on
special excess levies to discharge its constitutional duty to educate children. The trial court was upheld by the
Washington Supreme Court. As a consequence, the state legislature rewrote the statutes for funding K-12
education in the State of Washington.

Activities

Washington Committee for Ethical Judicial Campaigns
   Board Member

King County Superior Court
   Judge Pro Tempore, 1986-Present

King County Superior Court
   Arbitrator, 1983-Present

American Bar Association
   Member, Litigation Section
   Member, Employment and Labor Section

Washington State Bar Association
   Member, Litigation Section
Federal Bar Association
King County Bar Association
2008 Foster Pepper Pro Bono Annual Report
In the Community - Ethical Judicial Campaigns
Magnolia Community Club
Board of Trustees
Seattle Tennis Club
President, 1998-2000

Honors & Awards
The Best Lawyers in America® - Labor and Employment Law, 2007-2012
2010 Top Lawyer, Seattle Metropolitan magazine
Martindale-Hubbell AV rating

Education
University of Oregon, J.D.
Stanford University, A.B.

Personal / Interests
Born in Seattle, Washington. Married, 3 children
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Litigation and Dispute Resolution
Employment and Labor Relations
Business

Industries
Transportation Industries
Arts and Entertainment

Practice Summary
Ms. Milodragovich advises and represents all types of employers in a broad range of labor and employment law matters, including union avoidance, wage and hour disputes, discrimination complaints, progressive discipline issues, and employee terminations. She represents corporations and small business in union negotiations, organizing campaigns, elections and labor arbitrations. Ms. Milodragovich’s practice also includes representing clients in unfair labor practice proceedings and 10j actions before the National Labor Relations Board and related administrative agencies.

In addition to her traditional labor experience, Ms. Milodragovich has significant experience defending employers of all sizes in employment litigation involving claims of disability and employment discrimination, wrongful termination, and wage and hour class actions. She has extensive California litigation experience, including representing employers in California state administrative proceedings. Ms. Milodragovich works closely with Human Resource professionals to ensure clients’ compliance with applicable state and federal labor laws, as well as other statutory and contractual obligations. She also serves as Publisher of Foster Pepper’s Washington Workplace Law blog: www.washingtonworkplacelaw.com.

Prior to law school, Ms. Milodragovich worked as a Human Resources Generalist for a multi-state education company.

Experience
Foster Pepper PLLC
Associate, 2010-Present

Littler Mendelson, PC - San Francisco, CA
Associate, 2005-2010

Office of the Washington State Attorney General, Ecology Division - Olympia, WA
Clerk, June-September 2004
Office of the Washington State Attorney General, UW Division - Seattle, WA
Clerk, June 2003-June 2004; September-December 2004

Bar Admissions
Washington, 2010
California, 2005
U.S. District Courts for the Northern and Central Districts of California
Ninth Circuit Appellate Court

Activities
American Bar Association
King County Bar Association
Washington State Bar Association
California Bar Association
Serbian Bar Association of America

Publications
Janelle Milodragovich is a contributor to Foster Pepper's Washington Workplace Law blog. Check out the latest news in this fast-changing area at: www.washingtonworkplacelaw.com.

Presentations
Issues Arising From Off-Duty Use of Social Media
Speaker, Social Media in the Workplace - May 2011

Collective Bargaining and Managing The Unionized Workforce
Speaker, PNRC-NAHRO conference - May 2011

Employment-Related Due Diligence For Transactional Attorneys
Speaker, WSBA YLD Summit - April 2011

Employment Issues for Filmmakers
Co-Presenter, Washington Lawyers for the Arts - March 2011

Trends in Collective Bargaining
Speaker, NW Hospital Council - March 2011

Education
University of Washington School of Law, J.D., 2005
Washington State University, B.A.
Selected by Governor Gary Locke as first Student Regent, 1998-1999
Student Speaker, WSU Commencement, 1999
Speaker Materials
Three recent National Labor Relations Board (NLRB) memoranda concluded that employees posting complaints about their jobs on social media websites may not be protected from disciplinary action even if their complaints are job-related. In each of the three cases, the NLRB Division of Advice recommended dismissal of the claims that employers violated the NLRA when they disciplined or discharged employees for Facebook activity.

In the first case, an employee was disciplined for profanely criticizing local management on his Facebook page. The remarks were visible only to his Facebook friends, some of whom were co-workers. Although two co-workers posted notes of support, the Division of Advice found that no evidence of protected concerted activity, as the Facebook posts were essentially a personal gripe made only on his own behalf. The employee had not included any language suggesting that his co-workers initiate or participate in group action; instead, the employee expressed his frustration over a single incident with a particular manager.

Likewise, the Division of Advice found no evidence of protected concerted activity where an employee in a mental health institution engaged in a Facebook conversation with a set of friends about the facility's clients. Her employer learned of the Facebook conversation when it was reported by a former patient, and the employer fired the employee. None of the employee's co-workers were Facebook friends, and the employee admitted she had never discussed her Facebook posts with co-workers. Therefore the employee had not engaged in protected concerted activity because she was not seeking to "induce or prepare for group action," and because her Facebook posts did not mention any terms and conditions of employment.

In a third case, the Division of Advice concluded that a bartender had not engaged in protected concerted activity when he complained about his employer's tip pooling policy on Facebook. Even though the bartender's complaint centered on his terms of employment, he did not direct his Facebook post to co-workers or discuss the post with them. In short, he was simply complaining and was not seeking to induce collective action.
Finally, the General Counsel also released a report summarizing the outcomes and reasoning behind more than a dozen cases in the past year involving employees' use of social media and employer social media policies. In each of the three memoranda and the vast majority of the social media cases, the General Counsel used similar legal standards, including:

- When an employee "acting with or the authority of" coworkers (a) "seeks to initiate, induce or prepare for group action," or (b) "brings truly group complaints to the attention of management," that employee's action is protected.

- When the employee's activities are "the logical outgrowth of concerns expressed by the employees collectively," the employee's activities are protected.

- When the employee is engaged in activity "solely by and on behalf of the employee himself," the employee's activity is unprotected.

- When the employee's comments are "mere griping," as opposed to "group action," the employee's comments are unprotected.

While not comprehensive, these guidelines will assist employers considering disciplining or terminating employees for offensive social media posts. Employers should consult competent employment counsel for additional guidance during the disciplinary process.

For more information on social media guidelines, compliance, and resulting employee discipline, please contact Foster Pepper's Employment and Labor Relations Practice Group.

**Washington Workplace Law**

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The Seattle City Council's Housing, Human Services, Health and Culture Committee has spent much of the summer working on revisions to a proposed ordinance that would require Seattle businesses to provide employees with "paid sick and paid safe time." As we previously discussed, if the ordinance is adopted, Seattle would join San Francisco, Milwaukee, and Washington D.C. as one of the few cities to require "paid sick and paid safe time."

Since June, the Committee has made several revisions to the proposed ordinance to make it friendlier to Seattle's businesses, including:

• Exempting businesses with fewer than 4 full-time employees ("micro employers") from the ordinance's requirements;

• Excluding college students on work study, even if they would otherwise qualify for "paid sick and paid safe time";

• Increasing the minimum eligibility requirement for employees who occasionally work in Seattle from 80 to 120 days per year to qualify for "paid sick and paid safe time"; and

• Enlarging the probationary period for employees at the largest businesses (250+ employees) from 90 to 180 days worked before any paid sick time may be used.

Despite these and other revisions, the legislation continues to be controversial with the Seattle business community. While some businesses have supported the measure, the Seattle Chamber of Commerce is urging its members to tell Seattle City Councilmembers to "slow down," "take more time" and "don't rush to mandate." The Chamber suggests that the City Council should more fully consider the impact of the leave ordinance on collective bargaining agreements, the impact on seasonal employment, and whether alternatives exist that wouldn't cause financial hardship for employers.

Despite this opposition, the ordinance is expected to be enacted in its current form on September 12.
For more information on the proposed ordinance and how it might affect your business, please contact Foster Pepper's Employment and Labor Relations Practice Group. We'll also discuss the outcome of the vote at our September 13th briefing.

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The Washington State Supreme Court has ruled that Washington's Medical Use of Marijuana Act ('MUMA') does not prevent an employer from discharging an employee for authorized medical marijuana use. (Roe v. TeleTech Customer Care Management (Colorado) LLC - links to Majority decision, Minority decision.)

MUMA was created as a result of a voter initiative in 1998. The statute exempts medical marijuana users from state criminal prosecution, if they obtain physician authorization and follow certain guidelines. MUMA does not trump federal law, which continues to prohibit even medically-prescribed marijuana use.

MUMA explicitly states that employers are not required to permit use of medical marijuana on the job. Before the Roe decision, however, it was unclear whether employers needed to accommodate medical marijuana use away from work.

The employee - who sued under the pseudonym "Jane Roe" -- suffered from debilitating migraine headaches. Roe began using medical marijuana at home in compliance with MUMA. She applied for a customer service job at TeleTech, contingent on the results of reference checks and a drug screening. The employer's drug policy required all employees to have a negative drug test result, and emphasized that non-compliance would make the candidate ineligible for employment. Roe acknowledged the drug policy and of course tested positive for marijuana. (The standard urine test for marijuana can detect the byproduct of the drug for days or weeks after it last was ingested.) Although there was no evidence that Roe ever was impaired while on the job, the company declined to make an exception to its drug policy for medical marijuana, and terminated Roe.

Roe sued TeleTech, claiming that her discharge directly violated MUMA and also violated a clear public policy allowing medical marijuana use.

The Supreme Court ruled 8-1 in favor of TeleTech, holding that MUMA does not provide a claim for an employee discharged for use of medical marijuana, "nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy." The Court did not differentiate between on-duty or off-duty use.
Roe did not claim disability discrimination or assert that TeleTech failed to reasonably accommodate her need for medical marijuana, so the decision did not address those concepts. As the Court noted, however, the Washington State Human Rights Commission takes the position that "it would not be a reasonable accommodation of a disability for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana." The Court further commented that although employers could still be sued for wrongful discharge, the HRC will not investigate claims of discrimination due to medical marijuana use because federal law prohibits marijuana possession.

Although the Roe decision clarifies certain questions arising under MUMA, employers should continue to monitor the legal status of employees who use medical marijuana. This issue will particularly concern employers with multi-state operations, as some states may provide greater employment-related protections for medical marijuana users.

Employers should review existing company drug policies. Policies should prohibit use of drugs that are illegal under either federal or state law. Policies should also be carefully crafted as "zero tolerance" policies (that is, prohibit any detectable trace of illegal substances). Human Resources personnel should also be prepared to respond to medical marijuana issues, whether arising in the hiring stage or as a request for reasonable accommodation. Moreover, the organization must consistently apply the drug policy.

For more information on employee use of medical marijuana, please contact Foster Pepper's Employment and Labor Relations Practice Group.

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In a win for employers, the Washington State Court of Appeals recently dismissed a lawsuit brought by the Washington State Nurses Association ("WSNA") against Sacred Heart Medical Center. The WSNA contended that Sacred Heart had violated Washington's Minimum Wage Act ("MWA") by failing to pay nurses overtime pay for missing mandatory rest breaks.

The WSNA filed a grievance in 2004, claiming Sacred Heart did not consistently provide its nurses two 15-minute rest breaks during an 8-hour work day as mandated by their collective bargaining agreement. An arbitrator ordered Sacred Heart to ensure that nurses receive their 15-minute breaks and to pay the nurses for any rest breaks missed in the past at the straight time rate.

In 2007, the WSNA brought an action in court claiming entitlement to overtime pay, not straight time, for a portion of the nurses’ missed rest breaks. Under Washington’s Industrial Welfare Act, which applies to all Washington employers and employees, an employee must receive a paid 10-minute rest break for every 4 hours worked. The WSNA argued that when a state-mandated rest break is missed it constitutes additional hours worked under the MWA – a so-called “extension” of the workday – which takes the employee beyond a 40-hour work week. The Court of Appeals rejected this argument.

The MWA generally requires that non-exempt employees be paid overtime if they work more than 40 hours in a week. “Hours worked” is defined as “all hours during which the employee is authorized or required by the employer to be on duty on the employer’s premises or at a prescribed work place.” The court ruled that because the additional labor is provided during, not after, the employee’s 8-hour work assignment, the 40-hour workweek is not exceeded and does not result in overtime pay.

While this case is a victory for Sacred Heart, the WSNA is still aggressively pursuing claims against other hospitals, including Evergreen Hospital Medical Center, Good Samaritan Hospital, Providence Holy Family Hospital, and Tacoma General Hospital, for failure to provide nursing staff with mandatory meal and rest breaks. These lawsuits allege that the hospitals failed to provide nurses with meal and rest breaks as required by state law and, in
some cases, collective bargaining agreements. The lawsuits seek back pay and other damages on behalf of over 1,000 nurses.

In order to avoid meal and rest break litigation, employers must be aware of Washington law governing meal and rest breaks. Department of Labor and Industries regulations require the following:

• Employees generally must receive at least two paid ten-minute breaks and one thirty-minute meal break during the course of an eight-hour day.

• Employees may not be required to work more than five consecutive hours without a meal break.

• Employees working more than three hours longer than a normal work day must be allowed at least one thirty-minute meal break during the overtime period.

If staff is unionized, employers should review applicable collective bargaining agreements to determine the length and frequency of required meal and rest breaks. The collective bargaining agreement may also impose additional obligations on employers with respect to documentation of meal and rest breaks.

Maintaining accurate and complete records is critical to defending a claim of missed breaks. Employers should implement a system to document that meal and rest breaks are being provided. Employers may also consider requiring employees to sign or initial for meal breaks actually taken, rather than missed. The record should also indicate whether the full break was taken. A break that is not signed for should be considered a break that was missed entirely. If a break was offered and refused, the record should reflect such refusal as a waiver of the meal break, and be signed or initialed by the employee.

For more information on meal and rest break requirements in Washington and how they might affect your business, please contact Foster Pepper’s Employment and Labor Relations Practice Group.

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FAMILY AND MEDICAL LEAVE
GUIDE FOR WASHINGTON EMPLOYERS
September 13, 2011

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Steven R. Peltin, Family And Medical Leave Guide For Washington Employers
This article is for informational purposes only. It does not contain or convey legal advice. Readers should not use or rely on this information without first consulting a lawyer.
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I. THE FAMILY AND MEDICAL LEAVE ACT.

A. What is FMLA?

   In 1993, Congress passed FMLA to provide employees the right to take unpaid leave to tend to serious medical conditions without losing employment benefits and without fear of losing their jobs upon return from leave. More specifically, FMLA seeks to:

   (1) 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;

   (2) Entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

   (3) Accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

   (4) Accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

Steven R. Peltin, *Family And Medical Leave Guide For Washington Employers*
(5) Promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 USC § 2601.

B. What does FMLA provide?

FMLA provides eligible employees with up to twelve workweeks of unpaid leave within a twelve month period. 29 USC § 2612(a)(1). The employer must notify employees how it defines the “twelve month period.” Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1129 (9th Cir. 2001). Family members of qualified servicemembers may receive more leave – up to twenty-six workweeks of unpaid leave in a twelve month period. 29 USC § 2612(a)(3). If a husband and wife are employed by the same employer, they may be limited collectively to twelve weeks of leave within a twelve month period, depending upon the reason for leave. 29 USC § 2612(f)(1). As explained below, leave may be taken intermittently where medically necessary. 29 USC § 2612(b)(1).

If the employer offers paid leave, and the employee’s reason for leave would qualify under FMLA, in most cases the employee or the employer may substitute paid leave for unpaid FMLA leave. 29 USC § 2612(c)(2)(A). If substitution occurs, however, the employee is entitled to full FMLA protections, even if leave is taken under an employer policy. Strickland v. Water Works & Sewer Bd. of City of Birmingham, 239 F.3d 1199, 1205 (11th Cir. 2001). Any paid leave used in that way reduces the amount of available FMLA leave. 29 USC § 2612(d)(1); 29 CFR § 825.207(a).

Moreover, an employee generally is entitled to receive health insurance benefits while on leave. 29 USC § 2614(a)(2); 29 CFR § 825.209. Upon return from leave, employees are generally entitled to restoration of their former position with the employer or to one with similar requirements, pay, and benefits. 29 USC § 2614(a)(1).

C. Which employers are covered under FMLA?

Generally, the statute applies to employers who employ 50 or more employees for each working day during 20 or more workweeks in the current or preceding year. 29 USC § 2611(4)(a)(i). The statute also covers public agencies as well as public and private elementary and secondary schools, regardless of the number of employees. 29 CFR § 825.104(a).

D. Which employees are covered by FMLA?

Employees must (1) work for an employer covered under the statute; (2) for at least a cumulative twelve months; (3) and have provided at least 1,250 hours of service during the twelve month period immediately before the leave. 29 USC § 2611(2)(A). The employee must also work at a location where at least fifty employees are employed by the employer within seventy-five miles of that site. 29 USC § 2611(2)(B). So employees in a remote outpost of a large employer may not be covered by FMLA. There also are special rules for certain federal officers and flight attendants. 29 USC § 2611(2)(B)-(D).

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E. When can an employee take leave under FMLA?

I. Ordinary Leave

FMLA provides leave when:

1. The birth of a child of the employee requires care for such child;

2. The placement of a child with the employee for adoption or foster care requires care for such child;

3. A spouse, child, or parent of the employee has a serious health condition, requiring the employee to care for him or her;

4. A serious health condition makes the employee unable to perform his or her job;

5. An employee needs time off due to a qualifying military exigency; or

6. An employee requires leave to care for an injured servicemember.

29 USC § 2612(a)(1)(A)-(E), (3).

The definitions here are important. A “serious health condition” includes an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider. 29 USC § 2611(11). “Inpatient care” requires an overnight stay in a hospital, hospice, or residential medical care facility. 29 CFR § 825.114. “Continuing treatment” requires any of the following:

1. Incapacity for a period of more than three consecutive, full calendar days, and any subsequent treatment two or more times within thirty days of the first day of incapacity; or treatment on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. For either, the first in-person treatment must take place within seven days of the incapacity.

2. Incapacity due to pregnancy or prenatal care.

3. Incapacity due to a chronic serious health condition that continues over an extended period of time and requires at least twice-a-year visits for treatment by a health care provider.

4. Incapacity which is permanent or long-term due to a condition for which treatment may not be effective. Though no treatment occurs, the employee or family member must still be under the continuing supervision of a health care provider.

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(5) Conditions requiring multiple treatments.

29 CFR § 825.115(a)-(e). Incapacity is measured by evaluating the employee’s ability to perform the current job, regardless of whether he or she could perform other jobs. *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1295 (11th Cir. 2006); *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858, 860-62 (8th Cir. 2000).

A “qualifying military exigency” means any circumstance that requires an employee to:

(1) Address issues that arise when a covered military member is notified of an impending call or order to active duty on short-notice;

(2) Attend military events and related activities;

(3) Arrange for or provide alternative childcare or to coordinate school activities;

(4) Make financial and legal arrangements or to act as the servicemember’s representative;

(5) Attend counseling due to deployment or potential deployment;

(6) Spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment; or

(7) Participate in or arrange for post-deployment activities.

A qualified exigency might also include other events arising out of the servicemember’s duties if the employer and employee agree that there is an exigency, and agree to the timing and duration of leave. 29 CFR 825.126(a)(1)-(8).

Separate and distinct from leave due to a qualifying military exigency, an employee may also take military caregiver leave. This leave is available to an employee with an immediate family member who is a servicemember, and that servicemember (1) is “on the temporary disability retired list,” and (2) has a “serious injury or illness” for which he or she is undergoing medical treatment, recuperation, or therapy or is in outpatient status. A “serious injury or illness” is one incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating. “Outpatient status” requires “a member of the Armed Forces [be] assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.” 29 CFR § 825.127(a).
II. Intermittent Leave

In certain situations, an employee may qualify for intermittent leave (leave taken in separate blocks of time due to a single qualifying reason) or for a reduced leave schedule (a schedule that reduces an employee's usual number of working hours per workweek or hours per workday). 29 CFR § 825.202(a). Employees may qualify for intermittent leave when:

1. They must care for their spouse, child, or parent, if such spouse, child, or parent has a serious health condition;

2. They have a serious health condition that makes them unable to perform the functions of the position;

3. There is a qualifying military exigency;

4. They must care for an injured servicemember.

29 USC § 2612(b)(1); 29 USC § 2612(a)(1), (3).

If an employee requires intermittent leave or leave on a reduced leave schedule for planned medical treatment, he or she must “make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.” 29 CFR § 825.203. Also, an employer may require an employee taking intermittent leave to assume an alternative position with similar pay and benefits, but the employer may not use the option to influence the employee’s decision to take leave. 29 CFR § 825.204. Further, an employee who no longer requires intermittent leave or a reduced leave schedule is generally entitled to reinstatement to the former position or one similar to it. 29 CFR § 825.204(e).

In determining the amount of intermittent FMLA leave taken, an employer may count the time off by using an increment that is less than one hour and no larger than the shortest period of time the employer uses to account for other forms of leave. 29 CFR § 825.205(a)(1). For example, if the employer tracks all other types of leave in half-hour increments, it must track intermittent FMLA leave using the same or shorter measure. On the other hand, if the employer tracks all other types of leave in four hour increments, the maximum measure of intermittent FMLA leave is limited to one hour increments. Regardless of the measure, an employee’s FMLA leave entitlement may be reduced only by the amount of leave actually used. 29 CFR § 825.205(a)(1). An explanation of how intermittent leave is calculated can be found at 29 CFR § 825.205(b).

F. What are the employer’s posting requirements under FMLA?

The statute requires an employer, whether it has eligible FMLA employees or not, to post notices explaining the important provisions of FMLA. The notice must be posted in conspicuous places on the employer’s premises where notices to employees and applicants are customarily posted. Electronic posting is sufficient as long as it otherwise meets these requirements. 29 USC § 2619(a); 29 CFR § 825.300(2), (a)(1).
If an employer has eligible employees, it must distribute the general notice to each employee, either by including it in an employee handbook or by distributing it to each employee upon hire. If the majority of employees do not speak English, the employer must provide the notice in a language that employees can understand. 29 CFR § 825.300(a)(3), (4).

G. How does an employee request FMLA leave?

If leave is foreseeable, the employee must provide the employer at least thirty days notice before the leave is scheduled to begin, unless it is impracticable in light of the circumstances. If impracticable, the employee must give notice as soon as practicable. Notice must be given only one time, but the employee must inform the employer of any later changes. 29 CFR § 825.302(a); 29 USC § 2612(e).

At a minimum, the notice must “make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.” For first time requests, the employee is not required to assert rights under FMLA; it is the employer's duty to determine whether the employee qualifies. On the other hand, if the employee is seeking leave for a reason previously qualified under FMLA, the employee must specifically reference the qualifying reason for leave. Employees are expected to comply with employer questioning in order to determine whether FMLA applies; failure to cooperate may result in denial of leave. 29 CFR § 825.302(c).

The employer may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, the employer may require the notice in a certain format or that the notice be given to a specific individual. Unjustified failure to comply with employer policies may result in delay or denial of the FMLA request. 29 CFR § 825.302(d).

Before taking foreseeable leave for medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. 29 CFR § 825.302(e).

When the need for leave is unforeseeable, the employee must provide notice to the employer as soon as practicable. If the employee is unable to give notice in person, notice may be given by the employee's “spokesperson.” 29 CFR § 825.303(a). Content and compliance requirements are essentially the same as when the leave is foreseeable. 29 CFR § 825.303(b)-(c).

H. What medical certification must the employee supply?

Generally, if an employee requests FMLA leave for medical reasons, an employer may require the employee to provide a certification prepared by the health care provider of the employee or relevant family member. 29 USC § 2613(a). An employer requiring such certification must notify the employee of these requirements, either at the time the employee gives notice of the need for leave or within five business days thereafter. In the case of unforeseen leave, the employee should give notice within five days after leave begins. Unless

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impracticable, the employee must provide certification within fifteen days of the request. 29 CFR § 825.305(a), (b).

Certification should be “complete and sufficient.” If an employee leaves blank any applicable entries or provides “vague, ambiguous, or non-responsive” answers, the certification is considered deficient. The employer must notify the employee if a certification is incomplete, and must state in writing what additional information is necessary. The employee has seven days to cure the problem, unless that amount of time is impracticable despite the employee’s “diligent good faith efforts.” Failure to cure a deficiency or to respond to a request for certification may result in denial of FMLA leave. 29 CFR § 825.305(c)-(d).

Content requirements for medical certifications vary depending on the situation. Certifications generally require:

1. Information on the health care provider, including contact information;
2. The date on which the health condition began and its probable duration;
3. A description of the appropriate medical facts regarding the condition;
4. A statement that the employee requires leave, either due to his or her own personal injury or due to the condition of another party qualifying the employee for leave under the statute;
5. Estimates of the frequency and duration of treatments, including when the leave requested in intermittent.

29 USC § 2613(b); 29 CFR § 825.306(a). If the employer has reason to doubt the certification, it may, at its own expense, require a second opinion from an independent health care provider. Disagreements between opinions are resolved by a third independent opinion, which is binding on both parties. 29 USC § 2613(c), (d).

An employer may request recertification when reasonable. 29 USC § 2613(e). Generally, an employer cannot require recertification more often than every thirty days. If the estimated duration of the condition is more than thirty days, however, the employer must wait until that time expires before requesting recertification. 29 CFR § 825.308(a), (b). An employer may request certification at any time if (1) the employee requests an extension of leave, (2) circumstances have changed significantly, or (3) new information casts doubt upon the employee’s stated reason for leave or upon the validity of the certification. Recertification is at the employer’s expense, but it is not subject to second or third opinions. 29 CFR § 825.308(c), (f).

I. How does the employer respond to the request for leave?

Absent extenuating circumstances, the employer must notify the employee within five business days of whether the employee is eligible to take leave under FMLA. If an employee

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requests FMLA leave and does not qualify, the employer must explain why (the employee failed to work 1,250 hours in the preceding twelve months), either in writing or orally. 29 CFR § 825.300(b)(1), (2). Prudent employers, however, will provide written notification.

At the same time that it provides the eligibility notice, the employer also should provide a notice to the employee explaining rights and responsibilities under FMLA. Such notice must include, at a minimum:

(1) That the leave may be designated and counted against the employee's annual FMLA leave entitlement;

(2) The applicable twelve month period for FMLA entitlement;

(3) Any requirements for the employee to furnish certifications;

(4) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;

(5) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;

(6) The possible consequences of failure to make such payments on a timely basis;

(7) The employee's status as a “key employee” and the potential consequence that restoration may be denied following FMLA leave;

(8) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and

(9) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

29 CFR § 825.300(c)(1).

Assuming that the employee is eligible for leave, the employer next must determine whether the employee in fact qualifies for leave. Here the employer examines whether the employee has a serious health condition or fits under any of the other reasons for FMLA leave and otherwise qualifies for leave.

If the leave request is denied, the employer must notify the employee. If the request is granted, the employer must affirmatively designate leave as FMLA-qualifying and notify the employee in writing of the designation within five business days, absent extenuating
circumstances. 29 CFR § 825.300(d)(1), (4). The employer must specify (1) the amount of leave counted against the employee’s FMLA leave entitlement and, if known, the number of hours, days, or weeks that will be counted, (2) whether it will require a fitness-for-duty certification, and (3) whether and how the employee is to substitute paid leave for FMLA leave. 29 CFR § 825.300(c)(1), (d).

The employer must designate leave as FMLA-qualifying based solely upon information provided by the employee or his or her spokesperson. The employee is required to provide enough information for the employer to make that designation. If there is insufficient information to make a designation, the employer should inquire further. Once enough information is obtained, the employer makes a designation and notifies the employee as outlined above. 29 CFR § 825.301(a),(b).

Disputes over whether the leave qualifies under FMLA are left in the first instance to the employer and employee to resolve. Such discussions must be documented. 29 CFR § 825.301(c).

If an employer fails to timely or properly designate leave as FMLA-qualifying, it may do so retroactively with appropriate notice, provided the failure does not harm or injure the employee. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 82 (2002); Coker v. McFaul, 247 F. App’x. 609, 618 (6th Cir. 2007). However, the employer’s failure to designate leave in a timely matter may violate FMLA if that failure causes the employee harm. The employer and employee can agree to retroactively designate leave. 29 CFR § 825.301(d), (e).

J. What happens during the leave?

An employee generally is entitled to receive health insurance benefits while on leave. 29 USC § 2614(a)(2); 29 CFR § 825.209. An employee who chooses to maintain health coverage is still responsible for any employee-paid premiums. 29 CFR § 825.210. The employer’s obligation to provide health insurance benefits ends if the employee is more than thirty days delinquent on employee premiums; however, before it can terminate coverage, the employer must provide at least fifteen days written notice to the employee. 29 CFR § 825.212(a)(1). Also, if the employee fails to return to work after the leave, the employer may collect from the employee the premiums paid on his or her behalf during the leave. 29 USC § 2614(c)(2).

An employer may require an employee on FMLA leave to periodically report his or her status and intent to return to work. If the employee chooses not to return to work, the employer’s obligations under FMLA cease. Conversely, an employee may need to take additional leave. In that case, the employee should give the employer at least two days notice when practicable. 29 CFR § 825.311(a)-(c).

K. What happens after the leave?

At the end of leave, the employer may require certification from a health care provider stating that the employee is healthy enough to return to work, so long as the requirement policy is uniformly applied. An employer also may require that the certification address the employee’s

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ability to do specific tasks. The employer may not delay the employee’s return to work after receiving the fitness for duty certification, and the certification is not subject to second or third opinions. 29 CFR § 825.312(a), (b). However, an employee who remains unable to work after exhausting his or her FMLA leave has no right to restoration, and failure to provide a fitness-for-duty certification disqualifies an employee from reinstatement. Edgar v. JAC Products, Inc., 443 F.3d 501, 509 (6th Cir. 2006); 29 CFR § 825.312(e). If leave is intermittent, the employer may only request a certification of fitness to return to duty once every thirty days and only if “reasonable safety concerns exist regarding the employee’s ability to perform his or her duties.” 29 CFR § 825.312(f).

Assuming the employee is medically able to work after the leave, he or she is entitled to return to the position held when leave commenced or to one with similar requirements, pay, and benefits. 29 USC § 2614(a)(1); 29 CFR § 825.214. Restoration should occur immediately upon an employee’s return from leave, so long as the employee has given reasonable notice of his or her return. Hoge v. Honda of Am. Mfg., Inc., 384 F.3d 238, 247-248 (6th Cir. 2004). However, an employee “has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed.” 29 CFR § 825.216(a). This means that if the employee would have been terminated had he or she never taken leave, the employer has no duty to reinstate. The employer has the burden on this issue. 29 CFR § 825.216(a). In fact, the employer may terminate an employee during the FMLA leave so long as the reason for termination is unrelated. Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 977 (8th Cir. 2005).

An employer may deny restoration of employment for other reasons as well. For instance, an employer can deny restoration to “key” employees — salaried employees in the top ten percent of compensation among employees located within seventy-five miles of the employee’s worksite — if denial is necessary to “prevent substantial and grievous economic injury” to employer operations. 29 CFR § 825.216(b). But key employees must be notified of this risk before taking FMLA leave.

L. What are FMLA’s record keeping requirements?

FMLA requires employers to maintain records “pertaining to their obligations under the Act.” 29 CFR § 825.500(a). These records must be kept for at least three years and are subject to inspection at the request of the Department of Labor. 29 CFR § 825.500(a), (b). The method of record keeping is generally up to the employer, but employers with FMLA eligible employees must maintain:

(1) Basic payroll and identifying employee data;

(2) Dates FMLA leave is taken by employees;

(3) If FMLA leave is taken by employees in increments of less than one full day, the hours of the leave;

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(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees;

(5) Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave;

(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.

29 CFR § 825.500(b), (c). Any records pertaining to medical histories must be kept separate and confidential. 29 CFR § 825.500(g).

II. THE WASHINGTON FAMILY LEAVE ACT.

A. What is WFLA?

WFLA is Washington’s version of FMLA. Washington passed WFLA in 1989, four years before the enactment of its federal counterpart. In 2006, however, Washington adopted the federal framework and mirrored WFLA after FMLA. The benefits provided under both statutes are nearly the same.

B. How does WFLA differ from FMLA?

While the current WFLA is modeled after FMLA, there are a few important differences:

(1) WFLA defines family member to include registered domestic partners. RCW 49.78.020(7); RCW 49.78.904.

(2) WFLA provides for a civil penalty of at least $1,000 for each violation. RCW 49.78.320.

(3) While leave under WFLA must generally be taken concurrently with any leave under FMLA, any leave taken for sickness or temporary disability because of pregnancy or childbirth is provided for in addition to leave otherwise available through FMLA or WFLA. RCW 49.78.390.

(4) Like FMLA, WFLA requires that employers restore an employee to the original position or to a similar position upon return from leave; WFLA, however, requires that the equivalent position be located within twenty miles of the workplace from where the employee took leave. RCW 49.78.280.

(5) WFLA does not have the military exigency or military caregiver leave provisions present in FMLA.

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III. WASHINGTON PREGNANCY DISABILITY LEAVE.

A. What is WPDL?

WPDL is a regulation issued by the Washington State Human Rights Commission. WPDL provides for additional benefits and protections to Washington women who wish to take leave related to pregnancy or childbirth. Specifically, WAC 162-30-020 requires employers to (1) “provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth” and (2) “treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities.” If a woman takes leave under this regulation, her employer must “allow [her] to return to the same job, or a similar job of at least the same pay,” unless business necessity dictates otherwise. This leave is in addition to leave provided for under WFLA or FMLA.

B. When is WPDL applicable?

As noted above, WPDL applies whenever an employee “is sick or temporarily disabled because of pregnancy or childbirth.” WAC 162-30-020(4)(a). “Pregnancy” means actual pregnancy, the potential to become pregnant, and pregnancy-related conditions, which include related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy. WAC 162-30-020(2)(a)-(b). Furthermore, an “employer” under WPDL is broader than either FMLA or WFLA, including “any person [who acts] in the interest of an employer, directly or indirectly, who employs eight or more persons.” However, WPDL does not cover “any religious or sectarian organization not organized for private profit.” RCW 49.60.040(11).

IV. RECONCILING FMLA AND STATE RIGHTS FOR PREGNANCY/MATERNITY LEAVE.

Some female employees would like the option to take as much time as possible after recovering from pregnancy-related medical problems in order to spend time with the newborn. Employers need to manage what could be extended time off for such reasons.

As noted above, WFLA and FMLA ordinarily run concurrently, leave under Washington law (whether WFLA or WPDL) may be taken for sickness or temporary disability because of pregnancy or childbirth in addition to leave otherwise available through FMLA. Even if FMLA leave is exhausted, employers must continue to allow the employee unpaid leave through the end of the pregnancy-related disability.

The safest approach is to stack and credit leave. That is, the employer would apply FMLA leave first, then continue the leave under Washington law until the women is no longer disabled. At that point, the employer would credit the woman’s FMLA account with the period of time that would have been available under Washington law. In other words, at the end of the period of actual disability, the employer would credit the employee with additional unpaid FMLA leave for “bonding” purposes in an amount equal to the length of FMLA leave exhausted during the pregnancy-related disability.

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This is complicated. Examples may help.

- Jane has an unremarkable pregnancy and recovery. She works up to the moment that her baby is born, then is temporarily disabled for a period of 6 weeks, as established by her doctor. She wants as much time as possible with her child.

The employer should designate Jane’s first 6 weeks after delivery as FMLA leave. Then, after her disability ends, the employer should credit her FMLA account with those 6 weeks of FMLA leave. Jane has 12 more weeks of bonding time with her newborn, or a total of 18 weeks off. Her FMLA entitlement is exhausted for the year.

- Beth’s pregnancy is more complicated. She is placed on bed rest 12 weeks before delivery, then recovers only 12 weeks after delivery. Beth then wants to take another six weeks to bond with her baby before returning to work.

The employer should designate Beth’s 12 weeks of bed rest as FMLA leave. From delivery, she should continue on unpaid disability leave for another 12 weeks. Then, after her disability ends, the employer should credit her FMLA account with 12 weeks of leave that would have been available under Washington law. Jane would have up to 12 more weeks of bonding time with her newborn, although she only wants to take 6 weeks. If so, she would have another 6 weeks of FMLA leave to use later in the year.

- Nancy’s medical status is similar to Jane’s. She works right up until delivery, then takes 8 (rather than 6) weeks to recover. However, Nancy had taken 12 weeks of leave two months before her delivery because her husband was very ill. She would like as much time as possible with her newborn.

The employer should not designate Nancy’s pregnancy leave as FMLA leave, because she already exhausted her FMLA entitlement. Therefore, her 6 weeks of pregnancy leave qualifies solely as pregnancy disability leave under Washington law, and she is entitled to no further FMLA leave for bonding.
Questions and Answers for Small Businesses: The Final Rule
Implementing the ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of “disability.” It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011.

The ADAAA did not change the basic legal requirement that employers must not discriminate against individuals with disabilities who are qualified for a job, with or without reasonable accommodation. The questions and answers below provide information on what has changed because of the ADAAA, what in the law remains the same, and some tips for complying with the law as amended. For general information on how the ADA’s employment provisions apply to small businesses, you may consult “The ADA: A Primer for Small Business” at www.eeoc.gov/eeoc/publications/adahandbook.cfm.

1. What is the purpose of the ADAAA?
Among the purposes of the ADAAA is reinstatement of a “broad scope of protection” by expanding the definition of the term “disability.” Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA’s definition of “disability.” Yet, Congress thought that individuals with these and other impairments should be covered. As a result of the ADAAA and EEOC’s regulations, it will be much easier for individuals seeking the law’s protection to demonstrate that they meet the definition of “disability.”

2. Must all small businesses comply with the ADAAA and these regulations?
No. These regulations apply to all private employers with 15 or more employees. State or local laws, however, may apply to smaller employers. Additionally, the ADAAA’s changes to the definition of disability would apply to employers who are federal contractors or subcontractors subject to Section 503 of the Rehabilitation Act and to employers who receive federal financial assistance under Section 504 of the Rehabilitation Act, regardless of the number of employees they have. Finally, although these regulations do not apply to the employment practices of businesses with fewer than 15 employees, such businesses, if they are considered places of public accommodation, are required to comply with the ADAAA’s changes to the definition of disability under Title III of the ADA with respect to the goods and services they provide to the public.

3. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?
No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

4. How do the ADAAA and the EEOC regulations define “disability?”
The ADAAA and the regulations define “disability” as:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an “actual disability”), or
- a record of a physical or mental impairment that substantially limited a major life activity (“record of”), or
- when an employer takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”).

We will address each of these definitions (sometimes called the three “prongs” of the definition) of disability.
PRONG 1: AN “ACTUAL DISABILITY”

5. How do the regulations define the term “physical or mental impairment”?

Basically, an impairment is a physical or mental disorder, illness, or condition. Like EEOC’s original ADA regulations and interpretive guidance (sometimes called the Appendix to the regulations), the revised regulations and appendix distinguish between impairments and ordinary personality traits, such as irritability, poor judgment, or chronic lateness, that are unrelated to a physical or mental impairment.

The revised regulations define “physical or mental impairment” as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. They also cover any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. This is basically the same definition that was included in the original ADA regulations.

6. What are “major life activities?”

The regulations provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

The regulations also state that major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The regulations also state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

As a result of the ADAAA’s recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability.

7. How much does an impairment have to limit someone to be considered a disability?

An individual must be substantially limited in performing a major life activity as compared to most people in the general population. However, Congress lowered the threshold for establishing a substantial limitation from the standards established by courts and in the original ADA regulations. An impairment no longer has to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting."

Congress directed that the term "substantially limits" be construed broadly in favor of expansive coverage, although not all impairments will constitute a disability. Furthermore, under the ADAAA and the EEOC’s regulations, the question of whether an impairment is a disability should not demand an extensive analysis.

8. Do the regulations require that an impairment last a particular length of time to be considered substantially limiting?

No. Even a short-term impairment may be a disability if it is substantially limiting.

9. What kinds of facts might be relevant in determining whether an impairment substantially limits a major life activity?

The regulations state that the condition, manner, or duration (where duration refers to the length of time it takes to perform a major life activity or the amount of time the activity can be performed) under which a major life activity can be performed may be considered if relevant in certain cases in determining whether the impairment is a disability. But, with respect to many impairments, including those that should easily be concluded to be disabilities (see Question 16), it may be unnecessary to use these concepts to determine whether the impairment substantially limits a major life activity. Assessment of the condition, manner, or duration may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

10. Can an impairment that does not affect someone all the time be considered a disability?

Yes. The ADAAA and the regulations specifically state that an impairment that is "episodic or in remission" (i.e., the impairment’s limitations are not present all the time) meets the definition of disability if it would substantially limit a major life activity when active. This means that even if the effects of an impairment occur briefly or infrequently, the impairment could still be a disability.

Examples of impairments that may be episodic include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but
that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the regulations.

11. If someone takes medication or uses some kind of a device, like a hearing aid, to lessen the effects of an impairment, may that be considered in determining whether the person has a disability?

No, except for ordinary eyeglasses or contact lenses (see Question 12). The ADAAA and the regulations require that the positive effects from an individual’s use of one or more “mitigating measures” be ignored in determining if an impairment substantially limits a major life activity. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using it.

The ADAAA and the regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy.

12. Does the rule concerning mitigating measures apply to people whose vision is corrected with ordinary eyeglasses or contact lenses?

No. “Ordinary eyeglasses or contact lenses” – defined in the ADAAA and the regulations as lenses that are “intended to fully correct visual acuity or to eliminate refractive error” – must be considered when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses to correct a routine vision impairment is not, for that reason, a person with a disability under the ADA. However, the ADAAA and the regulations do allow even individuals with fully corrected vision to challenge uncorrected vision standards that exclude them from jobs. An employer must be able to show that the challenged standard is job-related and consistent with business necessity.

13. May the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to “reasonable accommodation” or poses a “direct threat”?

Yes. The ADAAA’s prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of “disability.” Other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat (a significant risk of substantial harm to self or others) – can take into account both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, an employer will have no obligation to provide one. For example, an employee with epilepsy may no longer need permission for unscheduled breaks as a reasonable accommodation after switching to a different medication that completely controls seizures.

14. May an employer require that an individual use a mitigating measure?

No. An employer cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job or poses a direct threat.

15. Do the ADAAA and EEOC’s regulations still require that an individualized assessment be done to determine whether an impairment is a disability?

Yes. However, certain impairments, due to their inherent nature and the extensive changes Congress made to the definitions of “major life activities” and “substantially limits,” will virtually always be disabilities. For these impairments, the individualized assessment should be particularly simple and straightforward.

16. Do the regulations give any examples of specific impairments that will easily be concluded to substantially limit a major life activity?

Yes. The regulations identify specific types of impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.
17. Is pregnancy a disability under the ADAAA?
No. Pregnancy is not an impairment and therefore cannot be a disability. Certain impairments resulting from
pregnancy (e.g., gestational diabetes), however, may be considered a disability if they substantially limit a major
life activity or if they meet one of the other two definitions of disability discussed below.

PRONG 2: A RECORD OF A DISABILITY

18. When does an individual have a “record of” a disability?
An individual who does not currently have a substantially limiting impairment but who had one in the past meets
this definition of “disability.” An individual also can meet the “record of” definition of disability if she was once
misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a
learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above – including the expanded
list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic
impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of
mitigating measures – will apply to evaluating whether an individual meets the “record of” definition of disability.

PRONG 3: REGARDING AN INDIVIDUAL AS HAVING A DISABILITY

19. What does it mean for an employer to “regard” an individual as having a disability?
Under the ADAAA and the regulations, an employer “regards” an individual as having a disability if it takes an
action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual’s impairment
or on an impairment the employer believes the individual has, unless the impairment is both transitory (lasting or
expected to last for six months or less) and minor. This new formulation of “regarded as” having a disability is
different from, and is easier to meet, than the previous standard.

The regulations state that an employer may challenge a claim under the “regarded as” prong by showing that the
impairment in question, whether actual or perceived, is both transitory and minor. In other words, whether the
impairment in question is transitory and minor is a defense available to employers. However, an employer may
not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not
the case. For example, an employer who fires an employee because he has bipolar disorder cannot assert that it
believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and
minor.

20. If an employer regards an individual as having a disability, does that automatically mean
the employer has discriminated against the individual?
No. The fact that an employer’s action may have been based on an impairment does not necessarily mean that
the employer engaged in unlawful discrimination. For example, an individual still needs to be qualified for the job
he or she holds or desires. Additionally, in some instances, an employer may have a defense to an action taken
on the basis of an impairment, such as where a particular individual would pose a direct threat or where the
employer’s action was required by another federal law (e.g., a law that prohibits individuals with certain
impairments from holding certain kinds of jobs). As under current law, an employer will be held liable only when
the employee proves that the employer engaged in unlawful discrimination under the ADA.

OTHER ISSUES ADDRESSED BY THE ADAAA

21. Does an individual have to establish coverage under a particular definition of disability to
be eligible for a reasonable accommodation?
Yes. Individuals must meet either the “actual” or “record of” definitions of disability to be eligible for a reasonable
accommodation. Individuals who only meet the “regarded as” definition are not entitled to receive reasonable
accommodation. Of course, coverage under the “actual” or “record of” definitions does not, alone, entitle a
person to a reasonable accommodation. An individual must be able to show that the actual disability, or past
disability, requires a reasonable accommodation.

22. May a non-disabled individual bring an ADA claim of discrimination for being denied an
employment opportunity or a reasonable accommodation because of lack of a disability?
No. The ADA does not protect an individual who is denied an employment opportunity or a reasonable
accommodation because she does not have a disability.
WHAT THE ADAAA DOES NOT CHANGE

23. May a business still refuse to hire or terminate someone because he or she is currently engaging in the illegal use of drugs?
Yes. The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when an employer acts on the basis of such use. However, the ADA also still says that a person who no longer engages in the illegal use of drugs may be an individual with a disability if he:
• has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
• is participating in a supervised rehabilitation program (e.g., Alcoholics Anonymous or Narcotics Anonymous).

24. Does an individual with a disability still have to be qualified for a job? And may small businesses still hire the most qualified person?
Yes. The ADAAA does not change the requirement that an individual with a disability be “qualified” for a job. An individual is qualified for a job if he can meet a job’s general requirements—e.g., skills, education, experience—and can perform the essential job duties, with or without reasonable accommodation.

Additionally, although an employer may not refuse to hire a person with a disability for discriminatory reasons (e.g., because she needs a reasonable accommodation), it may still hire the best qualified person for a job.

25. Do any of the ADAAA’s changes affect workers’ compensation laws or Federal and State disability benefit programs?
No. The ADAAA and the regulations specifically state that changes to the ADA do not alter the standards for determining eligibility for benefits under State workers’ compensation laws or under Federal and State disability benefit programs.

26. Has the process for providing reasonable accommodation changed as a result of the ADAAA and the EEOC’s regulations?
No. Generally, a person with a disability still has to make a request for an accommodation, and an interactive process between the person with a disability and the employer may still be necessary to determine an appropriate accommodation. As part of this process, an employer may still ask for reasonable documentation showing a disability and a need for a reasonable accommodation where the disability and need for accommodation are not obvious or already known. However, since the definition of disability has been broadened, documentation may focus less on whether the person has a disability and more on the need for an accommodation. Finally, an employer is not required to provide an accommodation that would cause the employer an “undue hardship,” meaning significant expense or difficulty. For more information on reasonable accommodation, consult the EEOC’s Guidance on Reasonable Accommodation and Undue Hardship, www.eeoc.gov/policy/docs/accommodation.html.

27. Does a small business have to employ someone with a disability who poses a health or safety risk?
An employer does not have to employ a person who poses a “direct threat,” meaning significant risk of substantial harm to the health or safety of the individual or others. However, this is a stringent standard requiring an individualized assessment of the risks posed by a specific person with a disability in a particular job. An employer cannot rely on generalized information about a disability, or on myths, fears, or stereotypes about a disability when excluding someone on the basis of health or safety concerns.

TIPS FOR COMPLIANCE WITH THE ADAAA

28. What can small businesses do to make sure they comply with the ADAAA and the EEOC’s regulations?
As a result of the ADAAA’s expansion of the definition of disability, there are a number of things small businesses can do to make sure they comply with the ADA and these regulations.

• Review the wide array of resources on EEOC’s website. Most of these resources are written in a user-friendly question-and-answer format. Some, like “The ADA: A Primer for Small Business,” www.eeoc.gov/eeoc/publications/adahandbook.cfm, are intended specifically for small businesses. EEOC will be revising portions of many of these documents to reflect changes resulting from the ADAAA. When EEOC updates a particular document, we will note this on our website and explain what changes were made. All of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused almost
exclusively on changing the definition of “disability,” content in these documents unrelated to the definition of “disability” remains unaffected by the ADAAA and these regulations. Therefore, small businesses can continue to rely on these parts of the documents as reflecting current law.

- Review any policies that may address disability or otherwise affect individuals with disabilities (e.g., leave policies and policies for providing reasonable accommodations) to ensure they comply with the ADA and ADAAA.

For more information about the ADA, please visit our website, or contact our Small Business Liaisons who can provide confidential assistance with ADA compliance in specific workplace situations.

EEOC website: www.eeoc.gov
To find the Small Business Liaison nearest you, go to www.eeoc.gov/employers/contacts.cfm

For more information about reasonable accommodations, contact the Job Accommodation Network. JAN provides free, expert, and confidential guidance on workplace accommodations.

JAN website: www.askjan.org
800-526-7234 (Voice) and 877-781-9403 (TTY)
UNDERSTANDING SUPPLEMENTAL DISABILITY BENEFITS
FOR WASHINGTON POLICE AND FIREFIGHTERS
FOR JOB RELATED INJURY OR ILLNESS
September 13, 2011

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Disability leave supplements are provided under chapter 462, Laws of 1985, now codified at RCW 41.04.500-.550 ("leave supplement"). The leave supplement is an amount that, when added to the amount payable under Workers' Compensation (see RCW 51.32.090), will result in a police officer or firefighter receiving:

[T]he same pay he or she would have received for full time active service, taking into account that industrial insurance payments are not subject to federal income or social security taxes.

RCW 41.04.505. One-half of the amount of the leave supplement is charged against an employee's accrued, paid leave (e.g., sick leave account). RCW 41.04.510(2). One-half of the amount of the leave supplement is paid by the employer. RCW 41.04.510(3). The benefit is available “up to a maximum of six months from the date of the injury or illness.” RCW 41.04.515.

In computing the employee's charge, the calculation of sick leave use is based on "base monthly salary." However, in calculating the employer's contribution, the statute provides specifically that "same pay" must take into account that industrial insurance payments are not subject to federal income or social security taxes. In order to give effect to RCW 41.04.505, an employer must calculate its portion of the leave supplement using base salary less amounts normally withheld as a result of taxation.

Stephen P. DiJulio, Understanding Supplemental Disability Benefits for Washington Police and Firefighters for Job Related Injury or Illness
This article is for informational purposes only. It does not contain or convey legal advice. Readers should not use or rely on this information without first consulting a lawyer.
Support is found for this position in the specific language of the statute, the interpretation and application of the provisions by the agencies charged with their administration, and in legislative history.

In addition to the provisions of RCW 41.04.505 and 41.04.510(3), we note that RCW 41.04.525 states specifically that the employer's contribution "shall not be considered salary or wages for personal services." This language indicates that the Legislature contemplated that the employer's contribution to the leave supplement would not be considered wages or salary, not be taxed as such, and therefore not be calculated at the same rate as normal wages or compensation.

In fact, the Legislature considered and rejected the use of "base monthly salary" for calculating the employer's contribution. Substitute House Bill No. 435, considered by the House on March 18, 1985, was amended to strike a reference to "90% of his or her base monthly salary" and inserted "the same pay he or she would have received for full-time active service, taking into account that industrial insurance payments are not subject to federal income or social security taxes . . . ." Journal of The House, at 681 (March 18, 1985). We understand that some employers do not manage the payment of supplemental disability payments in such a precise manner. Rather, the employee is kept on salary, and is responsible for repayment of time loss payments received from L&I, to the employer.

The statute does say the disability leave supplement is not subject to interest arbitration. RCW 41.04.550. But, an employer is not precluded from entering agreements that are more favorable than the statute. RCW 41.04.535.

The benefits of the Supplemental Disability Program are not required for cities and towns with a population of less than 2,500, or for counties with population less than 10,000. RCW 41.04.540.

Stephen P. DiJulio, Understanding Supplemental Disability Benefits for Washington Police and Firefighters for Job Related Injury or Illness