# FMLA and Schools:

## The "Special Rules" for Teachers

By Jeffrey W. Larroca

The Family and Medical Leave Act (FMLA) encapsulates a simple proposition: if you have a child (or are adopting one or having one legally placed) or if you or a family member gets seriously ill, you can't be fired just for missing work because of the child or the illness. Gone are the days when an employer could simply respond to an employee pregnancy or emergency with a shrug and say, "Sorry to hear about it, but the show must go on." That's because the FMLA was put in place in 1993 to provide employees job comfort so that they can get back on their feet without having to worry about losing their job. As President Clinton noted upon the act's signing, "no parent should ever have to choose between work and family; between earning a decent wage and caring for a child."

The FMLA, however, is not without limits. Only employers with 50 or more employees in a 75-mile radius are required to provide their employees FMLA leave. Moreover, to be eligible for FMLA leave, an employee must have worked for the employer for at least a year, and in the year prior to taking FMLA leave he or she must have worked at least 1,250 hours. Leave is also limited to 12 weeks a year. After expiration of the 12 weeks, an employee no longer has any right to continued leave and may thereafter be terminated without running afoul of the FMLA. It should also be pointed out that none of the 12 weeks is paid leave, and an employer may run accrued vacation or sick leave concurrently with an employee's FMLA leave. Unpaid leave often dissuades employees from abusing FMLA rights.

In application, the FMLA is seemingly straightforward. For example, lets say a bus hits a woman on her way to work and she is eligible for FMLA. She is hospitalized, provides her employer medical certification of her serious health condition, and her job is protected while she recovers. As a separate example, lets say an employee is the proud father of a newborn child. He tells his employer that his wife is expecting on June 1st and that he intends to take six weeks of FMLA leave after the birth. After those six weeks, he is legally entitled to his prior job, or one that is nearly identical in terms of pay, benefits and working conditions.

But what is seemingly straightforward can often be excruciatingly complicated - and frustrating - for employers and employees alike. Let's take the case of a third employee who has the serious health condition of lung cancer, which will require regular treatments while causing irregular absences. He provides medical certification to the employer and also explains that a block of six or 12 weeks is really of no use to him. He needs to work, but he needs to use his FMLA leave "intermittently" – four hours for treatments on Thursday afternoons, and additional time off which cannot be known in advance, such as after a particularly grueling bout of chemotherapy. The FMLA allows for such intermittent leave, and while there are alternatives for the employer to allow for the smooth running of the business, generally, the time off must be granted to the employee.

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Now, suppose the employee requesting FMLA leave is a teacher with a daily or thrice-weekly class of 100 students. Can a teaching job be reconciled with the FMLA needs of an employee who requires intermittent leave in such a manner that it is impossible to determine when and for how long he or she may be out? The Hobson's choice may be a classroom of students who are shortchanged or a teacher who foregoes critical care.

The Department of Labor has developed "special rules" for instructional employees (classroom teachers). Among these special rules are denial of full "intermittent" leave rights to employees of public and private elementary and secondary schools during the school year. If an instructional employee needs intermittent leave for more than 20 percent of the total number of working days over the period the leave would extend, the school can either require the employee to take leave for a period or periods of a particular duration not greater than the duration of the planned treatment, or they can transfer them temporarily to an available alternative position that they are qualified for and which has equivalent pay and benefits and better accommodates recurring periods of leave. The "special rules" also provide a school greater latitude in requiring a teacher to take full blocks of FMLA leave, dependent on how many weeks before the end of a term an instructional employee requires the FMLA leave. Finally, the "special rules" give schools more say into what position an instructional employee is returned.

The current "special rules" do not apply to colleges and universities, trade schools or preschools. Nonetheless, employers are provided other tools in the FMLA to best effectuate the needs of their institutions while adhering to a teacher's FMLA rights, including the right to transfer teachers to suitable alternative positions during their use of intermittent FMLA leave. Moreover, the FMLA is in a state of change, having recently been amended to provide more benefits to caregivers of service members. Numerous amendments proposing further changes are pending in Congress, including legislation reducing the threshold number of employees from 50 to 25; allowing for some FMLA leave to be paid; and, perhaps most relevant to teachers, allowing FMLA leave to be used for parental involvement leave to participate in or attend activities that are sponsored by a school or community organization and relate to a program of the school or organization that is attended by the employee's child or grandchild.

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