14. EMPLOYMENT – FAMILY AND MEDICAL LEAVE ACT
14.00 OVERVIEW

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on 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. 29 U.S.C. § 2601(b).

The Act entitles eligible employees to take up to twelve workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent who has a serious health condition; or because of a qualifying exigency of a covered military member. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

Additionally, eligible employees are entitled to up to 26 workweeks of leave to care for a covered service member with a serious injury or illness. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

Employers Covered by the FMLA

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.104(a); *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998.) The Eighth Circuit has also held that public officials in their individual capacities are "employers" under the FMLA. *Darby v. Bratch*, 287 F.3d 673, 680-81 (8th Cir. 2002). In addition, the Supreme Court has held that states are employers under the FMLA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must work in an area where the employer employs fifty or more employees within a 75-mile radius, 29 U.S.C. § 2611(2)(B)(ii) and 29 C.F.R. § 825.110(a)(3), and he or she must have been employed by the employer for at least twelve months and must have worked at least 1,250 hours during the previous twelve-month period. 29 U.S.C. § 2611(2)(A).

Military Caregiver and Qualifying Exigency Leave

Amendments in 2008 to the FMLA provide two new leave entitlements: military caregiver leave and qualifying exigency leave. The Department of Labor issued revised implementing regulations effective January 16, 2009, allowing family members of wounded military personnel to take up to six months of unpaid leave to care for them during their rehabilitation process. 29 C.F.R. § 825 *et seq.*; *see* 73 FR 67934 *et seq*. Eligible employees who

are family members of covered service members will be able to take up to 26 workweeks of leave in a single twelve-month period to care for a service member who has a serious illness or injury that was incurred in the line of duty while on active duty. That twelve-month period begins when the employee starts using military caregiver leave. Employers will not have the option of using the calendar-year method as they do for other types of FMLA leave. Entitlement to 26 weeks of military caregiver leave is provided for each service member and for each illness or injury, and covers more extended family members than those who may take FMLA leave for other reasons.

Qualifying exigency leave is intended to help the families of members of the National Guard and Reserves manage the members' affairs while they are on active duty or called to active duty status in support of a contingency operation. Family members may use all or part of the regular allotment of twelve weeks of FMLA leave. The final rule defines "any qualifying exigency" to include a number of broad categories of reasons and activities, including short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-development activities, and any additional activities agreed to by the employer and the employee.

The Regulations should be consulted for appropriate guidance and jury instructions concerning the military family leave provisions.

Family Members Contemplated by the FMLA

Employees are eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. § 2611(13); 29 C.F.R. § 825.122(a).

Parent means a biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a child. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp. 2d 1082, 1091 (E.D. Mo. 1998).

For the purposes of leave taken for birth or adoption or to care for a family member with a serious health condition, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c). Persons with "*in loco parentis*" status under the FMLA include those who have day-to-day responsibility to care for and financially support a child. 29 C.F.R. § 825.122(c)(3).

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(c)(1).

"Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. *Id.* "Instrumental activities of daily living" include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

For the purposes of FMLA qualifying exigency leave, "son or daughter on active duty or call to active duty status" mean "the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age." 29 C.F.R. § 825.122(g).

For the purposes of leave to care for a covered service member with a serious injury or illness, "son or daughter of a covered service member" means the "service member's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the service member stood *in loco parentis*, and who is of any age." 29 C.F.R. § 825.122(h). A "parent of a covered service member" is "a covered service member's biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the covered service member." 29 C.F.R. § 825.122(i).

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

An expectant mother may take leave for pregnancy, prenatal care, or for her own serious health condition following the birth of the child. 29 C.F.R. § 825.120(a)(4). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a)(4). The expectant mother "is entitled to leave for incapacity even though she does not receive treatment from a health care provider during the absence and even if the absence does not last for more than three consecutive calendar days." 29 C.F.R. § 825.120(a)(4). An expectant father "is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition." 29 C.F.R. § 825.120(a)(5).

Likewise, prospective adoptive or foster parents "may take leave before the actual placement or adoption of a child if absence from work is required for the placement for adoption or foster care to proceed." 29 C.F.R. § 825.121(a)(1).

"A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition." 29 C.F.R. § 825.120(a)(3).

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the twelve-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.120(a)(2). Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state law. 29 C.F.R. § 825.701. If an employee's leave qualifies for FMLA and state-law leave, the leave used counts against the employee's entitlement under both laws. *Id.*

What Constitutes a "Serious Health Condition?"

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a "serious health condition" under the Act. The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.113(a); 29 C.F.R. § 825.115; see, 29 U.S.C. § 2611(11).

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114.

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three full consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves: 1) treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; the two visits must occur within thirty days of the start of the period of incapacity, 29 C.F.R. § 825.115(a)(1); or 2) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider, with the first visit to the health care provider taking place within seven days of the incapacity. 29 C.F.R. § 825.115(a)(2) and (3). In some circumstances, the regulatory definition of incapacity offers limited guidance. *See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient

guidance for determining whether child was incapacitated and fact finder must determine whether the child's illness demonstrably affected his or her normal activity). Note that under the FMLA, a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show the employee is incapacitated even if that job is the only one the employee is unable to perform. *Stekloff*, 218 F.3d at 861. However, in order to constitute a serious health condition necessitating FMLA leave, the conditions must affect the employee's ability to perform the functions of the position. *Dalton v. Manorcare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015). "Where absences are not attributable to a serious health condition ... FMLA is not implicated and does not protect an employee against disciplinary action based upon such absences." 782 F.3d at 962 citing *Rankin v. Seagate Tech., Inc.*, 246 F.3d 1145, 1147–48 (8th Cir. 2001). Thus, an employee may be terminated for performance deficiencies unrelated to the employee's need for medical care. *Id*. Using FMLA leave "does not give an employee any greater protection against termination for reasons unrelated to the FMLA than was available before." *Malloy v. U.S. Postal Serv.*, 756 F.3d 1088, 1090 (8th Cir. 2014).

The "time for determining whether a particular condition qualifies as a serious health condition is the time that leave is requested or taken." *Smith v. AS America, Inc.* 829 F.3d. 616, 622 (8th Cir. 2016) citing *Navarro v. Pfitzer Corp.*, 261 F.3d 90, 96 (1st Cir. 2001). Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors' visits. 29 C.F.R. § 825.115(b).

A chronic health condition means a condition that requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, that continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.115(c). To qualify as a chronic serious health condition, the employee must make at least two visits to a health care provider per year. 29 C.F.R. § 825.115(c)(1).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.115(d).

Conditions requiring multiple treatments include any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.115(e).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor

ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 825.113(c)(d). While the above conditions are not generally considered "serious," the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be "serious health conditions" if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir. 2000), *cert. denied*, 531 U.S. 871 (2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer's, a severe stroke or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.115.

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998), the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son's death noting "[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for." *Id.* at 1226.

In addition, the Eighth Circuit has held that examinations and evaluations given to an employee's child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child's ability to participate in any activity at all and did not restrict any of the child's daily activities. *Id.*

The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.113(c).

The regulations also provide that the employee must obtain a medical certification regarding a serious health care condition. 29 C.F.R. § 825.305. If the employer views one medical certification form as incomplete or insufficient, the regulations require the employer to notify the employee, in writing, and give the employee seven calendar days to provide additional information. 29 C.F.R. § 825.305(c).

Requiring an employee to take FMLA leave when it is disputed whether an employee has a serious health condition is not a violation of the FMLA. *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542, 544-545 (8th Cir. 2013)

Employment - Family and Medical Leave Act

Restoration to Position After FMLA Leave

The FMLA requires the employer to reinstate the employee to her original position or to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment," 29 U.S.C. § 2614(a)(1)(B); *Dollar v. Smithway Motor Xpress*, Inc., 710 F.3d 798, 807 (8th Cir. 2013); *Walker v. Trinity Marine Products, Inc.*, 721 F.3d 542, 544 (8th Cir. 2013); *Brown v. Diversified Distribution Systems, LLC*, 801 F.3d 901 (8th Cir. 2015). However, the FMLA does not require employers to restore employment following leave if ''the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition." *Dollar*, 710 F.3d at 807 quoting *Reynolds v. Phillips & Temro Indus., Inc.*, 195 F.3d 411, 414 (8th Cir. 1999); 29 U.S.C. § 2614(a) (1)); 29 C.F.R. § 825.214.

If the employer can establish that the employee was terminated for reasons unrelated to an FMLA absence, a finding for the employee on an FMLA claim is appropriate even if that absence was FMLA-protected. *Dalton v. Manorcare of Des Moines of IA, LLC*, 782 F.3d 955, 961 (8th Cir. 2015).

Separate Causes of Action Under the FMLA for Entitlement, Discrimination, and Retaliation

The Eighth Circuit has recognized three categories of FMLA claims arising under 29 U.S.C. § 2615(a)(1)-(2): (i) entitlement claims, in which an employee alleges a denial of a benefit to which he was entitled under the statute; (ii) discrimination claims, in which an employee alleges that the employer discriminated against him in the terms and conditions of employment because the employee exercised rights to which he was entitled under the FMLA; and (iii) retaliation claims, in which an employee alleges that the employer took adverse action against him for opposing a practice made unlawful under the FMLA.[1] *Johnson v.Wheeling Mach. Prods.*, 779 F.3d 514, 517–18 (8th Cir. 2015); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012).[2]

First, a plaintiff may pursue recovery under an "entitlement" theory.[3] *Pulczinski*, 691 F.3d at 1005-1006. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny" an employee's rights under the FMLA. *Scobey v. Nucor Steel–Arkansas*, 580 F.3d 781, 785 (8th Cir. 2009); *Wages v. Stuart Management Corp.*, 798 F.3d 675, 679 (8th Cir. 2015). Under an entitlement claim, it is the plaintiff's burden to demonstrate that she was entitled to a benefit under the FMLA, but was denied that entitlement. *Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008); *Wages v. Stuart Management Corp.*, 798 F.3d 675, 680 (8th Cir. 2015).

[1] Some courts within the Eighth Circuit have treated discrimination and retaliation claims as the same since both are statutorily based on 29 U.S.C. § 2615(a)(2). *Lovland v. Employers Mutual Casualty Co.*, 674 F.3d 806, 812 (8th Cir.2012).

[2] Some courts in the Eighth Circuit have only two classifications of claims under the FMLA, namely~~classify the types of claims under § 2615(a)(1) as~~ "entitlement claims" under § 2615(a)(1) and "discrimination claims~~.~~" under § 2615(a)(2). *Burciaga v. Ravago Americas LLC*, 791 F.3d 930, 934 (8th Cir. 2015)~~;~~. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 864–65 (8th Cir. 2015).

[3] Some courts in the Eighth Circuit refer to an "entitlement" claim as an "interference" claim. *Pulczinski*, 691 F.3d at1005.

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The employer's intent is immaterial to an FMLA entitlement claim. *Massey-Diez v. University of Iowa Community Medical Services, Inc.*, 826 F.3d 1149, 1158 (8th Cir. 2016); *Pulczinski*, 691 F.3d at 1005; *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006).

The second type category of claims under the FMLA is "discrimination." *Burciaga v. Ravago Americas LLC*, 791 F.3d at 934. A discrimination claim occurs when "an employer takes adverse action against an employee because the employee exercises rights to which he is entitled under the FMLA." *Id. citing Pulczinski* 691 F.3d *at* 1006. An employee making this type of claim must prove that the employer was motivated by the employee's exercise of rights under the FMLA. *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012); *Pulczinski*, 691 F.3d at 1006. To establish a prima facie case of discrimination, an employee must show "(1) that [s]he engaged in activity protected under the Act, (2) that [s]he suffered a materially adverse employment action, and (3) that a causal connection existed between the employee's action and the adverse employment action." *Hasenwinkel v. Mosic*, 809 F.3d 427, 433 (8th Cir. 2015) citing *Pulczinski*, 691 F.3d at 1007. A causal connection exists when the plaintiff shows that a discriminatory motive "played a part in the adverse employment action." *Hasenwinkel*, 809 F.3d at 433 *citing Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 865 (8th Cir. 2006).

If the plaintiff makes a showing of discrimination, the burden then shifts to the employer to establish that there was a reason for terminating the employment that was unrelated to the employee exercising his FMLA rights. *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 978–79 (8th Cir. 2005). "As long as an employer can show a lawful reason, i.e. a reason unrelated to an employee's exercise of FMLA rights, for not restoring an employee on FMLA leave to her position, the employer will be justified to interfere with an employee's FMLA leave rights." *Id.* at 979; *Chappell v. Bilco Co*, 675 F.3d 1110 (8th Cir. 2012).

Unlike an entitlement claim under the FMLA, a discrimination claim rests on a connection between an adverse employment action and an illegal motive on the part of the employer." *Pulczinski*, 691 F.3d at 1006. *Massey-Diez*, 826 F.3d at 1160.

The third type of recovery under the FMLA is the "retaliation" theory. This claim arises under 29 U.S.C. § 2615(a)(2). A retaliation claim occurs when an employer takes an adverse action against an employee who opposes any practice made unlawful under the FMLA. *Pulczinski*, 691 F.3d at 1006.

To establish a prima facie case of retaliation, an employee must show that: 1) he engaged in protected conduct; 2) he suffered a materially adverse employment action; and 3) the materially adverse action was causally linked to the protected conduct. *Chappell*, 675 F.3d at 1116-1117 *citing Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011).

Retaliation claims are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id*. If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to the plaintiff to establish that the employer's reasons are pretextual. *Chappell*, 675 F.3d at 1115.

Employment - Family and Medical Leave Act

Notice of the Need for Leave

In order to be entitled to leave under the FMLA, the employee must give timely notice of the need for leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 785-86 (8th Cir. 2009); *Phillips v. Matthews*, 547 F.3d 905, 909 (8th Cir. 2008); *Clinkscale v. St. Therese of New Hope*, 701 F.3d 825, 827 (8th Cir. 2012); *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 780 (8th Cir. 2013). If the leave is foreseeable, the employee must provide at least thirty days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). If the leave is unforeseeable then the employee is to provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Notice under the regulations takes into account the circumstances of the individual case, which in most cases would be that same day or the next business day. 29 C.F.R. § 825.302(b). Further, an employer may require that the employee comply with the employer's notice requirements absent unusual circumstances. 29 C.F.R. § 825.302(d).

Additionally, the employee must provide sufficient information about the reason for leave for the employer to reasonably determine the FMLA may apply to the leave request. 29 C.F.R. § 825.302(c) and 29 C.F.R. § 825.303(b); *Woods v. Daimler-Chrysler Corp.* 409 F.3d 984, 990 (8th Cir. 2005). "The employer's duties arise 'when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.'" *Phillips*, 547 F.3d at 909 (quoting *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999)). Thus, employees have an affirmative duty to timely advise the employer of the need and reason for leave. *Scobey*, 580 F.3d at 785-86; *Bosley v. Cargill Meat Solutions Corp.*, 705 F.3d 777, 780-781 (2013).

Notifying an employer of the intent to take FMLA leave is protected activity. *See*, *Hager v. Arkansas Dept. of Health*, 735 F.3d 1009, 1016 (8th Cir. 2013); *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 963 (8th Cir. 2012).

The Relationship Between the Fair Labor Standards Act (FLSA), Civil Rights Legislation, and the FMLA

Although earlier cases suggested the FMLA was more akin to the FLSA than to Civil Rights legislation, *see, e.g., Morris v. VCW, Inc.*, 1996 WL 740544, *2 (W.D. Mo. 1996), the Supreme Court has left no doubt that the FMLA is an anti-discrimination statute. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (holding the FMLA aims to protect the right to be free from gender-based discrimination in the workplace and such a statutory scheme is subject to heightened scrutiny). However, the FLSA can provide guidance for the interpretation of FMLA terms such as using FLSA "hours of service" to calculate FMLA eligibility for leave and determination of whether a supervisor is an "employer" for FMLA purposes. *See Morris* at *2 and cases cited therein.

In retaliation cases under the FMLA, courts frequently borrow the framework and method of analysis in civil rights cases. *See, e.g., Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008) (FMLA makes it unlawful for an employer to discriminate against any individual for

opposing any practice made unlawful by the Act; this opposition clause is derived from Title VII of the Civil Rights Act of 1964).

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability (*e.g.*, Title VII, the Pregnancy Discrimination Act, the Rehabilitation Act, the ADA, etc.). 29 U.S.C. § 2651(a)(b); 29 C.F.R. § 825.702(a).

Damages

The FMLA provides that an employer who violates the FMLA "shall be liable to any eligible employee affected" for lost wages, interest, and "an additional amount of liquidated damages equal to the sum of the amount" of lost wages and interest. 29 U.S.C. § 2617(a)(1)(A)(i) and (ii) . While Title VII allows plaintiffs to recover non-pecuniary damages, the FMLA limits damages to actual monetary loss. 29 U.S.C. § 2617(a)(1)(A); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S.721, 739–40, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *Hasenwinkel*, 809 F.3d 434. An employer may avoid a liquidated damages award if it can show, to the court's satisfaction, that it "acted with subjective good faith and that it had an objectively reasonable belief that its conduct did not violate the law." *Jackson v. City of Hot Springs*, 751 F.3d 855, 866 (8th Cir. 2014). Liquidated damages are mandatory unless the employer shows the good faith exception applies. *Smith*, 829 F.3d. at 623. The FMLA provides for reasonable attorney's fees to be awarded to a prevailing plaintiff." *Marez*, 688 F.3d at 965 *citing* 29 U.S.C. § 2617(a)(3).

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