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Troubles with FMLA

It's been almost three decades since the Family and Medical Leave Act became law. Why and how are employers still running afoul of it?

By Maura C. Ciccarelli
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Although it's been nearly 25 years since the Family and Medical Leave Act of 1993 took effect, employers -- and courts -- continue to struggle with the law.

For example: In February, the United States District Court for the Eastern District of Louisiana upheld an earlier jury trial decision that Schlumberger Technology Corp. "interfered" with sales manager Gregory Crain's FMLA rights. He was laid off as part of a larger reduction-in-force plan two days after he inquired about short-term disability because he needed to take time off following foot surgery.

In response to the decision, Susan Ganz, public relations manager for Schlumberger's Western Hemisphere operations, said, "Schlumberger disagrees with the jury verdict and has filed an appeal, which is currently pending."

The case illustrates how difficult it can be sometimes to cover all the bases related to FMLA.

"It's utterly striking that in the last 12 to18 months, there's a clear trend of situations like this where an employer has a policy on FMLA, but it's the practice of it that is going awry in some way," says Matt Morris, an attorney and vice president of FMLASource at ComPsych in Chicago.

"There are always problems with FMLA," says Anne Yuengert, a partner and labor and employment lawyer with Bradley Arant Boult Cummings in Birmingham, Ala., where she regularly writes and speaks to employers about FMLA issues.

FMLA requires employers with more than 50 employees to provide workers with job-protected and unpaid leave for qualified medical and family reasons such as personal or family illness, family military leave, pregnancy, adoption or the foster-care placement of a child.

> Where it has become tricky, say legal and industry experts on the issue, is when managers and HR professionals don't follow up on any potentially relevant leave situations of employees, even if the employee handbook is clear on the process for applying.
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> "The number one problem I see with FMLA is that the entire burden is on the employer," says Yuengert. "If I'm an employee and I give any notice that I would have need for a leave, even though it's just mentioned casually, the burden is on the employer to say, 'these are your FMLA rights.'"
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> The linchpin in Crain's case was that he was not told about his FMLA rights and there was no definitive written documentation to show that he was among the people listed on the layoff list prior

to his time off inquiry.

"This case affirms that most FMLA mistakes can be avoided if the employer does a better job of recordkeeping and working with the employee on requests for leave," notes Peter Siegel, shareholder with Greenspoon Marder, and a specialist in Labor & Employment, based in Fort Lauderdale, Fla. "What happened in this situation is that in the absence of good, comprehensive HR documentation, the trier of fact will base the decision on the credibility of the witnesses."

Morris also noted a trend that some companies believe that if an employee doesn't use the "magic words" of "I want FMLA leave," then the company won't be held liable in an FMLA claim. That's simply not the case, as this decision and others in recent years has confirmed.

"Where they also fall down," he adds, "is when there's not a clarity of path on how to request leave or if there is, the employer obfuscates it by saying, 'You have to call this 1-800 number to request your leave but if you text your manager, that's fine.' That's where the message gets muddled."

As for RIF planning, employers should develop objective criteria related to absences to decide who to include in an RIF plan, says Janice Dubler, a partner at Montgomery McCracken in Philadelphia, who focuses on employment litigation and counsels clients on employee policy development and litigation avoidance.

> "The regulations are very specific," she says. "[They allow employers] to lay someone off who is on FMLA leave but the employer has the burden to provide evidence that their selection is not related to any time off taken under FMLA."
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> The Crain case also included debates about whether the foot surgery qualified as a serious medical condition, something that perhaps employers should be wary about judging too quickly, says Nicholas H. Sikon, an associate with Outten & Golden in New York.
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> "The employer said it was a transient medical condition and not a serious medical condition," Sikon says. "The [U.S. District Court] rejected the argument because the nature of his work required travel on a monthly basis and he could not drive during his recovery from surgery."
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> "The case is also a good example of how HR practices could impact a damage award," says Scott Grubin, partner in the labor and employment division of the Barton law firm in New York. "The defendant's failure to consider the possible impact of FMLA leave could not be said to be reasonable and in good faith."
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> In short, the best advice to employers and HR folks is to make sure employees have a

clear path for requesting FMLA leave, that workers are alerted to their FMLA rights when there's even a slight hint of a potential need, and that employers keep good records to prove that a RIF decision was unrelated to an FMLA leave.

Avi M. Attal, chair of the labor and employment litigation practice group at **Kahana** & Feld in Santa Ana, Calif., summed up the lessons this way: "Employers should not be scared of FMLA. It's a regular part of doing business and, because of that, it should be standard practice."

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