10. FAMILY AND MEDICAL LEAVE ACT

10.1 NATURE OF FMLA CLAIM

Plaintiff claims that Defendant violated the "Family and Medical Leave Act," which is often referred to by its initials, "FMLA." This law entitles an eligible employee to take up to 12 [26] weeks of unpaid leave during any 12-month period

[because of the birth of a child]

[*or*]

[because of the placement of a child for adoption or foster care]

[*or*]

[to care for a [spouse/child/someone *in loco parentis* relationship/parent] with a serious health condition]

[*or*]

[because of the employee's serious health condition that makes him unable to perform the functions of his position]

[*or*]

[because of [*describe qualifying exigency*] arising [from the call/the notice of a call] to active duty in the [Armed Forces/National Guard/Reserves] of the employee's [spouse/child/parent]]

[*or*]

[to care for a member of the Armed Forces who is the employee's [spouse/son/daughter/parent/nearest blood relative] and who is undergoing [[medical treatment] [recuperation] [therapy] [in outpatient status] [on temporary disability retired status] for a serious illness or injury]].

The FMLA gives the employee the right following FMLA leave [either] to return to the position he held when the leave began [or to an equivalent position].

Committee Comments

a. General authority. *See* 29 U.S.C. §§ 2612(a)(1)(A)-(D), 2614. The FMLA leave period is 12 weeks for leaves due to the birth of a child, the adoption or placement of a child for foster care, the serious health condition of certain family members, the employee's own serious health condition or because of a qualifying exigency arising from the call or notice of a call to active duty of spouse, child, or parent in a war, national emergency or a military operation designated by the Secretary of Defense. 29 U.S.C. §§ 2612(a)(1)(A)-(E). FMLA leave is 26 weeks for leave

to care for a service member undergoing treatment, recuperation, or therapy, on outpatient status, or on the temporary disability retired list due to a serious illness or injury. 29 U.S.C. § 2612(a)(3).

b. Son or daughter. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.

c. Qualifying exigency. Regulations issued under the FMLA define "qualifying exigency." 29 C.F.R. § 825.126(a). The qualifying exigency involved should be described here.

d. Outpatient status. For purposes of leave to care for a service member, the FMLA defines "outpatient status" as the status of being assigned to a military medical treatment facility as an outpatient or to a unit established to provide command and control to service members receiving medical care as outpatients. 29 U.S.C. § 2612(16).

e. Intermittent leave or leave on a reduced leave basis. Except for leaves due to the birth of a child or placement of a child for adoption or foster care, the FMLA allows leave to be taken on an intermittent or reduced leave basis. 29 U.S.C. § 2612(b). In cases involving alleged denial of an intermittent or reduced leave, the following should be substituted for the last two sentences of this instruction:

An employee may take FMLA leave on [an intermittent basis] [a reduced leave schedule]. [An employer may temporarily assign an employee taking leave on [an intermittent basis] [a reduced leave schedule] to an alternative position for which [he/she] is qualified if the position has equivalent pay and benefits and better accommodates recurring absences.]

f. Special rules for local educational institutions. The FMLA contains special rules for employees of local educational agencies relating to intermittent leaves, duration of leaves near the conclusion of any academic term, restoration to an equivalent position, and damages. 29 U.S.C. § 2618. These instructions do not encompass those special rules.

10.2 ELEMENTS OF FMLA INTERFERENCE CLAIM

To succeed on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:

First: [[Plaintiff] [*Plaintiff's defined family member*]] had [*condition*].

Second: The condition was a serious health condition. I will define "serious health condition" for you in a moment.

Third: Defendant had appropriate notice of Plaintiff's need for leave. I will define "appropriate notice" for you in a moment.

Fourth: Defendant interfered with [his/her] right to take FMLA leave by [[not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not giving [him/her] written notice detailing his rights and obligations under the FMLA] [*other alleged interference*]].

Committee Comments

a. General authority. This instruction is for cases in which Plaintiff's right to FMLA leave is alleged to have been denied or otherwise interfered with. 29 U.S.C. § 2615(a)(1). Plaintiff bears the burden of showing entitlement to FMLA leave. *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997). In contrast to a claim that Plaintiff was retaliated against for taking FMLA leave, a Plaintiff claiming denial or interference with his right to take FMLA leave need not show discriminatory intent. *King v. Preferred Tech. Grp.*, 166 F.3d 887, 891 (7th Cir. 1999); *Goelzer v. Sheboygan Cnty.*, 604 F.3d 987, 995 (7th Cir. 2010). Additionally, a Plaintiff need not show they were denied an FMLA leave but rather can also state an FMLA claim by establishing they were discouraged from exercising their right. *Ziccarelli v. Dart*, 35 F.4th 1079, 1089-90 (7th Cir. 2022). *See* Instruction 10.4.

b. Scope. The instruction above deals with leave due to the employee's own serious health condition or that of a covered family member, by far the most common cases. In cases involving leaves for the other four reasons provided for in the FMLA, the instruction needs to be modified as set out in the comments below. The definition of "serious health condition" is in Instruction 10.6, which should be given in conjunction with this instruction. The definition of "notice" is in Instruction 10.8, which should be given in conjunction with this instruction.

c. Return to job or equivalent position. In cases where Plaintiff is or entitled to be on FMLA leave and is terminated for misconduct, poor performance, or as a result of a reduction in force, the employer may present evidence that it would have discharged (or laid off) Plaintiff even if the leave had not been taken. 29 U.S.C. § 2614(a)(3); 29 C.F.R. § 825.216(a)(1). Plaintiff must then prove that he/she would

have remained in his/her position had he/she not taken leave. *Kohls v. Beverly Enter. Wis., Inc.,* 259 F.3d 799, 804 (7th Cir. 2001); *Mitchell v. Dutchmen Mfg., Inc.,* 389 F.3d 746, 748 (7th Cir. 2004); *Rice v. Sunrise Express*, 209 F.3d 1008, 1017-18 (7th Cir. 2000), *cert. denied*, 531 U.S. 1012 (2000). "An employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA's job restoration or maintenance of health benefits provisions." 29 C.F.R. § 825.216(d).

d. Birth of child. In cases involving leave due to the birth of a child, the instruction should be:

First: Plaintiff's child had been born within the prior 12 months;

Second: Defendant had appropriate notice of Plaintiff's need for leave;

Third: Defendant interfered with [his/her] right to take FMLA leave by [not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not giving [him/her] written notice detailing [his/her] rights and obligations under the FMLA].

29 U.S.C. § 2612(a)(1)(A).

e. Placement of child. In cases involving leave due to the adoption or placement for foster care of a child, the instruction should be:

First: [[Plaintiff had adopted a child] [A child had been placed with [him/her] for foster care]] within the past 12 months;

Second: Defendant had appropriate notice of Plaintiff's need for leave;

Third: Defendant interfered with [his/her] right to take FMLA leave by [[not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not giving [him/her] written notice detailing [his/her] rights and obligations under the FMLA]].

29 U.S.C. § 2612(a)(1)(B).

f. Due to active duty. In cases involving leave due to the active duty or call to active duty of a covered family member, the instruction should be:

First: Plaintiff's [spouse/child/parent] was [[on active duty] [called to active duty]].

Second: There was [*qualifying exigency*] arising out of the [[active duty] [call to active duty]].

Third: Defendant had appropriate notice of Plaintiff's need for leave.

Fourth: Defendant interfered with [his/her] right to take FMLA leave by [[not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not giving [him/her] written notice detailing [his/her] rights and obligations under the FMLA]].

g. Serious illness or injury of service member. In cases involving leave to care for a service member with a serious illness or injury, the instruction should be:

First: Plaintiff is the [spouse/child/parent/nearest blood relative] of a service member.

Second: Plaintiff's [spouse/child/parent/nearest blood relative] [[undergoing [medical treatment/recuperation/therapy]] [in outpatient status] [on the temporary disability retired list]] for a serious illness or injury. I will define "serious illness or injury" for you in a moment.

Third: Defendant had appropriate notice of Plaintiff's need for leave.

Fourth: Defendant interfered with [his/her] right to take FMLA leave by [[not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not giving [him/her] written notice detailing [his/her] rights and obligations under the FMLA]].

h. Intermittent leave or leave on a reduced leave basis. Except for leaves due to the birth of a child or placement of a child for adoption or foster care, the FMLA allows leave to be taken on an intermittent or reduced leave basis. 29 U.S.C. § 2612(b). In cases involving alleged denial of an intermittent or reduced leave, for the employee's own serious health condition, the final three elements should be:

Third: Plaintiff sought leave on [[an intermittent basis] [a reduced leave schedule]] due to [his/her] serious health condition.

Fourth: If requested by Defendant, Plaintiff provided Defendant with a written certification by [his/her] health care provider that [he/she] was unable to do [his/her] job, [[of the dates on which medical treatment is expected to be given and how long the treatment will last] [of the medical necessity for the [intermittent] [reduced schedule] leave]] and the expected duration of the leave.

Fifth: Defendant interfered with [his/her] right to take FMLA leave by [[not giving [him/her] leave] [terminating [him/her]] [not allowing [him/her] to return to [his/her] job or an equivalent position] [discouraging [him/her] from taking leave] [not

giving [him/her] written notice detailing [his/her] rights and obligations under the FMLA]].

29 U.S.C. §§ 2613(b)(4)(B), (5), (7). This instruction should be modified as appropriate in cases involving alleged denial of an intermittent or reduced leave for other reasons. If there is a dispute of fact about whether Defendant requested the written certification by Plaintiff's health care provider, the jury should be instructed that it is Defendant's burden to show that the certification was requested.

10.3 SUPPLEMENTAL INSTRUCTIONS FOR SPECIFIC ISSUES

(a) Substitution of paid leave

Paid [vacation/personal/family/medical/sick] leave may be substituted for all or part of the 12 [26] weeks of unpaid leave provided for by the FMLA.

(b) Definition of "son or daughter" [or "child"]

This case involves Plaintiff's [[biological child] [adopted child] [a foster child] [stepchild] [legal ward]], who is considered his "son or daughter" for purposes of this law.

(c) In loco parentis

Although [*name*] is not Plaintiff's biological [parent/child], [he/she] is considered a ["parent"/"son"/"daughter"] under the law because he occupied the same role in Plaintiff's life that a biological [parent/child] would be expected to occupy.

(d) Return to former position

An employee need not be returned to that position if his job would have been eliminated if [he/she] had not taken leave. To prevail, Plaintiff must show by a preponderance of the evidence that Plaintiff's position would not have been eliminated had Plaintiff not taken leave.

(e) "Key employee" defense

The Family and Medical Leave Act permits an employer to deny job restoration to a "key employee" when necessary to protect the employer from substantial and grievous economic injury. Defendant contends that it had no obligation to restore Plaintiff to an equivalent position because Plaintiff was a "key employee" and denying [leave/reinstatement/other action]] was necessary to protect Defendant from substantial and grievous economic injury.

To succeed on this defense, Defendant must prove the following things by a preponderance of the evidence.

First, Defendant must prove that Plaintiff was a "key employee" by proving that at the time Plaintiff requested leave Plaintiff was a salaried employee who was among the highest paid 10 percent of all the employees employed by Defendant within 75 miles of Plaintiff's worksite.

Second, Defendant must prove that failing to restore Plaintiff to Plaintiff's former job [or an equivalent position] was necessary to prevent substantial and grievous economic injury to the operations of Defendant. In determining whether or not Defendant's action was economically justified in this sense, you may consider

factors such as whether Plaintiff was so important to the business that Defendant could not temporarily do without Plaintiff and could not replace Plaintiff on a temporary basis. You may also consider whether the cost of reinstating Plaintiff after a leave would be substantial.

Third, Defendant must prove that when it determined that substantial and grievous injury would occur from Plaintiff's leave, Defendant promptly notified Plaintiff of its intent to deny restoration of Plaintiff's job, specifying in the notice that Plaintiff was a "key employee" and restoration of Plaintiff's job after a leave would cause substantial and grievous economic injury to Defendant.

If you find Defendant has proved these three things by a preponderance of the evidence, your verdict must be for Defendant.

Committee Comments

a. Substitution of paid leave. The FMLA allows certain paid leaves to be substituted for all or a part of the 12 or 26-week FMLA-required unpaid leave. 29 U.S.C. § 2612(d); *Repa v. Roadway Express, Inc.,* 477 F.3d 938, 941 (7th Cir. 2007). Where appropriate, the jury should be instructed as to the types of paid leaves that may be substituted for the FMLA leave involved.

b. Definition of "son or daughter." The FMLA defines "son or daughter" to include a biological child, an adopted child, a foster child, a stepchild, a legal ward or the child of a person standing *in loco parentis*. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.102. The FMLA limits "son or daughter" to persons under the age of 18 or those 18 or older who are incapable of self-care because of a physical or mental disability. 29 U.S.C. § 2611(12). Where a case presents an issue as to whether a child is incapable of self-care, the following additional element should be inserted after the second element and the remaining renumbered: "That Plaintiff's child was incapable caring for [himself/herself] because of a [mental] [physical] disability." 29 U.S.C. § 2612(a)(1)(C); 29 C.F.R. §§ 825.112-825.115, 825.122(d); *Gienapp v. Harbor Crest*, 756 F.3d 527, 530-31 (7th Cir. 2014) (individual's inability to care for herself rendered her a "son or daughter" under FMLA notwithstanding fact she was over 18 and married). The statute uses the phrase, "son or daughter," but the Committee recommends the word "child" in the text of instructions. Therefore, it may be appropriate for this instruction to define "child" instead of "son or daughter."

c. Definition of "parent." The FMLA defines "parent," "son," and "daughter" to include *in loco parentis* relationships. 29 U.S.C. §§ 2611(7), (12).

d. Job elimination on leave. If an employee was not reinstated because the employee's position was eliminated while on leave, the employee must prove the "position would not have been eliminated had [the employee] not taken leave"—an issue on which the employee bears the burden of proof. *See Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978 (7th Cir. 2008); *see also* 29 C.F.R. § 825.216(a).

e. Reinstatement defense—key employees. The employer may assert as a defense that denial of reinstatement was lawful because Plaintiff was a key employee, that is, a salaried employee who is among the highest paid ten percent of employees within 75 miles of the facility where the employee was employed and certain additional requirements described in the statute and explained in Department of Labor regulations were met. 29 U.S.C. § 2614(b); 29 C.F.R. §§ 825.216(b), 825.217-825.219; *see also* Third Circuit Model Civil Jury Instructions 10.3.1 (describing the "Key Employee" affirmative defense); *Luna Vanegas v. Signet Builders, Inc.*, 46 F.4th 636, 641 (7th Cir. 2022), *cert. denied*, 144 S. Ct. 71 (2023) (explaining that the party asserting statutory exemption under FLSA, the statute through which FMLA is enforced, bears the burden of proof for a statutory exemption). The court should consider which statutory elements are at issue in crafting an instruction.

10.4 ELEMENTS OF FMLA RETALIATION CLAIM

To succeed on this claim, Plaintiff must prove, by a preponderance of the evidence, that [his/her] [*protected activity*] was a motivating factor in Defendant's decision to [*adverse action*] [him/her]. The term "motivating factor" means a reason why Defendant took the action that it did. It does not have to be the only reason.

If you find that Plaintiff's [*protected activity*] motivated Defendant to [*adverse action*] [him/her], you must find for Plaintiff—unless you decide that Defendant has proved by a preponderance of the evidence that it would have [*adverse action*] [him/her] even if Plaintiff had not [*protected activity*], in which case you must find for Defendant.

Committee Comments

a. General authority. The FMLA prohibits discharging or discriminating against an employee for exercising his rights under the FMLA. 29 U.S.C. § 2615(a)(2), (b).

b. Scope. Unlike an FMLA interference claim, a claim of retaliation requires a showing of discriminatory intent. *Goelzer v. Sheboygan Cnty.,* 604 F.3d 987, 995 (7th Cir. 2010) ("The difference between a retaliation and interference theory is that the first 'requires proof of discriminatory or retaliatory intent while [an interference theory] requires only proof that the employer denied the employee his or her entitlements under the Act.'") (quoting *Kauffman v. Fed. Express Corp.,* 426 F.3d 880, 884 (7th Cir. 2005)). The methods of proving a retaliation claim are the same as under Title VII and other similarly interpreted statutes. *Smith v. Hope Sch.*, 560 F.3d 694, 702 (7th Cir. 2009); *Burnett v. LFW Inc.,* 472 F.3d 471, 481-82 (7th Cir. 2006).

c. Mixed motive. In certain cases, a party may elect to pursue a mixed motive theory. In such a case, this instruction should be modified accordingly. *Goelzer v. Sheboygan Cnty.*, 604 F.3d 987, 995 (7th Cir. 2010); *Lewis v. Sch. Dist. No. 70*, 523 F.3d 730, 741-42 (7th Cir. 2008).

10.5 DEFINITION OF "EQUIVALENT POSITION"

An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perks, and status. In addition to equivalent pay and equivalent benefits, it must involve the same or substantially the same working conditions and duties, which must entail substantially equivalent skill, effort, responsibility, and authority.

Committee Comments

a. General authority. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.215(a); *Breneisen v. Motorola, Inc.,* 512 F.3d 972, 977 (7th Cir. 2008); *James v. Hyatt Regency Chi.*, 707 F.3d 775, 780 (7th Cir. 2013) (requiring return to "'an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment'") (quoting 29 U.S.C. § 2614(a)(1)); *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602, 605 & 613 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 777 (2023) (even when another teaching position was not available, returning plaintiff to a paraprofessional, non-teacher position warranted declaratory relief and attorneys' fees based on plaintiff's "harm (placement in a position below her skill level)" because of employer's "failure to return her to an equivalent position," notwithstanding the fact plaintiff "received the same salary and benefits in her new role" that "involved significantly less responsibility, independence, discretion, and management than her previous Lead Teacher position" and required splitting time between two different elementary schools).

b. Comparing pay, benefits, and terms and conditions. Department of Labor regulations provide guidance on specific issues, including what pay increases or bonuses may be necessary for pay to be considered "equivalent," how benefit eligibility must be treated for benefits to be "equivalent," and other types of changes to terms and conditions of employment (*e.g.*, work location, shift schedule, earnings opportunities, or terms and conditions that are *de minimis*, intangible, or unmeasurable). *See generally* 29 C.F.R. § 825.215. Circuit precedent has relied on this guidance in determining whether an employee was returned to "an equivalent position" as defined by the FMLA. *See, e.g., Breneisen v. Motorola, Inc.,* 512 F.3d 972, 977-78 (7th Cir. 2008); *see also Mitchell v. Dutchmen Mfg., Inc.,* 389 F.3d 746, 748-49 (7th Cir. 2004).

10.6 DEFINITION OF "SERIOUS HEALTH CONDITION"

As used in these instructions, the phrase "serious health condition" means an [[illness] [injury] [impairment] [physical condition] [mental condition]] that involves: [[inpatient care in a hospital, hospice, or residential medical care facility] [continuing treatment by a health care provider]].

[To establish that [he/she] received inpatient care, the Plaintiff must demonstrate that [he/she] [child/spouse/parent] had an overnight stay (*i.e.*, one calendar day), in a hospital, hospice, or residential medical care facility, including any period of incapacity (which means the inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) or any subsequent treatment in connections with such inpatient care.]

[To establish that [he/she] [his/her child/spouse/parent] received continuing treatment by a health care provider, the plaintiff must prove:]

(A) [That [he/she] [his/her spouse/child/parent] experienced a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

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

[or]

(B) [That [he/she] [his/her daughter/parent] experienced any period of incapacity due to pregnancy or for prenatal care.]

[or]

(C) [That [he/she] [his/her spouse/child/parent] experienced any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

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

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

[or]

(D) [That [he/she] [his/her spouse/child/parent] experiences a period of incapacity, which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatments by, a health care provider.]

[or]

(E) [That [he/she] [his/her spouse/child/parent] experiences any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiations, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).]

[or]

(F) [That [he/she] [his/her spouse/child/parent] experiences other absences attributable to incapacity even though Plaintiff or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.]

Committee Comments

29 U.S.C. § 2611(11); 29 C.F.R. §§ 825.113-115; *Guzman v. Brown Cnty.*, 884 F.3d 633, 638 (7th Cir. 2018); *Burnett v. LFW Inc.*, 472 F.3d 471, 478-79 (7th Cir. 2006).

10.7 DEFINITION OF "SERIOUS ILLNESS OR INJURY" IN ARMED FORCES CASES

As used in these instructions, the term "serious illness or injury" in the case of a member of the Armed Forces (including a member of the National Guard or Reserves) means an injury or illness incurred by the service member in the line of duty on active duty in the Armed Forces or that existed before the beginning of the service member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the member unfit to perform the duties of the member's office, grade, rank, or rating.

[As used in these instructions, the term "serious illness or injury" in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) means a qualifying injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that manifested itself before or after the member became a veteran.]

Committee Comments

29 U.S.C. § 2611(18); 29 C.F.R. § 825.127.

10.8 APPROPRIATE NOTICE

The phrase "appropriate notice" depends on context.

[*When the need for leave is foreseeable:*] Plaintiff must give Defendant at least 30 days' notice before FMLA leave was to begin. If that was not possible, Plaintiff must have given notice as soon as both possible and practical, taking into account all of the facts and circumstances. Plaintiff must have given at least verbal notice sufficient to make Defendant aware that [he/she] needed FMLA leave. Plaintiff did not need to mention the FMLA or use any specific words if [he/she] gave Defendant enough information that Defendant knew, or should have known, that Plaintiff needed FMLA leave.

[*When the need for leave is not foreseeable:*] Plaintiff did not need to give advance notice to Defendant if [[Plaintiff could not have foreseen [his/her] need for leave] [Plaintiff was incapable of giving notice]]. As soon as both possible and practical, taking into account all of the facts and circumstances, Plaintiff should have given notice. [Plaintiff/Someone acting on Plaintiff's behalf] must have given at least verbal notice sufficient to make Defendant aware that [he/she] needed FMLA leave. Plaintiff did not need to mention the FMLA or use any specific words if [he/she] gave Defendant enough information that Defendant knew, or should have known, that [he/she] needed FMLA leave.

Plaintiff did not need to request FMLA leave if the Defendant knew or should have known from the circumstances that Plaintiff needed FMLA leave or was so incapacitated that [he/she] could not provide notice of his need for leave.

Committee Comments

a. General authority. Except for leaves due to a qualifying exigency relating to a call to active duty, where the need for leave is foreseeable the FMLA requires the employee to provide at least 30 days advance notice of the need for leave or, if less, as much advance notice as is practicable. 29 U.S.C. § 2612(e)(1). If the leave is not foreseeable, the employee must provide as much advance notice as practicable in the particular case. 29 C.F.R. § 825.303(a). For leave due to a qualifying exigency relating to a call to active duty, notice must be given as soon as is practicable regardless of how far in advance such leave is foreseeable. 29 U.S.C. § 2612(e)(3); 29 C.F.R. § 825.302(a). But the notice requirements are not onerous and "'the employee can be completely ignorant of the benefits conferred by the Act.'" *Burnett v. LFW Inc.*, 472 F.3d 471, 478-79 (7th Cir. 2006) (quoting *Stoops v. One Call Commc'ns.*, 141 F.3d 309, 312 (7th Cir.1998)).

b. Sufficient information or notice. An employee meets his/her notice obligation if he/she provides sufficiently clear information for the employer to know that he/she probably is entitled to FMLA leave. *Lutes v United Trailers, Inc.* 950 F.3d 359, 366-67 (7th Cir 2020); *see also Stevenson v. Hyre Elec. Co.,* 505 F.3d 720, 724-26

(7th Cir. 2007). The employee need not expressly mention the FMLA in his/her leave request or otherwise invoke any of its provisions. *Freddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816-17 (7th Cir. 2015). An employee may be excused from asking for leave when circumstances (*e.g.*, observable changes in the employee's behavior) provide the employer with sufficient notice of the need for FMLA leave or when the employee is so incapacitated that he/she cannot provide notice. *Burnett v. LFW Inc.,* 472 F.3d 471, 478-79 (7th Cir. 2006) (citing *Byrne v. Avon Prods., Inc.,* 328 F.3d 379, 381-82 (7th Cir. 2003) (erratic behavior triggers notice)); *Stevenson,* 505 F.3d 720, 726-27 (same). An employee's telling his/her employer that he/she is "sick," even if suffering from a serious health condition, generally is insufficient notice. *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001). Information that is inadequate to alert the employer of the need for leave may be enough to obligate the employer to inquire further as to the need for leave. *Righi v. SMC Corp.*, 632 F.3d 404, 409-10 (7th Cir. 2011).

c. Employer notice requirements. Absent unusual circumstances, where an employer has customary notice procedures regarding requests for leave, the employer may require the employee to comply with its procedures. 29 C.F.R. §§ 825.302(d), 825.303(c); *Gilliam v. United Parcel Serv., Inc.,* 233 F.3d 969, 971 (7th Cir. 2000).

10.9 DAMAGES: LOST WAGES OR BENEFITS

If you find that Plaintiff has proved [his/her] claim by a preponderance of the evidence, you should award [him/her] as damages any lost wages and benefits [he/she] would have received from Defendant if [he/she] had [[been granted a FMLA leave] [been reinstated following [his/her] FMLA leave] [[not been] [*adverse employment action*]]]. [You should then reduce this amount by any wages and benefits that Plaintiff received from other employment during that time [that [he/she] would not otherwise have earned]]. It is Plaintiff's burden to prove that [he/she] lost wages and benefits and the amount of [his/her] loss.

Committee Comments

a. General authority. 29 U.S.C. § 2617(a)(1). If Plaintiff did not lose wages or benefits, then Plaintiff may recover actual monetary losses as a result of any leave denial (in addition to other declaratory or other equitable relief). 29 U.S.C. § 2617(a)(1)(A); *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602, 611 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 777 (2023); *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 928-29 (7th Cir. 2006). *See* Instruction 10.11.

b. Jury must determine damages. The Committee contemplates that Pattern Instruction 3.17 ("Damages: General") be given before this instruction.

10.10 DAMAGES: MITIGATION

Defendant argues that Plaintiff's claim for [lost wages/benefits] should be reduced by [*describe the reduction*]. Defendant must prove by a preponderance of the evidence that (1) Plaintiff did not take reasonable actions to reduce [his/her] damages, and (2) Plaintiff reasonably might have found comparable employment if [he/she] had taken such action. If you find that Defendant has proven both those things, you should reduce any amount you might award Plaintiff for [lost wages/benefits] by the amount [he/she] reasonably would have earned during the period for which you are awarding [lost wages/benefits].

Committee Comments

29 U.S.C. § 2617(a)(1).

10.11 DAMAGES: WHERE NO LOST WAGES OR BENEFITS

If you find that Plaintiff has proved [his/her] claim by a preponderance of the evidence, you should award [him/her] any actual monetary losses [he/she] sustained as a result. It is Plaintiff's burden to prove that [he/she] had monetary losses and the amount of those losses.

Committee Comments

29 U.S.C. § 2617(a)(1). This instruction should be given only if Plaintiff did not lose wages or benefits, but had other monetary losses such as the cost of providing care. 29 U.S.C. § 2617(a)(1)(A)(i)(II); *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 929 (7th Cir. 2006); *Cianci v. Pettibone Corp.,* 152 F.3d 723, 728 (7th Cir. 1998).