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Rising Tide Of FMLA Claims Unlikely To Recede, Attys Say

By **Ben James**

Law360, New York (August 13, 2014, 7:03 PM ET) -- Family and Medical Leave Act lawsuits tripled from 2012 to 2013, a surge lawyers attributed to factors including workers' increased awareness of their rights and an improving job market. And though businesses are becoming more savvy about their obligations, lawyers say the upward trajectory of FMLA claims isn't likely to level off in the near future.

Management-side and employee attorneys alike say FMLA claims are on the rise, and that anecdotal evidence is backed up by statistics from the Administrative Office of the U.S. Courts and PACER, the online clearinghouse for federal litigation information.

New FMLA case filings jumped from 291 in the 2012 fiscal year to 877 in fiscal 2013, according to the office. PACER searches for new FMLA filings during those time periods mirror those numbers, showing 292 results for the fiscal year ending Sept. 30, 2012, and 881 for the year ending on Sept. 30, 2013.

And it appears 2014 will be another banner year for FMLA claims, with a search for FMLA cases filed between Oct. 1, 2013, and Aug. 13, 2014, bringing back 950 results.

"The phones are ringing a lot more with FMLA-related questions," said Michael Arnold, a Mintz Levin Cohn Ferris Glovsky & Popeo PC partner. "We're seeing more claims than ever, and there's nothing that makes me think this is going to stop."

Lori Deem, a partner in the Chicago office of Outten & Golden LLP who represents employees, also said FMLA claims were on the rise.

"There has been an increase in the frequency with which we see individuals presenting FMLA claims," Deem said. "Many of them are going to choose to pursue litigation in federal court, particularly where there has been a job loss."

Lawyers pointed to a variety of reasons to help explain why so many more claims brought under the 1993 are ending up in court these days. One frequently cited factor was increased awareness of the law and the rights it provides.

"The FMLA is part of the public consciousness now," Deem said. "Most employees are fully aware of their rights, or at least they have a basic understanding that they're entitled to some level of time off."

Many employees also know that they don't have to take the 12 weeks of annual unpaid leave the FMLA provides for all at once, Deem noted. And workers may be inclined to take their leave in smaller increments — like an afternoon off work for a doctor's appointment

— because they feel like a request for a longer absence will taint their employers' perception of them.

But ironically, intermittent leave can present a daunting administrative challenge for employers, as longer periods of absence are easier to keep track of, management-side lawyers say, adding that more leave requests translates to more chances for an inadvertent compliance failure.

The FMLA and the implementing regulations lay out a detailed notification and communication process for dealing with employees, and those obligations can be "exponentially multiplied" when intermittent leave comes into play, Kelley Drye & Warren LLP's Mark Konkel said.

"The regulatory scheme of the FMLA makes it very difficult to administer intermittent leave because you have to micromanage the leave," Konkel said, adding that an employer might have to keep track of 12 weeks of leave in one-hour increments.

"There's a failure to recognize that obligation, and even when an employer does recognize that obligation, it can be exceptionally difficult to track," Konkel said.

Another problematic area for employers is FMLA retaliation. There is sometimes a disconnect between FMLA-savvy human resources personnel and front-line managers who are in the trenches with the employees before and after the leave, said Deem, who added that retaliation claims make up the majority of FMLA matters that are presented to her.

Even if a company's human resources team complies with the FMLA's technical requirements, the employer can still find itself on the hook for violating the law's retaliation ban if it isn't made clear to supervisors that they cannot subject workers to adverse treatment because they've used FMLA leave time, she pointed out.

"Retaliation claims are something that I'm seeing more of in federal court," Deem said. "Those are the ones that employers find the most troublesome, too. The HR department might have offered and designated the leave correctly, but where it falls apart is how the employee was treated before or after the leave."

The relative ease with which a worker can prove an FMLA claim — as opposed to a Title VII bias claim — and the possibility of recovering attorneys' fees under the FMLA have helped make the statute increasingly popular with the plaintiffs bar, which is another factor that plays into the overall uptick in suits, Arnold said.

"You have plaintiffs attorneys who are increasingly coming to rely on this law," he said.

Arnold noted that an additional challenge that comes with the FMLA is understanding its interplay with other laws, including state-law FMLA corollaries and the Americans with Disabilities Act, which may require leave as a reasonable accommodation.

"I think a lot of employers are waking up to the reality of the FMLA right now and starting to take their obligations more seriously," he said.

Konkel pointed to improving conditions in the years following the economic downturn of 2008 as a key factor behind the rise in FMLA claims. More workers on the payroll means more potential claimants, he noted.

"I'm sure there's more than one reason why you see the uptick, but I really think overall market forces are at play," he said. "As the economy and the job market improve, I think you can expect to see that upward trend continue."

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