Are Family Vacations Protected Under the Family and Medical Leave Act?

BY **RON STADLER, PARTNER, GONZALEZ SAGGIO & HARLAN, LLP**

As you are likely aware, the Family and Medical Leave Act ("FMLA") entitles qualifying employees up to 12 workweeks per year of leave "to care for" a spouse, child, or parent who has a serious health condition. 29 U.S.C. § 2612(a)(1)(C). Suppose you have an employee who comes to you to seek FMLA leave to accompany her terminally-ill mother on a vacation trip. Can she invoke FMLA leave?

Whether the trip qualifies for coverage under the law hinges on how the term "to care for" is interpreted, which as of now varies by jurisdiction. Both the United States Court of Appeals for the First Circuit (which covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) and the Ninth Circuit (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), have found that there must be some type of ongoing medical treatment connected to the type of trip in order for it to fall under the purview of the FMLA. In a 2011 case, for instance, the Court of Appeals for the First Circuit held that an employee who accompanied her seriously ill husband on a seven-week "spiritual healing trip" to the Philippines did not qualify for leave under the FMLA. The court noted that the trip needed to be related to medical treatment of the employee's husband and that, because faith or spiritual healing was in essence not medically related, accompanying a family member on a "healing pilgrimage" did not constitute "care" within the meaning of the FMLA. Before reaching this conclusion, the court noted that while the employee assisted her spouse in administering medications, helping him walk, and being present in case sickness arose, there was no "conventional" medical treatment, and the spouse saw no medical doctors or health care providers during the trip. Thus, it did not qualify for FMLA coverage. Likewise, the Court of Appeals for the Ninth Circuit has noted that "caring for" a family member with a serious health condition required a level of ongoing medical "treatment" for that condition.

At direct odds with the rulings of both the First and Ninth Circuits is a recent Seventh Circuit ruling on the matter. In this recent case, the Seventh Circuit (which covers Wisconsin, Illinois and Indiana) held that an employee's request to accompany her terminally ill mother on a non-medical vacation to Las Vegas was covered by the FMLA. In that case, the employee's mother, who at the time was in hospice care in connection with a serious health condition, had communicated to a social worker that a family trip to Las Vegas was a dream she had always wanted to fulfill. Subsequently, the social worker secured funding for her trip to Vegas from a foundation that affords terminally ill adults with such opportunities. Because the employee acted as her mother's primary caregiver and provided a host of services such as bathing, administering medication, dressing and preparing her mother for bed, she requested FMLA leave in order to provide "care" for her mother during the trip to Las Vegas. The request was denied, and the employee was ultimately discharged in connection with her absences related to days she while accompanied her mother on the trip.

The Seventh Circuit's analysis boiled down to what is meant by the phrase "to care for" as used in the FMLA and whether the employee's trip fell into that category. The employer, in a reasoned argument following the holdings of the First and Ninth Circuit Courts, argued that the trip itself was recreational in nature and not medically related or necessary. And, because any care provided by the employee to her mother on the trip was not related to ongoing medical treatment, the employer argued that the employee did not "care for" her mother within the meaning of the FMLA during the trip.

In breaking with the First and Ninth Circuits' holdings, the Seventh Circuit broadly defined the "care for" provision of the FMLA, finding that the relevant portions of the law speak in terms of "care" and not "treatment," and therefore ongoing treatment was not necessary for the FMLA to apply. Further, the court noted, the text of the FMLA does not restrict care to a specific place or geographical area.

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Instead, and pursuant to 29 CFR 825.116(a), the "care" necessary to invoke FMLA protections need only be care for the basic medical, hygienic, or nutritional needs of a family member suffering from a serious health condition. Hence, as the employee's mother's need for care for basic medical, hygienic, or nutritional needs did not change by virtue of her going to Las Vegas, and because the employee continued to provide that care in Las Vegas, the employee, according to the court, was entitled to leave under the FMLA.

The difference in opinion between circuits on this somewhat novel issue is interesting and highlights the need of employers to be aware of what the law is in their jurisdiction and to keep abreast of any developments. Those employers within Wisconsin need to be aware that at least for now, requests to travel with a spouse, child or parent with a serious health condition who needs "care" are viewed to be covered under the FMLA.

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About Attorney Ron Stadler

Mr. Stadler is an experienced attorney and advisor to his clients, practicing labor and employment law, education law, municipal law and related litigation. He regularly advises private and public sector employers on labor and employment matters. Mr. Stadler has extensive experience in collective bargaining, union contract administration, grievance and interest arbitration, wage and hour issues, unemployment compensation, workers' compensation, the Fair Labor Standards Act, the Family and Medical Leave Act, the Americans with Disabilities Act, discrimination issues, hiring and firing issues, plant closing issues, and health insurance matters.

Mr. Stadler also regularly represents school districts and higher education institutions on all aspects of education law. His experience includes student discipline, special education matters, section 504 issues, ADA compliance, teacher and administrator nonrenewal, labor and employment law issues, collective bargaining, grievance and interest arbitration, board policies and governance, premises liability issues, and Open Meetings and Public Records issues.