Family Medical Leave (FMLA) Title I vs. Title II

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Robert Dietrich September 26, 2011 Human Resources Comments (13)

The Family Medical Leave Act (FMLA) was enacted into law in 1993 to allow up to 12 weeks of time off for employees to care for themselves or immediate family members who had a serious medical condition. FMLA is not an antidiscrimination law, it is an entitlement law and a very complex one at that.

Since 1993 this seemingly straight forward entitlement has become a nightmare for managers to administer. It does not seem like FMLA's requirements should be so difficult, yet you cannot afford to make a mistake without risking the potential of paying very expensive back pay and benefits, attorney fees, and an overall loss of credibility in management ability to do the right thing. While the Department of Labor's Wage and Hour Division was charged with the enabling regulations under Title I, Title II regulations apply to most federal agencies and the Office of Personnel Management (OPM) is responsible for these.

The enabling regulations for FMLA treat private industry and some quasi-government agencies differently than the enabling regulations for other federal agencies. While the overall regulations for both are quite similar, there are some subtle differences. These differences require the practitioners and managers to be steered to the appropriate sections of the code of federal regulations to ensure they are receiving the accurate guidance.

Title I coverage applies to certain limited federal employees, including:

- Individuals employed on a temporary appointment of one year or less.
- Individuals employed on an intermittent appointment.
- Employees of the U.S. Postal Service and the Postal Rate Commission.
- Employees of the government of the District of Columbia.

Title I also covers employees of the U.S. Postal Service and the Postal Rate Commission. These employees are governed by Department of Labor regulations found in 29 CFR § 2601 and Part 825. Other specific employees, including non-appropriated fund employees of the Department of Defense and the Coast Guard, DOD teachers, and Veterans Health Administration employees appointed under Title 38, are covered under regulations promulgated by their agencies, which mirror the DOL Title I regulations.

Title II coverage applies to the majority of the federal agencies and employees not mentioned above. FMLA falls under Title II of the Act and is governed by the Office of Personnel Management Regulations found in 5 CFR § 630.1201. It is not clear why Congress set up separate administration of FMLA for federal employees, and a side-by-side comparison of the two Titles reveals that coverage is not the same.

By way of example: do employees have to provide notice of an intention to use FMLA leave? The answer is "yes" under Title II, which applies to most federal employees. However, in some cases the incapacity of the employee and the employee's representative may excuse the employee. Agencies may not place employees on FMLA leave if they do not request it.

By contrast, under Title I the answer is "no". The U.S. Postal Service or other Title I agencies must determine whether any form of leave is FMLA leave, whether or not the employee requests it.

Another difference between the two titles involves eligibility. Title II employees are eligible after at least 12 months of government service. The service does not have to be consecutive. By contrast, Title I employees must have worked at least 1,250 hours in the previous 12 months.

Under Title II management may not place an employee on FMLA leave unless it has confirmed that the employee has invoked or intends to invoke the FMLA entitlement. FMLA leave is leave without pay and only Title II employees may substitute paid leave for LWOP, as part of their 12-week FMLA

entitlement. From the agency's point of view, decisions to substitute paid leave should actually be encouraged, since they reduce the agency's total paid leave obligation. However, if the employee does not wish to substitute paid leave for FMLA LWOP, management may not require it under Title II.

Title I is different. Under Title I, the employer may designate any qualifying leave, paid or unpaid, as FMLA leave, as long as the employee receives proper notification. In this case, the employer must determine whether the paid leave request is FMLA-qualifying. If it is, the agency must grant it and may count the paid leave against the 12-week FMLA total. This has the effect of reducing the agency's total yearly leave obligation.

There are a few situations where OPM's Title II regulations are silent, while there is coverage under DOL's Title I regulations. Under Title I, if both husband and wife are employed by the same employer, even if in different locations, they are entitled only to a combined FMLA leave of 12 weeks per year for birth, adoption or fostering of a child, for care of a child, or for care of a parent, or to a combined 26 weeks to care for a service member. 5 CFR, Part 630 is silent on this entitlement.

In rare circumstances, Title I salaried employees within the highest paid 10 percent of government employees, within 75 miles of the work site, may not be restored to their positions after taking FMLA leave. These "key employees" may not be restored if the restoration (not the FMLA leave itself) causes "substantial and grievous economic injury to operations." Key employees must be notified of this in advance and be given an opportunity to return to work. 5 CFR 630 does not have any provision for key employees. However, Section 630.1208 (g) states "An agency may not return an employee to an equivalent position where written notification has been provided that the equivalent position will be affected by a reduction in force if the employee's previous position is not affected by a reduction in force." Absence this condition employees' restoration rights are protected by FMLA.

So who does one turn to determine what are the entitlements under Title II where 5 CFR 630 is silent. When I asked, OPM refused to weigh in on this and only recommended me to contact my servicing personnel office. When I explained that I was the regional personnel officer, the response was still not forthcoming. Helen Applewhaite, DOL's FMLA Branch Chief did provide the answer that OPM … "shall, to the extent appropriate, be consistent with the regulations prescribed by the Secretary of Labor to carry out Title I of the Act."

These are some of the subtle differences, and when applying the provisions of FMLA the practitioner needs to be careful to know just what Title is appropriate for your situation, and what the entitlements are.

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Since retiring in 2011 after nearly 40 years of federal service, Bob Dietrich has been active in training supervisors and HR staff on FLSA and FMLA. He has a three-day course that he can bring to your agency, and he may be reached through the FedSmith.com website.