FMLA Insights
Guidance & Solutions for Employers

Best Practices: FMLA Leave to Care for an Adult Child

By Jeff Nowak on October 06, 2011

Perhaps it's just me, but I recently have received several calls from clients inquiring about an employee's right to take FMLA leave to care for an adult child (i.e., age 18 or older). Some examples include: Can a grandparent take FMLA leave to care for her daughter after the birth of her baby? Or can an employee take leave to care for an adult child suffering from depression? The answer is not always an easy one. What are an employer's obligations when an employee seeks leave under the Family and Medical Leave Act to care for an adult child? (I apologize in advance for the length of this post, but I hope it's worth the read.)

First, let's reacquaint ourselves with the law and regulations on point. As we know, an employee is entitled to FMLA leave to care for a child with a serious health condition. Under the regulations, "child" is defined as a son or daughter who is: 1) under the age of 18; or 2) age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Therefore, based on the applicable FMLA regulations, two factors must be present before an employee can take FMLA leave to care for his/her son or daughter: the adult child must be *incapable of self-care* **and** have a *physical or mental disability*.

Incapable of Self-Care

Under the regulations, the adult child must require active assistance or supervision to provide daily self-care in **three or more** activities of daily living or instrumental activities of daily living. The regulations define these activities as follows:

Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

There is no magical line here. Temporary conditions, such as minor pregnancy-related conditions, a bout with the flu, a broken bone or routine surgeries, typically would not result in being incapable of self-care. On the other hand, plenty of others would: an adult child with Down syndrome, brain damage, serious illnesses or other developmental disabilities that are long term in nature. It also could include a child who is involved in a catastrophic accident that impacts activities of daily living. Notably, in Salas v. 3M, a federal trial court recently refused to dismiss an FMLA lawsuit when the evidence showed that that the employee's adult daughter had learning disabilities, was unable to cook, got lost easily and might have been harmed at birth by an oxygen shortage. As you can see, it doesn't take much to create a fact issue in these cases, which is a scary proposition for employers.

Physical or Mental Disability

The regulations also require that the adult child have a physical or mental disability as defined by the ADA regulations. Under the EEOC's recently expanded interpretation of disability under the ADA Amendments Act of 2008 (ADAAA), an employee's burden to establish a disability is much lower, and the "new" ADA allows for the possibility that a short-term impairment lasting fewer than three to six months may very well be considered a disability. Put another way, it has become a whole lot easier to establish that an adult child has a disability. In turn, it arguably is easier now for an employee to take FMLA leave to care for an adult child.

As to the common conundrum of whether pregnancy-related complications constitute a disability, we recently received some guidance from the courts. Just last month, in Serednyj v. Beverly Healthcare, LLC, a federal appellate court ruled that pregnancy-related complications can rise to the level of a "disability" within the meaning of the ADA. *However*, such complications, if they are of limited duration and dissipate once a woman gives birth, may not be "substantially limiting." Under these circumstances, the court held that no "disability" exists. See my colleagues' analysis of the *Serednyi* case here.

Since we're on the topic of pregnancy, another helpful case to keep in mind is Novak v. MetroHealth Medical Cntr (pdf). There, a federal court found that the *two weeks* the adult child suffered from a bout of postpartum depression failed to establish that she had a disability. Although the *Novak* decision predates the ADAAA, it nevertheless is helpful guidance when determining the conditions that potentially fall in and out of the ADA.

Insights for Employers

So, what approach should employers take? Since the ADAAA makes it significantly easier for employees to establish a disability, employers are in an incredibly difficult spot when determining whether an adult child is incapable of self-care and has a disability. Take a situation involving a car accident. Although the adult child might in the hospital with broken bones and other related injuries (rendering them incapable of self-care), can we determine within days after the accident whether they are considered disabled? After all, the regulations tell us this FMLA determination must be made at the time FMLA leave is needed. Seriously -- how can employers make an educated determination at this point? Often, it will be difficult, if not impossible, to do so. Therefore, we must make a reasoned decision based on the facts as we know them within that short window.

Keep some of following best practices in mind when analyzing an employee's request for leave to care for an adult child. I welcome more, if you have any that have worked for you (jsn@franczek.com):

1. Set aside the misconception that an employee cannot take FMLA leave for an adult child. Information is critical. When the FMLA medical certification is returned to you, insist that you have a clear picture of the adult child's medical condition, the three or more activities of self-

care they are unable to perform, and a good sense that the condition might be rise to the level of a disability under the new standards of the ADAAA.

2. Set aside the misconception that an employee can take FMLA leave to be present for the birth of his/her grandchild or to care for the daughter after a normal childbirth. This is not covered by the FMLA. Only where significant pregnancy complications arise do we need to turn our attention to a possible FMLA situation.

3. Conditions that may appear short-term *but* serious can be a trap for employers. Take, for instance, Patton v. Ecardio Diagnostics LLC (pdf). There, the adult child was in a car accident, causing two broken femurs, a small hole in her lung, and a small hole in her bladder. She recovered, but required a wheelchair to ambulate for more than one year. Unfortunately, the employer did not have the benefit of knowing what the child's prognosis was long term. It had to make the decision to designate FMLA leave or not within the first few weeks when the child was in the hospital. In these situations, employers are wise to look closely at the child's current medical condition and take an extremely broad view as to the possibility that a court might later find the child to have been disabled during the FMLA period.

4. When the disability and self-care issues are obvious, don't push it. If an employee needs leave to care for a child with Down Syndrome or mental retardation, do you really need extensive documentation? Remember, the FMLA does not require you to obtain medical certification for every absence. Let common sense (and a little compassion) rule here.