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## Extended-family leave

by Presley Reed, M.D.

Author's Note: Companies who manage FMLA absences must protect themselves by having ample access to medical and legal information. The following article focuses on a case in which the absence management provider had ample medical experience but wisely chose to rely on legal experts for making the final decision regarding family and medical leave.

Both the present and the future confront employers with difficult decisions concerning their employees' familial responsibilities. The present difficulties arise from exceptions that must be made to the parent/spouse/dependent-child designation. The future difficulties will arise from the shifting description of what constitutes a "family."

A future concern for family and medical leave management is how the expanding definition of "family" in our society will affect the responsibilities of employers. One proposed bill that demonstrates the social change is HR 2287, which is currently in a House subcommittee. Proposed by Representative Maloney in June of 2001, this amendment to the FMLA would expand eligible family relations considerably. In addition to the present eligible members (self, dependent child, parent, or spouse), domestic partner, parent-in-law, adult child, sibling, and grandparent would be added. Obviously, the coverage a company would be obligated to extend to employees would expand greatly if this amendment were ratified. Even if this particular proposal stalls, employers should expect others like it to be proposed in future congressional sessions.

Even without future modifications to the FMLA, leave decisions in present times are not always straightforward. Recently, a case involving an adult child demonstrated the need for companies to remain informed and teachable, lest they jeopardize themselves with overly hasty judgments.

In this particular case, a woman (referred to as Lydia) called to request FMLA leave based on planned gallbladder surgery to be performed on her adult daughter. Lydia requested the leave to care for both her adult daughter and her grandchildren while the daughter recovered from surgery. The initial response of the FMLA administrator was to say "no, this is not a dependent child and therefore not a qualified relation."

However, along with Lydia's faxed request for FMLA leave was a copy of her daughter's "Decision from the Social Security Administration Office of Hearings and Appeals." The "Decision" stated that the daughter had been unable to work for over a year due to a generalized anxiety disorder, and on appeal, she was approved for Social Security disability benefits. The FMLA defines "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 under the age of 18, or is 18 or older and incapable of self-care because of a mental or physical disability. From this definition, it appears that Lydia's adult child is covered.

The short version of this story is that FMLA leave was granted, and no repercussions followed. The absence management provider researched the case, listened to legal advice, and chose the safe path; the moral is that, as in most decisions, it is best to measure twice and cut once.

However, this story deserves an important qualification: Do not assume that all assertions of dependent, disabled, adult children are equally valid. Or, more generally, do not mistake good FMLA management as a mindless process of making concessions. Requests for leave to care for an adult child are routinely denied as not falling under the FMLA's protection. Many courts and employers have interpreted the statute as requiring that an adult child be severely and permanently disabled. This interpretation severely restricts the situations where leave to care for an adult child is granted.

A recent legal case that revolved around an FMLA request similar to Lydia's shows how complicated the analysis of such requests can be. In the initial verdict, the district court ruled in favor of the company that

denied FMLA leave to a grandmother of a bedridden, pregnant daughter. The denial was based on the above reading of “disability”—that the condition must persist for a long period of time. The appellate court, however, read the definition differently, and overturned the decision in favor of the grandmother (Navarro v. Pfizer Corp., No. 00-1856 (8th Cir., August 20, 2001)).

On the surface, the parallels between these two cases (Lydia’s and Navarro’s) suggest that dependent, disabled adult children are easily identified and should generally fit within the current FMLA definition of “dependent child.” However, the appellate court’s ruling suggest to the contrary—that the definition of “disability” must be considered carefully in light of each particular case.

The appellate court was troubled by the fact that the FMLA takes its definition of disability from the ADA. Congress should have crafted a new definition suited to the specific needs of the FMLA, said the court. However, using the statute’s definition, the court stated that the assessment of a disability “must be performed on a case-by-case basis, balancing all factors in light of the FMLA’s purpose, structure, and provisions for relief.” In addition, courts should use a balancing test to make the decision, because no single factor will determine whether a disability exists for FMLA purposes.

The moral of the story, then, is that in debatable cases the company should make sure that when it measures twice, it does so not only with legal advice, but with advice that is informed by the most current interpretations of the law.

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