



Managing Family and Medical Leaves of Absence: Statutory Entitlements, Employer Commitments, and Reasonable Accommodations

ROBERTO SCALESE: Welcome to today's webcast "Challenging and Recurring Issues Under the New FMLA Regulations."

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Our presentation today will be moderated by Megan Belcher, Senior Counsel at ConAgra Foods, and now I'll turn it over to Megan. Take it away.

MEGAN BELCHER: Thank you, Roberto. Today we're going to be talking about challenging and recurring issues under the new FMLA regulations. Presenting today will be two partners with Jackson Lewis. First, Frank Alvarez is a partner in Jackson Lewis' White Plains office. He's the national coordinator of the firm's disability, leave and health management practice. His practice focuses entirely on assisting employers in complying with the challenging array of federal and state laws that protect injured and ill employees, the most notable being the ADA and the FMLA.

Alex Passantino is a partner in Jackson Lewis' Washington, DC regional office, where he practices with the firm's wage and hour group. Prior to joining Jackson Lewis, Alex headed the US Department of Labor's Wage and Hour Division. During Alex's tenure at the Wage and Hour Division, the agency published a number of proposed and final regulations, including the revisions to the FMLA regulations that will be a focus for us today.

I am senior counsel at ConAgra Foods. I've been at ConAgra managing its labor and employment matters for a little over two years. Prior to that, I was in private practice in Kansas City with Husch Blackwell Sanders, providing day-to-day chart counsel and litigation services to corporate clients, focusing on labor and employment matters.

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MEGAN BELCHER: All right, and, as Roberto advised, you can ask questions throughout the program and those will be sent along to me and, where appropriate, I will chime in with those verbally. In addition, there will be a dedicated block via the same chat function at the end of the session where we will review questions as well.

OK, I'm going to talk a little bit about what we're going to focus on today. The new regulations under the FMLA were effective January 16, 2009. The highlights of those are primarily: More notice obligations for employers and employees, improved medical certification forms, military family leave, light duty and attendance bonus issues, waivers, HIPAA considerations, and then various organizational changes. Today, we're going to focus on issues that have arisen since that effective date. And now I'm going to hand it over to Alex to take us through our first couple of substantive slides.

ALEX PASSANTINO: Thank you, Megan. The first issue we'll talk about is what we have termed "growing into leave." Frank and I have actually encountered this issue several times, and it has to do with an employee who is out on non-FMLA leave and becomes eligible for leave. So, most frequently this takes place when an employee is employed for fewer than the 12 months

required under the FMLA to be eligible for leave. The employer, pursuant to an employer policy or just the goodness of the employer's heart, allows the employee to take leave prior to eligibility for FMLA leave, but while they are on that non-FMLA leave they become eligible, so they meet the 12-month requirement. They are now eligible for 12 weeks of FMLA leave, and what happens in that circumstance?

In response to the proposed regulations, we received a number of comments on this issue. Primarily, employers wanted to treat the period of time before eligibility as FMLA leave, allowing the protection and allowing it to count against the 12-week entitlement, so that, once the person actually became eligible, their 12-week entitlement would have been reduced by how ever many weeks they had taken prior to that time.

In the final rule, the department took the position that the statute prohibited the period of time before eligibility from counting against the employee's leave entitlement under the FMLA, and prepared the regulation and wrote a regulation that suggests that you can do that; that an employee can become eligible while out on non-FMLA leave. There is arguably some conflict between certain of the provisions in the regulations, and I just wanted to talk briefly about those.

They are in [29 C.F.R. §825.] 110(d) and 300(b)(1). If I can talk briefly on 300(b)(1) first, it has to do with when you make the determination of employee eligibility, which is determined at the beginning of the first instance of each FMLA-qualifying reason and the applicable 12-month period. And then it goes on to say that, "all FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period."

I think the key words to focus on in this regulation are "FMLA absences." So, it's "FMLA absences," it's not "all absences." You have to focus on the words "FMLA absences," and so when you look at the leave prior to eligibility, that employee is not on FMLA leave; it is not an FMLA absence, so you're not making the determination of eligibility until such point as the person actually has an FMLA absence.

And that's echoed in the regulation § 825.110(d), which talks about "growing into leave" specifically. [29 C.F.R. § 825.110(d)], which talks about "an employee may be on a 'non-FMLA leave' at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be 'FMLA leave.'" So, [when an] employee out on non-FMLA-qualifying leave becomes eligible, an employer can count the time after eligibility against the leave entitlement, can request all of the same information that you would request for all other types of FMLA leave; you get the medical certification, you have to give the same types of notices if you plan to count it, and all of the other notices and information that you can request for any other purpose under FMLA leave you can request when the person becomes eligible, even if they are out on some other form of leave.

FRANK ALVAREZ: Alex, this is Frank. I have a question on this.

ALEX PASSANTINO: Sure.

FRANK ALVAREZ: Let's have a little dialogue on this. Is it your sense that people who are out

there on non-FMLA leave prior to say their 12-month anniversary with the company, are still out on leave, but they've been replaced before they reached their one-[year] anniversary. So, somebody else is doing their job, they weren't entitled to FMLA leave before their one-year anniversary. What's your sense of what the employee's rights [are] under the FMLA leave? Certainly they're entitled to FMLA leave at that point when they reach their one-year anniversary, assuming they have 1,250 hours of service in the time that they were out, that they had been at work. What right do they actually have at that point? Is it one to return to the job that they had before they began a non-FMLA leave or something less?

ALEX PASSANTINO: It is, I believe, something less. The entitlement the employee has is to that 12 weeks of FMLA protection and their restoration to the equivalent position that they held prior to the taking of leave. Because the employee who was out on leave prior to eligibility was not on FMLA leave, there's no FMLA protection. They are on leave pursuant to an employer policy, or again, just an employer practice. So, they are entitled to be restored to whatever position they had at the time their FMLA leave started, and if they have been replaced, there is no, their equivalent position is: There isn't one.

FRANK ALVAREZ: Right. It would seem that if that's happening at some of the companies represented by the attendees on today's webinar, one thing I would be careful of is making certain that there's some documentation in place confirming that the person has, in fact, been replaced or they don't have a right to job restoration at the time the 12-month anniversary occurs. Would you agree?

ALEX PASSANTINO: I would agree with that, yes.

FRANK ALVAREZ: I wondered also if there's some other variations of this. Because I'll tell you, a lot of the employers I speak to on this seem to be inherently frustrated that this is an unfair provision, in the sense that they're actually in some ways, if they don't replace the person before like a one-year anniversary, the person who has left years of service with the company actually ends up getting more job-protected leave as a result of the employer's more generous approach to giving them leave before they become eligible for FMLA. And I'm wondering whether you think that there's anything else out there that might be of interest for the employer in terms of addressing that issue, if they think that it is inherently unfair. Is it just to eliminate that job restoration right, or is it to communicate to people while they're out on leave that there's some other potential for them to get right-of-job protection that [goes] beyond that under the FMLA? Do you have any suggestions as to how employers can navigate through this type of perceived unfairness for employees of less years of service with them?

ALEX PASSANTINO: Sure, and I guess the perceived unfairness was specifically addressed in the regulation and ultimately the department decided that the statute—the law, the Family Medical Leave Act itself—didn't allow the period of time prior to eligibility to be FMLA protected, and so, any perceived unfairness was a direct result of the employer policy. So, I suppose that if the concern is that someone who is new to the job gets an additional period of time prior to eligibility, where they are effectively job protected because that's how the employer is going to treat it, there's nothing on the back-end for someone who's been there for a longer period of time to prevent that employer from extending the period of time from 12 weeks on to something else. Obviously, the remaining leave that the employee gets is not FMLA protected,

but you can provide the same types of guarantees that you would have provided someone who was not yet eligible on the back-end. So, if there's some perceived unfairness that somebody's getting to take 16–20 weeks of “protected” leave, you can address that on the backend by extending the period of time for people who've been there a longer period of time.

MEGAN BELCHER: And Alex, do you think that is, it ties in to the department's larger philosophy of no retroactive designation? Do you think that was the focus of where they were coming from there?

ALEX PASSANTINO: I don't know that I'd go so far as saying no retroactive designation. But retroactive designation is prohibited if it's going to cause some damage to the employee; if the employee may be harmed in some way. There is no FMLA protection until the one-year mark. And so anything that happens before that is up to the employer; it's the employer's decision.

MEGAN BELCHER: Right.

ALEX PASSANTINO. OK. Were there any questions on it? Frank, Megan, do you have any additional questions?

FRANK ALVAREZ: Well, just one observation on, I think, it's slide seven, the one that you're showing right now. We've gotten some questions or some confusion amongst employers on determining when you determine eligibility for FMLA. In particular, with intermittent leave where somebody [is] hovering over that 1,250 hours of work requirement and when they initially request leave, they can be determined either eligible, and then all of a sudden their hours drop thereafter, or they can be initially determined ineligible, and then their hours increase. And it seems to me—and just confirm if this is how you read this as well, because you've appropriately focused on the phrase “all FMLA absences” for the same qualifying reasons—because you can have a situation where somebody is initially determined eligible for FMLA and then, once they are determined to be eligible for FMLA—say they have a diabetic condition that's going to require periodic absences for treatment or recovery—they, even if their hours drop thereafter—under 1,250 hours—they remain eligible for intermittent FMLA leave for that same qualifying reason (the diabetes) for the next 12-month period. Correct?

ALEX PASSANTINO: For that condition, correct. Now, if they broke their leg or something like that and needed time off for that, you would do the eligibility analysis at the time that leave was supposed to start, and if they were under the 1,250 at that point, they wouldn't qualify for that condition.

FRANK ALVAREZ: Right. So I guess in my mind one of the takeaways on this rule is that you have to be very good at tracking not only how much leave is taken, but the reasons that leave is taken. Because there would be different eligibility determinations based upon the reason that FMLA leave is taken, at least for those people who are on the cusp of qualifying for FMLA leave.

ALEX PASSANTINO: I think that's absolutely right.

FRANK ALVAREZ: I guess the other potential variation of this that may be not so intuitive is that if somebody is initially determined to be ineligible for FMLA leave—while they may be out

and it's not an FMLA absence—as you note, this rule applies to all FMLA absences for the same qualifying reason, are considered a single leave, and employee eligibility as to that reason does not change. But because the person was initially determined ineligible for FMLA leave—assuming they didn't have 1,250 hours of work, and assuming it was seeking leave for diabetes—they can come back two, three months down the road and, if they have enough hours, they can seek FMLA leave for that same reason, but you would be obligated to do another eligibility determination, because none of the leave they've had before then is FMLA qualifying. Do you agree with that?

ALEX PASSANTINO: I do agree and I think the difference is—the way I think about it is eligibility sticks and ineligibility doesn't. A determination that someone is ineligible, that's all well and good for that one instance, but if someone comes back you have to reconsider that. Once you've determined someone eligible, they're eligible for the next 12-month period.

FRANK ALVAREZ: Yeah, I agree. The devil's always in the details of FMLA, and I don't think this is—these points are often so obvious, which is one of the reasons why we wanted to do a little bit of a deeper dive into some of these more challenging and recurring issues. But thanks a lot for those thoughts.

MEGAN BELCHER: And then, weighing in, we don't have any questions from the audience for this particular piece. There's a couple that are more appropriate for, I think, issue seven, so I'll just hold them until then.

FRANK ALVAREZ: Shall we move onto issue number two then?

ALEX PASSANTINO: I will go ahead and move onto issue number two.

FRANK ALVAREZ OK, and I guess I'll take the lead on this one.

Really what we're trying to drill down on in this issue is two things: How do absences affect incentive compensation plans, [and] how do absences effect productivity evaluations? And this is really the bonus issue on the FMLA that I'm sure all in-house counsel listening to this are very familiar with, this is one area where I think the Department of Labor really did a nice job of giving employers a little bit more breathing room. There was an awful lot of confusion on this. I think there were six or seven opinion letters. The old rule essentially required employers to distinguish between bonus programs that were based on productivity, versus bonus programs which really were based on attendance—the old rule was that you couldn't have a perfect attendance bonus that would not violate FMLA if somebody was out for reasons that were covered under the FMLA.

But what we found was that, first of all, in the new regs (moving on to the next slide), there's a much more simplified approach to this. And I think that the challenge is applying the rules to specific nuances of your incentive compensation programs and then what I'll talk about a little bit is the notion of how productivity might also bleed into the evaluation of performance and performance management and career opportunities, and it might impact career opportunities, so I think we still have to distinguish between those concepts.

But from the compensation standpoint, the rule really emanates from 825.215(c)(2). I'll note that

(c)(1) of the regulations also speaks in terms of not so much to bonuses, but it speaks to the whole notion of other salary increases or payments that might be linked to productivity, and there's really a kind of similar rule under 215(c)(1). But in 215(c)(2), we talk about any bonus or payment, whether it is discretionary or non-discretionary, and it's really an extrapolation of the concept that when somebody returns from FMLA, they're entitled to job restoration, and that means they be returned to the same or equivalent position with equivalent pay and benefits.

Well, what does equivalent pay means? Equivalent pay includes any bonus or payment, whether it's discretionary or non-discretionary. However, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, or product sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. And the regulations also give an example. They say, "For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment."

So, as I interpret this regulation, as I read this regulation, essentially what the Department of Labor is saying is, "Listen, you can adopt a uniform approach to bonuses that would consider absence under the bonus program as long as you're not treating people who are taking FMLA leave more harshly than you would for people who are taking leave for non-FMLA purposes." I kind of simplify it by thinking it's really a non-disparate treatment rule, or non-retaliation rule, in the sense that you are treating everybody the same way in terms of bonuses or other payments based upon not only productivity but attendance, so that people who are on FMLA leave really are not in any way adversely impacted worse than they would be if they were absent or not producing for reasons that are related to non-FMLA covered absences.

So, I think that's a big change. It simplifies it a lot, because in the past we've had to kind of figure out: Well, when is a bonus based upon productivity? Because there's almost an assumption in many incentive compensation plans that people are producing while they're at work, and therefore they're contributing to the overall performance of the company and therefore should be rewarded, but many programs really don't look down at individualized productivity level, and therefore somebody could actually be doing a bad job at work, and not helping the company achieve its performance or productivity goals, and they would still be rewarded. And in the past, it's been viewed as more of a reward based upon attendance—physical presence at work—rather than productivity.

Under the new regulations we don't have to really get into those details, because it's essentially a disparate treatment rule. And I think that's what employers really need to look at is: Are they treating people consistently? One of the main areas to look at is: Are there carve-outs—exceptions—that don't, for certain bonus programs where certain types of absences are not counted. The example, and the regulations gives one, where paid vacation leave would not be counted against someone in terms of their bonus. And the trick here is that sometimes FMLA leave, which is generally unpaid, is one during which somebody is entitled to substitute accrued paid time, such as vacation. So, if somebody is not being nicked in a bonus award for taking paid vacation that's not FMLA qualifying, the person who's taking FMLA leave and substituting accrued paid vacation time also should not be getting nicked in terms of that bonus program.

And so, look at the carve outs under your bonus programs and make certain that people who are on FMLA leave are not being treated any worse than people who are not on FMLA leave.

Moving to the next slide: You know, this is the other consideration that in the past has shaped a lot of the analysis of the compensation programs, which is 825.220(c). This rule really is largely unchanged in that it prohibits interference against individuals or discrimination or retaliation against employees or prospective employees for having exercised or attempted to exercise FMLA rights. And as you'll see here, it says, "For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits will be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions such as hiring, promotions, or disciplinary actions, nor can FMLA leave be counted under 'no-fault' attendance policies." This rule, again, suggested to many that you really couldn't adversely impact someone's compensation by virtue of them being on FMLA leave, but I think, as we talked about, 215(c)(2) really does settle the issue under the regulations with respect to bonuses or other payments that are premised on the achievement of a specific goal, hours worked, product sold or perfect attendance.

The flip side of this I think relates to performance management and any other disciplinary actions that might result as a result of somebody not being at work. And here the rule continues to exist that you should not be penalizing somebody in disciplinary action under a "no-fault" attendance policy or in other ways by virtue of the fact that they are out of work.

These two regulations really come together and, I think, are addressed in the preamble, which is on the next slide. And the preamble to 825.215 where they address this head on where they say that "The revised regulation does not contradict the principles in 825.220(c) that prohibits employers from using the taking of FMLA leave as a negative factor in employment actions or counting FMLA leave under 'no-fault' attendance policies. Penalizing an employee for taking FMLA leave under a 'no-fault' attendance policy is distinct from disqualifying an employee from a bonus or reward for attendance because the former faults an employee for taking leave itself, whereas the latter denies a reward for achieving job-related performance goals or perfect attendance."

And the preamble goes on to say that, "The Department notes that employers are free to prorate such bonuses or awards in a non-discriminatory manner; nothing in these regulations prohibits employers from doing so."

So, here's what I want attendees to think about, though, because it's never so simple in application. Many employers will have some sort of ratings and evaluations as to productivity, which would be used to evaluate whether somebody gets their target bonus, or a targeted incentive compensation, and it may be that they meet or exceed their goals in terms of productivity, and as a result that their compensation varies according to that—and that's fine under 825.215(c)(2).

But what you need to be careful of I think is, if you use those same types of rating systems to evaluate productivity, and they're adversely impacted by FMLA-qualifying absences, and all of a sudden that finds its way into a performance evaluation which might be used for purposes of

evaluating people's opportunities for advancement in your organization—promotions—or it might find its way into disciplinary actions because somebody has not been productive enough, that's where 220(c), in my opinion, comes into play, and employers have to be very careful to sanitize those types of performance evaluations with regard to productivity where productivity is adversely impacted by someone's taking of FMLA leave. So, we've been getting a lot of questions on that, and it's a line which in application oftentimes gets blurred, and I think it's important for in-house counsel to remember that.

MEGAN BELCHER: And, Frank, while we're on the topic, we've had a question come in with regard to issue number one, but raises some questions about interference—claims of interference, which you've mentioned a little bit here. We've had a question from the audience in terms of the discussion surrounding the pre-FMLA leave that an employer may provide under its own policy and in talking about replacing someone, there has been an inquiry raised about: When replacing someone while on that employer-provided leave, shortly in advance of that individual becoming eligible for FMLA leave, raise the indicia of interference, if you will? And if so, how do you deal with that as an employer?

FRANK ALVAREZ: Alex, you want to take a shot or do you want me to go?

ALEX PASSANTINO: Sure, well I just, well, I think I read it today, the postal service case that came down where an employee who was 1.2 hours away from becoming eligible was suspended for two hours, and then I think was terminated in the two hours that they were suspended, and the court said that that was OK. The issue with someone who is not yet eligible: Sure, it raises some concerns, but as long as it's well documented, there is no entitlement of that employee to any job protection until such point as they become eligible, so the employer is free to do what they want to do prior to that point.

MEGAN BELCHER: And in terms of proactively documenting and dealing with that arrangement, what do you recommend for in-house counsel and their management of that from a documentation and, you know, employee management perspective?

ALEX PASSANTINO: Frank, you want to take a crack at documentation?

FRANK ALVAREZ: Well, again, I think, as you noted, Alex, there's a notion of whether it violates the entitlement rights under the FMLA, and I think it clearly doesn't. You have entitlement to job restoration to the position that you left, and, therefore, if you've been replaced—you've been replaced or terminated—you never get there. I think the whole notion, like any other EEO case of whether there's an intent-based claim for retaliation is one which goes to your point, Megan, of documenting. And I think it goes actually beyond documenting, which is very important, and timing of it, which is very important, but to: What your practice is, and do you have a policy? If, all of a sudden, the evidence shows that you've jumped on this one person because the person is about to roll into FMLA leave and you've never done this before, I think there's a much greater risk involved in terms of a retaliation claim under the FMLA, even though the person may not have an entitlement to the law.

I think there's also the potential for other types of claims under state law, like wrongful discharge and violation of public policy, where somebody kind of slips through the cracks and

sometimes in some states that tort exists to fill the gaps of employee protections. I saw a case years ago on that in Connecticut where somebody was fired the day before they rolled into their Connecticut Family Medical Leave entitlement.

So, I think the theories exist, I think the takeaway is that employers should think about the situation where people are going to begin leave before they are eligible for the FMLA, and how do you want to approach that? And if you want to gain some control over it so that you don't find yourself giving three months of job protected leave for non-FMLA purposes followed by three month of FMLA leave for a total of, you know, 24 weeks of protected leave, think about that ahead of time, and communicate with employees so you can show that your response is not retaliatory or discriminatory and is consistent with your other policies and practices.

MEGAN BELCHER: Thank you.

FRANK ALVAREZ: You're welcome. Should we move to issue three?

MEGAN BELCHER: Yes.

ALEX PASSANTINO: Issue three is: The interaction of the Family Medical Leave Act and the Family Standards Act. This comes up in the context of exempt employees who must be paid on what's called a salary basis. And that prohibits reductions in their guaranteed salary because of variations in quality or quantity of work performed.

So, ordinarily you cannot make deductions, except in certain limited circumstances, from the salary of an exempt employee. Recognizing that that was an issue, the regulations allow employers to make deductions for intermittent or reduced-schedule FMLA leave from an exempt employee's salary without affecting the exempt status of the employee. So, where typically you wouldn't be able to deduct 15 minutes, 20 minutes, an hour, four hours, from an exempt employee's salary. And there are issues related to paid time off and sick leave where you can make those deductions, provided that they have offsets and the employee actually gets the total salary amount in a combination of salary and paid time off or sick leave, but let's put that aside and assume that they are either not entitled to it, or they've exhausted it, or it's for a reason that doesn't qualify under your sick leave or paid time off policy, but it does qualify under FMLA. So, you would otherwise be in a situation where the exempt employee is not working a full schedule—is working reduced hours or is taking intermittent leave throughout the week—that can be unpaid. So, you could make deductions from the employee's salary for any time that was missed as a result of taking FMLA leave.

One of the things that you need to be careful of is that those deductions are limited to the FMLA—the “growing into leave” concept. So, if someone is on some other type of leave that would, but for a condition that would otherwise qualify for FMLA, you cannot make those deductions until that person becomes eligible. Similarly, if the employer has fewer than 50 employees, that person is not taking FMLA leave and therefore you can't make that deduction.

And then the one that I was asked about most frequently at the department was when there is a state or local law that provides for certain types of leave. So, if there is a local ordinance that allows for domestic partner leave—or FMLA-type leave for domestic partners—and the FMLA does not provide that, you can't make those deductions—those partial workweek deductions—

from an exempt employee's salary because that is not FMLA qualifying leave.

So, the issue is: The employer must comply with those laws. And the way that we always described it at the department was you have to comply with both: you have to comply with state law, with FLSA—I guess with all three—and the FMLA, but if it's not FMLA qualifying, the carve-out for when you can make deductions under the Fair Labor Standards Act is limited to the Family and Medical Leave Act; it's specifically limited in the regulations to that period of time, to FMLA leave.

And then another issue that Frank and I actually talked about recently is: When you are making deductions for FMLA—so, it's an exempt employee who takes a partial-day absence under the FMLA, and so you're going to deduct two hours worth of pay from that employee's salary for the week—is there an issue with possible interference or retaliation—more likely retaliation—if you're not making those same deductions for other exempt employees? Which you're not permitted to do.

So, if someone is, again, taking the two hours for a domestic partner, and not for one of the enumerated family members, it's not FMLA qualifying, so you can't make that deduction, if it was for an enumerated family member you could make the deduction, and is that treating people in similar situations differently? Is there an issue with a possible interference or retaliation claim [or] a discrimination claim against someone taking FMLA leave because they're the only exempt employees for whom you are making deductions? I think, and I don't want to speak for Frank, but I think I come down on the side of, you know, it's specifically provided for in the regulations as the only time you can make that deduction—and, you know, as long as you're documenting that's when you make those deductions—I think that you will be OK on that issue. Frank, any thoughts on that?

FRANK ALVAREZ: Yeah, I agree. I think it's, I think there's an interesting issue there for someone who might want to pursue it at some point in time where they say, "Listen, the only people who are getting hours deducted who are similarly situated, taking time off, partial-day absences or exempt employees, are the people who are FMLA qualified. And as a class they're being discriminated against in some way."

Even that, as you say, is a product of the FLSA rules, that there are no other exceptions that would justify deducting the salaries from other exempt employees who are out for reasons that are not FMLA qualified. So, employers are forced into that situation. I think as a result maybe that might inform a court's judgment or interpretation of whether there's a retaliation claim under the FMLA if you are basically forced there. But I think it's also instructive for employers to think about that scenario.

I mean, you raised an interesting example in noting that it might be somebody who is taking leave to care for a domestic partner, who might all of a sudden be out of luck—or actually be in luck—where somebody who is taking leave for their spouse may be out of luck in terms of getting their pay docked. Now, they would get, on the other end of it, job protection for that time, absence from work, when the person who is taking leave for a domestic partner would not, at least under the FMLA. But, you know, many people would just look at the paycheck and glean whether they're being treated differently from others on that basis.

So, I think it's a lurking issue out there for employers in terms of whether they are perceived to have practices that differentiate between people on protected classifications is something I would watch closely. Many employers just kind of waive the right to deduct it entirely from exempt employees for some of these reasons. So, it's an interesting issue out there and I think it'll be a bigger issue for some companies than others.

Shall we move on to issue four?

ALEX PASSANTINO: I think so.

FRANK ALVAREZ: Megan, anything else before we do that?

MEGAN BELCHER: Nope, we've not had any queries with regard to that. Oh, wait, we actually, we have had one come in a little late. If you decide to make prorated deductions, then do you have to treat that employee as non-exempt or hourly?

FRANK ALVAREZ: If it's prorated deductions for leave taken under the Family Medical Leave Act, that specifically allows you to keep the exempt status. So, if they took an hour and their expected hours in the workweek were 40, you would take 1/40 of their salary and deduct it, and it doesn't trigger an overtime obligation, it doesn't require hourly payment, it's just you're allowed to make the appropriate deduction from their salary, maintain the exemption, maintain the salary basis of payment, provided that it is unpaid leave under the FMLA.

MEGAN BELCHER: Great, thank you.

FRANK ALVAREZ: OK, issue number four: Complying with employer call-in procedures. This was one of the big changes under the FMLA. [It is] a win, if you would, for employers. The question is: When can leave be delayed or denied for failure to comply with employer's policy?

Here, it seems as though the Department of Labor has heard of the challenges employers have been having with managing unplanned, unscheduled absences and in an attempt to provide employers with some clarity as to the rules that they can impose on employees. The first one relates to 825.303(a) on the next slide, and it really goes to the timing of notices. And here, the Department of Labor confirms that, "When the timing of the need to leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." But the regulations go on to say, "It generally it should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."

It's my sense that one way to think about this is that there has been a change in the default rule under the FMLA by virtue of these regulations. And it's really one where in the past it seemed as though the regulations had to be interpreted as granting an employee protection even if they failed to give timely notice of their need for FMLA leave, if looking back on it, it was FMLA qualifying. It seems like the default, and I say default because, as you can see up on the slide, there is the word "generally" in there, and you know, there is still reference to the facts and circumstances of the particular case—and when we go to the next slide you'll see some more qualifying language—that there's always some exceptions.

But the default seems to be now that employers can expect if they've satisfied their obligation under the general notice provisions of the law to give employees notice in advance of their need for leave, that they have to provide timely notice of the need for leave and particularly if there is some additional usual and customary notice requirements that the employer requires for all similar leaves. If the employer has done that education on the front end, then it would be much more readily able to enforce those requirements on the back end. And again, it's subject to some exceptions. And I think if we move on to the next slide it talks about 825.303(c) in complying with the employer policy, you'll see some more of this.

First, the regs say, "When the need for leave is not foreseeable an employee must comply with the employers usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone."

So, what this reg is basically saying is that, "Listen, you can have a rule, and enforce it uniformly to employees who don't show up for work on time, and fail to give you the notice that you require when somebody is not going to be at work, and you can generally enforce that, except if the employee shows that it really was not reasonable or practicable under the circumstances for them to comply with those requirements."

And moving on to the next slide I think there's a couple of other examples that continue to flesh this out. The regulations in 825.303(c) go on to say that, "Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved." Here, again, it's a case of an emergency. There is nothing to say that in the case of a non-emergency employers cannot enforce requirement that there be written advanced notice requesting the FMLA leave. But you do need to be sensitive that, because FMLA leave is an entitlement, that there are instances where an employer would not be able to absolutely require the notice under its internal rules and procedures.

The last part of this slide reads, "If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." So, if push comes to shove—if the employee doesn't have any justification—it seems to me that an employer can delay or deny the leave, and this is very important.

I think one way employers can set this up is, again, doing a better job on the front end of educating employees about what's expected of them, and basically tell them that, "This appears to be a non-FMLA qualifying reason of leave," giving them an opportunity to explain themselves. I think it's always good to learn from employees what their explanation is for failing to comply with policies before you make a final decision and, but if you do that type of due diligence an employee does not have a reasonable expectation, these regulations would clearly support a more aggressive classification of that absence as being non-FMLA qualifying, unexcused if you will, and therefore it could be considered down the road in other types of attendance infractions, which, again, is very important. And I suspect that many employers will

find that once you go down this road, and if you set it up right and enforce the requirements uniformly, you'll find that employee behavior changes somewhat more rapidly.

So, that's what we wanted to bring out on this issue in terms of complying with employer call-in procedures.

MEGAN BELCHER: And Frank, particularly for those employers who are managing individuals in a production work force, I think sometimes they manage failure to utilize a call-in procedure with points. Can you talk about why that would be problematic, i.e. issuing a point under a no-fault attendance problem for the failure to call in—not necessarily for the absence—as opposed to appropriately handling that through more progressive discipline, i.e. not through an attendance point? Can you talk about why that is a better way to handle that?

FRANK ALVAREZ: Yeah, well, first of all I think you have to set it up through a uniform process. It's generally an employee is going to be entitled to be out of work for an FMLA qualifying reason, and you can't count that as a point under the current systems in a production setting. The only question here that is raised by the call-in procedures is whether somebody gave you a sufficient advance notice. And I tend to think that it, in those close questions—where somebody called in, they just were a little bit late—they have to be very careful in terms of applying the point system to that.

However, you know, if you construct it appropriately and you can show that you are treating other people who are calling in late the same way, even though there is not FMLA qualifying, I think there is a path to hold people accountable for calling in late in a production facility. But, generally speaking, you can't penalize somebody if they're out of work or if they're arriving late through no fault of their own due to an FMLA-qualifying reason. I know that is very frustrating because you also have an obligation to keep information confidential, so you can't go and tell coworkers why this person is continually allowed to come in late or miss work and they're not being disciplined, but, at the same time, there is an obligation to carve that out under your attendance infractions. Did that get at the issue you were addressing, Megan?

MEGAN BELCHER: Yeah, I think, you know, it's a particular challenge for employers to manage that. I think it's just more [that] you want to avoid disciplining employees for any type of failure to utilize the call-in procedure that looks as though you're making it an attendance issue. I think it's certainly a progressive discipline issue that you can manage through a softer progressive discipline process such as a written warning, etc. moving forward, but you want to avoid making it look “attendantcy”, for lack of a better phrase.

FRANK ALVAREZ: Yeah, I mean, again, you couldn't, and maybe it's really in the documentation, because as you say it could look like attendance when it's really not, it's just a notice issue. And somebody is entitled to be out of work for, if they have depression, if they have migraine headaches, they have morning sickness, they are entitled to be out of work if those are FMLA-qualifying reasons. And you should not be penalizing them for the attendance itself. You really have to thread the needle under these call-in procedures under the new regulations, and I think what I am seeing a lot is that employers don't appreciate that you can't just adopt these policies and procedures for calling in and giving notice for people who are on FMLA leave, because that doesn't fall within this protection as well. It should be a uniform approach, and not

all employers are prepared to take that uniform approach for all similarly sought leaves or absences.

MEGAN BELCHER: Exactly. OK. I didn't mean to hold you up there. We've got a couple questions on number five, so I'll let you go ahead and move on to that.

ALEX PASSANTINO: Okay, I think number five and number six there is a lot of overlap on obtaining documentation and combating fraud and abuse or investigating fraud and abuse. So, why don't we sort of talk about those as one?

The list, on the next slide, which is issue six, is a pretty comprehensive list of the types of documentation or, basically, documentation that you can get for an employee's serious health condition: You've got the initial certification. There are in the regulations, an explanation of how to get authentication, which is essentially determining whether the doctor's signature is accurate or whether it's actually filled out by the doctor. Clarification, which is, "Is this a two or a seven?" You know, it details procedures by which employers can get second and third opinions, the recertification process, can get an intent to return to work, and then, in certain circumstances, fitness for duty certification.

The one thing that you'll notice is not on there, and which is, I guess, what we get asked about most frequently, is: Can we require a note each and every time that an employee is out on intermittent leave? The answer to that is: no, But as Frank was talking about, you can follow up and ask questions if the notice was improper; if the individual didn't give proper notice, you can ask questions to determine how foreseeable the leave was and whether or not there was, in fact, some reason why the employee couldn't comply with the notice provisions. Frank, do you want to—we're getting short on time, so I don't know what you want to weigh-in on.

FRANK ALVAREZ: Well, I want to, let me just briefly mention that when it comes down to investigating the suspected issues of fraud and abuse, where I find employers are entirely frustrated is the constraints that they have on getting medical documentation. Because, as you say, you know, you can't get a note each time somebody's absent saying, "This is FMLA qualifying."

But what I would suggest employers keep in mind is, that the FMLA does govern the effort to get medical information from health care providers. But it does not govern at all the ability of the employer to speak directly to an employee to find out the facts surrounding their need to be absent, and it's always 10 % of your employees that cause 90% of your problems, and I find that employers can investigate vis-à-vis asking the employee directly what the circumstances surrounding their failure to give notice, their reason to be out, the reason why they needed to be out as long as they were out, why they couldn't come back to work after they saw a doctor in the morning; you can directly communicate with employees on those issues.

And I think you have to be careful not to run into a retaliation claim, but, like any other EEO situation, it's all about the story you want to tell. And if you can legitimately say you have concerns about what this, about what's going on, and you don't want to act based upon suspicion, you want to act based upon fact, you meet with the employee and express your concerns. And I think, from a perspective of combating fraud and abuse, it can be an entirely

effective device to, you know, demand employees be accountable for their actions and explain what they're doing at work. And the challenge is that it takes time to have those types of meetings, but the alternative of just looking the other way and allowing employees to come and go as they choose without any accountability, I have found, is not a very good one for employers.

MEGAN BELCHER: We've had a question from the audience inquiring: Once intermittent leave is approved for a serious health condition, can you require that an employee tell the employer that the action was for that approved intermittent absence within two days, or can you require when they call in, or do they get an additional 15 days for that?

FRANK ALVAREZ: I believe the final regulations say that employee has an obligation to tell the employer if the reason that they are out of work is for a reason that has been previously certified as FMLA qualifying on an intermittent basis. I do not believe the regulations place a timeframe around that, but we can double-check that. I don't believe there is a time frame. I don't know, if Alex, if you remember off-hand?

ALEX PASSANTINO: I don't think there is a time frame. I think that's right, there is no timeframe and the notification is essentially either identifying the condition for which the certification is on file or saying the magic words FMLA. The employee has to put the employer on notice that it is for a previously qualifying reason.

FRANK ALVAREZ: And I guess you would apply the rule where it is not foreseeable that they give as much notice as was reasonable and practicable under the circumstances to police what your entitlement is to advance notice. I'd be careful about it, and understand—set it up proactively by informing employees of their obligation to continually provide that information if they are out for reasons that are previously certified as FMLA qualifying.

MEGAN BELCHER: And in terms of certification, we've had a specific question as to whether or not a chiropractor is an appropriate certifying medical person. Can you weigh-in on who is and is not appropriate?

ALEX PASSANTINO: Chiropractors are defined as health care providers specifically, but it is limited to the treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. And then the other way that chiropractors often get covered as health care providers is: Any health care provider from whom an employer or the employer's group health plans benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits. So, if the health plan allows chiropractors to substantiate a claim for benefits, then they are a health care provider for your purposes for the FMLA, and if not, then it's limited to manipulation of the spine.

MEGAN BELCHER: And can you talk a moment about the difference between the notice that you require to provide information to the employer that you are taking that leave for intermittent versus recertification for intermittent, i.e., what are the options that an employer has to have an employee with an intermittent claim to recertify?

FRANK ALVAREZ: Well, with the recertification employers, there was a change in the rule with regard to those conditions for which will continue for an indefinite period of time, or maybe even a lifetime condition. The rule always starts off with, "What's the period in which somebody

needs leave?” And you generally can’t get recertification until that initial period is elapsed. But with intermittent leave, in particular with these types of permanent or lifetime conditions, the need for leave may never lapse. So, the question became how frequently could you get recertification for those situations? And the new regulations basically say in those situations you can get recertification once every six months. And I guess it also dovetails into the notion that every 12 months you would be entitled to a new initial medical certification, the distinction being that a new initial medical certification is subject to a second or third opinion, whereas a recertification is not subject to a second or third opinion. You can always still get recertification more frequently if you have reason to doubt the validity of the leave—you have reason to suspect fraud—but the general rule would be you’d have to let the initial period to elapse. Or, if it’s a lifetime condition or a condition that can continue indefinitely, the minimum duration is six months.

MEGAN BELCHER: OK, I think we’re running a little short on time, so if you guys want to move along to issue seven we will follow up with that and then close things up.

ALEX PASSANTINO: Issue seven is the military family leave issues. The new regulations contain a number of provisions related to a recently passed entitlement to leave for what’s called any qualifying exigency and also to provide care for certain members of the military.

We were planning to just discuss one somewhat confusing aspect of the military caregiver leave, which is leave to care for a covered service member with a serious injury or illness. It discusses something called a single 12-month period. It allows an employee to take 26 workweeks of leave in a single 12-month period to care for a covered service member with a serious injury or illness. You know, the single 12-month period starts with the first incident of leave for the care for a covered service member with serious injury or illness.

So, you have 12 weeks of FMLA that are rolling along on whatever calendar it is that you as an employer use—you know, rolling forward, rolling backward, calendar, fiscal, whatever, anniversary date—the single 12-month period that’s at issue for the caregiver-leave starts the first time that somebody takes leave and runs for 12 months from that time. So, FMLA leave taken prior to the first time that someone takes military caregiver leave, doesn’t count against the 26 total weeks in that single 12-month period. Within that 12-month period, the single 12-month period, the employee is entitled to take 26 weeks combined of FMLA and caregiver-leave, and then once the 12-month period ends, the regular FMLA rules that your company has apply. So, they operate at the same time independently and together. So, there’s a single 12-month period that operates all by itself, but you also need to look at the regular FMLA calendar that you are using and the entitlement that the employee has to leave under the regular FMLA. There are a lot of other issues under military family leave, but we are, I think, out of time.

MEGAN BELCHER: And we have a couple pending questions. To the extent that we have not addressed those, please feel free to email me or Alex or Frank. Feel free to send them to me. Do we have time for Q&A, Roberto?

ROBERTO SCALESE: We could probably do a minute or two.

MEGAN BELCHER: OK, then, Alex we had talked about this a little earlier, we’ve had an

inquiry about an employee obtaining FMLA to care for their child if the child is over the age of 18. Can you talk about what the rules are with that in terms of a medical condition and the nuances of that in the military leave aspects?

ALEX PASSANTINO: Sure. In the context of what I'll call regular FMLA, it's leave taken for a child who is under the age of 18 or over the age of 18 and incapable of self care because of a mental or physical disability. So, if there is a mental or physical disability then that child is still a son or daughter under the Family Medical Leave Act. Under the military caregiver-leave provisions, there is no age restriction; it is the son or daughter of a covered service member is specifically for a son or daughter of any age, and that is also in connection with the qualifying exigency active duty, or call to active duty status, is also for a child of any age. So, for regular FMLA, it's under 18 or over 18 and incapable of self care because of a mental or physical disability, but for the military caregiver provisions it's for any age.

MEGAN BELCHER: Do we have time for one more or should I wrap it up?

ROBERTO SCALESE: Unfortunately, we're pretty much out of time. We're a bit over time, actually, so if you could please go to the closing statements.

MEGAN BELCHER: OK.

FRANK ALVAREZ: Megan, I have one other thing just to mention, which is the FMLA info pack that we have prepared for ACC members, especially given how much information as is here, it's been updated and is available for members to discuss the new FMLA regulations. So, there is an info pack for ACC people as well.

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MEGAN BELCHER: OK, I'd like to thank Alex and Frank for all their time and efforts. You've been great panelists and thank you for providing all this information. I'd also like to thank our audience members for all your great questions and insight into the issues that you are seeing in your organizations. Again, feel free to e-mail or contact any of the three of us if you have any questions or concerns or follow up. In addition, I think Roberto has given the information that you need with respect to the slides and things like that, but Roberto, can you close out the program just to make sure we have all the final details closed up?

ROBERTO SCALESE: Great, thank you Megan. On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you again for listening to today's program

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This program is now concluded. Thank you again, and have a great day.