Proposed Family and Medical Leave Act Pattern Jury Instructions

The Seventh Circuit Pattern Civil Jury Instruction Committee has completed a draft set of instructions for Family and Medical Leave Act cases, and welcomes public comment up to June 30, 2008.

Comments may be e-mailed to the committee chair, Chief Judge Robert L. Miller, Jr., at robert_miller@innd.uscourts.gov or mailed to 327 Robert A. Grant Federal Building, 204 S. Main St., South Bend, IN 46601.

Note: Effective January 28, 2008, Congress amended the Family Medical Leave Act to extend FMLA eligibility to an employee who needs time off to handle certain qualifying "exigencies" related to certain family members' service or call-up for service in a war, national emergency or military operation designated by the Secretary of Defense, or to care for a service member receiving care or on temporary disability retired status due to a serious illness or injury. Regulations interpreting the 2008 amendment have not yet been issued by the Department of Labor. It is anticipated that those regulations, when issued will define "qualifying exigencies" and other terms used in the amendment. The committee will modify the instructions as needed to reflect those changes after the regulations are issued. Those developments seemed insufficient to delay posting of this draft for public comment.

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1. Nature of FMLA Claim

_____Plaintiff claims that Defendant violated the "Family and Medical Leave Act," which is often referred to by its initials, "FMLA." This law entitles an eligible employee to take up to twelve weeks of unpaid leave during any twelve-month period for several reasons, including [the birth of a son or daughter and to care for the son or daughter] [the placement of a son or daughter for adoption or foster care] [to care for a [spouse] [son or daughter] [parent] with a serious health condition] [a serious health condition that makes him unable to perform the functions of his position]. [An [employer][employee] may substitute paid [vacation] [personal] [family] [medical] [sick] leave for all or part of the 12 weeks of unpaid leave provided for by the FMLA. The FMLA generally gives an employee the right following FMLA leave [either] to be returned by the employer to the position he held when the leave began [or to an equivalent position]].

Committee Comments

a. General authority: 29 U.S.C. § 2612(a)(1).

b. Son or daughter: The FMLA defines "son or daughter" to include a biological child, an adopted child, a foster child, a stepchild, a legal ward or the child of a person standing *in loco parentis*. 29 U.S.C. § 2611(12). In cases involving leaves relating to this family member, the following sentence should be inserted after the second sentence: "This case involves Plaintiff's [biological child] [adopted child] [a foster child] [stepchild] [legal ward], who is considered his [son][daughter] for purposes of this law." 29 C.F.R. §825.113(c). Further modification will be needed if the jury must decide whether the child is the plaintiff's "son" or "daughter" for purposes of the FMLA.

c. Parent: A "parent" includes person[s] who stood *in loco parentis* to the employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). In cases involving leaves relating to this category of family member, the following sentence should be inserted after the second sentence: "Although [Name] is not Plaintiff's biological parent, he is considered a "parent" under the law because he occupied the same role in Plaintiff's life that a biological parent would be expected to occupy."

d. Substitution of paid leave: The FMLA allows certain paid leaves to be substituted for all or a part of the 12-week FMLA-required unpaid leave. 29 U.S.C. § 2612(d); *Repa v. Roadway Express, Inc.*, 477 F.3d 938, 941 (7th Cir. 2007). Where appropriate, the jury should be instructed as to the types of paid leaves that may be substituted for the FMLA leave involved.

e. Intermittent leave or leave on a reduced leave basis: The FMLA allows leave for a serious health condition for covered persons to be taken on an intermittent or reduced leave basis. 29 U.S.C. § 2612(b). In cases involving alleged denial of an intermittent or reduced leave, the following should be substituted for the last two sentences of this instruction:

> An employee may take FMLA leave on [an intermittent basis] [a reduced leave schedule]. [An [employer][employee] may substitute [paid vacation] [personal leave] [medical leave] [sick leave] for all or part of the 12 weeks of unpaid leave provided by the FMLA. An employer may temporarily assign an employee taking leave on [an intermittent basis] [a reduced leave schedule] to an alternative position for which he is qualified if the position has equivalent pay and benefits and better accommodates recurring absences caused by the leave.]

f. Reinstatement – certain highly compensated employees: Reinstatement may be denied to a salaried employee who is among the highest paid ten percent of employees within 75 miles of the facility where the employee was employed if certain additional requisites are met. 29 U.S.C. § 2614(b).

2. Elements of FMLA Claim

To prevail on this claim, Plaintiff must prove all of the following by a preponderance of the evidence:

First: that he had a serious health condition that made him unable to perform the functions of his job. I will define "serious health condition" for you in a moment.

Second: that he provided Defendant [notice of his intention to take leave at least 30 days before the leave was to begin]

or

[as much notice as he reasonably could]

or

[that he provided enough information so Defendant knew [or should have known] that he likely was eligible for FMLA leave];

or

[that he was incapable of giving notice.]

Third: that Defendant [denied him] [did not reinstate him [to an equivalent position] after his] FMLA leave.

Committee Comments

a. General authority: This instruction (or a variant of it) is intended to cover cases in which the plaintiff's right to FMLA leave is alleged to have been denied or otherwise interfered with. 29 U.S.C. § 2615(a)(1). A different formulation of the elements is set forth in *Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006) (five elements, but holding that intent is not an element in claims for denial or interference).

The FMLA entitles employees to leave due to four reasons – the birth of a child; the adoption or placement of a child for foster care; the serious health condition of certain other family members; or the employee's own serious heath condition. 29 U.S.C. § 2612(a)(1). The Plaintiff bears the burden of showing entitlement. *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997); *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997) (no showing of intent is necessary); *King v. Preferred Tech'l Group*, 166 F.3rd 887, 891 (7th Cir. 1999) (unlike retaliation, *infra* § 2615(a)(2) and (b)).

The instruction above deals with leave due to the employee's own serious heath condition, by far the most common case. In cases involving leaves for the

other three reasons, the first and second elements need to be modified as set out in the comments below. In cases where the Plaintiff is or entitled to be on FMLA leave and is terminated for misconduct, poor performance or as a result of a reduction in force, the employer may demonstrate that it would have discharged (or laid off) the employee even if the leave had not been taken. 29 U.S.C. § 2614(a)(3); 29 C.F.R. §825.216(a)(1); *Kohls v. Beverly Enter. Wis., Inc.*, 259 F.3d 799, 804 (7th Cir. 2001); *Mitchell v. Dutchmen Mfg., Inc.*, 389 F.3d 746, 748 (7th Cir. 2004); *Rice v. Sunrise Express*, 209 F.3d 1008, 1017-18 (7th Cir.), *cert. denied*, 531 U.S. 1012 (2000).

b. Birth of son or daughter: In cases involving leave due to the birth of a son or daughter, the first two elements should be:

> First: that his [son] [daughter] had been born within the prior twelve months;
>
> Second: [that he provided Defendant notice of his intention to take leave because of the birth of his [son] [daughter] and in order to care for his [son] [daughter] at least 30 days before the leave was to begin]
>
> *or*
>
> [that he provided Defendant as much notice as he reasonably could of his intention to take leave because of the birth of his [son] [daughter] and in order to care for his [son] [daughter]]
>
> *or*
>
> [that he provided enough information so Defendant knew [or should have known] that he likely was eligible for leave under the FMLA because of the birth of his [son] [daughter] and in order to care for his [son] [daughter]]; and

29 U.S.C. §2612(a)(1)(A).

c. Placement of son or daughter: In cases involving leave due to the adoption or placement for foster care of a son or daughter, the first two elements should be:

> First: that [he had adopted a [son] [daughter]] [a [son] [daughter] had been placed with him for foster care] within the past 12 months;
>
> Second: [that he provided Defendant [notice of his intention to take

leave because [he had adopted a [son] [daughter]] [a [son] [daughter] had been placed with him for foster care] at least 30 days before the leave was to begin]

or

[as much notice as he reasonably could of his intention to take leave because [he had adopted a [son] [daughter]] [a [son] [daughter] had been placed with him for foster care]]

or

[that he provided enough information so Defendant knew [or should have known] that he likely was eligible for leave because [he had adopted a [son] [daughter]] [a [son] [daughter] had been placed with him for foster care]; and

29 U.S.C. §2612(a)(1)(B).

d. Serious health condition of person other than employee: In cases involving leave due to the serious health condition of a covered family member, the first two elements should be:

First: that his [spouse] [son] [daughter] [parent] had a serious health condition. I will define "serious health condition" for you in a moment.

Second: [that he provided Defendant notice of his intention to take leave in order to care for his [spouse] [son] [daughter] [parent] with a serious health condition at least 30 days before the leave was to begin]

or

[as much notice as he reasonably could of his intention to take leave in order to care for his [spouse] [son] [daughter] [parent] with a serious health condition]

or

[that he provided enough information so Defendant knew [or should have known] that he likely was eligible for leave in order to care for his [spouse] [son] [daughter] [parent] with a serious health condition]; and

e. Son or daughter: The FMLA limits "son or daughter" to persons under the age of 18 or those 18 or older who are incapable of self-care because of a physical or mental disability. 29 U.S.C. § 2611(12). Where a case presents an issue as to whether a son or daughter is incapable of self-care, the following additional element should be inserted after the first element and the remaining

renumbered: "Second: that his [son] [daughter] was incapable caring for [himself] [herself] because of a [mental] [physical] disability." 29 U.S.C. §2612(a)(1)(C); 29 C.F.R. § 824.13(c); 29 C.F.R. § 825.114(a)(2), *et seq*.

f. Intermittent leave or leave on a reduced leave basis: The FMLA allows leave for the employee's own serious health condition or that of covered family members to be taken on an intermittent or reduced leave basis. 29 U.S.C. § 2612(b). In cases involving alleged denial of an intermittent or reduced leave for the employee's own condition, the second and third elements should be:

> Second: that he sought leave on [an intermittent basis] [a reduced leave schedule] due to his serious health condition.
>
> Third: that he provided Defendant with a written certification by his health care provider that he was unable to perform the functions of his position, [of the dates on which medical treatment is expected to be given and how long the treatment will last] [of the medical necessity for the [intermittent] [reduced schedule] leave] and the expected duration of the leave.

29 U.S.C. § 2613(b)(4)(B), (5), (7).

In a case involving alleged denial of an intermittent or reduced leave for the serious health condition of covered family members, the second and third elements should be:

> Second: that he sought leave on [an intermittent basis] [a reduced leave schedule] in order to care for his [spouse] [son] [daughter] [parent] with a serious health condition.
>
> Third: that he provided Defendant with a written certification by his [spouse's] [son's] [daughter's] [parent's] health care provider of the need for Plaintiff to take [leave on an intermittent basis] [a reduced leave schedule] to care for his [spouse] [son] [daughter] [parent] and the amount of time for which he is needed, [of the dates on which medical treatment is expected to be given and how long the treatment will last] [that he is needed to care for his [spouse] [son] [daughter] [parent] or will assist in their recovery, how long the leave is expected to last and a schedule of the [intermittent] [reduced schedule] leave.

29 U.S.C. § 2613(b)(4)(A), (5), (7).

g. Sufficient information or notice: An employee need not expressly mention the FMLA in his leave request or invoke its provisions. An employee meets his notice obligation for himself or covered family members if he provides sufficiently clear information for the employer to know that he probably is entitled to FMLA leave. *Stevenson v. Hyre Electric Co.*, 505 F.3d 720 (7th Cir. 2007); *Burnett v. LFW Inc.*, 472 F.3d 471, 478-79 (7th Cir. 2006). An employee may be excused from even expressing a need for leave when circumstances (e.g., observable changes in the employee's behavior) provide the employer with sufficient notice of the need for FMLA leave or when the employee is so incapacitated that he cannot provide notice. *Id*. (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381-82 (7th Cir. 2003)). However, telling your employer that you are "sick," even if suffering from a serious health condition, generally is insufficient notice. *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001). And an employer may require an employee to comply with its usual and customary notice and procedural requirements so long as they do not disallow or delay an employee's taking FMLA if the employee gives timely verbal or other notice. 29 C.F.R. § 825.302(d); *Gilliam v. United Parcel Service, Inc.*, 233 F.3d 969, 971 (7th Cir. 2000).

3. Retaliation

_____Plaintiff claims that he was [*adverse action*] by Defendant because of [*protected activity*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant [*adverse action*] him because of his [*protected activity*]. To determine that Plaintiff was [*adverse action*] because of his [*protected activity*], you must decide that Defendant would not have [*taken adverse action against*] Plaintiff if he had [*not engaged in protected activity*] but everything else had been the same.

If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

Committee Comment

29 U.S.C. §§ 2615(a)(2) and (b) are FMLA's anti-retaliation provisions, although one decision seems to treat all § 2615 provisions as such. *Kauffman v. Federal Express Corp.*, 426 F.3d 880, 884-85 (7th Cir. 2005) ("A claim under the FMLA for wrongful termination can be brought under a discrimination/retaliation or interference/entitlement theory; the difference is that the first type of claim requires proof of discriminatory or retaliatory intent while the latter requires only proof that the employer denied the employee his or her entitlement under the Act."). The elements of a retaliation claim are the same as under discrimination statutes. *Burnett v. LFW, Inc.*, 472 F.3d 471, 481-82 (7th Cir. 2006).

4. Definition of "Equivalent Position"

An equivalent position is one that is almost identical to the employee's former position in terms of pay, benefits and working conditions, and that involves substantially equivalent skill, effort, responsibility and authority.

Committee Comment

a. Authority: 29 C.F.R. §825.215(a); *Breneisen v. Motorola, Inc.*, 512 F.3d 972 (7th Cir. 2008).

5. Definition of "Serious Health Condition"

As used in these instructions, the phrase "serious health condition" means an [illness] [injury] [impairment] [physical condition] [mental condition] that involves [inpatient care in a [hospital] [hospice] [residential medical care facility]] [continuing treatment by a health care provider].

[To establish continuing treatment by a health care provider, plaintiff must prove that he:

[was unable to [work], [attend school], [or perform other regular daily activities] for more than three consecutive days, and had subsequent treatment

or

was unable to [work], [attend school], [or perform other regular daily activities] due to the same condition, and [was treated two or more times by a health care provider] [was treated on at least one occasion by a health care provider resulting in a regimen of continuing treatment under the supervision of the health care provider]

or

[was unable to [work], [attend school], [or perform other regular daily activities] due to pregnancy or for prenatal care]

or

[was unable to [work], [attend school], [or perform other regular daily activities] due to a chronic serious health condition. A chronic serious health condition is one which requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may prevent him from [working], [attending school], [or performing other regular daily activities] on an occasional rather a continuing basis]

or

[was unable to [work], [attend school], [or perform other regular daily activities] on a permanent or long-term basis due to a condition for which treatment may not be effective]

or

[was absent to receive multiple treatments by a health care provider either for restorative surgery after an accident or injury or for a condition that would likely prevent him from [working], [attending school], [or performing other regular daily activities] for more than three consecutive days without medical care.]]

Committee Comments

a. General authority: 29 U.S.C. § 2611(11); 29 C.F.R. §825.114(a); *Burnett v. LFW Inc.*, 472 F.3d 471, 478 (7th Cir. 2006).

b. Healthcare provider: Healthcare provider is defined in the statute, 29 U.S.C. §2611(6), and regulations, 29 C.F.R. §825.800.

c. Treatment: Absences due to substance abuse are treated differently from absences due to other conditions. Even if substance abuse would meet the FMLA's definition of serious health condition, only absences due to treatment for substance abuse qualify for FMLA leave; absences which result from use of the substance do not qualify. *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008).

6. Damages: Lost Wages or Benefits

If you find that Plaintiff has proven his claim by a preponderance of the evidence, you should award him as damages any lost wages and benefits he would have received from Defendant if he had [been granted a FMLA leave] [been reinstated following his FMLA leave] [[not been] [adverse employment action]]. [You should then reduce this amount by any wages and benefits that Plaintiff received from other employment during that time [that he would not otherwise have received]]. It is Plaintiff's burden to prove that he lost wages and benefits and their amount. If he fails to do so for any periods of time for which he seeks damages, then you may not award damages for that time period.

Committee Comments

a. General authority: 29 U.S.C. § 2617(a)(1). If Plaintiff did not lose wages or benefits, then Plaintiff may recover his actual monetary losses as a result of any leave denial. 29 U.S.C. § 2617(a)(1)(A); *Harrell v. U.S. Postal Service*, 445 F.3d 913, 928-29 (7th Cir. 2006). See Instruction No. 8 below.

b. Jury must determine damages. The Committee contemplates that Pattern Instruction No. 3.09 ("Damages: General") be given before this instruction.

7. Damages: Mitigation

_____Defendant argues that Plaintiff's claim for lost wages and benefits should be reduced by [describe the reduction]. If you find that (1) Plaintiff did not take reasonable actions to reduce his damages, and (2) that Plaintiff reasonably might have found comparable employment if he had taken such action, you should reduce any amount you might award Plaintiff for [lost wages] [benefits] by the amount he reasonably would have earned during the period for which you are awarding [lost wages] [benefits]. Defendant must prove both that the reduction should be made and its amount.

Committee Comment

a. General authority: 29 U.S.C. §2617(a)(1).

8. Damages: Where No Lost Wages or Benefits

_____If you find that Plaintiff has proven his claim by a preponderance of the evidence, you should award him as damages any actual monetary losses he sustained as a result. It is Plaintiff's burden to prove that he had monetary losses and their amount.

Committee Comments

a. General authority: 29 U.S.C. § 2617(a)(1). This instruction should be given only if Plaintiff did not lose wages or benefits, such as the cost of care. 29 U.S.C. § 2617(a)(1)(A)(i)(II); *Harrell v. United States Postal Service*, 445 F.3d 913, 929 (7th Cir. 2006); *Cianci v. Pettibone Corp.*, 152 F.3d 723, 728 (7th Cir. 1998).