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February 12, 2014

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The FMLA and Vacation Destinations

By Warren E. Buliox

I would think that most of us have thought about a trip or two we would like to make before we pass. For me, Tahiti and Bermuda come to mind. Now, what does this have to do with employment law? Suppose you have an employee who, shortly after the legalization of marijuana in Colorado, advises that she plans to accompany her mother on a trip to Colorado. Her mother, who is in hospice care but for years has been an outspoken advocate for the legalization of marijuana, planned the trip in order to participate in a few of the "green" tours taking place there and to show her support for the movement to legalize the recreational use of cannabis.

Ordinarily, your employee requesting time off to attend to personal affairs such as recreational trips would not be an issue. In this case, however, she has exhausted her vacation and other paid-time off time and seeks to use federal Family and Medical Leave Act leave for the trip. She is seeking FMLA leave because her mother suffers from a serious health condition and is incapable of fully caring for herself. Ordinarily, her mother's care needs are being met in hospice care but, since hospice support would not be available during the trip, there would be a void in care should she elect to make the trip. While the trip itself has no underlying medical or treatment related purpose, as the employee's mother is not going to Colorado specifically to seek or receive treatment for a health condition, your employee is planning to make the trip in order to assist with her mother's care during the trip. This would include bathing, feeding, and administering medication, among other items.

Under these circumstances, are you obligated under the FMLA to grant the employee's leave request? Would it make a difference if the employee is making the trip in order to secure medical treatment (i.e. medical marijuana) or in response to recommendations from one of the hospice caretakers?

The answer may very well depend on the jurisdiction in which you reside. As you are likely aware, the FMLA entitles qualifying employees up to 12 workweeks per year of leave "to care for" a spouse, child, or parent who has a serious health condition. 29 U.S.C. § 2612(a)(1)(C). Whether the trip described above qualifies for coverage under the law hinges on how the term "to care for" is interpreted, which as of now varies by jurisdiction.

Both the United States Court of Appeals for the First Circuit (which covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) and the Ninth Circuit (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), have found that there must be some type of ongoing medical treatment connected to the type of trip at issue in our scenario in order for it to fall under the purview of the FMLA. In a 2011 case, for instance, the Court of Appeals for the First Circuit held that an employee who accompanied her seriously ill husband on a seven-week "spiritual healing trip" to the Philippines did not qualify for leave under the FMLA. The court noted that the trip needed to be related to medical treatment of the employee's husband and that, because faith or spiritual healing was in essence not medically related, accompanying a family member on a "healing pilgrimage" did not constitute "care" within the meaning of the FMLA. Before reaching this conclusion, the court noted that while the employee assisted her spouse in administering medications, helping him walk, and being present in case sickness arose, there was no "conventional" medical treatment, and the spouse saw no medical doctors or health care providers during the trip. Thus, it did not qualify for FMLA coverage.

Similarly, the Court of Appeals for the Ninth Circuit has noted that "caring for" a family member with a serious health condition required a level of ongoing medical "treatment" for that condition. In one instance, the Ninth Circuit declined to extend FMLA coverage for a trip to relocate a child to another country over the mother/employee's concerns that keeping the child in the United States could be unhealthy for the child given the "social environment" of the country. In so deciding, the court noted that the relevant federal regulation explaining the meaning of "to care for" (29 CFR 825.116(a)) advises that the phrase contemplates "both physical and psychological care" in situations where, for example, the family member is unable to care for his or her basic needs, such as medical, hygienic, or nutritional needs. Since moving the child to

another country (and leaving him there) would have had the effect of the child receiving no treatment at all for the serious health condition asserted, the Court held that the employee could not "care for" him under the FMLA and therefore was not entitled to the protections of the law.

At direct odds with the rulings of both the First and Ninth Circuits is a recent Seventh Circuit ruling on the matter. In this case, the Seventh Circuit (which covers Wisconsin, Illinois and Indiana) held that an employee's trip to accompany her terminally ill mother on a non-medical/treatment-based vacation to Las Vegas was covered by the FMLA. In that case, the employee's mother, who at the time was in hospice care in connection with a serious health condition, had communicated to a social worker that a family trip to Las Vegas was a dream she had always wanted to fulfill. Subsequently, the social worker secured funding for her trip to Vegas from a foundation that affords terminally ill adults with such opportunities. Because the employee acted as her mother's primary caregiver and provided a host of services such as bathing, administering medication, dressing and preparing her mother for bed, she requested FMLA leave in order to provide "care" for her mother during the trip to Las Vegas. The request was denied, and the employee was ultimately discharged in connection with absences related to days she missed while accompanying her mother on the trip.

As was the case in the First and Ninth Circuit cases discussed above, the analysis for the Seventh Circuit principally boiled down to what is meant by the phrase "to care for" as used in the FMLA and whether the employee's trip fell into that category. The employer, in a reasoned argument following the holdings of the First and Ninth Circuit Courts, argued that the trip itself was recreational in nature and not medically related or necessary. And, because any care provided by the employee to her mother on the trip was not related to ongoing medical treatment, the employee did not "care for" her mother within the meaning of the FMLA during the trip.

In breaking with the First and Ninth Circuits' holdings, the Seventh Circuit broadly defined the "care for" provision of the FMLA, finding that the relevant portions of the law speak in terms of "care" and not "treatment," and therefore ongoing treatment was not necessary for the FMLA to apply. Further, the court noted, the text of the FMLA does not restrict care to a specific place or geographical area. Instead, and pursuant to 29 CFR 825.116(a), the "care" necessary to invoke FMLA protections need only be care for the basic medical, hygienic, or nutritional needs of a family member suffering from a serious health condition. Hence, as the employee's mother's need for care for basic medical, hygienic, or nutritional needs did not change by virtue of her going to Las Vegas, and because the employee continued to provide that care in Las Vegas,

the employee, according to the court, was entitled to leave under the FMLA.

The difference in opinion between circuits on this somewhat novel issue is interesting and highlights the need of employers to be aware of what the law is in their jurisdiction and to keep abreast of any developments. For those who reside in jurisdictions that have yet to address this particular issue, it is important to note the distinctions between those jurisdictions and weigh options based on judicial climates and business needs in order to make informed decisions. As always, a good employment lawyer who is familiar with the law in your jurisdiction and the temperament and tendencies of judges likely to hear this type of issue goes a long way in helping you make a good decision should you ever be presented with an issue like this.


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