How Employment Law Can Help You and Your Client: Updates on FMLA, Adoption, Child Placement, and Protection from Retaliation for Reporting Child Abuse and Neglect

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Adjusting the Bar: The Definitive Ad Litem Seminar
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I. Introduction

It may seem unusual to see an employment law presentation at a family law program. However, employment law touches virtually everyone in our society. The parents, grandparents, foster parents, and other persons involved in your cases will usually have jobs. They will be concerned about how the family court proceeding will affect their jobs, and how their jobs will affect their ability to participate in the proceeding.

For example:

- Will your client be able to get time off from work to participate in the court proceeding?
- If the adoption or placement of a child requires your client to miss time from work, will your client's job be at risk?
- If an adopted or foster child has special needs, can your client get an accommodation from the employer to meet those needs?
- Can employer discriminate against your client, or refuse to hire your client, because an adopted or foster child will have special needs?

You may never practice employment law yourself, but you should be armed with knowledge of a few basic principles of state and federal employment law. That is the purpose of this presentation.

If you should ever need additional information, you can contact me with questions. You can also visit the blog section of my website (http://www.davidcholmeslaw.com/blog), which contains a number of general information pieces about employment law.

II. Employment Law in a Nutshell

A. The General Rule: At-Will Employment

Like every state other than Montana, Texas is an at-will employment state. At-will employment is a common law rule which provides that the employment relationship is voluntary on the part of both the employer and the employee. Both the employer and the employee can end the relationship "at will."

What does this mean for an employer?

- The employer can refuse to hire anyone for a good reason, a bad reason, or no reason at all.
- The employer can fire anyone for a good reason, a bad reason, or no reason at all.
- The employer can impose any workplace rules that it wants.
- The employer can set whatever work hours that it wants.
- The employer can promote or demote anyone that it wants.
- The employer does not need to provide breaks, vacation days, or any other benefits.
- The employer can harass the employees and treat them however it wants, subject to the obvious limitations of tort and criminal law.

- The employer can change the terms of conditions at any time, provided that it tells the employee.

What does this mean for an employee?

- The employee can refuse to apply for a job.
- The employee can quit whenever the employee wants, with or without notice.
- If the employer imposes conditions or requirements that the employee does not like, the employee can simply quit.

This applies to all employees in Texas, with three exceptions. First, employers and employees who enter into employment contracts (usually written) are subject to the terms and conditions set forth in the contracts. Second, union members are subject to the terms in the collective bargaining agreement. Third, state and federal government employers may have special statutory rules, and they are sometimes affected by constitutional considerations.

B. The Exceptions

Over time, the courts, the state legislature, and Congress have enacted an enormous number of exceptions to the at-will employment rule. This is why we have employment lawyers.

While an employer can hire or fire employees at will, it cannot do so for illegal reasons, such as discrimination on the basis of race, sex, age, disability status, and the like. An employer cannot fire an employee for engaging in legally protected conduct, such as complaining about discrimination or OSHA violations. Even if an employer is permitted to fire an employee, it will be required to pay unemployment compensation unless the employee was fired for work-related misconduct.

While an employer is free to set workplace rules, hours, and wages, it must comply with the minimum wage and overtime laws, it must comply with workplace safety laws, it must offer reasonable accommodations to disabled employees, and it must provide leave to employees in certain cases. Under the Affordable Care Act, the employer may soon be required to offer health insurance.

While an employer can treat its employees however it wishes, it cannot harass them on the basis of race, sex, and the like. The employer cannot prevent employees from discussing their wages or banding together to discuss or complain about workplace conditions.

Conversely, while an employee can quit for any reason, the employee cannot misuse the employer's trade secrets or confidential information in future employment. Furthermore, if the employer obtained a covenant not to compete, the employer may be able to restrict the employee's future employment for some period of time.

The bottom line is that when we say that Texas is an at-will employment state, this is a half-truth. The reality is that the employment relationship is nominally free, but in fact heavily

regulated. This is why most large employers have sizable human resources departments. The employment relationship is a minefield for the unwary employer.

So how can employment law help you and your clients in a family court proceeding? The answer lies in the exceptions to the at-will employment rule.

III. Protections for Parents, Foster Parents, Adoptive Parents, and Others Under the FMLA.

The Family and Medical Leave Act is a federal statute that requires an employer to provide up to 12 weeks of leave per year to eligible employees. The employer cannot discriminate against an employee who takes FMLA leave, cannot interfere with the FMLA leave, and must restore the employee to the same position (or a reasonably equivalent position) at the end of the leave. As discussed below, the FMLA applies:

- When an adoptive or foster parent needs to meet with attorneys or CPS personnel in connection with an adoption or placement.
- When an adoptive or foster parent needs to attend court proceedings in connection with an adoption or placement.
- When an adoptive or foster parent needs to spend time with a newly adopted or placed child.
- When an adoptive parent, a foster parent, or any other person who is acting *in loco parentis* needs time to deal with the health needs of a child.

While the FMLA does not require the employer to pay the employee for the leave time, the employee has an absolute statutory right to use available vacation time, sick leave, or paid time off (PTO) so that paychecks keep coming during the leave period.

Unlike most employment statutes, the FMLA is an intricate statute that is backed up by extensive regulations. For the most part, the statute and the regulations place the burden on the employer to insure that it is complying with the statute. The penalties for violating the FMLA can be draconian, so most large employers are very careful when an FMLA issue arises.

A. The Scope of the FMLA

1. Which employers are subject to the FMLA?

a. General Rule: 50 Employees Within a 75 Mile Radius

The basic rule is that the employer must have 50 employees within a 75-mile radius of the employee's workplace. The statute reaches this result in a roundabout way, defining an "employer" as a person with 50 employees, but excluding coverage for employees who work at facilities with less than 50 employees if there are not a total of 50 employees within 75 miles. 29 U.S.C. § 2611(2) and (4). In practical terms, this means that:

- If the employee works in a facility with 50+ employees, the employer is subject to the FMLA.

- If the employer operates multiple locations (for example, a fast food chain), and there are a total of 50 employees within 75 miles of the employee's location, the employer is subject to the FMLA.
- If the employer has 50 employees spread around the country, the employer is not subject to the FMLA.

The reasoning here is that an employer should not be subject to the FMLA unless the employer has sufficient employees available to cover for employees who take leave.

"Public agencies" are also covered by the FMLA. The statute defines "public agency" to include most if not all federal, state, and local government employees. 29 U.S.C. § 203(x). However, most federal employees are covered by a different statutory scheme from what is discussed in this paper.

b. Special Rule #1: Employers with Fluctuating Workforces

Most employers have stable workforces. The employer either has 50 employees or does not. However, the statute provides that the 50-employee rule applies if the employer has 50 employees during 20 calendar workweeks during the current or prior calendar year. 29 U.S.C. § 2911(4)(A)(i). Thus, certain types of employers who have seasonally fluctuating workforces may be covered by the FMLA even though they do not have 50 employees at the time of the request for FMLA leave.

For example, if a company had a large volume of business during the first six months of Year 1, but then cut back its workforce to fewer than 50 employees, the employer remains subject to the FMLA during Year 1 and Year 2.

c. Special Rule #2: Integrated and Joint Employers

The FMLA also includes a special rule that is not found in most employment statutes. "Employer" is defined to include:

> (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
>
> (II) any successor in interest of an employer

29 U.S.C. § 2611(4)(A)(ii). This means that the "employer" for purposes of the FMLA may be an entity that is not the W-2 employer of the employee.

At first glance, this may sound like an academic curiosity, but it is not. Many people are the W-2 employees of small companies, such as staffing agencies and contractors, but they work as part of a larger operation. Consider three hypothetical cases:

- Wanda Worker is a W-2 employee of Micro Staffing Agency, but she is placed with Colossus Corporation. Acme has only 10 employees, but Colossus has 10,000 employees. Is Wanda covered by the FMLA?
- Larry Laborer is a W-2 employee of Lee Key Plumbers, a subcontractor for Trakt Homes, which is building a new subdivision in Fort Bend County. Lee Key Plumbers has only 10 employees, but Trakt Homes has 100 of its own employees. Is Larry covered by the FMLA?
- Bob Broker is a W-2 employee of Sellhigh Investments, an investment advisory company. Sellow has 10 employees, but the owner of Sellhigh (Mr. Bylow) operates several different businesses – a life insurance company, a mortgage company, and a bail bond company. They all operate out of the same building, and they have a total of 75 employees. Is Bob covered by the FMLA?

The regulations provide for two different tests. The first test is the "integrated employer" test. If two or more businesses are sufficiently integrated, they will be treated as a single employer for FMLA purposes:

> Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:
>
> (i) Common management;
>
> (ii) Interrelation between operations;
>
> (iii) Centralized control of labor relations; and
>
> (iv) Degree of common ownership/financial control.

29 C.F.R. §825.104(c)(2). Applying this test to our hypothetical employees:

- Bob Broker will have a good argument that he is an employee of an integrated employer consisting of all of Mr. Bylow's businesses
- Wanda Worker has the weakest argument, assuming that Micro Staffing is an independent company. However, it is not uncommon for the client (Colossus Staffing) to exercise enormous control over the staffing agency, to the point that the staffing agency is just an alter ego for the client. In some cases, the staffing agency may even be owned by the client or the principals of the client. In those situations, Wanda would have a much stronger argument.

- Larry Laborer will have a better argument than Wanda, especially if he can show that Trakt Homes manages everything and handles all employment issues on the worksite. This is not an uncommon scenario.

The second test is the "joint employer" test. This applies in situations in which a worker is deemed to be an employee of more than one entity:

> Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> > (1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
> >
> > (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
> >
> > (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R, § 825.106(a). This could potentially apply to all three of our hypothetical employees. The clearest case is Wanda Worker. In fact, the regulations state that "joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer." *Id.* § 825.106(b).

However, Wanda would not be deemed to be an employee of a single entity, as was the case under the "integrated employer" test. Although Wanda is counted as an employee of Colossus Corporation for purposes of the FMLA, the other employees of Colossus Corporation are not counted as employees of Micro Staffing Agency. Thus, it is possible for Colossus Corporation to be subject to the FMLA, but for Micro Staffing Agency not to be covered.

This is important because there is a distinction between the primary employer (normally the staffing agency) and the secondary employer (normally the client). The primary employer has the principal duty to insure FMLA compliance. In the hypothetical case, Micro Staffing Agency has no duties under the FMLA.

However, "An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer." 29 C.F.R. § 825.106(d). When the employee returns to work, the primary

employer is responsible for restoring the employee's job, and the secondary employer is responsible for accepting the employee if it is continuing to use employees from the primary employer. 29 C.F.R. § 825.106(e). Micro Staffing Agency is not required to restore Wanda to her position, but if it does, Colossus is obligated to take her back.

2. Which employees are covered by the FMLA?

The basic rule is that the employee must have worked for the employer for 12 months and must have worked 1,250 hours during the last 12 months. 29 U.S.C. § 2611(2)(A). As noted above, the definition of an employer includes successors in interest. If the employee worked for a predecessor company, the time worked for that company carries over to the successor.

However, there is a special rule for "highly compensated employees." This applies to an employee who "is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed." 29 U.S.C. § 2614(b)(2). If such an employee takes FMLA leave, the employer is not required to restore the employee to his or her job if:

> (A) such denial [of restoration] is necessary to prevent substantial and grievous economic injury to the operations of the employer;
>
> (B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and
>
> (C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

29 U.S.C. § 2614(b)(1).

3. What Are the Rights of an Employee Who Takes FMLA Leave?

First and foremost, the employee is entitled to be restored to employment at the end of the leave. Specifically, the employee is entitled:

> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

29 U.S.C. § 2614(a). There are exceptions to this for cases in which the employee's position has been eliminated, such as through the closing of a department or a plant shutdown. In such cases, the employer bears the burden of proving that the position was eliminated for reasons other than the fact that the employee took leave. 29 C.F.R. § 825.216(a).

The employer is not required to provide paid leave. However, if the employee has accrued vacation time, sick leave, or other types of leave for which the employer pays, the employee may substitute that paid leave for unpaid leave. The employer can also require the employee to use available paid leave in place of unpaid leave. 29 U.S.C. § 2612(d). For example, if the employee has four weeks of vacation time available, and then needs four weeks of FMLA leave, the employee may elect to substitute paid vacation time for unpaid FMLA leave. Likewise, the employer may require the employee to use the accrued vacation time during the FMLA leave.

The employer must maintain the employee's benefits during the FMLA leave. 29 U.S.C. § 2614(a)(2). The employee is entitled to continued coverage under group health insurance, provided that the employee pays whatever premiums are normally the responsibility of the employee. 29 C.F.R. §825.210.

In addition, the employee is protected from discrimination, retaliation, or interference with the exercise of FMLA rights. 29 U.S.C. § 2615. For example, an employer cannot (1) discharge an employee who has requested FMLA leave, (2) demote the employee or reduce the employee's pay, or (3) restore the employee to the original position, and then discharge the employee on a pretext as punishment for taking leave.

"Retaliation cases" generally follow the same framework as retaliation cases under Title VII and the other employment discrimination statutes. An employer will rarely admit that the reason for terminating the employee was the exercise of FMLA rights. Instead, the employer will usually claim that the reason for the termination was poor work performance, a violation of company rules, or some similar ground.

These cases are usually analyzed under the framework from the Supreme Court's decision under Title VII in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). This involves a three-step analysis:

i. The employee must establish a prima facie case of retaliation or discrimination by showing:

   a. The employee engaged in protected activity (exercising rights under the FMLA).

   b. The employee was qualified for the job. This is usually not an issue for existing employees, as opposed to job applicants, but it can be relevant if the alleged retaliatory act is the denial of a promotion for which the employee may not have been qualified.

   c. The employee suffered an adverse employment action, which means an action that either affected the terms and conditions of employment (firing, demotion, pay cut, etc.) or is of a nature that would dissuade a reasonable employee from exercising the protected rights under the FMLA.

d. There is evidence of a connection or nexus between the protected activity and the adverse employment action. This can come in many different forms, such as negative comments by supervisors, temporal proximity (for example, the employee is fired immediately after requesting FMLA leave or immediately after returning from leave), and other actions that give rise to an inference that the employer was retaliating.

ii. If the employee establishes a prima facie case, the employer must articulate a legitimate, non-discriminatory basis for the adverse action.

iii. The employee must then prove that the employer's stated reason was a pretext for retaliation or discrimination. This can be done by showing that the stated reason is false, that other employees who committed similar infractions were not fired, that the employer made negative comments linked to the exercise of FMLA rights, or that any other circumstances show that the employer was motivated by retaliation or discrimination.

In applying these principles, the courts regularly draw on the principles that have been developed under Title VII and similar statutes.

4. What Are the Penalties for Violations of the FMLA?

The penalties for violating the FMLA are severe. The damages for a violation of the FMLA are either (a) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation," or (b) if there are no lost wages, benefits, or compensation, any actual economic losses up to an amount equal to twelve weeks of pay. 29 U.S.C. § 2617(a)(1)(A)(i). In addition, the employee can recover an additional 100% liquidated damages (in effect, double damages), unless the employer meets the burden of proving that the violation "was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of" the FMLA. *Id.* § 2617(a)(1)(A)(iii). The employee can also recover attorneys' fees.

In other words, unless an employer can prove that it made an honest mistake, the employee will recover double damages plus attorneys' fees. If the employer manages to prove that it made an honest mistake, the employee will still recover single damages plus attorneys' fees. To say the least, FMLA violations are a serious matter for employers.

In lieu of filing a private lawsuit, an employee can file a complaint with the Department of Labor, which will investigate the employer's actions. Thus, an employer who violates the FMLA can find itself being audited by the Department of Labor and watching its employees get interviewed by government investigators. The Department of Labor can file suit against the employer, or the employee can choose to proceed with a private lawsuit.

B. FMLA Leave in the CPS Context

So when does the FMLA apply in the CPS context? Two provisions of the statute are relevant. These provisions state that FMLA leave is available:

> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

29 U.S.C. § 2612(a)(1).

1. Subsection (B): The "Placement" Provision

Although subsection (B) uses the term "son or daughter," that term is defined expansively. "For purposes of FMLA leave taken for birth or adoption, . . . 'son or daughter' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*, who is either under age 18, or age 18 or older at the time that FMLA leave is to commence." 29 C.F.R. § 825.122(c). The following persons can thus claim the leave:

- An adopted parent
- A foster parent
- Any other person who stands *in loco parentis* to the child, such as a grandparent. This is defined as "those with day-to-day responsibilities to care for and financially support a child." *Id.* § 825.122(c)(3). "A biological or legal relationship is not necessary." *Id.*

The regulations regarding subsection (B) are expansive and cover virtually everything that an employee might need to do in connection with a child placement:

> Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. **For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.** The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

29 C.F.R. § 825.121(a)(1). Thus, FMLA leave applies to:

- Pretrial activities such as meeting with counselors and attorneys
- Attending court proceedings
- Meeting with doctors or case workers
- Anything else that is "required for the placement for adoption or foster care to proceed"

In addition to leave in connection with the placement itself, the employee can take time (up to the 12 week maximum) to bond with the newly placed child.

However, if the child is being placed with a husband and wife, and if the husband and wife work for the same employer, they are limited to a combined total of 12 weeks of FMLA leave. 29 C.F.R. § 825.121(a)(3).

2. Subsection (C): The "Serious Health Condition" Provision

Subsection (C) provides that an employee may take FMLA leave in order to care for a son or daughter with a serious health condition. Again, "son or daughter" is defined expansively to include adopted children, foster children, and children for whom the employee stands *in loco parentis*.

In other words, if a child is placed with adopted or foster parents and has a serious health condition, then the adopted or foster parents have a right to FMLA leave to attend to the child's health issues. Unlike the leave provided by subsection (B), both parents can take 12 weeks of subsection (C) leave even if they work for the same employer. 29 C.F.R. 825.121(a)(4).

So, what is a "serious health condition"? The regulations on this subject are complex, but in general one of five conditions must be present:

(i) The condition must require an overnight stay at a hospital, hospice, or residential medical care facility, 29 C.F.R. § 825.114, **or**

(ii) The condition must involve a period of incapacity (for example, inability to attend school or perform regular daily activities) of more than three consecutive days **and** continuing treatment by a health care provider, 29 C.F.R. § 825.115(a), **or**

(iii) The condition is chronic in nature and requires periodic treatments over an extended period of time (for example, asthma or epilepsy), 29 C.F.R. § 825.115(c), **or**

(iv) The condition is permanent or long-term and treatment may not be effective (for example, a terminal illness or brain damage), as long as the child is under the continuing supervision of a doctor, 29 C.F.R. § 825.115(d), **or**

(v) The period of absence involves multiple treatments by a health care provider for restorative surgery after an accident or injury or a condition that would cause more than three days of incapacity in the absence of medical treatment (for example, cancer treatments or dialysis), 29 C.F.R. § 825.115€.

In other words, a common cold or the flu will not suffice. The FMLA is triggered only by truly serious, ongoing health problems. However, mental illness can qualify as a serious health condition for purposes of the FMLA. 29 C.F.R. § 825.113(d). Substance abuse treatment can qualify as a serious health condition if the treatment is by a health care provider or by a provider of health care services on referral of a health care provider. 29 C.F.R. § 825.119(a).

Thus, an employee who becomes an adoptive or foster parent for a child with a significant health problem may be entitled to FMLA leave to deal with the child's problems. This can include mental issues and substance abuse issues, as well as physical issues, provided that the specific regulatory requirements are met.

C. The Mechanism for Taking Leave

1. Requesting Leave

If the FMLA leave is foreseeable, then the employee is required to provide 30 days advance notice if practicable. If the employee cannot give 30 days' notice for some reason, then the employee must give as much notice as practicable. 29 C.F.R. 825.302(a). If the FMLA leave is not foreseeable (for example, a sudden illness or an accident), then the employee must give notice as soon as practicable. 29 C.F.R. § 825.303(a).

The employee is not required to refer to the FMLA when seeking notice, nor is the employee required to give notice in writing. Instead, the employee need only make the employer aware of the facts that qualify for FMLA coverage, as well as the anticipated timing and duration of the leave. 29 C.F.R. 825.302(c). However, if an employer has formal policies and procedures for requesting leave (for example, notifying a specific person or filling out a specific form), the employer can require the employee to follow those policies and procedures if practicable.

Once the employee has given notice, it is the duty of the employer to process the request for FMLA leave and to provide various notices to the employee. The employer has the right to require medical certifications and other information to verify the need for FMLA leave.

2. Types of Leave

The FMLA provides for three types of leave: (1) the traditional leave of absence, (2) intermittent leave, and (3) reduced schedule leave. The distinction between these types of leave will be important in the CPS and family court context.

a. The Traditional Leave of Absence

This is the simplest type of leave. For example, an employee could take four weeks of leave and simply not be expected to come to work. In the CPS context, this sort of leave would be appropriate for (a) attendance at trial, (b) post-placement bonding with a child, or (c) absence due to surgery or other extensive treatment for a child.

b. Intermittent Leave

An employee may also request intermittent leave, which is leave that is taken in bits and pieces over an extended period of time. In the CPS context, this sort of leave would be appropriate for (a) pretrial proceedings and meetings with lawyers and other personnel, and (b) dealing with the ongoing health issues of a child with a health disorder.

However, an employee does not have a right to intermittent leave in the context of child placement (*i.e.,* Subsection (B) leave). Instead, the employer must agree to this arrangement. 29 C.F.R. § 825.121(b).

Why would an employer agree to this? If the employer does not agree, then the employee must give a continuing string of FMLA notices to the employer every time the employee needs to meet with counsel or go to court, and the employer must separately process each request. Furthermore, if the employer agrees to intermittent notice, the employer gains the right to move the employee to an alternative position within the company during the pendency of the intermittent leave. 29 C.F.R. § 825.204. This temporary reassignment allows the employer to alleviate any problems that may be caused by the employee's absences. As a result, many employers will be motivated to agree to intermittent leave in Subsection (B) cases.

In the case of leave based on the serious health condition of the child (*i.e.,* Subsection (C) leave), the employer's agreement is not required. Instead, the question is simply whether intermittent leave is medically necessary. 29 C.F.R. §825.202(b).

c. Reduced Schedule Leave

Reduced schedule leave is a reduction in the employee's hours or work schedule, typically a change from full time work to part time work. In the CPS or family court context, this sort of leave would be appropriate for (a) bonding with a newly placed child, or (b) dealing with the health issues of a child.

This type of leave is subject to the same limitations as intermittent leave: the employer must agree to it in the context of Subsection (B) leave, and it must be medically necessary in the context of Subsection (C) leave.

D. Summary

The FMLA is widely used in the context of medical leave for employees, but it tends to be underutilized in other contexts. This is mostly because most employees – and most lawyers – do not appreciate the full scope of the FMLA. This is a powerful tool that can be used for the benefit of clients, lawyers, and the courts in CPS cases.

IV. "Associational" Disability Discrimination

The Americans with Disabilities Act and Chapter 21 of the Texas Labor Code prohibit discrimination against persons with disabilities. For the most part, this has no special relevance to family court cases. An adoptive or foster parent is not treated any differently from any other employee.

However, there is one exception. The ADA includes language that prohibits discrimination against an employee who is associated with a disabled person. Suppose that an employer learns that an employee is adopting, or accepting for foster placement, a child who is disabled and will

require significant care. Can the employer fire the employee because the employer believes that this will impede the employee's performance, lead to absences, or increase the employer's health care costs? The answer is no.

To date, few cases have addressed this theory of liability. The most commonly cited discussion of the matter came from Judge Posner in *Larimer v. IBM Corp.,* 370 F.3d 698, 700 (7th Cir. 2004). However, Judge Posner's discussion was fairly generic:

> Three types of situation are, we believe, within the intended scope of the rarely litigated (this is our first case) association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for an accommodation (that is, special consideration) is critical because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.

The Fifth Circuit has not discussed this theory of liability in a published opinion, but seemed to recognize the viability of this theory in a recent unpublished opinion. *EEOC v. DynMcDermott Petroleum Operations Co.,* 537 Fed. Appx. 437 (5th Cir. 2013).

The EEOC has offered interpretive guidance on "associational" disability discrimination, offering a number of helpful illustrations and examples:

> **3. What types of employer conduct does the association provision prohibit?**
>
> • An employer may not terminate or refuse to hire someone due to that person's known association with an individual with a disability.
>
> **Example B:** An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to offer him the position because Arnold disclosed during the interview that he has a child with a disability. The employer violates the ADA if it refuses to hire Arnold based on its belief that his need to care for his child will have a negative impact on his work attendance or performance.

. . . .

• An employer may not make any other adverse employment decision about an applicant or employee due to that person's association with a person with a disability.

Example E: The president of a small company learns that his administrative assistant, Sandra, has a son with an intellectual disability. The president is uncomfortable around people with this type of disability and decides to transfer Sandra to a position in which he will have less contact with her to avoid any discussions about, or interactions with, Sandra's son. He transfers her to a vacant entry-level position in the mailroom which pays less than Sandra's present position, but will allow him to avoid interacting with her. This is a violation of the ADA's association provision.

• An employer may not deny an employee health care coverage available to others because of the disability of someone with whom the employee has a relationship or association.

Example F: An employer who provides health insurance to the dependents of its employees learns that Jaime, an applicant for a management position, has a spouse with a disability. The employer determines that providing insurance to Jaime's spouse will lead to increased health insurance costs. The employer violates the ADA if it decides not to hire Jaime based on the increased health insurance costs that will be caused by his wife's disability.

. . . .

• An employer may not deny an employee any other benefits or privileges of employment that are available to others because of the disability of someone with whom the employee has a relationship or association.

Example H: A company has an annual holiday party for the children of its employees. The company president learns that one of its newly hired employees, Ruth, has a daughter with Down Syndrome. Worried that Ruth's daughter will frighten the other children or make people uncomfortable, he tells Ruth that she may not bring her daughter to the party. Ruth has been denied the benefits and privileges of employment available to other employees due to her association with a person with a disability.

• An employer may not subject someone to harassment based on that person's association with a person with a disability. An employer must also ensure that other employees do not harass the individual based on this association.

Example I: Martin and his supervisor, Adam, have had an excellent working relationship, but Adam's behavior toward Martin has changed since Adam learned

> that Martin's wife has a severe disability. Although Martin has always been a good performer, Adam repeatedly expresses his concern that Martin will not be able to satisfy the demands of his job due to his need to care for his wife. Adam has begun to set unrealistic time frames for projects assigned to Martin and yells at Martin in front of co-workers about the need to meet approaching deadlines. Adam also recently began requiring Martin to follow company policies that other employees are not required to follow, such as requesting leave at least a week in advance. Adam has removed Martin from team projects, stating that Martin's co-workers do not think that Martin can be counted on to complete his share of the work "considering all of his wife's medical problems." Though Martin has complained several times to upper management about Adam's behavior, the employer does nothing. The employer is liable for harassment on the basis of Martin's association with an individual with a disability.

EEOC, *Questions and Answers About the Association Provision of the Americans with Disabilities Act* (http://www.eeoc.gov/facts/association_ada.html).

In sum, despite the dearth of case law on the subject, it seems clear that an employer cannot fire or discriminate against an employee because the employee is the adoptive or foster parent of a disabled child.

V. Protections for Witnesses

Suppose that a key witness (for example, a foster parent) is worried that he or she might have trouble with an employer due to the need to appear in court. What can you do to help?

The answer lies in Chapter 52 of the Texas Labor Code. Section 52.051 of the Texas Labor Code protects an employee from discharge for complying with a witness subpoena:

> PENALIZING EMPLOYEE FOR COMPLIANCE WITH SUBPOENA.
>
> (a) An employer may not discharge, discipline, or penalize in any manner an employee because the employee complies with a valid subpoena to appear in a civil, criminal, legislative, or administrative proceeding.
>
> (b) If the subpoena to which a violation of Subsection (a) applies is issued by a court, the employer violating Subsection (a) may be found in contempt by the court issuing the subpoena.
>
> (c) If the subpoena to which a violation of Subsection (a) applies is issued by a legislative committee or a state agency, the employer violating Subsection (a) is subject to the authority of the committee or agency to impose a monetary penalty, not to exceed $500, on a person who violates an order of the committee or agency.
>
> (d) An employee discharged in violation of this section is entitled to return to the same employment that the employee had at the time the employee was subpoenaed

> if the employee, as soon as practical after release from compliance with the subpoena, gives the employer actual notice that the employee intends to return.
>
> (e) An employee injured because of the violation of this section by an employer may recover:
>
> (1) damages in an amount that does not exceed six months' compensation at the rate at which the employee was compensated when the subpoena was issued; and
>
> (2) reasonable attorney's fees.
>
> (f) It is a defense to an action by an employee under this section for reemployment that reemployment is impossible or unreasonable because of a change in the employer's circumstances while the employee complied with the subpoena.

If the employee has been subpoenaed to appear in court (or for a deposition), the employee is protected from discharge. If the employee is discharged, the employee is entitled to reinstatement if the employee promptly notifies the employee that the employee is released to return to work. If the employer fails to reinstate the employee, then the employer is liable for back pay damages (limited to six months) and attorneys' fees.

It is not difficult to issue a "friendly" subpoena. Subpoenas are governed by Rule 176 of the Texas Rules of Civil Procedure. An attorney has the power to issue a witness subpoena, so you can issue the subpoena yourself. Tex. R. Civ. P. 176.4(b). Your client can accept the subpoena by signing it, so you do not need to hire a process server. Tex. R. Civ. P. 176.5(b)(1). A subpoena form is available from the Harris County District Clerk's office:

https://www.hcdistrictclerk.com/Common/Forms/pdf/Civcp01Witness_Subpoena_Suboena_Duces_Tecum.pdf

There have been only two court cases that have ever addressed this statute, and neither of them are published opinions. This suggests that employers do not make an issue when they are shown a valid subpoena. However, if an employer makes trouble, you can simply send them a copy of the statute.

But what about your own client? Suppose that you represent a grandparent who has intervened in the proceeding, and who is worried that he or she might have trouble with an employer. What can you do?

The simplest solution is to get another party in the case to subpoena your client. If you have another party who is aligned with your client, this may be a workable solution. Under appropriate circumstances, you might even be able to prod an adverse party into issuing a subpoena for your client.

However, your options are limited if you cannot get another party to help you. In theory, you could subpoena your own client. Nothing in the rule limits a subpoena to third parties, and there is no case law saying that you cannot subpoena your own client. Still, an employer could argue that this is not a "valid" subpoena because your client is compelling *himself* to show up for the proceeding. If your client wound up suing the employer, your client would be in an unsympathetic position with the court. Still, this tactic could give your client some leverage in dealing with a difficult employer.

VI. Retaliation for Reporting Child Abuse or Neglect

Texas law provides strict reporting requirements for actual or suspected child abuse or neglect. Most family law practitioners know this. However, it is less well known that Texas law provides expansive protections for persons who report child abuse or neglect.

Let's start with the reporting requirements, which are contained in section 261.101 of the Family Code:

First of all, subsection (a) contains a general provision that applies to everyone: "A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter."

Next, subsection (b) contains a provision that applies to "professionals," which includes a broad range of people:

> If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code [indecency with a child], and the professional has cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

Finally, subsection (b-1) contains a generally provision applicable to adults who were abused as children:

> In addition to the duty to make a report under Subsection (a) or (b), a person or professional shall make a report in the manner required by Subsection (a) or (b), as

applicable, if the person or professional has cause to believe that an adult was a victim of abuse or neglect as a child and the person or professional determines in good faith that disclosure of the information is necessary to protect the health and safety of:

(1) another child; or

(2) an elderly person or person with a disability as defined by Section 48.002, Human Resources Code.

Section 261.101(d) of the Family Code provides that the duty to report applies to attorneys, members of the clergy, and other persons whose communications would otherwise be privileged.

So, what happens if someone complies with the statutory duty to report child abuse or neglect, but then encounters retaliation from an employer?

-- Example: A teacher reports child abuse by another teacher and is then disciplined or terminated by the school.

Section 261.110 of the Family Code is the anti-retaliation provision. This was amended in the last legislative session, effective September 1, 2019.

Who Is Protected?

The anti-retaliation statute applies only to "professionals." It does not apply to parents.

What Is Prohibited?

The original language of the statute was fairly broad, as long as the report is in good faith and is made to a supervisor or public authority:

An employer may not suspend or terminate the employment of, or otherwise discriminate against, a person who is a professional and who in good faith:

(1) reports child abuse or neglect to:

(A) the person's supervisor;

(B) an administrator of the facility where the person is employed;

(C) a state regulatory agency; or

(D) a law enforcement agency; or

(2) initiates or cooperates with an investigation or proceeding by a governmental entity relating to an allegation of child abuse or neglect.

The amended version is even broader. The legislature added the term “adverse employment action” and defined that term broadly (borrowing language from Title VII case law involving federal retaliation claims:

> "Adverse employment action" means an action that affects an employee's compensation, promotion, transfer, work assignment, or performance evaluation, or any other employment action that would dissuade a reasonable employee from making or supporting a report of abuse or neglect under Section 261.101.

In addition, the statute contains a burden shifting provision that is common to retaliation statutes under state law:

> A plaintiff suing under this section has the burden of proof, except that there is a rebuttable presumption that the plaintiff's employment was suspended or terminated or that the plaintiff was otherwise discriminated against for reporting abuse or neglect if the suspension, termination, or discrimination occurs before the 61st day after the date on which the person made a report in good faith.

What Are the Remedies?

The statute provides for broad remedies, including injunctive relief, reinstatement, and damages:

> (d) A plaintiff who prevails in a suit under this section may recover:
>
> (1) actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown;
>
> (2) exemplary damages under Chapter 41, Civil Practice and Remedies Code, if the employer is a private employer;
>
> (3) court costs; and
>
> (4) reasonable attorney's fees.
>
> (e) In addition to amounts recovered under Subsection (d), a plaintiff who prevails in a suit under this section is entitled to:
>
> (1) reinstatement to the person's former position or a position that is comparable in terms of compensation, benefits, and other conditions of employment;
>
> (2) reinstatement of any fringe benefits and seniority rights lost because of the suspension, termination, or discrimination; and

(3) compensation for wages lost during the period of suspension or termination.

Does This Apply to State and Local Government Employers?

Yes, and the statute waives sovereign immunity. It does place damages caps on claims against state and local governments:

> (f) A public employee who alleges a violation of this section may sue the employing state or local governmental entity for the relief provided for by this section. Sovereign immunity is waived and abolished to the extent of liability created by this section. A person having a claim under this section may sue a governmental unit for damages allowed by this section.
>
> (g) In a suit under this section against an employing state or local governmental entity, a plaintiff may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds:
>
> (1) $50,000, if the employing state or local governmental entity has fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
>
> (2) $100,000, if the employing state or local governmental entity has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
>
> (3) $200,000, if the employing state or local governmental entity has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year; and
>
> (4) $250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.
>
> (h) If more than one subdivision of Subsection (g) applies to an employing state or local governmental entity, the amount of monetary damages that may be recovered from the entity in a suit brought under this section is governed by the applicable provision that provides the highest damage award.

Does This Protect People Who Commit Acts of Child Abuse and Then Report Themselves?

No. The statute expressly excludes protection for this: "This section does not apply to a person who reports the person's own abuse or neglect of a child or who initiates or cooperates with an investigation or proceeding by a governmental entity relating to an allegation of the person's own abuse or neglect of a child."

VII. Conclusion

Even though Texas is a pro-business, at-will employment state, employees still have significant protections. The courts and the legislatures understand that there are times when the business interests of employers must give way to matters of fundamental public policy – the need for adoptive and foster parents to participate in the family court process, the need for witnesses to attend court proceedings, the need for parents to care for children, and the need for parents of disabled children to maintain their employment.

The rules and statutes discussed in this paper can be used to benefit yourself and your clients in CPS and family court matters. Use them!