

USING SICK LEAVE OR FMLA LEAVE TO CARE FOR FAMILY MEMBERS: THE GRAY AREAS

By: Karen Sutherland

The use of sick leave or FMLA leave to care for family members can be difficult to monitor because the person who has the medical condition is someone other than the employee who is taking leave. The usual questions that apply to sick leave (such as “are you too sick to do your job?”) do not apply. Instead, the issue is whether a family member of the employee has a medical condition that qualifies, and whether the employee is caring for that family member. Time off to care for family members is already a common concern, and will arise more often next year when the statute that currently allows employees to use sick leave to care for a child is expanded to include other family members, as was discussed in last month’s article.

LEGAL BACKGROUND

Washington law currently allows employees to use paid sick leave to “care for” a child under age 18 in most situations. Effective January 1, 2003, the law applies to all leave (not just sick leave), the definition of “child” is broadened, and an employee can also use leave to care for a spouse, parent (including biological parents and persons who acted as parents when the employee was a child such as step-parents), parent-in-law, or grandparent. Additionally, if an employer is covered by the FMLA, qualified employees are entitled to leave to care for a variety of family members such as spouses, children and parents.

What it means to “care for” a family member has been a subject of debate. The state law does not define “care for,” which means that the state courts are likely to use similar federal law for guidance. Interpreting federal law (the FMLA), 29 CFR 825.116 discusses what is meant by the phrase “needed to care for” a family member. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

The term “care for” also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently--such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

A recent Ninth Circuit case, Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union Local 952; Albertson’s, Inc., broadly interpreted the “care for” language to include a situation where a son took leave from work to “deal with” his father’s depression and to settle the estate of his murdered sister. The court found that the situation was a “close call,” but that there was sufficient evidence to allow the case to go forward. Specifically, Mr. Scamihorn’s

father was depressed following the death of Mr. Scamihorn's sister. Mr. Scamihorn moved from California to Reno, where his father lived, and spent time with his father. During the time that Mr. Scamihorn was with his father, his father was employed full time and did not miss any work due to illness, according to his deposition and his employer's records. Later, however, he submitted a declaration stating that he missed a week of work for his daughter's funeral and five days of work the following month because he was so depressed he could not go to work, though he did work from home. When he was working, Scamihorn's father drove himself to work (including driving to one office that was 52 miles from his home) and to most of his counseling sessions, though there were occasions when Mr. Scamihorn would drive his father to counseling.

The "care" that Mr. Scamihorn provided to his father consisted of talking with his father about his sister's death, shoveling snow, chopping firewood, clearing the backyard and cleaning the garage. His father was able to shower, dress, eat, drive, take care of medical safety needs and engage in various daily activities without assistance by others. Additionally, Mr. Scamihorn's father did not live alone. His mother lived there, too.

The Scamihorn case and the regulation quoted above demonstrate how broadly the concept of "caring" for a family member is defined by the courts and the Department of Labor.

PRACTICAL GUIDELINES

- Be aware that employees can use FMLA leave and their sick leave (and, after the first of the year, other leave) to care for certain family members.
- Be aware that the standard for determining whether an employee is needed to care for a family member is very low.
- Be aware that "caring for" a family member includes providing psychological care, such as being there for the family member to talk to.
- Be aware that pregnancy and childbirth generally qualify as serious medical conditions that are covered by the law, and that employees may take time off to "care for" qualified family members who are pregnant or who have just given birth even if your organization does not have a maternity or paternity leave policy.
- The fact that there are others in the household such as siblings or parents or a nurse who can provide the care does not matter. The employee is still allowed to take the time off.
- The fact that another family member who works for a different employer has unused sick leave does not matter. The employee is still allowed to take the time off.

Karen Sutherland is the Assistant Managing Member and the Chair of the Employment and Labor Law Practice Group at Ogden Murphy Wallace, P.L.L.C. where she represents businesses, municipalities and other organizations on employment issues. Karen can be reached at ksutherland@omwlaw.com or 206-447-7000.