A LEGAL PERSPECTIVE

Jeffrey J. Greenberger Attorney at Law
Katz, Greenberger & Norton LLP
105 E. Fourth Street, Ste. 400
Cincinnati, Ohio 45202-4056
(513) 721-5151

FAMILY & MEDICAL LEAVE ACT

The Family & Medical Leave Act is easiest of the federal laws to violate without knowing it. It is sometimes amazing that so many employees think they are entitled to leave and that so many employers give the leave without understanding the Act. The Act may not apply to you at all. You may ask, "Why did I then write this article?" It is certainly written for the bigger operators but it is also written for smaller operators to know why the FMLA does not apply to them and what the consequences are of expanding your operations that may trigger compliance.

The Act may only apply to larger companies; you must have 50 employees within a 75-mile radius of each other in order for the Act to apply, although a very few states have lowered the number needed to qualify for the Act. As an example, IBM may have an office of 40 employees in the middle of Iowa. Although IBM, as a corporation at its main headquarters would be subject to the Family Medical Leave Act, the office in Iowa, if there are no other IBM offices within 75 miles of this office, are not required to abide by the FMLA.

Where concern may arise is if you own multiple businesses in a certain city, for example, a construction company and a self-storage facility. In certain circumstances, if you have 50 or more employees, you may have to observe the FMLA at your self-storage facility.

Even if you are an employer who has more than fifty employees, it does not mean that every employee is entitled to the benefits of the Act. To be entitled to be covered by the Act, the employee must have: (1) had one year of service prior to requesting the leave; and (2) have worked at least 1,250 hours during that year.

There is also an exception which excludes highly-compensated key executives from the entitlement of the Family Medical Leave Act, although this is not a clearly-defined term.

Assuming you are the employer who has more than fifty full and part time employees within a seventy five mile radius, and assuming you have employees who have met this threshold of employment, what triggers entitlement to benefits? The scope of availability of these benefits is limited to: (1) The birth or adoption of a child; (2) If the employee him or herself has a "serious health condition" (defined below); or (3) If the employee is needed to care for an immediate family member (defined only as spouse, parent or child) with a "serious health condition".

We will get back to the definition of a "serious health condition". If you are this employer, and your employee makes this request: (1) they are entitled to up to twelve weeks of leave in a twelve-month period, if needed; (2) the leave is unpaid, unless you agree otherwise; and (3) you can require the employee to use all unused paid leave as part of the twelve week period. That is, you can make the employee use up all of their unused paid or unpaid sick leave, vacation days, personal days, etc., as part of the twelve week leave period.

While the leave is unpaid, you do have to maintain benefits for this employee during the leave. That is, if you pay 100% of the health insurance for the employee, you must maintain

100% of the health insurance during the leave. If you require some sort of split, you can only require the employee to continue to pay the split amount, and of course if the employee does not pay the split amount, you can terminate your end of the health insurance or benefit coverage.

At the end of the leave, you must give the employee their old job or a substantially similar job with the same pay.

The definition of "serious health condition" which allows you to take leave as defined by case law is a physical or mental condition and is a condition that meets one of the following three criteria: (Remeber, it applies to the employee or an immediately family member).

1. Any health condition requiring inpatient hospital treatment, if even for one day, is deemed under the Act to be serious enough to trigger the right to the leave under the FMLA.
2. A condition which incapacitates the employee for at least four days and requires continuing medical treatment. Continuing medical treatment is defined as at least two contacts with a medical professional, not within any specific period of time. That is, if you go to the doctor one time and begin a course of physical therapy, and you are incapacitated for four days, the employee is entitled to leave. It has also been held that a doctor visit and then having a prescription filled constitutes "continuing medical treatment".
3. A chronic or permanent condition which requires periodic medical

treatment. Thus, asthma, migraine headaches and arthritis have, in some circumstances, been found to be serious health conditions.

Intermittent leave or reduced schedule leave are also permitted under the FMLA. That is, if it is medically necessary to allow the employee to leave periodically for short periods to receive treatment such as dialysis, or to go home and care for a loved one every Thursday afternoon, for example, and it otherwise qualifies under the Act, you have to allow the employee to take the leave.

There is a notice requirement for both employers and employees. The employee is supposed to give thirty days notice of an intent to take a leave, but only if it is practical to do so. If it is not practical, the employee must give only as much notice as can reasonably be expected. The employee is not required to ask for FMLA leave specifically. It is the employer's responsibility to determine if the time off qualifies as FMLA leave and the employer has to notify the employee that the time off counts against their FMLA leave time. For example, the employee calls in sick and is out for four days, In theory, the employee could have been suffering from a condition that incapacitated him/her for four days, and if they went to the doctor two times, it could be considered FMLA leave, at which time you are required as the employer to notify the employee that the time counts against their FMLA leave time for the year. The employer's notice has to be in writing and the employer is supposed to tell the employee, within a reasonable period of time, that their time off is charged against their FMLA time. In the beginning, the Department of Labor had very strange rulings that said if you did not give the employee notice within a reasonable time, you may waive the right to claim that

the leave was FMLA leave. As an example, in the older cases where an employee calls in with a migraine headache, if the employer did not give the employee written notice at that time that it may be FMLA leave, then the employee was not charged with the time. Courts have subsequently tried to straighten out these over-interpreted rulings and give the employer a reasonable period of time to serve notice, but notice in writing must be given. I admit this is tricky.

There is a two-year statute of limitations on most actions. The employee can have a jury trial; if they win, they would get their benefits, back wages, and get their job back, plus attorney's fees and liquidated damages in an amount equivalent to the award of lost wages and benefits.

Again, this area of the law is full of potential pitfalls and mistakes are easy to make, without intending to do so. If you believe you may be subject to the terms of the Act, confirm you have the employees in number and location to qualify for the Act and make sure you know which employees are actually eligible. Then you should consider a review of your employment practices with a qualified attorney. If you are not subject to the Act, first be grateful, but also make certain you are not giving leave to which the employee is not entitled.

Jeffrey Greenberger is a Partner with the law firm of Katz Greenberger & Norton LLP in Cincinnati, Ohio and is licensed to practice in the states of Ohio and Kentucky. This column is for the purpose of providing general legal insight into the Self-Storage field and should not be substituted for the advice of your own attorney.

Mr. Greenberger's practice focuses primarily on representing the owners and operators

of commercial real estate including self-storage owners and operators.

Mr. Greenberger is the legal counsel for the Ohio Self-Storage Owners Society, Inc., and the Kentucky Self-Storage Association, Inc., as well as a regular presenter at Inside Self-Storage Trade Shows. He has also appeared in numerous adult films, with tacky titles, which are available for $14.95 each (vhs), or $19.95 (DVD). Soundtracks of the music for these films are also available for a nominal fee. You can send your questions, comments, or suggestions for future topics to Jeffrey Greenberger at jjg@kgnlaw.com, or mail them to Jeffrey Greenberger c/o Katz Greenberger & Norton LLP, 105 E. Fourth Street, Suite 400, Cincinnati, Ohio 45202 or you can reach Mr. Greenberger at (513) 721-5151.