COURSE #91012 — 5 CONTACT HOURS/CREDITS Release Date: 08/01/22 Expiration Date: 07/31/25

Family and Medical Leave: Law, Health Care, and Social Services

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- Read the enclosed course.
- Complete the questions at the end of the course.
- Return your completed Evaluation to NetCE by mail or fax, or complete online at www.NetCE.com. (If you are a physician, behavioral health professional, or Florida nurse, please return the included Answer Sheet/Evaluation.) Your postmark or facsimile date will be used as your completion date.
- Receive your Certificate(s) of Completion by mail, fax, or email.

Faculty

Beth Ribet, PhD, JD, is the co-founder and co-director of Repair, a health and disability justice organization. Dr. Ribet obtained her doctorate in Social Relations (Sociology & Anthropology) from the University of California-Irvine, and her law degree at UCLA, with a specialization in Critical Race Studies. (A complete biography appears at the end of this course.)

Leslie Bunnage, PhD, is an associate professor of sociology and director of the Lewinson Center for the Study of Labor, Inequality & Social Justice at Seton Hall University. Her research falls within the two main areas of social movement mobilization and strategic formation and labor and inequalities. (A complete biography appears at the end of this course.)

Lisa Concoff Kronbeck, JD, graduated from UCLA School of Law in June 2010 and was admitted to the California State Bar later that year. She also holds a master's degree in public policy from the UCLA School of Public Affairs, with a concentration in health and social policy. (A complete biography appears at the end of this course.)

Faculty Disclosure

Contributing faculty, Beth Ribet, PhD, JD, has disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

Contributing faculty, Leslie Bunnage, PhD, has disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

Contributing faculty, Lisa Concoff Kronbeck, JD, has disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

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The division planners and director have disclosed no relevant financial relationship with any product manufacturer or service provider mentioned.

Audience

This course is designed for all physicians, physician assistants, nurses, social workers, counselors, and allied healthcare professionals with patients who require or would benefit from protected leaves of absence.

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Course Objective

The purpose of this course is to provide healthcare professionals with the information necessary to guide patients and make clinical decisions regarding the needs for an extended leave from work.

Learning Objectives

Upon completion of this course, you should be able to:

1. Outline the types of leave available in the United States.
2. Describe the impact of leave-taking on individual, family, and community health.
3. Identify common obstacles to leave-taking.
4. Discuss the legal rights of workers to take leave.
5. Analyze the role of healthcare and social service providers in ensuring access to leave.

INTRODUCTION

Family and medical leave in the United States has a substantial legal and social history, with certain states providing leave-taking rights as early as the 19th century [1]. In contemporary parlance, family and medical leave, also known as FML or "leave-taking," is the practice of taking a temporary leave of absence from employment for a set of legally protected and/or employer-sponsored reasons [1]. Leave-taking is generally recognized as a vital resource for worker and family health [2]. Millions of workers have exercised rights provided since 1993 under the federal Family and Medical Leave Act (FMLA), and existing analyses indicate that access to appropriate leave-taking is substantial factor in worker and family health. It also affects gender equity in employment and the ability of parents and children to bond during infancy or subsequent to an adoption [2; 3]. In order to meet the needs of patients and maximize family, community, and public health, healthcare practitioners and institutions should be able to fully understand their prospective role in helping to ensure appropriate leave-taking access.

FORMS OF LEAVE-TAKING AVAILABLE IN THE UNITED STATES

TYPES OF LEAVE-TAKING

Typically, family and medical leave-taking is full-time, meaning that workers will stop working for a set period of days or weeks. However, less commonly, leave-taking may involve a reduction of work hours without a complete cessation of employment [4]. Types of leave-taking in the United States most commonly include medical or personal disability leave, caregiver leave, and parental or pregnancy leave [4]. All three of these types of leave are provided for at the federal level by the FMLA [4]. The most common form of leave-taking is medical or personal disability leave, accounting for slightly more than 50% of all worker leave-taking in the United States [5]. Caregiver and parental or pregnancy leave combined account for the remainder (slightly less than 50%) of U.S. family and medical leave-taking [5].

Medical leave is sometimes conflated with workers' compensation programs, for the understandable reason that both involve time off of work for a health or medical reason [6]. However, separate laws, rules, and resources affect workers' compensation programs, and as such, family and medical leave policy and programs are generally treated as distinct from workers' compensation, encompassing forms of medical leave that are either not related to on-the-job injuries or that may be available after workers' compensation benefits expire [6]. It is particularly helpful for medical and social service providers to understand this distinction, as workers who use workers' compensation benefits until they expire may return to work before medically advisable in the event that options for medical leave-taking are not fully explored. Although, in practice, leave-taking may also overlap with other forms of time off of work, including vacation time and short-term use of sick days or personal days, under law and policy, family and medical leave-taking are usually treated as somewhat distinct from each of these other practices as well [6].

Some U.S. states enable leave-taking for additional reasons, and the FMLA has similarly been interpreted using an expanded scope. For instance, domestic violence leave-taking is a more recent development and enables workers who are victims of domestic violence, or related forms of assault in some states, to take leave while recovering from abuse, while engaged in legal processes such as obtaining a restraining order, or to facilitate safety, for instance when a victim of violence needs to temporarily relocate to another home or shelter not located near a place of employment [7].

Employers or U.S. states may also allow specific forms of short- or long-term leaves from work for other specific purposes, including bereavement or medical events or appointments, such as donation of blood or bone marrow [8]. For the purposes of this course, the more common categories of medical or personal disability leave, caregiver leave, parental or pregnancy leave, and domestic violence leave will be the focus. It should be acknowledged that definitions of family and medical leave are not entirely consistent across state and federal legal systems. For instance, in some states, the term "medical leave" may be treated as if it is roughly interchangeable with "sick leave," while in other states and under federal law, the two terms are different, with "sick leave" referring to short-term use of days off, generally without comparable requirements in terms of documenting the severity of a medical condition or the need for more prolonged leave required to access "medical leave" [9].

ACCESS TO LEAVE

The right or ability to take leave can have different meanings for workers. Workers may formally have the right to take a leave of absence under federal law (the FMLA) but may in practice experience obstacles to doing so [10]. A particularly common example involves the ability to afford unpaid leave. The federal law provides workers with rights to take an unpaid leave of absence without retaliation and without loss of benefits, such as health insurance, if such benefits are already employer-provided [4]. However, for workers who live "paycheck to paycheck," an unpaid leave of absence for more than a very short duration often generates substantial hardship [1].

In practice, many workers do not have adequate or substantiated access to leave [11]. For those who do, however, access to leave can be provided through a variety and sometimes a combination of channels [12]. Employer-provided leave can be part of the formalized infrastructure of employment benefits, supported by disability insurance carriers or by in-house policy and funding reserves [13]. Employer-provided leave—particularly with relatively smaller businesses that may be exempt from legal coverage, but characterized in some cases by closer personal relationships—can also manifest more informally, based on assurances or agreements to maintain benefits during prolonged absences and the promise that the "job will be waiting."

Workers may be anxious about negotiating these questions with employers and therefore may underutilize prospective leave options. Healthcare and social service providers may be able to facilitate leave access by assisting workers in thinking through the prospects for pursuing informal options or agreements and developing strategies or talking points for approaching employers. In these instances, medical documentation can also play a vital role in highlighting to employers the legitimacy of such requests and in allowing parties to plan for likely recovery or return times. Often, such employers want some sense that leave is not thoroughly unpredictable and open-ended. The indirect involvement of service providers through the provision of letters or other documentation providing the broad contours of the need for leave is particularly useful in helping workers communicate to their employers that the need for leave is appropriate, finite, and compatible with future successful employment.

In some U.S. states, the state will provide certain categories of workers with various forms of leave-taking benefits in order to build on the rights already provided at the federal level [14]. That is, the U.S. government provides a right to leave, but does not fund that right; states can voluntarily opt to provide workers with access to material benefits, typically wage-replacement [15]. In these instances, the state will enable workers to qualify for state-provided wages, usually based on a percentage of past earnings or income, for a finite period of time, in order to enable workers to take family and medical leave without the hardship of losing all income

[16]. Most such programs operate similarly to (but are distinct from) state unemployment insurance by providing checks or deposits to qualifying workers until they return to work or the legally covered leave period expires [17]. Some states, such as Nevada, also structure unemployment benefits to factor the expiration of legally protected family or medical leave into the degree of benefits provided. In these cases, full (as opposed to partial) unemployment benefits will essentially become available for workers who exhaust their leave-taking benefits before they are able to return to work [18]. A growing minority of U.S. states presently provide state-paid access to leave for workers across employment sectors, this area of public health policy appears to be gaining traction, as evidenced by new legislation in the past 10 years [19]. Further, efforts at the federal-level to expand FMLA-based protections to include paid-leave have been introduced in successive sessions, with the Family and Medical Insurance Leave Act (FAMILY Act) moving as far as committee and subcommittee in Congress and the House, respectively, before stalling-out in 2020 [82; 83].

The events surrounding the COVID-19 epidemic led to the U.S. government passing temporary legislation in April 2020 for emergency funding to employers in order to provide paid-leave and/or expanded family and medical leave to most workers regardless of their FMLA-related status [84]. Although these measures in the Families First Coronavirus Response Act (FFCRA) expired at the end of 2020, they inspired the expansion of permanent protections in some states, including somewhat novel provisions for schooling/education-related leave for workers caring for children [69]. For example, California continued to extend temporary measures rooted in those expanded protections due to COVID-19 through most of 2022 [85].

Even in states that do not generally provide state-paid access to leave to workers in private employment, a majority support some form of paid access to leave for workers who are state employees. Therefore, it is important for healthcare providers to understand that blanket statements like, "Our state never pays for leave-taking," may not apply to civil servants or may be subject to special exceptions based on occupation (e.g., public school teachers, law enforcement). Resources may be further supplemented by particular counties or municipalities, such that the resources available to a civil servant in a particular county may be layered at federal, state, and local levels. Additional rights and resources also attach to veterans under federal and, in some instances, state legislation [20].

It is not uncommon for leave options to be underutilized because neither workers nor their healthcare providers are fully aware that options beyond the FMLA exist [21]. It is also not uncommon for healthcare and social service providers to confuse multiple and overlapping areas of law when contemplating workers' compensation, family and medical leave, and permanent disability benefits (i.e. social security), a challenge further complicated by the fact that additional rules and regulations may apply under state law [6]. While healthcare and social service providers cannot and should not be expected to provide legal counsel, developing a basic understanding of the scope of benefits available in the state in which one practices is especially helpful in order to properly refer and advise patients about the process of coupling medical treatment plans with access to health-related legal rights. It is equally if not more important to be able to direct patients and consumers to the sites or sources of information that will fill in gaps in service provider knowledge. For instance, each state has a Department of Labor with publicly available information or access to services that can provide information regarding available resources and localized processes. An additional resource list is also provided at the end of this course.

ELIGIBLE CANDIDATES FOR LEAVE

Several factors influence whether an individual worker is among those who have a legally protected right to take family and medical leave in the United States. Generally, these factors fall into three categories based on the basis for leave, the worker's status within her/his workplace, and the size and type of employer. A more detailed overview of the baseline legal rules and definitions is presented later in this course. This section introduces these three factors, as they are likely to be relevant in guiding clients and patients.

The Basis for Leave

As indicated, leave-taking may be protected for individual medical/disability needs, for parents proximate to a birth or adoption, for family caregivers, and, in some states or circumstances, for survivors of domestic violence. For medical and caregiving leave, a critical factor in determining leave eligibility involves the severity of the need, which the FMLA defines as a "serious injury or illness" [4].

Medical/health documentation is almost always a vital element of leave access. For personal medical or disability leave, it is typically not necessary to specify that a worker is completely incapacitated (unless this is true). The general threshold for leave eligibility is that the worker is temporarily either unable to work at all or cannot do so without substantial threat to health or safety. If it would be physically conceivable that a worker could show up to work and attempt to perform but doing so would substantially exacerbate an illness or injury, this is sufficient for the purposes of establishing that a person cannot reasonably work.

In practical terms, documentation that indicates only that leave-taking is in a patient's or client's "best medical interest" might be insufficient, but language indicating "medical necessity" or specifying that leave is mandatory for the purposes of restoring health, functionality, and/or employability will serve the purpose of documenting medical eligibility. Providers who exaggerate or distort the need for leave-taking with the intention of ensuring eligibility may inadvertently harm their clients or patients in addition to potentially committing a breach of medical ethics. For instance, if a provider were to indicate that a condition is so severe that a patient might never be able to recover in any respect, this documentation might actually trigger loss of employment, because the basic premise of leave-taking is that there is at least a substantial prospect of return-to-work. When the likelihood of return-to-work is uncertain, it is best to avoid speculation and simply present the need for leave based on the estimated time the worker will likely require, up to the maximum available. In essence, documentation should be accurate and clearly stated (to the extent possible, allowing for medical terminology), should emphasize medical necessity, and should not prematurely indicate that absence from work is certain or extremely likely to be permanent.

For caregiver leave, healthcare or social service providers also play a role in providing required documentation for employers and/or government agencies and in counseling family members of ill or injured persons about their options to secure leave. Providers should keep in mind that, as with other areas, there can be different rules for states or municipalities, as compared to the federal FMLA. In simple terms, a "caregiver" is a person who needs to leave employment for a period of time in order to address the health- or disability-related needs of a family member [22]. Providers will generally need to document that the person who is the proposed recipient of care has a serious or substantial illness or injury, such that access to a caregiver is medically necessary [22].

For parental leave, providers should be mindful that both adoptive and birth parents can potentially qualify for leave [22]. Even absent adoption, parental leave is also not exclusively coupled with pregnancy; for instance, parents using a surrogate can qualify for leave to bond with an infant child. For women giving birth, earlier leave-taking for pregnancy-related complications (beyond the scope of a healthy pregnancy and delivery) essentially overlaps with disability leave and can be covered, as can time off for post-natal recuperation [23]. Either parent can

qualify for leave to care for and bond with a newborn [24]. While only pregnant women are eligible for disability-related leave in the event of pregnancy complications, partners who are not pregnant may qualify for caregiver leave. Parental leave therefore may operate distinctly from or in tandem with disability and caregiver leave, depending on the family and medical circumstances.

The Worker's Status in the Workplace

As with other areas of family and medical leave law, exact definitions and resources will vary between federal, state, and even municipal legal instruments. Employers may also voluntarily create policies providing leave rights to workers beyond those required by applicable law. In order to determine whether an individual worker is leave eligible, appropriate steps include consulting with the employer's human resources division in order to ascertain whether any specific resources or options are available and reviewing municipal, state, and federal guidelines regarding eligibility. Examples of factors that bear on eligibility include length of time employed, hours or time-percentage worked per week or in a one-year period, and, in some instances, the type of position or work involved [14].

It is important that providers not casually assume workers are ineligible for leave. For instance, it would be easy to assume that a worker who is classified as a private contractor rather than an employee is ineligible (and in many instances, this will be true). However, in instances where contractors derive primary income from a single client/employer, are working onsite, and/or are more directly supervised than a private contractor normally would be, this obstacle to leave eligibility may be overcome [25]. Workers who are ineligible for leave under the most commonly referenced legal instrument, the FMLA, may still secure coverage at the state, local, or employer-level [26]. So, it is important not to assume prematurely that, for example, someone who is working fewer hours or was recently hired is ineligible for any coverage, even if they have no federal protection.

Certain categories of workers will not be covered under any instrument. For example, undocumented workers—defined as those who are not authorized to work legally in the United States—will usually not be protected by any area of family and medical leave law (although a Wisconsin court ruled that undocumented workers are eligible for leave under the FMLA, without back pay) [27]. New hires and temporary workers who are employed through an employment agency generally do not qualify for family and medical leave rights unless they can establish consistent employment with a particular employer for a substantial period of time or unless the temporary employment agency meets the requirements for an eligible employer [25].

As discussed, in guiding clients and patients regarding their leave eligibility, providers should, as a rule, be cautious about assuming or conveying that leave is unavailable too quickly. By the same token, providers should not be overly casual in communicating to clients and patients that leave is an option without first having verification that the individual's employment status fits within established legal guidelines or employer-initiated policies. Providers should be prepared to share family and medical leave-related information that will help inform patients and clients about the reasons to explore leave options, without providing premature assurance about eligibility.

As an example, it would be effective and responsible to communicate: "If you are eligible for leave under the law or through your workplace, then we can provide you with the documentation you need to take some time off of work, without losing your job permanently and without giving up your workplace benefits. We will need to find out what your leave options are, and then we can proceed." On the other hand, it might mislead a consumer or client in a harmful manner to communicate, without first verifying eligibility and leave options: "I can write a letter to your boss telling them you need this time off of work, and then you won't have to go back to work until your treatment is complete." In the latter instance, should it turn out that the employee is ineligible or that s/he does not have enough leave

time available to correspond to the duration of treatment, the employee may make poorly informed health and economic decisions that will ultimately jeopardize her or his employment or ability to recover safely from a course of treatment.

Size and Type of Employer

In cases in which workers otherwise meet all of the legal criteria required for coverage under federal, state, and/or municipal legal instruments, some workers may still be ineligible for leave-taking based on the type of employer [28]. Very small private businesses (e.g., fewer than four employees) will almost never be covered under any instruments. However, if a small business is part of a larger chain, it may still qualify as an "employer" covered under family and medical leave law if the larger corporation has a substantial ownership and managerial interest in the smaller business. Small businesses (fewer than 50 employees) that are wholly privately owned and managed, even if they are part of a larger franchise, may not qualify as "employers" for the purpose of FMLA coverage [28]. In some states and municipalities, the number of employees required may be substantially lower, and others may have no provisions below the federal requirements (discussed later in this course). Employers that are heavily seasonal (e.g., employing lifeguards only in summer and not employing anyone during the rest of the year) may also not meet the threshold for family and medical leave coverage. As noted, different rules may also apply depending on whether the employer is private or public (e.g., civil servants, military). Note that businesses that are not bound by the terms of the law may still voluntarily adopt internal family and medical leave policies, such that before determining leave is unavailable, workers can inquire about their options with their employers.

Practically, when advising clients and patients, providers should highlight three tests for eligibility:

- **Is the reason for leave appropriate under relevant state, federal, or municipal law?** Keep in mind when assessing coverage under state or municipal law, for employees who live and work in different states or different cities, that it will generally be the location of the workplace that determines which law applies. So, for instance, providers working near a state border should ideally be at least minimally familiar with the relevant policies in the neighboring state(s) before attempting to guide clients. Healthcare providers play a critical role in helping patients and clients answer this particular question, because questions of medical necessity or the seriousness of an illness or injury are important in determining whether the proposed reason for leave-taking is legally appropriate.
- **Is the worker the type of employee who is eligible for family and medical leave under the law or their own workplace policy?** Providers cannot generally answer this question for their clients/patients but should be prepared to share information or referrals with those who need to know how to proceed in answering this question.
- **Is the worker employed by an employer who falls within the legal definitions under either federal, state, or municipal laws, or by an employer who has a voluntary family and medical leave policy?** Providers cannot generally answer this question for their clients/patients but should be prepared to encourage clients and consumers to find answers, whether by consulting local or state Departments of Labor or in consultation with the employer, or both.

LEAVE-TAKING AS A VITAL HEALTH, COMMUNITY, AND ECONOMIC RESOURCE

The documented benefits of access to leave are multiple and can include, but are not limited to, improved recovery times and outcomes from illness, injury, or medical procedures; positive effects for pre- and post-natal health, for both mothers and infants; increased job security; and reductions in stress [29]. It should be noted that empirical analysis of the correlations between specific health outcomes and leave-taking practice is still a relatively nascent and developing field, with much existing analysis focused on maternal and child health, as compared with caregiver or personal disability leave [30]. However, contemporary scholarship collectively supports several general findings regarding the positive effects of leave access. More expansive family and medical leave access, as indicated by financial supports for leave-taking and longer available duration of leave, is associated with improved health outcomes over time, for leave-takers and for affected family members [31]. Access to leave can also ultimately enhance worker productivity and workplace relations, as workers who have the needed flexibility to attend to health and family, when necessary, are ultimately less likely to be distracted, exhausted, and frustrated at work [32]. Furthermore, measures that reduce work-family conflict, including family and medical leave, can function to reduce job strain, with a resulting reduction in symptoms of depression and anxiety among workers [33].

While empirical analysis of the benefits of leave access is still evolving, social scientific and public health research also yields particular insights about the social, economic, and health consequences of not having access to leave or having limited, inadequate access. The phenomenon of "presenteeism," or being present at work while ill or recuperating from injury is associated with decreased workplace productivity for those workers who are ill or injured and in instances in which illness is infectious, as other workers are affected by exposure [34]. Inadequate access to medical leave is associated with multiple negative health outcomes relative to the primary diagnosis and increases the likelihood of prolonged or total disability, resulting in loss of employment and income [35].

Inadequate access to parental leave is associated with decreased child, maternal, and in some instances paternal health, while inadequate access to caregiver leave correlates with comparatively negative physical and psychologic health outcomes, both for family members in need of care and for workers who experience increased work/family conflict [30; 32]. Overall, inadequate access to leave promotes or can escalate the development of mental health challenges due to increased job strain and can be a factor in the development of comorbid diagnoses, including psychiatric conditions and physical conditions associated with increased psychologic stress and fatigue [35].

The public health implications and social politics of family and medical leave access are not homogeneous. Several demographic, economic, geographic, and social factors help to determine both the degree to which leave-taking is protective of individual and family health and the severity of the consequences when leave-taking is unavailable, inadequate, or under-utilized. Further, leave-taking patterns are demographically stratified, with certain populations more able to access leave when needed and to take leave for longer periods when appropriate [36].

Data on family and medical leave utilization indicate certain demographic differences in leave-taking patterns. Not unsurprisingly, female workers are more likely than their male counterparts to take parental leave during a period of pregnancy and to take parental leave for a longer period of time [37]. Female workers are also substantially more likely to take caregiver leave than male workers [38]. Male workers primarily utilize personal disability leave, with caregiver and parental leave accounting for a relatively minor portion of the leave-taking behavior of employed men [39].

Leave-taking is a finite resource. While the duration of leave and the benefits available may vary based on the state, employer type, and localized policy, it is virtually always true that workers have only a certain amount of leave time available. Female workers spend disproportionately more leave time on caregiving for others and during pregnancy, and therefore tend to have proportionately less available access to leave for other personal disability or health issues [40]. As a consequence, there are gender disparities in medical leave utilization. While the full contours of these disparities are not yet manifest in empirical research, initial study supports the supposition that reduced medical leave access has corresponding negative health consequences stratified by gender [31].

Gender differences in income and socioeconomic status further escalate disparities in leave access. The gender "pay gap," with employed women presently earning 83 cents for each dollar that employed men earn in the United States, creates escalated challenges for women who want to take leave but cannot afford substantial time away from work, particularly in states or with employers who do not provide any form of paid leave-taking or wage replacement [41; 86]. Preliminary analysis indicates that workers, particularly those who do not also have financial support from family or a partner, are more likely to attempt to either work through severe illness or injury (at cost to health and safety) or to fall into economic crisis while unable to work, with potential consequences for health, recovery, and future employability [34].

Wage disparities reflect an interaction between gender and race, such that several groups of women of color experience the most severe gaps in relative income, with the lowest rate (54 cents for each white, male dollar) among Latina women [42]. While racial disparities in wages are generally most aggravated for women of color, men of color (particularly from African American, Latino, Native, and some immigrant populations) are also disproportionately likely to experience economic challenges in access to leave [43].

Similarly, workers with permanent disabilities, though proportionately more likely to need a disability-based leave, are at a severe disadvantage relative to income and earning potential in the United States, even controlling for race and class [44]. For instance, white, male workers with disabilities lag behind their counterparts without disabilities relative to wages and socioeconomic status [44]. Disability-based vulnerability and stratification interacts with race and gender, such that the most aggravated disparities in wages and income disadvantage women of color with disabilities [44].

Wage disparities and differences in leave-taking norms partially account for racial-, gender-, and disability-based disparities in leave utilization among those workers who are otherwise legally eligible to benefit from family and medical leave rights and resources. The social and health benefits of leave-taking access are stratified at a more basic level, however, as legal eligibility for leave is also substantially affected by dynamics of racial, gender, and disability inequity and by access to the benefits of citizenship. The categories of workers least likely to enjoy leave eligibility—underemployed and temporary workers, migrant agricultural labor, and immigrant workers without the legal right to work in the United States—are disproportionately drawn from vulnerable communities of color [45]. Women and people with disabilities are also disproportionately likely to be underemployed, working sporadically, part-time, or based on temporary contracts, and therefore are comparatively less likely to be leave-eligible [46]. Women (and in some contexts, teenage girls), primarily from African American and Latina communities, make up the vast majority of "pink collar" or domestic workers, employed as maids, nannies, or related forms of domestic service. These spheres are almost never organized to enable leave eligibility and are often entirely informal [47].

Workers in these spheres often develop disabilities or chronic health problems, not based on any preexisting condition, but because the conditions of work are frequently exploitative, physically unsafe, or exhausting and do not reliably generate enough income to support basic needs and enable health and well-being [48]. The conditions of work, coupled with vulnerability to poverty, cause progressive damage to individual and family health. However, absent the legal and economic right to medical leave, workers in these contexts are generally unable to recuperate from that damage, with consequences including escalating disability and chronic illness and premature mortality [49]. It should be noted that while workers' compensation insurance can cover certain types of workplace-related injuries, the terrain of workers' compensation is rarely so expansive as to cover illness caused by overwork or labor exploitation at large. A specific injury may be covered, but workers cannot successfully claim workers' compensation benefits based on long hours and meager pay alone (for example) [50]. Therefore, absent leave eligibility, workers in these conditions may experience progressive medical deterioration, leading to eventual inability to work at all.

Healthcare and social service providers working with those who do not have any leave eligibility can best be prepared by establishing basic familiarity with poverty-relief, labor rights, and social welfare resources in the state and locality and by referring leave-ineligible workers to whatever safety nets may exist for those without more substantial access to legal benefits and rights. Beyond immediate management of healthcare and economic crises, however, social service providers working with vulnerable families and workers can help to disrupt the process of "disablement" (defined as the production of new injuries, illnesses, and disabilities among vulnerable populations caused by social inequities) by identifying opportunities with employers who are covered under family and medical leave law or who provide family and medical leave resources directly [51]. This step is particularly important in improving the health and economic stability of families already affected by poverty or unhealthy working conditions, as placing workers who are already dealing with medical challenges in jobs that do not have provisions for leave-taking is likely to sustain patterns of cyclical unemployment. That is, the worker will likely lose employment at the first moment when leave rights are needed and unavailable, with predictable consequences in terms of psychological stress, economic distress, and reduced medical recovery chances.

Interprofessional collaboration between healthcare and social service providers may be particularly vital in identifying what forms of work can be safely pursued without aggravating health challenges and matching those needs with available vocational opportunities in spheres in which family and medical leave resources are accessible. In instances in which a healthcare provider is aware that a patient's ability to recuperate and remain employable is contingent on appropriate leave access, documentation to that effect may help trigger social service provider awareness of the need to find viable labor options. Similarly, social service providers will often need to solicit health information, whether from clients or, with permission, directly in collaboration with healthcare providers, in order to plan for employment stability and worker and family health.

Generally, healthcare and social service providers should have some basic awareness of contemporary inequities in leave access, to the extent that such broader policy issues are likely to manifest in population health and to matter in comprehending the structural context affecting individual patients, clients, and families. While the broader sociopolitical context cannot be fully addressed or remedied in individual treatment or service plans, understanding the environment that affects individual health, well-being, and employment supports the delivery of more personalized, culturally and structurally competent medical, mental health, and social services.

LEGAL RIGHTS OF WORKERS TO TAKE LEAVE

The FMLA protects the rights of employees to take up to 12 weeks of unpaid leave for the employee's serious health condition, to care for the employee's family member who has a serious health condition, for the birth of a child, or for the placement of a child for adoption or foster care [52]. Health and social welfare providers are key figures in assisting workers to obtain approved FMLA leave, as illness leave will require adequate documentation of the nature of the condition. Many states expand upon the rights provided by the FMLA, particularly with respect to key definitions.

DEFINITIONS

The key terms that define eligibility for FMLA leave are as follows [53; 54]:

- Employer: The FMLA applies to public agencies and to private employers with 50 or more employees for each working day during at least 20 of the workweeks in the previous or current calendar year.
- Employee: To be eligible for FMLA leave, an employee must have worked for her or his present employer for at least 12 months and have completed at least 1,250 hours of service within those 12 months. Providers should note that this definition includes many part-time employees, who may not be aware that they are protected under the FMLA. The employee must work at a worksite where the employer employs at least 50 other employees within 75 miles of that site.
- Employment benefits: Employment benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan."
- Healthcare provider: Under the FMLA, a healthcare provider is a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state in which she or he practices, or any other person deemed by the Secretary of Labor to be capable of providing healthcare services.
- Parent: The term "parent" means the biological, adoptive, step, or foster parent of an employee or an individual who stood in loco parentis (i.e., in place of a parent) to an employee when the employee was a son or daughter.
- Reduced leave schedule: A reduced leave schedule is "a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee."
- Son or daughter: A son or daughter includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is younger than 18 years of age, or older than 18 years of age if the son or daughter is "incapable of self-care because of a mental or physical disability."
- Serious health condition: A serious health condition under the FMLA is an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a healthcare provider. The FMLA explicitly includes treatment for substance abuse in this definition, provided that the criteria set forth for serious health conditions are met.
- Spouse: Under the FMLA, "spouse" means a husband or wife. Following Supreme Court decisions, if a same-sex couple is legally married, they are recognized as spouses under the FMLA.

RIGHTS PROVIDED

As discussed, the FMLA entitles employees (as defined) to a total of 12 weeks of unpaid leave during any 12-month period for [55]:

- Parental leave: The birth of a son or daughter, or the placement of a son or daughter with the employee for adoption or foster care (within 12 months of birth or placement)
- Caregiver leave: To care for the employee's spouse, son, daughter, or parent who has a serious health condition
- Medical leave: The employee's own serious health condition makes the employee unable to perform the functions of his or her job position
- Certain servicemember provisions: Any "qualifying exigency" arising from the fact that the employee's spouse, son, daughter, or parent has been called to or is presently on covered active duty in the Armed Forces. The FMLA also grants the spouse, son, daughter, parent, or next of kin up to 26 weeks in a single 12-month period to care for the servicemember. The total leave time for both provisions cannot exceed 26 weeks.

The 12 weeks of FMLA leave can, under some circumstances, be accomplished by working shorter days or shorter workweeks or by taking leave intermittently (i.e., taking the 12 weeks of leave non-consecutively over the course of the 12-month period). Medical and caregiver leave may be taken intermittently or on a reduced schedule when medically necessary, subject to provisions regarding notice and foreseeability. The employee may be required to transfer temporarily to an equivalent position that can better accommodate intermittent periods of absence. Leave for the birth or placement of a child can be taken intermittently or on a reduced leave schedule only if both the employer and the employee agree to the reduced schedule [56].

The FMLA mandates the continuation of group health plan benefits through the duration of the employee's leave as though the employee was not on leave. However, when the period of eligible leave is over, the employer can recover premium payments made during the leave if the employee fails to return to work for reasons aside from continuation of the qualifying serious health condition or other circumstances beyond the employee's control [57].

Upon returning to work, an employee is entitled to restoration of his or her previously held position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. The FMLA protects benefits and seniority accrued up to the point that leave begins but does not guarantee continued accrual of benefits and seniority during the employee's absence. Employees are entitled only to the rights, benefits, or positions to which they would have been entitled had they not taken leave [58].

WORKER RESPONSIBILITIES AND LIMITATIONS

Although the FMLA offers job protection, its criteria exclude a large swath of the workforce. In addition, the FMLA imposes notice and certification requirements on workers requesting leave and carves out some employer defenses to denial of a request for leave.

Coverage Limitations

The FMLA excludes a large portion of the workforce by limiting coverage to public agencies and private employers with at least 50 employees. As noted, workers must also have been in their current position for at least 12 months, with a minimum of 1,250 hours of service within those 12 months. While the FMLA does cover part-time employees who meet its criteria, it does not cover newly hired employees, who frequently also do not have substantial paid time off accrued.

The FMLA allows some leeway for denial of leave or restoration for an employer's highest-paid workers if the denial is necessary to "prevent substantial and grievous economic injury" [59]. Additionally, when two spouses work for the same employer, the aggregate leave may be limited when taken for the birth or placement of a child or to care for a sick parent [60].

Notice

The FMLA typically requires 30 days' notice of intent to take leave, where practicable. When leave is foreseeable based on expected birth or placement of a child in the home or on the worker's or family member's planned medical treatment, a worker must provide the employer with notice of his or her intent to take leave not less than 30 days before the date of leave is to begin. If leave must begin in fewer than 30 days, notice must be given as soon as is practicable. When the leave is foreseeable based on planned medical treatment, the worker must, subject to the approval of the healthcare provider, make a reasonable effort to schedule the treatment "so as not to disrupt unduly" the employer's operations [61].

Designation of Leave as FMLA-Eligible

Under federal regulations, employees giving notice of the need for FMLA leave do not need to expressly refer to the FMLA in order to meet their notice obligations, but employees do need to state a qualifying reason for their leave such that the employer can determine whether the leave will be taken under the FMLA [62]. Simply "calling in sick" does not put the employer on notice that the worker intends to take FMLA leave [63].

Certification and Additional Opinions

The FMLA permits employers to require that leave for a worker's or family member's serious health condition be supported by certification from that individual's healthcare provider, including subsequent recertification on a reasonable basis [64]. Certification of a serious health condition is sufficient if it includes [65]:

- The date on which the serious health condition began
- The "probable duration" of the condition
- The "appropriate medical facts" regarding the condition, which may include information on symptoms, hospitalization, doctors' visits, and referrals for treatment
- For caregiver leave, a statement that the worker is needed to care for the family member and an estimated time period for that need
- For the employee's own condition, a statement that the employee is unable to perform the job functions of his or her position
- For intermittent leave or reduced schedule for the purpose of planned medical treatment, the dates and duration of such treatment
- For intermittent leave or reduced schedule due to the employee's serious health condition, a statement of medical necessity and expected duration of the leave
- For intermittent leave or reduced schedule for the purpose of caregiver leave, a statement that such leave is necessary for the care of the family member with a serious health condition and the expected duration and schedule of the leave

An employer may, at its own expense, require that the employee or family member obtain a second opinion from a healthcare provider designated or approved by the employer concerning any certified information. The healthcare provider designated or approved by the employer must not be employed on a regular basis by the employer.

In the case of conflicting opinions in the original certification and the second opinion, the employer may, at its own expense, require that the employee obtain a third opinion from a healthcare provider designated or approved jointly by both the employer and the employee. The third opinion is considered binding for both parties.

LEAVE VIOLATIONS AND RETALIATION IN THE WORKPLACE

Violations of FMLA rights may not always be blatant or obvious. An employer might refuse to authorize leave or refuse to restore an employee to her or his previous position or its equivalent, but retaliation can take more subtle forms as well. The U.S. Department of Labor's examples of family and medical leave retaliation include discouraging employees from using FMLA leave, manipulating employee work hours to avoid FMLA eligibility, considering a request or use of FMLA leave as a negative factor in employment actions (e.g., hiring, promotions, or disciplinary actions), or including FMLA leave as an absence under a "no-fault" attendance policy [66].

Employers are prohibited from retaliation against employees for exercising any of their rights under the FMLA. This prohibition protects employees against retaliation not only for requesting leave, but also for making complaints about or opposing unlawful practices under the FMLA or for filing charges, instituting proceedings, or testifying in any inquiry in connection with rights under the FMLA.

Recourse for Workers Who Experience FMLA Violations

Filing a Civil Legal Action

When an employer violates FMLA rights, the employee may be eligible to recover wages, salary, employment benefits, or other compensation that was lost as a result of the violation. If no wages were lost, the employee may still be able to recover other monetary losses arising from the violation. For example, if an employee was denied caregiving leave and had to pay someone to care for a family member with a serious health condition, the employer may be liable for those caregiving expenses. Interest is recoverable on these losses as well. In some cases, employers may be required to pay punitive damages up to the amount of monetary losses and may also be required to reinstate the employee, as appropriate. Finally, an employer found to be in violation of FMLA rights may also be required to cover the employee's legal fees in connection with enforcing those rights in court.

Reporting to State and Federal Agencies

Employees may not always be in a position to bring a civil action against an employer. Employees may also file a complaint with the Wage and Hour Division of the U.S. Department of Labor to seek the same monetary damages available in a civil action [67]. If the FMLA violation is also contrary to federal civil rights protections, a complaint may also be filed with the Civil Rights Division of the U.S. Department of Justice [68]. If the employer's actions also violate state labor or civil/human rights laws, complaints may be filed with the state agencies that regulate employers under those laws.

Statutes of Limitations

A statute of limitations sets a time frame within which a complaint must be filed in court or with a public agency. Generally, the statute of limitations for violations of FMLA rights is two years from the date of the last event constituting the alleged violation, although it may be longer for certain willful acts. State agencies have varying statutes of limitations that may be more generous than the federal statutes. Health and social welfare providers should avoid advising patients/clients as to exact deadlines for filing complaints. However, they should make patients/clients aware that statutes of limitations exist and suggest that an attorney be consulted regarding such statutes to ensure that complaints are filed within the proper time frames. Providers should also avoid withholding documentary medical support for a complaint on the basis that the provider feels too much time has passed for a patient to file a successful claim. As noted, different agencies have different deadlines, and determination of whether a complaint falls within the statute of limitations may, in some cases, be a complicated matter requiring legal expertise.

ADDITIONAL PROTECTIONS AND RESOURCES AVAILABLE

State and Local Agencies

Some states offer no state-level protections for leave-taking, but nearly one-third (e.g., California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin) have passed family and medical leave statutes conferring rights that are similar or identical to those delineated in the FMLA [69]. Of the states offering more generous leave-taking protections, nearly two-thirds provide provisions for paid family medical leave [87]. Typically, a state's leave-taking statute will designate a state agency to enforce leave-taking rights (e.g., the state's labor and employment or civil/human rights agency). In addition to filing complaints with federal agencies under the FMLA, workers may file complaints with the appropriate state agency for violations of leave-taking rights under state law. City and county labor and civil/human rights entities may also have enforcement authority in places where local governments have codified additional leave-taking rights.

Labor Unions

Where applicable, labor unions may be a valuable resource, particularly for public workers who are entitled to FMLA leave but who may or may not have access to paid leave benefits. A labor union representative can help guide such workers as to the negotiated contractual benefits available for personal, parental, or caregiving leave.

Nonprofit Legal Services Agencies

Nonprofit legal services agencies may be able to provide specific legal advice to workers with questions about their rights. In some cases, legal services agencies may, at their discretion, provide direct legal representation.

COMMON MISCONCEPTIONS ABOUT FAMILY AND MEDICAL LEAVE LAW

A number of common misconceptions about family and medical leave rights can deter people from requesting leave or enforcing their rights free from retaliation. Misconceptions can also deter providers from cooperating in the leave-taking process.

Eligibility for Parental Leave

There is often confusion regarding eligibility for parental leave, specifically as it relates to pregnancy disability leave and leave for fathers. In a 2009–2010 survey, 22% of respondents were unaware that paid leave was available to fathers upon the arrival of a new child [70]. When researchers controlled for pay level, they discovered that 88.1% of workers in high-quality jobs (i.e., jobs that paid well and included benefits) were aware of fathers' eligibility, while 72.2% of workers in low-quality jobs (i.e., jobs with low wages and few, if any, benefits) were aware that new fathers could take paid leave [70].

Paid Leave, FMLA, and Job Protection

Many workers believe that receiving state temporary disability benefits or paid family leave also means their job is protected when they return to work. State Disability Insurance and Paid Family Leave are insurance programs meant to offer wage replacement, but they do not offer job protections. Workers must be FMLA-eligible or protected under state law to guarantee reinstatement upon returning to work.

Healthcare Providers' Role

It is a common misconception among workers that healthcare providers can tell them whether or not they are eligible for paid leave. Typically, a provider will be asked to document specific limitations regarding the worker's condition. Providers are not expected to determine whether or not a worker is eligible for a particular benefit, as they are not trained in making legal determinations regarding statutory criteria for public benefits. Such decisions are made by the governmental agencies responsible for administering benefit programs.

WORKPLACE CONSIDERATIONS

As noted, many workers are not covered by the FMLA due to employer size, length of employment, and other criteria addressed in the FMLA's definitions. Additionally, a large percentage of the workforce is protected only in theory and not in practice; an employee may be eligible for leave-taking under the FMLA, but extenuating circumstances in the workplace may interfere with employees' ability to enforce their leave-taking rights. Important workplace factors that can complicate FMLA eligibility and access to leave-taking include job structure and immigration status.

In states with large agricultural industries (e.g., California), a large portion of the labor force consists of transitory and seasonal workers. Because the FMLA requires one year of employment before a worker is eligible for leave, its protections are inaccessible to many workers due to the nature of their employment.

Workplace negotiation dynamics may be complicated for people who are dependent upon their employers for their immigration status. A worker may be facially protected under the FMLA but may still be unable to take leave due to the potential for exploitation by employers who know that their cooperation with the visa process is what allows the worker and her or his family to remain in the United States. Access to leave-taking is further complicated when the worker needs time off to care for a family member who is undocumented.

Providers should be at least minimally aware of the potential for exploitation of vulnerable populations with respect to leave-taking but should refer patients to attorneys for more concrete legal advice. A legal services referral guide is included at the end of this course.

THE ROLE OF HEALTHCARE AND SOCIAL SERVICE PROVIDERS IN ENSURING ACCESS TO LEAVE

COUNSELING AND EDUCATING CLIENTS AND PATIENTS ABOUT LEAVE-TAKING

Workers' Misgivings About Leave-Taking

Workers' own misgivings about their needs or entitlement may pose a barrier to leave-taking. Health and social welfare practitioners are uniquely situated to counsel workers about the need for leave-taking, as they are best equipped to convey the health impacts of working while injured or of having inadequate care for a loved one who is ill. While practitioners should avoid pressuring workers to take leave when they are financially unable to take time away from work, they should provide encouragement and counseling to workers who are hesitant to take leave out of discomfort about asking for help, denial about the seriousness of their situation, belief that leave-taking is only warranted in dire emergencies, fear of how they will be perceived if they take leave, or guilt about creating extra work for coworkers in their absence. Practitioners should emphasize the legitimacy of leave-taking needs and may wish to provide patients with language they can use to help mitigate any misunderstandings or misconceptions held by others, including employers, coworkers, and family members.

Lack of Awareness of Available Benefits

A 2018 survey by the U.S. Department of Labor revealed that about 6.9% of workers needed to take leave in the prior 12 months but were not able to do so; a 50% increase compared with the 2012 rate. The workers' reasons for not taking leave were largely related to economic security and job protection. Roughly two-thirds of "leave-needers" said they could not afford to take leave, a more than 40% increase compared with 2012 [71; 88].

DIFFERENTIATING TEMPORARY DISABILITY LEAVE AND PERMANENT DISABILITY RETIREMENT

In evaluating patients seeking medical certification for a personal disability, it is important to distinguish between disability leave, in which a worker leaves the workplace temporarily due to illness or injury but intends to return upon recovery, and disability retirement, in which a worker becomes permanently unable to participate in the workforce due to disability. In short, the distinction is that under FMLA leave, a worker departs from the workplace temporarily, whereas in a disability retirement, a worker departs from the workforce permanently. This distinction is particularly relevant when patients request medical certification in order to apply for state-funded disability benefits.

It is critical that healthcare and social welfare providers are aware of the availability of benefits for both temporary and permanent leave. Healthcare and social welfare providers function as gatekeepers to the extent that public benefits require medical certification. While healthcare practitioners are typically asked to certify the patient's specific condition and limitations, as opposed to certifying the patient's eligibility for a particular benefit, a misunderstanding of the eligibility requirements can make practitioners reluctant to certify an otherwise eligible worker for leave.

CLIENTS/PATIENTS EXPERIENCING WORKPLACE RETALIATION

Recognizing Employer Retaliation

As discussed, the consequences of employer retaliation are far-reaching and may involve harm to the worker's health and well-being. Failure to take leave for a major illness can have an obvious and immediate health impact on an employee who needs to recover from an illness, or on a family member who needs the employee at home to provide care. In the U.S. Department of Labor's 2012 survey, 17% of workers who failed to take needed disability or caregiving leave did so because they feared losing their job [71]. In addition, 6% reported that their employer denied their request for leave, a significant decrease from 20.8% in 2000 [71].

However, a violation of FMLA rights is not always as simple as an outright refusal to allow leave-taking or to reinstate a position after leave. Employers also penalize workers for exercising FMLA rights in the form of ongoing retaliation, and this can create additional physical and emotional stress and further aggravate the worker's condition. In some cases, a worker may not even realize that the employer is retaliating or that the added stress may be harmful to his or her health.

Leave-taking retaliation can come in many forms, but the following are some examples of behaviors that may constitute retaliation, particularly if the actions are catalyzed or motivated in response to leave-taking:

- An employer imposes an unusually excessive workload or unreasonable deadlines on an employee taking intermittent leave or on an employee who has just returned to work.
- An employee is passed over for a promotion or otherwise excluded from advancement opportunities as punishment for taking leave previously.
- The employer delivers an ultimatum ("If you don't come to work on Monday, you are fired.").
- The employer reassigns the employee to a different work site that entails a burdensome commute.
- The employer assigns predominately undesirable work hours.
- The employer cuts benefits and imposes a gag order so workers cannot discuss benefits with one another and learn that benefits were cut unevenly.
- The employer fails to provide a customary annual raise only to those employees who took leave recently.

Note that this list of scenarios is not intended to be all inclusive, but rather is meant to illustrate the variety of tactics employers may use to penalize workers who exercise their rights under the FMLA.

Providers should know that a worker's need for leave-taking may also be an escalating factor in existing racial or gender harassment of vulnerable workers. FMLA retaliation can be further complicated by the existence of racism, homophobia, ableism, anti-immigration bias, and other detrimental social factors present in the workplace and may therefore violate civil and human rights laws in addition to the FMLA. For example, people of color often report feeling that they need to over-perform to compensate for or live down racial stereotypes, and women often repeat this sentiment, particularly in positions and fields traditionally dominated by men [73]. Anything short of flawlessness may appear to fulfill stereotypes for already-biased employers, so people of color and women might be hesitant to "rock the boat" by requesting leave or even disability accommodations, and employers may penalize people of color and women more harshly than other employees for taking leave or may require more of them upon return to work in order to be "forgiven" for accessing their rights [74].

The need for leave itself may be used as a tool of discrimination or exploitation. For example, an employer might refuse to allow a male employee to take FMLA leave to care for his sick husband even though state and federal law protect leave-taking for legally married couples regardless of gender. A worker who relies on her employer for an immigration visa may find her immigration status in jeopardy if the employer chooses not to cooperate with her request for leave. Because retaliation is not always obvious, health and social welfare providers can assist vulnerable workers in accessing their FMLA rights by recognizing the more subtle forms of retaliation when patients discuss details of their work environment in connection with their effort to seek leave, and by documenting these acts to the extent that they interfere with patient health.

Documenting Medical and Social Consequences Associated with Retaliation

Health and social welfare providers play a key role in documenting the physical and mental health consequences of working while ill and working in a hostile environment. Providers who have been asked to document the health consequences of retaliation should consider, among other things, the retaliation's impact on the health condition for which the worker took leave; the retaliation's impact on the worker's stress level and overall well-being; and whether the increase in stress has generated, escalated, or contributed to any ongoing or new health challenges.

Documentation should focus on the patient's history and avoid drawing legal conclusions. For example, a provider might report that the patient was injured or became ill on a given date; that the provider advised the patient not to return to work for a certain period of time; that the patient told the provider the employer had refused to grant time off (or otherwise acted to prevent leave-taking); that the patient returned to work before it was medically advisable to do so; and that as a result of his or her premature return to work, the injury or illness was further exacerbated. It would also be appropriate to report any additional health problems that arose after the patient returned to work too soon, including physical harms, mental health stressors, and any other detrimental impacts that may be correlated to working while injured or ill. While it would be reasonable for the provider to conclude that the worker incurred damage to health as a result of returning to work while injured or ill, it would be inappropriate for the provider to state that the worker's health damage was the result of an FMLA violation, as this is a legal argument and should be made either by the employee or his or her legal representative.

Referrals for Legal Advocacy or Investigation

Healthcare professionals should avoid offering legal advice and should ensure that patients do not interpret recommendations or suggestions as such. To avoid confusion, it may be useful to state outright that only attorneys are allowed to offer legal advice and to recommend that patients consult with an attorney if they have specific questions about their leave-taking rights. Patients should also be advised that seeking legal advice does not mean they have to file a lawsuit. Many patients will not need legal representation but may benefit from legal counseling about their rights based on their particular circumstance, recommendations to help them self-advocate, or some minimal assistance in enforcing leave-taking rights.

For many patients, consulting with a private attorney is not a feasible option. Providers should be prepared to refer patients to nonprofit legal organizations for advice and recommendations. Nonprofit agencies may provide representation at their discretion, but if legal action is necessary, they may also have referral lists of attorneys who will work on contingency or on a sliding scale.

COUNSELING AND EDUCATING CLIENTS AND PATIENTS ABOUT THE PROCESS OF RETURNING TO WORK

Under the FMLA, employers may require certification that workers on temporary disability leave are able to return to work safely. In some cases, workers may be dealing with long-term health ramifications following an illness or injury, and a return to work may require some job modifications. It may be useful to refer patients for legal advice regarding how to request reasonable accommodations, particularly if a previous request has been denied. However, health and social welfare providers should also have a basic understanding of the process, as workers will need providers to document the need for accommodations necessitated by ongoing disability.

The federal Americans with Disabilities Act (ADA) requires an employer to "provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship" [75]. Under the ADA, employers are required to enter into a good-faith "interactive process" (the legal term for a negotiation of prospective disability accommodations) to determine if there is a reasonable accommodation that would allow the worker to continue to perform his or her essential job functions [76]. The worker must be able to perform the essential job functions, with or without accommodations, in order to be protected against termination. Therefore, it is important for providers to avoid being overbroad in their recommendations, as negative language regarding an employee's limitations may be used against the employee if legal action is taken. For example, if a provider writes, "The patient is able to perform her essential job functions with the following accommodations," the possibility is still open that other accommodations might also allow the patient to keep working. On the other hand, if the provider states, "The patient cannot perform her job functions without the following accommodations," this restricts the interactive process. Specifically, the employer has the opportunity to first argue that the requested accommodations pose an undue hardship on business operations [77]. The employer may then argue that the employee must be terminated because he or she has admitted being unable to perform essential job functions without those specific accommodations. Providers, therefore, should avoid creating documentation that forecloses further discussion about potential accommodations, particularly those that could allow the worker to remain employed.

DEVELOPMENTS IN LAW AND POLICY

STATE EMPLOYEES' RIGHTS UNDER THE FMLA

Typically, under the 11th Amendment's "sovereign immunity" protections, private individuals cannot sue states for monetary damages in federal court without their consent. However, the Supreme Court has held that Congress can "abrogate" (override, in this case) states' sovereign immunity rights in order to enforce the 14th Amendment's guarantee to equal protection under the law [78]. In 2003, the Supreme Court upheld the right of state employees to sue state employers for violating the employees' family caregiving rights under the FMLA. In Nevada Department of Human Resources v. Hibbs (2003), the Supreme Court reasoned that the FMLA's caregiving protections were passed in order to remedy a long history of family-leave policies that discriminated on the basis of sex, and therefore, Congress was within its rights to allow suits against states in federal court in order to enforce equal protection of the law under the 14th Amendment.

More recently, however, the Supreme Court held in Coleman v. Court of Appeals of Maryland (2012) that suits against state employers based on violation of the FMLA's personal disability leave protections were not permitted because the personal disability (or "self-care") provisions were not intended to remedy a long pattern of sex-based discriminatory leave policies. Although the Supreme Court did not overrule the previous case, it distinguished rights to remedies under the FMLA's family leave and personal leave protections and essentially left state workers with no viable remedies under federal law when state employers violated their rights to take leave for their own serious health condition. In California and other states with their own leave-taking statutes, state employees may still have some available remedies, so as always, workers should be encouraged to discuss potential violations with an attorney to determine whether they may still have a claim for damages.

LEAVE-TAKING RIGHTS OF LEGALLY MARRIED SAME-SEX COUPLES

In 1996, Congress passed the Defense of Marriage Act (DOMA), which allowed states to refuse to recognize same-sex marriages granted under the laws of other states and also prohibited the federal government from recognizing same-sex marriages. However, in 2013, the Supreme Court held as unconstitutional the portion of DOMA that forbade the federal government from recognizing legally married same-sex partners as spouses [79]. As a result, federal spousal protections, including the FMLA leave-taking rights, are now available to same-sex couples who are legally married.

Later in 2013, the U.S. Department of Labor issued a statement confirming that under its regulations pertaining to employee benefits and group health plans, the word "spouse" would include legally married same-sex spouses regardless of the state in which they live [80]. In 2015, the Supreme Court held that the 14th Amendment guarantees same-sex couples the right to marry, and same-sex spouses are now protected and recognized in all states. As such, the leave-taking rights provided by the FMLA extend to all married couples in every state, regardless of sex. It is important to note that the FMLA does not extend to civil unions or domestic partnerships [81].

THE ROLE OF SERVICE PROVIDERS IN INFORMING POLICYMAKERS AND COMMUNITIES

Service providers in the fields of health care and social services are often in a relatively unique position as those responsible for supporting the health and well-being of workers and families. Public health studies tracking the effects of leave-taking are still emerging and do not yet fully engage major gaps in knowledge regarding the short- and long-term effects of leave access (and of lack of access). Federal and state policy on family and medical leave law continues to evolve, with many states considering legislation and amendments on subjects such as expanded caregiver leave rights, state paid leave benefits, and domestic violence leave. Beyond the imperatives of immediate service provision, providers can contribute to public health dialogue and community knowledge by engaging in localized case studies, with appropriate human subjects protections, of the health effects of leave-taking, barriers to leave-taking, patient and client awareness of and perceptions of leave-taking access and options, and the factors and determinants of leave-taking efficacy.

Providers may also play a vital role in reporting flagrant violations of family and medical leave law to appropriate governmental entities, particularly in instances in which vulnerable workers are unable or unlikely to do so. The U.S. Department of Labor's Wage and Hour Division maintains a number of resources and a toll-free number for complaints and queries and coordinates with state labor offices throughout the United States. In instances in which family and medical leave is entangled with or inextricable from other forms of civil rights violations—a common dynamic in cases involving disability or pregnancy, or based on race, age, veteran status, religion, or any other protected categories (varies by state and municipality)—providers should also consider outreach to the U.S. Equal Employment Opportunity Commission or state or municipal equivalents (e.g., local human rights or civil rights entities). Finally, providers can play a critical role in informing policymakers about the benefits and limitations of existing policy, relative to affected client/patient populations, including those who do and those who do not have sustainable leave access.

RESOURCES

Equal Rights Advocates
https://www.equalrights.org

AAUW Legal Advocacy Fund
Know Your Rights: Family and Medical Leave Act
https://www.aauw.org/resources/legal/laf/fmla

National Partnership for Women and Families
https://www.nationalpartnership.org

California Work and Family Coalition
https://www.workfamilyca.org

National Advocates for Pregnant Women
https://www.nationaladvocatesforpregnant-women.org/

Family Values at Work
https://familyvaluesatwork.org

Patient Advocate Foundation
https://www.patientadvocate.org

International Labour Organization
https://www.ilo.org

Institute for Women's Policy Research
https://iwpr.org

Family Caregiver Alliance
https://www.caregiver.org

National Organization for Women
https://now.org

National Conference of State Legislatures
State Family and Medical Leave Laws
https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx

U.S. Department of Labor Wage and Hour Division Family and Medical Leave Act
https://www.dol.gov/agencies/whd/fmla

Office of Personnel Management
Fact Sheet: Family and Medical Leave
https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/family-and-medical-leave

California Department of General Services Family and Medical Leave Act
https://www.dgs.ca.gov/OHR/Resources/Page-Content/Office-of-Human-Resources-Resources-List-Folder/Personnel-Operations-Manual/Family-and-Medical-Leave-Act

California Employment Development Department Family and Medical Leave Act and California Family Rights Act FAQs
https://edd.ca.gov/en/disability/faqs-fmla-cfra

CONCLUSION

Family and medical leave law remains a dense and at times contested area of U.S. law and policy, while simultaneously delivering or enabling leave-taking rights for millions of U.S. workers. Despite the salience of family and medical leave law as one of the most utilized and high-impact areas of labor and health law, many professionals concerned with community health remain uncertain about its applications and content. For many workers and families, however, healthcare and social service providers (rather than legal service providers or employers) are a primary resource when attempting to learn about and pursue access to leave. Confusion, lack of information, or misinformation in health and social service spheres can therefore be particularly detrimental to worker and family health, to the extent that it contributes to the under-utilization of leave resources. While medical and social service providers should not be expected to become thoroughly fluent in this area of law, basic "legal literacy," involving awareness of applicable law and policy and its core meanings in health spheres, is a critical element in ensuring that health and family needs are more effectively reconciled with employment and economic imperatives.

APPENDIX

Family and medical leave is a right provided to many workers in the United States. It allows you to take a temporary leave of absence from work without losing your job or provides access to benefits, such as employer-provided health insurance. Leave is often available to workers who are ill and injured, including both physical and mental health conditions. Leave can also be available to new parents, for birth and adoption. Leave can be available to family members who need to care for another family member who is ill and needs care at home. Leave can also sometimes be available for particular groups, such as victims of domestic violence.

Q: *How do I know whether I need to take leave?*

A: This is a decision to make with your or your family's healthcare provider, based on whether you can safely work without endangering your health or whether you have a special event like birth, adoption, or a family member who is seriously ill or injured.

Q: *How do I know whether I have a legal right to take leave?*

A: You can find this out by talking to the Human Resources office at your workplace, your state Department of Labor, and social service agencies you may already be working with.

Q: *If I take leave, do I still get paid?*

A: Maybe. Not all workers have a right to leave pay. Some U.S. states or counties offer "replacement wages" to workers who need to take a leave. Some employers or disability insurance plans may also provide wages to workers who need leave. You can find out what rights you have during leave by talking to your employer's Human Resources office, your state Department of Labor, and any other social service providers available to you.

Q: What if my supervisor doesn't want me to go on leave?

A: If you have a legal right to take leave, you can still do so. If your employer retaliates against you, for instance by refusing to let you come back to work, by reducing your salary or benefits, by harassing you, or by denying your promotions or opportunities you would otherwise have gotten, you can potentially take legal action. "Retaliation" against an employee who takes a legally protected leave of absence is prohibited under the U.S. Family and Medical Leave Act and under many state laws.

Q: In order to take a leave of absence, what would I need to do?

A: Most employers will have forms for you to complete to request a leave under the Family and Medical Leave Act and any relevant state law. You will generally need assistance from your or your family's healthcare provider to complete some forms or to provide a letter indicating the reason for leave. If you know ahead of time that you will need to take a leave, try to start the paperwork early to make sure you get everything you need in time. If your state or employer provides wages to employees on leave, you may have additional applications or paperwork to complete to get those wages (or "wage replacement").

Q: What do I need to do to return to work?

A: Many employers will have a form for a healthcare provider to complete certifying that you are able to return to work (if you took leave based on your own illness or disability). You should also make sure not to stay on leave longer than the law allows, unless you have a written agreement from your employer to allow you to do so. If you do not return to work at the end of your legally protected leave time, you may no longer be protected from losing your employment.

Q: What do I do if I use up my leave time and am not able to return to work?

A: Several resources exist for workers who become disabled or injured or who need to be longer-term caregivers for family members. Talk with your state Department of Labor, your or your family's healthcare providers, local social service agencies, and if needed, an attorney, to determine your options.

FACULTY BIOGRAPHIES

Beth Ribet, PhD, JD, is the co-founder and co-director of Repair, a health and disability justice organization. Dr. Ribet obtained her doctorate in Social Relations (Sociology & Anthropology) from the University of California-Irvine, and her law degree at UCLA, with a specialization in Critical Race Studies. Her areas of expertise include disability and employment, disability civil rights, medical sociology, healthcare advocacy, and social psychology. Her particular research and teaching interests focus on the production of new disabilities and illnesses as a result of violence, exploitation, and inequity and strategies for using law and policy to address the concerns of people disabled or injured by inequity. Dr. Ribet speaks publicly and trains healthcare, legal, and social service practitioners regarding work with vulnerable populations, including but not limited to trafficked and exploited persons, refugees, incarcerated persons, and children and youth with disabilities.

Leslie Bunnage, PhD, is an associate professor of sociology and director of the Lewinson Center for the Study of Labor, Inequality & Social Justice at Seton Hall University. Her research falls within the two main areas of social movement mobilization and strategic formation and labor and inequalities. Her recent projects include an analysis of Internet communication technology as a basis for cohering social movement organization (SMO) messaging and strengthening collective identity (with Deana Rohlinger), and a qualitative study of dehistoricization and rhetoric in the U.S. Tea Party movement. Dr. Bunnage also examines labor movement revitalization and intersectional racial, gender, and socioeconomic barriers to leadership development in the AFL-CIO "Union Summer" youth training program. She is currently developing a socio-legal research agenda examining the impact of family and medical leave law and policy on the materialization of workers' rights.

Lisa Concoff Kronbeck, JD, graduated from UCLA School of Law in June 2010 and was admitted to the California State Bar later that year. She also holds a master's degree in public policy from the UCLA School of Public Affairs, with a concentration in health and social policy. Following law school, Ms. Concoff Kronbeck worked for two years as a staff attorney in the public benefits unit at Disability Rights California, assisting clients primarily with benefits linked to disability, including Medi-Cal, Supplemental Security Income, Social Security Disability Insurance, and In-Home Supportive Services. At present, she is caring for her tiniest client thus far: her young daughter who has Down syndrome.

Implicit Bias in Health Care

The role of implicit biases on healthcare outcomes has become a concern, as there is some evidence that implicit biases contribute to health disparities, professionals' attitudes toward and interactions with patients, quality of care, diagnoses, and treatment decisions. This may produce differences in help-seeking, diagnoses, and ultimately treatments and interventions. Implicit biases may also unwittingly produce professional behaviors, attitudes, and interactions that reduce patients' trust and comfort with their provider, leading to earlier termination of visits and/or reduced adherence and follow-up. Disadvantaged groups are marginalized in the healthcare system and vulnerable on multiple levels; health professionals' implicit biases can further exacerbate these existing disadvantages.

Interventions or strategies designed to reduce implicit bias may be categorized as change-based or control-based. Change-based interventions focus on reducing or changing cognitive associations underlying implicit biases. These interventions might include challenging stereotypes. Conversely, control-based interventions involve reducing the effects of the implicit bias on the individual's behaviors. These strategies include increasing awareness of biased thoughts and responses. The two types of interventions are not mutually exclusive and may be used synergistically.

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