

# Quarterly Review

Volume 13

Issue No. 2

Spring 2019

## OHIO ASSOCIATION *of* CIVIL TRIAL ATTORNEYS

**A Quarterly Review of  
Emerging Trends  
in Ohio Case Law  
and Legislative  
Activity...**

### Contents

<b>President's Note</b> .....	<b>1</b>
<i>James N. Kline, Esq.</i>	
<b>Introduction: Employment Law Committee</b> .....	<b>2</b>
<i>Brigid E. Heid, Esq., Committee Chair</i>	
<b>Recent Trends in Employment Arbitration: What Employers Need to Know in 2019</b> .....	<b>3</b>
<i>Ian D. Mitchell, Esq.</i>	
<b>The Blunt Facts: Legalized Marijuana and the Workplace</b> .....	<b>8</b>
<i>Melissa A. Ebel, Esq.</i>	
<b>DOL Proposes New Overtime Rule for White Collar Exemptions</b> .....	<b>10</b>
<i>Brigid E. Heid, Esq.</i>	
<b>FMLA Leave Must Run Concurrently With Other Forms of Paid Leave</b> .....	<b>12</b>
<i>Douglas P. Holthus, Esq.</i>	
<b>Going Rogue: Employer Liability For Employee Misuse or Theft Of Company Data</b> .....	<b>14</b>
<i>David J. Oberly, Esq.</i>	

## FMLA Leave Must Run *Concurrently* With Other Forms of Paid Leave

**Douglas P. Holthus, Esq.**

Mazanec, Raskin & Ryder



Ah, the halcyon days of youth:

“I’m just a bill; yes, I’m only a bill, and if they vote for me on Capitol Hill, well then I’m off to the White House where I’ll wait in a line with a lot of other bills for the president to sign;

and if he signs me, then I’ll be a law. How I hope and pray that he will, but today I am still just a bill.”<sup>1</sup>

However, with the benefit of twelve years of primary education, four years of undergraduate studies (unless you were one of those fortunate few who permitted themselves a “Victory Lap”), six semesters of law school, a tedious, three day exam and so many years of practice, we realize the lyricist may have missed at least one additional stanza ... unless, of course, that stanza was sacrificed as a compromise during Committee hearings:

“I’m now a law, yes I’m finally a law, and I thought I held the power of voice. But no one cared to tell me I’d be subject to interpretation and caprice and now there’s a letter from the Department Secretary; and if he decides what it is I’m really s’posed to mean then the winds of change may carry my voice away”.

The FMLA entitles eligible employees of covered employers to take up to twelve (12) weeks of unpaid, job-protected leave per year for specified family and medical reasons [or, twenty-six (26) weeks for a military caregiver]. 29 U.S.C. § 2612(a).<sup>2</sup> When called upon to interpret this

provision, the Ninth Circuit had previously determined that a qualifying employee was permitted to make an initial election to first use and even exhaust all other types of employer available leave, such as vacation time, for an FMLA-qualifying situation and defer taking FMLA allotted time for a future use. The net effect, of course, was to extend the periods of time an employee may be permitted to be away from her/his position, with or without pay, and still maintain protection for her/his employment position. See *Escriba v. Foster Poultry Farms, Inc.*, 743 F3d 1235, 1244 (9th Cir. 2014.)

That was then.

On March 18, 2019, Mr. Keith E. Sonderling, Acting Administrator of the U.S. Department of Labor (Wage & Hour Division) issued an Opinion Letter (No. FMLA2019-1-A) “disagreeing” with the 9th Circuit’s interpretation in *Escriba*, specifically advising that employers are required to run periods of employee Family Medical Leave Act (FMLA) leave *concurrently* with other forms of paid leave.

The bottom-line; employees may no longer use periods of employer-paid leave benefits (e.g., vacation time, sick pay, short-term disability, PTO) prior to availing themselves of any unpaid leave available under the FMLA. Under the advices of this Opinion Letter; as soon as a covered employer determines that an employee’s absence qualifies for leave under the FMLA, the employer must begin allocating the twelve (12) weeks of FMLA / unpaid leave to the absence and the employee is not permitted to delay the FMLA leave by first exhausting PTO, vacation or any other type of employer-provided paid-leave benefit periods. These now, instead, can only be used after the FMLA annual allotment of time has been exhausted.

The Opinion Letter also shuts down any debate: FMLA Leave protection is limited to twelve (12) weeks annually, even if the covered employer provides some greater, more generous leave policy within its Handbook, Collective Bargaining Agreement or other employer leave policies.

It remains subject to debate; yet this same Opinion Letter suggests that workers' compensation leave time may also have to run concurrently with periods of qualified FMLA Leave.

“I’m now a law, yes I’m finally a law, and geez, I still get kicked around the block. The courts read me one way, the bureaucracy the next and no one ever seems to get it right. How I hope and pray that the people can know the scheme ... or can at least hire capable lawyers to define the theme.”

Let your clients know that, consequently, their FMLA and related leave policies may need to be revisited and possibly redrafted.

---

#### Endnotes

- <sup>1</sup> *“I’m Just A Bill”*; Music & Lyrics by Dave Frishberg. Performed by Jack Sheldon. Animation by Phil Kimmelman and Associates. First aired: 1975; © 2017 School House Rock Lyrics
- <sup>2</sup> § 825.104 Covered employer. “An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. See§ 825.600.

**Mr. Douglas P. Holthus, Esq.’s** primary areas of focus are the defense of claims involving licensed professionals, public sector entities and school districts, businesses and commercial entities, employers, insurers, and construction contractors. He has tried, advocated and/or arbitrated nearly 100 cases before civil juries, administrative licensing (and other) boards and arbitration panels throughout Ohio (and California), in both state and federal court.

Prior to joining MRR, Doug was in private practice and had also served as General Counsel for Kokosing Construction Company and its multiple affiliated entities. He is past Chair of the Columbus Bar Association’s Professionalism Committee (by appointment) and is a former Member of the Board of Directors of the Professional Liability Defense Federation (“PLDF”). Doug is “AV Preeminent rated” by Martindale-Hubbell, as well as named an Ohio Super Lawyer (2017-2019) and a “Best Lawyer” by Best Lawyers in America.



*Save the Date*  
**2019 OACTA  
Annual Meeting**

**November 21-22, 2019**

**Hilton Cleveland Downtown  
Cleveland, Ohio**