

EMPLOYEES CAN SUE STATES UNDER FEDERAL FMLA

The United States Supreme Court has expanded the right of employees to sue their employers under the Family and Medical Leave Act (FMLA or Act). In a less-than-enthusiastic 6-3 decision, the Supreme Court stepped back from its recent swing toward “states’ rights,” and delivered a blow to states and their respective “public agencies” in the employment arena. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. ____ (2003).

Chief Justice William Rehnquist, whose tenure at the Court has been emphasized by his willingness to expand the legal rights of states and their respective municipalities, stepped back from that jurisprudence to allow an employee who alleges a violation of his rights under the FMLA to sue the State of Nevada for an alleged violation of his rights under the Act. This situation is a departure from the Supreme Court’s jurisprudence for much of the Twentieth Century, during which it has reinforced the Eleventh Amendment’s principle that “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .” Essentially, unless Congress “abrogates” (revokes) the general immunity conferred on the States by the Eleventh Amendment, States are immune to lawsuits. The Supreme Court has adamantly endorsed this concept, stating, “We have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.” *Nevada Department of Human Resources v. Hibbs*, 538 U.S. ____ (2003).

Congress does have the power, however, to cancel the immunity conferred upon the States, through statutes such as the FMLA. The FMLA, for example, provides that employees may seek damages “against any employer (including a public agency) in any Federal or State court of competent jurisdiction.” 29 U.S.C. § 2617 (a) (2). A “public agency” has been defined to include municipalities, which are “political subdivisions” of a state. Additionally, the Supreme Court has held that the Eleventh Amendment does not apply to municipalities. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Essentially, municipalities do not enjoy the same constitutional protections from suit that are enjoyed by the States.

The particular question at issue in the *Hibbs* case is whether Congress acted within its constitutional authority when it sought to abrogate the States’ immunity for purposes of the FMLA’s family leave provision. Other cases have held that Congress never adequately detailed its findings of unconstitutional state action such that it would be appropriate to impose a statutory remedy that could be used in a civil action against the States. See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Congress did not meet test for adequate findings detailing a pattern of constitutional violations under the Fourteenth Amendment; Americans with Disabilities Act did not confer private right of action on citizens against the States in federal court). *Hibbs* can be differentiated, however, from *Garrett* and other cases because, “according to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.” *Hibbs* at *7. Chief Justice Rehnquist’s argument basically states that, because Congress relied on detailed empirical evidence to correct a trend it considered a violation of the Fourteenth Amendment (which requires equal

protection of the laws for all persons), it acted within its constitutional authority in enacting the FMLA. Therefore, because Congress used the proper methodology in abrogating the traditional Eleventh Amendment immunity rights of the States under the FMLA, plaintiffs were accorded the right to sue states in federal court.

Does this case change the playing field for the municipal employer? Probably not. Municipalities have never been accorded immunity from suit in federal court under the Eleventh Amendment like the States have. What makes the *Hibbs* case important is that it increases the exposure of states to claims for damages under the FMLA. What this case does for municipal employers is to reiterate the fact that they must comply with the family and medical leave provisions of the FMLA, such as granting leave when requested, and returning employees to the same or comparable positions upon return. *Hibbs* also shows that the federal courts are available forums in which plaintiffs could bring suit against municipalities for alleged violations of the FMLA.

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FMLA REQUIREMENTS: A BRIEF REFRESHER

It is important to periodically review the main provisions of the FMLA. In general, the FMLA requires that covered employers provide eligible employees the right to take up to 12 weeks of unpaid leave from work for family or medical reasons. 29 U.S.C. § 2612.

When examining any employment law such as the FMLA, there are a number of threshold questions for employers, particularly municipalities, to ask. Some of these questions include:

1. Whether municipalities are “covered employers,” under the particular law;
2. Whether the employee has a right to the benefits conferred by the relevant law; and
3. Exactly what employee protections does this law provide, i.e., what do we need to do to comply with the law?

For purposes of the FMLA, an “employer” who must comply with the Act includes “public agencies,” such as municipalities. 29 U.S.C. § 2611 (4) (a) (iii), 29 C.F.R. 825.108. Private employers, on the other hand, are only covered if they employ greater than 50 employees. Therefore, the FMLA requires municipalities to provide to their employees, if the employee requests, 12 workweeks of unpaid leave during any 12-month period. 29 U.S.C. § 2612 (1). Such leave can be taken because of the birth of a child, to care for a child after birth, to adopt a child, to care for a seriously ill family member, or because the employee is seriously ill. *Id.* In order for an employee to be eligible to receive leave under the FMLA, he or she must have worked for the employer for at least 12 months prior to the commencement of that leave, and have been employed for at least 1,250 hours of service during those preceding 12 months. 29 U.S.C. § 2611 (2) (A) (i) (ii). Additionally, when an employee returns from a period of leave, he or she must be restored to the same position held prior to taking leave, or be restored to an equivalent position with equivalent pay, leave, and other benefits. 29 U.S.C. § 2614 (a) (1). If you have further questions about the FMLA, please give the VLCT Municipal Assistance Center a call at 800/645-7915 or e-mail info@vlct.org.