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No Paid Sick or Annual Leave. What About FMLA Leave for Excepted Employees?

By Mathew TullyAmid the shutdown, much emphasis has been placed on the morale-crushing requirement for excepted employees to show up to work each day with delayed pay or be deemed absent without leave (AWOL) and face disciplinary action. Paid annual and sick leave are not part of the equation. One big question is whether the same is true for Family Medical Leave Act (FMLA) leave.In an open letter to congressional leaders, National Air Traffic Controller Association (NATCA) leadership said, “[T]hose controllers who show up to work every day will no longer be able to access their federally guaranteed Family Medical Leave Act days, or use their sick leave.” It’s not clear whether NATCA was referring to paid or unpaid FMLA leave, but I’d say unpaid FMLA leave is an option for excepted employees.Before I delve deeper into this debate, let me cover the basics. First, the reason why previously approved paid annual and sick leave must be cancelled lies in the Anti-Deficiency Act, which prohibits federal officials and employees from engaging in unauthorized spending. However, so long as an excepted employee is on leave without pay (LWOP), these spending concerns are avoided; hence, there is no Anti-Deficiency Act violation. By definition, FMLA leave is unpaid leave, (i.e., LWOP). Federal employees can normally substitute paid sick and/or annual leave for FMLA LWOP for up to 12 weeks per year, but they cannot do so during a government shutdown. However, unpaid FMLA leave should still be available to excepted federal employees who otherwise qualify for and need it, even during the shutdown.Second, excepted employees need to keep in mind that they cannot use FMLA leave for a mental health day or because they have a case of the sniffles or a child is home sick with a fever. OPM’s FMLA regulations under 5 C.F.R. 630, Subpart L allow eligible employees to take up to 12 workweeks of unpaid leave for, among other things, the care of a spouse, son, daughter, or parent suffering from a serious health condition or if the employee cannot work due to his or her own serious health condition. A “serious health condition” means any “illness, injury, impairment, or physical or mental condition” involving inpatient care or certain types of treatment by a health care provider generally following periods of incapacity lasting at least three consecutive calendar days.The Merit Systems Protection Board (MSPB) case Floyd J. Gross III v. Department of Justice (1997) involved a Border Patrol agent who had been suspended for 20 days after he went AWOL for five days. In early December 1995, the agent had requested annual leave for the last 10 days of the year so he could visit his ill 67-year-old mother who had suffered from a heart attack. That request was at first approved, but the leave was cancelled mid-month because the agency ran out of funding. Shortly before Christmas, the agent renewed his leave request and asked to be put on furlough. He informed his immediate supervisor that his mother had taken a turn for the worst and he needed to take care of her affairs and arrange for her personal care.An MSPB administrative judge initially found the agency properly placed the agent in AWOL status because he did not follow acceptable leave procedures. Further, the administrative judge found the agent – an excepted employee – was not entitled to FMLA leave due to the fact that at the time he made the leave request the agency was operating under a furlough.On appeal, the Board disagreed with the administrative judge and found the agent’s family

medical emergency did qualify him for FMLA leave. The Board pointed out that even though the Anti-Deficiency Act required the agency to cancel previously approved leave, “the agency retained some discretion in granting leave to ‘excepted’ employees….It follows logically then that, if the agency had the discretion to grant ‘excepted’ employees paid leave, it also had the discretion to grant them LWOP because such grant did not require the agency to make or authorize an expenditure or obligation.” The Board added that the agent’s request to be furloughed “was tantamount to a request for emergency medical LWOP under the FMLA.” The agency, the Board added, was unreasonable in denying the LWOP and it violated the FMLA by not granting the LWOP.In sum, excepted federal employees are legally entitled to take up to 12 weeks of unpaid FMLA leave during a shutdown furlough. However, it would be more beneficial to such an employee to actually be furloughed than to be placed on LWOP under FMLA, as the latter would be deducted from the employee’s 12-week annual FMLA leave limit, whereas the former would result in the employee likely being retroactively paid for that time once the shutdown is over and would not reduce their annual FMLA allotment. The grant of FMLA LWOP time is not discretionary if the employee qualifies for it. Discretion comes into play as to whether the employee is furloughed instead of being placed in FMLA LWOP status for the duration of the serious medical condition or 12 weeks, whichever is shorter.Federal employees with questions about whether they qualify for FMLA leave or who have been subjected to retaliation for taking FMLA leave should immediately contact a federal employment attorney.