

Stryker dad

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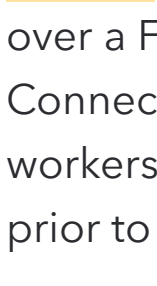
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A newborn baby in a hospital. Photographer: FRANK RUMPENHORST/DPA/AFP via Getty Images

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Stryker Worker Appeal Puts Focus on Early Leave for Child Birth

 **Patrick Dorrian**
Reporter

- Partners' FMLA leave rights before baby's birth date at issue
- Novel legal question could affect countless fathers, others

Stryker Corp.'s defense of its court victory over a Florida employee fired while in Connecticut for his child's birth will test when workers can take federal job-protected leave prior to a baby's arrival.

The argument Friday before the US Court of Appeals for the Eleventh Circuit involves a novel issue under the [Family and Medical Leave Act's provision](#) on leave for the birth of a child. The judges will review whether non-pregnant parents can take job-protected leave in advance of the expected due date for reasons unrelated to prenatal care.

The Eleventh Circuit ruling's consequences will likely fall most often on fathers, especially unmarried **dads**, employee-side attorneys familiar with the case told Bloomberg Law.

Unwed father Tristan Tanner's appeal challenges the US District Court for the Middle District of Florida's [2022 ruling](#) for the medical device maker on his FMLA interference and retaliation claims.

[FMLA regulations](#) expressly allow expectant mothers and their spouses to begin leave for child birth before the baby's arrival when needed for prenatal care or to assist with prenatal care.

The appeals court's ruling will, in some respects, have the potential to provide useful guidance on whether FMLA leave for child birth is ever available prebirth other than when related to prenatal care, [Jennifer Stefanick Barna of Epstein Becker & Green PC](#) said. But the facts in Tanner's lawsuit are so unique and extreme that it may turn out the ruling won't end up having frequent application, she said.

It's not often that someone travels so far and is away from work for as long as Tanner was in order to be present for the birth of their child, Barna said. The biggest takeaways from Tanner's case for her, as someone who counsels employers, are the importance of having clear leave policies and open communications with employees seeking or using FMLA leave, Barna said.

Other Leave Expired

According to [Tanner](#), he'd planned to cover his absence by using paid time off and sick leave, in addition to parental and FMLA leave. But his PTO and sick leave dwindled due to unplanned Covid-related absences and planning for his trip. It expired while in Connecticut waiting for his baby to arrive.

Stryker knew he intended to use part of his FMLA and parental leave to travel prebirth and approved his leave request on that basis, Tanner said.

But a week before he hit the road, the company told him his FMLA leave, which would have protected him from being fired, and his parental leave would only kick in when his child was born, Tanner said. It then terminated him for missed work days during the gap between when his PTO and sick leave ran out and when his FMLA leave—in **Stryker's** view—would have started, he said.

Tanner was reminded repeatedly that his FMLA and parental leave wouldn't start until the day his baby was born, **Stryker** said. He was fired only after racking up four straight unexcused absences that put him well over the number of attendance points for which employees could be fired under company rules, it said.

The FMLA doesn't insulate employees from termination for a reason unrelated to protected leave, the company said.

Statutory Interpretation, Purpose

The briefs lean heavily on issues of statutory interpretation and the purpose of the FMLA, which makes sense given the scarcity of case law on prebirth leave in situations similar to Tanner's, Barna said.

Employee-side attorneys Cassandra W. Lenning of Outten & Golden LLP and [Brian J. Sutherland](#) of Beal Sutherland & Berlin LLC believe Tanner has the better of those arguments.

Stryker points to a separate subsection of the regulation on birth leave for time off to bond with a newborn to support its contention that leave for birth can't begin until the birth, except when needed for prenatal care, Sutherland said. The company's argument is contrary to the rules of statutory construction, under which a clause within a subsection generally only applies to that subsection, not to other subsections, he said.

Tanner is also right that the express mention of prebirth leave for prenatal care doesn't mean time off before a baby arrives to be present for the birth is unavailable as FMLA leave "for birth," Sutherland said.

Prenatal care is medical care, and the FMLA also requires leave for family needs, Sutherland said. For this reason, references to prenatal care make sense when referring to a spouse, because the family care provision is limited to spouses and other immediate family members. But there is no reason why the limitation to spouses should apply to leave for a birth, which isn't so limited by the statute, Sutherland said.

It would frustrate the purpose of the FMLA if the Eleventh Circuit were to affirm the lower court, Sutherland and Lenning said.

Congress was clear that it wanted to provide both parents with an equal chance to be there for their baby's birth and to have job security while doing so, Lenning said.

Purpose Is Balance

But management-side attorney [Jeff Nowak](#) said the key principle underlying the FMLA is to strike a balance between an employee's need for time off for their own serious health condition or to care for their family with the employer's need to operate its business.

Reasonable commuting time to be present for a child's birth arguably may be considered part of the birth and covered under the FMLA, Nowak said. But personal time not inextricably connected to birth seems to fall outside the leave for birth intended by federal law, he said. Nowak is co-chair of [Littler Mendelson PC's leave and accommodations practice group](#).

FMLA regulations on [leave for adoption](#) are instructive on how the regulation on leave for birth should be understood, Nowak said. The adoption regulation outlines specific instances in which leave can begin before the actual placement or adoption, including for travel, he said.

The leave-for-birth regulation provides no guidance on prebirth leave, Nowak said. If the Labor Department had intended employees to be able to take leave for birth before a baby arrives for a reason unrelated to prenatal care, it arguably would have spelled that out, he said.

Training, Communication, Planning

Leave to be present for a baby's birth won't introduce the unmanageable uncertainties suggested by **Stryker**, Lenning said. Parents usually have a pretty good idea when a baby will be born and they are able to keep the employer updated, she said.

Tanner was in constant communication with **Stryker**, Lenning said. "He did everything right."

"The idea that leave for birth is only available at the moment the birth comes is just untenable." So is firing someone the day after their child is born, as **Stryker** did to Tanner, she said.

Like Barna, Lenning said she sees Tanner's case "as somewhat of a unique situation," because most employers wouldn't fire someone under similar circumstances and would have better training and communications.

Working spouses typically bank other types of non-FMLA leave in advance of a baby's arrival, Barna said. Open communication when possible is the best way to avoid a lack of those other types of leave for prebirth purposes, she said.

Employers are overwhelmingly supportive of their employees' FMLA rights and need for leave "during one of life's truly spectacular moments," and they are flexible on granting leave for birth and bonding, Nowak said. So the Eleventh Circuit's decision in Tanner's case isn't going to drastically change life as we know it, he said.

Florin Gray Bouzas Owens LLC represents Tanner. Jackson Lewis PC represents **Stryker**.

The case is [Tanner v. Stryker Corp.](#) of Mich., 11th Cir., No. 22-14188, oral argument 5/17/24.

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