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When an employee takes or requires a leave of absence from work, several statutes may be implicated, including the Family Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), and similar state laws. Despite the fact that both of these federal statutes have been in place for many years, the issues surrounding them still confound employers and the courts alike. In the past few years, there are have been a number of significant statutory and regulatory developments that expand the class of employees who may be eligible for leave and require employers to make modifications to their existing leave policies and practices. Additionally, the courts have continued to address a number of FMLA and ADA issues with often puzzling and contradictory results. The lessons learned from these cases are simple. Employers must exercise extreme caution in every aspect of handling a leave request, from identifying potentially protected absences to deciding whether to grant or deny leave. The companies that fare best before judges and juries are those that are sympathetic to their employees' plights and work hard to be fair and afford full and generous leave rights to their staff.

Set out in this article are ten lessons that employers should learn from recent regulatory and case law developments. While some of these lessons may only clarify or confirm practices employers have already adopted, others suggest new practices employers should adopt or stay away from to avoid running afoul of the FMLA or the ADA.

Do Update Your FMLA Policies and Procedures to Reflect the 2010 National Defense Authorization Act Changes

The FMLA affords eligible employees two types of military-related leave, qualifying exigency leave and leave to care for a covered service member with a serious illness or injury. The former allows eligible employees to take up to 12 workweeks of job-protected leave in the applicable 12-month period for any "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent. The later allows eligible employees to take up to 26 workweeks of job-protected leave in a "single 12-month period" to care for a covered servicemember with a serious injury or illness. These two types of FMLA leave were not among the original qualifying reasons for leave in the FMLA when it was enacted in 1993. Rather, the National Defense Authorization Act ("NDAA") for Fiscal Year 2008 amended the FMLA to include them, and when its FMLA regulations were amended in January 2009, the Department of Labor ("DOL") provided regulatory guidance on military family leave.

After the regulations were issued, on October 29, 2009, Congress expanded eligibility for qualifying exigency and covered service member leave when it passed the NDAA for Fiscal Year 2010 ("NDAA 2010"). The NDAA 2010 did not have an effective date, but it is widely presumed that its new FMLA provisions took effect immediately, except that the provision regarding caregiver leave for veterans (as discussed below) requires action by the U.S. Secretary of Labor before becoming effective. As yet, the DOL has not updated its FMLA regulations in accordance with the NDAA 2010. Moreover, the changes brought by that Act are so recent that they have not been the subject of court decisions.

The NDAA 2010 altered the right to take qualifying exigency leave in two important ways. First, qualifying exigency leave is no longer limited to employees who are spouses, sons/daughters, and parents of National Guard members or Reservists. Rather, it is now also available where the military member is an active duty service member of a regular component of the U.S. Armed Forces. Second, prior to being amended, the FMLA provided qualifying exigency leave where the military member was called to or serving on active duty in support of a military contingency operation, whether abroad or in the U.S. As changed, the law limits FMLA leave for qualifying exigencies related to deployment to a foreign country.

The NDAA 2010 also expanded the FMLA's military caregiver leave provisions. Now, employees may take such leave to care for certain veterans. Prior to amendment, military caregiver leave was available only where the covered service member requiring care was either a current member of the Armed Forces, or a member of the temporary (and not permanent) disability retired list, and not a veteran. As amended, leave can be taken for a veteran service member, provided the individual was a member of the Armed Forces sometime within five (5) years preceding the date on which the veteran undergoes the medical treatment, recuperation or therapy for which the leave is needed. The 2010 NDAA also expanded the definition of "serious illness or injury" beyond an illness or injury incurred in the line of duty on active duty to include conditions existing prior to active duty that were aggravated by active duty. Moreover, for veterans, provided that the serious injury or illness was incurred by or aggravated while on active duty in the Armed Forces, the injury or illness will be covered even if it did not manifest itself until after the member became a veteran. This change should bring conditions such as posttraumatic stress disorder under FMLA protection.

Employers should revise their policies, notices and procedures immediately to ensure that they are in compliance with these amendments.

Do Include GINA Safe Harbor Language in Medical Certification Forms and Other Documents Requesting Medical Information

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") issued its final regulations under Title II of the Genetic Information Nondiscrimination Act ("GINA"). In addition to prohibiting employment discrimination based on genetic information, Title II of GINA, which became effective in November 2009, prohibits employers from requesting, requiring, or purchasing genetic information.[1] The prohibition against "requesting" genetic information is a broad one and includes "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." *See* 29 C.F.R § 1635.8.

GINA outlines certain *limited* exceptions to the prohibition against requesting, requiring, or purchasing genetic information, one of which is for "inadvertent acquisition" of family medical history information. The "inadvertent acquisition" exception reflects Congress' concern that supervisors may accidentally learn an individual's genetic information by overhearing a conversation between the individual and others in the workplace or by receiving too much information from an employee in response to a general question regarding the employee's well-being (e.g., "How are you?").

The "inadvertent acquisition" exception may also apply where a covered entity receives genetic information in response to a lawful request for an employee's medical information under the FMLA or the ADA. The EEOC regulations make clear, however, that in such circumstances, the receipt of genetic information will not generally be considered inadvertent unless the covered entity directs the individual and/or health care provider from whom it requests medical information not to provide genetic information. In other words, employers should warn individuals and health care providers responding to the employers' medical inquiries that they should not provide data regarding an individual's genetic information.

The EEOC recommends the following "safe harbor" language for this purpose:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information.

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1 Genetic information includes information about: (i) an individual's genetic tests; (ii) the genetic tests of that individual's family members; (iii) the manifestation of disease or disorder in family members of the individual (family medical history); (iv) an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or (v) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. *See* 29 C.F.R. § 1635.3.

> "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

See 29 C.F.R § 1635.8(b)(I)(i)(B). According to the regulations, provided that employers warn individuals and healthcare providers not to provide genetic information by using the above safe harbor language, any receipt of such information in response to a lawful request for medical information will be deemed inadvertent and not in violation of GINA. Absent such language, an employer may still be able to demonstrate that the receipt of genetic information in response to a request for medical information was inadvertent, but only where it can demonstrate that the request for information was sufficiently narrowly tailored and not likely to result in the receipt of genetic information.

Accordingly, to avoid liability under GINA, employers should update their FMLA medical certification forms to include the EEOC's recommended "safe harbor" language. The warning should likewise be included on all requests for medical information, including request for accommodation forms and fitness for duty forms. In addition, the final regulations provide that when an employer sends an employee for a medical examination related to his or her fitness for duty, the employer must instruct the doctor not to ask for genetic information, including family medical history, as a part of the medical examination.

In addition to the inadvertent disclosure exception, the GINA regulations provide that family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition or a serious illness or injury. Under these circumstances, the EEOC's safe harbor language standing alone would be misleading because the receipt of family medical history information *is* required to demonstrate that the employee is entitled to the requested leave. While it is still a good idea to include the "safe harbor" warning in certification forms for leave to care for a covered family member, employers should modify or add to the language to make it clear that family medical history is required to the extent necessary to make the medical certification complete and sufficient under the applicable law or policy. Toward that end, employers can add the following sentence to the "safe harbor" clause:

> Please note, however, that if you are requesting leave to care for a covered family member with a serious health condition or a serious illness or injury, you will be required to provide family medical history to the extent necessary to make the medical certification complete and sufficient under the Family and Medical Leave Act or other applicable state or local law or company policy.

Finally, to the extent that an employer obtains genetic information in response to its lawful requests for information, it must keep such information in a confidential file separate from the individual's personnel file, e.g., in an existing ADA confidential medical information file.

Do Grant FMLA Leave to Employees Who Have Assumed the Role of Parent to a Child Even in the Absence of a Biological or Legal Relationship

Several types of FMLA leave are available to employees who are parents so that they can attend to the needs of their sons and daughters, and also to employees for the purpose of attending to their parents. These include: leave for the birth and to care for the employee's son or daughter; leave for the placement with the employee of a son or daughter for foster care or adoption; leave to care for the employee's son, daughter or parent with a serious health condition; qualifying exigency leave arising out of the fact that the employee's son, daughter or parent is on covered active duty; and leave to care for a covered service member with a serious illness or injury who is the employee's son, daughter or parent. 29 C.F.R. § 825.112. Where the parental relationship is biological or has legal formality, determining whether a person qualifies as a "parent" or "son or daughter" is straightforward. However, the FMLA extends rights even where no biological or legal relationship exists, making a leave eligibility determination difficult.

For all types of FMLA leave, the definition of "parent" includes anyone who stood *in loco parentis* to the employee when the employee was a son or daughter. Similarly, the definition of "son or daughter" under the FMLA includes a child of "a person standing *in loco parentis.*" 29 C.F.R. § 825.122. The current FMLA regulations define "persons in loco parentis" as those with day-to-day responsibilities to care for and financially support a child, or in the case of an employee, who had such responsibility for the employee when he/she was a child. A biological or legal relationship is not necessary. Whether an individual qualifies as a person *in loco parentis* will depend on the facts in each situation. 29 C.F.R. § 825.122(C)(3). Not surprisingly, courts are disinclined to grant employers' motions for summary judgment when the right to FMLA leave hinges on whether an *in loco parentis* relationship exists.

Furthermore, the DOL recently signaled that it will take a liberal enforcement position when handling FMLA complaints that involve the issue. On June 22, 2010, the DOL issued an Administrator's Interpretation (No. 2010-3), explaining its enforcement position on when an employee stands *in loco parentis* for purposes of FMLA leave taken for a child, and that the determination depends on the facts in each case. According to the DOL, employees who have no biological or legal relationship with a child may nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave.

The DOL's interpretation explains that grandparents and a range of other relatives, unmarried partners of parents, same-sex partners, and other adults may qualify as standing *in loco parentis* to a child. Key to whether such a relationship exists is the intention of the adult to assume the status of parent to the child. Other relevant factors are the age of the child, the degree of the child's dependency on the adult, the amount of support provided, if any, and the extent to which duties commonly associated with parenthood are exercised. As noted above, the FMLA regulations currently define *in loco parentis* to include persons with day-to-day responsibilities to care for *and* financially support a child. However, in its new Interpretation, the DOL contends that either daily care *or* financial support, but not both, is required. Whether courts will agree remains to be seen.

According to the DOL, the FMLA places no limit on the number of individuals who are eligible to care for a child. The fact that a child has both a mother and father, or a biological parent in the home, does not preclude a finding that some other adult stands *in loco parentis* to that child. For example, where one of a child's divorced or unmarried parents has remarried, and the other has a same-sex partner, all four adults

may have equal rights to take FMLA leave for the child. And, according to the DOL, while an employer may require an employee to provide reasonable documentation of his/her relationship to the child, a simple statement asserting that an *in loco parentis* relationship exists will suffice.

Do Not Maintain an Inflexible Leave Policy

As most employers know, the FMLA is not the only concern when considering an employee's need for leave. Not only do employers have to watch out for state laws that might afford employees additional leave rights, but employers must also consider whether they have additional obligations under the Americans with Disabilities Act ("ADA").

In its Enforcement Guidance, the EEOC has emphasized that unpaid leave may be a reasonable accommodation under the ADA. *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA* (October 17, 2002) at p. 13. Many courts have agreed. *See e.g.*, *Rascon v. US West Communications*, 143 F.3d 1324 (10th Cir. 1998); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir 1998); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782, (6th Cir. 1998); *Haschmann v. Time Warner Entertainment Co.*, L.P., 151 F.3d 591, 602 (7th Cir. 1998). Accordingly, employees who are unable to return to work after the expiration of their FMLA leave on account of their own serious health condition may be entitled to additional leave under the ADA. In addition, employees who do not meet the eligibility criteria for FMLA leave may nevertheless be entitled to leave as a reasonable accommodation under the ADA.

While most authorities recognize unpaid leave as a potential type of reasonable accommodation under the ADA, the question of how much time off is required is much less settled. Unlike the FMLA, the ADA does not contain a specific time limit on the amount of leave an employee may take. The amount of leave that may be required as a reasonable accommodation under the ADA depends on the facts and circumstances of each individual case. When considering a request for unpaid leave under the ADA, a number of factors should be considered, including (a) whether the employee's impairment qualifies as a disability, (b) whether there is a relationship between the leave request and the employee's ability to perform the essential functions of his job, (c) whether another reasonable accommodation is available, and (d) whether the leave would pose an undue hardship to the employer. Not surprisingly, requests for leave for a specified and brief duration will generally be deemed reasonable; whereas requests for leave of indefinite or long duration will most likely be deemed unreasonable. Even if an employee requests a definite period of leave, however, the requested leave will generally not be considered a reasonable accommodation if the employee's medical documentation shows that he or she is not likely to be able to return to work at the end of the requested period of leave. Moreover, where an employer determines that holding a job open for an extended period of time would not be reasonable, it must nevertheless consider other possible accommodations, e.g., whether it has a vacant, equivalent position to which the employee can be reassigned.

Due to their ease of administration, many employers favor "no-fault" attendance policies under which employees are provided a fixed amount of leave before their employment is terminated regardless of the reason for such leave. The EEOC has cautioned, however, that employers cannot strictly adhere to such "no fault" leave policies where additional leave beyond the fixed-leave period may be a reasonable accommodation under the ADA. Specifically, the EEOC's Enforcement Guidance provides that "[i]f an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer

must modify its "no-fault" attendance policy to provide the employee with the additional leave," unless another effective accommodation would enable the employee to continue working, or granting additional leave would cause an undue hardship. *See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Oct. 17, 2002), p. 14. Thus, if an employee requests additional leave as an accommodation for a disability, employers cannot rely solely on their general leave policies to deny the request. Instead, they must engage in the interactive process and inquire into the specific circumstances of the particular employee and the nature of the employee's request.

Recently, the EEOC has launched an attack on what it deems to be "inflexible" leave policies. The policies under scrutiny include those with strict maximum leave periods that do not allow room for exceptions where additional leave is needed as a reasonable accommodation for qualified individuals with a disability under the ADA. The following lawsuits highlight the EEOC's emphasis on enforcement of the ADA in the context of medical leave and the risks associated with inflexible termination policies:

- *EEOC v. Supervalu Inc.* (N.D.Ill.). In January 2011, the EEOC settled a class action ADA lawsuit against Jewel Food Stores Inc. ("Jewel"), a Chicago-area supermarket chain, for 3.2 million dollars. In its Complaint, the EEOC alleged that Jewel had a policy of firing employees after one year of leave if they were then unable to return to their jobs without restrictions. According to the EEOC, Jewel did not endeavor to provide such employees extended leave or any other reasonable accommodations before terminating their employment. The EEOC also charged that Jewel refused to allow disabled employees to participate in its light duty program unless they were injured on the job.

- *EEOC v. Princeton HealthCare System* (D.N.J.). The EEOC sued Princeton HealthCare System in August 2010 for failing to reasonably accommodate employees who needed medical leave. According to the EEOC's suit, Princeton HealthCare System enforces leave policies that do not provide reasonable accommodations to qualified individuals with a disability. The company allegedly fires employees who are not qualified for leave under the FMLA if they cannot return to work within seven days, and refuses to grant leave beyond the 12 weeks allowed by the FMLA. The EEOC's lawsuit asserts that Princeton HealthCare System does not grant exceptions to these policies for qualified individuals with disabilities who need additional leave as a reasonable accommodation.

- *EEOC v. United Road Towing* (N.D.Ill.). On September 30, 2010, the EEOC brought a lawsuit against United Road Towing in the United States District Court for the Northern District of Illinois, asserting that the company violated the ADA by enforcing an inflexible leave policy. According to the EEOC, United Road Towing fails to provide reasonable accommodations to qualified employees with disabilities who are on authorized medical leave, and instead terminates them after they exhaust their 12-week FMLA entitlement. The EEOC also contends that United Road Towing fails to re-hire employees with disabilities who have been terminated under the company's medical leave policy when such employees subsequently reapply.

- *EEOC v. Sears Roebuck & Co.*, (N.D. Ill. consent decree approved Sept. 29, 2009). The Court approved a $6.2 million settlement of an EEOC class action claiming that Sears violated the ADA through operation of an inflexible leave policy of terminating injured employees who exhausted their workers' compensation leaves rather than return them to work.

- *EEOC v. Beverage Solutions Inc.* (N.D.Ill. consent decree entered Feb. 26, 2010). A beverage distribution company entered into a consent decree with the EEOC, settling claims that the company operated an overly restrictive leave policy in violation of the ADA. The company's leave policy prevented employees from taking leave for any reason during certain critical periods in its annual business cycle.

- *EEOC v. United Parcel Service, Inc.* (N.D.Ill.). The EEOC sued UPS in federal court in Chicago in August 2009 for denying sufficient medical leave to disabled employees. The suit asserts that UPS sets arbitrary deadlines for returning to work after medical treatment. In the EEOC's administrative investigation, it found that UPS discharged an employee who was diagnosed with MS for exceeding the company's 12-month leave policy despite evidence that she could have returned to work after an additional two weeks.

The need to consider leave as a reasonable accommodation under the ADA is particularly important following the passage of the ADA Amendments Act of 2008 (the "ADAAA"), which went into effect on January 1, 2009 and greatly expanded the number of individuals eligible for the Act's protection. In enacting the ADAAA, Congress intended to make it easier for individuals to establish that they have a disability within the meaning of the statute and shift the focus of disability claims from coverage to a determination of whether discrimination in fact occurred. The ADAAA overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for individuals with significant impairments.

At long last, the EEOC's final regulations implementing the ADAAA were published in the Federal Register on March 25, 2011. The ADAAA and its implementing regulations altered the original ADA in the following dramatic ways:

- Although the ADAAA did not alter the ADA's definition of "disability," it emphasized that the definition of disability should be construed in favor of broad coverage of individuals. The final regulations provide nine rules of construction to guide the analysis of what constitutes a disability.

    1. The term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by the Act.

    2. An impairment need not prevent or significantly limit a major life activity to be considered "substantially limiting."

    3. In keeping with Congress' intent that the primary focus of the ADA should be on whether discrimination occurred, the determination of disability should not require extensive analysis.

    4. The determination of whether an impairment "substantially limits" a major life activity requires an individualized assessment.

    5. Although the determination of whether an impairment "substantially limits" a major life activity will ordinarily not require scientific, medical, or statistical evidence, such evidence may be used if appropriate.

6. The determination of whether an impairment substantially limits a major life activity should be made without regard to ameliorative effects of mitigating measures (other than ordinary glasses or contact lenses).

7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

8. An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of "disability."

9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

- While emphasizing that the question of "disability" remains an individualized determination, the final regulations provide examples of impairments that should "virtually always" constitute disabilities, including: deafness, blindness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder and schizophrenia.

- The EEOC's final regulations clarify that the term "major life activities" includes "major bodily functions" (such as functions of the immune system, normal cell growth, and brain, neurological and endocrine functions) and provide two non-exhaustive lists of activities and major bodily functions that qualify as "major life activities."

- The ADAAA also changed the "regarded as" category in the definition of "disability." Under the old law, the ADA covered individuals who were "regarded as" having an impairment that limited one or more major life activities. The amendment clarifies that an individual can meet the "regarded as" prong if the individual can establish that he or she was subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not "transitory and minor." The regulations further clarify, however, that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation.

If You Suspect That an Employee's Absence May Be For an FMLA-Qualifying Reason, Do Inquire Further

To claim protection under the FMLA, an employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. But, no magic language is required. Under the current regulations, when seeking leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.[2] *See*

[2] But, when an employee seeks leave due to a FMLA-qualifying reason for which he or she has already taken FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. *See* 29 C.F.R. § 303(b).

29 C.F.R. §§ 302(c), 303(b). Instead, where an employer has reason to believe that an employee may be absent for an FMLA qualifying reason, the employer must inquire further to determine whether the employee is seeking FMLA-protected leave.

Whether an employee provided sufficient information to put his or her employer on notice of the need to take leave for a qualifying condition is an issue that is frequently litigated. Because every case turns on its own facts, courts reach diverging conclusions in this area. Cases with sympathetic facts often lead courts to reach unexpected conclusions, making this issue particularly perilous for employers. The following recent cases are illustrative:

An unusual and surprising "notice" case last year was *Murphy v. FedEx Nat'l LTL Inc.*, 2010 WL 3341233 (8th Cir. Aug. 26, 2010). Susan Murphy ("Murphy"), a FedEx truck driver, was discharged while she was out of work following the unexpected death of her husband. Murphy sought and was granted FMLA leave on August 31, 2006 to care for her husband, who was in the hospital. On September 7, 2006, Murphy's husband passed away. That same day, Murphy contacted her supervisor to notify him of her husband's death and to ask about employee benefits related to funeral expenses. She then took three days of bereavement leave. On September 11, 2006, Murphy's supervisor contacted her and told her that her FMLA leave ended on September 7 and asked how much additional time she needed. Murphy said that she needed 30 days "to take care of things." Her supervisor responded "okay, cool, not a problem. I'll let HR know." When the supervisor raised the issue with HR, however, it denied Murphy's request for additional leave. Murphy's supervisor contacted her on September 15, 2006 to tell her that the company decided to terminate her employment.

Murphy sued FedEx for unlawful interference with her FMLA rights. Murphy prevailed at trial, and FedEx appealed. The Court of Appeals for the Eighth Circuit remanded the case for a new trial based primarily on faulty jury instructions. In so doing, however, the Court reached several surprising conclusions.

First, the Court rejected FedEx's argument that Murphy could not prevail unless she demonstrated the existence of a serious health condition that would have qualified her for FMLA leave. Instead, the Court held that Murphy could state a sound FMLA claim under an estoppel theory even if she did not in fact suffer from a serious health condition following the death of her husband. According to the Court, "an employer who makes an affirmative representation that an employee reasonably and detrimentally believed was a grant of FMLA leave can be estopped from later arguing that the employee was not in fact entitled to that leave because she did not suffer a serious health condition." The Court agreed with FedEx, however, that on an estoppel theory, in order to invoke the protections of the FMLA, Murphy was required to demonstrate that she provided notice to FedEx that she "may need FMLA leave" and that she reasonably believed that FedEx granted her "FMLA leave, rather than some other kind of leave." Since the lower court's jury instruction omitted this fundamental element, the case was remanded for a new trial.

Second, in rejecting FedEx's request for judgment as a matter of law, the Court concluded that a reasonable jury could find that Murphy gave adequate notice of her need for FMLA leave. The Court recognized that, by itself, Murphy's statement that she needed 30 days to "take care of things" would ordinarily be insufficient. It concluded, however, that such statement coupled with the supervisor's knowledge that Murphy's husband had passed and that her mental state was impaired, could have placed FedEx on notice that Murphy needed additional FMLA leave.

Whether an employee provided sufficient notice of her need for FMLA-qualifying leave was also examined in *Schaar v. Lehigh Valley Health Services, Inc.*, 732 F.Supp.2d 490 (E.D.Pa. 2010). Rachael Schaar ("Schaar"), a medical receptionist at Lehigh Valley Health Services, Inc. ("Lehigh Valley"), suffered a urinary tract infection. When Schaar visited her doctor, who likewise worked for Lehigh Valley, on Wednesday, September 21, 2005, he prescribed an antibiotic to be taken for at least three days, and gave her a note stating she would be unable to work September 21 and 22 due to her illness. Schaar went into her office, taped the note to her supervisor's door, and left work. Fortuitously, Schaar had previously been approved for vacation days on Friday, September 23, and Monday, September 26. According to Schaar, she remained ill and could barely get out of bed until Monday, September 26, when she felt well enough to wash dishes and do some laundry. Schaar returned to work on September 27, 2005, informing her supervisor that she was sick all weekend and was still not feeling too good. Her employment was terminated on October 3, 2005. Schaar sued.

Lehigh Valley argued that Schaar had not given proper notice that she might qualify for FMLA leave for her absence. The District Court for the Eastern District of Pennsylvania disagreed, finding genuine issues of material fact that precluded summary judgment. In so holding, the Court emphasized that Schaar's doctor, whom Schaar regarded as one of her supervisors, was aware of her condition, authored a medical excuse note on her behalf, and said that he would speak to Schaar's supervisor about her condition and resulting absence. When combined with Schaar's report to her supervisor that she was sick all weekend, the Court concluded that a reasonable jury could find that Schaar provided Lehigh Valley adequate notice that she may need FMLA leave.

In *Stimpson v. UPS*, 2009 WL 3583466 (6th Cir. Nov. 3, 2009), the Court of Appeals for the Sixth Circuit likewise found that an employee gave his employer sufficient notice that he might need FMLA-qualifying leave. There, Paul Stimpson ("Stimpson"), who had been working as a part-time, on-call package sorter for UPS, had been hit by a car while riding his bike off duty. He initially refused medical treatment, but later visited an emergency room, where doctors noted he had contusions and gave him a prescription for pain medication that he failed to fill. He returned to the hospital a day later complaining of back pain.

On April 30, 2006, the day of the accident, and the following day, Stimpson phoned UPS to report he had been hit by a car, but gave no other information. Stimpson claimed that during the next four days, he spoke with his supervisor and said he would not be returning to work until he recovered. On May 5, 2006, UPS sent Stimpson a letter explaining that he had been absent without medical documentation, and would be fired within 72 hours unless he submitted the information. The Company discharged him on May 12. Stimpson subsequently brought suit, alleging that his discharge violated the FMLA.

The Court concluded that by reporting that he had been hit by a car and could not work, Stimpson had given UPS sufficient notice of his need for leave, and a reasonable employer would have inquired further to determine if FMLA leave was needed. However, the Court proceeded to grant summary judgment in favor of UPS, finding that Stimpson had failed to demonstrate that he suffered from a serious health condition as a result of the accident and was, therefore, not entitled to leave under the Act.

In one victory for employers, the Court of Appeals for the Eighth Circuit upheld the lower court's rejection of Michael Kobus' ("Kobus") allegations that his employer constructively fired him in violation of the FMLA, finding that Kobus failed to "adequately state an intent to take FMLA leave." *See Kobus v. College of St. Scholastica Inc.*, 608 F.3d 1034 (8th Cir. 2010). Rather, Kobus told his supervisor only that he was stressed and anxious due to personal problems. He avoided telling his employer that he was

diagnosed with depression and was taking prescription medication for the condition. Furthermore, his supervisor specifically asked Kobus whether he was seeking FMLA leave. Kobus responded that he didn't have a doctor to prepare a medical certification, and he asked whether there was another option. Kobus resigned after being informed that no other type of leave was available. Concluding that Kobus failed to reveal his diagnosis, expressed doubt about his ability to confirm his diagnosis with a physician, and failed to pursue a leave of absence under the FMLA, the Court of Appeals upheld the dismissal of Kobus' FMLA claim.

Similarly, in *Brown v. Kansas City Freightliner Sales, Inc.*, 2010 WL 3258301 (8th Cir. Aug. 19, 2010) (cert. denied Feb. 22, 2011), the Court of Appeals for the Eighth Circuit upheld the lower court's grant of summary judgment in favor of Kansas City Freightliner Sales, Inc. ("KCF") on the ground that Donald Brown ("Brown") failed to provide adequate notice of his need for FMLA protected leave.

In both June and August 2007, Brown injured his back at work. After the June incident, Brown visited an occupational doctor, was diagnosed with a lumbar strain, and was released to return to work that day with limited restrictions. He was subsequently released to work full duty "as tolerated" on September 21, 2007. Several days later, on September 26, 2007, Brown told his supervisor that he hurt his back again and wanted to go home. Brown declined medical treatment before leaving work. He remained out through October 2, 2007. On each day, Brown or his wife called him in sick but provided no other information. Brown had no available sick time left for his absences from September 26 through October 2. When he returned to work on October 3, 2007, his employment was terminated by KCF.

In upholding the district court's decision, the Court of Appeals emphasized that employees have an affirmative duty to indicate both the need and the reason for leave and they must let their employer know when they anticipate returning to their position. In this case, the Court concluded that KCF did not have sufficient notice of Brown's need for FMLA leave and it did not, therefore, interfere with Brown's FMLA rights.

Finally, in *Righi v. SMC Corporation*, 2011 WL 547364 (7th Cir. Feb. 14, 2011), the Court of Appeals for the Seventh Circuit held than an Illinois sales representative did not provide sufficient notice of his need for FMLA leave where he failed to inform his employer how much time he would need off from work and neglected to respond to his employer's repeated requests for additional information concerning his absence.

Robert Righi ("Righi") was employed by SMC Corporation ("SMC") as a sales representative. While at a training seminar on July 11, 2006, Righi received a call from his sister who informed him that their mother had gone into a diabetic coma. Righi left the seminar to return home to Illinois to be with his mother. The following day, Righi sent an email to his supervisor, explaining that he left the seminar to attend to his mother and that he needed a couple of days to make arrangements for her immediate care. He further noted "I do have vacation time, or I could apply for the family care act, which I do not want to do at this time." Upon receiving the email, Righi's supervisor tried to contact him approximately 15 times over the next seven days to inquire further about his need for leave. Righi failed to return his supervisor's calls. When Righi's supervisor finally got in touch with Righi on July 19, 2006, he told Righi to come into the office for a meeting the following day. During that meeting, on July 20, 2006, SMC terminated Righi's employment. Righi then sued SMC, asserting FMLA violations.

While the Court of Appeals disagreed with the district court that Righi's statement in his email that he did not want to apply for leave under the "family care act" "at this time" constituted a waiver of his right to FMLA leave, it nevertheless upheld summary judgment in favor of SMC. According to the Court, "ordinarily, an employee's statement to his employer indicating that he needs leave to care for a seriously ill parent would be sufficient to invoke the protections of the FMLA." *Righi*, 2011 WL 547364, at *4. And, in fact, Righi's email to his supervisor was sufficient to give rise to SMC's duty to make a further inquiry regarding Righi's absence. However, in this case, SMC repeatedly attempted to fulfill its obligation to inquire further; but, Righi failed to respond to SMC's calls or otherwise contact SMC to provide additional information regarding his leave request, including the anticipated duration of such leave. "The FMLA does not authorize employees to 'keep their employers in the dark about when they will return' from leave." *Id*. at *5. Finding no extraordinary circumstances that justified Righi's failure to respond to SMC, the Court concluded that Righi's failure to notify SMC of the expected duration of his leave foreclosed his FMLA interference claim.

Do Advise Employees of Certification and Other Leave Requirements and the Consequences Of Failing to Meet Those Requirements

Under the current FMLA regulations, employers are required to provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* 29 C.F.R. § 300(c). In keeping with these regulations, courts repeatedly hold that employers who fail to provide the required notice may not take adverse action against an employee for failing to comply with any of his or her obligations under the Act.

For example, in *Branham v. Gannett Satellite Information Network, Inc.*,619 F.3d 563 (6th Cir. Sep. 2, 2010), the Court of Appeals for the Sixth Circuit held that an employer was not entitled to rely on a "negative certification" submitted by an employee's health care provider in denying a request for FMLA leave where the employer never effectively triggered the employee's obligation to provide medical certification or informed the employee of the consequences of failing to provide a sufficient medical certification.

Deborah Branham ("Branham") worked as a receptionist for a newspaper owned by Gannett Satellite Information Network ("Gannett"). On November 7, 2006, Branham called her supervisor and advised that she would not be in because her son was ill. She was likewise absent the following day on account of her son's illness. On November 9 and 10, Branham left messages for her supervisor stating that she was sick and would be absent. The following Monday, her husband left another message stating that Branham was still sick and was going to the doctor that day. On November 13, 2006, Branham was seen by Dr. Singer, who found her exam to be "normal" and expected her to return to work on November 14. Although Branham informed her supervisor that Dr. Singer released her to return to work the following day, Branham explained that she still wasn't feeling well. Her supervisor told her to come in and fill out short term disability paperwork to see if she qualified for anything.

Branham did not report to work on November 14, 2006, but went to the office to complete the medical certification form. Gannett faxed the form to Dr. Singer's office. On November 17, 2006, Dr. Singer faxed the completed form back to Gannett, indicating that Branham's condition began on November 10, that she was able to perform full duty on November 14, and that she did not require intermittent leave.

Branham remained absent, and both her supervisor and HR advised her that she needed to provide additional medical documentation to support her absences. Branham did not do so and the company decided to terminate her employment effective November 24, 2006. On November 28, a nurse practitioner who had previously seen Branham sent the company a medical certification stating that Branham had an illness that began on May 6, and that she would not be able to return to work until January 1, 2007.

Branham filed suit alleging that Gannett interfered with her rights under the FMLA. The district court granted summary judgment in favor of Gannett, concluding that Gannett was entitled to rely on the negative certification provided by Dr. Singer in denying Branham's FMLA leave. The Court of Appeals reversed. The Court noted that the parties focused their attention on the issue of whether an employer may rely on a negative certification provided by the employee to deny leave without waiting the full fifteen-day period prescribed by the applicable regulation. According to the Court, it was not required to reach that issue in this case because Gannett never effectively triggered Branham's obligation to provide medical certification to support her leave. While Branham's supervisor orally requested a certification from her on November 13, 2006, Gannett never made the request in writing as it was required to do by the FMLA regulations. Gannett could not, therefore, rely upon Branham's failure to provide sufficient medical certification as a basis for terminating her employment.

In *Clark v. Macon County Greyhound Park, Inc.*, 2010 WL 2976492 (M.D.Ala. July 23, 2010), the District Court for the Middle District of Alabama likewise emphasized the importance of providing notice to employees concerning medical certification requirements and the consequences of failing to meet those requirements. On June 14, 2007, Candis Clark ("Clark"), an employee of Macon County Greyhound Park, Inc. ("MCGP"), told her supervisor that she needed to take a medical leave of absence. The MCGP personnel manager gave Clark short term disability forms and an application for FMLA leave. According to Clark, the personnel manager instructed Clark to return *all* of the completed forms to the short term disability carrier. Clark and her doctor completed the forms and mailed them to the insurance company. On July 2, 2007, MCGP terminated Clark's employment for "job abandonment" because she failed to return her FMLA paperwork to MCGP.

In denying MCGP's motion for summary judgment on Clark's FMLA interference claim, the District Court for the Middle District of Alabama noted that MCGP failed to present evidence that it told Clark to whom to return the medical certification form, the deadline for returning the form, or the consequences of her failure to return the form. The Court similarly denied summary judgment on Clark's FMLA retaliation claim, finding that there was sufficient evidence that MCGP's proffered reason for terminating Clark's employment was pretextual because MCGP gave Clark misleading directions regarding the medical certification form and failed to inform her of the consequences of not returning the form to MCGP within fifteen days.

The Ninth Circuit's holding in *Boecken v. Gallo Glass Co.*, 2011 WL 245503 (9th Cir. Jan. 27, 2011) is another interesting opinion, and one with a surprising result. Larry Boecken ("Boecken") was on an approved FMLA leave to care for his grandmother. His employer, Gallo Glass Company ("Gallo"), discharged him for misusing his FMLA leave upon learning that he was walking in the park and was not in proximity to his grandmother. Reversing the district court's summary judgment in favor of Gallo, the

Court of Appeals for the Ninth Circuit held that there were genuine issues of material fact as to whether Gallo provided Boecken with sufficient advance notice of the consequences of his alleged good faith misuse of FMLA time.

Do Grant Eligible Employees FMLA Leave For Substance Abuse Treatment

Substance abuse may constitute a serious health condition under the FMLA if it otherwise meets the definition of "serious health condition" under the Act. However, under the current FMLA regulations, FMLA leave may only be taken for treatment of substance abuse by a healthcare provider or by a provider of health care services on referral by a health care provider.[3] *See* 29 C.F.R. § 825.119(a). Absences caused by an employee's use of the substance, instead of for treatment, are not protected. *See id.* Unfortunately, it is not always clear which absences are attributable to substance abuse and which absences are for treatment. Accordingly, employers should carefully analyze all absences related to substance abuse and treatment for substance abuse before taking adverse action against an employee because of such absences.

In one recent case, the United States District Court for the Southern District of Texas seemed to blur the line between substance abuse and treatment for abuse. In *Picarazzi v. John Crane, Inc.*, 2011 WL 486211 (S.D. Tex. Feb. 7, 2011), the Court held that a worker with alcoholism who was fired for absenteeism could proceed on his FMLA and ADA claims. Perry Picarazzi ("Picarazzi"), a customer service representative for John Crane, Inc. ("JCI"), had a history of alcoholism, which led to a number of absences during the months of January 2008 through March 2008. Although these absences triggered enough points under JCI's attendance policy to warrant a written warning, JCI did not give Picarazzi the written warning until June 20, 2008. According to JCI, the delay was occasioned by Picarazzi's subsequent absences.

In late March or early April 2008, Picarazzi told his supervisor about his alcohol problem and voluntarily admitted himself into a treatment program on April 2, 2008. He requested a leave of absence from JCI beginning on April 1, 2008. Picarazzi was subsequently discharged from the inpatient treatment program on April 23, 2008. However, Dr. Zella, the doctor who treated Picarazzi while he was in treatment, referred Picarazzi to an outpatient treatment program and opined that he could return to work on April 30, 2008. Picarazzi did not return to work in the days immediately following his release from the inpatient treatment program and subsequently contacted his supervisor on April 29, 2008 to report that he had relapsed and had decided to return to rehab. Picarazzi was in rehab from April 30, 2008 to May 8, 2008 and was released to return to work on May 13, 2008. After returning to work as expected on May 13, 2008, Picarazzi again relapsed in mid-May 2008 and was absent several times between May 15, 2008 and May 21, 2008. On May 21, 2008, Picarazzi notified JCI of his relapse. He was then absent from work between May 21, 2008 and May 29, 2008. Picarazzi did not see a physician during this time, but rather sought help from Alcoholics Anonymous and clergymen. He then entered another rehab facility between June 9, 2008 and June 15, 2008. Picarazzi returned to work on June 18, 2008, following his discharge from the treatment program.

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3 Employees suffering from alcoholism and recovering drug addicts may also be entitled to leave for treatment as a reasonable accommodation under the ADA.

On June 20, 2008, JCI issued Picarazzi a written warning for his absences in the January 2008 to March 2008 time frame and a final written warning for various subsequent absences. Six days later, on June 26, 2008, JCI discharged Picarazzi for accumulating too many points under JCI's attendance policy. In reaching its decision, JCI considered the periods when Picarazzi was in inpatient treatment programs as FMLA leave and did not assess any points against him for those absences. However, JCI did assess absence points against Picarazzi for days on which Picarazzi was absent, but not in a treatment program. For example, Picarazzi was assessed points for absences between the dates on which he was discharged from treatment programs and his return to work dates.

Picarazzi sued JCI for retaliation under the FMLA and the ADA. Denying JCI's motion for summary judgment on Picarazzi's FMLA claim, the Court concluded that a reasonable jury could find that Picarazzi qualified for FMLA leave because he was receiving treatment for his substance abuse during his absences. The Court rejected JCI's contention that Picarazzi was only entitled to protected FMLA leave during his stays in inpatient rehabilitation centers. Although the applicable regulation provides that "FMLA leave may only be taken for treatment of substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider" (*see* 29 C.F.R.§ 825.119(a)), the Court emphasized that the language of the regulation "does not indicate that, to qualify for FMLA leave, Plaintiff must have been under the care of a physician or enrolled in a rehab institution for *each day* that he was on leave." *Picarazzi*, 2011 WL 486211, at *9. Thus, according to the Court, some of the other days Picarazzi was absent may also have been considered FMLA leave.[4]

In addition, the Court concluded that, even if Picarazzi was not receiving "treatment" for some of the absences for which points were assessed against him, JCI was estopped from asserting that Picarazzi was not qualified for leave based on JCI's representations to Picarazzi concerning his entitlement to leave and his reliance thereon. By way of example, the Court noted that JCI had sent Picarrazi a notice indicating that he was on approved leave from April 1 through May 4, after receiving a medical certification explaining that Picarazzi was expected to remain in a rehab program through that date. Although Picarazzi was discharged earlier than expected, JCI never informed Picarazzi that his absences after his release date would not be protected. According to the Court, Picarazzi reasonably relied to his detriment on JCI's representation that he was on an approved leave through May 4, 2008.

The Court went on to find that the temporal proximity between Picarazzi's leave and his discharge suggested a causal connection sufficient to satisfy Picarazzi's prima facie burden. Furthermore, while JCI asserted that it discharged Picarazzi for a legitimate, non-discriminatory reason due to his accumulation of absence points, the Court held that a reasonable jury could find that such reason was pretextual, especially if Picarazzi was successful in demonstrating that absence points were improperly assessed against him while he was on a protected leave. For similar reasons, the Court also denied JCI's motion for summary judgment on Picarazzi's ADA claim.

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[4] Note that the *Picarazzi* case involved different facts than those presented to the Seventh Circuit in *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008). There, the plaintiff was absent from work for three days due to substance abuse before being admitted for inpatient substance abuse treatment. Those three days brought the plaintiff's total absences over the employer's threshold and he was subsequently discharged. The plaintiff contended that the three-day absence prior to his hospitalization should be covered because they occurred after he reached out to his physician to seek a referral for inpatient treatment. In other words, the plaintiff contended that his treatment began with the phone call to his physician. The Court of Appeals for the Seventh Circuit disagreed, holding that the plaintiff's treatment did not begin until he was under the care of a physician when he entered the rehabilitation treatment program.

The employer fared better in *Ames v. Home Depot U.S.A.*, Inc., 629 F.3d 665 (7th Cir. 2011). There, the Court of Appeals for the Seventh Circuit held that a Home Depot USA, Inc. ("Home Depot") employee discharged for alcohol use lacked claims under the FMLA and the ADA.

After working for five years without incident, Diane Ames ("Ames") told her manager that she had a drinking problem and needed assistance through Home Depot's Employee Assistance Program ("EAP"). In connection with the EAP, Ames agreed to periodic drug and alcohol testing throughout the remainder of her employment. She likewise agreed that she would be immediately discharged if she tested positive for alcohol on the job. After taking a leave of absence to seek treatment for alcohol abuse, Ames returned to work.

The following month, however, Ames was arrested for driving under the influence. Upon learning of her arrest, Home Depot required her to schedule an alcohol treatment evaluation. Ames requested and was granted several extensions within which to schedule the evaluation. During this time period, she sought accommodations from her manager so she could attend her Alcoholics Anonymous meetings.

On December 23, 2006, Ames reported for her regular shift and smelled of alcohol. A blood alcohol test revealed that she was in fact intoxicated. As a result, Home Depot made the decision to terminate her employment, which it planned to communicated to her on January 2, 2007. On January 1, 2007, however, Ames checked herself into the hospital and was subsequently discharged on January 2, 2007 with instructions to seek an outpatient treatment program. Because of her hospitalization, Ames did not attend her January 2, 2001 meeting with her manager. On January 10, 2007, Home Depot sent Ames a letter by mail, terminating her employment.

Ames brought suit, contending that her discharge violated both the FMLA and the ADA. Affirming summary judgment on Ames' FMLA interference claim, the Court held that Ames failed to demonstrate that she was entitled to leave under the Act. Although Ames received treatment for alcoholism through Home Depot's EAP, she failed to demonstrate that she suffered from a serious health condition. Under the FMLA, substance abuse may qualify as a serious health condition if it involves "inpatient care" or "continuing treatment by a healthcare provider." The Court concluded that Ames failed to demonstrate that she suffered from either condition. Prior to the company's decision to terminate her employment, Ames did not go into inpatient care for treatment; nor did she establish that her condition required continuing treatment by a healthcare provider. In fact, she testified that she was never incapacitated by her condition. Although the parties spent considerable time arguing whether Ames gave Home Depot sufficient notice of her need for leave, the Court did not reach this issue, finding that she was not in any event entitled to leave.

The Court also concluded that Ames' FMLA retaliation claim was properly dismissed on summary judgment because she presented no evidence of a causal connection between her alleged requests for leave and her discharge. Rather, the record evidence demonstrated that Ames was discharged for violating Home Depot's Code of Conduct by coming to work under the influence of alcohol.

According to the Court, Ames' ADA claim was also appropriately dismissed because Ames failed to demonstrate that she was disabled within the meaning of the ADA (under the definitions then in effect) and that she was discharged for legitimate non-discriminatory reasons. Furthermore, there was no evidence that Home Depot refused to accommodate Ames' condition because the company had tried to assist her through its EAP and by affording her time off.

Do Not Implement Procedures That Discourage Employees From Taking Leave

Employers may not "interfere with, restrain, or deny the exercise of or the attempt to exercise" any rights under the FMLA by their employees. *See* 29 C.F.R § 825.220(a). It is well settled that both the refusal to grant leave and discouragement from taking leave constitute unlawful interference. In several recent decisions, federal courts have attempted to strike the right balance between an employer's right to information and an employee's right to freely exercise rights under the FMLA.

Although employers are entitled to require their employees on FMLA leave to provide periodic reports of their status and intent to return to work (*see* 29 C.F.R § 825.311), there can sometimes be a fine line between checking in with employees and interfering. The holding in *Terwilliger v Howard Mem. Hosp.*, 2011 WL 308990 (W.D.Ark. Jan. 27, 2011) demonstrates the perils of an overzealous manager.

Regina Terwilliger ("Terwilliger") was employed as a housekeeper by Howard Memorial Hospital ("Howard"). On November 14, 2008, Terwilliger requested FMLA leave because she needed to have back surgery. Terwilliger's request was granted on November 26, 2008, and she had back surgery on January 29, 2009. Terwilliger subsequently returned to work on February 16, 2009. However, during her recovery, Terwilliger's supervisor contacted her weekly to ask when she was going to return to work. During one call, Terwilliger asked whether her job was in jeopardy, and her manager replied that she should return to work as soon as possible.

Terwilliger was subsequently discharged by Howard in connection with an investigation regarding thefts at the Hospital. Although she was not caught stealing anything, Terwilliger was seen on video in an employee's office and she appeared to be opening and looking into the desk drawer. Terwilliger claimed that she was merely pulling a trash can out from behind the desk and denied opening the desk drawer. But, it was undisputed that she had not been assigned to clean the employee's office that day.

Following her discharge, Terwilliger brought a lawsuit against Howard under the FMLA contending that the Hospital interfered with her FMLA rights by pressuring her to return to work after only eleven weeks of leave and then retaliated against her for taking leave by terminating her employment. In denying Howard's motion for summary judgment on Terwilliger's FMLA interference claim, the Court emphasized that an employer's actions that deter an employee from taking FMLA leave constitute an interference of the employee's rights. Contrary to Howard's argument, Terwilliger was not required to establish that she was denied a benefit to which she was entitled. Because a reasonable jury could conclude that Howard interfered with Terwilliger's FMLA rights by discouraging or "chilling" her exercise of those rights, Terwilliger's interference claim survived summary judgment.

Terwilliger's retaliation claim did not fare as well. Despite Terwilliger's contention that she did not steal anything, the Court held that the relevant inquiry was whether the Hospital's articulated reason for Terwilliger's termination was a pretext for retaliation, and not whether Terwilliger actually committed the alleged wrongdoing. According to the Court, Howard reasonably believed that Terwilliger intended to steal from another employee's desk, and Terwilliger failed to demonstrate that the stated reason for her termination was a pretext for retaliation.

In another recent case, an employer's attempt to curtail abuse of intermittent leave was found to have a chilling effect on the use of protected leave. In *Jackson v. Jernberg Industries, Inc.*, 677 F.Supp.2d 1042 (N.D.Ill. 2010), the District Court for the Northern District of Illinois held that an employer unlawfully interfered with its employee's FMLA rights by demanding that the employee submit a doctor's note for every FMLA absence even though the employee had already provided FMLA certification in support of intermittent absences.

Matthew Jackson ("Jackson") was employed by Jernberg Industries, Inc. ("Jernberg") and performed physically demanding work. On account of a wrist injury, Jackson requested and was granted FMLA leave to have surgery from August 4, 2004 through October 24, 2004. Despite the surgery, Jackson continued to suffer from pain in his wrist after his return to work. He, therefore, applied for intermittent leave in August 2005, provided the appropriate medical certification forms to Jernberg, and was approved. During the months that followed, Jackson was absent on numerous occasions and provided verbal notice to Jernberg that the majority of these absences were caused by his wrist condition. Pursuant to the company's attendance policy, however, Jernberg demanded that Jackson provide a doctor's notice for each absence to ensure that it was indeed related to his FMLA-certified medical condition. Although Jackson complied with this requirement on a few occasions, he generally resisted providing the documentation and argued that he should not need to go to the doctor each time he had to miss work for his wrist. On occasions when Jackson failed to produce the requested doctor's note, he was assessed points under the company's attendance policy. On June 29, 2006, Jernberg terminated Jackson's employment for exceeding the 14-point threshold established by the attendance policy.

In analyzing the parties' cross motions for summary judgment, the Court began by first emphasizing that "an employer's refusal to authorize leave and discouragement from taking leave both constitute impermissible interference" under the FMLA. *Id*. at 1048. The Court then proceeded to analyze Jackson's contention that Jernberg's policy constituted an impermissible recertification requirement. Jernberg contended that its doctor's note policy simply enabled it to verify that employees' claimed FMLA absences were indeed FMLA-related. It further argued that recertification and its doctor's note policy served different purposes; the purpose of recertification is to ascertain the continuing existence of a medical condition while the doctor's notes simply verify that a particular absence is related to that condition. Although the Court seemed to agree that Jernberg's policy did not constitute a request for recertification, it nevertheless found that the policy unlawfully interfered with Jackson's FMLA rights. The Court reasoned that Jernberg's doctor's note policy, which required employees to go to a doctor and obtain a doctor's note for each absence, was too onerous and had the effect of discouraging Jackson and others from taking intermittent FMLA leave.

While conceding that the FMLA regulations do not specifically address the legality of doctor's note policies, the Court noted that the regulations show an intent to limit medical verification to the certification and recertification procedures and that the FMLA's recertification regulations adequately protect employers from the abuse of intermittent leave. "Had Congress, or the Department of Labor, desired to permit employers to demand such intermittent verifications, the statute or regulations would provide as much." *Id*. at 1052.

Recognizing the interest of employers in confirming FMLA absences, the Court noted that other courts have approved other less invasive, "verification" practices, such as calling an employee at home, or requiring an employee to verify, either orally or in writing, that a particular absence was indeed FMLA-related.

Similarly, courts have frequently upheld employers' enforcement of procedural requirements for requesting leave, such as mandatory call-in procedures. For example, in *Thompson v. CenturyTel of Central Arkansas*, 2010 WL 4907161 (8th Cir. Dec. 3, 2010), the Court of Appeals for the Eight Circuit upheld summary judgment against an employee who was discharged for repeatedly violating her employer's daily call-in policy.[5]

Loretta Thompson ("Thompson") worked for CenturyTel, a telecommunications company, in its programming department where she reported to Carolyn Wilson ("Wilson"). Pursuant to CenturyTel's generally applicable policy, which Thompson acknowledged receiving, employees were required to contact their supervisors every day during a period of absence. Employees who failed to comply with this procedure for three consecutive workdays or three workdays within a 12-month period would be deemed to have voluntarily terminated their employment. While on an approved FMLA leave of absence, Wilson permitted her employees to call in only weekly.

During the period between July 2006 and February 2008, Thompson failed to comply with the company's call-in procedure, despite a verbal warning in August 2006 and a written warning in November 2007. In early February 2008, CenturyTel terminated Thompson's employment, explaining that she had violated the call-in procedure seven times within the prior twelve-month period.

Thompson sued CenturyTel for violation of the FMLA, claiming that CenturyTel interfered with her leave under the Act. In upholding the district court's grant of summary judgment in favor of CenturyTel, the Court of Appeals for the Eighth Circuit noted that call-in policies are permissible under the FMLA. The Court emphasized that the FMLA regulations then in effect specifically provided that an employer may require an employee on FMLA leave to "report periodically on the employee's status and intent to return to work." Thompson did not dispute that she was aware of the call-in procedure or that she failed to comply with the procedure despite several warnings. Because Thompson was discharged for repeated violations of the call-in procedure, and not because she took leave protected by the FMLA, Thompson's claim failed.

The current FMLA regulations now explicitly provide that employees must comply with their employers' usual and customary notice and procedural requirements for requesting leave, including call-in procedures, absent unusual circumstances. *See* 29 C.F.R §§ 825.302(d), 825.303(c). However, the key here is the last clause, "absent unusual circumstances." Employers must be mindful that, while they are free to establish specific reporting requirements related to leaves of absence, compliance with those

5 *But see Parsons v. Principal Life Ins. Co.*, 686 F. Supp. 2d 906 (S.D. Iowa 2010) (holding that there was a fact issue as to whether the application of the employer's daily call-in policy violated the employee's FMLA rights where the employer insisted that the employee continue to call in on a daily basis, despite her unwavering reports that she would be unable to return to work for one month).

requirements should be determined based on the specific facts and circumstances of the employee's situation and may need to be flexible for emergency or unique situations.[6]

The facts presented in *Saenz v. Harlingen Med. Ctr.*, 613 F.3d 576 (5th Cir. 2010) demonstrate the need to be reasonable and flexible in enforcing call-in and other notice procedures. Shauna Saenz ("Saenz"), an employee at Harlingen Medical Center ("Harlingen"), was diagnosed with a seizure disorder and was granted intermittent leave by letter dated August 26, 2006 for the period from July 24, 2006 through July 24, 2007. The letter explained that Saenz would be required to notify Harlingen by calling Hartford, a third party administrator, no later than two days after each time she took leave pursuant to her intermittent leave request. The letter further cautioned that failure to do so could result in the loss of FMLA protection.

Between July 24 and December 26, 2006, Saenz was absent on nine different occasions, seeking and receiving approval within two days of each absence, consistent with the heightened reporting requirement. Saenz subsequently missed work on December 29-31 and January 3-4, 2007; however, these absences were due to a psychological condition that caused hallucinations and disorientation and was later diagnosed as depression and bipolar disorder. Saenz' mother, Rhonda Galloway ("Galloway"), contacted Harlingen on three separate occasions beginning on December 28, 2006 to report Saenz' condition and inability to work. She conveyed enough information to cause Saenz' House Supervisor to recommend that Galloway take Saenz to the emergency room at Harlingen. Saenz' House Supervisor subsequently visited Saenz at the hospital and saw her condition first hand. Harlingen likewise was aware that Saenz was subsequently transferred to McAllen Behavioral Center for additional medical treatment. Saenz was so incapacitated that Galloway needed to obtain a guardianship to permit the transfer. Saenz was discharged from McAllen after three days and released in her mother's care.

On January 9, 2007, Saenz called Hartford to report her diagnosis of depression and bipolar disorder, discuss her recent absences, and request intermittent leave. Although Saenz received a letter from Hartford indicating that it was processing her leave request, she also received a letter dated January 18, 2007 from Harlingen informing her that her employment was terminated due to non-FMLA approved absences. The termination letter expressly referenced her failure to comply with the two-day call-in policy.

Saenz sued Harlingen asserting it violated her rights under the FMLA. Citing Saenz' prior use of FMLA and compliance with the company's notice requirement, the district court granted summary judgment in favor of Harlingen on the ground that Saenz failed to provide proper notice of her need for leave. The Court of Appeals for the Fifth Circuit reversed. According to the Court, due to her compelling circumstances, Saenz was not required to comply with Harlingen's heightened reporting requirement to be protected by the FMLA where she otherwise provided adequate notice under the FMLA's less stringent notice standard. Noting that Saenz' mother promptly contacted Harlingen on three occasions and explained Saenz' severe symptoms and the treatment she was receiving, and that a Harlingen supervisor personally observed Saenz receiving treatment in the hospital in which Saenz worked, the Court concluded that Harlingen was sufficiently apprised of Saenz' need for FMLA leave.

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6 FMLA protected leave may not be delayed or denied where an employer's policy requires notice to be given sooner than required by the FMLA regulations if the employee otherwise provides timely notice under the regulations. *See* 29 C.F.R § 825.302(d).

Do Exercise Caution When Discharging or Disciplining Employees During or Immediately After FMLA Leave

Employers occasionally terminate the employment of employees while they are out of work on an approved FMLA leave, or immediately upon their return from such leave. Whether or not the rationale is legitimate -- a reduction in force, recently discovered performance problems, or fraudulent use of leave, for example -- the result is almost always the same. The employer must defend a lawsuit alleging FMLA interference and/or retaliation.

Under the FMLA an eligible employee may take up to twelve weeks of unpaid leave for a serious health condition or other defined reason. *See* 29 U.S.C. § 2612(a)(1). Employers may not "interfere with, restrain or deny the exercise of or attempt to exercise any [FMLA] right provided." *Id.* at § 2615(a)(1). Nor may an employer retaliate against an employee for invoking his/her rights to FMLA leave. *Id*. at § 2615(a)(2).

However, an employee's right to reinstatement under the FMLA is not absolute. An employee on an FMLA leave has no greater right to reinstatement than if the employee had continued to work instead of taking leave. *See* 29 C.F.R. § 825.216. If the employee would have been terminated or laid off for reasons unrelated to the leave, then the employee is not entitled to reinstatement.

But, employers have to be careful. Close proximity between an employee's leave and his or her discharge will undoubtedly look suspicious, and, as a practical matter, employers will bear the burden of proving that the discharge was motivated by legitimate reasons unrelated to the protected leave. Accordingly, employers must be prepared to justify their decisions and offer clear, consistent and well-documented reasons for their actions.

In the context of layoffs, for example, it will certainly look suspicious if the only employee selected for layoff is out on FMLA leave or recently returned from leave. However, employers are not shielded from liability in large scale reductions either. Employees are well-advised to carefully document their decision-making process. Furthermore, employers should ensure that their decisions are supported by the relevant documents. Courts will be skeptical when an employee with solid performance reviews is suddenly found at the bottom of an employer's stack ranking sheet.

A recent example of a reduction in force case is *Cutcher v. KMART Corp.*, 2010 WL 346131 (6th Cir. Feb. 1, 2010), which demonstrates the perils of laying off an employee on an approved FMLA leave. In December 2005, while Susan Cutcher ("Cutcher") was on an approved leave from her position as a full-time hourly associate at a KMART store, the company conducted a nationwide reduction in force. Cutcher's store had a targeted reduction of six positions, and Cutcher was one of those selected because she had a low RIF performance ranking. She alleged that her selection violated the FMLA by interfering with her FMLA rights and that KMART retaliated against her for taking FMLA leave. While the district court granted summary judgment for KMART, the Sixth Circuit reversed, finding that there were disputed issues of fact as to whether KMART used the RIF as a pretext to terminate Cutcher's employment.

While there was no dispute that the store downsized by six positions and no dispute that the RIF was national in scope, the Court still found factual issues in the ranking process. In this case, Cutcher consistently received high annual performance review ratings. Her RIF ratings, however, were

significantly lower, particularly in the categories of customer service and teamwork, the same categories in which she had received high marks in the annual review. The Court found it extremely troubling that there were only twenty days between the last annual review and the RIF review, and no change in performance to explain the significant decrease. Moreover, on the RIF ranking forms, one of the managers wrote "LOA." He explained that his notation meant only that Cutcher would receive notice of the layoff upon her return to work. The Court found, however, that the notation could suggest that the leave was an issue for the decision-maker. Thus, the interference claim survived.

The retaliation claim was also sent to the jury. The Court noted that the RIF occurred while plaintiff was on leave. "[A]lthough temporal proximity alone is insufficient to establish circumstantial evidence of a causal connection, temporal proximity between the protected activity and the adverse employment action, coupled with other indicia of retaliatory conduct, may give rise to a finding of causal connection." *Id.* at *6. The evidence supporting the interference claim provided the indicia of retaliatory conduct. The employer did not take adequate care in the manner in which it ranked employees. It did not ensure that the annual reviews and RIF rankings were consistent, and plaintiff's manager made inappropriate comments regarding the leaves. This case should provide a lesson to any employer contemplating a reduction in force. Do rankings with care, look back at past performance reviews and be consistent, and do not make stray comments regarding those on layoff.

Summary judgment was likewise denied in *Seil v. Keystone Automotive Inc.*, 678 F.Supp.2d 643 (S.D.Ohio 2010), where an employee was laid off in a restructuring upon his return from protected leave. Robert Seil ("Seil") was working as an inside sales coordinator for Keystone Automotive, Inc. ("Keystone") when the company was acquired by a competitor in October 2007. Shortly thereafter, in November 2007, Seil learned that he had contracted a lung disease and needed to have an operation. He requested and was granted FMLA leave for the surgery and recovery from December 17, 2007 through January 25, 2008, which was subsequently extended. Shortly before Seil's leave, LKQ, the company that had acquired Keystone, had a meeting to decide how to consolidate its various facilities. According to LKQ, during that meeting, an LKQ manager concluded that Seil's position should be eliminated due to a redundancy in positions and based on feedback from Keystone managers that they were not satisfied with Seil's performance. Upon notifying the company that he was able to return to work on February 15, 2008, Seil was notified that his employment was being terminated as part of the restructuring. Seil sued, asserting claims under the FMLA and the ADA.

In their motion for summary judgment, the defendants contended that Seil could not establish a causal connection between his FMLA leave and his discharge because an LKQ manager made the decision to eliminate Seil's position prior to his FMLA leave. But, the District Court for the Southern District of Ohio found that the evidence regarding the timing of LKQ's decision was uncertain, noting that none of the participants in the November 2007 restructuring meeting recalled any recommendations regarding Seil's layoff and there were no documents memorializing such alleged decision. The Court also found the timing of Seil's notification of his layoff to be suspect and emphasized that Seil's recent excellent performance reviews did not square with LKQ's assertion that Keystone managers were dissatisfied with his performance. For these reasons, summary judgment was denied as to Seil's FMLA claim. Summary judgment was granted on Seil's ADA claim, however, because Seil failed to present evidence that the defendants regarded him as disabled.

If an employer discovers performance problems during an employee's leave, the company may refuse to reinstate the employee, but again, the timing makes that action risky. There were several cases in the last year dealing with an employer's discovery of performance problems during or immediately before an employee's leave.

For example, in *Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010), Smithkline Beecham Corp. ("SBC") demoted Ellen Schaaf ("Schaaf") after she returned from maternity leave because of extensive performance problems discovered only after she announced in July 2002 that she was pregnant and taking leave in January 2003.

Schaaf was a Regional Vice President for SBC, responsible for a region in Florida and Georgia that had consistently failed to meet company expectations. Under her stewardship, the region's performance markedly improved. In July 2002, at the same time that Schaaf announced her pregnancy, three of her direct reports complained to a Human Resources Representative about Schaaf's unprofessional management style. Interviews conducted with these and other direct reports revealed broad complaints: Schaaf's antagonistic and inflexible management style; chronic inaccessibility; poor communication skills; harsh and demanding demeanor; and tendency to play favorites, to name a few problems. Schaaf's manager placed her on a Performance Improvement Plan ("PIP") requiring the completion of specific tasks by certain target dates. The PIP was designed to allow Schaff an opportunity to correct her management shortcomings and to foster improved relationship with her subordinates.

Schaaf failed to meet these deadlines, even after they were extended several times. After she began her maternity leave, the interim Regional Vice President discovered additional administrative problems including scores of expense reports that were ignored and invoices that Schaaf failed to pay. When Schaaf returned to work, SBC offered her a choice of demotion or termination. She chose demotion and predictably, filed a FMLA interference and retaliation claim. The Court found in favor of SBC on all claims.

To support her interference claim, Schaaf argued that had she not taken a leave, SBC would not have discovered her performance problems. While this was true, to a degree, it does not permit an interference claim to succeed. The Court of Appeals for the Eleventh Circuit explained: "[t]he fact that the leave permitted the employer to discover the problems can not logically be a bar to the employer's ability to fire the deficient employee ... Although one could say that plaintiff might not have been demoted if [s]he had not taken leave (at least not at that time), the leave was not the proximate cause of the demotion." *Id.* Nor did plaintiff's retaliation claim succeed. The performance-related factors noted above showed that Schaaf's demotion was for legitimate reasons unrelated to her FMLA leave. Schaaf did not present any evidence suggesting that SBC's action was motivated by anything other than her aggressive, insensitive management of her subordinates.

The employer did not fare as well in *Terry v. Real Talent, Inc.*, 2010 WL 3749224 (M.D.Fla. Sep. 20, 2010). Michelle Terry ("Terry") worked for Real Talent, Inc. ("Real Talent") as a bookkeeper. Terry's half brother, Bryan Peabody ("Peabody"), was the President of Real Talent. Upon learning that she was pregnant in December 2007, Terry informed Peabody and later requested two to three months off following the birth of the baby. According to Terry, shortly before her leave, Terry repeatedly informed Peabody of issues related to Real Talent's finances. Peabody assured Terry that he would take care of things and that her work was fine. Terry began her leave on August 5, 2008. On August 18, 2008, Peabody called Terry and terminated her employment. When Terry told Peabody that she would return to

work early if that was the problem, Peabody said that he could not allow her to return to work early because "she would be a liability." In a subsequent email, Peabody told Terry that he needed to let her go to prevent the company from going into bankruptcy.

Terry sued, alleging claims under the FMLA and the Pregnancy Discrimination Act. Real Talent moved for summary judgment, arguing that Terry was terminated due to performance issues that were not discovered until after she went out on leave. In denying summary judgment, the District Court for the Middle District of Florida concluded that material disputed facts existed that precluded summary judgment on Terry's FMLA interference and retaliation claims. The Court seemed particularly troubled by Peabody's shifting explanations for Terry's discharge. It further emphasized that there was evidence that Peabody was aware of the state of the company's finances and that Peabody never told Terry that she was being let go for performance reasons. For these reasons, coupled with the suspicious timing of Terry's discharge, the Court held that a reasonable fact-finder could find Real Talent's alleged reason for its adverse action unworthy of credence.

Employers often have great success in defending against FMLA retaliation claims where they can demonstrate that the relevant decision-maker was unaware of the employee's use of protected leave. That was the case in *Krutzig v Pulte Home Corp*., 602 F.3d 1231 (11th Cir. 2010), where the Court of Appeals for the Eleventh Circuit affirmed summary judgment for the employer. Betsy Krutzig ("Krutzig") was a sales associate for Pulte Home Corp. ("Pulte"), selling homes in Florida. In June 2007, she fell and injured her foot. The next month she received two written warnings and was placed on a 30-day performance improvement plan. On August 17, 2007 she contacted her human resources representative and requested FMLA leave for foot surgery. She did not tell her immediate supervisor of the request at that time.

That same day, Krutzig had a dispute with a disgruntled customer who complained to Pulte management. Pulte's Director of Sales, at a higher level of management than Krutzig's direct supervisor, learned of the complaint and made the termination decision because Krutzig had failed to address the issues in her performance improvement plan. He was not aware of any leave request at the time he made the termination decision. Krutzig was terminated on August 20, 2007 – three days after requesting (but before beginning) leave to have foot surgery. She brought a claim for interference with her FMLA leave rights and retaliation.

The Court first rejected the retaliation claim because the decision-maker had no knowledge of the request for FMLA leave. The Court noted, however, that the interference claim presented different issues. With an interference claim, the employee need not allege that the company intended to deny the benefit since the employer's motives are irrelevant.

In granting the employer's motion for summary judgment on the interference claim, the Court looked to the same analysis used when an employer denies reinstatement to an employee already on leave. "[A]s with the FMLA right to reinstatement, the FMLA right to non-interference with the commencement of leave is not absolute, and if a dismissal would have occurred regardless of the request for FMLA leave, an employee may be dismissed, preventing her from exercising her right to leave or reinstatement … [A]n

employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request than she did before submitting the request." *Id*. at 1236. In this case, the decision would have occurred regardless of the leave request because the decision maker had no knowledge of Krutzig's request for leave.

Similarly, in *Long v. Teachers' Retirement System of the State of Illinois*, 585 F.3d 344 (7th Cir. 2009), the Court of Appeals for the Seventh Circuit affirmed summary judgment for the employer where the relevant decision-maker had no knowledge of the employee's FMLA leave. The Teachers' Retirement System of the State of Illinois ("TRS") administered the pension plan that provided monthly retirement benefits to approximately 82,000 retired teachers in the State of Illinois. Julie Long ("Long") was a Payroll Clerk responsible for enrolling members in the electronic fund transfer program, entering data into the program and verifying bank routing and account numbers among other things. When she initially began in the payroll clerk job she received favorable performance reviews. Over time, however, errors in her work and increasing absenteeism led to markedly lower reviews.

In mid-September 2005, Marshall Branham ("Branham"), Long's immediate supervisor, met with her to address her numerous errors, customer complaints and the impact her extensive absences had on other employees. Around this same time, both Branham and Sally Sherman ("Sherman"), Long's second level supervisor, met with Human Resources Director Gina Larkin ("Larkin") to share the performance problems including the fact that some of Long's errors resulted in TRS members failing to get their pension checks.

Approximately two weeks later, Long applied for intermittent leave for tennis elbow and TRS granted her request. In November 2005, she modified her FMLA application to request intermittent leave for ovarian cysts. This too was granted. Long missed fourteen days of work in October and November for FMLA-related absences. She also missed nine days of work in December and January unrelated to the FMLA leave.

Long's supervisors met with Larkin again in January to discuss the lack of improvement in Long's performance, their frustration with her continuing absenteeism and their recommendation that Long be fired. Larkin did an independent review of the performance evaluations and member complaints, agreed with the recommendation to terminate employment and then met with TRS' Executive Director Jon Bauman ("Baumnan"), who was responsible for these decisions. Larkin recommended Long's termination. Bauman then did his own review of the facts and agreed that termination was the correct course of action. He made the decision to terminate on February 3, 2006.

Long claimed that TRS retaliated against her for taking FMLA leave. The district court granted TRS's motion for summary judgment, and the Court of Appeals affirmed. The Court first found that Bauman was the decision-maker and he had no knowledge that Long had taken FMLA leave. Without knowledge of the leave he could not have a retaliatory motive as a matter of law. The Court recognized that "[a]lthough a plaintiff must generally provide evidence that the decisionmaker acted for a prohibited reason to establish a prima facie case of retaliation, courts have imputed the retaliatory intent of a subordinate to an employer in situations where the subordinate exerts significant influence over the employment decision." *Id.* at 351. Even if Larkin, Sherman and Branham had retaliatory animus, however, it could not be imputed to Bauman because they did not exert significant influence over Bauman, and he conducted an independent investigation. "[A]n independent investigation weighs heavily against a finding of excessive influence." *Id.* at 352.

Long also claimed that a decline in performance evaluations provided circumstantial evidence that TRS terminated her in retaliation of taking FMLA leave. While the Court recognized that "an employer's sudden dissatisfaction with an employee's performance after that employee engaged in a protected activity may constitute circumstantial evidence of causation," *Id*. at 354, that was not the case here. Branham first documented a decline in Long's performance in June 2005, at least three months before Long ever took FMLA leave. A decline in performance before the employee engages in protected activity does not allow for an inference of retaliatory motive.

Finally, the Seventh Circuit's decision in *Goelzer v. Sheboygan County*, 604 F.3d 987 (7th Cir. 2010) underscores the importance of providing accurate feedback in performance reviews and avoiding references to FMLA usage (however seemingly benign). Dorothy Goelzer ("Goelzer") was fired from her administrative assistant job with Sheboygen County ("the County") after 20 years. During her employment, Goelzer consistently receive good performance reviews. She had taken a significant amount of authorized FMLA leave during the four years preceding her discharge to deal with her own health issues as well as those of her husband and mother. In her performance reviews and verbal discussions regarding her performance, Goelzer's supervisor repeatedly referenced her covered absences. On one occasion, Goelzer's supervisor informed her that her sick leave "presented challenges in the functionality and duties associated with the office." She was ultimately discharged two weeks before she was scheduled to begin a two-month FMLA leave to have foot surgery. Goelzer sued.

The County claimed Goelzer was let go because her supervisor wanted to hire someone with a "greater skill set," and that it had nothing to do with Goelzer's exercise of FMLA rights. The district court granted summary judgment in favor of the County. The Court of Appeals for the Seventh Circuit reversed, concluding that Goelzer had marshaled enough evidence to reach a jury due to her supervisor's comments suggesting frustration with her use of leave, her favorable performance reviews, and the timing of her termination.

Do Not Count an Employee's FMLA-Covered Absences Against Him or Her in Applying Your Attendance Policy

The FMLA's prohibition against ''interference'' "prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). As a result, an employee's FMLA leave cannot be counted under an employer's ''no fault'' attendance policy. While administering this rule may seem simple, in reality, tracking an employee's use of leave and ensuring that an employee is only assessed points for non-covered absences can prove tricky, especially in the context of intermittent leave. Accordingly, when taking adverse action against an employee for excessive absenteeism under an attendance policy, employers should scrutinize their records, confirm that they have done the math properly, and ensure they are not counting FMLA time against the employee.

As demonstrated by the Seventh Circuit's recent decision in *Murray v. AT&T Mobility LLC*, 2010 WL 1488794 (7th Cir. April 14, 2010), however, merely exempting FMLA absences from the application of an attendance policy does not necessarily insulate the policy from an FMLA challenge. Sharon Murray ("Murray") was a customer service representative in AT&T Mobility LLC's ("AT&T") call center from 2003 until she was discharged in March 2008 for excessive absenteeism. During the six months before

AT&T fired her, Murray missed a substantial amount of work for health-related reasons. The dispute between the parties concerned how much of that time was FMLA protected.

Murray had a heart disorder and was out of work for a period of time through October 2007. Thereafter, AT&T accommodated Murray's disability with a modified return-to-work schedule that required her to work only three eight-hour shifts per week. The remaining two eight-hour shifts per week were charged against her FMLA balance. By February 2008, AT&T notified Murray that she had exhausted her FMLA allotment. In March 2008, Murray's employment was terminated because she had accumulated 23.25 unexpired absence points, most of which were assessed following the exhaustion of her FMLA entitlement. Murray sued.

As an initial matter, Murray claimed that since the 16 hours of leave per week were an ADA accommodation, they should not have been charged against her FMLA entitlement. As the Court held, however, an employer can provide a qualified individual with a disability a reduced work schedule as a reasonable accommodation and count this as FMLA leave if it notifies the employee. The general rule is that other types of available leave, such as short-term disability and workers' compensation leave, may be charged against FMLA as well. *Id*.; 29 C.F.R. § 825.207. AT&T provided notice that the ADA accommodation would be counted against Murray's FMLA entitlement, so there was no dispute that she exhausted her FMLA leave.

Murray also alleged that AT&T's no-fault attendance policy, which postponed the expiration of an employee's absence points by the length of his or her leave, violated the FMLA. Pursuant to AT&T's attendance policy, the company could fire for excessive absenteeism any employee who accumulated 12 or more absence points in a rolling 12-month period. The rolling 12-month period was extended by the number of days of any continuous absence, thereby effectively delaying the expiration of points. Employees were not assessed points under the policy for short term disability leave or for up to 480 hours (i.e., 12 weeks) of FMLA leave. Murray contended that "stopping the 12-month clock" for the time that an employee is on FMLA leave unlawfully punished employees for exercising their rights. Citing the Seventh Circuit's prior decision in *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010), the Court disagreed. According to the Court, "the Act does not require employers to extend benefits *during* FMLA leave, 29 U.S.C. § 2614(a)(3)(A), and continuing to run the 12-month expiration clock during leave would be such a benefit." *See Murray*, 2010 WL 1488794, at *4. The Court, therefore, affirmed summary judgment for AT&T.

The Eight's Circuit's recent decision in *Estrada v. Cypress Semiconductor (Minnesota) Inc.*, 616 F.3d 866 (8th Cir. 2010) highlights the importance of good recordkeeping, accurately tracking absence points, and consistent enforcement of attendance policies. Laura Estrada ("Estrada") sued Cypress Semiconductor (Minnesota) Inc. ("Cypress"), alleging that her discharge for attendance issues violated the FMLA because Cypress improperly counted an FMLA-covered absence against her in applying progressive discipline.

Estrada worked nights as a technician on Cypress' production line. On Sunday, February 17, 2008, Estrada informed her supervisor that she was going to have surgery and requested the following Sunday off. Her supervisor approved the absence. Estrada had surgery on Friday, February 22 and called in sick as contemplated on Sunday, February 24, 2008. She returned to work on Monday night and left a return-

to-work slip on her supervisor's desk. Cypress nevertheless recorded the February 24, 2008 absence as unexcused pursuant to its attendance policy.

Cypress's attendance policy was based on a point system, with points and half points assessed based on the type of absence. Employees received written warnings depending on the frequency of the infractions. An accumulation of 3 points in any rolling three month period would result in a Level I attendance warning and triggered a 60-day period of review. The accumulation of additional points during an employee's warning period would result in a higher level warning. Furthermore, a "no call, no show" automatically triggered a Level II warning or advanced the employee to the next level if he or she already had a written warning. An employee could be discharged if he or she: (1) accumulated an additional half-point while on a Level III warning; or (2) accumulated 5 points or more during a 6-month period, regardless of attendance warning status.

Estrada received a written Level II warning on March 31. The warning explained that Estrada had accumulated 4.5 absence points. Among the absences referenced was February 24 -- the Sunday following Estrada's surgery. The warning emphasized that accumulating 5 or more points in a 6-month period could result in termination. Estrada never objected to the warning's reference to her February 24, 2008 absence. Subsequently, on April 14, 2008, Estrada came to work late and left early because of an old foot injury. She was also absent the following day for the same reason and failed to speak with a supervisor as required by the policy. Her absence was, therefore, recorded as a "no call, no show." When Estrada returned to work on April 16, 2008, her supervisor told her that her job was in jeopardy and warned against additional attendance problems, including taking extended unauthorized breaks. However, later that day, Estrada took a hour long extended break, which she failed to satisfactorily justify. She was suspended and sent home. The following day, after Estrada met with the company's human resources manager, Cypress terminated Estrada's employment for violating her Level II warning.

Estrada brought suit under the FMLA, alleging that Cypress unlawfully counted her FMLA absence on February 24, 2008, which resulted in an improper Level II write-up. Cypress contended that Estrada's February 24, 2008 absence was not covered by the FMLA, arguing that Estrada failed to demonstrate that she suffered a serious health condition. While conceding that Estrada would have only received a Level I warning on March 31 without the point assessed for the February 24, 2008 absence, Cypress further argued that Estrada would have nevertheless been discharged because it was undisputed that she had accumulated 5.5 points for unprotected absences in a 6-month period.

The district court found material questions of fact existed as to whether Estrada suffered from a serious health condition at the time of her February 24, 2008 absence. It granted summary judgment to Cypress, however, finding that the company demonstrated that it had adequate grounds for terminating Estrada even without considering the February 24, 2008 absence. The Court of Appeals affirmed. According to the Court, Cypress demonstrated that it "would have made the same decision notwithstanding Estrada's exercise of her FMLA rights." Even if Cypress improperly assigned a Level II warning, it provided proper notice regarding Estrada's attendance issues. Furthermore, Estrada's subsequent absences, the fact that she took an unauthorized extended break right after being warned that her job was in jeopardy, and evidence of Cypress' consistent application of the attendance policy were sufficient to show that Cypress would have terminated Estrada regardless of her FMLA absence.