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Updating Our Understanding Of The FMLA: Part 1

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It has been more than 20 years since the passage of the Family and Medical Leave Act, 29 U.S.C. §2601 et seq., yet employers continue to grapple with a host of challenging issues: compliance with the FMLA's technical requirements, administration of leaves and issues of employee abuse. Failure to fulfill any of the FMLA's complex requirements, be it making a mistake in leave designation or terminating an employee after a leave, even if justified, can generate lawsuits, damage an employer's reputation and cost thousands of dollars in litigation costs and potential damages.

Make no mistake, compliance with the FMLA is difficult and employees frequently sue. According to the U.S. Department of Labor, the number of lawsuits alleging an FMLA violation has tripled between 2012 and 2013, with these numbers expected to grow. In addition, the DOL has announced that 2014 will be a "pivotal" year for its FMLA enforcement activities, meaning it will increase the amount of enforcement activity as well as the depth and breadth of its investigations. According to the DOL, on-site visits will now be a routine investigative tool, with an emphasis on finding and eradicating "systemic" issues.

Given the litigation and enforcement climate, it is imperative that employers fully understand the FMLA, administer it properly and prepare to defend against the inevitable challenge. This three-part series helps employers meet these goals. Part one discusses challenging cases in the areas of eligibility for leave and employee-employer notice requirements. Part two discusses developments in the areas of medical certifications and interference with and retaliation for taking leave. Part three focuses on the meaning of the phrase "to care for" a covered family member, the fraudulent use of leave and how to combat it, as well as practice advice on preparing for and overcoming any legal challenge .

Recent Case Law Developments

We begin this series with a general overview of the most significant case law developments in the areas of eligibility for FMLA leave and employee-employer notice requirements and the lessons learned from these cases.

Eligibility for FMLA Leave

In order to be eligible for FMLA leave an employee must satisfy all of the following criteria:

1. the employee must have been employed by the employer for at least 12 months (not consecutively) before the commencement of the leave;
2. the employee must have worked at least 1,250 hours in the 12 months immediately preceding the leave; and
3. the employee must work at a site at which the employer has 50 or more employees within a 75-mile radius.

See 29 C.F.R. §825.110; 29 U.S.C. §2611(2). These seemingly simple requirements cause considerable confusion as the following cases illustrate.

Consider the 1,250 hour requirement. With telecommuting arrangements and the expectation that employees be available after hours, calculating hours worked is no easy feat. Furthermore, according to the DOL regulations, if an employer does not maintain accurate records of hours worked (including for exempt employees under the FLSA), the employer will bear the burden of demonstrating that the employee has not worked the requisite hours. See 29 C.F.R. §825.110(c)(3).

In the case of Alexander v. Boeing Co., 2014 WL 3734291 (W.D.Wash. Jul. 28, 2014) Jill Alexander claimed she was unlawfully discharged after requesting FMLA leave to recover from migraine headaches. Boeing filed a motion for summary judgment, arguing, among other things, that Alexander had recorded only 1,203.2 total hours during the preceding 12 months and thus was not eligible for leave. Alexander responded that Boeing knew or had reason to know that she actually worked at least 2.5 extra hours each week when she checked and responded to email in the morning and evening, and when she took work calls on her way to and from work. Denying Boeing's motion, the district court concluded that if a jury credited Alexander's evidence, she would have worked approximately 1,275 hours prior to her requested leave, making her FMLA-eligible. She was permitted to proceed with her claim.

Counting the number of employees employed by an organization to determine employer coverage and employee eligibility also continues to frustrate employers. In counting, many employers neglect to include individuals who are not on their payroll, but who otherwise may be considered employees under the integrated employer or joint employment tests.

Under the integrated employer test, separate entities may be deemed to be part of a single employer for purposes of the FMLA. Factors to be considered include: common management, interrelation between operations, centralized control of labor relations, and degree of common ownership and financial control. See 29 C.F.R. §825.104(c). Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. Additionally, where two or more separate businesses exercise some control over the work or working conditions of an employee, the businesses may be considered joint employers under the FMLA. Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll. See 29 C.F.R. §825.106.

The recent decision in Cuff v. Trans States Holdings, 2014 WL 4653010 (7th Cir. Sep. 19, 2014) illustrates the joint employer concept. Daren Cuff was a regional manager for Trans States Airlines, which along with GoJet Airlines, provided regional air services to United Airlines. Both Trans States and GoJet were

owned by Trans States Holdings. Cuff was discharged in January 2010, after he took leave despite the denial of his leave request. Cuff brought suit, and Trans States moved for summary judgment, arguing that Cuff was not entitled to protection because Trans States only had 33 employees within 75 miles of O'Hare. The district court disagreed, granting summary judgment for Cuff on the eligibility issue, because GoJet (which had over 300 employees within 75 miles of O'Hare) was Cuff's joint employer.

The Seventh Circuit affirmed, holding that the DOL's regulations expressly grant coverage to a worker jointly employed by multiple companies that collectively have 50 or more workers. According to the Seventh Circuit, the two principal factors in this analysis are whether there is an arrangement between the employers to share the employee's services and whether one employer acts directly or indirectly in the interest of the other employer in relation to the employee. The Seventh Circuit answered both questions in the affirmative, pointing to evidence that Cuff represented Trans States, GoJet and Trans States Holdings in their dealings with United Airlines and O'Hare, that Cuff's business card bore the logos of all three companies, and that internal directories and a supervisor identified Cuff as the contact person for operations questions regarding Trans States and GoJet.

Employee Duty to Provide Notice

Employees are required to provide notice of their need for FMLA leave to trigger the law's protections. Although no magic language is required, an employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. The employee need not mention the FMLA. Instead, where an employer has reason to believe that an employee may be absent for an FMLA-qualifying reason, it should always inquire further to determine whether the leave is FMLA-qualifying.

Whether an employee provided sufficient information to put the employer on notice is a frequently litigated issue. The Seventh's Circuit's holding in Spurling v. C & M Fine Pack Inc., 739 F.3d 1055 (7th Cir. 2014) demonstrates just how complex and challenging this area is for employers.

Kimberly Spurling worked the night shift at a factory, often fell asleep at work and was repeatedly disciplined. In April 2010, Spurling received a second final warning for sleeping and was suspended pending termination. At that time, Spurling informed the human resources manager that her performance issues might be related to a medical condition and she requested time off to determine the cause of her problems. Though denying that Spurling made a request for leave, the HR manager gave Spurling paperwork concerning the Americans With Disabilities Act and a form for her doctor to complete. The doctor checked a box indicating that Spurling had a mental or physical disability covered by the ADA and recommended periods of scheduled rest. Although the HR manager informed Spurling that the submitted paperwork would be sent to corporate for review, Spurling instead received a termination notice.

With regard to the FMLA claim, the court looked only at the issues of whether Spurling provided sufficient notice of the need for FMLA leave. According to the court, Spurling's alleged statement to the HR manager that she needed time off to figure out why she was falling asleep fell short of satisfying her notice obligation. It reasoned that employers are not required to "divine or investigate whether an employee has a condition covered by the FMLA at any minor request for leave." 739 F.3d at 1063. Spurling did not inform her employer that she had a "serious health condition," and could not have, because she herself was unaware of the cause of her sleepiness.

Furthermore, the court emphasized that sleeping on the job was prevalent among night-shift

employees, such that Spurling's sleep issues would not automatically alert her employer to the possibility of a serious health condition. Accordingly, the court affirmed the district court's grant of summary judgment to the employer on Spurling's FMLA claim. Spurling was permitted to proceed with her ADA claim, however. While the Spurling holding is good news for employers — at least in regard to the FMLA — the court's reasoning seems somewhat at odds with its findings on Spurling's ADA claims. Furthermore, because the notice issue is often driven by each case's unique facts, employers are well-advised to exercise caution when evaluating requests for leave.

Employer Duty to Provide Notice

Employers also have notice obligations under the FMLA. In addition to providing general notice by displaying required postings and including specific information in their employee handbooks, employers must provide detailed individual notices to employees after receiving a request for FMLA leave or upon learning that an employee's leave may be FMLA-qualifying.

First, within five business days after learning of the need for leave, employers are required to provide a written "eligibility and rights and responsibilities notice." This notice must provide information concerning the employee's eligibility to take FMLA leave as well as detailed information regarding the employee's specific obligations and the consequences of any failure to meet those obligations. Then, within five business days of obtaining sufficient information to determine whether a particular leave is FMLA-qualifying, employers are required to provide a written "designation notice" explaining whether the leave will be designated and counted as FMLA leave. See 29 C.F.R. §825.300(b)-(d).

Providing proper notices to employees is critical. As the following cases illustrate, an employer's failure to follow the notice requirements may constitute interference with an employee's FMLA rights and prove very costly.

In Wallace v. FedEx Corp., 764 F.3d 571 (6th Cir. 2014), the Sixth Circuit upheld the district court's ruling that FedEx Corp. interfered with Tina Wallace's FMLA rights by failing to notify her of the consequences of not returning her FMLA medical certification form. In August 2007, Wallace, a senior paralegal in FedEx's legal department, developed a variety of health problems that required her to take a leave of absence. FedEx offered Wallace two weeks of leave and verbally asked her to return a completed medical certification form within 15 days. FedEx never explained the consequences of not returning that form. Although Wallace had her physician complete the medical certification form, she never returned it to FedEx, contending that she "was not herself" and that she could not bring herself to interact with any company employees. FedEx reached out to Wallace a few times after her two-week leave expired, but was unable to reach her. It subsequently terminated her employment, citing job abandonment. Wallace brought suit, alleging FedEx interfered with her FMLA rights.

The case went to trial. At trial, Wallace testified that she would have submitted the medical certification form if only she had known the consequences of failing to do so. The jury found in favor of Wallace and awarded damages. FedEx then moved for judgment as a matter of law, arguing that Wallace was not eligible for FMLA leave because she never returned the required medical certification form. The district court denied the motion, finding that FedEx failed to notify Wallace of the consequences of her failure to return the form. Both sides appealed.

On appeal, the Sixth Circuit upheld Wallace's FMLA interference claim. Since FedEx did not request the certification in writing or explain the consequences of failing to return the completed certification, it could not successfully argue that Wallace was ineligible for leave. According to the Sixth Circuit, the DOL

had “good reason” to require employers to provide employees with individualized notice regarding the consequences of not completing the FMLA certification process. “[W]hen notice is given of the consequences, employers can safely deny leave or terminate employment if the certification is not returned, and all parties have a clear understanding of their duties and responsibilities.” 761 F.3d at 590. Finding that a reasonable jury could conclude that Wallace was prejudiced by FedEx’s failure to provide proper notice, the court affirmed the denial of FedEx’s post-trial motion for judgment as a matter of law and reinstated the jury’s original damages award to Wallace.

Just two weeks before the Wallace decision, the Third Circuit took the FMLA paperwork burden one step further, emphasizing that even written notice of an employee’s rights and responsibilities may not be sufficient if an employer cannot prove that the employee actually received it. In Lupyan v. Corinthian Colleges Inc., 761 F.3d 314 (3d Cir. 2014), the Third Circuit reversed summary judgment in favor of Corinthian, finding there was a fact dispute regarding whether Corinthian informed Lisa Lupyan that her leave of absence had been designated as FMLA leave and that her employment could be terminated if she did not return to work at the conclusion of her 12-week leave. In so holding, the Third Circuit criticized the long-standing mailbox rule, finding it to be relatively weak evidence that the addressee actually received the information sent.

Lupyan worked as an instructor for Corinthian. In December 2007, Lupyan’s supervisor noticed she seemed depressed and suggested she take a leave of absence. Although Lupyan initially requested a “personal” leave, her supervisor encouraged her to apply for short-term disability benefits. Toward that end, Lupyan submitted a medical certification form completed by her doctor. Based on the information contained in the form, Corinthian’s HR department designated the leave as FMLA leave, and set a projected return to work date of April 1, 2008. On Dec. 19, 2007, Corinthian allegedly sent Lupyan a letter designating the absence as FMLA leave further explaining her rights and responsibilities. Lupyan denies receiving the letter.

On March 13, 2008, Lupyan initially informed Corinthian that she had been released to return to work with certain restrictions, but after being told that she could not return to work with restrictions, Lupyan gave her supervisor a full release from her psychiatrist. Nevertheless, on April 9, 2008, Corinthian informed Lupyan that her employment was being terminated due to low student enrollment and the fact that she failed to return to work within the 12-week FMLA period. Lupyan filed suit against Corinthian alleging interference with her FMLA rights and retaliation. The district court granted Corinthian’s motion for summary judgment as to both claims. With respect to her interference claim, the district court applied the “mailbox rule” and concluded that Lupyan was informed of her FMLA rights and failed to return within 12-weeks. Under the mailbox rule, if a letter is “either put into the post-office or delivered to the postman, it is presumed ... that it reached its destination at the regular time, and was received by the person to whom it was addressed.” 761 F.3d at 319. In other words, despite Lupyan’s testimony that she did not receive the rights and responsibilities notice, there was a legal presumption that she did.

On appeal, the Third Circuit reversed, concluding the mailbox rule “is not a conclusive presumption of law.” Id. Instead, it is a rebuttable inference that can be overcome by evidence of nonreceipt. According to the Third Circuit, Lupyan’s contention that she never received Corinthian’s letter notifying her that her leave was subject to the FMLA was sufficient to burst the mailbox rule’s presumption and require a jury to determine the credibility of the parties’ respective testimony. The Third Circuit reasoned that requiring more than Lupyan’s own testimony to rebut the presumption would put individuals in the untenable position of trying to prove a negative, thereby elevating the mailbox rule to a conclusive presumption. The Third Circuit emphasized that “[i]n this age of computerized communications and

handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice." Id. at 322. Lupyan's interference claim was remanded to the district court for a determination of whether Lupyan in fact received the FMLA notice and whether she could have returned to work within 12 weeks had she known her job was in jeopardy.

The lesson learned from Lupyan is that employers must ensure delivery of all legally required notices, and retain proof of that delivery. This can be accomplished by sending notices via certified mail, requiring employees to acknowledge receipt in writing or using other means that provide a verifiable receipt.

Conclusion

The next article in this series will continue with interesting and significant case law developments in the areas of medical certifications, interference with FMLA rights or retaliation for exercise of those rights.

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