Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Updating Our Understanding Of The FMLA: Part 2

Law360, New York (November 19, 2014, 11:02 AM ET) --

Linda Dwoskin

Despite the fact that the Family and Medical Leave Act has been in existence for more than 20 years, administering its myriad technical requirements continues to confound employers. Every year, the FMLA evolves through judicial interpretation and an employer that fails to review and heed these judicial pronouncements does so at its own peril.

This article, the second part in our series, addresses recent case developments in the area of medical certifications, as well as the cases discussing what constitutes interference with FMLA rights and retaliation for exercise of those rights. Every employer is well-advised to review these case developments, understand the lessons learned from these opinions and fully comply with their pronouncements.

Part three of the series will conclude with the issues of what it means "to care for" a covered family member, the fraudulent use of leave and how to combat it, and then provide practical advice on how best to prepare for and overcome any legal challenge.

Medical Certifications, Recertifications and Fitness for Duty Certifications

The FMLA allows an employer to require various medical certifications to support an employee's request for FMLA leave or return from that leave. Understanding what documents may be required and what an employer may do with documents it finds to be insufficient or incorrect, is critical to avoiding FMLA liability. Several recent cases illustrate the challenges in this area.

The case of Budhun v. Reading Hospital and Medical Center, 765 F.3d 245 (3d Cir. 2014) involved an employer's refusal to accept an employee's return-to-work certification. Vanessa Budhun was a credentialing assistant for Reading Hospital and Medical Center, a job that required significant typing. She was involved in an accident outside of work and broke a bone in her right hand. To help the bone heal, the doctor bound three of her fingers together, making typing slower, but still possible. After a few weeks on FMLA leave, and at the employee's request, the doctor cleared her to return to work without restriction. Budhun returned to the hospital with the doctor's release, but with a splint on her hand and she explained to her employer that she could perform "hunt-and-peck" style typing. The employer unilaterally rejected the doctor's release and asked the employee to return to leave status until such

time as she could use of all of her digits and type at full speed: “It seems that your physician was incorrect in stating that you could work unrestricted. If you were truly unrestricted in your abilities, you would have full use of all your digits.” Budhun returned to leave status but the hospital replaced her at the expiration of 12 weeks of leave before Budhun was able to return to work.

Budhun claimed that Reading interfered with her right to be restored to her position in violation of the FMLA. The district court granted summary judgment to Reading Hospital because Budhun could not perform the essential function of typing and the Third Circuit reversed.

The Third Circuit acknowledged that prior to permitting an employee to return to work, an employer may require an employee to provide a fitness-for-duty certification. An employer may also require that this certification address the employee’s ability to perform her job’s essential functions, but only if it makes the request in a timely fashion. In other words, the employer must provide the employee with a list of essential functions and request that the doctor assess the employee’s abilities, at the time it provides the designation notice to the employee. Id. at 253 (citing 29 C.F.R. §825.312(b)). The FMLA regulations place the onus on the health care provider — not the employer — to certify whether the employee is unable to perform any essential function. Id. at 254-255 (citing 29 C.F.R. §825.123(a)). Once the employee provides the certification, his/her restoration rights have been triggered.

In other words, Reading Hospital was free to provide Budhun with a list of the specific functions that were essential to her job, 29 C.F.R. §312(b), and it was free to contact the physician — with her permission — to clarify the certification. Id. What it was not free to do was to unilaterally override the doctor.

Although the employer can request an initial medical certification, the FMLA limits how often an employer can request recertification. The case of Oak Harbor Freight Lines v. Antti, 998 F.Supp. 2d 968 (D. Or. 2014) illustrates the difficulties caused by these limitations. Oak Harbor, a common carrier, experienced significant employee abuse of intermittent FMLA leave. To curb this abuse, the employer implemented a “notice policy” requiring that for each and every absence, employees submit a doctor’s note stating that their absence related to the underlying FMLA-qualifying condition. The company then brought a declaratory judgment action against two employees seeking a declaration that its notice requirement was permitted by the FMLA. Unfortunately for the employer, the court granted summary judgment in favor of the employees.

The court found the notice requirement tantamount to a request for a medical certification or recertification for each absence, and while the statute permits an employer to require the completion of a medical certification upon the initial request for leave, 29 U.S.C. §2613(a); 29 C.F.R. §305(a), it limits the frequency with which the employer may request recertification. An employer can request recertification “no more often than every 30 days,” 29 C.F.R. §308(a), and if the minimum duration of the condition is more than 30 days, the employer must wait for the expiration of that minimum duration. 29 C.F.R. §308(b). An employer may request recertification in less than 30 days only if the employee requests an extension of leave, if there are changed circumstances or when the employer doubts the continuing validity of the certification. 29 C.F.R. §308(c). In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Id. While the court sympathized with the employer’s problem of leave abuse, it could not rely on the notice policy to correct that problem, but was bound to comply with the recertification time limits. Oak Harbor, 998 F.Supp. at 975.

Interference With FMLA Leave

There are two types of claims for violation of the FMLA: (1) interference with the rights afforded by the law under 29 U.S.C. §2615(a)(1); and (2) retaliation for the exercise of rights afforded by the law under 29 U.S.C. §2615(a)(2). This section addresses the myriad ways employers are alleged to have interfered with an employee's rights to FMLA leave.

While the FMLA cases discussed in the foregoing parts of this article often involved employees who took more leave than they were entitled to, interference claims can also be brought by employees who take less. Such was the case in Evans v. Books-A-Million, 762 F.3d 1288 (11th Cir. 2014).

Tondalaya Evans worked as a payroll and insurance manager and was involved in the implementation of a new ADP payroll system. Evans became pregnant and requested leave, and despite her statements that she did not intend to work during leave, her supervisor, Sandi Meeks, insisted. Meeks explained that the company needed Evans to continue her work on the ADP implementation, and she gave Evans a new laptop to enable her to work remotely. Evans, who felt that she had no choice in the matter, worked almost full-time during her maternity leave.

Unfortunately, when she returned to the office, rather than being grateful for her efforts, Meeks was displeased with the pace of the ADP implementation and decided to reassign Evans to the newly created position of risk manager. Evans declined the position, was fired and sued for FMLA interference. The district court granted the company's motion for summary judgment, reasoning that, even if Books-A-Million interfered with Evans' FMLA rights, she could not state a claim because she had been paid for her time and therefore did not suffer a loss of income.

The Eleventh Circuit reversed, explaining: "[t]o prove FMLA interference, Evans must demonstrate that she was denied a benefit to which [she] was entitled under the FMLA … and that she suffered prejudice by the violation." Id. at 1295. The Eleventh Circuit concluded that the reassignment could constitute an unlawful act of interference with her FMLA right to be reinstated to her former position, and that the prejudice she suffered need not take the form of monetary damages. "It seems plain to us that if an employer coerces an employee to work during her intended FMLA leave period and, subsequently, reassigns her based upon her allegedly poor performance during that period, the employee may well have been harmed by the employer's FMLA violation." The harm, the Eleventh Circuit added, was remediable by reinstatement. Id. at 1297. The Evans case teaches that employers should not pressure employees to work during leaves and that even if an employee ultimately consents to work and is paid, interference claims are still possible.

One of the most significant interference cases this year is Escriba v. Foster Poultry Farms, 743 F.3d 1236 (9th Cir. 2014) which dealt with the issue of whether an employee could affirmatively decline to use FMLA even if the underlying reason for the absence was FMLA-qualifying. The surprising — and troubling — answer was yes.

Maria Escriba worked at defendant's poultry processing plant. She requested two weeks of vacation time to travel to Guatelmala to care for her ill father. As she admitted at trial, she intended to request vacation time, not family leave. She understood the difference since she had requested FMLA leave on at least 15 different prior occasions. Escriba went to Guatemala and stayed 16 days beyond her approved vacation time without contacting her employer. She was terminated for violating the no-call, no-show rule and she sued alleging FMLA interference. The case went to the jury which found for the employer. The verdict was affirmed on appeal.

The question before the Ninth Circuit was whether an employee can affirmatively decline to use FMLA leave, which it answered affirmatively. In reaching its decision, the Ninth Circuit focused on the FMLA regulations' expectation that the employer engage in an informal process to obtain additional information about whether the employee is seeking FMLA leave: "in all cases, if it is necessary to have more information about whether FMLA leave is being sought by the employee," the employer should make further inquiry. 29 C.F.R. §825.302(c) (emphasis added).

Based on this language, the Court concluded that "there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA" in order to preserve her FMLA leave time for later use. Escriba, 743 F.3d at 1244.

The reasoning of the Ninth Circuit is seemingly contrary to the DOL regulation which provides that employers must designate an absence as FMLA leave whenever it is taken for a FMLA-qualifying reason, regardless of employee preference. The applicable regulation provides that "once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer **must** [designate the absence as FMLA leave]." 29 C.F.R. §825.301(a) (emphasis added).

Mandating a FMLA designation makes sense since it avoids administrative nightmares trying to divine employee intent, and it protects both the employer and employee. Designating leave protects the employee by affording reinstatement rights, and it protects the employer by limiting the amount of time out of work. It remains to be seen whether other courts will agree with the Ninth's Circuit's troubling analysis.

A recent decision from the Third Circuit is welcome news for employers since it confirms that an employee who is afforded all FMLA leave to which he is entitled, as well as full reinstatement rights, does not have a viable interference claim. In Ross v. Gilhuly, 755 F.3d 185 (3d Cir. 2013), Ronald Ross was an area district manager for Continental, a tire manufacturing company. Ross had significant performance problems and was put on a performance improvement plan by his manager. Thereafter, he told the company that he suffered from prostate cancer and he took a 60-day FMLA leave for his surgery and recovery. Upon his return, the company extended the PIP by 60 days, but when Ross' performance did not improve his employment was terminated. Ross brought an FMLA interference and retaliation claim.

The district court granted summary judgment to the employer and the Third Circuit affirmed. "We have made it plain that for an interference claim to be viable, the plaintiff must show that FMLA benefits were actually withheld." Id. at 192. Ross received all of the benefits to which he was entitled and then was reinstated to the same position from which he left, and as a result, he had no interference claim. Moreover, the evidence was undisputed that Ross was terminated based on performance deficiencies which were documented in the PIP he received before requesting leave, thus defeating any retaliation claim. Id.

Retaliation for Exercise of FMLA Rights

Employees routinely claim that adverse actions taken after the exercise of FMLA rights constitute retaliation. Employers that can present documented and/or uncontested evidence of employee misconduct or poor performance, particularly of problems predating the FMLA leave, fare well in these matters.

In Ebersole v. Novo Nordisk Inc., 758 F.3d 917 (8th Cir. 2014) plaintiff Aubree Ebersole was a drug sales

representative who was fired for falsifying her call log. Ebersole suffered from rheumatoid arthritis and the company knew of her condition at her time of hire in 2007. In January 2009, she was granted a five-week FMLA leave for arthritis treatment. Two months after her return, her supervisor began an investigation into reports that Ebersole may have falsified her call logs the previous year. In August 2009, after the investigation was concluded and had uncovered three instances of falsification, she was fired. The company terminated Ebersole's fellow sales representative the same day for falsification, fired six other employees in Ebersole's district that year and fired a host of other sales representatives nationwide for falsifying calls. Nonetheless she sued claiming FMLA retaliation.

The Eighth Circuit affirmed summary judgment for Novo Nordisk on plaintiff's FMLA retaliation claim, stating "an employee who requests FMLA leave has no greater protection against termination for reasons unrelated to the FMLA than she did before taking the leave." Id. at 923. Plaintiff knew that the falsification was a terminable offense and the Eighth Circuit upheld the termination. See also Lopez v. Lopez, 997 F.Supp. 2d 256 (D.N.J. 2014) (Summary judgment granted to employer in FMLA retaliation claim; call center employee yelled obscenities and smashed computer and then took FMLA leave for post-traumatic stress disorder. Upon return was suspended and fired. Court stated: "[T]aking an FMLA leave of absence does not, of course, shield a plaintiff from discipline for misconduct."); Bloom v. Grp. Health Plan Inc., 2014 WL 3955668 (D.Minn. Aug. 13, 2014) (Medical assistant fired during maternity leave after employer discovered that she stole baby formula has no FMLA claim. Employee "should not be shielded from wrongdoing simply because she was on FMLA leave.")

In cases where employees have been fired for poor performance, employers do best if they can prove that the performance problems predated the FMLA leave. In Langenbach v. Wal-Mart Stores Inc., 761 F.3d 792 (7th Cir. 2014) plaintiff Erika Langenback, an assistant manager, was terminated for poor performance. She had been placed on a PIP and received documented negative performance evaluations for more than a year preceding her request for FMLA leave to treat uterine fibroid tumors. The performance problems continued after her return, all of which were also documented. Six months after her return from leave Wal-Mart terminated Langenbach's employment. The Seventh Circuit considered the evidence of poor performance voluminous and overwhelming and affirmed the district court's grant of summary judgment on the FMLA retaliation claim.

The employer did not fare as well in Smothers v. Solvay Chemicals Inc., 740 F.3d 530 (10th Cir. 2014). Steve Smothers was a long-service maintenance mechanic in one of Solvey's mines. He had back problems and had been granted extensive intermittent leave for several years. Despite his technical knowledge and solid performance, his supervisors complained about his FMLA-protected absences and at one point denied him a promotion because of his absenteeism. The incident which led to his termination involved a leak of hydrochloric acid from one of the pipes. During the repair Smothers violated a safety rule and had an argument with another mechanic. Solvay terminated Smothers' employment and he brought an FMLA retaliation claim. The district court granted summary judgment to the employer and the Tenth Circuit reversed.

The Tenth Circuit found the explanation for Smothers' termination pretextual for three reasons: (1) the company had never sought Solvay's version of events during its investigation of the argument; (2) there was evidence that the company had long complained about his FMLA absences and refused to promote him for this reason; and (3) others were not fired for comparable safety violations.

Conclusion

The next and concluding article in this series will address case developments in the areas of what it

means “to care for” a covered family member, the fraudulent use of leave and how best to combat it, as well as provide practical advice on how best to prepare for and beat the inevitable legal challenge.

—By Linda Dwoskin and Melissa B. Squire, Dechert LLP

Linda Dwoskin is a senior associate and Melissa Squire is an associate in Dechert's Philadelphia office, where they are both members of the firm's labor and employment group.