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Updating Our Understanding Of The FMLA: Part 3

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Every year the courts address a myriad of Family Medical Leave Act issues, sometimes clarifying and sometimes confusing the issues. It is imperative that employers review these cases and attempt to understand and comply with the various judicial pronouncements.

In this third and concluding part of our series, we address the issue of what it means "to care for" a covered family member. We canvas the cases highlighting the many ways employees fraudulently use and abuse their leave rights and then discuss how best to combat that fraud. At the end of the article we provide practical advice on how best to prepare for and overcome any legal challenge in this complex and confusing area.

Needed "To Care For"

Courts continue to struggle with distinguishing who "cares for" a covered family member and who seeks leave for compassionate or other reasons that fall short of the "caring for" requirement. In Ballard v. Chicago Park District, 741 F.3d 838 (7th Cir. 2014), the Seventh Circuit recently held that an employee who sought leave to take her terminally ill mother on a trip to Las Vegas was "caring for" her mother within the meaning of the FMLA.

Beverly Ballard worked for the Chicago Park District. In 2006, Ballard's mother was diagnosed with end-stage congestive heart failure and began receiving hospice support. Ballard lived with her mother and acted as her primary caregiver, attending to her hygienic and medical needs. In 2007, during a meeting with a hospice social worker to discuss her end-of-life goals, Ballard's mother said that she had always wanted to take a family trip to Las Vegas. The social worker obtained funding for the trip, and Ballard requested a six-day leave of absence in January 2008. The park denied Ballard's request, though Ballard maintained that she was not informed of the denial before leaving for her trip. While in Las Vegas, Ballard and her mother engaged in typical tourist activities, but Ballard continued providing her usual primary caregiver duties. Several months later, the park discharged Ballard for unauthorized absences accumulated during her Las Vegas trip. Ballard filed suit, and the park moved for summary judgment, contending that Ballard did not "care for" her mother while they were in Las Vegas because the trip was not related to a continuing course of medical treatment. The district court denied the motion and the park appealed.

On appeal, the Seventh Circuit rejected the park's argument that "care," in the context of an away-from-home trip, requires services provided in connection with ongoing medical "treatment." The court said that the park failed to explain "why participation in ongoing treatment is required when the employee provides away-from-home care, but not when she provides at-home care." Ballard, 741 F.3d at 840. According to the court, the plain language of the applicable statute and regulations define "care" expansively to include both "physical and psychological care" and do not restrict the provision of "care" to any particular place or geographic location. See 29 U.S.C. §2612(a)(1)(C). The regulations expressly state that physical care "includes situations where … the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety...." 29 C.F.R. §825.124(a). The court emphasized that Ballard's mother's "basic medical, hygienic and nutritional needs did not change while she was in Las Vegas, and [Ballard] continued to assist her with those needs during the trip." Ballard, 741 F.3d at 841. Accordingly, Ballard's absences were protected under the FMLA.

In reaching its decision, the Seventh Circuit expressly disagreed with rulings from the First and Ninth Circuits, which held that travel unrelated to medical treatment does not fall within the boundaries of "caring for" a family member. See e.g., Tayag v. Lahey Clinic Hosp. Inc., 632 F.3d 788 (1st Cir. 2011) (holding that an employee's seven-week spiritual pilgrimage to the Philippines with her ailing husband, which was unrelated to his medical treatment, did not qualify as "care" protected by the FMLA even though she assisted him by administering medications, helping him walk, and being present in case his illness incapacitated him). According to the court, none of the cases cited by the park explained "why certain services provided to a family member at home should be considered 'care,' but those same services provided away from home should not be." Ballard, 741 F.3d at 842.

The Seventh Circuit again confronted the question of what it means to care for a family member in Gienapp v. Harbor Crest, 756 F.3d 527 (7th Cir. 2014) — this time in connection with the care of an adult child. Suzan Gienapp took a leave of absence from Harbor Crest to care for her biological, adult daughter, who was undergoing treatment for thyroid cancer. Although Gienapp never supplied a firm return-to-work date, Harbor Crest inferred that Gienapp would not be able to return to work at the conclusion of her 12-week leave period by April 1, 2011, due to a statement from the treating physician indicating that the daughter's recovery was uncertain and that she would require assistance at least through July 2011 if she recovered. Accordingly, Harbor Crest filled Gienapp's position. Gienapp filed suit after she reported to work on March 29, 2011, and was told that she no longer had a job.

On appeal, Harbor Crest argued, among other things, that Gienapp was not entitled to FMLA leave at all because she did not take leave to care for her ill daughter. Instead, according to Harbor Crest, Gienapp took the leave to care for her daughter's children (i.e., her grandchildren) to reduce the burdens on those who were caring for her daughter. Because leave to care for one's grandchildren is not protected by the FMLA, Harbor Crest contended that Gienapp's leave was not FMLA-qualifying.

Granting summary judgment in favor of Gienapp, the Seventh Circuit rejected Harbor Crest's invitation to narrowly construe the FMLA's definition of "care." Although Gienapp conceded that she cared for her grandchildren, according to the court, such care was not FMLA-disqualifying provided Gienapp also cared for her eligible daughter — which she contended she did. Citing to its earlier decision in Ballard, the court emphasized that "care" under the FMLA includes both psychological and physical assistance to a covered family member. The court said that the combination of assistance to the daughter plus caring for the grandchildren to "take a load off the daughter's mind and feet" counted as permissible "care" under the FMLA due to the "mental boost" it gave Gienapp's ailing daughter. In other words, by caring for her daughter's children, Gienapp was essentially providing psychological care to her daughter.

The Ballard and Gienapp decisions highlight the broad nature of FMLA family care leave, particularly in the Seventh Circuit, and serve as an important reminder to employers that FMLA cases often turn on thin distinctions in the law and are significantly influenced by the specific facts in a given case.

Fraudulent Use of Leave

One of the more difficult aspects of administration of FMLA leave is handling suspected instances of employee abuse of leave rights. Indeed, no matter how flagrant the abuse and no matter how solid the proof of that abuse preceding an employment termination, employees sue anyway. The following cases highlight not only the many ways employees game the system, but also some successful defense strategies as well.

The case of Dalpiaz v. Carbon County, Utah, 760 F.3d 1126 (10th Cir. 2014) involves an employee lying about the extent of her injuries. Bridget Dalpiaz was administrator for Carbon County, a sedentary job. She was in a car accident, hurt her back and took an extended FMLA leave, returning to work on a significantly reduced schedule. During her leave, her supervisor received an increasing number of credible reports that plaintiff engaged in physical activities inconsistent with her claims of a back injury — she played football with her children, worked in her yard and performed various physical tasks at dance recitals. As a result of these reports, the supervisor asked plaintiff to submit to an independent medical exam. When she refused, the employer suspended and then fired her for both untruthfulness and failure to comply with the request for the IME. She sued claiming FMLA interference.

The district court granted summary judgment to the employer and the Tenth Circuit affirmed. Contrary to plaintiff's argument, the Tenth Circuit held that the dispute was not about "the absolute truth regarding Plaintiff's state of health, but rather whether the county terminated her because it sincerely, even if mistakenly, believed she had abused her sick leave and demonstrated significant evidence of untruthfulness." Id. at 1134. The court concluded that on the record before it, there was no evidence to suggest that the county fabricated the reasons for termination. Moreover, the court stated that Dalpiaz was required to comply with legitimate directions given by her supervisors, and her request for FMLA leave did not shelter her from this obligation, even when the instructions were related in some way to her use of FMLA leave. Id.

The case of Hamilton v. Republic Airways Holdings, 2014 WL 2968596 (S.D.Ind. July 2, 2014), provides an example of an employee lying about the reason for leave. Lorrie Hamilton, a flight attendant, suffered from migraines and based on this condition was approved for intermittent FMLA leave. In January 2012, the airline changed Hamilton's flight schedule to one requiring an overnight stay. Unhappy with this assignment, she made a number of phone calls requesting a change, all of which were recorded, stating variously that she had no clothes or overnight items. When the scheduler reminded her that a refusal to accept the assignment was a terminable offense she "abruptly changed course" by "flippantly" stating "well I have a migraine then, so you can call me off then — I'm just FMLA then. I have a migraine." Id. at *3. She was also overheard on a hotel shuttle later that day stating that she did not want to work, so she'd said, "No, FMLA." After investigation, Republic terminated her employment, she sued and the district court granted summary judgment for the airline on both her FMLA interference and retaliation claims.

The district court noted that an employee who takes FMLA leave must take it for the intended purpose of the leave, and the employer need only show that it had an honest suspicion that plaintiff was abusing her leave. The court ruled that, with the recorded calls and the subsequent report of her shuttle conversation, no reasonable juror could find the employee's invocation of her FMLA rights credible. Id.

at *10. See also Rowe v. United Airlines, 2014 WL 3819461 (D.Colo. Aug. 4, 2014) (summary judgment for employer; airline had honest and good faith belief that Rowe misused intermittent FMLA leave to extend vacation in Taipei. "FMLA does not shield an employee from termination simply because the alleged misconduct concerns use of FMLA leave.")

In the case of Buel v. The Toledo Hospital, 2013 WL 6230957 (N.D. Ohio Dec. 2, 2013), the employer suspected that the employee altered his medical certification form to afford himself an additional 10 days of leave per month. Dan Buel's title in the hospital's transportation network was flight follower, and he dispatched helicopters and ambulances in this role. He requested intermittent FMLA leave and submitted a medical certification form as required by his employer. Although the form was signed by the doctor and stated that Buel needed 12 days of leave per month, the human resources manager suspected that the form had originally requested "2" days off, but had been altered to add the number "1," increasing the actual number of days off to "12." To investigate, the HR leave-of-absence specialist contacted the doctor, who confirmed he had authorized two, not 12, days of leave. The supervisor confronted Buel, who denied the alteration, but confirmed that he had sole possession and control over the certification form until it was submitted to the employer. The hospital terminated Buel's employment and he sued.

The court granted summary judgment on Buel's FMLA retaliation claim on the grounds that the hospital established that it had an "honest belief" that plaintiff altered his certification form. "Where the employer makes a reasonably informed and considered decision before taking an adverse employment action, the employer establishes a basis for its honest belief." Since the hospital conducted an investigation, gathered relevant information and assessed the situation, it established an honest belief that plaintiff falsified the records. Id. at *6.

The lesson learned from these decisions is that an employer is most successful in abuse cases if it conducts a reasonable investigation, affords the employee the opportunity to explain and only then takes any adverse action. A studied and deliberative approach in assessing the alleged dishonesty or misconduct is the best defense to a FMLA claim.

Practical Advice to Ensure FMLA Compliance

Given the aggressive posture of the U.S. Department of Labor and the expansive view of FMLA rights articulated by the courts, employers are advised to carefully review their policies and procedures to ensure that they are fully compliant with the FMLA's myriad requirements. What follows is a detailed to-do list, to help every conscientious employer prepare to properly administer FMLA leaves and be ready for any legal challenge.

Review and Update Your FMLA Policy

Make sure that your FMLA policy has been updated to include all of the 2013 regulations. In addition, ensure that the policy includes the following items: eligibility requirements; the reasons an employee may take FMLA leave; the definition of the company's 12-month period (calendar year, anniversary year, or rolling year, forward or back); any call-in procedures; substitution of paid leave requirements; the medical certification process and timing requirements and the consequences for failure to comply; an explanation of intermittent or reduced leave; benefit rights during leave; and the requirement for fitness for duty certifications.

Ensure that Policies are Posted

The company's FMLA policy should be in the employee handbook and the DOL's poster should be "prominently" posted in "conspicuous" places so that it can be readily viewed by both employees and applicants. If a substantial portion of the workforce speaks a language other than English, the poster must be in that language as well.

Review and Update All Forms

The FMLA requires that an employer provide a number of different forms to employees at various times in the process of administering FMLA leaves, such as the Rights and Responsibilities Form, the Notice of Eligibility, Certification Forms, and Designation Notices. These forms should be reviewed to ensure that they are fully compliant. Any form correspondence used to communicate with employees regarding FMLA leave should also be reviewed and revised as necessary.

Self-Audit FMLA Practices

The DOL has announced that as part of its on-site investigations it will interview managers and ask them to articulate each and every step taken in handling an employee's request for FMLA leave. As such, it behooves any reasonable employer to do the same.

Thus, the company should ask every manager: (1) what procedures are used when an employee reports an absence that may be FMLA-qualifying. Are managers asking the right questions to ensure that the company properly evaluates the leave request and do managers understand that the employee does not need to mention the FMLA when requesting leave; (2) is the company calculating FMLA usage correctly, including correctly calculating intermittent leave; (3) is the company ensuring that employees are given the correct amount of time to return medical certifications, are they informed in writing of the consequences of failing to provide timely certifications, and is the company properly following up on incomplete or insufficient certifications as permitted; (4) does the company require status reports from the employee and is this handled correctly; and (5) is the company seeking fitness-for-duty certifications correctly.

Ensure Correct Recordkeeping

Make sure that the company maintains FMLA-related documentation and that the data maintained is accurate. In other words, the employer should have at the ready employee-identifying information, payroll data, dates and hours of FMLA leave taken and forms collected (e.g., certification, designation, fitness for duty, etc). The documents should be maintained for three years and kept in a file separate from the personnel file.

Train Employees

Many FMLA cases turn on statements by managers about an employee's leave rights or the difficulty the manager faces as a result of the employee's absences. Far too many employers pay far too much money as a result of a manager's actions and statements. Training is imperative. Everyone must know what obligations are imposed on an employer by law, what types of statements are foolish, or worse, unlawful, and how to address employee requests for leave or reinstatement. Training is one of the cheapest forms of litigation avoidance available.

Understand and Apply Any State Law Requirements

Some state laws are more stringent than the federal FMLA. Understand the laws applicable in various jurisdictions and apply them correctly.

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