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How To Avoid Violating FMLA's Technical Rules — Part 1

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Two years ago, the U.S. Department of Labor commissioned a survey of the usage and impact of the Family and Medical Leave Act. The results not only lauded the benefits of the law for employees, which was not surprising, but also found that employers suffered "little to no negative impact from the FMLA," a finding which was surprising and seemingly in conflict with what was actually occurring in workplaces across the country. The Administrative Office of the United States Courts recently issued its annual statistics on types of claims filed in the federal courts, and these numbers stand in stark contrast to the DOL's glib pronouncement. FMLA litigation has skyrocketed in recent years, a trend which is expected to continue. In 2012, 406 new cases were filed, in 2013, 987 new cases were filed, and in 2014, 1,114 new cases were filed. (See Annual Statistics of the Administrative Office of the United States Courts.) These numbers provide tangible proof of the continuing challenges employers face with regard to FMLA compliance.

The reason for the dramatic increase in the number of filings is unclear. While it could be as simple as greater employee knowledge of FMLA rights, many of the recent court opinions suggest errors and omissions in employer compliance with the FMLA's detailed and nuanced technical requirements. Whatever the reason for the legal action, there is no avoiding the conclusion that these technical requirements merit considerable employer attention.

The old saying "knowledge is power" applies equally to knowledge of the technical details of the FMLA and the power to forestall or defend against the inevitable challenge. To help employers gain this knowledge, this series will address several of the more challenging technical issues, discuss case developments, and provide practical guidance. The series is divided into three parts. Part one will focus on the areas of employee eligibility and employee and employer notice requirements. Part two will address the issues surrounding the meaning of "serious health condition" and medical certifications, and part three will discuss intermittent leave and what constitutes statutory "interference." It will then

conclude with detailed practical guidance. To quote yet another old saying, “now is the time” for employers to become intimately familiar and fully compliant with their FMLA obligations.

Employee Eligibility

The FMLA’s benefits and protections apply only to eligible employees of covered employers. To be eligible, an employee must satisfy all of the following criteria:

1. The employee must have been employed by the employer for at least a total of 12 months (which need not be consecutive) 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 objective criteria are seemingly straightforward and to the uninitiated look simple to apply. However, as illustrated by the following cases, an incorrect determination concerning eligibility can be a costly mistake.

In Wages v. Stuart Management Corp., 798 F.3d 675 (8th Cir. 2015), the Court of Appeals for the Eighth Circuit affirmed an award of summary judgment for Ena Wages on her FMLA entitlement claim. Throughout the case, Stuart Management Corp. (SMC) had argued unsuccessfully that Wages had not met the 12-months of service requirement. Wages was hired on Nov. 17, 2008, as a full-time caretaker at one of SMC’s 30 apartment complexes. Her high-risk pregnancy was diagnosed in the summer of 2009, and in October when Wages began experiencing abdominal pain, SMC reassigned her vacuuming and mopping duties at her doctor’s request. In early November, she was medically cleared to perform all job responsibilities except snow removal.

Wages was absent Tuesday, Nov. 10 through Thursday, Nov. 12, but worked 4.25 hours on Friday, Nov. 13, when she presented a doctor’s note written the prior day restricting her to 20 hours of work per week effective immediately. Also on Friday, SMC’s HR director, Wages’ supervisor and another manager met and decided to discharge Wages, reasoning that while the company had been getting by with the prior restrictions on Wages’ duties, the new time limit was untenable. Wages was not scheduled to work on the weekend, but clocked in and began working on Monday, Nov. 16 when SMC told her that she was being discharged because it could not accommodate her work restrictions.

Wages sued, alleging that she was improperly denied FMLA leave. To prevail on her claim, she had to establish that she was eligible and had given SMC notice of her need for leave. That she had given notice was indisputable. But SMC argued that it had terminated Wages before she had completed 12 months of service, as she would have been ineligible until Nov. 17. Although agreeing that her eligibility date was Nov. 17, the district court observed that even if Wages’ reduced schedule had begun immediately upon her return to work on Friday, Nov. 13, there was no evidence that she could not have reached the 17th by working a full day on Nov. 16 or having used paid time off to cover her reduced time until then. The Eighth Circuit was even less analytical, noting that Wages had worked through Nov. 16, and thus had completed the service requirement.

Failure to properly calculate the 1,250 hours worked requirement under the act also dooms an

employer's ineligibility defense. DOL regulations expressly state that in the event an employer does not maintain accurate records of hours worked (including for employees who are exempt 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 Barnes v. Vibra Healthcare LLC, (D.N.J. May 26, 2015), the U.S. District Court for the District of New Jersey refused to dismiss Flora Barnes' FMLA claim based on her alleged ineligibility under the 1,250 hours rule. Barnes had worked as a nurse on weekends at Vibra Healthcare LLC's rehabilitation hospital for four years before becoming pregnant in 2013. She began a leave of absence on June 5, 2013, for her pregnancy and gave birth by caesarian section in late October. In early December 2013, Barnes contacted Vibra's human resources director, Joanne Cernova, seeking to extend her disability leave for two weeks until Dec. 20. Cernova told her at that time that her position had been given to someone else because she had exceeded the maximum 12-week FMLA leave period allowed.

Barnes sued, alleging interference with her FMLA rights. She claimed that Cernova informed her that she was approved for FMLA in June when Barnes had completed LOA paperwork, but had neither indicated when the leave was to begin nor provided written notice. Barnes assumed leave would start when her child was born. Had that been the case, Barnes' 12 weeks would have run out in late December.

Vibra filed a motion to dismiss, asserting that Barnes was not eligible for leave because she had not worked at least 1,250 hours in the prior year. In support of its motion, Vibra produced time clock records for the 12-month period preceding June 5 — the date on which Barnes' leave began — which showed a total of only 1,103 work hours. However, Barnes disputed the records' accuracy, contending that the time clock had not always worked properly and that she had worked 24 hours per week on average. When the time clock malfunctioned, employees had to manually record work hours and managers signed off on them. Although the company's human resources director admitted in an affidavit that the time clock system was not always accurate, Vibra contended that manual hours were entered into the system routinely. However, the court concluded that there was no evidence that all manual hours were entered, precluding dismissal of Barnes's claims.

The Court of Appeals for the Sixth Circuit's recent decision in Tilley v. Kalamazoo County Road Commission, 777 F.3d 303 (6th Cir. 2015) demonstrates the perils of misstating the FMLA's eligibility criteria in a poorly drafted FMLA policy. Terry Tilley had worked for several years as an area supervisor for the Kalamazoo County Road Commission. In July 2011, he was suspended and placed on final warning for not having satisfactorily performed several assignments. On Aug. 1, 2011, the day on which one of his tasks was to be completed, Tilley experienced chest pain and went to the emergency room. Tilley was released from the hospital the next day, and thereafter received a medical note from his doctor excusing him from work until October 2011. Tilley requested, and on Aug. 9 received FMLA paperwork. The commission's FMLA policy based eligibility only on meeting the 12 months of service and 1,250 hours worked requirements. It made no mention of the FMLA's 50/75 rule. Before Tilley returned the FMLA paperwork, the commission sent him a letter terminating his employment due to his failure throughout the year to timely complete the tasks assigned to him and otherwise communicate his progress on them. Tilley sued, alleging FMLA interference.

The district court granted summary judgment to the commission, finding that Tilley was ineligible for leave under the FMLA because he did not work at a location at which the commission employed 50 or more employees within a 75-mile radius. This fact was indisputable. On appeal, the Sixth Circuit reversed the district court's decision. Although the court agreed that Tilley could not demonstrate he satisfied the FMLA's 50/75 rule, it held that he nevertheless presented sufficient evidence that the

commission should be equitably estopped from denying his eligibility based on the policy in its handbook. According to the court, the commission's FMLA policy contained a definite misrepresentation as to the eligibility criteria, and Tilley presented evidence that he relied on the policy to his detriment. In his supporting affidavit, Tilley asserted that he sought medical treatment prior to completing his assignment on Aug. 1 because the unqualified and unambiguous statements in the commission's handbook led him to believe that he was covered under the FMLA.

Employee Duty To Provide Notice

Employees are required to provide notice of their need for leave to trigger the FMLA'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. 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. (See 29 C.F.R. §§302(c), 303(b).) However, when an employee seeks leave due to a qualifying reason for which the employer previously provided the employee FMLA protected leave, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employee's obligations under the FMLA. An employee must respond to an employer's reasonable questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond can result in denial of the FMLA's protections. (See 29 C.F.R. §§302, 303.)

Absent unusual circumstances, an employer may require employees to comply with its standard and customary notice and procedural requirements. This can include following specific mandatory call-in reporting procedures in an unambiguous policy. If the employee fails to comply and no unusual circumstances justify the failure, FMLA protection can be denied. (See 29 C.F.R. §825.302(d).)

While an employer may defend against an FMLA interference claim by proving that the employee did not give notice as required under the Act, mustering that proof may be more difficult than imagined. To illustrate, in Hudson v. Tyson Fresh Meals Inc., 787 F.3d 861 (8th Cir. 2015), the Court of Appeals for the Eighth Circuit recently reversed summary judgment in favor of an employer where the plaintiff failed to comply with the employer's explicit policy requiring management team members, like the plaintiff, to personally call their direct supervisor to report an unplanned absence or lateness. The court concluded that there were genuine issues of material fact concerning whether or not the policy's provisions were customarily enforced and about whether the plaintiff's deviations from the policy provisions (e.g., having his girlfriend call his manager to report the absence or texting rather than calling the manager directly) actually violated the policy.

Delbert Hudson, a supervisor for Tyson Fresh Meals Inc., had sporadic health-related absences, but had not used any FMLA during the prior year. On Dec. 27, 2011, Hudson became upset when disciplined for not appropriately handling an employee's work injury. The next day, Hudson's girlfriend called his manager to say that Hudson would be late or absent. Hudson also sent his manager a text that day stating that he was having health issues, would be out a few days, and needed to see a doctor. Hudson was absent Dec. 28 through 30 and was not scheduled to work until Jan. 3. He saw his doctor on Jan. 2, who gave him a work release noting that he was and would remain under the doctor's care until Jan. 7. On Jan. 3, Hudson reported to Tyson's health services to provide the work release, and on Jan. 4 his leave was approved. He was not scheduled to work again until Jan. 9.

On January 9, Hudson returned to Tyson and told the plant manager that he could not work due to his pain. The matter was referred to human resources, which upon investigating noted that Hudson had not

called in on each day he was absent since Dec. 27 and that he had admitted that he should have called but was "fed up." Tyson's call-in procedures clearly stated that: "[a]ll management team members are expected to personally call their direct supervisor to report an unplanned absence or to report that they will be late." Tyson subsequently discharged Hudson for failing to properly report his absences.

While the district court concluded that Hudson clearly had not met his FMLA notice obligations in not complying with the call-in policy, the Eighth Circuit was not persuaded. It turned out that Hudson had a history of texting his manager for different reasons, and that there were instances of noncompliance with the call-in procedures by other employees who were not disciplined as a consequence. Further, notes compiled by the Tyson HR employee who investigated Hudson's situation contained factual errors, indicating that Hudson gave no notice on certain days when he in fact had texted.

In contrast, in Norton v. LTCH d/b/a McLaren Bay Special Care et al., (6th Cir. Jul.29, 2015), the Court of Appeals for the Sixth Circuit held that a hospital was justified in firing a nurse who was two minutes late for her shift because she failed to inform the hospital that she needed intermittent FMLA leave. Kathleen Norton, a registered nurse with McLaren Bay Special Care (MBSC) for 17 years, had a history of excessive absenteeism and tardiness. As of early May 2013, she had received three written reprimands. She understood her job was in jeopardy if she committed additional infractions.

Later in 2013, Norton began to experience migraines with related vertigo and nausea. She was approved for intermittent FMLA leave, and was specifically instructed that when calling in for an FMLA absence, she had to follow normal call-in procedures and also call the FMLA Call Center phone number at least two hours before the start of her shift. An employee seeking an exception to this rule had to submit a written request to human resources.

On July 14, Norton arrived to work two minutes late. She neither called in nor told her managers or human resources why she was late. The next day, in a meeting with a HR representative and two managers, Norton admitted she had been late because she had been waiting for a babysitter. MBSC terminated her for violation of its attendance policy.

After the fact, Norton claimed that she had been dizzy while getting ready for work on July 14, and these symptoms affected her driving, causing her to be late. The court was not impressed. Affirming summary judgment in favor of MBSC, the court concluded that Norton's admitted failure to notify MBSC that she arrived late on July 14 because she was experiencing migraine symptoms doomed her interference claim. Norton clearly failed to comply with the reporting policy, had not sought an exception to the policy, and had not demonstrated that she could not have complied with it.

Employer Duty to Provide Notice

Like employees, employers also have notice obligations under the FMLA. The DOL's implementing regulations specify the types of notices that must be given and their content, and also set time limits for delivery of those and minimum periods which an employer must allow for an employee to respond. Providing proper notices to employees is critical. Failure to adhere to the FMLA's strict notice requirements is often fatal in litigation. Paperwork violations alone do not give rise to FMLA claims by employees unless an employee can show that the employer's failure to provide the notice impacted the employee's decisions regarding leave or otherwise caused harm. If an employee suffers prejudice due to an employer's failure to satisfy a notice requirement, the failure may support an FMLA interference claim.

In Gardner v. Detroit Entertainment LLC, d/b/a Motorcity Casino, (E.D. Mich. Oct. 15, 2014), the employer suffered that hard fate for emailing an employee familiar with Motorcity Casino's FMLA leave procedures a request for recertification and firing her for absenteeism after she failed to submit it. The employee claimed to have never received the employer's request, which the court found credible and served as the basis for its denial of the casino's motion for summary judgment.

Summer Gardner, who had worked for the casino for several years and had a degenerative spinal disorder, had been approved for intermittent FMLA leave seven separate times between 2006 and 2011. In 2009, the casino began using a third party administrator (TPA) to handle its FMLA leaves, and between 2009 and December 2011, Gardner received numerous FMLA letters and requests for certification from the TPA via postal mail, the form of communication she preferred and had requested.

In early July 2011, Gardner began a period of intermittent leaves. In October, the casino and the TPA noticed that Gardner had been absent on intermittent leave five times more than her doctor had certified and she had called out every Saturday and Sunday during the month. Thus, on Oct. 7, the TPA emailed Gardner a request for recertification to be submitted by Oct. 25. Gardner claimed not to have opened the email, and did not submit the recertification by that deadline. Concluding that absences after Oct. 6 — which were arguably related to her back problem — were unprotected, and adding them to other unrelated, unexcused absences since July, the casino determined that Gardner had accumulated more than the maximum allowable attendance points permitted under its policy. The casino discharged Gardner, and she filed suit, claiming interference with her FMLA rights.

In denying the casino's motion for summary judgment, the U.S. District Court for the Eastern District of Michigan recognized that the Casino had the right to require Gardner to recertify her medical condition, but took issue with the method of delivery chosen by the casino to request recertification. In other words, the question was whether Gardner received proper notice of the casino's recertification request. The court acknowledged that the FMLA regulations permit an employer to provide oral notice of the need to recertify a medical condition — in lieu of written notice. (See 29 C.F.R. § 825.305(a), (b).) According to the court, such oral notice is most desirable, because it involves person-to-person communication which guarantees actual notice to the employee. Conversely, an email without proof of opening and actual receipt by the intended recipient falls short of actual proof. The court emphasized that this distinction "becomes particularly significant when an employee has expressed a preference for correspondence to be sent by postal mail, as opposed to email." Because there was a genuine dispute concerning whether Gardner received the recertification request, summary judgment was inappropriate.

To avoid the type of notice pitfall the casino experienced, employers should consider, where possible, delivering FMLA notices and requests for certification in person and having the employee confirm receipt in writing. If this is not possible, mailing the documents via certified or overnight mail in order to obtain proof of receipt is highly advisable. Should an employer wish to communicate via email, it should do so only after the employee signs a document confirming an agreement to receive notices via email, although this option is less foolproof than the nonelectronic options suggested above.

Conclusion

FMLA compliance is challenging. Understanding legal obligations, staying abreast of case developments, and continually auditing/revising procedures will help employers avoid legal challenge and at a minimum, fare better when in forced into court. Part two of this article will address issues surrounding the meaning of "serious health condition" and medical certifications.

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