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How To Avoid Violating FMLA's Technical Rules — Part 3

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This is the third and final installment of the series addressing compliance with the Family and Medical Leave Act's complex technical requirements. Part three discusses the challenging issues employers confront when dealing with intermittent and reduced schedule leaves and what actions and comments constitute "interference" with FMLA rights. It concludes with practical guidance to help employers manage their FMLA leave processes carefully so as to minimize legal risk. Understanding and accurately applying the FMLA's technical requirements are challenging tasks, and at times they can feel overwhelming, but compliance with each and every FMLA requirement is absolutely essential in today's litigious environment to forestall or defend against the inevitable legal challenge.

Intermittent/Reduced Schedule Leave

Managing the often unpredictable nature of intermittent leave, while minimizing fraud and abuse, has been a challenge for employers since the FMLA's inception. The FMLA permits employees to take leave intermittently or on a reduced schedule under certain circumstances, including when medically necessary due to the employee's own serious health condition or the serious health condition of a covered family member. Intermittent leave is "leave taken in separate periods or blocks of time due to a single qualifying reason." 29 C.F.R. §825.202. Reduced schedule leave is leave that amounts to a change in an employee's usual number of work hours in a workweek or in a workday, in many cases reducing an employee's full-time schedule to a part-time schedule due to a qualifying reason.

Unfortunately, these types of leave can be abused by employees who may endeavor to use FMLA leave to avoid undesirable assignments or mandatory overtime. In Santiago v. Department of Transportation, 50 F.Supp.3d 136 (D.Conn. 2014), the U.S. District Court took up the question of whether an employee could use FMLA leave to permanently convert his position into one in which he was no longer required to work overtime. Samuel Santiago worked for the Connecticut Department of Transportation as a

material storage supervisor, a position which required considerable overtime in the winter months. For years, Santiago suffered from "cluster headaches," which are more intense than migraines and can last for days. In 2011, Santiago's physician concluded that Santiago's "excessive work schedule" triggered his cluster headaches and advised that he should limit his hours to no more than eight per day and 40 per week.

In May 2011, Santiago submitted a medical form to the DOT in which his physician certified that he suffered from a serious health condition, would most likely be incapacitated four times per year for up to three days at a time, and could not work more than eight hours a day because such work "precipitates" headaches. In response, the DOT informed Santiago that overtime was an essential function of his position, and, under the applicable union contract, if he was unable to perform the essential functions of the position, the DOT would search for a position with "less arduous duties." Ultimately, the DOT informed Santiago that it was unable to find a suitable position to which he could be transferred. Santiago was compelled to apply for disability retirement and went out on leave, using a six-month bank of accrued vacation and sick time. In December 2011, unable to financially support his family, Santiago returned to work and had his physician complete a new medical form, removing the overtime restriction. The DOT informed Santiago that if he suffered from a cluster headache, he would have to take a full sick day, not just be excused from required overtime, and that he would be subject to discipline for refusing overtime. After resigning to work elsewhere in a position that did not require overtime, Santiago brought suit against the DOT.

In its motion for summary judgment, the DOT argued that Santiago was not entitled to the type of leave he sought for two reasons — both of which were rejected by the district court. First, the DOT contended that Santiago was only "entitled to FMLA leave during the times that he was incapacitated by his headaches — not medical leave each time [he] was required to work mandatory overtime to avoid the possibility of triggering a headache." Santiago, 50 F.Supp.3d at 145. In other words, the DOT argued that Santiago should not be permitted to use FMLA leave as a preventative measure to avoid a period of incapacity that may or may not occur in the future, but only during periods in which he was actually suffering from a headache. The court disagreed. It found that the FMLA does not require a complete inability to work full-time and covers leave taken to avoid the onset of illness. The court noted that the regulations specifically provide an example of an employee with asthma who may be unable to report to work because "the employee's healthcare provider has advised the employee to stay home when the pollen count exceeds a certain level." 29 C.F.R. §825.115(f). Accordingly, the court determined that Santiago was entitled to take leave as a "prophylactic" measure.

The court likewise rejected the DOT's second argument that the FMLA does not allow Santiago to use leave in a way that would permanently convert his position into one in which he was no longer required to work overtime. It acknowledged that Santiago's 12-week entitlement was probably sufficient to relieve him from all required overtime, but emphasized that nothing in the statute precluded this result. In fact, according to the court, "the potential for such an outcome has been noted since the inception of the FMLA and it appears to be a result contemplated by the statute and the U.S. Department of Labor." Santiago, 50 F.Supp.3d at 147. The court explained that the FMLA can sometimes do what the Americans with Disabilities Act cannot, and each must be analyzed separately. While the ADA does not require an employer to eliminate an essential job function (such as mandatory overtime) or provide an accommodation that would cause an undue hardship, the FMLA contains no such limitations. This case reinforces the need to evaluate claims for leave and changes to work schedules under both the FMLA and the ADA.

Employer Interference With FLMA Rights

The FMLA makes it unlawful for an employer to "interfere with, restrain or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). To assert an interference claim, the employee need show only that he was entitled to benefits under the FMLA and that he was denied them. The term "interfering with" includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). An employer who acts to discourage or chill an employee's access to leave may be liable for FMLA interference even if the employee takes all leave to which he is entitled. In other words, even "ineffective" acts to discourage an employee's usage of leave can rise to the level of actionable interference. See Gordon v. United States Capitol Police, 778 F.3d 158 (D.C. Cir. 2015) (holding that employer's requirement for fitness for duty examination before the use of any FMLA leave, which caused plaintiff to suffer economic losses, had a reasonable tendency to interfere with FMLA rights and gave rise to interference claim, even without actual deprivation of FMLA leave).

Set out below are some recent cases illustrating various employer statements and behaviors that have been found to rise to the level of statutory interference. It makes preeminent sense for employers to look to and learn from these cases and thereby avoid the alleged mistakes of others. As the saying goes "let this be a lesson to you."

Requiring an Employee to Work During Leave

Requiring an employee to work during leave can constitute actionable FMLA interference, depending on the amount of and nature of the work required. In Smith-Schrenk v. Genon Energy Services LLC, (S.D.Tex. Jan. 12, 2015), Joan Smith-Schrenk was a manager in the Genon Ethics & Compliance (E&C) Department, whose duties included investigation, monitoring and reporting potential regulatory or ethical violations. She reported to Jane Champion, director of E&C. In early 2012, Smith-Schrenk began missing work due to her own health needs and those of her mother. According to Smith-Schrenk, most of the FMLA-related problems began in late March, when she requested intermittent leave to care for her mother. At the time of the request, Champion was "immediately hostile" and "visibly upset." Thereafter, Champion purportedly increased Smith-Schrenk's work load, sent an email asking her where she was, notwithstanding having been told that she was out to care for her mother, and asked if someone else could complete paperwork when Smith-Schrenk asked for time out for this purpose. Despite the alleged hostility and Smith-Schrenk's repeated failure to provide advance notice, Genon granted all of her requests for intermittent leave. Smith-Schrenk then requested an immediate full-time FMLA leave on April 18 to care for her mother, again without notice. This too was granted.

Smith-Schrenk contended that her supervisor continued to call and email during this full-time FMLA leave, requesting that she update compliance cases, revise a safety review project, and drop off files at the office. According to Smith-Schrenk (although contested by the employer), the assignments required 20 to 40 hours of work per week. Smith-Schrenk returned to work on June 18, 2012, and at that time, her supervisor delivered a performance improvement plan dealing with long-standing and previously addressed communication issues. Believing that her termination was imminent, Smith-Schrenk resigned three weeks later, citing the allegedly hostile work environment following her FMLA-approved absences. She filed suit against her employer alleging, among other things, that Genon interfered with her FMLA rights by requiring her to perform work while on full-time leave. The district court denied summary judgment to Genon on this count.

The district court cited the general consensus among courts that reasonable contact with employees on leave, limited to inquiries about the location of files or passing along institutional or status knowledge,

will not interfere with an employee's FMLA rights; however, asking or requiring an employee to perform work while on leave can constitute interference. An employer's de minimis contacts with an employee do not necessarily materially interfere with an employee's leave since "there is no right in the FMLA to be 'left alone' or be completely relieved from responding to an employer's discrete inquiries." Smith-Schrenk v. Genon Energy Services LLC. In this case, although all leave was granted and Smith-Schrenk was reinstated after her leave, there were disputed issues of material fact as to the amount of work actually required during leave, making summary judgment inappropriate.

The determinative factor in this area is the amount and type of work required. The more limited the work, the better an employer's ability to withstand an interference claim. In Adams v. Anne Arundel County Public Schools, 789 F.3d 422 (4th Cir. 2015), assistant principal Andrew Adams had been accused of physically accosting a student at MacArthur Middle School. While Child Protective Services cleared him from wrongdoing, the school board launched its own investigation. During that investigation, Adams was temporarily reassigned to another school, but upon learning of his expected return to MacArthur, Adams requested and was granted the first of several FMLA leaves. He returned to work several weeks later, and on his first day back, he claimed that the principal berated him causing a panic attack. He requested and was granted a second FMLA leave. Two weeks later, he returned to work, claimed that he was berated by his principal again, and took a third and final FMLA leave for "acute stress disorder." During the third leave, the board required that Adams see a psychiatrist of its choosing, and also required as part of its continued investigation, that Adams and his lawyer meet with them. This meeting occurred and the board issued Adams a written reprimand. Adams was cleared to return to work on or about Aug. 4, and he was assigned to a smaller, less stressful middle school with no immediate diminution of salary.

Adams sued the school district, alleging among other things that his meeting with the board during leave was "work," and both the work and the verbal and written reprimands constituted interference with his FMLA rights, discrimination in violation of the ADA and retaliation against him for exercising his rights under both the FMLA and ADA. The district court granted summary judgment on all claims and the Court of Appeals for the Fourth Circuit affirmed.

With regard to the FMLA interference claim, the appellate court recognized that Adams took three separate leaves totaling well over 12 weeks. Adams, 789 F.3d at 427. The court acknowledged, however, that an interference claim was still viable if Adams could prove that the board "discouraged" him from taking leave, but it found no record evidence of discouragement in this case.

Adams first argued that the board's predisciplinary conference constituted "work" which interfered with his leave. The Fourth Circuit disagreed stating that this was a one-time conference and a legitimate part of an ongoing investigation into Adams misconduct. The investigation, which began before the leave, was handled according to a standard procedure and Adams was accorded due process. He never complained, nor sought a continuance, and there was no evidence linking the process to the ample FMLA leave provided. Id. Adams next argued that the verbal and written reprimands were interference, but here too the court disagreed finding no evidence of any discouragement. To the contrary, Adams began his second leave immediately after the verbal attack and took leave for more than two months after the reprimand.

The simple lesson from these cases is that employers should use care when asking employees to do any work during leave. As the saying goes: "less is best."

Comments Can Constitute Interference

A supervisor's statement(s) to an employee, no matter how infrequent and no matter whether they actually chill the exercise of statutory rights, can constitute actionable interference if they are found to discourage the use of FMLA leave. The case of Kimes v. University of Scranton, 2015 (M.D.Pa. Aug. 25, 2015) illustrates how managerial comments can get an employer into legal trouble. Lisa Kimes was hired by the University of Scranton's Department of Public Safety as a public safety officer. Kimes had a history of performance issues with the department and received ongoing discipline for her various infractions. The record was also rife with evidence of various misogynistic statements directed at Kimes and discriminatory actions directed at female officers in general.

In December 2011, Kimes submitted a request for intermittent FMLA leave to care for her diabetic son. The university never discussed the request with her, nor did it ever notify her that the request had been approved, although it granted each of her subsequent requests for intermittent leave. On July 1, 2012, Kimes requested time off under the FMLA to care for her son, and this request was granted. Later that month, Captain Cadugan, Kimes' supervisor, stated that Kimes was "inconsiderate" for taking FMLA leave because the department was short-staffed at the time and other officers needed to cover her shift. When Kimes complained to Chief Bergmann, her second-level supervisor, about this comment, he reiterated that the request was "inconsiderate."

Kimes was ultimately fired for her submission of an allegedly false police report following an assault investigation as well as poor past performance. She sued, claiming, among other things, that the university interfered with her FMLA rights: 1) by her supervisors' comments and hostility; and 2) by failing to provide required FMLA information. The university's motion for summary judgment was denied as to the comments and granted as to information/documentation.

First, the court found that there was a genuine issue of material fact as to whether her supervisors' actions chilled Kimes' desire to exercise her FMLA rights. Although Kimes used FMLA leave in 2013, the supervisors' comments that Kimes was "inconsiderate" figured prominently in the district court's decision to deny the university's summary judgment motion. See Id. *17.

Second, the court rejected the interference claim based on the failure to provide documentation. Although the FMLA requires that an employer provide certain information to an employee, such as an eligibility notice, notice of rights and responsibilities, and designation notice, for example, 29 C.F.R. §§825.300(b)-(d), the university's failure to provide such information in this case did not constitute interference because Kimes neither alleged nor proved that she suffered any injury as a result. Kimes v. University of Scranton.

Job Eliminations During Leave

Adverse employment actions, such as termination decisions, made during FMLA leave may withstand scrutiny, but only if it is clear that the adverse actions would have occurred regardless of leave. For example, in Janczak v. Tulsa Winch Inc., (10th Cir. Jul. 30, 2015), Paul Janczak was employed as Tulsa-Winch Inc.'s (TWI) general manager of Canadian operations. As early as June 26, 2012, and July 6, 2012, the company began to discuss eliminating the general manager position. On July 30, Janczak was injured in a car accident and took FMLA leave through Oct. 1. On that day, he returned to work and was informed that his position had been eliminated. The Canadian controller was also fired. TWI claimed that it finalized the decision to eliminate the position and reorganize the Canadian operation on Aug. 14. Janczak sued for FMLA interference and retaliation. The Court of Appeals for the Tenth Circuit affirmed summary judgment as to the retaliation claim, but allowed the interference claim to go to the

jury.

With regard to the interference claim, the court required the employer to provide "undisputed proof" that Janczek's position was definitively slated for elimination before his leave began. "TWI presented evidence suggesting that it was contemplating eliminating the GM position before Janczak was placed on leave. But such evidence does not constitute sufficient proof to permit summary judgment. Our precedent requires an employer ... to show that termination would certainly have occurred regardless of leave." Id., at *4. There were emails in the record suggesting some continued dialogue about the contours of the reorganization during the leave and some question as to whether to terminate Janczak's employment in connection therewith. Given the mere "contemplation" of the termination, summary judgment was not appropriate.

Practical Guidance

Given the explosion in FMLA litigation, employers are well advised to ensure full compliance with all of the act's nuanced and detailed technical requirements. Set out below are some steps employers can take now, to help avoid litigation later.

- **Review Your Policy:** Ensure that your policy includes items such as eligibility requirements (12 months of employment; 1,250 hours of service, and the 50/75 rule); the reasons an employee may take FMLA leave; the definition of the company's 12-month period; any call-in procedures; substitution of paid leave requirements; certification process and consequences for failure to comply; explanation of intermittent leave and reduced leave; benefit rights during leave; fitness for duty certification requirements; and any outside work prohibitions.

- **Posting Requirements:** While your FMLA policy should be in the employee handbook, the DOL's poster should be prominently posted in "conspicuous" places so that it can be viewed by 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.

- **Forms:** Ensure that all forms meet DOL requirements. Necessary forms can be found online here.

- **Audit All Procedures:** Ensure not only that you have complete and correct forms, but also that you are meeting the various FMLA-imposed time deadlines to provide notice, certifications, etc., and you are calculating usage correctly.

- **Beware Stray Comments:** Comments often feature prominently in FMLA litigation and managers need to understand that anything they say can and will be used against the employer in FMLA litigation. These comments can undermine an otherwise valid discipline/discharge decision and/or require a hefty damages payout.

- **Review All Discipline and Discharge Decisions for Employees Who Recently Used FMLA:** Whenever taking employment action against an employee, and particularly against one who is using or has recently used FMA leave, employers

should ensure that all documentary support for the action is in order, and that there is consistency in treatment among employees for the same offense. This review includes examining past performance reviews and any existing documentation. Companies get into trouble when a termination occurs or discipline is imposed after a leave and the employer's reason for the action is contradicted by a glowing performance review or otherwise contradictory documentation.

- **Train You Managers:** Managers are the front line of FMLA enforcement and also the biggest source of litigation risk. They need to understand and recognize when an employee needs leave, and be cognizant of the rule that the employee need not mention FMLA when seeking time off. Managers must avoid problematic comments, and as with any performance management process, ensure that discipline or discharge decisions are supported by adequate documentation. Training is the cheapest form of litigation avoidance.

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