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Employment Law

Lessons Learned in Administering FMLA Leaves and ADA Requests for Accommodation—Part I

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Administering employee leave requests under The Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*. (''FMLA''), and handling accommodation requests under the Americans with Disabilities Act, 29 U.S.C § 12101 *et seq*. (''ADA''), continue to be some of the most challenging activities for today's human resources and employment law professionals. The FMLA contains myriad technical requirements that, if not carefully followed, can raise the specter of litigation and significant damage awards. The ADA is no less challenging, with the courts routinely requiring employers to provide an ever-greater and more burdensome variety of accommodations.

Litigation and charge statistics on the FMLA and ADA highlight the risk borne by employers in this area. In 2016, 1,246 complaints were filed in the U.S. District Courts alleging FMLA violations. This was a 10 percent increase in the number of filings over the prior year. With regard to the ADA, 2,208 federal court complaints were filed alleging an ADA violation, a 7.5 percent increase over the prior year, and 28,073 disability discrimination charges were filed with the Equal Employment Opportunity Commission (''EEOC''), an approximately 4 percent increase over the number of charges filed in 2015. Payments to employees obtained by the EEOC (excluding payments secured in litigation) was a staggering $131,000,000.

Given the risks associated with FMLA and ADA compliance, it is imperative that employers keep abreast of developments in this area. In an effort to assist employers with FMLA and ADA compliance, this two-part series discusses some significant ''lessons learned'' from recent cases. While the lessons learned are legion, we have selected a few of the more interesting topics. Part I discusses: 1) the sufficiency of employee notice of a need for leave or other accommodation; and 2) complying with the employer's notice obligations. Part II of the series discusses: 1) understanding and avoiding those actions that may unlawfully ''discourage'' an employee from exercising FMLA rights; and 2) understanding how much leave must be provided as a reasonable accommodation. FMLA and ADA compliance is challenging, but with an understanding of employee rights and employer obligations, and careful administration of leaves and other accommodations, employers can significantly minimize risk.

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LESSON ONE: If You Suspect That an Employee Needs an ADA Accommodation or FMLA Leave, Inquire Further

One of the most challenging issues for employers is recognizing when an employee has provided notice of the need for leave or other accommodation sufficient to trigger the employer's obligations under the ADA or FMLA. While no magic language is required and employees need not mention either statute by name, little else is certain. Under the FMLA, an employee is required to ''provide *sufficient* information for an employer to reasonably determine whether the FMLA *may* apply to the leave request.'' 29 C.F.R. § 825.303(b) (emphasis added). What constitutes ''sufficient'' notice is not defined. Likewise, how much information an employee must provide in order to put an employer on notice of a requested ADA accommodation is also unclear. Upon receiving such information, however, it becomes the employer's responsibility to inquire further in order

 ISSN 0418-2693

to adequately evaluate the employee's entitlement to statutory benefits.

Despite many differences between the FMLA and the ADA, the ''lessons learned'' apply equally under both: the thresholds for invoking the statutes' protections are not onerous and effective communication is critical to ensuring compliance. Every case turns on its own facts and those opinions with sympathetic facts often lead courts to reach unexpected results. When in doubt, employers must communicate with their employees to avoid liability.

Coutard v. Municipal Credit Union, 848 F.3d 102 (2nd Cir. 2017) stands out as the most surprising ''notice'' case decided this year. In this case, plaintiff Frantz Coutard requested leave to care for his seriously ill grandfather. His employer, Municipal Credit Union, denied leave, explaining that the FMLA doesn't cover leave to care for a grandparent. Coutard nevertheless stayed home from work to provide care and MCU subsequently terminated his employment.

Unbeknownst to MCU, Coutard's grandfather had raised him from age 4 through age 14. Although the FMLA does not expressly allow for leave to care for grandparents, it does allow for leave to care for parents, including those who ''stood *in loco parentis*'' to the employee when the employee was a child. Thus, Coutard brought suit alleging that MCU interfered with his right to take FMLA leave for his grandfather, who stood ''*in loco parentis*'' under the FMLA. The issue was whether Coutard provided sufficient information regarding his relationship to put the company on notice of an *in loco parentis* relationship.

The district court granted summary judgment for MCU, finding that Coutard hadn't provided sufficient notice of his need for FMLA-qualifying leave and the Court of Appeals reversed. On appeal, Coutard argued that he would have told MCU about his relationship with his grandfather if he had been asked or if he had been aware of the applicable FMLA provision defining covered family members. MCU countered that it was not required to affirmatively inform employees of the FMLA's coverage of *in loco parentis* relationships and it pointed to the Labor Department's model FMLA notice, which itself does not define ''parent.''

The Court of Appeals sided with Coutard and stated that the applicable FMLA regulation requires only that an employee provide sufficient information for an employer to ''reasonably determine whether the FMLA *may* apply to the leave request.'' *Coutard,* 848 F.3d at 110. Emphasizing that a grandparent's raising of a child is hardly unique in today's society, the court opined that ''[t]here can be no serious question that an employee's request for leave to care for his seriously ill grandfather seeks leave that 'may' qualify for FMLA protection.'' *Id.* at 112. The court faulted the employer for failing to ask for additional information and reversed summary judgment.

In keeping with *Coutard,* employers should consider adding the definition of ''parent'' to their FMLA leave policies. Employers should likewise seek additional information when leave is sought to care for a family member regardless of the biological relationship. There are many non-traditional, familial relationships that may fall under the FMLA's umbrella of coverage—aunts, uncles, siblings, and even cousins. Nobody is out of the question.

In yet another noteworthy FMLA case, the District Court for the Northern District of Illinois recently held that an employee provided sufficient notice of her need for FMLA leave when she began ''crying regularly and uncontrollably'' at work. In *Valdivia v. Township High School District 214* (N.D. Ill. May 15, 2017), Noemi Valdivia brought suit against her former employer, Township H.S., asserting that the school interfered with her right to take FMLA leave, among other things. To be clear, Valdivia never requested an FMLA leave. Instead, she resigned from her secretarial position after the school allegedly failed to address her concerns regarding coworker derogatory comments about Hispanics. According to Valdivia, she became so distraught by these comments that she began crying regularly at work and she told her principal that she was overwhelmed and afraid and she wasn't eating or sleeping well. She alleged that the school told her there was nothing they could do and she needed to make a decision to continue working or resign. She resigned, and only thereafter, was diagnosed with depression, anxiety, panic disorder, and insomnia.

In her complaint, Valdivia alleged that the school interfered with her FMLA rights by failing to notify her that she had the right to take job protected leave. The school filed a motion to dismiss, arguing that Valdivia failed to provide sufficient notice of a serious health condition entitling her to leave. Stressing that the FMLA's notice requirement is not onerous, the district court denied the motion, stating: ''an employee need not give direct notice of the seriousness of her health condition or even mention the FMLA or demand its benefits.'' The court reasoned that this is particularly true when the employee is unaware that he or she may be suffering from a serious health condition. In such cases, the notice requirement may be met indirectly by observable changes in an employee's condition or unusual conduct. Here, regular and uncontrollable crying at work put the school on constructive notice of her need for leave.

The *Valdivia* case demonstrates that an employee's conduct—without any words at all, magic or otherwise—will be sufficient to put an employer on notice of the need for FMLA leave. However, employers must tread carefully when initiating the FMLA process based solely on observations of employee behavior. Taking aggressive action, such as compelling leave upon suspicion of the existence of a serious health condition, may subject an employer to a claim for perceived disability bias under the ADA. Except in unusual circumstances, the safest approach is to open the lines of communication, suggest the possibility of leave, and provide the requisite FMLA paperwork for consideration.

This past year wasn't entirely doom and gloom for employers. In *Davidson v. Evergreen Park Community High School District 231* (N.D. Ill. May 23, 2017), the district court granted summary judgment to the employer school, finding the employee's notice insufficient to entitle him to FMLA leave. Plaintiff Brad Davidson was a high school science teacher whose performance was sub-par. In August 2014, while on a performance improvement plan, Davidson reported that he would not be able to report to school due to a ''serious family health emergency.'' While out, he responded to his superintendent's email explaining that things were ''not okay'' and that he was working with his spouse's physi-

  DLR ISSN 0418-2693

cian to get ''her urgent and intermediate health care needs met.'' Upon request for documentation, Davidson submitted a note from his wife's physician stating: ''Ms. Davidson is a patient of mine who first reported on 8/15/14. Since then she has had office visits, phone consultations, been refered [sic] to physical therapy, and prescribed education and decreased activity.'' Davidson was subsequently granted leave to care for his wife beginning a few weeks later based on a revised note from the physician. However, following his discharge for poor performance, Davidson brought suit alleging, among other things, that the school district interfered with his FMLA rights by not counting his absences from August 19-22 as FMLA leave.

The district court stated that an employee's notice obligation is satisfied when he provides information sufficient to show that he or a covered family member ''likely'' has an FMLA-qualifying condition—a very different standard than the one employed in *Coutard*. The court emphasized that the notice must ''succeed in alerting the employer to the *seriousness* of the health condition.'' Here, the court concluded that ''Davidson did not provide the District with any specific information with respect to his wife's medical condition, diagnosis, prognosis, or the amount of time that Davidson would need to be off work.'' *Id.* Finding his notice insufficient as a matter of law, the court granted summary judgment against Davidson on his FMLA interference claim.

Another employer-friendly notice case, this time brought under the ADA was *Patton v. Jacobs Engineering Group, Inc.*, 863 F.Supp. 419 (5th Cir. 2017). Timothy Patton was employed by Talascend, LLC, which supplied contract employees to its clients. In October 2012, Patton was assigned to work at Jacobs Engineering Group. While there, Patton, who had an obvious stutter, complained to his Jacobs supervisor about coworker harassment and the noise in his workspace and asked to be moved to a quieter area where his ''nerves would not affect [his] stuttering.'' According to Patton, neither Talascend nor Jacobs did anything to address the harassment or noise. He alleged that he suffered severe anxiety and had a panic attack while driving, causing him to have a car accident. He never returned to Jacobs.

The district court granted defendants' motion for summary judgment on both Patton's hostile work environment and failure to accommodate claims. Patton appealed, and the Court of Appeals affirmed. On the failure to accommodate claim, the court held that there was insufficient evidence to prove that either defendant had knowledge of Patton's disability sufficient to trigger the duty to accommodate. Although Patton's stutter was obvious, Patton was required to show that the defendants attributed his limitation (sensitivity to noise) to a physical or mental impairment. The court recognized that it was reasonable to infer from Patton's discussions with his Jacobs supervisor that Jacobs was on notice that noise *aggravated* his anxiety, which in turn *aggravated* his stutter. However, the court held this was not enough; Patton was required to demonstrate that Jacobs was aware that Patton's disability *caused* his noise sensitivity. *See Id.* at 426. While recognizing that it was a close question, the court failed to adequately explain the distinction it drew.

It is difficult to square the *Patton* and *Davidson* cases with the *Courtard* and *Valdivia* opinions, demonstrating the difficulty employers face when evaluating the sufficiency of notice. In these cases, as in many others decided under the FMLA and ADA, the outcome often turns on the court's sense of fairness and justice between the parties. Nevertheless, the employer that makes an effort to open a dialogue with an employee in need of a leave of absence or some other form of accommodation will always fare better before judges and juries.

LESSON TWO: Advise Employees of Certification and Other Leave Requirements and the Consequences of Failing to Meet Those Requirements

Like employees, employers also have notice obligations under the FMLA—and these obligations are fairly characterized as demanding and technical. In addition to providing general notice regarding the FMLA in employee handbooks or in workplace postings, the FMLA regulations require employers to give employees *individualized* notice when they request leave for an FMLA qualifying reason. These notices, which are referred to as the eligibility and rights and responsibilities notice and the designation notice, are designed to detail an employee's specific expectations and obligations and explain any consequences of failing to meet those obligations. *See* 29 C.F.R. § 825.300(c). The FMLA regulations not only delineate the content required in these notices in painstaking detail, but they also set precise time limits for provision of the notices and minimum periods which an employer must allow for an employee to respond.

While paperwork violations alone will not give rise to an FMLA claim, an employee will succeed in stating a claim for interference under the FMLA if he/she can demonstrate that the employer's failure to provide a required notice impacted the employee's decisions regarding leave or otherwise caused harm. Recent court decisions confirm that failure to meet the FMLA's **technical** requirements expose an employer to significant risk.

The decision in *Ross v. Youth Consultation Service, Inc.* (D.N.J. Dec. 29, 2016) highlights the importance of compliance with all of the FMLA's notice requirements. In the fall of 2012, Janet Ross, who worked as a nurse for YCS, requested leave due to hip dysplasia. After receiving a packet containing FMLA information and forms, Ross completed an FMLA request form identifying Oct. 1, 2012, as the start date of her leave and writing ''unknown'' as the end date. The designation form provided by YCS explained that Ross was eligible for up to 12 weeks of leave and likewise indicated that the amount of Ross' leave was ''unknown.''

Less than two weeks later, Ross' physician provided YCS with an updated note, explaining that Ross was scheduled to have surgery on both hips and would not be able to return to work until the end of April 2013—well beyond her 12-week FMLA leave entitlement. YCS did not respond to that information or explain to Ross that her protected FMLA leave would expire prior to her anticipated return date. Instead, *after* Ross' FMLA leave expired, YCS contacted Ross to confirm that her return to work date hadn't changed. The company subsequently sent Ross a letter, informing her that her FMLA leave had expired on Dec. 21 and that her employment would be terminated, effective Jan. 4, 2013. Following her hip surgeries, Ross brought suit asserting claims under the FMLA, among other things.

To support her FMLA interference claim, Ross asserted that YCS failed to give her proper FMLA notice. According to Ross, if she had known that her proposed return to work date exceeded her leave entitlement, she could have structured her leave differently to avoid losing her job. The district court agreed. Rejecting YCS's argument that it properly notified Ross that the FMLA only protects leave up to 12 weeks, by providing a packet of FMLA information, the court held that the company failed to provide the *individualized* notice required by the act. The court emphasized that the FMLA regulations require employers to specifically designate the amount of time that will be counted as FMLA leave. Although this was unknown at the time YCS sent Ross her initial designation notice, the regulations require employers to notify employees of any change to the designation notice, including the amount of leave to be designated, within five days of learning of such change. *See* 29 C.F.R § 825.300(d)(5). Granting summary judgment to Ross on her FMLA interference claim, the court explained that ''YCS's silence when it learned that the requested leave exhausted available leave failed to comport with the letter and spirit of the law.''

The *Ross* case reminds employers that their designation notices must include a calculation of the amount of leave that will be counted against their employees' FMLA entitlements. Where, as is often the case, the duration of an employee's leave is initially unknown, the employer must provide an updated designation notice upon receiving additional information to ensure that the employee understands the limits of available leave and the consequences of exceeding that leave.

CONCLUSION FMLA and ADA compliance continues to be very challenging, and each year many employer actions are subject to legal challenge. While court opinions in this area are sometimes employee-friendly and sometimes not, they always provide invaluable lessons in compliance. This series highlights some of the interesting and important lessons to be gleaned from recent opinions. Part II of the series will discuss how to avoid actions that may unlawfully ''discourage'' an employee from exercising FMLA rights; and understanding how much leave must be provided as a reasonable accommodation before an employer can say ''enough is enough.''

  DLR ISSN 0418-2693