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New Opinions Highlight 3 FMLA Issues To Avoid

By **Linda Dwoskin** (May 28, 2019, 1:12 PM EDT)


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The Family and Medical Leave Act[1] has been in place for decades, but employers continue to grapple with a host of challenging issues. Each season presents a surprisingly large number of court opinions explaining what employers did right or wrong with regard to leave administration.

While employers can always cheer for fellow employer victories, or lament their losses, no opinion should go unheeded for the lesson it teaches. With that admonition, this article presents three lessons learned from recent court cases.

The first involves notice of the need for leave, the second lesson teaches when to designate leaves, once there is notice, and the third teaches how to avoid statements which mistakenly afford FMLA rights to employees that are otherwise unentitled, or in legal parlance, understanding estoppel in the FMLA context. This spring, employers should learn their lessons well, and work hard to ensure proper leave administration.

1. If an employee mentions the need for leave and a reason which could be FMLA-qualifying, always inquire further.

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."[2] While it has long been clear that no magic language is required to invoke the act's protections, and employees need not specifically mention the FMLA by name if requesting leave for the first time, it is critical that employers open a dialogue with their employees if they are ever unclear as to the FMLA's application.

The U.S. Court of Appeals for the Fourth Circuit's recent decision in Hannah P. v. Coats[3] is instructive. Hannah was hired in 2011 for a five-year term at the federal Office of the Director of National Intelligence, or DNI. A few months after her hire, Hannah was diagnosed with depression and so informed her supervisors. She did not request an accommodation at this time, and her performance reviews, at least until 2015, were excellent. In November 2013 she was assigned to work on a matter involving Edward Snowden's unauthorized disclosures, a very high-stress role. By 2015, her attendance and timeliness became extremely erratic and on occasion she was completely unreachable.

In March 2015 Hannah and her supervisors together developed an attendance plan to reconcile her depression with DNI's staffing needs, but she failed to comply. The supervisors then unilaterally changed

the plan. The next month, they met with Hannah again and informed her that they were referring her to the employee assistance program, or EAP. They made an appointment for her the following day, and her attendance was mandatory.

In response, Hannah informed them that her psychiatrist recommended four weeks of medical leave. The supervisors insisted they would authorize medical leave so long as she met with the EAP first. Hannah did so, but when the supervisors approved the leave request, Hannah suddenly withdrew it. After several more weeks of erratic attendance, Hannah requested leave for a second time. This too was granted, and Hannah used mostly annual leave to cover her time off.

The day before leave began, Hannah applied for several permanent positions. She was recommended for one of these jobs, but the chief management officer rejected Hannah's application due to her performance issues. She then finished her five-year term and sued, claiming violation of the FMLA and the Rehabilitation Act. The U.S. District Court for the Eastern District of Virginia granted summary judgment on all claims, but the court of appeals reversed as to the FMLA interference claim.

While the opinion is interesting on many levels, the FMLA notice issue warrants mention here. As to that claim, the appellate court held that Hannah had put the DNI on notice of the need for leave and that the DNI had an obligation to inquire further into the reasons for leave and whether she was seeking FMLA leave. In failing to do so, the DNI prejudiced Hannah. She could have structured her leave differently had she been advised about the FMLA.

The court confirmed that an employee is mandated to provide notice to her employer when she requires FMLA leave, but need not specifically invoke the act to benefit from its protections. Here, Hannah's repeated disclosures of her depression together with her initial request for psychiatrist-recommended leave were sufficient to put the DNI on notice and trigger its responsibility to inquire further about whether Hannah was actually seeking FMLA leave.

The appellate court rejected as premature the DNI's argument that the depression did not qualify as a "serious health condition." Since the DNI had not inquired into whether Hannah's depression was an FMLA-qualifying condition, its "argument would allow it to use its own failure to determine whether leave should be designated as FMLA-protected to block liability." The court would not let that happen.

The employer fared better in Shoemaker v. Alcon Laboratories Inc.,[4] which stands for the unremarkable proposition that a mere absence is not a request for leave. Amanda Shoemaker did quality control work for her employer Alcon Laboratories, a contact lens manufacturer. Shoemaker began to experience neck and back pain, headaches, and dizziness at work. She did not say that her symptoms prevented her from performing her job. In October 2015 she suffered a dizzy spell and passed out, and her supervisor allowed her to take an extended break to recover. He also changed her work setting. A week later she submitted a doctor's note recommending a change in work until further medical evaluation could be done, but the supervisor had already made the change.

In November 2015, Shoemaker called out of work and provided no excuse. She had exhausted all paid time off. Alcon issued her a final warning for various performance issues the very next day, and terminated her employment several weeks later for her performance problems and her unexcused absence. She sued, claiming that Alcon's failure to notify her of her eligibility to take FMLA leave, constituted interference with her FMLA rights. The U.S. District Court for the Southern District of West Virginia granted summary judgment in Alcon's favor and the U.S. Court of Appeals for the Fourth Circuit affirmed.

The court emphasized that a "request for leave for a medical reason is necessary to trigger Shoemaker's notification rights under the FMLA."[5] Here, Shoemaker did not make a leave request, or tie any request to a medical condition, when she called in her absence. Alcon's knowledge of her past medical issues related to neck and back pain, headaches, and dizziness, did not qualify as notice that Shoemaker needed or intended to take leave to address her condition.[6]

The lesson is simple: When an employee references a medical issue and a need for leave for the first time, the burden is on the employer to seek information to determine if the employee is seeking and qualified for FMLA leave. This is so even if the employer doubts whether the medical issue is legitimate or FMLA-qualifying.

2. Once an eligible employee communicates the need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.

Until recently, there was a question whether an employer could delay the designation of leave, whether an employee could decline the designation of leave, or whether an employer could designate leave of more than 12 (or, if applicable, 26) weeks. According to a recent U.S. Department of Labor opinion letter, FMLA2019-1-A, and as explained below, the answer is a resounding no.

For years, most employers understood that once they were on notice that a leave was FMLA-qualifying, they were required to designate that leave as FMLA leave.[7] The U.S. Court of Appeals for the Ninth Circuit, however, injected uncertainty into this area in its opinion in Escriba v. Foster Poultry Farms Inc.[8]

The plaintiff, Maria Escriba, took time off to care for her sick father. She fully understood her FMLA protections, but affirmatively chose to take vacation time instead. When she failed to return to work at the end of the "leave," she was fired. The plaintiff argued that the employer was required to designate her leave as FMLA leave and return her to her job. The appellate court found for the employer and concluded that an employee can affirmatively decline to use FMLA leave even if the underlying reason for seeking time off qualifies under the law.

The DOL's opinion letter firmly rejects the Escriba decision, concluding that once an employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.[9] In other words, employee preferences are irrelevant and employer compliance is mandatory.

The DOL further reiterated that this does not prevent employers from permitting or requiring that employees substitute paid leave to cover otherwise unpaid FMLA leave. FMLA leave will run concurrently with any paid leave, and neither employees nor employers can expand an employee's FMLA entitlement with paid time off benefits.

For employers in the Ninth Circuit, however, the issue is still unsettled. The DOL opinion letter, however provides solid counsel and good reason to designate FMLA leave regardless of employee preference.

3. Do not make representations that employees are entitled to leave when they are not or that they are excused from the FMLA's technical requirements. Your statements could create FMLA liability.

The appropriate handling of medical-related absences requires both technical knowledge of the FMLA

and the ability to communicate empathetically. Care must be taken, however, to ensure that comments, no matter how well-meaning, do not mislead employees or afford greater rights than the statute provides.

In Reif v. Assisted Living by Hillcrest LLC,[10] Angel Reif was hired in January 2017 at one of defendant's facilities. Just shy of one year later, Reif's doctor recommended surgery to repair her Achilles tendon. Kari Verhagen, the human resources coordinator, explained to Reif that she would not be eligible for FMLA leave until Jan. 25, 2018, her one-year anniversary.

Accordingly, Reif scheduled surgery for Jan. 31 and informed HR of the scheduled date and her intention to take FMLA leave. Later that day, Verhagen informed Reif that the company wanted her to leave immediately and not return until completely healed. She was a "liability" and the company did not want to risk the filing of a workers' compensation claim. With regard to the FMLA leave, Verhagen told Reif to schedule her surgery as soon as possible and "that she would work with her so that her FMLA would be approved."

In reliance on this statement, Reif rescheduled her surgery for Jan. 17 and submitted her FMLA paperwork. However, on Jan. 22, she received a letter denying her request for FMLA leave because she was ineligible. She was later informed first, that the company would not hold her position open, and then, that it was filled. Reif sued claiming FMLA interference. The employer unsuccessfully moved to dismiss the complaint on the grounds that Reif was ineligible for leave at the time she had her surgery.

According to the U.S. District Court for the Eastern District of Wisconsin, the employer's statements, encouraging the employee to reschedule her surgery before eligibility and the promise to work with her on FMLA approval, estopped them from arguing that Reif was ineligible for leave: "It would be fundamentally unfair to allow an employer to force an employee to begin a non-emergency medical leave less than two weeks before she would become eligible under the FMLA, assure her that she would receive leave and her job would be waiting for her when she returned, and then fire her for taking an unauthorized leave."[11]

The lessons here are simple: Use care and communicate clearly to employees; avoid comments which cause confusion or set expectations different than FMLA requirements; and put instructions in writing. This ensures clear communication as to expectations and the consequences of a failure to meet them.

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[1] 29 U.S.C. §2601 et seq.

[2] 29 C.F.R. §825.303(b)(emphasis added).

[3] Hannah P. v. Coats, 916 F.3d 327 (4th Cir. 2019)

[4] Shoemaker v. Alcon Laboratories, Inc., 741 Fed. Appx 929 (4th Cir. 2018)

[5] Id. at 932.

[6] Id.; see also Keogh v. Concentra Health Services, Inc., 752 Fed. Appx. 316 (6th Cir. 2018) (Affirming grant of summary judgment for employer. “Mere questions about possible leave and adjustment of working hours, without other information alerting Concentra to plaintiff’s possible intent to take such leave, are insufficient” to provide notice.)

[7] See 29 C.F.R. §825.301(a).

[8] Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236 (9th Cir. 2014).

[9] 29 C.F.R. §825.220(d).

[10] Reif v. Assisted Living by Hillcrest LLC, 2018 WL 5810514 (E.D. Wis. 11/6/2018),

[11] Id. See also, Curlee v. Lewis Brothers Bakeries, Inc., 2019 WL 1470602 (M.D. Tenn. 4/3/2019)(Rejecting employer’s motion for summary judgement. HR manager comment that she “would take care of” certification form acted to toll the 15-day deadline to return the form, and estop the company from relying on timeliness as a ground to deny FMLA leave.)