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

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Understanding and complying with the various aspects of The Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (''FMLA''), and 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. Every year, employer action, or inaction, is subject to legal challenge, and while employers can lament the cost and time associated with defending administrative charges and lawsuits, there is a silver-lining; and that is (at least for those not a party to the legal action), these opinions teach us invaluable lessons in compliance.

In Part I of this series, we addressed the sufficiency of employee notice of a need for leave or other accommodation, and complying with the employer's notice obligations. Part II of the series will discuss: 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 continues to challenge employers, but with an understanding of employee rights and employer obligations, and careful administration of leaves and accommodations, employers can significantly minimize risk.

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LESSON ONE: Do Not Implement Procedures That Discourage Employees From Taking Leave Both the refusal to grant leave and discouragement from taking leave constitute unlawful interference under the FMLA. *See* 29 C.F.R § 825.220(a). Negative comments concerning the impact of an employee's leave, frequent calls from overzealous managers seeking status updates, and demands for documentation beyond what is outlined in the FMLA have been found to constitute actionable interference. In several recent decisions, federal courts have attempted to strike the right balance between an employer's right to information and an employee's right to freely exercise FMLA rights.

The Court of Appeals for the Eleventh Circuit's opinion in *Diamond v. Hospice of Florida Keys, Inc.*, 677 Fed. Appx. 586 (11th Cir. 2017) presents a classic example of an employer that went too far. Jill Diamond, a licensed social worker at Hospice of Florida Keys, requested intermittent leave to care for her parents, who lived 300 miles away and suffered from serious health conditions. After learning that her mother's condition had worsened, Diamond began requesting intermittent leave more frequently. Shortly thereafter, Hospice sent Diamond a memo, requesting additional documentation to support her absences, including an updated medical certification form from her mother's physician as well as travel or healthcare provider receipts. Hospice informed Diamond that such additional travel-related documentation, which could include any receipts for food, lodging or gas in the vicinity of her parents' home, would be required whenever she took FMLA leave with less than 30 days' advance notice.

In a series of emails between Diamond and Hospice discussing the need for this additional documentation, Hospice also told Diamond that her ''continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization.'' That same month, Hospice terminated Diamond's employment, citing poor performance.

Reversing summary judgment on her FMLA interference claim, the Court of Appeals for the Eleventh Circuit found ample evidence for a reasonable jury to conclude that Hospice interfered with Diamond's FMLA rights by discouraging her from taking leave. According to the court, the clearest example of such discouragement was Hospice's April 8 email to Diamond telling her that her continued absences were compromising

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patient care. This statement could easily be interpreted as providing a warning to Diamond that additional time off would put her job in jeopardy.

The court further stressed that Hospice's requests for ''proof of need'' in the form of gas and other travel receipts was also significant evidence of discouragement. While the FMLA allows employers to require medical certification in support of a request for leave to care for a covered family member, the requested travel documentation bore no relation to verifying the employee's need for leave. Instead, it appeared to be an attempt by Hospice to verify that Diamond was in fact using the leave for its intended purpose. The court explained that ''even assuming an employer could permissibly request additional documentation to verify an employee's absence about which it had doubts, nothing in the record suggests that Hospice had reason to doubt Diamond's veracity.'' *Diamond*, 766 Fed. Appx. at 594. These facts, according to the court, supported the inference that Hospice sought to discourage Diamond from taking FMLA leave. Diamond's FMLA interference claim was remanded for trial—along with her retaliation claim.

Most employers find FMLA leave—intermittent leave in particular—to be both difficult to administer as well as disruptive to the operation of their businesses. In an effort to curtail perceived abuse of intermittent leave, employers are often tempted to require employees to provide doctor's notes or other documentation to justify each intermittent FMLA absence. *Diamond* provides a cautionary tale to employers about demanding additional documentation beyond that which the FMLA permits. Unless the employer has reason to believe that the employee is abusing leave or there are other extenuating circumstances, employers that require additional documentation, such as doctor's notes or travel receipts, to support each intermittent leave do so at their peril.

In better news for employers, federal courts have upheld employer's strict enforcement of procedural requirements for requesting leave, such as mandatory call-in procedures, against claims that such procedures interfere with employee FMLA rights. The FMLA regulations expressly authorize employers to deny FMLA leave for failure to comply with the employer's internal policies for requesting leave ''absent unusual circumstances.'' 29 C.F.R. § 302(d). Employees may be required to contact a specific individual and may even be required to make two calls—one to the employer and one to a third-party leave administrator.

For example, in *Alexander v. Kellogg USA, Inc.*, 674 Fed. Appx. 496 (6th Cir. 2017), the Sixth Circuit Court of Appeals affirmed summary judgment for Kellogg USA, Inc., where the employee failed to comply with the company's procedures for requesting FMLA leave. According to Kellogg's policy, employees were required to report absences two hours prior to the start of their shift, and they were also required to report the absence to Cigna, a third-party administrator, within 48 hours if the absence was FMLA qualifying. Despite having complied with these policies many times, Christopher Alexander failed to provide notice to Cigna on several occasions. As a result, he exceeded the allowable points under Kellogg's attendance policy, and he was subsequently discharged. Finding no extenuating circumstances sufficient to warrant a departure from the employer's general policy, the court found Alexander's dismissal justified. *See also Acker v. General Motors, LLC*, 853 F.3d 784, 789-790 (5th Cir. 2017) (upholding suspension of employee who failed to call 2 separate lines to notify employer of need for FMLA leave in violation of policy); *Duran v. Stock Building Supply West, LLC*, 672 Fed. Appx. 777 (9th Cir. 2017) (affirming summary judgment in favor of employer; employee failed to comply with employer's procedures for requesting leave).

Employers demanding strict compliance with call-in procedures must carefully document employee expectations in written policies and be able to demonstrate that employees received proper notice of them. Such policies must also be consistently applied to all similarly situated employees, and employers must be prepared to make exceptions when unusual circumstances justify flexibility. While the courts' recent trend in upholding mandatory call-in procedures is good news for employers, the permissibility of such procedures is something that is specifically contemplated in the regulations implementing the FMLA. When implementing procedures or requesting information not specifically permitted by the FMLA, employers should be very careful to avoid making it unreasonably difficult for employees to take protected leave or otherwise ''chilling'' or interfering with FMLA rights.

LESSON TWO*: *Sometimes An Employer Can Say 'Enough Is Enough' When Dealing With Lengthy Leaves of Absence The EEOC has long emphasized that unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability. *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship (Oct. 17, 2002) (''EEOC Enforcement Guidance''). The Commission further acknowledges the somewhat limiting principal that a leave must enable an employee to return to work in order to be considered reasonable. *See* Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016) (''EEOC Resource Document''). The courts overwhelmingly agree with these basic tenets. Where the courts and the EEOC diverge, however, is on the question of how much leave is too much and how long must an employer wait for an employee to be able to return to work. The EEOC seemingly never deems a lengthy leave period unreasonable, so long as the period is specifically defined. The courts have begun to successfully challenge this position, however, creating some hope in the employer community that saying ''enough is enough'' may be okay.

The case of *Severson v. Heartland Woodcraft, Inc.* (7th Cir. Sept. 20, 2017), is the leading example of an employer that successfully limited the length of an employee's medical leave. The facts of *Severson* are straightforward. Raymond Severson worked for Heartland Woodcraft, a retail display fabricator, in a position requiring manual labor. He suffered from a back condition that pre-dated his employment. In June 2013, Severson wrenched his back at home, aggravating his condition and making it difficult for him to perform his job duties. At that time he began an FMLA leave, periodically submitting notes from his physician as to his treatment and informing Heartland that he was unable to work. On week 10 of his 12 week FMLA leave, Severson informed Heartland that his condition had not improved, that he would undergo back surgery on Aug. 27, 2013 (the day his leave expired), and that the typical recovery time was at least two months. He requested an extension of his medical leave.

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On the day before his surgery, Heartland's human resources manager, Jennifer Schroeder, called Severson and told him that his employment would end when his FMLA leave expired the next day. She then invited him to reapply with the company when he recovered from surgery and was medically cleared to work. Severson recovered several months later and, instead of reapplying, filed a lawsuit. The district court awarded summary judgment in favor of Heartland on Severson's ADA claims and the Seventh Circuit Court of Appeals affirmed.

The EEOC filed an amicus brief articulating its longstanding position that a long-term medical leave should qualify as a reasonable accommodation when the leave is of a definite, time-limited duration, requested in advance, and likely to enable the employee to perform his job's essential functions when he returns. In other words, the EEOC viewed the length of the leave as irrelevant, so long as there was an end date where the employee could resume his/her duties. The court soundly rejected this position: ''If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term ''reasonable accommodation.'' *Id*. at 4.

The Court of Appeals left open the possibility that ''intermittent time off or a short leave—say, a couple of days, or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule.'' *Id*. at 3. But, relying on prior Seventh Circuit precedent, the Seventh Circuit stated that the ''[i]nability to work for a multi-month period removes a person from the class protected by the ADA.'' *Id*. at *3. In what is sure to become the new employer mantra in ADA cases, the Court of Appeals stated: ''A multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA.'' *Id*. at *1. *See also Billups v. Emerald Coast Utilities Auth.* (11th Cir. Oct. 26, 2017) (Affirming summary judgment for employer on ADA claim. Employee took 26 weeks of leave per policy, and despite evidence that doctor might have cleared him to return after an additional 6 weeks, employer terminated employment. The court held that the request for additional leave was unreasonable ''unless it would allow the employee 'to perform the essential functions of their jobs presently or in the immediate future.' '')

In a similar vein, the case of *Whitaker v. Wisconsin Dept. of Health Services*, 849 F.3d 681 (7th Cir. 2017) dealt with repeated extensions of leave as reasonable accommodation, finding that such extensions (for a total amount of time-off in excess of 4 months) were not reasonable. Joyce Whitaker was an economic support specialist in the Wisconsin Dept. of Health Services. Her responsibilities included processing applications for public assistance benefits. She suffered from a preexisting back condition and as a result, in December 2009, she requested and was granted an accommodation to stand and stretch for 5 minutes once every 30 minutes during the workday.

Eight months later, on Aug. 27, 2010, Whitaker requested 2 weeks of continuous FMLA leave due to her ''recurrent back pain.'' Her request was approved, but 2 days before her leave expired, she requested additional leave until Dec. 27, 2010, for both her own and a family member's serious health condition. The department authorized FMLA leave, but only through Oct. 18, 2010, at which point her 12-week statutory leave would have been expired. The department also advised Whitaker that her contract allowed her to request an additional 30 days of unpaid leave, beyond the FMLA entitlement. On Oct. 18, 2010, she requested this additional unpaid leave, but she asked for more than 60 days, through Dec. 28, 2010. The department again approved her contractual leave but only through Nov. 5, 2010, and it warned Whitaker that no further extensions would be granted.

Whitaker failed to return to work, however, instead submitting 2 doctor's notes at the conclusion of the approved leave period. The first note provided only ''medical leave of absence until 11/17/10.'' The second note provided only ''medical leave of absence until 12/17/10.'' Whitaker did not return to work and the department terminated her employment, effective Nov. 30, 2010. Whitaker sued for disability discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq*. (''Rehabilitation Act''), alleging a failure to accommodate her request for ''finite, unpaid leave.'' The standards for determining accommodation claims under the Rehabilitation Act are the same as those used in the ADA.

The Seventh Circuit Court of Appeals affirmed summary judgment for the employer, finding that the requested extensions of leave were not reasonable. Neither the doctor's notes nor the supplemental declaration Whitaker had submitted during the pendency of litigation provided sufficient proof that the extended leave would have enabled her to return to work on a regular basis. While she had presented treatment information in her declaration, there was no proof of the effectiveness of that treatment or the medical likelihood that she would have been able to return to work regularly. Significantly, the court found that the repeated requests for extension, always made at the conclusion of the leave period, made the final request ''a futile concession.'' *Id*.

While these few opinions are a welcome sign for employers, it remains to be seen whether they represent a trend, or merely a momentary pause on the road to ever-more expansive accommodations. In the meantime, the cases provide important lessons. Always tread carefully in this area and, despite these recent victories, never assume that a leave is too long. Consider each request on its facts, including the nature of the job held by the employee, whether prior leaves were approved, and when and how often the employee requested an extension of leave. Whenever an employee requests an extension, ensure that documentation is sought detailing the medical condition at issue, treatment of the condition, the effectiveness of that treatment, and the ability of the employee to return to work following leave.

Enough may be enough, but in most cases where the employer was successful, the employer was empathetic, had granted prior extensions for a limited time, and had obtained medical documentation concerning the employee's needs and the ability to return to work.

CONCLUSION Compliance with the FMLA and ADA continues to be very challenging even for experienced human resources and employment law practitioners, and each year many employer actions are subject to legal challenge. It is extremely important for anyone who works in this area to stay up to date on all legal devel-

opments, and to ensure that requests for leave and other accommodations are handled legally and empathetically. This two-part series discussed some of the more interesting court opinions this past year and distilled these opinions into several ''lessons learned'' about FMLA and ADA compliance. Ensuring an understanding of legal obligations and working hard to guarantee compliance with the myriad technical requirements of both laws will go a long way toward minimizing employer risk in this area.

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