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Employee Benefit Plan Review

Federal Appeals Court Throws Up a Flare for Intermittent FMLA Leave Compliance

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A federal appeals court just ruled that an employee had provided sufficient notice for his need for intermittent Family and Medical Leave Act (FMLA) leave and subsequent absences due to "flare ups" of recurrent depression – even though he had only provided that notice the first time he sought approval for the leave. The U.S. Court of Appeals for the Sixth Circuit (which hears cases arising in Kentucky, Michigan, Ohio and Tennessee) found that the employee did not have to give any "formal notice" each time he called into to use the FMLA leave in order to be protected by the statute. When you combine the nuances of "intermittent leave" under the FMLA with the ongoing mental health crisis gripping many of those in the U.S. workforce, this decision is bound to create problems for employers. What can employers learn from the decision in Render v. FCA US, LLC?

Employee's Termination in Midst of Intermittent Leave Causes Conflict

In October 2017, Edward Render informed FCA's management he was suffering from a medical condition and would like to apply for FMLA leave. Thereafter, in November 2017, he submitted the FMLA Healthcare Providers Certification form for the qualifying reason of major recurrent depression and moderate/generalized anxiety disorder. That form noted the employee was unable to perform "any/all duties related to his job during a flare-up of symptoms." Ultimately, FCA approved intermittent leave for these conditions up to four FMLA days per month.

Pursuant to written "call-in" instructions, Render made calls to provide advance notice of tardies and/or absences from work on three days in December 2017 and one day in January 2018. For instance, on a couple of "calls," which were recorded by the employer's call-in messaging, he stated he would be absent or tardy because: "I'm having a flare up. I don't feel good at all." On another call-in, he stated he would be tardy because he had "been sick for the last few days."

In none of the calls was he asked if these absences were related to his intermittent FMLA leave or underlying qualifying condition. Although Render claims he mentioned the FMLA in each call, there was no recording or notation that he had done so.

All four of these absences and tardies were classified by the employer as unexcused. These infractions, in combination with similar attendance infractions noted prior to his FMLA request, were sufficient to terminate employment under the attendance policy.

Render sued FCA, claiming his former employer violated both theories of recovery under the FMLA: (1) the "entitlement'" or "interference" theory arising from 29 U.S.C. § 2615(a)(1), and (2) the "retaliation" or "discrimination" theory arising from 29 U.S.C. § 2615(a)(2).

Render claimed FCA interfered with his FMLA rights by failing to classify these four absences/tardies appropriately as FMLA leave." Examples of unlawful interference include "refusing to authorize FMLA leave" when the employee is eligible and counting FMLA leave under no-fault attendance policies.[1]

He separately claimed that his former employer discriminated against him in violation of the FMLA by terminating his employment for attendance policy violations which counted these four absences/tardies as infractions.

A federal district court in Michigan ruled in favor of the employer on both of these claims. Specifically, the court said, Render's FMLA interference claim failed because he had not given sufficient notice to his employer before these absences and tardies. And, because he had not properly requested FMLA leave on these four occasions, his retaliation claim failed because he had not engaged in protected activity under the FMLA.

How Does an Employee Notify an Employer of Intent to Take FMLA Leave?

In order for an employee to provide notice of intent to take FMLA leave, the statute at 29 C.F.R. § 825.301(b) provides these general instructions:

> An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable.

So, the statute makes clear that the employee needs "to state a qualifying reason for the needed leave." However, the employee may or may not expressly assert or mention the FMLA to trigger notice. Rather, providing information to the employer that the employee needs to be absent from work for a "qualifying condition," which would be for an injury, illness or medical condition of a "severe health condition."

It is much debated whether intermittent leave falls into the category of "foreseeable leave" under 29 C.F.R. § 825.302 or "unforeseeable leave" under 29 C.F.R. § 825.303.

As indicated, before determining whether what communications qualify as adequate notice, it must be determined if the need for the leave is "foreseeable" or "unforeseeable."

Which Is It – Foreseeable or Unforeseeable Leave?

It is much debated whether intermittent leave falls into the category of "foreseeable leave" under 29 C.F.R. § 825.302 or "unforeseeable leave" under 29 C.F.R. § 825.303. For that matter, even the judges involved in this most recent decision were split on determining which class applied. Nevertheless, the analysis invoked by the Sixth Circuit's panel is instructive for human resources managers making these decisions.

The lead opinion by U.S. Circuit Judge Eric L. Clay determined that intermittent leave falls into the "foreseeable leave" category. This is because "the regulation governing foreseeable leaves includes specific procedures that apply to requests for intermittent leave" but "the regulation on unforeseeable leaves never mentions intermittent leave."

That seems simple enough, but does it make sense? Yes, according to Judge Clay. He provided this reasoning:

> This may seem counterintuitive, since the point of intermittent leave is that an employee asking for approved FMLA leave for unexpected and unpredictable absences. But, as this Court [i.e., Sixth Circuit] has explained, 'intermittent leave is leave taken in separate blocks of time for a *single* qualifying reason. Foreseeability thus on whether the *qualifying* reason, i.e., illness or medical condition, was foreseeable. In intermittent leave cases, the qualifying reason is known in advance, even if it is unclear when the condition will flare up and require time off.

Does an Employee Have to Give Notice for Every Absence?

So, we have determined that, in the Sixth Circuit at least. intermittent leave is in the foreseeable leave category. But does that mean that the employee has to provide notice initially and then separately for each subsequent absence? The lead opinion answers this question as follows:

> The regulation for foreseeable leaves provides that:

> 'Whether FMLA leave is to be continuous or is to be taken intermittently . . . *notice need only be given one time*, but the employee shall advise the employer as soon as practicable *if dates of scheduled leave . . . were initially unknown*.'

Here, the court held the employee only needed to meet the notice requirement when he first sought approval for intermittent leave (i.e., when the employer first learned about the employee's qualifying condition). Therefore, the employee did not have to give "formal notice" each and every time he called in to use FMLA leave.

In this particular situation, the employee provided initial notice and submitted the healthcare providers certification form for the qualifying reason of major recurrent depression and moderate/generalized anxiety disorder in November 2017. "Therefore, his formal FMLA approval process satisfied the one-time notice requirement for intermittent leave [per the foreseeable leave regulation]."

Accordingly, Render's "subsequent calls on the days he wanted to use his leave did not need to 'specifically reference either the qualifying reason for leave or the need for FMLA leave.'" The lead opinion went on to provide that the employee "merely had to advise the employer of his schedule change on days that he wanted to use his intermittent leave." Thus, the employee's call-ins to the employer indicating reasons for absences ("I'm having a flare-up. I don't feel good at all.") sufficiently advised the employer of anticipated absences.

The use of the term "merely" in this regard indicates a fairly low standard which should be easily met by an employee calling into inform his absence. Again, it does not require the employee to use the term FMLA in the notice of absences occasioned for "flare ups" – just "merely" enough to provide some notice.

For the record, a separate majority and concurring opinion by U.S. Circuit Judge Karen Nelson Moore and Senior U.S. Circuit Judge Richard F. Suhrheinrich determined that intermittent leave at least with respect to the four "flare ups" was properly categorized in the "unforeseeable leave" category. This separate majority, however, reached the same conclusion that a reasonable jury could find that these employee's communications regarding his four absences/tardies amounted to sufficient notice of the need for "unforeseeable" leave.

Provide Clear Instructions for "Calling-In" Absences

In addition, the opinion provides sound guidance on "call-in" procedures. "Employers can establish call-in procedures, and they may deny FMLA leave if an employee fails to follow these instructions [per the FMLA at 825.302(d)]." However, an employee cannot be faulted, or denied FMLA leave, if the "call-in instructions" are confusing or unclear. In this particular case, the panel held that the written "call-in instructions" to the employee were unclear and contradictory.

Next Steps

These days, more and more employees are seeking intermittent leaves under the FMLA for depression, anxiety, and other mental health related conditions. Typically, as in this example, there will be periodic "flare ups" of these conditions which render the employee unable to work. Thus, you should be prepared to comply with such leave requests. This includes having appropriate mechanisms for receiving and properly designating employee's endeavors to "call-in" an absence for a "flare up" of an FMLA covered condition.

This decision may mean an internal review of "call-in" FMLA absences may also be worthwhile in your organization, thus avoiding or removing unclear or contradictory instructions for employees.

Note

1. 29 C.F.R. § 825.220(b)–(c).

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