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MASSACHUSETTS EMPLOYERS MUST EXERCISE CAUTION: "IMPLICIT" DOMESTIC VIOLENCE LEAVE REQUESTS COULD LEAD TO LIABILITY

Insights
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The highest court in Massachusetts just ruled that employers may be subject to liability under the state's domestic violence leave law even if employees don't explicitly request such leave, creating a potential liability trap for unsuspecting employers. The Massachusetts Supreme Judicial Court had its first opportunity to analyze the Commonwealth's Domestic Violence and Abuse Leave Act (DVLA) in the August 25 *Osborne-Trussell v. The Children's Hospital* decision, ruling in favor of an employee suing her former employer. Its decision broadly interpreted how "employee" is defined under the statute and held that the law's anti-interference and anti-retaliation provisions apply even when an employee does not expressly ask to take domestic violence leave. Here is what Bay State employers need to know about this decision and its implications.

A Refresher on the DVLA

The DVLA requires all public and private employers with more than 50 employees to provide up to 15 days of leave in any 12-month period. An employee is eligible for domestic violence leave if (1) the employee, or a family member of the employee, is a victim of abusive behavior and (2) the employee is using the leave from work for purposes closely related to the abusive behavior, including obtaining medical attention or counseling, securing housing, attending court proceedings, and obtaining other victims' services. The leave may be paid or unpaid at the employer's discretion.

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Like most employment statutes, the DVLA prohibits employers from interfering with an employee's attempt to use the statutory leave. It also prohibits employers from discharging or discriminating against an employee for using the leave.

Court Broadly Interprets the DVLA, Permitting Employees to Trigger Protections Implicitly.

In her lawsuit, Kehle Osborne-Trussell claimed that she had accepted an offer of employment with Boston Children's Hospital but had not yet started work. During the time between accepting the hospital's offer of employment and her first day of work, her abuser posted false statements about her on social media and tagged the hospital as well. Osborne-Trussell says she told the hospital about her abuser's behavior, provided a copy of a harassment prevention order she had previously obtained against the abuser to the hospital's Human Resources Department, and shared that she was pursuing enforcement of the order. Importantly, though, Osborne-Trussell never requested leave under the DVLA (or any other law).

In the hospital's motion to dismiss, it emphasized that the DVLA's anti-retaliation and anti-interference protections did not apply to Osborne-Trussell because she was not an "employee" (as she had yet to start work). In addition, the hospital argued that Osborne-Trussell had not asked for time off in connection with the domestic violence she reported. These arguments, however, did not convince the Supreme Judicial Court (SJC), which rejected the motion to dismiss and allowed the case to proceed.

First, the SJC rejected the hospital's argument that Osborne-Trussell was not an employee under the definition in the DVLA. Although the hospital argued she had not yet "performed services" and was not under its "current control or direction" because she had not yet started her job, the SJC reasoned that the Massachusetts legislature did not intend to only limit its protections to current employees. Moreover, the limitation of the DVLA's protections to current employees would leave individuals such as Osborne-Trussell , who had accepted an offer of employment but had not yet assumed their position, without any recourse in the event they sought leave to address domestic violence.

After deciding the plaintiff was an "employee" under the DVLA, the SJC looked to whether she had a viable claim for

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retaliation. The SJC articulated the standard for retaliation under the DVLA for the first time, holding an employee must allege that:

1. the employee availed themselves of a protected right under the DVLA;

2. the employee was adversely affected by an employment decision; and

3. there is a causal connection between the employee's protected activity and the employer's adverse action.

The SJC then stated that while the DVLA requires "appropriate advance notice," what is considered "appropriate" depends on the circumstances of each case. In this case, Osborne-Trussell provided the requisite "appropriate" and "advance" notice when she informed the hospital that her abuser had violated the harassment prevention order and that she was cooperating with law enforcement in connection with enforcing it. Based on the notice she provided, the hospital should have been aware that Osborne-Trussell might need the leave afforded under the DVLA.

In justifying this decision, the SJC pointed out that a contrary conclusion would be at odds with the remedial purposes of the DVLA to encourage appropriate advance notice and to "create a situation in which abuse is not something to remain silent about."

How Should You Proceed in Light of the SJCs Expansive Holding?

Employers ought to proceed carefully given that this decision extends DVLA protections beyond employees to applicants who have accepted a job offer but not yet begun their employment, even in the absence of a specific request to take leave. Therefore, you should be aware that the DVLA can apply to individuals whose employment has not yet begun, such as applicants who have accepted an offer. For purposes of the DVLA, you should treat this category of individuals as you would any employee.

Further, you should pay close attention to any reports of domestic violence and/or domestic disputes from your employees. As with other statutes, such as the Americans with Disabilities Act or the Massachusetts Fair Employment

Practices Law, employees do not necessarily have to specifically ask for leave under the DVLA in order to trigger its protections. Given the SJC's decision, an employee's report of domestic violence could be considered an implicit request for leave under the DVLA, irrespective of whether they use the "magic words" that they would like to take a leave of absence to address domestic violence or abuse at some point in the future. If you are considering taking a personnel action against an employee who has informed you of potential domestic violence, you are strongly encouraged to confer with employment counsel before doing so.

We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting Massachusetts employers, so make sure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this alert, or any attorney in our Boston office.