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Circuit Courts and Agency Split on Enforceability of FMLA Claim Releases

A recent federal case has cast doubt on the enforceability of releases of claims under the Family and Medical Leave Act (FMLA) without prior approval by a court or the U.S. Department of Labor (DOL).

The ruling of the Fourth Circuit (which covers Maryland, Virginia, West Virginia and North and South Carolina) in Taylor v. Progress Energy Inc held in July that the plain language of the regulations bar not only waivers of future FMLA rights, but also releases of claims of actual violations of FMLA rights. Remarkably, the ruling rejected the DOL's position, which permitted employee waiver of past FMLA claims, even though the DOL Wage and Hour Division is the agency that promulgates rules concerning FMLA. The DOL has requested review of the Fourth Circuit decision.

For those employers operating in the Fourth Circuit, this ruling makes release of FMLA claims very difficult because the DOL is taking the position that it will not to approve such waivers. Mary Dodds, Regional FMLA Coordinator for the Wage and Hour Division said, "We're not going to act on or approve any settlement, including giving our opinion on them." On the other hand, the DOL may be reluctant to advocate released FMLA claims. Louis Greer, Assistant District Director of the Division said, "If someone made a complaint, we would review it, but I'd be highly disinclined to take a complaint from someone who signed a settlement agreement."

There is also disagreement on this issue among the federal circuit courts. The Fourth Circuit refused to follow a 2003 Fifth Circuit decision, Faris v. Williams WPC-I, Inc. There, the Fifth Circuit, which covers Louisiana, Texas and Mississippi, held post-dispute settlements of FMLA claims enforceable.

This ruling adds FMLA to the small group of labor law claims, such as overtime claims under the Fair Labor Standards Act of 1938, that cannot be released by agreement without DOL involvement.

Since it is uncertain at this time whether New York courts will enforce releases of FMLA claims, where FMLA matters are at issue employers are advised to contact counsel concerning the status of enforceability.

Please contact Kimberly Klein for more information at kklein@mosessinger.com.

New DOL Report Recognizes Employer Frustrations with FMLA, But The Agency Has No Plans to Propose Changes

After fourteen years, the U.S. Department of Labor (DOL) undertook a review of the Family and Medical Leave Act (FMLA) regulations, concluding that employees are happy with the Act and want to see benefits expanded, while employers are frustrated by vague terms, problems managing absenteeism and perceived abuse.

Unfortunately, despite soliciting comments and culling through more than 15,000 submissions, the DOL is not proposing any regulatory changes as a result of its findings. Instead, the department views the report as promoting discussion on FMLA and how the regulatory provisions “have played out in the workplace,” according to the report which was released in June 2007.

FMLA, which was enacted in 1993 and applies to employers with 50 or more employees, benefits workers and their families by providing job protection to employees who need to take time for a birth or adoption of a child or to deal with a serious illness of their own or a family member.

The report concluded that “[t]here is a broad consensus that family and medical leave is good for workers and their families, is in the public interest, and is good workplace policy.” At the same time, the DOL acknowledged that “FMLA produced some unanticipated consequences in the workplace for both employees and employers.”

While employees expressed desire for expanded benefits, such as more time off, paid leave, coverage of additional family members and applying FMLA to employers with less than 50 employees, employers voiced dissatisfaction and asked for clarity to help control attendance issues, vet out misuse of the leave and maintain necessary staffing levels.

Among the “unanticipated consequences”, and those that cause the most frustration for employers, are:

- unscheduled intermittent leave;
- the medical certification process;
- defining and understanding the term “serious medical condition”;
- understanding the interplay between FMLA and the Americans with Disabilities Act;

Intermittent Leave

The report found that the “single most serious area of friction between employers and employees” is unscheduled intermittent FMLA leave by workers who claim to have chronic health conditions. Among other problems, such leave disrupts business operations, especially businesses that have time-sensitive obligations. The result, according to the DOL, has been a backlash by employers demanding detailed medical certification from doctors to confirm the legitimacy of the requests.

Employers see employees using intermittent leave as an excuse to come in late or leave early from work, obtain a preferred shift, or convert a full-time position to a permanent part-time one. In addition, employee morale of the remaining workforce suffers, either from the stress of an increased workload or from a feeling that the absent worker is misusing the leave.

Medical Certification

The medical certification process apparently frustrates everybody equally – employees, employers and medical providers. Employees are concerned about their privacy and the time factor in obtaining the certification; employers are often not happy with the medical explanation and want more definitive answers (i.e. when can the employee return to work); and medical providers complain about having to

predict the recovery period.

Employers are further frustrated by the lack of options to verify that employees are using FMLA leave for legitimate reasons. Employers want to be able to talk directly to medical providers and say this will help ferret out improper claims. All involved in the process believe the DOL's model certification form could be improved.

Serious Medical Condition

Causing equal confusion is the definition of a "serious medical condition." Employers find the term vague and/or confusing and believe that the regulations need to provide more guidance as to what "serious" means when defining a medical condition. Medical providers have trouble reconciling the legal definition with the medical understanding of an illness.

In short, the feeling is that under the current definition every illness is serious and nothing is minor, including a drawn out common cold or flu. Currently, an illness can be serious if it involves "a period of incapacity of more than three consecutive calendar days" and treatment by a health care provider as set forth in the regulations. Employer groups want to see the three days either elongated or be counted as business days before an illness is classified as serious. Others ask that the "treatment two or more times by a health care provider" occur during the period of incapacity before the leave is approved.

FMLA vs. ADA

Applying and/or reconciling FMLA with the Americans with Disabilities Act of 1990 (ADA), creates confusion for many employers. While both laws exist to protect employees and provide job security, the purpose of the laws is very different: FMLA exists to provide reasonable leave from work, while the ADA ensures that qualified individuals with disabilities have an equal opportunity to work. Employers have an obligation to apply the statute that provides the greater rights to employees.

But where both are triggered, employers struggle to determine:

1. whether an illness is a disability or serious medical condition;
2. the extent they can inquire into an employee's health condition before such inquiry infringes on an improper medical inquiry under the ADA;
3. their access to an employee's medical information, which is greater under the ADA than under the FMLA; and
4. their ability to have direct provider contact under the ADA, but not FMLA.

Among the suggestions was to allow employers to be able to obtain all relevant medical information equally under the ADA and FMLA (whether to determine if a disability exists or to grant FMLA leave), allow direct access to medical providers in all instances, and permit more of an interactive process under the FMLA similar to that under the ADA.

Conclusion

The DOL report shows that FMLA is a tremendous benefit to employees. At the same time it has brought to the forefront the difficulties employers are having administering the Act while trying to operate a business. Although the DOL does not currently intend to promulgate rules based on the findings, those who took the time to respond and voice concerns and suggestions deserve to see meaningful change. We will continue to keep you updated and inform you of any new developments.

Please contact Kimberly Klein for more information at kklein@mosessinger.com.

Discrimination Against Working Parents Or Caregivers Has Become An EEOC Focus

Although not yet a "protected group" under federal discrimination and disability statutes, the U.S. Equal Employment Opportunity Commission (EEOC) has issued a guidance warning employers that certain

acts can result in discrimination against working parents and others with caregiving responsibilities. The Guidance is a response by the EEOC to assist employees who struggle to balance work and family, and focuses on working mothers and fathers, pregnant workers, women of color, individuals with disabilities and other caregivers.

The Guidance describes the following scenarios that could result in unlawful treatment:

Treating male caregivers more favorably than female caregivers, such as denying women with young children an employment opportunity that is available to men with young children. ([Example](#))

Sex-based stereotyping of working women:

Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job. ([Example](#))

Reducing a female employee's workload after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work overtime. ([Example](#))

Subjective decision making, such as lowering subjective evaluations of a female employee's work performance after she becomes the primary caregiver of her grandchildren, despite the absence of an actual decline in work performance. ([Example](#))

Assumptions about pregnant workers, such as limiting a pregnant worker's job duties based on pregnancy-related stereotypes. ([Example](#))

Discrimination against working fathers, including denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver. ([Example](#))

Discrimination against women of color, such as reassigning a Latina worker to a lower-paying position after she becomes pregnant. ([Example](#))

Stereotyping based on association with an individual with a disability, including refusing to hire a worker who is a single parent of a child with a disability based on the assumption that caregiving responsibilities will make the worker unreliable. ([Example](#))

Hostile work environment affecting caregivers:

Subjecting a female worker to severe or pervasive harassment because she is a mother with young children. ([Example](#))

Subjecting a female worker to severe or pervasive harassment because she is pregnant or has taken maternity leave. ([Example](#))

Subjecting a worker to severe or pervasive harassment because his wife has a disability. ([Example](#))

What Employers Can Do To Avoid Unlawful Acts

Employers must be sensitive to family/work balance issues. While family needs can interrupt business operations, usually in the form of absenteeism, employers must think twice before taking an adverse action against an employee with caregiving responsibilities. The Guidance advises that employers should consider whether any of the following influenced the decision making process:

- whether an employee was treated differently once that employee assumed caregiving obligations, got married or became pregnant;
- whether single and/or childless employees are being treated more favorably than women or men employees with caregiving responsibilities;
- whether factors such as children and/or marital status played a role in promoting and/or hiring a single or childless employee over a married employee with children; or

- whether the decisionmaker(s) made stereotypical or derogatory comments about pregnant workers, working mothers or other caregivers;

Decisions to hire, promote and/or terminate should be based on credentials, merit and/or performance, and not assumptions based on marital status, children, pregnancy or association with an individual with a disability.

Please view the above "Examples" on our website at:
<http://www.mosessinger.com/eEmploymentMatters/doc3.htm>

Please contact Kimberly Klein for more information at kklein@mosessinger.com.

Employers Must File Revised EEO-1 Report In September

The U.S. Equal Employment Opportunity Commission (EEOC) has revised the EEO-1 Report, which requires certain employers to annually file an anonymous count of their employees by job category and by ethnicity, race and gender. Employers must file the revised form by September 30, 2007.

All private employers with 100 or more employees, and all employers with federal government contracts of \$50,000 or more and 50 or more employees, are required to file the new EEO-1 Report. The EEO-1 Report is confidential, and the data is used by the EEOC to support its enforcement of federal discrimination statutes.

The revised EEO-1 Report makes changes to the: (1) ethnic and racial categories; and (2) job categories. In addition, in an area that has been a source of confusion for employers in the past, the EEOC now strongly endorses self-identification of race and ethnic categories, as opposed to visual identification by the employer. Thus, employees are encouraged to identify the category that best describes their race or ethnicity, as opposed to the employer doing so. If an employee refuses to self-identify, the employer can make that determination visually or from employment records.

Although employers do not have to resurvey current employees for the 2007 EEO-1 Report, the EEOC encourages them to do so since the categories have changed. Also, the self-identification method, if not used by the employer in the past, will allow the employee to describe him/herself as opposed to the employer. New hires should be asked to self-identify "as soon as possible."

The following are the changes made to the race and ethnic categories:

- added a new category titled "Two or more races";
- divided "Asian or Pacific Islander" into two separate categories: "Asian" and "Native Hawaiian or other Pacific Islander";
- renamed "Black" as "Black or African American"; and
- renamed "Hispanic" as "Hispanic or Latino".

As a result, there are now seven race and ethnic categories: Hispanic or Latino; White; Black or African American; Native Hawaiian or Other Pacific Islander; Asian; American Indian or Alaska Native; and Two or More Races. These categories are further broken down by male/female.

In addition, the current category titled "Officials and Managers" is now divided into two levels based on responsibility and influence within the organization, according to the EEOC:

Executive/Senior Level Officials and Managers (plan, direct and formulate policy, set strategy and provide overall direction; in larger organizations, within two reporting levels of CEO)

First/Mid-Level Officials and Managers (direct implementation or operations within specific parameters set by Executive/Senior Level Officials and Managers; oversee day-to-day operations)

The other job categories are: Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; and Service Workers.

When surveying the workforce, employers must use employment figures from any pay period between

July and September of the survey year, in this case, 2007. All results of the self-identification surveys should be kept separate from an employee's personnel file and should not be made available to those responsible for personnel decisions.

The EEOC strongly recommends that employers fill out and file the EEO-1 Report online. Instructions on how to file can be found at: <http://www.eeoc.gov/eeo1survey/howtofile.html>. The new EEO-1 Report and supporting documents can be found at: <http://www.eeoc.gov/eeo1/index.html>.

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