FMLA and ADA Update
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Speaker Bio
Denise Portnoy is a Partner with Spencer Fane law firm specializing in labor and employment law. She handles all aspects of management-side labor relations and defends companies and managers against harassment, discrimination, retaliation, FMLA, FLSA, non-compete, and other lawsuits. To reduce the risk of costly litigation and workplace distractions from arising in the first place, Denise partners with employers to provide proactive counseling, workplace training, and policy guidance. She is a certified SPHR and SHRM-SCP and regularly advises managers and human resource professionals in all aspects of human resources functions, including making termination decisions, issuing disciplinary actions, responding to sexual harassment and discrimination allegations, administering leave and disability accommodations, and solving workplace conflicts. She holds the distinction of being named a “Super Lawyers’ Rising Star” in the practice of labor and employment law.

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FMLA AND ADA LANDSCAPE
Statistics

• FMLA Statistics:
  – 26.3 percent jump in FMLA lawsuits from 877 in 2013 to 1,108 in 2014.
  – FMLA Termination (564)
  – FMLA Discrimination (365)
  – Refusal to Grant FMLA Leave (292)
  – Refusal to Restore to Equivalent Position (166)
  – Failure to Maintain Health Benefits (32)

• ADA Statistics:
  – 25,369 Charges Filed in 2014.
  – 28.6% of all Charges Filed.

Reasons Driving Claims

• Recent surge in FMLA lawsuits because:
  – Higher awareness of rights by employees.
  – More workers on payroll now; thus more potential claims.

• Plaintiffs’ lawyers find FMLA cases appealing because:
  – Easier to prove than a Title VII, ADEA, or ADA discrimination claims.
  – Attorneys’ fees are recoverable.

DOL Investigative Approach

• Pre-2013:
  – DOL investigated aggressively and interpreted regulations liberally,
    but rarely filed suit.
  – Issued letter to employee indicating he/she could file suit.
  – All communications handled by telephone and e-mail.

• Post-2013:
  – DOL is still aggressive.
  – DOL has increased frequency of on-site FMLA investigations.
  – DOL is very pro-employee. Puts employers on the defensive and
    uses intimidation to try to convince employer to settle or resolve the
    issue.
  – DOL will not provide closure letter for file.
Regulatory Developments

SAME-SEX MARRIAGE AND FMLA
• Same-sex marriage is now lawful nationwide.
• Employers should revise policies and practices, including EEO & FMLA policies, to avoid discrimination.

PAID SICK LEAVE
• Emerging trend.
• Executive Order providing paid sick leave for federal contractors (September 2015).
• Four states (California, Connecticut, Massachusetts and Oregon), Washington, D.C., and more than 20 municipalities have created paid-sick-leave laws.
Regulatory Developments

INDEPENDENT CONTRACTOR STATUS
• Increasingly difficult to classify workers as independent contractors.
• Provision of increased workplace rights for workers who once were classified as independent contractors will have a substantial impact on employers.
• Misclassification of individuals as independent contractors could lead to the failure to: withhold employment taxes, include workers on medical benefits plans under the Affordable Care Act, complete I-9 forms, pay unemployment compensation insurance, pay workers’ compensation insurance, and provide Family and Medical Leave Act leave (any of which could result in significant penalties).

Regulatory Developments

JOINT EMPLOYER STATUS
• Recent federal guidance on the joint-employer standard and expansion of the pool of employers will have a critical impact on labor relations and business relationships of many employers.
• e.g.: DOL Administrative Interpretation and Fact Sheet on FLSA, Fact Sheet on FMLA, NLRB Rulings.
• Federal agency guidance and rulings will result in increased determinations of joint employer status.
• e.g.: Franchisor’s mere potential of control over a franchisee is enough for them to be considered joint employers.

Regulatory Developments

FMLA FACT SHEET REGARDING JOINT EMPLOYERS
• DOL recently issued Fact Sheet #28N on Joint Employment Under FMLA.
• What is a joint employer?
  – "When a person is employed by two or more employers such the employers are responsible, both individually and jointly, for compliance with a statute."
• Primary Employer vs. the Secondary Employer
  – Who has authority to hire and fire, and to place or assign work to the employee?
  – Who decides how, when, and the amount that the employee is paid? and
  – Who provides the employee’s leave or other employment benefits?
Regulatory Developments

FMLA FACT SHEET REGARDING JOINT EMPLOYERS Cont.

• Primary Employer Responsibilities
  – Providing required FMLA notices to its employees, and providing FMLA leave.
  – Maintaining group health insurance benefits during the leave.
  – Restoring the employee to the same job or an equivalent job upon return from leave, and
  – Keeping all records required by the FMLA with respect to primary employees.

• Secondary Employer Responsibilities
  – Prohibited from interfering with a jointly-employed employee’s exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA.
  – Restoring the employee to the same or equivalent job upon return from FMLA leave, such as when the secondary employer is a client of a placement agency and continues to use the services of the agency and the agency places the employee with that client employer, and
  – Maintaining basic payroll and identifying employee data with respect to any jointly-employed employees.

TAKEAWAY:
• Analyze your arrangement and coordinate with the joint employer.
• Don’t hide behind contracting relationships.
Recent EEOC Compliance Advice on FMLA/ADA

• Courts have consistently ruled that employers must consider offering additional leave as a “reasonable accommodation” for disabled employees after they exhaust their FMLA allotment.
• But…employers have been given very little guidance as to when and where this accommodation should apply.
• EEOC Commissioner provided guidance in recent presentation.

EEOC Says:

– Communication is key.
– Supervisors create liability.
– Assess ‘Undue Hardship’ Early.
– To Deny leave accommodation, leave must impact business operations.

Case Update

Presumption of Retaliation Where the Plan for Adverse Action Changes After Employee Engages in Protected Activity


Facts

• Good employee initially. Promoted a number of times.
• Struggled in promoted position.
• New owners assessed workforce. Brown one of weakest.
• Company discussed transferring Brown to different position in lieu of termination.
• Brown told Company she is pregnant.
• Company informed her she’d be reassigned upon her return from leave.
• Later, Brown complained to HR about the reassignment during discussion of her FMLA rights.
• Shortly thereafter, complained again to manager about the reassignment.
• Five days later, Brown was discharged.

LAWSUIT
- Filed suit, alleging she was demoted and terminated in violation of FMLA.
- Claimed she was entitled to be reassigned to the position she held before going on leave.
- 8th Circuit found genuine issues of material fact as to reassignment and termination.
- The FMLA provides that an employee who takes FMLA leave is entitled, upon returning to work, to be restored to a position that is the same as, or substantially equivalent to, the position she occupied when the leave began.
- Company did not dispute that the backup position was neither the same as nor substantially equivalent to the account executive position, but argued that the subsequent reassignment had not interfered with Brown’s taking FMLA leave.
- 8th Circuit held Brown’s entitlement to her pre-leave position was separate and distinct from the company’s obligation not to interfere with her leave.

Presumption of Retaliation Where the Plan for Adverse Action Changes After Employee Engages In Protected Activity


LESSONS
- When personnel actions are planned and contemplated, employers can still implement those actions even if the final decision to do so was not made until after an employee engaged in protected conduct (e.g., requested FMLA leave or complained of unlawful activity).
- However, when the planned action (here, keeping Brown and terminating a co-worker) changes after the employee engages in protected conduct, there is a presumption that the change was caused by the conduct and constitutes retaliation.

Managers Who Are Uneducated On FMLA Can Cause Trouble In Leave Situations


FACTS
- James Hefti worked as a tool and die designer for about 15 months before he was fired in March 2013.
- While employed, he often insulted co-workers.
- In March 2013 Hefti requested FMLA leave because son was suffering from mental health issues.
- Hefti returned a completed FMLA form on March 22. On March 25, the department manager recommended his termination, and he was terminated on the same day.
Managers Who Are Uneducated On FMLA Can Cause Trouble In Leave Situations


**Lawsuit**
- Alleged Brunk interfered with, and fired him in retaliation for exercising, rights under FMLA.
- Hefti argued timing of the termination was suspicious.
- Manager argued that Hefti was terminated for unprofessional and inappropriate communications with co-workers.
- Court denied summary judgment; sent case to jury.

Managers Who Are Uneducated On FMLA Can Cause Trouble In Leave Situations


**Lessons**
- Document poor performance and behavior; inform employees that poor performance and behavior may result in consequences, including termination. Document that the employees were informed.
- While managers and supervisors do not need to know every detail of FMLA, they must be aware of basics, how to issue spot, and how to appropriately discuss employee absences.

Bad Manager Conduct Results In FMLA Interference Claim

*Gordon v. U.S. Capitol Police* (D.C. Cir. 2015)

**Facts**
- Police officer brought action against United States Capitol Police, alleging interference and retaliation in violation of FMLA.

**Lawsuit**
- The Court allowed an employee’s FMLA interference and retaliation claims to proceed, even though the employee was not prevented from taking leave.
Bad Manager Conduct Results In FMLA Interference Claim

_Gordon v. U.S. Capitol Police_ (D.C. Cir. 2015)

**LESSON (cont)**

- Train managers to avoid any conduct seen as interfering with an employee’s right to FMLA leave. Avoid any behavior that arguably chills employees’ FMLA leave rights and train managers to respond appropriately to all leave requests.
- Managers should not:
  - Express displeasure with any leave request.
  - Discourage employees from taking leave.
  - Suggest that leave will be difficult on the business.
  - Require fitness for duty examinations, unless supported by legitimate business reasons and as part of a consistent and articulated policy.
  - Whenever possible, leave requests should be referred to the human resources department or other trained leave administrators.
- Proximity of Layoff to Maternity Leave Insufficient to Establish FMLA Violation
  _Stewart v. DaVita_ (M.D. Tenn. 2015)

**FACTS**

- Maternity leave was a series of unfortunate events for this administrative assistant, Stewart.
- Twice returned from maternity leave with no one to assist. First time, she remained employed until she had someone new to assist. Second time Stewart was out on maternity leave, she learned that the person she was assisting resigned.
- At time of resignation, company was undergoing budget cuts requiring elimination of some positions. Stewart’s administrative assistant duties and another administrative assistant’s duties were redistributed among other employees.
- When Stewart returned from leave, she was notified of the decision to eliminate her position.

**LAWSUIT**

- Court dismissed Stewart’s FMLA interference claim.
- Determined Stewart received all leave she requested and was allowed to complete her leave before being terminated.
- Court further found Stewart failed to show that any equivalent position existed.
Proximity of Layoff to Maternity Leave Insufficient to Establish FMLA Violation

Stewart v. DaVita (M.D. Tenn. 2015)

LAW SUIT

• Court held closeness in time between the start of leave and decision to eliminate Stewart’s job not enough to establish retaliation where the employer asserted several legitimate reasons for her termination.
• Stewart did not have an individual to support upon return, budget cuts required the elimination of positions, and her position was selected because it had few duties that were easily redistributed to other employees.
• Job of another assistant, who had never requested FMLA leave, was also eliminated. Another colleague of Stewart’s took FMLA leave but remained employed.

LESSON

• Identify specific valid reasons for eliminating a position.
• Ensure no equivalent position available.

FMLA 2 Year SOL Runs From Date of Last Alleged FMLA Violation

Barrett v. Illinois Dep’t of Corr. (7th Cir. 2015)

FACTS

• Employee terminated for violating the defendant’s unauthorized absence policy.
• Employee alleged employer violated her FMLA rights by improperly denying leave requests between 2003 and 2005. She challenged each before the defendant’s employee review board.
• Terminated under the absence policy.
FMLA 2 Year SOL Runs From Date of Last Alleged FMLA Violation

Barrett v. Illinois Dep’t of Corr. (7th Cir. 2015)

LAW SUIT
• Court held employee’s lawsuit untimely.
• Determined last event is employer’s denial of leave request.
• Employee’s termination was not the last event in which her FMLA rights were violated.
• Claim accrued, and the FMLA statute of limitations began to run, each time she lost a challenge to the defendant’s leave denials.

LESSON
• This Circuit held two-year statute of limitations runs from the date of the employer’s last alleged FMLA violation, not the date of the employee’s termination.

Clarification of FMLA Notice and Protected Activity Standards

Curtis v. Costco Wholesale Corp. (7th Cir. 2015)

FACTS
• Employee had been promoted to optical manager. Due to customer complaints, Costco started keeping a closer eye on him.
• Later, co-worker informed Costco that Curtis planned to scam the company by taking medical leave.
• Curtis eventually did take leave.
Clarification of FMLA Notice and Protected Activity Standards

Curtis v. Costco Wholesale Corp. (7th Cir. 2015)

**LAWSUIT**
- Later sued his supervisor for retaliation and interference in violation of FMLA and discrimination based upon a disability and failure to accommodate in violation of ADA.
- Court held it was not retaliation to demote an employee after learning he or she plans to file a fraudulent FMLA leave request.
- Notice to a co-worker about scamming a company is not sufficient for FMLA notice. Employers do not have an obligation to reasonably accommodate an employee by transferring him or her to a different store while he or she is on FMLA leave.

**LESSON**
- Lookout for fraudulent information submitted by employees.
- When defending FMLA claims, verify whether the employee provided sufficient notice as required under the statute.

Terminating Employee without Giving Time to Cure Deficient Medical Certification Is FMLA Interference

Hansler v. Lehigh Valley Hosp. Network (3d Cir. 2015)

**FACTS**
- Employee submitted a medical certification form requesting leave for two days a week for approximately one month.
- Fired for “absenteeism” a month later.
- Fired after she had taken several days off work, but before she was notified that her FMLA request had been denied.
- Former employer had not sought any clarification about the medical certification.

**LAWSUIT**
- Sued former employer for violations of the FMLA.
Terminating Employee without Giving Time to Cure Deficient Medical Certification Is FMLA Interference

_Hansler v. Lehigh Valley Hosp. Network_ (3d Cir. 2015)

**LESSON**

• When a Family and Medical Leave Act (FMLA) certification submitted by an employee is insufficient under 29 U.S.C. § 2613(b), the employer, under 29 C.F.R. § 825.305(c), must advise the employee what information is necessary to make the certification complete and must provide the employee with time to cure.

• Where employer fails to comply with these regulatory requirements, therefore prejudicing the employee, the employee may state a claim for interference under 29 U.S.C. § 2615(a)(1).

Interpretation of “Overnight Stay” to Define Scope of “Serious Health Condition”

_Bonkowski v. Oberg Indus., Inc._ (3d Cir. 2015)

**FACTS**

• Due to shortness of breath at work, Plaintiff went to the hospital and arrived shortly before midnight.

• Admitted to the hospital shortly after midnight, on November 15, 2011.

• After testing done at the hospital did not reveal any serious medical issues, Plaintiff was released from the hospital in the early evening of November 15, 2011 with no restrictions on his activities.

• Plaintiff was terminated for walking off the job.

**LAWSUIT**

• Employee sued claiming that he had a “serious health condition.”

• Court found that Plaintiff did not satisfy the definition because he did not have an “overnight stay” in the hospital.
Interpretation of “Overnight Stay” to Define Scope of “Serious Health Condition”

*Bonkowski v. Oberg Indus., Inc.* (3d Cir. 2015)

**LESSON**

- Bright line rule for what constitutes an “overnight stay” under the FMLA in Third Circuit. Requires an employee to be admitted on one calendar day and discharged the next calendar day.
- Alternative “overnight stay” definition – that an employee stay in a hospital, hospice or residential medical facility for a substantial period of time – still lacks clarity due to the court’s unwillingness to define the additional “substantial period of time” requirement.

Employee Who Makes Serious Threats of Violence Towards Co-Workers is Not Qualified Under the ADA

*Mayo v. PCC Structural, Inc.* (9th Cir. 2015)

**FACTS**

- Timothy Mayo made death threats about his supervisor and another manager to fellow coworkers.
- Threats were fairly detailed, including a specific time of day.
- Employer notified the police. Police took Mayo to a hospital because he posed a danger to himself and others.
- Mayo then took FMLA.
- Later, Mayo was terminated.

**LAWSUIT**

- Mayo sued.
- Court determined Mayo was not a “qualified individual” under the ADA because of his violent threats.
- Employer’s summary judgment motion was granted.

**LESSON**

- Employees who make serious and credible threats of violence toward their co-workers are not “qualified individuals” under the ADA.
- Employers not required to accommodate those employees.
**Employee Looking for Other Jobs Had No ADA Discrimination Claim**  
*Adetimehin v. Healix Infusion Therapy, Inc.*  
(Texas April 6, 2015)

**FACTS**
- Court granted summary judgment to employer, finding a former employee’s job search activities prevented her from proving her Americans with Disabilities Act (ADA) bias claim.
- Court did not believe that the employee provided evidence that a major life activity was substantially limited by her condition.
- Record clearly reflected employee’s struggles.
- Employee’s health care provider was clear that struggles were specifically related to her job at the company, not her overall ability to work.

**LAWSUIT**
- Court determined inability to perform a single, particular job does not constitute a substantial limitation to the major life activity of working. Concluded employee failed to raise a question of material fact as to the first prong of her reasonable accommodation claim.
- Employee’s health care provider admitted the employee was looking for other jobs, including full-time work, while she was on FMLA leave. Testified if the employee had found a full-time job with another employer, she would have recommended that the employee take that job, beginning immediately.

**ADA Allows Wellness Exams as Condition of Health Plan Enrollment**  
(W.D. Wis. Dec. 31, 2015)

**FACTS**
- EEOC brought an action against employer alleging that it violated the ADA by conditioning participation in its employee health insurance plan on completing a health risk assessment and a biometric screening test as part of employer’s wellness program.

**LAWSUIT**
- The central issue was whether Flambeau’s wellness program violated ADA provision prohibiting employers from requiring medical exams that are not job-related or for business necessity.
- Court found that the wellness requirement was protected by the ADA’s safe harbor for insurance benefit plans.
ADA Allows Wellness Exams as Condition of Health Plan Enrollment

(W.D. Wis. Dec. 31, 2015)

**LESSON**
- Employers must ensure their wellness programs comply with existing regulations under the Affordable Care Act and other existing laws such as the ADA.
- Employers should be aware that the EEOC may not change its position on wellness programs because of this case.
- Thus, Employees have two choices. Employers can choose to follow the more restrictive regulations proposed by the EEOC, or employers can design their own wellness programs outside EEOC restrictions relying on the ADA's “safe harbor” exemption. Either way, employers should continue to monitor this situation for future developments.

Telecommuting is an Unreasonable Accommodation if Employee Presence is Essential Job Function

*E.E.O.C. v. Ford Motor Co.* (6th Cir. 2015)

**FACTS**
- Ford Motor Company fired employee who had worked as a resale buyer of steel and who suffered from irritable bowel syndrome.
- As an accommodation, employee requested that she be able to perform her job by telecommunication up to four days a week.

**LAWSUIT**
- Court found that telecommuting was not a reasonable accommodation for Plaintiff.
- Court did not rule that telecommuting will always fail as a reasonable accommodation. Concluded that, under the facts of this case, the employee’s telecommuting proposal was not a reasonable accommodation because it would not allow her to perform the essential functions of her particular job.
- Court also found that Ford Motor Company had engaged in a good faith “interactive process” to determine if a reasonable accommodation was possible.
Telecommuting is an Unreasonable Accommodation if Employee Presence is Essential Job Function

E.E.O.C. v. Ford Motor Co (6th Cir. 2015)

LESSON

• A requested accommodation that eliminates an essential function of the job is not a reasonable accommodation.
• Illustrates need to maintain job descriptions that specify essential job functions, including on-site attendance if necessary.
• Also a reminder that employers are required to engage in a reasonable accommodation interactive process and should document that engagement.

Employee’s Hope that She’ll Return to Work isn’t Enough to Require Additional Leave Under the ADA

Minter v. D.C. (D.C. Cir. 2015)

• Issue: What can employers do if an employee cannot return to work after FMLA leave expires? What if the employee doesn’t know when she’ll be able to return?
• Takeaway: An employer is never required to provide an employee an indefinite leave of absence. However, again, it is important to engage in an interactive process with the employee to determine whether any accommodation is available. Must manage FMLA and ADA issues.

Employer Fails to Provide Leave of Absence to Probationary Employee, Pays the Price

EEOC v. EZEFLOW USA, Inc. (D.C. W. Pa., 2015)

FACTS

• Company offered up to 26 weeks paid medical leave to non-probationary employees.
• Probationary employee, who had only been working for about 10 weeks, requested six weeks unpaid leave for treatment of seizures.
• Company denied the accommodation based on the probationary status and terminated the employee.

LAWSUIT

• Former employee filed suit.
• Case eventually settled for $65,000 and other relief to the employee.
• The company also agreed to commit to extensive training and modify its policies.
Employer Fails to Provide Leave of Absence to Probationary Employee, Pays the Price

_EEOC v. EZEFLOW USA, Inc._ (D.C. W. Pa., 2015)

**LESSON**

- Even though employers are not required to provide paid leave or FMLA to probationary employees, they are required to provide unpaid accommodation leave to those with disabilities because there is no probationary status under the ADA.

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**UNUSUAL FMLA AND ADA ISSUES**

Unusual FMLA/ADA Issues

**CALCULATING FMLA LEAVE ON SNOW DAYS**

- Recent blizzard left many employers scrambling with how to handle leave issues.
- If employee is out on FMLA leave, should it count snow day against the 12 week entitlement?
- FMLA rules do not directly address this situation—apply the general rules.
- If employee is out on FMLA for the entire week, then count the snow day against the 12 weeks of leave.
- If employee actually worked any part of the week, count only the days employee would actually have been expected to work as FMLA leave.
- If worksite closed for one or more full weeks, any days employee would not be expected to work should not be counted against leave entitlement.
Unusual FMLA/ADA Issues

SEASONAL AFFECTIVE DISORDER (“SAD”)
- Seasonal affective disorder condition is recognized under disability law. Employers may need to grant accommodations to employees with SAD.
- SAD has been the subject of workplace lawsuits. A federal court jury ordered school district to pay a former teacher more than $2 million for failing to accommodate her SAD.
- According to the website of the Job Accommodation Network (JAN), a service of the U.S. Department of Labor’s Office of Disability Employment Policy, other accommodations include:
  - Moving the employee’s workspace to an area with increased exposure to daylight.
  - Letting the employee take extended breaks outside.
  - Changing the employee’s schedule.
  - Allowing an employee to take leave for treatment
  - Taking Leave

Unusual FMLA/ADA Issues

IN VITRO FERTILIZATION AND THE FMLA
- FMLA regulations do not specifically address in vitro fertilization treatments
- Courts have not ruled definitively on the issue
- Appears central question is whether a woman who undergoes the process has a “serious health condition.” However, related issue is whether denial of leave for these treatments would lead to a gender or pregnancy discrimination claim
- Takeaway: Employers should not make these decisions without thorough analysis and should continue to watch for updates on this issue

QUESTIONS??????

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