Employment Law Briefing

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New rules interpret the Family and Medical Leave Act

Since its enactment in 1993, the Family and Medical Leave Act (FMLA) has required employers to provide eligible employees with up to 12 weeks of unpaid leave in any rolling 12-month period for the birth or adoption of a child; to care for a parent, child or spouse with a serious medical condition; or for an employee's own serious medical condition.

Here are highlights of the Department of Labor's revised FMLA rules that took effect on Jan. 16, 2009:

Eligibility. To be eligible, employees must have worked for their employers for at least 12 nonconsecutive months preceding leave and have at least 1,250 hours of service. But employment before a continuous break in service of seven years or more needn't be counted unless the break was for military service or an approved absence.

Employee handbooks must contain FMLA policies, and companies without handbooks must give employees written notice of their FMLA rights and responsibilities when hired.

Establishing a serious health condition. For the purpose of establishing a serious health condition, an employee is deemed to be receiving "continuing treatment" if — in connection with a period of incapacity exceeding three consecutive days — the employee has:

1. Twice visited a health care provider within 30 days of the beginning of the period of incapacity (except under extenuating circumstances), or

2. Visited a provider once and is under a regimen of continuing treatment — such as a prescription. In both cases, the first in-person treatment must occur within seven days of the first day of incapacity. Only providers — not employees or patients — may decide the necessity of a second visit during a 30-day period.

Eligibility notice. Within five days of a leave request, employers must notify employees whether they are eligible for leave and give those who are eligible a written notice of their FMLA "Rights and Responsibilities." Employees who aren't so notified may be entitled to lost compensation and benefits — and other remedies — if they can show they were harmed by the employer's failure to notify.

Designation notice. After approving a requested leave, employers must notify employees within five business days whether the leave will be designated as FMLA leave.

Medical certification. Employers requiring medical certification for leave must give employees the medical-certification form and the "eligibility notice" and allow them 15 days to provide certification. Employers should describe employees' essential job functions to providers to help them properly address employees' fitness to return to work.

A medical certification is considered incomplete if even one applicable entry hasn't been completed or if the information is "vague, ambiguous or nonresponsive." Then an employer must notify an employee in writing what additional information is needed and allow the employee seven days to provide it.

Posting requirements. All covered employers must post the prescribed FMLA notice in the workplace — even if no employees are eligible. Employee handbooks must contain FMLA policies, and companies without handbooks must give employees written notice of their FMLA rights and responsibilities when hired.

Intermittent leave. Employees who take intermittent leave must make a reasonable effort to schedule it so as to not disrupt employer operations. For example, employees who require intermittent leave for periodic medical attention should schedule it during days or times when least burdensome on the employer.

Light-duty work. Time spent in "light duty" work doesn't count against an employee's FMLA leave entitlement, and job-restoration rights are held in abeyance during light-duty periods.

Achievement bonuses. Employees may be disqualified from receiving achievement bonuses — such as for perfect attendance — when they haven't met the goal because of FMLA leave.

Health insurance. If employees' health insurance lapsed while on FMLA leave for failure to pay their premium share, when they return to work their employers must reinstate the insurance or be liable for any resulting employee losses.

Contacting providers. The rules now allow employers to directly contact an employee's health care providers to authenticate and clarify medical certification. But only a health care provider, a human-resources professional, a leave administrator or a management official may make this contact — not an employee's direct supervisor.

For more information regarding the new FMLA rules, visit the Department of Labor Web site (dol.gov/esa/whd/fmla) or contact your attorney. ♦

DOL releases new rules to help implement leave provisions

The Department of Labor has issued rules to help implement leave provisions for military families as required by the 2008 National Defense Authorization Act.

The act's first provision requires employers to provide up to 26 weeks of protected unpaid leave in a single 12-month period to an employee who is the spouse, child, parent or next-of-kin (that is, closest blood relative) of a member of the Armed Services (including the National Guard and reserves) who has a serious injury or illness incurred during active duty. This provision took effect on Jan. 28, 2008.

The act's second provision took effect on Jan. 16, 2009. It requires employers to allow an eligible employee to take up to 12 weeks of unpaid leave in a 12-month period as a result of a "qualifying exigency" when the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to duty in support of a contingency operation or has just returned from that duty.

Here are the eight "qualifying exigencies" under which a covered employee may take leave:

1. **Issues arising from a covered military member being deployed on short notice,**
2. **Military events and related activities,**
3. **Arranging for alternative child care; providing child care on an urgent, immediate basis; enrolling a child in a new school or day care center (or transferring the child to one); or meeting with school or day care staff,**
4. **Making financial or legal arrangements addressing the covered military member's absence while on active duty or on call to active duty,**
5. **Undergoing counseling, or attending counseling for the covered military member or his or her child,**
6. **Taking up to five days of leave to spend with a covered military member who is on short-term temporary rest-and-recuperation leave during a deployment period, for each instance of such leave up to a maximum of 12 weeks in a 12-month period,**
7. **Attending postdeployment activities, including arrival ceremonies and reintegration briefings and events, and**
8. **Additional activities if the employer agrees.**

For more information regarding these rules, go to dol.gov/esa/whd/fmla or contact your attorney.

Something in the air

Employee's perfume prompts ADA dispute

Employment law cases frequently revolve around the term "work environment." Yet in few instances can that phrase be taken quite as literally as when the very air inside an office plays a key role in the case in question. So it was in *McBride v. City of Detroit*, in which an employee's heavy perfume prompted a dispute involving the Americans with Disabilities Act (ADA).

The facts

For six years, a senior city planner worked for the city of Detroit without incident, despite her lifelong chemical sensitivity to scented substances. But her symptoms immediately flared up when the city transferred a worker to her floor who wore perfume and used a plug-in air freshener and potpourri in the reception area. The planner experienced headaches, nausea, chest tightness, coughing and rhinitis. When she notified her supervisor, the worker stopped using the air fresheners but didn't stop wearing perfume.

Because the planner's severe symptoms continued, she asked the city to implement a no-scent policy to accommodate her sensitivity. The city rejected her request, formulated no other policy and refused to relocate either party.

The suit

The planner alleged that the city's failure to reasonably accommodate her disability violated the ADA. The city moved for judgment without a trial on grounds that the facts were undisputed and it was entitled to judgment as a matter of law.

The trial court found that to establish a prima facie case for failure to accommodate under the ADA, employees must show that:

1. They are disabled,
2. They are able to perform the essential functions of their jobs with or without a reasonable accommodation, and
3. Their employers knew of their disabilities and refused to reasonably accommodate them.

Here, the two key issues were whether the planner was disabled under the ADA and whether the city had failed to offer a reasonable accommodation.

Disability defined

Although the ADA doesn't define "disability," EEOC rules define it as a "physical or mental impairment that substantially limits one or more major life activities." An impairment substantially limits persons if they are "unable to perform" (or are "significantly restricted as to the condition, manner or duration" under which they can perform) a major life activity as compared to the average person in the general population.

So the court held that the planner had to show that she was significantly restricted as to the condition, manner or duration under which she could breathe compared to the average person.

The planner stated that the irritants caused a cough that constricted her throat and tightened her chest, making breathing difficult. Sometimes she had trouble driving home from work, was bedridden and thought she was dying. Sometimes her symptoms lasted long after the workday ended, sometimes even until the next morning. And her symptoms compounded during the workweek, making her feel worse each successive day, so that she could barely function by the end of the week.

The court found that she had shown sufficient evidence of significantly restricted ability to breathe as compared to the average person. Thus, a genuine issue of fact existed as to whether she was disabled under the ADA.

Interactive process required

Then the court took up the issue of whether the city had failed to reasonably accommodate the planner. The court agreed with the city that a workplace scent-free policy wasn't reasonable because it would cause undue hardship.

Although the rules state that it "may be necessary" for an employer and employee to engage in an "interactive process" to determine an appropriate accommodation, the trial court relied on the Sixth Circuit's ruling that *mandates* an interactive process. The court found that the city had neither discussed with the planner a less-restrictive scent policy nor spoken to her about transferring either party.

So the court concluded that a genuine issue of fact existed as to whether the city could have reasonably accommodated the planner and denied the motion to rule for the city without a trial.

Treat requests seriously

The lesson for employers is to seriously consider every request for accommodation. Even if a requested accommodation seems overreaching, employers have a duty to explore with employees other possible less-restrictive accommodations. ♦

The Pregnancy Discrimination Act

Treating workers equally is key

Employment disputes often arise regarding whether the reason behind a firing decision was lawful. Such was the case in *Doe v. C.A.R.S. Protection Plus*, wherein an employee was fired after missing work as she recovered from an abortion. As one might expect, the Pregnancy Discrimination Act (PDA) came into play, and the result represents a key lesson for employers about treating employees equally under this federal law.

Time off for tests

Two months after learning she was pregnant, a graphic artist called her supervisor (who was also the company's vice president and part-owner) to report that she needed to take off the following day to get a sonogram necessitated by problems detected in a blood test. He was out of the office that day, so the artist gave the message to his personal secretary and the office manager.

After the sonogram, the artist's husband informed the supervisor that problems with her pregnancy required further tests the next day. Her supervisor approved the absence and said to contact him the next day.

Absences approved

The next day, the artist learned that her baby was severely deformed, and her physician recommended terminating her pregnancy. That afternoon, her husband told her supervisor that she wouldn't be at work the next day. He approved her absence and asked the husband to call in the following day, a Friday, which he did, telling the supervisor that the pregnancy would be terminated the next day and obtaining permission for her to take the following week as vacation.

Later, the office manager told the artist that her supervisor's secretary was cleaning out the artist's desk. The artist called her supervisor, who told her that she had been fired.

The Third Circuit cited evidence showing that the employer treated different employees differently.

The artist alleged that the company was in violation of the PDA because it had fired her for having had an abortion. The employer maintained the firing was for violating company policy by taking time off without calling in. Without a trial, the court ruled for the employer on grounds that the facts were undisputed and the employer was entitled to judgment as a matter of law.

The Third Circuit weighs in

First, the Third Circuit noted that the PDA requires employers to treat "women affected by pregnancy, childbirth, or related medical conditions" the same for all employment-related purposes. And "related medical conditions" includes abortions.

Next, to establish a prima facie case of pregnancy discrimination, the artist had to establish that:

1. She had been pregnant and her employer had known this,

2. She was qualified for her job,

3. She suffered an adverse employment action, and

4. Her pregnancy and the adverse action were causally connected.

The only element in dispute was the fourth.

Disparate treatment raises inference

The Third Circuit cited evidence showing that the employer treated different employees differently. The supervisor's personal secretary testified that the employer had a "separate set of rules" for every employee, and that no rule required sick employees to call in every day.

Furthermore, when a male employee suffered a heart attack, neither he nor his wife called in every day. And at least two other employees who missed work because of illnesses weren't required to phone the company every day.

The court found that this testimony showed that, while other sick employees weren't required to call the office every day, the company had fired the artist for precisely this reason. This disparate treatment raised an inference of discrimination.

The burden shifts

The burden then shifted to the employer to show that it had a nondiscriminatory firing reason. Her supervisor testified that, contrary to her and her husband's claims, neither had called to request a week's vacation. He asserted that she had been fired because of her unexcused absences, which the Third Circuit agreed was a legitimate nondiscriminatory reason.

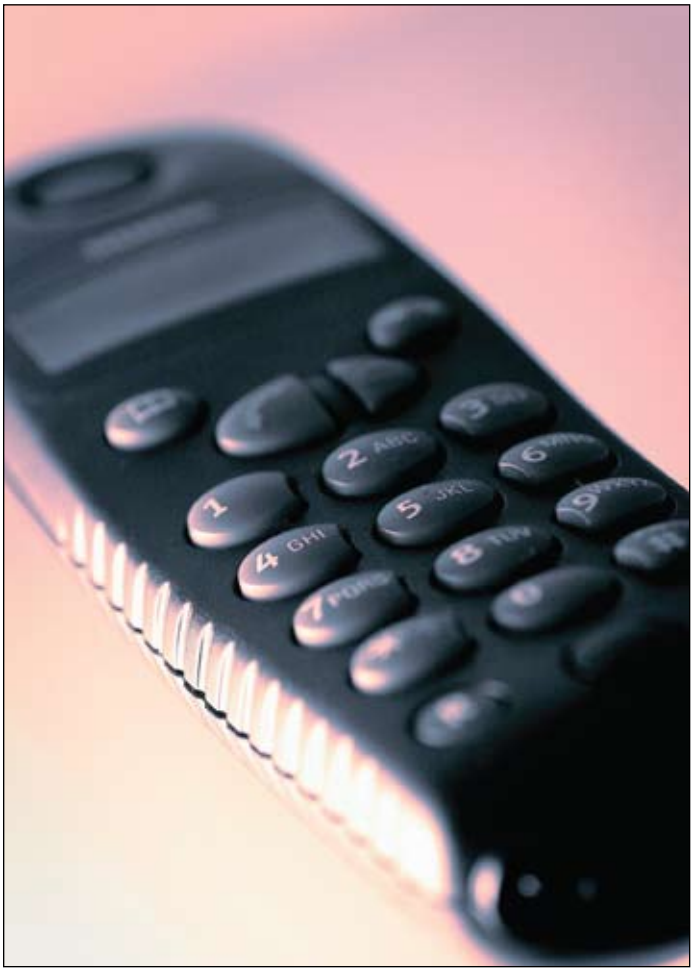
This shifted the burden back to the artist to show that the firing reason was a pretext for pregnancy discrimination. The court found that, though her husband claimed to have called from his father-in-law's house to request the week's vacation, telephone records showed no such call. But the artist testified that the call "had to be from a cell phone" and that "there was a lot going on at that time."

Moreover, the office manager testified that — when the artist's husband requested the vacation — she had transferred his call to the supervisor, who had to approve it. Then the supervisor asked her to make sure that someone took over the artist's usual lunch-hour task of covering the receptionist station.

Thus, the Third Circuit concluded that the supervisor's awareness of a receptionist-coverage issue permitted an inference that he had known the artist would be on vacation that week. Accordingly, the court reversed the trial court's dismissal of the suit and ruled that a trial was necessary to resolve fact issues.

Equal treatment

In dealing with pregnant employees, employers must beware that, though the PDA doesn't require preferential treatment for pregnant employees, it does require employers to treat pregnant employees the same as nonpregnant employees who are similarly situated with respect to their ability to work. ♦



What constitutes salary for FLSA overtime rules?

That was the question before the Second Circuit in *Havey v. Homebound Mortgage Inc.* A mortgage underwriter claimed she was entitled to overtime pay under the Fair Labor Standards Act (FLSA) even though she was salaried.

Base salaries

The mortgage company paid underwriters a base salary ranging from $48,000 to $64,000 based on the number of loans they had reviewed in the previous quarter. Those who received "efficiency pay increases" had to maintain that productivity level for at least two months in a quarter or lose the increase. And the company could reduce base pay for defective work but never below $48,000.

The underwriter alleged that she was entitled to overtime pay when she worked more than 40 hours a week. The court granted judgment to the company without a trial.

The administrative exemption

On appeal, the Second Circuit noted that the FLSA requires employers to pay at least time and a half to employees who work more than 40 hours per week. But the overtime requirement doesn't apply to "any employee employed in a bona fide executive, administrative, or professional capacity."

The company could reduce base pay for defective work but never below $48,000.

To be exempt from overtime pay, employees must perform primarily nonmanual work directly related to the employer's general business operations, exercise discretion and independent judgment, and be paid at least $455 per week on a "salary basis."

The issue on appeal

The sole issue on appeal was whether the underwriter was paid on a salary basis. She alleged that the employer reduced pay midquarter for underwriters who made

excessive errors or who failed to meet their productivity targets. She argued that, because an underwriter's base pay changed each quarter, any midquarter reductions constituted a change in the predetermined amount.

The court found that, under the rules, employees are considered paid "on a salary basis" if they regularly receive "a predetermined amount constituting all or part" of their compensation that isn't "subject to reduction because of variations in the quality or quantity of the work performed."

Because any reductions to the underwriter's pay were to her "efficiency pay increase" — never to her $48,000 base salary — the fact that her overall compensation for a given quarter could be decreased didn't make her a nonsalaried employee. The adjustments didn't affect her base salary, only the size of any increases above it. Ruling that she was an administrative employee ineligible for overtime pay, the Second Circuit affirmed the trial court's judgment.

Double damages and attorneys' fees

Wage and hour lawsuits are on the rise and can be expensive because of the availability of double damages and attorneys' fees in FLSA lawsuits, even if not brought as class actions where attorneys' fees can be multiplied. Better to be safe than sorry. Be sure that all employees not receiving overtime compensation meet all exemption criteria or pay them on an hourly basis with time-and-a-half for overtime. ♦