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FAMILY AND MEDICAL LEAVE

The risks of unpaid leave and the FMLA

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As the saying goes, no good deed goes unpunished. That is especially true in the employment law context. In an effort to retain valued employees or just do the right thing, employers often extend unpaid leave to employees and inadvertently create a sense of entitlement. When dealing with the Family and Medical Leave Act (FMLA), employers can create an actual legal entitlement to leave. In the spirit of being nice, but not too nice, here's what all employers should know about managing employee leave before and immediately after employees become FMLA-eligible.

A quick refresher on FMLA eligibility

The complications of the FMLA do not apply to all employers. An employer must have at least 50 employees in a 75-mile radius surrounding the site where the employee works. Thus, just because you don't have 50 employees at a single site does not render your business exempt. In addition, recall that to be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months and 1,250 hours in the 12 months preceding leave.

One key to FMLA eligibility that many employers overlook is the request for leave. The FMLA puts much of the onus for determining eligibility on the employer. The law is very clear that employees are not required to use any "magic" words to invoke their right to take leave. For example, an employee who discloses her pregnancy and discusses her need for maternity leave has given you enough information to conclude that she may be seeking the FMLA's protection, even if she never mentions the FMLA.

Impact of unpaid leave before FMLA eligibility

Keep in mind that the FMLA is a floor below which affected employers may not drop. It does not prohibit employers from extending unpaid leave to ineligible employees. This is where some employers get into trouble.

Many employers offer non-FMLA-eligible employees unpaid leave out of a sense of goodwill. For example, imagine that you hired an employee on January 1, 2017, and he serves the company well for 10 months. On November 1, he slips in his driveway while shoveling snow and injures his back. He exhausts his available sick leave (which is minimal since he is relatively new), and the company elects to extend him unpaid leave to allow him to complete necessary physical therapy and return to work. Unfortunately, days slip into weeks, and weeks slip into months. As of December 31, the employee still has not returned to work and cannot provide a date on which he will be capable of performing the essential functions of his job with or without a reasonable accommodation (as required by the Americans with Disabilities Act (ADA)).

At that point, many employers would decide to terminate the employment relationship, believing that because the employee was not eligible for FMLA leave when his leave began, he has no protection. Sadly, that is not necessarily true.

Despite the FMLA's language requiring that an employee "work" for the employer for at least 12 months, regulations implemented by the U.S. Department of Labor (DOL) indicate that an

employee must only be "employed" for 12 months. In other words, if an employee remains on your payroll for 12 months, he may be eligible under the FMLA, regardless of how many months he actively performed work.

Thus, in our example, the two months the employee was on unpaid leave would count toward FMLA eligibility. Consequently, if the employee worked 1,250 hours in the 10 months he actually worked and you delay issuing his termination letter until January 5, 2018, he would be FMLA-eligible. His leave would be *automatically* converted to FMLA leave under the current federal regulations, and you may be in violation of the FMLA even though he never requested FMLA leave.

Most troubling of all is the fact that unpaid leave extended before the employee becomes FMLA-eligible would not count toward his 12 weeks of FMLA leave. So after taking eight weeks of unpaid leave, the employee could request an additional 12 weeks of leave before exhausting his protection.

Bottom line

Employers that are subject to the FMLA are well-advised to check employees' tenure with the company *very* carefully before extending unpaid leave to non-FMLA-eligible employees. If you extend unpaid leave to an employee and he becomes FMLA-eligible at any time during the leave, he is legally entitled to the protections of the FMLA, and termination becomes significantly more complicated. If an employee becomes a problem while on unpaid leave, give serious consideration to terminating his employment before he reaches his 12-month anniversary. Remember, however, that an employee's pending FMLA eligibility alone is not grounds for termination and that firing an employee because he will soon be FMLA-eligible may lead to a claim that you interfered with his FMLA rights. Instead, terminate employees only if there is evidence they are abusing leave or engaging in other misconduct. As always, when in doubt, consult legal counsel.

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