HRxaminer

Examining practical HR issues business owners and managers encounter every day

FMLA: Something to Cheer About

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FMLA Commentary

Just a reminder that FMLA only applies to employers with 50 or more employees within a 75-mile radius.

While many smaller employers tend to mirror the generosity of FMLA by granting 12 weeks for medical, parental, and the newer military leave requirements, it is important that these employers do not claim to comply with FMLA. I recommend just stating your policy as a factual benefit without referencing FMLA at all.

New FMLA Ruling

As employers, we're frequently frightened to take action against a poor performing employee when an FMLA, ADA, Workers' Compensation or other potentially "dangerous" situation appears.

Last week I received an email update from Jackson Lewis law firm and was pleased to find an employer "success story."

Below you'll find much of the article (I abbreviated it due to space restrictions), but if you want to read the entire article, here's a link: Jackson Lewis FMLA Article.

Employee Demoted Following Maternity Leave Had No FMLA Claim

Affirming the dismissal of an employee's Family and Medical Leave Act claims,

In the handbooks I create/audit, I typically call this policy Parental and Medical Leave, just so it doesn't sound like FMLA. Of course, just because you say you comply with FMLA, if you're a small employer you still don't have the legal obligation to do so. But it can get "messy." There may be circumstances where you choose not to offer someone 12 weeks of leave and as a small employer, you don't want to jeopardize your right to flexibility.

So make sure your policy is open-ended and doesn't lock you into an obligation you don't wish to keep.

MN Parental Leave

Actually, MN doesn't require a medical leave at all for small employers! It does require a parental leave of 6 weeks for employers with 21 or more employees.

But that's not really fair to people who become ill for extended periods. So I always include a policy where an eligible employee can take 6 weeks of medical leave under the same conditions as the State requires parental leave.

the federal appeals court in Atlanta, Georgia, held that an employer did not violate the law by demoting an employee when she returned from maternity leave for performance deficiencies discovered while the employee was out on leave. Schaaf v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline, No. 09-10806 (11th Cir. Apr. 6, 2010). The Court also rejected the employee's retaliation claim for failure to demonstrate that the employer's reason for her demotion – her poor performance – was a pretext for retaliation.

The Facts:
Beginning in 1999, Ellen Schaaf worked as a Regional Vice President in the employer's southern Georgia and Florida region. In July 2002, three District Sales Managers complained to the employer's human resources department that Schaaf had an "antagonistic and inflexible management style," was inaccessible, had poor communications skills, tended to play favorites, and failed to give feedback on performance. Consequently, morale in the region was poor.

In response, the employer issued Schaaf a verbal warning, and Schaaf's supervisor, Lisa Gonzalez, directed Schaaf to complete a Performance Improvement Plan ("PIP").

Among other things, the PIP required Schaaf to issue previously uncompleted written performance reviews and to attend management-training programs. At about the same time, Schaaf informed Gonzalez that she was pregnant and would take maternity leave in early 2003. Schaaf also expressed her concern that she would be unable to complete the PIP before her leave.

Schaaf, true to her prediction, failed to complete the performance evaluations or take any training, and failed to meet the PIP's deadline. Gonzalez subsequently extended the deadline until after Schaaf returned from leave.

During Schaaf's leave, an interim RVP assumed Schaaf's duties, and the region

While there is a state-mandated (and a federal-mandated) waiting period for these leaves, if someone needs a maternity leave, since pregnancy is a protected classification, we still typically grant the minimal 6 weeks of leave. But the other leaves are not required for employees (a) with less than one year of service with your organization and (b) who fail to meet the minimum hours required by each statute.

Check your policies to make sure they match your intent and the laws that apply to you! And if I can help, feel free to call!

Mid-Year HR Mastery

I've received requests from several clients to start another monthly HR Mastery Group this summer. Please contact me if you're interested in joining!

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functioned significantly better – productivity increased, communication improved, and morale was higher. The interim RVP also discovered and corrected several significant administrative problems that had occurred under Schaaf's watch.

Shortly before Schaaf's return, the DSMs met with Gonzalez to express their concerns that the region's increased morale and productivity would end if Schaaf resumed her RVP position. When Schaaf returned to work in April 2003, she met with Gonzalez, who gave her a choice of either accepting a demotion to DSM or leaving the company. Schaaf accepted the demotion to DSM and sued the employer for interference with her FMLA rights and retaliation.

The employer moved to dismiss Schaaf's claims as a matter of law, and the district court granted the employer's motion. Schaaf appealed.

FMLA Leave:

The FMLA permits covered workers to take up to twelve weeks of unpaid leave each year to attend to the birth and care of the new child. When an employee returns from leave, she must be reinstated to her original or an equivalent position. However, the right to reinstatement is not "absolute." The FMLA permits an employer to deny reinstatement if it can demonstrate it would have discharged the employee if she had not been on leave. The employer must prove the employee was discharged for reasons unrelated to the leave.

The Court flatly rejected Schaaf's argument, finding it "legally incorrect" and "logically unsound." It found that in an FMLA interference case, the employee must prove the failure to restore her to her position was the "proximate cause" of the action, i.e., the employer took the action because of the leave. It is not enough to simply show that "but for" the employee's use of leave she would not have been demoted.

The Court explained, "[T]he statute's purpose is not implicated in the least if an

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employee's absence permits her employer to discover past professional transgressions that then lead to an adverse employment action against the employee."

Schaaf's reading of the statute, the Court observed, would "effectively protect deficient employees from adverse employment actions, such that those workers could actually attain job security by seeking leave under the FMLA." The Court found such a result "laughable" and unsupported by policy, common sense, or the FMLA itself. The evidence established that Schaaf was demoted because of her performance deficiencies, not the leave itself. Accordingly, the Court affirmed the dismissal of Schaaf's FMLA interference claim.

About Arlene Vernon

Arlene Vernon, PHR, partners with small businesses as their Human Resource Xpert to create their HR systems and solve their HR problems.

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