

Employees Now Protected Against Retaliation For Merely Requesting FMLA Leave

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The federal Family and Medical Leave Act (“FMLA”) provides eligible employees with a right to take an unpaid leave of absence from work, as well as protection from retaliation when exercising that right. Employers must comply with the retaliation provisions of the FMLA not only when the employee commences the leave of absence, but also when the employee invokes that right by merely requesting to take a leave.

RETALIATION IS PROHIBITED

The FMLA provides that it is unlawful for an employer to take an adverse employment action (retaliate) against an employee who has commenced an unpaid leave of absence. On September 23, 2009, the United States Court of Appeals for the Third Circuit ruled that it is also unlawful for an employer to take an adverse employment action against an employee who has merely requested unpaid leave under the FMLA.

In Erdman v. Nationwide Ins. Co., No. 07-3796 (3d Cir. September 23, 2009), the Court ruled that the FMLA’s retaliation provisions may be invoked by employees, who claim they were retaliated against for merely asking permission to take a leave. The retaliation provisions are no longer limited to protecting those employees who actually commenced a

leave of absence.

The plaintiff, Erdman, requested to take a leave of absence under the FMLA. Approximately three weeks after requesting the leave, and before the leave commenced, Ms. Erdman was terminated for purported behavioral problems. Erdman sued Nationwide in federal court alleging she was terminated for requesting FMLA leave.

Nationwide argued that Erdman could not recover on a retaliation theory because she did not actually commence a leave of absence under the FMLA. The Court, rejecting Nationwide’s argument, stated “it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins.” The Court found that by requesting a leave of absence, Erdman invoked her FMLA rights even though she did not actually commence a leave of absence. Therefore, the Court held that firing or taking an

adverse employment action against an employee after a valid request for FMLA leave constituted an interference with the employee’s FMLA rights as well as retaliation.

Practical Steps For FMLA Compliance

Employers must know the applicability and eligibility requirements affecting their employees. Employers must also take proactive steps to implement and enforce a compliant FMLA policy, and to engage their human resource professionals before making personnel decisions.

A. Know if You Are a Covered Employer.

The FMLA applies to all private-sector employers (as well as public agencies and local education agencies), who employ 50 or more employees in 20 or more work weeks in the current or preceding calendar year, including joint employers and successors of covered employers.



B. Determine if an Employee is Eligible for Leave.

To be eligible for FMLA benefits, an employee must: (1) work for a covered employer; (2) have worked for the employer for a total of 12 months; (3) have worked at least 1,250 hours over the previous 12 months; and (4) work at a location where at least 50 employees are employed by the employer within 75 miles. While the 12 months of employment do not need to be consecutive, employment periods prior to a break in service of 7 years or more need not be counted

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unless the break is occasioned by the employee's fulfillment of his or her obligations as a member of the National Guard or Reserve military, or a written agreement, including a collective bargaining agreement, setting forth the employer's intention to re-hire the employee after the break in service.

C. Evaluate the Reason for the Requested Leave.

A covered employer must grant an eligible employee up to 12 work weeks of unpaid leave during any 12-month period for the following 5 reasons:

- (1) for the birth and care of a new born child of the employee;
- (2) for placement with the employee of a son or daughter for adoption or foster care;
- (3) to care for a spouse, son, daughter, or parent with a serious health condition;
- (4) to take medical leave when the employee is unable to work due to his/her own serious health condition; or
- (5) for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or called to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

The 2009 amendments to the FMLA regulations require an employer to grant an eligible employee who is a spouse, son, daughter, parent, or next of a kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness up to a total of 26 work weeks of unpaid leave during a single 12-month period in order to care for the servicemember.

D. Implement and Enforce a Compliant FMLA Policy.

Employers are advised to insure that their FMLA policy: addresses the non-retaliation provisions of the FMLA; sets forth the employee eligibility requirements; and explains the reasons for which an employee may request FMLA leave.

An employer may require its employees to substitute their accrued paid leave time (such as sick or vacation leave) to cover some or all of the unpaid FMLA leave. To be enforceable, any such requirement must be set forth in the employer's written FMLA policy.

Additionally, the FMLA policy must make clear that the employer will maintain group health insurance coverage for an employee on FMLA leave if such insurance was provided before the leave was taken. Moreover, the policy should make clear that the employer may recover any and all premiums that it paid to maintain health coverage for an employee on

leave in the event that the employee fails to return to work following the FMLA leave.

E. Include Human Resources in All Personnel Decisions.

When deciding to terminate or to take some other adverse employment action against an employee it is critical for decision-makers to include human resource professionals in the discussion before a decision is made. Although a decision-maker may have a legitimate basis to take an adverse employment action against an employee, if the decision-maker is unaware that the employee has either requested or commenced an FMLA leave of absence the decision-maker may unknowingly interfere with the employee's FMLA rights and be accused of retaliation. Although the employer may ultimately prevail against such a claim, the employer will not have done so before having spent time and money defending itself in federal court.

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When dealing with personnel issues especially under the FMLA, the proverbial saying rings true – "an ounce of prevention is worth a pound of cure." As counsel to the AGC of New Jersey, we are always ready to advise the association and its members on the FMLA statute and other legal matters.

