

Client *Urgent* Briefing

Urgent Legal News • Aug., 2000

Keep Good Track of Your Employees' FMLA Leave

by Patricia F. Weisberg

Joe Smith didn't show up for work today. In fact, he hasn't shown up all week. Does he have Lyme Disease? Has he hurt his back? Is his mom in the hospital? Do you know why he's out? Well, after a major ruling from the Sixth Circuit Court of Appeals last month, you'd better know. And you certainly can't just assume he's taking a Family and Medical Leave of Absence without first discussing the issue with him. Otherwise he would be well within his rights to say that the week of missed work was due to his back problem, for which he used his employer-provided paid sick leave, and now his mother is in the hospital so he needs those twelve weeks of Family leave now, thank you very much.

Until now, not telling an employee that you were counting his absence towards the Family and Medical Leave Act (FMLA) was no big deal. Sure, the Department of Labor (DOL) issued regulations informing employers they could not count paid leave against the 12-week FMLA maximum, unless they notified the worker in advance, but a number of courts had rejected those regulations saying they imposed an additional burden on employers that was inconsistent with the original intent of the FMLA. So, the Sixth Circuit's decision is a big surprise, and it means the DOL's regulations will now be enforced in its jurisdiction, which includes Ohio, Michigan, Tennessee and Kentucky.

The case, *Plant v. Morton International, Inc.*, involved Philip Plant, a worker at Morton's Orrville, Ohio plant who was involved in a car accident in February of 1995 while working on a job site. He suffered back injuries and subsequently missed over six months of work, while still receiving his full salary. He eventually returned to work that September, although he was excused from performing strenuous duties. Nevertheless, in 1996, Plant aggravated his injuries at work and took another paid leave of absence. The company never notified him that they considered him to be on FMLA leave. About six weeks into the leave, Morton fired him, citing poor performance. Plant filed suit against Morton alleging violation of the FMLA, as well as disability discrimination laws.


The district court dismissed Plant's FMLA claim because, even though he was terminated before he had used his 12 weeks of leave, he would have been physically unable to return to work at the end of the 12-week period anyway. However, the Sixth Circuit Court took issue with the fact that Morton never notified Plant that his leave was being counted against his FMLA allotment. Both courts dismissed Plant's disability claims due to lack of evidence, but the higher court upheld his FMLA claims, making it very clear that when you want to designate someone's leave as FMLA, you've got to tell him.

What You Need To Know:

1. It is your responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to notify the employee.
2. If you do not give notice, you cannot retroactively designate the leave as FMLA.
3. If you don't think you have sufficient information to determine whether the employee's reasons for requesting leave are covered by the FMLA, then you need to speak with the employee to ascertain whether the leave is potentially FMLA-qualifying.

Eventually this issue could be pushed to the U.S. Supreme Court. But until that time, it's a

good idea to find out whether FMLA applies to an employee's request for leave. If it does, notify the employee right away that the leave is, in fact, being designated as FMLA leave. Otherwise, the employee *may* end up with much more leave than the statute requires since, in the majority of cases, FMLA can't be applied retroactively after the employee has been off work for a couple of weeks.

If you have any other questions or want more specific legal advice about the FMLA, please feel free to e-mail or call Nancy A. Noall (nan@walterhav.com) or Patricia F. Weisberg (pfw@walterhav.com) at 216-781-1212 

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The information in this newsletter is a summary of often complex legal issues and may not cover all the "fine points" related to a specific situation or court jurisdiction. Accordingly, it is not intended to be legal advice, which should always be obtained in consultation with an attorney.

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