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DANGER: Employees Working While on Leave, Part 1

By Jill Pedigo Hall, Esq.

April, an exempt employee, goes to the hospital to have her baby. She has already applied for leave under the Family and Medical Leave Act ("FMLA") and indicated she would like to take the full 12 weeks of leave available to her beginning upon the birth of her child. April's baby arrives, and six hours later April is propped up in her hospital bed, answering work e-mails and returning work-related calls. This signals the beginning of a trend for April who, for the rest of her FMLA leave, continues to exchange e-mails and make sporadic telephone calls related to work. Because she has done this work, does the Fair Labor Standards Act ("FLSA") require that her full salary be continued during what would otherwise be unpaid leave? If you allow her to continue working or ask her for assistance on matters during her leave, are you interfering with her FMLA rights? Can you still count all her time off as FMLA leave?

This scenario and these questions are not rare. Clients face these issues frequently as they try to balance concerns over increased governmental scrutiny of their wage and hour practices with the need to move forward in their businesses when vital exempt employees are on leave. Employers are consistently trying to determine how often they can contact exempt employees on leave for key operational information and at which point such contact might mean that the employee is really considered to be at work or that they are interfering with the employee's leave. Employers also face these issues when employees, such as April, who want or feel the need to work, continue to do varying levels of work while on leave or engage in work communications while on leave, perhaps to help maintain a client or customer relationship.

The wage and hour and FMLA issues presented by the employee who works sporadically during a continuous FMLA leave are not necessarily distinct from those of an exempt employee who is working almost continuously but taking limited intermittent leave. Both scenarios concern issues as to whether full salary must be paid to each individual in order to preserve their exempt status and also what actions might be illegal "interference" with the employee's FMLA leave rights.

The question of how FMLA leave factors into pay of an exempt employee is answered by the regulations to the FLSA and the text of the FMLA. Generally, employees who are classified as exempt executives, administrators, and professionals under the FLSA must be paid on a "salary basis." To meet the salary basis criterion, an exempt employee must receive a fixed salary each workweek, which may not fluctuate regardless of the number of hours worked. Deductions from the fixed salary are permissible in certain instances, however, including when the employee takes FMLA leave:

An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a *proportionate part of the full salary for time actually worked*. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

29 C.F.R. § 541.602(b)(7) (Emphasis added.) This exception is also contained in the FMLA statute itself at 29 U.S.C. § 2612(c):

Where an employee is otherwise exempt under regulations issued by the Secretary [of Labor]...the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee...

Under both laws, an exempt employee's weekly salary can be prorated to reflect unpaid FMLA leave taken in that week. If an exempt employee normally works a 40-hour week and is taking one unpaid day off each week, the employer can reduce the salary paid in those weeks to 4/5ths (or 80%) of his usual salary. (Of course, if the employee is using available paid leave during an FMLA absence, there would be no deviation in the employee's salary.) In April's scenario, April's employer needs to calculate how much time she spends working while on FMLA. If April is just answering sporadic telephone calls or occasionally sending brief e-mail responses, the time spent working may not be significant enough to generate a need to pay her a proportionate amount of her salary. However, if it is clear that April is spending hours and not minutes working during her leave, she may be entitled to a portion of her salary proportionate to the time she has actually worked.

Yet, even knowing this, employers face the practical problem of monitoring how much time an employee is working while ostensibly

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on continuous leave. This accounting may be best approached by having a policy that addresses working on leave. For example, an FMLA policy could prohibit any type of work being performed while on *unpaid* leave without the express written authorization of an employee's supervisor and Human Resources. The policy would further set out a requirement for the employee to account weekly for any time spent doing work, including a description of the work done and the time spent. Again, if the employee on FMLA is utilizing available *paid* leave, and the salary is automatically continued, this FLSA issue is not presented.

Aside from the potential issues under the FLSA, could asking or permitting an employee to perform work while on FMLA leave be considered illegal interference with the leave? That issue, as well as some ways employers can address these issues through internal policies, will be discussed in next week's article. Stay tuned.

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