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Jill Pedigo Hall, Esq.

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DANGER: Employees Working While on Leave, Part 2

By Jill Pedigo Hall, Esq.

When we last left April, our hypothetical employee, she was working while on leave:

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?

Last week's article addressed the FLSA issues that arise from this situation. The second issue presented by an exempt - or a nonexempt - employee working while on leave is when and whether such work "interferes" with the employee's exercise of FMLA rights.

As many employers are aware, an employer is prohibited from interfering with, restraining, or denying the "exercise [of] or attempt to exercise" any right under the FMLA. 29 U.S.C. § 2615. Thus, if an employer interferes with the FMLA right to medical leave, then the

employer has denied the employee a right to which he or she was otherwise entitled and an FMLA violation has occurred. Interference can take the form of discouraging an employee from taking leave or denying leave to which an employee is entitled. 29 C.F.R. § 825.220 (b). At some level, requiring an employee who would otherwise be on (and entitled to) continuous leave to work is considered interference. Employers should therefore approach each situation in which an employee is working while on leave with caution and should limit the amount of time and type of work an employee is asked or allowed to perform while on leave. Unlike with the FLSA issues discussed last week, paid leave does not prevent interference. An employer may be found to interfere with an employee who utilizes paid leave while on FMLA because the focus is on the medical need for leave, not whether the time off is paid.

Courts have provided some helpful guidance for when working on leave may be considered interference. Generally, it appears unlikely that an employer will be considered to have interfered with an employee's right to FMLA leave when the employee is asked to respond to occasional e-mails and take a few phone calls during leave. Courts have held that "[f]ielding occasional calls about one's job while on leave is a professional courtesy that does not abrogate or interfere with the exercise of an employee's FMLA rights. When limited to the scope of passing on institutional knowledge to new staff, or providing closure on completed assignments, employers do not violate the FMLA by making such calls." *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 537 (S.D.N.Y. 2009). The *Reilly* court found that if an employer makes a few brief, infrequent phone calls to an employee on leave asking, for example, where files are saved on a computer or where to find certain things, and the employee is not required to produce work product or complete assignments, then the contact is not considered interference with FMLA Leave. Thus, whether or not interference occurred appears to be a practical consideration that looks at the frequency and level of work requested.

It is not entirely clear, however, if an employee must complain to an employer about having to do the work for a request for work to be interference. One court found that an employer has not interfered with an employee's FMLA leave right when the employee worked on leave without first telling his supervisor that he did not want to work or was too fatigued to do so. *Soehner v. Time Warner Cable, Inc.*, 2009 WL 3855176, 4-5 (S.D. Ohio 2009). However, an employee concerned about job security may not want to object to a request to work while on leave. Out of caution then, employers should consider defining what an employee can and cannot be asked for while on leave. Certainly, the safest practice is to prohibit employees from working on leave entirely. But because that may not be realistic, employers should set, by policy, a procedure for asking employees for work or information while on leave.

In addition, when an employee (such as April) voluntarily works while on leave without the employer's knowledge or agreement, it is likely that the employer has not interfered with the employee's exercise of FMLA rights. However, if the employer could or should have known that the employee was working while on leave, then all the issues discussed in this article arise once again, and the

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employer should take steps to address them.

Suggested leave practices

Employers should consider developing a separate internal operations policy that addresses the following:

1. An employee on leave should not be asked or permitted to do work unless it is requested or performed on a brief, occasional basis for institutional information or is needed as a professional courtesy around a customer or client relationship.
2. Supervisors seeking more from an employee on leave than institutional information on an occasional basis should first inform Human Resources of the need for, and nature of, the proposed request to the employee and receive prior approval to go forward with the request.
3. Working time spent by an employee on leave should be tracked and documented and reported to Human Resources.
4. The policy should define when an employee (exempt or nonexempt) on unpaid leave should be paid for time worked based on time tracked.

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