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EMPLOYERS! FMLA DOES NOT GUARANTEE AN EMPLOYEE'S JOB WHILE ON LEAVE!

By Philip S. Holloway, Esq.

Heralded by many as groundbreaking legislation, the Family Medical Leave Act of 1993 ("FMLA") was meant to provide protections for American workers who needed to take time off of work because of ill health or to assist in the care of relatives with health concerns. Without a doubt, FMLA has been a boon for employees and their families. For employers, however, FMLA has presented a host of problems. One of the toughest issues facing employers when dealing with FMLA is: 'Can I terminate an employee while he/she is on FMLA leave?'^[1]

Over the last fifteen years, employers have struggled to balance their responsibilities to their employees under FMLA while keeping the interests of productivity in mind. FMLA provides that covered employers (an employer that employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year) must provide an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period. FMLA also provides that, upon the conclusion of leave, the

employer must reinstate the employee to the position he/she held prior to taking FMLA leave or to a position with equivalent employment benefits, pay, and other terms and conditions of employment. The FMLA prohibits employers from discharging or, in any other manner, discriminating against any individual for opposing any practice made unlawful by the FMLA. Such discrimination occurs when employers use the taking of FMLA leave as a negative factor in employment actions. In analyzing FMLA retaliation claims, the courts rely on the framework established in other employment statutes, such as Title VII of the Civil Rights Act of 1964. Employers found liable for denying employees their rights under FMLA are subject to significant damages (including attorney's fees).

Does FMLA prohibit an employer from weeding out an unproductive or substandard employee while that employee is on FMLA leave? In order to maintain productivity, an employer must find a worker to replace an employee on FMLA leave. What is an employer to do when the employee who replaced the employee on FMLA leave is far more productive? It may be surprising to know that the right to reinstatement afforded by FMLA is not absolute.

For example, Tim, an accountant with Company Y, takes 12 weeks of FMLA leave to deal with a health condition. During Tim's absence, Company Y conducts an internal audit and finds that Tim has made serious accounting errors that will cost Company Y millions of dollars in profits. Can Company Y terminate Tim's employment while he is out on FMLA leave? FMLA provides little guidance in this type of situation other than its declaration that an employee on leave is not entitled to "any right, benefit, or position of employment other than...[that] which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(3)(B). The courts have interpreted this provision of FMLA to mean that an employee such as Tim can be terminated even while on FMLA leave, if he would have been terminated absent his leave. *See Phelan v. City of Chicago*, 347 F.3d 679, 683 (7th Cir. 2003) (city employee's termination that was motivated by poor quality of his work did not violate FMLA simply because it occurred while he was on FMLA leave). In a situation such as this, employers must be careful to document the reasons behind the termination of an employee on FMLA leave.

In another scenario, Jane, an accountant with a less-than-satisfactory performance record with Company X, takes FMLA leave to care for her sick father. Jane and Company X agree that Jane will take the full 12 weeks of FMLA leave. Company X hires Mary, a temporary worker, to replace Jane during the 12

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weeks of Jane's FMLA leave. Mary immediately demonstrates that she is an excellent accountant whose performance easily surpasses Jane's. Can Company X retain Mary and terminate Jane's employment while she is on FMLA leave? Company X can, in fact terminate Jane's employment, but must tread carefully and make sure it makes the best business sense to take such a course of action. In the likely event that Jane were to file a lawsuit alleging discrimination under FMLA, a trial court would have to determine whether Jane's termination was illegally motivated by Jane's choice to take FMLA leave or whether the termination was motivated by other, valid reasons.

"With no absolute right to reinstatement, whether an employer violates the FMLA turns on why the employee was not reinstated. Clearly, an employee may not be fired because she took leave - that would be in direct violation of the statute." *Kohl's v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 804 (7th Cir. 2001). If Company X were to terminate Jane, it must be able to clearly demonstrate that her termination was due to her less-than-satisfactory performance and the business decision to replace her with someone more effective. Company X must also be able to clearly establish that it would have been entitled to replace Jane even if she had not taken FMLA leave. As always, it would be wise for an employer facing this situation to have clearly stated reasons - supported by documentation - for its business decision to terminate a poorly performing employee while on FMLA leave.

Further, when making decisions regarding underperforming employees on leave, employers must keep in mind other non-liability related considerations, such as the impact on employee morale. While the grounds for the employee's discharge should not be discussed in a manner that makes the termination grist for the rumor mill, the employer needs to make clear that it is not retaliating against employees for taking FMLA leave. One additional alternative is to consider whether the employee ill fit for his or her current position has qualifications better suited for another open position. FMLA does not guarantee an employee a return to the exact same position he was in when he left, but rather to a comparable position. However, trying to accommodate the underperforming employee can lead to even greater headaches and worries, as the employee may claim that the FMLA still has been violated because the position is lesser in stature. Even though consistency in handling employee matters is key, each situation is unique and must be evaluated and handled in light of its own facets and merits.

[1]

This discussion does not consider the narrower "key employee" exemption to reinstatement specified in 29 U.S.C. §2614(b) and 29 C.F.R. 825.217. A

future 60-Second Memo will address this topic.

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