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The GSH 60-Second Memo

August 27, 2008

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FMLA Leave: Don't Promise More Than You Can (or Need to) Deliver

By Laurie E. Meyer, Esq.

The federal Family and Medical Leave Act ("FMLA" or "the Act") requires employers covered under the Act to provide **eligible employees** with up to twelve (12) weeks of unpaid leave in a twelve-month period for the birth/adoption of a child, to care for certain family members suffering from a serious health condition, and for the employee's own serious health condition. The FMLA applies only to employees who have worked for their employer at least one year and 1,250 hours in that past year. Further, an employee is only eligible for leave under the FMLA if he or she works for an employer with at least 50 employees and within 75 miles of the employee's worksite.

But what happens when an employer **erroneously** represents to a statutorily-ineligible employee that he or she **is** in fact eligible for FMLA leave? Last month, the Seventh Circuit Court of Appeals (covering Illinois, Indiana and Wisconsin) answered that question in [*Peters v. Gilead Sciences, Inc.*, 533 F.3d 594 \(7th Cir. 2008\)](#).

Steven Peters worked for Gilead Sciences, Inc., an Indiana pharmaceutical company. Gilead employed less than 50 employees within 75 miles of Peters' worksite. But Gilead's employee handbook simply stated, "A request for family and medical care leave will be granted for all employees employed by the Company for at least twelve months and who have worked 1,250 hours during the twelve months preceding the commencement of leave." The handbook further stated, "You will retain your employee status during the period of your FMLA leave. This includes accrual of tenure and vacation, in addition to continued health benefits coverage. You will be guaranteed reinstatement to your position, or equivalent position, if you return to work by the time your FMLA leave expires."

After sustaining a shoulder injury at work, Peters filed a workers compensation claim and took medical leaves of absence to recover. Gilead sent Peters letters at the start of each of his leaves of absence, which restated the Gilead's FMLA policy from its employee handbook, included specific leave dates and guaranteed reinstatement. **Neither Gilead's handbook policy nor its approval letters to Peters contained any reference to the FMLA's restriction that the employer employ 50 employees within a 75-mile radius of the employee's worksite.**

Before Peters exhausted the 12 weeks of leave, Gilead replaced Peters with another employee. When Peters returned to work, Gilead offered him a different position, which Peters declined. Gilead then terminated Peters' employment. Peters sued Gilead, alleging a violation of the federal FMLA and making an Indiana state-law claim for promissory estoppel -- an equitable contract remedy that permits enforcement of a promise that induces actual and reasonable reliance on the part of the plaintiff. Peters argued that he had actually and reasonably relied upon promises made to him by Gilead about his FMLA eligibility.

The trial court granted summary judgment in favor of Gilead, finding that Peters was not statutorily eligible for FMLA leave. The Seventh Circuit reversed on appeal. While declining to decide the FMLA issue, the appellate court held that Gilead's employee handbook, as well as Gilead's representations in letters to Peters, gave rise to a cause of action for recovery under the theory of promissory estoppel. The Seventh Circuit observed, "Gilead's employee handbook promised 12 weeks of medical leave - the equivalent of the leave guaranteed by the FMLA - and Gilead repeated these promises in its letters to Peters." Further, the court reasoned, "There is no reason employers cannot offer FMLA-like leave benefits using

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eligibility requirements less restrictive than those in the FMLA, and that is what Gilead did. Peters' statutory ineligibility is irrelevant to the contract-based theories of liability."

Tips for Employers Post-Peters

First, know whether your company, its various locations, and its individual employees are eligible for FMLA leave. Second, carefully draft your FMLA policy to include all statutory eligibility restrictions under the Act. Add qualifying language to your handbook to make sure that ineligible employees are not promised FMLA leave. If your company does offer opportunities for medical leave to all employees (regardless of FMLA eligibility), make sure your policy is defined as company leave, and that your handbook clearly defines the eligibility criteria for such leave.

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