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Third Party Administrators and Liability Under the FMLA

By Jill Pedigo Hall

To spare costs and streamline and coordinate complex processes, employers are increasingly turning to third party administrators (TPAs) to administer leave under state and federal family medical leave laws. It seems a relatively straightforward and beneficial relationship, as the TPA can take care of sending out and collecting various notices, forms, and other paperwork within statutory timelines. However, the nature of leave administration can be complex, and the employer's potential liability exposure greater than one might originally think.

For example, an employee's FMLA claim may involve coordination with self-funded short term disability leave - the administration of which is likely also outsourced to a TPA. In addition, an employee's need for FMLA may be driven by the employee's disability and may present need for extended leave as an accommodation following the expiration of FMLA leave.

So, while the TPA's "basic" FMLA role may appear simple, it is not a mechanical process for the TPA or one from which an employer can be entirely disconnected. As opposed to employers, however, TPAs have been relatively immune from claims under the FMLA or other leave laws. Yet, as the recent FMLA case *Arango v. Work & Well, Inc.*, 2013WL1093206 (N.D. Ill. March 15, 2013), demonstrates, TPAs may need to start paying particular attention to their own liability exposure as well.

In *Arango*, a former Sysco employee alleged that Work and Well, Sysco's TPA responsible for administering his FMLA claim, tortiously interfered with his employment relationship with Sysco. The claim stemmed from the process Work and Well used to administer Mr. Arango's FMLA claim. Specifically, Work and Well required Mr. Arango to recertify his FMLA leave at four-weeks' time, in accordance with its "two-step" certification process. This was despite

the fact that Mr. Arango's initial certification, which had been accepted by Work and Well, specified that he would require eight weeks of leave. When Mr. Arango did not recertify at four weeks, Sysco terminated Mr. Arango's employment.

Work and Well moved for summary judgment on Mr. Arango's claims, but the district court found Work and Well's advertised "two-step" certification process, which was the basis for Mr. Arango's termination, ran directly contrary to an FMLA regulation which specifies that when "an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider." 29 C.F.R. § 825.307(a).

The court further found Work and Well waived any consulting privilege it might have on the basis "that it is reasonable to infer that [Work and Well] knew what kinds of information the FMLA permitted it to obtain from an employee and when it was permitted to do so." The court held that because the TPA accepted the certification as complete and sufficient to support eight weeks of leave but only allowed four, the facts "are sufficient to suggest, though they do not conclusively prove, that [Work and Well] intentionally denied meritorious FMLA leave requests to enhance its reputation as a benefits administrator and increase its book of business."

Based on these facts, as well as the nature and extent of how Work and Well administered FMLA generally, as implemented in Mr. Arango's case, the federal district court in the Northern District of Illinois denied Work and Well's motion for summary judgment, clearing the way for the case to go to trial.

The *Arango* decision suggests renewed caution and the following specific considerations for employers and TPAs around FMLA administration:

1. Employers should establish a clear internal FMLA communication pathway. Accurate, comprehensive information relating to an employee's leave should be gathered from all appropriate sources, such as supervisors, payroll and the EAP, and consolidated in one location in Human Resources.
2. Supervisors should be trained on FMLA, including the concept that an employee does not need to say the "magic acronym" of FMLA to invoke rights under the law.
3. An employer should work with the TPA to establish a productive communication protocol allowing HR to communicate critical information to the TPA at any stage of a leave and also to receive regular reporting on leave status. In addition, there should be an understanding as to when the TPA will come back to HR to partner on difficult FMLA issues.
4. An employer may want to consider working with the TPA to have an arrangement whereby the TPA provides updates regarding the notices given, leave balance, clarifications and cures sought and obtained. This may be most easily provided by the TPA's providing HR computer access to certain systems to allow for review of FMLA documentation

and track employee leave status.

5. The employer and the TPA should agree upon what process the TPA will follow in the medical certification process. How and when will the TPA seek clarification or cure of an incomplete or inaccurate medical certification? Will employer permission be required before the TPA seeks a second opinion?
6. The employer and TPA should agree to confer and partner on any leave denial.
7. Finally, the parties should agree on how return-to-work information will be obtained and at what point the return-to-work process will become the employer's responsibility. For example, what medical information will be required for return-to-work and does the TPA or the employer obtain it? Does the employer step in only when extended leave is sought?

Put simply, employers and TPAs should work to ensure open communication and structured teamwork to ensure compliance with the laws and minimize potential liability.

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