

Can Employees Voluntarily Work During FMLA Leave?

Labor & Employment Law Update

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Last month, the United States Court of Appeals for the Fifth Circuit issued an opinion that provides a helpful reminder about the extent to which an employer may ask an employee to work during a leave taken under the Family Medical Leave Act (FMLA).

In D'Onofrio v. Vacation Publications, Inc., a sales representative requested FMLA leave to care for her husband, who had suffered a major back injury. Her employer gave her two options – she could either go on unpaid leave or she could log on remotely a few times per week during her leave in order to service her existing accounts and keep her commissions. The sales representative opted to continue servicing her accounts during her leave. Later, the sales representative sued her employer and alleged, among other claims, that her employer denied her entitlements under the FMLA by requesting that she work during her leave.

The court quickly dismissed this claim because the sales representative had voluntarily agreed to the work. The employer had not coerced this work and had not conditioned the sales representative's continued employment on completing the work during her leave. The court stated that “[g]iving employees the option to work while on leave does not constitute an interference with FMLA rights so long as working while on leave is not a condition of employment.”

This case serves as an example of a black and white rule – an employer may not condition continued employment on completing work while on FMLA leave or otherwise coerce or require an employee to work while out on FMLA leave. However, there is a lot of gray area surrounding this clear rule.

While an employer may not require an employee to complete full assignments or regular work during leave, nothing in the FMLA statute or regulations prohibits an employer from contacting an employee during leave with de minimis requests or short and simple questions. For example, an employer may contact an employee on FMLA leave to request a password to access a file, to locate paperwork, or to obtain a quick update on where a particular matter was left.

To best avoid interference claims under FMLA, employers should limit contact with employees who are on leave. Any communication about work assignments should be short and not require the employee to travel to the workplace or

otherwise require the employee to expend significant time or effort.

Should an employee voluntarily agree to work during leave, the employer should communicate that the work is not required and document the nature of the voluntary agreement. And, if the employee is out on unpaid FMLA and has agreed to complete some assignments, the employer should ensure the employee is compensated to avoid any wage and hour issues.

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