Does Your Attendance Policy Violate the FMLA?

Labor & Employment Law Update

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The recent decision in *Dyer v. Ventra Sandusky, LLC*, issued by the U.S. Sixth Circuit Court of Appeals (which has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee), should motivate employers to take another look at whether their attendance policies run afoul of the Family and Medical Leave Act (FMLA).

There are plenty of gray areas in the law, but it is generally clear that employees are not to be disciplined because they are absent for FMLA-covered reasons. That also means that employees should not accumulate attendance "points," e.g., under a no-fault attendance policy, for FMLA-covered absences when such points can contribute to discipline up to and including termination of employment.

To its credit, the employer in *Dyer* did not assign attendance points for FMLA-covered absences. But unfortunately for the employer, that is not the end of the story.

Under the employer's attendance policy, employees were eligible for a one-point "reduction" of their attendance point balance for every 30-day period in which the employee had "perfect attendance." The employer's definition of perfect attendance was not self-explanatory. For instance, an employee could be absent for several different reasons — including vacation, bereavement, jury duty, military duty, holidays, and union leave — and still have "perfect attendance" and eligibility for attendance point reductions.

However, FMLA-covered absences were not included among the types of absences that preserved perfect attendance status and point-reduction eligibility. And if an employee had a FMLA-covered absence, his progress toward the 30-day point reduction goal was reset to zero.

The Sixth Circuit noted that the FMLA's regulations generally require that an employee not lose benefits while on FMLA leave. Because attendance point reductions (and progress toward such reductions) are benefits, the Sixth Circuit noted that, at the very least, progress toward the 30-day goal should be frozen while employees are on FMLA leave, rather than being reset to zero. The court also indicated that if other "equivalent," but non-FMLA forms of leave were counted toward the 30-day goal, then FMLA-covered absences should also be counted toward the 30-day goal.

The bottom line is that the *Dyer* decision instructs employers that disciplinary and benefit policies must be closely scrutinized to determine whether they might dissuade employees from taking FMLA leave — or otherwise harm employees who take FMLA leave. If harm results, or if employees are faced with the decision of taking FMLA leave or forgoing benefits, potential exposure to liability under the FMLA may exist.

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