Employers Must Tread Carefully In FMLA Request Discussions To Avoid FMLA Interference Claims

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The federal Family and Medical Leave Act (FMLA) provides employees essentially two paths to bring lawsuits for alleged FMLA violations: retaliation claims and interference claims. Employers are generally familiar with the concept of retaliation, and FMLA retaliation claims tend to fit a familiar mold: If an employee suffers an adverse employment action (e.g., termination, unpaid suspension) that is causally connected to a request for FMLA leave or other FMLA-protected activity, the employee may have a claim for FMLA retaliation.

FMLA interference claims may not be as familiar to employers, but the recent decision by the U.S. Seventh Circuit Court of Appeals in *Ziccarelli v. Dart* illustrates a landmine that FMLA-covered employers must be careful to avoid.

Perhaps the simplest form of the FMLA interference concept is the situation in which an employer denies FMLA leave to an employee who is qualified for such leave. But the *Ziccarelli* decision makes clear that, at least in the states for which the Seventh Circuit has jurisdiction (Illinois, Indiana, and Wisconsin), denial of FMLA leave is not necessarily required for an employee to bring a FMLA interference claim.

The main allegation at issue in *Ziccarelli* was essentially this: An employee who was eligible for FMLA leave made a request for leave. The employer's representative in charge of authorizing FMLA leave allegedly responded by saying, "you've taken serious amounts of FMLA … don't take any more FMLA. If you do so, you will be disciplined." In light of that response, the employee decided not to request FMLA leave.

The Seventh Circuit ruled that such an allegation was sufficient for the FMLA interference claim to proceed to trial. In making that ruling, the court highlighted that FMLA interference claims could be based on the denial of leave or other forms of prejudice. What "prejudice" might mean in a given case may vary greatly —but based on the *Ziccarelli* ruling, prejudice for FMLA interference claims could include an employee's decision not to take FMLA leave that should have been available to them.

What does this mean for companies that have to respond to FMLA leave requests in the future? The main takeaway is that HR (or whichever employees handle the FMLA request intake and approval process) must be trained not to make snap decisions, off-the-cuff comments regarding an employee's eligibility for FMLA leave, or any other statements that could indicate that the company may view the employee unfavorably because they requested leave. And HR should never threaten an employee with discipline for "taking FMLA leave."

Instead, at the initial intake stage of a FMLA leave request, HR should make sure that the request contains sufficient information to make a decision. If so, HR should not say anything more regarding the employee's eligibility for leave until the company has had an opportunity to carefully evaluate whether the request should be approved. HR should also document and confirm all discussions regarding FMLA leave requests in writing.

Companies should also make sure that they have a complaint procedure for FMLA requests and most other employee relations issues. This can be as simple as an "open door policy" that invites employees to reach out to an appropriate member of management if an employee ever has questions or concerns that a workplace issue has not been handled properly. An effective open door policy where potentially mishandled FMLA requests can be quickly rectified could go a long way toward eliminating any argument that an employee suffered prejudice in a situation like the one at issue in *Ziccarelli*.

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