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Beware: Courts Find More Ways to Trap Employers Under the FMLA

By: Jennifer Craighead Carey

A recent case, initiated in the Federal District Court of the Middle District of Pennsylvania in Harrisburg, Pennsylvania, illustrates yet more traps for unwary employers under the Family and Medical Leave Act (FMLA).

In Erdman v. Nationwide Insurance Company, the Plaintiff, Brenda Erdman, filed suit against her former employer, Nationwide Insurance Company, alleging, among several claims, claims for retaliation under the FMLA and the Pennsylvania Human Relations Act (PHRA). Ms. Erdman worked for many years for Nationwide, initially in a full-time capacity. Later, after giving birth to a child with Down Syndrome, she reduced her work schedule to part-time. Ms. Erdman often brought work home with her after regular business hours and submitted slips seeking compensation in the form of wages or compensatory time off for the additional work hours.

Eventually, her part-time job was eliminated and she was transferred to full-time status. She was instructed not to work overtime hours, but continued to take work home with her and work additional hours.

In the midst of transitioning back to full-time work, Ms. Erdman requested the entire month of August off for vacation and to assist her daughter in transitioning back to school. Her request was denied. Immediately thereafter, Ms. Erdman submitted an FMLA request, seeking time off to care for her daughter during the month of August. Her request was conditionally granted; however, before she commenced the leave, her employment was terminated. Among the reasons cited for the termination was her use of profanity during a call which Nationwide claimed it was monitoring for customer service purposes, but which Ms. Erdman claimed was a private call.

One of the key issues in the case was whether Ms. Erdman had worked the required 1250 hours in the twelve month period proceeding her request for leave in order to qualify for FMLA and therefore, raise an FMLA claim. The District Court ruled that Ms. Erdman did not have enough hours of work to qualify for FMLA and dismissed her claim. On appeal by Ms. Erdman, the Third Circuit Court of Appeals disagreed and held that Ms. Erdman did qualify for FMLA leave.

Importantly, the Third Circuit counted as hours worked all hours Ms. Erdman worked at home that it believed Nationwide knew or should have known about. While Nationwide argued that it had instructed Ms. Erdman not to

work from home after she transitioned to full-time status, the Court found that even if Nationwide did not actually approve the hours, it had constructive knowledge of them. The Court cited the fact that Ms. Erdman regularly worked outside of the office for many years and that Ms. Erdman continued to put in for "comp time" for later use even after being admonished not to work from home.

The Third Circuit sent the case back to the District Court. One of the issues, among others, addressed by the District Court upon remand was whether Ms. Erdman could bring a claim under the PHRA based on a claim that she was fired in retaliation for requesting FMLA leave. In other words, is a request for FMLA leave considered protected activity under the PHRA such that an employee can sue her employer for retaliation under both the FMLA and the PHRA.

Surprisingly, the District Court ruled that Ms. Erdman could proceed with her PHRA claim, finding that requesting leave under the FMLA was protected activity under the PHRA since providing leave in a caretaking role may invoke gender based discrimination. Interestingly, the District Court made this ruling even though other federal district court judges had recently ruled to the contrary, thereby leaving the law in a state of conflict. The District Court found that after Ms. Erdman requested FMLA leave she was fired. Citing the history of animosity between Ms. Erdman and her employer and the conflicting reasons for Nationwide's termination, the District Court determined there was enough evidence of retaliation under both the FMLA and PHRA to send the case to trial.

This case is a cautionary tale to employers. First, employers should beware of the implications of employees working from home after regular business hours. The Erdman case makes clear that where an employer knows or should know that an employee is working from home, those hours will count as hours worked for FMLA purposes. In some cases, this could confer upon a part-time employee sufficient hours to qualify for leave under the FMLA. Secondly, employers should conduct a careful review of the facts and circumstances with legal counsel before firing an employee who has exercised his or her rights under the FMLA. A careless or quick decision to terminate may open employers up to liability not only under the FMLA, but also under the PHRA.

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Deductions From Exempt Employees' Salary: Don't Risk Losing That Exemption

By: Jill Sebest Welch

Wage and hour litigation spiked in 2009 -- and is a trend that is expected to continue through 2010. In 2009, new Fair Labor Standards Act (FLSA) cases jumped by 19% over the previous year. In addition to the rising trend in FLSA litigation, there has also been a surge in enforcement of wage and hour laws by the government. Indeed, the latest budget proposal from the Obama administration seeks $244 million for the United States Department of Labor's (DOL) Wage and Hour Division, an increase of almost $20 million from the prior year, which includes funding to hire 90 investigators, thereby stepping up enforcement efforts.

In light of this increased attention from the DOL, employers need to ensure that their exempt employees are properly classified and are not being subject to improper pay deductions. Generally, an exempt employee must be paid a fixed salary of at least $455 per week, regardless of the number of hours worked. Deductions may not be made for the quality or quantity of their work. The regulations spell out which deductions are appropriate for exempt employees and which are not. There are seven exceptions to this "no pay-docking" rule under which deductions from an exempt employee's salary are permitted.

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employees salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

Note that the employee's decision to take time off must be completely voluntary and not "occasioned by the employer or by the operating requirements of the business."

There can be no deductions for half-day or partial day absences for personal reasons.

Employers may require an employee to take vacation or use paid time off (PTO) to cover half or partial day absences. If the employee has exhausted PTO and takes the half or partial day absence anyway, no deduction may be taken from the exempt employee's salary, but the employee would be subject to the employer's absenteeism and discipline policy.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability (i.e. a short term disability plan or workers' compensation insurance). The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan or for the initial waiting or qualification period. For example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the 4th day of absence, the employer may make deductions from pay for the 3 days of absence before the employee qualifies for benefits under the plan and for the 12 weeks in which the employee receives salary replacement benefits under the plan.

(3) While an employer cannot make deductions from pay for absences of an exempt employee for jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family Medical Leave Act (FMLA). Rather, when an exempt employee takes unpaid leave under the FMLA, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the FMLA, the employer could deduct 10 percent of the employee's normal salary that week.

This is one instance where a deduction for a partial day absence is permitted for exempt employees.

If an employer has a practice of making improper pay deductions, the exemption is lost. The regulations, however, provide a safe harbor for employers in this area. Specifically, employers who have a written policy which contains a procedure for reporting and investigating improper pay deductions may avoid jeopardizing employees exempt status so long as the employer promptly reimburses employees for the improper deductions and makes a good faith commitment to comply with the FLSA in the future.

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