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How Not to Respond to a Request for FMLA

Any employer who has had to deal with the painful combination of a difficult employee and FMLA can relate to the feeling of frustration that inevitably accompanies such a pairing. However, a recent case illustrates the importance of keeping those feelings in check.

Imagine this scenario: The employee provides his employer notice of his yearly vacation to Mexico. He then provides notice of a need to take FMLA for purposes of knee surgery before his vacation. The employee takes the FMLA for the surgery as planned, and provides a medical certification putting him out of work for 6-8 weeks. At the tail end of the FMLA, the employee takes his pre-planned vacation.

The employee returns to work as planned at the end of his vacation. Approximately a week later, the employee emails the company with what is perceived to be a "snippy" complaint about the the company's salary continuation program and the fact that he received a small check instead of his salary while he was on FMLA. That same day, the employee sends another email to HR reminding them that he will need additional medical leave (something his FMLA paperwork submitted months earlier had stated).

In the case of *DaPrato v. Massachusetts Water Resources Authority*, this was, apparently, enough to put the company over the edge. Although the company had already been notified of the employee's need for future leave, they were upset and reacted with "shock and offense at the idea of providing this employee with more FMLA leave."

The company began an investigation into the employee's FMLA leave, looking at surveillance footage of the employee driving while he was on leave; and eventually placed him on administrative leave, and then terminated his employment believing he behaved in manner inconsistent with his stated reason for leave.

The Court held that although the company investigated in good faith (it wrongly believed the employee's doctor said he couldn't walk at all and surveillance video found proof of him driving), it still violated the FMLA and retaliated against the employee for exercising his FMLA rights.
This case holds a couple of key lessons for employers:

1. Review FMLA paperwork carefully, and do not read it with an eye for denying leave. Here, the employer's actions were based on one doctor's note, although their reading of it was contradicted by the FMLA form that was returned. The court acknowledged that the employer acted in good faith – they legitimately believed this employee was walking around on his knee when the doctor said he couldn't put any weight on it, but that good faith belief did not shield them from an FMLA retaliation finding.

2. No matter how annoying you find the employee, it is important to administer all FMLA in an unbiased way. It is not worth a claim of FMLA retaliation and interference.

"Ban the Box" is a Mandate, Not a Suggestion

Yesterday, Massachusetts Attorney General ("AG") Maura Healey issued a **press release** that detailed an AG investigation into employer compliance with Massachusetts' "**ban the box**" law. This investigation, which appears to have been conducted independent of a specific complaint by an applicant or employee, revealed that many employers in the Boston and Cambridge area had paper applications that violated the state's "ban the box" law. As a result of the investigation, four businesses have made process changes and paid fines. 17 additional businesses received letters indicating that they must make immediate changes to comply with the law.

A Refresher on the Law

Massachusetts' "ban the box" law limits employers' inquiries into an applicant or employee's criminal history in the following ways:

- The written job application may not contain any questions related to the candidate's criminal history; and

- Questions (both oral and written) about the following may not be asked at any point during the interview process or at any point during the employment relationship:
  - An arrest that did not result in a conviction;
  - A criminal detention or disposition that did not result in a conviction;
  - A first conviction for: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
  - A misdemeanor conviction more than 5 years old; and
  - Sealed records and juvenile offenses.

What Should Employers Do?

The press release explains that the investigation is part of a "larger ongoing effort" by the AG's office to ensure that businesses are aware of, and in compliance with, the law. From this, employers must recognize that the AG is not only reacting to complaints filed but is also pursuing independent investigations into employer practices. While this investigation targeted primarily retailers and restaurants using paper applications, it is inevitable that future investigations will include business in different industries and businesses who utilize electronic applications.

Proactively audit your own recruiting and hiring practices so that your business isn't named in the next AG press release.

Some practical tips:

- Immediately review your paper and electronic applications. If you operate exclusively in MA, remove all language that relates to criminal history. If you operate in multiple states, you may elect to have multiple versions of your application or to include language specifically instructing MA applicants with regard to questions of criminal history.

- Provide a list of appropriate and inappropriate questions to all individuals who conduct interviews (whether for new hires or promotions/transfers). This list can address not only the avoidance of certain criminal history questions but also questions that can violate other laws such as non-discrimination or equal pay.

- Conduct training for all individuals who conduct interviews.

- Enact specific procedures related to the running of background checks – both CORI and non-CORI.

Need assistance creating or updating an application? Looking for a list of appropriate/inappropriate interview questions? Are managers/supervisors in need of training? Interested in drafting a CORI policy? We can help.

Are You Providing FMLA to Ineligible Employees?

I have many multi-state clients who like to provide the same benefits to all of their employees, across all locations. In some cases, this may mean providing FMLA to employees in a location with less than 50 employees within a 75 mile radius – employees who are not actually eligible for FMLA under the law.

As a reminder, to be eligible for FMLA the employee must have been employed with the employer for a year and worked at least 1250 hours within the last 12 months. The employee must also work at a job site with at least 50 employees within a 75 mile radius.

Recently, a client called to ask me whether she needed to provide FMLA to an employee who worked out of a 10 person office in another state. The Company included an FMLA policy in their handbook that was given to all employees, and had allowed another employee at that location to take FMLA for purposes of parental leave a year earlier. My advice to the client was to allow the employee to take FMLA, and treat him as though he was protected by all aspects of the law. We then got to work on updating the handbook language, and on drafting a memo notifying the employees in the small office of the company's change in policy related to FMLA going forward.

In the recent case of *Reid v. Centric Consulting, LLC,* a U.S. magistrate judge drives this point home, holding that an employee can bring a retaliation claim under the federal Family and Medical Leave Act even if the employer isn't covered by the statute.

The plaintiff in the case, took 17 weeks of medical leave after being put on a performance improvement plan. The employer labeled 12 weeks of the leave as FMLA leave, even though the company did not have 50 employees within 75 miles of the employee's job site.

Three months after returning from leave, the employee was (allegedly) fired for performance reasons. The employee brought an FMLA retaliation claim, claiming that because the Company told him his leave was covered by FMLA, they were equitably estopped from retaliating against him. U.S. Magistrate Judge Judith G. Dein held "there is no First Circuit precedent to limit the application of equitable estoppel to interference claims," and "there are strong policy reasons to hold otherwise." This decision is consistent with the 1st Circuit's precedent that equitable estoppel may be applied to FMLA interference claims.

By calling the leave FMLA, the employer is promising the employee that he/she will be given the protections of the FMLA, including protection against interference and retaliation.

To avoid an FMLA retaliation/interference claim, employers who are not covered by FMLA should consider the following tips:

1. Don't use the DOL's FMLA forms for leaves that are not FMLA. While these forms may work well for a disability leave or personal leave for an employee not covered by FMLA, by using the forms the employer is implying that FMLA is being administered.

2. Don't provide FMLA to employees who are not eligible. If you are interested in providing an FMLA-like leave to these employees, call it something else.

Sexual Harassment: A Problem Even Academics Haven't Solved

Here's a math problem for you: Harassment Policy + Harassment Training = _____

According to the EEOC and the National Academies of Sciences, Engineering and Medicine, the answer is: a workplace in which sexual harassment remains a prevalent issue.

Earlier this week, the National Academies of Sciences, Engineering and Medicine released a 311-page report that addresses sexual harassment in academic workforces. The report indicates that harassment starts when women are students, continues through their careers, and is prevalent because of five factors*. While certain factors are somewhat specific to academia, one applies to all employers in all industries: **a focus on technical legal compliance has not been effective in actually preventing harassment.** Said differently: Policy + Training != Compliance.

The EEOC gave us evidence of this equation earlier today, when it issued a **press release** explaining that it has filed seven harassment-based lawsuits against employers across the country. The lawsuits are against employers of varying sizes in a broad range of industries. In the press release, acting EEOC Chair Victoria Lipnic is quoted as saying: "There are many consequences that flow from **harassment not being addressed in our nation's workplaces.** These suits…are a reminder that…action by the EEOC is potentially one of those consequences."

At Foley & Foley we, of course, advocate that employers adopt sexual harassment policies and deliver training to all employees. We believe both are critical pieces that move an employer *toward* compliance. But, we echo the National Academies and EEOC's sentiment that organizations must do more than draft policies and deliver training to "create significant and sustainable change" in the workplace. The National Academies report provides 15 recommendations* for reducing sexual harassment. Many of the recommendations can be summarized by just one: **employers must move beyond technical compliance to address culture and climate.** How? We offer a few suggestions:

1. Build a diverse workforce and diverse leadership team.
2. Ensure leaders are modeling appropriate behavior.
3. Confront harassers & provide support for targets of harassment.
4. Improve transparency & support open communication.
5. Hold employees and managers accountable: in general, and specifically as related to reducing and preventing sexual harassment.

We help businesses tackle harassment-related issues every day. Please reach out if we can help you achieve meaningful compliance.

*To see the full list of factors and recommendations, download the **full report, here**.