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Family and Medical Leave Act: When Is Employer on Notice?

By now, almost every employer knows about—and hopefully complies with—the Family and Medical Leave Act, 29 U.S.C. §2601 (FMLA). The well-prepared employer will have a written and promulgated FMLA policy. That, however, is not enough: the FMLA places the burden on the employer to provide an employee with notice of his or her FMLA rights whenever the employer knows or should have known that the employee's circumstances may qualify for FMLA leave. Failure to give the proper notice and/or to designate an absence as FMLA-qualifying can result in large damage awards to the affected employee.

By **Jeffrey D. Pollack**

An employer's notice obligations for foreseeable events (e.g. an employee informs the employer that she will need surgery next month) are fairly straightforward. Oftentimes, however, the need for FMLA leave is unforeseeable and the employer must offer FMLA leave even if the employee does not request a leave but simply calls-in to inform the employer of his or her absence. This situation can arise when the employer already knows about the employee's (or family member's) serious health condition and such knowledge combined with the information conveyed to the employer about the instant absence, puts or should put the employer on notice that the circumstances may qualify for FMLA leave.

An employer that has notice of circumstances that may qualify for FMLA leave must provide notice to the employee as provided in 29 C.F.R. §825.300(d), which requires the employer to provide "designation notice," i.e. notice to the employee of whether the employer will designate the leave as FMLA leave. (A better practice is for the employer to also give the employee a copy of the FMLA policy.)

For the employer's obligation to be triggered the employee need only inform the employer of a medical condition that may qualify as a "serious health condition" of the employee or a member of the employee's family; the employee need not actually invoke the FMLA. Once the employee so informs the employer, the employer then has the burden to inquire further of the employee to determine if the leave is covered by the FMLA.[1]

An employer on notice of facts that may qualify for FMLA leave who fails to provide designation notice and/or disciplines an employee due to absences related to a known "serious health condition" of the employee (or the employee's family member) runs the risk of violating the FMLA. An adversely affected employee can bring claims of interference with FMLA rights as well as retaliation for exercising such rights. See generally *Nally v. New York State*, 2013 WL 2384252 (N.D.N.Y. May 30, 2013).

Notice from Employee

The requirements under 29 C.F.R. §825.303 provide in part:

> (a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances…. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room….
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> (b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply…. Depending on the situation, such information may include… the anticipated duration of the absence…. Calling in "sick" without providing more informa-

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tion will not be considered sufficient notice to trigger an employer's obligations under the act….

Employer on Notice

The following cases held that the employer was on notice of sufficient facts (or there were questions of fact) to determine that the circumstances may have qualified for FMLA leave.

In *Barnett v. Revere Smelting*, 67 F.Supp.2d 378 (S.D.N.Y. 1999), plaintiff, who worked in the defendant's refinery operations, informed his supervisor that he might have to miss work occasionally because of his heart condition. His condition was also known by the company nurse. Five or six months later, plaintiff called defendant's security guard to report that he was having chest pains and would not be in that day. The next day he still did not feel well, so he called again. The following day he returned to work, but the company terminated him.

The court denied the employer's motion for summary judgment because it found a question of fact "as to whether [Vincent] Barnett's prior conversations about his condition…, coupled with his phone call to Revere's security guard…, should have given Revere reason to conclude that his absence was due to his "serious health condition" under the FMLA. Id. at 387.

In *Jennings v. Parade Publications,* 2003 WL 22241511 (S.D.N.Y. Sept. 30, 2003), plaintiff, a personal assistant in the company's human resources department, requested FMLA leave to care for her son who had attention deficit hyperactivity disorder. The company, believing ADHD was not covered by the FMLA, denied the request. Approximately two weeks later, plaintiff requested a modified work schedule in order to take her son to school, but did not mention his ADHD during that request. When the company rejected her request for a modified schedule, plaintiff refused to continue working her set schedule and was terminated.

The court denied the employer's motion for summary judgment because the information imparted to the employer when plaintiff requested FMLA leave "was surely still possessed by" defendant two weeks later when she requested a modified schedule. Id. at *4.

> An employer that has notice of circumstances that may qualify for FMLA leave must provide "designation notice," of whether the employer will designate the leave as FMLA leave.

In *Avila-Blum v. Casa De Cambia Delgado*, 519 F.Supp.2d 423 (S.D.N.Y. 2007), plaintiff, an executive assistant in defendants' travel agency, was diagnosed with hyperthyroidism in September. She requested and was granted a day off in October to visit her doctor, but alleged that the next day her boss yelled at her for missing work. Plaintiff took off Nov. 26 and 28, calling in sick both days. According to plaintiff, she was not permitted to work on Nov. 29 or 30 and was terminated on Dec. 1. Defendant contended that she was never fired, but simply stopped coming to work. The court held there were questions of fact as to whether "her calling in sick on both days combined with her communications with defendants over the several months prior to her absence sufficiently put them on notice as to the reason for her need to miss work." Id. at 427-28.

Employer Not on Notice

The following cases held that the employer was not on notice of sufficient facts to determine that the circumstances may have qualified for FMLA leave.

In *Johnson v. Primerica*, 1996 WL 34148 (S.D.N.Y. Jan. 30, 1996), plaintiff, a computer programmer at Smith Barney, did not report for work or call on Thursday, Friday, or Monday. He worked Tuesday and Wednesday, but was a no-call/no-show again on Thursday. He worked Friday, but he called in several days the next week to say he would be out because of back problems and was a no-call/no-show for two days. He was fired the next week.

The court rejected the argument that an employer's general knowledge of an employee's (or family member's) medical condition (here, his son's asthma) can trigger the employer's FMLA notice obligations.

> Johnson argues that… it was generally known that his son suffered from asthma [and] that, in view of Smith Barney's prior knowledge of his son's illness, his supervisors were obligated to inquire as to whether his leave request was qualified under the FMLA….
>
> Nothing in the FMLA, or the governing regulations, however, suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events.

Id. at *5-6. The court noted, however, that "[a]rguably, Smith Barney would have been obligated to inquire further…if Johnson had called in daily to report that his son was ill." Id. at *7.[2]

In *Brown v. The Pension Boards*, 488 F.Supp.2d 395, 408 (S.D.N.Y. 2007), plaintiff Ricardo Brown, the controller of defendant's administrative services company, called-out on Jan. 27 and 28. On Jan. 29, the employer received a doctor's note saying that plaintiff would not be returning to work until Feb. 9, but the note did not specify the nature of his illness. Plaintiff did not return to work on Feb. 9. On Feb. 10, defendant spoke to plaintiff's sister who

said that plaintiff was "sick," but she did not say that plaintiff needed additional time off. That same day, the employer decided to terminate plaintiff for two days since he was both no-call and no-show.

The court granted defendant summary judgment, holding that, "[m]erely calling in sick, as Brown did on Jan. 27-30, is insufficient to put a company on notice that an employee is requesting leave that may be eligible under the FMLA." Id. at 409.

> Brown argues that…[the employer's] conversations with his sister and mother constituted FMLA notice…. in light of the fact that Boards was already appraised of Brown's "chronic illness." However, an employer is not required to be clairvoyant. Here, there was no way—other than temporal proximity—for the Boards to connect Brown's undefined chronic illness with Brown's relatives' statements that he was "sick" and in "a breakdown condition." Furthermore,…. despite being in daily phone contact with his mother, Brown did not contact Boards until Feb. 11, after his termination for failure to abide by Boards' call-in policy. There is nothing in the record to suggest that Brown was unable to contact Boards himself; indeed, the record indicates that Brown was in fact able to do so.

Id. at 409.

The court reached the same conclusion in *Slaughter v. American Bldg.*, supra, where plaintiff, a building porter, called in on Aug. 19 saying he was "calling-in sick" but did not give any further explanation. He was absent from Aug. 19 through Aug. 24.

> ABM's general awareness of [Ellis] Slaughter's back troubles would not relieve Slaughter of the obligation to inform ABM that he was taking leave because of his back.…[N]othing in the FMLA, or the governing regulations…suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events.…
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> * * *
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> It would neither be reasonable nor consistent with the FMLA's notice requirements to impose a burden upon ABM to inquire affirmatively for every absence thereafter whether Slaughter was, in fact, seeking leave because of his back.

Id. at 327-29.

In a 2013 decision, *Nally v. New York State*, 2013 WL 2384252 (N.D.N.Y. May 30, 2013), due to an undescribed "medical emergency" involving her husband, plaintiff called in sick Feb. 18, 19, and 20. Plaintiff worked as an agency program aide in the State Division of Parole. Plaintiff's manager told plaintiff to take as much time as she needed. Several days later, plaintiff and defendant had a series of communications about the FMLA, during which defendant provided plaintiff with its FMLA policy and forms.

Over the course of the next few months, defendant granted plaintiff several leaves, again provided her with FMLA forms, and also approved her request to reduce her work schedule. Nevertheless, because plaintiff never informed defendant about the nature of her husband's illness, the court held that plaintiff failed to provide enough information to put defendant on notice that he suffered from a "serious health condition." Id. at *12.

In 'Jennings,' the court denied the employer's motion for summary judgment because the information imparted to the employer when plaintiff requested FMLA leave "was surely still possessed by" defendant two weeks later when she requested a modified schedule.

Conclusion

Employers must be hyper-vigilant any time an employee calls-out of work for a medical condition that is even arguably related to a serious health condition of which the employer is already aware.

1. A "qualifying reason for [FMLA] leave" is: the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee's spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty"; or to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin. See generally 29 U.S.C. §2612.

2. The Barnett court distinguished *Barnett* from *Johnson*.

> In *Johnson* the employer's prior knowledge was based on a few vague statements referring to his son's "sickness" or "illness" that were remote in time from the plaintiff's request for leave.…[Here], Barnett testified that he made several references to specific symptoms—chest pains and labored breathing—during the weeks immediately leading up…, and that he described those same symptoms in his message to Revere's security guard.…
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> 67 F.Supp.2d at 388, n.3.