FMLA Reminders

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Two recent developments serve as good reminders and clarifications for school districts regarding the Federal Family Medical Leave Act (FMLA). The first is a new Fact Sheet and Frequently Asked Questions published by the Department of Labor (DOL). The second is a Seventh Circuit Court of Appeals decision discussing "interference" with employee rights under the FMLA. While neither the new guidance nor the court case involves "new" law, they are good reminders for school districts.

Mental Health Conditions And The FMLA

As many employers are aware, there seems to be an uptick in the number of employees who are seeking time off for mental health conditions. It also seems that COVID-19 has exacerbated or potentially caused mental health issues in some employees. Another factor might be that we are just becoming more aware of these issues as a society.

Under the FMLA, employees may take unpaid time off work for their own serious health condition or to take care of a spouse, child, or parent because of a serious health condition. A serious health condition can include a mental health condition. Generally speaking, both mental and physical health conditions are considered serious health conditions under the FMLA if they require (1) in-patient care; or (2) continuing treatment by healthcare provider.

The DOL issued Fact Sheet 28-0 and a series of Frequently Asked Questions (FAQs) which give examples of when an individual's mental health conditions or a family member's mental health conditions might be covered under the FMLA.

Public agencies, including a public or private elementary or secondary schools, are FMLA-covered employers regardless of the number of employees they employ. Eligible employees still need to have worked for a covered employer for at least 12

months and have at least 1,250 hours of service for the employer during the 12 months before the leave and work at a work location where the employer has at least 50 employees within 75 miles. Note that Wisconsin has its own state FMLA law with different qualification requirements. This article will only focus on the federal FMLA law.

The Fact Sheet makes it clear that leave for an employee's own mental health condition, leave to care for a family member with a mental health condition, or a leave to care for an adult child with a mental health condition are all covered under the FMLA.

The DOL notes that some mental health conditions may satisfy both the definition of a disability under the Americans With Disabilities Act (ADA) and the definition of a serious health condition under the FMLA even though the statutory tests are different. Under the ADA, a disability is a mental or physical impairment that substantially limits one or more of the major life activities of an individual. The FMLA relies on the EEOC's regulations under the ADA to determine if a life activity is substantially limited and the EEOC has held that conditions that should easily be concluded to be substantially limiting include "major depression disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia." Conditions that may only be active periodically are considered disabilities if the condition would substantially limit a major life activity when active.

The FAQs provide a number of examples of different circumstances in which mental health issues may arise in a workplace and an employer's obligations thereunder. [Click Here For Fact Sheet https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs28O.pdf and here for FAQs https://www.dol.gov/agencies/w...]. Mental health issues can be trickier to navigate than physical health conditions because they are usually not as easy to see as a physical condition and sometimes are harder to diagnose. The DOL's new guidance is an effort to bring these issues to the forefront of employers' minds and provide some pointers on how to proceed.

FMLA Interference

In *Ziccarelli v. Dart*, the Seventh Circuit Court of Appeals (the federal appellate court with jurisdiction over Wisconsin) reminded employers that they may be liable for interference with employee rights under the FMLA even if they do not actually deny a request for leave.

While the facts in this case are in serious dispute and the Seventh Circuit ultimately sent the case back to the lower court to resolve these factual disputes (most likely in a jury trial), the court did provide some useful reminders to employers about how they could be held to have interfered with employees' rights under the FMLA.

Ziccarelli worked as a correctional officer. From 2007 to 2016, he used between 10 and 169 hours of FMLA each year, and then 304 of his 480 hours in 2016 because of treatment for work-related post-traumatic stress disorder. According to Ziccarelli, he called the FMLA benefits manager to ask for more leave to undergo a new eight-week PTSD treatment program. He alleges that the FMLA benefits manager told him that he had already taken a lot of leave and that if he took anymore FMLA leave that he would be disciplined.

The court held, relying solely on the facts as claimed by Ziccarelli, that FMLA interference could have occurred. The court noted that the FMLA makes it unlawful for an employer to "interfere with, restrain, or deny" an eligible employee's exercise or attempt to exercise FMLA rights. The court noted that an employer can interfere with or restrain rights under the FMLA without explicitly denying a leave request. For example, an employer that implements a burdensome approval process or discourages employees from requesting FMLA leave could interfere with and restrain access to FMLA leave without actually denying any leave request because few requests requiring a formal decision would ever be made. Likewise, the court noted that if an employee sought medical leave information intending to exercise their FMLA rights and if the employer did not provide basic FMLA information or overly discouraged FMLA use before the employee actually requested leave, that could also amount to interference with an employee's "attempt to exercise" their rights.

The court also noted that the DOL's FMLA regulations specifically state that an employer violates the FMLA by not only refusing to authorize FMLA leave, but "discouraging an employee from using such leave."

While FMLA leave can be frustrating to implement and monitor, especially intermittent leave, this case is a reminder to school districts that they need to communicate carefully with their employees about any FMLA requests or FMLA related inquiries. School districts should also train managers, supervisors, and anyone else who has a role in the FMLA process to prevent interference with an employee's right to seek time off under the statute.

School districts may also wish to review their FMLA policies to ensure the policies do not use language that might be viewed as discouraging or interfering with the use of protected FMLA leave. School districts with questions about FMLA rights or usage can reach out to a member of Boardman Clark's School Law Practice Group Team.

of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.

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