

Legislative Update

October 2014

An Examination of Recent FMLA Rulings Regarding Notice

This update provides additional information regarding the recent Sixth Circuit decision *Wallace v. FedEx Corp.* and the Third Circuit decision in *Lupyan v. Corinthian Colleges, Inc.* Both cases provide clarification regarding notice requirements under the FMLA.

Additional information will be forthcoming related to any required change in Matrix's process, practice, written or verbal employee communications as a result of these decisions.

Wallace v. FedEx Corp., Nos. 11-5500/5577(6th Cir. Aug. 22, 2014)

Wallace worked various jobs at FedEx for 21 years, and was employed as a paralegal in 2007. She developed health problems and was subsequently provided leave under the FMLA. She was initially taking less than 12 weeks of FMLA leave. Company representatives verbally requested that she complete a medical certification form as part of her FMLA paperwork. The company did not advise her of any consequences or potential adverse employment actions as a result of non-completion of the medical certification form. The employee did not return the form in a timely manner, and the company terminated her employment when the medical certification form was two days past due. The employee filed suit, alleging FMLA violations.

A magistrate judge dismissed the employee's request for liquidated damages and front pay, but a jury awarded the employee back pay and liability damages in the amount of \$173,000. The magistrate judge reduced the jury award to \$90,788. Both sides filed appeals, the employee requesting reinstatement of the jury demand, as well as an appeal of the magistrate's dismissal of liquidated damages and front pay. FedEx appealed the decision for several reasons, most pertaining to the belief that the company should have been granted judgment as a matter of law.

The Sixth Circuit Court of Appeals reversed the lower court's decision to reduce the jury award, ordering the magistrate judge to enter judgment in favor of the employee in the amount of \$173,000. The Court also affirmed the denial of the FedEx's argument granting judgment as a matter of law.

In reviewing the legal framework of the FMLA, the Court looked to 29 U.S.C. §2615 (a)(1), it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." To prove an interference claim, the employee must prove: (1) the employee was eligible, (2) the defendant was an employer as defined by the FMLA, (3) the employee was entitled to leave under the FMLA, (4) the employee provided the employer notice of an intention to take leave, and (5) the employer denied or interfered with the employee's FMLA benefits to which he or she was

entitled. If an employee can successfully demonstrate these elements, the employer is liable for damages and other appropriate equitable relief.

Based upon this legal framework, FedEx argued, among other things, that no reasonable juror could conclude that the employee provided notice of an intention to take leave. This was premised upon the fact that the employee did not return the medical certification form.

The Court reviewed the FMLA notice requirements. It is clear that the employee must provide notice and a qualifying reason, and that such notice must be provided as soon as practicable. However, the employee does not have to expressly assert or proclaim FMLA rights specifically, but may simply advise the employer that leave is needed. The *employer* is then initially expected to obtain any additional information through informal means. This might require the employer to determine whether the leave is an FMLA qualifying event, as well as the timing and duration of the leave.

In *Wallace*, FedEx argued that the failure to return the medical certification form provided the opposite of an intention to take leave. The Court was unpersuaded, and stated, “FedEx largely misses the point of this notice element...the relevant question is whether Wallace provided FedEx with notice that she needed FMLA leave, not whether she provided written notice that she needed a certain amount of leave.”

Factually, the Court determined that FedEx clearly had notice of the employee’s need for FMLA leave as the issue was discussed with in-house counsel and the employer had provided the employee with FMLA paperwork.

The Court was also critical of the employer for failing to provide adequate notice of any negative consequences for failing to return the medical certification form. Citing 29 C.F.R. § 825.305 (d), “in order to impose [sanctions], at the time the employer requests certification, the employer must also advise the employee of the anticipated consequences of an employee’s failure to provide adequate certification.”

The Court noted that dismissal might be appropriate in a situation in which the employee would have been dismissed for facts or circumstances other than FMLA matters, but the Court clearly indicated that the leave at issue in this particular case was directly related to FMLA leave.

Employers would be wise to review the decision to make sure that there is procedural compliance with respect to the notice provision of the FMLA. Specifically, expressly advising the employee of any possible negative consequences is an essential component of any policy. The reality is that courts often deem employers to be sophisticated parties, while employees are sometimes afforded greater latitude in the complying with notice requirements. A review of this case provides at least a modicum of guidance to employers in matters related to notice requirements.

The case itself can be viewed at: <http://www.ca6.uscourts.gov/opinions.pdf/14a0202p-06.pdf>

IMPACT TO YOUR PROGRAM WITH MATRIX: Matrix is updating all eligibility, denial and day 10 letters with the following phrase:

Any time off that is not approved may be applied to [CLIENT]’s attendance policy and may result in disciplinary action up to and including termination.

Lupyan v. Corinthian Colleges, Inc., No. 13-1843 (3rd Cir. August 14, 2014)

In *Lupyan*, the employee initially requested personal leave for a medical condition, which was later changed to short-term disability leave as provided under the FMLA. At the direction of a supervisor, she changed her leave request form to indicate “Family Medical Leave,” rather than “personal leave.” Aside from changing the form, there was no discussion at the meeting regarding the FMLA or the employee’s rights under the FMLA. Although the employer failed to provide the employee with a notice of FMLA rights at the meeting, later in the day the company mailed a notice to the employee informing her that she was on FMLA leave, as well as information regarding her legal rights under the Act.

The employee was subsequently terminated. Upon attempting to return to work, the employee denied ever receiving the FMLA notice letter, and also denied having any knowledge that she was on FMLA leave. One basis for the termination was that the employee failed to return after the exhaustion of FMLA leave. The employee brought suit against the employer claiming a failure to provide notice and interference with FMLA rights.

The employer was granted summary judgment by the trial court, utilizing the Mailbox Rule. The traditional rule provides a presumption of receipt if it can be proved that the letter was mailed. The employer provided affidavits indicating that the letter had been mailed. On appeal, the Third Circuit Appellate Court determined that the Mailbox Rule does not provide conclusive proof, but only a rebuttable inference.

Consequently, the court determined that a letter mailed by regular mail, with no certified receipt, tracking number or signature, as well as a denial of receipt by the employee, creates a rebuttable presumption.

This ruling clarifies that employers should be able to prove traceability of any form of FMLA notice. Employers in all jurisdictions may be wise to make sure that any form of mailed communication is conducted utilizing certified mail or electronic receipt e-mail confirmation; as such forms of verification were mentioned by the Court.

This case clearly demonstrates that regular mailings and affidavits may not be enough to verify compliance with FMLA notice requirements. This decision indicates that employers must develop procedures and protocols in which they can objectively document and prove that an employee was made aware of his or her rights under the FMLA. This case did not eviscerate the mailbox rule, but it certainly diminished the employer’s ability to rely upon it in proving legal compliance.

This case can be found at: <http://www2.ca3.uscourts.gov/opinarch/131843p.pdf>

IMPACT TO YOUR PROGRAM WITH MATRIX: In contrast to the leaves at the root of this ruling where there was no contact between employee and employer for an extended period of time, Matrix remains in contact with employees throughout their leave.

We offer three means of communication delivery to each employee verified with the employee at intake – online accounts, email and US Mail. In addition we engage both automated phone messages as well as personal phone calls to the employees providing updates as to documentation received and not received, as well as status updates, and we reach out to offer customer service, ensuring the employee’s leave is managed efficiently, appropriately, and the employee’s needs are met from a leave perspective. Thus, Matrix has determined that additional mail options are not necessary.

What You Need to Do:

Reliance Standard and Matrix are committed to keeping our clients informed and in compliance. We will provide updates on meaningful changes - and how they may affect our clients – as necessary. In the interim, for more information on how to manage productivity in the face of this and other employee leave legislation, contact your sales representative or account manager.

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