PUBLICATION

Employer Requiring Doctor's Note for Intermittent Leave Violated FMLA

March 13, 2014

The United States District Court for the District of Oregon recently held that an employer's requirement that employees on intermittent leave provide a doctor's note for each absence violated the Family and Medical Leave Act (FMLA). In *Oak Harbor Freight Lines, Inc. v. Antti* (D. Or. Feb. 19, 2014), the court explained that such a requirement was tantamount to requesting medical certification for each absence.

The FMLA allows eligible employees with serious health conditions to take intermittent leave related to their medical condition. An employer may require a medical certification from a doctor, which must be deemed sufficient if it includes the dates of expected treatment, the medical necessity of intermittent leave, and the expected duration of the intermittent leave.

If the employer disagrees with the initial medical certification, a statutory process authorizes the employer to request second and third opinions and to require its employee to obtain a subsequent recertification on a reasonable basis. A reasonable basis for recertification is no more often than every 30 days and only in connection with an absence by the employee, unless an exception applies. An employer may request certification in less than 30 days when circumstances change or when the employer doubts the continuing validity of the certification.

In this case, to curb FMLA leave abuse, Oak Harbor Freight Lines, Inc. instituted a uniform policy requiring an employee taking intermittent leave to submit a doctor's note for each absence. The employee was not required to actually see a doctor; rather, the employee only needed to ask the doctor's office to provide a brief note confirming the reason for the absence.

Oak Harbor brought suit against two employees who took intermittent leave, seeking declaratory judgments that its policy did not violate the FMLA. Over a six-year period, employee Robert Argyle's intermittent leave fell adjacent to a holiday or weekend almost 89 percent of the time. Likewise, employee Chad Antti's leave coincided with a holiday or weekend 94% of the time. The employees counterclaimed alleging disability discrimination, and the cases were consolidated in this opinion.

The court concluded that the suspected abuse was no excuse for Oak Harbor's policy. The court emphasized that the FMLA provides a fairly rigid process to document an employee's medical condition, which suggests Congress intended to explicitly control the means by which an employer may obtain information from an employee's doctor. Further, the court noted that regulations from the Department of Labor "suggest by implication that information from a doctor must come only in the guise of a medical certification."

Although Oak Harbor argued its note policy was simply a means of independently confirming the reason an employee had given for the absence, the court concluded Oak Harbor was essentially asking for a medical opinion establishing the "medical necessity" for the absence – the very thing certification is intended to do. Oak Harbor was effectively treating each absence as a separate period of FMLA leave and requiring its employees to reestablish eligibility for each absence. Oak Harbor's policy directly conflicted with the FMLA's explicit recertification procedure designed to prevent abuse.

These consolidated cases presented an issue of first impression in the Ninth Circuit, and other jurisdictions may follow suit. This opinion serves as a good reminder that employers suspecting leave abuse should exercise their rights to recertification only as explicitly allowed by the FMLA.