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Employment Law Outlook

Spring 2019

Employees and Employers May Not "Opt Out" of FMLA Leave

David A. Kushner

The Family and Medical Leave Act (FMLA) applies to employers with more than 50 employees. It provides eligible employees with up to 12 weeks of unpaid leave for certain qualifying reasons. Since 1993, the FMLA has served as an important source of job-protected leave that is available for employee or family member serious health conditions, pregnancy-related medical appointments or complications, and bonding time with newborns.

In addition to required compliance with the FMLA, employers are increasingly providing generous paid leave benefits for employee or family member illness, short-term disability, and/or maternity/paternity leave. We often receive one of the following questions from clients, and especially those with generous paid leave policies:

1. What do we do when an employee says he/she does not want the FMLA to apply to their leave?

2. Do we have to require employees to use FMLA leave during maternity/paternity leave (or some other form of leave) or can we let them save their FMLA for an emergency?

A recent Opinion Letter from the United States Department of Labor (DOL) addresses this question directly. According to the Opinion Letter, employers *must* designate employees' FMLA eligible absences as FMLA covered (and count the absence against the 12-week entitlement) even if the employee does not want to use FMLA time. In other words, employees do not have the right to decline FMLA leave when they are out for an FMLA-qualifying reason. Similarly, employers may not generously offer to allow an employee to save his or her FMLA time for a rainy day. According to the DOL, as soon as the employer knows or should know that the time is FMLA covered, the time must be counted against the employee's FMLA entitlement.

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DOL Issues Proposed Overtime Rules for White Collar Exemptions

William M. Furr

On March 7, 2019, the U.S. Department of Labor issued proposed revisions to the regulations governing white collar exemptions under the Fair Labor Standards Act (FLSA). The most significant change is the increase of the salary threshold to qualify for a white collar exemption from $455 per week to $679 per week (i.e., from $23,660 per year to $35,308 per year).

Currently, exempt employees under the FLSA's white collar exemptions must be paid at least a salary of $23,660. If the DOL's proposed regulations are approved, employers will need to pay exempt employees at least $35,308 per year in order to qualify for the exemption.

In 2016, the Obama administration issued regulations raising the salary threshold for the white collar exemptions to $47,476 per year. A federal judge held the DOL's regulations to be invalid and blocked the implementation of the new rules. In the proposed regulations issued by

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David advises businesses in all aspects of the employment relationship, including: employment litigation avoidance, overtime litigation, FMLA and ADA litigation, civil rights litigation, trade secret and non-compete litigation, employment policies and documentation, and employment agreements.

He is recognized as a "Legal Elite Labor and Employment Lawyer" by *Virginia Business*, a "Future Star" by *Benchmark Litigation*, and a "Rising Star" by *Virginia Super Lawyers.*

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IS YOUR INSURANCE POLICY COVERING NEGLIGENT ACTIONS IN ADMINISTERING YOUR BENEFIT PLAN?

Cher E. Wynkoop

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In *Erickson-Hall Construction Co. v. Scottsdale Ins. Co.*, the court decided that the employer was not covered under its two business insurance policies for losses incurred paying claims to employees or their beneficiaries under lapsed life and long-term disability insurance policies.

The company's Controller was tasked with enrolling employees, deducting from their paychecks monies to pay premiums for supplemental coverage elected by employees, paying premiums for employer's provided coverage, receiving and processing premium invoices from third-party insurance companies, and responding to late payment notifications. The Controller failed to pay premiums and did not notify anyone when the coverage lapsed. Three employees suffered injuries and death that would have been covered under the insurance policies offered by the employer. The company settled the claims for $200,000 and then filed claims for reimbursement under two business insurance policies.

The insurers asserted, and the court agreed, that the failure to pay premiums was not a covered event under the policies. Both policies covered losses arising from negligent acts or omissions or fiduciary breach associated with administration of the employer's benefit plans. The employer argued that the Controller's mishandling of records, premium payments, and renewal notices, and his communication failures, constituted negligent acts or fiduciary breaches associated with plan administration and thus fell within the policies' coverage terms.

The court examined key policy definitions, including "employee benefits injury" and "wrongful act" and concluded that the employer's claim did not fall within these terms. The court decided that the employer's obligation to pay benefits was based on its contractual obligations under the insurance policies and not because of any negligent acts or breaches of fiduciary duty by the Controller.

The court found that it would not be reasonable for an insured to expect that an insurance policy providing coverage for negligence or breaches of fiduciary duties would cover a claim that the insured "forgot to pay its bills."

Employers should carefully review their fiduciary liability and errors and omissions insurance policies to understand the type of coverage and limits. Modern fiduciary liability insurance policies provide coverage for breach of fiduciary duty, negligence in the administration of the plan, voluntary compliance programs, and regulatory penalties. The coverage for voluntary compliance programs and regulatory penalties are relatively new offerings and employers should consult with ERISA counsel to understand the risks associated with their benefits plans in order to ensure appropriate sublimits coverage.■

EMPLOYEES AND EMPLOYERS MAY NOT "OPT OUT" OF FMLA LEAVE

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The DOL's Opinion Letter adds some clarity to a question on which courts have provided inconsistent answers. For example, in 2014 the Ninth Circuit Court of Appeals (with jurisdiction over California, Washington and a number of other western states) issued a much-criticized opinion suggesting that an employee had the right to decline the FMLA's protections. Most employment lawyers agreed that the case was wrongly decided, and have counseled their clients to accept the risk of ignoring the opinion, at least in states (such as Virginia) outside of the Ninth Circuit's jurisdiction. Thus, while not necessarily controlling (especially in the Ninth Circuit), the DOL's recent opinion adds welcome clarity to this issue.

We recommend that our FMLA-covered clients, and especially those outside the Ninth Circuit, follow these guidelines:

- Train your supervisors to know what leave is eligible for the FMLA's protections. Remember that employees need not use magic words or specifically request FMLA leave to trigger employer duties.
- As soon as you know or should know that past or future employee leave is potentially FMLA qualifying, provide the employee with the required FMLA eligibility notice.
- Assuming the employee is eligible, and assuming the leave is for a serious health condition or military exigency, require the employee to return a completed certification form.
- If the leave is clearly FMLA covered, provide the employee with notice designating the leave as FMLA covered.
- Make sure you are tracking use of leave for the same reason, and counting this against the employee's total FMLA entitlement.

Examples of the eligibility notice form, designation notice form, and certification forms can be found on the DOL website at https://www.dol.gov/whd/fmla/forms.htm.■

NLRB and Post-Boeing Advice Memos

Cameron A. Bonney

The National Labor Relations Board (NLRB) recently refocused its attention on employer's use of employee handbooks and work policies to dictate what information employees may and may not publicize about their company. Currently, the well-known *Boeing* test provides the standard to evaluate the validity of all work rules in light of employees' Section 7 right to engage in protected concerted activity. The *Boeing* standard looks to "(i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule" when evaluating a handbook provision or employment policy that appears facially neutral.

The first step in the *Boeing* analysis is to determine the appropriate category for the rule. Category 1 rules are those that do not prohibit or interfere with an employee's statutory right or when any slight or minor interference is clearly outweighed by the business justification for the rule. Category 1 policies are lawful. On the opposite end of the spectrum are Category 3 rules, which are facially invalid. Category 3 rules are those which, on their face, prohibit or limit statutory rights of the employees, and the impact on the employee's rights outweigh any business justification associated with the rule. Finally, Category 2 rules are those that are neither "obviously" lawful nor unlawful. These rules require a case-by-case analysis of the potential impact on an employee's statutory rights and the legitimate business justifications articulated by the employer.

In March 2019, the NLRB released two advice memoranda to give employers a better understanding of these categories and how to evaluate work policies. While advice memoranda are not binding guidance for employers, they do provide insight on how the NLRB or a court might handle certain questions. The NLRB appears to be focusing additional attention on employer policies, especially media publication policies, with the release of these two advice memoranda which were decided on November 12, 2018 and July 31, 2018, but both just released on March 14, 2019.

Of broad application, employers should note that the *Nuance Transcription Services, Inc.* Memorandum addressed rules requiring employees to keep confidential their employee handbook and an addendum policy regarding payroll information. The NLRB found that those rules were improper and interfered with an employee's Section 7 rights. The Memorandum stated that these rules requiring the confidentiality of the employee handbook likely fell into Category 3 and were facially invalid, but even if they were Category 2 rules, the employer did not present any sufficient business justification to outweigh the interference with the employee's rights. In drafting employment policies and rules, employers should keep in mind the ruling in *Nuance*, and the unlawful nature of rules requiring employees to keep confidential their employer's policies.

The *ADT, LLC* Advice Memorandum also discussed the appropriateness of work policies, including a dress code policy, a personal cell phone use policy, a confidential information policy, and a media-relations rule. The employer's media-relations rule stated that "all information provided to media, financial analysts, investors or any other person outside the [Employer] may be provided only by [Employer] designated spokespersons or [Employer] officers." The Board found this rule to be a Category 1 lawful rule because this rule makes clear that it is only limiting who may speak on the employer's behalf regarding official company positions. The rule does not limit an employee's personal media usage and therefore does not impact their Section 7 rights. This is helpful guidance for employers who want to include similar rules.

A third advice memorandum was also released on March 14, 2019 which sheds light on the NLRB's stance on employment policies. While not a *Boeing* standard matter because there was no policy on point, the decision in *North West Rural Cooperative* provides guidance on to the NLRB's view of social media policies. In that matter, the employee, a lineman, posted on a Facebook page specifically for lineman expressing concerns about workplace safety and started a discussion on solutions to his concerns. His employer terminated him for these actions citing a "bad attitude" for airing his "harsh feelings." The Board determined that the employee's actions of posting about safety concerns on a social media site met the definition of protected concerted activity as his actions were (1) aimed at mutual aid or protection and (2) concerted. Discussions of health and safety are considered to be "inherently concerted." This Advice Memorandum provides guidance for employers with social media policies, as any such policies must be tailored narrowly in order to not infringe on employees' Section 7 rights.

The NLRB's release of these three Advice Memoranda demonstrates a continued focus by the Board on employer policies. Employers should ensure that they fully consider a policy's impact on an employee's Section 7 rights when drafting an employee handbook and other work policies.■

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the Trump administration on March 7, 2019, the salary threshold is raised, but not as high as the threshold proposed by the previous administration.

The thresholds under the proposed rule will not be automatically adjusted each year. Rather, the proposed rule states that the DOL intends to review the thresholds every four years or so.

The DOL's proposed regulations do not alter the duties test for meeting the threshold for the white collar exemptions. The proposed regulations allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary threshold. Previously, employers were not allowed to use such nondiscretionary bonuses and incentive payments to meet the salary thresholds.

The DOL is currently inviting the public to comment on its proposed regulations. Once the commentary period has ended, the DOL will issue a Final Rule which will govern employers. Stay tuned for further developments.■

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