Management Update
April 2009

Negative Certification" Dooms FMLA Claim

In a case handled by Ford & Harrison attorneys, a federal court in Florida recently held that an employee's submission of "negative certification" indicating that she could, in fact, work, doomed her Family and Medical Leave Act (FMLA) claim. *See Allen v. Progress Energy, Inc.* (M.D. Fla. 2009).

In this case, Allen missed numerous days of work for a variety of reasons and ultimately used all of her sick time and paid vacation. Subsequently, the employer learned that she was pregnant. Allen missed several more days of work and claimed she was unable to work due to morning sickness and dehydration from vomiting.

Allen applied for short-term disability through Liberty Mutual, the employer's third party disability provider, but it denied her claim because the medical forms she submitted indicated that she could, in fact, work. Liberty informed Allen of its denial of her claim and the reason for that denial.

Subsequently, Allen told the employer's human resources department that she believed her absences were covered by the FMLA. The company e-mailed Allen FMLA forms and told her to complete and return them. Allen did not submit the forms. She did, however, ask Liberty to send to the employer the medical documentation she had submitted in support of her request for short-term disability benefits. Liberty did so; however, none of the forms it sent the employer indicated that Allen was unable to work. Liberty sent the employer three forms signed by Allen's doctor, each of which answered "yes" to the question of whether the patient "can return to work full-time now within the restrictions listed above."

After receiving the forms from Liberty, the employer discharged Allen. Allen then sued the employer, claiming her discharge violated the FMLA. In granting summary judgment in favor of the employer, the court held that where an employee claims to be incapacitated but submits medical documentation indicating that the employee *can* work, the employer may rely on the doctor's "negative certification" in denying leave. The court noted that this is not a case in which Allen claimed she was not aware of the need to submit medical documentation. Instead, Allen submitted documentation, although it was not in the form the employer requested, and this documentation indicated she could work. Accordingly, her discharge did not violate the FMLA.

If you have questions regarding the FMLA or would like more information regarding this decision, please contact the attorneys who represented Progress Energy, Dawn Siler-Nixon, dsiler-nixon@fordharrison.com, 813-261-4834 or Bridget Escobar, bescobar@fordharrison.com, 813-261-7852.

Court Rejects FMLA Claim By Employee Fired For Refusing To Sign Performance Improvement Plan

The Seventh Circuit recently held that an employer did not violate the Family Medical Leave Act (FMLA) when it discharged an employee who refused to sign a Performance Improvement Plan, even though the discharge occurred less than two months after the employee took FMLA leave. *See Cole v. Illinois* (7th Cir. April 7, 2009).

In this case, the plaintiff, Cole, took FMLA leave after she was in a car accident. Cole had performance problems before she went on leave, which continued after she returned to work. After she returned from leave, her supervisors developed a Performance Improvement Plan (PIP) that identified three areas in which she needed to improve: attendance, attitude, and job performance. Under attendance, the PIP stated that Cole needed to more effectively communicate to her superiors the exact days and times she would be out of the office. To this end, the PIP suggested Cole write out her schedule on a daily and weekly basis, give her supervisors a copy of the schedule, and notify them of any deviations from the schedule. The PIP also stated that Cole needed to plan her day and become more organized with her work.

Cole's supervisors told her she would be fired if she did not sign the PIP. Nevertheless, she refused to sign it and was discharged. Subsequently, Cole sued her employer in federal court claiming her discharge violated the FMLA.

The trial court ruled in favor of the employer and the Seventh Circuit affirmed this decision. Noting that Cole was told twice that she would be discharged if she didn't sign the PIP, the court found no evidence that her termination was motivated by anything other than her refusal to do so. The court further held that even though Cole was fired within two months of taking FMLA leave, "suspicious timing alone rarely is sufficient to create a triable issue."

Additionally, the court held that requiring Cole to sign the PIP was not an adverse action; thus, she was not subjected to retaliation when she was asked to sign it. Relying on the U.S. Supreme Court's decision in *Burlington N & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), the Seventh Circuit held that the adoption of the PIP did not constitute an adverse action that would cause a reasonable employee to forego exercising her rights under the FMLA. The court noted that the most onerous aspect of the PIP was the requirement that Cole submit daily and weekly schedules to her supervisors. "Although the task of preparing daily plans would necessitate some extra work, this requirement is not so oppressive that a reasonable employee would be discouraged from taking FMLA leave."

The court further noted that signing the PIP would not make Cole ineligible for job benefits. Rather, "the context for the plan was an attempt to secure Cole's FMLA benefits while ensuring that she made an adequate contribution to the office."

Additionally, the court held that Cole's situation was not similar to an earlier case in which the court found that an employee was subjected to retaliation after she was told she missed too much work and was given the option of resigning or accepting a lower paying position. Unlike that case, Cole could have signed the PIP and presumably avoided termination. Further, the court

noted that unlike the employee in the earlier case, Cole did not face a materially adverse employment action, but instead faced "the less-than-intimidating prospect of planning her days and minding her tone."

New Publications Provide Guidance for OSHA Compliance

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) recently issued two publications that will help employers understand and comply with procedures used by the agency to ensure workplace safety. The first, the Field Operations Manual (FOM), replaces the 15-year-old Field Inspection Reference Manual (FIRM), and provides OHSA compliance officers and employers with a single comprehensive resource of updated guidance in implementing and complying with the agency's health and safety regulations. The second, the Assigned Protection Factors (APF), is a new guidance document published on April 1 to provide employers with vital information for selecting respirators for employees exposed to contaminants in the air such as dust, gases, mists, or vapors in accordance with the Respiratory Protection standard that was revised in 2006. These publications are valuable tools that covered employers can use to learn about OHSA procedures and stay in compliance with agency regulations.

The Field Operations Manual replaces the Field Inspection Reference Manual, which was issued on September 26, 1994, and constitutes OSHA's general enforcement policy and procedures for use by the agency's field offices when conducting inspections, issuing citations and proposing penalties. The manual is the guiding document for OSHA's compliance officers in scheduling and conducting inspections, enforcing regulations, determining violations, and calculating penalties.

Employers can benefit from this manual by learning about agency inspection procedures, the process the agency uses when issuing citations, the method used when calculating penalties and settlements, and how to contest citations. The manual also outlines OSHA resources available to employers to assist them in keeping in compliance with OSHA regulations. The 329 page manual is available online at: http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

Assigned Protection Factors (APF), a new guidance document issued by OSHA on April 1, 2009, provides employers with vital information for selecting respirators for employees exposed to contaminants in the air such as dust, gases, mists, or vapors. OSHA revised its existing Respiratory Protection standard in 2006 to add Assigned Protection Factors (APFs) and Maximum Use Concentration (MUC) provisions. The final Respiratory Protection standard (29 CFR 1910.134 and 29 CFR 1926.103) applies to general industry, construction, longshoring, shipyard, and marine terminal workplaces. APF and MUC are mandatory respirator selection requirements that can **only** be used **after** respirators are properly selected and are used in compliance with the entire Respiratory Protection standard. This standard requires fit testing, medical evaluations, and specific training in proper respirator use.

Assigned Protection Factor means the workplace level of respiratory protection that a respirator or class of respirators is expected to provide to employees when the employer implements a continuing, effective respiratory protection program as specified by OSHA regulations. The

higher APF number (5 to 10,000), the greater the level of protection provided to the user. APFs are used to select the appropriate class of respirators that will provide the necessary level of protection against airborne contaminants.

Maximum Use Concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator, and is determined by the APF of the respirator and the exposure limit of the hazardous substance. The MUC usually can be determined mathematically by multiplying the assigned protection factor specified for a respirator by the permissible exposure limit (PEL), short-term exposure limit, ceiling limit, peak limit, or any other exposure limit used for the hazardous substance. MUC is the upper limit at which the class of respirator is expected to provide protection. Whenever the exposures approach the MUC, the employer should select the next higher class of respirators for the employees. When the calculated MUC exceeds the Immediately Dangerous to Life or Health (IDLH) level for a hazardous substance, or the performance limits of the cartridge or canister, then employers must set the maximum MUC at that lower limit. Therefore, care must be taken when selecting a respirator so as not to run afoul of this selection process.

Together these documents should help covered employers to understand and comply with OSHA regulations and procedures. It should be noted that there is now a 2009 appropriations bill before Congress, endorsed by President Obama, that seeks to increase spending for OSHA by $27 million, which would bring the department's total budget to over $513 million. The bill requires that the increase not only be used to rebuild OSHA's enforcement capacity, but also to increase the pace at which the agency creates new safety standards. If passed, employers can expect not only an increase in inspections, but additional regulations aimed at improving workplace safety.

About the Authors

Pedro Forment is a partner in our Miami office with extensive OSHA experience. Mr. Forment is a member of the employment and OSHA Sections of the American Bar Association and the National Safety Council and is actively involved as a Board Member of the Centers for Disease Control & Prevention. Prior to joining Ford & Harrison, Mr. Forment worked as an attorney in the Solicitor's office of DOL where he represented OSHA and other DOL administrations. He can be reached at pforment@fordharrison.com or 305-888-2104. Bill Singleton, an attorney in our Memphis office, also has experience representing and advising employers on OSHA-related matters. Additionally, Mr. Singleton is a degreed engineer with more than twenty years of manufacturing experience. Mr. Singleton can be reached at bsingleton@fordharrison.com or 901-291-1520. •

DOL Opinion Letter Says Employers May Require Exempt Employees To Take Accrued Vacation During Plant Shutdown

In a recently released opinion letter, the Wage and Hour Division of the Department of Labor (DOL) has stated that an employer may require employees who are exempt from the minimum

wage and overtime provisions of the Fair Labor Standards Act (FLSA) to use their accrued vacation time during a temporary plant shutdown without affecting their exempt status or violating the FLSA. *See* Wage and Hour Opinion Letter, FLSA2009-2, 1/14/09 [released 3/6/09]. According to the DOL, based upon the facts as represented by the employer who requested the opinion letter, the employer can require the use of vacation time by exempt employees who are paid on a salary basis as long as they receive vacation pay or some other payment that equals their guaranteed salaries.

Referring to an earlier opinion letter addressing weather-related absences, the DOL noted that an employer is not required to provide any vacation time to employees, thus "there is no prohibition on an employer giving vacation time and later requiring that such vacation time be taken on a specific day(s)." According to the DOL, a private employer "may direct exempt staff to take vacation or debit their leave bank account..., whether for a full or partial day's absence, provided the employees receive in payment an amount equal to their guaranteed salary."

The opinion letter also states that if an employee has no accrued vacation benefits or has a negative balance, he or she must still receive his or her guaranteed salary for any absences occasioned by the employer or the operating requirements of the business.

DOL opinion letters do not constitute binding law and are limited to the facts as described by the employer requesting the opinion. It is helpful, however, to be aware of the DOL's opinion regarding this issue, especially in light of the current economic circumstances.

Date of Federal Contractor E-Verify Rule Delayed

The applicability date of the rule requiring federal government contractors and subcontractors to begin using the USCIS E-Verify system has been delayed for a third time, until June 30, 2009. The rule requiring federal contractors and subcontractors to agree to electronically verify the employment eligibility of their employees was first published on November 14, 2008, and was set to become effective on January 19, 2009, but has since been postponed three times. The Federal Register notice announcing the delay can be accessed at: http://edocket.access.gpo.gov/2009/pdf/E9-8849.pdf.

According to a release by the USCIS, the extension will provide the Administration an adequate opportunity to review the entire rule prior to its applicability to federal contractors and subcontractors.

If you have any questions regarding this issue or other business immigration issues, please contact Geetha Nadiminti, gnadiminti@fordharrison.com, 404-888-3940 or any member of Ford & Harrison's Business Immigration practice group.