FMLA Insights
Guidance & Solutions for Employers

Life After Wal-Mart v. Dukes: Is the FMLA the New Breeding Ground for Class Actions?

By Jeff Nowak on August 09, 2011

For several weeks now, attorneys and legal academics across the country have dissected the U.S. Supreme Court's Wal-Mart v. Dukes (pdf) decision, which shut the door to a 1.5 million class of current and former female Wal-Mart employees who are claiming that they were denied pay increases and promotions because of their gender. In striking down class certification, the Supremes held that there was no commonality among the member of the class, that is, no "glue" that tied all of their discrimination claims together.

The *Wal-Mart* decision underscores the heavy burden plaintiffs have when pursuing a case on behalf of others in a class action. Surely, employers will use the Wal-Mart decision to fight class certification on the basis that the members of the proposed class lacks commonality. In a post-*Wal-Mart* era, plaintiffs seeking to advance a class action will be forced to narrow the scope of the class and focus on policies and practices that are specific and clearly establish a discriminatory effect on a class of individuals.

Might an employer's FMLA practices provide just what a plaintiff needs to withstand the scrutiny of the Supreme Court's exacting standards for class certification? Unlike many other statutes, the FMLA requires employers to adhere to a multitude of exacting rules, any one of which can trap an employer. If an employer's FMLA administration runs afoul of the FMLA, it could prove to be the "glue" that the Supreme Court insists is required to tie together the claims of an entire class. Whereas the Wal-Mart class was rejected because the plaintiffs pointed to rather amorphous, vague policies of discrimination as the basis for their class action, it seems that a class of plaintiffs may have an easier time attacking a specific FMLA policy or practice whose effect creates harm across an entire group of employees.

Two recently filed proposed class actions suggest that at least some plaintiff-side employment attorneys are thinking the same thing:

- Last week, two former AT&T employees filed a proposed FMLA class action in federal court in San Francisco, alleging that AT&T maintains a "total absence policy," whereby FMLA-protected absences are counted against an employee just like any other absence. In Beard and Guerrero v. AT&T (pdf), Andre Beard and Gloribel Guerrero allege that AT&T "blacklists"

employees when they reach the bottom 30% of the Company's monthly absence calculations. Thereafter, the plaintiffs claim that employees in this category are harassed, denied promotional opportunities and "targeted" for termination. Perhaps taking a cue from the *Wal-Mart* holding, the plaintiffs propose a narrowly-defined class: non-managerial and first-level managers at the Company's call and collection centers who took FMLA leave and were in the bottom 30%.

- Earlier this year, a proposed class of current and former Sysco employees filed suit in federal court in Chicago, claiming that the Company (through its third-party administrator, Work & Well) has continuously violated the FMLA by insisting that employees provide more medical information than is legally required in the FMLA medical certification and clarification process. In Arango v. Sysco Chicago, Inc. and Work & Well, Inc. (pdf), the plaintiffs claim that Sysco requires its employees to provide medical information such as their prescribed medications, dates of upcoming doctor appointments and detailed information regarding any medical procedures performed. When employees do not provide the requisite information, the plaintiffs claim that Sysco denies FMLA leave, designates the related absence as unexcused and subjects the employees to a variety of adverse employment actions, up to and typically including termination. Discovery in this case has just begun.

I share these lawsuits not to suggest that they have any merit or that they are even worthy of class certification. It's much too early to tell. Moreover, the employers in these cases have plenty of good arguments to make, and the discovery process will bear that out. However, these lawsuits simply illustrate the potential for a surge in FMLA class actions as plaintiffs' attorneys get their hands around the *Wal-Mart* mandate.

Insights for Employers

So, what is an employer to do? Several suggestions come to mind:

1. It is imperative that employers consider whether (and how) their FMLA policies and procedures expose them to claims that can be advanced by a group or class of employees. Strongly consider conducting a comprehensive audit of your entire FMLA administration to ensure your procedures do not violate the regulations and expose potential class claims. A couple questions might help to guide your analysis:
    - Does your leave request form elicit necessary information without delving beyond the medical condition at issue?
    - Are you requesting more medical information than allowed through the FMLA's medical certification form or the regulations?
    - Are you using the clarification/authentication process as a tool to convince the employee's health care provider that an employee's serious health condition is not valid or not as severe as stated in the medical certification?

- Do you require blanket authorization to communicate with the employee's health care provider before medical certification is due or before the employee has the opportunity to cure deficient certification?
- What medical information do you require upon an employee's return to work? Does your practice comport with the FMLA's return-to-work rules?
- As to those employees who have taken FMLA leave, are there a disproportionate number who have been denied promotional opportunities or terminated (for unexplained reasons)?
- How does your FMLA policy mesh with your attendance and other leave policies? Are there inconsistencies?

2. Closely analyze your relationship with any third-party administrator that conducts FMLA administration on your behalf. Do you know how your TPA handles the questions above? If not, find out. Keep in mind that the employer ultimately is on the hook for the TPA's FMLA administration. Thus, the lines of communication between employer and TPA must constantly remain open so that you are able to obtain information, as necessary, and that you are partnering with the TPA on particularly difficult FMLA scenarios.

3. I know I sound like a broken record, *but* ensure that your managers are properly trained on their responsibilities in FMLA administration. Although front-line managers may play little to no role in the FMLA process, they are your eyes and ears of potential FMLA abuse. Conversely, their inappropriate comments or poor handling of an FMLA situation may create significant liability.