Year End Grab Bag: FLSA and FMLA Questions

This will be a grab bag of sorts: We cover will issues arising under two different laws that share something in common: They both are enforced by the U.S. Department of Labor (a/k/a "the evil socialists"), and, unlike Title VII and most other discrimination law cases, violations of these laws can lead to both agency and personal liability for responsible management officials.

Issue One: Do Employers Have to Pay for "Off-the-clock" Work Performed Without Employer's Knowledge?

Previously we discussed how federal law requires employers to compensate employees for all hours worked. It is well-settled that any work performed for the employer's benefit must be compensated.

But what about a situation where employees perform overtime work "off-the-clock" for the benefit of an employer, and the employer has no knowledge or reasons to know that the work was performed. In its recent decision *Kellar v. Summit Seating Incorporated,* the U.S. Court of Appeals for the Seventh Circuit answered this question in favor of the employer. Specifically, the court held an employer is not required to pay for the overtime hours if such employer had no actual or constructive knowledge about the time worked.

In *Kellar,* the employer, Summit, was a small company that manufactured seating for buses. Kellar was an employee acting in capacity of a sewing manager. Because she was paid on an hourly basis rather than being "genuinely salaried" she did not qualify for any of the "white collar"

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exemptions such as an executive or administrative exemption, even though her principal duties appeared to fall within those classifications. After voluntarily resigning, Ms. Kellar sued Summit, claiming that she had not been paid overtime wages in violation of the Fair Labor Standards Act ("FLSA"). (The case does not indicate just how "voluntary" Ms. Kellar's resignation was. However, most FLSA cases arise right after a forced resignation or termination.)

In her pre-trial deposition, Ms. Kellar claimed that she regularly arrived at Summit's factory between 15 and 45 minutes before the start of her 5:00 a.m. shift. When she arrived, Kellar spent about 5 minutes unlocking doors, turning on lights, turning on the compressor, and punching in on the time clock. She prepared coffee for the rest of Summit's employees; she reviewed schedules; she gathered and distributed fabric and materials to her subordinates' workstations. Ms. Kellar admitted that no one had told her that she needed to come in before her shift, and her time cards reflected that she often punched in early, although on those days when she forgot to clock in, Kellar would write the official start time of her shift on her time card.

In its decision, the Circuit Court of Appeals held the following:

A. Kellar's Pre-Shift Activity Was Non-Preliminary Work

The Portal-to-Portal ("P-to-P") Act governs the enforcement of employees' rights to minimum wages and overtime compensation which are secured under the Fair Labor Standards Act ("FLSA"). The P-to-P Act provides that activities that are "preliminary" to principal activities are not compensable, meaning, an employer is not required to count the time for compensation purposes. Specifically, the P-to-P Act exempts those activities that are "predominantly . . . spent in [the employee's] own interests," However, the Pl-to-P Act does not relieve employers from liability to compensate employees for any work that is of consequence that the employee performs for an employer, and from which the employer derives significant benefit.

The court explained that Kellar's subjective reasons for arriving early simply do not matter for purposes of determining whether her pre-shift activities primarily benefitted her or Summit. It stated: "The fact that the employees too may have benefited . . . is not inconsistent with the conclusion that the work was an integral and indispensable function of the defendant business.").

B. *Kellar's Pre-Shift Work Was Not De Minimis*

The *de minimis* doctrine ("*De minimis non curat lex.")* allows employers to disregard work that is otherwise compensable work when only a few seconds or minutes of work beyond the scheduled working hours are in dispute. The doctrine usually applies where, as a practical administrative matter, it is impossible to record precisely the work time for payroll purposes.

The court held that Kellar's claim was not a case where the *de minimis* doctrine applies, because the amount of her pre-shift work, both per day and in the aggregate, was substantial. Specifically, Kellar worked between 15 and 45 minutes before each shift.

C. The Employer's Lack of Knowledge

Summit's last line of defense was that it didn't know that Kellar was working the overtime hours each day. The success of this defense was a real victory for employers. The Court's held that, even though Kellar's work activities were neither preliminary nor *de minimis*, her work was nevertheless non-compensable, because the employer **had no idea that Kellar worked** the time.

Under the FLSA, Kellar had to prove that Summit had actual or constructive knowledge of her overtime work. The court explained that if an employer does not want its workers to work overtime, it must "exercise its control" and make sure that the workers do not perform any work. The

employer "cannot sit back and accept the benefits without compensating for them." However, the FLSA does not require the employer to pay for work it did not know about, and had no reason to know about.

In Ms. Kellar's case, Summit had no reason to suspect she was acting contrary to the company's no- overtime policy. Kellar's behavior raised no flags. When Kellar forgot to punch in, she would simply write in her time card that she arrived at the beginning of her scheduled work shift. Over the course of eight years, Kellar never told her employer that she had been working overtime. There was no indication that anyone else in management knew Kellar was performing pre-shift work. On the contrary, every week, Summit's management had meetings to discuss the following week's schedule, but Kellar, who was herself a manager, never mentioned during any of those meetings that she was working before her shift began.

Practical Impact of Kellar:

While *Kellar's* decision presents a victory for employers, it is crucial to understand that the court sided with the employer on only one issue and that the two other issues were decided in favor of the plaintiff-employee. First, the court rejected the employer's argument that 15 to 45 minutes of pre-shift work constituted non-compensable *de minimis* hours. Second, the court refused to accept the employer's "preliminary-work" argument because Kellar's off-the-clock work benefited the employer, regardless of Kellar's personal motive for performing a pre-shift work.

To avoid liability for failure to pay for the "off-the-clock time" under the FLSA, employers must take into account the following considerations:

- A "no-overtime" policy in itself is not enough for an employer to avoid paying overtime. Employers who do not wish to pay overtime must take affirmative steps and make sure that workers do not perform any work without permission.

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- Employers must implement and enforce a strict time keeping policy and discipline those workers who do not record their hours accurately.
- An employer must be on alert as to the time preformed by employees before or after the scheduled shift. If an employer is aware of or has reason to suspect that employees work "off-the-clock" (e.g. employee's complains, time-keeping cards, manager's observation), the employer must compensate for such hours.
- The Employer will always have the burden of proving by a preponderance of evidence the lack of knowledge that an employee worked the overtime hours claimed. You won't be able to prove this by behaving like an ostrich.

Issue Two: FMLA Documentation

Under the Family and Medical Leave Act ("FMLA"), employees who have worked for an employer for twelve months and have accrued at least 1,250 hours of work in the preceding 12 month period are eligible to take up to 12 weeks of non-paid but job-protected leave. Employers have to inform employees of their rights to such leave by means of the U.S. Department of Labor posters, and by including a summary of the employees' FMLA rights and any employer procedures required for exercising them in any handbooks that are given to employees. The FMLA covers all private employers who have at least 50 employees working within a 75 mile radius, and all public employers regardless of their size. A question often is asked about how an employee must inform the employer of the need or intent to take such leave, and how employers must respond to the requests.

The answer is: Some conversations with employees about their FMLA rights can be oral, but most need to be documented. For example: If an employee asks, "Am I eligible for FMLA leave?" the employer can respond orally. If the employee requests leave, the employer must respond with documentation. This is particularly true where the employer wants some documentation showing that the employee's reason for asking for the leave is authentic.

What Forms of Documentation Can an Employer Require?

You may request, as appropriate:

- Adoption/Foster Care/ Birth Documentation. There's no DOL form for this, because this is not a medical request, it's a request for a report of a legal proceeding.
- Exigency documentation. With Family Military Leave requests, Qualifying exigency statement and supporting documentation or DOL form WH-384.
- Medical Certification. DOL Medical Certification form, regular (WH-380) or for Family Military Leave Requests (WH-385).

You will also use the following forms:

- Notice. DOL Notice of Eligibility and Rights & Responsibilities form (WH-381), (attach it to WH-380).
- GINA Disclosure attachment. (Technically, this is only required when the employee is requesting leave for his or her own medical condition. Including the statement will generally provide the employer with a safe harbor in the event that the medical professional who provides the medical documentation happens to reveal genetic information.)

Who Can Complete Certifications ?

Who can complete an FMLA medical Certification form? It's a long list. First, doctors of medicine (MD) or osteopathy (DO) who are authorized to practice medicine or surgery by the state in which the doctor practices. In addition, the following state-licensed professionals:

- Podiatrists

- Dentists
- Clinical psychologists
- Clinical social workers (Usually MSW, or LCSW)
- Optometrists
- Chiropractors (These certifications are limited to certifications of treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated to exist by X-rays, MRI's or CAT scans.)
- Nurse practitioners
- Nurse-midwives
- Physicians' Assistants (if functioning within the scope of their licensed practice)
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts
- Any other health care provider recognized by the employer or the employer's group health plan benefits manager.

Also, any of those listed above who practice in other countries, if they are authorized to practice in accordance with the law of that country and are performing within the scope of their practice as defined by such law.

Can You Push Back Against Doctors?

You can push back if the forms they supply certifying the need for the leave are incomplete or unclear. Generally, you should not accept "unknowns" (such as, for instance, "Duration and frequency -unknown.") If you do accept "unknowns," and especially if you accept them because you do not want to bother the employee or the doctor, then blame yourself when things spin out of control.

Remember, the regulations do clearly put the onus on the employee to provide a complete and clear form. If the employee doesn't do that, you may deny leave. You also should check the form for internal consistencies, and be

sure that an authorized person signed the form.

Can You Contact the Health Care Provider ?

You can contact the health care provider directly as long as:

- You call to "clarify" or "authenticate" ***only***; (*i.e.,* no requests for "additional information")
- The employee's direct supervisor is not the person who makes the contact. Ideally the contact should be made by a person designated by the City or by the Agency to obtain such clarification and authentication. It cannot involve an employee's direct supervisor.
- Give the employee a chance (and 7 calendar days) to "fix" any problems regarding the documentation form (after notifying the employee in writing and indicating in writing what the employee needs to have done to make the form acceptable).
- Execute a HIPAA release if required by health care provider.

Remember, at this point in the FMLA proceedings will be your first and last chance to use second and third opinions certifying the medical basis for a medically-based leave request for 12 months.

When Provider and Ailment Don't Match

You can also push back if the provider and the condition don't match. For example, if the OB-GYN is certifying that an employee needs the leave to deal with migraines or if the podiatrist is certifying that the employee is suffering from depression, these "medical" observations are outside the normal range of knowledge and competency for such professionals. You can require that the employee obtain a certification from a professional with recognized competency to provide the medical advice.

Other FMLA Leave Management Tips

Cover Letter with the FMLA Leave Designation Notice

If you use a cover letter with your DOL designation notice, it should include the following:

- Leave status update/reminder.
- If planned intermittent FMLA leave is being approved (either alone or along with unplanned intermittent leave), state that the employee will be required to work with his or her supervisor in order to coordinate the planned leaves in advance.
- State the rules for intermittent leave. (Employees on intermittent leave tend to think that they can come and go as they please, so explain what the rules are).

Also consider at this time whether, in light of the planned intermittent leave, you want to move the employee to an alternative position (as permitted by the DOL). If so, state this in the cover letter, explaining that this move is temporary and will involve the same rate of pay (per hour) and benefits as the employee's regular position.

If unplanned intermittent FMLA leave is being approved, remind the employee that he or she will still be required to comply with the regular call-in/absence reporting procedures of your company/department unless it is not medically possible to do so.

Indicate if there are any special FMLA leave calls required. Make it very clear: “Call Manager A at extension ## when (insert the condition when you want the employee to call).

You should also consider adding the additional provision that merely reporting an absence as "It's my FMLA" or "I'm sick" will not be sufficient to have an absence covered by their approved intermittent FMLA leave certification.

Some employers wait to provide such examples until the employee starts using such flippant phrases. It's OK either way.

Refer to your FMLA policy as a reference and also remind employees to whom they should direct all FMLA-related questions. Be sure to say, "If you need another copy, let us know."

Keep a FMLA Calendar

Establish an FMLA calendar. On it:

- Record dates of leave
- Track patterns of absence, like Monday Friday absences
- Indicate when additional documentation is needed
- When updates are received, note what their content was, how they were received and by whom.

Require Re-certification

Use your re-certification opportunities; *i.e.,* where there is intermittent leave, periodically require the employee to obtain re-certification from the health care provider that the intermittent leave is necessary. They are the tools to use if you question the employee's use of FMLA leave as compared to his or her current documentation.

- If a re-certification calls for additional approved leave periods or a changed amount of leave, send an updated letter.
- Get a re-certification every new 12-month period during which leave is requested. At that time, also reassess the 1250-hour-in-the-past-12-months requirement.

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‘I Have No Recollection’ Excuses

Back up any oral communications about FMLA leave in writing. Otherwise, you won't be able to refute the most common response in FMLA cases: "I have no recollection."

As always, if a client has any questions regarding this article or any other employment-law-related matters, please contact us.

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