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FMLA COMPLIANCE

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Employee's behavior revealing she suffered severe emotional stress and anxiety may constitute a "report" of the need for FMLA Leave.

An employer cannot escape legal liability under the FMLA by merely firing someone who takes leave for a condition that ultimately may be diagnosed as a serious health condition requiring FMLA leave before the employee formally completes an FMLA Leave request. This was a mistake that New Hope Minnesota-based St. Therese of Hope Long Term Care facility made when it terminated nurse Ruby Clinkscale the day after she experienced such a severe emotional melt-down in the Human Resources office which that she requested her employer to call an ambulance. The melt-down came after she was told that she would be terminated and reported for patient abandonment if she refused a work assignment requiring her to "float" to a nursing unit on which she had received no training. The Human Resources Director told her to go home, and that the employer would discuss the assignment the next day.

On the following morning, October 12, 2010, Clinkscale's doctor diagnosed her as having a "situationally triggered" anxiety attack. He prescribed therapy and medications. He also provided her with a note recommending that Clinkscale take the remainder of the week off work. Clinkscale delivered the physician's note to St. Therese's HR department at 9:30 am that same morning. In response, the employer provided her with FMLA leave medical certification forms to be completed by her doctor. Later on that same day, however, the employer called Clinkscale at home and said that her employment had been terminated, effective on October 11, for "walking off the job." Ten days later, St. Therese added insult to injury when it filed a complaint against Clinkscale with the Minnesota Board of Nursing, alleging that Clinkscale had refused a work assignment and had "walked out" of her job abandoning patients.

Clinkscale sued the Employer under the Family and Medical Leave Act (FMLA) for interfering with her rights to FMLA leave. To state a claim of interference under the FMLA, an employee must show that his or her employer denied benefits to which the employee was entitled under the Act. For example, an employee might raise an interference claim if the employer discouraged the employee's use of FMLA leave. To raise an interference claim successfully, an employee must show that he or she has put the employer on notice that the absence may be covered by the FMLA. This ordinarily means that the employee must provide at least verbal notice to the

employer within one or two business days of the point at which the employee becomes aware of the need for leave.

While the District Court dismissed Clinkscale's claims on the employer's motion for summary judgment, the Eighth Circuit Court of Appeals reversed the decision. It held that an employee's exhibition of signs of severe distress and anxiety were sufficient to inform her employer of the possible need for medical leave. *Clinkscale v. St. Therese of Hope*, No. 12-1223, (8th Cir. November 13, 2012).

The Eighth Circuit reasoned that Clinkscale's manifestations of extreme distress and anxiety after her reassignment on October 11 reasonably could be viewed as notification to the employer of a serious health condition. Further, it noted that Clinkscale had left the premises on October 11 only after the HR Director instructed her to do so. When she returned on the following day with her doctor's note, the employer provided Clinkscale with FMLA paperwork, a clear indication that St. Therese viewed her situation as a possible FMLA-related occurrence just prior to informing her of the termination.

The Circuit Court found that when St. Therese told Clinkscale to go home to attend to her condition, provided FMLA paperwork to her, and then decided instead to fire her before she could submit her completed FMLA application and certification, it created an issue of fact, and that a jury reasonably could conclude both that Clinkscale had provided notice to St. Therese as required under the FMLA and that St. Therese had interfered with Clinkscale's possible leave.

It is important to note that the Eighth Circuit did not find that St. Therese actually violated the FMLA. It simply found that in light of the facts that Clinkscale alleged a jury would have to determine whether she provided St. Therese with notice of a serious health condition "as soon as practicable" as required by the FMLA, and whether St. Therese interfered with Clinkscale's possible FMLA leave when it terminated her employment for leaving work on October 11, 2010.

FMLA Record-keeping Requirements –the most overlooked element of compliance.

Many employers grapple with the better-known aspects of the Family and Medical Leave Act (FMLA), such as determining whether an employee's illness constitutes a serious medical condition, obtaining required certification or providing adequate coverage for workers on intermittent leave. All too often, however, employers focus on the leave itself breathing a sigh of relief when they receive notice confirming the dates of leave or when the employee has resumed his or her usual schedule. An employer's compliance with federal law doesn't end there. It includes the obligation to maintain adequate records related to the leave. Failure to do so can have significant consequences.

What Records Must An Employer Maintain?

The FMLA recordkeeping requirements are found in 29 C.F.R. § 825.500 which requires employers to keep and preserve records in accordance with the recordkeeping requirements of

the Fair Labor Standards Act (FLSA). The employer must retain such records for no less than three years. Although no particular order or form is required, the records must be capable of being reviewed or copied.

Covered employers with eligible employees must maintain not only records that include basic payroll and data identifying the employee's compensation, job classification, and hours worked, but also the days of FMLA leave, and the hours of FMLA leave which each employee takes where they take such leave in increments of less than a full day. Failure to maintain accurate records can have significant consequences for employers, who have the burden of establishing eligibility for leave. Accuracy is important. Lack of suitable records documenting when and for how long an employee takes such FMLA leave can doom an employer's defense to claims for discrimination or interference with such leave. Special rules apply to joint employment and to employees who are not covered by or are exempt from the FLSA. All public employers are covered.

Importantly, the FMLA Regulations require that the employer must maintain copies of employee notices of leave furnished to the employer under the FMLA, if in writing, and copies of all general and specific written notices furnished to employees. The required copies may be maintained in employee personnel files. In the event of a dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, employers must present the required records, including any written statement from the employer or employee regarding the reasons for the designation and for the disagreement. All too often employers fail to audit their own personnel files to confirm that the required documentation is in place.

The employer must also maintain documents (which include both written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves, along with records of premium payments, if any, of employee benefits.

Don't Forget About Confidentiality

It is especially important for employers to maintain records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA. These documents, however, must be maintained as confidential medical records ***separately from the usual personnel files***. Where the Americans with Disabilities Act (ADA) or the Rehabilitation Act also applies, employers have a duty to maintain such records in conformity with the confidentiality requirements of those laws.

Be Proactive, Audit Your Records

It's never too late to conduct a compliance audit to determine whether their organization is complying with FMLA requirements. Identifying and fixing any problems with your recordkeeping processes now could save a lot of headaches down the road.