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Labor & Employment Client Service Group

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Employers Should Consider Expressly Prohibiting FMLA Fraud

Many employers have updated their FMLA policies to reflect recent amendments to the law and revisions to the regulations. Another aspect of an FMLA policy that merits attention is ensuring that the policy expressly prohibits FMLA fraud and specifies the penalty for the offense. Failing to do so may prevent an employer from dismissing claims of interference with FMLA rights in terminations for fraud or abuse of FMLA leave.

The United States Court of Appeals for the Ninth Circuit issued an unpublished opinion earlier this year that reinforces the need for an express fraud prohibition. In *Boecken v. Gallo Glass Co.*, No. 08-17454, 2011 WL 245503 (9th Cir. Jan. 27, 2011), an employee had been approved to take FMLA leave to care for his grandmother. After suspecting fraud, the employer conducted surveillance and discovered when the employee left work early allegedly to provide the care, the employee instead ran errands and took walks in a park. The employer concluded the employee had misused his FMLA leave and terminated the employee. The district court granted the employer's motion for summary judgment, holding that the employer's decision to terminate the employee's employment for engaging in non-covered activities during his FMLA leave did not constitute interference with the employee's FMLA rights. In particular, the court found no issue of triable fact due to the employee's admission that he took walks for his own purposes during the time he was taking the FMLA leave to care for his grandmother.

While the Ninth Circuit agreed that the employee had misused his FMLA leave, the court reversed the summary judgment because it found there was a question of fact as to whether the employer had provided the employee with the requisite notice of the consequences of such misuse. The court pointed to FMLA regulations requiring employers to provide employees with "written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." 29 C.F.R. § 825.301(b)(1) (2005) (now at 29 C.F.R. § 300(c)(1) (2008)). The regulations further limit an employer's actions if the employer has not provided the requisite notice. Under the prior version of the regulations (in effect at the time of the events relevant to the case), an employer who failed to provide required notice could not take action against an employee for failure to comply with the employer's requirements. *See* 29 C.F.R. § 825.301(f) (2005). Similarly,

under the current regulations, an employer who fails to provide the required notice may be found to have interfered with, restrained or denied an employee's FMLA rights. *See* 29 C.F.R. § 825.300(e) (2008).

While the employee manual in *Boecken* included a progressive discipline policy and permitted termination for "[t]heft or dishonesty," the manual did not state that immediate termination could result from the misuse of FMLA time. And, while the employee may have *misused* FMLA, the court found there was a question of fact as to whether the employer had considered the employee to have been *dishonest* in his use of FMLA. Accordingly, the court held that the question of whether the employer had violated the employee's FMLA notice rights could not be decided on summary judgment. *See Boecken*, 2011 WL 245503, at *1.

The *Boecken* decision is a cautionary warning to employers that general misconduct policies referencing "dishonesty" may not be sufficient to ensure employers' ability to take disciplinary action when FMLA fraud is discovered. Employers should review their FMLA policies and consider adding language expressly prohibiting FMLA fraud, abuse and misuse, and indicating that any such misconduct with respect to either requesting or taking FMLA leave may result in discipline, up to and including immediate termination.

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For additional information on this topic, please contact a member of Bryan Cave LLP's Labor and Employment Client Service Group.