FMLA Insights
Guidance & Solutions for Employers

FMLA FAQ: Is a Reinstated Employee Short on "Hours Worked" Eligible for FMLA Leave?

By Jeff Nowak on August 01, 2011

Q. We terminated an employee who has been reinstated by an arbitrator with full back pay. Now, he has requested FMLA leave. Are we obligated to provide leave even though he has not worked 1,250 hours in the previous 12 months?

A. When determining whether an employee has worked the requisite 1,250 hours in the previous 12 months to be eligible for leave under the Family and Medical Leave Act, an employer must account for hours actually worked by the employee within the meaning of the Fair Labor Standards Act (FLSA). 29 CFR § 825.110(c). The issue here is whether an employer must treat the back pay award as the equivalent of "hours worked."

This issue even has the courts conflicted. In Plumley v. Southern Container, Inc., the First Circuit Court of Appeals ruled that several months of back pay awarded to an employee who was reinstated after successfully grieving his termination *does not* count towards the 1,250-hour requirement. The court found that hours worked:

"include only those hours actually worked in the service and at the gain of the employer," and not hours for which a wrongfully-discharged employee was compensated in the form of back pay pursuant to an arbitral award.

However, the Sixth Circuit Court of Appeals in Ricco v. Potter (pdf) held precisely the opposite. Where an employee has been wrongfully terminated and is reinstated with back pay, the court held that an employer is obligated to to treat the period of time covered by the back pay as "hours worked" for purposes of FMLA eligibility. In short, the court reasoned that an employee should be credited for the hours that he wanted to work but was *unlawfully* prevented from doing so. Thus, under *Ricco*, if the back pay period provides the hours necessary to meet the 1,250-hour requirement, and the employee is otherwise eligible, he is entitled to FMLA leave.

From an anecdotal standpoint, I find that most employers tend to follow the *Ricco* holding, since the risk of following *Plumley* clearly could be more costly in light of the split in the appellate courts. Interestingly, the courts have not addressed grievances that are settled and which result in some amount of back pay awarded to the employee. Here, it seems as though the employer has a much stronger argument that the time covered by the back pay *does not* count as "hours worked," since there is no finding of wrongful termination against the employer, and the parties otherwise have compromised their positions to achieve resolution. In this scenario, my sense is that a court would be far less likely to count this period of time toward an employee's 1,250 hours worked.

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