Legal Alert: Handbook Language May Create Leave Rights even if Employees are not Eligible for FMLA Leave

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The Seventh Circuit recently held that an employer may be bound under state law to comply with the leave policy contained in its employee handbook, even though the employee seeking leave is not an eligible employee under the federal Family and Medical Leave Act (FMLA). *See Peters v. Gilead Sciences, Inc.* (7th Cir. July 14, 2008).

Under the FMLA, eligible employees are those who have been employed for at least 12 months, have worked for at least 1,250 hours during the 12-month period immediately preceding the leave of absence, and work in an office or worksite at which 50 or more employees are employed. All employees within a 75-mile radius of the particular facility are counted to determine whether an employer has 50 or more employees.

In *Peters,* the employee was not eligible for FMLA leave because he worked at a site that employed fewer than 50 employees in a 75-mile radius. However, he took two leaves of absence for work-related injuries and received letters, tracking language in the employee handbook, which stated:

The Federal Family and Medical Leave Act (“FMLA”) went into effect August 5, 1993. The act grants eligible employees of covered employers up to twelve weeks of unpaid leave in a twelve month period to care for a newborn or adopted or foster child, to care for the seriously ill parent, child, or spouse of the employee, or to attend to the employee's own serious health condition. To be eligible for FMLA benefits, an employee must have worked for a covered employer for a total of 12 months and have worked at least 1,250 hours over the previous twelve months.

You will retain your employee status during the period of your FMLA Leave. This includes accrual of tenure and vacation, in addition to continued health benefits coverage. You will be guaranteed reinstatement in your position, or equivalent position, if you return to work by the time your FMLA leave expires.

The letters also provided the start date of the leaves and when Peters would be required to return to work to be guaranteed reinstatement.

Additionally, the eligibility provision of the employer’s policy stated that all employees who had been employed by the company for at least 12 months and had worked 1,250 hours during the 12 months preceding the commencement of leave would be granted 12 weeks of family and medical leave and would be reinstated to the same or an equivalent position upon

returning from leave. The handbook did **not** contain the exclusion found in the FMLA for worksites employing fewer than 50 employees in a 75-mile radius.

When Peters attempted to return from his second leave, he was denied reinstatement to his prior position; however, the employer offered him a different position. Peters declined this position and was discharged. Peters sued in federal court, alleging violations of state law as well the FMLA. The employer defended the FMLA allegations on the grounds that Peters was ineligible for FMLA leave under the 50-employee/75-mile radius exclusion.

The Seventh Circuit refused to address the question of whether the former employer should be permitted to raise the defense of ineligibility under the FMLA even though it had not mentioned in the exclusion in the handbook or in correspondence with Peters. Instead the court held that Peters could obtain remedies identical to those available in his FMLA claim through the enforcement of contractual rights, if the trial court finds that the handbook language created an enforceable contract. Additionally, if the handbook did not create an enforceable contract, the Seventh Circuit held that Indiana's promissory-estoppel cause of action allows enforcement of the former employer's promises to the extent of the reliance harm Peters suffered.

Accordingly, the court reversed the case for further proceedings on Peters' state law claims.

Employers' Bottom Line:

This case demonstrates the importance of ensuring that employee handbooks and policies are carefully drafted and accurately reflect the employer's intent. In this case, the employer's policy gave employees greater rights than the FMLA by not including the 50-employee/75-mile exclusion. While employers often choose to provide greater leave rights than required by the FMLA, doing so should be the result of the employer's conscious decision rather than inadvertence. Although violation of a more generous leave policy may not create a cause of action under the FMLA, courts may find these policies enforceable under state law. Employers may want to consider reviewing their leave policies to ensure that these policies accurately reflect the employer's intent and the requirements of applicable state and federal laws.

If you have any questions regarding the FMLA or need assistance in preparing or reviewing handbook language, please contact the Ford & Harrison attorney with whom you usually work.