FMLA Insights
Guidance & Solutions for Employers

FMLA FAQ: Can an Employer Deny FMLA Leave to An Employee Who Is Not Yet Eligible to Take Leave?

By Jeff Nowak January 19, 2012

Q: Can an Employer Deny FMLA Leave to An Employee Who Is Not Yet Eligible to Take Leave?

A. It depends, particularly after a federal appellate court handed down a ruling on this very issue last week.

The underlying story is straightforward: On October 5, 2008, Kathryn Pereda began working for Brookdale, which operates senior living facilities in Florida. In June 2009, Pereda informed her employer that she was pregnant and would need FMLA leave after the birth of her child in November 2009. However, in September 2009, about 11 months after her hire, Brookdale terminated Pereda's employment.

Pereda thereafter filed suit, claiming that the employer violated the Family and Medical Leave Act when it: 1) denied her FMLA leave (interference); and 2) terminated her for exercising her right to take FMLA leave (retaliation).

The Court grappled with whether an employee who is not yet eligible for leave (because she had not worked for Brookdale for the requisite 12 months) could advance an FMLA interference claim. For the Court, the answer was quite clear: Yes, she can. In answering the question, the Court first looked to the regulation regarding eligibility:

"The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start." 29 C.F.R. § 825.110(d).

So, the answer is easy enough: when assessing an employee's eligibility under the FMLA, employers should make the calculation not as of the date of the request, but as of the date the leave is to begin. If an employer terminates the employee “in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible,” the employee could advance an FMLA interference claim. Pereda v. Brookdale Senior Living Communities, Inc.

Insights for Employers

There are several takeaways for employers on this issue:

1. Keep in mind that the FMLA requires a 30-day notice for foreseeable leave. This is particularly true for the birth of a child. An employee who reports a future need for FMLA leave (even

though they are not yet eligible) likely will be protected by the FMLA if the employee would be eligible by the time the leave is to begin.

2. A gentle reminder -- don't treat your employee differently after the leave request has been made. According to Pereda above, she claims to have been harassed, disciplined for attending prenatal appointments (an FMLA no-no!), and inappropriately placed on a performance improvement plan. Of course, an employer can and should insist that their employees meet legitimate performance expectations, but retaliating against the employee after she requests leave not only violates the FMLA, it results in a dejected employee who will have no desire to work for you again.

3. Note: If an employer grants leave before the employee becomes eligible under the FMLA, any leave taken in the first year cannot be counted against the employee's FMLA allotment. See my prior post on this subject.

4. Eric Meyer of The Employer Handbook points out several other lessons from Pereda case that are worth reviewing.