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August 21, 2014

An Estimate is Just That—The Seventh Circuit Highlights Several Important Lessons for Employers Navigating Intermittent FMLA Leave

By Michael Congiu and Carly Zuba

The U.S. Court of Appeals for the Seventh Circuit recently ruled on two important intermittent Family and Medical Leave Act (FMLA) leave issues in *Hansen v. Fincantieri Marine Group*.[1] First, the court determined that the FMLA does not require a plaintiff to present expert testimony to prove he was incapacitated for each day for which he requested FMLA leave. Second—and perhaps more important for employers—the court decided that an employer should not summarily deny intermittent FMLA leave when an eligible employee exceeds the *estimated* length or duration provided by a doctor in an FMLA medical certification form.

This ruling should inform employers within the Seventh Circuit regarding the appropriate response to employees whose absences exceed the estimated frequency and duration of incapacity listed on their medical certification forms. The FMLA regulations authorize an employer to request recertification at any time if "[c]ircumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence …)."[2] *Hansen* reinforces the need for employers to seek FMLA recertification where conditions appear to have considerably changed rather than take adverse action against an employee who has exceeded his or her certified leave. *Hansen* further underscores the need for employers to work closely with their third-party leave administrators when making leave determinations that may lead to adverse actions.

Facts of the Case

Fincantieri Marine Group (FMG or "the employer") employed the plaintiff as a shipbuilder. The plaintiff suffered from depression, and provided medical certification to FMG from his physician, stating that the plaintiff had a condition that would cause episodic flare-ups that prevented him from performing his job functions. The doctor estimated the duration of the condition was "months," the frequency of flare-ups was four episodes every six months, and the duration of the related incapacity was two to five days.

1 No. 13-3391.

2 29 C.F.R. § 825.308(c)(2).

After the plaintiff requested FMLA leave for an absence in connection with his eighth episode in a matter of about two months, the employer's third-party administrator[3] (TPA) sent the plaintiff's doctor a fax, indicating his latest absence was "out of his frequency and duration. Please confirm item #7." Item #7 on the medical certification form asked about the plaintiff's need to attend follow-up appointments or work part-time or on a reduced schedule because of the plaintiff's condition. The court assumed that the TPA intended to seek confirmation about Item #8 on the certification form, which asked about the estimated frequency and duration of episodic flare-ups and the duration of the incapacity. The plaintiff's doctor faxed back "Item #7 confirmed" to the TPA. Therefore, the TPA denied the plaintiff's request for FMLA leave since it believed his "[f]requency [was] exceeded."

Over the following few weeks, the plaintiff requested, but was denied, additional days of FMLA leave in connection with his flare-ups. The employer had an attendance policy whereby employees accumulate points for unexcused absences from work. Eventually, the plaintiff exceeded the allotted points for unexcused absences, so the company terminated his employment for violating its attendance policy. The plaintiff then sued under the FMLA, alleging claims of interference and retaliation.

The employer argued the plaintiff was not entitled to FMLA leave for his absences because he significantly exceeded the estimated frequency in his doctor's medical certification, and moved for summary judgment on that basis. The district court found that, while it appeared the plaintiff was taking off more time than was medically necessary, it was not so clear as to justify summary judgment. The employer moved for reconsideration of its motion shortly before trial, arguing this time that the plaintiff needed expert medical testimony to establish he was incapacitated due to his serious health condition during the absences in which he was denied FMLA leave. The district court ultimately agreed with the employer and concluded expert medical testimony was in fact required to prove that the plaintiff's serious health condition rendered him unable to perform the functions of his job during the absences, and granted summary judgment to the employer.

The Seventh Circuit Opinion

The Seventh Circuit, however, reversed that decision. The court decided that, while a plaintiff needs some medical evidence to establish a serious health condition, a plaintiff does not need *expert* testimony to establish incapacity where the employee suffers from a chronic condition like depression. The court pointed out that the FMLA regulations addressing "continuing treatment" and "intermittent leave or reduced leave schedules" actually anticipate that the determination whether an employee cannot work due to a serious health condition would not necessarily be made by a medical professional. The "continuing treatment" regulation provides that "[a]bsences attributable to incapacity … [due to a chronic serious health condition] qualify for FMLA leave *even though the employee … does not receive treatment from a health care provider during the absence.*"[4] And the "intermittent leave" regulation similarly provides that "[i]ntermittent … leave may be taken for absences where the employee … is incapacitated or unable to perform the essential functions of the positions because of a chronic serious health condition … *even if he or she does not receive treatment by a health care provider.*"[5]

The Seventh Circuit ruled also that the TPA's denial of the plaintiff's FMLA leave because his absences exceeded his doctor's estimates in the medical certification was improper. The court explained that "[a]n estimate, by definition is not exact and cannot be treated as a certain and precise schedule." To support this premise, the court relied on the existence of the recertification process, reasoning that, if the certified frequency and duration were hard limits on an employee's entitlement to leave, there would be no need to request recertification when an employee's requested leave exceeded the frequency or duration stated in the certification. When the plaintiff's absences exceeded the frequency of the flare-ups and duration of related incapacity estimated in the certification, the employer should have sought recertification instead of simply denying leave. The Seventh Circuit explained that, as part of that recertification, the employer could have asked the plaintiff's doctor whether the plaintiff's condition and the need for leave were consistent with the frequency and duration of his absences, but the employer failed to do this. The court found that the TPA's fax to the plaintiff's doctor asking him to confirm the prior certification was *not* a recertification; it did not request certification for the absences that exceeded the estimated frequency and duration. Further, the court noted the fax was improper for other reasons: there was no evidence that the TPA gave the plaintiff notice of its faxed communication to his doctor, and the regulations prevent an employer from communicating directly with the employee's health care provider.

3 The third-party administrator managed FMG's attendance policy.

4 29 C.F.R. § 825.115(f) (emphasis added).

5 29 C.F.R. § 825.202(b)(2) (emphasis added).

Three Important Lessons for Employers

The *Hansen* decision highlights three important lessons for employers to keep in mind while navigating the treacherous waters of intermittent FMLA leave:

1. Where the frequency or duration of an eligible employee's absences changes substantially, the recertification process is the safest means to understand whether the employee's continued need for leave is legitimate. The FMLA regulations permit employers to provide the employee's doctor with a record of the absences and inquire whether the employee's serious health condition and need for leave is consistent with the pattern of absences.
2. When seeking recertification from a physician, keep in mind that there are certain procedural requirements employers must adhere to throughout the process. For example:
    - Be wary of seeking recertification too early, such as when an employee is only a couple of absences over the doctor's estimate in the medical certification. The general rule is that an employer may require recertification no more than every 30 days and only in connection with an employee's absence. If a certification indicates that the minimum duration of the serious health condition is more than 30 days, the employer must generally wait until that minimum duration expires before requiring recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an employee's absence. *However*, an employer may request a recertification in *less* than 30 days if:
        - The employee requests an extension of leave;
        - The circumstances described by the previous certification have changed *significantly*; or
        - The employer receives information that causes it to doubt the employee's stated reason for the absence or the continuing validity of the certification.
    - Employers (and their TPAs) are generally prohibited from directly contacting an employee's health care provider, except where the employer seeks clarification/authentication of the medical certification and has first given the employee an opportunity to cure any deficiencies in the medical certification.
3. It is important to analyze carefully the actions that a TPA is taking in the face of particularly difficult FMLA and other leave of absence scenarios. To be sure, recertification processes should be reviewed with employment counsel to guarantee proper compliance with the FMLA.

Michael Congiu is a Shareholder, and Carly Zuba is an Associate, in Littler's Chicago office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Congiu at mcongiu@littler.com, or Ms. Zuba at czuba@littler.com.