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E-UPDATE

May 28, 2021

RECENT DEVELOPMENTS

The DOL Offers Guidance on the ADA's Interaction with COVID-19 Vaccines

The U.S. Department of Labor, through its Office of Disability Employment Policy (ODEP)-funded Job Accommodations Network (JAN), has recently added a number of resources for employers on COVID-19 and reasonable accommodations under the Americans with Disabilities Act to its COVID-19 webpage. These include frequently asked questions on COVID-19 Vaccination and the ADA. We summarize these FAQs as follows:

- **Employers may mandate the COVID-19 vaccine**.
- If employers (or their agents) administer the vaccine directly, they must ask the **CDC-mandated screening questions** – which are disability-related inquiries. Thus, under the ADA, the employer would have to demonstrate that such questions are job-related and consistent with business necessity.
- If the employee receives the vaccine from some other provider in the community, the employer may require the employee to **confirm that they received the vaccine or show proof of vaccination**, and doing so would not be considered a medical inquiry. The answer, however, would be considered medical information that must be treated confidentially.
- Employers with vaccine mandates need to engage in the interactive process to consider **reasonable accommodations** for those who cannot be vaccinated because of a disability (or, although not addressed by JAN, religion).
- Citing to the EEOC, JAN states that employees who cannot be vaccinated because of a disability (or, again, religious need) and therefore cannot work safely in the workplace **may be excluded** from the workplace. JAN cautions that the employee should not necessarily be terminated, if other accommodations such as remote work apply, or if the employee is entitled to other protections under law. (For example, we note that some states are passing or considering employment discrimination protections for the unvaccinated).
- Of particular interest, if an employee is teleworking because of a disability, **an employer may ask whether getting a vaccine will allow them to return to the workplace**.
- Employers **should not assume that they can end telework once at-risk employees are vaccinated** – that would be a case-by-case determination based on the employee's individual medical situation.
    - If the disability-related limitation does not require telework, then the employer can stop the telework.
    - If other accommodations are available to enable the employee to return to the workplace, those can be provided in lieu of telework.

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    - If the employer temporarily suspended essential functions of the employee's job in order to enable telework, such change would not be deemed permanent or that telework would always be a feasible accommodation.
- Employers can **require employees to notify them** if they become vaccinated (and consequently, no longer need telework as an accommodation).
- It is **"questionable" whether employers could require an employee with a teleworking accommodation to get a vaccine** in order to return to work when the vaccine is not otherwise being mandated. Employers should explore other reasonable accommodations to enable the employee to return to the workplace, and if no such accommodations are available, consider continuing telework as long as the employee is able to perform all of their essential job functions and it is not an undue hardship.

The DOL Offers Guidance on Reasonable Accommodations for Long-Haulers Under the ADA

Among the new resources that the U.S. Department of Labor's Job Accommodations Network (JAN) recently added to its COVID-19 webpage is included frequently asked questions on COVID-19 Long Haulers and the ADA.

Many individuals are "long haulers," meaning that they are experiencing lingering symptoms of COVID-19 – a condition known as Post-acute COVID-19 Syndrome or Long COVID. Such people may meet the ADA definition of having a "disability": a physical or mental impairment that substantially limits one or more major life activities. And if so, they would be entitled to reasonable accommodations to enable them to perform the essential functions of their jobs. On this issue, JAN offers the following guidance from the perspective of long haulers:

- Long haulers are encouraged to **ask employers for an accommodation**, whether or not they technically meet the disability definition, since employers are free to provide accommodations even if not required.
- Although requests for accommodation need not be formal, JAN encourages long haulers to put their **requests in writing**. We note that, once a request has been made, however informally, employers can then require the employee to follow up with a written request.
- Employers may require long haulers to **provide sufficient medical information** to establish coverage under the ADA, clarify the need for accommodation, and explore alternative accommodations. Employers may not ask for medical information unrelated to these reasons.
- **Accommodations may need to be provided for temporary conditions**, and may be removed once they are no longer required.
- In providing accommodations, which can range widely, **employers need not remove essential job functions, lower production standards, provide personal need items** (e.g. hearing aids or wheelchairs), **or experience an undue hardship**. They also need not provide the employee's preferred accommodation as long as the provided accommodation is effective.
    - JAN can help to propose accommodation ideas.
    - Employers have the duty to propose accommodation ideas even if the employee does not have any ideas.
    - Health care providers may also suggest accommodations.

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- If the **employer denies the accommodation**, JAN suggests that the employee ask why (and we suggest that the employer explain why when denying the request).
    - If the employer believes there is no disability, the employee could provide additional medical information to establish one.
    - If the employer believes the requested accommodation is an undue hardship, the employee could propose other accommodations (although we suggest that employers explore all possible reasonable accommodations before denying a request altogether).
    - If the employee believes the denial was not valid or the employer refuses to explain the denial (we do not advise employers to do that), JAN suggests that the employee go up the chain of command, file a grievance if a union member, or file a complaint with the federal Equal Employment Opportunity Commission or state fair employment practices agency, which are charged with enforcement of disability statutes. (We note that, although the DOL is offering these guidance documents, it does not have enforcement authority for the ADA).

No More No-Match Letters – But Employers Should Not Ignore SSN Discrepancies!

The Social Security Administration has discontinued its practice of mailing "educational correspondence" (aka EDCOR or "no-match" letters) to employers where Social Security number information reported on employees' Forms W-2 do not match the SSA's records. This, however, does not relieve an employer of the responsibility to address no-match situations of which it becomes aware.

The no-match letters were a practice that the SSA used at various points of time over the years, most recently starting again in 2019. At this time, the SSA states on its website that "At present, we are discontinuing EDCOR letters to focus on making it a better, easier, more convenient experience for employers to report wages electronically. We also will continue to seek out new opportunities to educate employers." It is unclear what those "new opportunities" will be.

But nonetheless, there may be times when an employer learns of a no-match situation. Because Immigration and Customs Enforcement (ICE) could pursue charges against employers for knowingly employing unauthorized workers, employers should be prepared to address such situations when they arise. Steps that employers should take include:

- Review their records to ensure that there are no clerical errors.
- If no clerical errors are found, notify employees of the mis-match, and ask them to confirm the accuracy of the information provided to the employer.
- If the provided information is correct, direct the employee to contact the SSA and allow the employee a reasonable amount of time – which could be months, given the challenges of dealing with a bureaucracy – to resolve the discrepancy. Make sure to follow up with the employee.
- If the employee is unable to resolve the discrepancy, or the employee admits that they are not authorized to work in the U.S, consider terminating the employee to avoid a charge of knowingly employing an unauthorized worker.

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Importantly, employers should not request to see the employee's SSN card or assume that the employee has submitted a false SSN and terminate the employee without allowing them to resolve the discrepancy – these actions could lead to discrimination claims.

NLRB Finds No-Recording Policy Remains Lawful Even Where Unlawfully Applied to Restrict Protected Activity

The National Labor Relations Board ("NLRB" or the "Board") held that a lawful rule or policy applied to restrict employee rights provided by the National Labor Relations Act ("NLRA") did not automatically render the rule unlawful to maintain.

No-Recording Policy: In *AT&T Mobility, LLC*, the company maintained a no-recording policy prohibiting employees from recording conversations with other employees, managers, or third parties. An employee, who was also a union steward, accompanied another employee to a meeting with management to discuss management's alleged targeting of the employee for termination. At the meeting, the company terminated the employee. The union steward secretly recorded the meeting on his personal and work cell phones. When the company learned of the recording, a store manager administered a coaching and advised the union steward-employee that recording conversations with management violated the no-recording policy, and the manager "did not want anyone to be held accountable for not following policy."

ALJ Decision: The administrative law judge (ALJ) held that the company violated Section 8(a)(1) of the NLRA, which prohibits employers from interfering with employees' protected rights under the Act, in two ways. First, the company unlawfully threatened an employee engaged in protected activity. Second, the company violated the NLRA by maintaining the no-recording policy.

Board Decision: The Board agreed that the company violated Section 8(a)(1) by threatening the union steward-employee that a refusal to comply with the no-recording policy would result in unspecified reprisals. The Board, however, reversed the ALJ and held that the no-recording policy was lawfully maintained. Additionally, the Board held that an otherwise lawful policy need not be found unlawful to maintain simply because an employer applied the policy unlawfully. Put simply, the Board concluded that applying a rule or policy to restrict employees' exercise of Section 7 rights (to engage in concerted activity for their mutual aid or protection) is an unfair labor practice, but it does not make the applied rule unlawful to maintain.

In concluding that the policy was lawful under *Boeing*, the Board reiterated that such no-camera/no-recording rules as a *type* are lawful. While such rules may prohibit recording of some protected conversations, a majority of conversations covered by such policies have no relation to Section 7 activity. Additionally, employees remain able to speak to each other about working conditions and other protected Section 7 topics even if they may not record such conversations. On the other side of the balancing test, employers have strong business justifications outweighing the "comparatively slight" impact on Section 7 rights. Specifically, employers have a legal duty under federal law to safeguard customer information and customer communications. Accordingly, the Board again found a no-recording policy lawful to maintain.

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The Board then considered whether the union steward-employee was engaged in protected union activity when he recorded the termination meeting with management, and, if so, whether the company unlawfully applied the policy by threatening him with unspecified reprisals for future violations of the rule. The Board rejected the company's argument that because the rule was lawful to maintain, it could not violate the NLRA by advising employees it would enforce the rule against violators. The Board reasoned that whether an employee is engaged in protected activity by recording a workplace discussion is a fact-based inquiry. Here, the employee was acting in his capacity as a union steward when he recorded the meeting. Further, the recorded meeting was held for the sole purpose of terminating another employee, and the company was not contending that private customer information or customer communications were likely to be discussed during the meeting. Accordingly, the Board found that the employee was engaged in protected union activity when he recorded the termination meeting, even though his act of recording violated the lawful no-recording policy. Additionally, the Board found that the company unlawfully applied the policy because the employee's sole act of not following the policy was protected by Section 7. Thus, the manager's application of the rule amounted to an unlawful threat that unspecified adverse action would be taken against the employee if he were to again engage in the protected activity of recording a termination meeting.

Finally, the Board addressed whether the rule became unlawful to maintain solely because it was applied unlawfully. The Board's 2004 decision in *Lutheran Heritage Village – Livonia* set forth a three-part test to determine whether a rule is unlawful. Prong three of the test states that if a rule has been "applied to restrict" Section 7 activity, it cannot be lawfully maintained. The current Board opined that this rationale did not adequately explain why a single instance of a lawful rule being applied unlawfully automatically renders the rule unlawful to maintain. The Board concluded that *Lutheran Heritage*'s "applied to restrict" prong ignores an employer's often legitimate interests in maintaining the rule. Accordingly, to the extent that prong three of the *Lutheran Heritage* test permits blanket prohibition of rules that have been applied unlawfully even once, it was overruled.

Takeaways: This decision touched on many issues to employers. First, the Board reaffirmed that no-recording policies are lawful to maintain (Note: This holding may be revisited with the nearing change of the political composition of the Board. We will keep you posted of any developments.) Second, even if an employee violates a lawful rule, it may be unlawful for the employer to discipline the employee – or even threaten discipline – if the employee was engaged in activity protected by the NLRA while violating the lawful rule. Finally, in what is a positive holding for employers, the Board will not simply find a lawful rule unlawful to maintain simply because it was applied unlawfully on a single occasion.

Fourth Circuit Expands Evidentiary Routes for Establishing Same-Sex Harassment

The U.S. Court of Appeals for the Fourth Circuit joined several sister circuits in finding that a plaintiff has routes beyond the three identified by the Supreme Court in its *Oncale v. Sundowner Offshore Servs., Inc.* decision to establish a same-sex harassment claim.

Background of the Case: In *Roberts v. Glenn Industrial Group, Inc.*, the plaintiff was a field employee of a company that provided underwater inspection and repair services to utility companies. All of its field employees were male. The plaintiff alleged that, throughout his employment, his

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supervisor repeatedly called him "gay" and made sexually derogatory and explicit remarks to him. The supervisor also physically assaulted him on two occasions, including by putting him in a chokehold. The plaintiff complained to his supervisor's supervisor on multiple occasions, but was told to "suck it up." He also complained to Human Resources on at least two occasions to no avail. He was then terminated following two workplace safety incidents, and he sued for harassment in violation of Title VII.

The trial court threw out the harassment claim, finding that the plaintiff had not met any of the three evidentiary routes for same-sex harassment identified by the Supreme Court in *Oncale*: (1) when there is credible evidence that the harasser is homosexual and explicitly or implicitly proposes sexual activity; (2) when the harassment indicates general hostility to the victim's sex in the workplace; and (3) when comparative evidence shows that the harasser treated one sex worse than the other in a mixed-sex workplace.

The Court's Decision. On appeal, the Fourth Circuit reversed the trial court's decision, finding that the three routes set forth in *Oncale* are not exclusive, and that, under another Supreme Court case (*Price Waterhouse v. Hopkins)* same sex harassment can also be established with evidence of sex-stereotyping. As in this case, the plaintiff shows that he was subjected to discrimination on the basis of his failure to conform to sex stereotypes – an approach that was broadly reiterated by the Supreme Court in its recent *Bostock v. Clayton County* decision, in which it recognized that Title VII's definition of "sex" included sexual orientation and transgender status.

Lessons for Employers. This case is significant in that it supports a trend – although not unanimous – of expanding the means by which plaintiffs can establish claims of same-sex harassment, which is not unexpected given the greater acceptance and voice of the LGBTQ+ community. This means expanded risk of liability for employers facing same-sex harassment claims. But this case also offers a more general warning to employers to not tolerate or ignore inappropriate conduct in the workplace, especially by managers, and to respond promptly and effectively to employee complaints of such conduct.

TAKE NOTE

DOL Officially Withdraws Independent Contractor Rule. On May 6, 2021, the U.S. Department of Labor formally withdrew the independent contractor Final Rule that had been issued in the waning days of the prior administration, which it had previously proposed to do and we discussed in our March 2021 E-Update.

The now-withdrawn Final Rule made it easier to achieve independent contractor status, meaning that employers would not need to keep time records and pay overtime, extend employment benefits or pay employment taxes for those individuals. With the withdrawal of this rule, we anticipate a return to the DOL's prior approach to this issue, which greatly favors the finding of employee status.

In light of this development, employers should be particularly cautious with regard to their designations of individuals as independent contractors. Given the change in approach, it is entirely possible, if not likely, that those individuals who were arguably properly treated as independent contractors during the last administration may nonetheless now be found to be employees.

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FMLA Does Not Excuse Employees From Complying with Call-In Requirements. A recent case reminds employers that employees can usually be held accountable for complying with call-in requirements, even when the Family and Medical Leave Act may apply to their absences. Moreover, when calling in, employees must provide sufficient information to trigger FMLA.

In *Koch v. Thames Healthcare Group, LLC*, the employer had an attendance policy requiring employees to notify their supervisors at least two hours before their shift starts if they will miss work. Failure to do so is considered a no-call/no-show, and two no-call/no-shows results in termination.

The nurse, who had a history of attendance issues, missed two consecutive shifts – the first for a doctor's appointment for a wrist injury, and with no explanation for the second, other than she would miss the rest of the week – and failed to provide timely notification. Although her supervisor completed the termination paperwork, she held off on submitting it to human resources to give the nurse a chance to explain her absences. The nurse then missed the next two shifts. In her untimely notification, she stated that she had run out of medication and could not leave the house, without further explanation. Her supervisor submitted the termination paperwork. On the fifth day, the nurse provided a doctor's note stating that she was being treated for major depressive order and ADHD and had run out of medication, and excusing her from work for the week. Nonetheless, she was terminated. She then sued, alleging among other things, interference with her FMLA rights. The trial court threw out her claims and she appealed.

The U.S. Court of Appeals for the Sixth Circuit upheld the trial court's decision. It found that the nurse had failed to provide proper notice of her need for leave, as her calls did not contain sufficient information for her employer to conclude that the FMLA applied. Additionally, she failed to comply with the FMLA's requirement as much notice as practicable for foreseeable leave (where 30 days is not possible), as she knew she had run out of medication prior to her first absence but did not inform her supervisor in the first call. And "more importantly," the Sixth Circuit emphasized that her calls to her supervisor did not comply with the two-hour pre-shift deadline, and were therefore tardy and subject to discipline under the attendance policy. While the unforeseeable need for leave might require notice after the fact, it was clear, based on the numerous other calls and texts that she made during the week, that she easily could have communicated with her supervisor in a timely manner.

The lesson for employers here is that they can, and should, hold employees accountable for complying with reasonable call-in procedures. Employees may also be held accountable for providing sufficient information to trigger any FMLA coverage. General statements of feeling sick or running out of medication is not enough to put the employer on notice of the need for FMLA leave.

Be Consistent and Thorough with Termination Reasons! The failure to do so can result in liability – or at least the costs and aggravation of extended litigation – under anti-discrimination statutes, as an employer recently found to its great dismay.

In *Watkins v. Tregre*, a Black employee in a local Sheriff's Office was terminated shortly after she requested leave that was covered under the Family and Medical Act. The employee had been verbally counseled for poor performance prior to her request, and two days after her request, her supervisor requested a disciplinary review board hearing for five infractions. The board, however,

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only reviewed one infraction – sleeping on the job – and recommended her termination. The employee sued, alleging violations of Title VII and the FMLA. In support of her claims, she noted that a White employee holding the same position had been counseled but not fired for sleeping on the job. The trial court dismissed her claims, finding that the Sheriff's Office had offered legitimate reasons for her termination – a variety of performance issues.

The U.S. Court of Appeals for the Sixth Circuit reversed the trial court's ruling, finding that there was evidence of pretext for discrimination. More specifically, the employee was fired for sleeping on the job while a White colleague was only counseled. Although the Sheriff pointed to performance issues beyond the sleeping, which likely would have been a sufficient basis for the disparate treatment, the problem was that there was evidence that the board considered only the sleeping – and not the other infractions – in deciding to terminate her.

The case demonstrates the need for employers to ensure that, if there are multiple reasons for termination, the record needs to reflect all – not just some – of the reasons. And it is critical to review how other employees engaging in similar behavior have been treated and ensure consistency of treatment for the misconduct on record.

Minor Acts Are Not Sufficient to Support a Discrimination or Harassment Claim. In order to sustain a claim of race discrimination under Title VII, a plaintiff must allege that they were subjected to an adverse employment action – but minor changes or actions do not constitute such actions. Similarly, such actions do not constitute illegal workplace harassment unless they affect the terms, conditions or privileges of employment.

In *Watson v. McDonough*, the employee sued for race discrimination and hostile workplace harassment based on a litany of concerns, including the failure to regrade her position, inadequate training for new duties, assignment of additional duties, her performance review, and written counseling. The trial court granted summary judgment for the employer, finding these claims had no merit.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's ruling. It agreed that the actions identified by the employee did not rise to the level of adverse employment actions for purposes of Title VII. And these same actions were not sufficient to create a hostile work environment, as they were not sufficiently severe or pervasive to materially alter the conditions of her employment.

This case therefore affirms that minor changes to an employee's duties or responsibilities, in and of themselves, cannot be considered adverse employment actions for purposes of sustaining a race discrimination claim or workplace harassment claim, unless they lead to actions with more tangible economic consequences – such as loss of pay, demotion, or termination. But as discussed elsewhere in this E-Update, such minor concerns could, in fact, support a claim of retaliatory harassment – so employers should be careful not to dismiss these concerns too quickly if an employee has made a claim of discrimination or harassment prior to raising concerns about these types of actions.

But Minor Acts Can Add Up to Retaliatory Harassment. While minor acts may not serve to support a claim of race discrimination or workplace harassment, as discussed elsewhere in this E-Update, they can be considered for purposes of assessing a claim of retaliatory workplace

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harassment, as explained by the U.S. Court of Appeals for the Sixth Circuit in *Davis v. Metro Parks and Recreation Dept.*

This case involved a female employee's claims for retaliatory harassment, among other things, following her internal sex discrimination complaint regarding a promotion for which she was not selected. Among the acts that she complained of were written reprimands, denied access to her personnel file, denied access to the open door process, lower performance evaluations, transfer to another supervisor, and transfer of the employee's assistant away from her. The trial court granted summary judgment to her employer, on the grounds that many of the acts were time-barred as they had occurred outside the applicable limitations period for harassment complaints (300 days under Title VII, one year under state law), and that the remaining acts were not sufficiently severe or pervasive to create a hostile work environment.

On appeal, the Sixth Circuit found that the trial court had applied the wrong standard to the employee's retaliatory harassment claim. The Sixth Circuit explained that different standards apply to hostile workplace harassment claims and retaliatory hostile workplace claims. A hostile workplace claim must relate to an employee's compensation, terms, conditions or privileges of employment. A retaliatory claim, however, is broader – it "extends beyond workplace-related or employment related retaliatory acts and harm." Thus, the assessment for such a claim is whether the conduct "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." But in relying on the conduct, which will typically extend over a period of time that may exceed the normal limitations period, the plaintiff must show that a reasonable person in the same circumstances, with the same training and experience, would believe that the conduct was unlawful. The Sixth Circuit observed that this reflects the purpose of the antiretaliation provision, which "protects an individual not from all retaliation, but from retaliation that produces an injury or harm."

In this case, the trial court had determined that the complained-of conduct was not sufficiently severe or pervasive to create a hostile work environment, but in doing so, it only considered events related to terms and conditions of employment, and treated each event individually. The Sixth Circuit stated that the trial court should have assessed the cumulative effect of these individual acts.

Thus, employers should be aware that what it may view as petty slights or annoyances, while not rising to the level of a hostile workplace, can, in fact, support a claim of retaliatory harassment if such conduct follows an initial complaint of discrimination or harassment.

NEWS AND EVENTS

Honor - Shawe Rosenthal has been ranked in the top tier of Maryland labor and employment firms for the eighteenth consecutive year by Chambers USA: America's Leading Lawyers for Business – one of only two firms in Maryland to receive this ranking. Seven Shawe Rosenthal partners – the most of any labor and employment firm in the State – received recognition as top individual practitioners: co-managing partners Stephen D. Shawe and Gary L. Simpler, as well as Eric Hemmendinger, J. Michael McGuire, Fiona W. Ong, Parker E. Thoeni, and Elizabeth Torphy-Donzella. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients.

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Welcome – We are delighted to announce that two associates have joined our firm.

- Veronica Yu Welsh brings a diverse litigation background and has represented clients from all different industries in various types of matters. She advises and represents employers with their employment-related matters and partners with her clients to provide practical and strategic solutions to their legal issues to both prevent and defend against legal disputes. Veronica received her Bachelor of Arts in Psychology from Boston College. She graduated from American University Washington College of Law.

- Before joining the firm, Evan L. Conder worked in compliance while pursuing his M.B.A., later graduating from the University of Louisville College of Business with distinction. Evan graduated cum laude from the University of Louisville's Brandeis School of Law where he was a member of The University of Louisville Law Review and competed in the ABA National Arbitration Competition.

Victory – Gary L. Simpler represented a health system in an arbitration case where a nurse was terminated for diverting narcotic medication. The arbitrator upheld the termination based on evidence that showed the nurse's ID was used over 40 times to access the narcotic bin in the hospital's computerized medicine distribution system but not withdrawing the narcotic, yet the number of vials decreased. Although the nurse denied taking any of the narcotic, he was the only nurse to work on each of the days when the narcotic bin was accessed with his ID and there was no evidence to show his ID was obtained by another person.

Podcast – Parker E. Thoeni was a guest speaker for the Employment Law Alliance's podcast series, Episode 246: The Ban on Non-Compete Agreements in the District of Columbia. The podcast can be accessed on the ELA website or on your favorite podcast streaming service.

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q1 2021. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the eighth consecutive quarter and ninth time overall that Fiona has received this honor.

Article – Mark J. Swerdlin authored the lead article, "Best Practices for Mask Policy," in the Maryland Auto Dealers Association's May Newsletter, *On The Move*.

TOP TIP: ADA and FMLA Do Not Necessarily Excuse Attendance Requirements

Employers often struggle with managing unpredictable attendance for employees with health conditions. A recent case from the U.S. Court of Appeals for the Eighth Circuit, *Evans v. Cooperative Response Center, Inc.*, offers some insight in what employers can and cannot do under the Americans with Disabilities Act and the Family and Medical Leave Act. (Because this discussion is rather lengthy, we note that practical pointers can be found at the end of this article).

Background of the Case. The employer's conduct policy provided that regular attendance was a "essential job function for all [Company] employees." Its attendance policy provided that unexcused absences that are not FMLA-eligible or otherwise approved incur points that result in progressive

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discipline up to termination. In addition, it required employees to follow a two-step procedure when calling in to have the absence designated as FMLA leave, by calling the supervisor to notify of the absence and then calling human resources to notify them of the use of FMLA leave. Employees incurred an attendance point for failing to follow the process.

The employee, who was the only office assistant, suffered from an autoimmune disease that flared up intermittently. She was approved for FMLA leave of 2 half days (for medical appointments) and 2 full days (for flareups) per month, and was further informed that absences in excess of the FMLA-approved amounts would receive points. She subsequently had both FMLA-covered and non-FMLA absences (including those in excess of the FMLA-certified amount and those for which she failed to follow the two-step notification process), incurring points for the latter. At some point, the employer also asked the doctor to recertify the employee's need for FMLA leave so it could determine if she needed additional FMLA leave, but the doctor's response was to refer the employer to the prior certification. She was given a warning for her attendance and informed that her absences burdened co-workers and caused unacceptable delays in business functions. After the employee called out for an illness that did not appear to be related to her FMLA condition, she was terminated. She then sued, alleging numerous violations of the ADA and FMLA. The trial court dismissed all of her claims, and she appealed.

The Court's Ruling on the ADA Claims. The Eighth Circuit upheld the dismissal of the employee's ADA claims, which included both discrimination and failure to accommodate, among other things. In order to sustain a claim of disability discrimination, an employee must show that (1) they are disabled within the meaning of the ADA, (2) they are qualified to perform their essential job functions, with or without a reasonable accommodation, and (3) there is a causal connection between their disability and an adverse employment action.

In this case, the Eighth Circuit found that the employee was unable to meet the second requirement, since, as it has repeatedly held, "regular and reliable attendance is a necessary element of most jobs." Whether that is the case will depend on evidence such as written job descriptions, as well as policies regarding attendance and conduct. In this case, the employer clearly had written policies designating attendance as an essential job function. Moreover, the employee's job description contained tasks, such as answering the phone and greeting visitors, that could only be performed in the office. Her absences admittedly distracted co-workers from their own duties in covering for her. Of particular note, although the employee attempted to invoke her FMLA leave as an accommodation for her disability, the Eighth Circuit asserted, "[I]ntermittent FMLA leave does not excuse an employee from the essential functions of the job, such as the need for regular and reliable attendance." Thus, the Eighth Circuit found that the employee was not qualified for her job, and consequently was not entitled to the protections of the ADA.

With regard to the employee's failure to accommodate claim, the Eighth Circuit rejected her contention that she should have been able to take FMLA leave beyond the approved amount. Her requested accommodation – more leave – would not enable her to perform the essential job function of regular and reliable attendance.

The Eighth Circuit also stated that it was an employee's responsibility to alert the employer that she needed an accommodation – in this case, that she needed leave beyond the 2½ approved FMLA days per month. But the employee did not do so. As the Eighth Circuit pointedly commented, "[The

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employee] cannot expect [the employer] to read her mind and know she secretly wanted [additional FMLA leave] and then sue [the employer] for not providing it."

The Court's Ruling on the FMLA Claims. The employee also asserted a number of FMLA claims, including interference with her FMLA rights. The employee's FMLA interference claims encompassed several issues. First, she challenged the employer's two-step notification system, as a number of the points that were assessed were based on her occasional failure to provide notification of her FMLA leave to both her supervisor and HR. The Eighth Circuit, however, rejected this summarily, noting that the regulations provide that employers may deny FMLA leave where an employee fails to "comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." Moreover, it had previously upheld such a two-step procedure under the FMLA.

Additionally, the Eighth Circuit found that points were appropriately assessed on occasions where the employee failed to mention that her absence was related in any way to her FMLA condition. The FMLA regulations provide that an employee seeking leave for a qualifying reason "must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act."

The employee also argued that she was improperly assessed points for absences that were clearly connected to her FMLA condition, but were in excess of the number of absences certified by the doctor. She contended that the employer should have requested recertification when it became clear that she needed more leave. But, as the Eighth Circuit noted, the employer did in fact request just such a recertification – and was referred by the doctor to the prior certification of 2½ days per month. The Eighth Circuit found that the employer had no obligation to continue to request recertification, and that it was permissible for the employer to assess attendance points for the excess absences.

The Eighth Circuit further found that the employee was not entitled to use FMLA leave for a condition that was unrelated to her FMLA-certified condition and that did not constitute a serious health condition. As the Eighth Circuit noted, the FMLA does not protect absences that are not attributable to a serious health condition.

Lessons for Employers. This case provides a plethora of guidance for employers on the ADA and FMLA, including the following:

- **Regular and reliable job attendance may be – even is likely to be – an essential job function**. Employers should review and, if necessary, revise their job descriptions and policies to ensure that they appropriately reflect the need for regular and reliable attendance, if this is the case. If an employee cannot meet this – or other essential job functions – with or without a reasonable accommodation, they are not qualified for the job and are not protected by the ADA.
- In considering a request for accommodation, **employers need not excuse the performance of an essential function** – including regular and reliable attendance, if that is the case for the

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job in question. Intermittent leave is not a reasonable accommodation that enables an employee to meet the essential function of regular and reliable attendance.

- It is the **employee's responsibility to notify their employer of their need for accommodation**. We provide a caveat to this point – if the employee's need for accommodation is obvious, then the employer may need to engage in the interactive discussion to determine if a reasonable accommodation is required. However, we suggest that, to the extent the employee's "obvious" disability may be impacting their work performance, the employer address the performance and allow the employee to raise their need for accommodation in the context of that discussion – rather than assuming that the employee needs an accommodation.
- Employers can establish **a two-step call-in procedure** that requires employees to contact both their supervisor and HR (or a third-party leave administrator) in order to have their absence treated as FMLA leave – and they can consider the leave unprotected and subject to discipline if the employee fails to follow this procedure. This two step procedure gives employers another tool in which to control the use and potential abuse of intermittent FMLA leave.
- Employers need not assume that absences are FMLA-covered. If approved for intermittent FMLA, it is the **employee's responsibility to notify the employer** that they are taking FMLA leave when they call out.
- If an employee's use of FMLA leave exceeds the certified amount, employers may be able to consider **the excess leave to be unprotected** and subject to discipline. We would recommend, however, as the employer here did, that the employer request a recertification from the doctor to confirm the employee's leave needs before taking this action.
- An employee is only entitled to use FMLA leave for a qualifying serious health condition. **An existing FMLA certification does not cover new conditions**. If the new condition may qualify for FMLA, the employer should provide a new set of certification forms to be completed. And if it does not qualify for FMLA, any absences in connection with that new condition will not be protected.

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