

Seventh Circuit Awards FMLA Rights To Ineligible Employee

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In today's workplace, employees are increasingly looking for opportunities to telecommute. Whether based on a desire to balance family and professional responsibilities, or more recently, to save money at the gas pumps, a rapidly growing number of employees would prefer to work from home. According to a recent Dice Holding study, nearly 40% of information technology workers would accept up to a 10% reduction in salary for the opportunity to work from home. This trend shows no signs of letting up any time soon.

Many employers are already familiar with the operational challenges presented by this trend. But those same employers are now confronting a variety of compliance issues in connection with workplace laws that were passed before telecommuting was common. Even relatively recent statutes such as the Family and Medical Leave Act (FMLA) can lay traps for the unwary employer who chooses to make telecommuting available.

Recently, a U.S. Court of Appeals allowed an employee to pursue the equivalent of full FMLA benefits, despite the fact that he was clearly unable to satisfy the statute's eligibility requirements. Interpreting employee handbook provisions, along with statements contained in correspondence from the company, the Court allowed the employee to move forward with his claim for twelve weeks of unpaid leave as a breach of contract, rather than an FMLA claim. *Peters v. Gilead Sciences, Inc.*

Broad Representations Come Back to Haunt Employer

Steven Peters was employed as a sales representative by Gilead Sciences Inc., a California-based organization with operations worldwide. Peters was working out of his home in Indianapolis when he was injured in a car accident. The company's handbook limited FMLA eligibility to those employees who had been employed by the company for at least 12 months, and who had worked a minimum of 1,250 hours over the 12 months preceding any leave request.

Following his leave request, the company reiterated the initial service requirements, and expressly informed Peters that he would retain his position and be eligible for reinstatement following his leave.

The company subsequently replaced Peters during his leave, and offered him an alternative position that would have required him to relocate. He then sued, based upon statutory provisions

generally stating that an employee who takes FMLA leave cannot be terminated or otherwise adversely penalized because of it.

At issue was the FMLA's so-called "50/75 exception," which requires that an employee be employed at a worksite that employs 50 or more employees within 75 miles. The company's FMLA policy was silent as to the "50/75 exception" and it failed to make any mention of this exception in its correspondence to Peters. A lower court agreed with the company's argument that Peters was not entitled to FMLA leave, and threw the case out.

But on appeal the U.S. Court of Appeals for the Seventh Circuit reversed the case, holding that while FMLA may not apply, Peters might still be entitled to protected leave under a state law contractual theory, based on provisions within the employee handbook and representations made by the company. In other words, the company could be bound by its promise to provide leave and subsequent reinstatement, *regardless* of whether the FMLA applies. The court sent the case back to the state court which originally heard the matter. There Gilead may face the possibility of providing monetary and reinstatement relief to an employee that Congress never intended to protect.

Get Your Policies in Order

What can you do to make sure you do not find yourself in the same situation? The most important thing you can do is to familiarize yourself with applicable federal, state, and local leave laws. Consult legal counsel if you're not sure of all the mandates. Employees may try to use the *Peters* decision, and the reasoning behind it, to extend your policies in a manner you never contemplated.

Breach of contract is typically a creature of state law, and the construction of employment policies under such laws tends to vary substantially from one jurisdiction to the next.

Regardless of where you conduct business, your policies should clearly state the terms and conditions under which benefits will apply, with full disclosure of any and all limiting and disqualifying eligibility provisions. Although it can be an unpleasant conversation, it is just as important for employees to be aware of any applicable restrictions to your benefits policies, as it is for them to be made aware of the benefits themselves. Be sure to provide a comprehensive set of disqualifying factors, have those factors reviewed regularly, and confirm them in writing with employees.

Coordinate all Leave and Other Company Correspondence

Another issue in the *Peters* case was the legal notion of "promissory estoppel." Most states recognize this doctrine, which allows a court to enforce a mere promise as a "contract," to protect

the rights of one party who relied on it to his or her detriment. In *Peters*, the Seventh Circuit found that, even if the handbook did not constitute a contract, Peters relied on the promises contained within the leave correspondence to his detriment.

The Court suggested that these promises could form the basis for a cause of action under state law, even in the absence of a conventional contract.

This case serves as a reminder that only those management-level employees who are well-versed in Company policy and applicable law should be authorized to speak on behalf of the organization. Otherwise you could be held accountable for the careless representations of a supervisor who speaks out of turn, even if your written policies are appropriately drafted.

It's also important to strike a proper balance between rigidity and flexibility. Don't take this decision as a directive not to examine situations on a case by case basis where appropriate. To the contrary, as technology allows you to move away from a traditional workplace setting in which all employees are under one roof, you are going to be faced with any number of new challenges. Management-level employees need to be properly trained to utilize their discretion with a proper amount of consistency, and a focus on communicating any plan of action to ensure that you and your employees are on the same page.

The Bottom Line

The decision, and the rationale behind it, should cause concern, but not alarm. As more employees begin to telecommute and work from home, it will become increasingly difficult to account for employees who are scattered across your service area. Keep this in mind when drafting leave policies and other procedures as well, with an understanding that a "one size fits all" approach may not be in your best interests.

Armed with a working knowledge of the applicable law, comprehensive, updated policies, and a properly trained management team, you can substantially reduce your exposure to claims like this, and avoid inadvertently creating liability where none would otherwise exist.

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