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EMPLOYERS MUST EXERCISE CAUTION WHEN CALCULATING FMLA LEAVE

An employer will be found liable for “interference” when it fails to provide an employee with notice as to the method for calculating the 12-week period of leave allowed under the Family and Medical Leave Act (FMLA), 29 U.S.C. §2612(a). The FMLA provides four methods for calculating leave. The four methods are set forth in 29 CFR 825.200. However, an employer is obligated to provide notice to its employees of the method used. Should notice not be given, the employee may be successful in an interference claim instituted against the employer.

A recent Sixth Circuit Decision has placed the burden on an employer to provide employees with at least 60 days’ notice to all employees of the option the employer intends to implement even though the method used was a method always used. In Thom v. American Standard, Inc., Case No. 09-3507, 2012 U.S. App. LEXIS 1166 (6th Cir. Jan. 20, 2012), the dispute involved the calculation of the leave allowed. The employee was injured in a non-work-related incident. He sought leave and was approved leave for 12 weeks. When his doctor authorized a return to light duty prior to the expiration of the 12-week period, American Standard informed the employee that it would not allow light duty work for a non-work-related injury. However, the employee provided American Standard with the return to work slip allowing a return prior to the original return to work date. As such, American Standard calculated the leave on a rolling method, using the return to work date and counting backwards. When the employee did not return to work on the date his doctor authorized, American Standard terminated his employment for the reason that he had exceeded the allowable unexcused absences. The employee argued that he was still within his FMLA time period if one were to calculate the period on the “calendar” method. American Standard used a “rolling” method of calculation and argued that it not only was the method always used, but that the Union officers were aware of this method for calculating leave. The plaintiff established that he was unaware of this method and the only time American Standard notified him of the method for calculations was when the lawsuit was filed.

The court held that even if American Standard's policy could be applied to his leave, the plaintiff was nonetheless entitled to application of the "calendar" method. The Sixth Circuit followed the principle that an employer that "subsequently select[s] an option" must "provide. 60-day notice to all employees of the option the employer intends to implement."

The lesson to be learned herein is that in order to avoid an interference claim based on calculations from FMLA, an employer should always follow the rules set forth in 29 CFR 825.200 relative to providing timely notice. Thus, if timely notice is provided, an employee cannot argue that the “calendar” method is the proper method of calculation, even if an employer maintained a practice of following one of the other three methods provides under the rules.
If you have questions about how this may impact your business, please contact Julie P. Apter (716.566.5458; japter@goldbergsegalla.com), Sean P. Beiter (716.566.5409; sbeiter@goldbergsegalla.com), or another member of the Goldberg Segalla Labor and Employment Practice Group.

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