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DISABILITY DISCRIMINATION

Requiring employee to pay for follow-up medical exam violates ADA

by Maria O. Hart
Parsons Behle & Latimer

Preemployment and postoffer medical exams are becoming increasingly more commonplace in the modern workplace. If your company requires such exams as part of your onboarding process, the following scenario may be familiar.

You have just interviewed an applicant for an open position at your company. You've reviewed his application, conducted an interview, and concluded that he's sufficiently qualified, experienced, engaging, intelligent, and hardworking. Following the interview, you extend an offer of employment—which, as your job description indicates, is contingent on the applicant passing a background check and satisfactorily completing a postoffer medical exam. The standard company-mandated medical exam seeks confirmation that he has the minimal level of physical fitness required to perform the essential functions of the job. This process is part of your company's hiring policies for this type of position. Your questions are appropriate, and your processes are dialed-in.

During the medical exam, the applicant discloses that he was injured a few years ago and has experienced back pain ever since. You're concerned that the back injury may prevent him from performing certain duties and responsibilities of the job he's being hired to perform. In fact, you want to require him to undergo additional follow-up medical tests, at his own expense, to ensure he can do the job. Should you require him to take those medical tests at his own expense?

According to the U.S. 9th Circuit Court of Appeals (whose decisions apply to Idaho employers), the answer is "no." On August 29, 2018, the 9th Circuit held that an employer violated the Americans with Disabilities Act (ADA) by first requiring a prospective employee to undergo follow-up medical testing, at his own expense, as part of a postoffer medical review, and then revoking the job offer when he didn't comply.

Case background

After Russell Holt interviewed for a job as a senior patrol officer, BNSF Railway Company extended a job offer contingent on his satisfactory completion of its postoffer medical evaluation process. During the medical review, Holt disclosed a back injury he had suffered four years earlier. Although he exhibited no current symptoms and had been working in a similar law enforcement job for five years and three reviewing doctors agreed that he had no limitations that would prevent him from performing the duties of a senior patrol officer, BNSF's medical officer requested a current MRI on his back, among other things. Apparently, the medical officer wanted to resolve any lingering uncertainty about the underlying back condition.

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AGENCY ACTION

OFCCP releases directives on equal employment and religious freedom. The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) in August issued two new policy directives, one focused on equal employment opportunity and the other addressing religious freedom. The equal employment opportunity directive calls for more comprehensive reviews of contractor compliance with federal antidiscrimination laws. The religious freedom directive is aimed at protecting the rights of religion-exercising organizations. The DOL said it is implementing a comprehensive compliance initiative that will include adding focused reviews to its compliance activities. The religious freedom directive instructs OFCCP staff to take into account recent U.S. Supreme Court decisions and White House Executive Orders that protect religious freedom.

NLRB defends its ALJ appointments. The National Labor Relations Board (NLRB) in August rejected a challenge regarding the appointment of its administrative law judges (ALJs), concluding that all of the Board's ALJs have been validly appointed under the Appointments Clause of the U.S. Constitution. In June, the U.S. Supreme Court issued a decision in *Lucia v. SEC,* finding that ALJs of the Securities and Exchange Commission (SEC) are inferior officers of the United States and thus must be appointed in accordance with the Appointments Clause—i.e., by the president, the courts, or the heads of departments. Unlike the SEC's ALJs, the NLRB's ALJs are appointed by the full Board as the head of department and not by other agency staff members. NLRB Chairman John F. Ring was joined by members Mark Gaston Pearce, Lauren McFerran, Marvin E. Kaplan, and William J. Emanuel in the order.

OSHA extends certain compliance dates for beryllium standard. The Occupational Safety and Health Administration (OSHA) issued a final rule in August to extend the compliance date for specific ancillary requirements of the general industry beryllium standard to December 12. The extension affects provisions for methods of compliance, beryllium work areas, regulated areas, personal protective clothing and equipment, hygiene facilities and practices, housekeeping, communication of hazards, and record keeping. The extension doesn't affect the compliance dates for other requirements of the general industry beryllium standard. OSHA has determined that the extension will maintain essential safety and health protections for workers while the agency prepares a "Notice of Proposed Rulemaking" to clarify certain provisions of the beryllium standard that would maintain the standard's worker safety and health protections and address employers' compliance burdens. ✤

When Holt informed BNSF that his insurance wouldn't cover the MRI and the out-of-pocket cost would exceed $2,500, the company refused to waive the requirement and stated that he would have to bear the expense of the procedure himself. When he failed to obtain the MRI, BNSF rescinded the job offer. Holt filed a charge with the Equal Employment Opportunity Commission (EEOC), which sued BNSF for alleged violations of the ADA.

Under the ADA, employer medical inquiries are divided into three categories. Each category has different triggering elements and comes into play at different times in the process. The three categories include:

(1) Inquiries conducted before an employer makes the employment offer;

(2) Inquiries conducted after the employer has made an employment offer but before the start of employment; and

(3) Inquiries conducted on or after the start of employment.

A Category 2 inquiry was at issue in this case. Category 2 inquiries don't have to be related solely to the applicant's ability to perform job-related functions or be consistent with business necessity. However, the ADA still generally prohibits the employer from discriminating against a qualified individual on the basis of a disability with respect to its job application procedures, hiring, and other terms, conditions, and privileges of employment.

The district court in Seattle granted the EEOC's motion for partial judgment in Holt's favor on the question of BNSF's liability under the ADA, concluding that he had established a *prima facie* (basically, a "slam-dunk") case of disability discrimination. Essentially, that means the court agreed that BNSF discriminated against Holt when it made a postoffer, preemployment medical inquiry that violated the ADA. The court then adopted the damages agreement reached by the parties and entered a nationwide injunction that prohibited BNSF from engaging in certain hiring practices. The employer disagreed with the district court's decisions and appealed to the 9th Circuit.

Outcome at the 9th Circuit

The 9th Circuit affirmed the trial court's decision that Holt had presented a "slam-dunk" case. In agreeing with Holt, the court found he had provided evidence to satisfy all three prongs required to prove a *prima facie* violation of the ADA.

First, the court found that Holt has a disability within the meaning of the ADA because BNSF perceived him as having an impairment—unresolved or lingering back pain—unless he could prove otherwise with an MRI. The court stated that BNSF regarded Holt as disabled by requiring him to submit to an MRI, conditioned the job offer on his having the MRI at his own expense, and revoked the offer after he was unable to provide the MRI results. In other words, he didn't need to actually have a disability to prove an ADA violation; it was sufficient that BNSF regarded him as having an impairment that wasn't transitory or minor. Such a perception or assumption renders the individual "disabled" under the ADA.

Second, the court found that BNSF discriminated against Holt on the basis of his perceived disability by requiring him

to pay for the MRI. According to the court, BNSF imposed an additional financial burden on an individual with a perceived impairment that it didn't impose on other individuals without perceived disabilities.

Finally, the fact that Holt was qualified for the senior patrol officer job was undisputed by both parties. The 9th Circuit noted that although employment entrance examinations don't have to be focused solely on an individual's ability to perform job-related functions or consistent with business necessity, they cannot be used in a way that violates the ADA's general prohibition on disability discrimination. By conditioning Holt's job offer on the completion of an MRI, BNSF assumed he had a back impairment that disqualified him from the position unless he could prove otherwise.

Although the ADA authorizes follow-up medical exams, which may have a disproportionate impact on individuals with disabilities, it doesn't authorize an employer to impose an additional financial burden on an individual with a perceived or actual disability by making him bear the costs of the testing. Keeping the financial burden of follow-up medical testing on employers:

- Avoids the situation of placing an additional barrier before applicants based on their ability to pay for required testing and is consistent with the ADA's

QUESTION CORNER

Addressing employee misconduct through payroll deductions

by Jason R. Mau
Parsons Behle & Latimer

Q *We recently discovered that one of our employees has been ordering supplies for his own personal use through his office account. He has admitted to the theft. We don't want to press charges, but we are going to fire him. Are we allowed to withhold his final two paychecks as repayment for the stolen supplies? He has signed a form authorizing us to do so.*

A Idaho law allows you to withhold wages if the employee has provided written authorization. However, the Fair Labor Standards Act (FLSA) prohibits you from withholding repayments for the stolen supplies if the deductions would reduce the employee's wages below the minimum wage for the hours he has already worked or would cut into any overtime compensation required under the Act.

Q *One of the facilities we operate has a formal dining room and bar. One of our directors observed a bartender drinking wine while she was on duty. We have a rule that prohibits employees from drinking on our premises at all times. We would like to fire the bartender for violating that rule. If she tells us she has a drinking problem, would the termination violate her rights under the Americans with Disabilities Act (ADA)?*

A The ADA specifically allows employers to prohibit alcohol use in the workplace. If you are applying your no-drinking rule uniformly and not enforcing it in a way that treats alcoholics more harshly than other employees who are not alcoholics, terminating the bartender for drinking on your premises would not violate her rights under the ADA.

Q *One of our employees has failed to meet our performance standards for the past three months. We have spoken with him about his performance several times, but the discussions weren't documented. Is it too late to document his past performance deficiencies before we proceed with termination?*

A Documenting performance issues provides a potential defense to a future employment lawsuit because it shows you took steps to help the employee succeed at his job and he was on notice of the consequences of not meeting your standards. While you aren't prohibited from documenting the employee's past issues now, you run the risk of losing credibility before a court if your documentation isn't thorough or accurate. Of course, contemporaneously documenting your discussions about performance with employees limits the risk of your records being challenged in court as self-serving or inaccurate.

Q *A female employee has accused a male subordinate of not respecting her authority because of her gender. The male employee says he has been falsely accused and is very angry. What should we do?*

A You should investigate the situation promptly and take appropriate disciplinary action against either employee if a valid claim exists. Not taking any action could lead to potential vicarious liability for (1) retaliation, if the male employee faces an adverse employment action in the future, or (2) harassment, if the situation escalates and an intimidating or hostile work environment is created.

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purpose of increasing employment opportunities for individuals with disabilities;

- Is consistent with other provisions of the ADA, including its requirement that employers bear the expense of reasonable accommodations absent an undue hardship;
- Discourages unnecessary and burdensome testing of individuals with disabilities or impairments; and
- Prevents employers from abusing their ability to require additional testing at the postoffer, preemployment stage.

Further inquiry into BNSF's motivation was unnecessary because it was clear that its request for the MRI was based on its assumption that Holt had a back impairment. As for the nationwide permanent injunction, the court instructed the district court to make appropriate factual findings regarding its scope. *EEOC v. BNSF Railway Co.*

Practical implications and best practices

Although the ADA doesn't specifically require it, the best practice is to pay for any follow-up postoffer, preemployment testing that you deem necessary to assess a prospective employee's ability to perform the job. Remember, while the ADA explicitly allows you to require a medical exam after you've made an employment offer and before the applicant begins working, and you may condition the offer on the results of the exam, you may not impose additional financial burdens, including the costs of a medical exam, on a disabled individual because of his disability. Requiring prospective employees to bear such costs invites EEOC scrutiny and risks expensive liability for unlawful disability discrimination under the ADA.

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INDEPENDENT CONTRACTORS

Don't forget to properly classify independent contractors

You likely recall a time not so long ago when the improper classification of employees as independent contractors was the hot topic for the IRS and the U.S. Department of Labor (DOL). In 2011, the agencies entered into a "Memorandum of Understanding" in which they agreed to share information about potential misclassifications in an effort to crack down on the common practice. The DOL also entered into similar agreements with roughly 30 state departments of labor.

If you haven't heard much about independent contractors lately, you're not alone. Nevertheless, we consider this an important issue that presents serious risks to employers that get it wrong. So in case it has fallen off your radar, consider this your refresher course.

General principles

Employers are prohibited from classifying a worker as an "independent contractor" if the nature of the working relationship is, for all intents and purposes, that of "employer-employee." If certain factors are met, you cannot classify employees as independent contractors even if, for example, they are begging you to do so or they sign an apparently ironclad contract in which they specifically acknowledge being independent contractors.

The IRS is concerned about misclassification because employers that misclassify employees as independent contractors don't pay employment taxes or withhold them on the employees' behalf. The DOL's concern lies primarily in the fact that employees who are misclassified as independent contractors are deprived of key benefits and legal protections under such laws as the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA).

Factors to consider

So how can you be sure your independent contractors are properly classified? The easier question is, how can you tell they aren't? Here are some of the biggest red flags that employees have been misclassified as independent contractors:

- You require them to follow instructions on when, where, and how the work is to be done. This is the single most important factor.
- You provide training for them (which can be as informal as requiring them to shadow more experienced employees).
- The nature of the relationship precludes them from making a profit or suffering a loss. (In other words, employees get paid no matter what, while

independent contractors have a financial stake in their enterprise.)

- You pay them on an hourly, weekly, or monthly basis (as opposed to a per-project fee).
- They provide services that are integral to the success of your business. (In other words, they do what your business was formed to do.)
- They perform services for you on an ongoing (not necessarily continuous) basis.
- You require them to perform the work personally.

On the other hand, there are certain factors that may weigh in favor of concluding the workers are properly classified as independent contractors:

- You have a written agreement with them reflecting that (1) they are independent contractors who will be paid by the job or project, (2) they will provide all necessary tools or equipment for the performance of the work, and (3) there is a defined duration for the contract/project and a set project fee.
- They are incorporated or have their own employees.

Just keep in mind that you can't be certain either of those "green flags" will protect you if other factors weigh in favor of classifying the workers as employees.

Final thoughts

While the federal agencies may be taking a less aggressive (and less collaborative) enforcement approach, remember that the underlying legal requirements have not changed. If someone you have classified as an independent contractor files a complaint with the DOL (or a state agency), there's a good chance you will receive a call or visit from an agency official who will want to take a close look at your independent contractors. Once the DOL is involved, there is a chance the IRS will come knocking as well.

More important, if one of your contractors consults an attorney, you could quickly find yourself on the receiving end of a lawsuit. If you happen to have a number of independent contractors performing similar services, that lawsuit could turn into a costly and time-consuming class action. ✤

WORKPLACE TRENDS

Salary increases expected to remain flat. Research from workforce consulting firm Mercer shows salary increase budgets for U.S. employees are at 2.8% in 2018—no change from 2017. Salary increase budgets for 2019 are projected to be just 2.9%, despite factors like the tightening labor market and a high rate of workers voluntarily quitting their jobs. The information comes from Mercer's "2018/2019 US Compensation Planning Survey." Mercer's research shows that even newly available investment dollars from the new Tax Cuts and Jobs Act aren't enhancing the compensation budgets for most companies. Mercer says just 4% of organizations have redirected some of their anticipated tax savings to their salary increase budgets.

Study shows fewer workers relocating for jobs. Data from global outplacement consultancy Challenger, Gray & Christmas, Inc., shows the percentage of jobseekers relocating for new employment has fallen dramatically since the late 1980s, when over one-third of jobseekers were willing to move for a new position. Just 11% of jobseekers relocated for work over the last decade, compared to nearly 19% of workers who relocated for new positions in the previous decade. Just over 10% of jobseekers relocated for work in the first six months of 2018, virtually unchanged from the relocation rate in the first two quarters of 2017. The relocation rate in the third quarter of 2017 was 16.5%, the highest quarterly relocation rate since the second quarter of 2009, when 18.2% of jobseekers moved for work. But by the fourth quarter of 2017, just 7.5% of jobseekers relocated. The data is based on a survey of approximately 1,000 jobseekers who successfully found employment each quarter.

Report shows how employers are taking advantage of the gig economy. A new report from Deloitte details how midmarket and private enterprises are taking advantage of the gig economy. Sixty-two percent of respondents to a survey of 500 executives in the midmarket and private company segment say the rise of the gig economy has allowed their companies to become even more agile in product and service development, while half of companies surveyed are leveraging gig workers to develop entire new lines of business. In addition to greater utilization of the gig economy, the Deloitte report, "Technology in the mid-market: Embracing technology," says that employers are placing a premium on talent as being a critical factor in technology deployment. The Deloitte researchers found that 46% of the executives surveyed plan to hire more people than before emerging technologies came on the scene. Only 26% saw digital disruption as shrinking the workforce. ✤

UNION ACTIVITY

AFL-CIO leader hails defeat of right-to-work law. AFL-CIO President Richard Trumka has spoken out to praise the August referendum in Missouri that struck down the state's right-to-work law. "Missouri is the latest sign of a true groundswell, and working people are just getting started," Trumka said after the vote. Calling the right-to-work law "poisonous anti-worker legislation," he said the law's defeat represents a victory for workers across the country. "The message sent by every single person who worked to defeat Prop. A is clear: When we see an opportunity to use our political voice to give workers a more level playing field, we will seize it with overwhelming passion and determination." A day after the election, the AFL-CIO announced an advertising campaign aimed at drawing attention to the "wave of collective action happening across the country and showing that anyone can join the momentum working people are generating."

UAW announces petition for postdoctoral researcher union. The United Auto Workers (UAW) announced in August that postdoctoral researchers at Columbia University had filed a petition with the National Labor Relations Board (NLRB) to initiate the certification process for a union. If a majority votes yes for Columbia Postdoctoral Workers-UAW as their union in an NLRB election, organizers believe the union would become the first certified union of postdocs at a private university in the United States. Postdocs are researchers who have earned a doctoral degree and work under the supervision of a faculty member on research projects. A statement from the UAW said the union now represents roughly 75,000 academic workers across the United States. The UAW also represents support staff at Columbia and graduate student workers who voted in favor of unionization in 2016. The union says the administration has refused to bargain with the graduate worker union based on the claim that student employees don't have union rights.

CWA criticizes AT&T's use of tax cut. The Communications Workers of America (CWA) announced over the summer a multistate political effort focused on the Midwest with radio ads spotlighting what the union calls AT&T's cuts to U.S. jobs in the wake of the new tax cut law. The union claims that AT&T has eliminated over 7,000 jobs since the tax cuts took effect in January despite seeing $20 billion in tax savings. The union says AT&T plegeded before the tax plan passed to use tax savings to create jobs. The CWA says it has has been leading the charge "to hold AT&T and other corporations accountable to their tax bill promises by publicly challenging them to reveal their spending plans for the tax windfall." ✤

DISABILITY DISCRIMINATION

ADA prohibits bias against employees who are 'regarded as' disabled

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against employees because of their disabilities. A covered disability is a physical or mental impairment that substantially limits a major life activity. That protection also extends to employees who are simply "regarded as" having a disability.

Before 2008, to prevail on a "regarded as" claim, an employee had to prove his employer subjectively believed he was substantially limited in a major life activity. In 2008, however, the scope of the "regarded as" protection was expanded by the ADA Amendments Act (ADAAA), which eliminated that requirement. The current state of the law was discussed in a recent decision from the 9th Circuit.

Facts

Herman Nunies was employed by HIE Holdings as a full-time delivery driver. He primarily handled and delivered five-gallon bottles of water to residential and commercial customers. At some point, he developed a shoulder injury that caused stabbing pain when he lifted his arm above his chest. He asked HIE to transfer him to a less physical part-time job in the company's warehouse.

After his supervisor told him the transfer was approved, Nunies disclosed his shoulder pain. Two days later, the supervisor told him the part-time warehouse job had been eliminated because of budget cuts and that he had to resign. A few days later, however, HIE advertised for a part-time warehouse employee.

Nunies sued, contending HIE violated the ADA by discriminating against him because of his disability. He advanced two claims:

(1) The company took action against him because he has a covered disability.

(2) It regarded him as having a disability.

On the question of whether Nunies has a covered disability, the judge ruled that he didn't identify any major life activity that is affected by his impairment. On the "regarded as" claim, the judge ruled Nunies didn't present direct evidence that HIE subjectively believed he is substantially limited in a major life activity. Therefore, the judge threw out both claims. Nunies appealed to the 9th Circuit.

9th Circuit disagrees with trial court

In discussing whether Nunies presented evidence that he has a covered disability, the 9th Circuit emphasized that the ADA's definition of "major life activities" includes lifting and working. In addition, according to the regulations adopted under the Act, the phrase "substantially limits" should be construed broadly, and an impairment "need not prevent,

or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."

HIE argued that because Nunies continued working at his delivery job despite his pain, his shoulder condition didn't substantially limit his activities. The court disagreed, concluding that having a stabbing pain when raising your arm above your chest substantially limits the major life activity of lifting and perhaps also working.

Turning to Nunies' "regarded as" claim, the court found that he wasn't required to present evidence that HIE subjectively believed he was substantially limited, pointing out that Congress expressly did away with that requirement in the ADAAA. All Nunies had to do was present evidence that HIE regarded him as having a disability.

The evidence Nunies presented was sufficient. His supervisor told him he would get the transfer, but two days after he disclosed his shoulder pain, HIE rescinded the offer and forced him to resign. That temporal proximity would permit a reasonable inference that the company forced him to resign because of his shoulder injury. The evidence that HIE was looking to hire someone for the same job while telling Nunies the job had been eliminated also would support a reasonable inference that the company changed its mind for an illicit reason. Therefore, the 9th Circuit sent the case back to the trial court, where Nunies will be able to present his claims to a jury. *Nunies v. HIE Holdings, Inc.*, Case No. 16-16494 (9th Circuit, September 17, 2018).

Takeaway for employers

Employers greatly prefer having employment claims dismissed by the trial court judge to avoid the costs and risks of having the claims go to a jury trial. This case demonstrates two circumstances that often will make it impossible to convince the judge to dismiss a case before trial. The first was the short amount of time—only two days—between the company learning of Nunies' shoulder pain and rescinding the transfer. In many contexts, such temporal proximity in and of itself is sufficient evidence that the adverse action was taken because of an illegal reason. The second circumstance—the evidence that the company falsified the reason for rescinding the offer—also was damaging to its case.

Employers should exercise great care before taking an adverse action against an employee soon after he has disclosed what could be a protected disability or has engaged in some sort of protected conduct, such as complaining about perceived discrimination. And the old saying "Honesty is the best policy" is as true in the employment world as it is in the rest of life: Dishonesty and misrepresentations often come back to haunt employers. ✤

FAMILY AND MEDICAL LEAVE

DOL issues FMLA opinion letters after a long break

For the first time in nearly a decade, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) has issued opinion letters interpreting the requirements of the Family and Medical Leave Act (FMLA). This may be a sign that the Trump administration intends to rely heavily on opinion letters as a form of guidance for employers, a practice that had been discarded by the Obama administration.

Regardless, the new letters offer interesting insight into several topics that aren't directly answered by the regulations or case law. Let's take a look.

FMLA leave for organ donors

An issue that comes up more often than you might think is whether an otherwise healthy employee who voluntarily donates an organ is entitled to FMLA leave. While the opinion letter doesn't specifically say so, the question seems to be whether organ donation is treated the same as other vo\luntary medical procedures, such as elective cosmetic surgery, which is never considered a serious health condition under the FMLA.

The WHD has concluded that organ donation can be an FMLA-qualifying serious health condition when it involves either "inpatient care" or "continuing treatment." Organ donors are usually required to stay at least one night in the hospital, which would qualify as "inpatient care." It's also possible that FMLA leave would be allowed in the rare case that an overnight stay isn't required, assuming the employee must undergo continuing treatment as defined by the Act (i.e., the employee is incapacitated for three or more days and receiving treatment from a healthcare provider).

In short, based on this opinion letter, it appears there is no situation in which an organ donor should be denied FMLA leave.

No-fault attendance policies

The second letter considered whether an employer's no-fault attendance policy violates the FMLA. Under the policy in question, employees accrue points for tardiness and absences and are automatically discharged when they reach 18 points. There are no "excused" or "unexcused" absences under the policy, but employees aren't assessed points for FMLA leave, workers' compensation leave, vacation, and similar absences. In addition, points remain on an employee's record for 12 months after accrual.

The issue addressed by the WHD involved the fact that when an employee takes FMLA leave, the 12-month period is temporarily frozen, meaning:

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- When the employee returns from FMLA leave, he has the same number of points as before taking leave; and
- The 12-month accrual period pauses during leave and starts back up upon return to work, potentially resulting in points that may remain on an employee's record for more than 12 months.

The WHD approved of the policy because employees "neither lose a benefit that accrued prior to taking leave nor accrue any additional benefit to which they would not otherwise be entitled." The policy doesn't violate the FMLA as long as attendance points accrue (and the 12-month period is frozen) the same for FMLA leave as for equivalent types of leave.

Compensation for FMLA-covered rest breaks

While technically an interpretation of the Fair Labor Standards Act (FLSA), this letter is relevant for those who administer FMLA leave for obvious reasons. The employer requesting the letter stated that several of its nonexempt employees had been approved for FMLA leave in the form of a 15-minute break every hour. As a result, the employees performed only six hours of work in a typical eight-hour shift.

Under the FLSA, short rest breaks of up to 20 minutes in length are usually compensable because they primarily benefit the employer, not the employee. However, the DOL concluded that short rest breaks that are necessitated by an employee's FMLA-covered serious health condition are for the benefit of the employee, not the employer. Consequently, such breaks don't have to be paid.

It's important to note, however, that employees taking FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. For example, if an employer generally allows employees to take two paid 15-minute rest breaks during an eight-hour shift, an employee who needs 15-minute rest breaks every hour because of a serious health condition would be paid for two of them, and the rest would be unpaid.

Final thoughts

While the attendance policy is a somewhat obscure issue, the other two opinion letters answer questions that come up surprisingly often. It's good to have a clear answer on those questions. We hope the DOL will issue similar opinions in the future. ✤

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