

# WEST VIRGINIA CASE EMPHASIZES FMLA NOTICE REQUIREMENTS

*Having an effective and efficient process for receiving and evaluating FMLA requests can save employers a lot of time and money and mitigate the risk of litigation.*

As we were all looking forward to the weekend on Friday, August 5, 2022, a decision in the West Virginia Supreme Court, *Fairmont Tool Inc. v. Opyoke*,\* came down that emphasized the importance of the Family Medical Leave Act's (FMLA) notice requirements.

The FMLA requires an employer to provide employees with certain information about FMLA leave, commonly referred to as the notice requirements. Generally speaking, once an employee makes a request for FMLA leave, the employer must provide three sets of notices:

- The eligibility notice, which advises the employee as to the eligibility of requested leave.
- The rights and responsibilities notice, which advises the employee of their obligations under the FMLA and the consequences for failure to meet them.
- The designation notice, which advises the employee whether the FMLA leave is approved, and the amount of leave that will be designated as FMLA and counted against that 12-week entitlement.

The notices must be sent in short order, generally within five days of the FMLA leave request and determination of eligibility. Delays in meeting these requirements can (and often do) lead to claims being made alleging an employer interfered with the employee's rights under the FMLA. Such interference claims generally do not require the employee to show any intentional interference or delay by the employer. Rather, they only need to establish there was a technical violation of the reporting requirements.

The good news for the employer is that while the timeline requirements may be stringent, potential strict liability consequences are less likely. Employees making a claim under the FMLA must prove that they were prejudiced by the employer's violation of the statute, and the statute does not provide any relief unless the employee loses compensation or benefits by reason of the violation.

FMLA violations are routinely listed within the definition of "Wrongful Employment Practices Act" in employment practices liability (EPL) policies, and as such employers may look to their EPL insurers for assistance in defending themselves against these allegations. Self-insured retentions under EPL policies can be significant though. In times such as these, with the pandemic(s) and the high cost of healthcare and nursing facilities, employees are often faced with the prospect of having to take time off work to care for themselves or family members. Having an effective and efficient process for receiving and evaluating FMLA requests can save employers a lot of time and money and mitigate the risk of litigation.

\**Fairmont Tool Inc. v. Opyoke*, No. 20-1042, 2022 WL 2072101 (W.Va. June 9, 2022).



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