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What Am I Doing Wrong?? Common FMLA Mistakes.

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What did I do wrong? and *Am I doing this correctly?* are frequent questions from clients regarding FMLA administration. This is the sixth in a monthly series highlighting some of the more common mistakes employers can inadvertently make regarding FMLA administration.

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Inconsistently applying a return to work fitness-for-duty certification requirement.

When an employee takes FMLA leave for his or her own serious health condition, an employer may request a return-to-work fitness-for-duty certification confirming that the employee is able to resume work. The FMLA regulations state that if an employer has such a policy, it must be *uniformly applied*. This means that all similarly-situated employees, such as those in the same occupation or the same serious health condition, must submit a return-to-work fitness-for-duty certification before being permitted to return to work. Alternatively, an employer can require such a certification of all employees. If an employer does not uniformly apply the return-to-work fitness-for-duty requirement, liability could result.

In *Casagrande v. OhioHealth Corp.,* Case No.15-3292 (6th Cir. Dec 20, 2016), an employee claimed that his rights under the FMLA were violated because he was not reinstated for over two months after notifying his employer that he was ready to return to work. The lower court found that the employer was entitled to delay the employee's reinstatement until the employee provided his return-to-work fitness-for-duty certification. The employee appealed, and the appellate court reversed the decision, because the lower court did not explore whether the employer's return-to-work fitness-for-duty certification policy was applied uniformly. This fact needed to be more fully established, because even though the employee delayed in submitting his certification, he may not have been at fault for the delay if the employer had only required the certification from him and not from other similarly-situated employees. If the employer had not implemented the policy uniformly, then the request would be improper.

In *Jones v. Gulf Coast Health Care of Del., LLC*, Case No. 8:15-cv-702-T-24EAJ (M.D. Fla. Feb. 18, 2016), an employee wanted to return to work on light duty despite not providing a fitness-for-duty certification, and his employer denied the request. The employee claimed that his employer interfered with his rights under the FMLA by requiring him to present a fitness-for-duty certification in order to return to his job. The employee pointed to two co-workers who had been allowed to return to work as evidence that the employer had not applied its fitness-for-duty certification requirement in a consistent manner. The court found in favor of the employer, finding that the policy was, in fact, uniformly applied. The court ruled that because the co-workers held different positions than him, and also had different types of injuries than him, the employee could not point to them as comparators to show that the policy was not uniformly enforced. Additionally, the employer provided evidence that those co-workers did, in fact, provide fitness-for-duty certifications before returning to work.

Consistent application of an employer's return-to-work fitness-for-duty certification policy is crucial. An employer should take special care to evaluate its FMLA return-to-work fitness-for-duty policy for uniformity, and consistently apply this return-to-work requirement. An important reminder – an employer must provide notice of the return-to-work fitness-for-duty certification requirement when the FMLA Designation Notice is issued.

Jenna Decker contributed to this post.

Part 1 - Common Family Medical Leave Act Mistakes: What Am I Doing Wrong??

Part 2 - Employee Leave Notice: Common Family Medical Leave Act Mistakes, Pt 2

Part 3 - FMLA Equivalent Position: What Am I Doing Wrong? Common FMLA Mistakes

Part 4 - Counting FMLA-Protected Absences: What Am I Doing Wrong?? Common FMLA Mistakes

Part 5 - What Am I Doing Wrong? Common FMLA Mistakes – the California Edition

Part 6 - What Am I Doing Wrong?? Common FMLA Mistakes

Part 7 - Common FMLA Mistakes: In Loco Parentis Relationships: What Am I Doing Wrong??