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FMLA And Equitable Estoppel

Law360, New York (August 12, 2009) -- A Scottish proverb warns that it is a shame to swallow an ox just to choke on its tail.

Since its passage in 1993, employers have diligently attempted to incorporate the Family and Medical Leave Act's regulatory scheme into the workplace compliance regimen, only to be tripped up on some final and technical requirement that lands them in the courthouse.

What can be even more gut-wrenching is the employer who provides FMLA leave when not statutorily required to do so only to be sued later for noncompliance.

Unfortunately, an employer's act of kindness in providing "FMLA-like leave" can often place the employer in the difficult position of being estopped from later denying coverage.

Similarly, even covered employers can make mistakes on individual FMLA leave approvals, which if relied upon to an employee's detriment, may act, under the equitable estoppel theory, to bar any subsequent lack of coverage defense.

On the other hand, as a recent Sixth Circuit Court of Appeals' decision demonstrates, an employee must present sufficient evidence of detrimental reliance on an employer's mistaken pronouncements concerning FMLA coverage to defeat an employer's coverage/eligibility defense under the estoppel doctrine.

On July 8, 2009, in *Dobrowski v. Jay Dee Contractors Inc.*, No. 08-1806, 2009 WL 1940368 (6th Cir. July 8, 2009), the appellate court determined that an ineligible employee must first demonstrate that he detrimentally relied upon his employer's assurances about FMLA coverage in order to recover under equitable estoppel.

Working as an engineer for Jay Dee Contractors, Daniel Dobrowski took approved FMLA leave to have elective surgery for his epilepsy.

His employer granted the request in a letter that included the DOL's "Employer Response to Employee Request for Family or Medical Leave" form, which summarized Dobrowski's application, indicated that he was an "eligible" employee, and confirmed the provision of FMLA leave.

Upon returning from leave after his surgery, management informed Dobrowski that he was being discharged as Jay Dee no longer needed his services.

In responding to Dobrowski's subsequent FMLA suit, the company challenged FMLA coverage as it employed fewer than the requisite 50 workers within 75 miles of the worksite. Dobrowski countered that equitable estoppel prevented Jay Dee from denying his eligibility after confirming his coverage upon his initial leave of absence.

In granting Jay Dee's Motion for summary judgment, the district court concluded that estoppel did not preclude Jay Dee's ineligibility defense as Dobrowski had not demonstrated that the company's assurances affected his decision to take leave when he did for his procedure.

On appeal, the Sixth Circuit Court of Appeals, noting its previous conflicting opinions, clarified that an employer may be equitably estopped from denying coverage under the FMLA if the employee establishes: (1) a definite misrepresentation as to a material fact; (2) a reasonable reliance on the misrepresentation; and (3) a resulting detriment to the party reasonably relying on the misrepresentation.

Although the appellate court agreed that Jay Dee had materially misrepresented Dobrowski's FMLA status, it affirmed the district court's ruling as no evidence existed that Dobrowski detrimentally relied upon Jay Dee's statements.

To the contrary, the record indicated that Dobrowski had already decided on and scheduled the surgery by the time he was informed of his eligibility for leave under the FMLA.

In turn, under the Sixth Circuit's reasoning, unless an employee can reveal that he or she would not have taken leave but for the employer's flawed designation, an employer's compliance with FMLA-like notice and certification requirements would be insufficient standing alone to prevail on equitable estoppel.

The Fifth Circuit Court of Appeals has applied a similar test in *Minard v. ITS Deltacom Commc'ns. Inc.*, 447 F.3d 352, 359 (5th Cir. 2006).

Under *Minard*, an employer who mistakenly makes a definite but erroneous statement to an employee of FMLA eligibility and has reason to believe the employee will rely on its statement(s) will be estopped when the employee presents evidence of detrimental reliance.

Likewise, in *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 724–25 (2d Cir. 2001), the Second Circuit appellate court affirmed a district court’s decision to estop an employer from asserting an affirmative defense challenging an employee’s FMLA eligibility when the employer’s unintentional misleading behavior caused the employee to justifiably and detrimentally rely on the FMLA leave designation.

Although in *Dobrowski*, the Sixth Circuit Court reasoned that the employee did not detrimentally rely on his employer’s representations of FMLA eligibility, the court noted how a different fact situation would alter the outcome. Jay Dee would have been estopped from contesting eligibility if *Dobrowski* presented evidence of changing his behavior after being told he was eligible for leave.

Based on potential application of the estoppel doctrine, employers must cautiously review FMLA threshold coverage and be prepared to assume the entire FMLA regulatory compliance scheme when they offer FMLA when not required to do so.

Moreover, when some facilities fail to employ the requisite number of 50 employees within the 75-mile radius, the employer must be careful not to rely on a company-wide handbook that does not carve out these facilities.

For example, the Seventh Circuit Court of Appeals found in *Peters v. Gilead Sciences Inc.*, 533 F.3d 594 (7th Cir. 2008), that language in the handbook, which failed to include the 50/75 exception, could potentially create an enforceable contract under state law, giving an employee a contractual right to the equivalent of FMLA leave regardless of the fact that the employee was not eligible for actual FMLA leave at his location.

Further, in individual coverage cases, employers are well-advised to check the leave count, especially for employees who are on and off FMLA.

A recent decision from U.S. District Court Judge Melinda Harmon in the Southern District of Texas, Houston Division, underscores how communications to an employee following the discovery of a miscount can prevent the employee from proffering sufficient evidence of detrimental reliance.

In *Garcia v. Kinder Morgan Inc.*, No. H-07-1081 (S.D. Tex. June 8, 2009), the employer erroneously informed Garcia that he had 84 days of FMLA leave remaining when in fact he possessed only 37 days.

Kinder Morgan had sent written notices with the erroneous dates. When the company discovered the mistake, Human Resources made phone calls and sent letters to Garcia, explaining that he would need to re-establish STD eligibility as his FMLA time had expired. When Garcia failed to do so, the company discharged him.

In his lawsuit, Garcia asserted that Kinder Morgan was estopped from terminating him before the original and erroneous FMLA expiration date based on his “reasonable” reliance on company communications.

In awarding the company summary judgment, the District Court disagreed, noting that while Garcia claimed not to have received some specific communications about his actual FMLA leave, he admitted to Kinder Morgan continually “harassing him” for medical paperwork.

Consequently, Judge Harmon explained that his reliance on the original leave designation form was not reasonable as “Garcia cannot unilaterally decide to open his ears to the good news of extended leave from Kinder Morgan and then close his ears to the demand for medical paperwork, labeling it ‘harassment.’”

As Garcia and Dobrowski illustrate, other than the employee’s detrimental reliance, which is presumably out of the employer’s control, the crucial element in equitable estoppel is the employer’s representation — and in some cases silence — as to whether the employee was eligible to take the FMLA leave.

Employers should carefully review their policies and practices to ensure that they accurately reflect FMLA eligibility requirements generally and individually when leave is granted. When giving the gift of FMLA leave when not required to do so, employers have to be prepared to eat the entire Ox — tail and all.

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