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No-Fault Attendance Policy Creates "Fault" for Employer Under FMLA

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“No-fault” attendance policies are common in many industries, especially those involving union settings. These policies do not require employees to justify an absence by presenting a doctor’s note or other equivalent evidence.

For instance, under some policies, employees are assessed between .5 and 1.5 points for absences, depending on factors such as whether the employee calls in to report the absence and whether the employee misses the entire shift or only part of it. Progressive discipline is imposed at various thresholds, often leading to termination if an employee accrues a certain number of points. Many no-fault attendance policies also allow employees to reduce the number of accrued absence points if they demonstrate good or perfect attendance for a certain time period.

On their face, no-fault attendance policies are legal. But what if the policy provides that an employee’s point balance will be reduced for every 30 days that an employee has perfect attendance, and that vacation, bereavement, jury duty, military duty, union leave, and holidays will count as *excused* absences, but all other absences will not be excused? For instance, what if an approved FMLA day is *not* considered “worked” for purposes of perfect attendance credits when another employee taking bereavement leave is deemed to have worked?

The answer is clear – an employer’s policy violates the FMLA if it treats FMLA leave differently than vacation, bereavement leave, and other types of absences considered “worked” for purposes of receiving credit for perfect attendance. This issue was recently considered in Dyer*v. Ventra Sandusky, LLC*, No. 18-cv-3802 (September 13, 2019), in the Sixth Circuit Court of Appeals, the federal judicial circuit covering Michigan, Ohio, Kentucky and Tennessee. In that case, the court overturned a lower court decision that upheld the employer’s attendance policy. Relying on the Department of Labor’s guidance, the appeals court held that the employer’s no-fault attendance policy was problematic because it impermissibly treated FMLA leave differently than other types of leave, such as military leave and union leave.

This case takes on a challenging interpretation of the FMLA’s regulations, which cover how benefits must be applied to employees exercising FMLA. The regulations provide that the taking of FMLA cannot be used as a negative factor in employment actions and imply that “equivalent” leave turns on whether the leave is paid or unpaid. For example, in describing the equivalency principle, the

regulations state that “if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave.” However, neither the FMLA nor the regulations define “equivalent leave status” and other types of leave could be compared to FMLA leave to see how they are treated. Thus, the court held that there were genuine issues of fact as to whether the employer’s no-fault attendance policy impermissibly treated other types of “equivalent” leave more favorably than FMLA leave.

The takeaway is that no-fault and perfect attendance policies have to treat FMLA leave comparably to other forms of leave. While the regulations refer to “paid” and “unpaid” leave as factors to consider, other factors may be the length of time taken and whether the leave is approved in advance or unscheduled. Consistency is key – employees exercising FMLA must be treated the same as those on equivalent types of leave.

To ensure compliance, employers should:

- Review no-fault attendance policies and determine how employees’ points are wiped off of their absenteeism slate;
- Consider how other non-FMLA leaves of absence are treated under these policies; and
- Update policies that would tend to discourage employees from exercising FMLA leave.

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