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DOES AN EMPLOYER HAVE FMLA OBLIGATIONS EVEN BEFORE AN EMPLOYEE SATISFIES THE ELIGIBILITY REQUIREMENTS FOR TAKING FMLA LEAVE?

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In a word: Yes. In fact, there are many.

The most notable obligation under the Family and Medical Leave Act – the obligation to provide protected leave for a qualifying reason – does not apply until the employee has become eligible for leave under the Act. However, many other obligations apply even before an employee becomes FMLA-eligible:

- Employers may not manipulate the size of a worksite or the number of work hours available to an employee in order to avoid employee eligibility for FMLA leave.
- Employers may not induce an employee to waive prospective rights under the FMLA, such as inducing a pre-eligible employee to waive the right to take leave once the employee becomes eligible in exchange for some other employer-provided benefit.
- Employers must not retaliate against an employee who, before becoming eligible for FMLA leave, requests leave that will begin after eligibility is achieved. *See Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Jan. 10, 2012) (holding that the FMLA prohibits an employer from harassing, criticizing the performance of, and terminating an employee in response to a pre-eligibility request for post-eligibility leave, because to hold otherwise would create "a loophole . . . whereby an employer has total freedom to terminate an employee before she can ever become eligible. Such a situation is contrary to the basic concept of the FMLA").
- Employers must give accurate information to an employee about whether the employee is eligible for leave. When an employee is given inaccurate information and relies on that information to the employee's detriment, the doctrine of equitable estoppel may prevent the employer from challenging the employee's FMLA eligibility.
- While employers may choose to provide various types of leave to an employee before the employee is FMLA-eligible (e.g., paid vacation, paid sick, unpaid personal, leave as an ADA

accommodation) , employers may not count such pre-eligibility leave against the employee's FMLA entitlement even if the leave was for an otherwise FMLA-qualifying reason.

- Every employer covered by the FMLA is required to post a general notice explaining the provisions of the FMLA and the procedures for filing complaints with the Department of Labor(DOL). In addition, any FMLA-covered employer that has even one eligible employee must also provide the general notice to *all* employees either: (a) by including the notice in an employee handbook or other written guidance to employees concerning employee benefits and leave rights (if such written materials exist), or (b) by providing the notice to every new employee upon hire.

- Employers must provide specific notices to an employee who requests FMLA leave, even if that employee is not yet eligible for leave. These notices include:
  - Notice of Eligibility (informing the employee, within five business days of the employer being put on notice that the employee may need FMLA leave, as to whether the employee is eligible to take FMLA leave);

  - Notice of Rights and Responsibilities (informing the employee of the expectations and obligations of the employee with respect to the FMLA request, and the consequences of failing to meet those obligations); and

  - Designation Notice (informing the employee whether the leave will be designated and counted as FMLA leave, or if not, why not).

Employers must not discharge or discriminate against an employee, regardless of whether the employee is eligible for FMLA leave, for filing a charge with the DOL or providing information in a proceeding relating to a right under the FMLA.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess best practices under FMLA. If you or your organization would like more information on FMLA or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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