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Subject: HR Alert: The risk when employees conduct work during a Leave of Absence

While the article below primarily refers to FMLA leave, the issues with regard to pay (an FLSA issue) and counting time worked against leave entitlement pertain to other types of leave of absence, specifically non-FMLA Medical leave of absence. These same issues ALSO pertain to employees who perform work during VACATION time off.

With smart phones, and tablets, and iPads, and iPhones, and all the other technology devices, it is probable, not just possible, that an employee on a leave of absence (or VACATION) will conduct work. That raises FLSA issues with regard to pay – especially for Exempt employees.

Source: the law firm of *Gonzalez Saggio & Harlan LLP*

DANGER: Employees Working While on Leave, Part 1

April, an exempt employee, goes to the hospital to have her baby. She has already applied for leave under the Family and Medical Leave Act ("FMLA") and indicated she would like to take the full 12 weeks of leave available to her beginning upon the birth of her child.

April's baby arrives, and six hours later April is propped up in her hospital bed, answering work e-mails and returning work-related calls.

This signals the beginning of a trend for April who, for the rest of her FMLA leave, continues to exchange e-mails and make sporadic telephone calls related to work.

Because she has done this work, does the Fair Labor Standards Act ("FLSA") require that her full salary be continued during what would otherwise be unpaid leave?

If you allow her to continue working or ask her for assistance on matters during her leave, are you interfering with her FMLA rights?

Can you still count all her time off as FMLA leave?

This scenario and these questions are not rare. Clients face these issues frequently as they try to balance concerns over increased governmental scrutiny of their wage and hour practices with the need to move forward in their businesses when vital exempt employees are on leave. Employers are consistently trying to determine how often they can contact exempt employees on leave for key operational information and at which point such contact might mean that the employee is really considered to be at work or that they are interfering with the employee's leave. Employers also face these issues when employees, such as April, who want or feel the need to work, continue to do varying levels of work while on leave or engage in work communications while on leave, perhaps to help maintain a client or customer relationship.

The wage and hour and FMLA issues presented by the employee who works sporadically during a continuous FMLA leave are not necessarily distinct from those of an exempt employee who is working almost continuously but taking limited intermittent leave.

Both scenarios concern issues as to whether full salary must be paid to each individual in order to preserve their exempt status and also what actions might be illegal "interference" with the employee's FMLA leave rights.

The question of how FMLA leave factors into pay of an exempt employee is answered by the regulations to the FLSA and the text of the FMLA. Generally, employees who are classified as exempt executives, administrators, and professionals under the FLSA must be paid on a "salary basis." To

meet the salary basis criterion, an exempt employee must receive a fixed salary each workweek, which may not fluctuate regardless of the number of hours worked.

Deductions from the fixed salary are permissible in certain instances, however, including when the employee takes FMLA leave:

An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a *proportionate part of the full salary for time actually worked*. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week. 29 C.F.R. § 541.602(b)(7) (*Emphasis added*.)

This exception is also contained in the FMLA statute itself at 29 U.S.C. § 2612(c):

Where an employee is otherwise exempt under regulations issued by the Secretary [of Labor]...the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee...

Under both laws, an exempt employee's weekly salary can be prorated to reflect unpaid FMLA leave taken in that week. If an exempt employee normally works a 40-hour week and is taking one unpaid day off each week, the employer can reduce the salary paid in those weeks to 4/5ths (or 80%) of his usual salary. (Of course, if the employee is using available paid leave during an FMLA absence, there would be no deviation in the employee's salary.)

In April's scenario, April's employer needs to calculate how much time she spends working while on FMLA. If April is just answering sporadic telephone calls or occasionally sending brief e-mail responses, the time spent working may not be significant enough to generate a need to pay her a proportionate amount of her salary. However, if it is clear that April is spending hours and not minutes working during her leave, she may be entitled to a portion of her salary proportionate to the time she has actually worked.

Yet, even knowing this, employers face the practical problem of monitoring how much time an employee is working while ostensibly on continuous leave. This accounting may be best approached by having a policy that addresses working on leave. For example, an FMLA policy could prohibit any type of work being performed while on *unpaid* leave without the express written authorization of an employee's supervisor and HR. The policy would further set out a requirement for the employee to account weekly for any time spent doing work, including a description of the work done and the time spent. Again, if the employee on FMLA is utilizing available *paid* leave, and the salary is automatically continued, this FLSA issue is not presented.

Aside from the potential issues under the FLSA, could asking or permitting an employee to perform work while on FMLA leave be considered illegal interference with the leave? That issue, as well as some ways employers can address these issues through internal policies, will be discussed in the following article. Stay tuned.

DANGER: Employees Working While on Leave, Part 2

When we last left April, our hypothetical employee, she was working while on leave.

Part 1 addressed the FLSA issues that arise from this situation. The second issue presented by an exempt - or a nonexempt - employee working while on leave is when and whether such work "interferes" with the employee's exercise of FMLA rights.

As many employers are aware, an employer is prohibited from interfering with, restraining, or denying the "exercise [of] or attempt to exercise" any right under the FMLA. 29 U.S.C. § 2615. Thus, if an employer interferes with the FMLA right to medical leave, then the employer has denied the employee a right to which he or she was otherwise entitled and an FMLA violation has occurred. Interference can take the form of discouraging an employee from taking leave or denying leave to which an employee is entitled. 29 C.F.R. § 825.220(b). At some level, requiring an employee who would otherwise be on (and entitled to) continuous leave to work is considered interference. Employers

should therefore approach each situation in which an employee is working while on leave with caution and should limit the amount of time and type of work an employee is asked or allowed to perform while on leave. Unlike with the FLSA issues discussed in Part 1, paid leave does not prevent interference.

An employer may be found to interfere with an employee who utilizes paid leave while on FMLA because the focus is on the medical need for leave, not whether the time off is paid.

Courts have provided some helpful guidance for when working on leave may be considered interference. Generally, it appears unlikely that an employer will be considered to have interfered with an employee's right to FMLA leave when the employee is asked to respond to occasional e-mails and take a few phone calls during leave. Courts have held that "[f]ielding occasional calls about one's job while on leave is a professional courtesy that does not abrogate or interfere with the exercise of an employee's FMLA rights. When limited to the scope of passing on institutional knowledge to new staff, or providing closure on completed assignments, employers do not violate the FMLA by making such calls." *Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 537 (S.D.N.Y. 2009). The *Reilly* court found that if an employer makes a few brief, infrequent phone calls to an employee on leave asking, for example, where files are saved on a computer or where to find certain things, and the employee is not required to produce work product or complete assignments, then the contact is not considered interference with FMLA Leave. Thus, whether or not interference occurred appears to be a practical consideration that looks at the frequency and level of work requested.

It is not entirely clear, however, if an employee must complain to an employer about having to do the work for a request for work to be interference. One court found that an employer has not interfered with an employee's FMLA leave right when the employee worked on leave without first telling his supervisor that he did not want to work or was too fatigued to do so. *Soehner v. Time Warner Cable, Inc.*, 2009 WL 3855176, 4-5 (S.D. Ohio 2009).

However, an employee concerned about job security may not want to object to a request to work while on leave. Out of caution then, employers should consider defining what an employee can and cannot be asked for while on leave. Certainly, the safest practice is to prohibit employees from working on leave entirely. But because that may not be realistic, employers should set, by policy, a procedure for asking employees for work or information while on leave.

In addition, when an employee (such as April) voluntarily works while on leave without the employer's knowledge or agreement, it is likely that the employer has not interfered with the employee's exercise of FMLA rights. However, if the employer could or should have known that the employee was working while on leave, then all the issues discussed in this article arise once again, and the employer should take steps to address them.

Suggested leave practices

Employers should consider developing a separate internal operations policy that addresses the following:

1. An employee on leave should not be asked or permitted to do work unless it is requested or performed on a brief, occasional basis for institutional information or is needed as a professional courtesy around a customer or client relationship.
2. Supervisors seeking more from an employee on leave than institutional information on an occasional basis should first inform HR of the need for, and nature of, the proposed request to the employee and receive prior approval to go forward with the request.
3. Working time spent by an employee on leave should be tracked and documented and reported to HR.
4. The policy should define when an employee (exempt or nonexempt) on unpaid leave should be paid for time worked based on time tracked.

