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FAMILY AND MEDICAL LEAVE ACT (FMLA)

UPDATE

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Since the FMLA took effect more than four years ago, courts have struggled with what illnesses constitute “serious health conditions” to trigger coverage under the Act. While some courts have recognized that not all illnesses and absences constitute serious health conditions, see Bauer v. Varsity Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997) (holding that one day absence for hematochezia, or passage of bloody stools, failed to constitute a serious health condition under the FMLA); Murray v. Red Kap Industry, Inc., 124 F.3d 695 (5th Cir. 1997) (limiting FMLA coverage to narrow period where physician authorized employee’s absence), other courts have attempted to expand the FMLA’s coverage to absences not formerly recognized as serious health conditions under the Act. See Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997) (holding that serious health condition may exist if a series of minor health conditions were linked together to constitute one “serious” condition).

Most recently, the Third Circuit further expanded the definition of a serious health condition. Victorelli v. Shadyside Hospital, No. 96-3597, slip. op. (3d Cir. Nov. 3, 1997). The Victorelli decision is of particular importance because it restricts an employer’s ability to terminate an employee for excessive absenteeism where the employee alleges that the absences were caused by a chronic condition, in this case, a peptic ulcer. Because it is difficult to distinguish between an employee who abuses an attendance policy from an employee who legitimately requires sporadic absences from work due to a chronic medical condition, employers must be even more aware of the reasons for an employee’s absences so that absences protected by the FMLA do not form the basis for an adverse employment action.

The Facts of Victorelli:

One morning, Kathleen Victorelli (Ms. Victorelli), a technician at Shadyside Hospital (“the Hospital”), called in sick, citing abdominal pain. Ms. Victorelli called her physician, who told Ms. Victorelli that her stomach pain was a flare-up of her peptic ulcer. The physician, however, did not examine Ms. Victorelli, and made this diagnosis based on her subjective complaints and her prior history of stomach pain, for which she had visited him only four times since her first

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holding, the Third Circuit emphasized that her employer was aware of her condition because the employee's supervisor had been told by Ms. Victorelli that the reason for her absence was her peptic ulcer, and the Hospital had not contested the legitimacy of her sickness by requiring a second or third opinion, as is permitted under the regulations. The court also credited the employee's treating physician, who opined that if left untreated, the employee's condition could cause a period of incapacity in excess of three days. The physician also stated that her condition occasionally prevented the employee from working. Therefore, based on these facts, the court determined that a jury should decide whether the employee suffered from a serious health condition.^{2/}

The court reached this conclusion despite the fact that in enacting the FMLA, Congress specifically stated, as part of the legislative history, that minor ulcers, and other relatively minor ailments (such as the common cold, the flu, ear aches, upset stomach, headaches other than migraines) do not constitute serious health conditions under the Act. However, the court noted with approval that the Department of Labor's final rule omitted a reference to this legislative history, because of its view that even relatively minor ailments can constitute serious health conditions under the FMLA if the standards set forth in the regulations are met.

The Implications of Victorelli and other Decisions Expanding the Definition of "Serious Health Condition":

1/(...continued)

Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

- (A) Requires periodic visits for treatment by a health care provider, or by a nurse or physicians assistance under direct supervision of a health care provider;
- (B) Continues over an extended period of time (including recurring episodes of a single underlying condition) and;
- (C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.114.

2/ Remarkably, the Third Circuit determined that Ms. Victorelli had sufficiently engaged in continuing treatment merely by the fact that she had seen her physician four times for stomach pain since 1990. This interpretation of continuing treatment appears to be at odds with the intent of the FMLA, which was designed to cover serious health conditions, and not all minor aches and pains which necessitate a visit to the doctor.

Because it is often difficult for an employer to determine if an individual has a “chronic” condition rather than a minor illness, decisions such as Victorelli, which expand the scope of a “serious health condition,” make it even more difficult for an employer to terminate an employee pursuant to its attendance policy. As in Victorelli, if an employer is on notice of an employee’s condition, even though that notice is through a first level supervisor, every absence for a chronic condition will be FMLA protected, and therefore, cannot be counted as an occurrence under a no-fault attendance program or as a basis for disciplinary action.

Obviously, this will mean extensive monitoring of an employee’s illnesses, or the illnesses of an employee’s family, which is often inconsistent with a no-fault attendance program, which is designed to allow employees to take a certain amount of absences without employer scrutiny. In addition, an employer now must determine if absences for certain common illnesses, such as the flu or ear infections, are sufficiently serious or of such duration so as to be considered protected under the FMLA. The Victorelli decision, as with other cases that expand the FMLA’s protection, certainly make it more difficult for an employer to deny FMLA protection for even the most common of illnesses, and therefore, more difficult to terminate employment for attendance problems, and further demonstrates the importance of establishing protocols for identifying the reasons for an employee’s absence, for designating absences as FMLA leave, and for carefully reviewing any termination decision based on attendance problems.

Michael J. Ossip
Sarah E. Sutor