CTSI
Serving Colorado's Counties

Technical Update

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When FMLA Cannot be a Factor

The Family Medical Leave Act passed in 1993 guarantees covered employees up to 12 weeks of job-protected unpaid leave for qualified medical or family reasons. Eligible employees are those who work for a private-sector employer with more than 50 employees and all public employees, including state and county employees, regardless of organization size. In addition to working for a covered employer, the employee must have worked for at least 12 months (a minimum of 1,250 hours) prior to taking FMLA leave. Note that the 12 months does not need to be consecutive, so long-term seasonal workers may also be eligible. The employee must also work at a location where the employer has at least 50 employees within 75 miles.

FMLA & Termination

Covered employees cannot be terminated for using FMLA. Nor can the use of FMLA be a factor in the decision to terminate employment. In a recent case in Delaware, an employee at the Delaware River Port Authority requested intermittent FMLA to deal with a health issue. His leave request was approved; however, while the employee was on leave his position was eliminated. The employee sued as he felt that his use of FMLA was a factor in his termination. On appeal, the 3rd Circuit court ruled in the employee's favor after reviewing the U.S. Department of Labor (DOL) regulations regarding FMLA.

The DOL calls for a mixed-motive theory instead of a but-for theory when it comes to retaliation claims. The mixed-motive theory, legislated into Title VII of the 1991 Civil Rights Act, states that if a protected right, like FMLA, is used as part of an adverse employment decision, even if that decision would have been the same without taking into consideration the protected right, then it is illegal. The but-for theory states that but for the action, the result would not have happened.

FMLA & Disciplinary Actions

Furthermore, a disciplinary action cannot be taken against an employee for failure to meet deadlines or goals, if the reason for not meeting them was due to the employee taking protected time off. However, the employer need not award the employee bonuses or awards if they fail to meet the criteria because of their leave as long as employees who took vacation are also disqualified.

What This Means for Counties

FMLA cannot be a factor, even a minor one, in an adverse employment decision. Before terminating or disciplining an employee on approved FMLA, please consult CTSI's Senior Human Resources Specialist, Dana Mumey, at 303-861-3122 to ensure that you are in compliance with the law. CTSI

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