Victory in ERD Challenge to Running State and Federal FMLA Concurrently

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Practice Area: Health Industry Labor, Employment and Immigration & Labor and Employment

As several of our clients have encountered, recently employees and their counsel have argued that a woman can choose to take her federal Family and Medical Leave Act ("FMLA") leave and her Wisconsin FMLA leave consecutively. The situation most often presents itself when a woman requests time off during pregnancy, before the birth of a child, but wants to "save" her six weeks of Wisconsin FMLA leave to use upon the birth of her child. In one case in which von Briesen & Roper represented the employer, the Wisconsin Department of Workforce Development's Equal Rights Division ("ERD") advised an employee that she could "stack" her state and federal FMLA leave in this way. In fact, the ERD found probable cause to believe there had been a violation of the Wisconsin FMLA when an employer told an employee that her state and federal FMLA pregnancy leaves would run concurrently when taken in the 16 weeks before the birth of her child. Our client stood by its position that the federal and state FMLA laws run concurrently when the leave qualifies for protection under both laws and went to a hearing on the merits.

Administrative Law Judge Allen Lawent found that the employer had properly applied the law when it ran the state and federal leave concurrently. In this case, the employee, an assistant cook in a hospital cafeteria, requested a number of adjustments to her job duties early-on in her pregnancy (including not lifting over 25 pounds, not working at a grill, and not using harsh cleaning chemicals, all of which were a part of her everyday job functions).[1] Because the employer was unable to allow the employee to avoid those tasks for the remaining six months of her pregnancy, she went out on FMLA leave. The employer immediately designated the leave as federal FMLA leave. When the employee reached within 16 weeks of her due date, the employer also designated the leave as Wisconsin FMLA leave. The employee argued that she was entitled to use her federal FMLA leave before her due date and then begin using her Wisconsin FMLA leave only after the federal leave expired.

ALJ Lawent noted that "it is irrelevant whether the leave granted is counted by the employer as concurrent or consecutive with any other leave" (for example, sick leave, short term disability leave, or federal FMLA leave). He found that the proper questions are: (1) was the leave related to the birth of a child, and (2) was the leave that was granted no more restrictive than the leave available under the Wisconsin FMLA. If those two requirements are met, ALJ Lawent held that the leave may be properly designated as leave for the birth of a child under the Wisconsin FMLA.

It is important to remember that the facts and circumstances of each FMLA request may affect the outcome under the law. For example, leave for pregnancy complications that occur more than 16 weeks before the birth of the child cannot be counted as Wisconsin FMLA leave for the birth of a child.

[1] Note, in this case, the employee's physician eventually stated on a medical certification that there was no medical need for the employee to be out of work and the employee had no medical condition other than pregnancy.

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