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Pitfalls of FMLA and Collective Bargaining Agreements

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Pitfalls of FMLA and Collective Bargaining Attendance Policies

By Karin Mika

Almost all collective bargaining agreements include a progressive disciplinary process. The imposition of discipline may involve "points" being assessed for violating a company's rules, including its attendance policy. In some situations, employees may accumulate attendance points based on missed days, tardiness, or failures to call in timely. Attendance infractions may lead to progressive discipline, ultimately leading to discharge.

In a unionized workplace, the collective bargaining agreement has historically governed the day-to-day relationship between a union member and an employer.

Despite the fact that such agreements are negotiated contracts that, in some respects, memorialize trade-offs of some legal rights for other rights, this process is no longer as insular as it once was.

Collective bargaining agreements must incorporate many statutory rights now enjoyed by most employees in the workforce. These include the right to be free from discrimination, the right to be free from sexual harassment, the right to take advantage of the provisions of the Americans with Disabilities Act, and the right to take advantage of the Family and Medical Leave Act (FMLA).

Under the federal FMLA, eligible employees may take up to 12 workweeks of unpaid leave to deal with a serious health condition or to care for an immediate relative who has a serious health condition. (Where state or local laws provide greater benefits, they supersede federal law.) Employees may request long-term leave in advance or may take "intermittent" leave when, for example, a chronic illness requires a day or hour here or there, or the employee faces unforeseeable situations.

When an employer has certified an employee for intermittent leave, the employee is obligated to provide notice of the need for time off as soon as practicable and must also provide medical certification verifying the need for the leave. If the certification requirement is met, and as long as the employee is eligible, employers are obligated to assess an absence (or similar attendance infraction, such as tardiness) as FMLA time and may not discipline the employee for invoking the right to the leave. Failure to properly allow an attendance infraction to be characterized as FMLA time may result in liability for the employer.

The attendance policy in a collective bargaining agreement must be squared with the provisions of the FMLA. The act specifically provides that it shall not "be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act." 29 U.S.C. § 2652(a). It also provides that the rights it establishes "shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." § 2652(b).

Consequently, while the FMLA permits employers to negotiate collective bargaining agreements that provide greater rights than those the statute requires, employers may not enforce an agreement or policy that restricts the rights guaranteed by federal law. If not carefully drafted with the FMLA in mind, collective bargaining agreement attendance policies may run the risk of causing FMLA violations.

Employers must be aware of family and medical leave rights when applying contract provisions.

Consider an example of a typical attendance policy that may run afoul of the FMLA: An employer assesses a disciplinary "point" against an employee who fails to call off for a shift within 60 minutes prior to the shift's start. Now add the elements that the employee is caring for a seriously ill child who has unpredictable seizures and that the child has a seizure near the time the employee is to begin the shift.

According to the FMLA, if the employee has appropriately certified to the employer that he is caring for a seriously ill child, that employer may not be entitled to assess the employee a disciplinary "point" for failing to call in 60 minutes before the shift. Rather, the employer may be required to excuse the employee if he lets the employer know about the situation "as soon as practicable."

This is not to say that the employee is exempt from providing medical certification verifying that the event occurred, or that the employer may not reassess what it considers "as soon as practicable" if an employee seems to be abusing the leave policy. However, under the FMLA, the employer may not always have the opportunity to enforce the attendance policy in a collective bargaining agreement as written without potentially violating the FMLA and subjecting itself to lawsuit.

Arbitrators must particularly be aware of the potential conflict between a negotiated attendance policy and the FMLA. Arbitrators are not necessarily bound by precedent when interpreting a collective bargaining agreement nor are they necessarily bound by statute. However, the FMLA sets out clear language providing that it is applicable to collective bargaining agreements.

Thus, in assessing discipline based on attendance infractions when FMLA-protected absences are alleged, the arbitrator must use caution to ensure that the attendance policy itself does not restrict the rights of an employee under the FMLA. Moreover, when drafting collective bargaining agreements containing attendance policies, drafters must be aware of the FMLA's restrictions to avoid future liability for discipline violating the statute. ■

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