

CLIENT ALERT

FMLA Protections from Interference and Retaliation Extended to Pre-Eligible Employees

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A recent decision from the Eleventh Circuit enlarges the pool of employees who may assert claims under the Family and Medical Leave Act (“FMLA”). In *Pereda v. Brookdale Senior Living Communities, Inc.*, the Eleventh Circuit extended protection from interference and retaliation to certain employees who are not yet eligible for leave under the FMLA. The court found such protection applies to employees who requested, and will be eligible for, FMLA leave by the time that the requested leave is scheduled to begin. The Eleventh Circuit also followed the Sixth Circuit in concluding that an employee’s request for FMLA leave constituted protected activity under the FMLA’s retaliation provision, regardless of whether the request is made before or after the employee is eligible to take it. In light of this case, employers should assume that employees who are not yet eligible for FMLA leave may nonetheless assert meritorious FMLA claims in the face of adverse action.

In *Pereda*, the Eleventh Circuit overturned the district court’s order granting the employer’s motion to dismiss Kathryn Pereda’s FMLA interference and retaliation claims. Pereda, who was hired in October 2008, notified Brookdale Senior Living Communities in June 2009 that she was pregnant. At that time, she requested FMLA leave to commence in November 2009, to coincide with the expected birth of her child. Pereda was not eligible for FMLA leave when she requested it, as she had not yet worked for Brookdale for 12 months. She would have been eligible at the requested leave commencement date. Pereda alleged that after her request, she was harassed, placed on a performance improvement plan with unreachable goals and, in September 2009, discharged after taking several days off, under doctor’s orders, for bed rest.

The district court dismissed Pereda’s claims because she was not yet eligible to take FMLA leave at the time of her discharge, and the Eleventh Circuit reversed. Dismissal was contrary to the “purposes for which the FMLA was enacted,” the appellate court concluded, as “[w]ithout protecting against pre-eligibility interference, a loophole is created whereby an employer has total freedom to terminate an employee before she can ever become eligible.” Pereda’s interference claim stood because the FMLA requires advance notice of the need for leave, and employers may not interfere with, restrain, or deny a leave request before a triggering event slated to occur after the employee becomes eligible for leave. The determination of whether an employee is eligible to take FMLA leave is to be made as of the expected commencement date of the leave, not as of the date of the request.

Pereda’s retaliation claim was also legally viable, according to the Eleventh Circuit. Because the FMLA protects both employees and prospective employees from discrimination on the basis of taking prior FMLA leaves, an employee making a pre-eligibility leave request is engaging in protected activity. The Eleventh Circuit rejected the employer’s “slippery slope” contention that the ruling would extend FMLA protections to employees from the first week of employment, viewing a request for leave that early in the employment relationship as “a non-starter.” According to the Court, “[t]hat employee, just as Pereda, still could be terminated for legitimate reasons, such as poor performance or dishonesty.”

In the end, the practical effect of the *Pereda* decision for employers is two-fold. First, it serves as a reminder that employers must carefully review any request for FMLA leave and determine whether the employee will have satisfied the FMLA’s eligibility

requirements by the date that the leave is to commence. Under the FMLA regulations, this review must be performed, and the employee notified of his or her eligibility status, within five business days of the request for leave. Second, employers faced with FMLA leave requests from pre-eligible employees should be aware that they may need to defend against claims for damages, including liquidated damages, challenging the validity of any subsequent adverse employment actions. If other courts follow the *Pereda* analysis, motions to dismiss similar interference and/or retaliation claims are unlikely to succeed. Instead, these litigations are likely to reach the discovery phase. Accordingly, employers should consider the potential legal risks before taking any adverse employment action against pre-eligible employees who have requested FMLA leave.

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