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Employers Beware - Delivery of FMLA Notices By First Class Mail May Not Cut It Any More

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In a new decision sure to force employers to review their procedures under the Family Medical Leave Act ("FMLA"), the Third Circuit Court of Appeals held that an employee, who steadfastly denied receipt of a letter posted by first class U.S. Mail from her employer which designated her leave as one covered under the FMLA, created an unresolvable factual dispute precluding summary judgment and necessitating resolution by a jury. *Lupyan v. Corinthian Colleges, Inc.*, No. 13-1843 (3d Cir. Aug. 5, 2014). The lesson is clear - an employer who sends required FMLA notices by regular mail *only* runs the very real risk that it will be held to have run afoul of FMLA notice requirements based on nothing more than an employee's uncorroborated claim that she did not receive the letter.

In *Lupyan*, an employee suffering from depression requested a "personal leave of absence." She met with her physician and had him complete a DOL "Certification of Health Provider" form. Based on the submission of the health provider certification, human resources determined that her leave was qualified under the FMLA. The College then met with the employee and instructed her to initial her leave request as "Family and Medical Leave." Her FMLA leave rights, including the requirement that she return within twelve weeks, were otherwise not discussed at the meeting. Later that afternoon, the employer mailed the employee an FMLA Designation Notice designating her leave as FMLA leave and advising her of her rights under the Act. The letter was mailed first class U.S. mail. Seventeen weeks later, the employee announced that she was ready to return to work. However, the College told her she no longer had a job because she didn't return to work after her 12 weeks of FMLA leave expired. It was at this point that the employee claimed she did not know that her absence was classified as FMLA leave and that she never received notice that her leave was covered by the FMLA. The employee then sued, alleging that the College interfered with her rights under the FMLA by failing to give notice that her leave fell under that law and retaliated against her for taking FMLA leave. The district court granted the College's motion for summary judgment, concluding that it had informed the employee by first class regular mail of her FMLA rights. The court reached this conclusion relying on the "mailbox rule" evidentiary presumption that a letter properly addressed, mailed and with sufficient postage is deemed received by the recipient.

The Third Circuit Court of Appeals reversed, holding that the employee's claim that she did not receive the letter was enough to overcome the presumption in favor of delivery set out in the "mail box rule." The court assessed various modes of communication. Certified mail, for example, offers a "strong presumption" of receipt by the addressee. Regular mail, however, assures only a "weaker presumption." The court determined that this "weaker" presumption is nullified whenever the addressee denies receipt of the mailing.

The Bottom Line: Employers should immediately

review their FMLA procedures and use some form of mailing that includes verifiable receipt when sending FMLA notices. Send all FMLA notices by certified mail, return receipt requested, or overnight mail with a required signature so that employers can obtain verifiable receipt. Hand delivery is also fine if one obtains a signature that the employee received it. Some have suggested email with an electronic receipt. We are not keen on this idea because an email can be sent into a junk mail folder and never be seen by the employee. ■

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