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EMPLOYEE WHO FAILS TO RETURN FROM FMLA CAN BE FIRED, BUT …

Employers frustrated by employees who fail to report to work after their FMLA benefits have expired may be in luck! Earlier this year, the U.S. District Court for the District of Maryland held that an employer may terminate an employee who fails to report to work on his return-to-work date.

In this case, the court explained that when an employee's medical leave expires, he or she is no longer entitled to FMLA benefits. At that point, the employer is entitled to treat the non-returning employee as they would any other employee and hold him or her responsible for coming to work. Because discharging an employee who fails to report to work is a valid, nondiscriminatory reason for termination, the court held that the employer had not interfered with the employee's rights under the FMLA by terminating his employment after he failed to report to work. This is true even though the employee in this case mistakenly believed that his doctor had provided the employer with a note postponing his return-to-work date. The court stated that there was no evidence that the employer had received any such documentation from the employer's physician and therefore the employer had no notice regarding whether the employee was entitled to further FMLA benefits.

BUT DON'T FORGET THE ADA!

This ruling can be very useful for employers who are struggling with employees that do not report to work on their scheduled return-to-work date after FMLA leave. However, employers should keep in mind that FMLA issues can prompt an ADA analysis. If the non-returning employee is "disabled" under the ADA, then he or she may be entitled to a reasonable accommodation. Providing exceptions to certain employer policies and/or allowing the employee to take additional unpaid leave beyond that required by the FMLA could both reasonable accommodations. Therefore, the employer should still follow-up with the non-returning employee before taking any employment action if the ADA applies. It's best to engage in the **4-Step Good Faith Interactive Process** to determine if a reasonable accommodation exists. However, if the ADA does not apply or if the employee causes a break down in the interactive process, employers now have legal support for terminating that employee.

Reference: *Wallace v. Rite Aid Corp.*

If you have questions or would like further information, please contact Mary Kate McNamara at mmcnamara@hallrender.com or 317-977-1455 or Stephen W. Lyman at slyman@hallrender.com or 317-977-1422.

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