Fourth Circuit Revives FMLA Case Against City

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The Family and Medical Leave Act ("FMLA") generally requires employers of 50 or more employees to allow their employees to take up to 12 weeks of unpaid leave for medical reasons, for the birth or adoption of a child, or for the care of a child, spouse, or parent who has a serious health condition. A question arises, however, as to who is the "employer" for FMLA purposes where two or more businesses or entities exercise control over the working conditions of the employees, such as where a company outsources its payroll and administrative functions to a staffing firm. In that case, there would be a primary and secondary employer of the employees, which have overlapping obligations under the statute. This principle is illustrated by a recent Fourth Circuit decision involving the City of Alexandria.

Quintana's Employment

In 2011, Monica P. Quintana ("Quintana") began working for the City of Alexandria ("City") answering phone calls from residents and directing callers to the appropriate City department. Approximately a year later, the City contracted with Randstad US, L.P. ("Randstad") to administer the payroll and perform related administrative functions for Quintana's position.

The City characterized Randstad as Ms. Quintana's new employer and told her to complete portions of a Randstad employment application form. The City, however, also presented the change as a condition of Quintana's continued employment with the City and told Quintana that all other aspects of her employment would remain the same.

For the remainder of Quintana's time in her position, Randstad's role remained limited to payroll and related administrative functions. Quintana continued to report to City supervisors regarding all matters not related to payroll, and the City continued to control Quintana's job title, compensation, work schedule, job functions and day-to-day work duties.

Quintana Takes Leave

On January 9, 2014, Quintana learned that her husband had been hospitalized and was in a coma. Later that day, Quintana asked her supervisor, Lisa Baker, who was a City employee, if she could take leave starting the next day to care for her husband. Baker told Quintana that she could take leave without losing her job, as long as she was not gone for more than three months. No one at the City indicated that Quintana was required to notify or obtain approval from Randstad to take leave. Nonetheless, Quintana still notified Randstad that she was taking leave to care for her husband, with permission from the City.

On January 10, Quintana requested any necessary Family and Medical Leave Act ("FMLA") forms from the City. The City never provided Quintana with the forms or any notice about her rights and responsibilities under the FLMA. After Quintana commenced her leave, she updated her supervisors and co-workers at the City regarding her husband's condition and the status of her leave.

Quintana's Termination

On January 16, Quintana notified Baker that she hoped to return to work soon. However, on January 17, Baker emailed Quintana indicating that because the City had not heard from her in over a week, the City had replaced her. This email was the only notice of Quintana's termination. Quintana sought reinstatement or alternative employment numerous times from the City and from Randstad, but without success.

The Lawsuit

Quintana sued the City and Randstad in Alexandria federal district cour, asserting violations of the FMLA. Quintana claimed that the City, as her primary employer, and Randstad, as her secondary employer, both denied her rights under the FMLA and retaliated or discriminated against her for exercising those rights. In the alternative, Quintana claimed that Randstad was her primary employer and the City was her secondary employer.

Both the City and Randstad asked the district court to dismiss the case, contending that Quintana's complaint failed to allege any FMLA violations. In addressing the City's request, the federal court assumed that the City was the secondary employer of Quintana and concluded that she had not alleged sufficient facts in her complaint to state a claim against the City.

Quintana appealed the decision to the Fourth Circuit Court of Appeals , which is based in Richmond, and whose decisions apply to the federal courts in Virginia, as well as those in West Virginia, Maryland, and North and South Carolina.

Fourth Circuit Decision

In addressing Quintana's appeal, the Fourth Circuit explained that under the FMLA, only the primary employer is responsible for giving required notices to employees seeking leave, providing FMLA leave, and restoring the employee to his or her old job following FMLA leave. By contrast, the secondary employer has a so-called "conditional reinstatement obligation" and is responsible only for accepting the employee returning from FMLA leave. Both primary and secondary employers, however, are liable for "interference" and "retaliation" under the FMLA. Additionally, in determining which of two joint employers is the primary employer, the Fourth Circuit said that a court should focus on which employer has the authority or responsibility to (1)

hire and fire, (2) assign or place the employee, (3) make payroll, and (4) provide employment benefits.

In considering whether Quintana's complaint stated an FMLA claim against the City as a primary employer, the Fourth Circuit emphasized that "[i]t is not fatal to Ms. Quintana's complaint that all factors do not strongly indicate that the City is her primary employer." In her complaint, Quintana alleged that (1) the City had the authority and responsibility to hire and fire her and to assign or place her, (2) the City determined her compensation, and (3) the City unilaterally interviewed, hired, assigned, evaluated, and terminated her. In light of these allegations, the Fourth Circuit ruled that Quintana had sufficiently alleged that the City was her primary employer and, therefore, had the responsibility to provide FMLA leave and restore her to her job following leave.

Moreover, even if the City were a secondary employer, the Fourth Circuit found that Quintana had alleged numerous instances of conduct by the City that could establish that it unlawfully interfered with, or denied, her FMLA benefits. Such interference included failing to give proper notice or approval of Quintana's request for FMLA leave, failing to restore Quintana to her phone answering position or to a substantially equivalent position, and terminating Quintana's employment while she was on FMLA qualifying leave.

Finally, the Court found that the January 17 email from Baker terminating Quintana because she took leave sufficiently demonstrated that the City terminated Quintana because she engaged in activity protected by the FMLA. The Fourth Circuit's decision is *Quintana v. City of Alexandria*, No. 16-1630 (4th Cir. June 6, 2017).

The Takeaway

If you are an employer covered by the FMLA, prudence dictates that you should comply with the requirements of the statute whether you believe you should be classified as a primary employer or a secondary employer. This is true for two reasons. First, because the determination of primary versus secondary employment is predicated on a fact-based analysis, which requires weighing a number of factors, the outcome of the analysis can change over the course of an employee's tenure. Accordingly, rather than having to engage in a new evaluation each time one of the various factors changes, it usually is much easier to assume that all of the FMLA obligations apply. Second, both primary and secondary employers are responsible for ensuring that they do not interfere with, or retaliate against, an employee who seeks to exercise his or her FMLA rights.

Thus, the safest route for you is not to rely on a specific employer designation as being primary or secondary, but, instead, to comply to the best of your ability with all the requirements of the FMLA that are under your control. And, when in doubt, it always is wise to consult with legal counsel experienced in these matters to avoid the possibility that a lawsuit will be filed against you, as occurred with the City of Alexandria.

Editor's Note: A discussion of best practices to follow in outsourcing various business functions may be found in the article "Avoiding Employment Problems When You Decide to Outsource," by DiMuroGinsberg partner, Milton Whitfield, which appears in the December, 2016 issue of the Virginia Employment Law Letter.