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EMPLOYMENT LAWSCENE ALERT: HOW FMLA LEAVE SHOULD—AND SHOULD NOT—AFFECT YOUR EMPLOYEES' PERFORMANCE EVALUATIONS

Under the Family Medical Leave Act, employers are not permitted to take an employee's FMLA-protected absences into consideration when making employment decisions such as discipline and termination. However, if performance deficiencies are discovered while an employee is on FMLA leave and would have resulted in termination or discipline had the employee not been on leave, the employer is permitted to follow through with the same discipline or termination. Determining which category an employee's performance issues fall into can be very challenging.

For example, in a recent decision out of the United States District Court for the Eastern District of Michigan, the period in which the employee was on FMLA leave factored into the employer's calculation of her achievement of performance goals, which eventually led to her termination. As an Account Executive, the employee was assessed based on her revenue-to-budget figure, which was calculated on a three-month rolling average. Because the employee was on leave for five weeks, the court found that her numbers were affected for not only those specific weeks but also the following five months in which the revenue that could have been generated in those weeks would have shown up as part of her assessment. Because of this, the Court granted summary judgment to the employee finding that "no reasonable juror could conclude that [the employer] did not use [the employee's] FMLA leave as a negative factor in its decision to discipline and then terminate [the employee]."

However, employees who take FMLA are not entitled to greater rights than they would have been if they had been continuously working. "Therefore, if, while the employee is on leave, an employer happens to discover a performance issue or other offense for which the employee would have been disciplined or terminated had he or she been working at the time, the employer is still entitled to terminate or discipline that employee." As the Seventh Circuit Court of Appeals has said "the fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee."

Employers need to be very careful in handling how they discipline and terminate employees who are either taking or have recently taken FMLA leave. If the employee's FMLA leave could

affect an objective performance criterion in a negative way, employers need to be cautious of using that criterion to terminate an employee. However, if the employer can show that they would have taken the action independent of the leave and merely discovered the issue while the employee was on leave, it will have a solid defense to an FMLA claim.