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ALERT

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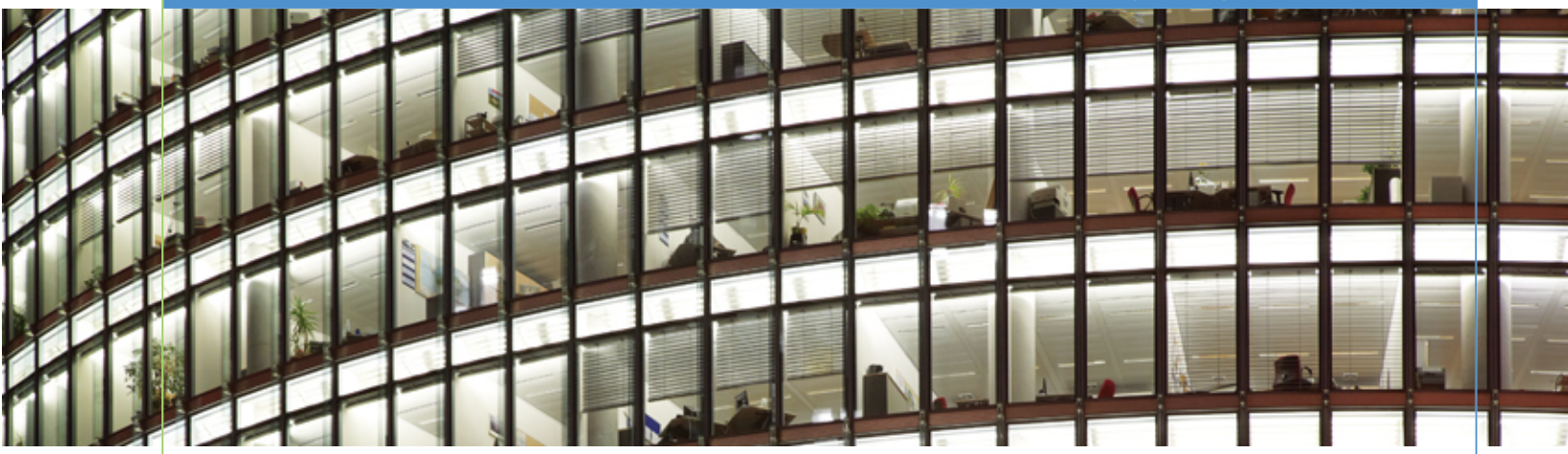

Does Regular Mail Make The Cut? - Third Circuit Creates Increased Liability For Employers When Mailing Routine Mandatory FMLA Notices

In an important decision, the Third Circuit recently held in *Lupyan v. Corinthian Colleges, Inc.* that an employee's sworn statement — and nothing more — that she did not receive management's mailed notification that her leave was designated as qualifying under the Family and Medical Leave Act (FMLA), created a fact question precluding summary judgment on plaintiff's FMLA interference and retaliation claims. In other words, plaintiff in *Lupyan* was able to force her former employer to proceed to trial simply because plaintiff claimed she never received her employer's notification that her leave was designated FMLA leave. Also of note, the Third Circuit in *Lupyan* held that management's alleged failure to send statutorily mandated documentation, standing alone, violates the FMLA, provided the employee can establish "prejudice." *Lupyan* thus stands as a stark reminder to employers that they must be careful to strictly comply with the FMLA's notice requirements, and preserve verifiable documentation of all communications with their employees on leave. This opinion is likely to have implications nationwide.

Briefly, the plaintiff in *Lupyan* requested a "personal leave" in early December 2007 relating to her depression. Plaintiff's supervisor suggested she apply for short-term disability instead, and to that end plaintiff submitted a Certification of Health Care Provider. The Company determined that plaintiff qualified for protected leave under the FMLA. On Dec. 19, 2007, the Company mailed the plaintiff a letter explaining her rights under the statute and advising that she was expected to return to work by April 1, 2008. Plaintiff denied ever having received the letter. Five weeks after plaintiff was scheduled to return to work, the Company terminated her employment. Plaintiff claimed interference with her FMLA rights, arguing under the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) that had she known her leave was subject to the requirements of the FMLA, she would have "expedited her return" to avoid placing her job in jeopardy.

The District Court granted the employer summary judgment. The Third Circuit reversed. In support of its summary judgment application, the employer submitted affidavits from two employees verifying the notification letter was sent via standard mail. The Third Circuit recognized that this evidence entitled the employer to the benefit of the "mailbox rule," whereby "if a letter 'properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed … that it reached its destination at the regular time, and was received by the person to whom it was address.'" The Court stressed, however that "this 'is not a conclusive presumption of law.'" Because plaintiff claimed in an affidavit that she never received the notice, the Third Circuit concluded that she "sufficiently burst the mailbox rule's presumption, to require a jury to determine the credibility of her testimony, as well as that of [defendant]'s witnesses."

Key Takeaways

- In light of *Lupyan*, employers should review their procedures for administering FMLA leave to avoid costly litigation and potential liability. In particular, employers should take to heart the Third Circuit's admonition against relying upon "snail mail" for providing required notices to employees:

  In this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice. The negligible cost and inconvenience of doing so is dwarfed by the practical consequences and potential unfairness of simply relying on business practices in the sender's mailroom.

- As a reminder, current FMLA regulations mandate that employers:

  (1) notify employees of their eligibility to take FMLA within five business days of either the employee's request for FMLA or the employer's knowledge that an employee's leave may be for an FMLA-qualifying reason;

  (2) determine whether the employee's leave qualifies as FMLA and notify the employee within five business days from the time they obtain enough information to determine whether the leave is being taken for an FMLA-qualifying reason and notify the employee in writing; and

  (3) provide employees with written notice of the specific expectations and obligations while on leave. Importantly, such notices must explain any consequences of a failure to meet these obligations and should require employees to furnish status and intent to return reports on specified dates, prior to the expiration of their leave.

- In short, in light of *Lupyan*, it cannot be sufficiently stressed that documented, verifiable communication with one's employees while on leave is critical to avoiding liability, not only under the FMLA and not only in the Third Circuit (New Jersey, Pennsylvania and Delaware). Never allow 12 weeks to pass before communicating with an employee who is on FMLA and when an employee's FMLA absence approaches the end of the leave period, send the employee a note inquiring as to their plans for returning. When appropriate, have employees sign an acknowledgement they were informed of their (i) eligibility for FMLA; (ii) designation as being on FMLA leave, (iii) specific obligations under the law; and (iv) consequences for failing to meet those responsibilities. Where such an acknowledgment is not feasible, consider requiring a

signature of receipt, or using a trackable delivery service. E-mailing correspondence and requesting email receipt is a practical and cost efficient option, as well.

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