by Donald R. Lee

Promissory estoppel: Be careful what you say in an employee handbook

A court recently determined that an employer was obligated to allow an employee to take unpaid leave from his job through the federal Family and Medical Leave Act (FMLA) because of a policy contained in its employee handbook, even though the employee seeking leave was not otherwise an eligible employee for FMLA.

Under FMLA, eligible employees are those who have: (1) been employed for at least 12 months; (2) have worked for at least 1,250 hours during the 12-month period immediately preceding the leave of absence; (3) and work in an office or worksite at which 50 or more employees are employed. All employees within a 75-mile radius of the particular facility are counted to determine whether an employer has 50 or more employees.

Hot tip

To avoid entanglement situations of promissory estoppel as the one described in this article, newly created or revised employee handbooks should always be reviewed by a hotel's legal counsel before being distributed to employees.

An unintentional error

In a recent case, an employee was not eligible for FMLA leave because he worked at a site that employed fewer than 50 employees in a 75-mile radius. However, he took two leaves of absence for work-related injuries and received letters, tracking language in the employee handbook, which stated:

> "The Federal Family and Medical Leave Act ("FMLA") went into effect August 5, 1993. The act grants eligible employees of covered employers up to twelve weeks of unpaid leave in a twelve month period to care for a newborn or adopted or foster child, to care for the seriously ill parent, child, or spouse of the employee, or to attend to the employee's own serious health condition. To be eligible for FMLA benefits, an employee must have worked for a covered employer for a total of 12 months and have worked at least 1,250 hours over the previous twelve months.
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> You will retain your employee status during the period of your FMLA leave. This includes accrual of tenure and vacation, in addition to continued health benefits coverage. You will be guaranteed reinstatement in your position, or equivalent position, if you return to work by the time your FMLA leave expires."
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> The letters also provided the start date of the leaves and when the employee would be required to return to work to be guaranteed reinstatement.
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> Additionally, the eligibility provision of the employer's policy stated that all employees who had been employed by the company for at least 12 months and had worked 1,250 hours during the 12 months preceding the commencement of leave would be granted 12 weeks of family and medical leave and would be reinstated to the same or an equivalent position upon returning from leave. The handbook did **not** contain the exclusion found in the FMLA for worksites employing fewer than 50 employees in a 75-mile radius.

Promissory estoppel

When the employee attempted to return from his second leave, he was denied reinstatement to his prior position; however, the employer offered him a different position. The employee declined this position and was discharged. The employee sued in federal

court, alleging violations of state law as well the FMLA. The employer defended the FMLA allegations on the grounds that the employee was ineligible for FMLA leave under the 50-employee/75-mile radius exclusion.

The court refused to address the question of whether the former employer should be permitted to raise the defense of ineligibility under the FMLA even though it had not mentioned the exclusion in the handbook or in correspondence with the employee. Instead, the court held that the employee could obtain remedies identical to those available in his FMLA claim through the enforcement of contractual rights because of the handbook. The court also noted that even if the handbook did not create an enforceable contract, the employee could obtain remedies in accordance with a legal principle known as "promissory estoppel." In this setting, promissory estoppel means that since the employee relied on the employer's promise that he could take FMLA leave, he is allowed to enforce that promise.

Hoteliers' bottom line

This case demonstrates the importance of ensuring that employee handbooks and policies are carefully drafted and accurately reflect the employer's intent. In this case, the employer's policy gave employees greater rights than the FMLA by not including the 50-employee/75-mile exclusion. This exclusion can be particularly applicable to hoteliers with multiple properties. Depending on the location and size of each property, it is possible that a hotelier's employees at one property may be eligible for FMLA leave while employees at another property would not.

While hoteliers often choose to provide greater leave rights than required by the FMLA, doing so should be the result of the hotelier's conscious decision rather than inadvertence. Although violation of a more generous leave policy may not create a cause of action under the FMLA, courts may find these policies enforceable under state law. Hoteliers may want to consider reviewing their leave policies to ensure that these policies accurately reflect the employer's intent and the requirements of applicable state and federal laws. ✧

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