Pitfalls of FMLA and Collective Bargaining Agreements

Karin Mika
Cleveland-Marshall College of Law, Cleveland State University, k.mika@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

Part of the Labor and Employment Law Commons

How does access to this work benefit you? Let us know!

Repository Citation
https://engagedscholarship.csuohio.edu/fac_articles/1075

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.
Almost all collective bargaining agreements include a progressive disciplinary process. The imposition of discipline may involve "points" being assessed for violations of a company's rules, including attendance policy. In some situations, employees may accumulate attendance points based on missed days, tardiness, or failures to call in timely. Attendance infractions may lead to progressive discipline, ultimately leading to discharge.

In a unionized workplace, the collective bargaining agreement has historically governed the day-to-day relationship between a union member and an employer. The attendance policy in a collective bargaining agreement or any employment attendance policy may involve "points" being assessed for violations of the agreement or any employment attendance policy. In some situations, employees may accumulate attendance points based on missed days, tardiness, or failures to call in timely. Attendance infractions may lead to progressive discipline, ultimately leading to discharge.

Employment rights guaranteed by federal law. If not carefully drafted with the FMLA in mind, collective bargaining agreement attendance policies may run the risk of causing FMLA violations.

Consider an example of a typical attendance policy that may run afoul of the FMLA: An employer assesses a disciplinary "point" against an employee who fails to call off for a shift within 60 minutes prior to the shift's start. Now add the elements that the employee is caring for a seriously ill child who has unpredictable seizures and that the child has a seizure near the time the employee is to begin the shift.

According to the FMLA, if the employee has appropriately certified to the employer that he is caring for a seriously ill child, that employer may not be entitled to assess the employee a disciplinary "point" for failing to call in 60 minutes before the shift. Rather, the employer may be required to excuse the employee if he lets the employer know about the situation as soon as practicable.

This is not to say that the employee is exempt from providing medical certification verifying that the event occurred, or that the employer may not reassess what it considers "as soon as practicable" if an employee seems to be abusing the leave policy. However, under the FMLA, the employer may not always have the opportunity to enforce the attendance policy in a collective bargaining agreement as written without potentially violating the FMLA and subjecting itself to lawsuit.

Arbitrators must particularly be aware of the potential conflict between a negotiated attendance policy and the FMLA. Arbitrators are not necessarily bound by precedent when interpreting a collective bargaining agreement nor are they necessarily bound by statute. However, the FMLA sets out clear language providing that it is applicable to collective bargaining agreements.

Thus, in assessing discipline based on attendance infractions when FMLA-protected absences are alleged, the arbitrator must use caution to ensure that the attendance policy itself does not restrict the rights of an employee under the FMLA. Moreover, when drafting collective bargaining agreements containing attendance policies, drafters must be aware of the FMLA's restrictions to avoid future liability for discipline violating the statute.