EMAILING FMLA NOTICES – A NEW RISK FOR EMPLOYERS?

Providing notice to employees utilizing FMLA can be difficult. Unfortunately, it's only getting worse. A federal court recently decided the issue of whether an employer, by informing an employee of the FMLA recertification requirement *via email*, gave proper notice. Although the employer previously sent FMLA notices to the employee via email, the court found that in this case the employee's FMLA lawsuit should survive because (i) whether the email was received was in dispute; and (ii) the employee claimed to have never authorized her employer "to communicate with her via email only."

IS SENDING AN EMAIL ENOUGH?

The employee in *Gardner v. Detroit Entertainment LLC dba MotorCity Casino* utilized FMLA leave during the seven-year period prior to her eventual termination. The employee suffered from a degenerative back disorder that required her to take intermittent leave. The employer, via a third party administrator ("FMLA Source") used to process FMLA leave requests, became aware that Plaintiff had been absent on intermittent FMLA leave five times more than anticipated by her doctor and that she also called off work each Sunday during a single month. In response, FMLA Source then sent the employee an *email* requesting that her health care professional re-certify the basis for her leave. The employee failed to provide timely recertification from her health care professional, which meant that some of her absences were not FMLA-protected. The employer, consistent with its policies and procedures regarding unexcused absences, subsequently terminated her employment. The employee then sued, claiming her termination was done in violation of FMLA notice provisions.

Creating an issue of fact and thus ensuring that her claims not be dismissed by motion, the employee asserted that she never received the email. The employer did not establish, at this stage in the litigation, that the email was actually received. Further, the employee claimed that she never authorized FMLA Source to send correspondence to her via email only. Because of these notice issues, the employee's claims could not be dismissed by motion. Instead, the court permitted these issues to be decided at trial.

IMPACT FOR EMPLOYERS

When employees deny receipt of notice (and they often do), employers will have a difficult time having these types of claims dismissed by motion unless proof of receipt is established. If an employee is present and the notice may be hand delivered, this is likely the best course assuming written confirmation of receipt is simultaneously obtained. If this is not possible, employers should strongly consider sending FMLA notices and/or requests for certification or recertification via a method that establishes receipt by the employee.

Reference: Gardner v. Detroit Entertainment, LLC, d/b/a MotorCity Casino (E.D. Mich., Case No. 12-14870).

As you consider these issues and other issues related to FMLA notice, please do not hesitate to contact Larry Jensen at ljensen@hallrender.com or your regular Hall Render attorney.