



Department of Labor Issues Guidance on Prohibited Retaliation Under the FMLA

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The Department of Labor (DOL) recently published Field Assistance Bulletin (FAB) 2022-2, which provides information about worker protections from interference and retaliation under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). This Aon bulletin covers the FMLA guidance in FAB 2022-2.

Background

Under the FMLA, eligible employees can take job-protected leave for specified family and medical reasons. Employers are required to maintain any pre-existing group health plan coverage during FMLA leave and to restore the employee to the same or an equivalent position at the end of the approved leave.

The FMLA prohibits employers from interfering with or retaliating against employees who engage in protected activity. Interfering with an employee's FMLA rights can include an employer's refusal to grant FMLA leave or discouraging an employee from taking FMLA leave. Retaliation can occur when an employer, whether through a supervisor, leave administrator, or otherwise, takes an adverse employment action (like shift changes, a reduction in hours, or termination of employment) against an employee because they engaged in protected activity, such as requesting or taking FMLA leave.

FAB 2022-2

By far the most important guidance in the FAB is the DOL's clear statement that FMLA regulations prohibit as retaliation the practice of counting FMLA leave as an absence under a no-fault attendance policy. Under a typical no-fault attendance policy, employees are assigned points for every absence from work, regardless of the reason for the absence. Employees are disciplined when they reach a set number of points and may be terminated when they reach an even higher set number of points.

The FAB includes an example about no-fault attendance policies, as well as one about an employee whose hours are cut upon return from an intermittent FMLA leave because the employer needs "workers who will show up every day."

Action Step for Employers

Employers should review the examples in FAB 2022-2, and, in particular, employers who have no-fault attendance policies should be sure to train managers so that they know not to include FMLA-protected leave as an absence from work under the no-fault policy.

Resources

DOL FAB 2022-2 can be found [here](#).



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