

Auditor's Notepad



EMPLOYEE MUST COMPLY WITH FMLA REQUIREMENTS TO BE PROTECTED

The Ninth Circuit Court of Appeals recently held that an employee who failed to submit required information to her employer was not entitled to protection under the federal Family Medical Leave Act.

The employee requested leave without pay under the FMLA. The FMLA entitles an employee up to 12 weeks of unpaid leave within a 12 month period if the employee has a "serious health condition that makes the employee unable to perform the functions of the employee's position." The U.S. Department of Labor has created a medical certification form (the WH-380 form), which requires the employee's treating physician to disclose a summary of medical facts supporting the employee's diagnosis and inability to work.

In *Lewis v. United States of America*, the employee submitted a WH-380 form without the supporting facts. The employer notified her that the form submitted was insufficient. When the employee failed to supplement the form, the employer changed her status to absent without leave and then terminated her.

Because the employee failed to submit all required information to her employer, the court held the termination was not in violation of the FMLA.

Wal-Mart Sex Discrimination Case May Not Proceed as a Class Action

In *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court recently decided that a class of 1.5 women nationwide who worked for Wal-Mart and claim class-wide sex discrimination may not proceed with a class action against the large retailer. In order for a case to proceed as a class action, the named plaintiffs must first demonstrate to the court that there are sufficient "common questions of law or fact." In other words, the claims of the 1.5 million women must depend upon a common claim of such a nature that it is capable of being resolved on a class-wide basis.

On the facts before the court, it held the gap between an individual claim for discrimination and the existence of a group of people who suffered the same injury must be bridged by the existence of a general policy of the employer. The plaintiffs claimed Wal-Mart had a policy of giving its local managers discretion over employment matters, making it vulnerable to gender bias. Wal-Mart produced evidence of corporate policies forbidding sex discrimination and that the company has penalties for denials of equal opportunity. The court held that in light of Wal-Mart's corporate policies, the "policy" of giving discretion to local managers was not enough to show commonality. Given Wal-Mart's large geographical size and scope, it's unlikely that all local managers would exercise their discretion in any common way, absent policies and direction at a corporate level.

This case is a victory for employers. Sanctioning class actions for claims such as gender discrimination could have opened the floodgates to a new type of employment class action.

Employers should be aware, however, that this case has no impact on the viability of individual claims. As always, employers may be held liable for practices which, although not intentionally discriminatory, have a statistically disparate impact on a protected class. Innocent motive is not always enough.

Big Firm Quality • Small Firm Flexibility



4225 Executive Square, Suite 200 • La Jolla, CA 92037

Tel: (858) 554-0500 • Fax (858) 554-0673

www.fleming-pc.com