

October 16, 2007

RE: First Circuit Rules That Employers Can Count Holidays  
As Part of an Employee's FMLA Leave

In late September, the United States Court of Appeals for the First Circuit issued an important decision, *Mellen v. Trustees of Boston University et al.*, on how employers should treat holidays that fall within the period an employee is out on leave. Fortunately, the decision is employer friendly.

In July 2003, the plaintiff, Mellen, applied for intermittent FMLA leave from her position as a Financial Manager for the BU School of Public Health. She requested to be out of work for two distinct periods in order to care for her ill mother. Mellen scheduled the first leave to last for about nine weeks and the second leave to last about three weeks. Given the break in the two distinct periods, Boston University properly classified the leave as an intermittent leave. Boston University terminated the employment of Mellen after she failed to return to work upon exhausting the twelve weeks of leave she was entitled to take under the FMLA.

Mellen sued and claimed, among other claims, that Boston University should have extended her leave by at least another four days because four holidays fell within the period she was out on family leave. The Court rejected Mellen's claim, holding that "if an employee's intermittent leave includes a full, holiday-containing week," the FMLA "provides that the amount of leave used includes the holiday." The Court further held that Mellen had an obligation to notify Boston University if she was intending to claim FMLA leave beyond the date for which she had previously obtained approval. Therefore, even if Boston University miscalculated the amount of leave Mellen used, Mellen failed to notify the University that she needed additional leave, justifying the University's termination of her employment when she failed to return to work on the expected day.

As a result of this decision, employers now have the blessing of the court to count a holiday as a day of leave when the holiday falls within a full week of leave. Although an employer can also reasonably expect an employee on leave to keep the employer informed as to when the employee will return to work, employers should work closely with counsel to make sure that information regarding the duration and expiration of FMLA leaves are properly communicated to employees.

Please contact Peter Bennett or me with any questions on this issue.

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