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CAN AN EMPLOYEE DECLINE TO TAKE FMLA LEAVE FOR AN FMLA-QUALIFYING REASON?

By: Bill Mattix and Leonard H. Smith

The Wage and Hour Division of the U.S. Department of Labor ("WHD/DOL") has recently indicated that an employee is not able to decline taking leave under the Family and Medical Leave Act ("FMLA") where the leave request is for an FMLA-qualifying reason. This is contrary to an earlier opinion by the Ninth Circuit Court of Appeals that suggested that an employee could affirmatively decline FMLA leave and instead substitute other available leave.

In a 2014 case, *Escriba v. Foster Poultry Farms*, 743 F.3d 1236 (9th Cir. 2014), the Ninth Circuit, which circuit includes Montana, ruled that an employee can decline to take FMLA leave, even if the leave is clearly for an FMLA-qualifying reason. In that case (which, ironically, was decided in favor of the employer), Maria Escriba requested two (2) weeks' vacation to care for her father. Foster Farms granted the request. Escriba left but did not contact the company until sixteen (16) days after she was supposed to have returned from her vacation. Because she failed to return after her vacation leave expired, Foster Farms terminated her employment.

After she was discharged, Escriba sued, alleging that her leave was FMLA-protected (i.e., leave to care for a family member) and, accordingly, Foster Farms was required to return her to her original job or an equivalent position. The Ninth Circuit disagreed, holding that an employee can affirmatively decline to take FMLA leave and substitute other available leave. Because Escriba had not taken FMLA leave, Foster Farms was not required to return her to work.

No other circuit court has followed this decision. However, on March 14, 2019, the WHD/DOL issued an opinion letter that pointedly rejects the holding in *Escriba*. The WHD/DOL states that an employer is **required** to designate leave as FMLA-qualifying when it has enough information to determine that leave is being taken for an FMLA-qualifying reason.

In this regard, the WHD/DOL noted that the applicable regulations provide that the employer is responsible in all circumstances for designating leave as FMLA-qualifying and for giving notice of the designation to the employee. Absent extenuating circumstances, the employer is ***required*** by the regulations to provide a written designation notice to the employee within five (5) business days after the employer has enough information to determine that the leave is being taken for an FMLA-qualifying reason. Designation is mandatory and the neither the employer nor the employee may decline the protection of the FMLA for that leave. In fact, pursuant to the FMLA's regulations, failure by the employer to properly designate leave may constitute impermissible interference with an employee's FMLA rights.

In issuing this opinion, the WHD/DOL acknowledged the Ninth Circuit's decision in *Escriba* and expressly stated that it "disagrees . . .that an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use".

Accordingly, there is a clear difference of opinion between the Ninth Circuit and the WHD/DOJ on this issue. Because Montana is in the Ninth Circuit, the question arises, "What is a Montana employer to do when faced with this situation"? There is little in the way of clear guidance. Only Montana court has been presented with a similar issue since the WHD/DOJ issued its guidance earlier this year.

In *Sims v. Stillwater Mining Co.*, 2019 WL 4142506 (August 30, 2019), the plaintiff suffered from joint problems in his shoulder. Following an adverse reaction to a cortisone injection, he contacted his employer and requested FMLA leave. Stillwater provided him with the necessary FMLA paperwork and Sims' doctor faxed the employer a certification indicating that sims would be unable to work from July 20th to August 1st.

Sims returned to work on August 1st and worked the next two days but planned to request additional time off using his vacation time instead of FMLA leave. Incorrectly thinking that he had accrued vacation remaining, Sims submitted a vacation request form to his supervisor, which included the comment "for Doctor Apt Regarding FMLA follow up". Sims took a vacation day on August 4th despite having no vacation time remaining. Stillwater discharged him for violating the terms of his collective bargaining agreement by taking a vacation day he did not have.

Sims sued alleging, among other things, that Stillwater had interfered with his FMLA rights. (Of note, Sims returned to his doctor and got him to extend his FMLA leave through August 4th.) In moving for summary judgment, Stillwater relied heavily on *Escriba* for the proposition that Sims had declined further FMLA leave after he had returned. The court denied the motion, commenting that it was a question of fact whether Sims had "affirmatively declined" further FMLA leave.

So, how much guidance is this? Unfortunately, not much. While the court, based on *Escriba*, clearly indicated that an employee eligible for FMLA could affirmatively decline to take such leave, it is also clear from the case that the guidance issued by the WHD/DOJ was not cited to or considered by the court. Had it been, the result might – or might not – have been different.

An employee can substitute paid leave for FMLA leave, and employers may require that they do so. However, the WHD/DOL states that the term "substitute" as used in the FMLA means that the paid leave will run concurrently with the FMLA leave. In other words, such substituted leave is not in addition to the FMLA leave, and the employer may not delay designating leave as FMLA leave even if the employee would prefer that it do so.

An employer can have a more generous leave policy than is required by the FMLA. However, the employer may not designate more than twelve (12) weeks of leave (twenty-six (26) weeks for care of servicemembers) as FMLA leave. For example, an employer could provide for twenty-four (24) weeks' leave under its own policies, but only twelve (12) of those weeks would constitute FMLA leave. An employee cannot maintain a cause of action against the employer for violation of its own more generous leave policy. (Although, in Montana, if an employer had a written personnel policy to this effect and discharged an employee in violation of it, it would likely be grounds for a wrongful discharge action.)

The *Escriba* decision has not been overruled, so it is still good law in the Ninth Circuit for the time being. However, the recent WHD/DOL guidance calls into question the soundeness of the Ninth Circuit's reasoning and provides employers with an argument that an employee cannot decline FMLA leave when the circumstances for the leave qualify. Until that question is resolved in this circuit, employers are well-advised that when an employee requests leave for an FMLA qualifying reason, they should provide the employee the required FMLA forms. If the employee indicates that he or she does not wish to take FMLA leave – i.e., wishes to take accrued vacation, sick leave, or other personal time – document that fact in writing.

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COMPLYING WITH PRESERVATION DUTIES: EMPLOYEE CELL PHONE EVIDENCE

By: Mark Feddes

In a recent case in Montana federal court, sanctions were imposed for the quick destruction of an employee's personnel file in the face of what the court deemed to be foreseeable litigation. *Webster v. Psychiatric Med. Care, LLC*, 2019 WL 2300634. The sanctions ordered in *Webster* are a strong motivator for employers to promptly identify and preserve relevant evidence. More and more, employers are being asked by claimants to preserve and produce text messages, call histories, photos, and other forms of electronically stored information ("ESI") on other employees' cell phones. An employers' duty and practical ability to preserve this ESI presents a unique set of challenges. The critical point, however, is that employers should understand that their preservation duty likely extends to ESI on employees' phones and reasonable steps should be taken to preserve it.

In the modern workplace, it is common for relevant (and even critical) evidence such as text messages, call histories, or photos to be stored on an employee's phone—triggering the employer's duty to try to prevent destruction of relevant evidence. On the other hand, it seems strange that an employer would have the right to independently invade an employee's privacy rights in order to access and preserve that ESI for litigation. While there are certainly competing interests to be considered, the important takeaway is that employers must take proactive steps to preserve cell phone evidence. The failure to do so may result in spoliation sanctions or third-party claims. Whether or not the employer has a separate right to unilaterally demand access and obtain ESI without authorization is a separate question. What is vitally important is the employer making prompt preservation efforts.

An employer may not necessarily think to preserve ESI on employees' phones because it may seem outside the employer's possession or control. However, that is not necessarily the case. In this context, control is defined as "the legal right to obtain evidence upon demand." *Palmer v. City of Missoula*, 2015 WL 11090360 (D. Mont. 2015). A number of courts have held that ESI in an employee's possession is within the "control" of the employer. *Selectica, Inc. v. Novatus, Inc.*, 2015 WL 1125051 (M.D. Fla. 2015). The reasoning is that the employer-employee relationship is considered to result in the employer having the necessary practical control over information possessed by the employee.

The duty to preserve ESI extends to those employees likely to have relevant information. Courts have held that a corporate party's duty to preserve ESI evidence extends to the "key players" in the case (i.e. those employees likely to have relevant information). *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). More broadly, at least one court has also held that the duty to preserve and produce ESI on employees' cell phones issued by the employer extends to the space on the employees' phones used for any business that is relevant to the litigation. *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, 2013 WL 6486921 (S.D. Ill. 2013).

The degree of actual control an employer will be considered to have over ESI on employee phones may depend on a number of factors, such as: whether the phones are company issued, whether the employer pays

or reimburses for bills associated with the device, whether the employee is expected to use a personal mobile device for work, or whether the employee generally owns, maintains, and uses his/her mobile device separately from work—a growing rarity. These factors may determine the employee's expectation of privacy in the contents of his or her device. Regardless of the actual level of control, it is best practice to proactively work to preserve ESI and seek employee cooperation in those efforts. For example, an employer should issue a written notice to "key player" employees, identifying the categories of ESI on phones they should preserve as well as providing meaningful instructions to do so. An employer may also request that employees turn over any relevant ESI to the employer to ensure preservation and facilitate potential production in discovery.

From a practical standpoint, it may be difficult to determine what else an employer may do to preserve ESI. Imagine, for example, a potential wrongful discharge case in which an employer specifically requests a supervisor preserve and produce text messages on the supervisor's cell phone regarding the reasons for an employee's termination. The supervisor then fails to take the immediate necessary steps to preserve the texts or even deletes them. If the text messages are lost in those circumstances, it is difficult to say the employer did not make a good faith effort to comply with its preservation duties or that sanctions can be fairly imposed. *See Webster* (culpability for destruction one factor in spoliation sanctions analysis). Additionally, the same ESI may be available from other sources (e.g. via subpoena duces tecum to a service carrier or from the recipient of texts)—another potentially mitigating factor.

In Montana, one of the primary barriers to employers' ability to take more aggressive preservation steps is the employee's right to privacy. Mont. Const. Art. II § 10. Montana adheres to one of the most stringent protections of its citizen's right to privacy in the country and those protections extend not only to autonomy privacy but also confidential "informational privacy." *State v. Burns*, 253 Mont. 37, 830 P.2d 1318 (1992); *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997). Employees undoubtedly have a high privacy interest in the contents of their personal cell phones. *Riley v. California*, 134 S. Ct. 2473 (2014) (providing lengthy analysis of the nature of modern cell phones, the important privacy interests embodied by them, and the "several interrelated consequences for privacy" presented by their storage capacity); *Palmer v. City of Missoula*, 2015 WL 11090360 (D. Mont. 2015) ("privacy concerns of the individuals outweigh any potential benefit" with regard to production of employee cell phone information and other ESI); *Montana v. Johnson*, 2012 WL 9388181 (D. Mont. 2012) (finding victim and individuals with whom she communicated possessed reasonable expectation of privacy in text messages). In *Johnson*, for example, the Federal District Court for the District of Montana observed that special privacy interests are implicated because a cell phone is "an 'access point' to potentially boundless amounts of digital information." *Johnson*, 2012 WL 9388181. Because of these privacy rights, employers should be wary of wholesale attempts to commandeer employees' phones or ESI without first obtaining the employees' authorization.

Ultimately, employers should understand their duty to preserve evidence likely extends to relevant ESI stored on employees' phones. Practically, the preservation lengths to which an employer may go without violating employees' privacy rights is a developing area, particularly in states like Montana with robust individual privacy rights. Nevertheless, once the preservation duty is triggered, employers should work with legal counsel to identify any potentially relevant ESI and issue litigation hold requests to those employees with meaningful instructions on preserving and/or turning over ESI to the employer.

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