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Employee Cannot Maintain Collective Action for Employer's Failure to Post FMLA Notice

By Tasos C. Paindiris on January 11, 2017

We all know that the FMLA is fraught with pitfalls that can lead to costly mistakes. But a collective action for simply failing to post a notice?

On January 6, 2017 a U.S. District Court in Maryland rejected such an attempt. In *Antoine v. Amick Farms, LLC* the plaintiffs claim that a class of employees were prejudiced by the company's failure to post a notice of FMLA protections because they did not know they had the right to request or take protected FMLA leave. The Court held that there is no private right of action by an individual based on an employer's failure to post the general FMLA notice required by the regulations. Only the Department of Labor ("DOL") has the authority to enforce the posting requirement and seek penalties against the

employer. It is important to note, however, that the decision is limited to the *general notice* requirements of the FMLA, and not the *individual notice* requirements.

The FMLA requires two types of notice by employers. The “general” notice provision requires an employer to post a DOL approved notice summarizing the provisions of the FMLA and the rights provided to employees. The regulations state that the DOL may issue a civil penalty against an employer who fails to meet the posting requirements. The FMLA also requires that employers provide an “individual” notice to affected employees regarding their rights and responsibilities and whether an absence qualifies under the FMLA. Failure to comply with the individual notice requirements may constitute an interference with the exercise of an employee’s FMLA rights and result in liability to the employee.

In addition to the collective action for failure to post the general notice, the plaintiffs in *Antoine v. Amick Farms* also brought claims for violation of the individual notice requirements which were not

dismissed and will proceed through the litigation process.

This is a good reminder to check on your FMLA general notice postings and your process for providing individual notice.

Once an employer is aware that an employee is taking time off that is potentially FMLA-qualifying, the employer must, within five business days, notify the employee of his or her eligibility to take FMLA leave and the employee's rights and responsibilities under the FMLA. Individual notice requirements also include the requirement to notify the employee in writing whether the leave will be designated as FMLA leave and the specific amount of leave that will be counted against the employee's FMLA leave entitlement.

