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PRE-ELIGIBILITY REQUEST FOR POST-ELIGIBILITY LEAVE IS PROTECTED ACTIVITY UNDER THE FAMILY MEDICAL LEAVE ACT

Florida employers should be aware that the Eleventh Circuit Court of Appeals recently ruled that the Family Medical Leave Act ("FMLA") protects a pre-eligibility request for post-eligibility leave.

In the case on appeal, an employee had advised her employer that she was pregnant and would request FMLA leave after the birth of her child. *Pereda v. Brookdale Senior Living Communities, Inc.*, 11th Cir. No 10-14723 (Jan. 10, 2012). Shortly thereafter, the employer terminated the employee's employment. At the time when she gave notice, the employee was not eligible for FMLA leave, but she would have become eligible by the time of the birth. Based on those facts, the trial court ruled the employer could not have interfered with the employee's FMLA rights because she was not entitled to FMLA leave when she requested it. Further, the trial court ruled that, because the employee was not eligible for FMLA leave, she could not have engaged in protected activity, and as a result, her employer did not retaliate against her in violation of the FMLA when it terminated her employment.

On appeal the Eleventh Circuit reversed the trial court and ruled that, because the FMLA requires that an employee give advance notice of future leave, employees are protected from interference prior to a triggering event, such as the birth of a child, stating that an employee who is not yet eligible for FMLA leave may bring a lawsuit if the employer terminates the employee in order to avoid having to accommodate the employee once the employee becomes eligible for FMLA leave.

On the retaliation claim, the Court ruled that pre-eligibility requests for post-eligibility leave are a protected activity in that the FMLA aims to protect both employees in exercising their FMLA rights and employers in planning for the absence of employees on FMLA leave.

The lesson learned from this case is that an employee who announces a future need for FMLA leave may be protected by the FMLA if it appears likely that the employee will be eligible for FMLA leave by the time the leave is to commence.

Questions regarding this decision can be directed to any member of the [GrayRobinson Employment and Labor law team](#).

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