

## Beware of Individual Liability Under the Family and Medical Leave Act

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It is much easier to establish individual liability under the Family Medical Leave Act (FMLA) than under New Jersey state and federal anti-discrimination laws. That is to say that supervisors, human resources managers and others can potentially be held liable for their actions if an employee files an FMLA claim.

The FMLA's definition of an employer broadly includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." According to the Third Circuit Court of Appeals, which governs New Jersey law, the FMLA plainly contemplates that liability may be imposed upon an individual person fitting this far-reaching definition. The court points to the regulations that govern the FMLA which state that "individuals such as corporate officers acting in the interest of an employer are individually liable for any violations of the requirements of the FMLA." As a result, a New Jersey court may find an individual subject to FMLA liability when he or she, acting in the employer's interest, exercises supervisory authority over the complaining employee and is responsible in whole or part for the alleged FMLA violation.

The Third Circuit has defined some of the criteria for ascertaining whether supervisory authority exists. These include whether the individual: 1) had the power to hire and fire the employee; 2) supervised and controlled the employee's work schedules or conditions of employment; 3) determined the rate and method of payment of the employee; and 4) maintained employment records. However, no one of the four factors alone is definitive. New Jersey courts look at the totality of the circumstances in determining whether supervisory authority exists.

For example, if a supervisor or human resources representative exercises substantial authority over terminating an employee, even if that person lacks final authority to dismiss the individual, he or she may be individually liable. To escape such liability, it is not enough that a higher level employee has a veto vote over the termination of said employee; if the supervisor or human resources person advocates for the termination, he or she may be individually liable for violations of the FMLA. In addition, a supervisor or human resources manager does not have to engage in continuous monitoring of an individual's job performance for him or her to be held to control the employee's work environment. Involvement in preparing annual performance reviews and/or disciplining an individual may be enough to be considered supervisory authority.

As a potential supervisor, make sure that you follow the requirements of the FMLA to avoid individual liability. At a minimum, that includes making sure you provide FMLA leave when appropriate and ensuring employees are not penalized for taking FMLA leave time.

### **Attorney**

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