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TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
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RE: [Second Circuit Court of Appeals Rules That Human Resources Managers May Be Individually Liable under the FMLA](#)

On March 17, 2016, in *Graziadio v. Culinary Institute of America*, the United States Court of Appeals for the Second Circuit held that a Human Resources Director may constitute an “employer” under the Family and Medical Leave Act (“FMLA”) such that individual liability could result for violations of an employee’s FMLA rights.

Graziadio v. Culinary Institute of America - Background

The plaintiff, a payroll administrator at the Culinary Institute of America (“CIA”), took several weeks off from work to care for her two sons, one who was hospitalized for previously undiagnosed diabetes and the other who broke his leg. Prior to returning to work, the plaintiff requested a temporary reduced work schedule in order to continue to provide her sons with care. At that time, the plaintiff provided a medical certification with respect to her son who was hospitalized and indicated that she would obtain additional documentation with respect to her other son if the CIA required. The plaintiff apparently made repeated requests to her supervisor -- and when the matter was turned over to the Human Resources Department, to the Human Resources Director (“HRD”) – regarding whether she needed to provide any additional information to support her request for intermittent FMLA leave. Instead of directly responding to these inquiries, the HRD provided the plaintiff with an FMLA brochure. At some point during this time, the plaintiff provided a doctor’s note regarding her son’s medical care for his broken leg.

After repeated phone calls and emails to the HRD that spanned over a week regarding when she was able to return to work, the plaintiff was informed that her FMLA paperwork was deficient. A series of emails were then exchanged between the plaintiff and the HRD: the plaintiff made several requests for clarification of the deficiencies of her paperwork and ultimately requested to return to work on a full-time basis; and the HRD refused to allow the plaintiff to return to work until the two met in person. Additional emails were exchanged where the plaintiff offered her availability to meet in person but the meeting was never arranged. The plaintiff hired an attorney, at which point CIA’s counsel conveyed to the plaintiff’s attorney that the plaintiff could return to work by calling her supervisor but also reiterated that proper FMLA paperwork was required. Because the plaintiff’s attorney failed to respond within the time frame provided by the company, CIA terminated the plaintiff for job abandonment.

The Second Circuit's Analysis

The plaintiff filed a lawsuit against her supervisor, the HRD and CIA claiming interference of her FMLA rights, retaliation for taking FMLA leave, and discrimination under the American with Disabilities Act ("ADA"). The Southern District of New York dismissed the complaint in its entirety. That court held, in part, that neither the supervisor nor the HRD constituted an "employer" under the FMLA and that CIA stated a legitimate business reason for the plaintiff's termination.

The Second Circuit reversed the lower court's decision, finding, in part, that the HRD may constitute an employer under the FMLA based on the "economic reality test." In determining whether a manager is, in economic reality, an employer for purposes of FMLA, the Second Circuit looked to the following set of non-exclusive factors¹:

1. Whether the manager has the power to hire and fire the employee,
2. Whether the manager supervises and controls the employee's work schedule or conditions of employment,
3. Whether the manager determines the rate and method of payment, and
4. Whether the manager maintains employment records.

The Power to Hire and Fire the Employee

In *Graziadio*, it did not matter that CIA's Vice President retained the ultimate authority to fire the plaintiff. It was enough that the HRD recommended the plaintiff's termination for the court to conclude that the HRD had "substantial power" over the plaintiff's termination.

Supervises and Controls the Employee's Work Schedule or Conditions of Employment

Because the HRD was the sole individual responsible for when and how the plaintiff could return to work, and whether the plaintiff could obtain an accommodation to her schedule, the Second Circuit concluded that the HRD exercised control over the plaintiff's schedule and conditions of employment.

Determines the Rate and Method of Payment and Maintenance of Employment Records

Neither party in *Graziadio* submitted evidence regarding who determined the rate and method of the plaintiff's wages. The Second Circuit also noted that the maintenance-of-records factor cut against finding the HRD an employer because the routine administration of FMLA leave was handled by the payroll department. But despite the fact that these two factors of the economic reality test were not satisfied, the Second Circuit concluded that since the HRD reviewed the plaintiff's FMLA paperwork, determined whether such paperwork was adequate, and sent nearly all of the communication to plaintiff regarding her leave, the HRD "controlled plaintiff's rights under the FMLA" such that she could be subject to liability under the FMLA.

The Court also noted that the HRD's failure to specifically respond to the plaintiff's requests for clarification of what additional FMLA paperwork was needed "may itself run afoul of the FMLA's explicit requirement that employers responsively answer questions from employees regarding their rights and responsibilities under the FMLA."

¹ This is the same test utilized under the Fair Labor Standards Act.

What to Do

Because Human Resources managers are specifically tasked with the responsibility of evaluating FMLA claims, and thus necessarily inject themselves directly into scheduling and other employment determinations regarding an employee's FMLA rights, it is difficult to find a way around potential individual liability under the *Gradiadio* standard. Therefore, Human Resources Managers should ensure that each claim for FMLA leave is handled with care, including by doing the following:

1. Train managers on the FMLA and their responsibilities to the employees that report directly to them,
2. Respond in a timely manner to any requests for information regarding an employee's FMLA rights. The *Gradiadio* decision reminds managers that unresponsiveness to such requests could be a *per se* violation of the FMLA,
3. Specifically request medical certifications from employees who seek FMLA leave – under the statute, an employee is not required to provide a medical certification unless specifically requested by the employer, even if the employer maintains a handbook stating that such certification is required,
4. Explain in writing any deficiencies of FMLA paperwork to the employee, and clearly state the statutory time frame within which an employee may cure such deficiencies – the statute specifically requires employers to state “in writing what additional information is necessary to make the certification complete and sufficient”, and
5. Remember that employees have fifteen (15) days or more to provide a certification upon initial request, and seven (7) days to cure any deficiencies in a certification.

Conclusion

An employer's responsibilities addressed above touch upon only a minute aspect of a set of regulations promulgated under the FMLA. Therefore, and because of the seriousness of potential individual liability under the FMLA, Human Resources Managers are advised to seek counsel to ensure that no employee's FMLA rights are being thwarted.

Kane Kessler, P.C. will be conducting a training on the FMLA to guide clients through the salient aspects of the statute and regulations. A separate notice regarding such training is forthcoming.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydakis](#), [Jaclyn Ruocco](#) or [Jennifer Schmalz](#).

cc: Joseph E. Spinnato, President
Vijay Dandapani, Chairman

This memo is provided for informational purposes only.

It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.