*Barclay Damon Live*: *Labor & Employment Podcast*

Episode 59: “Untangling the Web of Leave Issues Under ADA, FMLA, and Related Laws, Part 1,” With Scott Rogoff

Speakers: Ari Kwiatkowski and Scott Rogoff, Barclay Damon

Ari: Hi, everyone. This is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I'm Ari Kwiatkowski. Let's dig in.

Ari: Hi, everyone. Welcome to episode 59, “Untangling the Web of Leave Issues Under ADA, FMLA, and Related Laws, Part 1.” I am thrilled to welcome back to the podcast Scott Rogoff today. Scott is a partner in our Rochester office. He has decades of experience representing clients in litigated matters, and counseling them on a whole host of labor and employment issues. So, Scott, welcome back.

Scott: Thanks, Ari. Decades. Unfortunately, it's accurate, but I feel so old.

Ari: I think it's that’s good thing.

Scott: I guess.

Ari: You're a “learned counselor.”

Scott: Okay.

Ari: So, Scott, you know, excited for these couple of episodes. Scott and I were talking offline, and these are issues that for me have come up a lot over the last I would say, four to six weeks. Scott and I have talked with clients together about these issues, and we'll get into that later. But Scott, you know the drill. Before we dig into the substance—I still remember your fun fact from last time you were on, but I'm wondering if you can hit us with another fact about your personal or professional life.

Scott: I'm really not that interesting. I mean, I'll come up with something.

Ari: I mean, the last one you gave was very interesting. Time it was about how you were, like in D.C. and you got pulled over by the…

Scott: Oh, yeah. I was driving the press van in a presidential motorcade and I went the wrong way.

Ari: Yes. Yes.

Scott: Well, I guess something happened. It was kind of fun. In college I was visiting a friend of mine at Hamilton College and we went to a Bobby McFerrin concert and I had a little bit to drink and our seats were a little bit too good in the front row. And at one point, Bobby McFerrin asked if anybody wanted to come up on stage and sing, and because my inhibitions were a little lowered at that time, I went up on stage with about ten other people and it was cool. Bobby McFerrin, he just went down the line and gave us all a part to sing and we sang a part. And then before you knew it, it was a really cool song. So thanks to my friend Dan, who was at Hamilton College at that time and we had a really good time, but I guess that's kind of interesting.

Ari: I think so. See, you're saying that you don't have… you're not that interesting, but every time I ask you this, you pull this like random fact point out that like no one else has ever done so.

Scott: Well, I'm nothing if not different.

Ari: All right, well, I'll take it. So, Scott, let's dig in. You know, I think today I really wanted to talk with our listeners for this week, in next week's episode, about the issues that can come up when an employee takes leave. Because I do think that this is a bit of a web and there are so many different statutes and issues at play. So can you just talk generally about the reasons an employee may be taking leave under this scenario and what we'll be talking about?

Scott: Yeah, sure. Basically, life happens, you know, when you go into work, life happens and, you know, whether it could be a childcare issue, whether it could be a sickness, whether it could be a bereavement type thing, whether it could be, “I just don't feel like coming today,” depending on what the employer's policy is. So there's a hundred reasons why employees might tell their employer on a given day or even in advance, “I'm just not coming in.” And as employers, we like to say, yeah, you are. But like you said, Ari, there are so many laws and rules and regulations that govern employee leave. It's very important that employers at least have a working knowledge of the framework before they make a mistake, say no, and then get too much trouble.

Ari: Right. And I think another thing, too, we'll touch on maybe next week is issues that come up with this and even worker's comp injuries. So workplace injuries, things that happen at work, and that kind of opens up a whole other web.

Scott: It does, because worker's comp has its own separate discrimination and retaliation provisions. Right. So, you know, you and I and those in our group are mostly used to claims before the Division of Human Rights in either the unprotected class discrimination. But I actually had a hearing several years ago, which was before the worker's comp board, which was saying specific to its specific section of the worker's comp law that says employers cannot discriminate against employees because they've either taken worker's comp or they have asserted rights under the worker's comp law. So that's a different venue and a whole different set of rules. But absolutely, worker's comp comes into play, too.

Ari: And so, Scott, is that something that's decided before the worker's comp board?

Scott: Correct. Yeah. Yeah. You have a hearing like you would in front of the DHR, but there's an administrative law judge at the worker's comp board, and they take testimony and there's an actual hearing. And the administrative law judge will make a determination of whether the employer has violated the employee's rights under the worker's comp law.

Ari: Got it. So that's a whole separate ball of fun.

Scott: Oh, you know, you win, you did well on ours….

Ari: Right.

Scott: It was fun when you win. Not so much when you make a mistake.

Ari: I mean, of course. Well, Scott, I think, you know, I think when employers, business owners think, you know, an employee has a disability or an illness and they have to go out, they think about the ADA. Can you talk about other protected forms of leave or other statutes that implicate ADA leave and are kind of interrelated? Because I think that's really what we're going to talk about today.

Scott: Yeah, sure. So when an employee notifies an employer that they're going to be out or sometimes they don't notify.

Ari: Right.

Scott: Or sometimes they don’t notify, and you just realize they're out. When I get these issues, I think of different buckets because there's a whole lot of buckets. So one of them you mentioned, you know, does the individual have a disability under the Americans with Disabilities Act, which is, of course, a federal law. And the New York State Human Rights Law is the state counterpart. And standard actually for disability are the state human rights law is less than it is under the federal law. That's the first thing the employer has to think and consider is this… does this person have a disability? So in addition to that, New York State has passed a law recently called the New York State paid sick and safe leave law. And that requires certain employers, depending on how large they are, to give employees paid sick leave for a qualifying event. And the standard is very, very low.

Ari: Yes.

Scott: And it's also it's not just sick leave. It's also safety. So.

Ari: Right.

Scott: If there's a domestic violence situation and somebody has to go to court or a shelter with an attorney. Those leaves are covered as well. So that's another bucket. Yet another bucket is New York paid family leave. Unlike the federal law, you cannot use New York paid family leave for your own condition. With a couple of exceptions, one of them being COVID, there’s an amendment to the COVID leave law that now says you can use it in certain circumstances if every other leave has been exhausted. So those are the main ones that we see. You got the federal FMLA, which we talked about. You got disability leave, you got worker's comp leave. You might have leave under the employer's own policy.

Ari: Right.

Scott: Either in addition to all of these leaves or separate. So the takeaway from this is: if you're a manager or a supervisor or even owner, you know, if these come to your attention before you make any knee-jerk decision on what to do, you really have to consider, does the request for leave fall under one of these categories? And it could change. So. So let me look like… carry you through one example. You are… you own a frozen yogurt shop. Right. And you get a call the next day from your night manager who says they so they call it Brett, for lack of a better word. Brett says, Gee, boss, I was trying some of our new flavors last night. And boy, the rhubarb frozen yogurt does not work at all. I'm very sick. Yeah, I'd you know, I'm sick from it. I'm not coming in tomorrow. Okay, well, right off the bat, providing that Brett has enough time under New York paid sick leave. That's enough. Brett doesn't have to show a medical excuse or anything at that point. He's going to be entitled to paid sick leave under New York. Now, does Brett also get paid a protected leave under the ADA? Well, not unless this turns into some kind of a bacterial infection or something that lasts. Right. And it really affects their ability to work or what they call, you know, interrupts their usual daily functions. So that took care of. Now, let's say that does happen and you exhaust your New York state sick leave and you got your ADA leave and now you're on disability. You know, the question that you and I get, Ari, all the time from employers is how long do we have to do this job open? And they hate our answer. But I'm sorry, the answer is it depends. Depends on the scenario.

Ari: So we see that a lot on this podcast.

Scott: We do. That's right. Right. And that really is the answer to every anyone who's in law school, by the way. That is, is it?

Ari: Put that in the final exam.

Scott: You'll get an A. We really have to go through all of these different buckets. If someone says, I don't feel good today and I'm not coming in. And we… and I go through this whole analysis with all of these different laws to see if there is an excused absence that might be available.

Ari: Yes. Good. That's a good summary and primer, Scott, for I think all the things that are kind of at play. You know, I think I get a lot of questions from HR people, business owners about what types… when an employee is out for an extended period. So we'll say not the upset stomach from the rhubarb…

Scott: From the.

Ari: Frozen yogurt.

Scott: If that hits. I want a cut of that. Not that rhubarb pie. So if this happens, I want a cut of the procedure.

Ari: I mean, I will. I promise I won't be developing that product.

Scott: Was going to split it with you…

Ari: Okay. All right, Well, well, and I know all of our listeners. You just heard Scott said he'd split everything with me

Scott: We’ll talk offline.

Ari: Yes, but so basically, I get a lot of questions which are… are there any can any of these leaves run concurrently or is it always this leave? Then you have to tack on the next leave, and tack on the next leave. And I think it's a good question because I think it comes up a lot. So can you talk a little bit about that? And I think it really comes up a lot when an employee is taking FMLA leave and then also some other type of leave.

Scott: Yeah, it does. And really the answer is where they start, or how you classify it. So let's take FMLA because you mentioned it. So if the employer is large enough, meaning if they have at least 50 employees, within a 75-mile radius and the employee has worked at least one year and they've logged 1,250 hours, those are the general requirements for FMLA leave. If that comes into play, then the employer not only can some circuits they *must* run FMLA concurrent with these other sorts of leave, whether it's New York, sick leave, whether it's PTO under the policy, whether it's whatever they *must* do it. I think there was a case, Ari, out of the Ninth Circuit, 2019, maybe something along those lines where that came up. Because the employer kept deferring the FMLA leave and the court said, no, you must run them concurrently. So the answer is yes, but you want to make sure that the employees know about it. So there should be a provision in your handbook, if you're an employer that says when you take these other types of leave, if they also qualify for FMLA, we will run them concurrently. So you want to put the employees on notice, because if you don't, then there could be an argument that they don't run concurrent. And now you're in another whole period. And as an employer, you obviously want to avoid that. So, yes, the general rule is these various kind of leave will run concurrently with FMLA, providing the employee's also eligible for FMLA. Just let the employee know about it in advance.

Ari: Right. That's right. I think that's a really good kind of practice point because I've reviewed some handbooks where I haven't seen those types of provisions as it relates to FMLA specifically, and we always recommend including those because the employee just… you always want to have, as we've talked about, I think you and I talked about before it, we talk about a lot. We always want to have a policy to point to for these types of issues.

Scott: Right? Yeah. It's very …and if it's not in the handbook, but if you’re an employer, you have it coming up a lot, you can do a stand-alone policy. If you went to the employees because the key is that the employee's know about …that is it's going to run concurrent. So they can't think or they won't think at least reasonably to think that. All right. Well, I've got this bandk, but I've used that up. But I still have all of these other ones. They can should run concurrently.

Ari: Right. And it makes sense because obviously, as an employer, business owner, you know, the goal is to have everyone on the same page.

Scott: Right? Yeah, absolutely.

Ari: So, Scott, we've been talking about FMLA. You know, I wanted to talk a little bit about or ask you about what happens when an employee is out on leave and their FMLA expires because I think we get a ton of questions about this. So we know that under the statute you have to keep an employee's job open for a period of time. You have to keep that job open for the full 12 weeks, assuming an employee takes the full 12 weeks.

Scott: While generally speaking, yes, However, and this doesn't happen often, and I urge any business owners or employers watching this, please consult legal counsel before taking action, whether it's us or whoever you typically use. There are times when someone is out on FMLA leave and let's say you have a temp come in, and a replacement and the replacement finds that the person who went on FMLA committed all these horrible acts that you're discovering when you go in there. For example, I had a case years ago where there was someone who worked in the medical office and she went out on FMLA leave. And when her replacement came in, she opened a drawer and found all of these notes of… doctor's notes that weren't transcribed. And for months and months the doctors had been saying, do you have my notes? And the… and the FMLA person said, Oh, I did them, you lost them. So when you open the drawer, they're all there. She never did it. There was also money missing when you opened the drawer. If you are that this person had had taken without explanation, there were some other things that were discovered while this person was out. So in those cases, again, be very careful. I'm not saying do anything without consulting counsel, but the FMLA does not give somebody greater rights than if they were still there. So, if they would have been subject to discipline while they were there, the FMLA does not protect their job for any amount of time because it would have happened anyway. Another thing would be with job eliminations, right? You're going to eliminate an entire department. So whether the person went out on FMLA or not, their job would have been gone. You can make that determination. Now the proof is in the pudding, right? You've got to show, we had talked about this for a long, long time. And we did, you know, maybe sales projections or operating budget projections. And so we had decided to do this long before so-and-so went out on leave. So if you have those scenarios… and the rule of thumb is, would this person have been disciplined or out of a job or a job eliminated had they not taken FMLA? And if the answer is yes, you can take action, but please get guidance on that. It's very tricky and I'm a big pain in the neck when my clients tell me that. I cross-examine them harder than you know, some of these agencies would, because we want to make sure they have it. But other than that, our yeah, the general rule is if they're out, you've got to hold that job open for up to 12 weeks. And when I know the regs say, or comparable, it's pretty much the same job, it’s got to be the same pay the same level of prestige, the same hours, etc. So it's really the same job.

Ari: Right? I'm glad you brought up the exceptions, Scott, because I think too, it was… it's smart kid to tell your listeners this is something you really do need legal counsel to navigate, because I think especially if there's disciplinary type issues, you know, you really do need to do your due diligence to investigate those issues. And you can't just say, you know, we think this employee did this, so we don't have to hold their job.

Scott: Yeah, that's a bad idea.

Ari: Yes, I think we would counsel against that. But, Scott, I think this was a great primer. I think we talked a lot about the issues, the statutes at play. We talked about the FMLA. I think this is a good time to stop for this week. And I think for the next episode we will pick back up and we will start talking about issues under the ADA in what employers need to know about that. But before we sign off, any final words of wisdom or maybe anything we didn't cover.

Scott: Only again, that any time an employer becomes aware that an employee wants to be out by way of notice or has been out without notice yet to someone who knows what they're doing, whether it's your H.R. professional or the owner of the company if they have knowledge, or legal counsel. You don't want to be making these decisions just based on, you know, on the fly. You really have to analyze all of these potential issues that come up because if you don't, we will see in litigation.

Ari: Yes, unfortunate but true. All right. Thanks, Scott. I will see you next week. And to our listeners, tune in and we will pick back up where we left off.

Scott: Sounds good. Thanks, Ari.

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