



FENWICK & WEST LLP

Weekly Employment Brief

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New Employees Not Entitled to FMLA Leave by Virtue of Employer Inaction

A trap for the unwary employer regarding FMLA leave has been avoided. The U.S. Supreme Court let stand a lower court decision that invalidated a federal regulation allowing new employees to take FMLA leave despite not meeting the FMLA's time-in-service requirements where the employer fails to object within two days of the employee's request for a leave. *Brungart v. BellSouth Telecommunications Inc.* The FMLA states that in order to be eligible, the employee must have been with the employer for at least one year and worked 1250 hours during the previous 12 months. A federal regulation provided that a new employee may nonetheless be eligible for FMLA leave if the employer failed to advise the employee of his/her ineligibility for FMLA leave within two business days of receiving the employee's request for a leave. The lower court had ruled the regulation was contrary to the statute.

The Flu may be covered by the FMLA

The FMLA continues to vex employers because of its complexity. A federal appellate court ruled that an employee's three-day absence due to the flu was protected under the FMLA as a "serious health condition" that required "continuing treatment" rendering unlawful her termination despite repeated warnings about unsatisfactory attendance. *Miller v. AT&T Corporation* (4th Cir.) The employee had the flu, visited an urgent care center on two separate

days, and obtained a doctor's note for her three-day absence. She also requested an FMLA leave for the three days. The employer had denied the request and terminated her employment because the flu is generally not considered a serious health condition and the doctor's note did not indicate she had received treatment two or more times.

Supreme Court lets Disabled Golfer Ride a Cart

In a hotly contested sports case, the U.S. Supreme Court ruled that the ADA requires that disabled golfer Casey Martin be allowed to ride a cart between holes rather than walk the course during PGA tournaments. The PGA tour had argued that changing its rules to accommodate Martin's circulatory disorder would fundamentally alter the game. The court disagreed ruling that walking was neither an essential attribute of the game nor an indispensable feature of the tournament.

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