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Client Alert

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Third Circuit Rules That Employers May Generally Prorate "Productivity" Bonuses To Employees Returning From FMLA Leave

In *Sommer v. The Vanguard Group*, 2006 WL 2441970 (3d Cir. August 24, 2006), the U.S. Court of Appeals for the Third Circuit addressed the issue of prorating bonuses for employees who return to work after taking a leave of absence under the Family and Medical Leave Act ("FMLA"). It held that bonuses that reward production (such as those tied to number of hours worked) may generally be prorated, but those that reward "the absence of an occurrence" (such as those given for avoiding accidents or having perfect attendance) may not be prorated. Thus, it concluded that Vanguard Group, Inc. ("Vanguard") did not violate the FMLA by reducing the annual bonus payment of a financial administrator who missed two months of work while on FMLA leave.

Factual and Procedural History

Robert Sommer, a former Vanguard employee, brought a lawsuit in the U.S. District Court for the Eastern District of Pennsylvania seeking, among other relief, the income and benefits he would have received had Vanguard not prorated the amount of his bonus under the firm's Partnership Plan (the "Plan") to take into account the two months he spent on FMLA leave. One factor in the Plan bonus formula was "hours worked," which was defined as:

> the actual hours for which an employee is paid or entitled to be paid by the Company for the performance of duties or for vacation, holidays, sick time, or an approved leave of absence (including bereavement leave, court duty leave, and military leave). Any employee who is on a disability leave of absence under the Company's short-term or long-term disability program shall not be credited with Hours of Service during such leave of absence.

Sommer alleged that, by prorating his bonus under the Plan, Vanguard interfered with his FMLA rights and treated him differently because he had taken FMLA leave. Sommer and Vanguard filed cross motions for summary judgment on the FMLA liability issue. The district court denied Sommer's motion, granted Vanguard's and entered judgment in favor of Vanguard, holding that the proration of the bonus did not interfere with Sommer's FMLA rights because the bonus rewarded production. Sommer appealed that decision to the Third Circuit.

The Third Circuit's Decision

In affirming the district court's decision, the Third Circuit observed that it was the first federal appeals court that has been required in an FMLA interference action to distinguish between the two classifications of company bonus programs – namely, employee production or absence of an occurrence. Noting that the statute and U.S. Department of Labor ("DOL") regulations do not directly address the proration of bonuses, the Court found persuasive three DOL opinion letters providing guidance on the subject. The Court derived from these letters the precept that "although an employer may not reduce an absence of occurrence bonus paid to an FMLA leave taker if the employee was otherwise qualified but-for the taking of the FMLA leave, that employer may prorate any production bonuses to be paid to an FMLA leave taker by the amount of any lost production (be it hours or another quantifiable measure of productivity) caused by the FMLA leave."

The Court rejected Sommer's argument that, because bonus eligibility was contingent upon an employee's remaining employed during the period in which the bonus was calculated, the bonus fell into the category of those rewarding the absence of an occurrence, *i.e.*, not resigning or getting fired. While acknowledging that "it is often difficult to sift through the jargon-laden terms of a company's bonus program documents to ascertain the goal actually being rewarded," the Court concluded that the plan at issue more resembled one that rewards employee production. The Court found particularly significant the frequent references in the bonus program documents to Vanguard's wish to encourage employees to meet a predetermined goal of 1,950 hours a year, with bonus amounts prorated for every hour that employees are under the annual goal. The Court held that Vanguard's hours-based annual production requirement made the program a production bonus program, where proration is permitted under the FMLA.

Sommer also had argued that, even assuming that the bonus was awarded for production, and not for the absence of an occurrence, it still interfered with his FMLA rights because the program discouraged the taking of FMLA leave. By prorating the bonuses of those who take unpaid FMLA leave, but not prorating the bonuses of those who take paid forms of leave, such as vacation or sick leave, Sommer argued that the program violated DOL regulation 29 C.F.R. § 825.215(c)(2), which mandates that employees on FMLA leave be given "the same consideration" for bonuses as those who go "on paid or unpaid leave" not covered by the FMLA. The Court rejected Sommer's contention, concluding that the words "same consideration" do not require that FMLA unpaid leave takers be treated the same in all respects as those on paid leave. According to the Court, those words merely apply to an FMLA leave taker's "qualification and consideration for bonuses, not their calculation or proration." The Court noted that Vanguard gave the required "same consideration" to FMLA unpaid leave takers as to paid leave takers because it also prorated various other non-FMLA leaves of absence, including long-term disability, workers compensation, personal leave and unpaid court leave.

The Court did not address whether Vanguard, had it only prorated bonuses for FMLA leaves, and not for any other types of leaves, would have interfered with Sommer's FMLA rights, regardless of whether its bonus program rewarded productivity. The Court also acknowledged that paid vacation and sick leave were treated differently by employers than other leaves and suggested that Congress did not intend to change such treatment in enacting the FMLA.

Implications For Employers

In response to this case, employers should prorate for FMLA leave only those bonus programs that reward specific productivity standards, such as hours worked. Employers should review the productivity standards in their plans to ensure that they are set forth prominently and in plain, unambiguous language in the bonus program documents.

In addition, if an employer decides that FMLA leave should trigger proration of an employee bonus in such a productivity-based program, it should make sure that at least some other, non-FMLA forms of leave that negatively impact production also trigger proration (though these need not include paid vacation or sick leave).

If employers are uncertain whether a particular bonus program permits prorating of employee bonuses during FMLA leave, or whether their proration policies in general meet DOL requirements for giving the same consideration for bonuses to FMLA leave takers as to others who take paid or unpaid leave, they should consult legal counsel.

Proskauer's Newark office has 40 attorneys with significant and diverse experience in labor, employment, employee benefits and immigration law. The following individuals serve as contact persons for this alert and would welcome any questions that you might have. For more information on this matter, please contact:

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