# HRMA-PRINCETON LEGISLATIVE/LEGAL UPDATE
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***Ross v. Youth Consultation Service, Inc., 2016 WL 7476352 (D.N.J. 12/29/16)***

Ross worked as a licensed practical nurse at YCS for 7.5 years. Ross completed a three-day disciplinary suspension between September 25 and September 28, 2012. While she was out on suspension, Ross visited her physician, who gave her a medical note, supporting Ross's request for time off until October 8th because of hip dysplasia. On October 5th, Plaintiff delivered another doctor's note to YCS asking for additional time off from October 9, 2012 to October 23, 2012.

Four days later, on October 9, 2012, YCS Benefits Manager sent Ross a packet containing information about FMLA leave benefits and several forms: a "Family/Medical Leave Request Form"; a "Leave Designation/Employee Acknowledgment of Obligations Form"; and a "Certification of Health Care Provider Form." On the first form, Ross checked the box requesting consecutive medical leave, writing "10/1/12" as the beginning date of the medical leave request and putting "unknown" as the end date.

The designation form, which had been partially filled out by the YCS Benefits Manager, indicated that Ross was eligible for up to 12 weeks' FMLA leave; that her job would be protected during FMLA leave; and that she had requested an October 1, 2012 start date and an "unknown" end date. In its last paragraph, this form stated: "While on leave, you must furnish us with reports every 30 days of your status and intent to return to work. Note: Failure to return to work on the applicable return date may result in the termination of employment/you being considered to have voluntarily resigned."

Ross's doctor filled out the Certification of Health Care Provider form on October 15, 2012, indicating that Ross suffered from a serious condition. The physician's form also indicated an "undetermined" end date.

However, less than two weeks after Ross sent her packet back to the Benefits Manager, her physician provided a note that stated Ross was "unable to work at this time and has been scheduled for a Right Total Hip Arthroplasty on 11/19/12 and a Left Total Hip Arthroplasty on 1/21/13." The physician also estimated her return-to-work date to be April 21, 2013. Nobody from YCS contacted Ross after getting this communication, which was received no later than October 26, 2012.

The next contact Ross had with YCS was on December 31, 2012, when the YCS Benefits Manager called her and asked if her April return date had changed. Ross replied that it had not and that she was unable to return to work before April, as instructed by her doctor. On that same day, YCS sent Ross a letter terminating her employment, explaining that her leave time under the Family and Medical Leave Act ("FMLA") exhausted on December 21, 2012, and that YCS was unable to hold her position open indefinitely.

**Legal Analysis**

The FMLA. The FMLA requires an employer to provide three essential notifications to employees: (1) eligibility notice, (2) rights and responsibilities notice, and (3) designation notice. Within 5 business days of an employee requesting FMLA leave, or when an employer is on notice of an employee's potentially-FMLA-qualifying

condition, it "must notify the employee of the employee's eligibility to take FMLA." C.F.R. §825.300(b)(1). Along with the eligibility notice, employers must also provide "written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." C.F.R. § 825.300(c)(1). The notification may, but is not required to, include other information such as "whether the employer will require periodic reports of the employee's status and intent to return to work." C.F.R. § 825.300(c)(1)(2). The employer must designate leave "as FMLA—qualifying" and give notice "of the designation to the employee." C.F.R. § 825.300(d)(1). When the employer knows the leave is for an FMLA—qualifying reason, "the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances." C.F.R. § 825.300(d)(1). "If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change." C.F.R. § 825.300(d)(5).

Further, the employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. C.F.R. § 825.300(d)(6).

The arguments. Ross argued that YCS never gave her proper FMLA notice; if it had, she would have structured her leave differently to prevent losing her job. Ross claimed that after she informed YCS on her leave request form that the length of her absence was unknown, and then followed this up with a doctor's note stating she required leave until April, YCS never gave her notice that the proposed April date exceeded the available 12 weeks' leave. YCS contends that Ross cannot show prejudice because she was unable to return to work after 12 weeks of leave. More specifically, by her own admission, Ross was unable to work after the first hip surgery, so she could not have structured her leave differently or intermittently.

The outcome. Ross wins. Here, the "Leave Designation/Employee Acknowledgment of Obligations Form" did not specifically state that Ross was eligible for the full 12 weeks and it did not identify the 12-month period in which the leave was calculated. The burden of calculating the time is on the employer, not the employee. C.F.R. § 825.300(c)(1), (c)(1)(i) ("Such specific notice must include, as appropriate ... the applicable 12-month period for FMLA entitlement."). When YCS gave Ross her designation notice, neither party knew the anticipated end date of her FMLA leave and it was impossible at that point for YCS to provide "the number of hours, days, or weeks" of leave. But a couple of weeks later, Ross's physician sent YCS a note stating that she was unable to work, that two hip surgeries were scheduled, and that she would not be able to return to work for approximately six months, which well exceeded the 12 weeks available to Ross.

The FMLA requires employers, in the event of change in the designation notice, to provide "within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change." C.F.R. § 825.300(d)(2). The note sent by Ross's physician was a change in status and it gave YCS enough information to know Ross would exhaust her 12 weeks' leave before her anticipated return date. Yet YCS never contacted Ross. YCS did not tell Ross what specific amount of time was available to her, it did not provide the change in designation notice after receiving the doctor's note, and it did not communicate the critical information that the FMLA would not provide all the requested leave. As to prejudice, Ross convincingly argued that if she had been informed that her April end date exceeded her FMLA leave and that she would be terminated if she did not return to work in December, she would have structured her surgeries differently and postponed her second hip surgery.