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Mr. Riccio concentrates his practice in representing management in the public and private sectors in various employment matters such as discrimination, harassment, retaliation, and wrongful termination claims. He represents management before the EEOC, NLRB, Division on Civil Rights, PERC, and federal and state courts. He also conducts investigations of discrimination and harassment claims, training sessions on workplace anti-discrimination and harassment issues, and advises clients regarding employment practices, policies, and procedures.

Mr. Riccio was appointed by the Director of the New Jersey Division on Civil Rights as Chairperson for the Southern New Jersey Region in an employer outreach initiative undertaken by the Division. Among other things, the initiative will provide employers the opportunity for input on regulations.

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Continuing with the facts from last week's H.R. Brain Break. (Please click here for a link to last week's H.R. Brain Break.)

You attend a Hapless Board meeting during which CFO Carol "Chicken" Little informs everyone that Bernie Madoff had a cleaner set of financial records than Hapless. Carol predicts the demise of Hapless is almost certain, but no more than 6 months away, unless there is a substantial infusion of capital and a restructuring of Hapless. One of the Board members, who has made clear that he is less than accepting of civil unions, complains that based on Carol's financial analysis Hapless can not afford to have Pat and Jamie out on leave. Can Hapless deny the leave to Pat and/or Jamie?

By Armando Riccio: Although undue hardship is not a basis to deny FMLA or NJFLA leave, Hapless can deny Jamie's leave if she is a "key employee" as defined under the NJFLA provided that denial of her leave is necessary to prevent substantial and grievous economic injury to Hapless' operations. In order to be a "key employee" under the NJFLA, Jamie must be either among the highest paid 5% or one of the 7 highest paid employees of Hapless. While Hapless cannot deny Pat's FMLA leave, it can deny reinstatement if Pat is a "key employee" under the FMLA provided that the denial of reinstatement is necessary to prevent substantial and grievous economic injury to Hapless' operations. In order to be a "key employee" under the FMLA, Pat must be among the highest paid 10% of employees.

Note, the FMLA regulations specifically state that the "substantial and grievous economic injury" standard is different from and more stringent than an "undue hardship" analysis under the Americans with Disabilities Act. Keep in mind that the more stringent standards applied here combined with the Board member's well known disposition requires a very strong set of proofs as to the substantial and grievous economic injury in order to avoid valid claims against the company. Also, in the event of a legal challenge, the financial information relied upon by Hapless in reaching its "substantial and grievous economic injury" determination would be subject to disclosure.

Finally, you must notify Pat and Jamie of their key employee status prior to commencement of their respective leaves. Although the notice must also state whether the leave will cause the company substantial and grievous economic injury, nothing prevents Hapless from updating the notice based upon unforeseen circumstances.

Feel free to pass the question, or question and answer, along to supervisors, fellow HR professionals, or insureds.

Would your company like an in-house training session? If so, please contact ariccio@capehart.com.

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