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## Questions?

If you have any questions about this alert, please contact:



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## Supervisors Can Be Personally Liable for Violations of FMLA

Managers and supervisors who act within the scope of their responsibility believe that their actions will not expose them to personal liability. While that is generally true, it is not always the case. Now two federal courts have found that public sector supervisors can be personally liable for violations of the Family Medical Leave Act (FMLA).

In the first case, which reached the appeals court in Philadelphia, an employee with a history of diabetes, heart disease and kidney problems missed work frequently to seek medical attention. These conditions and the employee's absences qualified for FMLA coverage. The supervisor questioned her about why she breathed so heavily and why she needed to see her doctor so frequently. He also told her that she needed to start taking better care of herself. In her annual performance reviews, he noted that she had to improve her overall health and reduce the number of days she missed due to illness. When the supervisor did not see improvement, he placed her on a six month probationary period.

When there was still no improvement, the supervisor recommended her discharge. His managers agreed with his recommendation. The supervisor prepared the discharge papers. The supervisor and his managers then met with the employee to terminate her.

She sued her supervisor, among others, for violating the FMLA. The district court threw out the case finding that the supervisor did not qualify as an "employer" under the FMLA. This decision was reversed by the Court of Appeals in Philadelphia as it found that under the FMLA's definition of "employer," a supervisor in a public agency may be subject to individual liability.

In the second case, a New York federal district court decision interpreted the statute the same way, finding that an individual can be an "employer" under the FMLA. In order to establish liability, the adversely impacted employee will have to prove that the supervisor controlled,



in whole or in part, the ability of the employee to take leave under the FMLA and/or the employee's return to work after the FMLA leave. This will include a review of whether the supervisor has the authority to discipline, grant the leave, extend the leave, or determine the return to work, or whether he/she can effectively recommend these actions. The court's inquiry will focus on the extent to which the supervisor controls the employment relationship. While there is a split among the appellate courts, and no specific direction from the Second Circuit Court of Appeals, public employee supervisors should be alert to complying with the FMLA as they risk being sued individually, just as their private sector counterparts can be.

### ***Questions or Assistance?***

If you have questions regarding this alert, please contact Gary Starr at (860) 251-5501 or [gstarr@goodwin.com](mailto:gstarr@goodwin.com) or Kevin Roy at (860) 251-5162 or [kroy@goodwin.com](mailto:kroy@goodwin.com).

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