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Practical Problems in Employment Law: FLMA Notices and the Not-So-Reliable Mailbox Rule

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PRACTICAL PROBLEMS IN EMPLOYMENT LAW: FMLA NOTICES AND THE NOT-SO-RELIABLE MAILBOX RULE

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I. INTRODUCTION

The Family and Medical Leave Act (FMLA) places significant responsibilities on covered employers, including, among other things, the duty to provide notice to employees of their rights under the FMLA. The notice requirements of the FMLA set it apart from other employment laws and make compliance more difficult for employers. Notice problems range from the abstract to the practical. The Third Circuit Court of Appeals, in *Lupyan v. Corinthian Colleges Inc.*,[1] examined a practical concern related to the employee notice requirement of the FMLA; specifically, it examined what happens when an employer fails to follow through on its notice responsibilities and the impact such failure can have on both employers and employees.[2] Pulling from both common law and the rules of evidence, the court held that a genuine issue of material fact existed regarding whether the employee received the requisite FMLA notice regarding her rights under the FMLA, based in large part on the "Mailbox Rule."[3] The court also found that genuine issues of material fact existed regarding allegations that the employee was terminated in violation of the FMLA, vacating the lower court's grant of summary judgment for the employer.[4] In doing so, the Third Circuit provided a clear, concise takeaway for employers: "use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice"—a practical solution to a complex legal problem.[5]

II. FACTUAL AND PROCEDURAL HISTORY

In 2004, Corinthian Colleges, Inc. (Corinthian) hired Lisa Lupyan as an instructor.[6] Approximately three years later, in December 2007, Lupyan submitted a request for personal leave, and she indicated that the leave would last approximately four weeks.[7] Based on a suggestion by her supervisor to apply for short-term disability, she obtained a Certification of Health Provider

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1. 761 F.3d 314 (3d Cir. 2014).
2. *See generally id.*
3. *Id.* at 316.
4. *Id.*
5. *Id.* at 322.
6. *Id.* at 316.
7. *Id.*

form from her doctor.[8] Upon receipt of this document, Corinthian "determined that Lupyan was eligible for leave under the FMLA, rather than personal leave."[9] Lupyan subsequently met with Corinthian's supervisor of administration, who "instructed her to initial the box marked 'Family Medical Leave' on her Request for Leave Form."[10] The supervisor changed her projected return to work date to a date in excess of twelve weeks, based on the information provided on the certification form.[11] Although Corinthian conducted this meeting, presumably for the purpose of placing Lupyan on FMLA leave, Lupyan claimed she was never told of her rights under the FMLA during the meeting, which Corinthian apparently did not argue or contest.[12] While Corinthian claimed that it mailed correspondence to Lupyan that same afternoon indicating that "her leave was designated as FMLA leave" and explaining her rights, Lupyan claimed she never received the correspondence—thus creating the conflict at the center of the case—and further denied any knowledge of being placed on FMLA-covered leave.[13]

Lupyan's initial request for leave was approximately four weeks—from December 4, 2007, to December 31, 2007—well within the twelve weeks provided for under the FMLA.[14] However, when Corinthian extended Lupyan's expected return to work date, it was extended beyond twelve weeks, to April 1, 2008.[15] On March 13, 2008, Lupyan received a partial release to return to work from her doctor and informed Corinthian of the same.[16] However, Corinthian apparently did not respond until April 1 and indicated that Lupyan could not return to work if she was under any restriction.[17] Lupyan subsequently received a full release to return to work, more than twelve weeks from the date her leave began.[18] Ultimately, Lupyan never returned to work. Corinthian terminated her employment before she returned due to low student enrollment and the failure to timely return from her FMLA leave.[19] Lupyan alleged that this was the first time she became aware of being placed on FMLA-covered leave.[20]

Lupyan filed suit, alleging Corinthian interfered with her FMLA rights by failing to provide notice that she was on FMLA leave (thus leaving her unaware of the requirement to return to work within twelve weeks), and further that she was terminated in retaliation for taking such leave.[21] Corinthian moved for

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 316–17.
13. Whether intentional or not, the court emphasized the central issue in this case by referring to the correspondence as "the 'Letter.'" *Id.* at 317.
14. *Id.* at 316.
15. *Id.*
16. *Id.* at 317.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

summary judgment, which the District Court for the Western District of Pennsylvania granted in part. The district court did not dismiss the interference claim, noting the dispute regarding the notice of FMLA leave.[22] Corinthian subsequently filed an amended motion for summary judgment, introducing affidavits from Corinthian employees indicating that the FMLA notice was in fact mailed to Lupyan.[23] The district court then granted Corinthian's motion on the interference claim based on the new evidence, citing the "Mailbox Rule" and presuming that the correspondence was received by Lupyan.[24] Thereafter, Lupyan appealed the dismissal of her FMLA interference and retaliation claims to the United States Court of Appeals for the Third Circuit.[25]

III. THE FAMILY AND MEDICAL LEAVE ACT

The FMLA provides eligible employees with up to twelve weeks (twenty-six weeks in some instances) of unpaid leave in a twelve-month period for several reasons, including the employee's own serious health condition(s).[26] Eligible employees are those that work for a covered employer and satisfy three requirements. The employee must have (1) worked for that employer for at least twelve months; (2) worked at least 1,250 hours during the twelve months prior to the start of the FMLA leave; and (3) worked at a location where at least fifty employees are employed or within seventy-five miles of the location.[27] Employers covered by the FMLA include (1) private employers with fifty or more employees for at least twenty workweeks in the current or preceding calendar year, including joint employers and successors; and (2) public agencies, including federal, state, and local government—including local educational agencies and school districts.[28]

The FMLA provides certain protections for eligible employees, including the right to return to the same job or an equivalent position as well as healthcare protections.[29] Importantly, the FMLA imposes several notice requirements upon employers, including both general and individual notice to employees regarding their rights and responsibilities under the FMLA.[30] The Department of Labor implemented regulations, which provide sample notices of the specific types of notice an employer is required to provide, the time frame for doing so, and any penalties for failing to provide the notice.[31]

Every employer covered by the FMLA must post a general notice where it can be seen by employees and applicants alike, explaining the provisions of the FMLA as well as providing procedural information for filing a complaint

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. 29 U.S.C. § 2612(a)(1)(D) (2012).
27. *Id.* § 2611(2); 29 C.F.R. § 825.102 (2015).
28. 29 U.S.C. § 2611(4); 29 C.F.R. § 825.102.
29. 29 U.S.C. § 2614.
30. *Id.* § 2619; 29 C.F.R. § 825.300.
31. 29 C.F.R. § 825.300.

regarding a violation of the FMLA.[32] The employer must post this notice regardless of whether it has any FMLA-eligible employees.[33] If it does have eligible employees, the employer must also provide this general notice in a handbook or similar document, and the employer may distribute it electronically.[34]

When an employee requests FMLA leave, or when the employer has reason to believe an employee's leave may qualify for FMLA leave, the employer must provide notice of eligibility for such leave to the employee within five business days.[35] This notice must include specific information, including whether the employee is eligible for FMLA leave and, if not, at least one reason why.[36] Further, once an employer has determined that an employee is eligible for FMLA leave, it must provide what is known as a "rights and responsibilities" notice to the employee, which "detail[s] the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations."[37] If the employee's leave has already begun, this notice is to be mailed "to the employee's address of record."[38]

The employer is further required to notify the employee whether his or her leave has been designated as FMLA, once it has enough information to make that determination.[39] This notice must be provided within five business days, and it must be in writing.[40] If the employee's leave does not qualify as FMLA leave, the employer must provide that information as well.[41] The regulations further detail other requirements, including the obligation to notify the employee whether a fitness-for-duty certification will be necessary prior to returning to work, what to do if any information provided changes, and notification regarding how much leave will be counted against the employee's FMLA leave entitlement.[42] These notice requirements, including the duty to provide notice if the employer has reason to believe that an employee has requested leave for an FMLA-qualifying event, is what really sets the FMLA apart from other employment laws.

As one might imagine, attempting to ascertain whether an employee may be on a leave that qualifies as FMLA leave may be difficult. Further, and important to this case, the regulations also provide consequences for employers that fail to provide the required notices, including the "[f]ailure to follow the

32. The notice must be "fully legible" and easy to read, and electronic posting is also permitted. *Id.* § 825.300(a)(1).

33. *Id.* § 825.300(a)(2).

34. Id. § 825.300(a)(3).

35. *Id.* § 825.300(b)(1).

36. Notably, the regulations indicate that this notice can be done verbally or in writing. *Id.* § 825.300(b)(2). However, as the instant matter shows, that is not necessarily the case; at least, not without further confirmation.

37. *Id.* § 825.300(c)(1).

38. *Id.*

39. *Id.* § 825.300(d)(1).

40. *Id.* § 825.300(d)(1), (4).

41. *Id.* § 825.300(d)(1).

42. *Id.* § 825.300(d)(3), (5), (6). This last piece of required information may be provided verbally or in writing; if done verbally, it must be confirmed in writing within the time frame specified in 29 C.F.R. § 825.300(d)(6).

notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights."[43] In addition,, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."[44] The regulations also provide that "[a]n employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."[45] Finally, the FMLA also prohibits retaliation against an employee seeking to exercise his or her rights under the FMLA.[46]

IV. THE *LUPYAN* DECISION

As noted, Lupyan brought both an interference claim and a retaliation claim, alleging that she never received the required FMLA notices, and further, that she was terminated for taking such leave.[47] As detailed above, under the FMLA, failure to provide the requisite notice(s) to an employee seeking or taking FMLA-eligible leave can be considered interference.[48] An employee is not eligible for relief under the FMLA unless he or she has been prejudiced by the failure to receive the notices, "'render[ing] h[er] unable to exercise [the right to leave] in a meaningful way, thereby causing injury.'"[49] The district court concluded that Corinthian had provided "adequate notice" to Lupyan based on the Mailbox Rule.[50] The Third Circuit Court of Appeals reversed, concluding that, because Lupyan denied receipt of the notice, there was a genuine issue of material fact that required denial of summary judgment.[51] However, the Third Circuit further noted that Lupyan would still be required to establish prejudice.[52]

A retaliation claim can be proven by either direct or indirect evidence. Here, Lupyan presented no direct evidence; as such, the lower court utilized the *McDonnell Douglas Corp. v. Green*[53] burden-shifting approach.[54] In order to establish a prima facie case using this framework, a plaintiff such as Lupyan must show "(1) she invoked her right to FMLA-qualifying leave, (2) she suffered an adverse employment decision, and (3) the adverse action was

43. *Id.* § 825.300(e).
44. 29 U.S.C. § 2615(a)(1) (2012).
45. 29 C.F.R. § 825.300(e).
46. 29 U.S.C. § 2615(a)(2).
47. Lupyan v. Corinthian Colls. Inc., 761 F.3d 314, 319–24 (3d Cir. 2014).
48. *Id.* at 318 (citing Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 144–45 (3d Cir. 2004)).
49. *Id.* at 318–19 (second and third alterations in original) (quoting *Conoshenti*, 364 F.3d at 143).
50. *Id.* at 319.
51. The court noted that this was especially true in reviewing summary judgment, as the facts must be considered "in the light most favorable to Lupyan . . . ." *Id.* at 322.
52. *Id.* at 323–24.
53. 411 U.S. 792 (1973).
54. *Lupyan*, 761 F.3d at 324.

causally related to her invocation of rights."[55] If a plaintiff is able to do so, the burden would then shift "to the employer to articulate a legitimate, non-discriminatory reason for the decision."[56] If the employer meets that burden, "the plaintiff must establish by a preponderance of the evidence that the articulated reason was a pretext for discrimination."[57] On review, the Third Circuit vacated the lower court's summary judgment ruling, finding that "a reasonable jury could discredit [Corinthian's] reasons for Lupyan's termination as pretextual."[58]

A. *Failure to Send Notice as Interference*

As noted above, the lower court relied on the Mailbox Rule in dismissing the interference claim. The Mailbox Rule is derived from common law, creating the presumption that "if a letter 'properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time and was received by the [addressee].'"[59] However, the presumption is rebuttable, "founded on the probability that the officers of the government will do their duty and the usual course of business."[60]

Corinthian claimed that it sent Lupyan's FMLA letter via regular mail. The court considered this to be a weak presumption of receipt, as "no receipt, or other proof of delivery, is generated."[61] The court further recognized that a stronger presumption would be service that produces a receipt or proof of delivery, such as certified mail.[62] While the court noted that Corinthian's method of delivery was weak, it acknowledged that "receipt can be proven circumstantially by introducing evidence of business practices or office customs pertaining to mail," such as a sworn statement from someone with "'personal knowledge' of the procedures in place at the time of the mailing."[63]

Corinthian attempted to do just that, providing affidavits of employees who had personal knowledge of its "customary mailing practices."[64] However, the

55. *Id.* at 324 n.6 (citing Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012)).

56. *Id.* at 324 (citing *McDonnell Douglas*, 411 U.S. at 802).

57. *Id.* (citing Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997)).

58. *Id.* at 325.

59. *Id.* at 319 (first alteration in original) (citing Rosenthal v. Walker, 111 U.S. 185, 193 (1884); Phila. Marine Trade Ass'n-Int'l Longshoremen's Ass'n. Pension Fund v. Comm'r, 523 F.3d 140, 147 (3d Cir. 2008)).

60. *Id.* (quoting *Rosenthal*, 111 U.S. at 193) (internal quotation marks omitted).

61. *Id.* (citing Santana Gonzalez v. Att'y Gen., 506 F.3d 274, 279 (3d Cir. 2007)). In *Santana Gonzalez*, the Petitioner was allegedly sent a notice of removal by the Immigration Court via regular mail, as permitted by the Immigration and Nationality Act. *See Santana Gonzalez*, 506 F.3d at 274. Similar to the instant matter, the Petitioner claimed that it was never received. *Id.* In examining "what presumption of receipt attaches to a notice [] sent by regular mail," the court relied upon rulings by both the Bureau of Immigration Appeals and the Ninth Circuit in determining "that a weaker presumption of receipt applies when such a notice is sent by *regular* mail." *Id.* at 274, 278–79.

62. *Lupyan*, 761 F.3d at 319 (citing *Santana Gonzalez*, 506 F.3d at 279).

63. *Id.* at 319–20 (citing Kyhn v. Shinseki, 716 F.3d 572, 574 (Fed Cir. 2013)).

64. Those employees were the Mailroom Supervisor and the Human Resources

court considered the affidavits to be "self-serving," as they were "signed nearly four years after the alleged mailing date."[65] The court further pointed out that no evidence was provided to support Corinthian's position that Lupyan actually received the letter, as there was no proof of delivery.[66]

Once a party has proven mailing (which did not seem to be the case in *Lupyan*), the other party has the "burden of producing evidence to rebut the presumption [of delivery]."[67] The court noted that the amount of evidence needed to do so is "minimal," recognizing that "a single, non-conclusory affidavit or witness's testimony, when based on personal knowledge and directed at a material issue, is sufficient to defeat summary judgment."[68] Applying these standards, the court determined that Lupyan's own testimony that she did not receive the notice was enough to rebut the presumption claimed by Corinthian.[69] The court noted that although the Mailbox Rule is helpful at the summary judgment stage "'for determining, in the face of inconclusive evidence, whether or not receipt has actually been accomplished,'" the rule is merely a flawed presumption, which places the responsibility on the recipient "to prove a negative."[70] The court recognized that this is "next to impossible," especially for an individual, as individuals traditionally do not keep mail records, and even if they did, it would not be admissible, as it would not fall under the "business record" provisions of the Federal Rules of Evidence.[71]

Ultimately, the court summed up the key takeaway here as it applies to providing the required FMLA notices to eligible employees, noting that

> [i]n this age of computerized communications and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice.[72]

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coordinator. *Id.* at 320. Notably, however, there was no affidavit from Corinthian's Supervisor of Administration, who met with Lupyan and encouraged her to change her request for leave from "personal leave" to "FMLA leave." *Id.* at 316.

65. *Id.*

66. *Id.*

67. *Id.* (citing FED. R. EVID. 301; McCann v. Newman Irrevocable Trust, 458 F.3d 281, 287 (3d Cir. 2006)).

68. *Id.* at 320–21, (citing Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 161–63 (3d Cir. 2009)).

69. *Id.* at 321–22. In doing so, the court adopted the same position in the instant matter as it did in a Truth in Lending Act matter, where it held that "'the testimony of a borrower alone,' that she did not receive the requisite notice, was 'sufficient to overcome TILA's presumption of receipt.'" *Id.* (quoting Cappuccio v. Prime Capital Funding LLC, 649 F.3d 180, 190 (3d Cir. 2011)). The court here went on to opine that there was "no meaningful distinction between the circumstances" of the two cases. *Id.* at 321.

70. *Id.* at 321–22 (quoting Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 961 (9th Cir. 2001); Phila. Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund v. Comm'r, 523 F.3d 140, 147 (3d Cir. 2008)).

71. *Id.* at 322 (citing Piedmont & Arlington Life-Ins. Co. v. Ewing, 29 U.S. 377, 380 (1875); 30C MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 7047 (2014)).

72. *Id.*

The court recognized that the presumption created by the Mailbox Rule is easily defeatable (apparently the recipient merely needs to testify that the letter was not received) and reversed the lower court's conclusion that the FMLA correspondence was received.[73]

B. *Interference and Harm*

Although the court devoted most of its analysis of Lupyan's interference claim to whether there was a genuine issue of material fact related to the receipt of the notice, it did acknowledge that there was a second element that Lupyan needed to establish to prove interference; that is, whether Lupyan "was prejudiced by the lack of notice."[74] To establish prejudice, one must show "that, had she been properly informed of her FMLA rights, she could have structured her [FMLA] leave differently."[75] The court made no determination on the second element of her interference claim, but it did acknowledge that if Lupyan's assertion that she would have structured her leave differently was accepted by a jury, that would be enough "to establish the required prejudice under the FMLA."[76] The court further noted that "corroborating evidence is not necessary," and that Lupyan's credibility would also play a factor.[77] As with the notice issue, apparently all that is needed to provide prejudice is the plaintiff's testimony.

C. *Retaliation Claim*

As noted above, the lower court properly analyzed Lupyan's retaliation claim under the *McDonnell Douglas* burden-shifting framework, as she presented no direct evidence of retaliation.[78] Under the burden-shifting approach, once a plaintiff such as Lupyan has established a prima facie case, the burden "shifts to the employer to articulate a legitimate, non-discriminatory reason for the decision"; if the employer is able to do so, the burden shifts back to the employee to establish that such reason(s) are merely pretext.[79] At the summary judgment stage, "'the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious

73. *Id.* at 323. However, the court also noted, in footnote 4, that Lupyan bore the burden of persuasion regarding receipt of the Letter. *Id.* n.4.

74. *Id.* at 323 (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002)).

75. *Id.* (citing Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 145–46 (3d Cir. 2004)).

76. *Id.* (citing *Conoshenti*, 364 F.3d at 142–43).

77. *Id.* at 323–24.

78. *Id.* at 324 (citing Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012)). In *Lichtenstein*, the court recognized that for a plaintiff to establish a prima facie case, he or she "must point to evidence in the record sufficient to create a genuine factual dispute about each of the three elements of her retaliation claim . . . ." *Lichtenstein*, 691 F.3d at 302. The same standard seemingly applies here.

79. *Lupyan*, 761 F.3d at 324 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997)).

discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'"[80]

Although the Court laid out the burden-shifting framework, it did not spend any time analyzing Lupyan's prima facie case, instead moving right to Corinthian's articulated reasons for dismissing Lupyan.[81] Corinthian provided two reasons for her dismissal: low enrollment and failure to return from FMLA leave.[82] In examining Corinthian's assertion that Lupyan was terminated due to low enrollment, the court found that the lower court's ruling was "inconsistent with the record," as testimony provided by a Corinthian witness indicated that instructors were not terminated due to "downturns in enrollment."[83] The court indicated that this testimony alone could lead to the conclusion that "Lupyan's request for FMLA leave motivated this differential treatment."[84] Additionally, the court noted the timing of Lupyan's termination, pointing out that only a week before, Lupyan was notified that she needed a full release to return to work.[85] The court, in looking at the totality of the testimony, concluded that the reasons given for Lupyan's termination could be pretextual.[86] As a result here, the court overturned the lower court's grant of summary judgment on Lupyan's retaliation claim.[87]

V. CONCLUSION

The court ultimately found that Lupyan had presented enough evidence to create genuine issues of material fact in both her interference and retaliation claims, focusing much of its analysis on the standards of proof that would be necessary to establish such claims which, unfortunately for employers, are low. This ruling provides valuable guidance to employers regarding both the significance of the content and the delivery of FMLA notices. As the court correctly pointed out in its opinion, employers certainly have means of providing notice with a verifiable receipt in this day and age. As bloggers have been quick to note, this can include methods of delivery that produce receipts or proof of delivery or email with return receipt requested.[88] Courts in other

80. *Id.* (quoting Fuentes v. Perksie, 32 F.3d 759, 763 (3d Cir. 1994)).
81. *Id.*
82. *Id.*
83. *Id.* at 325.
84. *Id.*
85. *Id.*
86. *Id.* at 325–26 (citing Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 760 (3d Cir. 2004)).
87. *Id.* at 326. The court also recognized that "employment legally ended upon expiration of her FMLA leave." *Id.* at 324 (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 85 (2002)). However, the court noted that a retaliation claim analysis examines the employer's reason for termination, and that retaliation protection extends beyond the actual period of the leave and "'encompasses the employer's conduct both during and after the employer's FMLA leave.'" *Id.* at 324–25 (quoting Hunt v. Rapides Healthcare Sys., LLC, 277 F.3d 757, 768–69 (5th Cir. 2001)). In doing so, the court acknowledged that an employee can bring a retaliation claim even if the FMLA-leave entitlement has been exceeded. *Id.* at 325 (citing Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012)).
88. *See, e.g.*, Eric B. Meyer, *Here's the Wrong Way to Deliver FMLA Notices to*

circuits have also begun to note the importance of actual notice, with a federal court in Michigan recently ruling that an email to an employee regarding recertification of her FMLA leave, without proof of receipt, did not amount to actual notice.[89]

Ultimately, the lesson to be learned is that no matter how your FMLA or other required notices are provided, ensure that you can prove *actual notice*, with proof of delivery and receipt. From a practical standpoint, this should be attainable, based on the suggestions from the court in *Lupyan*. However, employers may still face an uphill battle when it comes to notice. While an employer may be able to show actual receipt, by an electronic or physical delivery confirmation, or even an electronic-read receipt, the question still remains whether an employer will bear the burden of proving that not only was the notice received but that it was read and understood by the intended recipient.

Employees, EMP'R HANDBOOK (Aug. 6, 2014), http://www.theemployerhandbook.com/2014/08/heres-the-wrong-way-to-deliver.html.

89. *See* Gardner v. Detroit Entm't, LLC, No. 12–14870, 2014 WL 5286734 (E.D. Mich. Oct. 15, 2014); Eric B. Meyer, *You'd Think Emailing FMLA Paperwork Would Be Ok. Yeah, You'd Think That*, EMP'R HANDBOOK (Oct. 20, 2014), http://www.theemployerhandbook.com/2014/10/email-fmla-paperwork-notice.html.