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## BLOGS

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# Pre-Eligibility Notice of the Need for Leave May Be Protected Under the FMLA

Last week, the Eleventh Circuit Court of Appeals held that a former employee can pursue her FMLA claims against her former employer even though she failed to meet eligibility requirements under the FMLA at the time she was terminated. In *Pereda v. Brookdale Senior Living Communities, Inc.*, an employee gave advance notice that she would need FMLA leave because of her pregnancy. Shortly thereafter, the employee was put on a performance improvement plan and then terminated. The employee brought suit, claiming that her former employer had interfered with her FMLA rights and retaliated against her.

When the employee made her request for leave, she did not yet meet eligibility requirements under the FMLA. In defending against the lawsuit, the employer argued that the employee could not state a claim under the FMLA because she was not eligible for FMLA leave when the alleged interference and retaliation took place. The parties did not dispute, however, that the employee would have met the FMLA eligibility requirements by the time she took her requested leave. The Eleventh Circuit ruled that because the FMLA requires employees to provide notice in advance of their need for FMLA leave, they should be protected once the notice is given and before (as well as during) their leave. The Court said that the employee engaged in protected activity under the FMLA when she made a pre-eligible request for post-eligible leave.

This particular issue has not been addressed by other circuit courts, such as the Eighth Circuit, which includes Minnesota. The Eleventh Circuit's decision in *Pereda* is only binding on the states in that circuit. Even so, other courts may look to this decision if faced with similar claims. So what's the takeaway for employers? When analyzing potential risks involved in terminating an employee, it's important to consider whether the employee has made a request for future FMLA leave, even if he or she isn't yet eligible for leave. If a request for future leave has been made and the employee would be eligible for the leave but for the termination that's being considered, it is critical to make sure that the termination is not motivated by or connected to the requested leave or the condition or occurrence that necessitates the leave.