



## COURT CLARIFIES RELATIONSHIP BETWEEN FMLA LEAVE AND NO-FAULT ATTENDANCE POLICIES

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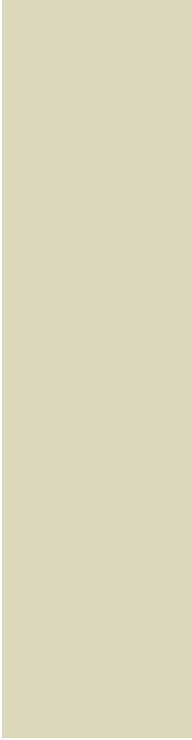
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Many employers have attendance policies under which employees accrue points or occurrences for unexcused absences and other attendance infractions. As employees accrue more points, they receive increasingly severe levels of discipline. However, after a certain period of time, generally 12 months, points are expunged from an employee's attendance record for disciplinary purposes.

As the list of legally protected absences grows, employers have become frustrated that attendance points may drop off an employee's attendance record even though the employee may have worked very little during the prior 12 months. To address this problem, some employers have modified attendance policies so that points are not expunged until an employee actually has worked 12 months since the point was accrued. In a decision issued last month, the United States Court of Appeals for the Seventh Circuit ruled these policies can apply to employees on FMLA leave.

On April 2, 2010, the Seventh Circuit decided *Bailey v. Pregis Innovative Packaging*. Under Pregis' attendance policy, an employee who accrued 8 attendance points would be discharged. Attendance points were expunged from an employee's record after 12 months of active work. It was not necessary for the 12 months to be consecutive. However, Pregis did not count any dates on which employees were absent, for any reason, toward this 12 month period. The Court ruled that this policy does not violate the FMLA because the Act explicitly states that employees on leave do not accrue additional benefits.

Based on *Pregis*, employers may want to consider modifying their attendance policies so that only those employees who actively work receive the benefit of having attendance points expunged from their attendance records. However, employers must be careful not to paint



with too broad a brush. Some protected leaves, such as state and federal military leaves, allow employees to accrue benefits while they are absent. Employees on these types of leaves may be entitled to have points expunged from their attendance records during protected absences.

If you have questions about this decision, or proposed modifications to your attendance policy, please contact John Murray at Lindner & Marsack, S.C., (414) 226-4818, [jmurray@lindner-marsack.com](mailto:jmurray@lindner-marsack.com), or any other attorney with the firm.

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