

# Are Employers Treating Virtual Businesses and Traditional Storefronts the Same When It Comes to Work Restrictions While on FMLA/CFRA Leave?

By Sabrina L. Thomas

## **Introduction**

With the exception of public service and military leave, many employers prohibit outside employment while on medical leave. After reviewing the recent unanimous California Supreme Court decision in *Richey v. AutoNation, Inc.*,<sup>1</sup> an interesting question came to mind: Do employer restrictions on outside employment while on medical leave unfairly differentiate between virtual<sup>2</sup> businesses and traditional storefront enterprises?

## **Restricting Outside Employment While on FMLA/CFRA Leave**

The Family Medical Leave Act<sup>3</sup> ("FMLA") does not directly prohibit an employee from working another job while on leave, but FMLA's implementing regulations provide that "if the employer has a uniformly applied policy governing outside or supplemental employment, such policy may continue to apply to employees on FMLA leave."<sup>4</sup> Conversely, if an employer does not have such a policy, the employer may not deny benefits to which an employee is otherwise entitled under FMLA on the ground that the employee is working elsewhere while on leave, unless the FMLA leave was fraudulently obtained.<sup>5</sup> The California Family Rights

Act<sup>6</sup> ("CFRA") is consistent with FMLA regarding outside employment: where there is no policy in place, employees on CFRA leave can arguably maintain a second job even if the work is similar to their current position.

## **Outside Employment in a Traditional Storefront**

*Richey v. AutoNation, Inc.* provides an example of how an outside employment policy can play out in the context of a traditional storefront business. In that case, employee Avery Richey was granted leave under FMLA and CFRA after injuring his back. Richey's employer, AutoNation, Inc., had a policy prohibiting outside work while on approved medical leave. After suspecting that Richey was working at a restaurant he owned, the employer dispatched another employee to observe the restaurant. The employee witnessed Richey bending over, sweeping the floor, and using a hammer to hang up a sign. AutoNation ultimately terminated Richey on the ground that he had engaged in outside employment while on leave in violation of company policy. Richey sued for violation of his right to CFRA leave.<sup>7</sup>

Ultimately, the California Supreme Court found that the evidence showed that Richey violated company policy

<sup>1</sup> 60 Cal. 4th 909 (2015).

<sup>2</sup> For purposes of this article, "virtual" and "online" business are used interchangeably.

<sup>3</sup> 29 U.S.C. §§ 2601-54.

<sup>4</sup> 29 C.F.R. § 825.216(e); see e.g., *Pharakhome v. Nissan N. Am.*, 324 F.3d 405 (6th Cir. 2003) (employer entitled to terminate employee for violating employer's policy prohibiting "unauthorized work for personal gain while on leave").

<sup>5</sup> 29 C.F.R. § 825.216(e).

<sup>6</sup> Moore-Brown-Roberti Family Rights Act, CAL. GOV'T CODE §§ 12945.1, 12945.2. CFRA is the California counterpart to FMLA and allows employees to take leave from work for certain personal or family medical reasons without jeopardizing their job security. The main two components of CFRA are 1) a right to leave of up to 12 weeks in any 12-month period to care for a family member or for the employee's own medical condition, and 2) a right to reinstatement in the same, or a comparable, position at the end of the leave. Gov. Code § 12945.2(a).

<sup>7</sup> Cf. *Lonnick v. Sutter Health Central*, 43 Cal. 4th 201 (2008) (employee's ability to work a similar part-time job while on CFRA leave did not conclusively establish her ability to perform the job for her full-time employer because the phrase "functions of the position of that employee" in § 12945.2, subd. (c)(3)(C), refers to the specific functions of her position with that particular employer, not to the job functions generally).

when he engaged in outside work. Even though the court criticized the employer's employment manual - pointing out that it "could have more clearly stated the rule about outside employment" - the court nevertheless found that Richey "blatantly ignored his superiors' clear instructions not to work at the restaurant while on CFRA leave."<sup>8</sup>

The facts of this case raise an interesting question: Would Richey's case ever have made it to court, let alone the California Supreme Court, had he engaged in "outside employment" vis-a-vis a virtual business from the privacy of his home?

### **Virtual Businesses: The Challenge of Detecting Outside Employment**

Outside employment is generally defined as any of the following: 1) employment or consulting in an outside work or activity; 2) receipt from an outside source of a regular retainer fee or salary; or 3) regular or periodic involvement with a business or company in which the employee has a principal interest.<sup>9</sup> A virtual business would necessarily satisfy each of these prerequisites. In terms of the definition of outside employment, then, there does not appear to be an appreciable difference between an online retailer and a brick-and-mortar business such as the restaurant in *Richey*.

On the other hand, there are some significant practical differences between virtual business and traditional storefront business that can pose a challenge for employers' detection of outside employment. Many popular online businesses - direct customer sales; resellers on eBay; ghost writers; online technical support; graphic and web designers; specialized retailers selling items such as clothing, shoes, jewelry, and gourmet goods; consulting; health and fitness coaches; proof-reading and resume writing services - can all be performed from the comfort and privacy of an employee's home. These jobs differ from your traditional storefront operations like restaurants, coffee shops, grocery stores, or other retail outlets where an employer or anyone from the public can observe the employee working while on medical leave. Unlike traditional storefront businesses, the owner of a virtual store can potentially remain anonymous, making it nearly impossible for an employer to determine whether an

employee on protected medical leave is engaged in outside employment unless the employee informs the employer about his online business. Even then, the employer would have a herculean task of proving that the employee is actually the one performing the work. If the employer has some credible suspicion that the employee is operating an online business, the employer could contact the business, or check to see who registered the domain name. However, these options are a bit extreme and may expose the employer to a discrimination or retaliation claim.<sup>10</sup>

### **Enforcing Outside Employment Policies**

Employers who seek to prohibit "outside employment" are cautioned to thoroughly explain the parameters of outside employment. It is essential that employers maintain a uniformly applied policy that prohibits work while on CFRA/FMLA and any other form of medical leave. This policy should be distributed and available to all employees, and employees should be reminded of the policy again when they begin their leave, preferably in writing. In short, employers should have employees acknowledge in writing that company policies prohibit outside employment while out on protected medical leave, including the operation of a virtual business.

If an employer learns that an employee is working another job while on FMLA/CFRA leave, the employer should:

*Confirm the facts.* The employer may have to conduct a more detailed investigation to confirm the facts if the employee is operating a virtual business than would be required if the employee were working for a traditional storefront operation. If there is a listed phone number for the virtual business, the employer might call and make some inquiries.

*Check in on the employee.* A uniformly applied practice of checking in during a leave of absence can go a long way toward curbing FMLA abuse. However, the Act itself does not establish clear boundaries for contact between employers and employees during a period of FMLA leave, and employers should be careful about

<sup>8</sup> *Richey*, 60 Cal. 4th at 920.

<sup>9</sup> USLegal, Definitions, "*Outside Employment Policies - Private Employer*," available at <http://definitions.uslegal.com/outside-employment-policies-private-employer/>.

<sup>10</sup> Cal. Gov't Code § 12945.2, subd. (1)(1) ("It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of . . . [a]n individual's exercise of the right to family care and medical leave."); see *Dudley v. Dep't of Transp.*, 90 Cal. App. 4th 255, 260-61 (2001); *Rogers v. County of Los Angeles*, 198 Cal. App. 4th 480, 490-91 (2011).

contacting employees while on leave for reasons other than checking on recertification requests, intent to return to work, or straightforward questions directly related to the employee's business knowledge. At the same time, when the lines of communication are open and the employer maintains contact with the employee, employers are often surprised at the positive results.

*Conduct surveillance, if appropriate.* Where FMLA abuse is particularly rampant, courts have been increasingly supportive of the use of surveillance to ensure employees are being honest. Before conducting any surveillance, however, employers should make sure it is consistent with their personnel policies and any applicable collective bargaining agreements. Employers should also consider the circumstances, keeping in mind that while surveillance can be an effective option for observing employees engaged in businesses where the employee is visible, the strategy may be less effective for virtual businesses. For instance, an employer could not conduct surveillance on an employee who was working from the confines of her home at 1:00 a.m. Finally, employers should always seek legal advice before conducting surveillance.

### **The Future**

Given the ease, cost, and profit potential of operating an online business, the number of employees operating virtual retail stores and other virtual business will continue to rise. The challenge for employers with policies that prohibit outside employment will be their ability to treat employees who engage in outside employment while on FMLA/CFRA leave the same, irrespective of the type of business.

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