

THE INTERPLAY BETWEEN ADA & FMLA

BEST PRACTICES IN ADDRESSING LEAVE

SEPTEMBER 14, 2017

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What will we cover?

- **Navigating the Minefield of Disability and Leave Laws**
- **What Is a Disability?**
- **Engaging in the Interactive Process**
- **Understanding Reasonable Accommodations**
- **FMLA Leave**
- **The Interplay: ADA & FMLA Compliance Tips**

A Snapshot Of Key Federal Laws

FMLA

Requires leave for a “serious health condition”

Prohibits retaliation for taking a FMLA leave

ADA

Prohibits discrimination based on a “disability” and may require accommodation of the disabled employee

May require leave as accommodation

GINA

Prohibits discrimination based on “genetic” information

Prohibits collection of family medical history or genetic information

PDA

Prohibits discrimination “on the basis of pregnancy, childbirth, or related medical conditions”

Prohibits discrimination in all aspects of employment, including hiring, firing, promotion, pay and other employment benefits

Don't Forget State Leave / Disability Laws

Paid Family Leave

Paid benefits when wage loss due to leave -- not additional leave

Pregnancy Specific Protections

IL: reasonable accommodations unless undue hardship

CA: leave up to 4 months for disability due to pregnancy, childbirth, or related condition

Paid Sick Leave

Some states and many municipalities require paid sick leave.

CA: 3 days per year

Santa Monica: 4 / 5 days (2017)

5 / 9 days (2018)

State Versions of FMLA

Most states with own FMLA laws expand federal law in leave duration or eligibility, or both.

Navigating the Minefield

- In addition to employer, courts have held HR managers and supervisors liable for FMLA violations
 - Employee worked at FedEx for 21 years. Doctor recommended employee take 15 days off. FMLA approved but employee didn't return on planned date of return. Employee left message explaining she was having surgery. FedEx terminated employee. A jury awarded Employee **\$173,000**. *Wallace v. FedEx Corp.* (6th Cir. 2014)
 - CVS employee on FMLA leave after a car accident. The day before employee is scheduled to return, her daughter hospitalized. Her manager terminated her on the day she was scheduled to return despite her FMLA request related to daughter's illness. Manager held personally liable for FMLA violation and ordered to pay **\$75,000**. *Richardson v. CVS Corp.*, (E.D. Tenn. 2001).

Navigating the Minefield: What do I do?

- Maria was expecting a baby. In her seventh month of pregnancy, she began experiencing complications and commenced medical leave. While on leave, Maria stayed in touch with her employer. She was later released to "light, part-time duty" but continued to experience problems and was out intermittently.
- Maria submitted medical certification, but the Managers said the documentation was incomplete and insufficient, and they requested additional certification. Maria took the paperwork to her doctor's office and believed that the staff had completed it and that her employer had received it on that same day.
- The company terminated Maria for job abandonment after she delivered her baby, claiming it did not receive proper medical certification to allow for the continued leave.

ADA - The Basics

- Prohibits discrimination against “**qualified individuals with a disability**”
- Employers must comply with ADA if they employ **15 or more employees**
- Applies to **all applicants** and to **all employees** regardless of length of service

Qualified employee or applicant =

An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job in question

What Does the Law Require?

- No Discrimination
- Reasonable Accommodation
- Leave / Time Off
- Confidentiality



What Is a Disability under the ADA?

- A person who:
 - has a **physical or mental impairment** that **substantially limits** one or more **major life activities**,
 - has a **history or record** of such an impairment, or
 - is perceived by others as having such an impairment.

What Is a Disability?

- Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”)
 - Broadened definition of disability Mitigation factors do not determine whether an employee has a disability
 - ♦ One Exception = Eyeglasses
 - Easier for an individual seeking protection under the ADA to establish a disability
- Federal v. State Definitions
 - CA: impairment that makes performance of a major life activity “difficult”

Takeaway: Evaluate every employee medical issue as if it could be a disability

What Is A Disability?

- Some examples:
 - Diabetes
 - Chronic Asthma
 - Anxiety / Depression
 - Back problems
 - Fertility issues
 - Migraines
 - Cancer
 - Deafness
 - Epilepsy
 - Mobility impairments
 - HIV Infection
 - PTSD

NOT DISABILITIES

- Current illegal drug use
- Sexual behavior disorders
- Compulsive gambling
- Pyromania
- Kleptomania
- Vision impairment that can be corrected with eyeglasses

Who Is Protected?

- **Employee / Applicant who is:**
 - Qualified for the job
 - Able to perform the “essential functions” of the job
 - With or without a “reasonable accommodations”

Essential (“CORE”) Functions

- **A job function might be essential if:**
 - Its performance is the reason the job was created
 - The employee spends a significant amount of time performing it
 - Its duties cannot be reassigned to another employee without changing the fundamental nature of the job



Essential Functions: Job Descriptions

- Document qualifications
- Document essential physical AND non-physical functions

Take Away -- Review and make sure job descriptions clear, accurate, and up to date.



"You can keep your job if you can come up with a satisfactory description of it."

Reasonable Accommodations

Possible Accommodations

- Provide special equipment
- Modify schedule
- Extra time off
- Reassign non-essential duties
- Exchange assignments
- Redesign procedures
- Offer time off
- Modify deadlines

Not Required Accommodations

- Remove essential functions
- Fundamentally change essential function
- Tolerate misconduct because of a disability
- Displace another employee
- Create a position for the disabled employee

When Is A Reasonable Accommodation Request Made?

- *Do not* need to use magic words
- *Do not* have to submit in writing
- *Do not* need to tell you the “diagnosis”
- *Do not* have to provide a doctor’s note



What Do I Do?

- **One of your best, long-term employees is depressed and has a child with medical issues, so is out “constantly”:**
 - Can you suggest she take a leave?
 - Can you suggest she see your good friend, Dr. Smith, who is a psychiatrist, for an exam?
 - Can you discipline her?

Disability Related Inquiries – Dos and Don'ts

OKAY to ASK:

- Generally about employee's well-being
- Whether employee can perform job functions
- Whether employee has been "drinking"
- Current illegal drug use
- For medical documentation
- Expected RTW date
- Whether accommodations working in employee's opinion

DON'T ASK:

- If employee is or ever has been disabled
- Co-workers, family, friends about an employee's condition
- Whether employee believes they should seek mental health counseling/treatment (and don't suggest it)
- Treatment related details
- For genetic information

Engaging in the Interactive Process

- Individualize
- Exchange information about employee's work restrictions
- Obtain clarity where needed
- Identify reasonable workplace accommodations
- Reach a mutually satisfactory decision about the reasonable accommodation to be provided

Employees have a duty to cooperate in the accommodation process in a timely and reasonable manner.

FMLA – The Basics

- Applies to private employers with at least **50** employees
- **12 weeks** job-protected leave (paid or unpaid)
- Qualified employee = **1-year service / 1,250 hours**
 - *Not immediately eligible*
 - *No undue hardship exception for employer*
- **Triggering events:**
 - Employee's own serious health condition
 - Newborn children and newly adopted children
 - Immediate family members' serious health conditions

FMLA Military Leave – The Basics

- Must have worked for employer for 12 months before taking leave
- **Qualifying Exigency Leave:**
 - ♦ 12 weeks of job-protected leave when your spouse, parent, son or daughter is deployed or notified of impending deployment
- **Military Caregiver Leave:**
 - ♦ 26 weeks job-protected leave if your spouse, parent, son, daughter, or next-of-kin has a qualifying serious injury or illness



Own Serious Health Condition under FMLA

- FMLA available when an employee with a **serious health condition** is **unable to perform the essential functions** of his or her job.
- **Serious health condition =**
 - an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider
 - *Not necessarily a disability*
- **"Unable to perform the functions of his or her job" =**
 - the employee must be unable to work at all, or
 - is unable to perform any one of the essential functions of the position

FMLA Employee Obligations

- Employees must explain reasons for leave to allow employer to determine if FMLA applies
- Calling in sick may trigger FMLA
- Employees can be required to comply with customary notices and procedural requirements for requesting leave
- Employees are required to make reasonable efforts to schedule planned medical treatment so as not to unduly disrupt business operations

FMLA Employer Obligations

- **Notify employee of FMLA rights**
- **Post a notice of FMLA rights in the workplace**
- **Once certified:**
 - Provide full or intermittent leave
 - Reinstate at the end of leave
 - No retaliation
 - No discipline for poor attendance for FMLA time off
- **Confidentiality**
 - Keep medical information confidential
 - Maintain medical records separate from personnel files
 - Department / Manager files should not contain medical information

Can I Contact an Employee's Doctor about FMLA Leave?

- An employer **may require** an employee seeking FMLA leave to provide **medical certification** from a health care provider.
- If an employee submits a **complete and sufficient** medical certification, the employer **may not** request additional information from the health care provider.
 - An employer **may** use a HR professional, a leave administrator, or another healthcare provider to authenticate or clarify the certification / work restrictions.
- If the employer doubts the medical certification, the employer **may require**, at its own expense, that the employee obtain a second opinion of another health care provider.

What Do I Do?

- **An employee is calling out sick every week, due to migraines.**
 - Do you have to give the time off?
 - Can you discipline her?
 - Can you move her to another job?
 - Can you share her condition with another employee experiencing similar issues?

The Interplay: ADA / FMLA Communication Essentials

- Managers / Supervisors should receive only “need to know” medical information
- Identify an organizational / departmental “go-to” person(s) for all disability and leave-related questions and requests
- Inform Managers and Supervisors about the parameters of employees’ medical leave, including intermittent time off

When in doubt, contact Legal.

FMLA Leave Is NOT The Only Option

- ADA – Leave as a Reasonable Accommodation
- Paid Sick Leave
- Pregnancy Disability Leave
- Kin care (California)
- Organ donor/bone marrow donor leave
- Victims of domestic violence leave
- Alcohol and drug rehabilitation leave

Know the state and local requirements!

The Interplay: ADA / FMLA Compliance Tips

- **Leave is, usually, a reasonable accommodation**
- **Evaluate individual facts of each request**
 - **Do not blindly rely on:**
 - ♦ “No Fault” leave policies that automatically terminate an employee after a specified duration of leave
 - ♦ Policies prohibiting leave for all new employees
- **No Fixed Date of Return?**
 - Requests for leave without a fixed date of return may be a reasonable accommodation under the ADA
 - Request for leave without a fixed date of return NOT NECESSAIRLY request for “indefinite leave” (employee can provide no indication of when or, she will be able to return)

The Interplay: ADA / FMLA Compliance Tips

- When an employee requests leave related to a medical condition, conduct a thorough review to confirm which federal and state requirements apply (FMLA, ADA, PDA, and state leave laws). . .
- When overlap exists, consider the one that provides the employee greater rights.
- When an employee who has exhausted FMLA leave states that he or she is physically unable to return to work, consider whether non-FMLA leave as a reasonable accommodation is required.

When in doubt, contact Legal.

CONTACTS



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