

PRACTICAL TIPS

FOR MANAGING EMPLOYEES ON LEAVE UNDER THE FMLA + ADA

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Managing an employee on a medical leave of absence for the employee's own medical condition can require the coordination of leave rights under company policies, as well as federal, state and local laws. All too often, an employee commences a medical leave not to be heard from again for months or longer. Suddenly, the company needs to replace the employee; but the employee may retain the right to return to his or her position. This article provides practical tips for employers for managing medical leaves under the FMLA and ADA with the goal of hastening an employee's return to work or, if that is not possible, separating the employee from employment after the employer has satisfied its legal obligation to the employee.

MEDICAL LEAVES UNDER THE FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA) AND AMERICANS WITH DISABILITIES ACT (ADA)

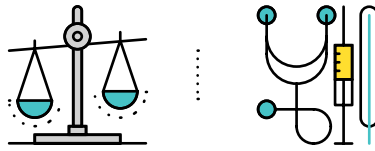
An Employee's Medical Leave Rights Under The FMLA

Under the Family and Medical Leave Act of 1993 (FMLA), eligible employees of covered employers (employers with 50 or more employees) are entitled to 12 weeks (or 26 weeks for injuries sustained in active duty) of unpaid leave each year for a "serious health condition" that makes the employee unable to perform his or her job. Except in the cases of "key employees," when an employee returns from FMLA leave, the employee must be restored to the same or an equivalent position with equivalent benefits, pay, and other terms and

conditions of employment. An equivalent position must have the same pay, benefits and working conditions, including privileges, perquisites, and status.

An Employee's Medical Leave Rights Under The ADA

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities. A reasonable



EMPLOYERS SHOULD DEVELOP POLICIES AND PROCEDURES FOR MANAGING THE **LEGAL, MEDICAL AND PRACTICAL ISSUES** THAT CAN ARISE TO ENSURE THEY COMPLY WITH THE **FMLA, ADA** AND OTHER APPLICABLE LAWS.

accommodation is, generally, “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.

Granting leave as a reasonable accommodation

Leave as a reasonable accommodation is consistent with the purpose of the ADA when it enables an employee to return to work following the period of leave. Requests for leave related to disability often fall under existing employer policies. In those cases, the employer’s obligation begins with providing persons with disabilities access to those policies on equal terms as similarly situated individuals. However, that is not the end of an employer’s obligation under the ADA. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. That is the case even when:

- the employer does not offer leave as an employee benefit;
- the employee is not eligible for leave under the employer’s policy; or
- the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers’ compensation program, or the FMLA or similar state or local laws).

The ADA does not require an employer to provide paid leave beyond what it provides as part of its paid leave policy. Also, an employer

can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances.

Leave and the interactive process, generally

As a general rule, the individual with a disability – who has the most knowledge about the need for reasonable accommodation – must inform the employer that he or she needs an accommodation. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. The employer should then promptly engage in an “interactive process” with the employee; a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

The information required by the employer will vary, depending on the circumstances. Sometimes the disability may be obvious; in other situations, the employer may need additional information to confirm that the condition is a disability under the ADA. However, most of the focus will be on the following issues:

- the specific reason(s) the employee needs leave;
- whether the leave will be a block of time; and
- when the need for leave will end.

Depending on the information the employee provides, the employer should consider whether the leave would cause an undue hardship.

An employer may obtain information from the employee’s health care provider (with the employee’s permission) to confirm or to elaborate on information that the employee has provided. Employers may also ask the health

care provider to respond to questions designed to enable the employer to understand the need for leave, the amount and type of leave required, and whether reasonable accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave). Information from the health care provider may also assist the employer in determining whether the leave would pose an undue hardship.

The interactive process may continue even after an initial request for leave has been granted, particularly if the employee’s request did not specify an exact or fairly-specific return date, or when the employee requires additional leave beyond that which was originally granted.

Example: An employee with a disability is granted three months of leave by an employer. Near the end of the three-month leave, the employee requests an additional 30 days of leave. In this situation, the employer can request information from the employee or the employee’s health care provider about the need for the 30 additional days and the likelihood that the employee will be able to return to work, with or without reasonable accommodation, if the extension is granted.

However, an employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, although it may reach out to an employee on extended leave to check on the employee’s progress.

Example: An employee with a disability is granted three months of leave to recover from a surgery. After one month, the employer phones the employee and asks how the employee is doing and whether there is anything the employee needs from the employer to

help the employee recover and return to work. That is an acceptable request for information. Additionally, a week prior to the end of the employee's leave, the employer again reaches out to the employee to ask whether the employee is able to return to work at the end of leave and if any additional accommodations are required. This is also an acceptable request for information.

The ADA requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation. Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship.

Employees on leave for a disability may request reasonable accommodation in order to return to work. The request may be made by the employee, or it may be made in a doctor's note releasing the employee to return to work with certain restrictions.

An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is, be “100%” healed or recovered – if the employee can perform his or her job with or without reasonable accommodation, unless the employer can show providing the needed accommodations would cause an undue hardship. Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk, but it cannot show that the individual is a “direct threat.” If an employee's disability poses a direct threat of substantial harm to self or coworkers, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

If an employee returns from a leave of absence with restrictions from his or her doctor, the employer may ask why the restrictions are required and how long they may be needed; and it may explore with the employee and his doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor's recom-

mended restrictions. In some situations, there may be more than one way to meet a medical restriction. An employee is not entitled to his or her choice of accommodation.

If necessary, an employer should initiate the interactive process upon receiving a request for reasonable accommodation from an employee on leave for a disability who wants to return to work (or after receiving a doctor's note outlining work restrictions).

In some situations, the requested reasonable accommodation will be reassignment to a new job because the disability prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship. The EEOC takes the position that if reassignment is required, an employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions. Reassignment does not include promotion, and generally an employer does not have to place someone in a vacant position as a reasonable accommodation when another employee is entitled to the position under a uniformly-applied seniority system.

Undue Hardship

When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship. If it would, the employer does not have to grant the leave. Determination of whether providing leave would result in undue hardship may involve consideration of the following:

- the amount and/or length of leave required;
- the frequency of the leave;
- whether there is any flexibility with respect to the days on which leave is taken;
- whether the need for intermittent leave on specific dates is predictable or unpredictable;
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner; and
- the impact on the employer's operations

and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

In many instances, an employee (or the employee's doctor) can provide a definitive date on which the employee can return to work (for example, October 1). In some instances, only an approximate date (for example, “sometime during the end of September” or “around October 1”) or range of dates (for example, between September 1 and September 30) can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified in light of changed circumstances, such as when an employee's recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis. However, indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – is not a reasonable accommodation.

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may take into account leave already taken, whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

Conclusion

Managing employees who seek and take leaves of absences for medical reasons can be challenging. Employers should develop policies and procedures for managing the legal, medical and practical issues that can arise to ensure they comply with the FMLA, ADA and other applicable laws.

Endnote

Employees have similar and in some cases broader rights under Wisconsin state law that are beyond the scope of this article. 