

# *2022 Business Office Professional Conference*

*Avoiding Traps in the Administration of  
FMLA, ADA Leave, and  
Worker's Compensation*

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# *Family and Medical Leave Laws*

# *Eligibility*

- Federal FMLA.
  - Employees with 12 months of employment, not necessarily consecutive. Paid or unpaid leave periods count as weeks of employment if the employee receives compensation or other benefits from the employer; and,
  - They must have worked 1,250 hours in prior 12-month period. Only hours actually worked, including overtime hours, must be counted; and,
  - There are 50 or more employees within 75-mile radius of the employee's worksite. The 75-mile radius is measured by surface miles using the most direct route. Part-time employees and employees on leave but who remain on the payroll count toward the 50-employee threshold.
- Wisconsin State FMLA.
  - Employees must have 52 weeks of continuous employment (not necessarily the 52 weeks immediately before the request for leave); and,
  - Employees must have 1,000 or more paid hours in the most recent 52 weeks (includes paid holiday, vacation, sick time, etc.).

# *Basic Leave Rights*

- Federal.
  - Qualifying Events.
  - Leave Entitlement.
- State.
  - Qualifying Events.
  - Leave Entitlement.
- Generally, run concurrently, but sometimes stack together to provide longer leave durations.

# *Notice, Certification, and Designation of Leave*

- Employees must generally give 30 days' advance notice of the need for leave if it is foreseeable. If leave is not foreseeable, then the employee must give notice of the need for leave as soon as practicable.
- When the employee requests leave, the employer generally should issue prescribed forms to inform the employee of his/her eligibility for leave and rights under the FMLA, and whether the specific leave requested will be designated as FMLA leave.
- The employer may also require the employee to provide medical certification of the need for leave.
- Practice point: While it is the obligation of employee to request FMLA leave, managers must exercise reasonable diligence in situations where an employee is missing work and it may be FMLA related.

# *Intermittent or Reduced Schedule Leave*

- Federal.
  - For birth/placement of child, allowed only if employer agrees.
  - Allowed all the time for serious health condition if medically necessary.
  - Calculating amount of leave.
- State.
  - Employee always allowed to take intermittent leave, but for birth or adoption of a child, the last increment of the leave must begin within 16 weeks of the birth of the baby.

# *Substitution of Paid Leave*

- Although FMLA leave is unpaid leave, employees have rights under the federal and Wisconsin law to use paid time they have available during a leave. The rules on substitution are complicated, but this is a general overview.
- Federal.
  - Employers may choose or require substitution.
- Wisconsin.
  - Substitution is solely at the option of the employee.

# *Reinstatement*

- Federal.
  - Same or equivalent position.
- State.
  - Former position, if available. Otherwise, equivalent position.
- Challenges in denying re-employment when employer discovers performance issues while the employee is on leave.



# *Special Federal Rules for Instructional Employees Under the Federal FMLA*

- Leave at the end of an academic year and into the next academic year is consecutive leave. Employees receive benefits as if continuously employed.
- If an instructional employee needs intermittent leave which is foreseeable based on planned medical treatment and the employee would be on leave for more than 20% of the total number of working days for the period of the leave, the employer may require the employee to take a leave of absence no longer than the duration of the anticipated leave or transfer to a different position with equal pay and benefits that better accommodates the recurring leave.

# *Special Federal Rules for Instructional Employees Under the Federal FMLA, con't.*

- If an instructional employee is going to take leave near the end of an academic term for specified reasons, the employer can require that the instructional employee take leave through the end of the term. However, only the period of time during which the employee was unable to work may be counted as FMLA. The additional leave is not counted as FMLA, but the employer must maintain the employee's benefits and restore the employee to the same or equivalent job at the conclusion of the leave. Determining what is an equivalent position will be determined by established school board policies and practices.

# *Federal and State Disability Laws*

# *Reasonable Accommodation*

- Federal.
  - Essential functions.
- State.
  - Adequately perform job responsibilities.
- Rules for Requests for Accommodation.
- Interactive Process.

# *Leave as a Reasonable Accommodation*

- Leave can be a reasonable accommodation.
- Indefinite leave is not a reasonable accommodation.
- There is no specific cap on the duration of a potential leave of absence.
- Leave can be longer than FMLA.
- But at what point is it unreasonable or an undue hardship?

# *Worker's Compensation*



# *Worker's Compensation*

- Medical and compensation benefits to employees who have been injured during the course of employment.
- Employers are generally prohibited from terminating or discriminating against an employee due to the fact that the employee has had a worker's compensation claim.
- Light duty may be provided to employees who are recovering from a worker's compensation injury. But you want to provide timelines or you may inadvertently create a new job for the employee.
- Worker's compensation injuries may also qualify as serious health conditions under the FMLA and as disabilities under the ADA.

# *Interplay of FMLA, ADA, and Worker's Compensation*





# *An Employee's Work-Related Injury May Be a Serious Health Condition and/or a Disability*

- If a workplace injury is covered by both the FMLA and the ADA, then the employer may be required to hold open the employee's job even after the expiration of the FMLA. The employer will have to determine whether additional leave will reasonably accommodate the employee and will not cause undue hardship.
- A continued medical leave of absence may be a reasonable accommodation if it will assist the employee to achieve recovery and ultimately return to work.

# *A Worker's Compensation Injury With Serious, Long-Term Restrictions*

- If the ADA applies to a worker's compensation injury, the employer must hold open the job of an employee who is temporarily unable to work unless the employer can show undue hardship.
- An employee who is determined to be "totally disabled" as the result of a worker's compensation injury must still be considered for other employment under the ADA.
- The long-term restrictions might also qualify as a serious health condition for FMLA purposes.

# *A Worker's Compensation Injury Causing a Temporary Impairment*

- A temporary impairment probably will not qualify as a disability.
- If an employee's work-related injury is also a serious health condition, the employer may not terminate the employee during any FMLA protected time.
- If at the end of the employee's FMLA entitlement, the employee still cannot return to his/her job and the employee does not have a disability, then the employer may terminate the employment.
- During a period of leave due to a worker's compensation injury that also qualified as a serious health condition, the employee may substitute his earned paid time to supplement workers compensation (or short-term disability) up to 100% of his regular wage.

# *A Worker's Compensation Injury Causing Extreme Impairment*

- If restrictions are so extreme that they cannot perform any available position with or without accommodation, they might not qualify for accommodations for a disability.
- The law does not require employers to grant what are essentially indefinite leaves of absence as an accommodation. Once there is no anticipated return to work date, or leave is ongoing or undefined, an employer is generally permitted to terminate the employment relationship.
- However, the law is clear that employers cannot automatically “replace” an employee in his/her job or terminate the employee when the employee cannot return to work at the conclusion of an FMLA leave. Well before the end of an FMLA leave, an employer must be considering whether the employee's medical condition may qualify as a disability and if so, commencing the interactive process with the employee to determine the nature and anticipated duration of any further absence and other accommodations that might be needed.

# *Practical Pointers*



# *Discussion Scenarios*



# *Questions?*

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