2022 Business Office Professional Conference

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

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THE FAMILY AND MEDICAL LEAVE LAWS

I. Eligible Employees Under the FMLA.

A. Federal. Employees Are Eligible for Federal FMLA ("FMLA") Leave If:

1. They have 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,

2. They have worked 1,250 hours in prior 12-month period. Only hours actually worked, including overtime hours, must be counted; and,

3. 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.

B. Wisconsin. Employees Are Eligible for Wisconsin FMLA ("WFMLA") Leave If:

1. They have 52 weeks of continuous employment (not necessarily the 52 weeks immediately before the request for leave); and,

2. They have 1,000 or more paid hours in the most recent 52 weeks (includes paid holiday, vacation, sick time, etc.).

3. The WFMLA covers any employees in Wisconsin of an employer that has at least 50 employees total, even if the employer has only one employee in Wisconsin.

II. Basic Leave Rights.

A. Federal.

1. Qualifying events. Employees may take FMLA leave for:

   a. The serious health condition of employee.

   b. The serious health condition of parent, child or spouse (including same sex spouses).

   c. Birth, adoption, or foster placement of a child. The father or mother of the child is entitled to such leave.

2. General leave entitlement. Twelve weeks (in the aggregate) in 12 months for any qualifying event or combination of events.

a. Time off for birth or placement must be taken within 12 months of birth or placement.

b. Employer may limit married co-workers to a total of 12 weeks of leave for birth/adoption/foster care and for the care of a parent.

B. **Wisconsin.**

1. Qualifying events. Employees may take WFMLA leave for:

a. Serious health condition of employee.

b. Serious health condition of parent, child, spouse, in-laws, domestic partner, and domestic partner's parent.

c. Birth or adoption of a child. The father or mother of the child is entitled to such leave.

2. Leave entitlement:

a. Two weeks total for employee's serious health condition.

b. Two weeks total for serious health condition of parent, child, spouse, in-laws, domestic partner, or domestic partner's parent.

c. Six weeks for birth or adoption (the leave must begin within 16 weeks before or after the birth or adoption of the child).

3. The federal and state leaves generally run concurrently. Example: If an employee takes two weeks of FMLA for a knee surgery, that time will generally count against the employee's two weeks of leave under Wisconsin law for the employee's own serious health condition and against the 12 weeks of federal FMLA leave.

4. However, there are many times when the federal and state FMLA leaves "stack together" so that the employee has more than 12 weeks of job protected leave. Example: A female employee who is pregnant must go on bed rest and uses her 12 weeks of FMLA for her own serious health condition. This time would count as her 12 weeks of leave under the federal FMLA and her two weeks of leave under Wisconsin FMLA for her own serious health condition. She then has the baby and receives another six weeks under the Wisconsin FMLA for leave in connection with the birth of a child. She could then take another two weeks of leave under the Wisconsin FMLA if the baby has a serious health condition, for a total of 20 weeks.

5. Wisconsin affords employees who are in "domestic partnership" specific rights under the WFMLA. A qualifying employee has the right to take up to two weeks of family leave to care for his/her domestic partner or the parent of his/her domestic partner if that person has a serious health condition. Domestic partners must meet the legal requirements for a domestic partnership and either be registered with the county clerk (same sex partners only) or the Department of Employee Trust Funds (same or opposite sex partners but had to have registered prior to September 23, 2017).

III. Notice, Certification, and Designation of Leave Status.

A. 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.

B. 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.

C. The employer may also require the employee to provide medical certification of the need for leave.

D. 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.

IV. Intermittent or Reduced Schedule Leave.

A. Federal.

Employees are not required to take all FMLA in one continuous block. The law provides that they may take leave in intermittent segments or as a reduced schedule as explained below.

1. For the birth or placement of child, intermittent leave is allowed only if employer agrees. However, no employer permission is necessary if the employee or newborn has a serious health condition.

2. For serious health condition leaves intermittent leave is allowed as medically necessary.

3. Calculating intermittent or reduced leave.

    a. An employer must generally account for FMLA leave using increments no greater than the shortest period of time the employer

uses to account for other forms of leave, provided that it is not greater than one hour.

b. If an employee would normally be required to work overtime but is unable to do so because of FMLA-qualifying reasons, "the [overtime] hours which the employee would have been required to work may be counted against the employee's FMLA entitlement." But, an employee's inability to perform voluntary overtime hours may not be counted against an employee's FMLA leave entitlement.

4. Employers cannot require employee to take more leave than necessary to address need for leave.

5. Employers can dock employee's wages by the hour for such leaves without jeopardizing employee's exempt status under wage and hour law.

6. If leave is planned for medical treatments, the federal FMLA allows the employer to transfer the employee to another position that better accommodates intermittent or reduced leave. The new assignment must have equivalent pay and benefits. The employer may also alter existing job to accommodate intermittent or reduced leave. Employers do not have a legal right to transfer an employee who is taking unforeseeable intermittent leave.

B. Wisconsin.

1. The employee may take leave in non-continuous increments less than a full workday if employer allows any other leave to be taken in increments of less than a full workday. The shortest increment available to employee must equal to shortest increment of any other non-emergency leave. (e.g., if employees may take sick leave in one-hour increments, must be allowed to take FMLA leave in one-hour increments as well).

2. There is NO transfer provision under the Wisconsin FMLA.

3. For birth or adoption of a child, the employee has the right to take FMLA on an intermittent basis, but the last increment of the leave must begin within 16 weeks of the birth of the baby.

C. Practice point:

If an employee is taking intermittent FMLA, and calls in absent, you must ask the reason for their absence to accurately track the employee's use of FMLA.

V. Substitution of Paid Leave.

A. 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.

B. Federal.

1. Employee may choose or employer may require the substitution of accrued or earned paid time for FMLA leave (watch out for Wisconsin law here).

2. An employee who elects to take paid leave must follow the employer's paid leave policies with respect to use of that leave.

    a. Employers may enforce employer rules regarding availability of leave even when an employee is on an FMLA leave. Note, Wisconsin employers may do this only after an employee has exhausted Wisconsin FMLA leave (which allows employees to substitute accrued paid leave regardless of the prerequisites for substitution).

    b. Employers must make employees aware of any additional procedural requirements for substitution of paid leave during FMLA leave in the notice of rights required to be provided to employees.

    c. An employee on FMLA leave who is receiving short-term disability or worker's compensation benefits may use accrued paid leave in order to "gross up" wages so that it equals 100% of the employee's income, provided the employer agrees, and state law permits, the arrangement.

C. Wisconsin.

1. Substitution is *solely* at option of employee.

2. Employee may substitute any "accrued" leave, paid or unpaid, of any type provided by the employer. (This may include self-funded STD leave.)

3. Using other leave counts against both FMLA leave and type of leave taken, provided that the leave substituted is provided under a policy that is no more restrictive than FMLA leave.

D. When Federal and Wisconsin FMLA are running concurrently, employer cannot make the employee substitute paid leave for FMLA leave.

VI. Reinstatement.

A. Federal.

1. An employee returning from FMLA leave must generally be returned to the same or equivalent position.

    a. Equivalence applies to pay, benefits, terms and conditions, status, perquisites, privileges, duties, skills, responsibilities, effort, and authority.

    b. If the employee is not able to perform the essential functions of the position, there is no right to be restored to same or equivalent position, or any other position. However, in that case, disability laws may require transfer to a *vacant* position (need not be equivalent).

2. Federal highly compensated ("key") employee exception may apply with respect to reinstatement of those employees.

B. Wisconsin.

1. The employee must be restored to his former position, if available.

2. If the former position is not available, the employee must be assigned to an equivalent position (same compensation, benefits, hours, status, responsibilities, and other terms and conditions of employment).

3. Restoration is not required where the employer can show that the employee would not have retained position (e.g. because of a plant closing or downsizing). However, the employee on leave may not be chosen or targeted for reduction because the employee is taking leave.

C. Practice pointer:

There are times a manager will "discover" during an employee's FMLA leave that the employee is underperforming in quality or quantity, or that co-workers have issues with the employee. If these issues have not been addressed with the employee prior to the notice of need for FMLA leave, the employer will be in a very difficult spot to address such problems after the leave without looking retaliatory. If an employee is having performance issues, DO NOT wait to address it.

VII. Special Rules Applicable to Instructional Employees Under the Federal FMLA.

A. Leave taken at the end of an academic year and into the next academic year is considered consecutive leave, not intermittent leave. Any summer vacation during which the employee would not be required to report does not count against the employee's FMLA entitlement.

B. Instructional employees (teachers) on FMLA leave must receive any benefits over the summer vacation that the employee would have received had he/she been working at the end of the school year.

C. 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.

D. 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.

DISABILITY LAWS
THE AMERICANS WITH DISABILITIES ACT AND
THE WISCONSIN FAIR EMPLOYMENT ACT

I. The ADA Versus Wisconsin Law on Reasonable Accommodation.

A. Under the ADA, a proposed accommodation is not reasonable (and thus an employer is not required to implement it) if the accommodation does not enable the disabled employee to perform the "essential functions" of the job. Thus, employers are not required to remove or significantly alter essential job functions to reasonably accommodate disabled employees. If an employee cannot perform essential functions, even with an accommodation, then the employee is not qualified for the job and can be terminated. However, employers may have to restructure jobs to remove marginal tasks.

B. The WFEA does not use the "essential functions" analysis. Instead, "reasonableness" of an accommodation goes to whether it allows the employee to "adequately" perform his or her job responsibilities and not whether the

accommodation allows the employee to perform some, most or all the duties. Employers in Wisconsin must individually assess accommodation requests to restructure a job or remove tasks, which may even include those that would remove essential functions, before refusing such a request.

II. Requests for Accommodation.

A. There are no formal requirements for disability accommodation requests.

B. Requests can be verbal or in writing.

C. An employee need not mention disability laws or use term "reasonable accommodation" in making a request. There is NO MAGIC language required.

D. Generally, employers should not proactively ask whether an employee has a disability or whether an accommodation is needed. When an employee is struggling in some aspect of job performance, the employer should focus on the job performance and leave it to the employee to raise any health issues. However, if the employee has a known disability which is suspected of causing workplace issues, the employer may want to initiate the "interactive process." Approaching these issues correctly requires an individualized of each situation.

E. A request for accommodation triggers the *Interactive Process*: a discussion and exchange of information to establish the need for accommodation and to identify appropriate reasonable accommodation(s).

1. The employer may ask relevant questions, including what kind of accommodation is needed.

2. The employer must not ignore or fail to follow up on the employee's requests for accommodation.

3. Unless the disability is obvious, the employer can request information from the employee's health care provider about the nature of the disability, the functional limitations caused by the disability, and what reasonable accommodations might exist.

4. Employers must pursue the interactive process in good faith, making an individualized inquiry and assessment for each situation.

5. An accommodation cannot be categorically ruled out as unreasonable. Insight and creativity may be necessary to devise an appropriate solution.

6. Employers must play an active role in identifying potential available positions for a disability employee; simply advising the employee to review posted positions is not enough.

F. Practice Tip:

Employers should generally not use "accommodation" language unless they are addressing a true disability accommodation.

III. Leave As a Reasonable Accommodation.

A. The ADA and WFEA both require employers to consider a leave of absence as a reasonable accommodation. This absence can be beyond FMLA entitlements.

B. Note that under Wisconsin law, a longer-term leave of absence is more likely to constitute a reasonable accommodation than under federal law. *See Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 478 (7th Cir. 2017) (a multi-month leave of absence is not a reasonable accommodation under the ADA.).

C. The purpose of a leave as an accommodation is to allow the employee to recover sufficiently from a condition related to a disability to be able to return to work and perform the job. The leave must be reasonably likely to result in the employee's return to work.

D. The EEOC has obtained multimillion-dollar consent decrees on behalf of disabled employees against employers that have:

1. Refused to consider leaves of absences beyond FMLA.

2. Refused to allow employees to return from leave with restrictions.

3. Refused to consider a reduced work schedule.

E. The burden is on the employer to recognize that employee may need a leave as a reasonable accommodation. Notice of the fact that an employee needs time off work or has a condition that could lead to a need for time off may trigger the employer's obligation to consider a leave of absence under ADA and FMLA. Often the employee provides this information to the employee's immediate supervisor, not HR. Examples:

1. Notice of medication changes or treatment regime affecting employee's ability to work.

2. Notice of need for time off to recover from illness, accident, or surgery.

3. Employee application for disability benefits.

F. A leave of absence can include reduced hours or a part-time schedule, a schedule or shift change, and providing more frequent breaks during work.

G. Unlike under FMLA, undue hardship *is* a basis to refuse a request for intermittent leave under ADA.

H. In general, an open-ended request for leave is not a reasonable accommodation. An employer is generally permitted to require information to show that an employee will be able to return to work in the "foreseeable future" or "near future."

WORKER'S COMPENSATION

I. Legal Basics of Worker's Compensation Laws.

A. Provides medical and compensation benefits to employees who have been injured during the course of employment.

B. 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.

C. Employers are generally prohibited from not hiring, discriminating against, or terminating an employee due to employer's concern or fear that the employee will suffer a workplace injury.

D. An employee's eligibility for worker's compensation benefits is determined by your workers' compensation carrier (not the employer) and then a state tribunal if there is disagreement.

E. Managers need to ensure that proper reports of injury are completed and submitted to the worker's compensation carrier in a timely fashion.

F. State laws will generally govern:

1. The employer's right to provide and obtain medical information during a worker's compensation claim.

2. Whether the employee must be reinstated to a position if the employee is released to work.

G. 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.

H. It is difficult to prove worker's compensation fraud. If you have concerns about fraud, a proper investigation should take place.

I. Worker's compensation injuries may also qualify as serious health conditions under the FMLA and as disabilities under the ADA.

INTERPLAY OF THE FMLA, ADA, AND WORKER'S COMPENSATION

I. <u>An Employee's Work-Related Injury May Qualify as Both a Serious Health Condition Under the FMLA and/or a Disability Under the ADA/WFEA</u>.

A. 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.

B. 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.

II. <u>A Worker's Compensation Injury That Results in Serious, Long-Term Restrictions May Well Qualify as a Disability Under the ADA/WFEA.</u>

A. 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.

B. 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.

III. <u>A Worker's Compensation Injury that Results in a Temporary Impairment May Well Qualify as a Serious Health Condition Under the FMLA, but Probably Will Not Qualify as a Disability</u>.

A. 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.

B. 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.

C. 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.

IV. **<u>If the Employee's Restrictions Are So Extreme That They Cannot Perform Any Available Position With or Without Accommodation, Then the Employee May No Longer Be Protected Under the ADA/WFEA</u>.**

A. This does not mean that employers must allow continuing, erratic attendance as a reasonable accommodation. The EEOC has stated, "Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice." EEOC, "The ADA: Applying Performance and Conduct Standards to Employees with Disabilities" (last updated Dec. 20, 2017) at Q. 20.

B. This also does not require employers to grant what are essentially indefinite leaves of absence. 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.

C. 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

I. Remember that the FMLA, disability, and worker's compensation laws are complicated and obligate your organization to do things or not do things that might not always make sense to you. Thus, do *not* make promises to employees about leaves of absence and do not threaten employees about their performance or job security when FMLA, ADA, or WC issues are involved.

II. The FMLA permits employees to sue INDIVIDUALS at companies for FMLA violations and an individual can be held PERSONALLY LIABLE in the case of legal violations. Thus, if you interfere with an employee's FMLA rights, you are putting your personal assets potentially on the line.

III. The FMLA, ADA, and WC laws prohibit retaliation. Do NOT retaliate or take adverse action against employees who have taken FMLA leaves or who have requested disability accommodations (including do not give negative reviews for attendance or productivity in a year with significant FMLA, ADA, or WC leave).

IV. When either: (1) an employee has been absent due to their own or a family member's health-related condition for several days; or (2) you are aware that the employee has a chronic condition or other condition that may be causing work-related issues, sensitively, but promptly address these issues with the employee.

V. Confidentiality is key. You are required to keep all medical information about employees confidential. You may not share the reason for an employee's FMLA absence with others unless the employee on leave authorizes the sharing of that information. The ADA has very limited exceptions to the confidentiality requirement including sharing such information on a need-to-know basis for safety or critical operational concerns.

VI. Communicate clearly with employees about leaves and expectations regarding returning to work so that everyone is on the same page!

VII. Document your FMLA-related conversations. Follow up with employees with emails to track communications. Be very careful that your written communications are factual, accurate and professional.

VIII. A company CANNOT successfully administer the FMLA and ADA laws without the active participation of managers. HR may not even be aware that an employee is having health-related issues until there is a problem.

DISCUSSION SCENARIOS

Scenario 1:

You have an employee who is certified to take FMLA intermittently for the year for depression and anxiety. Her certification anticipates that the depression will flare up and disable her from working once every three months for two to three days.

She has now missed 22 days of work in two months for a variety of reasons. Co-workers have also brought Facebook postings to the supervisor showing the employee on hikes in the woods and shopping on days she has called in unable to work.

The supervisor is tearing her hair out because of short staffing and is ready to terminate the employee.

1. What information do you need to follow up on to assess this situation?

2. Are you in a position to terminate?

3. What additional information would you need to assess this situation?

4. What additional steps might be taken?

5. What can/should the supervisor say to the co-workers?

Scenario 2:

You run FMLA on a rolling back calendar. Your employee starts work on March 1, 2020. Seven months into the job (September 1), she discloses that she has diabetes and needs to get attention for a wound that is not properly healing.

1. What do you need to consider at the time of this request?

You grant her leave, and she ends up being off from work for two months and returns December 1, 2020. In February of 2021, she has more issues with her diabetes and start taking off about a day per week, often on a Friday. Then, on March 1, 2021, she tells you she needs another leave of absence to address the same issues that was treated with her first absence.

2. How much FMLA has she used up at this time?

3. What other issues might you have to consider?