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Sperm donation = FMLA Leave?

by Presley Reed, M.D.

Infertility is a condition that is the topic of discussion in offices all over the country. With infertility affecting about 6 million men and women today, the inevitability that more and more employers will be faced with requests for time off for tests, procedures, and, hopefully, the ensuing pregnancy, is unavoidable.

None of this is news to employers. What may be new, however, are requests for time off from male employees—FMLA leave, to be precise—for infertility issues.

Recently, one such request came across the desk of a case manager. John Q. Worker and his wife were having fertility difficulties. As part of the infertility treatment process, John would need to donate sperm, and he applied for FMLA leave to donate.

Infertility can qualify one for FMLA leave, as it can fall under the category of “serious health condition” if the employee is unable to work because of the need for treatment, tests, and procedures (in vitro fertilization). Further, even if infertility itself does not qualify an employee for FMLA leave, the associated treatments may meet the requirements. For example, surgery to treat an underlying condition that may be the cause of the infertility (e.g., endometriosis, cysts or fibroid tumors, damaged reproductive organs, sperm motility) qualifies for FMLA leave if it involves inpatient care or continuing treatment as defined under FMLA.

In this case, John’s need to donate sperm for his wife did not qualify as a serious health condition, and he was denied leave.

John decided to try again. He requested leave again, this time using the ADA as the basis for the request. He claimed ADA covered infertility, as it is “a physical or mental impairment that substantially limits a major life activity.” Therefore, he was eligible for leave. However, John was trying to apply ADA requirements to a request for FMLA leave. Unfortunately for John, ADA and FMLA laws don’t necessarily work hand in hand—at least not in this case. John was denied again.

But the story doesn’t end here. Two months later, John was back. This time, he applied for FMLA leave to take care of his wife following the fertility procedure. Since John had created quite a name (and case) for himself, the case manager took this new request to an attorney specializing in FMLA law. Under the attorney’s direction, and because John would be caring for his spouse who would be receiving inpatient care and under anesthesia for the procedure, John was granted leave. Did John happen to donate sperm prior to the infertility procedure? We don’t know. But, in the end, John figured out a way to get the leave he wanted.

Is there a moral to this story? Not really. But there is some valuable information to be gained. First, it’s a good idea for case managers, benefits managers, and HR staffers to educate themselves on infertility and associated tests and procedures for men as well as for women. Second, there may be some cases in which leave to donate sperm will be considered. For example, if sperm donation is required for analysis and diagnosis of a potential “serious health condition,” FMLA leave might be granted.

Why FMLA leave?

Even with all this information, something is missing. Why did John request FMLA leave in the first place? Why didn’t he just request time off—either a sick day or personal day? Why would an employee work so hard to get FMLA leave?

The answer is found in the wording of John’s company’s absence policy.

Driven by the desire to show compassion for employees and their families, the company crafted an absence policy that emphasized FMLA leave. Each time an employee requested time off, if the request was FMLA-related, the time was granted (with proper documentation, of course). If, however, the absence was non-FMLA related, the employee received a point. The points had the potential to work against the employee during an annual review.

What the company had tried to do—show employees that it cared about them and supported the policy behind the FMLA—ended up working against them. Employees were turning in request upon request. Too many hours were spent on each request because the case managers had to research every one and, in some cases, seek legal advice to determine whether the FMLA leave was (or was not) appropriate. The casework was overwhelming. But the employees didn't know what else to do. They didn't want absence points hurting them when it came time for a review.

The lesson from this case

The lesson to be learned here is in policy wording. The company may have been better off with paid time off (PTO) banks since John would not have had to specify why he needed the time off. He could have then taken time for his wife's procedure, and all he would have had to do is provide the proper documentation. Under the best circumstances, no employee wants to be absent from work. But, even more so, no employee wants to be punished for being legitimately ill and needing time off. A policy that seems to support one type of absence over another can create many unforeseen problems for management and for the company.

So, before implementing an absence policy, think carefully about the wording. Or you and your managers may end up spending a lot of time reading absence requests fit for a TV movie-of-the-week!

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