

The Employer's Potential Exposure When Coordinating FMLA and Workers' Compensation

Is your company unnecessarily exposed? Are you leaving 12 weeks of job protection per employee on the table by not adhering to federal and state law? The FMLA legislation requires employers to determine whether or not an injured or ill employee is entitled to receive concurrent time away from work under the FMLA and to coordinate this time with that provided by workers' compensation law. If employers fail to coordinate these laws within company policy, they risk unneeded exposure, expense, and liability.

In the past, when confronted with issues involving employee absences due to illness or injury, employers looked to two sources for information about the employer's and the employee's respective rights and obligations: (1) the state workers' compensation law and (2) the employer's own policies and practices, including any applicable collective bargaining agreements. Even then, charting a course of action that accommodated competing interests of employer and employee was never an easy task.

That task was made more complicated by the enactment of state laws prohibiting discrimination against "handicapped" employees and the federal Rehabilitation Act of 1974, which applies to federal contractors and grant recipients. However, while these laws offered certain employee protections, a general lack of awareness about how these laws might affect medical leaves of absence often resulted in their being overlooked by employees, attorneys, (employers) and health care managers.

Managing medical leaves of absence became significantly more complicated with the enactment of the Americans with Disabilities Act of 1990 ("ADA") and the Family and Medical Leave Act of 1993 ("FMLA"). The ADA, FMLA and state workers' compensation laws impose numerous and not always consistent obligations on employers. This legal minefield has created a potential bonanza for plaintiffs' attorneys and has heightened the level of frustration for professionals responsible for dealing with these issues.

More than ever, professionals need a thorough understanding of the principal laws affecting medical leaves, including an understanding of how these laws operate in practice. This article provides summary information on the FMLA and workers' compensation law, focusing on those aspects of each law relating to managing medical leaves of absence and key areas of interplay between these laws with suggestions for practical strategies for employers.

Workers' Compensation Law

Each State has its own workers' compensation law, and there are considerable variations among the states. Workers' compensation laws generally require employers to provide certain benefits to employees suffering work-related injuries or illnesses. These laws also generally prohibit employers from discharging an employee for exercising his or her right to workers' compensation benefits.

Though originally created to provide coverage for employees involved in specified hazardous employment, workers' compensation now covers all private and public sector employers with one employee or more. Typically, any person working for an employer is protected on the first day of employment with some exceptions.

Workers' compensation is in almost all states the exclusive remedy for injuries sustained by an employee and serves as a bar against action for negligence brought by the employee against the employer and co-workers for such injuries.

Workers' compensation benefits are paid for illnesses and injuries arising out of and in the course of the employment that temporarily or permanently impair an employee's working abilities. The fact that an injury or illness involves the aggravation of pre-existing condition does not by itself absolve the employer of liability. Any injury that results from the employee's intent to injure himself or another, or that is due solely to the intoxication of the employee from alcohol or a controlled substance while on duty constitutes a non-compensable injury. However, an employee who is injured by the intentional act of a co-worker does qualify for benefits. Also uncompensable are injuries occurring due to travel to and from employment, which are not deemed incidents of employment. However, "special errands" which involve undertaking work or travel not associated with an employee's normal place or time of work and injuries arising from such tasks are compensable.

The employer is generally responsible for medical and rehabilitation benefits including payment for all first aid, medical, and surgical services reasonably necessary to relieve the effects of the work-related injury or illness. If warranted, the employer must generally also pay for the cost of necessary physical, mental, and vocational rehabilitation. Likewise, the employer is responsible for payment of compensation for disability, although compensation (wage replacement) for disability is typically not allowed for the first seven days of disability. If the injury results in the employee being disabled for more than a set time period (e.g., fourteen days) not necessarily consecutive, compensation shall be allowed from the date of the disability. This time period varies drastically among the states.

Some states require an employer to hold an injured employee's job open or to reinstate an employee once the employee is able to return to work. Many states prohibit an employer from discharging or otherwise retaliating against an employee for seeking benefits (or testifying in a proceeding) under the workers' compensation law.

Workers' compensation law typically requires the employee to submit to the employer the employee's treating physician's initial report and follow-up treatment reports.

Unlike the FMLA, which restricts an employer's access to medical information, the workers' compensation law generally permits employers to obtain medical information in a variety of ways:

- Written consent from the employee for the health care provider to release to the employer all records relating to the employee's treatment (often included in form report of injury the employee is asked to complete);
- Written consent from the employee allowing the employer or its insurance carrier to communicate directly with the health care provider to discuss the nature and extent of the injury, the anticipated duration of any period of disability, the ability to return to work, and any restrictions imposed (also often included in form report of injury the employee is asked to complete);
- A written request to the health care provider to make treating records available for inspection and copying;
- Industrial Commission or other state agency subpoena for records;
- A request for the employee to submit to a medical examination or reexamination by a doctor selected by the employer for purposes of evaluating the basis for the employee's claim, including the nature, extent and probable duration of the injury and the necessity of any work restrictions.

Thus, Workers' Compensation is medically-specific, with specific conditions for leave and reinstatement which decisions are accompanied by extensive medical disclosure. By contrast, FMLA covers a broad range of absences, accompanied by far less medical disclosure (if any). The two sets of regulations, however, must be considered at every critical turn by most companies.

Family and Medical Leave Act

The FMLA requires covered employers to provide eligible employees with up to 12 weeks of unpaid, job-protected leave each year for qualifying family and medical reasons. All private sector employers with 50 or more employees and all public sector employers regardless of the number of employees are subject to the FMLA. Generally, any employee that has been employed for 12 months (not necessarily consecutively) and that has worked at least 1,250 hours during the 12-month period preceding the commencement of the leave is subject to the FMLA.

An exception to the FMLA are employees who meet the 12 months and 1,250 hours criteria that are not entitled to FMLA leave if they work at a worksite with fewer than 50 employees and the total number of employees at all employer locations within a 75-mile radius of their worksite is less than 50.

The task of administering FMLA time is not so simple as mechanically tallying the missed days of work. First, the request for time off must be reviewed and approved (or

rejected) according to the criteria provided by the Act. The "request" must comply with certain standards, such as the reason for leave meeting the definition of a serious health condition. Secondly, the employee must be notified promptly, in writing, of the decision. Third, when the employee is granted leave, the administrator must know whether that leave is in addition to or concurrent with its own disability program. This third aspect is up to the individual company to decide. Fourth, the administrator must also align the request for FML with any leave awarded under the workers' compensation regulations. The two types of leave may also run concurrently, if a company has decided that to be the case in advance. Finally, the administrator must make sure the state FMLA modifications, if any, are being upheld and applied to each leave request.

Employees qualify for FMLA leave in the event of:

- Birth of a child of the employee and to care for the child, provided the leave is completed before the child's first birthday ("birth leave").
- Placement of a child with the employee for adoption or foster care ("placement leave").
- To care for a child, spouse or parent of the employee who has a serious health condition ("family medical leave").
- Because of a serious health condition of the employee that renders the employee unable to perform one or more of the essential functions of his or her job ("personal medical leave").

A "serious health condition" entitling an employee to FMLA leave (with relationship to workers' compensation) is defined as an illness, injury, impairment, or physical or mental condition involving:

- Inpatient care (i.e., an overnight stay) in a hospital or other medical care facility, including any period of incapacity or subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:
 - A. A period of incapacity requiring absence from work, school or other regular daily activities for more than three calendar days that also involves:
 - i. Treatment two or more times by a health care provider; or
 - ii. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the provider's supervision (Note -- according to the regulations, the prescription of an antibiotic constitutes a regimen of continuing treatment while the taking of over-the-counter medications, bed rest, and similar activities that can be initiated without a visit to a health care provider are not, by themselves, sufficient to constitute a regimen of continuing treatment), or
 - B. A period of absence to receive multiple treatments either for restorative surgery following an injury or for a condition that would likely result in a period

of incapacity of more than three consecutive days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) or kidney disease (dialysis).

An eligible employee is entitled to a total of 12 workweeks of FMLA leave during any 12-month period. Leave may be taken in one 12-week period, in several leaves for different reasons totaling 12 weeks, or when medically necessary, family medical leave or personal medical leave may be taken intermittently or as part of a reduced work schedule, up to a maximum of the equivalent of 12 weeks of leave.

If leave is being taken intermittently or on a reduced leave schedule, the employer may temporarily transfer the employee to an available alternative position that better accommodates the recurring periods of leave. The temporary transfer cannot result in a cut in the employee's rate of pay or benefits.

The 12-month period in which the 12-week leave entitlement occurs can be determined based on the calendar year, any fixed 12-month "leave year" (such as a fiscal year or a year starting on an employee's anniversary date), the 12-month period measured forward from the date the employee's first FMLA leave begins, or a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Unless an employer selects a specific method and communicates the method selected to its employees, the regulations provide that the method that must be used in determining an employee's entitlement to leave is whichever method is most favorable to the employee. Accordingly, the method selected should be clearly set forth in the employer's written FMLA leave policy. Most employers have elected to use the rolling 12-month period measured backward because it is the only one of the three methods that prevents employees from "stacking" two 12-month leaves back to back.

Generally, the FMLA is unpaid. However, the FMLA permits eligible employees to substitute accrued paid leave for FMLA leave. Accrued paid leave may be substituted for FMLA leave under the following circumstances:

- The employee may elect or the employer may require an employee to use paid vacation, personal leave, or family leave and charge that leave against an FMLA birth leave, placement leave, or family medical leave, provided that the employer is required to pay family leave only under circumstances permitted by the employer's family leave plan.
- The employee may elect or the employer may require an employee to use paid vacation, personal leave, or medical or sick leave for an FMLA family medical leave or personal medical leave, provided that the employer is required to pay medical or sick leave only under circumstances permitted by the employer's medical or sick leave plan.
- An employee on an FMLA leave may receive temporary total disability benefits if the leave is due to a work-related injury or illness. In order to avoid providing injured employees with an incentive not to return to work as soon as they are able, employers should make sure that their paid leave policies do not provide

compensation for employees receiving temporary total disability benefits (which, unlike wages, are not taxable income). Otherwise, the employee may end up making more (on an after-tax basis) while on leave than he or she would make working.

If an employee elects or is required to substitute accrued paid leave for FMLA leave, the paid leave used may be counted toward the employee's annual 12-week FMLA leave entitlement (provided the employer notifies the employee at the commencement of the leave that it is being counted as FMLA leave). Employers are required to provide group health insurance coverage during FMLA leave under the same terms and conditions that coverage would be provided if the employee were working. If the employee fails to pay the employee share of the premium, coverage may be terminated once the payment is more than 30 days late (provided at least 15 days' notice is given warning the employee that the payment is late and that coverage will terminate if the payment is not made).

Generally, at the conclusion of an FMLA leave, the employee must be restored to his or her former position or to an equivalent position with equivalent status, responsibility, pay, benefits, and other conditions of employment. There are some exceptions:

- If, at the conclusion of an FMLA leave, an employee is unable to perform the essential functions of the employee's job, the employee has no right to reinstatement under the FMLA. Of course, other laws, such as the ADA, as well as the employer's policies and practices and any applicable collective bargaining agreement, would need to be considered before a decision was made to terminate the employment relationship based upon the employee's inability to return to work after exhausting his or her FMLA leave entitlement.
- The taking of an FMLA leave does not provide an employee with any greater right to reinstatement or to other benefits or conditions of employment than if the employee had worked continuously during the leave period. For example, if the employee would have been terminated as part of a reduction in force if he or she had not taken the leave, the employer is not obligated to reinstate the employee at the conclusion of the leave.
 - A. Highly paid "key" employees may be denied reinstatement if doing so would cause "grievous economic injury" to the employer's operations. In light of the barriers erected by the Department of Labor's regulations implementing the FMLA, it appears that employers will rarely, if ever, be able to deny reinstatement based upon an individual's status as a key employee.

The FMLA prohibits employers and their agents from interfering with, restraining, or denying the exercise of FMLA rights, and from discriminating against employees for exercising their right to FMLA leave. Examples of unlawful conduct include:

- Refusing to approve a leave of absence to which an employee is entitled under the FMLA;

- Denying full benefits to an employee on FMLA leave while providing them to employees on other types of unpaid leave;
- Basing disciplinary action on the taking of FMLA leave, including the charging of FMLA leave against an employee under a “no fault” attendance policy;
- Discriminating against an employee for taking FMLA leave by, for example, using the taking of FMLA leave as a negative factor in promotion or compensation decisions; and
- Discharging an employee for taking FMLA leave.

Concurrent FMLA and Workers' Compensation

Employers should thoroughly document all employee leaves with FMLA qualifying reasons. In the event that the employer neglects to notify the employee that the leave will count against the employee's 12-week entitlement, the leave may not later be counted when considering a subsequent request for FMLA qualifying leave. (Although a recent Supreme Court opinion, *Ragsdale v. Wolverine*, made an exception, the recommended practice of notification should still be followed.)

Accordingly, because a workers' compensation absence will almost always constitute a qualifying personal medical leave under the FMLA, employers should make sure that employees who are eligible for FMLA leave and who are absent for work-related injuries are promptly notified that their absence is being counted toward their rolling 12-month FMLA leave entitlement. Employers must respond to the request within two business days. If the response is initially given verbally, promptly confirm it in writing.

If the leave is based on an FMLA-qualifying reason and the employee is eligible for FMLA leave, promptly provide the employee with written notice covering the following items using either the optional Department of Labor form (WH-381) or the employer's own response form:

- The leave is designated as and will be counted against the employee's FMLA leave entitlement;
- The employee is required to furnish a completed medical certification (and re-certifications) and the consequences of failing to do so (include with the notice the Department of Labor Health Care Provider Certification form (WH-380));
- Whether the employer's policy requires the employee to substitute any available paid leave and, if not, that the employee may do so if he or she wishes;
- The employee's obligation to report periodically on his or her status and intention to return to work, and to promptly report any changes in status affecting the expected return to work date;
- The terms and conditions under which any health coverage payments must be made;

- Any requirement that the employee present a fitness-for-duty certificate upon his or her return to work;
- The restoration rights of the employee (see below);
- If the employee is a “key” employee, the consequences of that status; and
- The employee's liability, if any, for health insurance premiums if the employee fails to return to work.

Medical Information

The FMLA imposes significant restrictions on an employer's ability to obtain medical information. However, when the FMLA leave is running concurrently with a workers' compensation absence, the employer and its workers' compensation insurer may utilize the methods of obtaining medical information available to them under the Workers' Compensation Act, notwithstanding the extensive FMLA restrictions that would otherwise apply. However, the employer should continue using FMLA forms and procedures for purposes of assessing the employee's eligibility for FMLA leave.

For the purposes of FMLA leaves, the Department of Labor's model medical certification form (WH-380) should be used. Although the form is optional, the regulations state that an employer may not require more information than what is asked for in the model. If the medical certification is complete, the regulations prohibit the employer from having any direct contact with the employee's health care provider (unless the employee is receiving or seeking workers' compensation benefits, in which case the methods authorized under the Workers' Compensation Act may be utilized).

If the employer has reason to doubt the validity of the certification, the employer may arrange for its doctor to contact the employee's health care provider, with the employee's permission, to clarify any questions and to verify the authenticity of the certification, and/or obtain a second opinion at its expense from an independent health care provider it selects to examine the employee.

If the second medical opinion conflicts with the first, the employer may require a third opinion (again at its expense). The third health care provider must be designated or approved jointly by the employer and the employee. The third opinion is final and binding on the employer and employee.

Although not entirely clear, the regulations appear to prohibit employers from requiring employees returning from an FMLA leave to submit to a return to work medical examination to determine their fitness for duty. Instead, the regulations appear to limit an employer's options to doing nothing or requiring a written certification from the employee's health care provider that the employee is able to return to work.

Benefits

Work-related injuries entitling an employee to workers' compensation temporary total disability (TTD) benefits normally will be “serious health conditions” under the FMLA.

This is because of the seven-day “waiting period” for TTD benefits and the FMLA's definition of “serious health condition” as including any injury involving a period of incapacity exceeding three days and continuing treatment by a health care provider.

Worker's compensation law typically permits an employer to terminate TTD benefits if an injured employee refuses to accept a medically appropriate light duty assignment. However, the FMLA regulations state that an employer is not permitted to require an employee entitled to FMLA leave to accept a light duty position. As long as the employee's serious health condition prevents the employee from performing one or more of the essential functions of his or her regular job, the employee may continue on FMLA leave (up to the 12-week rolling 12-month maximum).

Return to Work

Many employers have recognized that an aggressive return to work program, utilizing transitional light duty jobs, is one of the most effective ways of controlling workers' compensation costs. Return-to-work programs are also regarded as psychologically beneficial to injured employees.

The FMLA requires an employer to restore an employee to the same or an equivalent position at the conclusion of an FMLA leave. The FMLA contains no “undue hardship” exception (other than the very limited exception for “key” employees). In contrast, the workers' compensation law does not require an employer to reinstate an injured employee when he or she is able to return to work. Rather, it requires only that the employer not discriminate or retaliate against the employee for seeking workers' compensation benefits.

Because of the FMLA's guarantee of reinstatement, questions of terminating an employee who is unable to return to work for medical reasons ordinarily do not arise unless the employee (a) is not eligible for FMLA leave or (b) has exhausted all available FMLA leave. Unfortunately, because the extent of an employer's duty to accommodate is so hard to define and because of the potential for discrimination claims, employers without well-written policies addressing extended absences often find themselves fruitlessly asking, “How long is long enough?” In order to reduce the risk of liability for discrimination claims (based upon disability or workers' compensation or some other protected status, such as age, sex, race or national origin), many employers have adopted policies that place a specific time limitation (one year is common) on the length of any absence. The advantage of a standard maximum time limitation is that a discrimination claim ordinarily is much easier to defend if the decision to terminate was made pursuant to a uniformly applied policy rather than on an ad hoc basis. However, to be effective, the policy should extend to all types of absences (not just medical), with the exception of military leave of absence mandated by law, and should be consistently applied. Some of the other factors employers should consider in adopting this type of policy include:

- Health insurance coverage. Coverage need not be maintained beyond the period of FMLA leave. For administrative convenience, an employer may decide to adopt a set maximum coverage period, such as four months, applicable to all

leaves. If the employee wishes to continue coverage, he or she may do so pursuant to COBRA. The employer's health plan will need to be reviewed and revised if necessary to make it consistent with the policy adopted.

- Other benefits. Normally employees will not accrue additional paid vacation, sick days or other paid leave time while on an extended leave of absence. Continuing eligibility for other benefits, such as group life insurance or profit sharing, will depend on the terms of the plan document.
- Reinstatement rights. Often the employee's right to reinstatement under the policy (following the exhaustion of FMLA leave) is defined as being dependent upon the existence of available job openings.

Because the FMLA provides no undue hardship limitation, leave in the form of a reduced work schedule must be granted to eligible employees provided the reduced schedule leave is medically necessary. The FMLA permits the transfer of an employee taking a reduced schedule leave to an alternative position, with equivalent pay and benefits, which better accommodates (from the employer's perspective) the reduced work schedule. The FMLA requires employees needing reduced schedule leave to attempt to schedule their leave so as not to disrupt their employer's operations.

Courts generally recognize that regular attendance is an "essential function" of most jobs. The FMLA can complicate matters significantly if absences are due to a serious health condition. The FMLA permits eligible employees to take leave on an intermittent basis when medically necessary, regardless of the hardship the intermittent absences may pose for the employer. Furthermore, Department of Labor regulations prohibit employers from counting FMLA leave for disciplinary purposes under attendance policies, including "no fault" policies. Although the employee may be transferred to an alternative position that better accommodates the periods of intermittent leave, often this is not a feasible option.

Limited Exposure

One of the most wonderful developments of western civilization, in spite of occasional abuses, is the development of judicial and legislative institutions that protect the individual against the often unconscious and unfeeling collective, whether that be a government, an employer, or, on the other side of political lines, a labor union. The regulations described in this article are an extension of the protective impulse as it applies to individual employees. The regulations governing Workers' Compensation and Family and Medical Leave, recognized and incorporated judiciously in company policy can be consistent with the growth and well being of private and public enterprises. However, when they are not understood and not communicated well, they can and will have adverse affects on employers.

Given the complexities and interactions amongst the Family and Medical Leave Act ("FMLA") and state workers' compensation laws, it is important that employers:

- Notify eligible employees who are injured on the job that they are on FMLA leave as soon as they leave work;
- Train payroll, workers' compensation, and employee benefits staff to continue health insurance and supplemental life insurance during an FMLA leave;
- Notify workers' compensation claimants on light duty that the light duty is temporary;
- While an employee who is injured on the job has the right to reject light duty and remain off the job for the 12 weeks of FMLA leave, the employer should immediately stop the workers' compensation wage payments if allowed by state law;
- Recognize that most state workers' compensation laws do not require an employer to hold an employee's position open indefinitely;
- Recognize that most state workers' compensation laws do not require an employer to reinstate a "qualified person with a disability" unless that person can perform the essential functions of his or her position (if still available) or another open position with or without reasonable accommodations and without a substantial probability of injuring themselves or otherwise posing a danger.

Save time in the long run by creating company policy that clearly establishes procedures that protect you from exposing yourself to unnecessary FMLA absences and obligations.

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