

Practical Tips for Dealing With Employee Leaves of Absence

Many employers struggle with the difficult legal issues that arise when employees are absent for health reasons. This edition of the *Employment Law Advisor* provides some practical advice for employers as they consider their legal obligations and their business interests.

Employment Laws Covering Ill or Injured Employees

While it is beyond the scope of this brief article to detail the many complex regulatory issues governing leaves of absence, a summary of the applicable law will help frame the issues.

Family Medical Leave Act ("FMLA")

✓ Generally applies to employers of 50 or more.

✓ "Eligible" employees must: (1) have been employed by the employer for at least 12 months; (2) worked at least 1,250 hours during the immediately preceding 12 months; and (3) work at a site which has at least 50 employees or work within a 75 mile radius of such a site.

✓ Employees may take up to 12 weeks (intermittent or continuous) unpaid leave within a 12 month period for: (1) the birth of a child, adoption, or placement of a foster child; (2) to care for a spouse, child or parent who has a "serious health condition" or (3) the employee's own serious health condition.

✓ Generally guarantees reinstatement to the same or equivalent job upon return.

Americans with Disabilities Act ("ADA") / Massachusetts Fair Employment Practices Act ("Chapter 151B")

✓ The ADA applies to employers of 15 or more while Chapter 151B applies to employers of 6 or more.

✓ Both statutes prohibit discrimination in the terms and conditions of employ-

The legal issues flowing from employee leave rights may be the most difficult facing employers. Federal and state laws in this area often overlap and sometimes are in conflict with one another, potentially creating legal traps for employers.

Read on for more details...

ment against any "qualified individual" with a disability.

✓ A "disability" is a physical or mental impairment that substantially limits one or more "major life activities" such as: caring for oneself, performing manual tasks, breathing, learning, seeing, hearing, speaking, working or walking.

✓ Employers must provide "reasonable accommodation" to qualified disabled applicants and employees who would be able to perform the "essential functions" of the job in question with or without reasonable accommodation.

✓ A leave of absence may be a potential reasonable accommodation.

✓ Employers, however, do not have to provide an accommodation if they can show that the accommodation would impose an "undue hardship". An undue hardship usually involves a substantial expense or a significant workplace disruption.

Massachusetts Workers' Compensation Act ("Act")

✓ The Act applies to all employers and provides for wage continuation and other benefits to employees who suffer work-related personal injuries.

✓ Unlike the FMLA and potentially the ADA and Chapter 151B, the Act does not require an employer to hold open the employee's job but may require a re-hire preference for an employee who lost his/her job as a result of a compensable injury.

✓ An employee who suffers a compensable injury and is capable of performing the essential functions of the job with or without reasonable accommodations is automatically considered a "qualified handicapped person" under Chapter 151B.

Practical Advice on Dealing With Leaves of Absence

The following general tips can help employers handle leaves of absence properly, and avoid employee abuse of leave policies. Given the complicated nature of this area, we suggest that you contact employment counsel for specific guidance.

Develop a Comprehensive Leave of Absence Policy

a. The policy should cover all forms of possible leave - FMLA, personal, short-term disability, long-term disability, Massachusetts Maternity Leave, and workers' compensation.

b. Make sure the policy states that all forms of leave run concurrently, such that an employee entitled to leave under more than one statute or employer policy must take them simultaneously (for example,

an employee out on short-term disability leave (STD) will also be put on FMLA, if appropriate). In this way, employees cannot obtain successive leave entitlements.

c. Require an employee to use paid time off (such as a vacation, personal, etc.) during the leave, so that the employee's absence is not extended unintentionally beyond the expiration of the specific leave. Note: employers may not require an employee taking Massachusetts Maternity Leave to use available vacation and other paid time off concurrently with maternity leave.

d. Include a specific, reasonable deadline for a return to work (at a minimum following FMLA entitlement, if applicable), and clearly state that employment generally will be terminated if the employee cannot return within that time frame. This deadline may need to be modified as a form of reasonable accommodation; however, a bright-line, neutral rule will provide the employer with a degree of finality when dealing with extended leaves.

e. Provide that reinstatement cannot be guaranteed after a certain point (at a minimum following conclusion of FMLA entitlement, if applicable).

f. Provide that the employer retains discretion with regard to leave decisions whenever possible (note that employers may not have substantial discretion in decisions regarding FMLA leave).

Update and maintain accurate job descriptions

Whether an employee is a "qualified" individual with a disability and therefore entitled to reasonable accommodation often turns on whether he or she can perform the "essential" functions of the job. A clear, accurate job description specifically detailing the employee's job duties can be the best record of essential job functions. Especially important is identifying whether regular, timely attendance is essential.

Determine FMLA/ADA applicability

Employers should determine as promptly as possible whether the FMLA,

ADA or Chapter 151B applies to the leave at hand. Merely because an employee is dealing with a medical issue does not always mean that any one statute applies.

Designate as FMLA leave / Deny FMLA eligibility immediately

Generally, an employer must designate leave as FMLA leave within two business days of the notice of the employee's need for leave. If there is any doubt, the employer can preliminarily designate the leave as FMLA leave and retroactively revise the designation if necessary. With respect to the distinct issue of whether an employee is "eligible" for FMLA leave, regulations provide that the employer must inform the employee of whether he/she is FMLA eligible within two business days of notice of need for leave. Compliance is important because an employee seeking leave may believe he/she has job reinstatement rights if not informed of his/her lack of FMLA eligibility prior to taking leave.

Document

Make sure leaves are properly documented, particularly with respect to the FMLA. The U.S. Department of Labor publishes a form for an employer's response to a request for FMLA leave which can be found at: <http://www.dol.gov/library/forms/go-us-dol-form.asp?FormNumber=36&OMBNumber=1215-0181>.

Take affirmative steps to prevent abuse

Both the FMLA and ADA contain provisions designed to prevent employee abuse. For example, if an employee seeks a leave of absence, the employer can require the employee's physician to respond to requests for information or have the employee submit to a medical examination. The FMLA allows employers to require a second or even third medical opinion if it has a good faith reason to doubt a FMLA medical certification submitted by the employee's health provider. Similarly, employers can require "recertification" of a serious health condition when an FMLA leave takes longer than anticipated.

Consider the effect of an extended leave of absence as soon as possible

Many employers provide a short-term leave of absence as an accommodation without anticipating the impact that approval of a short-term leave may have on a

subsequent request for extending the leave. An employer that granted a short-term leave often cannot reverse position and claim that extension of the leave would cause an undue hardship. For example, if an initial leave of three months was not a hardship, how would a short extension change the analysis? Depending on the circumstances, an employer may be well advised to address the issue immediately by informing an employee requesting leave that it may not be able to extend leave.

Provide for "light duty" with clear documentation

Employers often provide "light duty" programs in order to return an injured employee to work as soon as possible to reduce workers' compensation costs. While the ADA and Chapter 151B do not require creation of light duty jobs for employees, there may be an obligation to provide "light duty" as a reasonable accommodation in some circumstances—either as job restructuring so that the employee is able to perform the job temporarily while recovering, or as a reassignment to a vacant position that the employee can perform. If light duty is intended to be temporary, the employer should make it clear, in advance and in writing, that the assignment is for a specific, limited period of time. By doing so, the employer reduces the potential that the "essential functions" of the employee's position become modified due to the light duty assignment.

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