Employment Leave Issues: Trying to Clear Murky Waters

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FMLA
NUTS & BOLTS
FMLA 101

- 12 weeks of leave for eligible employees (26 weeks in some cases)
- Unpaid leave – Employer can require use of PTO
- FMLA leave runs concurrently with PTO, Workers’ Comp, STD, federal contractor paid leave, etc.
- Only available for certain reasons
- Continued benefits, like health insurance
- Job protection
Covered Employers

- Covered Employer – Has 50 or more employees
- Need FMLA policy and posting even if no employees are eligible
Eligible Employee

- Worked 12 months (can be non-consecutive; count military service)
- Worked 1250 hours in last 12 months (count military service)
- Works within 75 miles of at least 50 employees
Reasons for 12 Weeks of Leave

- New Child
- Serious Health Condition – Employee’s or Qualifying Family Member’s
- Qualifying Exigency – Spouse, parent, or child of employee on active duty/called to duty
Reason for 26 Weeks of Leave

- Injured Servicemember (including spouse, parent, adult children and next of kin)
- Special leave year starts with first day of leave
- Available once per servicemember per injury (NOT once per employee)
Intermittent/Reduced Schedule Leave

- As little time as the employer’s time clock counts
- Planned (dialysis) or unplanned (migraine)
- Not required for New Child Leave
- May be able to assign to alternative position
Paid Leave for Employees of Federal Contractors

- Separate from – and does not change – FMLA
- Federal contractors must provide at least 1 hour per 30 hours worked on a covered contract
- Can’t limit accrual to less than 56 hours (7 days)
- Available for any illness, injury, or medical condition or treatment, including diagnosis and preventative care-- for employee or family
- Effective for contracts with solicitation date on or after January 1, 2017
Employer FMLA Notice Requirements

- **Eligibility Notice**
  - once you know the employee needs leave, only 5 days to say she is eligible (or not)

- **Rights and Responsibilities Notice**
  - provide with Eligibility Notice and request the medical certification

- **Designation Notice**
  - leave counts (or doesn’t) as FMLA, call-in and return to work requirements
Employee Notice Requirements

- 30 days if foreseeable
- If 30 days won’t work, as soon as possible and practical
- Even without adequate notice, employer may be able to delay (but probably not deny) FMLA leave
Protections for Employees

- Return to their job (or an equivalent position)
- No loss of the employment benefits employee had prior to leave
- Any benefit or position employee would have gotten if she had not taken leave (raises, vacation accrual increases)
- Maintain coverage under group health plans (like they were at work)
Lawsuits: Interference and Retaliation Claims

- **Interference**--Eligible employee doesn’t get leave
  - “I took time to take care of my sick mother and it counted against me under time and attendance”

- **Retaliation**--Employee punished for taking or asking for leave
  - “I didn’t get the safety bonus because I put in for FMLA leave”
  - “I didn’t get the promotion because they said my attendance wasn’t good – FMLA leave”
ADA NUTS AND BOLTS
ADA 101

- No discrimination against employees OR applicants based on disability (e.g., hiring, firing, discipline, etc.)
- Must provide “reasonable accommodations”
- No illegal medical inquiries
- No retaliation for exercising rights
- Applies to employers with 15 or more employees (like Title VII) on day 1 of employment
Defining a Disability:

- Every physical or mental impairment is potentially a disability—very broad law
- Does not have to be “severe” or “significant restriction” as compared to the average person
- BUT not transitory (< 6 months) AND minor (hangnails, common cold, etc.)
Reasonable Accommodations

- Is Employee/Applicant qualified to perform the essential functions “with or without an accommodation”?

- Reasonable accommodation is almost anything that enables employee to perform essential functions—sometimes looks a lot like leave
  - Modified schedules
  - Unpaid leave
Light Duty Policies

- ADA does not require light duty if that means reassigning essential functions.
- If you have light duty, can’t restrict to on-the-job injuries—must treat similar situations similarly.
ADA and Return to Work Letters

- “Return to work without restriction” letters – not okay under the ADA
  - Must consider whether you can provide a reasonable accommodation for someone’s restrictions
- Letter should say return to work when doctor releases and you can “perform essential functions with or without a reasonable accommodation”
Maximum Leave Policies

- Be careful of setting a maximum-- EEOC doesn’t like them (even generous ones)
- ADA requires individualized assessment
WHAT TO DO WHEN AN EMPLOYEE NEEDS TIME OFF
Step One: Is it OTJ and is the Employee Eligible for FMLA?

- Was Employee injured at work?
  - File First Report of Injury and notify carrier

- Do you have 50 employees and has the Employee worked for you for a year? If FMLA is available:
  - Provide FMLA paperwork
  - Make sure Employee gets any paid leave benefits concurrently with FMLA
Step Two: FMLA is Done/Not Available AND OTJ Injury

- Consider worker’s comp status
  - Reached MMI? If not, how long has Employee been out and what is the prognosis on return?
  - Will the doctor return Employee to work (with or without accommodations)?
  - Do you have light duty? Can Employee refuse?
  - Hold job open?
  - Consider worker’s comp retaliation law before you fire someone who is on or just returned from worker’s compensation leave
Step Three: FMLA Done/Not Available AND Not Not OTJ

- Consider ADA obligations
  - Other leave policy at the company (written or not)?
  - Back to work with a reasonable accommodation?
  - Is leave a reasonable accommodation?
    - Find out when doctor thinks Employee can return
      - A week is reasonable; 6 months probably not
    - Consequences to business for holding job open longer
    - Be practical and patient
USERRA NUTS AND BOLTS
USERRA 101

- Provides job protection and right to reinstatement for employees in uniformed military service
- Unpaid leave, with advance notice
- For up to five years of cumulative service while with a particular employer
- If employee timely returns to work, must be reinstated
- Restoration of job and benefits employee would have attained without taking leave ("escalator" seniority principle)
- Protection from discrimination and retaliation
Covered Employers

- All public or private employers in the United States
- Regardless of number of employees
- Applies to foreign employers doing business in the United States
Eligible Employee

- Persons who perform duty, voluntarily or involuntarily, in the “uniformed services”
- All military branches, National Guard, and reserves
- Covered service – active duty, training, inactive duty training and drills
- Includes part-time and probationary employees
Requirements for Reemployment

- Absence from job due to service
- Employee gave advance notice that she would be absent from job due to military service (unless impossible or unreasonable)
- Cumulative service <5 years
- No dishonorable discharge
- Timely reporting back to civilian job (scale depending on length of leave)
EXAMPLES
“I DON’T WANT FMLA LEAVE”
The Reluctant Leave Taker

- Janice has been off work for 2 weeks (taking PTO) and has just told you she was in the hospital and is now at home. You explain she may have FMLA rights but she says she does not want to take FMLA—she thinks she can come back to work in a few days.

WHAT NOW?
FMLA Questions

- Is Janice eligible for FMLA?
  - 1 year employment, 1250 hours in last year, 50 employees at site?

- Is this a serious health condition?
  - Inpatient treatment always counts

- Send her FMLA paperwork and designate her leave as FMLA.

- Verify she didn’t get hurt at work
She doesn’t return to work and no medical certification . . .

- She insists she is okay and will be back in a few days . . . Can you force her to apply for FMLA if she doesn’t want it?
  - Explain it is for her protection
  - Explain that we don’t have a choice— we have to give her FMLA

- Approve the leave without the medical certification?
Long Term Leave
Juan hurts his back at work in November and is out on workers’ comp leave. In February, he report that he is not able to return to work and has no projected return to work date. The employer needs to fill his job.

WHAT SHOULD THEY DO?
Workers’ Comp First

- Is Juan getting benefits and the necessary medical treatment?
- What does the comp carrier say about his ability to return to work?
- What is the last thing we heard from the doctor?
FMLA Questions

- Is Juan eligible for FMLA?
- If they haven’t sent the FMLA paperwork, can they send it now?
- Can they count the information from the comp carrier as the medical certification?
- Has he been out 12 weeks?
ADA Questions

- If FMLA is exhausted, is there any other leave available per company policy? Has he exhausted his PTO or other paid benefits?
- Is this a disability?
- Is additional leave a reasonable accommodation?
  - No projected return to work date

SHOULD THEY FIRE HIM?
Exempt Employee Working During Leave
The head of IT, Sarah, is pregnant. The employer is in the process of changing its IT system, including payroll, benefits, accounting, etc. This was scheduled to happen a month before Sarah went out but was delayed and will occur in the middle of her leave. Her leave is paid and she is happy to work while she is on leave.

IS THAT A GOOD IDEA?
Interfering with FMLA Rights

- Sarah is entitled to 12 weeks of leave
  - Leave— not work from home
  - Paying her during leave doesn’t change her rights

- When does calling her for help turn into an interference claim?
  - Coming to the office? Conference calls?

- Document Sarah’s rights and waiver

- Possible FMLA retaliation claim?
ACCOMMODATING
PREGNANCY
RESTRICTIONS
Accommodating Pregnancy

- Ellen, a HazMat Coordinator, announces she is pregnant and presents a doctor’s note that says she “can’t be around hazardous materials.”
- ???
Reasonable Accommodation Conversation

- Is pregnancy a disability under the ADA?
  - Regular pregnancy—probably not, but is it worth a fight?

- Can they reasonably accommodate her restrictions in the HazMat Coordinator job?
  - More information from doctor—Limited exposure? Protective clothing? Anything short of no hazmat?

- Do you have light duty (for anyone)?
  - Can’t have light duty only for workers’ compensation cases
No Reasonable Accommodation

- Does she have FMLA rights?
  - She won’t like this but it is an option and could buy her time
- Do they have a vacant position in which they can reasonably accommodate her restrictions?
  - Not light duty– a transfer as a reasonable accommodation
  - She doesn’t have to compete for the job (unless CBA)
  - Pays what the vacancy pays
  - Not a temporary move
QUESTIONS?