THE INTERPLAY BETWEEN ADA AND FMLA AND EMPLOYER OBLIGATIONS WITH RESPECT TO LEAVES OF ABSENCE

BY MOLLY REZAC, ESQ.

It happens almost weekly: the call from a client telling me that their employee is out on leave due to a serious health condition; the 12-week leave is over on Friday, but the client knows that the employee cannot return to work as expected. The client then asks, "We can terminate him and get someone in here in their place to do the work, right?"

Well, not so fast. When employees seek time off work for their own medical or serious health conditions, employers must consider their obligations under both the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) before making any decisions related to the employee's employment.

Under the FMLA, employees must have worked for the covered employer for at least 12 months and have worked at least 1,250 hours to be eligible. The ADA, however, does not have those requirements. Therefore, even if an employee is not eligible for leave under the FMLA, or when the 12 weeks has been exhausted but the employee still cannot return to work, he may still be covered under the ADA, and additional leave is a reasonable accommodation unless it causes the employer an undue hardship.

Therefore, analysis under both statutes should be done whenever an employee seeks leave for his own medical condition.

Here are some tips for coordinating leave under the FMLA and the ADA:

Review policies. The EEOC has been actively targeting employers with so-called "no-fault" policies. No-fault, or automatic termination policies, are policies that provide for termination upon the passing of a certain amount of time of leave, regardless of the circumstances. These policies fail to recognize the differences in each employee's circumstances and thus fail to recognize the obligations under the ADA to engage in communication (called the "Interactive Process") with the employee about the accommodation. Instead of policies with fixed-leave periods, policies should be amended to indicate that the amount of leave will be determined on a case-by-case basis.

Keep job descriptions accurate and up-to-date. This will allow you to determine whether, upon return from leave and with or without any other reasonable accommodation, the employee is able to perform the essential functions of the position.

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Immediately assess and think about both the FMLA and ADA when leave is requested.

If the employee qualifies for leave under both the FMLA and the ADA, we know that they are entitled to 12 weeks of unpaid leave. However, if they cannot return once the 12 weeks have been taken, additional leave has been found to be a reasonable accommodation. Therefore, the employer has to determine whether or not additional leave would cause the employer an undue hardship. Making these assessments early in the process will allow you to plan for long-term absences, and will allow you to appropriately document any undue hardship during the entire leave.

Communicate with the employee often and document every communication. Under the ADA, an employer must engage in the interactive process with the employee who has an ADA-protected disability and may require further accommodation. Employers should document each telephone conversation, e-mail or letter with the employee, to show that they tried to maintain contact during the leave. It is also important to document every *attempt* to communicate with the employee, even when the employee fails to respond. If an employee is out of FMLA leave, towards the end of the covered 12-week leave period, seek information from the employee about their expected return date. Having documented communications will be especially important if the employee fails to communicate with the employer. Showing, through this documentation, the employee's failure to engage in the interactive process means that the EEOC will be more likely to dismiss a disability discrimination claim; however, failure by the employer to engage in the interactive process has led the EEOC to initiate litigation against an employer.

Document how the leave of absence affects the employer's business to see if the leave creates an undue hardship. There are many factors to look at including:

1. If the leave of absence poses a significant loss in productivity because the work is being done by less-effective, temporary workers or because the workers who have had to take over the work are overburdened and tired from working overtime;
2. Lower quality of work;
3. Lost sales;
4. Customer service issues, including slower customer service, or customer complaints;
5. Deferred projects;
6. Increased burden on management to reassign projects;
7. Increased stress on co-workers; and
8. Morale issues.

If an employer can establish undue hardship, the employer can deny the leave request and still avoid liability from a discrimination charge.

If different people are administering the FMLA and ADA leave, **be sure to communicate internally** so that both departments are informed of the situation.

Evaluate each request for leave on a case-by-case basis. Even if another employee is having the exact same surgery, each employee may recover differently and have different needs. Treat them individually, and document each interaction.

Inquire about an employee's return to work and document responses. Employers are not required to honor employee requests for "indefinite leave" or endless requests for extensions of leave with no intended date of return.

By updating policies, consistently communicating with employees on leave, and analyzing each case individually, employers can maintain compliance under the FMLA and ADA and avoid liability. ■

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