Employee Leave Issues: Five Traps to Avoid

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Most employers provide their employees with some type of paid time off (PTO), vacation or sick leave. However, tracking and managing employee time off in a way that comports with state and federal laws can be tricky. Additionally, in certain circumstances, employers are obligated to provide employees with legally protected leaves of absence. Failing to do so may leave an employer in hot water. Listed below are five common traps to avoid when handling employee leave.

1. Denying Leave when an Employee is Ineligible for FMLA

The Family and Medical Leave Act (FMLA) applies to employers with 50 or more employees.[1] An employee is eligible for up to 12 weeks of FMLA leave if they have worked for the employer for at least 12 months, have at least 1,250 hours of service for an employer during the 12-month period immediately preceding leave and work at a location where the employer has at least 50 employees within 75 miles of that location.[2]

If an employee requests time off for a medical condition but is ineligible for FMLA leave, an employer should not simply deny the employee's request. Instead, the employer should determine whether the Americans with Disabilities Amendments Act (ADAAA) applies.[3] Under the ADAAA, an employee who is considered disabled—which is defined as an individual who has a physical or mental impairment that substantially limits one or more major life activities—may be eligible for leave.[4]

The ADAAA applies to employers with 15 or more employees. As part of their obligation under the ADAAA, employers are required to provide a disabled employee with a reasonable accommodation to facilitate employment opportunities for the disabled employee. In order to determine if a reasonable accommodation exists, the employer and employee engage in what is known as the interactive process, whereby the disabled employee and the employer discuss what type of assistance is needed. Depending on the circumstances, leave could function as a reasonable accommodation.

2. Forgetting that the ADA may Require Leave Beyond the FMLA

Unlike the situation described above where an employee was ineligible for FMLA leave, the second trap arises after an eligible employee exhausts their 12 weeks of FMLA leave. After an employee exhausts their FMLA leave, the ADAAA may still require additional leave. In order to make this determination, an employer will again need to ascertain whether the employee is considered disabled, and if so, the employer must engage in the interactive process and determine whether leave is a reasonable accommodation. However, employers should keep in mind that while the

employee is entitled to a reasonable accommodation, it does not necessarily have to be the reasonable accommodation he or she requests.

3. Strict Adherence to a Fixed Leave Policy

Some employees exhaust their 12 weeks of FMLA leave and take additional leave under the ADAAA but are still unable to return to work. In these situations, many employers look to fixed-leave policies to provide their employees with leaves of absence that extend beyond what is required under the FMLA and ADAAA. However, employers cannot rigidly adhere to a fixed-leave policy. Instead, the ADAAA requires a case-by-case assessment to determine whether the employer must provide more time than the policy allows. While employers are not required to grant indefinite leave under the ADAAA, courts have held that leave in excess of one – or even two – years may be appropriate under certain circumstances.[5]

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4. Failure to Adhere to the New Nevada Paid Leave Statute

Nevada's new paid leave law went into effect January 1, 2020, and applies to employers with 50 or more employees who have been in operation for at least two years.[6] Under the new law, all employees – except temporary, seasonal or on-call employees – must receive at least 0.01923 hours of PTO for each hour worked. Private employers must allow employees to use their PTO time after 90 days, and thereafter employers cannot deny PTO to an employee who provides notice of his or her need for PTO so long as the notice was provided as soon as practicable. Additionally, employees do not need to provide a reason for their PTO, nor do they need to find a replacement worker for their time off. Employers must also furnish to employees on each payday an accounting of the hours of PTO available for use, and maintain records of the accrual and use of paid leave for one year following its entry.

Employers who already have a written policy, contract, or Collective Bargaining Agreement (CBA) that provides leave that matches or exceeds the statutory accrual rate of 0.01923 are exempt from the statute—including its recordkeeping requirements.[7] However, employers who offer a fixed amount of PTO may unknowingly violate the statute if they have employees who work more than 40 hours a week. For example, if an employer's accrual policy provides full-time employees with 45 hours of leave per year, the policy would exceed the required statutory accrual rate for an employee who works 40 hours per week (45 hours of leave ÷ 2,080 hours worked per year = 0.02163 accrual rate) but would fall below the statutory accrual rate for an employee who works 50 hours per weeks (45 hours of leave ÷ 2,600 hours worked per year = 0.01731). Employers can avoid this issue by tracking both hourly and salaried employees to ensure that each employee receives at least 0.01923 hours of PTO for each hour worked—even if that means having exempt employees' clock in/clock out or otherwise logging excessive overtime. Additionally, employers should also ensure they are providing leave to part-time employees, who might not have previously received PTO.

5. Neglecting to Keep Accurate Job Descriptions

Job descriptions are important tools for employers when dealing with leaves under both the FMLA and ADAAA. Under the ADAAA, an employer is required to modify or eliminate non-essential job functions, however, an employer is not required to eliminate or modify essential job functions. A job description is used as evidence of a job's essential functions and therefore, the determination of whether leave is required may rest on how the employer defines the essential functions of the job in the job description. If an employer fails to list a certain function as essential – e.g. attendance – the employer may not be able to deny leave when it would otherwise be able to. Similarly, under the FMLA, employers can provide a list of essential job functions to determine when an employee is ready to return from his or her leave. An improperly defined essential job function could affect when the employee may return to work.

Leave issues remain complex and confusing for employers to navigate, due to the multiplicity of state and federal laws covering the topic. New legislation such as the Nevada paid leave statute add to this complexity by causing employers to speculate as to how government agencies such as the Nevada Labor Commissioner will enforce the new legislation. In order to minimize exposure, employers need to remain alert and avoid these common leave traps.

1. 29 C.F.R. § 825 et seq.
2. 29 U.S.C. § 2611(2).
3. 42 U.S.C. §12101 et seq.
4. 42 U.S.C. § 12102 (1); *see also* 29 C.F.R. § 1630.2(g).
5. *See U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 397-98 (2002); *see also EEOC Guidance, "The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities,"* http://www.eeoc.gov/facts/performance-conduct.html, at Q&A 21.
6. *See* enrolled text of Senate Bill 312 (2019).
7. *See id.*; *see also* Labor Commissioner Advisory Opinion dated October 4, 2019.

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