Job Reinstatement: Employer’s Obligations Under the FMLA and ADA

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View from the Top

This is an authentic baby, less than one week old.

As I feed this authentic baby in front of you, recall how big my stomach was last week.

So, do I still need a note from my doctor to explain my absence?

Yes, unless you can prove where Mickey Rooney is right now.
Overview: FMLA Leave

• Under the FMLA, eligible employees of covered employers are entitled to take unpaid, job-protected leave for specified family and medical reasons.

• Employers are covered if they employ 50+ employees for at least 20 workweeks in the current or preceding calendar year at one or more worksites within 75 miles.

• An employee is eligible if he or she: works for a covered employer; has worked for that employer for at least 12 months; has worked for at least 1,250 hours over the 12 months before leave is needed; and works at a location with 50 or more employees within 75 miles.
Overview: FMLA Leave

• Under the FMLA, eligible employees are entitled to:
  • 12 weeks of leave in a 12-month period for:
    – the birth of a child and to care for the newborn child within one year of birth;
    – the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
    – to care for the employee’s spouse, child, or parent who has a serious health condition;
    – a serious health condition that makes the employee unable to perform the essential functions of his or her job;
    – any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”
Overview: FMLA Leave

• Under the FMLA, eligible employees are entitled to:
  • 26 weeks of leave in a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin (military caregiver leave).
Overview: ADA

- The ADA applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

- A qualified employee may be entitled to leave as a reasonable accommodation under the ADA if he/she has a disability that substantially limits a major life activity, and the employee has a record of impairment or is regarded as having an impairment.
Overview: ADA

• An employer is required to provide a reasonable accommodation of the known disability of a qualified employee if doing so would not impose an “undue hardship” on the operation of the employer’s business.
Reinstatement Under the FMLA - Generally

• Upon returning from FMLA leave, an employee must be restored to his or her original job, or to an “equivalent” job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.
Reinstatement Under the FMLA - Exceptions

- "Key" Employee Exception:
  - Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees.
Reinstatement Under the FMLA - Exceptions

• Employers need not continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff.

• Employees who give unequivocal notice that they do not intend to return to work lose FMLA reinstatement entitlement.
Reinstatement Under the FMLA - Exceptions

- Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the 12-month period no longer have FMLA restoration protection. (Although, as explained later, they may have additional rights under the ADA.)

- Under certain circumstances, employers who advise employees experiencing a serious health condition that they require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is provided.
Leave and Reinstatement Under the ADA

- Leave may be an appropriate accommodation under the ADA when an employee needs a finite period of time to recover from the onset of a disability or a flare-up of a disabling condition, receive treatment for the disability, adjust to disability restrictions or learn to use an assistive device/technology.
Leave and Reinstatement Under the ADA

• How long is too long?

• One-size-fits-all policies are discouraged. Rather, individualized circumstances should be considered when determining what is “reasonable” in a given situation.

• In most circumstances, a leave period of 12 weeks or less is likely reasonable, since that period is job protected under FMLA.

  • However, compliance with the FMLA will not necessarily satisfy employers’ obligations under the ADA.
Leave and Reinstatement
Under the ADA

- Leave should generally be granted to an employee as a reasonable accommodation unless:
  - (1) Such leave poses an undue hardship to the employer; or
  - (2) Further leave is not reasonably likely to allow the employee to return to work – with or without reasonable accommodation (which could include reassignment).
Leave and Reinstatement Under the ADA

- Whether a temporary leave of absence is reasonable will depend on economic and business hardship on the employer.
- The length of time of the requested leave is a relevant factor too.
- Generally, longer periods of leave will be considered reasonable for larger employers and where the position is fungible.
Leave and Reinstatement
Under the ADA

• Longer periods of leave may be reasonable if an employee can be replaced on a temporary basis without excessive cost or investment in training a temporary employee.

• Similar to the FMLA reinstatement carve-out for key employees, reasonableness of leave periods for executive or key managerial employees whose position cannot be vacant for long or who cannot be replaced on a temporary basis will likely be shorter.
Leave and Reinstatement Under the ADA

- Another factor in considering the reasonableness of granting leave is whether an employee can perform the essential functions of the job within a reasonable period of time.
- Also relevant is whether the employer has previously granted such a request.
Case Study: EEOC v. Sears Roebuck, No. 04-C-7282 (N.D. Ill. Feb. 4, 2010)

• Employers should be wary of implementing hard-line cutoffs for leave periods. In the Sears Roebuck case, which settled for $6.2 million, Sears had a policy wherein employees who were on workers’ compensation leave for 12 months were terminated at the end of the period without consideration of the employee’s condition or potential accommodations. The EEOC argued that this inflexible policy did not satisfy the independent analysis and interactive process called for by the ADA.
FMLA Recertification

• Under the FMLA, an employer may request medical certification at the beginning of leave. Afterwards, the employer may periodically request recertification.

• The basic period for recertification set by the regulations is 30 days; however, depending on the circumstances, recertification may be appropriate more or less often.
Medical Inquiries Under the ADA

• The general standard governing when employers may make disability-related inquiries is that such inquiries must be job related and consistent with business necessity.

• Inquiries/medical examinations may be permitted if they follow up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position.
Managing Indefinite Leave

• Generally, providing employees with leave is not reasonable when the employee is requesting an indefinite leave.

• A key indicia of an indefinite leave is a request for leave that continues to be extended. See *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008) (leave request became indefinite – an unreasonable – after third request for additional leave, where each request further postponed her return-to-work date).
Managing Indefinite Leave

• Leave may also be effectively indefinite if the employee requests a very long period of time or has not provided the employer with an end-date for the leave.
Example

An employee needs 8 months of leave for treatment and recuperation related to a disability. The employer grants the request, but after 4 months determines it can no longer hold the position open without incurring undue hardship. The employer must see if there is a vacant, equivalent position to which the employee can be reassigned for the remaining 4 months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant, lower level position is also unavailable.
Fitness for Duty Certification

- FMLA: For employees returning from FMLA leave, an employer may seek fitness for duty certification only with regard to the particular health condition that caused the employee’s need for FMLA leave.
- ADA: Any return to work policy must be job-related and consistent with business necessity.
Termination During or After Leave

• Employees have no greater right to reinstatement or other benefits/conditions of employment than if they had been continuously employed during the FMLA- or ADA-leave period. (For example, employer discovers performance issues/misconduct during the employee’s FMLA leave.)