Navigating Employee Leave Issues Under the FMLA, ADA, and State Law
FMLA Basics
That Come Into Play
Eligible employees
29 CFR sec. 825.110

- Worked 12 months for employers
- 1,250 hours of work during preceding 12 months
- At least 50 employees work within 75 miles of the FMLA recipient’s worksite
FMLA’s 12-month leave year
29 CFR sec. 825.200

- 12 weeks of leave during the FMLA "Leave Year"
  - Calendar year
  - Fixed 12 months
  - Most common: Rolling 12-month
Notice by employee to employer of need for FMLA leave
29 CFR secs. 825.302 and .303

- May be oral or in writing (texts, voicemails, etc.)
  - Foreseeable leave - 30 days or as soon as practicable
  - Unforeseeable leave - as soon as possible
Planned medical treatment (for employee or employee’s spouse, child or parent)

- Schedule treatment so as to minimize disruption to operations
- Comply with employer’s usual and customary policies to report an absence
  - E.g.: required to call in to designated number or person
  - Key: consistent application of call-in requirement
  - Good faith effort by employee to comply?
    - Surrogate gave notice
    - Incapacity precluded giving notice
Medical certification process
29 CFR secs. 825.305, .306, .307, .308 and .313

- Completed by health care professional confirming the need for FMLA need
  - For the employee’s serious health condition
  - For the serious health condition of an employee’s spouse, child or parent (caregiver)
  - For the serious health condition of a covered service member (caregiver)

- Use the Certification forms provided by DOL
Medical certification process (cont’d)

- Employer must notify employee in writing of need for medical certification
- Employee must provide completed Certification within 15 days
- If Certification is incomplete or insufficient, give employee written notice of the Certification's insufficiency. [7 days to supplement or cure the deficiencies]
Concurrent use of paid leave
29 CFR sec. 825.207

- Require an employee to use their accrued paid leave concurrently when they are using FMLA leave
- Deters FMLA leave abuse
- Avoids “stacking” paid leave in addition to FMLA leave
- FMLA policy must spell-out the requirements of concurrent leave
- Must provide notice to employees of concurrent leave
Intermittent and reduced schedule
FMLA leave
29 CFR secs. 825.202 and .203

- Available for:
  - Employee’s serious health condition
  - Care for a spouse, child or parent with a serious health condition
  - Care for a service member with a serious health condition

- Not available for the birth, adoption or placement of a new child \textbf{UNLESS} approved by employer
What is intermittent or reduced schedule leave?

- Taken in separate blocks of time due to the same health condition
- A change in an employee's work schedule
- Chronic recurring health conditions
- Ongoing treatment
- Reduced hours during recuperation
Scheduling intermittent or reduced schedule leave; temporary reassignment
29 CFR secs. 825.203 and .204

- Planned treatment (employee or family member's) – make reasonable effort to schedule treatment so it does not unduly disrupt

- Temporary reassignment to an alternate position
  - Intermittent leave is foreseeable
  - Temporary situation
  - Reassignment position
    - Equivalent pay and benefits
    - Can include pro-rata reduction in pay
    - Reinstate to original position when need for intermittent leave ends
Increments of intermittent leave

- The shortest period of time used to record other forms of leave
- Never in excess of 1 hour
- Employer may not encourage or require an employee to take off a longer block of time than what is medically necessary
- Employee working at home due to health condition = not counted as FMLA absence
Addressing suspected FMLA abuse

- Entitled to investigate “honest suspicion” of FMLA abuse

  - Sources
    - Supervisor’s observation
    - Co-employee reports
    - Third party tips

  - Other sources of an “honest suspicion”
    - Absence patterns
    - Absences coinciding with non-work events
    - Absences different from medical certification
    - Sightings or reports, including social media
Best practices when investigating potential FMLA abuse

- Train supervisors
- Review medical certification
- Absence patterns – look over a long period of time
- Suspicion of FMLA abuse was reasonable
- Consider using qualified professional for surveillance
- Confront the employee
  - Explain what you have discovered
  - Give employee an opportunity to explain
Leave as an Accommodation Under the Americans with Disabilities Act
ADA Coverage

- “Qualified individuals with disabilities”
- Prohibits discrimination on the basis of a past, present or perceived “disability”
- Requires accommodation of disabilities if reasonable to do so and no undue hardship
- Applies to job-related and non-job-related
  - Physical and mental impairments
What triggers the interactive process?

- When an employer has notice or becomes aware of an employee’s disability
- Employee requests accommodation or need for an adaptation to work
- Employer receives medical information
- Employee confides in a supervisor
- Workplace observation of employee’s difficulty performing job
Accommodation Process

- Address permanent and temporary work restrictions
  - “Interactive process”

- Leave of absence
  - EEOC says “100% healed policies” violate ADA
  - Definitive period of time
  - Not open-ended leave
  - Maximum leave policies violate ADA
Interactive Process

- This is mandatory. Employers must participate in the interactive process in good faith.

- It is “interactive” – flexible and informal
  
  - Interactive discussion of potential accommodation is handled on case-by-case basis depending upon the disability, job and work environment. Mandatory, standard forms are discouraged by the EEOC.  
  
  *EEOC Discussion Letter (4/22/14).*
Interactive Process

- Information gathering process – can include requiring medical information or documentation

- Employee’s obligation to obtain the necessary medical documentation and provide it to the employer.
  - No specific guidelines exist for ADA requests for health information.
  - May rely upon medical information obtained during a Workers’ Comp. Claim
  - May use FMLA medical certification information in addressing ADA accommodation inquiry.
ADA and requests for medical information

- When job-related and consistent with business necessity.
- Limited in scope to information necessary under the circumstances.
- Determining an individual’s functional capacity. Ask about the nature, severity, duration, and limitations. Provide a job description of the job’s essential functions.
- A deterioration of job performance.
- Considering the necessity and nature of potential accommodations.
“Interactive process” how-to’s

- Must occur expeditiously
- Face-to-face, with two employer representatives participating
- Address only the medical condition at issue - known, observed, disclosed
- Address only the behavior, symptoms at issue - known observed, disclosed
- Discuss the nature, extent, severity and duration of any impairment, in sufficient detail
- Solicit multiple accommodation suggestions from the disabled individual
- Information gathered during the interactive process is confidential
Rounding out the "Interactive Process"

- Don’t decide the same day as your discussion
- Possibility: an accommodation on a trial or short-term basis
  - The interactive process requires an “ongoing, informal communicative process”
Documenting the interactive process and decision-making process

- How triggered
- When, where, who
- What was discussed with the employee
- What medical information was provided
- What accommodations were considered, what accommodations were rejected, and what accommodations were offered
Americans with Disabilities Act and FMLA leave

- ADA: exhaustion of FMLA does not mean automatic termination of employment
- Additional, unpaid leave considered as a potential accommodation
  - Applies to intermittent leave
  - Engage in the interactive process
WORKERS’ COMPENSATION
Workers’ Compensation

- On-the-job injury or illness
- Temporary total disability (TTD)
  - Replacement of lost wages
  - 70% of injured employee’s average weekly wage
  - Maximum TTD is 104 weeks
  - Unless consequential injury and additional time needed to reach MMI – 52 additional weeks
- Run TTD time concurrently with FMLA leave
FMLA, ADA and WORKERS’ COMPENSATION OVERLAP
REGULATIONS AND ENFORCEMENT

- FMLA – U.S. Department of Labor, Wage & Hour Division
- ADA – Equal Employment Opportunity Commission
- Workers’ Compensation – State agency and/or court system.
TRIGGERING HEALTH CONDITIONS

- **FMLA** – a “serious health condition”
  - Incapacitated and receipt of treatment.
  - Chronic, recurring health conditions.
  - Absences to receive treatment.

- **ADA** – a “disability” that substantially limits one or more major life activities.
  - Actual disability
  - Record of disability
  - Regarded as disabled
TRIGGERING HEALTH CONDITIONS

- Workers’ Compensation – health condition arising out of the course of employment
  √ - Physical or mental conditions
  √ - ADA’s expanded definition of “disability” means more overlap.
EMPLOYEE RIGHTS PROVIDED BY THESE LAWS

- **FMLA**
  - 12 weeks of unpaid leave and reinstatement
  - Continuation of health benefits
  - No discrimination or retaliation

- **ADA**
  - No discrimination or retaliation
  - Reasonable accommodation (no undue hardship)
EMPLOYEE RIGHTS PROVIDED BY THESE LAWS

- Workers’ Compensation
  - Medical treatment and rehabilitation
  - Disability benefits
  - No discrimination or retaliation
THE OVERLAP

- Workers’ Compensation health condition + missed work = FMLA leave
- ADA disability + missed work = FMLA leave
- Depends
  - Workers’ Compensation = ADA Disability?
  - FMLA Leave = ADA disability?
WHEN DO FMLA, ADA AND WORKERS’ COMPENSATION OVERLAP?

- Request or need leave for a health condition
- Difficulty performing their job
- Alternative work or “light duty”
- Need for medical information
- Release from care or return to work
REQUEST OR NEED FOR LEAVE

- How does the need for leave arise?
  - Specific request by an employee
  - Employer has “reason to know” employee may need health-related leave.

- Once employer has “reason to know,” it is the employer’s obligation to investigate.
REQUEST OR NEED FOR LEAVE

Employee tells supervisor “it looks like it was very possible he was going to have to have surgery.”

Notice to employer/supervisor “must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.” Here, not sufficient notice of need for FMLA leave.
REQUEST OR NEED FOR LEAVE

Employee informed his supervisor he was having knee surgery and requested unpaid leave of six weeks. Employee is not eligible for FMLA leave. He was fired and told he could return to work after the surgery and recuperation.

Leave of absence for needed treatment (non-FMLA) may be reasonable accommodation. Employer should have discussed and considered possible leave.
REQUEST OR NEED FOR ACCOMMODATION

- Once the employer has “reason to know” it is the employer’s obligation to initiate the interactive process.
  - Considering light or modified duty – temporary (healing/recuperating) or permanent.
  - Leave – including additional time beyond FMLA 12 weeks.
REQUEST OR NEED FOR ACCOMMODATION

- FMLA and light/modified duty
  - If eligible for FMLA leave, employee not required to accept light/modified duty.
  - If FMLA eligible employee chooses light/modified duty rather than leave, light/modified duty does not count against their 12 weeks FMLA entitlement.
  - BUT: rejection of light/modified duty offer may disqualify Workers’ Compensation claimant from receiving temporary total disability benefits.
RETURNING TO WORK AFTER AN ABSENCE

- FMLA – reinstatement to same or equivalent position if
  - Has not exhausted FMLA 12 weeks
  - Capable of performing the job

- ADA- return to work if capable of performing the essential functions of the job with or without reasonable accommodations.

- Determining the return-to-work date is part of the interactive accommodation process. Employer should communicate with employee about the necessity and timing of return-to-work
RETURNING TO WORK AFTER AN ABSENCE

- **Best Practices**
  - Policies explaining the necessity of a fitness-for-duty exam when returning to work.
  - FMLA – Notice and Designation reminds employees of the requirement.
  - No “100% Release” required.
  - Apply fitness-for-duty exam requirements consistently.
  - If unable to return to former position, consider accommodation.
THE OVERLAP CHECKLIST

- A health condition covered by Workers’ Compensation?
- Does FMLA apply?
- Is this employee eligible for FMLA leave?
- Does the employee suffer from a “serious health condition” under the FMLA?
- Has the employee exhausted 12 weeks of FMLA leave?
- Is this condition a “disability” under the ADA?
Scenario - Initial

- Employee has on-the-job back injury
  - Dr.’s report - unable to perform essential functions of job – off work

- Eligible for -
  - W.C. - TTD up to MMI, or 104 weeks
  - FMLA - up to 12 weeks of job protection
  - ADA - leave of absence accommodation
Employer Action – Initial On-The-Job Injury

- Workers’ comp – TTD
  - W.C. Commission/insurance approval

- FMLA leave
  - Employer must provide certification forms
  - Employer may designate

- ADA leave accommodation
  - No action
Scenario - 12 Weeks Leave

- 12 weeks of leave
  - FMLA leave expires
  - Advise employee FMLA leave exhausted
  - Check status of workers’ comp
  - Still on TTD/Not at MMI - TTD continues
  - ADA - no action
Scenario – MMI at 16 Weeks

- Treating doctor provides work restrictions

- Employer –
  - End TTD – by agreement or via WCC
    - Workers’ comp leave rights end
  - Assess ADA requirements
    - Ability to perform essential job duties
    - Reasonable accommodation/interactive process
    - Employee’s interest
    - Additional unpaid LOA may be reasonable accommodation
ADA Options

- **Fitness for Duty Evaluation**
  - To determine ability to perform job duties
  - Functional capacity examination - option

- **Additional leave of absence – unpaid**
  - Reasonably definitive period of time
  - Not open ended
TAKEAWAYS

- Don’t deal with FMLA, ADA and Workers’ Comp situations in isolation.
- It’s all about having meaningful communication with employees about health issues – don’t avoid.
- Assume ultimately it will be the employer’s obligation – not the employee’s – to be proactive when investigating and determining health issues.
PAID SICK LEAVE
PAID SICK LEAVE

- Oklahoma has no paid sick leave requirements.
- Arizona, California, Connecticut, District of Columbia, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington all have paid sick leave laws.
- Austin, Chicago, Cook County, IL, Dallas, Duluth, Los Angeles, Minneapolis, New York City, Oakland, Philadelphia, Pittsburg, San Antonio, San Diego, San Francisco, Santa Monica, Seattle, Tacoma, Westchester County, NY all have paid sick leave laws.
Questions?

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