

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

MANAGING THE ABSENT EMPLOYEE: ADVANCED LEAVE ISSUES FOR EMPLOYERS

Brent E. Siler

Baker, Donelson, Bearman Caldwell & Berkowitz, P.C.

165 Madison Avenue, Suite 2000

Memphis, Tennessee 38103

bsiler@bakerdonelson.com

901-577-8164

EXPAND YOUR EXPECTATIONSSM

Why Are We Here?

Roadmap:

1. To review the major laws applicable to employee leave issues, such as the FMLA, ADAAA, COBRA, USERRA, and state leave and workers compensation laws.
2. To review frequent trouble areas such as intermittent leave, leave as a reasonable accommodation, etc., and to discuss areas where these laws overlap, so that you are in a position to effectively defend your company.
3. To provide solutions and best practices to help you stay in compliance.



What Laws Are We Going to Discuss Today?

- Various Employee Leave Issues Under
 - The Family Medical Leave Act
 - The Americans with Disabilities Act Amendments Act
 - USERRA
 - COBRA
 - State law, including workers compensation

What is the FMLA?

A federal law that:

- (1) allows eligible employees,
- (2) of a covered employer,
- (3) to take job-protected, unpaid leave,
- (4) for up to a total of 12 work weeks in any 12 months.



Types of FMLA 12 Week, Job Protected Leave

- Leave for the birth of a son or daughter, and to care for the newborn child; or
- Leave for placement with the employee of a son or daughter for adoption or foster care; or
- Leave to care for the employee's spouse, son, daughter, or parent with a "serious health condition;" or
- Leave needed because of a serious health condition that makes the employee unable to perform the functions of his or her job.



Definition of “Serious Health Condition”

A “serious health condition” entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care; or
- Continuing treatment by a health care provider, which requires absence for 3 full, consecutive calendar days of incapacity and a regimen of continuing treatment.

Problem Area #1: Intermittent Leave

- Intermittent leave is FMLA leave that does not run concurrently or is for a period of less than an entire workday. Leave can be for a few days or a few hours.
- An employee may take intermittent or reduced schedule leave if he or a family member is incapacitated because of a serious health condition, because he/she is a military caregiver, or for a qualifying exigency. The certification must establish that intermittent leave is medically necessary.
- This is quite possibly the most irritating employment law in the entire world.
- Why? Because once an employee gets a physician to certify that intermittent leave is medically necessary, the employee can take time off essentially whenever they choose without much notice and without your approval.



Calculation of Intermittent Leave

- Only the time taken as intermittent leave can actually be charged against the leave entitlement.
- The number of hours against which leave is taken depends on the employee's typical work schedule. If an employee's schedule varies week to week, a weekly average of hours scheduled over the 12 months prior to leave should be used for calculating the employee's typical work week.
- An employer may limit leave increments to the shortest period of time the employer's payroll system uses to account for other forms of leave, provided that it is not greater than one hour.



Intermittent Leave: How do I stop its Abuse?

- If you have not done so already, make sure your policy requires notice to be in writing and to Human Resources, absent unusual circumstances, and that they require the substitution of paid leave.
- Require certifications initially, every leave year, every time the basis for leave changes, and every time there is a request for an extension of leave.
- Require recertification if the frequency and duration of leave is inconsistent with the certification, if there is a pattern of suspicious absences, or if circumstances cast doubt on the continuing validity of the certification.
- Require that employees make a reasonable effort to schedule treatment so that it does not unduly disrupt operations.
- Consider a temporary transfer to a position with equivalent pay and benefits.

Intermittent Leave: Scenario

- Bob has received certification to take intermittent leave for his diverticulitis. As his manager, you feel that he has been abusing his leave and using the certification to take off whenever he pleases. The Friday before the Super Bowl, he leaves you a voicemail telling you that he does not feel well and will need to leave at lunch and does not know if he will be back on Monday. Your policy requires written notice to Human Resources. What can you do and why?
- Same employee requests intermittent leave after he has exhausted his leave requirement. When you inform him that his leave entitlement has been exhausted, he tells you that he needs leave as a reasonable accommodation. What can you do and why?

Problem #2: Employee Notice to the Employer

- An employee does not have to assert rights under the FMLA. The employee merely must state that leave is needed for a potentially qualifying reason.
- Notice of unforeseeable leave must be given as soon as practicable under the circumstances.
- For foreseeable leave, the employee must give 30 days notice, unless the employee provides a reasonable excuse for the delay.



Problem #2: Employee Notice to the Employer

- The employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. A written notice requirement is permissible.
- If the employee fails to comply with the employer's usual and customary leave requirements, leave may be denied.
- If an employee requests additional leave based on a previous certification, the employee must specifically reference the certification or the condition. This may be some help with intermittent leave.
- To deny leave based on the employee's failure to provide notice, it must be clear that the employee had actual notice of the FMLA's notice requirements. Proof of notice may be satisfied through compliance with the posting requirements in the FMLA regulations.

“Constructive Notice” Issues

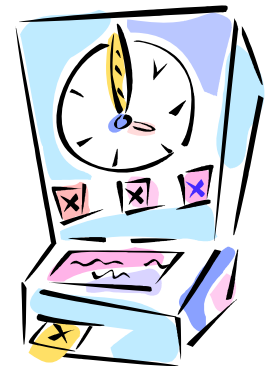
- Typically, employees give express notice of an FMLA leave election, but such explicit notice is not necessary if the employer has constructive notice (i.e. reason to believe leave may be warranted).
- Under the FMLA, employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to FMLA leave - **even if the employee is unaware that he or she suffers from a specific qualifying serious health condition or that he or she is entitled to leave.**
- Employers have to look for inconsistent behavior that could be attributable to a serious health condition, and when appropriate, have to inquire delicately if this inconsistent behavior is impacting performance.

Problem #2: Scenarios

- Bob has been certified for intermittent leave. He tells you that he needs off because he feels “sick.” Has he given you notice of the need for intermittent leave?
- Barry is a model employee. Recently, however, his work performance has been in decline. He was discovered sleeping on the job, missed a meeting regarding his job performance, and has begun to exhibit paranoia towards his co-workers. You want to fire him. Has Barry given you notice that he needs leave for a potentially FMLA-qualifying reason? Can you fire him? Would your answer change if you knew he had recently been treated for depression?

Problem #3: No-fault Attendance Policies

- Under a typical policy, employees accumulate points for every absence. Once an employee receives a certain number of points, the employee is subject to discipline.
- It is a violation of the FMLA to count an FMLA-protected absence against an employee under a no-fault policy.
- No-fault policies are particularly difficult because it is not up to the employee to invoke FMLA protection; the burden is on the employer to know if the FMLA applies before applying the no-fault policy.
- The only solutions are not to use this type of policy or to assign the task of determining whether to assign a point to an employee that is well-trained in the FMLA.



The Americans With Disabilities Act

- Enacted in 1990 and significantly amended in 2008.
- Prohibited employment discrimination against a qualified individual with a disability and requires employer to give a disabled individual a reasonable accommodation so that the disabled individual can perform the essential functions of his or her job.
- What does this have to do with employee leave? Leave may be a reasonable accommodation. Even leave in excess of what is required under the FMLA.

The ADAAA: Leave as a Reasonable Accommodation

- If an employee has a disability, you may be required to provide leave, even if the employee has exhausted FMLA leave.
- Is additional leave beyond the FMLA requirements always required by the ADAAA? No.
- Remember that indefinite leave is not a reasonable accommodation. The employee does not have to give a set return date, but must at least be able to give an estimate. The employee may also revise the return date.

How do you Know if Leave is a Reasonable Accommodation?

- Is attendance a required function of the employee's job? Have you given leave to other employees?
- Is the job time-sensitive or are there other factors that make the leave an undue hardship on you?
- Will leave ultimately enable the employee to perform the essential functions of his or her job?
- Does the employee's doctor certify that leave of a certain duration will get the employee back to work?



What do I do to Determine if Leave is a Reasonable Accommodation Under the ADAAA?

- First, determine if the employee has made a request for a reasonable accommodation. Has the employee expressed a desire to return to work? Has the employee stated that additional leave will allow him/her to return?
- Second, conduct the interactive process with the employee. The ADAAA requires the employer to sit down with the employee and to discuss the possible accommodations that would allow the employee to perform the essential functions of his or her job. Are there any options other than leave? You must document this process including any accommodations proposed by the employee and the employer.
- Third, require the employee's physician to provide you with responsive and complete verification for the need for leave. Does the physician believe that leave will allow the employee to return?

What do I do to Determine if Leave is a Reasonable Accommodation Under the ADAAA? (cont'd)

- Fourth, choose a reasonable accommodation and communicate it to the employee. Remember that the employee is entitled to a reasonable accommodation, not any reasonable accommodation he/she chooses. Does the employee's physician believe that your proposed accommodation will enable the employee to perform the job? Have you documented why you believe the accommodation is reasonable or why one is preferable to the other?
- Fifth, if you are considering denying the request for an accommodation, you must first analyze whether the accommodation would cause an undue hardship. Ask how the company will be harmed if the accommodation is not granted. What concrete costs will there be? Are the costs hypothetical and uncertain or likely? It is always advisable to discuss the decision to deny an accommodation with counsel prior to communicating it with the employee.

ADAAA: Scenarios

- Bob has diverticulitis and has exhausted leave under the FMLA. He calls you and informs you that although he cannot return to work right now, he believes that he can return to work if he has another six weeks off of work. You had the paperwork on your desk to terminate Bob when he called. Your FMLA policy requires written requests for leave to be submitted to Human Resources (which you are not). Can you deny his request based on his failure to make a written request for leave or because he failed to make his request to Human Resources?
- Can you terminate him?
- Can you request that he undergo an independent medical evaluation? Could you have done the same thing before approving his FMLA leave?
- Same scenario as above, except that Bob requests intermittent leave.

The Uniformed Services Employment and Reemployment Rights Act

- USERRA requires employers to grant unpaid leave for service in the military and to reinstate employees to their previous positions after completion of service.
- USERRA applies regardless of the employer's size and covers employees serving in the National Guard.
- If the employee is on leave 90 days or less, the employer must offer the employer the same job the employee would have if he/she had not gone on leave.
- If the leave is more than 90 days, the employer may substitute another job with equivalent pay, status, and seniority.
- Employees may choose but cannot be required to use paid vacation while on leave.
- USERRA prohibits discrimination based on military service.

The Uniformed Services Employment and Reemployment Rights Act

- “Leave” may include active duty, training for active duty, National Guard duty, fitness for duty exams, or funeral honors duty.
- Employees on military leave are entitled to the same benefits as employees on other types of leave.
- Seniority continues to accrue while employees are on military leave. Employees must receive any retirement contributions, raises, promotions, etc. that they would have received based on seniority.
- Employees must give advance notice (orally or in writing) of the need for leave and must notify the employer of their desire to return to work within a designated timeframe. The time limit depends on the length of leave.
- An employee who does not report back to work after completion of service does not necessarily lose reemployment rights but is subject to the company’s discipline policies for absences.
- In some cases the amount of leave allowed can be up to five years.

Problem #1: The Escalator Principle

- Bob worked as an HR Generalist I. Most HR Generalists become an HR Generalist II after three years of employment, assuming they get good review and do good work. Bob gets called to active duty after 2 years and 6 months as an HR Generalist I. When he returns, he has been with your company for 3 years and 1 month.
- What position is he entitled to when he returns? Would your answer change if Bob was not qualified to be an HR Generalist II because he needed additional training?

The Consolidated Omnibus Budget Reconciliation Act

- “COBRA” provides workers and their families who lose health benefits the right to continuation coverage of health benefits at the group rate.
- COBRA is available to “qualified beneficiaries,” which is defined as an individual covered by the plan one day before a qualifying event. This may include employees, spouses, and dependent children, and in some cases, retired employees and their spouses and dependent children.
- COBRA qualifying events may include a reduction in hours, voluntary or involuntary loss of employment for reasons other than gross misconduct.
- Remember that continuation of benefits during FMLA is not COBRA and lapse in health plan coverage during FMLA leave is irrelevant in determining whether a qualifying event under COBRA has occurred.
- The right to COBRA cannot be conditioned on the employee’s reimbursement for contributions made by the employer to maintain group coverage during FMLA leave.

The Tennessee Parental Leave Law

- Found in Tenn. Code Ann. section 4-21-408, this law applies to employees who work for employers with 100 or more employees, and who have been employed for 12 consecutive months as a full time employee.
- The Act allows the employee to be absent from employment for up to four months for the purpose of adoption, pregnancy, childbirth and nursing of an infant.
- Leave runs concurrently with the FMLA and is unpaid.
- If the employee gives at least three months of advanced notice and of their intention to return to work will be restored to their previous position with the same status, pay, and seniority, although lack of notice may not preclude the right to leave.
- There is an exception for unique positions that cannot be filled.

What About Worker's Compensation Claims?

- Workers' compensation laws protect people who are injured on the job. They are designed to ensure that employees who are injured or disabled on the job are provided with fixed monetary awards, eliminating the need for litigation.
 - What is covered? As long as the injury is job-related, it's covered. For example, employees are covered if they are injured while traveling on business, doing a work-related errand, or attending a business-related social function.



Problem #1: Light Duty/Return to Work

- Bob works on the production line and broke his hand while working. His doctor believes he can return to work safely but has not released him to full duty because there are some marginal job functions he cannot yet perform.
- Can you refuse to return Bob to work because you know that the court found him to have a permanent disability?
- Do you have to create a light duty position for him to get him back to work?
- Would your answer change if Bob was injured away from work and you had light duty positions open and available for on the job injuries?

Applying the ADA, FMLA, and Workers Comp

Bob works in your warehouse unloading crates and boxes. Lifting heavy loads is an essential function of his job. He hurts his back lifting a box at work and has to take off 6 weeks for surgery. After 6 weeks he wants to come back.

- Can you require a fitness for duty?
- What if he fails - - what is your obligation?

Applying the ADA, FMLA, and Workers Comp

Same Bob as the last slide. Bob wants to return but his doctor has only cleared him for light duty but has not yet given him a full release. You have a light duty position, which Bob refuses.

- Can you fire him?
- What is Bob entitled to?
- What if Bob wants a light duty position and one is not available?
- Do you have any obligation under the ADA?

Military Leave Under the ADA and USERRA

Bob works as a Production Technician. He has been a Production Technician for 2½ years. After 3 years, Bob will be moved to a Production Supervisor position. Both positions require (essential function) Bob to be able to walk around the plant. In some cases, up to 2 miles per day.

Bob is called up to active duty in Afghanistan. His job is protected by USERRA. While there, he is injured by a roadside bomb and loses the use of one leg.

- What position is Bob entitled to on return?
- What if he cannot perform the essential functions of the Production Supervisor position?
- What if Bob is not qualified for any other position?

Other Types of Leave

- Tennessee requires that employees be given time off for jury service. Leave is paid, although the employer may deduct from pay any amount the employee receives from jury service. You are also required to allow an employee time off if he/she is subpoenaed to testify as a witness in a court case.
- Employees cannot be terminated for being called to serve on a jury.
- Title VII requires employers to make a good faith effort to accommodate an employee's religious practices, which may include leave for religious observances or holidays.

Best Practices for Managing Leave Issues: Intermittent Leave

- FMLA policy must require notice to be in writing and to Human Resources, absent unusual circumstances.
- Know your rights on certification and recertification
- Require the employee to make reasonable efforts to schedule treatment so that it does not unduly disrupt operations.
- Consider temporary transfer of the employee to another position with equivalent pay and benefits and that better accommodates the employee's unpredictable leave.
- Provide the employee's physician with absence information if a suspicious pattern develops.
- Think in terms of cost versus benefit before making discipline decisions. Are you really sure that the employee is abusing his/her leave? Is it worth it to have to litigate?

Best Practices for Managing Leave Issues: ADAAA

- Don't forget that leave may be required but that you do have some leeway.
- Conduct an interactive process with the employee. Make sure you have documented any requested accommodations by the employee and any the employer proposes.
- Make sure you get complete and accurate information from the physician. Does he/she actually answer your questions? Do you have enough medical information to make a decision?
- Document why you have chosen one accommodation over the other and why you believe your choice is reasonable. Give the employee the chance to say if he/she believes the chosen accommodation is unreasonable and consider their opinion.
- If you are denying a request for accommodation, you must analyze whether denying the accommodation will truly cause an undue hardship and not a hypothetical and speculative problem. Always consult counsel first.

QUESTIONS, COMMENTS, DISCUSSION...

