

# TOP TEN EMPLOYER MISTAKES IN EMPLOYEE LEAVE ISSUES

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## **No. 1 - Forgetting that the ADAAA may require leave beyond the leave required by the FMLA**

- Leave may be a form of reasonable accommodation and may be required even if the employee has exhausted his or her FMLA leave.
- Permitting use of accrued paid leave is a form of reasonable accommodation, but the employer does not have to provide paid leave beyond what is given to similarly situated employees. Unpaid leave may also be a reasonable accommodation.
- Employers cannot penalize an employee for leave taken as a reasonable accommodation. the fact that your policy says X, Y, or Z may not be enough to prove you could not have accommodated the employee.
- The EEOC has said “The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are [sic] over.”

- Frequent issue: No-fault attendance policies. An employer cannot assess a point for leave taken as a reasonable accommodation. Modifying a no-fault policy may be a reasonable accommodation unless there is another effective accommodation or there is an undue hardship.
- REMEMBER THE RULES:
  - Employers have a duty to provide a reasonable accommodation unless undue hardship. The duty may arise because of a request for an accommodation and knowledge of the disability
  - If an employee has requested a reasonable accommodation, you must engage in the interactive process. The employee is entitled to a reasonable accommodation, not the reasonable accommodation he or she requests.
  - Undue hardship requires significant difficulty or expense considering the nature and cost of the accommodation, the employer's finances, and the impact of the accommodation.

- Indefinite leave is not required.
  - Slightly different analysis for short increments of leave. Attendance is generally an essential function.
- Determination of whether an employee must be given leave comes down to two issues: Is the requested leave a reasonable accommodation? Does it impose an undue hardship? The better of these two issues for employers is reasonableness. Get verification from the employee's physician that the requested leave will enable the employee to perform the essential functions of the job and will give the employee clear prospects for returning to work.
- It is much easier to prove that you acted reasonably if you have a well-documented interactive process.

## **No. 2 - Failing to correctly administer FMLA requests.**

- Employees must provide 30 days of notice for foreseeable leave and must provide notice as soon as practicable if unforeseeable. This typically must be by the next business day. Employers can request an explanation if this timeline is not met. The employee must also comply with the employer's usual and customary notice requirements.
- Notice of the need for leave does not have to mention the FMLA but must give sufficient information for the employer to be on notice that a potentially-qualifying reason exists.
- Upon notice, the employer must notify the employee of the employee's eligibility (eligibility notice-WH-381) within five business days.
- Certification should be given with eligibility notice (or within five business days) and must be returned within fifteen calendar days.

- Once the employer has enough information to determine if the requested leave is FMLA-qualifying, the designation notice (WH-382) should be given.
- COMMON PROBLEM: What to do when employees do not comply with these requirements?

### **No. 3 - Misunderstanding the importance of the interactive process.**

- ADAAA focus has changed from whether an employee is disabled to the reasonableness of the accommodations given. Leave may be a reasonable accommodation. Defending a decision to deny leave is done based on what happens in the interactive process.
- When does the duty arise? When an employee requests an accommodation. REMEMBER: A request does not have to be written and it can be based on information from others. The employee does not have to mention the ADAAA or any “magic words.”
- What is required? Employee and employer meet to discuss the problem/how a disability is prompting the need for accommodation. Both parties should suggest accommodations.

TO DO LIST:

1. Meet with the employee to confirm need for reasonable accommodation.
2. Confirm that employee has a disability if necessary. **REMEMBER:** You have a right to have medical confirmation of the disability and the need for accommodation.
3. Request possible accommodations from employee. It is critical not only to seek accommodations from the employee, but also to document the employee's suggestions.

4. Consider options and determine which accommodation you will provide. The employee is entitled to an effective accommodation, not necessarily the accommodation he or she wants. Make sure that the accommodation you select is effective. This may require follow up with the employee's physician. Consider undue hardship before refusing a leave request.
  
5. Document each step of the process.

## **No. 4 - Failing to appropriately manage intermittent leave.**

- Intermittent leave is the most common complaint about the FMLA because it is easy for employees to abuse.
- What can you do? Follow the rules:
  1. Intermittent leave is only allowed when “medically necessary” for employees with a serious health condition, a family member with a serious health condition, for military caregiver or qualifying exigency leave. For other types of FMLA leave, intermittent leave is in the employer’s discretion.
  2. Only the actual number of hours taken may be charged as FMLA leave. The number of hours taken depends on the employee’s normal work schedule. If the employee’s hours vary, use a weekly average for the prior 12 months. An employee may limit leave increments to the shortest period of time the employer’s payroll system uses to account for other forms of leave, but not greater than one hour.

3. Employees can be required to follow employer's usual and customary notice procedures for requesting leave, absent unusual circumstances or emergency medical treatment. When an employee requests leave for a condition that has already been certified, the employee should specifically mention the FMLA-qualifying reason and cannot just call in "sick."
4. If intermittent leave is required for a planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to unduly interrupt operations.
5. Recertification can be requested after the duration in the certification or every 30 days in connection with an absence. Regardless of the duration in the certification, recertification may be requested every six months.

6. You can get a second or third opinion on the need for intermittent leave. You can also contact the medical provider to clarify the need for leave.
  7. If a suspicious pattern develops or circumstances change significantly, you may be able to request a recertification. You can describe the pattern of absences to the doctor.
  8. Consider a temporary transfer to an alternative position with equivalent pay and benefits.
- **BOTTOM LINE:** This is still the most problematic area in the FMLA and will still be the most common way for employees to abuse employer leave. The only thing you can do is to know the rules and monitor the situation.

## **No. 5 - Failing to take advantage of your right to receive clear and sufficient medical information to support a leave request.**

- **ADAAA:** If an employee requests a leave as a reasonable accommodation and the disability and/or the need for accommodation are not obvious, the employer may ask for reasonable documentation about the individual's disability and functional limitations.
- Generally, the employer may require the employee to get the information from his or her physician or to sign a limited release so the employer can get the information.
- **FMLA:** The FMLA allows the employer to have a leave request certified. The physician may have to authenticate, complete, or clarify a certification. An employer must advise the employee in writing of what additional information is needed and must give the employee seven calendar days (in some cases longer) to provide the requested information. If the employee fails to do so, leave may be delayed or denied.

- Authentication allows the employer to verify that the medical provider actually completed it. No additional medical information may be requested.
- If a certification is vague, ambiguous, or non-responsive, the employer may request clarification. No additional information may be requested.
- The FMLA forbids the direct supervisor from contacting the employee's physician.
- The FMLA also allows for a second and third opinion.
- The most common problem is that employers fail to force the physicians to provide clear information. Also, employers fail to utilize second and third opinions when the employer doubts the validity of the certification.

## **No. 6 - Failing to protect yourself from GINA**

- GINA (the Genetic Information Nondiscrimination Act of 2008) prohibits an employer from requiring an individual to provide genetic information.
- An employer that receives genetic information pursuant to the ADAAA or FMLA can be liable under GINA.
- An employer is not liable if it inadvertently acquired genetic information
- To demonstrate that acquisition of genetic information was inadvertent, requests must have the statement found at 29 C.F.R. Section 1635.8(b)(1)(B).

## **No. 7 - Misunderstanding the requirements of the FLSA when paying employees on leave.**

- The Basics: Employers must pay the minimum wage and must pay non-exempt employees time and a half. Employers must pay employees for all hours worked.
- The Basics: Generally, federal labor laws (e.g. the FMLA and the FLSA) do not require employers to pay for sick leave. The FMLA allows an employee to substitute paid leave for unpaid leave and allows employers to designate paid leave as FMLA leave.
- Common Problem: Jeopardizing exempt employees' exempt status by docking pay for sick days and/or failing to dock exempt employees' pay when allowed.

- The Rule: Deductions from an exempt employee's pay are permissible when the employee is absent from work for one or more full days for personal reasons other than sickness or disability and for absences of one or more full days due to sickness or disability, if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary due to illness.
- If the employee has an actual practice of making improper deductions, the exemption may be lost during the time period of the deduction for employees in the same job classification working for the same managers responsible for the improper deductions.
- REMEMBER: The absence must be for a full day and must be in accordance with a bona fide plan.

## **No. 8 – Not using light duty when it is to your advantage.**

- ADAAA: The ADAAA requires an employer to “restructure” an employee’s job to reallocate or redistribute non-essential functions. The ADAAA does not require reallocation of essential functions, *i.e.*, to create a light duty or new position for the employee in which the employee is no longer performing essential functions. However, if the employer has existing light duty jobs, reassigning the employee to a light duty job may be a reasonable accommodation.
- Light duty is one of those areas where the law gives an employer some discretion. An employer may create a light duty position as an accommodation. Generally, the employer can keep the employee in light duty as long as it remains an effective accommodation.
- Light duty is an attractive option for employees because they continue to get paid and for employers because it gets the employee back to work.

## **No. 9 – Failing to take advantage of fitness for duty certifications.**

- Trend in the law to give employers more leeway to use fitness for duty certifications.
- FMLA: An employer may have a uniformly-applied policy or practice that requires all similarly situated employees to obtain and present a certification that the employee is able to resume work.
- Common Problems: The employer only requires certain employees to provide a certification. The can constitute interference. Also, employers are only allowed to seek certification for the health condition that caused the need for leave.
- REMEMBER: The employer may require that the certification address the employee's ability to perform the essential functions of the job.

## **No. 10 - Failing to maintain accurate job descriptions**

- Why is this a leave issue? Job descriptions are useful in dealing with the ADAAA and FMLA
- With the ADAAA's new focus on reasonable accommodation, the determination of essential functions in a job description is critical.
- An employer will be required to modify or eliminate a non-essential job function but will not be required to eliminate or modify an essential function.
- Job descriptions are excellent proof of what a job's essential functions are.
- The most common problem is that job descriptions are inaccurate and do not reflect the actual job functions. The determination of whether leave is required may rest on how the employer defines the essential functions of the job.

- The FMLA allows employers to provide a list of essential job functions to determine if an employee is ready to return from leave. Improperly defined essential functions can affect when the employee may return.