

HOW TO GET WORKERS TO WORK: LEAVE ACCOMMODATION ISSUES

COALITION OF PROVIDER ASSOCIATIONS JUNE 20, 2017

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The Big Two



1

◆ Family and Medical Leave Act (FMLA)

2

◆ Americans with Disabilities Act (ADA)

Basic Obligations

ADA:

prohibits discrimination against qualified individuals with a disability

FMLA:

provides eligible employees up to 12 weeks of leave due to SHC of EE or family member, military exigency or birth & adoption; 26 weeks for military caregiver leave



Basic Obligations



Length

ADA:

No specific length, based on reasonable accommodation and no undue hardship

FMLA:

12 weeks within 12-month period; 26 weeks within 12-month period for military caregiver leave

Length of Time/Leave



Intermittent Leave

ADA:

Available as a reasonable accommodation to enable the employee to perform essential functions of the job

FMLA:

Available due to SHC of EE or family members, military exigency or caregiver leave, bonding/adoption



Intermittent
Leave

The diagram features two blue rectangular boxes at the top, one on the left and one on the right. From the bottom of each box, a blue arrow extends downwards and then turns to the right, pointing towards a central green circle. The green circle contains the text 'Intermittent Leave'.



Extended Leave

ADA:

Offer if reasonable accommodation

FMLA:

Not required but should consider if it is a reasonable accommodation for a disability

Extended Time/Leave



Reinstatement

ADA:

Should return to same/equivalent position if available and can perform essential functions; if not, consider open equivalent if EE qualified

FMLA:

Should return to same/equivalent position

Reinstatement

The diagram features two blue rectangular boxes on the left and right. From the bottom of each box, a blue arrow points downwards. These two arrows converge towards a central green circle. The word 'Reinstatement' is written in blue text inside the green circle.



Retaliation

ADA:
Prohibited

FMLA:
Prohibited



Retaliation



Family Medical Leave Act

Family Medical Leave Act

- ◆ Provides up to 12 weeks of job-protected leave in a 12-month period to eligible employees of covered employers in the following circumstances:
 - Birth or placement of child
 - To care for spouse, child, or parent with serious health condition
 - Employee's own serious health condition
 - Military caregiver (26 weeks) / exigency leave

FMLA Triggers

- ◆ 3+ days of absence for a serious health condition that also involves continuing treatment by (or under the supervision of) a health care provider
- ◆ Physical or mental healthcare treatment
- ◆ Any absence due to pregnancy or childbirth
- ◆ Chronic, episodic conditions
- ◆ In-patient hospital admissions

Shared Responsibility

- ◆ Employers educate employees about rights and obligations (general notice requirements)
- ◆ Employees:
 - communicate need for FMLA leave
 - provide timely notice and medical certifications

Employee Notice

- ◆ If foreseeable, 30 calendar days before leave
 - Notice can be verbal
 - As soon as practicable if 30 days not possible
- ◆ Must state:
 - Enough info to know it is FMLA qualifying
 - Duration
 - Timing
- ◆ If not foreseeable, as soon as practicable

Employee Notice

- ◆ First request
 - Employee need not expressly assert rights under FMLA or even mention FMLA
- ◆ Subsequent request, same reason
 - Must reference qualifying reason
- ◆ Calling in “sick” without more information is not sufficient, but FMLA policy should state so
- ◆ Employees can be required to follow employer’s customary call-in procedures (absent unusual circumstances), but FMLA policy should specifically state so

Employer Specific Notices

- ◆ 5 business days after employee requests leave or employer learns leave may qualify for FMLA (DOL Form WH-381 Eligibility/Rights and Responsibilities)
 - Don't forget GINA notice with medical certification forms!
 - Include job description (best practice)
- ◆ Employee must return appropriate completed certification form (e.g., WH 380-E) within 15 calendar days after employer's request
 - Exception: diligent, good faith efforts
 - Employer entitled to “compete” and “sufficient” response

Employer Specific Notices

- ◆ 5 business days after receipt of medical certification, must provide designation notice (WH 382)
- ◆ If incomplete or insufficient certification returned, must let employee know in writing what is needed and give 7 days to return
- ◆ If employee refuses leave may be denied
- ◆ If reason to doubt validity of certification request second opinion

FMLA Intermittent Leave

- ◆ Suspected abuse of intermittent leave? Recertify if:
 - length of time needed for intermittent FMLA leave expires
 - employee requests an extension of leave
 - changed circumstance (i.e., duration/frequency exceeds cert, severity of SHC changes, complications)
 - receipt of information that casts doubt upon the employee's stated reason for absence or continuing validity of certification

Note: employee will still have 15 days to return certification, same as with original certification

Common FMLA Mistakes

- ◆ Not giving required notices/not recognizing employee notices
- ◆ Failure to terminate or document decision to terminate employee prior to employee's request for FMLA leave
- ◆ Failure to reinstate employee in same or equivalent position with equal terms and conditions of employment
- ◆ Counting protected absences against attendance or work record

New York Paid Family Leave Benefits

What You Need To Know

- ◆ **Paid** Leave Benefit
- ◆ Job **Protected** Leave
- ◆ Additional **Process** to administer PFL requests

Background

- ◆ Signed into law on April 4, 2016
- ◆ Passed by overwhelming margins
- ◆ Takes effect on January 1, 2018
- ◆ Employee deductions from payroll can begin on July 1, 2017
- ◆ Modeled after NY Temporary Disability Law and FMLA Family Leave entitlements but differences will make this a compliance challenge
- ◆ **Waiting for final regulations and forms**

Funding NY PFL

- ◆ Costs fully funded by employee payroll deductions.
- ◆ Carriers required to underwrite PFL benefits, like STD.
- ◆ Self-insured employers required to offer PFL benefits.
- ◆ The maximum employee contribution, to be set by the Superintendent of Financial Services, should be a modest deduction from each employee's paycheck.
- ◆ **ERs permitted, but not required, to collect the weekly employee contribution on July 1, 2017 for paid family leave coverage beginning on January 1, 2018. .126 percent of gross wages**

Reasons For Leave

- ◆ **Care for Family Member:** When paid leave is necessary to provide care, including physical or psychological care, to their family members due to a family member's serious health condition;
- ◆ **Bond with Child:** To bond with their newborn children during the first year of the child's life, or, in the case of adoption or foster care placement, for the first year after the placement of a child with the employee; and
- ◆ **Military Qualifying Event:** For any qualifying reason as provided for under the federal Family and Medical Leave Act arising from the employees' spouse, domestic partner, child, or parent being on active military duty, or, alternatively, being notified of an impending call or order to active military duty.

PFL Provides Greater Family Leave Benefits Than the FMLA

NY PFL	FMLA
12 weeks of paid leave (by 2021).	12 weeks of unpaid leave.
Applies to all Employers subject to NYSWC Law regardless of size.	50 or more employees in a 75 mile radius.
Covered after 26 weeks of employment (after 175 th day for part time employees).	Covered after 12 months and 1,250 hours of work.
Family member means the employee's child, parent, grandparent, grandchild, spouse, or domestic partner	Family Member means the employee's spouse, son, daughter, or parent
If offered by the employer, employees may supplement PFL benefits up to their full salary or wages with accrued vacation, or personal leave time during the paid leave.	An employer may compel an employee to substitute paid time off for unpaid family and medical leave.

Paid Leave – Phase In

- ◆ *January 1, 2018:*
 - ◆ 8 weeks paid at 50% of the employee's average weekly wage or 50% of the state average weekly wage, whichever is less;
- ◆ *January 1, 2019:*
 - 10 weeks paid at 55% of the employee's average weekly wage or 55% of the state average weekly wage, whichever is less;
- ◆ *January 1, 2020:*
 - 10 weeks paid at 60% of the employee's average weekly wage or 60% of the state average weekly wage, whichever is less; and
- ◆ *January 1, 2021:*
 - 12 weeks paid at 67% of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less.

Employers Required to Provide Notice of Right to PFL

◆ **Handbook Policies:**

- If ERs have a handbook or other written guidance regarding employment policies, PFL guidance must be included.

◆ **Other Written Guidance:**

- If ERs do not have written policies, manuals, or handbooks describing employee benefits and leave provisions, they shall provide written guidance to each EE concerning the EE's PFL rights and obligations.

◆ **Workplace Postings:**

- ERs must display/post a business typewritten or printed notice concerning PFL in a form prescribed by the Chair.
- Display in plain view where EEs and/or applicants can readily see it.

◆ **Foreign Language/Accessibility:**

- If many EEs do not read and write in English, the notice also must be in a language in which the employees can read and write.
- ERs must follow laws for sensory-impaired individuals.

Job Protected Leave

- ◆ Nearly identical to the FMLA job restoration benefit.
- ◆ Employee entitled to be restored to the position of employment held when the leave began;
- ◆ Or to be restored to a comparable position with comparable employment benefits, pay and other terms and conditions of employment.

Benefit Protected Leave

- ◆ Must maintain group health coverage during PFL under the same terms as if the employee was working.
- ◆ The taking of PFL cannot result in the loss of any employment benefit accrued prior to the date on which the leave commenced. (Similar to original FMLA regulation that required the payment of absence of occurrence bonuses, like perfect attendance. In other words the taking of leave could not disqualify the employee from the bonus.)
- ◆ Not entitled to the accrual of any seniority or employment benefits during PFL, but cannot discriminate against PFL leave takers.
- ◆ Not entitled to a right, benefit or position that the employee would not have been entitled to had she not taken the leave. (e.g., layoff, termination of employment would have occurred if the employee had been actively employed).

Different Claims Process Than FMLA

- ◆ **Content of Notice:**
 - To request paid family leave, employees will generally be required to complete a Request for Paid Family Leave or PFL-1 form that the state will generate and make available.
 - Employers and carriers can use alternative forms as long as they contain all the required information contained in the PFL-1 form.

- ◆ **Certifications:**
 - Bonding Certification: PFL-2 Form plus documentation.
 - Health Care Provider Certification: PFL-4 Form plus Personal Health Information (PHI) Release (PFL-3 Form).
 - Military Qualifying Event: PFL-5 Form plus documentation

Employer Specific Notice Requirements

- ◆ Designation Notices Required
 - Necessary to run PFL concurrently with FMLA.
 - If an employer fails to provide this notice, the employer will be deemed to have permitted the eligible employee to receive family leave benefits without concurrently using the benefits available under FMLA.
- ◆ Must provide notice that certifications are required similar to federal FMLA.
- ◆ When the total hours taken for FMLA in less than full-day increments reaches the number of hours in an employee's usual workday, the employer may deduct one (1) day of PFL benefits from an employee's annual available PFL benefit.

Employer Reimbursement Requests

- ◆ Employer may request reimbursement with the insurance carrier prior to the carrier's payment of family leave benefits, if employee elects to use paid time off.
 - The actual reimbursement amount may be computed after family leave is computed.
 - Where the employee makes this election, he or she still enjoys the full protections of the paid family leave law (i.e. job-protected leave).
 - This will not however, entitle an employee to utilize more than 12 weeks of paid family leave under the law in any consecutive 52-week period.

Restrictions On Taking PFL

- ◆ Leave Caps: Employees who also are eligible for disability benefits may receive only a combined amount of 26 weeks of disability benefits and NY PFL benefits in a 52-consecutive calendar week period.
- ◆ Leave Exceptions: Situations in which NY PFL benefits may not be payable include when the employee:
 - Is receiving total disability payments pursuant to a claim for workers' compensation, volunteer firefighters' benefits, or volunteer ambulance workers' benefits;
 - Is on administrative leave from his or her employment;
 - Is collecting sick pay or paid time off from the employer; or
 - Works partial days with pay for any employer.

Disputes/Penalties Arising Out of PFL

- ◆ Any PFL claim-related dispute, including eligibility, benefit rate, and duration of paid leave is subject to arbitration at the WCB. Carrier or self-insured employer pays.
- ◆ An employee who believes he or she has been discriminated or retaliated against for taking PFL may file a claim under Section 120 of the Workers' Compensation Law.
- ◆ Significant Penalties for failing to provide coverage and health insurance continuation during PFL leave.
 - Fines up to .5% of weekly payroll for period without coverage.
 - Employer fully liable for wage replacement benefits.
 - Employer fully liable for medical costs.

Takeaways

- ◆ Review the following to ensure compliance:
 - Family and Medical Leave Policies.
 - Benefit Claim Procedures and Processes.
 - Handbooks/Employment Manuals.
 - Employment Agreements.
 - Collective Bargaining Agreements (if applicable).
 - Independent Contractor Relationships.

Disability Laws And Reasonable Accommodation

Disability Law Basics

Applicable Laws:

1. Americans with Disabilities Act
2. State equivalents

Disability Laws And Reasonable Accommodation

Disability Law Basics

Federal Definition of “Disability”

1. An employee or applicant has a physical or mental impairment that substantially limits one or more “major life activities,” such as performing manual tasks, seeing, hearing, walking, lifting, bending, concentrating, thinking, communicating, or any major bodily function
2. A record of such an impairment
3. Being regarded as having such an impairment

Disability Laws And Reasonable Accommodation

“The Steps”

There are 3 Steps

1. Step 1 – Is there a Disability
2. Step 2 – Interactive Process
3. Step 3 – Decide on Reasonable Accommodation

Disability Laws And Reasonable Accommodation

Step 1 – Disability Law

What is a Disability?

Could be almost anything, depending on the severity:

- ◆ Epilepsy, sleep apnea, paralysis, depression/ anxiety, AIDS, diabetes, infertility, missing limb, Crohn's Disease, migraines, carpal tunnel, alcoholism/ drug addiction, back injuries, neck injuries, asthma, allergies/ scent intolerance, schizophrenia, heart disease, some cancers, hearing loss

Likely not:

- ◆ Sprains, colds, stomach bug, cosmetic surgery

Recognizing ADA Triggers

Examples of requests for accommodation:

- ◆ employee asks for something he is not automatically entitled to, citing health problems.
- ◆ employee needs a block of leave due to surgery, illness, medical treatment
- ◆ employee is frequently absent or late due to a medical condition, such as migraines, chemotherapy or physical therapy.
- ◆ employee is reaching the end of his/her allotted FMLA leave and is not medically able to return to work.
- ◆ employee cites a health reason to explain a performance conduct or attendance problem.

Disability Laws And Reasonable Accommodation

Step 1 – How to Confirm a Disability

Are You On Notice?

- ◆ “I can’t keep up with my work due to my medical condition.”
- ◆ “I know I shouldn’t have yelled at Susie, but lately I just feel so anxious I find myself snapping at people.”
- ◆ “I have a bad back.”
- ◆ Employee is often away from work for medical appointments
- ◆ You hear from another person that an employee has epilepsy.
- ◆ An employee explains that he runs past exterior windows to avoid the Dallas Cowboys who have put a hit out on him.

Disability Laws And Reasonable Accommodation

Step 1 – How to Confirm a Disability

- ◆ Once you're "On Notice" supervisors should immediately *contact HR (call/email)*
- ◆ HR should gather **up-to-date** medical
 - Diagnosis & Duration
 - Work Restrictions
 - FMLA?

SICK NOTE

The Medical Center

Excused Absence

Date: February 13

Excused from: work class other

Notes: Bitten by rabid
blood-thirsty
raccoon with
crazy eyes.

Signature: Dr. Yuri Zhivago

Disability Laws And Reasonable Accommodation

Step 2 – Interactive Process

- ◆ What is the “Interactive Process?”
 - Brainstorming session
 - Get employee input & ideas
 - You deliberate, pause, and think



Disability Laws And Reasonable Accommodation

Step 2 – Interactive Process

- ◆ What is NOT the “Interactive Process?”
 - Letting the employee tell you what to do
 - ◆ HR works with the employee and supervisor through the interactive process.
- * Note on confidentiality



Disability Laws And Reasonable Accommodation

Step 2 – Interactive Process

- ◆ Goal?
 - Gather employee's ideas
 - Not to make a decision
- ◆ Who should participate?
 - HR, Employee, and Supervisor
- ◆ How to document it? Suggested best practice
 - Letter inviting employee to meeting
 - Notes from meeting
 - Follow up letter after the meeting

The ADA Interactive Process

Identifying Non-leave Accommodations:

- Step One: Talk to employee to identify precise job-related limitations
- Step Two: Talk to employee to identify potential ways to enable performance
- Step Three: Obtain input from doctors or others with specialized knowledge on potential sources of accommodations
- Step Four: If no accommodation is identified, determine if employee can be reassigned to vacant position

Interactive Process cont'd

Identifying Non-leave Accommodations:

- Step Five: Before termination, ensure employee has exhausted all leave entitlement and additional leave is not required
- Step Six: Before termination, ensure documentation confirming accommodation efforts and the reason, if applicable, an accommodation was not provided
- Step Seven: If terminating employee, consider inviting employee to reapply

Disability Laws And Reasonable Accommodation

Step 3 – Reasonable Accommodation

- ◆ What is it?
 - Change (in duties, working hours, or policies) that allows the Employee to perform essential functions of the job
- ◆ Who chooses it?
 - The Company
 - **Not** the Employee
 - **Not** the Doctor
 - Employer must provide effective accommodation / may choose between equally effective accommodations

Disability Laws And Reasonable Accommodation

Reasonable Accommodation

Examples:

- ◆ Physical/software aid (Dragon software)
- ◆ Modified job duties (ex: limited travel)
- ◆ Modified hours (ex: shorter shifts)
- ◆ Alterations to equipment (ex: keyboards)
- ◆ Exempted from certain tasks
- ◆ Temporary exemption from rules (ex: attendance)
- ◆ Unpaid leave of absence
- ◆ Transfer to vacant position (accommodation of last resort)

Disability Laws And Reasonable Accommodation

Reasonable Accommodation

- ◆ Must be handled on a case-by-case basis
 - Do NOT make assumptions
 - Make decisions based on facts
 - Situation may change over time
 - Light duty v. accommodation
 - Be explicit about duration of temporary accommodations



Employer Exceptions in Providing a Reasonable Accommodation

- Do not have to eliminate essential functions of the job
- Do not have to change supervisor, but may need to change supervisory methods.
- Do not have to provide employee's preferred accommodation - employer may choose among effective accommodations.
- Do not have to monitor medications.
- Do not have to provide indefinite leave.

Three-Step Process for Managing Leave Requests

1. Provide all leave **entitlements** (FMLA, state law such as TDL)
2. Provide all leave **commitments** in policy or practice (e.g., personal leave)
3. Provide leave as a **reasonable accommodation** under the ADA or applicable state disability law if it will not impose undue hardship

THE PROCESS IS AS IMPORTANT AS THE RESULT!

Medical Information

- Can employers request medical information? Yes!
- FMLA – defined requirements for what can be requested, when, and how (defined regulatory structure)
- ADA – more flexibility in process, but also limits on what can be requested and when
- Other restrictions: HIPAA, GINA, state law

Undue Hardship

- Employers must provide reasonable accommodations to known physical or mental limitations of qualified applicants and employees unless the accommodation would impose an undue hardship on the operation.
- Undue hardship – focus on operational hardship.

Employer Exceptions in Providing a Reasonable Accommodation

- Do not have to eliminate essential functions of the job
- Do not have to change supervisor, but may need to change supervisory methods.
- Do not have to provide employee's preferred accommodation - employer may choose among effective accommodations.
- Do not have to monitor medications.
- Do not have to provide indefinite leave.

Reasonable Accommodation - Mental Impairments

What do I do if an employee exhibits signs of violence (that might be caused by a disability)?



Determine Initial Strategy for Dealing With Employee Threatening Behavior

- Commit to one path:
 - Address the threat as misconduct and discipline.
 - If conduct occurred, the conduct would result in discipline, potentially up to discharge.
 - Investigate.
 - Check comparators/discipline consistently.
 - Ignore medical issues.
 - Address the threat as a “fitness for duty” issue.
 - “Medicalizes” the situation.
 - Evaluation by employee’s healthcare provider.
 - If you choose the fitness for duty path, you can’t practically go back to termination if the employee passes the evaluation.

ADA Coverage Issues

- Is the individual posing the risk protected by the ADA because he/she has an actual disability (a physical or mental impairment that substantially limits one or more major life activities)?
 - If so, this might trigger reasonable accommodation obligations.
- If not, will the Company's actions cause a court to conclude that the individual would be covered under the ADA because the individual has:
 - a record of a disability; or
 - was regarded as having a disability?

ADA and Employee Conduct Rules

- Employers need not forgive or excuse misconduct, even if it is caused by a disability, as long as the conduct rule is job-related and consistent with business necessity.
- Certain conduct standards will always meet this “job-related and consistent with business necessity” standard, such as prohibitions on violence and threats of violence.
- Employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers.

“Direct Threat”

- An employer need not hire or employ individuals with disabilities if they pose a “direct threat,” but this is a high standard and requires an individual assessment.
- A “direct threat” means a “significant risk of substantial harm that cannot be eliminated or reduced through reasonable accommodation.”
- A finding of “direct threat” must be based on the best available objective medical evidence that relies upon the most current medical knowledge.
- Factors to considered in making direct threat determinations:
 - Severity of harm.
 - Likelihood of harm.
 - Imminence of harm.

Requesting Medical Information

- Must be “job-related and consistent with business necessity.”
- Must show a reasonable belief, based on objective evidence that: 1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or 2) an employee may pose a direct threat due to a known or suspected medical condition.
- Psychological tests may be medical examinations.
- Must maintain confidentiality and narrowly tailor medical exams or inquiries.
- Don’t forget GINA disclosures on requests for information.

Fitness for Duty Exams

- Make sure you have the facts to justify the FCE.
- Be careful to limit discoverable information related to the decision whether to conduct the FCE.
- Consider whether to remove employee from workplace while conducting FCE.
- Work with treating physician first (unless direct threat – can use physician of your choice with relevant expertise).
- If necessary then request an IME by healthcare provider chosen by employer.

The Dilemma Over How Employers Should Handle Workplace Violence

- Two recent cases highlight the dueling responsibilities that employers face when dealing with and responding to workplace violence:
 - ***Mayo v. PCC Structural, Inc.*, No. 13-35643 (9th Cir. July 28, 2015)** (summary judgment granted to an employer on a disability discrimination claim after the employer terminated the employee for making threats of violence against his supervisor).
 - ***Secretary of Labor v. Integra Health Management, Inc.*, OSHRC No. 13-1124 (June 22, 2015)** (two OSHA citations issued after the agency found that the employer failed to take appropriate action in avoiding the fatal stabbing of an employee by a client).

THANK YOU

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