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Work-Leave, the ADA, and the FMLA

Work-leave policies can be a challenge for many employers. In this brief, we consider how effective work-leave policies are a key part of legal compliance as well as a benefit to the business. Two main laws cover work-leave:

- The Americans with Disabilities Act (ADA) as amended applies to employers with 15 or more workers.
- The Family and Medical Leave Act (FMLA) applies to all government employers (local, state and federal) and to private businesses with 50 or more workers within 75 miles (with some exceptions).

ADA and work-leave

Do workers have a right to work-leave under the ADA? Yes. Workers who are substantially limited in one or more major life activities due to a physical or mental impairment have rights under the ADA. One of these is the right to an accommodation (a change in the workplace policies, facilities, or how work is done). Work-leave can be one form of accommodation.

How much work-leave must be given? There is no set amount of work-leave that the employer must grant. As with all accommodations, the amount of leave granted depends on the job and the disability and must be determined on an individual basis. Employers must grant leave as a form of reasonable accommodation unless doing so would cause them undue hardship. Undue hardship is determined on a case-by-case basis and depends on the financial resources of the employer or how much the accommodation disrupts job operations. In many cases, undue hardship can be difficult for the employer to prove.

Can employers get medical information? Employers may ask for medical documentation when workers request work-leave or other accommodations. This information should be limited to what is needed to confirm that the worker has a disability, determining how much leave is needed, or considering general accommodation options. Medical information must be kept confidential and in a separate file from other employment records.

FMLA (Family & Medical Leave Act) and work-leave

Which workers have a right to leave under the FMLA? FMLA gives workers the right to take work-leave for certain family or medical reasons. This leave can be paid or unpaid. While on leave, workers' jobs must be left open and their benefits (such as health insurance coverage) must be continued. Workers who have rights to FMLA leave are those who:



- Have worked at least 1,250 hours for the 12 months prior to the leave, work in locations with at least 50 employees within 75 miles and have worked with the business for at least 12 months (which need not be consecutive).
- Are pregnant, have just given birth or have adopted a child.
- Have a serious medical condition lasting at least three days and requiring medical treatment or requiring a hospital stay of at least one night.
- An incapacitating condition lasting at least three days and requiring medical treatment. Have a chronic condition that sometimes “flares up” and requires medical treatment.
- Are caring for a family member who has an injury or illness sustained during military service.
- Are caring for a family member (spouse, child or parent) with a serious health condition.
- Are family members of deployed National Guard and Reserve Personnel.

How much leave can workers take under FMLA?

- Twelve weeks of leave in a 12-month period for:
 - The birth, adoption, or foster care of a child.
 - The worker’s own serious health condition.
 - The care of a spouse, child or parent with a serious health condition.
 - Dealing with the military deployment of the employee’s spouse, son, daughter or parent.
- Twenty-six weeks of leave in a single 12-month period to care for a service member with a serious service-connected injury or illness.

Does the leave have to be taken all at once? When medically necessary, employers must let workers break up their FMLA leave time or “stretch” it out by working reduced hours. To find out more, go to <http://www.dol.gov/whd/regs/compliance/1421.htm#2d> .

Do workers have to provide medical information? An employer may (but does not have to) require the worker to certify the need for work-leave from a medical professional. The U.S. Department of Labor provides a form for this purpose at <http://www.dol.gov/whd/forms/WH-380-E.pdf>. The worker must be given at least 15 days to provide this medical information. This information must be kept private and in a separate file from other employment records.

When both laws could apply

- Generally, public sector employers and private business employers with more than 50 workers are covered under both the ADA and FMLA. Employees in these workplaces can have rights under both laws if they meet the definition of “disability” (ADA) and “serious health condition” (FMLA).
- *Workers who have used up FMLA leave can still have rights under the ADA if they meet the ADA definition of a person with a disability. Accommodation is one such right. Additional leave (beyond the worker’s FMLA leave) could be an accommodation that must be provided under the ADA.*



Additional guidelines

Avoid 100% healed policies. Employers cannot require a worker to be completely healed before returning to work. Such policies have been found to violate the ADA because they do not allow workers to use their right to an accommodation. Even if a worker is not 100% healed, he or she could possibly still work effectively with an accommodation.

Avoid no-fault leave policies. Automatically terminating workers who have, for any reason, exceeded a pre-set amount of leave violates the ADA. Like 100% healed policies, no-fault leave policies deny the worker the right to use a reasonable accommodation which would allow them to return to work with a disability.

Educate managers and supervisors. Managers are often “first responders” to disability disclosures and work-leave requests. Make sure they are educated about the legal rights of workers with disabilities.

Limit requests for medical information. Under both the ADA and FMLA, employers have a right to collect only the information needed to confirm that the worker has an impairment or medical condition, to identify possible accommodation options, and to determine the probable duration of the worker’s condition. Requesting or collecting medical information that is unduly lengthy, irrelevant, or arbitrary can violate the ADA. The FMLA does not allow the employer to demand a diagnosis to grant FMLA leave. Finally, collecting too much medical information can violate several laws.

Use work-leave as the last accommodation option, not the first. Employers should work with the employee to determine how the impairment impacts the essential functions of the job and what accommodations can be considered. Accommodations that keep the employee engaged in the job as much as possible tend to be most effective for both the employer and the worker. Before resorting to work leave as an accommodation, consider the full range of accommodations that could be effective given the impairment, the job and the situation.

Pregnancy might be covered under both FMLA and ADA. Work leave related to pregnancy and the birth of a child are clearly covered under FMLA. Generally, pregnancy has not been defined as a disability under the ADA. In some cases, though, pregnancy-related leave can be covered by the ADA. When a worker develops pregnancy-related impairments (such as anemia, cervical insufficiency or gestational diabetes), some courts have found that these can be considered impairments under the ADA. These workers would have a right to ADA work leave or other accommodations.

Treat obvious and nonobvious disabilities the same. Workers with impairments that may not be obvious, such as diabetes, depression or post-traumatic stress disorder, could be covered under the FMLA or the ADA.

About light duty. Employers may, but are not required to, create light duty positions. Employers cannot require workers to accept light duty in lieu of FMLA leave. The employer is not allowed to deduct FMLA leave while a worker is in a light duty position.

About indefinite leave. Employers are not required to grant indefinite leave and can require workers to provide an approximate return-to-work date. However, the employer must be flexible in situations where the return-to-work date must be changed for medical reasons, unless providing additional leave would cause undue hardship. For more information, go to <http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm>.



Resources

Equal Employment Opportunity Commission (EEOC). *Reasonable Accommodation and Undue Hardship under the ADA*. <http://www.eeoc.gov/policy/docs/accommodation.html>.

Equal Employment Opportunity Commission (EEOC). *Disability-Related Inquiries and Medical Examinations of Employees under the ADA*. <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

Equal Employment Opportunity Commission (EEOC). *Enforcement Guidance: Pregnancy Discrimination and Related Issues*.
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#amer.

The Job Accommodation Network. *Accommodations, ADA and Light Duty*.
<https://askjan.org/corner/vol03iss05.htm>

Office of Disability Employment Policy (ODEP). *Employment Laws: Medical and Disability-Related Leave*. <http://www.dol.gov/odep/pubs/fact/employ.htm>.

Overview of FMLA from U.S. Dept. of Labor: <http://www.dol.gov/whd/fmla/index.htm> .

Overview of sick leave from the U.S. Dept. of Labor:
<http://www.dol.gov/dol/topic/workhours/sickleave.htm>

FMLA Frequently Asked Questions from U.S. Dept. of Labor: <http://www.dol.gov/whd/fmla/fmla-fags.htm#10>

FMLA Certification form from U.S. Dept. of Labor: <http://www.dol.gov/whd/forms/WH-380-E.pdf>

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