



FMLA: How to Avoid the Most Common Employer Mistakes



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Family and Medical Leave Act (FMLA) – The Basics

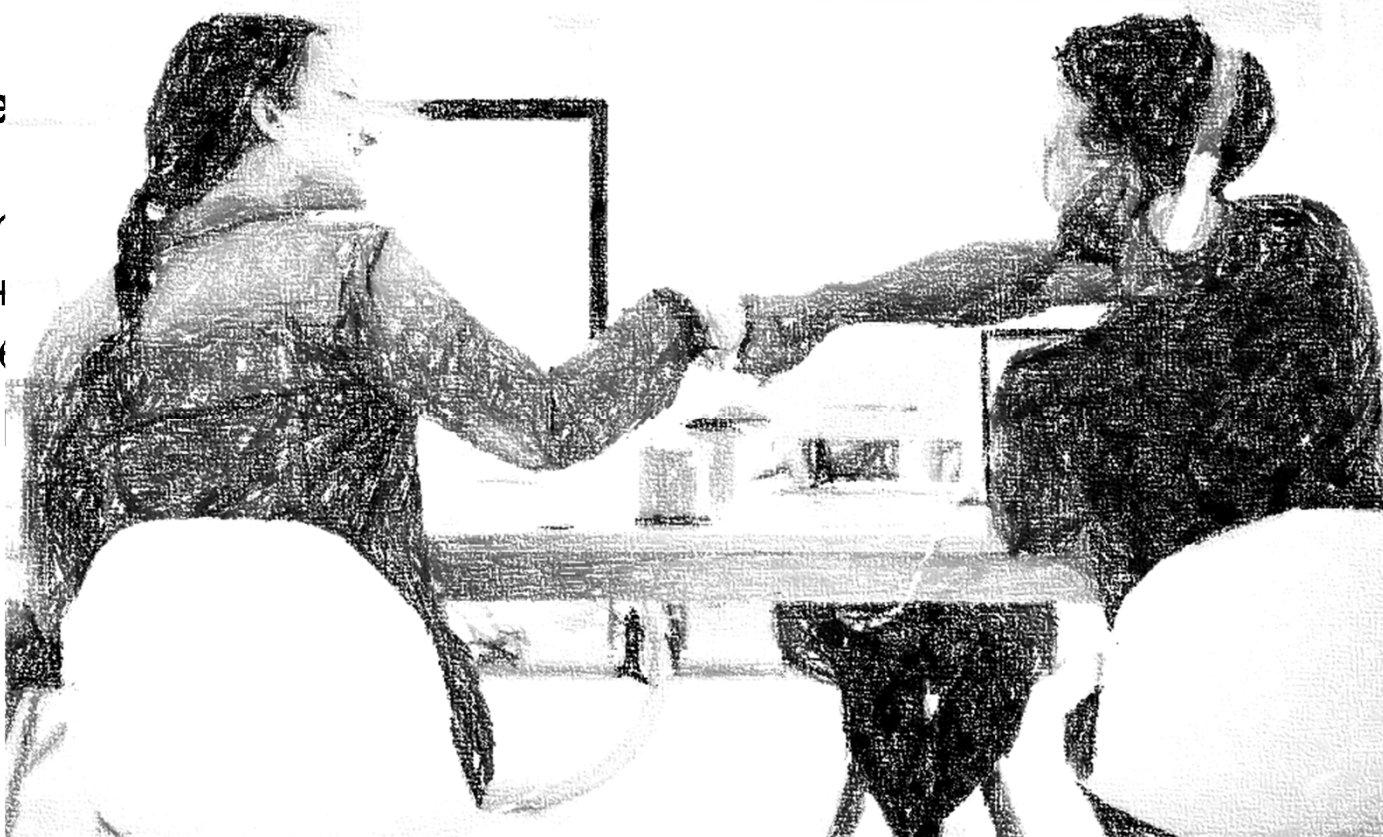


Family and Medical Leave Act of 1993 entitles **eligible employees of covered employers** to take **unpaid, job-protected leave for qualified reasons.**

Family and Medical Leave Act (FMLA) – The Basics

Employee

- “Covered” employees
- 50+ employees within 75 miles
- All full-time employees

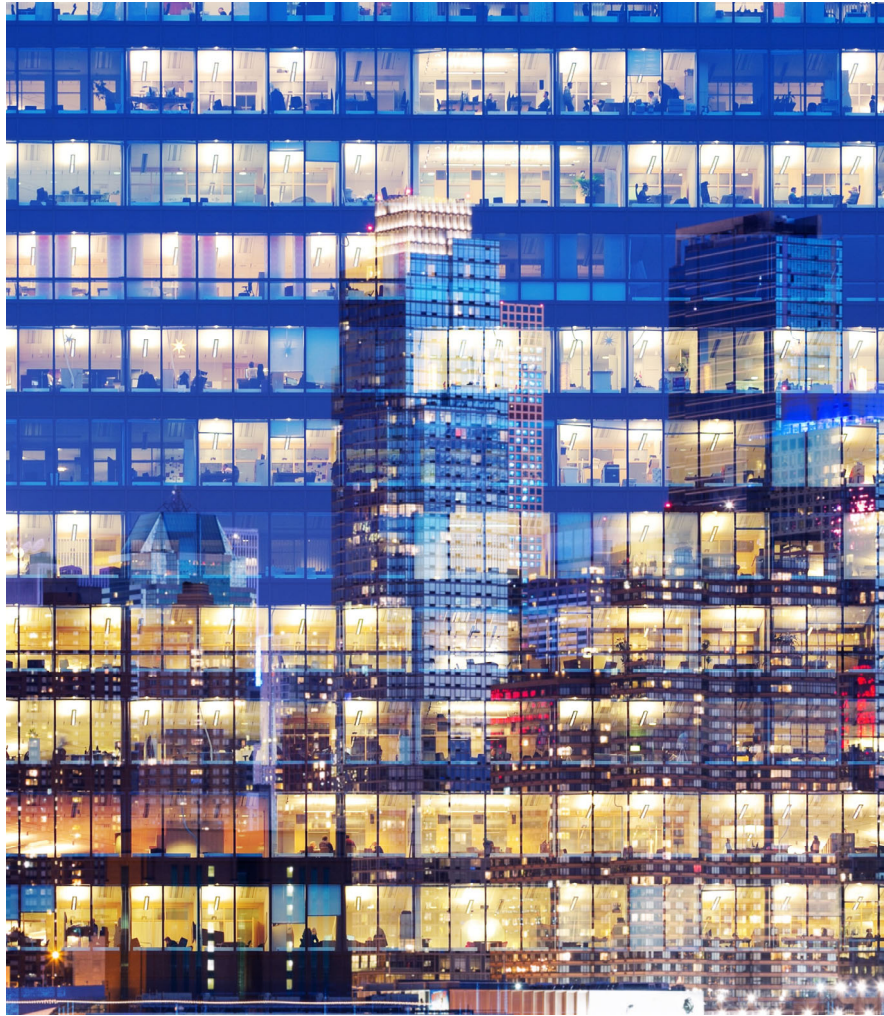


• Working for the employer for at least 12 months (not necessarily consecutive)

• 12 months of service within the last 12 months (not necessarily consecutive)

• 12 months of unpaid, job-protected leave for qualifying reasons

• 12 months of unpaid, job-protected leave for military service



Qualifying Reasons

- For employee's own serious health condition
- To care for spouse, son, daughter, or parent with a serious health condition
- Birth of a child (baby bonding)
- Placement of a child for adoption or foster care
- Care for injured servicemember who is a spouse, son, daughter, parent, or next of kin of employee
- Qualifying exigencies related to military leave

Employee Obligations



Employees must:

1) **Provide Notice** (written, verbal, spokesperson)

- At least 30 days' advance notice for foreseeable leaves
- Notice "as soon as practicable" for unforeseen leaves
- Need not mention FMLA specifically
- Employer must respond within 5 business days of the request

2) **Employer may request Medical Certification**

- Within 15-days, unless not practicable
- Stating date of leave, duration, medical necessity
- If inadequate, 7 days to remedy
- Employers may contact provider to clarify, not verify, with employee's consent

Employer Obligations



Employers must:

- 1) **Maintain Insurance** at same level as if employee was actively working
 - Employee may be required to continue to pay any portion of premium normally deducted from paycheck
- 2) Return employee to **Same or Substantially Equivalent Position**



Most Common Employer Mistakes

- Failing to properly designate or notify employee of FMLA leave
- Requesting/using medical information improperly
- Contacting employee on leave
- Taking adverse action related to FMLA leave
- Failing to reinstate employee to the same or equivalent position / termination on expiration of FMLA

Failing to Properly Designate or Notify Employee

Employee no-call / no-shows and doesn't respond to phone calls. A week later, employee's sister calls and reports employee was in a car accident and has been in a coma. Is this an FMLA request? What if you already terminated?

- Notice may come from **spokesperson** if employee is incapacitated
- Employer should **designate FMLA leave**

Employer fails to provide notice of FMLA rights and designate employee's 8-weeks of mental health leave.

- Issue designation notice **within 5 days** once employer determines qualifying FMLA leave
- Retroactive designation?

Requesting/Using Medical Information Improperly



Employee takes a three-week leave for a known medical condition. You have no reason to doubt that the employee was out for an FMLA-qualifying reason.



But the employee's certification is not filled out properly / employee doesn't provide a certification?



The employee returns to work.



Can you deny the designation of the time as FMLA leave?



Do you want to?

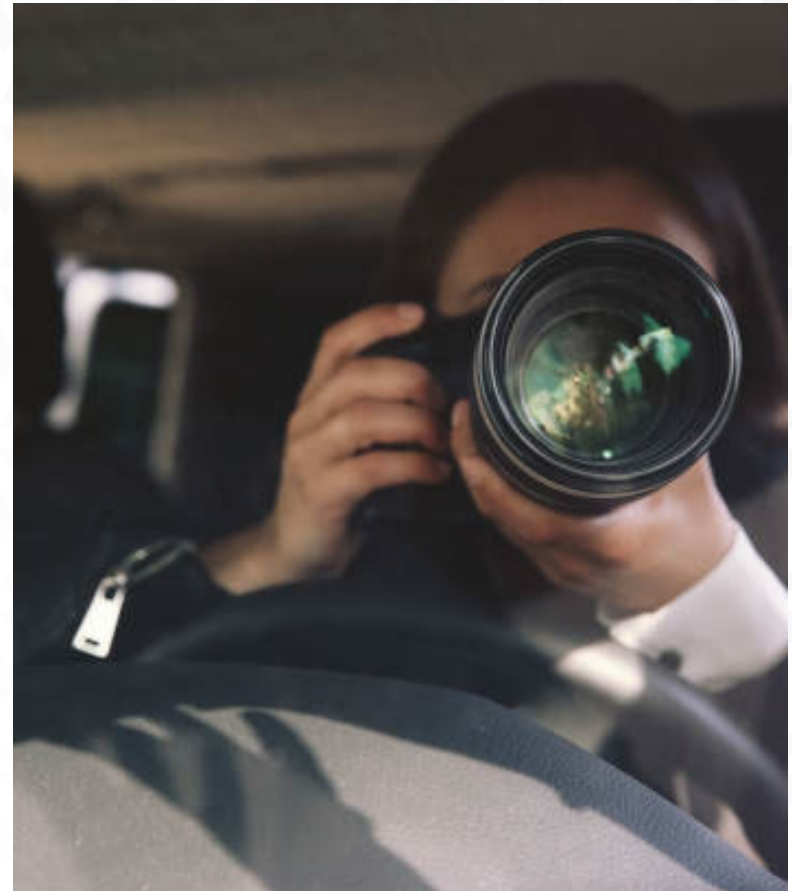
Contacting Employee on Leave



Employee is on family medical leave. Employee's manager has a question he wants to ask the employee about a work-related matter.



Is it permissible for a manager to contact an employee on family medical leave to ask a work-related question?



Taking Adverse Action

- Job protection, not performance protection
 - No greater rights
 - Performance management can continue post leave
- Document, document, document

“FMLA Shield”: Risks and Realities

- FMLA protects the right to take leave, not the right to avoid performance management or discipline.
- Employees must still meet all eligibility and certification requirements.
- When they return from leave, you can resume any performance management or disciplinary process that was in place before the leave.
- The key is documentation: if you can show that the performance issues existed before the FMLA request, you are much less likely to face liability for retaliation.

Failure to Reinstate to Same or Equivalent Position / Termination on Expiration of FMLA

- Virtually identical with regard to: pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status.
- The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.
- Exceptions: legitimate reason; FMLA fraud; layoff



Key Takeaways

- Train supervisors on FMLA and work closely with HR and counsel
- Manage the process, not the person
- Foster a culture of compliance and empathy



QUESTIONS?



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Wage And Hour Considerations When An Employee Is On Leave



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Agenda

- Wage-and-hour considerations for leave situations
- Navigate pay during various leave types
- Best practices

Wage and Hour Basics

Exempt vs. Non-Exempt Employees

Non-Exempt Employees:

- Hours worked and overtime rules apply
- Pay for any time worked

Exempt Employees:

- Salary
- Must manage hours and pay to avoid inadvertent loss of exempt status
- Intermittent/partial-day leave can complicate exempt status if not handled carefully

Leave Situations

- FMLA/CFRA
- ADA/FEHA
- PDL
- Disability
- Worker's Compensation
- Other state-specific leaves (e.g., Jury duty, bereavement, military leaves)

Leave Situations

- Full-time leave
- Intermittent or reduced schedule leaves
- Paid vs. unpaid status during each leave type
- Benefit continuation during leave

Wage and Hour Considerations

- PTO/Sick leave can be used to cover LOA time (concurrent with FMLA or other leaves)
- PTO accrual during LOA (depending on policy)
- Front-loading vs. accrual considerations
- Documentation and approvals

Pay During Leave: What Counts as Wages?

- PTO used during leave
- Bonuses, incentive pay, and commissions: how they're treated during leave (often based on policy)
- Disability benefits and wage replacement: how they interact with regular pay

Federal and State Considerations

- California: CFRA + Paid Family Leave; job restoration rights
- New York: NY Paid Family Leave; FMLA coordination
- New Jersey: Family Leave Act; state disability/paid family leave
- Texas/Other States: No state family leave at state level; can have private programs or local laws

Intermittent Leave

- Intermittent FMLA/CFRA leaves: reduce or modify weekly work hours
- Pay computations during intermittent leave
- Scheduling and coverage implications for payroll and benefits

Disability Leave

- Short-term disability (STD): typically paid; may run concurrently with other leaves
- Long-term disability (LTD): may commence after STD; often at reduced pay
- Interaction with FMLA/CFRA and state leaves and wage replacement

Workers' Compensation Leave

- Leaves with wage replacement via workers' compensation
- Interaction with other leaves and benefits

Benefits Continuation

- Health coverage: COBRA or state continuation; timing and premium responsibility
- Other benefits: life, disability, retirement plans
- Notices and election windows for benefits during/after leave

Complex Wage and Hour Considerations

- Commissions?
- Bonuses?
- Pay Plans?

Complex Wage and Hour Considerations

FMLA regulations do not address commissions directly, 29 C.F.R. § 825.215(c)(2) states as follows:

“If a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave... For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.”

ADA Protection for Non-FMLA protected Leaves of Absence

Same analysis applies to ADA type leave. To maintain a claim of retaliation under the ADA, a plaintiff must prove that (1) they engaged in protected activity, (2) their employer took adverse action against them, and (3) the adverse action was causally connected to their protected activity. Taking a leave of absence granted by an employer as an accommodation is a protected activity.

Denying employees who are on protected ADA leave from participating in commission or bonuses programs enjoyed by other similarly situated employees on other forms of leave could give rise to a claim of discrimination and unlawful retaliation.

Wage and Hour Scenarios

Exempt employee takes a one-week LOA with full paid salary (no work performed)

- Federal baseline: maintain salary
- Consider PTO policy if applicable
- State variations may apply
- Ensure consistency

Wage and Hour Scenarios

Non-exempt employee on a partial-week LOA using accrued PTO

- Hours actually worked vs. hours not worked?
- PTO offsets
- OT considerations

Wage and Hour Scenarios

FMLA intermittent leave for a non-exempt employee

- Track hours
- Apply PTO as designated
- Consider impact on overtime and benefits

Common Wage and Hour Pitfalls

- Misclassifying leave as unpaid when paid leave is available
- Miscalculating pay during leave with partial pay
- Failing to provide required notices or certifications
- Lapse in benefits during leave or incorrect continuation
- Inadvertent loss of exempt status due to improper timekeeping

Best Practices

- Clear LOA definitions and eligibility criteria
- Clear rules on pay during vacation and other leaves
- PTO/sick leave rules (when used, how it interacts with FMLA, CFRA, PDL, etc.)
- Salary-basis and deductions policy for exempt employees
- Documentation: certifications, notices, and recordkeeping
- Training for managers and HR on LOAs and pay interaction
- Regular audits to policies and practices

Resources

- Federal resources
 - U.S. Department of Labor (DOL) Wage and Hour Division
 - FMLA information and certification guidance
- State resources (state-specific leave laws and wage-hour guidance)
- Other Resources
- LOA policy, PTO policy, benefits continuation policy, communications templates
- A checklist for managers to follow when LOA is requested or approved

QUESTIONS?



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How Much Leave Is Reasonable?



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Putting the Puzzle Together: Different Laws Involving Leaves

- Family and Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)
- Americans With Disabilities Act (ADA)
- State counter-parts to ADA; i.e. CA FEHA, NY State Human Rights Law, MA Fair Employment Practices Act, etc.
- Pregnancy Disability Leave Laws (PDL)
- USERRA
- Other leaves; i.e.
- Bone Marrow, Domestic Violence, Jury Duty, Witness,
- Voting, School Activities, Crime Victims

Employer's Duty to Manage and Designate Leaves

- Make the right designation at the time of the request!
- Who, why and when
- Know your obligations under law and your policies/practices:
 - Protected leave?
 - Maintenance of benefits?
 - Job restoration?
 - Compulsory use of PTO?

The Interactive Process

- The ADA requires a timely, good-faith interactive process between employer and employee (and possible his/her physician) or applicant with a disability to explore:
- Whether a reasonable accommodation is needed; and
- How the employee may be accommodated.

The Interactive Process

The ADA requires a timely, good-faith interactive process between employer and employee/applicant with a disability.

Timeliness-triggers

- Applicant/Employee with a **known** physical or mental disability or medical condition **requests** reasonable accommodations;

OR

- Employer becomes aware of the need for an accommodation through a third party or by observation.

Good Faith

1. Acknowledge;
2. Identify essential functions of job;
3. Meet with employee;
4. Questionnaire?; and
5. Plan and repeat as ongoing process.

Timely Interactive Process

- “Disability caused” performance problems “known” to employer

Absenteeism Cases

- Absences with employer “knowledge” of potential disability cause
- Unpredictable, erratic attendance
- Rumors?
- Third party communication

Interactive Process: Amount of Leave?

Leave should be an accommodation of last resort.

- Fact dependent, individualized analysis, no minimum/maximum time.
- Employer's policies and circumstances drive analysis. *Consider:*
 - Previous unsuccessful leave attempts;
 - Leave not reasonably calculated to return employee to work; and
 - Undue hardship.
- *Dezham v. Macy's West Stores, Inc.* (C.D. Cal. 2014): Indefinite leave is not required.
 - Check local law; i.e. NYCHRL shifts burden to employer



Interactive Process: Denying Leave or Leave Extensions

When can you say that leave is indefinite or ineffective?

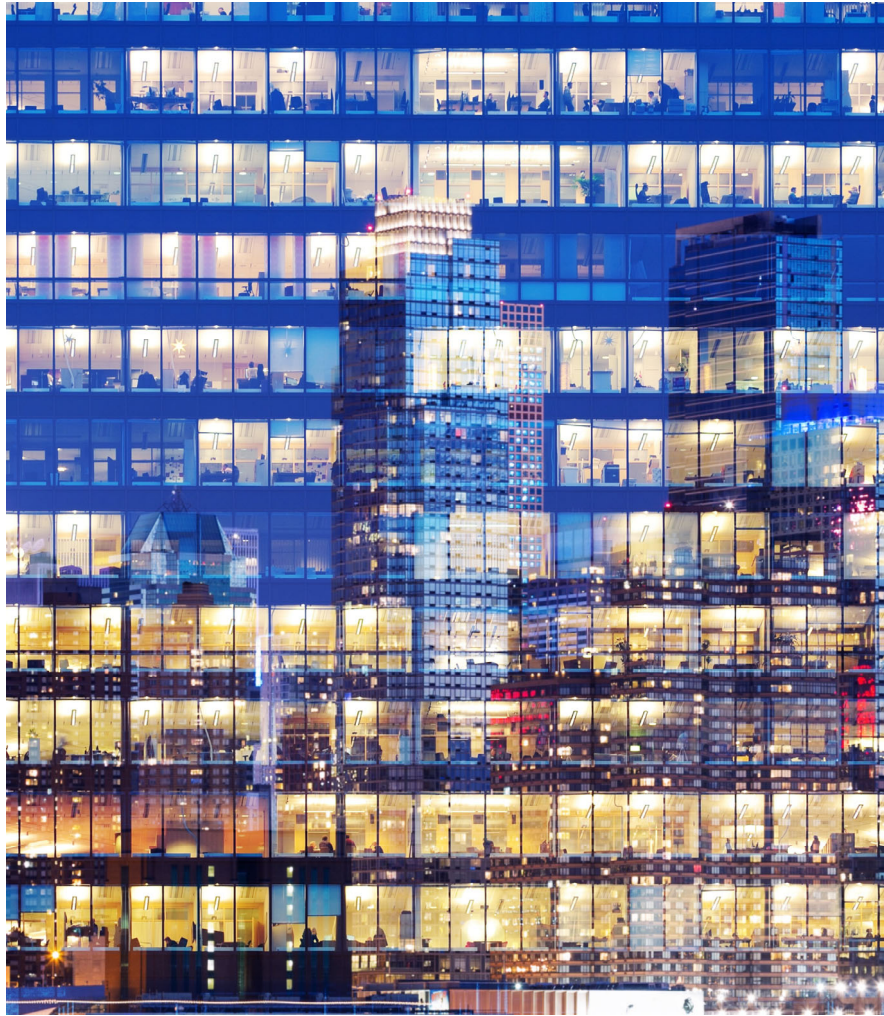
- Not required if employer can prove it.
- Individualized inquiry.
 - *Consider*: Quality of medical/other information known to employer at that time.
- *Samper v. Providence St. Vincent Medical Center*. Accommodation that would have allowed employee to miss work whenever and forever long she felt necessary was, as a matter of law, not reasonable.
- Is regular, onsite attendance an essential job function?
- Effect of leaves granted to comparator employees
- Consider available vacancies for which employee qualified
- Bad optics

Reasonable Accommodation: Leave Examples

- *Hanson v. Lucky Stores, Inc.* (1999): The employer reasonably accommodated the employee, a meat cutter who suffered a serious wrist injury, by providing him with a total of **sixteen months** of leave for surgery and therapy, nearly twice the allowable period.
- *Canupp v. Children's Receiving Home of Sacramento* (2016): The employee took medical leave for a back injury protected by FMLA and CFRA that lasted for approximately **1.5 months**. The employer reasonably accommodated the employee by providing an additional **thirty days** of personal leave. The employer did not have to further accommodate the employee because her back surgeries were postponed indefinitely, meaning her leave would have been indefinite as well.
- *Engel v. Time Warner Cable* (2021): The employer engaged in the interactive process with the employee as required under FEHA by **extending his leave by 21 days** and requesting the employee follow up with HR to identify further accommodations that would be necessary to facilitate his return to work.

More Reasonable Accommodation Leave Examples

- ***Garcia-Ayala v. Lederle Parenterals, Inc.*** Under the ADA, four additional months of leave beyond the one-year job reservation period provided under employer's policies was a reasonable accommodation for the employee's breast cancer given that her doctor confirmed she would be ready to return to work at that time.
- ***Nicholson v. Massachusetts Bay Transportation Authority*** Employee had already requested three extensions on her leave to accommodate her PTSD sustained during work. Under the ADA, the court determined that reducing the fourth extension from four months to two months was still a reasonable accommodation and did not constitute failure to engage in the interactive process on the part of the employer.
- ***Robson v. Shaws Supermarkets Inc.*** Former employee's FMLA leave expired, and employer chose to fill his position rather than hold it open for an additional six months. Former employee alleged that failing to offer extended leave violated the ADA. The court held that six or more months of leave was not a reasonable accommodation because of the demanding nature of the job in question.
- ***Larson v. United Natural Foods West Inc.*** Holding that a request for a six-month leave (that could potentially become indefinite) was not a reasonable accommodation under the ADA for an employee seeking treatment from a substance abuse professional.



Interactive Process: Undue Hardship

Employer's burden of proof.

- Nature or operation of business
- Impact of leave to operation of business
- Financial resources and cost to business;
- Work facilities and size of employer

Interactive Process: Mutuality

The interactive process requires employer and employee participation.

- Has the employee frustrated the interactive process?
- How good is the written record of the interactive process?



Interactive Process: Practical Tips

- Avoid unprofessional comments in written communications, including emails.
- Never make a unilateral decision based on your assumptions.
- Remain open-minded and consider all reasonable alternatives.
- Maintain communication and document it.

Reinstatement or Failure to Return

- **Reasonable Accommodation Leave Protected?**
- **Worker's compensation: injury permanent and stationary?**
- **Fit for Duty – Medical Release**
 - Can/should require – ensure uniformity.
 - Avoid “100% healed” requirement or suggestion
- **Same or Comparable Position**
- **Leave Extension?**
- **Further Interactive Process?**

Leave Practice: Putting it All Together

Rob severely injures his back on February 28 while lifting boxes in the walk-in freezer. The restaurant where he works has hundreds of employees. He immediately leaves work. His doctor determines that he needs to have back surgery, and then he will require physical therapy for ***undetermined*** time before he can return to work. He will be out for ***at least 9*** weeks.

How do you designate Rob's leave of absence?

Leave Practice: Putting it All Together

After 9 weeks, Rob is not ready to return to work. He had complications with his surgery, and he needs an additional 10 weeks of leave.

How do you designate Rob's additional leave of absence?

- Is it job protected?
- Is it an undue hardship?
- Can you terminate Rob?

Leave Practice: Putting it All Together

After you approve 10 more weeks of leave, Rob returns ***without*** restrictions per his doctor. Rob performs his job for another month but then is overheard complaining about ongoing back pain. As his manager, you observe that he has become unproductive, counsel Rob about it and, when he does not improve, you recommend immediate termination.

Is this the right move? What are your risks and options?

Leave Practice: Putting it All Together

Take aways:

1. Be patient!
2. Be sure that all statutory protected leaves have been addressed/exhausted
3. Methodically document interactive process
4. Review available reasonable medical documentation to support conclusions
5. If terminating, choose reasons carefully

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Pros & Cons of Working with a Third-Party Administrator



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THIRD PARTY LEAVE ADMINISTRATION

PROS AND CONS

PROS

- Reduce Burden on HR/Benefits
- Expert compliance
- May improved employee experience
- Increased efficiency
- Data protection

THIRD PARTY LEAVE ADMINISTRATION

PROS AND CONS

Cons

- Higher cost
- Less direct control
- Risk of one-size-fits-all, generic service.
- Communication delay
- Potential vendor reliability problems

THIRD PARTY LEAVE ADMINISTRATION

CONTRACT PROVISIONS

- **Historical data**
- **Not legal advice**
- **Employment litigation**
- **Indemnification**
- **Limits on liability**
- **Notice before termination**
- **Insurance**

THIRD PARTY LEAVE ADMINISTRATOR

CONTRACT PROVISIONS

- **HIPAA**
 - **What is covered by HIPAA**
 - **Agreement to send Certification and or document supporting accommodation upon request**

THIRD PARTY LEAVE ADMINISTRATOR

QUESTIONNAIRE

- **Healthcare Provider**
- **Retroactive designation**
- **Key employee**
- **Automatic extension of time to submit certification**

QUESTIONS?



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