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Common Misunderstandings About Medical Leaves Of Absence

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Managing an employee's medical leave of absence is often enough to give an employer a headache of its own. When an employee requests time off from work for a medical reason, questions that commonly arise include: Why is the leave needed? When is the employee expecting to return to work? Does the employer have to grant the leave request? And, if so, for how long? What kind of documentation, if any, can the employer require the employee to submit? As employers answer those questions, they have to comply with a handful of different laws, most notably workers' compensation law, the Family and Medical Leave Act (the "FMLA"), and the Americans With Disabilities Act (the "ADA"). Perhaps for that reason, it is not surprising that some managers and Human Resources professionals tend to rely on common, familiar principles to navigate these situations—including, gathering information, following company policy, and treating employees the same. Armed with those principles, they move forward and make decisions they believe are fair and reasonable. Is that so wrong?

Well, maybe. It is often wise to gather information, follow (legal) company policies, and treat employees the same. But in the context of managing a medical leave of absence, these principles, if relied upon exclusively, can sometimes steer even astute managers and HR professionals off the FMLA and ADA compliance track. Below are some of the most common misunderstandings about managing medical leaves.

Misunderstanding #1: If you don't understand why an employee needs a medical leave of absence, it's okay to ask about the employee's diagnosis prompting the work restriction.

Most managers wear two hats on a regular basis: their "prudent manager" hat and their "concerned colleague" hat. So, when an employee reports that he needs some time off to tackle a health issue (by, for example, having surgery), the prudent manager is focused on trying to ensure that he or she has sufficient coverage to meet the company's production or service needs. But the manager is also concerned about the employee's overall health and wellbeing. So, driven by concern, curiosity, or the need for careful planning, managers sometimes inquire into an employee's diagnosis. This is often a mistake.

As a general rule, an employer should never ask about an employee's underlying medical condition or diagnosis, either orally or in writing. If the employee has a serious medical condition, the leave may be protected by FMLA. The FMLA regulations expressly state that an employer can require an employee's health care provider to provide a statement or description of appropriate medical facts regarding the employee's health condition in connection with evaluating the applicability of the FMLA and that such facts may include information on symptoms and the

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employee's "diagnosis," among other things. 29 C.F.R. § 825.306(a)(3). But this regulation does not mean that management can ask *the employee* directly about that diagnosis. And the regulation does not *require* the employee's health care provider to provide the diagnosis in order for FMLA leave to be approved. More importantly, if the employee has a "disability" under the ADA (which is a relatively easy thing to show, thanks to the ADA Amendments Act, which broadened the definition of "disability"), then the employer must also comply with a more stringent requirement in the ADA that the employer not make health or medical inquires, unless doing so is "job-related and consistent with business necessity." But wait, you say, wouldn't inquiring about a diagnosis that keeps an employee out of work always be "job-related and consistent with business necessity?"

According to some courts, the answer is "no." Earlier this year, for example, the United States District Court for the Southern District of California determined that an employer with a policy that an employee's health-related absence would not be excused unless the employee submitted a doctor's note stating, "the nature of the absence (such as a migraine, high blood pressure, etc.)" violated the ADA. The court reasoned that such inquiries were not job-related and consistent with business necessity, because there was no evidence the employer needed to know the nature of the condition causing the absence. Instead, the employer only had a need to know whether the employee had a legitimate need to be absent from work (which a medical professional was capable of confirming without revealing the employee's diagnosis).

Misunderstanding #2: You can always request a doctor's note to verify the need for a medical leave of absence.

Employers sometimes require employees to produce a doctor's note every time they need to take leave for a health reason. Asking an employee to obtain a doctor's note is often fine (and, in fact, the FMLA has a detailed certification process designed to help employers obtain information from the employee's doctor to verify the need for FMLA-covered leave). But there is at least one context in which doctors' notes should not be requested: where the employee has already been approved to take FMLA leave on an intermittent basis for the condition prompting the absence. In such scenario, requiring a doctor's note for each instance of intermittent leave can give rise to a claim of FMLA interference. According to the United States District Court for the Northern District of Illinois, requiring an employee to seek out a doctor's note for each instance of an FMLA-certified absence may constitute interference with the employee's rights "on a practical level," where it effectively discourages the employee from taking FMLA leave and, therefore, is unlawful. Employers may, however, require employees to provide a new medical certification in each subsequent leave year if the need for intermittent leave continues.

Misunderstanding #3: If an employee has a medical condition and needs to be absent from work, the maximum amount of leave to which the employee is entitled is 12 weeks of FMLA leave.

Another common misconception is that, once an employee has exhausted his or her 12 weeks of FMLA leave, the employee's job protection rights end and the employee may be terminated if he or she cannot return to work. This is not necessarily true. If the employee continues to have a medical condition that constitutes a disability under the ADA, the employer may have to provide an extra leave of absence, beyond the 12 weeks of FMLA leave, as a reasonable accommodation to that employee. Numerous courts have ruled that an employer is not required to grant an employee's request for an *indefinite* amount of time off from work. But an employer does have an obligation to consider on a case-by-case basis whether it can accommodate an employee who requests a leave of absence for some *finite* period of time after his or her FMLA leave ends. Thus, an employer cannot have a

"blanket rule" that employees who have been absent from work for a specified period (e.g., a year) will be terminated. As with any other accommodation, if the employer can establish that the proposed leave would amount to an "undue hardship" or that another accommodation would enable the employee to perform the essential functions of the position, the proposed leave need not be provided.

In the real world, it is often tricky to determine how much extra leave may need to be provided as an accommodation. Accordingly, employers would be wise to document any specific and unique factors that were considered in analyzing how much leave is tolerable (such as the employee's position, the financial impact of the leave, the employer's resources, and ongoing business initiatives impacted by the leave), along with the steps the employer followed to gather relevant factual information, so that the context would be apparent to a jury, if litigation were to result. Some HR professionals may resist that advice because they have been trained to believe another principle, below, which is:

Misunderstanding #4: If you treat everyone the same, you won't violate the law.

HR professionals are commonly advised to treat all employees the same. That overarching principle often helps keep employers out of hot water and minimize the risk of a discrimination lawsuit. However, there are some occasions where one employee may need to be treated differently than other employees. One such instance is where the employee has limitations that are caused by a "disability" under the ADA. The ADA requires reasonable accommodations for persons with disabilities, even if doing so requires the employer to do some things it normally does not do for non-disabled employees, such as modifying work schedules. In fact, a disabled employee may have to be provided with an accommodation even if that accommodation will result in a greater burden for non-disabled employees. For example, under the ADA, an employer may be required to remove non-essential job functions from a disabled employee's job and give those additional responsibilities to his or her non-disabled coworkers.

Another example of a seemingly-fair, but problematic policy is a "no-fault" attendance policy, in which all absences are treated the same, regardless of the reason for the absence. The problem with these policies is that, if some of the absences qualify for FMLA leave or constitute a reasonable accommodation for a disability, the FMLA or the ADA may prohibit the employer from disciplining the employee for those absences, even if they violate company policy.

No-fault attendance policies are on the EEOC's radar screen. In fact, in 2011, the EEOC negotiated the settlement of a class action targeting denial of accommodations under a telecommunications company's no-fault attendance policy for $20 million, which, according to the EEOC, "represents the largest disability discrimination settlement in a single lawsuit in EEOC history." Thus, strict no-fault attendance policies generally should be avoided, in favor of more flexible leave policies.

Conclusion

As the case law and discussion above indicates, compliance with the FMLA and ADA is not always intuitive. FMLA and ADA rights can, at times, "trump" an employer's normal process and established procedures. Employers should be aware of the misunderstandings highlighted above and ensure that each medical leave of absence and applicable company policy is reviewed for FMLA and ADA compliance. For questions about applying those

principles to a particular individual or reviewing a specific policy, please contact a member of the Troutman Sanders LLP Labor & Employment Group.

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