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All the Leaves Around
FMLA. ADA. WC. MA PFLA:
Topics and Traps for the
Unwary Employer

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Family and Medical Leave Act - FMLA



- Public Agencies are covered (§ 825.108.)
- EE has worked for 12 months
 - need not be consecutive
 - Military service counts
- 1250 hours in year immediately prior to start of leave
- Leave available for:
 - Serious Health condition –involves inpatient care or ongoing treatment
 - Birth, adoption or placement of child
 - EE needs to care for EE’s spouse, child, or parent
 - Military Caregiver

What is Available under FMLA



- Eligible EE is entitled to a combined 12 work weeks of leave
- 26 Weeks for covered servicemember
- Unpaid (but may combine with paid leave and workers' compensation concurrently)

FMLA – Right to Reinstatement



- EEs returning from FLMA leave must be reinstated to the position they held when the leave commenced or “equivalent position.” The position must be “virtually identical to the original position.”
- Employees must get unconditional pay increases or bonuses. However, 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 the FMLA leave, it can be denied, unless employer offers it to others on leave.
- An employee cannot be required to requalify for any benefits the employee enjoyed prior to FMLA leave.

FMLA- What Does Reinstatement Entail?



- FMLA leave shall not be treated as a break in service for vesting of pension and retirement plans, but unpaid FMLA leave need not be treated as credited service for vesting and eligibility.
- EE returning from leave must be given reasonable opportunity to fulfill new requirements after returning to work. The employee must be reinstated even if the employee has been replaced or his position has been restructured to accommodate his/her absence.
- EE who accepts a voluntary and uncoerced light duty assignment does not waive his/her right to reinstatement to the regular position. However, the right to reinstatement ceases at the end of the applicable 12-month FMLA year.

FMLA Abuse

- DaPrato v. MWRA, 2019 - Taking vacation while on FMLA.
- "An employer may validly consider an employee's conduct on vacation... that is inconsistent with his or her claimed reasons for medical leave.... [V]acationing while on FMLA leave may take either permissible or impermissible forms."
- "An employee recovering from a leg injury may sit with his or her leg raised by the sea shore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process."
- Of course, if FMLA obtained by fraud, EE is not protected

FMLA – “Key Employees”

- Employers don't have to reinstate if the employee is a “key employee”
- •Must be salaried and among highest paid 10% of all employees within a 75 mile radius;
- •To deny job restoration, employer must determine that the restoration (not the absence) will cause substantial and grievous economic injury to the operations of the employer, which is more stringent than “undue hardship”;
- •The employer must give written notice to the employee of key employee status

MA Paid Family Leave Act



- Key for Governmental Employers:
- “Section 10. A municipality, district, political subdivision or authority may adopt this chapter upon a majority vote of the local legislative body or the governing body. For the purposes of this section, a vote of the legislative body shall take place in a city by a vote of the city council subject to its charter, in a town by a vote at town meeting, for an authority by a vote of its governing body, in a district, by a vote of the district in a district meeting and by any other political subdivision or instrumentality, by a vote of its legislative body in accordance with its charter or enabling act.”

MA Paid Family Leave Act - Jan. 1, 2021



- Up to 12 paid weeks to Care for Family Member (More broadly defined than FMLA!); Up to 20 Weeks for One's Own Illness
- State trust fund paid for by payroll tax
- EEs entitled to receive payments up to a max of \$850/wk
 - But there is a WC offset 1:1 – the PFLA benefit is reduced, not the WC
- Anti-retaliation provision – presumption of retaliation within six months
 - ER must show clear and convincing evidence
- New Department created by the law
- Notification Requirements

Job Protection (Cont'd) – FMLA ADA and Ch. 152



- Ch. 152 statute provides for payment of reasonable and necessary charges related to the employee's injury, but FMLA allows EE to continue **individual or family medical coverage** under group health plan with employer during FMLA leave. 29 U.S.C. § 2614(c)(1).
- Second, the ER **must continue its contribution** to the EE's individual or family medical coverage during absence. 29 U.S.C. § 2614(c)(1).
- Third, the FMLA requires ER reinstate **any other benefits** upon return. 29 U.S.C. § 2614(a)(2).
- Finally FMLA provides ER must reinstate employee's job or **a job with equivalent employment benefits**, pay, and other terms and conditions of employment for twelve weeks. 29 U.S.C. § 2614(a)(1). Plus now: Mass Paid Family Leave Act.
- Trap for the Unwary Employer: The end of FMLA does not mean the end of leave! The ADA may require additional consideration of leave as a reasonable accommodation. “Hard and fast” leave exhaustion terminations are disfavored.

Workers' Compensation Related Provisions of FMLA



- Time spent on light duty is not counted as FMLA leave. An employee does not have to accept an offer of light duty. If the employee does not, they may lose workers' compensation benefits, but still can remain on FMLA leave.
- An employee may accept a voluntary and uncoerced light duty assignment and it does not constitute a waiver of prospective rights, including the right to reinstatement to the regular position. The right to reinstatement does cease at the end of the applicable 12-month FMLA year.
- If permitted by state law, accrued paid leave can be used to supplement disability and workers' compensation payments to fully replace an employee's salary. Leave taken pursuant to disability plans and workers' compensation can run concurrently with FMLA.
- FMLA leave and workers' compensation leave may run concurrently.
- The FMLA does not prevent the employer from following the state workers' compensation provisions and information received under those law may be considered in determining entitlement to FMLA.

FMLA and Paid Leave

- FMLA allows to elect to substitute paid leave benefits while on an FMLA leave. [29 U.S.C. § 2612\(d\)\(2\)\(A\)](#).
- When EE gets WC payments, FMLA provision for substitution of the employee's accrued paid leave is inapplicable and neither the employee nor the employer may require the substitution of paid leave. [29 C.F.R. § 825.207\(e\)](#).
- May agree to have paid leave supplement workers' compensation benefits. [29 C.F.R. § 825.207\(e\)](#).

FMLA, ADA, 151B and Workers' Compensation



- 75B of the WC Act - employees who have sustained work-related injuries and who are capable of performing the essential functions of their jobs, with or without reasonable accommodations, are qualified handicapped persons entitled to **151B** protections
- Chapter 151B protects an employee from adverse action because of her handicap. These protections exceed the entitlement to preference in rehiring offered under the workers' compensation statute.

ADA/151B – General Topics and Traps



- Pre-Employment inquiries regarding handicap are forbidden
- But a physical exam may be used to determine if applicant can, with reasonable accommodations, perform the essential functions of the job
- Remember: The accommodations must let the EE do the job!
- The ADA has a FMLA and WC implication: leave beyond FMLA might be a reasonable accommodation. Hard and fast termination actions are disfavored.

What is Handicap?

- 1) have, have a record of, or are **regarded as** having,
 - 2) a physical or mental impairment that,
 - 3) substantially limits,
 - 4) one or more major life activities such as walking, seeing, hearing, speaking, working, or learning.
- ❖ Examples are cancer, hearing impairment or deafness, diabetes, epilepsy, heart disease, mental illness, mental retardation, multiple sclerosis, muscular dystrophy, AIDS, alcoholism, or visual impairment, and shortness of stature.

What does ADA/151B Require?

- Requires that ERs provide EEs with reasonable accommodation to enable them to perform essential functions of the job unless undue hardship
- The interactive process “involves an informal dialogue between the employee and the employer in which the two parties discuss the issues affecting the employee and potential reasonable accommodations that might address those issues. It requires bilateral cooperation and communication.”
- Duty of good faith in process

Leave as Reasonable Accommodation Under ADA



- Employees cannot always pinpoint return to work date
- “To determine reasonableness of accommodation solely by relying on the requirements of FMLA is misguided” – *Lapete v. Country Bank, MCAD 2017*
- There may be circumstances under which an extended leave of absence is an appropriate or reasonable accommodation
- “Flexible leave policies should be considered as reasonable accommodation when ppl with disabilities require time off from work ...where this will not cause undue hardship” MCAD Handicap Guidelines, p. 36, 20 MDLR 1998

Ideas for Reasonable Accommodation

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<https://askjan.org/>



ADA/151B and WC

- “An employee's responses on his or her workers' compensation claim forms or other disability benefit application forms may, however, be considered in determining whether the employee is a qualified person with a disability. If an employee asserts on a workers' compensation claim form or other disability benefit form that he or she is **totally and permanently disabled**, his or her response may be used against him or her in a determination regarding his or her status as a qualified person with a handicap.” *See Beal v. Bd. of Selectmen of Hingham*, 419 Mass. 535, 543 (1995)

Job Protection – Ch. 151B and Ch. 152



- Chapter 152 s. 75 “incorporates by reference” Ch 151B – the state anti-discrimination law
- G.L. c. 152 says ER may not **discharge** or **refuse to hire** an employee because they have used WC. Ch 152 s 75A provides an employee with a preference in hiring for suitable positions if available
 - **However S 75B provides:**(1) Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions **of chapter one hundred and fifty-one B.**
- Ch. 151B provides **more job protection** because it says term/failure to hire because of disabling condition is discrimination *Dartt v. Browning-Ferris Indus.*, 427 Mass. 1 (1998).

Retaliation 101

- Retaliation is the “Cause du Jour” of the plaintiff employment bar
- Retaliation can exist in multiple contexts but particularly in FMLA, ADA and WC.
- The defense problem is one of chronology – “post hoc, ergo propter hoc”
- Key for ERs: underlying discrimination or other claim may fail but retaliation claim may succeed