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The ABCs of the FMLA and ADA*

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Manager Responsibilities

1. Identify situations when employee may be requesting a leave/accommodation
2. Document absences (including absences due to intermittent leave)
3. Reinstatement of employee to position and related benefits following leave

Manager Responsibilities

4. Ensure no discrimination/retaliation due to protected leave/accommodation requests
5. Note: Communication with HR regarding leave and accommodation issues is critical

Types of Leave

1. Family and Medical Leave Act (“FMLA”)
 - a. Eligible employees
 - i. 12 months of employment (not consecutive)
 - ii. 1250 hours during 12 months preceding leave
 - iii. Work in worksite where 50 or more employees work within 75 miles of the worksite
 - b. Up to 12 workweeks of unpaid, job protected leave available within designated 12-month FMLA year (26 workweeks in some cases)
 - c. Continuation of health benefits during leave

Types of Leave

1. Family and Medical Leave Act (“FMLA”)

d. Conditions qualifying for FMLA:

- i. Birth of child to care for child
- ii. Care for child placed for adoption or foster care
- iii. Serious health condition of employee
- iv. Serious health condition of employee’s immediate family member
- v. Qualifying exigency
- vi. Leave to care for covered servicemember

Types of Leave

1. Family and Medical Leave Act (“FMLA”)

- e. Six general categories of a “serious health condition”
 - i. Inpatient care (minimum of 1 night hospitalization)
 - ii. A period of incapacity of more than 3 consecutive full calendar days plus treatment by healthcare provider (“incapacity plus treatment”)
 - iii. Any incapacity due to pregnancy or prenatal care

Types of Leave

1. Family and Medical Leave Act (“FMLA”)

- e. Six general categories of a “serious health condition” (continued)
 - iv. Chronic conditions requiring treatment by a healthcare provider
 - v. Period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective
 - vi. Multiple treatments for non-chronic conditions that if left untreated would become serious health condition

Types of Leave

2. Americans With Disabilities Act

- a. Definition of “disability” broadly construed
 - i. Physical or mental impairment that substantially limits a major life activity
- b. Individualized assessment of whether leave request is reasonable accommodation
- c. Potential undue hardship exception
- d. Cannot discriminate based on:
 - i. Current disability
 - ii. Prior disability
 - iii. Perceived as disability
 - iv. Associated with someone with a disability

Types of Leave

3. Americans With Disabilities Act Leaves

- a. Leave of absence is a possible accommodation
- b. Other possible accommodation obligations (e.g., adjusted work schedule, removal of non-essential functions, etc.)

Hypothetical 1

Human resources receives various resumes for a job opening for an open position and is now at the stage of interviewing. The manager interviews the applicant and, during the interview, the applicant discloses that she has post-traumatic stress disorder.

What does the manager do?

Hypothetical 2

What if, instead, the applicant discloses the existence of a prior disability (such as she suffered from Leukemia but has since recovered) that the manager would not have been aware of by looking at her?

Analysis of Hypotheticals 1 and 2

1. ADA protections go beyond employees and current disabilities
2. Nothing helpful to say
 - a. Non-verbal empathy
3. Documentation

Types of Leave

4. Family and Medical Leave Act (“FMLA”)

- a. How may FMLA be taken?
 - i. May be used all at one time
 - ii. May be used a few weeks at a time
 - iii. May be used intermittently
(e.g., a few hours at a time)
 - iv. May be used to create a reduced-work schedule

Scope of Laws/Benefits

1. Key Distinction:

a. Leave of Absence

i. FMLA

ii. ADA

iii. Organizational (e.g., parental, sick, etc.)

b. Monetary Benefits

i. Workers compensation

ii. Short-term disability

iii. Paid time off benefits

Hypothetical 3

Employee has been out for several days and informs you, either directly or by way of a doctor's note, that his absences were "due to a sickness."

Is this a request for FMLA?

Analysis of Hypothetical 3

1. Calling out “sick,” without more information, is not sufficient to trigger employer obligation to determine whether absence should be designated as FMLA leave
2. When making initial request for FMLA leave, employee must provide specific information, such as inability to perform functions of job, pregnancy, overnight hospitalization, need to care for an immediate family member, etc.

Hypothetical 4

Employee returns to work after being out for several days and tells the manager that he was in the hospital and then was home recovering from pneumonia.

Is this a request for FMLA?

Analysis of Hypothetical 4

1. Reference to hospital stay is sufficient to put organization on notice that absence may be covered by FMLA
2. Absence due to “inpatient” care (e.g., hospital stay) typically qualifies for FMLA leave, subject to medical certification
3. Example of coverage for short absences even where employee is not incapacitated in excess of three consecutive, full calendar days

Hypothetical 5

Employee informs manager that she needs to go to treatments for a kidney condition and needs to miss work 1 day per week for the next six weeks.

Is this a request for FMLA?

Analysis of Hypothetical 5

1. When making initial request, employee does not have to expressly assert rights under “FMLA” or even mention “FMLA”
2. Identification of need for “treatments” is sufficient to put organization on notice that absence may be covered by FMLA
3. Example of short, intermittent absences for a chronic condition that may be eligible for FMLA, subject to medical certification

Recognize a Request for FMLA Leave

1. Practical Pointers:

- a. Employee may provide sufficient information to trigger notification obligation even where employee does not follow required procedures
- b. Knowledge of managers is key and imputes knowledge to organization
- c. Need to be able to recognize a request for leave/accommodation and report it to Human Resources!

The Medical Certification Process

1. All FMLA leaves must be supported by appropriate medical documentation
****Managers do not solicit documentation; HR does!*
2. Organization may seek:
 - a. Clarification or authentication of original certification
 - b. Second or third opinion where question validity of original certification
 - c. HR may have direct contact with employee's healthcare provider in certain instances but managers may not!

Hypothetical 6

Employee was previously approved for intermittent FMLA. Several months have passed and now, in the summer, the employee's intermittent absences begin to frequently occur on a Monday and/or Friday.

Are you permitted to require the employee to submit an additional medical certification form?

Analysis of Hypothetical 6

1. Organization may require recertifications of need for FMLA more often than every 30 days when:
 - a. Extension of leave requested
 - b. Changed circumstances
 - c. Information casting doubt on need for leave

Integrating FMLA With Paid Time Off Benefits

1. Are employees are permitted/required to use accrued but unused paid time off benefits and/or organization-sponsored replacement benefits programs concurrently with FMLA?
2. Use of disability/workers compensation payments concurrently with and other leaves
3. Under no circumstances should an employee receive more than 100% of their pay

Hypothetical 7

Employee makes a request for FMLA to care for her ill family member. She has five days of paid time off available. She asks her manager if she can take these days first and then take an unpaid leave. What should be the manager's response?

Analysis of Hypothetical 7

1. Manager is not required to permit employee to use vacation first and delay commencement of FMLA, where reason for the absence qualifies for FMLA
2. Employees may choose whether to use paid time off or wage-replacement benefits concurrently with FMLA

Hypothetical 8

Employee is on FMLA leave. While employee is away, manager learns that employee spent significant amount of her working time before her leave operating her own side business using organization's computers and other property.

Is Employee's job still protected under the FMLA?

Analysis of Hypothetical 8

1. FMLA does not protect employee from discipline for violation of ***uniformly applied*** rules of conduct/behavior

Hypothetical 9

Employee is on FMLA leave. Just prior to going out on FMLA, manager was about to write the employee up for poor performance. When employee calls her manager to say she is ready to return to work, manager decides that she does not want to bring her back because of the performance issues.

Is this permissible?

Analysis of Hypothetical 9

1. Obligation under to return employee to same or equivalent position does not protect employee from otherwise appropriate discipline for performance reasons
2. Where employee's going out on leave prevents organization from implementing discipline, manager should promptly document prior intention to discipline; upon employee's return to work, manager should meet with employee to address performance issues going forward

ADA Obligations

1. Non-discrimination
2. Reasonable accommodations
 - a. Examples of reasonable accommodations
 - i. Adjusted schedule
 - ii. Adjusted work station
 - iii. Adjusted job responsibilities
 - iv. Leaves of absence

Hypothetical 10

Employee has record of poor attendance and periodically claims he finds his position to be stressful. Employee's family member tells the manager that the employee has been having a number of personal issues and is very stressed out.

Is this a request for a reasonable accommodation?

Analysis of Hypothetical 10

1. Comment by employees that position is “stressful” is fairly typical; however, reference is vague
2. Vague reference, however, does not end inquiry; appropriate to inquire as to whether there are tasks that cannot be performed or whether any assistance is needed
3. Family member’s comment may be sufficient to trigger organization’s obligation to make further inquiry

Hypothetical 11

Employee advises his supervisor that his medical condition, an anxiety condition, makes it difficult for him to concentrate and he has trouble meeting his deadlines. He advises his manager that what would really help would be if he could have an assistant or if his manager would remind him each week of all of his deadlines.

Is this request reasonable?

Analysis of Hypothetical 11

1. Accommodation requests are unreasonable
2. No automatic obligation to agree with specific employee requests
3. Inquiry does not end, however, with unreasonable request
4. Organization obligated to consider and propose alternative accommodations to address condition

Operational Guidance For Managers

1. Don't make accommodations without consulting HR
2. Consult with HR if employee discloses physical or mental condition in response to coaching, discipline or evaluation
3. Consult with HR if employee requests accommodation or leave of absence (at any time)

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