

MANAGING EMPLOYEE ATTENDANCE REQUIRES CAREFUL PLANNING AND COMMUNICATION

Navigating Family and Medical Leave Act, Americans with Disabilities Act, and worker's comp hazards

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Every year, my ELC partner Steve Greene and I present an employment law update at a state bankers' association meeting. After covering the latest legislative developments and Supreme Court pronouncements, we leave plenty of time for questions. Invariably, about half the questions concern employees who are on extended sick leave, or whose attendance is spotty, or who are requesting a reduced work schedule.

While every case is different, we have found two simple rules apply:

- Get prompt, accurate, and complete medical information
- Get the employee back into the workplace as soon as possible

Doctor, Doctor, give me the news

The challenge is successfully managing employee attendance while ensuring compliance with the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA) and state workers' compensation statutes. The key is obtaining prompt, accurate, and complete medical information about the condition that prevents the employee from coming to work.

Sounds easy, doesn't it? Unfortunately, a number of factors reduce your chances of getting this information without a fight.

Under FMLA, an employee must give at least 30 days notice of a foreseeable need for leave. When the need is unforeseeable, notice should be given "as soon as practicable" and in compliance with the bank's absence notification procedures.

Notice is more than "calling in sick." The employee must give enough information to let the bank know that one of the circumstances for FMLA leave might apply. (For the purposes of this article, we are referring only to leave for the employee's own serious health condition.) The employee's request for foreseeable leave, or the start of unforeseeable leave, triggers the five-day period in which the bank must request medical information.

A matter of form

In 2008, the U.S Department of Labor issued new FMLA rules supposed to clear up confusion concerning notice

obligations; the definition of a serious health condition; fitness for duty certification, etc. Mostly, the new rules just add to the paperwork burden of tracking FMLA compliance. However, with regard to obtaining medical information, the Labor Department gave employers a hand by publishing a model form which asks the healthcare provider all the right questions.

You should use this form!

Complete Section 1 with employer information, attach the relevant job description, and give it or send it to the employee, explaining that it needs to be completed and signed by his healthcare provider and returned within 15 days.

Be prepared for resistance from the healthcare provider. Some will require a HIPAA (Health Insurance Portability and Accountability Act) privacy release before providing medical information to the bank. The new FMLA rules state that the employee must sign such a release. Some health care providers charge for completing and signing the form. The employee may balk at paying. Explain that without medical certification, you cannot consider whether the time off qualifies as FMLA leave.

If the form is returned incomplete, illegible, or with inadequate information, the health care provider has up to seven days to correct or complete the certification.

Bottom line: FMLA leave can be denied if appropriate medical certification is not provided. If the time off is not designated as FMLA leave, the employee's right to return to work is not safeguarded.

Assuming the form is completed, signed, and returned within the 15-day period, what does it tell you?

- Most importantly, it provides the medical facts that show whether or not the employee has a serious health condition as defined by FMLA.

- Secondly, it indicates how much leave will be required, whether a reduced schedule is recommended, and whether there might be a need for subsequent intermittent leave for flare-ups.

Armed with this information, you can now start planning for the employee's return to work.

Gear shift to ADA: Accommodating the returning employee

Sadly, it is rare that, at the expiration of a disability leave, the employee bounces back to work, fit as a fiddle and raring to go.

Usually, the employee needs to be eased back into work with a reduced schedule, light duty, or other accommodation. Thus, as the date for the employee's return to work approaches, the focus shifts from the FMLA to the ADA.

While FMLA's object is to protect the employee's job during a leave of absence, the ADA's object is to permit individuals with disabilities to perform the essential functions of their job. Recent amendments to the ADA mean that, instead of arguing about whether the employee is truly disabled as intended by the Act, the employer needs to move on to explore how best to accommodate the individual's disability in the workplace.

Important: Basically, the definition of ADA disability has now been so broadened as to cover virtually every mental or physical impairment.

The accommodations most frequently requested by returning workers are a reduced schedule; working from home; or even more time off. The easy option is to acquiesce in what the employee wants, but the law does not require that. The ADA requires a meaningful dialog between the employer, the employee, and the employee's healthcare provider to determine a reasonable accommodation that allows the worker to perform the essential functions of the job without imposing an undue burden on the bank's operations.

Impatient managers may be unwilling to engage in the necessary dialog to determine whether there might be other accommodations required. For example, equipment or job function adjustments, which would allow the employee to integrate fully into the workplace while performing the essential job functions.

However, banks must take care in giving in to a request to work from home or for additional leave, without engaging in an informed dialog about the individual's ability to perform the job functions on the bank premises. Making such arrangements may perpetuate an unsatisfactory situation, breeding resentment in co-workers and managers, as well as disengagement in the employee.

Again, medical information is key in determining an accommodation that answers the bank's need to get the job done as well as meeting ADA obligations. That is why attaching the job description to your request for a fitness for duty report from the healthcare provider is so important.

I recommend you routinely seek a fitness for duty report for every employee returning from FMLA leave. However, that is just the first step. The individual needs to give input too, as does the manager and HR. The outcome of this dialog should be a return-to-work plan with specific timeframes and the goal of getting the employee back to full-duty status as soon as possible.

Watch out for surprises along the way

Again, the return-to-work dialog sounds easy on paper, but is difficult in practice. It is amazing how often previously unrecorded performance problems surface when an employee is on disability leave. Equally amazing: the number of managers who say they were actually on the point of firing the individual when he or she went out sick.

No matter how frustrated a manager may be at the prospect of having the employee back, I strongly discourage firing employees while they are on leave or immediately upon their return to work. They will have a convincing claim under either or both the FMLA and the ADA.

Litigation avoidance is not the only reason to prepare and follow a return-to-work plan. The longer an employee is out of the workplace, the more disengaged from the bank the individual becomes. Not only are they vulnerable to the lawyer ads on afternoon TV ("Have you been injured at work? Call..."), but they may begin to see themselves as permanently unable to work, and may begin to slide into a mindset of entitlement. Numerous studies have shown that "work hardening"--early return to work with some modification of job duties--actually speeds full

recovery.

One size fits all

Banks are not generally at high risk for workers' compensation injuries. For this reason, and because workers' compensation laws vary greatly from state to state, I won't spend any time on this topic, except to say that the two cardinal rules described above apply also in workers' comp cases: getting clear medical facts about the injured worker's condition is essential; then work with your workers' comp administrator to get the worker back to work as soon as possible, even if this means into a temporary light duty position.

This strategy not only keeps your workers' comp. costs down, it allows you to comply fully with your obligations under FMLA and ADA.

The hoped-for result? A healthy, happy, and productive employee for years to come.

Disclaimer: This article does not provide, nor is it intended to substitute for, professional legal advice.

About the author

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years' experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers' Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers' association conferences.

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Marian Exall, in addition to her blog, has written other recent articles for ABABJ.com: Why the HR director's popping Nexium * Overtime pay for home lenders in stunning upset to past U.S. law.

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