

Where are your employees when you need them?

May 26 2015

Employers should evaluate all of the applicable laws to determine how qualified employee leave could potentially affect staffing needs and take proactive steps to prepare for conceivable staff shortages.

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For most positions within the hospitality industry, employers provide employees vacation and sick days, but managing employee time off so that on any given day all duties are sufficiently covered can be challenging. Failing to successfully do so can result in disastrous consequences.

In addition to vacation and sick days, a host of federal, state and local laws—such as the Family Medical Leave Act and Americans with Disabilities Act—provide employees with other leave rights.

Managers need to understand employee leave rights as a first step in guarding against any abuse of those rights and to safeguard against excessive employee leave and inadequate staffing.

Family Medical Leave Act

Employers with 50 or more employees within a 75-mile area must comply with the Family Medical Leave Act. Employees become eligible for FMLA leave after they have worked for the employer for one year and at least 1,250 hours the preceding 12 months.

FMLA provides eligible employees up to 12 weeks of unpaid medical leave per year for:

- the birth of a child and to care for the newborn child;
- the placement of a child through adoption or foster care;
- the care of a spouse, son, daughter or parent with a serious health condition; or
- a serious health condition that makes the employee unable to perform the functions of his or her job.

FMLA also provides leave to employees for a qualifying need relating to the employee's spouse, son, daughter or parent's military active duty.

FMLA leave can be different depending on the needs of the employee. An employee may request a 12-week block period of leave, intermittent leave or a reduced schedule. For example, if an employee requests a few hours off each month to attend doctor's appointments, this leave could qualify as FMLA leave.

While the employee is on leave, the employer must continue the employee's health coverage on the same terms and conditions as if the employee had not taken leave. Once the employee's leave ends, the employer must restore the employee to the same or equivalent job. These requirements are crucial because employers cannot interfere with the employee's leave or retaliate against an employee for taking FMLA leave. Once an employee qualifies for FMLA leave, the employer must grant the leave without consideration of the burden on the employer.

American with Disabilities Act

The Americans with Disabilities Act applies to employers with 15 or more employees. The ADA requires that employers provide employees with disabilities reasonable accommodation to enable them to perform the essential functions of their jobs.

When determining what type of accommodation is appropriate the employer must engage the employee in an interactive dialogue to explore all of the potential options to accommodate the employee. Employers, however, are not obligated to provide an employee an accommodation that places an undue hardship on the employer.

Employees may request leave as an accommodation. Whether leave as an accommodation poses an undue hardship on the employer is fact-sensitive and depends upon the nature of the job, size of the employer, the employer's financial resources and other factors.

Similar to the FMLA, when returning from leave provided under the ADA, the employee is entitled to return to the same position, unless the employer can show that holding that position open is an undue hardship. Also, pursuant to the ADA, employers must look to determine if there are other open positions the employee could perform. Unlike the FMLA, there is no set time period for a leave under the ADA.

ADA and FMLA together

Employers cannot consider the ADA and the FMLA independently of one another because often they both apply to leave situations.

Employers with "no-fault" leave policies, which immediately consider employment terminated if an employee does not return from leave as scheduled, might not necessarily violate the FMLA, but they might violate the ADA if the employer fails to consider whether additional leave time can be granted without creating an undue burden.

Even when an employee has not worked for an employer long enough to qualify for FMLA leave, or an employee has used all 12 weeks of his or her FMLA leave, employers still may have an obligation to provide medical leave where such leave is a reasonable accommodation under the ADA. Of course, the employer can assert that such accommodation is an undue burden.

In such a case, the employer should consider:

- how long the employee is requesting for leave;
- why the employee is requesting the additional leave; and/or
- whether that request places an undue burden on the employer.

When addressing employees with workers' compensation injuries or illnesses, employers also must be mindful of their duties under the FMLA and the ADA.

Other leave laws

States and municipalities also have numerous laws that govern employee leave. It is crucial that employers, especially multi-state employers, are in tune with the each state's laws that govern their workforce.

While the majority of states and local governments generally have not governed paid vacation, sick leave or time off, an increasing number of states and municipalities have adopted paid sick leave laws that require employers to provide employees paid sick leave. These laws tend to specify an accrual rate for paid sick leave. Employers must either implement a paid sick leave policy if they do not already provide sick leave or be sure that their accrual rates provide the required leave.

Some states have enacted their own leave laws that mimic FMLA laws but provide broader protections to employees in those states. For example, these state FMLA laws may allow an employee to be eligible for leave sooner than guidelines set out in the FMLA, allow the employee to take leave to care for a broader set of family members, or provide different types of leave (i.e., pregnancy disability leave or care leave to look after a sick child).

States also provide other types of leave, including military leave, voting leave, jury duty leave and domestic or crime victims leave.

Conclusion

With numerous overlapping leave laws, employers should evaluate their practices and policies to ensure compliance. Employers must not be quick to terminate employment based on employee leave. Rather, employers should evaluate all of the applicable laws that pertain to their workplace in order to determine how qualified leaves could potentially affect their staffing needs and take proactive steps to prepare for conceivable staff shortages.

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