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SMART STRATEGIES

(by Paul Pautler)

Avoiding Family and Medical Leave Traps

Understanding the FMLA can prevent major headaches down the road.

Last winter, while watching a youth basketball game, a good friend and mid-level manager lamented to me about an employee who had used almost all of her allotted medical leave—to the employer's inconvenience—and then had the audacity to ask for a week of vacation around the holidays.

When I asked whether he had drawn down the employee's vacation time concurrently with the leave, I received a blank stare and knew he wasn't going to be pleased with my thoughts. A couple of minutes later, he was grumbling about lawyers. We've salvaged the friendship, but I fear he'll never be a fan of the Family and Medical Leave Act (FMLA).

For employers, the FMLA presents a frustrating framework that can be difficult to manage around. While no plan can completely eliminate FMLA administration headaches, recognition of a few key principles may simplify the process and help avoid liability.

Draw Down Paid Leave

Employees are only entitled to *unpaid* leave. However, they may substitute paid leave to the extent they have it available.

For instance, an employee who has accumulated one week of vacation time and one week of paid sick time may substitute them for the first two weeks of FMLA leave and, thereafter, any additional FMLA leave would be unpaid.

What some employers fail to recognize, however, is that an employee who simply takes unpaid FMLA leave for 12 weeks will still have available any unused paid leave time at the conclusion of the FMLA leave.

For this reason, employers should usually draw down an employee's paid leave time concurrently with any requested FMLA leave. An employer has the right to do so even if the employee objects. Concurrent drawdown will limit leave entitlement regardless of whether the employee has banked significant paid leave and will avoid the unhappy surprise when an employee returning from 12 weeks of FMLA leave announces that he or she plans to take two weeks of vacation later in the year.

Employers Can Mandate FMLA Leave

When an employee has a qualifying serious health condition, the *employer* may require the employee to take FMLA leave rather than transferring to a light-duty job or simply taking vacation or sick days. Under the FMLA, an employee is not entitled to light duty or other job modifications. If the employee cannot perform his or her job because of the health condition, the employer may mandate FMLA leave—and begin drawing down the leave entitlement.

Don't Forget Other Health-Related Employment Laws

One very important caveat to the administration tool described above is that employers must avoid tunnel vision and analyze entitlements under the Americans with Disabilities Act and workers' compensation laws. At minimum, an employer faced with an employee's request for FMLA leave should consider the following:

- An employer should always analyze separately whether an employee's "serious health condition" also qualifies as a "disability" under the ADA and whether the condition is "work-related." They are three different analyses.
- If an employee has a "disability," then he or she may be entitled to "reasonable accommodation," which could include additional leave beyond the 12-week FMLA entitlement. Many employers have tripped themselves by terminating an employee who could not return after 12 weeks of FMLA leave, without at least considering whether additional leave would be a reasonable accommodation.
- Similarly, while the FMLA does not require light duty or other job modifications, workers' compensation past practices or ADA reasonable accommodations may necessitate such changes, at least for a time.

While the FMLA might create heartache for HR professionals and employers trying to staff a business, the law is here to stay, and managers who do not take care can be easily tripped up. ■

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