

Family and Medical Leave Act (FMLA) in the workers' compensation setting

Most employers are familiar by now with the Americans with Disabilities Act (“ADA”). The ADA is federal legislation that prohibits discrimination in all aspects of employment against “qualified individuals with disabilities.” (Please see the *legal advisory* on the ADA for a general review of that Act.) More recently, the Family and Medical Leave Act (“FMLA”) went into effect. The FMLA is a federal law that provides for up to twelve weeks of unpaid leave per year for an employee who is unable to work because of a “serious health condition.” The FMLA leave may be used also for the birth or adoption of a child, or to care for a spouse or an immediate family member. A twelve-week cap is the *total cumulative* leave available to an employee under the FMLA each year, even if the leave is taken for more than one reason. Employers covered by the FMLA must maintain any pre-existing health insurance coverage for the employee during the leave and must reinstate the employee to the same or an equivalent job when the leave ends. (Equivalent jobs are described later in this advisory.)

Like the ADA, the FMLA may provide additional protection to an employee with a work-related injury. As a result, employers should be familiar with their rights and responsibilities under the FMLA when making employment decisions that involve workers' compensation claimants.

Covered employers and eligible employees

The FMLA became effective on August 5, 1993. The Act covers all employers with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. An employee will be eligible for the

FMLA if he or she has been employed by a “covered employer” for at least twelve months (which need not be consecutive), and has been employed by the employer for at least 1,250 hours of service during the twelve months preceding the commencement of the leave. Finally, in order to be eligible, an employee must also be employed at a worksite where 50 or more employees are employed by the employer within a 75-mile radius of that worksite.

Conditions covered by the FMLA

The FMLA defines a “serious health condition” as an illness, injury, impairment, or physical or mental condition that involves inpatient care or “continuing treatment” by a health care provider. Continuing treatment by a health care provider includes one or more of the following:

1. a period of incapacity of more than three consecutive calendar days along with one of the following: two or more treatments by a health care provider (or on referral by a health care provider), or one treatment by a physician which results in a regimen of continuing treatment;
2. any period of incapacity due to pregnancy or prenatal care;
3. any period of incapacity or treatment for such incapacity due to a chronic serious health condition;
4. any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's disease or a severe stroke);

5. any period of absence to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of the treatment (e.g., cancer, arthritis, kidney disease).

Some examples of “serious health conditions” include: heart conditions requiring bypass operations, back conditions requiring extensive therapy or surgical procedures, severe morning sickness due to pregnancy, treatment for allergies, treatment for stress, prenatal care, and treatment for substance abuse. Specifically excluded are: routine physical examinations, eye examinations, dental exams, cosmetic treatments, and colds, flu, or earaches.

While both the FMLA and the ADA may provide protection to a disabled employee, each case must be analyzed carefully. It is possible for a health condition to be a “serious health condition” under the FMLA, but not a “disability” under the ADA, and vice versa. For example, an employee could take time off work under the FMLA because of continuing treatment of a broken leg, yet the temporary nature of the injury, combined with the prospect of full recovery, could mean that the injury does not impair a major life function and therefore is not an ADA-covered disability. On the other hand, some employees may suffer from a “disability” as defined by the ADA, but because that condition does not require continuing treatment or inpatient care, the employee has no entitlement to leave under the FMLA. An example would be a visible cosmetic disfigurement.

Absences or leaves covered by the FMLA

An employee who, because of a serious health condition is “unable to perform the functions of his or her position,” may take leave for self-care. The employee is considered “unable to perform the functions of his or her position,” if he or she is unable to work at all or is unable to perform any of the “essential functions” (as defined by the ADA) of the employee’s position.

Even if an employee is generally still able to perform his or her job, but must take intermittent time off due to a “serious health condition,” the individual would be eligible for FMLA leave. For example, if an employee needed time off for therapy sessions, he would be considered “unable to perform the functions of the job” during those periods and could take the time necessary to receive therapy or treatment. In those cases, the employee does not reach the twelve-week limit until the intermittent leave time adds up to twelve weeks. In intermittent leave situations, the FMLA may permit an employer to temporarily transfer the employee to another position, as long as that position has equivalent pay and benefits.

Paid or unpaid leave

An eligible employee may elect, or the employer may require the employee, to substitute his or her paid accrued vacation, personal, or medical/sick leave for unpaid FMLA leave taken for the serious health condition of an immediate family member or for the employee’s own serious health condition. In all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as qualifying for FMLA and to give notice of the designation to the employee.

For example, an employer may designate a period of workers’ compensation disability as FMLA leave, even if the employee is receiving temporary total disability benefits or temporary partial disability benefits. It is important to remember that the employee must be notified that the period of compensated disability is being designated as FMLA leave.

An employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

Notice requirements

The FMLA has very detailed regulations outlining the Act’s notice requirements. These requirements include a posting requirement and a handbook or “written guidance” requirement.

In addition, when an employee actually requests FMLA leave, the employer is required to provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of failing to meet those obligations. Such notice should be given within two business days of the employee's request for FMLA leave. If notice is given orally, it must be confirmed in writing no later than the following payday.

The employer may not retroactively designate leave as FMLA leave (with only a few exceptions). Paid or unpaid leave counts against the twelve weeks of FMLA leave only from the date notification of the FMLA designation is given to the employee.

The employee also has notice requirements to meet. The employee must provide 30 days advance notice if the leave is foreseeable. If the leave is not foreseeable, notice must be given as soon as practicable. Verbal notice is sufficient, and the employee need not specifically mention the FMLA.

The notice requirements are very detailed, and employers must carefully read and comply with the regulations to satisfy those requirements.

Medical certification and fitness for duty exams

Employers may request medical certification to substantiate a "serious health condition" of an employee requesting leave, and to verify that the employee is able to resume work after the leave. To substantiate an employee's need for time off due to a "serious health condition," an employer may require an employee to submit medical certification from the employee's health care provider.

An employer may request only the following information:

- the date the condition began, and probable duration;
- a diagnosis of the serious health condition;
- a brief statement of the treatment plan;
- whether hospitalization is required;
- a statement that the employee is unable to work

or unable to perform essential functions of the job;

- if the request is for intermittent leave for planned medical treatments, the certification must also state the dates on which the treatments would be given and the duration of the treatments.

The employer's request for certification must be in writing, and the employer may submit a list of the essential functions of the job to the provider. The regulations do not permit the employer to contact the employee's health care provider for additional information. If the employee is receiving workers' compensation benefits, however, the employer may follow the provisions in the workers' compensation act with respect to contacting the employee's provider.

If the employer disputes the certification provided by the employee, the employer may require a second opinion. If the second opinion differs from the first, the employer may require a third opinion from a jointly designated provider. The opinion of the third provider is binding. The employer must pay for the second and third opinions.

At the end of a FMLA leave, an employer may require an employee to present certification from a health care provider stating that the employee is able to resume work. The request for the fitness-for-duty certification must be pursuant to a uniform policy already in place. In addition, the employer must notify the employee at the time the leave begins that a fitness-for-duty certification will be required as a condition of reinstatement. The notice must also be in the handbook or other "written guidance" describing the FMLA rights and obligations.

Reinstatement after the FMLA leave

On return from FMLA leave, an employee must be reinstated to the same position the employee held when leave commenced, or to an equivalent position. An "equivalent position" is a position with equivalent benefits, pay, and other terms and conditions of employment. There are some exceptions to the right to reinstatement, including an economic lay-off during

the FMLA leave, elimination of a shift, or completion of a project for which the employee was specifically hired. In addition, there is an exception for “key employees” and for employees who have given an unequivocal statement that they intend not to return to work. A “key employee” is a salaried FMLA-eligible employee who is among the ten percent highest paid of the employer’s employees within 75 miles of that worksite.

After the twelve weeks of unpaid leave expire, the employer’s responsibilities under the FMLA are satisfied if the employee is not able to return to his or her pre-injury position. Employers should be aware, however, that the ADA may require them to extend the leave, if additional time would constitute a “reasonable accommodation.” Similarly, reasonable accommodation under the ADA might require the employer to return the employee to a modified position, or a vacant position for which the employee is qualified.

In the workers’ compensation context, the employer must also consider the economic benefits of returning an employee to work in a light-duty position. If the employee is offered a suitable light-duty position within the twelve weeks of FMLA leave and refuses that position, the employer must still provide the

remainder of the twelve weeks of FMLA leave, and reinstate the employee as described above. However, the employer and insurer do not have to continue workers’ compensation wage-loss benefits if the employee refuses suitable light-duty work during the twelve weeks of FMLA leave.

Conclusion

The FMLA is a significant piece of federal legislation that must be considered by employers dealing with employee absences or leaves for medical reasons, including any period of disability due to a work-related injury. The FMLA requirements must be considered in addition to the requirements of the ADA and state leave laws.

This legal advisory is not intended to provide a complete review of the FMLA’s requirements. Its intent is to notify employers that the FMLA is in effect and does impact how employers handle periods of disability resulting from work injuries. Employers are encouraged to consult an attorney specializing in employment law to help them set up leave policies that comply with the FMLA.



The Work Comp Experts