Immersion Session

BACK TO THE FUTURE!

MANAGING RETURN-TO-WORK ISSUES

Jill Garcia (Moderator) – Ogletree Deakins (Las Vegas)

J. Carin Burford – Ogletree Deakins (Birmingham)

Matthew S. Effland – KAR Auction Services

Matthew K. Johnson – Ogletree Deakins (Greenville)

Christian J. Keeney – Ogletree Deakins (Orange County)
Employee leave rights provided by the federal Family and Medical Leave Act of 1993 ("FMLA"), state laws that mirror federal FMLA rights, the American with Disabilities Act ("ADA"), the Uniformed Service Employment and Reemployment Act ("USERRA"), state and local paid sick leave requirements, state workers' compensation laws, and other state leave requirements present unique challenge to human resources professionals and employment attorneys. This paper will examine the key provisions of these entitlements in the context of the challenges faced by employers in returning employees from these leaves, particularly where overlapping coverage and differing legal requirements complicate the reinstatement process in light of the parties' various rights and obligations under multiple statutory schemes.

I. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

A. Duration and Amount of Leave

The Family and Medical Leave Act of 1993 ("FMLA") covers employers with 50 or more employees within 75 miles. An employee is entitled to leave benefits under the FMLA if the employee has worked at least 12 months and 1,250 hours within 12 months prior to the leave. This leave may be taken: (1) for the birth and care of the employee’s child; (2) for the placement of a child with the employee for adoption or foster care; (3) to care for the employee’s spouse, child or parent suffering from a serious health condition; (4) because of the employee’s own serious health condition which renders the employee incapable of performing his/her job functions; (5) because of a “qualifying exigency” related to covered active duty of the employee's spouse, son, daughter, or parent (“qualifying exigency” leave); and (6) to care for a covered service member with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered service member (“caregiver” leave).

The FMLA generally provides up to 12 weeks of leave in a 12-month period, but it may provide up to 26 weeks in a 12-month period for caregiver leave.

Under the FMLA, a “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility (even if it involves only a one-night stay) or a variety of “continuing treatment” scenarios. These may result in leave and reinstatement obligations. Further, those that involve the employee's own serious illness or injury may also implicate the ADA, which is addressed further below.

B. Notice Obligations

To deny leave or reinstatement rights, employers must comply with numerous technical requirements, including posting a notice explaining the FMLA’s provisions and the procedures for filing complaints. FMLA-covered employers may also give employees written materials about FMLA entitlements and rights with any written materials relating to the company’s benefits or leave policies. Employers who fail to post appropriate notice face civil fines and/or penalties and possible liability for civil damages to affected employees.

Employees must also provide notice of their leave. If foreseeable (i.e. for the expected birth of a child or a planned medical treatment for a serious health condition), employees must provide notice at least 30 days in advance, if practicable, or according to the employer’s policies and practices. When leave is unexpected (i.e. for a medical emergency), notice must be given as soon as practicable under the circumstances and considering all facts of the individual case. Generally, this standard is interpreted to require at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.
C. Medical Certification

When an employee requests FMLA leave due to the employee’s serious health condition or for the care of a spouse, child, or parent with a serious health condition, an employer may require certification from a health care provider to verify the legitimacy of the employee’s request.\(^\text{10}\)

Generally, if an employee submits a complete certification signed by a health care provider, the employer may not request additional information from the health care provider.\(^\text{11}\) If an employer doubts the validity of the certification, the employer may require that the employee obtain a second opinion from a health care provider approved or designated by the employer, but the employer must pay the expenses connected with this second opinion and may not use a health care provider employed regularly by the employer.\(^\text{12}\)

D. Reinstatement

Under the FMLA, an employer must reinstate an employee to the same position or an equivalent position with the same pay, benefits and working conditions, including privileges, perquisites, and status at the end of leave, barring some exceptions.\(^\text{13}\) The position must involve the same or substantially similar duties and responsibilities, skill, effort, and authority. If the employee is no longer qualified (i.e., because of the employee’s inability to attend a necessary course or failure to renew a license) due to their leave, the employee must be given a reasonable opportunity to fulfill those conditions upon their return to work. Moreover, an employer must continue benefits under the same conditions had the employee been working for the period of leave.\(^\text{14}\)

Denying reinstatement after FMLA leave should be done with care. The exceptions to an employee’s reinstatement rights include: (1) where the employee would have been laid off had he or she remained actively employed;\(^\text{15}\) (2) when the employee cannot perform an essential function of the job;\(^\text{16}\); (3) where the employee took FMLA leave fraudulently (e.g., forged medical certification);\(^\text{17}\) and (4) where the employee is a “key employee” (one of the highest paid 10% within 75 miles of the employee’s worksite and whose reinstatement would cause the company substantial and grievous economic injury).\(^\text{18}\)

E. Fitness-for-Duty

If FMLA leave is taken due to the employee’s own serious health condition, an employer may request a certification from the employee’s health care provider stating that the employee can return to work.\(^\text{19}\) The employer may require the employee to bear the cost of this certification and the employee is not entitled to compensation-associated time or travel.\(^\text{20}\) However, an employer may not require certification of fitness-for-duty for each absence for intermittent or a reduced leave schedule.\(^\text{21}\) But, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days, if reasonable safety concerns exist regarding the employee’s ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employee fails to provide a fitness-for-duty certification as requested, the employer can deny the employee reinstatement and terminate the employee.

F. Intermittent Leave

The FMLA provides for intermittent or reduced schedule leave to care for the employee own serious health condition or that of an eligible family member, if medically necessary.\(^\text{22}\) The
sole possible exception would be intermittent or reduced schedule leave following birth, adoption, or placement of a foster child, in which case intermittent or reduced schedule leave is available only when agreed to by the employer.23 Employees and their medical providers routinely seek intermittent leave, particularly to transition back to work after a period of leave, and often to the frustration of employers. But not all employees qualify. Employees may qualify for intermittent leave only when medically necessary. For example, when an employee needs money but cannot perform all essential job functions (such as keeping up with production requirements), they frequently persuade their treating physician to "write them out" intermittently. To curtail intermittent leave abuse, employers should carefully review medical certifications to ensure that the medical provider is of the opinion that the employee needs intermittent leave.

If the employee’s condition is stable (meaning the employee’s restrictions are fairly constant), the condition should rarely result in unpredictable intermittent leave. One mistake that employees and medical providers often make is that they misinterpret the FMLA as permitting intermittent leave when the employee must perform an essential function that they cannot do (i.e. they can never do the essential function but they do not want to take leave when the lighter portions of the job are to be done). This is an incorrect use of the FMLA intermittent leave right and, in such case, the employee should be on a block leave rather than intermittent leave.

II. THE AMERICANS WITH DISABILITIES ACT

A. Who Is Covered?

Employers with 15 or more employees must comply with Title I of the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination based on disability in employment and requires, under certain circumstances, that covered employers provide reasonable accommodations to applicants and employees with disabilities.24 A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."25 "Disability" is defined as having: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded as having such an impairment.26

To be “qualified,” an individual with a disability must: (1) satisfy the prerequisites for the position, and (2) be able to perform the “essential functions” of the job in question, with or without reasonable accommodation.27

B. The Interactive Process

The reasonable accommodation process, often referred to as the “interactive process,” comprises “a flexible, interactive process that involves both the employer and the qualified individual with the disability.”28 The interactive process should be considered not only at the outset of a disability, but also when an employee seeks reinstatement from leave and in the context of a request to extend an existing leave, particularly where the extension is beyond an employer’s existing policies or preexisting statutory leave, such as FMLA leave or workers’ compensation leave.

The interactive process should begin once the employer receives a request for accommodation in the reinstatement process or a leave extension. After receiving the request, the employer should analyze the essential job functions of the employee’s position. Next, the employer should consult with the employee regarding their limitations and potential reasonable
accommodations. Third, the employer should identify possible accommodations and the effectiveness of alternative accommodations. Last, the employer should select the accommodation that the employer believes is most appropriate under the circumstances. The employer should consider the employee’s preference, but also any potential undue hardships, such as costs to the employer and threats to the employee and others.

C. Undue Hardship

The ADA requires employers to provide reasonable accommodation to disabled employees provided the accommodation causes no undue hardship to the employer.\(^{29}\) For an accommodation to be deemed “reasonable,” it must be “effective.”\(^{30}\) Sometimes, the ADA may require an employer to provide a leave of absence as a reasonable accommodation.\(^{31}\) But leave as an accommodation if such leave is of undefined duration or uncertain effectiveness may be unreasonable. When evaluating whether an “undue hardship” excuses accommodation, employers should consider: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility or facilities involved including the number of persons employed and effect on expenses and resources; (3) the overall financial resources and size of the employers’ business; (4) the business, including the composition, structure and functions of the work force; and (5) the impact of the accommodation on the facility.\(^{32}\)

When considering leave as a possible accommodation, often an employee (or the employee’s doctor) can provide a definitive date on which the employee can return to work (for example, October 1). In some instances, only an approximate date (for example, “sometime during the end of September” or “around October 1”) or range of dates (for example, between September 1 and September 30) can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified in light of changed circumstances, such as where an employee’s recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis. Although the ADA does not specify how much leave is required as a reasonable accommodation, indefinite leave—meaning that an employee cannot say whether or when he/she can return to work at all—will constitute an undue hardship, and thus, would not need to be provided as a reasonable accommodation, especially where the prospects for recovery are uncertain.\(^{33}\) Courts stress that the determination is based on an individualized, case-by-case assessment and appear to take similar fundamental considerations into account including: (1) the time requested, (2) certainty of the employee’s ability to return to work on the specified date, and (3) the employer’s written policies.

Further, undue hardship is also a consideration for reinstatement obligations such as updating facilities used by disabled employees to be accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment, all of which are contemplated under the ADA.\(^{34}\)

III. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301–4333, provides job-protected leave to employees during uniformed service. Interestingly, most of the complex issues faced by employers with uniformed service members involves the reinstatement process. The key concern is to determine whether a returning service member has retained reinstatement rights and, if so, what is the appropriate reinstatement position and benefits.
A. Advance Notice

Veterans’ reemployment statutes are liberally construed in favor of the returning veteran. Even so, in order to be eligible for rights and benefits, USERRA generally requires that employees give advance notice (written or oral and formal or informal) of the need for leave to perform uniformed services. No notice is required if precluded by military necessity or is otherwise impossible or unreasonable.

Although USERRA does not specify how far in advance notice should be given, employees should provide notice as far in advance as is reasonable under the circumstances. The Department of Defense (DOD) “strongly recommends” that employees give at least 30 days’ notice to their employers when feasible. However, neither the statute nor the regulations address an employee’s failure to provide advance notice when feasible, other than to state that an employee need not seek the employer’s permission prior to leaving to perform uniformed service.

Employees do not have to decide before leaving for service whether they will seek reemployment after completing uniformed service. However, when employees complete uniformed service, they must notify their employer of their intent to return to work.

B. Timely Application for Reemployment

Upon completion of uniformed service, an individual seeking reemployment must notify his/her employer. The method of notification required depends on the returning employee’s length of service in the uniformed services. An application for reemployment need not be in writing. If the employee’s period of service in the uniformed services was less than 31 days or the employee was absent for a military fitness examination, the employee must report to the employer for reemployment at the beginning of the first full calendar day following the completion of the period of service and the expiration of eight hours after a “safe transportation” period (defined as the time allowing for safe travel between the place of service and the person’s residence). If reporting within this time period is “impossible or unreasonable” through no fault of the employee, he or she must report back as soon as possible after the expiration of the eight-hour period. When the employee’s military service lasted for more than 30 days but less than 181 days, he or she must apply for reemployment within 14 days after completing the period of service. If it is impossible or unreasonable, through no fault of the employee, to submit an application within this time frame, the application must be submitted on the first full calendar day when submission of the application becomes possible. Where the employee’s period of service exceeds 180 days, he or she must apply for reemployment with the employer within 90 days after completing the period of service.

If a person fails to report or apply for employment or reemployment within the specified periods, the person does not automatically forfeit his or her right to reemployment and benefits. Rather, the employee shall be subject to the normal rules, practices, and disciplinary measures of the employer regarding unexcused absences.

C. Delays Due to Disability

The time periods discussed above may be extended up to two years when a person seeks reemployment following a period of hospitalization for or convalescence from an injury or illness incurred in or aggravated during performance of service in the uniformed services. Following recovery from such illness or injury, the person must report to the employer or apply for reemployment with the employer. This two-year period may be further extended by the
minimum time required to accommodate circumstances beyond the employee’s control which make reporting within the time period impossible or unreasonable.49

D. Required Documentation

When the person’s uniformed service lasts more than 30 days, he or she may have to provide to the employer documentation establishing that: (1) the application is timely; (2) the period of service in the military did not exceed five years (unless permitted under USERRA); and, (3) he or she received a qualifying discharge at the conclusion of the period of service.50

Failure to provide such documentation shall not be a basis for denying reemployment if the failure occurs because such documentation does not exist or is not readily available for several reasons. First, DOL regulations expressly recognize that the documentation to establish eligibility for reemployment may vary from case to case.51 Employers should know that the “focus of USERRA is on securing rights to returning veterans, not on ensuring that any particular documentation is produced.”52 Further, if after reemployment documentation becomes available showing that the employee does not meet one or more of these requirements, then the employer may terminate the person’s employment along with any rights or benefits afforded the person under USERRA.53

An employer, therefore, cannot “limit or delay” reemployment by requiring a veteran to comply with a return-to-work process because a returning veteran’s reemployment rights take precedence over such concerns.54 This prohibition applies even when the process applies to all individuals regardless of military service because USERRA “supersedes any ‘policy, plan, [or] practice’ that ‘reduces, limits, or eliminates in any manner any right or benefit’ provided by the Act.”55 If a veteran’s separation from military service is classified as “under honorable conditions” and meets the physical qualifications for reemployment, an employer must return the veteran to work and then complete any remaining return-to-work processing.

E. Prompt Reinstatement

Upon timely completion of the reemployment prerequisites, a person must be promptly reinstated. The USERRA regulations note that “prompt” typically means within two weeks of the employee’s reinstatement application, absent unusual circumstances. The regulations recognize that an employer’s logistical problems may be different with reinstatement after a weekend drill as compared to several years of active duty. For example, a full two-week period is likely to be needed if an employer must reassign other employees or give notice of termination to other employees to reinstate the returning uniformed service member. Therefore, employers should analyze each situation individually, but should be wary of extending the reemployment period beyond a two-week maximum. 38 U.S.C. § 4313; 20 C.F.R. §§ 1002.180-181.

F. Job Position upon Reemployment

Identifying the appropriate position upon reinstatement is often an issue with returning service members. This analysis is tied to the length of the service member’s service.

If less than 91 days the initial reemployed position is the one he or she would have been employed if his or her continuous employment had not been interrupted by such service, also known as the “escalator position.” If the employee’s uniformed service lasts more than 90 days, the initial reemployment position is the escalator position or a position of comparable seniority, status, and pay, if he or she is qualified for either position. Even if the employee cannot become qualified for either of these position despite the employer’s reasonable efforts to help, the
employee may be entitled to reemployment in his or her pre-service position first, then the nearest approximation first to the escalator position and then to the pre-service position, all subject to the employer’s reasonable efforts to qualify the employee if necessary, and subject to the duration of leave.\textsuperscript{56} 

Reemployment rights are “liberally construed for the benefit of those who left private life to service their country.”\textsuperscript{57} Similar titles or job classifications will not meet USERRA requirements where the result is a constructive demotion of the returning service member.\textsuperscript{58} The regulations specify consideration of six factors for evaluating whether an offered position is of like status: (1) opportunities for advancement; (2) general working conditions; (3) job location; (4) shift assignment; (5) rank and (6) responsibility.\textsuperscript{59} Furthermore, the seniority of the new position is an additional, explicit consideration.\textsuperscript{60} “Shift assignment” and “regular hours” are benefits of employment that affect a determination of an equivalent position.\textsuperscript{61} 

G. Lack of Qualification 

At times a returning service member may seek reinstatement but is not qualified for the appropriate reinstatement position, either due to disability or otherwise. If due to a disability incurred or aggravated during military service, the employer must first make reasonable efforts to accommodate the disability.\textsuperscript{62} If accommodation is impossible, then that person shall be reemployed in an equivalent position of like seniority, status, and pay for which he or she is qualified or could be qualified with reasonable efforts by the employer.\textsuperscript{63} If reemployment in such an equivalent position is impossible, then the person shall be employed in a position which is the nearest approximation to such a position in terms of seniority, status, and pay.\textsuperscript{64} 

If a person is no longer qualified for a reason other than disability and cannot become qualified with reasonable efforts by the employer, that person shall be reemployed, with full seniority, in any other position that is the nearest approximation to the position that the person would have had but for service which he or she is qualified to perform.\textsuperscript{65} 

H. Seniority 

A returning service member is entitled to the seniority, and other rights and benefits based on seniority, that the person had on the date of the commencement of service in the uniformed services, plus the additional seniority, rights, and benefits that person would have attained had the person remained continuously employed with his or her employer.\textsuperscript{66} 

I. Protection from Discharge after Reemployment 

A returning employee is granted special protection from discharge, except for cause, following reemployment. When the period of service in the uniformed services was between 31 and 180 days, this protection lasts 180 days. For periods of service in the uniformed services of 181 days or more, the period of protection is one year.\textsuperscript{67} “Cause” in the USERRA context is based either on the employee’s own conduct or because of other legitimate, nondiscriminatory reasons.\textsuperscript{68} If a discharge is based on the employee’s own conduct, “the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.”\textsuperscript{69} “Cause” may also include “any reason for discharge that is not arbitrary or made in order to avoid the statute’s requirement that military service members not be discharged because of their protected military service.”\textsuperscript{70}
J. Health Benefits upon Reinstatement (Exclusions and Waiting Periods)

USERRA creates a right to continuation coverage during military service for the employee-participant in any employment-related health plan, regardless of how many or how few employees are covered by the plan, and regardless of whether the plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). An employee eligible for USERRA continuation coverage who elects such coverage, and his or her dependents, will continue to be covered by the employment-related health plan until the day after his or her reemployment rights expire, or 24 months after the person's absence due to military service begins, whichever occurs first.\(^71\)

If an employee’s health coverage is terminated during military service and the employee is later reemployed under USERRA, the employee and his or her dependents cannot be subject to an exclusion or waiting period that would not have been imposed if the employee had not been terminated as the result of military service, with limited exceptions. Exclusions and waiting periods may be imposed if one would have been imposed without regard to uniformed service.\(^72\)

For instance, if an employee did not have health plan coverage provided by the employer prior to uniformed service, exclusions or waiting periods are acceptable.

IV. STATE AND LOCAL LEAVE LAWS

Employers generally know about federal FMLA requirements. But the FMLA also allows states to establish more expansive requirements and many have done so—e.g., California, Colorado, Connecticut, the District of Columbia, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin.\(^73\) Paid family leave is also a recent trend. California, New Jersey, New York, Rhode Island, and Washington have provided for paid family and medical leave benefits. The District of Columbia\(^74\) will join them in July 2020. In addition, San Francisco, California, has added paid parental leave requirements.\(^75\)

In addition, numerous state and local jurisdictions have passed sick leave requirements\(^76\) that will provide time off for reasons similar to the FMLA/ADA (the employee’s own illness or injury or that of an eligible family member. But these laws also require sick leave for other reasons—including but not limited to absences due to domestic violence, harassment, sexual assault, or stalking, certain public health emergencies, closure of a child’s school or place of care due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure, funeral and bereavement leave, etc.

V. WORKERS’ COMPENSATION LAWS

State workers’ compensation laws may pose limitations on employers whose employees are nearing the end of a maximum leave period and are being considered for termination. For instance, West Virginia\(^77\) and Oklahoma\(^78\) prohibit terminating employees on workers' compensation leave during a period of temporary total disability solely based on a maximum leave of absence policy, among other reasons. But in those states, once the period of temporary total disability has ended, the employer need not retain the employee if it is determined the employee is physically unable to perform assigned duties.

Most states also recognize some type of claim for workers’ compensation retaliation.\(^79\) The scope of what is considered “retaliatory," varies greatly from state to state. For example, in California, employers may not discharge a worker during workers’ compensation leave unless: (1) the employer reasonably believes that the employee is permanently disabled from performing the job, or (2) will be disabled for such a long time that termination is necessary in
light of demonstrated business necessity. However, for the employee to make a successful claim for retaliation in California, the employee must show he or she was singled out by the employer. Likewise, Montana’s workers’ compensation retaliation statute requires employers to give preference to an injured employee over other applicants for two years from the date of injury when filling a comparable position that has become vacant if the injured employee can return to work and has received a medical release to return to work. Similarly, Minnesota’s worker’s compensation retaliation statute provides that an employer who, without reasonable cause, refuses to offer continued employment to an employee out on workers’ compensation leave when employment is available within the employee’s physical limitations, shall be liable in a civil action for one year’s wages. However, to recover for retaliation under the statute, an employee must prove that he or she was discharged because he or she was seeking workers’ compensation benefits, which would not be the case if a maximum leave of absence policy is uniformly enforced.

Workers’ compensation leave may also affect employee benefits. Some states’ workers’ compensation laws prohibit discontinuation of benefits for employees on leave due to a workers’ compensation injury. Setting aside possible federal preemption arguments based on ERISA for how benefits are handled, employers should inquire about the state’s laws applicable to employee on workers’ compensation leave and make sure they are not restricted in terminating employment or benefits during or after workers’ compensation leave.

VI. RELATED CONSIDERATIONS

A. Maximum Leave Policies

Even facially neutral maximum leave policies (sometimes called “no fault” leave policies) may create liability under the federal ADA. The ADA, as interpreted by the EEOC and as amended under the Americans with Disabilities Act Amendments Act (“ADAAA”), clarify that at the end of such a maximum leave period, an employer still must engage in the interactive process and consider reasonable accommodations for any disability causing the extended leave, including the modification or extension of the maximum leave policy.

The EEOC’s “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act” specifically provides that an employer may not apply a maximum leave policy to an employee who needs leave beyond a set period. The EEOC recommends that if an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its maximum leave policy to provide additional leave, unless the employer can show that: (1) another effective accommodation would enable the person to perform the essential function of his or her position, or (2) granting leave would cause an undue hardship. According to the EEOC, adjusting or modifying workplace policies, including leave policies, is a form of reasonable accommodation. However, the EEOC also opines that “[w]hile undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to an employer’s operations if additional leave is granted beyond the period allowed by the policy. In determining whether an undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).”

Therefore, the EEOC interprets the ADA to mean that an employer’s reasonable accommodation obligation may include extending the employer’s medical or personal leave policies, including no-fault, neutral, or maximum leave policies, so long as doing so creates no undue hardship. The EEOC has sued employers with similar universal leave policies, and
received substantial settlements in each. While the EEOC’s guidance and interpretation on the issue is not binding upon courts or on employers, the EEOC’s enforcement practices must be considered in the administration of these policies.

As such, employers should conduct an individualized assessment (i.e., a case-by-case evaluation as contemplated under the ADA) to determine whether an extension of leave would be a reasonable accommodation even in a maximum leave policy. If dialogue with the employee suggests that a limited period of additional leave after exhausting the maximum leave provided would allow the employee to return to work and perform the essential functions of the position, this may be a necessary reasonable accommodation.

B. Medical Certification

Under the ADA, an employer may not require an employee to submit to a medical examination or provide a medical certification, unless there is a business necessity and the examination is limited to the employee’s ability to perform job-related functions. However, an employee requesting accommodation must provide documentation describing the nature, severity, and duration of the impairment, and substantiating the request for accommodation.

C. Reinstatement Position

Leave as a reasonable accommodation includes the right to return to the employee’s original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether alternatives permit the employee to complete the leave and return to work. For example, if an employer is not covered under the FMLA and an employee with a disability requires 16 weeks of leave as a reasonable accommodation, the employer may initially grant the request and hold open the job. But unforeseen circumstances may later arise resulting in an undue hardship in continuing to hold the job open. The job is filled within three weeks by promoting a qualified employee. Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly-vacant position as a reasonable accommodation.

D. FMLA and ADA Interplay

Perhaps the most underutilized provision of the FMLA in analyzing an employee’s return to work rights and obligations for providing additional leave or accommodations is its deference to the ADA. The FMLA is tough on employers because it is hyper-technical, particularly with what may be asked of an employee or an employee’s doctor. Conversely, the rules on information sharing under the ADA are relatively loose. The EEOC claims that an employee who seeks leave citing his or her own impairment is seeking an accommodation. So, the ADA is triggered almost every time an employee seeks leave citing his or her own impairment.

There are several other ways the ADA can help. First, if the ADA is triggered, an employer is not technically limited to the strict questions on the FMLA certification form, or the rigors of the FMLA certification process. An employer may obtain more information. This is especially true when one considers the structure of how the FMLA and the ADA interact with each other. The ADA analysis of whether the employee can be accommodated within his or her job comes first. So, an interactive dialog and fact-finding period should, technically, occur before an employer moves to the FMLA. The FMLA is basically a concession that the employee cannot perform one or more essential functions.
Another issue that often confounds employers involves unpredictable intermittent leave with little or no notice to the employer. If an employee’s explanation is that they are incapable of giving better notice, such as with flare-ups with little or no notice, then employers should consider safety implications when, with little or no notice, the employee cannot perform an essential function. If an essential function the employee suddenly cannot perform impacts health and safety, then perhaps the employee poses a significant threat to health and safety under the ADA, and could be temporarily or permanently unqualified for the position.

Finally, the FMLA return to work process is limited and restrictive on employers. As a consequence, most employers actually violate them repeatedly. Employers who require a doctor’s note every time an employee returns from a leave are likely violating the FMLA because that level of frequency is rarely permitted. But, if the ADA is triggered, because an employer has an objective basis to believe the employee may not be able to perform one or more essential functions, then the employer has the right under the ADA to seek medical clearance, regardless of what the FMLA says.

E. FMLA Leave and Workers’ Compensation

Under the FMLA, an employer can generally require an employee to use or exhaust any paid time off during FMLA leave. However, when this tenet involves a workers’ compensation setting, additional considerations may be needed. Where an employee is on FMLA leave due to a workers’ compensation injury and is receiving wage replacement benefits through workers’ compensation, the employer generally cannot require the use of paid time off. Rather, the employer may only supplement benefits paid through workers’ compensation if agreed to by both parties. Employers should be mindful of how they word their paid time off policies if they seek to limit the use of paid time off for otherwise “unpaid” leave.

Refusal of appropriate light duty typically stops wage replacement benefits under workers’ compensation. Once that stoppage becomes effective, the employee is considered on unpaid leave and the employer is back in position to require the use of accrued paid time off as it would be under normal FMLA leave scenarios. Of course, if the employee accepts light duty, the time worked cannot be counted against the employee’s FMLA leave.

F. Medical Information and Medical Inquiries

Under the ADA and the FMLA, there are prohibitions and limits on an employer’s ability to make medical inquiries during employment. However, such limitations are largely preempted in a workers’ compensation claim, at least to the extent state law permits related medical inquiries and the inquiries are reasonably related to the particular occupational injury.

Under the workers’ compensation laws of most states, employers are provided medical records from the authorized treating physician throughout the duration of a workers’ compensation claim. Beyond that, most states’ workers’ compensation laws allow employers and their representatives to make medical inquiries of an injured employee’s treating physician to establish work restrictions, return to work status, anticipated date of maximum medical improvement, etc. Accordingly, employers have access to employee medical information they would not normally have. By having such access, when it comes to notice of an “impairment” for purposes of the ADA or for certification of a serious health condition under the FMLA, an employer’s knowledge of the employee’s medical condition can be established via the normal course of a workers’ compensation claim. Employers should know that knowledge may be assigned to them in this way and assure that, as an organization, there is sufficient
communication between those who receive or have access to workers’ compensation medical records and those who administer FMLA leave and ADA accommodation requests.

Indeed, there is no requirement that FMLA certification be provided on the employer’s form. As long as the information provided is otherwise complete and accurate, a doctor’s note can certify the need for leave. Therefore, in a workers’ compensation scenario, employers should not unreasonably insist upon a specific format for the information. If the employer needs additional information, beyond what has been provided via the workers’ compensation process, it should provide the employee with a letter specifying what it needs for deciding on the leave. Insisting on a particular form where the necessary information is already in hand can constitute interference with FMLA rights.

G. Light Duty

Many employers offer light duty to employees with work-related injuries to prevent malingering, work hardening and to mitigate the payment of wage replacement benefits. State workers’ compensation laws may require an employer to offer employees the opportunity for a restructured light duty assignment. However, if the employee independently qualifies for leave under the FMLA, the employer may not require the employee to accept a light duty position. Refusal to accept such an assignment, however, may cause the loss of eligibility for workers compensation benefits.90

Often, too, the light duty offered employees with occupational injuries is not offered to employees hurt outside of work. Employers who offer light duty only to employees with occupational injuries should know of how their light duty programs interact with federal leave laws.

As an initial matter, employers should offer light duty work rather than maintaining light duty positions. It is important to distinguish between “light duty” and reasonable accommodations required by the ADA. Typically, the distinction is that light duty is work or a position created to address an employee’s particular restrictions and most often overlooks the employee’s inability to perform the essential functions of a regular, existing position. Such positions are also called “transitional or work-hardening positions.” Reasonable accommodations, on the other hand, are based primarily on the employee’s ability to perform the essential functions of an existing job, with or without accommodation. Employers are smart to consider light duty on a case-by-case basis rather than establishing regular or permanent “light duty” positions. Establishing regular “light duty” positions would effectively create a position which, if vacant, would have to be considered as a reasonable accommodation for a permanently impaired employee.

Moreover, the Supreme Court’s decision in Young v. United Parcel Serv., Inc.,91 which held that the Pregnancy Discrimination Act (“PDA”) “requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work,” impacts the light duty analysis. In Young, the plaintiff sued her employer for finding her ineligible for light duty work solely due to her pregnancy-related limitations. Because Young opens the door for plaintiffs to sue when an employer’s light duty policies impose a significant burden on pregnant employees, employers should review their policies related to light duty and reasonable accommodation requests to ensure that they are in line with legitimate business needs and not based, instead, on costs and convenience.
Often doctors write employees out of work without considering light duty options. In those cases, employers should inquire about the employee’s actual limitations to see if light duty can be provided. Such medical inquiries are generally permissible in this situation, and managers and human resources professionals should be trained on the need for individualized inquiries in granting and/or denying requests for light duty accommodations. Those inquiries, which would not necessarily be permitted under the FMLA, are permissible if made to administer to an employer’s light duty program in a workers’ compensation scenario. While an employee can reject light duty under the FMLA, that rejection is likely to disqualify the employee for wage replacement benefits under state workers’ compensation law, such inquiries are necessary and specifically permitted.

An employee who has been on FMLA leave and voluntarily accepts a light duty assignment retains his or her rights under the FMLA to be restored to the same or equivalent position for a cumulative period of up to twelve workweeks. For job restoration, all time spent on FMLA leave plus the time the employee is employed in a light duty assignment is counted. Thus, the employer’s obligation to restore the employee to an equivalent position ceases after 12 workweeks of FMLA leave and light duty.

However, the period during which the employee is employed in the light duty assignment does not count against the employee’s twelve-work-week allotment of the FMLA leave. If an employee with a work-related serious health condition accepts a light duty job, the employee will only have exhausted the FMLA leave taken prior to acceptance of the light duty position.

For job restoration purposes, all time is counted—leave and light duty—whereas for leave entitlement calculations, only the time on leave counts.

H. Benefits

The ADA does not require the employer to maintain health and other benefits for employees while on leave unless failure to do so would be discriminatory. The FMLA, however, requires maintenance of group health benefits (and possibly other benefits as well) for employees while on leave. As indicated above, workers’ compensation laws often do. And USERRA provides a fairly complex scheme for benefits continuation and reinstatement.

If an employee is on leave as a reasonable accommodation under the ADA, and such leave is counted against the employee’s FMLA entitlement, the FMLA requires the employer to continue providing group health benefits to that employee even if the employee would not be entitled to such benefits under the ADA. Likewise, upon reinstatement, employers would need to ensure that benefits are reinstated as required.

I. Medical Certification / Fitness-For-Duty Requirements

Generally, an employer may require fitness-for-duty certifications from employees returning from disability leave under the ADA. Similarly, the FMLA allows the employer to request a certification from the employee’s health care provider certifying that the employee can return to work, if FMLA leave was taken due to the employee’s own serious health condition. However, fitness-for-duty reports can be required only if the requirement is uniformly applied to all employees in similar situations. If an employee fails to provide a fitness-for-duty certification, the employee can be denied reinstatement and be terminated.

One source of conflict between the ADA and the FMLA involves the designation of health care professionals. Under the ADA, an employer may require that the employee go to a
health care provider chosen by the employer. However, under the FMLA, the employee generally may obtain a medical certification from the doctor of his or her choice, unless the employer doubts the validity of the initial certification. In that case, the employer may require a second opinion from a health care provider of the employer’s own choosing. As the FMLA requires that employers provide leave under whichever statutory provision (e.g., FMLA, ADA, state law) provides the greater rights to employees, perhaps an employee on leave that qualifies under the FMLA and the ADA may select the health care provider to conduct a fitness-for-duty examination.

J. Contact with the Employee’s Health Care Provider

Generally, under the FMLA, an employee returning to work must give the employer permission to speak with his/her healthcare provider. The employer may not speak to the employee’s health care provider without this permission. However, if an employee is on workers’ compensation leave running concurrently with FMLA leave, the employer typically may have direct contact with the employee’s workers’ compensation healthcare provider. Under the ADA, an employer is not prohibited from communicating with the employee’s physician.

As a practical matter, if the employer has designated the employee’s leave as FMLA leave, the employer should request permission to speak to the employee’s healthcare provider as required by the FMLA. If, however, the employee’s leave does not qualify for FMLA coverage, the employer should feel free to communicate directly with the employee’s healthcare provider as allowed under the ADA and the workers’ compensation laws.

K. Reassignment

The reassignment obligation under the ADA is affirmative. An employer cannot displace an employee and simply refer them to the company website for jobs. Requiring an employee to compete and be the most qualified person for a vacant position is not an accommodation, because all persons may apply for and compete for positions. The Supreme Court suggests that absent a seniority system strong enough to almost grant other employees a property interest in a vacant position (so it is not really vacant), or an undue hardship (which is not clearly defined), the employer has an affirmative obligation to place a displaced employee into a vacant position of equal or lesser status.

L. The Employer’s Obligation to Reinstate

The EEOC claims that the employee’s job must be held open while the employee is on reasonable accommodation leave under the ADA, unless the employer can establish that holding the position open would impose an undue hardship.

Even if the employer can show that keeping open the position for the entire period sought by the employee would constitute an undue hardship, the employer must consider reassignment of the employee to another, vacant position for which the employee is qualified upon conclusion of the leave.

FMLA requires that an employer hold open an employee’s job for twelve-weeks. An employee who cannot return to work upon expiration of FMLA leave has no right to reinstatement or to an alternative or modified position under the FMLA.

However, if FMLA leave has expired and the employee remains unable to return to work, the employer must determine whether the individual is a “qualified individual with a disability”
under the ADA. If the employee is covered by the ADA, the employer must determine whether the employee may have reasonable accommodation, including continued leave.

VII. TIPS FOR EMPLOYERS

The first step in the process, where in-house counsel and human resources personnel are critical, is recognizing an employee’s leave entitlement under applicable law, under any contractual obligation such as a collective bargaining agreement, and under company policies. Employers should ensure their own policies and procedures are consistent with federal, state, and sometimes local, requirements for all forms of leave to ensure employees returning from leave are handled appropriately. In considering the reinstatement process, employers should be certain their procedures were appropriate. If not, granting the employee additional leeway in the reinstatement process may be a simple means to avoid a technical statutory violation. Ensuring these processes are appropriate includes employer and employee notification requirements, proper consideration of potential ADA reasonable accommodations in FMLA, workers’ compensation situations, in addition to other employer-provided leaves and USERRA leave in which an employee’s own health condition or disability is at issue, maintaining employee confidentiality, and follow through on all requests.

In particular, to ensure uniformity and appropriate documentation, in-house counsel and human resources personnel should consider procedures and policies that definitively articulate how FMLA, ADA, workers’ compensation, and military leave requests, among others, are to be handled, particularly in the context of a reinstatement request. Further, risk should be minimized by ensuring necessary personnel are trained in the employer’s processes and a general understanding of the rights and obligations created by the various statutes. Finally, and because it is so often overlooked, which frequently impairs employers’ options in the leave and reinstatement process, job descriptions should be accurate and highlight essential functions, if they are used.

When a leave or reinstatement request arises, the employer should plainly state its expectations for employee communication during the leave and monitor compliance or regarding intermittent leave. Employees need to understand that if the company uses a third party administrator, they need to communicate changes to the administrator and to human resources to ensure the company has necessary information in a timely manner. In addition, communicate with the employee’s supervisor/manager is critical. Her or she must understand and/or develop a plan to cover the employee’s work duties during the leave or intermittent leave and otherwise in the reinstatement process.

Because of the opportunity for employees to abuse leaves of absence, employers should be particularly watchful. To limit abuse, employers should not grant indefinite leave, but instead, request an anticipated date of return, even if it is not an absolute return date. In addition, if possible, employers may benefit from providing a reasonable accommodation that requires an employee to remain on the job while still addressing their medical needs. But perhaps most important, employer’s should document all attempts to return the employee to work, document all offers that the employee rejects, and track leave to determine if there is a pattern of abuse surrounding Fridays, Mondays, or holidays.

When employee are out on leave and approaching the conclusion of leave, or regarding requests to extend an existing leave, the ADA interactive process must be undertaken and documented. If there is no accommodation it can provide that will enable the employee to return to active employment, the employer may consider whether additional leave is reasonable or an undue hardship. If not, additional leave may be denied and if the employee
does not return to work, the company may fill the position. However, the company should evaluate whether there are any job vacancies for which the employee is qualified and whether it is a reasonable accommodation to hold that position open during the employee’s leave.

Finally, at the conclusion of leave, and additional consideration of the interactive process, the employer should carefully consider whether it has considered all appropriate leave and attendance policies prior to premature termination.
ENDNOTES

1 See 29 C.F.R. § 825.104(a).
2 See 29 C.F.R. § 825.112(a)(1)-(4); 29 C.F.R. § 825.122; 29 C.F.R. § 825.126; 29 C.F.R. § 127; and 29 C.F.R. § 825.200(a).
3 See 29 C.F.R. § 825.200(a).
4 See 29 C.F.R. § 825.114.
5 Including incapacity of more than three consecutive calendar days that involves continuing treatment by a health care provider, incapacity due to pregnancy or for prenatal care, a “chronic serious health condition” requiring periodic and continuing treatment and causing episodic incapacity (e.g., asthma, diabetes, epilepsy, etc.), or permanent or long-term incapacity for which treatment may not be effective but involves the continuing supervision of a health care provider (e.g., Alzheimer’s, severe stroke or terminal stages of a disease), or absence to receive multiple treatments from a health care provider for restorative surgery or for a condition that would likely result in a three consecutive calendar days in the absence of treatment (e.g., cancer, severe arthritis, kidney disease, etc.). See 29 C.F.R. §§ 825.115(a)(2), (b), (c), (d), and (e).
6 See 29 C.F.R. § 825.300(a)(1).
7 See 29 C.F.R. § 825.302(a).
8 See 29 C.F.R. § 825.303(a).
9 See 29 C.F.R. § 825.302(b) and (c); see also 29 C.F.R. § 825.303.
10 See 29 U.S.C. § 2613(a); 29 C.F.R. § 825.305.
11 While there are no cases yet discussing undue hardship in a reassignment setting, an example may be if the employee, while minimally qualified, may require a substantial amount of training versus other applicants in the pool.
12 See 29 U.S.C. § 2613(c).
13 See 29 C.F.R. §825.214.
16 See 29 U.S.C. § 825.216(c).
19 See 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.312.
20 See 29 C.F.R. § 825.312(c).
21 See 29 C.F.R. § 825.312(f).
23 See 29 C.F.R. § 825.202(c).
24 See 42 U.S.C. § 12111(9) and § 12112; 29 C.F.R. § 1630.2(b) and (e)(1).
26 See 42 U.S.C. § 12102(1).
27 See 42 U.S.C. § 12111(8).
31 29 C.F.R. pt. 1630, app. §1630.2(o).
33 See, e.g., Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000); Walsh v. United Parcel Service, 201 F.3d 718 (6th Cir. 2000); Taylor v. Pepsi-Cola Co., 196 F.3d 1106 (10th Cir. 1999). Cf. Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (court affirms award in favor of disabled employee who was terminated when she requested that her employer extend her one-month leave of absence by a few more weeks); with Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998) (two short leaves of absence of two to four weeks each were not unreasonable).
34 See 42 U.S.C. § 12111(9).
35 See Hill v. Michelin North Am., Inc. 252 F.3d 307, 313 (4th Cir. 2001) (USERRA to be broadly
construed in favor of its military beneficiaries).

36 38 U.S.C. §§ 4303(b), 4312(a)(1), (b); 20 C.F.R. §§ 1002.5(g), 1002.85, 1002.86.
37 20 C.F.R. § 1002.85(a).
38 Id. § 1002.86.
39 Id. § 1002.85(d).
40 32 C.F.R. § 104.6(a)(2)(i)(B).
41 20 C.F.R. § 1002.87.
42 Id. § 1002.88.
43 Id. § 4312(e)(1); 20 C.F.R. § 1002.115.
44 20 C.F.R. § 1002.118 (“employee may apply orally or in writing”).
45 38 U.S.C. §§ 4312(e)(1)(A), (B) (2002); 20 C.F.R. § 1002.115(a).
46 Id. § 4312(e)(1)(C); 20 C.F.R. § 1002.115(b).
47 Id. § 4312(e)(1)(D); 20 C.F.R. § 1002.115(c).
48 Id. § 4312(e)(3); 20 C.F.R. § 1002.117.
49 Id. § 4312(e)(2)(A), (B); 20 C.F.R. § 1002.116.
50 20 C.F.R. § 1002.121.
51 Id. § 1002.123(a)(2).
52 In re Petty, 538 F.3d 431, 441 (6th Cir. 2008).
54 Petty, 538 F.3d at 441.
55 Id. at 442.
jury could conclude plaintiff’s loss of authority and reassignment of job duties constituted constructive
demotion).
(citing 20 C.F.R. § 1002.194).
60 Id. (citing 20 C.F.R. § 1002.193).
61 Smith v. United States Postal Serv., 540 F.3d 1364, 1366 (Fed. Cir. 2008) (citing Hill v. Michelin N.
Am., Inc., 252 F.3d 307, 313 (4th Cir. 2001)).
62 Id. § 4313(a)(3); 20 C.F.R. § 1002.225.
63 Id. § 4313(a)(3)(A); 20 C.F.R. § 1002.225(a).
64 Id. § 4313(a)(3)(B); 20 C.F.R. §§ 1002.225(b), 1002.226.
65 Id. § 4313(a)(4); 20 C.F.R. § 1002.198.
67 Id. § 4316(c); 20 C.F.R. §§ 1002.247–48.
68 20 C.F.R. § 1002.248.
Cas. (CCH) P11,125 (D.S.C. Nov. 13, 2008).
72 38 U.S.C. § 4317(b)(1); 20 C.F.R. § 1002.168(a).
73 California Family Rights Act (“CFRA”), Cal. Gov’t. Code § 12945.2; Cal. Code Regs. tit. 2, §§
7297.0 to 7297.11; “Kin Care” Leave, Cal. Lab. Code §§ 233-234; Family Temporary Disability Insurance
(“FTDI”), Cal. Unemp. Ins. Code §§ 2613(c), 2626, 3302(e); Colorado Family Care Act, Colo. Rev. Stat. §
31–51ll, 31–51pp, 31–51qq, and 31-69a; D.C. Code § 32-501 to 32-517; D.C. Family and Medical Leave
Act (“DFMLA”), D.C. Mun. Regs. tit. 4, § 1600 et seq.; DC Universal Paid Leave Amendment Act
(“UPLA”), D.C. Code § 32-541.01 to 32-541.12; Georgia Family Care Act, Ga. Code Ann. § 34-1-10; Haw.
Massachusetts Small Necessities Leave Act (“SNLA”), Mass. Gen. Laws ch. 175M, as added by St. 2018,
ch. 121; New Jersey Family Leave Insurance (“FLI”) N.J.S.A. 43:21-25 et seq.; N.J.A.C. §§ 12:15-1.1 to


San Francisco Police Code Article 33H.

Arizona; California (including additional local ordinances in Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica; Connecticut; Maryland (including an additional local ordinance in Montgomery County); Massachusetts; Michigan; Minneapolis/St. Paul, Minnesota; New Jersey; New York City, New York; Oregon (including an additional ordinance in Portland); Philadelphia, Pennsylvania; Rhode Island; Austin, Texas (which is currently on appeal); San Antonio, Texas; Vermont; Washington (including additional local ordinances in Seattle, SeaTac, and Tacoma) and Washington, D.C.

W. Va. Code § 23-5A-1; § 23-5A-3(b)


The following state statutes prohibit workers compensation retaliation in their respective jurisdictions: ALA. CODE §25-5-11.1; A.S. 23.30.247(a); ARS 23-1501(3)(c)(iii); A.C.A. § 11-9-107; CAL. LAB. CODE §132a; CONN. GEN. STAT. §31-290(a); DEL. CODE ANN. TIT. 19 § 2365; D.C. CODE §32-1542; FLA. STAT. § 440.205; HAW. REV. STAT. § 386-142 & §378-32(2); 820 ILCS 305/4(h); K.R.S. § 342.197; LA. REV. STAT. § 23:1361(A)-(B); ME. REV. STAT. 39-A § 353; M.D. CODE LAW. & EMPL. § 9-1105; MASS. GEN. LAWS ch. 152 § 75B(2); MCL § 418.301(11); MINN. STAT. § 176.82; R.S. MO. § 287.780; MCA § 39-71-317; J.J.S.A. §34-15-39.1; N.M. STAT. § 52-1-28.2(A); N.Y. WORKERS’ COMP. LAW § 120; N.C. GEN. STAT. § 95-241; N.D. CENT. CODE § 65-01-02; R.C. § 4123.90; 85 OK. ST. § 5; O.R.S. § 659A.040(1); S.C. CODE ANN. § 41-1-80; S.D. CODIFIED LAWS § 62-1-16; TEXAS LABOR CODE § 451.001; 21 V.S.A. § 710; VA. CODE § 65.2-308; RCW § 51.48.025; W. VA. CODE § 23-5A-2; WIS. STAT. § 102.35. Other states have addressed this concern through common and/or case law constructs.


See MCA § 39-71-317(2) (Injured employee “capable of returning to work within 2 years from the date of injury” and who has “received a medical release to return to work” must be given “preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker’s physical condition and vocational abilities.”)

See Minn. Stat. § 176.82, subd. 2.


In EEOC v. Sears Roebuck, filed in Chicago in 2004, the parties resolved the case in 2009 with a $6.2 million consent decree covering more than 250 claimants who had been separated under Sears’ 12-month leave policy. In EEOC v. Denny’s, filed in Baltimore in 2006, the parties entered into a $1.3 million consent decree in 2011 covering 33 claimants separated pursuant to Denny’s maximum leave policy. In EEOC v. Supervalu, filed in Chicago in 2009, the parties entered into a $3.2 million consent decree covering more than 100 claimants who had been separated under Supervalu’s 12-month leave policy. In
EEOC v. Verizon, filed in Baltimore in 2011, the EEOC simultaneously filed a $20 million consent decree providing relief to 800 claimants who were disciplined or terminated under Verizon’s no-fault attendance and leave policies.

90 See 29 C.F.R. § 825.702(d)(2).
92 See 29 C.F.R. § 825.220(d).
93 See 29 C.F.R. § 825.220(d).
94 See 29 C.F.R. § 825.702(d)(2).
95 See 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209.
96 See 29 C.F.R. § 825.702(c)(3).
97 29 C.F.R. § 825.307(a).
98 29 C.F.R. § 825.306(c).
99 See 29 C.F.R. § 825.216(c).
Back to the Future! Managing Return-to-Work Issues

Presenters
J. Carin Burford (Birmingham), Matthew S. Effland (KAR Auction Services), Matthew K. Johnson (Greenville), and Christian J. Keeney (Orange County)

Moderator
Jill Garcia (Las Vegas)

Agenda
- Leaves to consider....
- The reinstatement process
- Unique reinstatement issues
- Best practices
- Potential reinstatement scenarios
Leaves Scenarios to Consider

- FMLA
- ADA
- Workers’ compensation
- State/local paid sick leave
- State/local family/parental leave
- USERRA
- Other company leaves...

FMLA—Exceptions

- Exceptions to reinstatement
  - Inability to perform an essential function
  - Layoffs, plant closures, etc.
  - Fraudulent use
  - “Outside employment” policy
  - “Key employee”
FMLA—Reinstatement

- Intermittent leave or reduced schedule?
  - Is it “medically necessary”?
  - Employee must make reasonable efforts to schedule treatments to avoid disruption
  - Employer may transfer employee to alternate position with equivalent pay/benefits, but not duties, if transfer better accommodates recurring leave periods

Assume Disabled Always
ADA Inquiries after FMLA Leave....

- Qualified?
- Accommodation?
- Reasonable?
- Undue Hardship?

Reasonable Accommodation

- Making existing facilities accessible
- Job restructuring
  - modifying schedules or reassignment
- Acquiring/modifying equipment
- Adjusting/modifying materials
  - examinations, training documents, or policies
Reasonable Accommodation

- Expanded since ADAAA in 2008:
  - Gender identity
  - Service and emotional support animals
  - Scent-free workplace
  - Telecommuting/travel
  - Dress codes
  - Hidden disabilities

Reasonable Accommodations

- However, reasonable accommodations are not required if there is an:
  - undue hardship, or
  - direct threat.
Undue Hardship

- Action requiring “significant difficulty or expense”
- Consider:
  - Nature and cost
  - Impact on the facility’s operation
  - Overall financial resources
  - Type of operation

Leave as an Accommodation

- When does it become *indefinite*?
  - Consider the *amount* of time requested;
  - the degree of *certainty* of the employee’s ability to return to work on a specified date, and
  - the employer’s current sick leave policy or other *policies*. 
ADA Reassignment

- May be a reasonable accommodation.
- Other options:
  - Make facilities accessible and useable
  - Restructure the position
  - Acquire / modify equipment or devices

The Interactive Process

- It takes two to tango!
- Remember, employees don’t need to use “magic words”!
The Flow of Accommodation

- The request
- Substantiate the need
  - Ask for proof!
- Examine reasonableness
- Undue hardship?

Workers’ Compensation

- State laws differ
- Many preclude termination during workers’ compensation leave
- **Light duty** is allowed
USERRA

- Return to work after
  - Service
  - Fitness exams
  - Service-related disability
- Two-year extension for disability
- Documentation upon (30+ day leaves)

Also, consider reinstatement after....

- Paid sick and parental leave
- Company provided leave
- Collective bargaining agreement leave
The Reinstatement Process

- When managing returns from leave, remember:
  - **The Big Picture**
    - Purpose of laws
  - **Fundamentals** — be familiar with applicable law, and your policies
  - **Process** — develop a standard methodology
The Reinstatement Process

- Document responses to reinstatement and accommodation efforts
- Don’t presume or play doctor
- Consider job availability and light duty
- Challenge certification of ability to return to work!

Medical questionnaires & fitness-for-duty certifications

- Requested during or after leave?
- Job-related?
- Consistent with business necessity?
- Requested by a medical provider?
- Part of the ADA interactive process?
Reinstatement to Intermittent Leave

- Require health care provider to certify “medical necessity”
- Ask questions of the employee:
  - Whether intermittent leave is “necessary”?
  - Whether better notice is possible?
  - What is the treatment schedule?
  - Are alternative treatment dates an option?

Reassignment requests

- FMLA guarantees “equivalent” job
- May be an ADA accommodation
- May not be appropriate....
  - USERRA may preclude
  - Workers’ compensation
  - Other company leaves
**Conducting return-to-work interviews and medical assessments**

- May consider STD/LTD/FMLA information
- HIPAA release
- ADA considerations

**Can I terminate an employee who does not return from leave?**

- Often, but consider is there any:
  - PTO/vacation left?
  - Other leave left?
  - Duty to extend leave under the ADA?
  - Limiting workers’ compensation law?
Best practices for return-to-work

- Essential communications:
  - Supervisor—issues with the employee’s absence, work coverage, and any restrictions
  - Leave administrator—changes in medical condition or leave status
  - Employee—changes requiring extension of leave

Best practices for return-to-work

- Don’t make **assumptions**
  - It *rarely* hurts to seek more medical information....
  - “They never proved it” only works if you’ve actually asked for proof....
Best practices for return-to-work

- Revise policies
  - “Personal leave” policies after FMLA
  - Strengthen requirements for PTO, sick leave, etc.
  - Attendance/“call-out” policy
- **Accurate** job descriptions with actual essential functions

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50 Ways To Leave Your Workplace

Starring:

- Anita Bowles – Employee
- Sandy Stone – Supervisor
- Frank Langstaff – Director of HR
- Helen Wheels – Coworker
**Scene 1: Money for Nothing**

Anita Bowles is the Concierge for “Vacations Hotel and Resort.” Sandy Stone is her supervisor, and Frank Langstaff is the Director of Human Resources. Sandy is complaining to Frank about Anita’s attendance, and they are preparing to discipline her for being away from her desk and being late for work too often.

**What Would You Do?**

A. Continue with discipline as planned & deal with FMLA another day.

B. Stop the discipline aspect of the meeting, tell her this changes things, and get her FMLA paperwork right away.

C. Continue with discipline, and get her FMLA paperwork right away.
Scene 2: Inquiring Minds

Anita timely returned her FMLA paperwork to Frank. Her doctor certified that she will need at least 4 unpredictable bathroom breaks throughout the day, each lasting for up to 30 minutes. It could also occur at the beginning or end of a shift.

What Would You Do?

A. Apologize and count the tardy as FMLA.
B. Count the tardy as FMLA, but discipline for once again not calling in.
C. Deny FMLA and discipline for once again not calling in.

A. 0%  B. 0%  C. 0%
Scene 3: Slip Slidin’ Away

Several weeks have passed. Frank and Sandy are interviewing Anita’s coworker, Helen Wheels, who is a witness to an incident involving Anita.

Viewer discretion is advised.

What Would You Do?

A. Conduct additional investigation.
B. Contact the employee while she’s in the hospital.
C. Alert the insurance carrier.
D. All of the above.
Scene 4: Baby, Come Back

Anita’s injuries include a broken tailbone and nerve damage to her lower back that required surgery. The hotel ran her worker’s comp leave concurrently with FMLA because of the surgery. Anita has not returned to work, and has not responded to Frank’s attempts to reach her.

What Would You Do?

A. Grant the accommodation
B. Deny the accommodation
Scene 5: Ain’t That Peculiar?

Vacations Hotel & Spa grants Anita her request for leave as an accommodation because of the definite period of time.

Sandy sees Helen in the employee lounge and, knowing she and Anita are friends, asks how Anita is doing.
Oh my aching back!

Dan takes 12 weeks of FMLA for back problems. The week before his leave ends Dan’s doctor diagnoses him with a significant back disorder and requests 30 days of additional leave.

Oh my aching back!

30 days later, Dan is still out and has had no contact with you.
Oh my aching back!

Dan is released to return to work, but with restrictions. He cannot stand continuously for more than two hours at a time, and not more than 6 hours a day. His job description calls for standing continuously throughout an 8-hour day, except for required meal and rest breaks.

Breathless Sammy!

Landscaper Sammy has asthma and he’s been off work due to an “exposure” from a recent desert bloom outside while at work. After being returned to work by his doctor, he complains that trimming the hedges inside the hotel’s conservatory take his breath away.
Malingering Mary?

Mary missed more than three consecutive days of work due to illness. She called in to report her illness per policy. She works in a jurisdiction that provides for legally-mandated paid sick leave. She has returned to work but her supervisor thinks she fakes her illness.

What would YOU do?

Missing Return-to-Work Certification

Mary is returning to work after leave due a knee problem. Her job description includes standing, regular lifting floor-to-waist, and climbing a ladder. You’ve requested a return-to-work certification from her physician, but she hasn’t provided one.

What would YOU do?
When Johnny Comes Marching Home

Johnny left for Army Reserve duty six years ago. The company had forgotten about him. But Johnny has returned and wants his old job back.

What would YOU do?

When Johnny Comes Marching Home

Johnny left for Army Reserve duty last year. Before he left, he wrote a letter to his supervisor telling him he was not going to return to his job. But Johnny has now returned and wants his old job back.

What would YOU do?
**Missing in Action**

Amy had a work-related injury and has not contacted the company or returned to work in over six months. Nick, her supervisor, wants to terminate immediately?

*What would YOU do?*

**Back to the Future! Managing Return-to-Work Issues**

*Presenters*

J. Carin Burford (Birmingham), Matthew S. Effland (KAR Auction Services), Matthew K. Johnson (Greenville), and Christian J. Keeney (Orange County)

*Moderator*

Jill Garcia (Las Vegas)