

Managing Employee Leaves of Absence

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Agenda

- Family Medical Leave Act (FMLA).
- Americans With Disabilities Act (ADA).
- Areas of interplay.
- Military leave laws.

FMMLA



Provides 12 weeks of leave for—

- Birth of child or care of child.
- Adoption of child or placement of child for foster care.
- Care for child, spouse, or parent with serious health condition.
- Employee's serious health condition.
- Family member's call to active duty in military.
- Care of sick or injured family member in Armed Forces.

Covered employers

- Employer has 50 or more employees
 - For each work day
 - During 20 or more calendar work weeks
 - In present or preceding year.
-
- Eligibility is determined on day of employee's request.

Personal liability

- Failure to follow FMLA can result in personal liability of—
 - Supervisors.
 - Managers.
 - Corporate officers.

Eligible employees

- Worksite has 50 or more employees within 75 miles of worksite.
- Employee has worked for employer for 12 months (not necessarily consecutively).
- Employee has worked at least 1,250 hours during previous 12 months.
- Time spent in military service will be counted to determine 1,250 hours.

Coverage not limited

- Can apply to full-time or part-time employees.
- Can apply to FLSA-exempt employees who normally don't have to "punch the time clock."
 - Exempt employees are presumed to have worked 1,250 hours unless employer can prove otherwise.
- Based on actual hours worked. Paid or unpaid leave not counted.
- On-call time not counted.

Employee can be deemed eligible—

- If employer doesn't notify employee of his or her ineligibility when leave is requested.
- In the case of employee who provides less than 2 days' notice before leave commences, if the employer doesn't notify the employee of his or her ineligible status with 5 business days after receiving employee's notice.
- If employer fails to provide notice of ineligibility, employer can't deny leave.

Employee must provide notice if—

- Need for leave is based on birth, adoption, foster care, or planned medical treatment for serious health condition of employee or family member.
- Otherwise, employee must provide notice as soon as practicable.
- Unless there are unusual circumstances.
- Employers can specify who is supposed to receive requests for leave.

How notice given

- Notice must be sufficient to make employer aware of the need for FMLA leave.
- Example 1:
 - Employee begins hiding and sleeping on job.
 - Sister tells employer that her brother is very sick.
 - This is sufficient notice.

How notice given (continued)

- Example 2:
 - Employee got upset when stray dog wandered into workplace.
 - Started screaming and yelling at supervisor and went home sick.
 - Went to see doctor next day for tests.
 - On third day, came back to work and yelled and screamed at company president.
 - Took off 3 sick days.
 - Abnormal behavior provided notice for FMLA leave.

How notice given (continued)

- Example 3:
 - Employee was always curmudgeonly and behaved inappropriately.
 - Never asked for sick leave of any kind.
 - Behavior not sufficient to provide notice.

Medical certification

- Employer must also provide notice about medical certification **each time it is needed.**
- Must be written the first time.
- Can be oral with subsequent requests.
- Employers should not be reluctant to inquire about whether FMLA leave is being requested.

Employee should consult with employer

- When scheduling treatment.
- Employer can ask employee to try to reschedule treatment for justifiable cause.
- Employee normally expected to provide notice of leave 30 days in advance.
- If no excuse for delay, employer can require leave to start 30 days from date of request.
- Employer must show employee had notice of requirement to provide notice 30 days in advance.

Employer duty to give notice

- Once employee gives employer notice, the employer has 5 days to notify the employee that the leave will be counted against 12-week FMLA entitlement.
- Notification may be oral, but must be confirmed in writing by next regular payday, unless next payday more than week away.
- Notification can consist of note on pay stub.

What happens if employer doesn't provide notice?

- Employee not entitled to more FMLA leave time.
- Employer may have to pay back wages, provide benefits, or pay other monetary losses.
- Employee may be eligible for reinstatement, promotion, or other equitable relief.
- But courts will limit damages in light of what the employee would have done if he or she had notice.

Serious health condition

- Illness, injury, impairment, physical condition, mental condition involving—
 - Inpatient care (hospital or nursing home).
 - Incapacity (inability to work work) related to inpatient care.
 - Continuing treatment.
 - 3 consecutive days.
 - Continuing regular treatment (more than two treatment sessions).

Continuing treatment may–

- Involve pregnancy or prenatal care.
- Permanent or long-term period of incapacity for which treatment may not be effective.
- Terminal stages of disease.
- Absence to receive multiple treatments.
- Period of incapacity because of **chronic** serious health condition.

Chronic conditions

- FMLA leave can be appropriate for chronic conditions even if they don't last longer than 3 days and employee not required to seek medical attention.
- But employees may have to certify that they have seen physician at least twice a year for condition.

Serious health conditions

- Must affect the ability of employee to perform regular job as defined by Americans With Disabilities Act (ADA).
- Conditions not considered serious health conditions:
 - Treatment of acne.
 - Cosmetic surgery (unless complications develop).
 - Colds, flu, upset stomach, minor ulcers, non-migraine headaches.

Intermittent or reduced leave

- Employee is entitled to 12 weeks of leave, whether taken all at once, part time, or intermittently.
- Employer may limit intermittent leave to an increment that's the smallest its time-keeping system can accommodate, but not more than 1 hour.
- Employer may require temporary reassignment to another position to a better accommodate intermittent leave.

Intermittent leave (continued)

- Intermittent leave can't be taken for adoption or foster care unless employer agrees.
- **Example:** Dialysis treatment twice a week.

Reinstatement to position

- Upon return from FMLA leave, employee should be restored to position or equivalent position.
- Equivalent position must have same pay, benefits, and working conditions, including privileges, perquisites, and status.
- Equivalent position must have substantially similar duties, responsibilities, skills, effort, and authority.

Reinstatement (continued)

- If returning employee no longer eligible to do job, employee should be given reasonable opportunity to rectify, such as—
 - Class attendance.
 - Renewing expired license.
- If returning employee no longer able to do essential functions of job because of physical or mental condition, employee does not have to be reinstated.

Issues related to reinstatement

- Returning employee entitled to any unconditional pay increases or changes in benefit plan given to other employees during absence.
- FMLA leave treated as continued service for vesting or participation in pension and retirement plans.
- Not entitled to reinstatement if job eliminated during absence.

No reinstatement if—

- Employee indicates no intent to return to work.
- Employee fails to return to work after taking leave.
- Employee remains on leave after exhausting 12 weeks of leave.

Risky to terminate while on leave

- While employee on FMLA leave, it's typical to discover poorly done work or undone work.
- Can terminate under those conditions, but can be risky.
- **As always, documentation is important.**

Example

- Employer decided to terminate employee on May 31.
- Employee had heart attack on May 29.
- Employee returns to work in mid-July.
- Employer offered to let employee—
 - Work in lesser paid position.
 - Continue for 90 days in current position while looking for other employment.
 - Terminate immediately with 2 months' severance pay.

Example (continued)

- Employee chose last option, but sued.
- Court ruled that jury could believe termination was not a mere coincidence.
 - No documentation of pre-leave performance issues.
 - No documentation of decision to terminate employee.

Certification

- Employers should always require medical certification in FMLA leave.
- DOL has a form for this.

Certification: Employer responsibilities

- Employer must provide notice of the requirement for certification.
- Employer's notice must explain consequences if employee doesn't provide certification.
- Employer must request within 5 days of request for leave.
- Oral request for subsequent certification can suffice.

Certification: Employee responsibilities

- Employee must provide certification within time required by employer, but . . .
- Employer can't request certification in less than 15 calendar days after employee makes request.
- Employee must provide certification within time limits unless it's not practicable to do so after good-faith efforts.

Result of no certification

- Leave taken is not FMLA leave.
- Employee not protected by FMLA.

Sufficient certification

1. Date when serious health condition commenced.
2. Probable duration of condition.
3. Medical facts about the condition.
4. Statement about condition:
 - **For employee:** Employee unable to do any work or essential job functions.
 - **For family member:** Family member requires assistance for basic medical, hygiene, nutrition, safety, or transportation needs OR employee would provide psychological comfort for family member.

Sufficient certification (continued)

- Employee must indicate—
 - Form of care he or she will provide for family member.
 - Estimated time period.
- Healthcare provider does not have to certify that employee is the only person who can provide care.

Certification of intermittent leave

- Dates of expected treatment.
- Duration of treatment.
- Statement of medical necessity for intermittent leave and expected duration.

Second opinions

- Employer may require a second opinion from healthcare provider designated by employer, but with whom the employer doesn't regularly contract.
 - Employer pays for second opinion.
- If the opinions differ, a third opinion can be sought.
 - Employer and employee must agree on third healthcare provider.
 - Employer pays for third opinion.
 - If a party doesn't act in good faith about third healthcare provider, that party will be bound by adverse opinion.

Employer's only recourse

- Employer can only ask for second opinion.
- Can't ignore first certification and deny FMLA leave.
- Pending outcome of second or third opinions, employee is provisionally entitled to FMLA leave.

Recertification

- Recertification can be requested at any reasonable interval but not more often than every 30 days **unless**—
 - Employee requests an extension of leave.
 - Circumstances described in the original certification have changed significantly.
 - Employer receives information that casts doubt on the original certification.

Recertification can apply to intermittent leave

- For long-lasting conditions (longer than year), employers may require certification every 12 months.
- If employees are absent from work, certification can be required every 6 months.

Recertification (continued)

- Employee pays for recertification unless the employer offers to do so.
- Employee must provide recertification within time requested by employer, but employer must allow at least 15 days for response.
- Employer can't request second or third opinions for recertifications.
- Employer can require periodic reports on employee's status and intent to return to work.

Terminating employee who can't perform essential function upon return

- FMLA entitles employee to reinstatement only if employee can perform essential job functions upon return.
- Employee does not have to be placed in a lesser position that he or she could perform.
- But ADA may require reasonable accommodation.

Waiving FMLA rights

- Employees may voluntarily settle or release FMLA claims without court of DOL approval.
- Employees can't waive FMLA rights before a claim arises.
- I.E. Employers cannot contract around an employee's FMLA rights.

ADA



ADA applicability

- Applies to businesses with 15 or more employees.
- For each working day in each of 20 or more calendar weeks in the current or preceding year.

Eligibility for ADA protection

- Must be qualified individual with a disability.
- Qualified = able to perform essential functions of the job with or without reasonable accommodation.
- Disability =
 - Physical or mental impairment that **substantially** limits one or more life activities.
 - Record of such impairment.
 - Being regarded as having such impairment.

Americans With Disabilities Amendment Act (ADAAA)

- Limited effect of two U.S. Supreme Court decisions.
- Made it easier to be covered by ADA.
- Employee no longer has to be “as disabled” as the Supreme Court had ruled.

Expanded major life activities

- Caring for oneself.
- Performing manual tasks.
- Seeing.
- Hearing.
- Eating.
- Sleeping
- Walking.
- Standing.
- Lifting.
- Bending.
- Speaking.
- Breathing.
- Learning.
- Reading.
- Concentrating.
- Thinking.
- Communicating.
- Working.

Expanded major bodily functions

- Functions of immune system.
- Normal cell growth.
- Digestive.
- Bowel.
- Bladder.
- Neurological.
- Brain.
- Respiratory.
- Circulatory.
- Endocrine.
- Reproductive.

Mitigating measure not considered

- Medication.
- Medical equipment.
- Prostheses.
- Hearing aides.
- Mobility devices.
- Assistive technology.
- Auxiliary aides or services.
- But unaided vision requirements must be job related and necessary to business.

“Substantially limits” is broader

- Impairment need not limit two major life activities to be substantially limiting.
- Impairments can substantially limit event though they may be—
 - Episodic.
 - In remission.
- New regulations provide nine rules of construction to make coverage broader.

9 Rules of construction

1. “Substantially limits” should be construed broadly.
2. Significant or severe restriction isn’t required for impairment to substantially limit.
3. Substantial limitation shouldn’t be primary focus. Instead focus should be on reasonable accommodation and anti-discrimination.

Rules of construction (continued)

4. Individual assessment required.
5. Determination of substantial impairment should not typically require scientific, medical, or statistical evidence.
6. Mitigating measures shouldn't be considered.
7. Substantially limiting impairment can be episodic or in remission.

Rules of construction (continued)

8. One impairment need not limit others.
9. Transitory and minor exceptions to regarded-as category don't apply to actual-disability standard or record-of disability standard.
 - Impairments of less than 6 months may be disabilities under actual or record-of standards.
 - Short impairments are typically not covered unless severe.
10. Major life activities include major bodily functions.

Regarded-as cases

- Employee Doesn't have to prove an actual disability.
- Only that others thought they had a disability.
- Subjected to prohibited activity under Act.
- “Regarded-as” doesn't apply to transitory impairments of less than 6 months.

Reasonable accommodations

- Employers must make reasonable accommodations for known physical or mental limitations of otherwise qualified individuals.

Potential reasonable accommodations

- Improved physical accessibility of existing work and non-work areas.
- Job restructuring, including part-time or modified work schedules.
- Reassignment to vacant positions.
- Acquiring or modifying equipment, examinations, training materials, or policies to accommodate.

Possible accommodations (continued)

- Providing readers, interpreters, and possibly personal assistants to help disabled employees with specified job-related duties.

Employee must request accommodation

- Disability must be known.
- Employee doesn't have to use "magic words," such as "ADA" or "reasonable accommodation."
- Example of pharmacy assistant in New York.
 - Had cerebral palsy, shuffled walk, quiet voice.
 - Never revealed condition, never requested accommodation.
 - Moved from pharmacy to picking up trash.
 - ADA violation resulted.

Interactive process

- Employees are expected to participate in identifying accommodations.
- Wisconsin example of secretary with osteoarthritis.
 - Employee sued employer for ADA violation.
 - Employer's defense was that employee never attended requested meetings or signed release to talk with her doctor.
 - Employee lost case.

EEOC's technical assistance manual suggests employers—

- Determine job purpose and essential functions.
- Consult with employee to identify specific physical or mental limitations as they relate to essential job functions.
- Consult with employee to identify potential accommodations and assess their effectiveness.

Technical assistance manual (continued)

- Of reasonable accommodations available, employee's preference should be given first consideration, but . . .
- Employer can choose accommodation that is—
 - Least expensive.
 - Easier to provide.
- Courts have ruled that employee **not** entitled to requested accommodation, but only an effective accommodation.

Areas of Interplay



Laws involved

- Three laws govern ill or injured employees.
 1. ADA covers individuals with disabilities.
 2. FMLA covers serious health conditions.
 3. Workers' compensation covers employees injured on the job.
- A single employee may be covered by all three laws at the same time.

Workers' comp notice requirements

- Employee must notify within 5 days of injury, unless—
- Employer has actual notice.
- If employee fails to notify within 5 days of injury, employee only forfeits right to compensation during time employee failed to provide notice so long as notification occurs before 90 days.
- Failure to notify within 90 days will bar claim for benefits.

Light Duty

- Employers may use light-duty as a way to reduce workers' comp costs.
- Alabama workers' comp law doesn't require light duty.
- But having blanket policy of denying light duty can run afoul of ADA.
- Employee can request a light-duty position as a reasonable accommodation.

Light duty (continued)

- ADA doesn't require employer to **create** a light-duty position.
- But marginal job functions may be assigned to other employees as part of reasonable accommodation or job restructuring.
- If employer has vacant light-duty position for which employee is qualified, reassignment to vacant position is a reasonable accommodation.

Light duty (continued)

- Employer may have to provide reasonable accommodation for employee in light-duty position.
 - Qualifications must be judged by requirements of temporary position, not position held before injury.

Example

- Telephone line repair person breaks both her legs in a fall.
- Worker confined to wheel chair for 9 months and therefore has disability under ADA.
- Employer places her in desk job for light duty.
- Door to office doesn't accommodate wheel chair entry.
- Reasonable accommodation would be to widen door.

Light duty and FMLA

- Typically arises when employee sustains work-related injury and also has a serious health condition.
- Physician releases employee for light duty and employer has light-duty position.
- If eligible for FMLA leave, employee may decline light duty and take leave.
- Employer can't force light duty so long as employee entitled to FMLA leave.

Light duty and FMLA (continued)

- But declining light duty can bar claim for temporary total disability benefits under workers' comp.
- Light duty doesn't count against employee's FMLA leave entitlement.

Light Duty and ADA

- Assume same facts as in FMLA example, but employee is disabled under ADA.
- Employee released for light duty.
- Employee can decline temporary light-duty assignment if reasonable accommodation would permit him or her to return to regular job.

Duration of leave

- Under ADA, forms of reasonable accommodation include—
 - Permitting employee to use accrued paid leave.
 - Providing **unpaid** leave for necessary treatment.
- Thus providing 12 weeks of FMLA leave is reasonable accommodation under ADA.
- But employee may be entitled to additional unpaid leave under ADA after using FMLA leave.
- Courts assess whether unpaid leave after FMLA leave is undue burden.

Duration of leave under workers' comp

- Workers comp laws doesn't require employer to hold employee's job until he or she returns from injury.
- But if injury qualifies a serious health condition, then employer or employee may choose to have employee's 12-week FMLA leave run concurrently with workers' comp absence.
- After 12-week FMLA leave is completed and if employee not able to return to work—
 - Employee's position can be considered open, but . . .
 - Employer will have to continue to pay temporary total disability benefits.

General rule

- Employer should have employee's FMLA entitlement run concurrently with workers' comp absence.
- Avoids piggybacking or stacking of leaves.

Leave-stacking example

- Employee with serious health condition injures herself on job.
- Employer doesn't make job absence FMLA leave.
- Employee released for light duty.
- Employee can now request FMLA leave for serious health condition and be absent from work for another 12 weeks.

Fitness-for-duty certification: FMLA

- Under FMLA, employer may require fitness-for-duty certification before returning to work.
 - Certification indicates employee can perform essential functions of job.
- For intermittent leave where there are safety concerns, employer may also require fitness-for-duty certification.

Fitness-for-duty certification: ADA

- Employers typically require fitness-for-duty after work-related injury.
- ADA prohibits medical inquiries beyond those—
 - About work-related injury or
 - Request for FMLA leave.
- Employer can't demand full-duty release if employee can otherwise perform essential job functions with reasonable accommodation.

When workers' comp claimant returns—

- Employer should consider whether—
 - Treating physician reviewed job requirements.
 - Job within the employee's restrictions.
 - Restrictions discussed with employee.
- If employee disputes doctor's assessment and refuses to return to work, document refusal and get employee to sign it.

Contact with healthcare providers

- Under FMLA, employer may not request additional information from employee's healthcare provider if complete certification submitted.
- If certification incomplete, employee's direct supervisor can't be person contacting healthcare provider.
- Must be another healthcare provider, HR professional, leave administrator, or management.
- Can't request information beyond that required by certification form.

Contact (continued)

- If certification is incomplete, employer must—
 - Specify in writing what's missing.
 - Give employee 7 calendar days to cure deficiency.

Contact, workers' comp, and FMLA

- If FMLA leave and workers' comp absence are running concurrently, employer or representative may contact healthcare provider.

Medical exams: ADA

- Workers' comp allows employer to require employee receiving compensation to be examined by employer's physician.
- Permissible under ADA **so long as** exam limited to work-related injury.
- **Example:** Can't ask physician to run HIV test on employee getting workers' comp for a back injury.

Medical exams: FMLA

- When requesting second and third opinions under FMLA, exam is limited to serious health condition.

Functional capacities evaluation (FCE)

- Used in workers' comp cases to evaluate employee work status and physical restrictions.
- When employee near maximum medical improvement (MMI), treating physician will conduct an FCE to assist in determining employee's capabilities and limitations.
- FCE may be broader than just work-related injury.

Fitness-for-duty (FFD) assessment

- Can be required by law when employer has concerns about whether employee may be healthy enough to perform essential job functions.
- FFDs frequently requested when employee is returning from FMLA leave.
- Must be limited to serious health condition.
- FFD is limited to whether employee is healthy enough to resume work without creating safety problems for employee or other employees.

Reinstatement rights

- Workers' comp law don't provide reinstatement rights for workers.
- But retaliation provisions of workers' comp laws make termination during workers' comp absence risky.
- FMLA does provide for reinstatement, unless employee not able to perform essential job functions.
- ADA may apply.

Reinstatement rights (continued)

- FMLA does provide for reinstatement, unless employee not able to perform essential job functions.
- But if employee isn't able to perform essential job functions, ADA may require—
 - Reasonable accommodation.
 - One reasonable accommodation may be transfer to another position.

Health insurance continuation

- ADA doesn't require maintaining health insurance unless other employees receive health insurance under similar circumstances.
- But if employee on FMLA leave has serious health condition, employer required to maintain employee's group health plan on the same conditions that would apply if employee not on FMLA leave.

Confidentiality of medical info

- When employer obtains medical information as provided by various laws, ADA requires that it be kept confidential:
 - Separate forms.
 - Separate medical files.

Confidentiality exceptions

1. Supervisors and managers may know necessary restrictions on work or duties and necessary accommodations.
2. First-aid and safety personnel may be informed (when appropriate) if employee's physical or medical condition requires medical treatment.
3. Government officials investigating ADA compliance may see records.

Confidentiality and FMLA

- Information obtained through certification process should be treated the same way as ADA medical information.
- Information shouldn't be disclosed to supervisors or managers, except that medical leave granted and its length.
- Don't tell supervisors or managers reason for leave or treatment rendered.

Confidentiality and workers' comp

- Same rules apply.

FMLA and ADA

- ADA doesn't just address discrimination against disabled employee.
- ADA says employer can't discriminate against someone with family, business, social, or other relationship with a disabled person.
- **Example:** Can't refuse to hire husband of wife dying from cancer.

FMLA and ADA (continued)

- ADA doesn't require reasonable accommodation of employee in relationship with disabled person.
- **Example:** Employer doesn't have to give husband of dying wife a modified work schedule to take care of dying wife.
- **But** if the dying wife's condition qualifies as a serious health condition, FMLA requires employer to allow leave to take care of dying wife.

Military Leave Laws

- Active-duty leave (under FMLA).
- Caregiver-leave (under FMLA).
- Uniformed Services Employment and Reemployment Rights Act (USERRA).

Active duty leave

- Applies to employees who have immediate family member who is called or soon will be called to active duty in support of contingency operation. (Family member is in reserves or National Guard.)
- No requirement for overseas deployment for this leave to apply.
- Leave not available when—
 - Immediate family member is active military.
 - Reservists or members of National Guard who are doing regular training.

Eight qualifying events

1. Short-notice deployment.
2. Military events and related activities.
3. Childcare and school activities.
4. Making financial and legal arrangements.
5. Non-medical counseling.
6. Rest and recuperation.
7. Post-deployment activities.
8. Additional activities (agreed to by employer).

Active-duty leave is another form of FMLA leave

- For 12 weeks.
- Governed by same notice and eligibility requirements as other FMLA leave.
- Active-duty leave taken counts toward 12 weeks of FMLA leave.

Caregiver leave

- Applies to employees who are related to a covered service member.
- Employee needed to care for service member.
- Can last up to 26 weeks.
- Employee can be spouse, son, daughter, parent or next of kin of covered service member.

Covered service member

- Current member of armed forces, National Guard, or reserves.
- Has suffered serious illness or injury in line of duty or active duty.
- Is undergoing medical treatment, recuperation, therapy, outpatient care, or who has been placed on temporary retirement list by military.

Outpatient status

- Member assigned to military treatment facility as an outpatient.
- Member assigned to unit for purpose of command and control of members receiving medical care as outpatients.

Serious injury or illness

- Illness or injury incurred in line of duty or active duty.
- Renders member medically unfit to perform duties of member's office, grade, rank, or rating.

Aspects of caregiver leave

- Certification about condition of covered service member comes from military.
- Employer can't make that call or require exam.
- No second opinions or recertifications.
- Employees eligible for this leave are potentially more numerous because of next-of-kin provision.
- Not limited to spouse, child, or parent as with other FMLA leave.

Aspects (continued)

- Next of kin must be blood relative.
- Blood relative granted custody by court.
- Brothers and sisters.
- Grandparents.
- Aunts and uncles.
- First cousins.
- Service member can designate next of kin.

Aspects (continued)

- 26 weeks of leave during a 12-month period.
- Basis is per service member and per injury.
 - Employee may be able to take 26 weeks for first service member and then second 26 weeks for second service member.
 - Employee could take 26 weeks for first injury and then another 26 weeks for a second injury to same service member.
- Employer may have to keep track of two leave periods for any employee.

Aspects (continued)

- Caregiver leave doesn't apply to **former** service members.
- Once service member is discharged, caregiver leave no longer available for care.
- Of course, employee can use FMLA leave for that purpose.

USERRA



Covered employees

- All private and non-federal public employers.
- No size limitation for employer.
- Foreign employers must comply for employees working in U.S.
- American employers operating overseas must follow unless foreign country has contrary law.

Covered employees (continued)

- Applies to employees who—
 - Have been laid off with recall rights.
 - Are on strike.
 - Are on leave of absence.

Exceptions for short-time employees

- Employees who are employed for brief, non-recurrent period with no reasonable expectation of continued employment—
 - Have no re-employment rights or benefits protections.
 - But do have protection against discrimination and retaliation.
- USERRA does not cover independent contractors.

Covered service

- All military service and training during war or peace.
- Active duty.
- Active or inactive duty for training.
- Full-time National Guard duty.
- Absence from work for a exam to determine fitness for duty.
- Funeral honors.
- Service by intermittent employees of National Disaster Medical System.

Uniformed services

- Army, Navy, Air Force, Marine Corps, Coast Guard.
- Reserves for these groups.
- Army and Air National Guard.
- Commissioned corps of Public Health Service.
- Any other category designated by President during time of war or emergency.

Leave for military service

- Employee entitled to leave for qualifying service if the employee gives proper notice.
- Employee doesn't have to get employer's permission.
- Employee doesn't have to accommodate employer in terms of timing, duration, or frequency of service.

Additional time may be required

- Employer may have to give employee additional time off before actual service begins.
- Employer should consider—
 - Expected duration of service.
 - Amount of notice given by employee.
 - Location of service.

Military leave and benefits

- Employers must treat employees on military leave the same as they would treat an employee on furlough or unpaid leave.
- USERRA doesn't require employers to provide pay or any specific benefits to employees on leave.
- Employee is entitled to same non-seniority rights and benefits provided to other employees on leave who have similar seniority, status, or pay.

Military leave aspects

- When military leave begins, employee doesn't have to indicate whether he or she will seek re-employment after military leave is over.
- Employee gets to make that decision upon completion of military leave.
- Leave for military service is unpaid.
- Employer can't force employees to take accrued leave or paid time off to cover absences.

Aspects (continued)

- At employee's request, employer must allow employee to use accrued annual, vacation, and similar types of leave.
- Employer doesn't have to allow use of sick leave unless employer would allow that for similarly situated employees.

Notice requirement

- Employers must provide notice of rights, benefits, and obligations under USERRA.
- Poster is available at—
www.dol.gov/vets/programs/userra/userra_private.pdf

Continuing healthcare coverage

- Employees do have right to continued healthcare coverage for a limited time.
- Healthcare coverage must be continued either
 - 24 months beginning on day when employee's absence begins OR
 - From beginning of absence to date on which employee fails to return from service or apply for a position in the time allowed by USERRA.

Who pays for healthcare?

- If employee serves for less than 31 days, employee pays his or her regular share of coverage.
- If employee services more than 30 days, employer can require employee to pay for full coverage plus 2% administrative fee.
- If employee doesn't give advanced notice, coverage can be cancelled.
- But failure to provide notice can be excused by impossibility, unreasonableness, or military necessity.

Eligibility for re-employment

- Generally, employee is entitled to be re-employed in position he or she would have had or to a position of like seniority, status, and pay.
- Employee seeking re-employment doesn't have to prove elements of discrimination.

To be eligible for re-employment

- Employee must give **reasonable** advance notice of military service. Notice may be informal and not in writing.
- Employee must serve 5 or less years of military service. (There are a few exceptions.)
- Employee must make timely return to work.
- Employee's discharge from service can't have been under less-than-honorable circumstances.

Re-employment rights

- Prompt re-instatement.
- Same position.
- Same tasks.
- Despite disability.

Prompt re-instatement

- Immediately if employee serves less than 31 days.
- Within 2 weeks after notice if employee serves more than 30 days.
- Position.
 - Should be the same as if he or she had been continuously employed.
 - Employee should have same working conditions, job location, shift assignments, rank, responsibilities, and geographic location he or she would otherwise have had.

Same position

- Should be the same as if he or she had been continuously employed.
- Employee should have same working conditions, job location, shift assignments, rank, responsibilities, and geographic location he or she would otherwise have had.

Position: Escalator position

- To locate appropriate position of returning employee, employer must locate employee's "escalator position."
- Escalator position = where employee would be if he or she had been continuously working.
 - May be positive, such as a promotion.
 - May be negative, as in layoff, transfer, demotion, or termination.

Escalator position (continued)

- If employee served for 90 days or less, employer **must** put employee in escalator position unless employee not qualified.
- If employee not qualified, employee must be returned to pre-service position.
- If employee not qualified for escalator or pre-service position, employee must be re-employed in nearest approximation of (1) escalator position and then (2) pre-service position.

Escalator position (continued)

- For all preceding situations, when employee is unqualified for position, employer must make reasonable efforts to help employee become qualified for position.
- Reasonable efforts include employer-provided training that doesn't place undue hardship on employer.
- Having to pay something for the training doesn't constitute undue hardship.

Escalator position (continued)

- If employee serves more than 90 days, employer may place employee in **either**—
 - Escalator position OR
 - Another position of like seniority, status, and pay.
- If employee not qualified for escalator or pre-service position, employee must be re-employed in nearest approximation of (1) escalator position and then (2) pre-service position.

Essential tasks

- To determine whether employee is qualified, consider essential tasks of the job.
- Essential tasks = essential job functions under ADA.

Essential task considerations

- Which functions are essential.
- Written job descriptions developed before hiring process begins.
- Amount of time spent performing task.
- Consequences of employee not performing that task.
- Work experience of past employees in that job.
- Work experience of current employees in that job.
- This list not exhaustive.

Rate of pay upon re-instatement

- Rate should be rate associated with position employee is placed in:
 - Escalator position.
 - Pre-service position.
 - Another position.
- Rate must include pay increases, differentials, step increases, merit increases, or periodic increases that employee would have obtained with reasonable certainty if he or she had continued to be employed.

For pay increases, consider—

- Work history.
- History of merit increases.
- Work and pay histories of employees in same or similar positions.

Seniority rights

- Employee entitled to seniority and seniority-based rights employee would have had if he or she had been continuously employed.
- Seniority-based rights include statutory rights that accrue based on the time worked, such as FMLA leave.
- Time includes all the time absent, including military service, preparation time, and time spent recuperating from an injury.

Grounds for denying re-instatement

- Employer must prove grounds by preponderance of evidence.
- Employment was for brief, non-recurrent period.
- Employer's circumstances have changed, as in a reduction in force.
- After employer has made reasonable efforts to make an unqualified employee qualified, employer may assert **undue-hardship defense**.

What is undue hardship?

- Nature and cost of actions required by USERRA.
- Overall financial resources of facility.
- Number of persons employed at facility.
- Effect on expenses and resources.
- Effect of rehiring on operation of facility.
- Overall financial resources of employer.
- Overall size of business.
- Operations of employer.

Defenses unlikely to succeed

- Employer has hired replacement.
- No job opening exists.
- Changed circumstances must be a fundamental shift in the business model and reality of the employer's enterprise.

Conclusion

- FMLA, ADA, workers' compensation, and military leave laws are a complicated maze.
- Merely complying with one law is often insufficient.
- Employers must consider the interactions of these laws.

Questions?

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