

# Dancing with the Devil: Balancing FMLA and ADA Obligations

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Monday, October 19, 2015

Any employer will tell you that the federal **Family Medical Leave Act ("FMLA")** is a highly technical law. Despite the FMLA's massive web of regulations and *Department of Labor* opinion letters, it should be possible to comply with the extremely complicated requirements of the FMLA. *Should . . .* if you administered your FMLA policy in a vacuum. However, we know that is not the case. When an employee qualifies for FMLA leave, the employer might also have obligations to the employee under the **Americans with Disabilities Act ("ADA")**, to which the scope of this *Law Update* is limited. The Wisconsin employer also might have obligations under the Wisconsin Family and Medical Leave Act, the Wisconsin Fair Employment Act, the Workers' Compensation Act, short-term and long-term disability policies, and any rights contained in a collective bargaining agreement. This is where the dance begins.

## Is it a "Serious Health Condition" or a Disability?

Medical leave is available under the FMLA if the employee has a "serious health condition". However, FMLA qualification only provides access to FMLA leave. If the serious health condition also is an ADA disability, then the employer must consider available reasonable accommodations.

Employers should not assume that an employee with a serious health condition also is a disabled employee for purposes of the ADA. An employee with a *serious health*

*condition* must be incapacitated for at least three full days, seeing a physician at least once during the period of incapacity, and under a plan for follow up care. An employee is *disabled* for purposes of the ADA if he or she is substantially limited in a major life activity, such as walking, lifting, seeing, thinking, or working.

The easiest way to distinguish between a serious health condition and a disability is by measuring time. A serious health condition might only last three days. However, a disability has a sense of permanency. For example, a bout of the flu, which generally lasts a week or so, might constitute a serious health condition, but will not be considered a disability. While a broken arm is painful and might require several visits to the doctor, it generally is not a permanent condition either, and, therefore, will not be considered a disability under the ADA. However, if that broken arm does not heal properly, it could lead to a disability if the employee is substantially limited in his or her ability to lift or carry.

### **Stretching the 12 Weeks of Leave.**

Under the FMLA, an employee may be eligible for up to 12 weeks of leave. Typically, an employee's disability also qualifies as a "serious health condition". Frequently, a disabled employee will request time off to address issues associated with his or her disability, such as treatment, medical appointments, or reduced or changed schedules for purposes of adjusting to medication. These absences or schedule variances generally qualify for protected FMLA leave.

Under some circumstances, the disabled employee might not quite qualify for FMLA leave. For example, the employee might not have provided sufficient notice for foreseeable leave, or might have failed to properly document the need for leave. And the dance continues . . . . Technically, the employer could refuse leave under the FMLA until it has received proper notice and certification. However, the employer might then fail in its obligation to reasonably accommodate. Instead, the employer should consider providing FMLA leave as a reasonable accommodation, meeting its obligation under the ADA while also exhausting FMLA leave.

If a disability also qualifies as a serious health condition, the employer might be required to extend leave beyond 12 weeks as a reasonable accommodation if a slight increase in leave that is proportionate to the seriousness of the disability might help the employee to eventually return to work. In such a case, the employer should condition leave on proper medical certification, including establishing a clear return-to-work date and practical work restrictions.

Employees with disabilities frequently need periodic absences or schedule variances to receive treatment. Sometimes this treatment is so exhausting that the employee might need a reduced schedule. Such schedule changes can be considered reasonable accommodations if they do not create an undue hardship for the employer. In such a case, the employer should require the employee to apply for intermittent FMLA leave so that the employee receives protection for use of this leave, and the employer is permitted to exhaust leave.

### **Remote Work as an Alternative to FMLA Leave.**

When an employee is struggling with health issues, some employers offer temporary remote work as an alternative to leave. Employers should be aware that if the employee qualifies for FMLA leave, the employer is permitted to offer remote or light-duty work as an option. However, the employer cannot require the FMLA-qualified employee to accept the remote or light-duty assignment in lieu of leave. It must be the employee's choice.

If the employee accepts the remote or light-duty assignment, it should be treated as a reasonable accommodation, subject to any medical restrictions. The employer also should require the employee to consent in writing, documenting that he or she was offered FMLA but instead opted to work remotely or accept a light-duty assignment.

### **FMLA Outside the Vacuum.**

When addressing employee medical leave, employers must remember that the FMLA cannot be administered in a vacuum. If a serious health condition might also be a long term or permanent condition, the employer must consider possible accommodation duties under the ADA and the Wisconsin Fair Employment Act. If the absence is due to a work injury, the employer also should evaluate workers' compensation risk and options under short term disability, long term disability, and other employer-provided leave programs. Although a daunting balancing act, a prepared employer should consult with its attorneys and human resources professionals to anticipate these issues and resolve any problems early.

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