MANAGING THE MAZE OF EMPLOYEE LEAVE

June 15, 2017
Cyndi’s broad base of human resources experience serves clients across numerous industries, including manufacturing, high-tech, construction, not-for-profit, and financial institutions. She has consulted with both large and small firms and has managed start-up entities. Her focus on human resources strategy, staffing and recruiting, policy and program development, as well as merger and acquisition strategy, helps clients understand and solve their most complex workforce issues. Cyndi is a frequent speaker at local and national conferences and has been published in a number of periodicals and trade publications.

Areas of specialty include:
- Strategic human resources planning initiatives
- Local and global staffing and recruiting
- Human resources administration
- Human resources investigations and litigation support
- Human Resource Information Systems/payroll systems selection, and implementation
- Compensation and benefits
- Retirement plan consulting

Cyndi Mergele
Senior Director, Technology & Management Consulting
RSM US LLP
San Antonio, TX
cyndi.mergele@rsmus.com
+1 210 253 1610

©2017 RSM US LLP. All Rights Reserved.
Agenda

The Basics
- Americans With Disabilities Act
- Family Medical Leave Act
- Workers Compensation

The Intersection-When Leaves Overlap

Is There Ever Too Much Leave?
Americans with Disabilities Act

- Passed in 1990
- Amended in 2008 (ADAAA)
  - Substantially changed definition of a disability
- Prohibits discrimination in employment, public services and accommodations, and telecommunications
- Requires employers to provide “reasonable accommodation” to applicants and employees needed to apply for a job and subsequently to perform the essential functions of a job
Americans with Disabilities Act

• Employers with 15 or more employees must comply
• ANY employee is eligible, regardless of hours worked and tenure
• The employee **must be qualified** to perform the essential functions of the job
• Essential functions of the job can be determined by:
  – job descriptions
  – employer judgment
  – experience of current and former employees
• Attendance and acceptable behavior should be essential functions of the job
Americans With Disabilities Act

What is “reasonable accommodation”? 

• Job restructuring 
• Part-time/modified work schedules 
• Reassignment to a vacant position 
• Telework 
• Breaks 
• “Equal access” to training, office-sponsored events; different office space, technology, furniture
What is “unreasonable”? 

- To create or place someone in a job they are not qualified to perform
- An accommodation that causes “undue hardship”
- Removing an essential job function from the position
- “Personal items” used both at work and at home (i.e. hearing aids)
What is “Undue Hardship”

Have to consider:

• Nature and cost of the accommodation;

• The financial resources, size, number of employees at the facility and effect/impact of expense and accommodation on the operation;

• Financial resources of the company;

• Type of operation, including composition, structure, and functions of the workforce of the company;

• How disruptive is the accommodation on the other employees and the company’s ability to conduct business
Family and Medical Leave

Who must comply:
- Employers with 50 or more employees within a 75 mile radius

Who is eligible:
- Employee who has worked at least 1250 hours in the past 12 months in a facility where FMLA is required

Reasons for Leave:
- Birth of Child; placement for adoption or foster care
- Employee’s serious health condition
- Serious health condition of employee’s spouse, child or parent
- Qualifying exigency for family member on active duty
- Servicemember leave—for next of kin and up to 26 weeks
Family and Medical Leave

What’s the Benefit:
- Up to 12 weeks of unpaid leave
  • Can be combined with paid leave
  • Can be intermittent
- While on FMLA, group health coverage continues,
  other benefits escalate as if employee was not absent
- Return to same or equivalent position
Workers Compensation

• Compliance based on state regulations
• Coverage can apply to organizations with as few as one (1) employee
• Some states permit non-subscription or self-insuring
• Leave isn’t “required” (this is not to say that someone is able to work)
• Benefit for “covered worker”
  – Wage replacement (generally after absence of specified number of days)
  – Coverage of medical cost
  – Payment if a determination of disability
Considerations for All Leave

• Some states have laws that provide greater protection and benefits than federal law
• Companies may also decide to offer leave and benefits beyond what is required by law, i.e. non-FMLA leaves of absence, catastrophic leave plans…
INTERSECTIONS
When Leaves Overlap
The Intersection

ADA

FMLA

Worker Comp
Workers Compensation and FMLA

FMLA should run concurrently with workers compensation when:

- Any employee suffers a “serious” work-related injury/illness, i.e. is going to require treatment beyond first aid (to include physical therapy)
- Designate the leave as FMLA
- No need to request medical certification as medical information is being provided
<table>
<thead>
<tr>
<th>Workers Comp</th>
<th>FMLA</th>
<th>Combined WC/FMLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generally provided benefits (medical treatment and wage replacement) until released or reaches maximum medical improvement; while cannot retaliate, not required to provide job protection</td>
<td>Generally 12 weeks unpaid, with job protection</td>
<td>Employee provided at least 12 weeks of job protection</td>
</tr>
<tr>
<td>Generally not permitted to exhaust/substitute paid leave while on WC</td>
<td>Company policy can required employee to exhaust all paid leave concurrently with FMLA</td>
<td>Cannot be required to exhaust/substitute paid leave.</td>
</tr>
<tr>
<td>Not required to continue employee benefits</td>
<td>Required to continue employee benefits for 12 weeks</td>
<td>Required to continue employee benefits for 12 weeks</td>
</tr>
<tr>
<td>Provides the greatest access to medical information</td>
<td>Provides the most limited access to medical information (confirmation of serious health condition)</td>
<td>As inquiries are related to WC can make inquiries related to history, treatment and prognosis</td>
</tr>
</tbody>
</table>
Workers Compensation and FMLA

Additional Considerations:

• Employee turns down light duty offer
  – Under WC, employee is at risk of losing benefits
  – With FMLA, can turn down light duty and still has right to job protection for 12 weeks
  – Beware of limitation on leave policies

• Avoid
  – Retaliation against employee for requesting leave for a serious health condition
  – Interfering with the employee’s FMLA rights
  – Retaliating against the employee for filing a workers’ compensation claim
ADA Definition of Disability

1. A physical or mental impairment that **substantially limits** one or more major life activities ("actual disability"); or
2. A record of a physical or mental impairment that **substantially limited** a major life activity ("record of"); or
3. When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as").

**Likely Disability** - (diabetes, hypertension, heart disease, cancer, OCD, epilepsy)

**Unlikely** – (common cold, seasonal/common flu, sprains, broken bones – *but be cautious!*)

To be entitled to reasonable accommodation, an individual’s impairment must meet the first or second definition above.
### Workers Comp and ADA

<table>
<thead>
<tr>
<th>Workers Comp</th>
<th>ADA</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee is determined to have recovered as much as anticipated, but is “permanently disabled”</td>
<td>Determination for WC will establish disability and ability to perform essential functions, while also providing restrictions</td>
<td>Can the employee perform the essential functions of the job?</td>
</tr>
<tr>
<td>For light duty, can reassign</td>
<td>For accommodation have to return to original position and engage in interactive process, which should be individualized and ongoing</td>
<td>Beware of determining that an accommodation is unreasonable after the employee has demonstrated performing the duties while on light duty</td>
</tr>
<tr>
<td>Employee was also on FMLA, exhausted 12 weeks, and physician indicates recovery/return to work possible in “a few weeks”</td>
<td>Additional leave may be a form of accommodation</td>
<td>Beware of absolute limits on leave</td>
</tr>
<tr>
<td>No obligation to continue benefits</td>
<td>No obligation to continue benefits (if leave is the accommodation)</td>
<td>Be consistent in application of benefits continuation policies</td>
</tr>
</tbody>
</table>
## FMLA and ADA

<table>
<thead>
<tr>
<th>FMLA</th>
<th>ADA</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Twelve weeks</td>
<td>Where leave can be an accommodation, time off (usually intermittent) could be indefinite</td>
<td>Recertify FMLA annually</td>
</tr>
<tr>
<td>Serious Health Condition</td>
<td>Disability</td>
<td>They are not synonymous. Beware of “regarding” an individual as being disabled</td>
</tr>
<tr>
<td>Fifteen days to return forms/medication certification</td>
<td>Medical information must be provided within a reasonable time frame. Provide an actual deadline. For example, fifteen calendar days after the employer’s initial request.</td>
<td>In both cases clearly communicate decision/determination</td>
</tr>
<tr>
<td>Benefits must continue for the 12 week leave period</td>
<td>Benefits are not required to be continued for extended leave for accommodation</td>
<td>Be consistent in the application of benefits continuation</td>
</tr>
<tr>
<td>Notices, medical certification of “serious health condition”</td>
<td>Medical examination, medical inquiries that are “job related” and “consistent with business necessity”</td>
<td>Annual recertification of FMLA</td>
</tr>
</tbody>
</table>
Too Much Leave?

• Creating an unlimited leave policy out of compassion
  – Could create issues with group benefits (no longer eligible)
  – Does the practice become the policy?

• Too much leave isn’t always about “requirements”
  – Ensure that supervisors understand the policies and understand
    the need to communicate employee absences accurately and
    timely

• Address absences of exempt employees
  – FLSA and FMLA

• Provide FMLA forms timely
  – While FMLA can be applied retroactively, must be reasonable
  – Clearly communicate employee’s deadline to return forms
Request for Indefinite Leave of Absence

What should you consider when an employee requests an indefinite leave of absence **without** identifying when they are likely able to perform the essential functions of the job?

- After FMLA has expired, carefully analyze and document how the employee’s request impacts your business and operations, and potentially creates an undue hardship.
Employers should consider many factors when analyzing whether the requested leave truly poses an undue burden, such as:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error (but be prepared to prove it)
- Lower quality and less accountability for quality
- Lost sales
• Less responsive customer service and increased customer dissatisfaction
• Deferred projects
• Increased burden on management staff required to find replacement workers, or readjust work flow or readjust priorities in light of absent employees
• Increased stress on overburdened co-workers
• Lower morale
Additional ADA Considerations

• Engage in the interactive process to determine accommodation before it’s worked!
  – Difficult to say that an accommodation is unreasonable if the employee’s been accommodated for a period of time.
  – Is a duty REALLY essential?
    • A temporary employee performing a job, then sent for a physical when “permanently” hired only to be determined to be unable to perform “essential” functions of the job
    • When a long term employee has need for accommodation and a duty that hasn’t been performed by that person in years becomes “essential”
    • Driving (but only to get to work)
Additional ADA Considerations

• Beware of penalizing employees with a disability:
  – 100% healed policies (aka “full release”)
  – Absolute/maximum/limitation on leave policies

• ADA compliance extends to hiring
  – Accommodation may include assistance in applying
  – Provide applicants with essential functions of the job and their acknowledgement that they can perform the functions (with or without reasonable accommodation)
Leading Practices

• Review and revise policies
  – Ensure they are communicated and understood
  – Train supervisors for awareness and proper communication of leave needs and confidentiality

• Review and revise/update job descriptions to ensure essential functions are clearly identified

• Consider if practices are creating unlimited leave policies, or the “I’ll have what she’s having” policy
THANK YOU FOR YOUR TIME AND ATTENTION
QUESTIONS AND ANSWERS?