



Leave of Absence Q&A

Presenters
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Scott Mastley



- 25 years HR Experience
- Ownership in 2 Small Businesses
- Best HR Dept Awards
- SPHR, SHRM-SCP, MBA
- Let Thread Engage !
- Client Satisfaction Score 100%
- Still excited about supporting HR for growing businesses!

Lisa Taylor



- Employment law specialty – represents businesses of all sizes and select individuals
- Includes advice and counseling, document/policy/contract drafting, representation in investigations and administrative proceedings (DOL, OSHA, EEOC, etc.), and litigation
- Started practicing employment law 21 years ago in a big Atlanta firm, taught law school for a decade, and have been in private solo/small-firm practice since 2015

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Which laws come in to play when an employee needs time off for an illness or injury?

- FMLA (Family Medical Leave Act)
- ADA (Americans with Disabilities Act)
- Worker's compensation







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My company is covered by FMLA because we have more than 50 employees. Are they all eligible for FMLA leave?



- No – must be an eligible employee and the reason leave is needed must be qualifying
- Eligible employee:
 - Employed by employer at least 12 months
 - At least 1,250 hours of service during 12-month period immediately preceding leave
 - Work at site where 50 or more employees are employed within 75 miles

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Do we only need to provide FMLA leave when an eligible employee asks for it?



- No, not necessarily.
- Employer obligation can be triggered if it has knowledge that an employee's need for leave may be FMLA-qualifying.
- Provide notice of eligibility to apply within five business days, absent extenuating circumstances.

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We let an eligible employee take a month off to recover from surgery. Did we meet our obligations under the FMLA?



- No, not necessarily.
- Leave must be properly designated, so it's important to jump through the hoops of the DOL-approved paperwork, which includes:
 - Notice of requirements to furnish certification of need for leave and consequences for failing to do so
 - Employee's right to substitute paid leave, or employer's requirement to do so, if applicable
 - Any requirement for employee to make premium payments to maintain health benefits
 - Designation notice should inform employee of how much leave (s)he has been approved for
 - See optional DOL Forms WH-381 and WH-382

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We had to hire someone to fill in for an employee who was out on FMLA. What do we do when the employee who took leave is ready to return to work?



- It depends, but generally you have to reinstate that employee to the same or a very similar position.

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Can we require employees returning from FMLA to present a doctor's note saying that they are ready to return to work? For full duty?

- Yes, and it's a good idea to require a medical release for a returning employee.
- But NO, it's not a good idea to require that it say they are ready for full duty. This presents issues under the ADA regarding accommodations.
 - Interactive process
 - Able to perform essential functions of position with or without reasonable accommodations
- "100% healed" requirements/policies are problematic and get companies in trouble easily

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Our company is not covered by the FMLA, so we don't have to provide leaves of absence to employees with medical conditions, right?

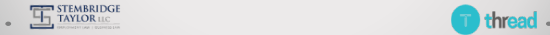
- Not necessarily! If covered by the ADA (15 or more employees) then the company may need to provide leave as a reasonable accommodation.
- Go through the interactive process with the employee.
- Able to perform essential functions of position with or without reasonable accommodations?
- Importance of job descriptions!



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We provided our employee with the full 12 weeks of FMLA, but she still was not ready to return to work. She didn't know when she'd be back. Can we terminate?

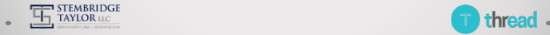
- Maybe – but be very careful. The best approach would be to inquire further with the employee to see if her health care provider can provide an estimate as to when she will be released to return to work.
- Indefinite leaves of absences are generally not a reasonable accommodation, but a definite extension of a few weeks or even a few months, depending on the circumstances, may be reasonable.
- How you have filled the position during the leave is also relevant – if you have a temporary employee in the position, for example, it might be reasonable to just keep that person in the position and let the employee stay out a little longer.



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When an employee takes time off for a workers' comp claim, do we need to consider the ADA or FMLA?

- You should. These laws are not mutually exclusive.
- An employee on workers' comp might be eligible for FMLA leave and then might be eligible for ADA accommodations upon her return, for example.
- Again, need to engage in interactive process and consider ability to perform essential functions with or without reasonable accommodations



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Can we have a non-FMLA leave policy?



- Definitely! Personal Leave, Medical Leave, Parental Leave, Bereavement...
- Check state laws and set the max time allowed and eligibility reasons
- Create the request and approval process as well as the admin process
- Add the policy to your handbook and share it with your team




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What about COVID? Is an employee with COVID covered by these laws?



- FMLA – maybe/probably for period of illness if serious case
- ADA – more likely not unless long-term effects that substantially limit a major life activity. EEOC has taken the position that COVID is generally not a disability under the ADA
- FFCRA – Emergency Paid Sick Leave requirements have sunset and not thus far been reinstated at the federal level

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Speaking of COVID, are we required to give employees paid time off for COVID-related reasons?

- Not required anymore at Federal level, remains an option, but the tax credits sunset September 20, 2021
- Some states require COVID leave be provided (Massachusetts...)

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What else would you like to know?



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