Accommodations and Leaves of Absence: Law Firms Confronting the FMLA and ADA

Presented by
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Accommodations and Leaves of Absence: Law Firms Confronting The FMLA And ADA

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HR/Administrator/Manager Responsibilities

1. Identify situations when employee may be requesting a leave/accommodation
2. Document absences (including absences due to intermittent leave)
3. Reinstatement of employee to position and related benefits following leave
HR/Administrator/Manager Responsibilities

4. Ensure no discrimination/retaliation due to protected leave/accommodation requests

5. **Note:** Manager communication with HR/Administrator regarding leave and accommodation issues is critical

Types of Leave

1. Family and Medical Leave Act (“FMLA”)
   a. Eligible employees
      i. 12 months of employment (not consecutive)
      ii. 1250 hours during 12 months preceding leave
      iii. Work in worksite where 50 or more employees work within 75 miles of the worksite
   b. Up to 12 workweeks of unpaid, job protected leave available within designated 12 month leave year (26 workweeks in some cases)
   c. Continuation of health benefits during leave
Types of Leave

1. Family and Medical Leave Act (“FMLA”)
   d. Conditions qualifying for leave:
      i. Birth of child to care for child
      ii. Care for child placed for adoption or foster care
      iii. Serious health condition of employee
      iv. Serious health condition of employee’s immediate family member
      v. Qualifying exigency
      vi. Leave to care for covered servicemember

Types of Leave

1. Family and Medical Leave Act (“FMLA”)
   e. Six general categories of a “serious health condition”
      i. Inpatient care (minimum of 1 night hospitalization)
      ii. A period of incapacity of more than 3 consecutive full calendar days plus treatment by healthcare provider (“incapacity plus treatment”)
      iii. Any incapacity due to pregnancy or prenatal care
Types of Leave

1. Family and Medical Leave Act (“FMLA”)
   e. Six general categories of a “serious health condition” (continued)
      iv. Chronic conditions requiring treatment by a healthcare provider
      v. Period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective
      vi. Multiple treatments for non-chronic conditions that if left untreated would become serious health condition

2. Americans With Disabilities Act
   a. Definition of “disability” broadly construed
      i. Physical or mental impairment that substantially limits a major life activity
   b. Individualized assessment of whether leave request is reasonable accommodation
   c. Potential undue hardship exception
   d. Cannot discriminate based on:
      i. Current disability
      ii. Prior disability
      iii. Perceived as disability
      iv. Associated with someone with disability
Types of Leave

3. Americans With Disabilities Act Leaves
   a. Leave of absence is a possible accommodation
   b. Other possible accommodation obligations (e.g., adjusted work schedule, removal of non-essential functions, etc.)

Types of Leave

4. Family and Medical Leave Act ("FMLA")
   a. How may FMLA Leave be taken?
      i. May be used all at one time
      ii. May be used a few weeks at a time
      iii. May be used intermittently (e.g. a few hours at a time)
      iv. May be used to create a reduced leave schedule
Scope of Laws/Benefits

1. Key Distinction:
   a. Leave of Absence
      i. FMLA
      ii. ADA
      iii. Firm policy (e.g., personal leave)
   b. Monetary Benefits
      i. Workers compensation
      ii. Short term disability
      iii. Paid time off benefits

Hypothetical 1

You have received various resumes for an open a legal assistant position. You are now at the stage of interviewing and, during an interview, the candidate discloses that she has post-traumatic stress disorder. What do you say in response to this disclosure?
Analysis of Hypothetical 1

1. Disclosure of disability
2. Non-verbal empathy
3. Documentation
4. What if the applicant said she had, in the past, suffered from Leukemia?

Hypothetical 2

An employee in your Accounting Department has been out for several days and comes to you and says, either directly or by way of a doctor’s note, that her absences were “due to a sickness.”

Is this a request for leave?
Analysis of Hypothetical 2

1. Calling out “sick,” without more information, is not sufficient to trigger employer obligation to determine whether absence should be designated as FMLA leave
2. When making initial request for FMLA leave, employee must provide specific information, such as inability to perform functions of job, pregnancy, overnight hospitalization, need to care for an immediate family member, etc.

Hypothetical 3

One of your associates returns to work after being out for several days and she tells the partner to whom she reports that she was in the hospital and then was home recovering from pneumonia.
Is this a request for leave?
Analysis of Hypothetical 3

1. Reference to hospital stay is sufficient to put organization on notice that absence may be covered by FMLA leave
2. Absence due to “inpatient” care (e.g., hospital stay) typically qualifies for FMLA leave, subject to medical certification
3. Example of FMLA coverage for short absences even where employee is not incapacitated in excess of three consecutive, full calendar days

Hypothetical 4

An employee in your mailroom informs his manager that he needs to go to treatments for a kidney condition and needs to miss work one day per week for the next six weeks.

Is this a request for leave?
Analysis of Hypothetical 4

1. When making initial request, employee does not have to expressly assert rights under “FMLA” or even mention “FMLA”
2. Identification of need for “treatments” is sufficient to put organization on notice that absence may be covered by FMLA leave
3. Example of short, intermittent absences for a chronic condition that may be eligible for FMLA leave, subject to medical certification

Recognize a Request for Leave

1. Practical Pointers:
   a. Employee may provide sufficient information to trigger FMLA notification obligation even where employee does not follow required procedures
   b. Knowledge of managers is key and imputes knowledge to organization
   c. Need to be able to recognize a request for leave/accommodation and report it to Human Resources/Administrator!
The Medical Certification Process - FMLA Leaves

1. All FMLA leaves must be supported by appropriate medical documentation
2. Firm may seek:
   a. Clarification or authentication of original certification
   b. Second or third opinion where question validity of original certification
   c. HR/Administrator may have direct contact with employee’s healthcare provider in certain instances but managers may not!

Hypothetical 5

One of your paralegals was previously approved for intermittent FMLA leave. Several months have passed and, now, in the summer, the employee’s intermittent absences begin to frequently occur on a Monday and/or Friday.

Are you permitted to require the employee to submit an additional medical certification form?
Analysis of Hypothetical 5

1. Organization may require recertifications of need for leave more often than every 30 days when:
   a. Extension of leave requested
   b. Changed circumstances
   c. Information casting doubt on need for leave

Integrating Leave With Paid Time Off Benefits

1. Under firm policy, what do you say about the use of accrued but unused paid time off benefits during FMLA and other leaves.
2. Use of disability/workers compensation payments concurrently with FMLA and other leaves
**Hypothetical 6**

One of your managers makes a request for FMLA leave to care for her ill family member. She has five days of paid time off available. She asks the COO if she can take these days first and then take an unpaid FMLA leave.  
What should be the COO’s response?

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**Analysis of Hypothetical 6**

1. COO is not required to permit employee to use vacation first and delay commencement of FMLA leave, where reason for the absence qualifies for FMLA leave
2. Do you require employee to use paid time off (limited “banking”) concurrently with FMLA leave with subsequent FMLA leave taken on unpaid basis?
Hypothetical 7

One of your clerks is on FMLA Leave. While the clerk is away, his manager learns that the clerk spent significant amount of his working time before his leave operating his own side business using firm computers and other property.
Is the clerk’s job still protected under the FMLA?

Analysis of Hypothetical 7

1. FMLA Leave does not protect employee from discipline for violation of uniformly applied rules of conduct/behavior
Hypothetical 8

An associate is on FMLA Leave. Just prior to going out on leave, the partner was about to write the associate up for poor performance. When the associate calls the partner to say she is ready to return to work, the partner decides that she does not want to bring her back because of the performance issues. Is this permissible?

Analysis of Hypothetical 8

1. Obligation under FMLA to return employee to same or equivalent position
2. FMLA does not protect employee from otherwise appropriate discipline for performance reasons
3. Where employee’s leave prevents organization from implementing discipline, manager should promptly document prior intention to discipline; upon employee's return to work, manager should meet with employee to address performance issues going forward
Hypothetical 9

A billing employee has been out on an FMLA leave for almost eight weeks. It is the department's busiest time of year. The supervisor suspects that the billing employee will not return from her leave of absence. When can the supervisor start looking for her replacement?

Analysis of Hypothetical 9

1. Employee must be returned to same or equivalent position, unless firm receives notice from employee of unequivocal intention not to return to work
   a. Preference for employee notice to be in writing
   b. If verbal notice, firm should confirm in writing
ADA Obligations

1. Non-discrimination
2. Reasonable accommodations
   a. Examples of reasonable accommodations
      i. Adjusted schedule
      ii. Adjusted work station
      iii. Adjusted job responsibilities
      iv. Leaves of absence

Hypothetical 10

A marketing employee begins missing deadlines. When counseled about the need to improve her performance, she tells her manager that she feels depressed, has difficulty sleeping and is unable to focus, but feels that she can do better.

Is this an adequate request for a reasonable accommodation?
Analysis of Hypothetical 10

1. Employee did not explicitly request accommodation and employee’s comment she can do better suggests she may not need assistance
2. However, other factors may suggest need for accommodation
3. Focus on performance, not underlying condition
4. Offer support and assistance generally

Hypothetical 11

Your receptionist has record of poor attendance and periodically claims he find his position stressful. The receptionist’s family member tells the manager that the receptionist has been having a number of personal issues and is very stressed out.

Is this a request for a reasonable accommodation?
Analysis of Hypothetical 11

1. Comment by employees that position is “stressful” is fairly typical; however, reference is vague
2. Vague reference, however, does not end inquiry; appropriate to inquire as to whether there are tasks that cannot be performed or whether any assistance is needed
3. Family member’s comment may be sufficient to trigger organization’s obligation to make further inquiry

Hypothetical 12

One of your direct reports advises you that his medical condition, an anxiety condition, makes it difficult for him to concentrate and he has trouble meeting his deadlines. He advises you that what would really help would be if he could have an assistant or if you would remind him each week of all of his deadlines.

Is this request reasonable?
Analysis of Hypothetical 12

1. Accommodation requests are unreasonable
2. No automatic obligation to agree with specific employee requests
3. Inquiry does not end, however, with unreasonable request
4. Firm obligated to consider and propose alternative accommodations to address condition

Operational Guidance

1. Managers don’t make accommodations without consulting HR/Administrator
2. Managers must consult with HR/Administrator if employee discloses physical or mental condition in response to coaching, discipline or evaluation
3. Managers must consult with HR/Administrator if employee requests accommodation or leave of absence (at any time)
Common Mistakes

1. Only engaging in reasonable accommodation process if employee formally initiates it
2. Having supervisors/managers obtain the medical information
3. Focusing on disability and not essential job functions
4. Failing to use job description summaries when focusing on essential job functions

Common Mistakes

5. Failing to consider other accommodation decisions in similar situations
6. Eliminating essential functions temporarily without preserving legal position that going beyond legal obligation
7. Sharing medical information beyond need to know, narrowly defined
Thank You!

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1. Michael S. Cohen concentrates his practice in the areas of employment law counseling and representing. Mr. Cohen has lectured and counseled employers throughout the country on subjects including: performance appraisal, workplace diversity, discrimination and retaliation, training and counseling policies, performance evaluations, litigation avoidance, sexual harassment and gender bias in the workplace, substance abuse testing, workplace violence, record retention, and background checks, terms in the workplace and interpreting employment contracts. He has also conducted training for managers, supervisors, employers and employees on many issues, including financial issues, health care, social media, general workplace laws, sexual harassment, and discrimination.


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Your opinion matters!

Please take a moment now to complete the evaluation.

Thank You!