

## **The Employer's Duty to Timely Designate Family Medical Leave Act Leave**

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The Family and Medical Leave Act (FMLA) requires unpaid leaves of absence for employees who have a serious health condition or need to care for family members who have a serious health condition. An employer must have 50 or more employees, however, for an employee to be covered under the FMLA.

Under the FMLA, eligible employees are entitled to 12 work weeks of leave during any 12 month period. Employers must choose a method for calculating the 12 month period from among four options. If an employer fails to designate one of the methods, employees will be allowed to calculate their leave entitlement under whichever method is beneficial to them.

Once the 12 month period is determined, an employee's FMLA leave entitlement is limited to a total of a maximum of 12 work weeks of leave during that 12 month period for any and all reasons that qualify for taking leave under the FMLA.

The FMLA regulations are clear that employers can designate an absence taken by an employee as leave under the FMLA "within a reasonable time of receiving notice." If an employee fails to do so, it can not retroactively designate the leave as exhausting the 12 weeks allowed under the law. If the employer does not notify the employee that requested time off is designated as FMLA leave, the employee's 12 week FMLA clock does not start ticking until he is notified. A manager who fails to figure out that the absence meets the conditions for FMLA leave may end up having provided the employee with much more than 12 weeks of leave.

Thus, when an employee is absent for any reason, an employer should immediately consider whether the employee should be notified that the absence has been designated as a leave of absence which will be counted toward the employee's maximum leave entitlement under the FMLA.

It is important to bear in mind that the FMLA is not in addition to Workers' Compensation leave or disability leave. An employer may designate workers' compensation leave also as FMLA from the outset and start the clock running on the employee's 12 week FMLA entitlement. Under these circumstances, an employee who is on workers' compensation and is unable to return to work within the 12 week FMLA period may be terminated from employment. The same holds true for employees on disability leave who are unable to return to work within 12 weeks. If, however, the employee has provided sufficient information for the employer to determine that he is a qualified individual with a disability under the Americans with Disabilities Act (ADA), the employer may have to provide some form of a reasonable accommodation to the employee before it may terminate the employee.

The bottom line: once an employer obtains information that provides even a clue that the employee is absent for a serious health condition or for some other event qualifiable as FMLA leave, it cannot ignore that information just because the employee doesn't specifically ask for FMLA leave. Failure by the employer to inquire further and designate the leave as FMLA leave may entitle the employee to an additional 12 weeks allotment under the FMLA.

You may contact us to inquire further of your rights and obligations under the FMLA.