



Never-Ending Leave Not Required, But Look Beyond FMLA Leave

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Many employers, from mom and pop stores to Fortune 500 companies, use a rigid approach when handling an employee's request for leave, which exposes the company to serious legal risk.

In short, these employers evaluate whether the employee is eligible for leave under the Family and Medical Leave Act (FMLA). If the employee is eligible, they grant him or her up to 12 weeks of FMLA-mandated leave. However, once the FMLA leave is exhausted, the employers expect the employee to return. If the employee is unable to return, these employers move to terminate the employee.

Unfortunately for employers, the Equal Employment Opportunity Commission (EEOC) and certain federal and state courts hold the view that such a practice is unlawful. The EEOC and many state and city human rights agencies argue that under the Americans with Disabilities Act (ADA) and local human rights laws, an employer must "reasonably accommodate" any physical or mental condition that qualifies as a "disability."

In addition, these courts and agencies believe that an employee's request for leave beyond 12 weeks may be "reasonable" in certain situations.

Lengthier Leave

Take, for example, some recent cases that the EEOC has brought or settled:

- In November 2009, the EEOC obtained a settlement of \$2.2 million from JPMorgan Chase based on the company having terminated certain employees after they exhausted their six-month medical leaves.
- In September 2009, the EEOC entered into a \$6.2 million settlement with Sears, Roebuck and Co. arising out of the company's inflexible leave policy that resulted in the company terminating employees once they had exhausted certain leave balances.

- In August 2009, the EEOC initiated a class action against UPS that was triggered by the termination of an employee who had exhausted her leave.

And, in New York, in the case of Phillips v. City of New York, 2009 NY Slip Op 05990 (N.Y. App. Div. 2009), a state appellate court held in July 2009 that the City of New York had violated city and state human rights laws when it terminated an employee after the 12-week FMLA period had expired without engaging in any evaluation of further leave.

In the face of these cases, an employer might wonder whether it is expected to grant employees never-ending leave. The answer is: not exactly.

Reasonable Leave

The EEOC and many of its local counterparts want companies to engage in a case-by-case, interactive process with the employee requesting leave to determine if the period of requested leave is “reasonable” given the circumstances. This approach means that companies cannot mechanically apply their leave policies. Even after an employee has exhausted his or her 12 weeks of FMLA leave, the company has to undertake a good-faith evaluation of any further request for leave.

To determine reasonableness, a company will need to evaluate:

- The size of the company.
- The employee’s position and its importance to the company’s operations.
- How much longer the employee is seeking to be out on leave.
- Whether the employee’s duties have been, and can continue to be, absorbed by another employee.
- The cost of having another employee fill in.

No one factor is determinative; a company must balance these factors and look at the totality of the circumstances to determine whether it is reasonable for the company to extend the leave beyond the 12-week FMLA period.

Steps HR Can Take

Unfortunately, there is no bright-line guidance on how to reach this conclusion. However, human resource professionals can implement the following best practices right away to avoid these types of leave-related claims:

- Seriously consider the employee’s request for an extended leave.
- Interview supervisory staff to determine how the employee’s work has been absorbed and may continue to be performed.
- Document the various alternatives the employer has examined to extend leave.
- If you are about to terminate an employee because his or her leave has been exhausted, make sure you can justify—in documents—the business rationale for the decision.
- Review these factors with counsel.

In conclusion, employers should be very reluctant to terminate an employee solely

because the employee has exhausted his or her FMLA leave or some other company-provided leave. Companies should be prepared to evaluate each request on a case-by-case basis and be able to defend with evidence any decision that denies the extension of leave.

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