

Effectively Managing Absences Under the FMLA and the ADA

The webinar will begin promptly at:

12:00 pm



Effectively Managing Absences Under the FMLA and the ADA

Rosemary G. Kenyon

J. Travis Hockaday

Webinar, October 3, 2013



© 2013 Smith Anderson



Effectively Managing Absences Under the FMLA and the ADA



Rosemary G. Kenyon, rkenyon@smithlaw.com

Rose has extensive experience in the employment law field and regularly advises and represents large and small companies in employment and labor law issues and litigation across a broad spectrum of industries. Having served as in-house counsel for a Fortune 500 company, she brings knowledge and experience from a corporate perspective. Rose is a frequent speaker at seminars for human resources professionals and business executives about key employment and labor law trends. She has served as a mediator in a wide variety of civil disputes.



J. Travis Hockaday, thockaday@smithlaw.com

Travis advises clients on a full range of employment law issues and represents them in employment related litigation in state and federal courts and agencies throughout North Carolina and the Southeast. His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims and representing clients in investigations conducted by both Federal and State Departments of Labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice.



© 2013 Smith Anderson

3

Effectively Managing Absences Under the FMLA and the ADA

Focus Today:

- Tools: Effective and compliant policies
 Process for administration
 Trained managers and supervisors
- Law: Getting the most out of FMLA rigor
 Understanding ADA overlap
- Problems: Using the tools to manage misuse and
 avoid pitfalls



Effectively Managing Absences Under the FMLA and the ADA

Effective and Compliant Policies

Attendance: Establish expectation that regular attendance is required

- Notification process
- Consequences for unexcused or excessive absenteeism
- Process for addressing protected absences

“No-Fault” policies under scrutiny



© 2013 Smith Anderson

5

Attendance Policy. An attendance policy should establish the employer’s expectation that regular attendance is required for the success of the business and to ensure appropriate customer service, employee productivity and morale, and proper workload allocation. The policy should clearly communicate:

- Expectations for employee attendance and punctuality
- Process for establishing employee work schedules
- Required notification and approval procedures for absences from work, arriving late or leaving early:
 - Scheduled time off (e.g., PTO, vacation, anticipated health related absences, etc.)
 - Last minute emergencies for employee sickness or other emergencies
 - Procedures for notification of absent from work, arrive late or leave early.
 - Consequences employees may face for unexcused absences, failure to follow appropriate notification procedures, or excessive absences
 - Relationship to other policies, such as paid sick leave, FMLA, reasonable accommodation

Effectively Managing Absences Under the FMLA and the ADA

Policies (cont'd)

PTO/Vacation: Establish amount and procedure for approval

Paid Sick Time or Short Term Disability:

- Required notification process
- Requirements for medical documentation
- Amount of entitlement



© 2013 Smith Anderson

6

Paid Sick Leave Policy. A paid sick leave policy should clearly communicate:

- Requirements for documentation of absences for paid time-off such as paid sick leave, if used by an employer
- Amount of entitlement
- Required notification and approval procedures for absences, including leaving early or arriving late:
 - Scheduled time off (e.g., anticipated health related absences, etc.)
 - Last minute emergencies for employee sickness or other emergencies
 - Procedures for notification of absences from work, arriving late or leaving early
- Consequences employees may face for unexcused absences, failure to follow appropriate notification procedures, or excessive absences
- Relationship to other policies, such as paid sick leave, FMLA, reasonable accommodation

Effectively Managing Absences Under the FMLA and the ADA

Policies (cont'd)

Work and Office Hours:

- When and where
- Procedure for flexibility/working from home, if allowed



© 2013 Smith Anderson

7

Company Business Hours, Work Hours, and Location of Work. As a backbone to attendance policies, the employer should also outline in a written policy its regular work hours and location for work. To the extent flexible work hours or working from home is allowed, the process for approval should be described.

Effectively Managing Absences Under the FMLA and the ADA

Americans with Disabilities Act, as amended in 2008:

Key Employer Obligations

- Non-discrimination
- Reasonable accommodations when required
 - Interactive process
- Prohibitions/limitations on medical inquiries
- Confidentiality



© 2013 Smith Anderson

8

ADA: The Interactive Process: What is it?

An *interactive process* by which an employer determines its specific obligations under the ADA with respect to an *individual*

For a more in-depth discussion of the ADA and the interactive process, please see our Webinar, *Americans with Disabilities Act: Responding to Requests for Reasonable Accommodations*, presented by Rose Kenyon and Megan Black, May 1, 2013

Link: <http://www.smithlaw.com/f-21.html>

Effectively Managing Absences Under the FMLA and the ADA

ADA Obligations and Employee Absences

Reasonable accommodations may include:

- Exceptions to attendance policies and practices
- Extra time off
- Alternative work hours
- Working from home
- Extended leave



© 2013 Smith Anderson

9

Effectively Managing Absences Under the FMLA and the ADA

Reasonable accommodation policy should:

- Invite employees to request a reasonable accommodation when appropriate
- Describe a clear process, including to whom to submit the request, avoiding direct line management
- Outline major steps, including need for medical information
- Emphasize confidentiality
- No-retaliation



© 2013 Smith Anderson

10

Disability Accommodation Policy. Employers should publish a policy informing employees how to request a reasonable accommodation under the ADA (including to whom to submit the request) and outlining in general terms the process that will be used to gather information and determine how to respond to the request (*i.e.*, the “interactive process”). The policy should also describe the requirements of confidentiality and “no-retaliation.”

Effectively Managing Absences Under the FMLA and the ADA

FMLA:

Coverage: 50 or more employees



© 2013 Smith Anderson

11

Overlapping Provisions of ADA, FMLA and Workers' Comp Laws

	ADA	FMLA	Workers' Comp Laws
Employer coverage	15 or more employees in 20 weeks in current or preceding year	50 or more employees in 20 weeks in current or preceding year	Minimum number of employees specified by state law
Employee Eligibility	None	<ol style="list-style-type: none"> 1. Worksite with 50 or more employees within 75 miles 2. Employee has worked for you total of 12 months (need not be consecutive) 3. Employee has 1,250 hours of service in 12 months before leave 	Generally none
Employee Health condition triggering protection of law	"disabled" under ADA, as amended	Employee has serious health condition that keeps him from performing essential job functions	Work-related injury or illness
Impact on ability to work requirement	To qualify for ADA protection, employee must be able to perform essential job functions if reasonable accommodation given	Employee's serious health condition must keep him from performing essential job functions	To receive income benefits, generally must show some level of incapacity



Overlapping Provisions of ADA, FMLA and Workers' Comp Laws

	ADA	FMLA	Workers' Comp Laws
Leave available?	Depends on facts. Requires reasonable accommodation that doesn't pose undue hardship, which in some cases, may mean leave of absence or the time off	Yes	Maybe, if employee is unable to work
Paid leave required?	Not generally, but again, depends on facts (must give reasonable accommodation), and may not discriminate based on disability	No, but if provided, can count against annual FMLA leave allotment	Depending on nature of injury and resulting incapacity, may be entitled to income benefits
Duration of leave? Intermittent leave or reduced work schedule required?	Depends on facts of case Again, depends on facts of case	Up to 12 weeks in a 12 month period Yes	Depends on nature of injury and incapacity Depends on state law
Notice from employee Required?	Yes, but "constructive notice" is possible	Yes, but "constructive notice" is possible	Yes, employee generally must notify you promptly of job-related condition
Medical certification permitted?	Yes	Yes	Generally yes



Overlapping Provisions of ADA, FMLA and Workers' Comp Laws

	ADA	FMLA	Workers' Comp Laws
Nature of medical certification?	Diagnosis, impact on job, impact on major life activities, recommendation on reasonable accommodation	Confirm "serious health condition"	Depends on state cases; employer may direct medical care in North Carolina
Frequency?	As needed	No more than every 30 days	As needed
Required to provide benefits during leave?	Depends	Yes, for health benefits (on same terms as before leave); upon return, must restore other benefits as if employee never gone	Generally not required
Required to reinstate at end of leave?	Generally yes, but again depends on facts of case	Generally, must restore employee to same or equivalent job	Generally depends on employee's ability to do the job
Obligated to provide light duty?	Depends on facts of case (reasonable accommodation test)	No; if do provide it, can't require employee to cut FMLA leave short to take it	Depends on state law
Anti-retaliation provision can employer terminate employment	Yes Depends on facts	Yes Only if extended leave	Yes Depends on facts; may have economic consequences



Effectively Managing Absences Under the FMLA and the ADA

FMLA: Unpaid leave of up to 12 weeks for:

- Pregnancy, birth, adoption and childcare
- Care for family members with serious health conditions
- Personal serious health conditions
- Military qualifying exigency leave
- Care for a military family member with an injury or illness (26 weeks)



© 2013 Smith Anderson

15

Job Duties During Intermittent or Reduced Schedule Leave

- May transfer employees taking intermittent or reduced schedule leave, but may not require employees to perform work during the portion of their workday when they are on FMLA leave.
- Transfer to a position of equivalent pay and benefits where the required schedule can be better accommodated.
- May modify an existing job to more appropriately accommodate the employee's intermittent or reduced schedule leave needs.

Counting Intermittent or Reduced Schedule Leave Time Taken

- Can count leave time using increments no greater than one hour, unless employer offers other kinds of leave in smaller increments, then must use that smaller increment to count intermittent or reduced schedule. Some exceptions apply.

Effectively Managing Absences Under the FMLA and the ADA

FMLA: Unpaid leave

- Full days or weeks
- Intermittent or reduced schedule



© 2013 Smith Anderson

16

Substitution of paid leave. If the employee chooses to substitute FMLA leave with paid leave and the employer deducts paid time off in increments greater than the amount of time actually taken by the employee, the employer may deduct time off in increments consistent with the paid time off policy and those may be counted against FMLA leave entitlement. However, if the employer requires substitution of paid time off for FMLA leave, the employer cannot count time off in increments greater than one hour.

Overtime. If an employee is normally required to work overtime, but cannot do so because of intermittent or reduced schedule leave, those required overtime hours taken as leave may be counted against the employee's FMLA leave. If an employee is not required to work overtime, but does so voluntarily, voluntary overtime hours taken as intermittent or reduced schedule leave may not be counted against the employee's FMLA leave.

Compensation and intermittent or reduced schedule leave. For exempt employees under the FLSA who take intermittent or reduced schedule leave, employers may "dock" their pay for the hours these employees are on FMLA leave without affecting the exempt status. State law may impose greater restrictions on deductions from wages and consequences for violations may be severe. For employees who work a fluctuating workweek (one in which working hours vary from week to week) and who take intermittent or reduced schedule leave, employers may pay employees for only the hours worked. Under a fluctuating workweek plan, employees receive a fixed salary that is consistent even if their hours are not.

Effectively Managing Absences Under the FMLA and the ADA

FMLA: 3 Kinds of Notices Required by Employer

Poster/Handbook Policy

See: U. S. Department of Labor Forms:
<http://www.dol.gov/whd/fmla/>



© 2013 Smith Anderson

17

Notice of Eligibility and Rights and Responsibilities

- Must issue within five business days (absent extenuating circumstances) of an employee's request for FMLA leave or the employer learning through other means of the employee's need for leave that may be FMLA-qualifying.
- An employee's eligibility is determined the first time covered leave is requested in the applicable 12-month period. If an employee provides notice of a further need for leave during that period for a different reason and the employee's eligibility has not changed, the employer need not provide a new eligibility notice. If, however, the employee's eligibility status has changed, the employer must notify the employee of the change within five days of the leave request.
- Must include notice of the employee's FMLA rights and responsibilities (e.g., including requesting medical certification, requiring substitution of paid leave and maintenance of benefits).

Effectively Managing Absences Under the FMLA and the ADA

Notice of Eligibility and Rights and Responsibilities:

Within 5 business days of learning of the need for leave that may be FMLA-qualifying

- Requirement for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising (*no sooner than 15 business days*)
- Requirements or rights for substitution of paid leave
- Requirement for payment of health insurance premiums
- Right to maintain benefits and to be restored to the same or equivalent position



© 2013 Smith Anderson

18

Key Provisions in Notice:

- That the leave can be designated and counted against the employee's annual FMLA leave entitlement. Requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to active duty status, and the consequences of failing to do so.
- Requirements, rights and options for substitution of paid leave.
- Requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making these payments along with consequences for failing to do so in a timely fashion.
- Of key employee status and its consequences, if relevant.
- Right to maintain benefits and to be restored to the same or equivalent position.
- Potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

Effectively Managing Absences Under the FMLA and the ADA

Designation Notice: Within 5 business days of receipt of medical certificate/information

- Whether leave has been designated as FMLA qualifying, and the amount
- If additional information is required, an explanation of what additional information is needed
- Requirements to substitute paid leave, if any
- Requirement for a fitness-for-duty certification before returning to work



© 2013 Smith Anderson

19

Designation Notice

Within 5 business days of receipt of sufficient information for employer to determine whether leave is FMLA qualifying, the employer has five business days (absent extenuating circumstances) to provide the employee with a notice stating that the leave (specifying the amount) has been or has not been designated as FMLA qualifying. However, if the employer requires additional information to determine qualification, an explanation of what additional information is needed is required. This notice must be in writing, and must include:

- Any requirement to substitute paid leave.
- Amount of leave that will count against the employee's FMLA leave entitlement, if known, and if not known, must advise the employee of the right to request the amount of FMLA leave that will be counted against the FMLA entitlement once in a 30-day period if leave was taken in the 30-day period.
- Any requirement for a fitness-for-duty certification before returning to work, along with a list of the employee's essential job functions, which will be provided to the physician responsible for completing the fitness-for-duty.

Employee Notice Requirements:

- Must provide employers at least 30 days advance written or verbal notice for foreseeable leave (for example, for birth or adoption of a child), or if not possible and practical, or if the leave is not foreseeable, leave is for a qualifying exigency, notice must be provided as soon as practicable.
- Must advise the employer as soon as practicable of any scheduled leave changes, extensions or previously unknown dates.

Employee Requirements Regarding Scheduling Treatment. Employees needing to schedule medical treatment must make a reasonable effort to schedule medical treatment to attempt to not unduly disrupt the employer's operations.

Effectively Managing Absences Under the FMLA and the ADA

Medical Certifications: Tools to Manage Absences

- Clarification and authentication
- Updates and recertification
- Second opinions



© 2013 Smith Anderson

20

Medical Certification for Serious Health Condition

- The employer can require that the certification be provided no sooner than within 15 days of the request.
- If an employee submits a medical certification form that is incomplete or insufficient, the employer must advise the employee in writing regarding what additional information is needed and give the employee seven (7) calendar days (or longer, if necessary, despite employee's diligent good faith efforts) to complete and return the form. A certification is considered insufficient if it contains information that is vague, ambiguous or non-responsive.
- An employer may request that an employee provide annual medical certifications for medical conditions lasting in excess of a leave year (to support intermittent leave).
- In assessing medical certification for a serious health condition, an employer may consider information about an employee's medical condition obtained while trying to determine disability status under the ADA, a workers' compensation program or qualification for benefits under a disability plan.

Clarification and Authentication of Medical Certifications. An employer has a limited right to contact an employee's health care provider to authenticate information. Only specified agents of the employer may contact an employee's health care provider for this limited purpose, and only include the following: health care provider, HR professional, leave administrator or management official. **An employee's direct supervisor is expressly prohibited from contacting an employee's health care provider. This contact should be rarely used.**

Second Opinions. If the employer has reason to doubt the validity of the certification, the employer may require, at its own expense, that the employee obtain the opinion of a second health care provider the employer designates. If the second opinion conflicts with the first opinion, the employer may require a third opinion, at its expense. The employer is bound by the third opinion. To aid in the second/third opinion process, an employee must authorize the release of relevant medical information to the second and third opinion health care providers, if requested by those health care providers. Employers are not permitted to

require second or third opinions for military caregiver leave.

Effectively Managing Absences Under the FMLA and the ADA

Fitness for Duty Certification

- Notice
- Adequacy
- Consistency



© 2013 Smith Anderson

21

Medical Recertification. Generally, an employer may request recertifications no more often than every 30 days and only in connection with an absence, unless the minimum duration of the condition is more than 30 days. An employer is permitted generally to request recertification once every six months in connection with an employee's FMLA. Recertifications may be requested in less than 30 days in any of the following circumstances:

- Employee requested an extension of leave.
- Circumstances have changed significantly (for example, duration or frequency of absence or the nature or severity of illness).
- Employer receives information casting doubt on continuing validity of employee's certification.

An employer may provide an employee's health care provider with a record of the employee's absence pattern and ask the health care provider if the employee's serious health condition and need for leave is consistent with that employee's pattern of absences. Employers are not permitted to seek recertification for military caregiver leave or exigency leave, except in limited circumstances.

Fitness-for-Duty Certification. Employers may require employees who are on leave because of their own serious health condition to provide fitness-for-duty certification as a condition of reinstatement. That requirement must be uniformly applied and impose the same requirements on employees sharing the same occupation and same kind of serious health condition. These are subject to the same authentication and clarification guidelines relevant to medical certification, but employers may not obtain second or third opinions on a fitness-for-duty certification. The health care provider supplying the certification information may be required to verify the employee can perform the essential functions of the job if the employee was advised of this requirement in the designation notice.

Intermittent or reduced schedule leave. Employer may require a fitness-for-duty certification to return up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform job duties. "Reasonable safety concerns" means a "reasonable belief of significant risk of harm to the individual employee or others."

Effectively Managing Absences Under the FMLA and the ADA

Irregularities with FMLA paperwork:

- Medical certification does not arrive within 15 days
- Medical certification is incomplete, vague or suspicious
- New information suggests that employee is not unable to work (*e.g.*, playing golf)
- Fitness for duty certificate does not arrive or is suspicious



Effectively Managing Absences Under the FMLA and the ADA

Common Problems:

- Employee conduct may trigger FMLA or ADA obligations outside formal process:
 - Frequent employee absences, explained or unexplained, in single block or repeatedly
 - Work-related injury
 - Employee tells supervisor or co-worker about personal medical problem, or health issues with family member
 - Employee comes to work but cannot perform duties due to known health problems, but refuses to ask for time off
- ✓ **Supervisors must be trained to recognize issues, engage HR, and maintain confidentiality**



© 2013 Smith Anderson

23

Effectively Managing Absences Under the FMLA and the ADA

Absenteeism: The Challenges

Intermittent leave:

- Absences are more frequent than anticipated or suspicious
- Employee is absent for other reasons (*e.g.*, vacation, car trouble), which cumulatively becomes excessive

Employee is frequently absent/late/leaves early for a variety of reasons

Unexplained or suspicious reasons

Last minute requests for personal reasons

Reasons that qualify for FMLA leave or relate to a disability under the ADA

After exhaustion of PTO

After exhaustion of FMLA, extended leave

Before eligible for FMLA

That exceed limits on “no-fault” attendance policy

To work from home (unauthorized)



© 2013 Smith Anderson

24

Attendance rules:

EEOC enforcement action: The EEOC has filed lawsuits and obtained settlements challenging use of “no-fault” attendance policies, claiming they violate the ADA.

Light duty work under the FMLA. An employer is not required to offer an employee light duty work under the FMLA, but an employer may choose to offer it, particularly for an employee with a workers compensation injury. (Refusal of light duty work may result in the denial of workers comp benefits in many states.) Light duty work does not count against an employee's FMLA entitlement. An employee's right to job restoration is put on hold during the light duty period up to the end of the applicable 12-month FMLA leave year. An employee's acceptance of a light duty assignment does not act as a waiver of that employee's prospective rights (including right to reinstatement in the same or equivalent position).

Effectively Managing Absences Under the FMLA and the ADA

- ✓ Techniques and Tools:
 - Enforce advance notification requirements under attendance policy
 - Consistently enforce policies regarding work hours, working in the office and drug testing
 - Require all documentation allowed under paid-time-off policies (*e.g.*, sick, STD)
 - Administer a rigorous FMLA process, exercising the full extent of employer rights for medical certifications and recertifications, and fitness for duty certifications
 - Use an individualized ADA reasonable accommodation process (*i.e.*, the “interactive process”) to review absences, both intermittent and lengthy single occurrence, and seek allowed medical documentation



© 2013 Smith Anderson

25

Selected Excerpts from the EEOC’s Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
(<http://www.eeoc.gov/policy/docs/accommodation.html>)

No-Fault Attendance Policies

Question: May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

EEOC Response: No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide an employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.

Penalizing or disciplining employee for leave

Question: Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation?

EEOC Response: No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law. Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.

Effectively Managing Absences Under the FMLA and the ADA

- ✓ Techniques and Tools (cont.)
 - Communicate with employee in writing about expectations and concerns, particularly after absenteeism has become an issue
 - Carefully monitor application of “no-fault” attendance policies to avoid discipline for FMLA or ADA related absences
 - Separate FMLA/ADA covered absences from non-protected absences when disciplining (including in evaluations)
 - Train managers and supervisors



© 2013 Smith Anderson

26

Thank you!

- Rose Kenyon

- Partner
- 919-821-6629
- rkenyon@smithlaw.com



- Travis Hockaday

- Partner
- 919-821-6757
- thockaday@smithlaw.com



Please see our Webinar

*Americans with Disabilities Act:
Responding to Requests for Reasonable
Accommodations,*

Presented by

**Rose Kenyon and Megan Black
May 1, 2013**

Link: <http://www.smithlaw.com/f-21.html>



Webinar Materials

To download the presentation materials and listen/view the webcast of today's webinar please visit

<http://www.smithlaw.com/practices-employment-labor-human-resources.html#flexlab>

Please note that the webcast will be posted October 3, 2013



© 2013 Smith Anderson

28

Effectively Managing Absences Under the FMLA and the ADA

Rosemary G. Kenyon

J. Travis Hockaday

Webinar, October 3, 2013



© 2013 Smith Anderson

