



What To Do When Workers Can't Work! Solving the FMLA, ADA, and Workers' Comp Puzzle

Dec 19, 2007

Categories:

[Publications](#)

Authors:

[John T. Lovett](#)

What is an employer to do when a worker is no longer physically or mentally able to work? A wrong answer to this question can cost millions of dollars. A Winchester, Kentucky, jury awarded over \$2 million against an employer who failed to return to work an injured employee, even though the worker had previously sworn under oath that he was "totally disabled" in order to obtain Social Security disability benefits.

A legal "minefield," now, awaits employers whenever an employee becomes physically or mentally unable to work. The purpose of this article is to suggest a safe pathway through this legal "minefield." The Family and Medical Leave Act ("FMLA"), the Americans with Disabilities Act ("ADA"), and State Workers Compensation Laws ("Workers Comp") are familiar to most employers. Yet, the interaction between these statutes, and the hidden traps they create, cause legal risks which are best minimized by following a step-by-step approach. This article sets out such an approach.

Legally Protected Absences.

As President Clinton stood in the Rose Garden, surrounded by disabled Americans in wheelchairs, few employers felt threatened by his signature on the Family and Medical Leave Act. FMLA leave is unpaid. Most employers already permitted genuinely sick or injured workers to apply for some form of paid or unpaid medical leave. Few realized that the FMLA would create a huge class of legally protected absences. Almost no one anticipated that the EEOC would place on the employer the burden of notifying employees whenever they are entitled to an FMLA Leave. The FMLA remains among the most misunderstood of all labor and employment laws. Your analysis of the rights of a sick or injured employee should begin with the FMLA.

What To Do To Limit Protected Absences.

An employer may not discipline, discharge, or take any other adverse action against an employee for any absence protected by the FMLA. Of course, employer contributions to medical insurance must also continue during any FMLA protected absence. Many employers take comfort, however, in the fact that an FMLA leave can only last twelve (12) weeks. This twelve-week limit, however, is available only if the employer recognizes that the absence is FMLA protected and notifies the employee that his/her absence qualifies for FMLA protection.

FMLA regulations state: "In all circumstances, it is the Employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the Employee." FMLA leave does not begin to run until this notice is sent to the employee. Yet, the employee's absence remains FMLA protected until the notice is sent. This means that a failure to notify an employee that his/her absence is protected by the FMLA causes this protection to continue indefinitely. For this reason, it is critical for employers to know how to determine when an absence is FMLA protected.

How To Know When The FMLA Protects An Absence.

The first question to ask is whether the FMLA applies. If your firm does not have 50 or more employees working within 75 miles of the absent employee's work site, the employee is not protected by the FMLA. Similarly, if the employee has been employed for less than twelve months, or has worked less than 1,250 hours in the twelve months immediately before the absence, then the employee has no FMLA protection. If the FMLA applies, however, a four-step process will help you determine whether the absence qualifies for FMLA protection.

STEP 1 — Does The Employee Have A "Serious Health Condition"? Any physical or mental condition that causes an inability to work, attend school, or perform any other regular daily activity qualifies as a "serious health condition." A few of the most basic and common ailments are excluded: the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease are not "serious health conditions." Except for these exclusions, if the employee can't work, and if his/her child cannot go to school, then a

“serious health condition” likely exists. This, alone, is not enough to make the absence FMLA protected.

STEP 2 — One Night In Hospital? If the serious health condition causing the employee’s absence required the employee to stay overnight in a hospital or other residential medical care facility, then the absence is legally protected by the FMLA. The absence is also protected if the employee was needed to care for a spouse, child, or parent with a serious health condition that required an overnight stay in the hospital.

STEP 3 — Over Three Days Absence +2 Doctor’s Visits. If the serious health condition required the employee to be absent for more than three days and the employee received, at least, two treatments by a physician or other health care provider (nurse practitioner, dentist, psychologist, chiropractor (limited to treating subluxation shown on x-rays)), then the FMLA protects the absence.

STEP 4 — Over Three Absences + 1 Doctor’s Visit + 1 Prescription. If the absence lasted more than three days, the employee received one treatment from a physician or other health care provider who prescribed prescription medicine or any other regimen continuing treatment that cannot be initiated without a visit to a health care provider, then the absence is FMLA protected. If your firm grants “excused absences” if the employee has visited the doctor, this policy will promote FMLA protected absences. If an employee makes even one visit to a doctor, he/she is highly likely to have received a prescription of some sort.

STEP 5 — Pregnancy or Chronic Conditions. If any absence is due to pregnancy or the need for prenatal care, it is protected, regardless of the length of the absence or whether a medical or hospital care was required. Similarly, absence due to any chronic health condition, such as asthma, diabetes, epilepsy, chemotherapy, terminal disease, etc. is FMLA protected, whether the absence is for hours or days and regardless of whether medical treatment is required. Note, however, that any absence is “due to” the serious health condition even if the reason for the absence is merely to treat (doctor’s visits, etc.) the serious health condition. Finally, the same four steps apply to analyzing the employee’s absence even if the absence is due to the employee’s need to care for a spouse,

child, or parent who has the serious health condition that satisfies these steps described above.

Action Needed.

FMLA regulations do require workers to notify their employer in advance if their need for an FMLA absence is foreseeable. Of course, few injuries or illnesses are foreseeable. Usually, you will have to proactive to determine whether an absence may be FMLA qualifying, then send the employee notice of his/her FMLA leave to start his/her twelve-week leave period "running." Most employers will be alert to absences that involve hospitalization, pregnancy, or chronic illnesses. With these exceptions, the employer has no good way to learn when an absence is FMLA protected. The best practice is to send an FMLA notice whenever an employee's absence extends beyond three days. Then, require the employee to provide a medical certification from his/her physician or other health care provider to confirm or deny that the absence is FMLA qualifying. This medical certification requirement must be sent to the employee in writing. It is best sent with the employer's notice to the employee that his/her leave may be FMLA qualifying. If the medical certification confirms that the employee's absence qualifies for FMLA protection, the employer will begin using up his twelve weeks of leave. If the doctor's statement confirms that the absence is not FMLA qualifying, then the leave is not protected. Similarly, if the employee fails to provide the medical certification, the absence is not FMLA protected. The employer must provide the worker a reasonable time (not less than 15 days) to produce the medical certification.

Policies Needed.

To avoid extending FMLA leave beyond twelve weeks, employers must also adopt employer-friendly policies governing FMLA leave. The first policy concerns how the twelve-month "leave year," during which an employee may take twelve weeks of leave, is determined. FMLA regulations offer several alternative ways to calculate this "leave year." These include a calendar year, any other fixed twelve-month period, the twelve-month period measured forward from the date of the employee's first FMLA leave, or a "rolling" twelve-month period measured backward from the date an employee uses any

FMLA leave. The “rolling” backward method of calculating the leave year is the most advantageous for almost all employers. It prevents an employee from ever having more than twelve weeks of leave simply because part of the leave is taken during one “leave year,” but continued during the next “leave year.” An employer may choose this rolling backward method simply by adopting a policy specifying the rolling backward method, then publishing the policy in the employee handbook and other appropriate locations. If the employer fails to elect a particular means of calculating the leave year, then the leave year must be calculated in the manner most advantageous to the employee whose absence is FMLA protected. For example, an employee could begin his/her FMLA leave in October and continue the leave for twenty-four weeks until the first of April, by using the calendar method of calculating leave years. This sort of “stacking” of FMLA leave years is usually prohibited, but only by the employer adopting an FMLA leave year policy in advance of the protected absence.

Employers also need a policy defining the relationship between FMLA leave and any other paid or unpaid leave provided by the employer. FMLA regulations authorize employers to adopt a policy making FMLA leave run concurrent with all other types of paid and unpaid leave. This includes vacation leave, paid or unpaid sick leave policies, workers’ comp leave, etc. In the absence of a policy notifying employees that FMLA leave will run concurrent with these other types of leave, however, the employee is entitled to stack one type of leave upon another. For example, the employee might take his/her two-week vacation, add the maximum amount of paid sick leave available under company policy, then begin his/her twelve-week FMLA leave. Again, adopting policies governing FMLA in advance of a protected absence are the key to avoiding lengthy employee leave entitlements.

ADA Leave.

Even after an employee has exhausted all of his/her FMLA leave, a disabled employee may be entitled to additional leave under the Americans with Disabilities Act. Courts have held an employer may be required to grant an employee an additional leave of absence as a “reasonable accommodation” to an employee’s disability under

the ADA. The federal court with jurisdiction over Kentucky, however, has ruled that it is not reasonable to ask an employer to grant a worker an indefinite leave of absence to accommodate his/her disability. Accordingly, an employer may have to grant an injured worker six additional weeks of leave to recuperate from a surgery, but an employer does not have to continue a leave of absence when the physician can provide no date when the employee can be expected to return to work.

Action Needed.

Employers may help avoid additional leave requirements under the ADA by being proactive in communicating with the employee's health care providers to learn when the employee can be expected to return to work. If the health care provider an offer no definite opinion on when the employee will be back on the job, this should be documented to avoid a later claim that the ADA required an additional grant of leave before the employee could be lawfully replaced.

Return to Work Disabilities.

With today's tight labor market and high workers' comp and short-term disability costs, employers want workers to return to work as soon as they are physically able to perform their job. This is true even if the employer must make some reasonable accommodation for a workers' disability. ADA compliance, however, does not guarantee protection from ADA liability.

The \$2 million verdict awarded against an employer for violating the Americans With Disabilities Act provides an illustration. The employer determined that the employee could not perform his job. The employer's decision was based, among other things, on the fact that the employee, himself, had sworn under oath to the Social Security Administration that he could perform no gainful employment of any type. The employer's decision certainly seemed rationale at the time it was made.

Yet, ADA liability is determined by a judge and jury looking at a sympathetic plaintiff with 20/20 hindsight. The jury asks, "If the disabled worker was willing to try to work, why wouldn't the employer 'let' him/her try?"

To withstand ADA scrutiny from a jury with 20/20 hindsight, you must be prepared to demonstrate that you took every step required by the ADA before concluding that a worker can no longer be employed after his/her absences are no longer legally protected.

In theory, ADA compliance is as simple as answering some basic questions about the employee's restrictions and job duties:

1. Can the employee perform all the duties of his/her current job?
2. If not, are the duties that the employee cannot perform "essential" to the job?
3. If yes, is there any "reasonable accommodation" that would allow the employee to perform the essential duties of his/her job?
4. If no, is there any "substantially equivalent" job that the employee could perform, with or without a "reasonable accommodation?"
5. If not, is there any other job (even though not equivalent in pay, hours, etc.) that the employee could perform with or without "reasonable accommodation?"

If the answer to all of these questions is "no," then the ADA does not require that the employee be returned to work since his/her disability will not permit him/her from performing productive work, even with a reasonable accommodation.

In practice, however, avoiding ADA liability will depend much on to whom these questions are asked, when these questions are asked and how the answers are documented. Amazingly, the ADA imposes upon the employer the duty of determining whether an employee can perform his/her job duties, and what accommodation, if any, would enable the employee to perform these duties. Nevertheless, the employee and his/her physician are the in the best position to know whether the employee's restrictions will prevent him/her from performing his job and what steps, if any, could be taken to enable the employee to perform the job. If the employer adequately documents the employer's reliance on the opinion of the employee and his/her physician in answering the above list of questions, it would be difficult for the employee to later prove that his/her employer failed to comply with the ADA in good faith. For this reason, the persons to whom the above questions should be asked

are the employee and his/her health care providers.

The answers to the above questions, however, may depend much on when the questions are asked. For example, in the “real world,” chances that an employee and his/her physician will say he/she can return to work, with or without a reasonable accommodation, is less while the employee’s workers’ comp claim is pending, while he/she is still receiving short-term disability payments, and while his/her absences remain protected by the FMLA. After an employee has exhausted FMLA protection and/or is not longer receiving any disability payments, the chances that the employee and his/her physician will opine that he/she can return to work, with or without a reasonable accommodation, go up. Of course, if the employee is truly able to be productive, even if the employer must provide some accommodation, most employers would welcome the return of a productive employee. Yet, if this analysis is not performed until the employee has no protection other than the ADA, there is the risk that the employee is not genuinely willing to return to work, but just the payroll.

Documentation of the answers to ADA questions is critical since the employee’s “story” and even the testimony of his/her physician may change over time. Documentation can be a difficult problem since direct, written communications from a physician, or other health care provider, is sometimes impossible to obtain. Usually, however, an employer can obtain at least oral communications with the physician’s staff, who will relate information from the physician in the physician’s medical records. These opinions can then be confirmed by letter from the employer. For example, the employer’s HR manager may write the physician’s office to confirm that the employee’s restrictions will not permit him/her to perform tasks required by his/her job and the physician knows of no step the employer can take that would enable the employee to perform the job. The letter would close by asking the physician to contact the employer by a specific date if the employer misunderstands the physician’s opinion. Usually, the employer will hear nothing. Such a confirmatory letter is not as advantageous as a direct written communication from the physician, but is far better than nothing.

Action Needed.

Begin asking your ADA questions of the employee and his/her physician, and documenting their answers, early in the employee's recuperation process. By the time the employer reaches maximum medical improvement, the position of both the employee and his/her physician on his/her ability to return to work, with or without a reasonable accommodation, should be fully documented. Then, a decision that will withstand ADA scrutiny by judge or jury can be made. The chances that the employee and his/her physician will testify that the employee could have returned to work, if given the opportunity, will be 100 percent after the ADA lawsuit is filed! Does The Employee Have A "Disability"?'

The above analysis may seem to skip an important question: Does the employee qualify for protection under the ADA? The ADA applies only to employers with fifteen or more employees and only to employees who are "qualified individuals with disabilities." Kentucky has a state law prohibiting discrimination against handicapped individuals. This state law, however, creates no "reasonable accommodation" requirement. Accordingly, if an employee does not have a "disability" within the meaning of the ADA, the law offers him/her little special protection.

Unfortunately, however, the ADA's definition of "disability" includes any physical or mental condition that "interferes with a major life activity." The federal court with jurisdiction over Kentucky has held that an inability to perform a single job may not be enough to qualify the workers having a "disability." Yet, most illnesses or injuries that create work restrictions will interfere with more than a single type of job, as well as other "daily life activities." For this reason, most employees with work restrictions will need to be treated as though they are protected by the ADA to minimize the risk of ADA liability.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.