

Lessons in Employee Leave

By Victoria L. Donati and Jason C. Kim

One of the most confounding areas of employment law relates to employee leave. Who is entitled to leave? Under what circumstances? Can you hire a replacement for an employee, or do you have to protect or hold open an employee's job during the leave?

Although the issues are seemingly complex and confusing at first, it is important that you understand them. You then can answer the questions with confidence by taking a step-by-step approach to considering and administering each leave according to the applicable laws and with regard to any applicable company policies and practices.



In this article, we will discuss the steps you should take to analyze a leave request under federal law. However, most federal laws have state and local counterparts that mirror federal provisions but often expand the reach of such provisions or apply different eligibility or definitional requirements. What law applies

depends on the state. Although the framework we will discuss can be applied to leave issues arising under any law, it is critical in every situation to consult legal counsel or a human resources professional to determine how state and local laws may alter or expand your considerations.

Following FMLA

The first question is whether you are covered by a law that mandates a leave be granted. Perhaps the most well-known of these laws is the federal Family and Medical Leave Act (FMLA). FMLA provides job-protected leave to eligible employees because of the birth or adoption of a child or foster placement of a child; to care for a parent, spouse, or child with a serious health condition; or for a serious health condition that renders an employee unable to perform the essential functions of his job.

FMLA covers employers who had (or have) 50 or more employees on each workday of 20 or more workweeks during the year in which the leave is being requested or the calendar year immediately preceding the year in which the leave is being requested. Generally speaking, when counting employees to determine eligibility, you must count every person on your payroll for the days or weeks in question, including employees on leave or disciplinary suspension, seasonal employees, and part-time and temporary employees. You need not count independent contractors or employees who have been laid off and have no reasonable expectation of recall.

When counting employees, it is important to bear in mind that under certain circumstances, an employee must be counted for FMLA purposes as the employee of two or more employers. Such employers are known as "joint employers." A joint-employer relationship exists when, considering the circumstances, it is determined that two or more employers exert control over the work and working conditions of a single employee. Joint-employer relationships generally arise when one or more of the following situations occur:

- Two or more employers share an employee's services or interchange employees (such as when two or more contractors share the services of certain laborers or skilled workers as work requires)
- One employer acts directly or indirectly in another employer's interest with respect to certain employees (such as when a contractor agrees to supervise or direct the work of another employer's employees or a contractor hires leased or temporary employees)
- One employer controls, is controlled by, or is under common control with another employer, and both employers use an employee's services (such as might be the case for contractors with a parent-subsidiary or sister-entity relationship)

If you believe you may have a joint-employer relationship with certain individuals, you should count those individuals when determining whether FMLA applies or consult legal counsel or a professional adviser to ensure you are correct in excluding them. Failing to properly count employees can result in liability under FMLA for improperly handling employee leave and leave rights.

It also is important to bear in mind that FMLA has a number of state and local counterparts that require leave under the same or similar circumstances as FMLA. However, such laws often apply to smaller employers (those with fewer



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than 50 employees) and/or provide for leave under broader circumstances or longer time periods. Before deciding whether a leave law applies, it is important to look not just at federal law but also to consult legal counsel or a professional adviser as to whether any state or local laws apply.

If a leave law applies, the next question (really a subset of the applicability question) is whether the employee requesting the leave is eligible for leave and has leave time available under that law. An employee is eligible for FMLA leave if, at the time the leave is scheduled or requested to begin, the employee has been employed by the covered employer for at least one year, has worked at least 1,250 hours for that employer in the immediately preceding 12 months, and works at a location with 50 employees either at that location or within a 50-mile (80-km) radius.

For employees who do not report to an office or specific location regularly or whose work takes them to various locations during the course of a day, the “location” for FMLA purposes will be the location from which an employee receives his work assignments or reports for his paycheck, benefits, or other such matters. The location in such circumstances generally will be a business’s main office or headquarters.

Whether an employee has leave time available depends on whether he previously has taken leave within the time period allotted. For FMLA purposes, employees are eligible to take up to 12 workweeks of leave (for covered purposes) within a designated 12-month period. The 12-month period can be a calendar year period, a rolling period, or another 12-month period depending on what is stated in your company policy. If no period is specified, the default will be a calendar year period. If there is no leave time available under the applicable statute, you may be able to deny the leave (subject to the other legal and policy considerations we will discuss).

If, under the terms of the applicable law, you are a covered employer, the employee is eligible for leave, there is leave time available, and the leave is for one of the qualifying reasons, you most likely will be required to grant the leave. However, you may be able to avoid the reinstatement rights associated with the leave if the employee in question falls within an exception specified by law.

Under FMLA, for example, if the requesting employee is within the highest paid 10 percent of your work force at his particular location and the leave would pose significant hardship to your business or operations, the employee

can decide (after receipt of proper notice) to take the leave without reinstatement rights or forego the leave and immediately be reinstated at the time notice is given.

Note that the level of hardship you must demonstrate to deny restoration to a key employee is high. You can take into account your ability to replace the key employee on a temporary basis or, if permanent replacement is unavoidable, the cost of reinstating the employee can be considered in evaluating whether substantial hardship will result from restoration.

Unfortunately, there is no precise test to determine the level of hardship or injury you must sustain. Such exceptional circumstances should be assessed and applied carefully because significant liability could result.

Applying ADA

If leave is not required by FMLA or one of its state or local counterparts, or if an employee has used up his leave allotment under such laws, the second question is whether you are covered by a law that prohibits discrimination against qualified individuals with disabilities and whether the employee has a disability covered by that law. Employers often are required to provide leave to such employees to accommodate disabled or handicapped individuals.

The federal Americans with Disabilities Act (ADA) covers employers with 15 or more employees on each working day of 20 or more calendar weeks in the current or preceding calendar year. Many ADA state or local counterparts cover employers of varying sizes, often with fewer than 15 employees. Such laws require employers to provide “reasonable accommodation” to qualified individuals with a “disability.”

If you are a covered employer, you must consider whether the employee requesting the leave is a qualified individual with a disability. If the employee does not have a disability as defined by applicable law, no leave need be provided and you simply can determine whether you have a policy or practice that would allow the leave. If the employee has a disability, you further must consider whether the requested leave constitutes a reasonable accommodation of such disability.

ADA defines a covered disability to include physical or mental impairments that substantially limit one or more major life activities, such as walking, lifting a reasonable weight, bending, stooping, breathing, seeing, hearing, or speaking. Working also might be considered a major life activity if an



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individual's limitation affects not just a particular job but a broad range of jobs.

For example, assume an individual is unable to perform in a laborer's job because he only can lift and manipulate 25 pounds to 30 pounds (11.3 kg to 13.6 kg), not the 40 pounds to 50 pounds (18 kg to 22.7 kg) required. Such an individual likely would not be considered to be substantially limited in the major life activity of working because there are a number of jobs he could perform other than a laborer job. If, by contrast, the individual was restricted to lifting just 5 pounds (2.3 kg), he may be considered to be disabled because such a lifting restriction likely would prohibit the individual from performing a good many — if not most — jobs.

Be cautious when determining whether an employee is disabled. The cost of being wrong in such situations and being sued for disability discrimination is quite high. Many times, that cost is far greater than the cost and inconvenience of simply granting the leave in appropriate cases.

Assuming the employee has a covered disability, you must next assess whether the requested leave constitutes a "reasonable accommodation." The term "reasonable accommodation" generally is defined quite broadly under ADA and its state and local counterparts. Under ADA, employers are required to think broadly about what steps can be taken and assistance provided to allow an employee to perform his job. Reasonable accommodations under ADA may include job restructuring or modification, moving the employee to another available position, providing mechanical or co-worker assistance for certain tasks, providing aids, reducing the employee's hours, and, generally speaking, providing leave.

However, your obligation to provide leave as a reasonable accommodation (or any other such accommodation) to a disabled employee is not absolute. ADA allows a number of exceptions.

For example, you could refuse leave if it would be indefinite and open-ended, such as if neither the employee nor the employee's doctor provides you with an estimated return-to-work date. Take care to ensure that before denying leave, you document your request for specific dates of the leave and if the employee fails to provide such information or provides such sketchy information about when he might return as to be tantamount to providing nothing at all.

You also could refuse leave if it would impose an undue hardship to your business. To establish undue hardship, you

must consider a number of factors, including the nature and cost of the leave (how much it will disrupt operations and how much it would cost to hire and train a temporary replacement); your overall financial resources and those of the facility or work team in question; the type of work performed and geographic separateness of work locations among which the hardship of the leave would be spread; and the effect of the leave on your business. In essence, you must consider whether the leave could be provided without significant difficulty or expense considering your organization's size, financial resources, and operational structure.

Another exception allowing you to deny leave would be if such leave would be futile. ADA does not require leave if it would not result in the employee being able to return to perform the essential functions of his job (with or without reasonable accommodation).

For instance, if leave would allow an employee to feel better or recuperate somewhat but not sufficiently to perform the essential functions of his job, the leave could be denied. Notably, this consideration is not available under FMLA, which requires leave regardless of whether the employee will be able to perform his duties at the end of the leave period.

There may be other applicable exceptions though they, similar to the exceptions discussed earlier, are quite narrowly applied and should be considered carefully. If there are not sufficient facts to support an exception (and assuming the employee is disabled), the leave likely must be granted as a reasonable accommodation.

Workers' compensation

If leave is not required by an applicable leave law or as a result of the employee's disability status, it still may be required by an applicable workers' compensation provision. Workers' compensation benefits and leave rights are governed by state law, generally the law of the state in which the individual reports to work.

Many such laws require employers to provide certain levels of benefits or insurance for employees who are injured on the job or suffer work-related injuries or illnesses, as well as certain leave rights for the purpose of recovering from and/or seeking treatment for such injuries and illnesses.

Because there is no federal law governing or prescribing leave rights for employees with work-related injuries and illnesses, there is no uniform advice regarding how to consider and address leave requested for such purpose. For that, you must consult your workers' compensation

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administrator or legal counsel. It is critical that if the need for leave is driven by a work-related illness or injury, you perform the appropriate analysis before making any decisions regarding an employee's leave request.

Company policy

Even if FMLA, ADA, or workers' compensation laws do not apply, the fourth question you must ask is whether your policies or practices require you to grant the requested leave. If you have an express policy that provides for such a leave, you should grant the leave or be able to articulate an objective reason for deviating from that policy. Similarly, if you have granted leave to other employees under similar circumstances, you should grant the leave or be able to articulate an objective reason why you are refusing the leave. You are, in effect, bound by your own policies and past practices.

The reason for this is twofold. First, if you fail to follow your policies and past practices, you may open yourself to a breach-of-contract claim. An employer's policies and past practices can, under the right circumstances, constitute a contractual commitment to act in a certain way or provide certain benefits. Whether a contract arises in any particular case will depend on how the policy is stated or the practice applied — considering degree of consistency, level of promise or commitment, and any disclaimers.

Second, if you fail to follow your policies and past practices, you may open yourself up to a discrimination claim.



Discrimination claims can arise if you contravene your leave policies or treat two similarly situated employees differently in terms of the leave you provide (and the terms on which you provide it) and if the employee you treat differently is in a protected class (for example, race, color, national origin, ethnicity, religion, gender,

age, disability status, citizenship status, sexual orientation, recent complaints of discrimination, harassment or other unlawful conduct, or other legally protected class). Under such circumstances, the employee whose leave is denied (or who is provided leave on less favorable terms) may claim the reason for his different and less favorable treatment is his membership in a protected class.

To guard against any such claims, be sure you are able to articulate objective and convincing reasons for the action you take. Reasons could be premised on factors such as the employee's relatively short tenure, job performance or probationary status, past absenteeism (so long as such absences were not themselves job-protected), or even the dates of the proposed leave. The reasons can be anything relevant to your business or operational needs as long as they are lawful and nondiscriminatory and do not take into account in any way the employee's protected characteristics or any protected actions (such as a complaint of harassment or mismanagement, participation in an investigation, etc.).

If you are not able to articulate any such objective, nondiscriminatory reasons, you should follow your policies and practices. That may require granting the leave or granting it on terms that you may not otherwise choose.

Stick to the process

Employee leave requests may seem daunting, but they are simply a matter of working through the request with a step-by-step process. You must consider the law and the employee's eligibility under any applicable law, as well as your own policies and practices. If you do so in every case, using a systematic process, you will be able to make leave determinations with confidence.

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