

Time Off Issues

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Why These are Explosive Issues

- Juries feel sorry for pregnant women
- Juries feel sorry for the disabled
- Juries are made up of employees
- Juries expect companies to go the extra mile for employees

Time Off Issues

- ADA = Americans with Disabilities Act
- FMLA = Family and Medical Leave Act
- PDA = Pregnancy Discrimination Act
- WC = Workers' Compensation

Overlap Problem

- ADA
- FMLA
- WC
- PDA

Conflict Between Laws

- FMLA's Goal: Give employees time off
- ADA's Goal: Bring employees back to work
- Your Job: Identify the issues and coordinate with Human Resources

Heidi D. Prest

- Litigation Clerk
 - Has been with firm for 2 years
 - Works part-time/30 hours per week
- Car accident
 - Husband calls—says that she is in bad shape and will not be back for a while
 - Accident occurred while she was delivering a file to partner at home

FMLA

- FMLA is a "leave entitlement law"
- Allows up to 480 hours (or 12 workweeks) of leave per 12 month period
- For birth or adoption of child, or to care for an employee's "serious health condition" or that of a spouse, child, or parent
- "Serious health condition" includes anything that requires continuing medical treatment

FMLA

- Applies to all employees who have:
 - worked for employer for more than one year and
 - worked more than 1,250 hours in the last 12 months
- Employees needing sporadic time off are entitled to it, although they can be required to temporarily transfer to other jobs without change in pay or benefits

FMLA

- Time off is given in increments as small as one hour, regardless of whether the employee is exempt
- Any paid leave the employee has (vacation, sick, etc.) will be used while FMLA is running; the remaining time is unpaid
- STD and workers' comp will usually run concurrent with FMLA

FMLA

- If position is not conducive to intermittent leave, can transfer to another position (at same salary) for duration of leave only
- If you suspect that the leave is either unnecessary or fraudulent:
 - The firm can request a second opinion
 - If there is a difference of opinion, firm must request a third tie-breaker

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Heidi D. Prest

- Is she eligible for FMLA?
 - 1,250 hours--WORKED
 - 1 year
 - Serious Health Condition
- What kind of FMLA?
 - What if she could only work one day per week?
- How much?
 - What if she took 2 weeks off in December for drug rehabilitation?

Heidi D. Prest

One week after FMLA leave starts, you find a large pile of incomplete work on her desk

You have spoken to her about performance issues in the past, but her performance evaluations are generally positive

What can you do about performance issues?

- Can you document these issues?
- Can you call her at home to discuss?

Heidi D. Prest

After 3 months FMLA, Heidi returns to work

Heidi sends you a note from her doctor indicating that she is suffering depression as a result of her injury, but will try her best

Heidi has filed a workers' comp claim

ADA

- Requires employer to “reasonably accommodate” persons with disabilities who require time off from work
- What is a disability?
 - Pregnancy is **not** a disability
 - Sexual disorders are **not** disabilities
 - Recovered addicts are protected** but current drug use is not
 - Alcoholism **is** a protected disability
 - If you aren’t sure, err on the side of caution

ADA

- Employee must be “qualified” for the job
 - To be covered by ADA, the employee must be capable of performing the essential job duties, with or without reasonable accommodation
- The ADA can apply to employees and even applicants—there is no seniority requirement

Heidi D. Prest

At the end of her first week back, she tells you that she cannot deal with the stress of her workload, and needs to limit her daily work to 6 hours

You go see your HR Director

Should the firm:

- Have Heidi examined by another MD?
- Tell Heidi she is out of FMLA and must work full-time or be terminated?

What is Reasonable Accommodation?

- A temporary leave of absence
 - The length of the leave of absence provided as an accommodation under ADA varies
- Job restructuring, part-time work, reassignment, etc.
- Changes to the employee’s physical environment

Heidi D. Prest

In the meantime, the firm has asked you to reduce the size of your department by one “headcount”

- Heidi would have been your first choice, based on performance
- The other likely choice is on maternity leave

Heidi D. Prest

Heidi survived the downsizing

She is feeling better, and is back to 8 hours, but she misses about one day every two weeks due to complications from her medications

Her doctor says that she cannot work any overtime

Her co-workers are concerned because Heidi has just started limping

ADA: Absences

- **Unplanned** absences need not be tolerated, nor leaves of indefinite duration

- The ADA allows employers to make permanent transfers to other jobs (as a last resort)
 - But employers need not “make work”

ADA: Medical Inquiries

- Applies to “disability related inquiries and medical examinations”
- Cannot ask any medical questions unless condition is affecting ability to do job
- “Need to Know” Rule

ADA: Medical Inquiries

- DO NOT:
 - Ask an employee what meds they are taking
 - Ask an employee’s co-worker about the employee’s medical problem
 - Post an employee’s condition and solicit prayers and gifts
- OK:
 - General questions about employee’s well-being
 - When’s the baby due?
 - How are you feeling?

PDA

- Employers cannot discriminate against pregnant employees
- Pregnant employees must be treated the same as other employees who require accommodation for health conditions (i.e., heart problems, diabetes, etc.)
- This includes time off from work (usually under FMLA)

Heidi D. Prest

Heidi has been transferred to Someone Else’s Department

Heidi is pregnant with twins (!)

She will need time off for the birth of her children; she will not have any FMLA leave available at the time of her due date

She continues to pursue her workers’ comp claim

YOU’RE FIRED!

Supervisor Liability

- How These Cases Can Affect You:
 - FMLA Claims
 - MHRA Claims
 - Tort Claims
 - Your Performance Review
 - Your Salary/Benefits
 - Your Job

Damages

- Backpay and Frontpay

- Emotional Distress
- Liquidated Damages (FMLA)
- Punitive Damages (ADA)
- Attorneys' Fees
- Decided by a Jury

Practical Suggestions

- First 480 hours:
 - FMLA: Leave is automatic if needed; may be sporadic
 - ADA: Reasonable accommodation issues begin immediately, including job restructuring, and physical alterations to work environment

Practical Suggestions

- After 480 hours:
 - FMLA: No further obligation
 - ADA: Reasonable accommodation obligations continue, including longer leaves of absence, but not sporadic or indefinite leaves. Part-time work may be a reasonable accommodation.

Practical Suggestions

- Work with Human Resources--obtain medical documentation
- To make leave available only without pay
 - Document the poor attendance record
 - Be consistent and fair
 - Also be fair in your performance reviews