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Employer Obligations after FMLA Leave is Exhausted

John worked for the ABC Company for over 10 years. He was a hard-working, dedicated employee who rarely missed work. Recently, however, John began having trouble breathing. Following his most recent doctor's appointment, he was diagnosed with Stage 2 cancer of the esophagus. John notified his employer and sought a medical leave to undergo chemotherapy treatment, which it granted. Thereafter, he used his full 12 weeks of leave under the FMLA, but when he requested an additional leave of absence to continue treatment, ABC Company denied his request, explaining that he had exhausted his FMLA leave. And because John was unable to report back to work, ABC Company terminated his employment. Does ABC Company have legal exposure under these facts?

As most employers know, the Family and Medical Leave Act of 1993 (FMLA) was created to craft a balance between workplace responsibility and the needs of families. The FMLA allows employees to take leave for medically-related reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.[1] Under the FMLA, an employer is subject to the Act if it is "engaged in commerce or in any industry affecting commerce [and] employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current of preceding calendar year."[2] Employees are eligible for this leave when they have been employed with the company for at least 12 months, have actually worked a minimum of 1,250 hours, and have been employed at a worksite where the employer employs at least 50 or more employees within a 75 mile radius.[3] While FMLA obligations are typically known and understood by most employers, many companies, however, struggle, or simply do not know, how to manage requests for medical leave once the employee's FMLA leave has been exhausted. Unfortunately, too many employers forget that they still have a continuing obligation to accommodate employees where the reason for the accommodation relates to a disability, as defined by the Americans with Disabilities Act (ADA).

The ADA prohibits discrimination based on disability. The ADA defines a person with a disability generally as a person who has a physical or mental impairment that substantially limits one or more major life activities. This includes people who have a record of such an impairment, even if they do not currently have a disability. When an employee has a disability and seeks an accommodation, the law requires the employer to engage in the interactive process. The courts have held that this interactive process is mandatory, not permissive, and is triggered by the employee's notice of disability and request for accommodation. The process requires, at a minimum, that the employer and individual work together to identify barriers that exist to that individual's performance of his or her job duties, and to identify a range of possible accommodations that have the potential to remove those difficulties, either in the work environment or with regard to the job tasks, which would allow the employee to perform the essential functions of the job without imposing an "undue hardship" on the employer's

operations.[4] Although the ADA does not provide a comprehensive list, it mentions at least three categories of "reasonable accommodations:"

"modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires;" or

modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[5]

Oftentimes, but not automatically, when an employee cannot work due to his or her own serious health condition, the FMLA and ADA overlap.[6] Many employees who qualify for leave under FMLA as a result of their serious health condition will also qualify for relief under the ADA, where the condition qualifies as a disability. One of the primary ways an employee seeks an accommodation for a disability is to request additional time off from work. Considering how much time off to provide as a reasonable accommodation can be quite tricky. These situations are also very fact-intensive and require a case-by-case analysis. Generally though, employers should consider factors, such as: (1) the nature and cost of that accommodation; (2) the overall financial resources of the company and impact on expenses and resources; (3) the overall resources of the employer; (4) the nature of the employer's operations, including the composition, structure and functions of the workplace; and (5) the impact of the accommodation on operations, including any impact on the ability of other employees to perform their work. Employees must also analyze how they have treated similarly-situated employees in the past. Has an extended leave been offered in the past and, if so, what were those circumstances?

The EEOC has provided some comfort to weary employers trying to tackle how much leave is reasonable. It has stated that "indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue burden."[7]Additionally, numerous federal appellate courts have held that an employee is not entitled to leave as a reasonable accommodation if the duration is unknown.

In our earlier example, the ABC Company should have engaged in the interactive process with John to determine the amount of leave he was seeking and whether it could accommodate him. The process should have some level of detail and be well-documented. More than one member of management should be involved in contemplating the request and alternatives should be explored. And, even if the company were to conclude that the leave would pose an undue burden, other options should be explored and where, appropriate, offered, 90 more days of leave instead of six months, for example, or some other arrangement that might meet the company's needs and still attempt to accommodate John.

When employers are posed with difficult workplace decisions of extended employee leave, they should consider each situation on a case-by-case basis. The EEOC does not favor blanket policies, such as policies where a company prohibits all extended leaves of absence beyond FMLA allowance. It is important to remember that every adverse employment decision has the potential for legal consequences. Employers who are prepared and proactive in their approaches to requests for medical leave will be in a better position to minimize their potential legal risk.

If we can help with compliance, please do not hesitate to reach out to us.

For the past two decades, Debra has focused her practice in the area of employment litigation and counseling, where she regularly assists employers with all aspects of employment matters. She helps employers navigate through the complicated and often-technical myriad of state, federal and local statutes and laws impacting employment decisions from the hiring process to performance evaluations, discipline, and separations, as well as litigation arising from all of those stages.

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[1] 29 U.S.C. sec. 2601(b).
[2] 29 U.S.C. sec 2611(4)(A).
[3] 29 U.S.C. sec. 2611(2)(A) & (B); 29 C.F.R. sex. 825.110.
[4] 42 U.S.C. § 12112(5)(A).
[5] 29 C.F.R. § 1630.2(o)(1)(i-iii) (1997).

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