

EMPLOYEE LEAVE: NAVIGATING THE MORASS

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THE FUNDAMENTALS OF EMPLOYEE LEAVE

I. TYPES OF EMPLOYEE LEAVES OF ABSENCE

- A. Disability, injury or illness (not caused on the job)
- B. Disability, injury or illness (on the job)
- C. Family circumstances

II. THE EMPLOYMENT RELATED STATUTES AND LEAVES OF ABSENCE

- A. ADA – Americans With Disabilities Act, 42 USC §12101, *et seq.*
 - 1. Persons and Entities Covered: An “Employee” who is an individual employed by an “Employer,” which is defined as a “Person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . .” 42 USC §12111(5)(A).
 - 2. Exclusions: Does not include the U.S. Government, or a corporation wholly owned by the U.S. Government; or “bona fide private membership club” that is exempt from taxation under IRC §501(c)(3) (other than a labor organization). 42 USC §12111(5)(B)(i).
 - 3. General Rule of ADA: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms,

conditions, and privileges of employment. 42 USC §12112(a). Employers subject to the ADA must offer to make “reasonable accommodations” of an employee’s qualified “disability” as long as it will not cause the employer an “undue hardship.”

4. No Express Unpaid Leave Required for an Employee’s Medical Reasons But. . . . may have the same effect due to its prohibition against discriminating against a qualified employee relating to discharge, compensation and other terms, conditions and privileges of employment. The EEOC’s Technical Assistance Manual and interpretative guidance suggest that “reasonable accommodations” could include permitting the use of accrued paid leave, providing additional unpaid leave necessary for treatment, and modified work schedules. Also, the ADA defines “reasonable accommodation” to include “part time or modified work schedules.” See, Section 12111(9).
5. No Unpaid Leave Requirement for “Family” Reasons: ADA does not require an employer to provide “reasonable accommodations” such as unpaid leave to an otherwise qualified employee without a disability simply because that person has a relationship with someone with a disability. The ADA is employee-focused, not family focused.

B. FMLA – Family Medical Leave Act, 29 USC §2601, et seq.

1. Persons and Entities Covered: Employers subject to FMLA are those engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, any person who acts directly or indirectly on behalf of such employer, any successor in interest of such an employer and any “public agency” as defined in the Fair Labor

Standards Act. To be an “eligible employee” for FMLA, the employee must have been employed by the employer for at least 12 months and worked for at least 1,250 hours of service for that employer during the previous 12-month period.

2. Exclusions: An “eligible employee” does not include an employee who works at a work site at which the employer employs less than 50 employees, and the total number of the employer’s employees within 75 miles of that work site is less than 50.
3. General Rule of FMLA: An eligible employee upon reasonable notice and a properly supported request is entitled to up to 12 workweeks of leave during any 12-month period, and the continuation of the employee’s group health plan coverage during the leave period (provided that the employee timely returns to work upon the expiration of leave). The employee can elect to, and the employer can require that the employee, substitute any accrued paid vacation time, personal time or family leave for all or part of the 12-week unpaid leave. When the leave ends, the employee is entitled to be restored to the same position or an equivalent position.
4. FMLA provides for leave under the following circumstances:
 - a) Because of the birth of employee’s son/daughter and in order to care for such son/daughter;
 - b) Because of the placement of a son or daughter with the employee for adoption or foster care;

- c) In order to care for the spouse, or a son, daughter or parent, of the employee, if such spouse, son, daughter or parent has a “serious health condition”; or
 - d) Because of a “serious health condition” that makes the employee unable to perform the functions of the position of such employee.
5. A “serious health condition” is defined in the FMLA as “an illness, injury, impairment, or physical or mental condition that involves – (a) inpatient care in a hospital, hospice or residential medical care facility; or (b) continuing treatment by a health care provider.”
6. A “serious health condition” based upon (b) [continuing treatment by a health care provider] includes:
- a) a period of incapacity (inability to work, attend school, or perform regular daily activities because of an illness, injury, impairment or condition) of more than 3 consecutive calendar days and subsequent treatment or period of incapacity that involves either (a) treatment two or more times by a health care provider, nurse or physician assistant or a health care provider (ie, physical therapist) under orders or referral from a health care provider; or (b) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment.
 - b) any period of incapacity due to pregnancy or for prenatal care.
 - c) any period of incapacity or treatment for a “chronic serious health condition.”

- d) Any period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of a health care provider (ie, stroke, terminal stage of a disease, Alzheimer's, ALS).
- e) Any period of absence to receive multiple treatments, such as for cancer, severe arthritis, kidney disease.

C. Persons With Disabilities Civil Rights Act (PDCRA/MHCRA), MCL 37.1101, *et seq.*

1. Persons and Entities Covered: An employer that has "1 or more employees or a person who as a contractor or subcontractor is furnishing material or performing work for the State or a governmental entity or agency of the State and includes an agent of such person." MCLA 37.1201(b). A covered person is an individual with a handicap (a "handicapper").
2. General Rule of PDCRA: An employer cannot discriminate against an employee with a disability. A "disability" is a determinable physical or mental characteristic of an individual which substantially limits 1 or more of the major life activities of that individual and is *unrelated* to the individual's ability to perform the duties of a particular job or position and/or is unrelated to the individual's qualifications for employment or promotion. The term "unrelated to the individual's ability to perform the job" means with or without accommodation.

3. Unpaid Leave: There is no express mention of unpaid leave being required under PDCRA. However, just like the ADA, the allowance of the use of accrued paid leave time, sick time, personal time or providing additional unpaid leave for necessary treatment may be considered to be an appropriate reasonable accommodation.
- D. Workers Disability Compensation Act (WDCA), MCL 418,101, et seq.
1. Persons and Entities Covered: All employees, all public employers, all private employers with more than 3 regular employees, and private employers with less than 3 employees if 1 or more of them have been employed for 35 hours or more for 13 weeks during the preceding 52 week period. Agricultural employers are subject to specific threshold requirements.
 2. General Relief: Provides wage replacement and related benefits for loss due to an employee's work-related personal injury or death. The WDCA does not provide for any required leave of absence.
- E. Interaction of ADA, PDCRA, WDCA AND FMLA a/k/a the Revolving Door.
1. These laws provide that each law will not invalidate the others, or limit any rights, remedies and procedures of any federal or state law that provides an employee with greater or equal protection than as provided under the ADA, PDCRA, WCDA or FMLA. The net result is that if there is a more protective, generous law, it will control.
 2. ADA: "Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals that are afforded by this Act." 42 USC §12201(b).

3. FMLA: “Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability.” 29 USC §2651.
4. PDCRA/MHCRA: provides that employers shall not take certain actions except as allowed by federal law. MCLA 37.1202. WDCA is silent.
5. The Department of Labor’s FMLA regulations provide that “if FMLA entitles an employee to leave, an employer may not, in lieu of FMLA entitlement, require an employee to take a job with reasonable accommodation.” 29 CFR 825.702(d)(1). However, the ADA may require that the employer offer the employee the opportunity to take such a position.
6. The ADA, PDCRA, WDCA and the FMLA can be operative at the same time and should be considered by employers when making determinations relating to an employee who is a “qualified individual with a disability” (ADA) and/or an employee who is entitled to leave due to a “serious health condition.” For example, an employer may have an employee who attends work with reasonable accommodations to the duties of her position under the ADA or PDCRA. Then, while being provided with those accommodations, the employee could suffer from a period of incapacity due to her physical condition for purposes of FMLA, and be entitled to 12 weeks of unpaid FMLA leave. The FMLA leave can be taken “intermittently” in blocks of days or sometimes hours, or on a “reduced leave schedule”. FMLA, §2612(b)(1). Also, an employee could be injured on the job and receive WDCA wage replacement and other benefits. However, if the employee recovers (ie, loses

three toes but heals) and wants to return to work but has difficulties in performing the essential functions of the job, the employee may seek reasonable accommodations under the ADA. In other words, just because an employee receives WDCA benefits, and may be on FMLA leave to recover, the inquiry does not end. Instead, it can be a revolving door. Each matter is very fact specific.

THE EMPLOYEE LEAVE FMLA FLOWCHART

Please see the attached flowchart from the U.S. Department of Labor

PITFALLS: NEW CASE LAW OPENS DOOR ON HUMAN RESOURCE LIABILITY

Please see the attached court decision – *Graziadio v. Culinary Institute of America, et al.*