

# Nuances in Leave Time Law

Tread carefully when handling requests for leave from employees

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**E**MPLOYERS, including medical practices and hospitals, must be aware of nuances in the laws allowing employees to take family and medical leave. New laws have been adopted starting on July 1, 2017, requiring employers to offer paid sick leave to employees in Chicago and Cook County. These laws add requirements to the existing rules under the federal Family and Medical Leave Act (FMLA). The myriad of regulations covered employers must follow range from accurately determining how to process an employee's request for leave to deciding what is required of the employer when an employee returns from leave. Two particularly tricky issues for employers involve requests for intermittent leave and requests for leave that are unforeseeable.

The FMLA entitles a qualified employee to a total of up to 12 work weeks of unpaid leave during any 12-month period. The following must be met:

- The birth of a son or daughter of the employee and the care of such son or daughter.
- The placement of a son or daughter with the employee for adoption or foster care.
- The care of a spouse, son, daughter or parent of the employee with a serious health condition.
- A serious health condition of the employee that makes the employee unable to perform the essential functions of his or her positions.

To qualify for FMLA, the employee must have been employed for an accumulated total of 12 months and must have worked a minimum of 1,250 hours during the 12-month period before the date leave begins. An employer may request medical certification for FMLA leave.

Upon return from FMLA leave, an employee must be placed in the same position or an "equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment." The FMLA prohibits an employer from interfering with an employee's exercise of his or her FMLA rights or retaliating against an employee for taking qualified leave under the FMLA.

## Intermittent Leave

The FMLA allows a qualified employee to use leave intermittently or as part of a reduced work schedule. Intermittent leave can create difficult decisions for an employer. For instance, in a recent case, Hansen v. Fincantieri Marine Corp., an employee with debilitating depression was approved for intermittent FMLA leave based on a certification from his doctor that he could experience "about four episodes" requiring leave "every six months." After the employee's

eighth episode in two months, the employer sent a letter directly to the employee's doctor asking him to confirm his initial medical certification. After the doctor confirmed, the employer found that the employee's absences exceeded the doctor's original estimate, denied his request for additional leave and terminated the employee for too many absences.

The employee sued alleging claims of interference and retaliation. In siding with the employee, the court held that medical certification forms are merely estimates and do not establish a hard limit on the frequency and duration of intermittent leave under the FMLA. The court explained that "an estimate, by definition, is not exact and cannot be treated as a certain and precise schedule." By terminating the employee, the employer violated the FMLA.

## Unforeseeable Leave

Some additional thorny issues arise when determining an employee's rights when the leave is deemed "unforeseeable." For instance, in another recent case, the court held that a former employee of a nursing home did not give up her FMLA rights despite not providing an anticipated return to work date from leave because her leave was unforeseeable.

In *Gienapp v. Harbor Crest*, the employee submitted a request for FMLA to her employer without identifying an anticipated date she would return to work. The employer later received a doctor's note stating uncertainty as to when the employee would be returning to work. Rather than treat the leave as "unforeseeable" and keep the employee's position open, the employer took the note to mean that the employee would not be returning before the 12-work weeks she was entitled to under the FMLA and hired a replacement. When the employee attempted to return to work prior to the 12 weeks, she was told she no longer had a job.

The employee sued. The court held that the employer may have violated the FMLA because the employee's leave was "unforeseeable" and she was not required to provide a firm return date when she requested the leave. The court also found that the employer failed to properly follow up with the employee and violated her FMLA rights by not returning her to an equivalent position.

Employers should tread carefully when handling requests for leave from employees. Any doubts about leave requests or reinstatement rights should be discussed with an employment attorney.

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