

A Second Opinion

Legal Pass Interference



By Pat Gavin, Lathrop & Gage

Football fly through the fresh fall air. Fans of the team on defense breathe a momentary sigh of relief after the football flutters through a receiver's outstretched hands. Then, feared sight of the yellow flag turns such relief into anguish.

Pass interference on the defense, that's a penalty and an automatic first down!

Like many football fans who dread having their favorite team flagged for pass interference this season, employers are often rightly worried about avoiding employee claims of interference with rights under the Family and Medical Leave Act ("FMLA"). However, upon further review, a number of court decisions encourage employers to stick to their workplace game plans for administering employee leave.

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The Leave Story

And Many (Un)Happy Returns



By Shelly Freeman, President, HROI

Imagine this scenario: An employee returns from a Family and Medical Leave Act ("FMLA") leave for her own serious health condition. Consistent with the requirements stated in the company handbook policy and the designation form sent to her at the

beginning of the leave, she presents a full release from her doctor. Problem is, she says she's really not well enough to be back – and maybe even indicates her doctor wasn't ready to release her, but she needs the money or doesn't want to stay out any longer. Or when her supervisor gives her an assignment, she indicates she's not really ready to perform certain (essential) assignments or job functions – despite the "full release." Experience indicates that you may not have to try very hard to "imagine" this situation. So what can (and should) you do?

Like so many leave issues, the "answer" in any given circumstance requires you to analyze competing and conflicting leave laws to determine your rights and obligations one by one, starting with the most obviously applicable statute – the FMLA. Once the employee presents the FMLA release to return to work, the company must "restore" her. According to the Department of Labor's (DOL's) FMLA regulations (29 CFR §825.310), the release need only be a simple statement of an employee's ability to return to work. Unlike the medical certification for the need to be gone, there is no provision for a second opinion about the ability to return. At most, under the FMLA regulations, the employer can have its own health care provider contact the employee's health care provider – with the employee's permission – to seek

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For instance, in *Throneberry v. McGehee Desha County Hospital*, the Eighth Circuit leveled the playing field by declining to hold an employer strictly liable for FMLA interference. Rather, the Eighth Circuit “legalized” such interference if the employer can show it would have made the same decision absent the exercise of FMLA rights. Indeed, *Throneberry* suggests that there is no reason to wait for an employee to return from an FMLA “time out” to impose discipline that otherwise would occur but for an absence due to FMLA leave.

Similarly, in *Werts v. Dahmer Chrysler Corp.*, the Eighth Circuit affirmed summary judgment where the employer had terminated the plaintiff for jumping off sides by leaving work early and failing to report the next day. Although the employee called stating he was seeing a doctor, the court ruled that the employee did not provide sufficient notice of his need for FMLA leave or that his absence was due to a serious health condition. Thus, the Eighth Circuit upheld the employee’s discharge.

In *Hoffman v. Professional Med Team*, the Sixth Circuit determined that an employee could be penalized for unsportsmanlike conduct toward her supervisor, which included the use of obscene and vulgar language even though the employee suffered from migraines.

Finally, in *Tellis v. Alaska Airlines, Inc.*, the Ninth Circuit refused to be faked out by a husband’s claim of FMLA entitlement to care for his pregnant wife. The employee had sought FMLA leave because his wife was having problems with her pregnancy. However, while awaiting his FMLA paperwork, the employee’s car broke down and he reversed his field and went to Georgia to pick up and drive back to Seattle a second car. When he was terminated for unexcused absence, he tried unsuccessfully to claim that telephone calls made to his wife constituted “care” under the FMLA leave. The employee’s cross-country legal razzle dazzle did not fool anyone and the Court went on to chastise him for leaving his wife at a critical time.

Like game-changing pass interference calls, protection against the bull rush of an FMLA interference claim can be a legitimate concern. However, as employers draw up their workplace “Xs” and “Os”, they should not fear yellow hankies for simply following uniform company rules unrelated to FMLA rights.

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CLARIFICATION of the employee’s fitness to return to work. Even then, no additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay her return to work while contact with the health care provider is being made.

So, you put her back on the clock (i.e. restore her) to meet your threshold FMLA obligations while determining what else to do. What about those pesky comments she’s made, or her refusal to perform essential job assignments – all indicating she’s not really ready to be back at work? Chances are good the employer’s health care provider is not going to get much helpful “clarification” – even with the employee’s permission – from the doctor who provided the “full release.”

But the analysis need not – and should not – stop there. Because she has indicated she cannot perform the job, the employer has every right and incentive to check out her ability to work. Of course, the employer always needs to be mindful of the FMLA’s anti-retaliation and anti-interference protections. But once she’s been restored and the FMLA obligations met, the employer’s ability to inquire about her condition and perform any fitness for duty exam is primarily governed by the Americans With Disabilities Act (“ADA”). Under the ADA, medical exams or disability-related inquiries of current employees must be “job-related and consistent with business necessity.” She has declined assignments, and/or indicated she is not well enough to perform her job, citing her medical condition, so a fitness for duty exam – narrowly tailored to test the ability to perform her actual job functions – is fully appropriate and defensible. Just make sure she has been restored and you are paying her before you embark on that process.

What if she cannot complete the fitness for duty test, or it discloses that she CANNOT safely do the job? To add one more wrinkle: what if she’s been doing the job for years and this fitness for duty exam reveals a latent problem that should have disqualified her before, but you just didn’t know about it? She may be entitled to go back out for more FMLA leave, if she has not exhausted her 12-week allotment. But under the ADA (and all other statutes) you CAN require that your employees be qualified for their jobs. Again, assuming you can defend that the examination or demonstration really does test the ability to perform essential functions (with accommodation, if necessary), and after exhausting any remaining FMLA leave, if she still can’t pass the test your remaining obligation under the ADA (assuming she even has a covered “disability”) is to transfer her to a lateral or lower vacant position for which she is qualified. If there is no such accommodation, you may have to part ways.

Of course, the reality of this imaginary scenario underscores the need to review employment policies and keep job descriptions current and accurate. A periodic policy audit and occasional legal advice are wise precautions to help reduce the possibility of your organization playing out this scenario in real time.

Time's Up

When Is 12 Weeks of Leave Not Enough?



By Tina Fowler, Lathrop & Gage

The length of an employee's medical leave of absence can include considerations under the Family and Medical Leave Act ("FMLA") and the Americans With Disabilities Act ("ADA") and state equivalent

laws, if any. Although both federal laws may be implicated, the FMLA and the ADA differ in terms of their purpose, coverage, and requirements. It is well-settled now that the FMLA permits eligible employees to take up to twelve weeks of unpaid leave for a serious health condition that makes the employee unable to perform the essential functions of their job. The ADA protects qualified individuals with disabilities and requires reasonable accommodation, which can include a medical leave. This means that when the employee's physical or mental condition is at issue, the employer should examine whether the FMLA applies, and then focus on other laws that may apply, such as the ADA.

The ADA provides protection to individuals with an actual disability, a record of disability, and to those regarded as disabled. Because the FMLA does not modify or affect federal or state laws prohibiting discrimination on the basis of a disability under the ADA, an employee covered by the ADA is not necessarily covered by the FMLA. Therefore, an employer should make two separate assessments when an employee requests accommodation and FMLA leave. One assessment should cover the FMLA and the other separate assessment should cover the questions needed to determine the reasonable accommodation process under the ADA. Where both the FMLA and the ADA apply, the employer must provide leave under whichever statutory provision provides the greater rights to the employee.

There may be situations in which a serious health condition will constitute a disability, entitling an employee to rights under both the FMLA and the ADA. Where an employee is covered by both, and barring an undue hardship, an employer may need to make a reasonable accommodation and grant the employee leave beyond that required by the FMLA. Once the FMLA's twelve weeks of leave have expired, an employer must consider whether additional leave should be provided to the employee as a reasonable accommodation under the ADA. Generally, an otherwise qualified individual with a disability is entitled to more than twelve weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the business. The amount of additional leave, if any, that would be "reasonable" may depend on a number of factors. The employer may consider the impact on its operations caused by the employee's initial absence, along with the undue hardship factors specified in the ADA. However, courts have repeatedly ruled that an employer is not required to provide an open-ended period of leave as a reasonable accommodation under the ADA.

Additionally, although FMLA regulations place restrictions on the employer's ability to contact the employee's health care provider, there is no conflict between the FMLA provision allowing employers to ask for certification of the employee's serious health condition and ADA restrictions on disability-related inquiries. When an employee requests FMLA leave for a serious health condition, employers will not violate the ADA by asking for the information specified in the FMLA certification form. While the FMLA form only allows for information requests relating to the serious health condition for which the employee is seeking leave, once twelve weeks have expired, the standard ADA medical certification may allow an employer to gain more health information about an employee. Under the ADA, an employer may conduct an investigation into an employee's disability as long as the investigation is job related and consistent with business necessity. Therefore, given the restrictions placed on FMLA inquiries, an employer should first have a medical inquiry consistent with the FMLA. Once the FMLA leave is over, and the employee has asked for additional leave, the employer may request further medical information under the ADA in order to determine if additional leave is needed as a reasonable accommodation.

When considering whether to grant additional leave at the expiration of FMLA leave, employers should keep in mind that courts will generally look first to the language of the ADA. The ADA provides that covered individuals include those who can perform the essential functions of their jobs "presently" or in the "immediate future." Therefore, when considering additional leave, an employer should exercise its right to obtain medical information which is job related and consistent with business necessity as it allows the employer to focus on two inquiries critical to a reasonable accommodation determination: (1) whether the need for leave is temporary; and (2) whether the employee will eventually be able to return to work.

Unlike the FMLA's mandated maximum of twelve weeks of leave, there is no magic number of additional weeks of leave, if any, an employer must allow as a reasonable accommodation. Some courts have held that an employer's refusal to grant an employee's additional leave request may constitute a denial of a reasonable accommodation, while other courts have rejected claims that such an extended leave would constitute a reasonable accommodation. Generally, requests for indefinite leave are not a reasonable accommodation under the ADA when there is no indication that the employee can perform their essential job functions within a finite or reasonable amount of time. However, within the last year, the Equal Employment Opportunity Commission filed charges that a national retailer violated the ADA when it allegedly terminated workers who spent more than one year on disability leave without regard to their individual circumstances and return-to-work projects. Regardless, decisions are highly fact-specific, and an employer faced with a request by an employee for a leave in excess of twelve weeks should review its leave policies and precedents and also seek the advice of its counsel before denying the request.

Leave Extensions

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Information in this newsletter is for the general education and knowledge of our readers. It is not intended as legal advice. Readers should not act upon the information contained in it without consulting competent legal counsel.

Intermittent Mentions

- In *Bedrossian v. Northwestern Memorial Hospital*, the Seventh Circuit Court of Appeals affirmed the denial of a preliminary injunction sought by a reservist under the uniform Services Employment and Reemployment rights Act ("USERRA") to restrain his employer from terminating his employment. The Seventh Circuit noted that such USERRA does not dispense with the request to show "irreparable harm" to issue such an injunction.
- The Tenth Circuit, in *Kelly v. Metallica West*, recently joined those Circuit Courts of Appeal that require an employer to make reasonable accommodations for employees "regarded as" disabled.
- In *Coffman v. Chugach Support Services, Inc.*, the Eleventh Circuit held that under USERRA an employee was not a successor-in-interest of one of its subcontractors where there was no predecessor-successor relationship since there was no merger or transfer of assets.

On Location

WORKERS' COMPENSATION IN MISSOURI

Workers' compensation related costs in Missouri are expensive for employers at every step of the process: lost productivity, disability benefit payments, medical costs, fraudulent claims and administrative costs. Legislation such as the Americans with Disabilities Act and the Family and Medical Leave Act has complicated the issue even more. How does an employer reduce costs? How does an employer stay in compliance? The information provided at this seminar can help you minimize the expense and headache of workers' compensation claims, and improve your company's compliance.

Date: November 9, 2005

Speaker: James Paul

Location: St. Louis, MO (Renaissance St. Louis Airport Hotel)

Registration: www.lorman.com/seminars/seminar_details.php?pid=111034&tid=&sid=MO&

LABOR & EMPLOYMENT EXECUTIVE BRIEFING

Immediately following this seminar is the Open House at the offices of Lathrop & Gage at 2345 Grand, Suite 2800, Kansas City, Missouri.

Date: December 1, 2005 from 2:15 p.m. to 5:15 p.m.

Speakers: Lathrop & Gage Labor & Employment attorneys

Location: The American Heartland Theatre at Crown Center in Kansas City, Mo.

Registration: <http://www.lathropgagelaw.com/events/eventsdetail.aspx?eventid=1674>

FMLA UPDATE 2005

This a one-day seminar and a one-day workshop gives you a complete update on how to avoid the top eight FMLA mistakes employers make.

Date: December 1-2, 2005

Speakers: Shelly Freeman
Patrick Gavin

Location: Overland Park, KS (site to be announced)

Registration: http://www.counciloned.com/seminars/seminar_details.asp?event_id=1688

WORKERS' COMPENSATION IN ILLINOIS

Workers' compensation related costs in Illinois are expensive for employers at every step of the process: lost productivity, disability benefit payments, medical costs, fraudulent claims and administrative costs. Legislation such as the Americans with Disabilities Act and the Family and Medical Leave Act has complicated the issue even more. How does an employer reduce costs? How does an employer stay in compliance? The information provided at this seminar can help you minimize the expense and headache of workers' compensation claims, and improve your company's compliance.

Date: January 17, 2006

Speaker: James Paul

Location: Belleville, IL (site to be announced)

Registration: <http://www.lorman.com/seminars.php>