



Labor and Employment Law Seminar

**2026
LAS VEGAS**

HR AND LITIGATION RISK: CAN WE TERMINATE THE EMPLOYEE ON LEAVE?



Presented by

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HR AND LITIGATION RISK: CAN WE TERMINATE THE EMPLOYEE ON LEAVE?

**ARE YOU EXHAUSTED WAITING ON AN
EMPLOYEE'S LEAVE TO EXHAUST?**

Can We Terminate The Employee on Leave?

When PTO is exhausted?  Generally, not.

When FMLA ends?  Maybe.

When the leave extension as an
accommodation ends?  Sometimes.

Can We Terminate the Employee on Leave?

- Employees often request leave under the FMLA or as a reasonable accommodation when:
 - They get put on a PIP
 - When they are underperforming and are at risk for termination.
 - Following a performance or conduct counseling.

Can We Terminate the Employee on Leave?

■ When FMLA Ends?

- If the employee is not taking leave for their own serious health condition and they do not return to work, no federal or Nevada state law continues to protect the employee ... but does the company have a personal leave policy that gives the employee additional leave?
- If the employee is taking leave for their own medical condition, you need to engage in the interactive process.

Can We Terminate the Employee On Leave?

THE INTERACTIVE PROCESS

- An exchange of information
- Important because if you do not do it, and there was a reasonable accommodation you did not make, you are ripe for a punitive damages reward
- Engaging in a good faith process to reasonably accommodate an employee is a complete defense to compensatory and punitive damages even if no reasonable accommodation was found.
- The goal is to determine whether the leave is reasonable or if there is an alternative to leave.
- Leave is reasonable when it is finite and there is a basis for believing the leave will enable the employee to return to work
- Indefinite and de facto indefinite leave are not reasonable.

Can We Terminate the Employee On Leave?

FITNESS FOR DUTY

- Don't turn a conduct or a performance issue into a medical issue.
- Generally, use this when you have objective evidence that an employee may be a threat of substantial harm to self or others.
- This generally is not used during the interactive process.

Can We Terminate the Employee on Leave?

- Questions you should have the employee's healthcare provider answer when an employee requests additional leave.
 - Is there an accommodation that would enable the employee to perform the essential job functions?
 - If not, does the employee need indefinite leave?
 - If not, when does the employee's healthcare provider estimate the employee will be able to return to work?
 - What is the healthcare provider's basis for believing the additional leave will enable the employee to return to work?

Can We Terminate the Employee On Leave?

- Often you will get a note from the employee's healthcare provider saying that the employee needs X months of additional leave.
- Don't stop the interactive process on receipt of this note.
- Ask the healthcare provider the second question about the basis for believing the additional leave will enable the employee to return to work.

Can We Terminate the Employee On Leave?

- The Ninth Circuit has some good and some unfortunate decisions concerning whether a doctor has an objective basis for believing the leave will enable the employee to return.
 - *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001). An employee cannot “repeatedly invoke[]” leave as an accommodation “where there are plausible reasons to believe” that leave would not be effective, such as “the fact that a prior leave was granted and was unsuccessful.”
 - Ruiz v. Paradigmworks Group, Inc., 2019 U.S. App. LEXIS 28836 (9th Cir. 2019)(unpublished). Reasonable accommodation “does not require the employer to wait indefinitely for an employee's medical condition to be corrected”, but the “mere fact that a medical leave has been repeatedly extended does not necessarily establish that it would continue indefinitely”.

Can We Terminate the Employee On Leave?

- If leave is indefinite or de facto indefinite, the leave request is not reasonable as to the position the employee holds BUT:
 - Is there a vacant position the employee is qualified to perform that the employee could return to?
 - If not, are you treating the employee whose employment you want to terminate consistent with how you have treated other employees in a similar situation?
 - The most likely situation where an employer allows an employees leave to go on and on is when the employee is on leave for a work-related injury.

Can We Terminate the Employee On Leave?

TIMING IS EVERYTHING!

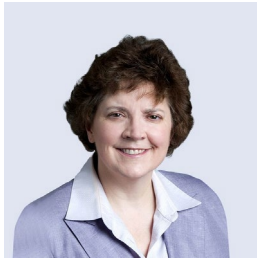
- If you plan to terminate, put your decision in writing the moment the decision is made. Do not wait one minute.
- Put it in writing before you send the invite for a meeting with the employee.
- If the employee is on a PIP, make notes every week of the employee's progress or lack thereof.
- If you meet with the employee and tell them you will let them know what you have decided, decide by the end of the day and memorialize the decision.

Can We Terminate the Employee On Leave?

- What if the employer is having a reduction in force?
- What if the employer finds out the employee is fraudulently taking leave?
- What if while the employee is on leave, the employer learns the employee has been violating work rules or engaging in criminal conduct?



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Questions?



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Thank you.