



2 Essentials For Dealing With Employees Attempting To Game the System

Insights

8.01.17

Today's workplace is fraught with legal traps for well-intentioned but unwary managers. But one issue stands out far above the rest as perhaps the single biggest employee challenge in today's workplace: malingering employees attempting to "game the system" with leave and accommodation requests.

The Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), in tandem with workers' compensation and other state laws, often make it treacherous to work through these frequently-encountered issues. Nevertheless, two simple but crucial elements can help employers overcome these challenges and avoid nasty surprises: beware of common misconceptions, and maintain a reliable communication process.

Avoid Misconceptions

First, the ADA and FMLA each impose distinct obligations and prohibitions on employers. Do not assume that compliance with one statute relieves you of any duties under the other. The same is true of state workers' compensation laws. Therefore, you must address compliance with each law individually. For example, an employee may have ADA rights despite being ineligible for FMLA benefits.

The ADA prohibits discrimination on the basis of a disability and generally requires that you provide reasonable accommodations to a qualified employee if doing so would enable the individual to perform the essential functions of the job. Meanwhile, the FMLA requires you to provide eligible employees with up to 12 weeks of job-protected leave (and other benefits) during a 12-month period, and prohibits interference with or retaliation against any employee seeking to exercise FMLA rights.

Second, no magic words or explicit reference to either the ADA or FMLA are required to trigger an employer's obligations. If you have sufficient information that an employee is actively seeking or simply needs an accommodation, or you're made aware of circumstances that qualify an employee for FMLA leave, you typically have a legal duty to make further inquiry.

Third, good intentions or facially neutral policies do not necessarily protect you from legal claims. Assume, for example, that your company policy limits leaves of absence to 60 days after exhaustion of FMLA, or denies leave to new hires until after completion of 90 days of service. Consistent

of FMLA, or denies leave to new hires until after completion of 90 days of service. Consistent application of either policy probably violates the ADA in certain situations. Many well-intentioned managers have struggled with – and violated – these principles.

Fourth, one size does not fit all. In other words, a set of strict standards will not protect you from liability. Under the ADA, consideration of possible accommodations requires an individualized assessment of the facts. Similarly, FMLA administration can be very fact-specific, especially as it pertains to intermittent leave. Each scenario is distinct and must be evaluated on its own.

Avoidance of the foregoing misconceptions is a critical first step to fulfilling your legal responsibilities regarding employee leave and accommodations. The next step toward compliance is following a thorough, timely communication process to ensure consideration of all appropriate information and to reduce the potential for confusion or surprises.

Maintain A Reliable Communication Framework

Under both statutes, you are required to fulfill certain communication duties. The ADA requires a confidential interactive exchange of information, while the FMLA calls for written notices, designations, and certifications. Properly documented communication trails are often pivotal when litigation ensues. Handled properly, the resulting documentation trail can help you demonstrate legal compliance, even when an employee is uncooperative.

FMLA Notifications

The FMLA's requirements for detailed communication begin with a general notice for all workers and applicants. When an employee requests or may need FMLA leave, you must provide a timely notice addressing eligibility. You must also provide a rights and responsibilities notice detailing particulars of the leave, including but not limited to how you will calculate the FMLA time used and the employee's duty to provide certification from a healthcare provider. At this stage, you should also confirm the anticipated length of the leave and provide call-in or scheduling procedures for intermittent leave, if applicable.

If intermittent leave is needed, attempt to define when and how often the employee intends to use the time. Seek medical clarification if and when the utilized time off varies materially from the healthcare provider's estimate. This often happens when malingerers attempt to game the system, so it's important to seek clarification before misuse of leave gets out of hand. But remember, only act on such suspicions when they are supported by objective facts based on the employee's conduct.

The ADA's Interactive Process

Though not as precisely described in federal regulations, communication regarding ADA issues is at least as important as that involved in FMLA leave. Consistently documented communication helps you determine whether the employee is legally entitled to a reasonable accommodation in the first place, and what, if any, accommodations might enable the employee to perform the essential functions of the job. Information from the employee and the healthcare provider can help establish

various parameters regarding the situation, including the employee's responsibilities to report to management, how the employee's condition affects their ability to perform essential duties, possible accommodations, and critical timelines. Litigation often arises when communication breaks down during the interactive process. It is therefore important to ensure that communication of information – including applicable deadlines – is timely, clear, and well-documented.

Establishing a timeline is important because gaps in communication often create troublesome issues in litigation. To manage leave effectively, you should develop procedures to ensure timely updates of medical information and reminders when an approved leave of absence is about to expire. Be careful to never substitute your own judgment for that of a healthcare provider; always refer to medical documentation before reaching conclusions.

Conclusion

As attendance, leave, and accommodation issues continue to arise, it is only a matter of time before almost every manager will be faced with an ADA or FMLA scenario. By helping management learn how to avoid misconceptions and to engage the appropriate framework for responding to leave and accommodation requests, you may save yourself enormous headaches, time, and money.

For more information, contact the author at KTroutman@fisherphillips.com or 713.292.5602.

Related People



A. Kevin Troutman
Senior Counsel
713.292.5602
Email

Service Focus

Employee Leaves and Accommodations
Counseling and Advice

