



Managing the Complex Web of Leave of Absence Laws

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Managing employee leave and staying on the right side of the law is challenging for employers, especially as federal and state laws continue to be enacted and interpretations of laws change and evolve. Hotel human resources teams must be prepared to recognize when and which law applies to an employee request for leave and manage the leave process. But they can't do their job if the employee's leave request is never brought to their attention or brought to them too late. Employers must train supervisors and managers to recognize requests for leave or attendance issues that may implicate federal laws such as the Americans with Disabilities Act, the Family and Medical Leave Act or state laws that provide for leave for a variety of absences such as school visitation, pregnancy or leave for crime victims, to name a few. Hospitality employers should address attendance and leave issues from a centralized decision-making perspective to ensure consistent application of, and possible modification of, relevant company policies.

The Federal Laws

There are generally four federal laws that may require some form of leave of absence for eligible employees – and your human resources team knows about them. The trouble is how to manage and track the time off and how to discipline or discharge an employee who is misusing the leave.

The Uniformed Services Employment and Reemployment Rights Act was enacted following the Persian Gulf War. The law's purpose was to expand the rights of employees returning to work from uniformed service by entitling them to positions with their pre-service employers, complete with all of the seniority, status, pay and benefits that they would have accrued had they never left. USERRA generally requires employers to provide eligible employees with up to five years of unpaid leave for uniformed service during the life of their employment. Throughout this period, the employee's seniority, health care and pension benefits must be maintained. Further, returning service members have a virtually unfettered right to reemployment by their pre-service employer upon timely application for return to work.

Under the federal Pregnancy Discrimination Act of 1978 (an amendment to Title VII of the Civil Rights Act), a pregnant employee may be entitled to time off for pregnancy and maternity-related issues on the same terms as those employees having other temporary disabilities.

The ADA provides numerous protections to disabled employees, including such accommodations as time off and extended leaves of absences. In 2012, the Equal Employment Opportunity Commission approved its Strategic Enforcement Plan for 2012-2016. In the plan, the EEOC stated five priority enforcement areas. One of the five areas includes reasonable accommodation under the Americans With Disabilities Act. And the agency is very serious about enforcing its priorities. The EEOC is vigorously pursuing employers for failing to modify their leave and attendance policies to accommodate disabled employees. Coupled with the time off obligations under the FMLA, it's no surprise that employers are frustrated and confused when trying to manage their employees' leaves and attendance issues.

The ADA and the FMLA are complex laws and they can significantly restrict an employer's ability to manage employee attendance issues. Although the two laws provide overlapping coverage for some employees and situations, an employer must assess its obligations under each law independently when attendance and leave issues arise. As with most employment laws, the law providing the greater protection will control.

The FMLA covers employers with 50 or more employees and gives eligible employees 12 or 26 workweeks of job-protected leave in a 12-month period for certain qualifying reasons, which include the employee's own serious health condition, to care for an immediate family member with a serious health condition, the birth or placement of a child for adoption or foster care and qualifying exigency leave. To complicate things further, when medically necessary, employees can take certain FMLA leaves intermittently or on a reduced schedule basis. Importantly, unlike the ADA, the FMLA does not recognize the concept of undue hardship on the employer. Employees are entitled to take FMLA leave regardless of whether the leave imposes an undue hardship on the property.

The ADA prohibits discrimination against employees based on their disability and requires employers to reasonably accommodate disabled employees unless doing so is an undue hardship. The ADA Amendments Act specifically directs that the term "disability" be broadly defined – adding many employees to the ranks of those that can be considered "disabled" and therefore entitled to a reasonable accommodation under the law. An employer must consider many types of accommodations for a disabled employee – additional and expanded time off or leaves of absence is among them – even if the employee has exhausted their allotted FMLA leave. An employer can only refuse to accommodate an employee if the employer can prove it is an "undue hardship." Be very cautious when making that determination. It is likely one you will have to defend to the EEOC or in federal court.

The Ever-Expanding List of State Laws

Hoteliers of many sizes must be prepared to comply with the various state laws entitling employees to leaves of absence as well. Since the federal laws which contemplate leave for employees generally apply to larger employers (50 or more employee for the FMLA, 20 or more for the ADA and 15 or more for Title VII), state legislatures are filling the gap by enacting state laws to cover smaller employers. A number of states have mini-FMLA laws (providing for medical leave) that cover

employers with as few as five employees. Many states have enacted laws covering smaller employers that specifically provide for maternity and pregnancy-related leave.

States also are enacting laws to cover other types of leaves. Some states mandate the amount of jury duty time off that must be given and even how much of it must be subsidized by an employer. A large number of states have passed laws requiring time off for victims of crime and even specific types of crimes and time off to provide witness testimony in criminal cases. State military and civil officers are entitled to job-protected leave in many states in addition to the protection under the federal military leave laws. States laws provide job-protected leave for blood and bone marrow donation time. Becoming more common are state leave laws allowing for time off for parental duties such as school visitation. And states are expanding the coverage of certain types of leave to domestic partners and civil union partners.

Human Resources and Leave Management

Your property's human resources team must be aware of the various leave requirements in the states in which you operate. Your policies, procedures and handbooks should address the various leave entitlements and give specific directions to employees on how to request leave and how to get approval before any leave is commenced. You must train your supervisors and managers to recognize these leave requests and seek the guidance of the human resources professionals who are administering the policies and tracking the leaves of absences. Don't ignore absences. Many human resources personnel will tell you they have had difficult discussions with operations managers who have allowed an employee to take significant time off, without letting the Human Resources Department manage and track the leave time, only to find out later that the failure to designate and track the time off allows the employee even more time off under one of these federal or state laws.

Employers should require employees seeking leave to provide all the necessary, and in some cases, legally required certifications, whether it is for jury duty, military leave or medical leave. Track the frequency and duration of an employee's leave usage to make sure it is reasonably consistent with the time requested. Consistently enforce your call-out policy for tardiness and absences that require employees to contact their supervisors or managers directly and speak to them in person, by telephone, a set period of time before their scheduled shift if they will be absent or be late and enforce the policy. An employer may require an employee to comply with those policies when no unusual circumstances prevented the employee from doing so, no matter what the reason for the absence. Finally, respond to employee requests for leave in writing and provide notification of the amount of time given, the reason for the leave and any requirements the employee may have to fulfill.

Although managing attendance and leave issues can be frustrating under the ADA, the FMLA and the myriad state leave laws, employers can take a number of steps to reduce their potential liability. Specifically, employers should make sure their policies comply with federal and state laws.

Employers should also train supervisors to have a clear understanding of the hotel's legal obligations. Your managers and supervisors act on your hotel's behalf, and even a simple innocent mistake on their part can lead to serious liability. Train managers to recognize leave requests and drive such requests and attendance issues to the Human Resources Department to permit centralized, consistent decision-making. Your human resources team is best prepared to deal with these complex and often frustrating situations.

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