Strategies For Continuous (And Intermittent) Medical Leaves

Publication
8.25.14

Have you ever scheduled an early-shift employee to cover for a late-shift employee who has just taken medical leave? The covering employee probably was not excited to have to work that extra shift. While the logistics of employee schedules can be difficult, it can be even more burdensome (and more important) to handle the employee's medical leave appropriately and in accordance with the law.

What do hospitality employers need to be mindful of when an employee takes a medical leave? This article discusses some of the strategies and principles that employers can use when medical leave issues arise.

The Family Medical Leave Act
The Family Medical Leave Act, also known as "FMLA," generally entitles an employee to twelve weeks of unpaid, job-protected leave for the employee's serious medical condition, or for the serious medical condition of an employee's immediate family member. FMLA does not apply to all employers. Only employers who operate with 50 or more employees are covered under the FMLA leave. FMLA also does not apply to all employees. The employee must have worked at least 1,250 hours within the twelve-month period preceding the beginning of the requested leave and they must have worked at a location with 50 or more employees within a 75 mile radius. Employees also must have been employed for at least a year.

Eligibility Depends on Hours Worked
The company must accurately calculate hours worked for FMLA eligibility. An employer should have a procedure to determine whether FMLA applies to a particular employee, including whether they worked for a year and whether they meet the 1,250 hours-worked requirement.

Employers should also have a policy that establishes how it calculates the use and duration of leave. Employers often will choose to implement a rolling 12-month period where its policies define how much FMLA leave an employee has left to based upon the 12 months immediately preceding the employee's request for leave. Alternative methods of hours-worked calculation include the calendar year (i.e. January 1 through December 31), any fixed 12 month period, and the 12 month period measured forward. These are all acceptable methods to establish the 12 month period to be uniformly applied to all employees taking FMLA leave.

Full-Time, Intermittent, and Reduced Schedule Leave Are Different

Employers must ascertain whether the employee's leave is indefinite or intermittent. To do this, the employer should communicate with the employee immediately upon receipt of the leave request to understand the extent of the leave. The employer should also document the type of leave the employee requests and prepare procedures to track the employee's adherence to the proposed schedule. Employers can also draft an agreement with the employee regarding the employee's schedule on leave. This is especially important for employees on an intermittent or reduced leave schedule because it is the employers burden to track the employee's schedule. Otherwise, the employee could say that he or she was working while on leave which could lead to claims of unpaid wages. Employers should incorporate a Certification of Health Care Provider form and a Leave of Absence Request form into their leave management documents.

Designate Leave as FMLA Immediately

If FMLA applies to the situation, the medical leave should be designated as an FMLA-qualifying leave immediately. As soon as practicable (and often before the leave actually begins), the employer must provide formal notice to the employee that the leave will be considered FMLA leave. A proper designation will inform the employee how the leave will impact accrued vacation time, rights to future FMLA leave, sick days, PTO, and any other time-away-from-work policies that the employer might observe.

If FMLA leave is not designated immediately, an employer may retroactively designate the leave as FMLA, but only under limited circumstances. Be advised that retroactive designation can be problematic. If the employee can show that he or she would be harmed, or prejudiced, by the retroactive designation, by the employer's failure to designate the leave appropriately, then retroactive designation is not allowed. Take, for example, an employee expected to use his FMLA entitlement to tend to his spouse in the future. Unexpectedly, his child became ill and the employee had to take time off to help his child recover at home. The time spent taking care of his child qualified for FMLA, but the employer did not designate the leave as FMLA. The employee, under the belief that he still had his full FMLA entitlement, did not change any of his plans for his spouse. The employee scheduled surgeries and declined to make contingent arrangements, believing he had not exhausted his FMLA entitlement. In the described situation, the employer may not be able to retroactively designate the earlier leave, for the child, as FMLA leave, even if he were to designate it before the employee returned from tending to his child.

Make Timely Requests for Medical Certification

Be sure to get all necessary medical certifications and document each of your requests for the same. Employer policies should notify employees what conditions trigger FMLA leave and the types of inquiries an employer will make to validate and make necessary adjustments for leave. These inquiries might include a questionnaire for the employee to determine whether the employee's condition qualifies for FMLA and whether the employee intends to return to work. The employer should also be sure to obtain the expected duration of the employee's leave from the physician.

Second medical opinions are an option, but employers must front the bill. The employer can, at its

own cost, request a second medical opinion when the employer has reason to doubt the validity of a medical certification. The employer can even designate a health care provider for the second opinion, so long as the employer does not employ the health care provider on a regular basis. When the first and second opinions differ, the employer may, again at its own expense, seek a final and binding opinion designated at the approval of both the employer and employee. Additional medical opinions should only be requested when there is reliable evidence that the initial medical opinion is fraudulent or deficient in some way.

Stay Updated On Employees' Leave Requirements

Employers must track the employee's leave entitlement throughout the leave and request recertification if and when appropriate. While an employee is on FMLA leave, the employer should communicate with the employee periodically regarding the status and timing of the employee's intent to return to work. The employer may request that the employee provide medical certification to qualify any update or change. If an employee requires intermittent leave (such as a half day every other day to care for a seriously ill family member), this must also be designated as FMLA leave and counted toward the employee's 12 week limit. But again, this must be diligently calculated and tracked. The employer can request that the employee's physician recertify the leave as frequently as every 12 months.

The employer is not entitled to request information about the employee's health condition. Therefore, while courteous inquiries may be socially appropriate, employers should be cautious with questions about private medical conditions. Furthermore, the employer cannot request information more frequently than every 30 days except under limited circumstances, such as when the employee requests an extension or when the employer learns of new information that casts doubt on the employee's stated reason for absence.

Health Insurance Premiums

Employers are required to maintain the employee's health benefits for the duration of the FMLA leave, but employees are generally responsible for their share of the premiums. Should an employee fail to pay for their share, employer's must not cancel health coverage without following the appropriate procedures. Pursuant to the FMLA regulations, 15 days before cancellation of any group insurance plan, all employers must notify the employee, in writing, that a failure to pay will result in cancelation of the employee's health insurance. Otherwise, any cancellation of health insurance will be deemed to violate the law.

What Happens When an Employee Exhausts FMLA Leave

When the employee's FMLA entitlement ends, the employer is no longer under any obligation to continue paying health insurance premiums. The employee can be placed on COBRA after FMLA is over. However, given the continuing obligation to accommodate under the American's with Disability Act, the conservative approach is the notify the employee that his or her FMLA leave is exhausted and clarify that the discontinuation of medical benefits is not a termination of employment.

If the employee returns from FMLA leave, the employee must be restored to his or her original job, or an "equivalent" job, meaning virtually identical pay, benefits, and other employment terms and

of an "equivalent" job, meaning virtually identical pay, benefits, and other employment terms and conditions. Furthermore, an employer cannot penalize the employee for using FMLA leave by denying employment benefits that the employee earned or was entitled to before using the FMLA leave.

Leave Beyond the FMLA Entitlement

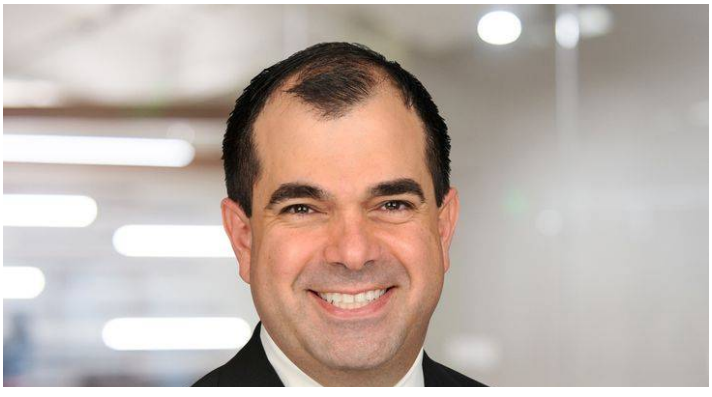
FMLA does not create an entitlement to indefinite leave for any employee. If the employee requests an extension of leave beyond their FMLA entitlement, the employer should consider this request carefully. A blanket policy of terminating employees who do not return to work at the end of FMLA could run afoul of other laws, such as the Americans with Disabilities Act, or "ADA." The ADA may require that the employer make reasonable accommodations for an employee's medical condition, which may in turn require further medical leave beyond the requisite 12 weeks.

Employers must conduct an ADA analysis to determine if it can accommodate the employee's disability and whether that accommodation would constitute an "undue hardship." In this procedure, the employer should evaluate the employee's position and duties, review the needs of the business and determine whether it is possible to accommodate the employee's condition, if covered, without undue hardship to the employer. Whether an accommodation would impose an undue hardship on the employer depends on the nature and cost of the accommodation, the financial resources of the facility making the accommodation, the financial resources of the employer, the type of operation the employer conducts, and the impact the accommodation would have on the facility's operations. Employers should consider viable alternatives to accommodations that may be difficult to implement and determine if it is possible for an employee to partially absorb the cost of an accommodation that would otherwise constitute an undue hardship. Undue hardship analysis is a fact-based inquiry and, with exception to the most obvious cases, should be reviewed with counsel.

Preparing and implementing FMLA policies can often be unintuitive. While this article may be used as an FMLA guide, it should not be construed as legal advice. Employers are encouraged to contact competent employment counsel regarding FMLA or any other employment law issue they may have.

This article was first published in *Hotel Executive*.

Related People



Lonnie D. Giamela
Partner
213.330.4454
Email