

Out Sick, or Sick of Work?

Managing Employee Medical Issues

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What's a manager to do with employees who, because of medical issues, frequently miss work or can't do their job? Can the employer require an employee to report for work or do his job anyway, and fire the employee when he doesn't or can't? Managers must proceed with caution when faced with these issues.

Special legal protections for employees with medical issues

Employees who miss work because of their own or a family member's medical issue may be entitled to job-protected leave under federal and/or state law. Covered employers may also have to make job-related accommodations for qualified employees who have medical limitations. State workers' compensation statutes generally prohibit taking adverse action against employees who claim benefits for a work-related injury. Because these statutes overlap, it's

easy for employers to unknowingly violate the law when making what seem like common sense business decisions.

The federal Family and Medical Leave Act (FMLA) applies to employers with at least 50

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employees. Eligible employees are entitled to take up to 12 work weeks of job-protected leave during any twelve-month period for their own serious medical condition, the birth or adoption of a child, or to care for an immediate family member with a serious health condition. (Eligible employees get 26 weeks off to care for family members injured in military service.) A "serious health condition" is an illness,

injury, impairment, or physical or mental condition requiring inpatient care or continuing treatment by a healthcare provider. A bad cold or the "24-hour flu" normally won't qualify.

Under the FMLA, employees must notify their employer in advance if the need for leave is foreseeable or as soon as practicable if it is not. The request can be made verbally or in writing. The employer usually can require the employee to submit a written notice specifying the reasons for leave, when it will begin, and its estimated duration. Within five business days after the employee gives notice, the employer must provide a notice of eligibility and statement of rights under the FMLA. The employer can require the employee to present a doctor's certification confirming the need for FMLA leave. Retaliation for use of FMLA leave is prohibited.

Note to managers: *You can be personally sued for denying an employee FMLA rights or retaliating*

against an employee for seeking or taking FMLA leave.

The Americans with Disabilities Act (ADA) applies to employers with at least 15 employees. It prohibits discrimination against and requires employers to provide “reasonable accommodations” to “disabled” employees unless doing so would be an undue hardship. (Proving undue hardship is very difficult.) An individual is protected by the ADA if he is qualified for the job and has a physical or mental impairment that substantially limits a major life activity (very broadly defined); has a record of impairment in the past (like diabetes or cancer); or is regarded as impaired (manager treats him as disabled). A reasonable accommodation is a change in work conditions which enables a disabled employee to perform a job or enjoy equal access to a job’s benefits and privileges. Common examples of reasonable accommodations may include special tools, time off from work, re-

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assignment, altered break or work schedules, telework, or changes in supervisory or communication methods.

When an employee communicates he cannot perform all or part of his job because of a medical issue, the employer should treat it as a request for an accommodation under the ADA, even if not made in writing. The employer and employee must engage in an “interactive process” to try to identify a reasonable accommodation. The employer should conduct an individualized assessment of the employee’s specific limitations, essential job functions, employee input information from health care professionals, including the employee’s own doctor(s), and legitimate safety issues. The

employer can ask to communicate with the employee’s doctor to clarify limitations and possible accommodations. If multiple reasonable solutions would address the employee’s issue, the employer can choose the one that works best for it.

Be careful when talking to employees about medical issues

Managers must be careful when discussing medical issues with employees. A request for time off from work or a work accommodation which is vague or ambiguous may nevertheless trigger rights and protections under the FMLA, the ADA and/or state law. When a manager asks too many questions about an employee’s medical issues or

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plays amateur doctor by guessing about the effects of or treatment associated with a medical issue, the manager may unknowingly set up a legal claim against himself and the company. Managers should handle such requests with the assistance of human resources personnel, if available.

Common scenarios

- An employee tells his manager “I’m having medical issues and will need to leave early if I experience pain or fatigue.”
- An employee tells his manager he needs some time off to care for his sick wife. As often happens, the manager expresses concern about her underlying condition by saying “What happened? Is she going to be OK?” or tries to express support by saying “It will be a problem not having you on the ABC project, but take the time you need.”
- A white collar worker returns from leave after recovering from injuries sustained in a car accident. The manager witnesses the employee stopping to catch his breath on his way back to his desk. Although the employee has not asked for more time off, the manager sends him home to “get some rest and get your strength up.”

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In these scenarios, the manager tried to do the “right thing” but may have deprived the employee of rights, expressed sentiments which could be interpreted negatively, and/or failed to request medical documentation before acting.

If an employee is eligible for FMLA leave, he may be entitled to intermittent leave or a reduced work schedule—the FMLA does not require that all leave be taken in full day or week increments.

In addition, the employee may be unaware of FMLA rights but thinks he is requesting a medical accommodation. In either case, the company may have the right to require documentation from a

Educate managers about their and the employer’s responsibilities under the FMLA and ADA.

doctor substantiating the need for leave or confirming the employee can safely perform core work functions, and the employer may be obligated to provide the employee information.

What happens when FMLA leave time ends and the employee is still out?

Employers often have difficulty managing extended employee absences. Some companies maintain neutral termination policies under which they automatically terminate employees when they don’t return from leave within a fixed amount of time (normally more than 3 or 6 months). Although an employee who does not return to work at the end of his FMLA leave loses his right to reinstatement to the same or equivalent job, the employer still may be required to grant additional leave time as an accommodation under the ADA. Termination for extended leave due to a work-related injury may also be considered unlawful retaliation under state law (as in Oklahoma).

This does not mean that employers must give all disabled employees unlimited time off. It means employers must be prepared to assess extended leave requests on an individualized basis.

Best practices

- Educate managers about their and the employer’s responsibilities under the FMLA and ADA.
- Adopt simple procedures for employees to report their need for FMLA leave or a medical accommodation and for the employer to consider same.
- Implement procedures for managers to report absences to

HR as they occur so that FMLA notices can be timely sent.

- Update leave of absence policies and procedures to reflect applicable law—inflexible leave policies will be subject to greater scrutiny.
- Update job descriptions to accurately reflect essential job functions.
- When an employee requests an accommodation, carefully document the employer’s efforts to identify and implement a reasonable accommodation.

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- Carefully exercise the employer’s right to require documentation from medical professionals confirming the need for leave or an accommodation.
- Maintain confidential medical files and keep managers and supervisors out of medical discussions whenever possible. Use trained HR personnel to manage medical issues when possible.

With an aging workforce and diagnosis of medical issues on the rise, managers will have to carefully manage workers who need to be away from work for their own or a family member’s medical condition. 🏠

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