

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Employee Leave Under the FMLA and ADA

Navigating Overlapping and Conflicting Leave Laws to Avoid Government Action and Worker Lawsuits

WEDNESDAY, NOVEMBER 30, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Neil A. Capobianco, Partner, **SNR Denton**, New York

Eric S. Dreiband, Partner, **Jones Day**, Washington, D.C.

Salvatore G. Gangemi, Principal, **Gangemi Law Firm**, New York

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service** at **1-800-926-7926 ext. 10**.

Conference Materials

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Continuing Education Credits

FOR LIVE EVENT ONLY

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- Close the notification box
- In the chat box, type (1) your company name and (2) the number of attendees at your location
- Click the SEND button beside the box

Tips for Optimal Quality

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-869-6667** and enter your PIN - when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Employee Leave Under the FMLA, ADA and Workers' Compensation Law



Neil A. Capobianco, Esq.

SNR Denton US LLP

1221 Avenue of the Americas

New York, New York 10020

(212) 398-5781

neil.capobianco@snrrenton.com

American with Disabilities Act Overview

- Prohibits discrimination against a QID – “qualified individual with a disability.”
- “Reasonable accommodation” may include:
 - “other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.” (EEOC Interpretive Guidance to 29 C.F.R. § 1630.2(o)).
- ADA prohibits both disability inquiry and medical exam unless inquiry or exam “is shown to be job-related and consistent with business necessity.” (29 U.S.C. § 12113(d)(4)(A), § 12112(d)(4)(A)).
 - ADA prohibits retaliation against individual for requesting a reasonable accommodation or complaining about discrimination.

State Workers' Compensation Law Overview

- Covers all accidents and injuries that arise “out of” or “in the course of” employment employee is entitled to any benefits to which eligible under state or company’s short-term or long-term disability programs;
- Pays medical benefits and wage replacement benefits.
- Medical benefits continue as long as employee needs treatment arising out of work-related injury.
- Wage replacement benefits continue as long as employee is unable to work.
- Employee loses wage replacement benefits if employer offers employee a position (e.g. light duty).
- Employer entitled to medical records & can compel IME.
- All disputes/settlements require approval of specialized state agency.
- Retaliation against claimants is prohibited.

Family and Medical Leave Act Overview

- Applies to Employees with 12 months & 1,250 hours.
- Covers birth/adoption of child, employee's own serious health condition, or serious health condition of employee's spouse, daughter, or parent.
- Entitles employee up to 12 weeks of leave for entire 12 weeks (birth/adoption) or for duration of serious health condition.
- FMLA Certification only.
- Prohibits retaliation against any employee for:
 - requesting or taking FMLA leave;
 - opposing any unlawful FMLA practice;
 - filing an FMLA complaint; or
 - providing information or testimony in connection with any FMLA case (29 U.S.C. § 2615).

Interaction Between FMLA and Worker's Compensation

- If an employee is out for an FMLA-qualifying reason, the employer should designate the time off as FMLA leave, including:
 - worker's compensation leave;
 - disability leave; or
 - time off for medical treatment.

Interaction Between FMLA and Worker's Compensation

- If employee is out of workers' compensation, employer may:
 - designate all time off as FMLA leave (assuming it constitutes a serious health condition);
 - inform employee that termination of employment will occur if employee is unable to return to work by end of 12 weeks;
 - offer employee a light duty position (within doctor's restrictions) and if employee refuses, stop wage-replacement benefits;

Interaction Between FMLA and Worker's Compensation

- if employee refuses light duty position, FMLA leaves continues for up to 12 weeks;
- employer (or insurance carrier) is entitled to all relevant medical records, IME, and doctor's FMLA certification;
- if employee is unable to return at end of 12 weeks of FMLA leave, employer may terminate employee's employment:
 - no right to reinstatement of employment (employee must re-apply for employment);
 - ending employer-provided health coverage, unless employee elects COBRA at own expense.

Interaction Between FMLA and Worker's Compensation

- if employment is terminated at end of 12 weeks of FMLA leave:
 - employee is entitled to worker's compensation medical benefits and wage replacement benefit as long as unable to work and ongoing treatment needed;
 - all benefits and rights are governed by workers' compensation law;

Interaction Between FMLA and ADA

- If employee with an ADA disability is out for an FMLA-qualifying reason, the employer should designate the time off as FMLA leave.
- If employee is out in connection with an ADA disability, employer may:
 - designate all time off as FMLA leave (assuming it constitutes a serious health condition);

Interaction Between FMLA and ADA

- inform employee that termination of employment will occur if employee is unable to return to work by end of 12 weeks;
- no obligation to offer a light duty position (unless policy provides otherwise);
- Employer **must** consider possible reasonable accommodations, including:
 - additional leave;

Interaction Between FMLA and ADA

- reassignment to a vacant position (only when accommodation to current position would pose an undue hardship).
- Employee may qualify for short-term disability or long-term disability under Company programs if unable to work as long as disability commenced at a time when employee was actively employed.

Interaction Between FMLA and ADA

- Employer is not entitled to any information about the reasons for the leave, except:
 - Doctor's FMLA certification;
 - Additional information about the ADA disability if the employee requests a reasonable accommodation.

Interaction Between FMLA and ADA

- Employment termination may occur if:
 - Employee is unable to return at end of 12 weeks of FMLA leave;
 - Reasonable accommodation will not allow the employee to perform the essential functions of positions; and
 - Consideration is given to extending the employee's leave for a reasonable additional period of time.

Interaction Between FMLA and ADA

- If employment is terminated at end of 12 weeks of FMLA leave:
 - employee is entitled to any benefits to which eligible under state or company's short-term or long-term disability programs;
 - employee has no right to reinstatement (must re-apply); and
 - employer-provided health coverage and other benefits end, unless continuation or conversion is offered and elected.

Keys to a Successful Light Duty Program

- Clearly written policy explaining who is eligible (e.g., only employees out on workers' compensation).
- Emphasize that program is transitional – to help employee transition back to former full-time position.
- Clear time limits establishing how long an employee can continue in a light duty position.

Keys to a Successful Light Duty Program

- Place employees in useful light duty positions only and insist that the functions of that position be performed.
- Communicate specific functions and expectations of light duty position and maximum duration in writing to employee before the light duty assignment begins.

Keys to Successful FMLA Termination Program

- Written policy with a bright light test establishing when termination occurs that is consistently and uniformly applied.
- Cover letter to Employer's Response to FMLA Request that clearly explains that if employee is unable to return to work after exhausting 12 weeks of leave, employment will be terminated.

Keys to Successful FMLA Termination Program

- Warning letter to employee 2-3 weeks before 12 weeks are exhausted explaining the date by which employee must return to work or employment will be terminated.
- Clearly written policy explaining what leave will be offered to employees who do not satisfy 1 year and 1,250 hours requirement (e.g., prorate 12 weeks).

Keys to Successful FMLA Termination Program

- Termination letter to employee upon exhaustion of 12 weeks should explain that employee is eligible to re-apply for employment.
- Except for reasonable accommodation, do not make any exceptions to policy because:

Keys to Successful FMLA Termination Program

- employee is exceptional or long-term;
- employee's reason for leave evokes sympathy;
- employee is high-ranking (key employee provisions may apply); and
- employee needs employer-provided health or other benefits.

What are the litigation risks?

- FMLA retaliation claim.
- ADA or ADA retaliation claim.
- Worker's compensation retaliation claim.
- Federal or state discrimination claims.

Leave Under the Americans with Disabilities Act and the Family and Medical Leave Act

Eric Dreiband, Esq.
esdreiband@jonesday.com

“Rigid” Leave Policies

- Employees are automatically penalized or discharged after being on leave for a certain period of time.
- Sometimes referred to as “no fault” leave policies.

“Rigid” Leave Policies

- Joe Smith, an employee of Big Box, is diagnosed with major depression and goes out on FMLA leave.
- Under Big Box’s leave policy, employees who are on leave for more than 12 weeks are automatically discharged.
- After Joe uses all 12 weeks of leave, he submits a doctor’s note to his supervisor indicating that he will be able to return to work in one month.
- May Big Box terminate Joe Smith for violating its no fault leave policy?

“Rigid” Leave Policies

- EEOC’s position is that employers must “modify” no fault leave policies to provide disabled employees with additional leave unless:
 1. Another accommodation would allow the employees to perform the essential functions of their position; or
 2. Granting additional leave would cause an undue hardship.

“Rigid” Leave Policies

- EEOC has sued a number of employers over their application of “no fault” leave policies.

“Rigid” Leave Policies

- *EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D. Ill Sept. 29, 2009)
 - EEOC alleged that Sears violated ADA by automatically discharging employees after one year of workers’ compensation leave.
 - \$6.9 million consent decree

“Rigid” Leave Policies

- *EEOC v. United Parcel Service, Inc.*, Civil Action No. 09-C-5291 (N.D. Ill)
 - EEOC alleges that UPS violated ADA by firing employees who exceeded a 12-month leave policy.
 - Pending

“Rigid” Leave Policies

- *EEOC v. Denny’s, Inc.*, Civil Action No. 1:06-cv-02527-AMD (D. Md.)
 - EEOC alleges that Denny’s violated the ADA by “limiting employee medical leaves . . . to no more than a maximum of 26 weeks”
 - Settled for \$1.3 Million and other relief

“Rigid” Leave Policies

- EEOC v. Verizon, Case 1:11-cv-01832-JKB (D. Md.)
 - EEOC alleged that Verizon maintained attendance plans that failed to accommodate certain individuals with disabilities
 - Settled for \$20 million and other relief

“Rigid” Leave Policies

- Courts do not necessarily agree with EEOC’s position.

“Rigid” Leave Policies

- In *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042 (6th Cir. 1998), the Sixth Circuit held that employer’s policy of automatically firing employees who were on leave for more than one year did not violate the ADA.
- The policy did not distinguish between disabled and non-disabled employees and there was no evidence that the policy was enforced inconsistently.

“Rigid” Leave Policies

- Employers should be aware of EEOC’s position and should usually engage in an “interactive process” with disabled employees who request a modification to a “no fault” leave policy
- Employee has a duty to request an accommodation
- EEOC contends that employers must engage in an interactive process when an employee requests and accommodation

Attendance Policies

- Must comply with both the FMLA and the ADA.
- “No fault” attendance policies are likely to receive scrutiny from EEOC.

Attendance Policies

- DOL regulations prohibit employers from counting FMLA leave time against employees under “no fault” attendance policy.
- Policies based on absenteeism rate must be examined closely to ensure that employees are not indirectly penalized for taking FMLA leave.

Attendance Policies

- Under Big Box's policy, an employee whose non-FMLA absenteeism rate exceeds 5% is subject to disciplinary action.
- The absenteeism rate is calculated by dividing the number of hours an employee is absent by the scheduled hours of the employee. FMLA leave is not counted towards the hours an employee is absent.
- Does Big Box's policy violate the FMLA?

Attendance Policies

- In *Dickinson v. St. Cloud Hospital*, 2008 WL 4659562 (D. Minn. 2008), the court found that a similar policy violated the FMLA.
- *Dickinson* court reasoned that FMLA leave reduced the scheduled hours of the employee (i.e., the denominator of the absenteeism rate), and therefore effectively reduced the number of days that the employee could be absent without incurring discipline.

Attendance Policies

- In *Keasey v. Federal Express Corp.*, 2003 U.S. Dist. LEXIS 27398 (W.D. Mich. 2003), the court found that a similar policy did not violate the FMLA.
- *Keasey* court reasoned that including FMLA leave in the rate would have resulted in an employee being credited with 100% attendance during period in which he did not work — a “windfall” to which he was not entitled.

Attendance Policies

- Seventh Circuit ruled that employer did not violate the FMLA when it terminated an employee who violated its no-fault attendance policy. See *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010).
- Under employer's no-fault attendance policy, employees who received more than eight "points" for absenteeism in a twelve-month period could be fired. Absenteeism points were removed from an employee's record twelve months after they were imposed, but FMLA leave did not count towards the twelve-month period.

Attendance Policies

- Employee argued that policy violated FMLA, which provides that FMLA leave “shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.” 29 U.S.C. § 2614(a)(2).
- Although court concluded that removal of absenteeism points was an “employment benefit” within the meaning of the FMLA, the court upheld dismissal of the employee’s FMLA claim because the “benefit” did not accrue until after leave commenced.

Attendance Policies

- Seventh Circuit also held that the 12-month period that is used to determine FMLA eligibility is not “tolled” when employees take FMLA leave.
- Employee is not eligible for FMLA leave unless she works 1,250 hours in the preceding 12 months, regardless of whether she was out on FMLA leave for part of that 12-month period.

Attendance Policies

- Courts disagree about whether attendance is an essential function of an employee's job.
 - “At the risk of stating the obvious, attendance is an essential function of any job.” *Rios-Jiminez v. Principi*, 520 F.3d 31, 42 (1st Cir. 2008)
 - “[D]aily attendance may be an essential function of a position, but it is not always an essential function.” *Webb v. Donley*, 347 Fed.Appx. 443, 445 (11th Cir. 2009).

Attendance Policies

- EEOC's position is that attendance is not an essential function.
- Modifying an attendance policy may, under some circumstances, be a reasonable accommodation.

Complying with ADA and FMLA Requirements

48

GANGEMI
LAW FIRM, P.C.

Salvatore G. Gangemi
Gangemi Law Firm, P.C.
82 Wall Street, Suite 300
New York, New York 10005
Tel: 212.425.0630
Fax: 212.425.0635
www.gangemilaw.com

FMLA Example #1

49

ABC Corp. has 30 employees. At some point, ABC enters into a contract with Temp Inc., to provide ABC with 25 temporary employees to work on a special project. At all times, the 25 temporary employees are on the payroll of Temp Inc. and not ABC Corp.

FMLA Example #1

50

1. Is ABC Corp. a covered employer ?

Answer: Yes. Even though ABC Corp. has less than 50 employees, because ABC Corp. exercises some control over all of the workers, then the temporary employees are counted as employees of ABC Corp., for purposes of the FMLA.

See 29 C.F.R. § 825.106.

FMLA Example #1

51

2. Must ABC Corp. provide FMLA leave to its employees on payroll ?

Answer: Yes, assuming the employee seeking leave is otherwise eligible.

FMLA Example #1

52

3. Are the temporary employees entitled to take FMLA leave?

Answer: Yes, assuming they are otherwise eligible. Under these circumstances, it is Temp Inc.'s responsibility to administer the FMLA with respect to these employees.

FMLA Example #2

53

Mary was an employee of XYZ Inc., who experienced respiratory problems because of her exposure to certain pollutants in the workplace. On the advice of her physician, Mary decides to request a leave of absence so that her condition might improve. At the time Mary requests the leave, she is three weeks away from her one year anniversary with XYZ. Mary decides to request the leave anyway, even though she knows that she hasn't satisfied the one year anniversary requirement. However, she asks that the leave begin after her one year anniversary. The day after she requests to take leave, XYZ fires her for poor performance. Thereafter, Mary sues XYZ for violating the FMLA.

FMLA Example #2

54

1. Since Mary was not an eligible employee at the time she made her request for leave, is she protected by the FMLA?

Answer: Yes. In determining whether or not an employee is eligible for FMLA leave, they must be employed for 12 months on the date the leave actually begins, not when it's requested.

See Meyer v. Imperial Trading Co., Inc., 153 F.Supp.2d 839 (E.D. La. 2001); 29 C.F.R. § 825.110(d).

FMLA Example #3

55

John and Frances are married. They both work for Acme Tools Inc. Frances gives birth to their child. John and Frances want to know how much leave they can take.

FMLA Example #3

56

1. How much FMLA leave can John and Frances each take?

Answer: Spouses, who are employed by the same employer have to share the 12 week entitlement for the birth of a child. However, Frances may be entitled to additional leave. For instance, Frances would be able to take 4 weeks of FMLA leave for her own “serious health condition”, i.e., recovering from giving birth in addition to whatever she and John decide with respect to their joint 12 week leave. So Frances might take 4 weeks and then 8 weeks to care for the birth of their child. John will still be able to take 8 more weeks during the year if he or the child or his spouse develops a serious health condition.

See 29 C.F.R. § 825.120(a)(3).

FMLA Example #4

57

In the last several months, Peter has missed quite a few days of work. Just recently, Peter did not come to work on Tuesday because he felt ill. On Wednesday morning, Peter was rushed to the hospital where he was diagnosed with the flu and dehydration. He was placed on intravenous fluids and sent home. On Friday, Peter went to the doctor for a follow up visit. On Monday, Peter returned to work and handed his employer a doctor's note together with a request to designate his absence as FMLA leave. The employer refused and, instead fired Peter for excessive absenteeism. Peter sued the employer under the FMLA.

FMLA Example #4

58

1. Should the leave for Peter's flu have been designated FMLA leave?

Answer: Yes. Even though the common flu is not a serious health condition, the complications caused by the flu (i.e., severe dehydration) results in the flu being treated as a serious health condition.

See Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001).

FMLA Example #4

59

2. Since Peter's attendance wasn't that great to begin with, wasn't the employer justified in terminating him?

Answer: No. The employer can't use the FMLA absence as the "straw that broke the camel's back." In other words, the decision to terminate Peter was illegal because it was based upon his having been absent for an FMLA qualifying reason.

FMLA Example #5

60

Jane recently became pregnant and informed her employer, who congratulated her. The employer understands that once Jane gives birth she will be entitled to take FMLA leave. However, since she informed her employer of her pregnancy, she has called in sick quite a bit. She hasn't been treated by a health care provider, but instead has just stayed home. The employer does not know what to do. Work is not getting done and Jane's co-workers are complaining.

FMLA Example #5

61

1. Can Jane's employer terminate her?

Answer: Absolutely not. Jane's time off from work must be designated as FMLA leave because her illness is probably attributable to her pregnancy. Regardless of whether she has been admitted to a hospital or received continuing treatment from a health care provider, conditions related to pregnancy are automatically considered serious health conditions.

See 29 C.F.R. § 825.114(e).

FMLA Example #6

62

John's son has a severe asthma attack, requiring that he take him to the emergency room. John's wife calls his employer to say he'll need time off to attend to their son.

1. Is this sufficient notice under the FMLA?

Answer: Yes. This is sufficient notice under the circumstances.

See 29 C.F.R. § 825.303

FMLA Example #7

63

Acme Co. has a “no fault” attendance policy, which charges points for an employee’s absenteeism during a 12-month period. Under the policy, if an employee accrues 8 points during a 12-month period, the employee may be terminated.

Joan took two absences in July 2006, which caused her to exceed the 8 point limit. The absences were for a serious health condition. In the 12 months preceding the July 2006 absence, Joan had taken a total of 56 days of FMLA leave. As a result of these prior 56 days of FMLA leave, she had not worked the 1,250 hours required under the FMLA in order to be eligible for leave. Had Joan not taken the 56 days of FMLA leave, she would have worked 1,250 hours. Joan claimed that the employer should have counted the hours she worked during the 56 days prior to the 12 months preceding her leave. She was terminated for excessive absenteeism.

FMLA Example #7

64

1. Because Joan was out for 56 days during the 12 months preceding her FMLA leave, must the employer consider or count the hours she worked during the 56 days prior to the 12 months period preceding her leave in order to satisfy the 1,250 hours requirement?

Answer: No. What Joan is essentially seeking is for her employer to extend the 12-month period to 12-months plus 56 days. The statutory language is clear on this point: In order to be eligible for leave under the FMLA, the employee must have worked a minimum of 1,250 hours in the preceding 12 months. There is no extension of the 12 month period, even to take into account lost hours attributable to taking FMLA leave.

See *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010)

FMLA Example #7

65

2. Assuming that Joan was eligible for FMLA leave at the time she was absent in July 2006, could the employer have charged her with points for those absences under the attendance policy?

Answer: No. An employer cannot factor FMLA leave time in considering violations of its no-fault attendance policy.

FMLA Example #8

66

James was employed for Container Co., Inc. Following his termination, he filed a grievance pursuant to the collective bargaining agreement between his employer and union. Ultimately, an arbitrator found that his termination was improper and awarded him 6 months back pay and reinstatement. Thereafter, James returned to work, but within the first week of his return, he requested FMLA leave to care for his ailing father. The employer claimed that James had not satisfied the 1,250 hour requirement. James argued that the employer should have considered the 6 month back pay award as hours worked for purposes of determining whether he met the 1,250 hour requirement.

FMLA Example #8

67

Was the employer required to consider the 6 month back pay award as hours worked for purposes of determining whether James worked 1,250 hours in the preceding 12 months?

Answer: Maybe. The courts are divided on this issue. The regulations state that employers must consider hours actually worked under the FLSA. 29 C.F.R § 825.110(c). Some courts hold that the 6 month back pay award does not count toward the 1,250 hours requirement. See, e.g., Plumley v. Southern Container, Inc., 303 F.2d 364 (1st Cir. 2002). Other courts have held that hours that an employee would have worked but for an unlawful prior termination should be counted in determining whether the 1,250 hour requirement has been met. See, e.g., Ricco v. Potter, 377F.2d 599 (6th Cir. 2004); Savage v. Chicago Transit Authority, 2007 WL 809600, N.D. Ill. 2007).