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The Law of Leave: How the Federal Framework Affects Daily Employment Decisions in Public Schools

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FMLA

- Purpose of the FMLA
- Requirements for Eligibility
 - o Employed for 12 months
 - o Worked minimum 1,250 hours in those 12 months
 - o Covered employees
 - All public agencies, public and private elementary and secondary
 - Private sector employers with at least 50 employees within 75 miles of worksite



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FMLA

- Counting the 1,250 hours
 - o Compensable hours under FLSA
 - o Presumption for full-time teachers
 - o Presumption can be overcome but all hours worked must be counted, including hours worked at home

Reasons for FMLA Leave

- Parenting leave
 - o 12 weeks per year for birth, adoption, foster care of a child
 - o Available for both mothers and fathers
- Serious Health Condition
 - o 12 weeks for employees own condition or to care for family member

Reasons for FMLA- Military

- Qualifying Exigency Leave
 - o Up to 12 weeks for immediate family member's covered active duty
 - o Various obligations that may arise while covering for person on leave
- Servicemember Family Leave
 - o Up to 26 workweeks of leave to care for a covered servicemember



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Serious Health Condition

Any illness, injury, impairment, or physical or mental condition that involves

- Inpatient care
 - Any period of incapacity or subsequent treatment in connection with inpatient care
- Continuing Treatment- incapacity or treatment
 - More than 3 consecutive days
 - Related to pregnancy or prenatal care
 - Continued over extended period of time
 - Permanent or long term due to condition for which treatment may not be effective
 - Any absences to receive multiple treatments for restorative surgery or a condition that will likely result in longer incapacity



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Twelve-Month Period

- Employers may choose their 12-month period based on
 - o The calendar year
 - o Any fixed 12-month “leave year”
 - Anniversary date
 - o 12- month period measured forward from the date any employee’s first FMLA leave beings
 - o A “rolling” 12- month period



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Employee Notification

- Must comply with employer’s “usual and customary requirements” for leave requests
 - o 30 days when applicable
 - o ASAP
- Submit request for leave
- May take FMLA leave on intermittent or reduced schedule basis
- Employer may waive notice requirements
 - o May take action against employee if notice requirements not waived



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Employer Requirements

- Post notice explaining employee rights
- Adopt policy and include FMLA info in employee handbooks
- After FMLA request, employer must provide notice regarding eligibility and corresponding rights and responsibilities
- Notify employee whether leave is designated as FMLA- amount deducted from FMLA leave entitlement
- Maintain records for min. 3 years



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Records

Maintained for minimum of 3 years

Available for inspection, copying, and transcription of Dept. of Labor

Must include

- Dates of leave
- FMLA hours taken
- Requests and responses
- Employer Policy
- Premium payments
- Records of any leave related disputes



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Medical Information

- Employers may request “proof” of need for FMLA
 - o May require subsequent opinions
 - o May request certification at a later date if appropriateness of continued leave is questioned
- Policy may require employee to provide periodic updates on plan to return to work
 - o Cannot be discriminatory and account for individual leave situation



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Determining Amount of Leave

- “Week” of FMLA leave is based on employee’s actual workweek
- Leave may be taken in
 - o Whole weeks
 - o Single days
 - o Hours
 - o Less than an hour
- FMLA leave must be allowed to be used in smallest increments use for any other type of leave



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Calculating Use of Leave

- Only the amount of leave actually taken can be used against FMLA leave entitlement
- Holidays excluded
- School Breaks excluded
- Required overtime hours included
- Light- Duty assignments excluded



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Insurance Benefits

- Employer must maintain coverage under group health plan
- Employees must pay their share of premium
- Coverage is dropped if payment is more than thirty days late



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Paid Leave for Unpaid Leave

- Employees may elect to substitute paid leave (vacation, paid sick leave) for unpaid FMLA
- Employer may require employees to substitute paid leave, provided this is not in conflict with bargaining agreement or bargaining law
- Substitution may be a mandatory subject of bargaining in states where there is a collective bargaining law

Fitness for Duty / Reinstatement

- Employer must return employees to their
 - o Original position
 - o Equivalent position
 - o Position with equivalent benefits
- Certification clearing employee for work may be part of policy
 - o Only if stated before employee took leave
- May fire employee after statutory leave period if they are unable to return to work duties

Special Rules for School Employees

- Special rules apply to “instructional” employees
- Summer breaks do not count as FMLA leave time, unless employee is normally required to work
- Special rules for use of intermittent leave are linked to end of “term”

Coverage of the ADA

- ADA applies to employees who
 - o Have an actual disability
 - o Have a record of disability
 - o Are regarded as disabled
 - o Are associated with a person who is disabled

Actual Disability

Physical or mental impairment

Substantially Limits

One or more major life activities



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Mental Impairments

- Employers need to be aware of and be able to identify signs of mental impairment
- Where impairment is obvious, employers should not wait for employee to request accommodation
- Consultation with mental health professionals is recommended



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Interactive Process

Discussion should include

- Nature and severity of employee's mental or physical impairment
- Essential functions of the job performed by the employee
- Available accommodations that will allow employee to perform functions of the job
- Whether possible accommodations are reasonable

Reasonable Accommodations

Modifications or adjustments to

- Job application process to enable a qualified applicant with a disability to be considered for a position
- Work environment or manner job duties are performed to enable individual to perform essential functions
- Allow employee to enjoy benefits and privileges of employment

Leave of Absence Considerations

Employers must provide same access to leave for disabled and nondisabled employees

Must consider unpaid leave as a reasonable accommodation

Know length of leave

COMMUNICATION

Additional accommodation upon returning

Indefinite leave does not need to be accommodated

Right to return to original position

Consider “undue hardship” when granting leave



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Interaction- ADA & FMLA

- An employer that asks for information specified in the FMLA certification form does not violate the ADA because the inquiry is deemed to be job-related and consistent with business necessity
- FMLA limit of 12 weeks of leave does not affect an employee's right to seek additional unpaid leave under the ADA
- Under the ADA, employees may be entitled to take intermittent leave, but the employer may deny such leave if the leave would create an undue hardship. Under the FMLA, employees are entitled to take intermittent leave when they otherwise meet the requirements of the regulations and there is no undue hardship exception available to employers



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Interaction- ADA & FMLA

- When employees request time off for reasons related to a disability or possible disability, employers should treat those requests as both requests for accommodation under the ADA and for leave under the FMLA.
- When both the ADA and the FMLA apply to a leave of absence, the employer must follow the statutory provision which gives the employee the greater benefit
- Employers may offer employees an alternative to a leave of absence, but, if the employee is eligible for FMLA leave, the employee cannot be compelled to accept that alternative



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USERRA

- Coverage
 - o Employees who have been absent from a position of employment because of “service in the uniformed services”
 - Active Duty
 - Inactive Duty
 - Full-Time National Guard Duty
 - Physical Fitness tests
 - Funeral honors duty
 - NDMS active for public health emergency
 - Service members who leave civilian jobs for military obligation



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Basic Provisions

- Treated as if on leave of absence
- Entitled to participate in any rights and benefits
- Entitled to any new benefits that became effective during their service
- Must be permitted, but not mandated, to use vacation time
- Health Benefits must be continuous during service leave, but employee can make election



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Employee Requirements

- Must notify employers of service obligations as soon as reasonable to do so
- 5 years max length of absence from work due to service
- May forfeit certain rights provided a written notice of intent not to return to work after service has been given
- Reemployment rights not waived



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Exemptions and Disqualifications

Exemptions

- Pre-service position is a nonrecurrent one
- Change in circumstance or reduction in force for employer

Disqualification

- Dishonorable or bad conduct discharge
- Separation from the service under other than honorable conditions
- Court Martial/ dismissal by order of the President during war time
- AWOL for more than 3 months or incarceration

Timeframe for Returning to Work

- For service up to 30 days – first regularly scheduled work period following completion of service
- For service of 31 to 180 days – within 14 days of completion of service
- For service of more 181 days or more – within 90 days of completion of service

Reinstatement

- Basic rule is the “escalator” principle – treat employees as though they had remained on the job
- For service up to 90 days – normally reinstated to previous position
- For service of 91 days or more – reinstated to previous position or position of like seniority, status and pay

Disabilities During Service

- Employers must make reasonable efforts to accommodate the employee's disability so that the employee can perform the position he or she would have held he or she had remained continuously employed
- If, despite reasonable accommodation efforts, the employee is not qualified for the position due to disability, the employee must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer
- If the employee cannot become qualified for these positions, the employee must be employed in a position that, consistent with the circumstances of the employee's case, most nearly approximates the position in terms of seniority, status, and pay.

Workers Comp and the ADA

- Not every employee who suffers a work-related injury is considered to be disabled under the ADA
- Not every employee who suffers a work-related injury is considered to have a “record of disability” under the ADA
- Employers may not insist that an employee who suffers a work-related injury only return to work when the employee can return to “full duty”

Workers Comp and the ADA

- Employers may not refuse to return to an employee who suffers a work-related injury simply because the employer assumes that the employee poses some increased risk of re-injury
- Employers may not refuse to return to work an employee who suffers a work-related injury simply because the employee has been determined, under the workers compensation statute, to have a “permanent disability” or to be “totally disabled”

Workers Comp and the ADA

- Under the ADA, it is the employer, and not a rehabilitation counselor, physician, or other specialist, who decides whether an employee who suffers a work-related injury is ready to return to work
- The ADA does not require an employer to provide a reasonable accommodation to an employee who suffers a work-related injury but who is not disabled
- An employer may not discharge an employee who suffers a work-related injury but who is temporarily unable to return to work



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Workers Comp and the ADA

- The duty of reasonable accommodation requires employers to reallocate marginal job duties as an accommodation for employee who suffers a work-related injury but who is unable to perform those duties
- The duty of reasonable accommodation requires employers to reassign employees who suffer a work-related injury and who are unable to perform the duties of their former position, provided there is a vacancy in a position for which the employee is qualified



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Workers Comp and the ADA

- Employers are not required to create a position for employees who suffer a work-related injury and who are unable to perform the duties of their former position
- If an employee who suffers a work-related injury requests a leave of absence, the employer may instead provide an accommodation which requires the employee to remain on the job

Workers Comp and the ADA

- Under the ADA, employers are permitted, but not required, to create a light duty position for an employee who suffers a work-related injury but who is temporarily unable to perform his or her normal duties. But, if an employer creates light duty positions for employees who suffer a work-related injury, the employer may not refuse to place disabled employees who have not suffered a work-related injury in those positions.
- If an employer only has temporary light-duty positions, it is not obligated to place an employee who suffers a work-related injury in such a position on a permanent basis

Tips and Suggestions

- Keep Job Descriptions up to date
- Be in regular contact with medical professionals regarding leave
- Know what medical inquiries you are permitted and prohibited from making
- Independent medical exams vs functional capacity evaluations
- Workers compensation insurance providers

Tips and Suggestions

- Understand Long-Term Disability insurance benefits and have a working relationship with provider
- Create a plan for employee returning to work
- Create a library of resources
- Review EEOC forms
- Learn the EEOC's instructions for investigations

Questions