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## **Ordered Absence: A Guide to Employee Medical Leave Laws**

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Companies clear unexpected hurdles every day to keep their workplaces humming with productivity, but employee leaves can be truly disruptive. It's easy to make mistakes when companies are scrambling to cover absences. But employers must know how to handle every kind of leave with calm—and legal certainty.

Leaves necessitated by employees' personal medical conditions can be particularly hard to handle. It's tough to balance day-to-day business needs with the personal, often emotionally-charged needs of employees who need time off due to illness. But the responsibility to strike that balance, while following the law, falls squarely on HR.

HR must manage every leave, ensure that employees don't feel mistreated at a vulnerable time—and make sure the company follows all applicable laws to the letter. By doing so, they can shield their companies from costly suits and keep everyone focused on business.

Devora Lindeman, Senior Counsel with Greenwald Doherty LLP, visited TemPositions' HR Roundtable Series on October 28, 2010 to offer her guidance on handling employee leaves in these types of situations. Employers, she explained, have two basic expectations from workers: that they'll come to work, and that they'll do their jobs. But when a worker simply can't work due to a medical condition, employee leave laws provide important guidance to HR.

Lindeman acknowledged that navigating all the laws that may apply to a leave can be confusing. There are federal, state and local city laws that must be followed. Often, multiple laws intersect or work in tandem. But compliance is ultimately beneficial, because it brings order to absences. The employer and the worker can both know HR is safeguarding their rights. And the company can make a clear plan for doing right by its employee—and then getting them back to work.

The first step? To determine which laws will govern a given leave. “You have to figure out what you're dealing with,” she explained, “and then determine what laws and rules are going to apply.”

### **Key Questions and Critical Answers**

If a worker has a physical problem, it falls into one of three categories: work-related injury/illness, non-work-related injury/illness, or pregnancy. As soon as HR knows what category of injury/illness a worker is suffering, they must answer the following questions as quickly as possible:

1. How long does the company need to let the employee be out?
2. Will the employee be paid while they are on leave?
3. How long does the company have to hold the employee's job, or a comparable position? (Note that this may not be as long as the employee is permitted to be out.)
4. Is the company required to continue the worker's health insurance benefits during the leave?

Doctors' input will be essential. But the answers to these questions are actually determined by:

- Insurance benefit laws like Workers' Compensation and Short-term Disability
- Leave laws like the Family and Medical Leave Act (FMLA)
- Disability discrimination laws like the Americans with Disabilities Act (ADA)
- Company policies
- Employer past practices

Lindeman instructed attendees to require thorough documentation from workers' physicians. (Never accept second-hand reports from the employee.) These notes must specify the injury or illness and provide an expected return-to-work date—or a reasonable timeframe for determining one. This documentation provides the first piece of guidance in determining which laws will govern the leave.

Some laws that provide a benefit to injured/ill workers don't require the employer to grant a leave. Others guarantee the worker time off, but don't require the company to keep paying them or provide health insurance. Benefits offered by some laws expire, and then other laws take over in governing the leave.

Lindeman conceded again that wading through the many applicable laws can be daunting. But HR can master all requirements but looking at the many laws individually—and breaking down what they do and do not address.

## **Insurance Benefit Laws**

Workers' Compensation and Short-term Disability are both insurance benefit laws. They provide workers with some salary and benefit security when they get ill/injured. Notably, they don't permit workers to be absent. If a worker's condition (and sometimes, other factors) do not make the employee eligible for a leave under other laws, the company may be within its rights to deny the employee leave.

All workers are eligible for Workers' Compensation insurance coverage. As Lindeman put it, they become eligible for benefits as soon as they suffer a work-related illness or injury. Under this law, employees are provided with some percentage of their pay (usually about 60%) as well as payment for all medical bills directly related to the work-related illness or injury.

It's critical, Lindeman said, that Workers' Compensation ailments actually be job-related. Catching the flu from a co-worker doesn't qualify, but an illness brought on by workplace fumes would. A classic example of an eligible complaint would be an injury caused by workplace machinery.

Attendees had many questions about work-related injuries. What if a worker complains of carpal tunnel syndrome, but you know they play guitar in their spare time? Lindeman counseled attendees to press doctors to make the determination. It's always possible that leisure activities contributed to a condition, but the company can only act based on expert medical diagnoses.

Notably, employers do not have to hold a position for a worker under Workers' Compensation insurance law. If a worker injured themselves in an act of misconduct, for example, Workers' Compensation does not protect them from termination. Other laws may safeguard the worker's job—but Workers' Compensation doesn't.

You cannot, however, fire a worker simply because they exercised their right to Workers' Compensation benefits. New York State prohibits such retaliation—and retaliation claims are not addressed within the Workers' Compensation system, but by the New York Supreme Court. A retaliation claim is therefore what Lindeman called “a true lawsuit against your company.”

Short-term Disability insurance operates differently than Workers' Compensation. It's required by only five US states: New York, New Jersey, Rhode Island, California and Hawaii.

Short-term Disability covers workers who are certified, by a doctor, as completely unable to work. The insurance provides salary continuation, but not coverage of medical costs. The company is only required to keep providing health insurance if a separate law requires it.

Short-term Disability laws also do not provide permission for the employee to be absent—though again, such “permission” may be found in other laws. And like Workers' Compensation, Short-term Disability does not prohibit companies from terminating workers on disability leaves.

Many attendees expressed astonishment that an employer would fire a worker who took time off for a work-related condition. But as Lindeman reminded them, companies must reserve the right to sever ties. Workers can't decide for themselves when they're eligible to be absent from work or how much time off they deserve. Absences have to be managed, even when illness is a factor.

“If they're out, they need your permission to be out,” she explained. “Otherwise, you can't discipline workers who are out too much.”

## **Company Policy**

Most companies provide sick days. And in some cases, these may be all that an injured/ill worker needs. Most employees only think of using their sick days for non-work-related ailments like colds and flu. But workers can be asked to use their sick days for work-related conditions.

Under Workers' Compensation, there is a one-week waiting period before benefits begin to flow, and employees may be required to use sick days. If a worker returns to work within 8-14 days, they may not receive workers' compensation benefits for the first week of absence (in such cases, those days can be covered by sick days). If the problem persists beyond 14 days, the employee may retroactively receive benefits for both weeks.

Short-term Disability operates similarly. At the beginning of a leave, there may be some days that are not covered. The law assumes workers will cover these absences with sick days.

It may seem insensitive to ask workers to use up their sick days for work-related conditions, but companies can't ignore the needs of their business. If a worker takes an extended leave and then returns with even more sick days "in the bank," it may prove very harmful for the company. Lindeman counseled attendees to be kind, but pragmatic. Require workers to use up paid sick time whenever legally permissible.

Companies that want to demonstrate greater caring can supplement employees' income during uncovered periods like the one-week waiting period under Workers' Compensation. There's no law requiring employers to provide wage continuity, but many companies add this benefit to their employee handbooks as an act of goodwill.

Lindeman encouraged all attendees to spend time with their handbooks and use them to protect the company as much as possible. Employee leave laws may overrule what the company publishes—but sometimes, they won't. Companies should specify the number of permitted sick days, how long they permit workers to be on leave, how long they'll hold a position and what will happen to health insurance benefits.

Be sure that the company's medical leave policy requires workers to communicate. They must provide a return-to-work date, and they must confirm their return a specific number of days in advance. They should also communicate if they can't return and offer a timeframe for providing a new date. These requirements enable HR to plan the employee's return as carefully as they did their absence—and they make it clear, at all times, that the employer is in charge.

HR has the right to require documentation for all unscheduled absences, not just medical leaves. Include instructions on how personal days, emergencies and other absence-causing events must be reported to the company.

Finally, be comfortable with the amount of time off you allow in the handbook, Lindeman said. Assume that employees will take all the time they're permitted. By law, you can't punish a worker whose absences fall within company policy...even if those absences cause hardship.

## **Leave Laws**

Companies look to FMLA (or related state laws like the New Jersey Family Leave Act) when workers' leaves for medical problems extend beyond what company policy permits or governs. If a company doesn't have its own leave policy, it's likely FMLA will provide them with the framework they need to manage a worker's time away.

FMLA is a federal law. It requires larger companies to grant leaves to workers who, for example, have serious illnesses, who need to care for sick family members, or who have recently become caregivers to new children. The law permits up to 12 weeks of leave in these situations.

FMLA leaves are unpaid, but many workers will receive salary continuation through Short-term Disability. The company is required to hold the worker's job and continue their health insurance benefits for the full 12 weeks. (Health insurance benefits can change, but only if they're changing for other employees—for example, if the company switches to a different provider.)

Smaller businesses are not covered by FMLA. The business must employ 50 or more workers for each working day during 20 or more calendar weeks. The business is covered if it meets this criteria in the current calendar year or the preceding one.

Employees are covered by FMLA once they've been employed for 12 months and worked 1,250 hours (as calculated on the day the leave will start) and once they've worked within 75 miles of 50 other employees (as calculated on the day the leave is requested).

Because FMLA leaves must only be granted when a worker (or immediate family member) has a "serious health condition," it's once again critical for employers to get doctors' input, directly, in the form of written letters. While workers may exaggerate a minor condition in hopes of getting a leave, doctors are more likely to provide accurate assessments to employers.

Serious health conditions are not the same as disabilities (see "Disability Discrimination Laws," below). The law states that an individual has a serious health condition if they are receiving in-patient care at a health care facility (i.e., they're in the hospital) or they are under the "continuing treatment" of a health care provider.

What constitutes continuing treatment can be complicated, but Lindeman offered several examples. Workers are covered if they're incapacitated for three or more days and have received medical treatments (a debilitating case of flu could qualify). FMLA recognizes chronic conditions like epilepsy, asthma and diabetes, which can cause sporadic absences. A cancer patient undergoing chemotherapy or a worker who needs to undergo regular dialysis would fall under FMLA. Pregnancies are automatically covered.

Workers who have permanent long-term conditions (e.g., Alzheimer's, terminal cancer, stroke) are also covered by FMLA, Lindeman noted. But because these conditions typically emerge in older people, fewer employers end up granting leaves for these ailments.

Many attendees had questions about determining whether workers' illnesses qualified them for FMLA leave. If a worker claims to be incapacitated but is then spotted at a social event, should the company require them to return to work, or threaten disciplinary action?

Lindeman explained that companies must conduct a simple cost-benefit analysis whenever they feel tempted to challenge an employee's story. What is the likelihood the worker's claims—and their doctor's notes—have some merit? How likely is it the worker will get upset and sue? Often,

it's less costly to grant a leave than to hire an attorney to fight it. That said, she noted, companies should always feel free to require a second medical opinion whenever they have doubts.

Keep your ears open as soon as a worker starts sharing information about an illness, Lindeman counseled, because it's not up to the employee to request FMLA leave. By law, the company must recognize that the employee qualifies for the benefit. Workers must provide their employer with enough information to know that FMLA is relevant. But if an employee is absent on self-proclaimed FMLA leave, the employer has the right to discipline them, up to termination, if HR hasn't received proper documentation.

Lindeman shared the results of a recent case in Minnesota. A worker told his employer he needed a few days off because he felt severely fatigued. He used his sick days, and he did provide doctors' notes that recommended more time off. He initially followed company policy by calling in to his supervisor regularly. But eventually, he stopped calling. The company fired him, and the worker sued. He claimed he had been denied federally-protected FMLA leave.

The court decided against him, for two reasons. He did not provide his employer with enough information to make them aware he needed FMLA leave (nothing in his doctor's notes detailed a serious condition), and he had violated company policy by failing to communicate with his supervisor as required.

On the other hand, Lindeman went on, companies can't expect workers to jump through hoops to communicate. In another case, a worker suffered epileptic seizures that caused her to be absent from work. Her mother called her supervisor, but was not aware that the company also required calls to a third-party administrator. The court ruled that the mother's phone calls constituted adequate notice of the worker's condition, even though company policy required additional calls.

To avoid such scenarios, Lindeman recommended that attendees create a clear, simple procedure for processing medical leaves, and stick to it. By adhering to one policy, companies safeguard their ability to fire workers for unexcused absences—and they protect themselves from lawsuits.

Some attendees were surprised to learn that employers can demand answers about absences, even when the answers include sensitive health information. But they can, and must, in order to fulfill their obligations under FMLA. Obtain a doctor's note that clearly describes a serious condition (either for the worker or family member), Lindeman instructed. Promptly provide FMLA paperwork, encourage employees to return it, and keep track of the employee's time off.

One attendee asked if a worker could choose to use paid sick days before going on unpaid FMLA leave in order to maximize time off. Lindeman responded that as soon as the company becomes aware that a worker is covered by FMLA, they are obliged to put them on FMLA leave. The company may choose to let the worker use sick days to get paid while they are out, but the 12 weeks of FMLA start being consumed from the first day of the leave.

It's easiest to manage leaves as large blocks of time. But the law allows employees to take their 12 weeks all at once, in sporadic smaller blocks, in hours, or on a shortened schedule (a firm schedule requiring fewer hours of work than normal).

Sporadic time off is called “intermittent leave,” and it’s the most likely to be abused. The key, Lindeman said, is to manage intermittent leave closely. Be flexible if a worker is in distress, but make sure the company obtains the proper medical documentation. Intermittent leave must be certified as medically necessary by a doctor (the worker cannot choose it on their own), and the leave should only be granted precisely as directed by the physician.

To guard against abuse, insist on specificity and never accept a vague request for “flex time.” If a worker suffers migraines, for example, their doctor’s note should state how many times per month the doctor expects the patient to need time off, and how much time should be granted. If a condition is expected to flare in the mornings, the note could say so. If ongoing doctor’s visits are required, request that the doctor provide expected frequency and timeframes.

It’s perfectly appropriate to require the employee to schedule intermittent leave in ways that minimize disruption. HR can require a worker to schedule doctors’ visits and/or medical treatments in the early morning or late afternoon to maximize productivity during the workday.

If a worker is on intermittent leave, it’s likely the law will not see them as disabled under the definition required by Short-term Disability. They will therefore not receive salary continuation under that law, and they will have to make do with what they can earn on a shortened or intermittent schedule (unless, once again, company policy fills the gap).

FMLA is unpaid leave, so wage and hour law permits companies to compensate hourly workers only for the hours they actually work. Companies can even deduct time from salaried workers taking sporadic FMLA leave, calculating it hourly. As long as the deduction is connected to FMLA, this will not affect salaried workers’ exempt status.

Intermittent leave can make it challenging for companies to track FMLA time, Lindeman warned, but it’s critical that HR keep accurate records. Again, never assume a leave will be short. And unless HR has an unambiguous record of how much time an employee has been out, they can’t calculate how much more they’re really due.

And you do have to give employees all of their FMLA time, Lindeman noted. In one recent case, a worker sued because she felt pressured to return from her FMLA leave. The court found her employer had interfered with the leave, and she won.

Of course, not every company and employee is covered by FMLA. And some medically-necessary leaves will last longer than 12 weeks. In these cases, employers can look to disability discrimination laws for guidance.

### **Disability Discrimination Laws**

ADA is a federal law. It protects workers with disabilities from workplace discrimination. ADA defines disability as “a physical or mental impairment that substantially limits a major life activity.” Workers who have limitations but are qualified and still capable of working—such as the blind or wheelchair-bound—became a protected category.

Under ADA, employers can't use a worker's disability as a factor in making employment decisions, any more than they can use a worker's age, sex, national origin, etc. In this way, ADA reflects the protections in the Civil Rights Act. But it's unique in that it requires employers to engage with disabled workers as part of their protection.

Under ADA, employers must provide "reasonable accommodation" to otherwise qualified employees with disabilities. Someone in a wheelchair, for example, could ask for (and expect to receive) an office space that is particularly easy to access. Employers have an obligation to mitigate the limitations of the disabled whenever possible, and granting leaves can be a solution.

If a worker uses up all their FMLA leave but still needs time off, it's possible that ADA will allow them to continue to be absent as a reasonable accommodation. The terms of the leave will simply be different than they were under FMLA.

Unlike FMLA, ADA does not require companies to continue providing health insurance benefits. It's permissible to discontinue coverage and invite workers to enroll under the Consolidated Omnibus Budget Reconciliation Act (COBRA), the law that allows employees to keep their coverage by paying their own premiums. For shorter leaves, Lindeman noted, this may not be practical. But for longer leaves, it is allowed under ADA.

Almost all New York companies are covered by ADA or state/city equivalents. While the federal law covers companies with 15 or more workers, the New York State Human Rights Law (HYSHRL) and New York City Human Rights Law (NYCHRL) cover employers with as few as four employees. When it comes to what's covered as a disability, the laws become increasingly more liberal as they become more local. So it's likely that workers eligible for FMLA leave will be eligible for time off as a reasonable accommodation.

To determine eligibility, Lindeman explained, employers have to engage in what's called the "Interactive Process." The company must communicate with immediate supervisors, the worker and their doctor(s) to discover whether leave is a reasonable accommodation, but also to determine whether it would pose an "undue hardship" for the company.

Again, companies must press doctors to be specific. (The doctor must state that leave is required, not the worker.) How much leave does the employee need? When will they return? What limitations will they have, if any? If an employee needs to be out for an extended period, can't provide a firm return-to-work date and can't guarantee that they'll perform functions adequately when they get back, the leave may present an undue hardship. In that case, the company may not be required to permit leave.

This, Lindeman warned, is the moment that many employers get sued. Workers sometimes believe that as long as they're unwell, the company must give them whatever they need to keep their job. This isn't always true.

And while many employees are permitted to take leaves under ADA, Lindeman stressed, the law expects all leaves to be finite. Companies are obligated to provide leave when the worker will

use the time to get treatment, heal and come back to work—but indefinite leaves are not considered a reasonable accommodation. So while employers can't terminate workers because of their disability, they can terminate them if their leaves have no end in sight.

To spot an indefinite leave in the making, carefully review all medical documentation. Doctor's notes that cite return-to-work dates as "undetermined," or notes that merely recommend "reevaluation in a few weeks," should raise red flags.

Employees enjoy 100% job security on FMLA leaves for their 12 weeks. But on ADA leaves, workers must specify when they're coming back to work, and that date must make sense for the business. The law permits companies to decide how much time off is reasonable vs. how much creates undue hardship. If an employee's request for leave starts to feel tense or uncomfortable, caution is wise. Consult an employment attorney.

### **Employer Past Practices**

Inevitably, some employee leaves will fall into grey areas. What if a worker has used up their FMLA leave, but it's unclear whether extended leave would be a reasonable accommodation under ADA? What if they haven't been with the company long enough to be covered by FMLA? And what if the company has no clear leave policy of its own? If a worker brings in a note saying they need to be out for a finite period (e.g., a couple of weeks), what should the company do?

In these cases, what the company has done in the past becomes very important. If you've given one employee a leave that was unassociated with leave laws, you may face charges of discrimination if you fail to grant a leave to someone else in similar circumstances.

Employers can craft different policies for distinct classes of employees, Lindeman noted. Leave practices can vary based on how long a worker has been with the company, their job level or their category. But companies must treat like workers with like rules and processes. Even the perception of discrimination—unfounded though it may be—can lead to a lawsuit.

The most defensible practices are ones that make sense. HR should look closely at each type of position. How hard is it for the company to cover an employee's workload? How long can others be asked to shoulder the burden before it becomes a significant problem? Could a temporary employee handle any tasks, and how long could the company afford to pay for one?

Absent the firm guidance of a leave law, some companies are uncomfortable granting leaves—particularly longer ones. And with the freedom to terminate workers, leadership may be tempted to just cut ties. It's up to HR to evaluate each situation calmly and decide what is best for the company. If it will take five months to hire and train a new worker, Lindeman noted, granting a four-month leave to a current worker makes better business sense.

Never, under any form of leave, permit an employee to come in off the record. Allowing employees on disability leave to work from home can be similarly problematic—especially if these hours are not monitored and compensated.

Supervisors may like it when an employee on leave offers to “pitch in,” and many workers may be willing to do it. But HR must guard against future risk. If the employee later becomes disgruntled, they could sue for being denied a true leave, or for not being properly paid.

## **Light Duty**

Some workers who need leave can return to the workplace relatively quickly, but can't resume their previous duties for some time. The law refers to this as “light duty,” and it can be complicated to handle. But as Lindeman noted, companies are not required to take employees back on light duty if it's not practical for their business.

Workers' Compensation doctors will often report that workers can return on light duty. The Workers' Compensation benefit stops being paid as soon as this happens, so the system has a vested interest in promoting light duty as a solution.

But if a worker is on FMLA leave, they don't have to return to work—even if their doctor recommends light duty. Workers' Compensation will stop paying their benefits. But HR can't pressure or force the employee to return on light duty before their FMLA leave is exhausted. (A worker can only be required to return once their doctor says they're ready for full duty.)

Permitting an employee to return when they are on FMLA leave complicates the law's requirement to hold their job. After all, if they're returning on light duty, they're not coming back to the same (or an equal) position. If such a worker comes back on light duty, their right to return to their original (or similar) position is extended to the end of their FMLA year.

Under ADA, offering a worker light duty can be considered a reasonable accommodation. But again, indefinite light duty is not something the company is legally obligated to bear. Companies are allowed to reevaluate their staffing needs as business realities change. Even if a company initially agrees to the arrangement, they can later decide it presents an undue hardship.

If light duty no longer works for the company and the employee cannot return to full duty, it may be permissible to terminate a worker. But once again, this can be treacherous legal territory, as workers who feel unjustly terminated may well sue. Lindeman recommended speaking with an employment attorney if such a termination starts to look necessary.

## **Pregnancy**

Compared to other medical leaves, leaves for pregnancy are straightforward and rarely controversial. As Lindeman explained it, pregnancy leaves are actually two types of leave taken in quick succession: medical leave and family leave.

A pregnant woman takes medical leave when she is physically unable to work. This is typically a few weeks immediately before and after childbirth. Doctors certify women as disabled for this period, and in New York, they receive Short-term Disability benefits.

Immediately after the medical leave, many women go on family leave. During this period, they're physically capable to work again (as confirmed by a doctor), but they want to take additional time off to care for their infant and bond. They're no longer considered disabled or suffering from a serious medical condition. But caring for a new child is covered by FMLA, so new mothers can take up to 12 weeks of unpaid time off as a combined medical/family leave.

While the law seems to have this well-covered, it's important for companies to have their own policies. Many employers don't want their valued workers to go unpaid for the length of an FMLA leave, and sometimes parents want more than 12 weeks to care for a new child.

Lindeman recommended drafting policies for "Primary Care Provider Leaves" (it's now a bit archaic to call them "maternity leaves") that cover natural-born and adopted children. These policies should also afford time off for men, who may be primary caregivers in heterosexual or homosexual households.

These policies can dictate whether or not employees are paid for this time off, whether their jobs are held and whether benefits continue. While FMLA guarantees continuing benefits and job retention for 12 weeks, the company's policy can kick in when those 12 weeks expire.

Company policies will also apply to workers who are ineligible for FMLA leave, or may be appropriate for companies not covered by FMLA. Companies may choose to be more generous than the law requires—but they don't have to be. Just remember, Lindeman warned, that pregnancy is a protected category. You can't fire a worker for getting pregnant, even if she just joined the company.

It's possible that a pregnant woman may be eligible for leave as a reasonable accommodation under the ADA. Some judges have ruled that this is required. So when in doubt, HR should consider pregnancy as a disability and use those laws as a guide.

### **Ordered Absence**

Every business, Lindeman said in closing, has to juggle obligations to its workforce and its bottom line. Employee leaves have the power to wreak havoc—but they don't have to. The key is for HR to step in, take the lead and look at every individual case with care. An employee who is treated lawfully and reasonably won't sue, and a well-planned absence won't kill productivity.

Leave law may seem overwhelming. But its many details protect the company as well as the worker. Once HR understands how the laws work, leaves become just another part of the company's game plan. Because the goal, no matter what an employee is suffering from, is to keep the company healthy—and to get good employees back to work.

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