Inside Counsel

Inside: What are reasonable accomodations for unpaid leave under the FMLA?

Is the FMLA a floor or ceiling for the amount of unpaid leave allowed to an employee?

By James A. Matthews, III

The Family and Medical Leave Act (FMLA) requires employers with 50 or more employees to permit those who meet statutory eligibility requirements to take up to 12 weeks of unpaid medical leave in a 12 month period. At the same time, many employers provide, as a matter of policy, a specified length for unpaid leaves of absence. But what of the employee who has exhausted (or is not yet eligible for) such leave? Does an employer have a legal obligation to grant a request for unpaid leave to an employee who is not eligible for FMLA leave or after it has been exhausted? Where its policies provide for leave in excess of FMLA, may an employer place a limit on the length and terminate an employee who remains unable to work after?

The unfortunate answer is “maybe.” Under the Americans with Disabilities Act (ADA), an employer violates the statute by, among other things:

not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . .

In both its regulations and enforcement guidance, the Equal Employment Opportunity Commission (EEOC) has made clear its view that an unpaid leave of absence can be a required reasonable accommodation and, for the most part, the court has agreed.

While a full discussion of reasonable accommodation under the ADA is beyond the scope of this article, an important first step is understanding the important distinctions between the statutory right under the FMLA and the right as a reasonable accommodation under the ADA.

First and foremost, for the ADA even to apply, the employee must be seeking because of his or her *own* condition that must rise to the level of a disability under the statute. The ADA does not require an employer accommodate an employee’s need or desire to care for another, nor does every “serious medical condition” under the FMLA constitute a “disability” under the ADA.

Second, again unlike the FMLA, an employee is not entitled to a requested leave if the employer offers another reasonable accommodation which would permit the employee to continue working. While the right to leave under the FMLA is absolute, the ADA provides only the right to *a* reasonable accommodation, not necessarily to *the* particular accommodation the employee prefers. Conversely, an employer may not insist that a disabled employee take a full-time, unpaid leave if he or she does not wish to do so and there is a less-drastic accommodation. In either case, however, permitting sporadic or unscheduled absences which do not permit the employer to cover the employee’s absence will virtually never be seen as reasonable.

Third, a request for leave under the ADA is subject to the same requirement as any other reasonable accommodation request that the employer and employee participate in good faith in the “interactive process” to determine the nature and scope of possible accommodations. This is precisely the opposite of the situation under the FMLA, where even a simple employer request that the employee reconsider some aspect of the request can constitute unlawful interference with the statutory right.

Fourth, the *purpose* of a leave under the ADA is different than under the FMLA. As with any other reasonable accommodation, the purpose of ADA leave is to ultimately permit the employee to perform the essential functions of his or her job. While the EEOC is often more aggressive on this point, the courts are virtually unanimous that to qualify as a required reasonable accommodation, there must be some evidence that the leave will ultimately permit the employee to return to work.

Fifth, again unlike the FMLA, there is no specified, maximum length of a reasonable accommodation leave. For its part, the EEOC takes the position that an employer may not enforce any arbitrary time limitation, but must engage each individual employee in the interactive process and make the reasonableness and undue hardship determinations on a case-by-case basis. That said, the courts in particular recognize an important distinction between leave in excess of some established length and indefinite leave. Generally speaking, the courts will find the latter to be an undue hardship where there is no more than a generalized hope that he or she may be able to return to work. In the former situation, where the request is for a specified length and there is evidence that the leave will permit the employee to return at its conclusion, the undue hardship analysis considers the amount of leave the employee has already taken, the amount of additional leave being sought and the burden on the employer of keeping the position open and covering the employee’s duties for the expected duration of the leave. Perhaps obviously, the latter inquiry will involve careful consideration of the nature and duties of the position, its importance to the employer’s operations, other employees who are capable of covering the position and the ability to obtain and cost of employing a temporary or substitute employee.

As with the question of criminal history records last discussed, the key take away from this discussion should be that the EEOC abhors “bright line” rules and policies which lead to adverse consequences for protected class members without any consideration of individual circumstances. While the interactive process and undue hardship analysis can easily be seen as unnecessarily burdensome — particularly in the case of an absent employee who might be viewed as “out of sight and out of mind” — the reality is that it is both little different, but also enormously less expensive, than the process involved in defending the administrative charge or subsequent litigation arising out of the arguably premature termination of an employee requesting additional leave.