

# **When State and Federal Regulations Collide**

**Employers can find themselves so focused on the intricacies of the workers' compensation rules that they forget about other regulations.**

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Workers' compensation claims do not occur in a vacuum. When faced with a difficult work injury claim, employers can find themselves so focused on the intricacies of the workers' compensation rules that they forget about other regulations that are often entangled with such a claim.

For example, employers working to mitigate workers' compensation costs might be surprised to find themselves running afoul of federal employment regulations such as the Family Medical Leave Act (FMLA). Employers must consider the requirements under these regulations when evaluating a workers' compensation claim and claims strategy.

## **Applicability of the FMLA**

Enacted in 1993, the FMLA requires many, but not all, employers to provide unpaid leave when an employee or the employee's family member is faced with a "serious health condition." Generally, FMLA applies to any private employer with 50 or more employees. Employers with fewer employees may still have to offer leave under their state's medical leave laws. FMLA also applies to all government employers (federal, state, and local governments) and schools, regardless of the number of employees.

Employees are eligible for FMLA leave when they have worked for their employer for at least 12 months; those 12 months do not have to be consecutive. Employment breaks are not included in that calculation, but separate periods of employment for the same employer are aggregated under most circumstances. To be eligible, the employee must have worked at least 1,250 hours during the 12 months immediately before the leave. That comes out to an average of just 24 hours per week.

A serious health condition under the FMLA is an illness, injury, impairment, or physical or mental condition that requires inpatient care or continuing treatment by a health care provider. Work injuries, like any other injuries or health problems, may qualify.

## **Leave Under the FMLA**

An employee electing to take FMLA leave simply needs to notify the employer regarding the need for leave as soon as it arises. However, the employee does not have to specifically request "FMLA leave" or even mention FMLA at all—the employee must only provide enough information to give the employer reason to believe that the leave may be FMLA eligible. It is up

to the employer to recognize whether such leave falls under the FMLA. If the leave will follow a planned event, like a surgery, then the employee must provide at least 30 days' notice when possible. The employer has just five days to approve or deny the leave request.

If the employee has a qualifying serious health condition, the employee can take up to 12 weeks off per year, which can be taken all at once or sometimes intermittently. In most cases, when the employee returns to work after FMLA leave, the employer must return the employee to the same job or one that is substantially similar with regard to duties, pay, and benefits.

FMLA leave can run concurrently with other leave, such as a period of disability for a workers' compensation claim. For example, if the employee is eligible for FMLA leave, and the work injury amounts to a serious health condition, then the employer can count periods of workers' compensation leave as FMLA leave. The employer must notify the employee that the workers' compensation leave is concurrently considered leave under the FMLA.

Light-duty work does not qualify as FMLA leave. In order for leave to be counted under FMLA, the employee must actually be on leave. Even if that employee is not working his regular duties, FMLA time only runs when the employee is actually not working.

### **Termination and Return-to-Work Risks**

Some employers strictly adhere to 12-week maximum leave, and will terminate an employee for exceeding that period, regardless of the circumstances. Employers might even terminate an employee who has been off work due to a work injury. Employers doing so, however, should proceed with caution. Such a termination could easily run afoul of the Americans with Disabilities Act or result in a workers' compensation discrimination claim. An employee off work for a workers' compensation claim may allege that the employment was terminated because the employee claimed a work injury. Depending on the state, that employee may find rules that provide for a workers' compensation discrimination claim.

To minimize the risk of a workers' compensation retaliation claim, employers must be careful to apply their medical leave policies uniformly to all employees, regardless of whether an employee's medical leave relates to a workers' compensation claim. For example, if an employer's policy is to allow two additional weeks of leave in addition to the 12-week leave permitted under the FMLA, the same must be offered to employees who are out of work for a serious health problem caused by a work injury.

Conversely, bringing an employee back to work before the FMLA leave has been exhausted may also be problematic. For example, an employer may invite an employee back to work after a work injury by offering a light-duty job within that employee's restrictions. In some states, like Ohio, if an employee refuses a properly proposed light-duty job offer, indemnity compensation under the workers' compensation claim is terminated. Moreover, under such circumstances, the employer could act on its established no-call, no-show policy and terminate the employee who does not show up for the light-duty position.

However, that termination could violate the FMLA. If the employee's work injury qualifies as a serious health condition, and if that employee still has FMLA leave remaining, then the employee can choose to simply take unpaid leave, and can refuse the light-duty job. Depending on the state's workers' compensation regulations, the employee's refusal could preclude further compensation under the claim, but the employer cannot terminate the employee.

Instead, the employer would have to wait for the employee to exhaust the 12 weeks of leave. If, at the end of that period, the employee still does not return to work, the employer can more safely consider termination, at least with regard to the FMLA. A termination under those circumstances could violate the ADA.

Employers should seek counsel when faced with such circumstances. Successfully negotiating state workers' compensation regulations sometimes is not enough. Workers' compensation, like any regulatory scheme, will impact other regulations and can trap an unsuspecting and unprepared employer.

While the best approach will depend on the circumstances of each case, one thing is clear: Employers and workers' compensation claims professionals need to recognize these potentially conflicting and intermingling concerns, communicate with one another, and develop a coordinated strategy that takes all factors into consideration. This will help in successful management of both the workers' compensation claim and the employment issues, and promotion of a long-term relationship between the employer and the claims professional.