

Are we there yet? Navigating leave and accommodation issues among a changed workforce

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As we hurtle past the one-year mark of COVID-19-forced telework, employees are grappling with unprecedented levels of ailments — and employers are grappling with a record number of employee class actions.¹

The long-term health impacts of COVID-19 coupled with the unique difficulties of pandemic-induced remote work — inactivity, isolation, stress and burnout, to name a few² — should have employers on high alert about complying with federal, state and local leave and accommodation laws, avoiding claims of leave-related retaliation, and setting up the workplace to address the return of a changed in-person workforce.

Here are five issues for employers to keep in mind as they navigate leave and accommodation issues in what is hopefully the remainder of the pandemic months.

1. KEEP YOUR FINGER ON THE PULSE.

The Family Medical Leave Act (FMLA) guarantees eligible employees the ability to take unpaid family or medical leave for up to twelve weeks every 12 months.

Importantly, the FMLA puts the onus on the employer to initiate the process — even if the employee has not requested it — if the employer is aware that the employee needs leave.

As soon as an employer receives information sufficient to identify an employee's leave from work as FMLA qualifying, the employer must designate it as FMLA leave.³

Similarly, under the Americans with Disabilities Act, there are no “magic words” to request an accommodation.

But the soft skills of in-person communication — including all of the information that we impart through body language and the routines we keep — have been absent for the past year, leaving most of us in the dark about what is really happening with our colleagues.

Decreased performance, increased errors and careless work may, when coupled with other signs such as persistent irritable or depressive mood, signal need for a mental health-related disability accommodation.

Consider training management and HR representatives to recognize signs of strain and then setting up a regular and formalized check-in process with remote employees.

This can help build employee morale generally and protect the company against productivity loss and litigation risk by ensuring that the company is not missing signs that may later be determined to have put it on notice of need for an accommodation under the law.

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Extended absences or failure to sign onto the computer during regular hours may signal other issues. Employers can help alleviate the risk associated with ambiguous notice from an employee by requiring employees to submit FMLA qualifying leave in writing or to contact a specific individual.

To be effective however, such procedures must be widely communicated and consistently enforced.

2. THE VACCINE IS NOT THE END OF THE ROAD.

As companies begin to think through their plan to return to in-person work, take into consideration how this year has changed us. For those who have had COVID-19, many continue experiencing long-term effects such as fatigue and headaches.

Many have lost loved ones. Others have struggled with childcare, financial worries, and the adverse health effects of inactivity or loneliness.

An estimated 41% of US adults have delayed or avoided routine medical care because of concerns about COVID-19,⁴ thus increasing the risk that people will develop more severe medical problems in the future than they would have under normal circumstances.

Consider how your company will address a potential increase in long-term health problems among employees as employees return to in-person work.

Plan to have broad discussions with management and their teams about how to allocate work among those who will be taking on additional work to aid their colleagues.

Ensure your policies and procedures build in time and room for a cooperative dialogue around an employee's return to work following an absence for their own health condition.

Determine if existing Employee Assistance Programs or other benefits programs have resources for employees who may be facing new and unforeseen challenges. Encourage employees to use their time off benefits, even for a staycation, to provide separation from work.

3. MAKE SURE TO CORRECTLY HANDLE THE RETURN TO WORK FROM A PROTECTED LEAVE.

When an employee is returning to work after taking an FMLA leave, make sure to handle it properly.

Several weeks before an employee's appointed return-to-work date is reached, send a formalized communication reminding the employee of the date and opening a dialogue as to whether any accommodations are needed to facilitate a smooth return.

Employers are not required to retain an employee if he or she can no longer perform the essential functions of the job, but employers are required to offer reasonable accommodations to attempt to make the job doable.

The EEOC has long advised that policies that lead to automatic termination after a set period of time, such as the 12 weeks of an FMLA leave, are unlawful.

Claims of failure to accommodate often arise when an employee requests accommodations — in the form of leave or some other workplace adjustment — at the end of a leave of absence.

Ensure your policies and procedures build in time and room for a cooperative dialogue around an employee's return to work following an absence for their own health condition.

4. AVOID CLAIMS OF RETALIATION.

Under the FMLA, employers may not punish an employee for taking leave. This could take the form of failing to promote

someone who otherwise would have been promoted, or disciplining or terminating an employee because they took leave.

Because retaliation claims generally have been steadily increasing over the past several years according to the EEOC, employers should ensure employees have ample notice about company policies and then consistently enforce them.

Create an established procedure for documenting all potential health-related concerns and actions taken to accommodate such actions and ensure the documentation occurs consistently.

5. MAINTAIN CONFIDENTIALITY.

When an employee shares health information with an employer, the employer must keep that information separate from other personnel files and it must remain confidential.

Sharing medical information is permitted only on a "need to know basis," which generally only extends to the Human Resources or Benefits team that manages the leave or accommodation request, and potentially a manager to determine the scope of an accommodation request.

Practically, managers can find it tough to balance explaining the need for others to pick up the slack or why an employee is receiving "special treatment" without violating the law by sharing too much information.

It can be helpful to remind employees that the employer needs to protect that employee's privacy, just as they would do if any other employee needed such confidentiality.

On the flipside, managers should always refer accommodation or leave requests to the Human Resources or Benefits team to ensure that the employee's request is handled consistently and that the employee receives the benefits provided by law and/or company policy.

Consider training managers on what leave and accommodation requests may look like, as they are rarely as straightforward as one may think.

Notes

¹ <https://bit.ly/3sy6QhB>

² <https://bit.ly/3edA1RL>

³ DOL opinion letter March 14, 2019.

⁴ <https://bit.ly/3edly7s>

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