Handling the Dual Implication Of the Family and Medical Leave Act and the Americans with Disabilities Act

Most employers assume that if they give an employee 12 weeks of leave to comply with the FMLA, their obligation to this employee is finished. However, if the employee also is disabled, the employer's duty under the ADA may be just beginning.

Ask a group of HR professionals to list the toughest aspects of implementing the Family and Medical Leave Act (FMLA), and most will agree that coordinating the law with the Americans with Disabilities Act (ADA) is one of their top challenges. To complicate matters, both the FMLA and the ADA may trigger obligations for the employer in connection with employees who are out on leave due to workers' compensation injuries or illnesses. To assist in navigating the interconnectedness of these various laws, the following is a sampling of frequently asked questions on this topic:

1. WHEN ARE BOTH THE FMLA AND ADA TRIGGERED BY AN EMPLOYEE'S LEAVE?

The ADA applies to employers with 15 or more employees, including state and local governments and the FMLA applies to private employers with 50 or more employees and to all public agencies and elementary and secondary schools. Therefore, if an employer is covered by the FMLA, it generally also will be covered by the ADA and must comply with both laws accordingly.

These laws have different purposes, but both can affect an employee's need for leave. The FMLA requires covered employers to provide eligible employees with up to 12 weeks of job-protected leave in a 12-month period for various family and medical reasons. For example, an eligible employee can take a leave of absence if he or she is unable to work because of a serious health condition. Whereas, the ADA prohibits discrimination against qualified disabled individuals and requires employers to provide a reasonable accommodation to such individuals that allow them to perform the essential functions of their jobs. According to the U.S. Equal Employment Opportunity Commission (EEOC), a leave of absence may constitute a reasonable accommodation under the ADA if taking the leave would allow the disabled employee to return to work and perform the essential functions of the job.

As a practical matter, these laws will overlap when an employee takes a leave of absence for an FMLA-qualifying purpose such as a serious health condition, which may also qualify as a disability under the ADA. For example, if an employee who

has been on FMLA leave for 12 weeks cannot return to work because of a continuing serious health condition, the condition also may be a disability. Therefore, the employer may have to accommodate him or her by granting additional leave beyond the 12 weeks of FMLA entitlement. Alternatively, if an employee requests a 6-week leave as an accommodation to seek treatment for a disability, that time off also could be counted as FMLA leave for a serious health condition if the employee meets the FMLA eligibility requirements.

2. IS A "SERIOUS HEALTH CONDITION" THE SAME THING AS A "DISABILITY"?

No. The FMLA regulations define "serious health condition" broadly to include any illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care (e.g., an overnight stay in hospital); (2) "continuing treatment" by a health care provider; or (3) certain periods of incapacity. Thus, the FMLA may cover temporary conditions such as a broken leg, as well as a chronic condition like diabetes.

The ADA, in contrast, generally is not intended to cover temporary medical conditions. Accordingly, a person is disabled under the ADA if (1) he or she has a physical or mental impairment; and (2) that impairment substantially limits a major life activity, such as walking, seeing, hearing, speaking, and breathing. In addition, note that under the ADA, a person may be considered to have a disability if he or she has a record of such impairment or is regarded as having such impairment. Generally, most disabilities will qualify as serious health conditions under the FMLA. For example, cancer can be both a serious health condition under the FMLA and a disability under the ADA. However, not all serious health conditions will also be disabilities.

3. IS A DISABLED EMPLOYEE ALWAYS ELIGIBLE FOR FMLA LEAVE?

No. To be eligible for leave under the FMLA, the employee must meet the FMLA's threshold eligibility requirements. An employee is eligible for FMLA leave if: (1) he or she has been employed for at least 12 months (not necessarily consecutively); (2) he or she has worked at least 1,250 hours in the previous consecutive 12-month period; and (3) he or she works at a work site that is within 75 miles of 50 or more employees in the case of private sector employers. Thus, for instance, an employee who becomes disabled and has worked for only four months will not be eligible for FMLA leave. However, he or she may be entitled to take leave as a reasonable accommodation under the ADA.

4. CAN MEDICAL CERTIFICATION BE REQUIRED TO DETERMINE COVERAGE UNDER THE ADA AND FMLA?

Yes. Both the ADA and the FMLA allow employers to make limited medical inquiries for purposes of determining application of the laws. For example, under the ADA, if an employee voluntarily discloses that he or she has a medical condition and requests an accommodation, the employer can ask for medical documentation of the existence of the disability and the need for the leave.

Under the FMLA, the employer can require medical certification of the serious health condition and the need for leave. However, the certification may relate only to the serious health condition that is causing the need for leave. Therefore, you may not require the employee to answer questions about conditions unrelated to the stated reason for the leave.

Thus, if you comply with the FMLA medical certification requirements, you also generally will comply with the ADA's limits on medical information.

5. HOW MUCH TOTAL LEAVE DO YOU HAVE TO GIVE?

The FMLA entitles eligible employees up to a total of 12 weeks of leave in any 12-month period. However, under the ADA, an employer may have a continuing obligation to provide additional leave beyond the 12-week entitlement if the employee also is disabled and the leave is considered a reasonable accommodation. The ADA does not place any specific time limit on the amount of leave a disabled employee may take as a reasonable accommodation. As a general rule, however, these leaves cannot be indefinite.

6. DO YOU HAVE TO CONTINUE TO PAY FOR HEALTH INSURANCE DURING A DISABILITY LEAVE?

If the disabled employee's leave qualifies as an FMLA leave, the employer must comply with the FMLA's requirements. Under the FMLA, employers must provide the same health benefits during an FMLA leave that it would have provided if the employee worked throughout the leave. For example, if the employer ordinarily pays for 100% of an employee's health insurance premiums then it must continue doing so during the FMLA leave.

If the employee is not covered by the FMLA, the employer does not have to continue to pay for the health insurance subject to any agreement, employer policy, practice, or individual terms of the insurance plan documents that otherwise governs. The ADA only requires the employer to give a disabled employee on leave the same benefits it gives any nondisabled employee on leave.

7. ARE THE REINSTATEMENT REQUIREMENTS DIFFERENT FOR THE ADA AND FMLA?

Yes. Under the ADA, the employee ordinarily is entitled to reinstatement to the same job since the duty of reasonable accommodation is intended to allow the employee to perform the essential functions of that job. Further, if reinstatement to the same position is an undue hardship for the employer, it may have to reinstate the employee to any available vacant position the employee is qualified to perform. In contrast, the FMLA requires reinstatement to the employee's original job or an equivalent job.

8. WHAT PRECAUTIONS SHOULD YOU TAKE TO MONITOR LEAVES?

HR professionals can take control of compliance by implementing a system to identify employees who may be covered by both the ADA and the FMLA. To this end, you should: (1) require medical certification for all health-related leaves to determine whether the ADA, FMLA, or both should apply; (2) at the end of an FMLA leave, determine if the employee is disabled under the ADA and entitled to further leave as an accommodation; and (3) evaluate your reinstatement policy to be sure it allows for return to the same job, not just an equivalent job, for employees who have been covered simultaneously by both the ADA and FMLA.