

# Attendance Control Issues: Balancing Employee and Employer Rights

*Knowing the ins-and-outs of the ADA, the FMLA and typical workers' compensation laws is the first step towards implementing common-sense rules for employees who need to miss work*

*Thomas B. Lewis and Jason A. Storipan*

Prior to 1990, employers had few concerns about the attendance control policies they had selected to control employee absenteeism. In 2007, however, employers must take into consideration a myriad of laws and statutes when drafting an employee attendance policy. When formulating a policy to control absenteeism, an employer must draft a policy that complies with state laws and numerous federal laws, including the Americans With Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), state workers' compensation laws, and state and local anti-discrimination laws. These laws have imposed limitations on an employer's ability to control employee attendance.

This chapter focuses on the ADA and the FMLA, and provides a general review of workers' compensation laws and their impact on attendance control policies. It also provides some useful ideas and steps to help ensure compliance with these laws.

## Attendance Issues Under the Law

### Attendance Control and the ADA

The ADA applies to employers with 15 or more employees. It covers employees as well as job applicants. Under the ADA, an employer may not discriminate against a qualified individual with a disability based on the disability. Therefore, an employer must provide a reasonable accommodation to employees or applicants who are qualified individuals, unless that accommodation would constitute an undue hardship.

In order to fully understand the requirements of the ADA, some important terms need to be defined:

- 1) A person is considered "disabled" under the ADA if a person has either a physical or mental handicap that substantially limits a major life activity.

---

*Thomas B. Lewis is a shareholder in the Litigation group and is chair of the Employment Litigation group of Stark & Stark, a professional corporation in Lawrenceville, N.J. He can be reached at [tlewis@stark-stark.com](mailto:tlewis@stark-stark.com). Jason A. Storipan, an attorney in the firm's Litigation group, can be reached at [jstoripan@stark-stark.com](mailto:jstoripan@stark-stark.com).*

- 2) A reasonable accommodation is an action that removes workplace impediments for a person with a disability. The focus of whether an accommodation is reasonable or not is a balancing act between the resources and circumstances of the employer and the expense or difficulty of providing a specific accommodation.
- 3) An undue hardship is a substantial difficulty or expense on the employer in providing an accommodation.
- 4) To be considered a qualified individual under the ADA, an employee must be able to perform the essential functions of the job either with or without a reasonable accommodation. To put it differently, if the employee cannot perform the essential functions of the job, then the employee is not a qualified individual and there would not be any requirement to provide a reasonable accommodation under the ADA. Unfortunately, the question of whether a person is a qualified individual under the ADA depends on the facts of a particular instance; therefore, it is difficult to define whether a particular disability will always prohibit a person from being declared a qualified individual.

Similarly, what constitutes an “essential function” of the job is a fact-dependent consideration that must be reviewed on a case-by-case basis. Thus, what may be considered an essential function in one set of circumstances may not be considered essential in another. Granted, this may be the reason why the ADA scheme envisions an informal meeting between the employer and employee after the employee has requested an accommodation. The relevant question when confronted with an employee who is regularly absent or late is, can that employee still perform the essential functions of the job? If the answer is yes, then the employee meets the required test to be deemed a qualified individual. In such a case, a suspension or modification of the attendance policy may be required for purposes of providing a reasonable accommodation to that employee.

Even so, most courts have stated that there is no requirement that an employee be provided indefinite leave. Notwithstanding such a proposition, the failure to provide a definite return date does not render a request for leave void. In the same way that the question of whether a person is a qualified individual is a fact-dependent inquiry, the issue of whether the inability to provide a definite return date makes the request for leave an unreasonable accommodation is a fact-dependent review that must be performed on a case-by-case basis.

When considering if attendance is an essential job function, courts have considered the regularity of the absences, the predictability of absences, the amount of skill required for the job, whether the regular absences have interfered with the work environment or caused deadlines to be missed, whether the work can be performed by the use of telecommuting technology or flex scheduling, and the employer’s emphasis on the importance of attendance typically shown through the use of formal written policies.

Generally, courts have found that attendance is an essential job function, and an employee who cannot attend work on a regular basis is not a qualified individual. Despite that fact, given the correct circumstances, the ADA may require a suspension or modification of an attendance policy.

### **Temporary Employees**

An additional concern that often is overlooked is the status of temporary employees under the ADA and the need to make reasonable accommodations. Because temporary employees may be used to fill the void left by an employee who is on leave, any attendance policies should take into consideration temporary employees. In such an arrangement, the staffing agency placing the employee and the client requesting the temporary employee both may qualify as the “employer” for purposes of the ADA. Moreover, liability for violation of the ADA may arise even if one of two entities would not qualify as the employer. For example, the client requesting the temporary employee may not qualify as the employer, but may be liable under the ADA if the client interferes with the temporary worker’s ADA rights. If both the staffing agency and the client are considered the “employer,” then both are obligated to provide reasonable accommodations to the temporary worker. Due to the nature of temporary work — namely the short notice and brief duration of the job — an issue of undue hardship may be shown by the inability to provide the reasonable accommodation in time for the temporary employee to begin or complete the temporary assignment. On the other hand, depending on the facts of the situation, short notice may not be enough proof to show undue hardship.

### **Attendance Control and the FMLA**

The FMLA applies to employers that employ 50 or more employees within 75 miles of the site where the employee seeking leave works. Additionally, the employee seeking leave must be employed for a minimum of 12 months, and have worked a minimum of 1,250 hours in the previous 12-month period. The FMLA requires that an employer, during a 12-month period, provide up to 12 weeks of unpaid leave to a person who qualifies for such leave. An employer may select how it calculates the 12-month period. The leave may be taken either all at once, in blocks or intermittently, but the total amount of time need not exceed 12 weeks. A person is entitled to leave when the leave is needed for an employee’s serious health condition, to care for certain members of the employee’s family who have a serious health condition, the birth of a child or care for a child, or for placement of an adopted child or foster child.

To qualify for FMLA leave, an employee must inform the employer of the need to take FMLA leave within a reasonable time after the employee knows of the need to use the leave. Under most circumstances, an employer may require that notice be in writing and specify: 1) the reasons for the leave; 2) when the leave will begin; and 3) the estimated length of the leave. In the case of foreseeable leave, the employee is required to give at least 30 days notice to his or her employer, or at a minimum, as much notice as is practicable. When the leave is unforeseeable, the employee must give notice in a time that is practicable under the circumstances. In such a situation, the employee is expected to provide notice of the need for the leave within one or two working days of learning of the need, unless providing the notice is not feasible. Unless the employer requires otherwise, notice may be given by just about any means possible and by an employee’s family member if the employee is unable to provide the required notice.

An employer may require that the employee use any accrued paid time or time the employer otherwise provides in lieu of part of the 12-week FMLA time. Additionally, an employer may require an employee to provide a medical certification in support

of the request for leave. The certification should inform the employer of the date the condition started, the likely length of time required for treatment, and the relevant facts known to the medical professional providing the certification. If the employer doubts the credibility of the certification from an employee, the employer, at its expense, may require that a second certification be provided from a medical professional of its own choosing.

As mentioned above, FMLA leave need not be taken all at once. An employee may use the time for either intermittent leave or a reduced schedule. In certain circumstances, to avoid the effects of intermittent type leave, an employer may take certain actions. For example, an employer may transfer an employee to an available alternate position. The transfer may not be done to discourage an employee from using FMLA leave. Further, the position that the employee is transferred to must be a position that has equal pay and benefits. However, the job duties need not be identical. Once the employee finishes the intermittent leave schedule, the employee must be restored to the employee's former position or an equivalent position. Next, an employee seeking this type of leave is expected to discuss the leave with his or her employer before the leave commences. Should the employee fail to start such discussions with the employer, the employer may begin the discussion. An employer may require the employee to coordinate the leave to minimize any disruptions to the employer, i.e. trying to schedule treatment on certain days or at particular times. Lastly, the employer may request that the employee provide a certification from the appropriate health care provider that contains the following information:

- 1) that the leave is medically necessary;
- 2) an estimate of the duration for which the leave is necessary; and
- 3) if the leave is for planned medical treatment, the dates that the treatment will be provided, and the length of the treatment.

An employer may not count an employee's absences that occur during FMLA leave against an employer's attendance policies. It is irrelevant if the employer's attendance policy is a no-fault policy. Further, employers must be careful not to discriminate or retaliate against an employee who has taken FMLA leave or is currently on leave. For example, an employer may not consider whether an employee has taken FMLA leave when making decisions on issues such as firing, promotions or discipline.

### **Workers' Compensation**

In the early part of the 20th century, many states began passing workers' compensation statutes. In many jurisdictions, workers' compensation statutes apply to employers with one or more employee. For an injury to be covered by workers' compensation, the injury must arise out of the employee's employment and during the employee's employment. An injury compensable under workers' compensation need not be severe or permanent and may not be covered by the ADA. However, an injury that arose out of employment ultimately may result in an employee meeting the standards of the ADA, and more importantly, requiring a reasonable accommodation on the part of the employer.

An employer may count the time an employee is absent due to workers' compensation leave as FMLA leave. In order to do so, the employer must provide proper notice

to the employee that the time absent as a result of the injury will count towards any FMLA leave time. Should an employer fail to provide such a notice, the employer may lose the ability to count the leave toward FMLA leave time. Hence, the employee could receive the full 12 weeks of leave after completing his or her workers' compensation leave.

Generally, under a workers' compensation scheme, an employer may offer an employee light duty work in order to lessen the amount of time an employee is receiving workers' compensation benefits. Such an action also allows an employer to avoid paying additional disability benefits. However, it is unclear whether an employer may terminate an employee who fails to accept the light duty assignment, or whether the employer is required to continue to make the disability payments. Before taking any such action, consult with your attorney.

### **How to Control Attendance in the Modern Workplace: A few Options**

As shown above, the current state of the law requires an employer to carefully think through its employee absenteeism policies. An error can cause liability on the part of the employer, and could negate certain protections available to the employer under the various statutes. First, an employer should have a working knowledge of the ADA, the FMLA, workers' compensation laws, and any applicable state and local anti-discrimination laws.

An employer would be wise to develop and draft formal policies on the issues of absenteeism and requests for leave. An employer may establish attendance and leave policies that are uniformly applied to all employees. Such a policy should then be disseminated to all employees, preferably shortly after the policy is drafted for current employees or at orientation for any new employees. Further, the leave policy should be updated regularly to ensure that the policy is in compliance with any recent court or agency decisions as well as any amendments to the law. If the employer has a handbook, placing the policy in the handbook ensures that every employee has a copy of the policy.

#### **Benefits of a Written Attendance Policy**

A formal written policy is often beneficial to an employer. First, the process of drafting and updating the policy will allow an employer to become familiar with the nuances of the relevant laws. Such familiarity will allow an employer to know and understand what rights it has, and how to protect those rights while causing as little disruption as possible. Moreover, a formal written leave policy would help a company satisfy the notice requirement of the FMLA. By law, an employer is required to advise employees of their FMLA rights and responsibilities. A formal written policy allows the employer to inform its employees of their rights under the FMLA while at the same time informing the employees of the effect the attendance policy has on those rights and of any consequences for failure to adhere to the policy. Most important of all though, a formal written policy may be something that a court would consider in deciding whether attendance is an "essential function" of the job.

A formal written policy should be drafted with certain goals in mind. The policy should merge the employer's policy and all relevant laws providing an employee with leave. The policy should promote work attendance rather than use of an employee's leave and benefits. The policy should create and integrate measures to ensure the

proper notice to employees who may qualify for leave under the FMLA, workers' compensation or disability plans. The policy must be neutral in its application to both disabled and non-disabled employees, and it may set a maximum period of leave. Lastly, if an employer provides any paid leave time in addition to ADA, FMLA or workers' compensation time, then the employer should explain the difference between the types of leave, the steps required to apply for the leave, and whether an employee must use all of his or her paid accrued leave before using any leave under the ADA or FMLA. Issues of light duty, if applicable, must also be set forth. Such a policy would ensure that any leave taken under the FMLA would not extend past the time allowed under law. Further, paid leave the employer grants may have restrictions or requirements that are stricter than the requirements provided in the FMLA. A word of caution though – the stricter standards for paid leave the employer provides must be applied toward the programs only the employer offers. In a situation where there may be overlap between FMLA leave and employer-provided leave, any restrictions that are stricter than the FMLA requires may be improper.

### **Compliance Committees**

Another program that an employer should consider is the establishment and implementation of a Compliance Committee for these issues. Because of the cumulative effects of the FMLA, ADA, workers' compensation laws and state and local anti-discrimination laws, an employer faces the dilemma of either violating an employee's rights or allowing an employee to take more leave time than necessary.

A Compliance Committee would be a select group of people from both within and outside of the company charged with reviewing and deciding requests for leave, light duty or reasonable accommodations on a case-by-case basis. The committee should be comprised of people with experience and knowledge in human resources, risk management, law, medicine and employee assistance programs. A committee comprised as such will have the opportunity to develop expertise in this area and allow an employer to have a consistent and coordinated response to employees' requests for leave, light duty or accommodations. If this is a route that an employer decides to take, the committee should draft the formal written leave and attendance policy.

### **Rewards and Incentives Programs**

Finally, to control employee absenteeism, an employer may create and institute a reward system, provided that the employee meets certain requirements. It is well known that a combination of discipline and rewards system can improve absenteeism. A rewards or incentive program can increase employee morale and create positive behavioral changes leading to reduced sick leave. Typically, such plans provide additional compensation based upon attendance, measures of productivity or a combination of the two.

When instituting such a plan, the employer needs to keep in mind the protections offered – for both the employer as well as the employee – by the FMLA, workers' compensation and the ADA. An employer cannot retaliate against an employee for exercising his or her rights under the laws. However, an employer may reward an employee for stellar attendance. If an employer selects to institute a perfect attendance plan – a plan that rewards compliance with the employer's attendance policies – an employee who qualified for any reward before taking FMLA leave must be eligible for the reward upon return to work. An employee's use of FMLA leave by an employee may not be

considered a negative factor in an employment decision. In a productivity bonus plan, the FMLA may allow a reduced bonus entitlement that takes into consideration the FMLA leave. The terms of the bonus program would have to be considered in entering the decision and a program based on productivity and applied consistently to all employees may take into consideration time lost as a result of FMLA leave. A no-fault absenteeism policy, which attempts to control absenteeism by assessing points that lead to discipline or termination if a certain number of points are assessed, would need to be modified under the FMLA, ADA and most workers' compensation schemes. The FMLA prohibits an employer from interfering with, prohibiting, or retaliating against the use of FMLA leave. Hence, considering such absences in making an employment determination is prohibited.

## Conclusion

Changes in the law over the past 17 years have made drafting an employee attendance policy more difficult. Nonetheless, with research and planning, an employer can draft and implement such a policy in the modern workplace. The employer needs to be aware of the potential pitfalls and the steps required for the employer to offer the employees their rights under the law, and at the same time to give the employer the protections of the law and to avoid the sanctions of non-compliance.

### Absenteeism Policy Basics

- Should uniformly apply to all employees.
- Should be disseminated to all employees, preferably shortly after the policy is drafted for current employees or at orientation for any new employees.
- A leave policy should be updated regularly to ensure that the policy is in compliance with any recent court or agency decisions as well as any amendments to the law.
- If an employer has a handbook, placing the policy in the handbook ensures that every employee has a copy of the policy.

