

Terminating an Employee Who Can't Return After FMLA Leave? Not So Fast!



Often referred to as the legal “Bermuda Triangle,” the federal Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA) and state worker’s compensation laws require an employer to navigate overlapping and, at times, conflicting laws when making employment decisions relating to an employee’s medical condition.

For instance, even if an employee has taken the full 12 weeks of FMLA leave, it is possible that an employer may have to provide additional unpaid leave as a reasonable accommodation. Before you terminate the employee who is unable to return to work after exhausting FMLA leave, determine whether he or she may be eligible for additional time off under another law.

Further, if the employee’s FMLA leave expires before their entitlement to worker’s compensation does, there still may be job restoration rights under a specific state’s workers’ compensation law. And additionally, if the employer is subject to the ADA, a reasonable accommodation of additional time off may be required.

In these scenarios, the employer should not terminate the employee immediately at the end of FMLA leave entitlement, even though the employee has taken the full 12 weeks of FMLA leave. The EEOC has long taken the position that when each employee has exhausted his or her leave of absence the employer must make an individualized determination about whether the employee can return to work with or without reasonable accommodation for a disability. An employer may ask the employee to provide additional information from his or her treating physician.

Therefore, when an employee reaches the end of a 12-week FMLA leave and cannot return to work, rather than automatically terminate, the employer should slow down and ascertain whether the employee’s medical condition is covered by the ADA, worker’s compensation or is a disability covered by state or federal law.


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A common scenario

A employee takes 12 weeks of FMLA leave and, at the expiration of the FMLA leave, presents the employer with a doctor’s note ordering more time off from work. According to Equal Employment Opportunity Commission (EEOC) Enforcement Guidance:

Another common situation that employers face is the employee with an ADA disability who takes 12 weeks of FMLA leave and, at the expiration of the FMLA leave, notifies the employer that he or she is able to return to work but cannot perform the essential functions of his or her job. Under the FMLA, the employer could terminate the employee’s employment; however, under the ADA, the employer must consider whether the employee could perform the job with reasonable accommodation (e.g., additional leave, job restructuring, work schedule modification, etc.).

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