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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2017 Issue

Ten ways that employers deny employees their medical leave rights

WHEN EMPLOYEES WITH DISABILITIES REQUEST MEDICAL LEAVE, EMPLOYERS OFTEN FAIL TO RESPOND PROPERLY

All too often, when employees with disabilities request medical leave their employers fail to properly respond to the requests. They may deny medical leaves to which employees are entitled, may impose requirements that are not lawful, or may fail to honor employees' reinstatement rights. Below are ten ways that employers deny employees their medical rights.

Failing to consider leave as a reasonable accommodation

When employees with disabilities request medical leaves, employers sometimes make the mistake of considering their obligations only under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. section 2601 *et seq.*, and California Family Rights Act ("CFRA"), Government Code section 12945.2. Employers may wrongly believe that if employees do not meet the eligibility criteria under the FMLA and CFRA, or if they have already exhausted their FMLA/CFRA leave, they are simply ineligible for job-protected medical leave.

The law is clear, however, that leave can be a reasonable accommodation under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. section 12101, and the Fair Employment and Housing Act ("FEHA"), Government Code section 12940 *et seq.* (See, e.g., *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 [holding that "a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties"]; *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243 ["Even an extended medical leave, or an extension

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of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer."]; EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (hereinafter "*EEOC Leave Guidance*") (May 9, 2016), <www.eeoc.gov/eeoc/publications/ada-leave.cfm> (last accessed Apr. 14, 2017); 29 C.F.R. Pt. 1630 App. § 1630.2(o) [identifying as possible reasonable accommodations "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"].) Note that the FEHA looks to the ADA to provide a "floor of protection," with the FEHA providing equal or greater protections to employees. (Cal. Gov. Code, § 12926.1.) For that reason, federal authorities are helpful in exploring the *minimum* protections afforded to employees.

ADA/FEHA leave often covers situations where FMLA and CFRA leave do not apply. The FMLA and CFRA both have eligibility requirements. Under the FMLA, an employee must: (1) have been employed by a covered employer for at least 12 months; (2) have had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) be employed at a worksite where the employer employs 50 or more employees within 75 miles or at a public agency, public school board, or elementary or secondary school. (29 C.F.R. §§ 825.104; 825.110; 825.600.)

The ADA and FEHA have no such requirements. Instead, a qualified employee with a disability may be entitled to leave as a reasonable accommodation even if:

- The employer has fewer than 50 – but at least five (for FEHA) – employees;
- The employee has not worked at the company for twelve months;
- The employee has not worked at the company for the requisite 1,250 hours; or
- The employee has already exhausted twelve weeks of FMLA/CFRA leave.

The only basis to deny leave requested as a reasonable accommodation is because it would be an undue hardship for the employer. (42 U.S.C., § 12112(b)(5)(A).) As the FMLA regulations confirm, "the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation." (29 C.F.R., § 825.702(b).) Thus, a qualified individual with a disability must be allowed additional leave time beyond the twelve weeks guaranteed under the FMLA/CFRA (and, in the case of pregnancy, the four months under California's Pregnancy Disability Leave Law ("PDLL"), Cal. Gov. Code, § 12945) so long as that additional leave time would not constitute an undue hardship on the employer.

Failing to consider all medical leave rights together

Each of the leave laws operate independently of each other. This means that "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees." (29 C.F.R., § 825.702(a).) For example, the FMLA allows an employer to place an employee returning from a covered leave in an "equivalent" position. (29 C.F.R., § 825.215.) In contrast, under the ADA, an employee who is granted leave as a reasonable accommodation is "entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship." (See *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* ("Reasonable Accommodation Guidance") (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html> (last accessed on Apr. 14, 2017), at Q&A 18.) Therefore, if an employee on a medical leave is covered by FMLA/CFRA and ADA/FEHA, the employer would need to reinstate her to her *original* position following a return from a medical leave, absent the employer demonstrating undue hardship.

The FMLA regulations, at 29 C.F.R. section 825.702, provide several additional examples of the interplay between the ADA and FMLA, including the following:

> A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship.

Denying pregnant women their full leave time

Far too many employers demand that women return to work prematurely from their pregnancy/maternity leaves because they do not understand the interplay between PDLL, FMLA, and CFRA. This is often the case when companies rely on human resources professionals located out of state who are not familiar with California law.

While the FMLA and CFRA generally overlap in their coverage, pregnancy is one situation where they do not. The FMLA covers leaves related to pregnancy and childbirth, while CFRA excludes pregnancy and childbirth-related medical conditions from its definition of "serious health condition." (See Cal. Code Regs., tit. 2, § 11093.) Pregnancy disability leaves are instead protected under California law through the PDLL, which provides for up to four months of job-protected pregnancy disability leave for women disabled by pregnancy, childbirth, or a related medical condition. (Cal. Gov. Code, § 12945, subd. (a)(1).) PDLL's protections apply to all women who work in California for employers with five or

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more employees; there are no eligibility requirements. (Cal. Code Regs., tit. 2, § 11037.)

Thus, in California, pregnancy disability leave under the PDLL runs concurrently with FMLA leave, but CFRA runs consecutively with it, so that an employee can get an additional 12 weeks of baby-bonding leave after their pregnancy disability leave ends. What this means is that a California employee who is covered by PDLL, CFRA, and FMLA can get nearly seven months of leave (technically, four months and twelve workweeks) as she first exhausts her pregnancy disability leave for her own pregnancy – and childbirth-related conditions, and then takes the next twelve weeks as CFRA time to bond with her baby.

In addition, women who continue to be disabled by pregnancy or childbirth-related conditions even after the expiration of pregnancy disability and CFRA leave may also be entitled to leave as a reasonable accommodation. (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1339 [holding that, under FEHA, "a woman disabled by pregnancy is entitled to the protections afforded any other disabled employee – a reasonable accommodation that does not impose an undue hardship on her employer.) As the caselaw makes clear, disability leave may in some circumstances exceed four months."]; Cal. Code Regs., tit. 2, § 11093, subd. (c)(1) [confirming that FEHA's obligations to provide reasonable accommodations apply to women who continue to be disabled at the expiration of their four months of pregnancy disability leave].)

Some employers completely disregard PDLL rights, erroneously telling women that they are entitled to just twelve weeks of leave before they must return to work. Others fail to understand that the twelve weeks of CFRA leave are tacked on at the end of the PDLL, and they draw a line at four months. Yet others see the PDLL and CFRA leave periods as a hard stop, failing to consider leave as a reasonable accommodation when it is warranted.

Failing to provide employees information about their leave rights

Employers have an obligation to inform employees about their leave rights. For example, an employer must "give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth, or related medical conditions," including by posting a notice of leave rights in a conspicuous location, including it in a handbook or distributing it to employees separately, and giving a copy to the employee "as soon as practicable after the employee tells the employer of her pregnancy or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves." (Cal. Code Regs., tit. 2, § 11049, subd. (a), (d).) Similarly, "[e]very employer covered by the CFRA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing." (Cal. Code Regs., tit. 2, § 11095.)

If the employer fails to provide an employee reasonable advance notice of their leave rights under PDLL, such failure "shall preclude the employer from taking any adverse action against the employee, including denying reasonable accommodation, transfer or pregnancy disability leave, for failing to furnish the employer with adequate advance notice of a need for reasonable accommodation, transfer, or pregnancy disability leave." (Cal. Code Regs., tit. 2, § 11049(c)(2).)

Moore v. Regents of the Univ. of California (2016) 248 Cal.App.4th 216, 252-53, has helpful language regarding the consequences for an employer that fails to notify an employee of her leave rights: "[S]ummary adjudication of an interference claim under CFRA may not be appropriate where, as here, the record fails to establish – as a matter of law – that the employer satisfied a threshold requirement of its obligations to an employee under CFRA," including by giving notice of an employee's leave rights.

Failing to treat a request for leave as protected

When an employee needs medical leave, he should provide notice sufficient to make the employer aware that he needs the leave, as well as the anticipated timing and duration of the leave. (Cal. Code Regs., tit. 2, § 11091.) However, the employee need not use any legal terms or buzzwords to request medical leave. As the CFRA regulations confirm:

> The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, provided the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information). An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.

(Cal. Code Regs., tit. 2, § 11091.)

Oftentimes, even when employers know that the employee needs time off for a CFRA/FMLA- or ADA/FEHA-qualifying reason, they may claim that the employee did not make their desire for protected leave explicit, or that they only

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expressed an interest in using their PTO or vacation time to take time off. In *Moore v. Regents of the Univ. of California* (2016) 248 Cal.App.4th 216, 248-49, the court rejected the argument that because Moore testified that she had not intended to use a protected leave for her surgery, she had not exercised her right to take CFRA leave. The Court held that "the relevant question . . . is not whether a plaintiff expressly requested *CFRA* leave, but rather whether she '*exercised her right to take leave*' and whether the purpose for the leave sought was a 'qualifying CFRA purpose.'" (*Ibid.*)

Instituting a maximum-leave policy

Many employers have "maximum leave" policies, under which employees are automatically terminated after they have been on leave for a certain period of time. These can violate the ADA and FEHA. Simply put: a maximum-leave policy does not satisfy an employer's obligation to engage in the interactive process and provide a reasonable accommodation to an employee who needs additional leave. (*EEOC Leave Guidance*, *supra*.) This is the case even if the amount of leave time the employer permits is seemingly generous (for example, permitting employees on short-term disability to be out on leave for a year).

The ADA and FEHA require that an employer assess each disability accommodation request on a case-by-case basis. This means that it is unlawful to simply apply an inflexible maximum leave policy to an employee with a disability who needs more leave. Instead, the employer must provide additional leave unless granting the time off would cause an undue hardship or there is another effective accommodation that will allow that employee to work.

What this means to a worker who needs additional disability-related leave time: If the employer has a maximum leave policy, it must amend the policy or make an exception to allow the employee who needs additional leave time beyond the maximum amount to take that time so long as doing so would not create an undue hardship. In addition, the employer must, throughout the leave process, communicate with the employee to determine whether other accommodations are needed that would enable the employee to return to work. This is particularly important in situations where there is separate leave administration related to FMLA/CFRA, workers compensation, or disability benefits from ADA/ FEHA administration, as they often fail to have adequate information flow and are more likely to not meet their accommodation obligations.

Instituting a "no-fault" attendance policy

Also subject to challenge are "no-fault" attendance policies in which employees are subject to discipline for reaching a certain number of absences, regardless of the cause of the absences. Such policies adversely affect people with disabilities, and can evidence a failure to accommodate if they do not make exceptions for individuals whose "chargeable absences" were caused by their disabilities. In 2011, Verizon entered into a settlement with the EEOC in which it agreed to pay $20 million to settle a nationwide class disability discrimination lawsuit that challenged its no-fault attendance policy. (U.S. Equal Employment Opportunity Commission, *Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit* (July 6, 2011), <www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm> (last accessed Apr. 14, 2017).)

Misidentifying medical leave as "indefinite"

There is only one bright-line rule when it comes to leave as a reasonable accommodation: an employer is not required to provide an employee with "indefinite" leave. (See, e.g., Cal. Code Regs., tit. 2, § 11068, subd. (c).) The rationale behind this rule is that leave as a reasonable accommodation is meant to allow an employee to recuperate and return to work. If the employee cannot say whether and when he can return to work, an employer cannot be required to hold that employee's position.

Sometimes employers deem a leave request indefinite because the return-to-work date is not precise or may be subject to reevaluation. However, an employee seeking leave need not show that the leave is certain or even likely to be successful in proving that it is a reasonable accommodation; the employee need only show it would plausibly enable the employee to return and perform his job. (*Humphrey v. Mem'l Hosps. Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136.)

The EEOC has made the following point: "In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return." (EEOC, Reasonable Accommodation Guidance, *supra*, at Q&A 44.)

Thus, an employer may not treat as indefinite leave one with an approximate return date or where the situation changes and the original return date has been revised. (See *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 648-50 [discussing difference between indefinite leave and one with approximate or revised return dates].)

Forcing employees to be out on leave instead of offering a different reasonable accommodation

An employer may not force an employee to go out or remain on leave if the employee can work with a reasonable accommodation. (Cal. Code Regs., tit. 2, § 11068, subd. (c).) Yet, employers frequently force employees to remain on unpaid leaves of absence because they incorrectly assume that the employees cannot perform their essential job functions or because they are not willing to offer reasonable accommodations that would allow the employees to work.

In *Wallace v. County of Stanislaus*, a deputy sheriff was placed on an unpaid medical leave of absence because of his employer's incorrect assessment that he could not safely perform his duties even with reasonable accommodation. (2016)

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245 Cal.App.4th 109, 134, reh'g denied (Mar. 24, 2016), review denied (May 11, 2016).) The court of appeal held that the employer must face the consequences of its error:

> [T]he Legislature intended to "provide protection when an individual is *erroneously or mistakenly believed* to have any physical or mental condition that limits a major life activity." (§ 12926.1, subd. (d), italics added.) In light of this clear expression of legislative intent, County cannot rely on its mistaken beliefs about Wallace's physical condition and safety to claim its reasons were legitimate under California law. . .
>
> In summary, we conclude there is no dispute that County's motive for placing Wallace on a leave of absence was its mistaken perception that his physical condition created a safety issue. It logically follows that County's perception of Wallace's physical condition was a substantial motiving reason for County's decision to place Wallace on a leave of absence. Consequently, there is no need for a trier of fact to consider the substantial-motivating-reason element on remand – it is established as a matter of law.

(*Ibid*.)

Failing to return employees to vacant positions for which they are qualified

Even if a disabled employee is unable to return to her own position, an employer's obligations do not end there. If there is a "comparable" or "lower graded" vacant position for which the employee is qualified and capable of performing with or without accommodation, the employer *must* offer it to her. (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 377 [citing Cal. Code Regs., tit. 2, § 11068, subd. (d)(1), (2).]) Note that FEHA does not require the employer to promote the employee or create a new position for the employee to a greater extent than it would create a new position for any employee, regardless of disability. (*Ibid.* [citing Cal. Code Regs., tit. 2, § 11068, subd. (d)(4)].)

An employer must offer a disabled employee the vacant position without requiring the employee to compete against other employees. (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 265 ["[T]o the extent Wells Fargo rejected Jensen for positions for which she was qualified because it had applicants who were more qualified or had seniority, it overlooks that when reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration."]). The onus is on the employer to search its positions and to make the offer (rather than simply telling the employee that she is free to search for vacant positions).

Even if there are currently no vacant positions, but openings are anticipated in the near future, the employer should extend the employee's leave until that time. (See *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.* (2008) 166 Cal.App.4th 952, 968 [where employee was terminated after her doctor placed her on a medical leave and extended it seven times, for a total of approximately nine months of leave, and indicated that at the end she would need to return to a different position, summary judgment was improper because "it may have been a reasonable accommodation for Neiman Marcus to extend Nadaf-Rahrov's leave of absence for a limited period of time until a position became available that Nadaf-Rahrov could perform, particularly if Neiman Marcus could have anticipated the future opening"].)

Conclusion

It is not easy to navigate the various leave laws that protect California employees and, as a result, employees' leave rights are violated far too often.

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