

The Intersections of FMLA, FLSA, ADA and WC

Colin Shive, Tharrington Smith LLP

Anita W. Alpenfels, Ed.D., Moore County Schools

Purpose

- Learn the basics of **FMLA**, **FLSA**, **ADA** and **WC**
- Learn how they intersect with one another and how they don't
- Discover potential pitfalls
- Practice application





FMLA

Family Medical
Leave Act

FLSA

Fair Labor
Standards Act

ADA

Americans with
Disabilities Act

WC

Worker's
Compensation

Family Medical Leave Act

- Provides up to 12 weeks of job protection for eligible employees
- “Serious health condition”
- Eligibility based on employment of at least 12 months AND 1,250 hours
- Runs concurrently with any available accrued leave, i.e., **FMLA** leave is not in addition to any accrued leave
- School districts must determine in policy whether their **FMLA** “year” begins with the onset of a medical issue or whether the year concurs with the fiscal year
- Required notices: eligibility, ineligibility and exhaustion

Fair Labor Standards Act

- Provides protection for employees to ensure that they are paid for time worked
- Non-exempt employees are subject to wage and hour regulations
 - Must be paid at least minimum wage
 - Must be paid overtime or earn compensatory time for hours worked over 40
 - Work week must be established in policy
 - Accurate record-keeping is required
- Exempt employees must meet one of the exemptions: Professional, Administrative, Executive, ~~Outside Sales~~, Computer-Related (be careful) and earn at least \$684 per week or \$35,568 annually
 - While it is important to treat employees fairly, exempt employees are not hourly and are expected to work until the job is done

Fair Labor Standards Act

- Are athletic coaches exempt?
- What about volunteers?

FMLA and FLSA Intersections

- None. **FMLA** deals with leave provisions. **FLSA** deals with pay and work hours.

Americans with Disabilities Act

- Prohibits discrimination against individuals with disabilities in employment
- Employee must be able to do the essential functions of the job with or without accommodations
- Requires the interactive process, the opportunity to discuss requested accommodations one-on-one, case-by-case
- Employer is required to accommodate unless the request equates to an “undue hardship”

ADA and FMLA/FLSA Intersections

- **ADA** intersects with **FMLA** because of its intersection with leave, but not **FLSA** which has to do with pay and work hours

ADA and FMLA/FLSA Intersections

- While the **ADA** is not a leave entitlement statute, the EEOC states that leave may be a reasonable accommodation.

ADA and FMLA/FLSA Intersections

- EEOC Guidance: “The purpose of the **ADA**'s reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave.”

ADA and FMLA/FLSA Intersections

- EEOC Guidance: “An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.”

Worker's Compensation

- Provides wage replacement and medical benefits to employees injured in the course of employment
- Seven-day waiting period for benefits to begin during which an employee may use appropriate accrued leave
- WC pay = $\frac{2}{3}$; Employee may opt to supplement with appropriate accrued leave

FMLA/FLSA/ADA and WC Intersections

- **WC** leave can run concurrently with unpaid **FMLA** leave, provided the reason for the absence is due to a qualifying “serious health condition”
- Both **FMLA** and **WC** leave *may* result in termination, if
 - Employee exhausts **FMLA** and all available accrued leave
 - Exception: Teachers on contract
- Check Board Policy on Excessive Absences

FMLA/FLSA/ADA and WC Intersections, cont.

- Check Board Policy on Excessive Absences, for example:

Any leave taken beyond the amount to which the employee is entitled under state and federal laws and regulations will be considered in assessing the employee's performance. Absences in excess of the entitled legal leave may result in dismissal from service. For the purposes of this policy, entitled legal leave includes sick, annual, personal and other leave days that an employee accrues under the North Carolina Benefits and Employment Manual, as well as leave protected under the Family Medical Leave Act. Entitled legal leave does not include donated leave or absences where an employee does not use accrued leave (for example, absences arising from a worker's compensation or short term disability claim).

Employees who are on workers' compensation leave concurrently with FMLA job protection may elect to use prior accrued leave to supplement their workers' compensation payments. After FMLA job protection has been exhausted, continued absences of employees who elected not to supplement their workers' compensation payments with prior accrued paid leave may be considered excessive.

Let's Practice

Mrs. Jones is a 24-year veteran English teacher for the school system. Despite her lengthy career, she has very little accrued leave. This school year, she has significant numbers of absences because of a diagnosis of multiple sclerosis. She has exhausted **FMLA** and all other accrued leave. Since she is now in leave without pay status, what are the considerations?

Let's Practice

A 10-month custodian was hired February 3, 2020. He worked one week and went out sick from February 10 - 16, 2020. While these days would have been leave without pay, he received donated days to cover his absence. On September 23, 2020, he was hospitalized with only two available sick leave days. Human Resources was notified after he was out two weeks that he needed to do a leave.

The Alphabet Soup Meets COVID-19

Unpaid leave and remote work as an accommodation

- Must you bump a teacher out of a remote teaching position to accommodate a high risk employee?

The Alphabet Soup Meets COVID-19

Emergency FMLA and Federal Emergency Sick Leave

- Can employees use FFCRA leave due to lack of childcare even if they used state leave in the Spring?
- Can employees use FFCRA leave due to their childcare facility being closed even if the school is providing childcare for employees?

The Alphabet Soup Meets COVID-19

Can employees who believe they contracted COVID-19 at work file WC claims?