

WORKPLACE LEAVE DUE TO A MEDICAL CONDITION

A BRIEF GUIDE TO RELEVANT LAWS

(Editor's Note: The article below provides an introduction to the laws that govern certain workplace leave practices. Its purpose is to alert municipal personnel directors or human resources staff to the existence of these laws and to some of the events that may trigger them. To determine whether and how the laws discussed below might apply in your municipality's particular situation, please consult the VLCT Municipal Law Center or your municipal attorney.)

Whenever an employee is injured or becomes seriously ill, there are a number of laws that may be implicated. For instance, an employee who sustains a workplace injury has rights under Vermont's worker's compensation laws - but he or she may also have medical leave rights that must be addressed under Vermont's Parental and Family Leave Act (PFLA), 21 V.S.A. § 471 *et. seq.* and the Federal Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et. seq.* Further, the injury may result in a disability as defined under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102 *et. seq.* and Vermont's Fair Employment Practices Act (VFPEA), 21 V.S.A. § 495. In these cases, the employer may be obligated to provide a reasonable accommodation to the employee in the form of an extended leave period, reduced hours or other accommodations.

The following is an outline of the separate analysis that must be done by all municipal employers under *each of the following federal and state statutes every time an employee suffers an injury, becomes ill or requests leave for family or medical purposes.* Because a comprehensive analysis is beyond the scope of this article, and because the interplay between the ADA/VFPEA, FMLA/PFLA and Vermont's Worker's Compensation Act (VWCA) is highly complex, employers should always consult their counsel for assistance with matters that implicate these laws before any action is taken.

A. ADA/VFPEA: These statutes prohibit employment discrimination against qualified individuals with disabilities who can perform the essential functions of the job with or without reasonable accommodation. Both statutes apply to all municipal employers. If an employee suffers a serious injury or develops a condition that renders him or her disabled as defined by these laws, the employer may have to provide a reasonable accommodation for that employee (absent a showing of undue hardship for the employer) if he or she can perform the essential functions of the job. Such an accommodation may include job restructuring or employee leave (including intermittent leave), if "reasonable."

During any leave period provided as a reasonable accommodation under the ADA, the employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period then the employer should grant unpaid leave. The employer must maintain the employee's health insurance benefits during the leave period only if it does so for other employees on similar leave status. (See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Act, which is available at www.eeoc.gov/docs/accommodation.)

B. FMLA: The Act provides employees with, among other things, up to 12 weeks of unpaid leave (including intermittent leave) in a 12-month period for (a) birth or adoption or foster care placement; (b) to care for the spouse, son or daughter, or parent of the employee with a serious health condition; or (c) because of the serious health condition of the employee that makes the employee unable to perform one or more essential functions of his or her job. The Act also prohibits employers from retaliating against employees for asserting their leave rights (the employee has full reinstatement after the leave period). The Act applies to all municipal employers.

Employees eligible for leave must have worked for the employer for at least 12 months and must have been employed for 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. Accrued paid leave can be substituted for unpaid leave under certain circumstances. The FMLA requires the employer to maintain the employee's health insurance during the leave period in the same manner as if the employee were continuously working.

C. PFLA: The parental leave portion of the Act applies to employers that employ 10 or more employees for an average of at least 30 hours per week during the year. Parental leave can be taken during

pregnancy and following the birth of an employee's child or within one year following the adoption of a child 16 years of age or younger.

The family leave portion applies to employers that employ 15 or more employees for an average of at least 30 hours per week during the year. Leave can be taken for the "serious illness" of the employee or the employee's child, stepchild, spouse (including civil union) partners, or parent of the employee's spouse. Eligible employees must have been continuously employed for one year for an average of at least 30 hours a week. Accrued paid leave may be substituted for unpaid leave at the employee election, and the employee is entitled to a continuation of benefits during the leave at the same level and under the same conditions coverage would be provided if the employee continued in employment for the duration of the leave.

D. VWCA: The Act provides compensation, benefits (including payment of medical bills and a certain percentage of lost wages during the time the employee is out of work) and reinstatement rights to employees injured on the job. It applies to all municipal employers. Leave due to a workplace injury cannot extend beyond two years.

Please note that if an employee suffers a workplace injury or is provided a leave of absence under the ADA that also qualifies for FMLA/PFLA leave, the employer should designate the leave as FMLA/PFLA leave - following all of the notice requirements of the statutes.

MEDICAL CONDITIONS OR INJURIES THAT TRIGGER AN EMPLOYEE'S RIGHTS

A. ADA/VFEPA: The employee must have a "physical or mental impairment" that substantially limits one or more major life activities (or must have a record of such impairment or must be regarded by the employer as having such an impairment that substantially limits major life activities). Major life activities include such things as walking, seeing, hearing, speaking, breathing, working and caring for oneself. The employee must also be qualified for the position and must be able to perform the essential duties of the job.

"Physical or mental impairment" is defined at length in the ADA and its regulations, as well as in VFEPA (which should be consulted by the employer). Basically, the ADA and VFEPA protect individuals with impairments that are of a significant duration and that have a significant impact on major life activities. Examples would include such conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and recovering substance abusers. Temporary, non-chronic impairments of short or limited duration with minimal longterm impact are not protected.

B. FMLA/PFLA: These statutes have a different standard than the ADA for coverage of medical conditions. That is, there is no requirement that an employee have a "physical or mental impairment" that "substantially limits a major life activity." Rather, to qualify for FMLA leave, the employee must show that he or she has a "serious health condition" (an illness, injury, impairment or physical or mental condition) that involves inpatient care in a hospital or continuing treatment by a health provider (pregnancy is included). The regulations contain detailed rules regarding the period of incapacity that must occur when the conditions require continuing treatment by a health care provider. Absent complications, conditions such as the flu, common cold, earaches, upset stomach, headaches (other than severe migraines), and routine dental problems will not qualify.

To qualify for PFLA leave, the employee must show that he or she had an accident, disease or physical or mental condition that poses imminent danger of death, requires inpatient care at a hospital or requires continuing in-home care under the direction of a physician. An employee's pregnancy would be covered under the parental leave portion of the act.

C. VWCA: An employee is entitled to worker's compensation benefits as prescribed under the Act when the employee receives a personal injury by accident arising out of and in the course of employment by his or her employer. (See 21 V.S.A. § 618.) The injury must be attributed to the employment, has to occur while the employee was on duty at a place where the employee "might reasonably be expected to be." (See *Moody v. Humphrey & Harding*, 127 Vt. 52 (1967).)

CONCLUSION

It would not be difficult to envision a scenario where an employee's medical condition would be covered by some, if not all, of the above statutes. For instance, certain conditions (e.g. chronic heart disease, multiple sclerosis, epilepsy and cancer) may qualify for ADA/VFEPA protection and FMLA/PFLA protection. Further, an employee may suffer a serious workplace injury with long-term effects (such as an amputation, hearing loss or blindness) – in which case all of these statutes may be implicated. Conversely, a routine broken bone suffered while on the job would be covered under VWCA and may qualify an employee for FMLA or PFLA leave - but this would not ordinarily constitute a disability as defined under the ADA/VFEPA.

Where the employee's condition could be considered a "disability" and a "serious health condition," the employer must be particularly vigilant in applying each of these laws to the employee's particular situation. For instance, if an employee is covered under the leave laws as well as the ADA, then the employer may have to provide extended leave to the employee beyond 12 weeks (or allow the employee to work a reduced schedule) as a "reasonable accommodation" - absent undue hardship on the employer. This is why it is critical that the facts of each situation be analyzed under all of the statutes to ensure compliance with all applicable statutes.

The above represent just a few examples of the areas employers should be considering when faced with an employee illness or injury. The list is by no means exhaustive, and employers should seek medical and legal advice whenever there are circumstances that implicate any of the disability, leave and worker's compensation statutes.

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