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# Should All Employee Absences Be Treated Equal?

**By Julie T. Bittner**

It certainly is beautiful this time of year. The sun is still shining, the leaves are changing colors, and many employees simply cannot resist the urge to enjoy these last few fine days of weather rather than be at work. However, absent employees can make it difficult for employers to fully carry out their operations for the day. As a result, regular, reliable attendance at work is typically identified as an essential job requirement.

Human resources and payroll departments can spend significant portions of their day tracking attendance and determining whether the absence is excused or unexcused. In an effort to reduce the amount of time spent on these determinations, some companies have chosen to implement a "no-fault" attendance policy.

Under a no-fault attendance policy, employers designate a specific number of absences that are allowed for a specific timeframe - such as six absences per quarter. These employers tend to lump all sick time and paid time off into one pool. Once the employee accumulates the six points in the quarter, then any additional absence is considered a violation of the attendance policy, and the employee faces discipline. Many employers choose to administer their attendance policy without any regard for the reason behind the absence. Therefore, the employee that chooses to take the day off to fly kites in the park and the employee that cannot get out of bed because of a stomach virus are treated exactly the same - each receives one point.

For many employers, these no-fault attendance policies are attractive because they are easy to enforce and eliminate any

appearance of favoritism. In essence, these policies allow employers to feel like they are abiding by the age old adage to "treat all employees the same." However, a rigid no-fault attendance policy can subject the employer to significant liability. For example, under the Family Medical Leave Act ("FMLA"), covered employees are entitled to 12 weeks of unpaid leave in a 12-month period for specified family and medical reasons. An employer that treats an absence that is covered by the FMLA as a violation of the attendance policy is in violation of the law. Employers simply cannot penalize employees for absences related to FMLA leave. Employers not covered by the FMLA because they employ less than 50 employees in a 75-mile radius still need to be careful, because disciplining an employee for attendance under a no-fault attendance policy without taking a disability into account may violate the Americans with Disabilities Act ("ADA") and similar state laws.

Furthermore, employers that automatically terminate employees who do not return to work at the end of their FMLA leave may also be in violation of the ADA. Under the ADA, employers are required to perform an individualized inquiry on a case-by-case basis to determine whether additional unpaid leave, if requested, may be a reasonable accommodation. Therefore, automatically terminating an employee without conducting that individualized assessment may lead to liability.

Employers with a no-fault attendance policy may want to consider revising their attendance policies to include language that allows excuses for absences under the ADA and FMLA. Another important step is to ensure that Human Resources and payroll professionals are trained with respect to absences and these two statutes.

Further, it is imperative that your employees have the means by which to report the nature of absences that may qualify for leave under the FMLA or an accommodation under the ADA. Front-line managers also need training to know when to communicate these types of occurrences to designated HR professionals. The Human Resources professionals, in turn, will be able to determine when to approach an employee about whether they need some sort of accommodation or may qualify for leave, should the need arise.

Finally, many employers choose to have a third party administrator, as the name would imply, administer FMLA and medical leave issues. These companies need to be vigilant in ensuring that the third party administrator coordinates with the client company's Human Resources department so that any interplay between absences and the applicability of FMLA, ADA, and similar state and local laws is recognized and handled appropriately.

This issue is extremely important for employers because the U.S.

Equal Employment Opportunity Commission ("EEOC") has demonstrated a renewed focus on bringing ADA-related litigation on no-fault attendance policies. Just this past July, the EEOC filed a lawsuit against an employer, alleging that the company violated the ADA when it did not allow an employee with multiple sclerosis additional points under the company's no-fault attendance policy. The EEOC has obtained settlements up to and including $20 million in matters involving no-fault attendance policies.

Simple changes to your company's policies and basic, but important, training may be the keys to avoiding liability. Individual situations and circumstances can, of course, be complex and very fact-specific, and employers are encouraged to seek legal advice where appropriate.




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