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Workers' Compensation Leave Can Run Concurrent with Federal Medical Leave

By Laurie J. Wiedenhoff, Esq.

One of your employees injures herself while working. You know she's entitled to workers' compensation benefits and time off due to her injury, but generally workers' compensation laws don't have explicit provisions regarding leave. So how does the federal Family and Medical Leave Act (FMLA) apply to this situation?

If the employee is eligible for leave under the FMLA and the on-the-job injury is considered a "serious health condition," workers' compensation leave may also be treated as FMLA leave. The FMLA defines serious health condition broadly to include any illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care or (2) continuing treatment by a health care provider. The FMLA does not distinguish between injuries that are work-related and those that are not. Therefore, any work-related injury incurred by a FMLA eligible employee that requires the employee to take medically required leave likely will be covered by the FMLA.

Treating workers' compensation as a totally separate category of leave may cause employers to inadvertently neglect the requirements of the FMLA. Employers should ensure that their FMLA policies reflect that FMLA will run concurrent with any time off for workers compensation. Whenever an employee is injured on the job and needs time off to recover, the employer should immediately determine if the employee also is eligible for leave under the FMLA. If the employee is eligible for FMLA leave, the employer must notify the employee, within five business

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days, of his or her eligibility to take FMLA leave. The notice must also state that time off for workers' compensation will be counted as FMLA leave so that the leave time may be counted against the employee's 12-week FMLA entitlement. If the employer does not run the workers' compensation leave concurrently with the FMLA leave, the employee may still have the full 12-week FMLA entitlement available to use after the employee returns from workers' compensation leave.

If the employee has been on workers' compensation without specifically being placed on FMLA leave, the employer should send notice to the employee immediately so that the FMLA clock starts running. However, the employer may then only designate the leave from the date written notice to the employee is provided - it cannot retroactively designate the time spent on workers' compensation as the FMLA leave.

It should be noted that some state family and medical leave laws, including Wisconsin, may not allow an employer to require an employee to use their state medical leave allotment while the individual is off work for a work-related injury. This creates a somewhat complex scenario relative to an employee's return, because the injured employee may have state FMLA leave available after reaching their healing plateau. Employers in those states prohibiting state FMLA and workers compensation concurrence may wish to consult with local counsel to work through such situations.

Employers should review and revise their FMLA policies, forms and practices to inform employees that workers' compensation leave runs concurrently with FMLA leave.

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