

Employee Leaves —Take Action! Don't Leave It for Later

By Stephen Marmaduke, Esq.

Federal and California laws challenge employers and employees with complex statutes and regulations that govern extended employee time off. To complicate matters further, disability laws may extend statutory leave periods. At first blush, the handling of a leave situation may appear overwhelming. All too often, leaves are not appropriately addressed, or addressed at all, depriving employees of rights and benefits they may be entitled to and exposing employers to liability. It is difficult for veterinarians or their employees to fully recognize the nuances of various leave laws. The intent of this article is to provide a succinct overview of the laws impacting employee leaves, and to provide a proactive, step-by-step approach to identifying and addressing leave situations.

Identify Potential Leave Situations

The first step is to identify if an employee may be out of work for an extended period of time. If the employee has prior knowledge of an extended period of time off, the employee should bring this matter to the attention of the employer. In exigent circumstances, or when the employer learns that a leave may be necessary from sources other than the employee, the employer has an affirmative duty to discuss with the employee that they may be entitled to a statutory leave or determine if they are suffering from a disability. The employer should act quickly. Waiting to see "how things work out" is a poor strategy.

Upon determining that a leave situation may exist, it is important that the employer immediately commits to proactively addressing the situation.

Determine if a Leave is Appropriate

After recognizing that an employee desires or needs extended time off work, the next step is to determine which, if any, leaves may apply to the employee's situation. An employee is not legally entitled to leave simply because they desire or need time off. Most leaves are statutory and address specific circumstances. The applicability of the leave laws vary depending upon factors such as the number of employees the employer has or the length of the employee's tenure with the present employer. Benefits may vary as well. If the employee's physical or mental health is involved, disability laws must also be considered.

Although a summary of the significant leave laws follows, employers and employees should not expect to have and do not need more than a working knowledge of leave laws. The commitment to be proactive, however, must prevail over feelings of being overwhelmed. Don't be reticent to get help if necessary. Competent HR consultants and legal counsel can assist in the process of determining if leave is appropriate.

Statutory Leaves

The hallmark leave statutes are the federal Family Medical Leave Act (FMLA) and the state counterpart, the California Family Rights Act (CFRA), which provide up to 12 weeks of leave for employees to address their serious health conditions, and to address specific family issues, such as to care for a child, parent, spouse, registered domestic partner, child of a registered domestic partner, and the birth or adoption of a child, or the placement of a foster child. Many veterinary practices are excluded from the FMLA and the CFRA as they apply only to employers with 50 or more employees. Further, the employee must have been employed with that employer for at least 12 consecutive months and have worked at least 1,250 hours during the last 12 months of employment to be eligible for FMLA or CFRA leave. An employee qualifying for FMLA or CFRA leave is entitled to health insurance coverage on the same terms and conditions. Thus, the employer and employee shall continue to pay their respective portions of the cost of health insurance coverage during the leave. In most circumstances, employees are entitled to reinstatement to the same or comparable position upon return from FMLA or CRFA leave.

California's Pregnancy Disability Leave (PDL) is frequently confused with the CFRA. The PDL, however, is distinct from the CFRA. Notably, the PDL applies to all employers, regardless of the number of employees. PDL is available for up to four months during a time an employee is unable to work, or is unable to perform her essential job functions due to health issues related to pregnancy and childbirth. Although an employee on PDL has certain reinstatement rights, the employer is required to pay benefits during a PDL leave period only if the employer would have paid for such benefits if the leave was for a disability other than pregnancy.



PDL may run currently with the FMLA, but does not run currently with the CFRA. Thus an employee who qualifies for CFRA is entitled to 12 weeks of CFRA leave in addition to any PDL.

Other statutory leaves include time off for voluntary entry into a drug and rehabilitation program, attendance at adult literacy programs, and leave for participation in certain school activities (each requiring a minimum of 25 employees), as well as serving as an emergency fire fighter, reserve peace officer, or emergency rescue person (each of which apply regardless of the number of employees).

Disability Leaves

Disability laws may need to be considered in leave situations that involve the employee's physical and mental health.

The Americans with Disabilities Act (ADA), which applies to employers with 15 or more employees, and the California Fair Employment and Housing Act (FEHA), which applies to employers with five employees or more, require an employee to provide "reasonable

accommodations" to employees with physical and mental disabilities unless doing so would cause "undue hardship." Difficulties arise as "disability," "reasonable accommodations" and "undue hardship" are determined subjectively. "Reasonable accommodations" may also include providing leave.

Coordinating the leave under the ADA and FEHA can be challenging. For example, an employee who has exhausted PDL and CFRA leave may continue to be unable to return to work due to a disability. Although the complexities of disability claim are beyond the scope of this article, the handling of disability leave is substantially the same as other leaves. Again, help is available and resources should be consulted if necessary.

Communicate

Both employers and employees have duties to communicate with each other regarding leave. The sooner the communication process begins, the better. In some circumstances, employers must advise employees of their legal rights. Employees should communicate with employers regarding their needs and expectations regarding leave. Although employers are not entitled to specific medical information regarding the cause of a disability, they are entitled to a physician's note to establish the nature and extent of the disability and that leave is a necessary and appropriate accommodation for the disability.

The Leave Plan

A common error that employers and employees will make is when they fail to define the terms of the leave. Once the needs of the employee and the limitations of the employer have been communicated and the appropriate leave identified, a leave plan should be designed. The plan may be very simple, merely providing when the employee is to return to work. If appropriate, it should go over how benefits will be addressed and the employee's right to the same or similar position upon return. If there is a possibility that the employee might need accommodations to return to work, these should be addressed as well. If the leave is based upon the employee's physical or mental health, it should be supported by a physician's note that clearly establishes the return to work date. Circumstances may be subject to change over the period of time off. If they do, channels of communication should be reopened, the leave redefined, and a new return to work date established. At all times there should be written documents (ideally signed by both the employer and employee, but at least a letter from the employer to the employee) establishing the return to work date. In no case should leave ever be left open-ended.

The employee should return to work when the leave ends, or seek an extension prior to that time. An employee who fails to return to work is in jeopardy of being terminated for being “AWOL” (absent without leave).

Conclusions

Addressing leave requires a sequence of proactive steps by employers and employees that should affirmatively identify circumstances that could lead to an employment leave. Once identified, the nature of the potential leave should be investigated and the benefits, if any—including the right to return to work and the payment of benefits—determined. The employee handbook should always be reviewed as it may enhance the legally

required benefits. The employer should assume the duty to advise an employee of his/her rights to leave under the circumstances. Further, the employer and the employee should communicate to determine the leave period, the return to work date, and everything should be memorialized in a writing. The leave may change based upon changing circumstances, but there should always be a written return to work date. When in doubt, seek assistance. No matter what, be proactive. Take action! Don't LEAVE it for later!



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