

Managing Employee Time Off

Presented by | Adam Jensen, Vice President
January 26, 2016



Cottingham & Butler

Cottingham & Butler
Dubuque, IA 52001 | 800.793.5235
www.CottinghamButler.com

Professional Credentials



Adam P. Jensen
JD, MS-HRM, CEBS,
GBA, FLMI
Vice President
Cottingham & Butler

608.467.5030
ajensen@cottinghambutler.com

Adam P. Jensen, Vice President with Cottingham & Butler, has worked in the insurance and employee benefits industry since 1986. He specializes in providing regulatory compliance and plan design services for health and welfare plans. He also advises executive clients on non-qualified deferred compensation issues. Prior to joining Cottingham & Butler, Adam was the Senior Compliance Officer for Virchow Krause Employee Benefits, LLC. He was previously a manager in the human capital practice of a Big Four accounting firm and has also served as an in-house ERISA attorney for a well-known national financial and retirement plan services firm. He leads Cottingham & Butler's Compliance and Human Resource Consulting practice group.

Specific Experience

- Advises Fortune 500 clients on HIPAA and ERISA compliance issues for health and welfare plans
- Advises Fortune 500 clients on plan design and IRS/DOL compliance issues for benefit plans
- Provides cost containment expertise for businesses and major health plans throughout the Midwest

Industry Involvement

- Milwaukee Chapter of the International Society Certified Employee Benefits Specialists
- 2008, 2009 Madison Chapter President
- 2007 Madison Chapter Vice-President
- International Foundation of Employee Benefit Plans
- Greater Madison Chapter of Society for Human Resource Management (SHRM)

Education

University of Minnesota - Minneapolis
- Bachelor of Arts in History

Boston University
- Master of Science in Human Resource Management

William Mitchell College of Law
-Juris Doctorate

Life Office Management Association
-Fellow, Life Management Institute (FMLI) designation

International Society of Certified Employee Benefits Specialists / Wharton School of Business
-Certified Employee Benefits Specialist (CEBS) designation
-Group Benefits Associate (GBA) designation
-Certificate in Global Benefits Management

Agenda

- Common Reasons for Employee Absence
- Sick Leave, Vacation, and PTO
- FMLA
- ADA Leave
- State Leaves
- General Leaves of Absence

Common Reasons for Employee Absence

- **Bullying and harassment** – Employees who are bullied or harassed by coworkers and/or bosses are more likely to call in sick to avoid the situation.
- **Burnout, stress and low morale** – Heavy workloads, stressful meetings/presentations and feelings of being unappreciated can cause employees to avoid going into work. Personal stress (outside of work) can lead to absenteeism.
- **Childcare and eldercare** – Employees may be forced to miss work in order to stay home and take care of a child/elder when normal arrangements have fallen through (for example, a sick caregiver or a snow day at school) or if a child/elder is sick.
 - “Sandwich Generation” providing care to children and parents.

Common Reasons for Employee Absence

- **Disengagement** – Employees who are not committed to their jobs, coworkers and/or the company are more likely to miss work simply because they have no motivation to go.
- **Illness** – Injuries, illness and medical appointments are the most commonly reported reasons for missing work (though not always the actual reason). Not surprisingly, each year during the cold and flu season, there is a dramatic spike in absenteeism rates for both full-time and part-time employees. **Injuries** – Accidents can occur on the job or outside of work, resulting in absences. In addition to acute injuries, chronic injuries such as back and neck problems are a common cause of absenteeism.
- **Depression** – According to the National Institute of Mental Health, the leading cause of absenteeism in the United States is depression. Depression can lead to substance abuse if people turn to drugs or alcohol to self-medicate their pain or anxiety.

Common Reasons for Employee Absence

- **Job hunting** – Employees may call in sick to attend a job interview, visit with a headhunter or work on their resumes/CVs.
- **Partial shifts** – Arriving late, leaving early and taking longer breaks than allowed are considered forms of absenteeism and can affect productivity and workplace morale.

Types of Leaves

- **Sick Leave, PTO, and Vacation**
- **FMLA**– Family Medical Leave Act.
- **ADA** – Americans with Disabilities Act.
- **USERRA**- Uniformed Service Employment and Reemployment Act
- **State Leaves of Absence**
- **General Leave of Absence**

Sick Leave, Vacation, and PTO

- Recognized employee benefits
- Usually increase with longevity
- Paid time off
- May be locally mandated

Sick Leave, Vacation, and PTO

Sick Leave and Vacation vs. PTO

Sick Leave and Vacation:

- Sick Leave and Vacations are usually separate and distinct allocations which may or may not carry over into subsequent years.
- Offers employer more control over employee time off

PTO:

- PTO is a combined allocation that can be used for any purpose- sick days or vacation.
- Offers employees more flexibility
- PTO more likely to be used than separate sick leave and vacation allocations
 - May be able find savings by offering less PTO than the combination of sick leave and vacation.

Sick Leave, Vacation, and PTO

Risks:

- Incorrect or unequal application of company policy
 - Doing it wrong or just doing it for those you like will probably get you sued
- Primary failure can result in secondary suit
 - Vacation or sick leave error recast as discrimination
- Employee Handbooks- Life Preserver or Smoking Gun?
 - Trial attorneys love out of date handbooks
- Failure to follow local or state leave law
 - Fines, bad publicity

Sick Leave, Vacation, and PTO

Strategies:

- Know why you offer what you offer
- Benefits are not benefits if they are not perceived as benefits
 - Baby Boomers vs. Millennials
- Benchmark to be sure you're current
 - Stay current or get left behind
- Make sure your handbook is current
 - Have it reviewed and updated
- Know your state and local laws

Family Medical Leave Act

- 12 weeks general
- 26 weeks for military
 - “Qualifying Exigency”
 - Providing Care for Service Member
- Federal and State
 - An Employee may qualify for State FMLA before Federal
- Unpaid, but can substitute paid time off (sick time, vacation, STD)
- Employee still considered “active” for health plan purposes
 - Not a COBRA event until FMLA leave concludes

Employer Risks

- Not offering FMLA
- Not offering FMLA correctly
- Retaliation for requesting or taking FMLA

Employer Risks in FMLA Administration

Not offering FMLA:

- If you are a Covered Employer, must offer FMLA
 - Covered Employer if you have at least 50 employees for at least 26 weeks of the year
 - 50 + employees within 75 driving miles

Employer Risks in FMLA Administration

Not offering FMLA:

- **Eligibility for FMLA**
 - Employed at least 12 months on the date of leave
 - Worked at least 1250 hours during prior 12 months

- **Triggers for FMLA**
 - A “serious medical condition”
 - Birth/placement of a child
 - “Providing care for”
 - New Military Leaves (12/26wks)

Employer Risks in FMLA Administration

Not offering FMLA correctly:

- Not having an FMLA policy
- Applying policy inconsistently
- Not having an up to date FMLA policy
- Failure to include an FMLA policy in handbook
- Failure to use or provide appropriate FMLA forms
- Failure to notify applicants
 - Notice must be posted where applications are accepted, physically or on the internet
- Medical Plan risk
 - Employees on FMLA are “active” for medical plan purposes and should not be put on COBRA until FMLA expires.
 - Failure to comply with FMLA allows stop loss carrier to deny claims.

Employer Risks in FMLA Administration

Not offering FMLA correctly

Wallace v FedEx Corp

FedEx was at fault for failing to provide an employee with written notice of the consequences of not returning a completed medical certification form.

Verdict of \$173,000

Employer Risks in FMLA Administration

Retaliation for requesting or taking FMLA is prohibited

- Cannot deny raises, promotion
- Cannot treat badly or give poor reviews
- Cannot terminate or take other disciplinary action

Employer Risks in FMLA Administration

Pagan-Colon v. Walgreens of San Patricio Inc.

Jury verdict in favor of employee with heart problems who was fired after he took a two-week leave of absence that included hospitalization and recuperation.

\$67,782 verdict

Nicholas Lore v. Chase Manhattan Mortgage Corp.

Jury verdict in favor of employee who was fired when he wanted to take FMLA to deal with serious medical issues.

\$2.2 Million verdict, With other damages, likely over \$8 Million

Employer Risks in FMLA Administration

FMLA Interference claim in the Hurley case

DAMAGES ITEM	COMMENT	AMOUNT
Back pay	Common award in termination case – lost wages up to date of judgment	\$200,000
Front pay	Awarded if employee has not yet become re-employed at time of judgment – lost wages looking forward for a period of time	\$353,901
Pre-judgment interest – on back pay only	Always awarded; rate and whether interest is compounded varies	\$8,000 [est. 2 years at 5%]
Liquidated damages	Similar to punitive damages – frequently awarded in FMLA cases	\$200,000
Plaintiff's attorney's fees and costs	Employer pays if employee wins	\$233,109 [fees] \$21,329 [costs]
Employer's estimated attorney's fees and costs	Employer always pays (and is usually larger than employee's fees)	\$250,000 [est.]
TOTAL COST TO EMPLOYER		\$1,266,339

How to Effectively Manage FMLA and Curb Abuse

The challenge is how to comply with the law's intent and specific provisions without allowing employees to game the system.

Here are some tips:

1. Ensure policies and practices are up to date and compliant/consistent
2. Train supervisors to spot and respond to situations involving FMLA
3. Confirm eligibility
4. Restrict intermittent leave to only what the law allows and ensure that it is taken properly
5. Medical certifications, re-certifications, second and third opinions
6. Track all usage and look for patterns to reduce improper usage
7. Investigate suspected FMLA leave abuse

How to Effectively Manage FMLA and Curb Abuse

1. Ensure policies and practices are up to date and compliant/consistent

- Clear, concise FMLA policy
- Include call-in procedures
- Uniformly apply and enforce the policy

2. Train supervisors to spot and respond to situations involving FMLA

- Employees do not have to specifically mention FMLA
- Timely reporting to HR (5 day notice)
- Supervisors should not question medical condition or contact medical provider
- Should not discipline for absence due to FMLA

How to Effectively Manage FMLA and Curb Abuse

3. Confirm eligibility

- Has employee worked 1250 hrs and worked 12 months
- Work with 50 employees within 75 mile radius
- State laws
- Is it a serious health condition?
- Qualified family member

4. Restrict intermittent leave to only what the law allows and ensure that it is taken properly

- Define the smallest increment allowed for leave. When leave is taken, count all of it and track it.
- Choose not to allow intermittent leave for the birth, adoption or placement of a child
- Require advance scheduling of planned intermittent leave (least disruptive)
- Consider temporary transfer for employees who require planned intermittent leave if it would better accommodate the leave

How to Effectively Manage FMLA and Curb Abuse

5. Medical certifications, re-certifications, second and third opinions

Medical certification

- Require certification for all requests
- Must return form within 15 days (in most cases)
- May contact healthcare provider for clarification or authentication
- If incomplete or insufficient, employee has 7 days to correct deficiencies

Recertification

- No more often than every 30 days & only in connection with an absence
- Annual certification (did they meet 1250 hr requirement)
- Every 6 months
- Recertification sooner if time off does not align with frequency or duration, employee extends the leave, or employer receives info that casts doubt

Second and third opinions

- Employer pays
- Must be independent doctor
- If second opinion differs from first, employer may require a third opinion
- Third opinion is binding

How to Effectively Manage FMLA and Curb Abuse

6. Track all usage and look for patterns to reduce improper usage

- Smallest increments of time allowed for other forms of leave
- Only the amount of leave actually taken
- Designate time as FMLA if it qualifies
- Workers compensation, short-term disability
- Make sure summary plan description mirrors your FMLA or leave policy
- Look for patterns (Monday-Friday or certain departments)

7. Investigate suspected FMLA leave abuse

- Employers are entitled to investigate if there is honest suspicion
- Second and Third medical certification exams available at employer expense
- Investigate before taking action

Americans with Disabilities Act

Americans with Disabilities Act

Leave Under ADA

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. (29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See *Cehrs v. Northeast Ohio Alzheimer's*, 155 F.3d 775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).)

Americans with Disabilities Act

Leave Under ADA

- An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees.
- Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.

Example:

- If employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

Americans with Disabilities Act

Leave Under ADA

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

1. Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
2. Recuperating from an illness or an episodic manifestation of the disability;
3. Obtaining repairs on a wheelchair, accessible van, or prosthetic device;
4. Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
5. Training a service animal (e.g., a guide dog); or
6. Receiving training in the use of Braille or to learn sign language.

Americans with Disabilities Act

How should an employer handle leave for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?

An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

Americans with Disabilities Act

Risks:

- EEOC is very proactive in suing employers for suspected ADA violations
- Employers run the risk of fines, attorney fees, and adverse publicity

Strategies:

- Train HR and supervisors to administer ADA leave once FMLA expires
- ADA leave is unpaid, so essentially costs an employer nothing

USERRA

Uniformed Services Employment and Reemployment Rights Act of 1994

- The return of employee/service members from active duty with the U.S. Armed Forces triggers important employer duties under USERRA.
- Main duties facing employers under USERRA are reinstatement/retention of returning employees to their jobs, application of USERRA's "Escalator" provisions, and employee benefit considerations.
- **Applies to Federal (Title X) service only, not State (aka National Guard) call ups unless National Guard unit is federally mobilized.**
- Affects medical plan if employee is called up for more than 31 days.
 - USERRA leave is like military COBRA.

USERRA

USERRA Reemployment Rights

- USERRA limits re-employment and other rights to those who served less than 5 years, with some notable exceptions.
- The position to which an employee is reinstated upon return must be determined by the length of service in the military and when more than one person is returning to the same job, who left first.
- Service < 91 days: entitled to the same job he/she left or the job he/she would have attained.
- > 91 days: entitled to the same job, the job he/she would have attained or a job of similar seniority, status, and compensation.

USERRA

USERRA Reinstatement Deadlines

Length of Active Duty Service	Employee Must Reapply No Later Than
Service of one to 30 days	The beginning of the next regularly scheduled work period on the first full calendar day following: a.) completion of service, and b.) the expiration of an eight-hour rest period following safe transportation home.
Service of 31 to 180 days	14 days after completion of military duty.
Service of 181 or more days	90 days after completion of military duty.

USERRA

USERRA Retention Rights of Employees

- Retention rights also protect individuals who are reinstating their employment after military leave by defining how long employers must retain them in their position.

Number of days on Military Leave absence	Job Retention Rights
Less than 31 days	Equal to length of military service
31 to 180 days	Six months
More than 180 days	Twelve months

USERRA

Risk:

- DOL vigorously pursues employers for USERRA violations.

Strategy:

- Be aware of which employees have Reserve or Guard obligations
- Request copies of orders as soon as they are available
- Employees must provide documentation as soon as reasonably possible

Salary integration:

- Be aware of base pay vs. allowances for housing, expenses, etc.

State Leaves

Many states and local units of government have their own leave laws in addition to the federal leaves.

- Numerous states and cities have enacted sick leave and vacation laws.
- Jury duty
- Parental/Sick Child Leave
- State FMLA or its equivalent

Risk:

- Denying employees state and locally sanctioned leaves can get you sued

Strategy:

- Know the laws of your state and any states in which you operate
 - Some state leave laws are triggered by working a set number of hours in the jurisdiction.

General Leaves of Absence

Many employers offer additional leaves of absence beyond FMLA that go by a variety of names- Medical Leave, LOA, Miscellaneous Leave, Layoff/Shut Down/Furlough, etc.

- Employers are permitted but not required to offer additional leaves.
- Must be documented in employee handbook
- Must be administered fairly
- Non-FMLA leaves trigger COBRA
- Make sure the stop loss carrier is aware and that the leave is in the medical plan document as well as in the employee handbook.
- Fully insured plans should get the leave approved by carrier and added to book if coverage is to continue during leave.
 - Limited continuation during shut down or lay off.

Thank You!



Adam P. Jensen

Vice President, Compliance and HR Consulting

608.467.5030

ajensen@cottinghambutler.com