

EMPLOYMENT SERVICES ALERT

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Start that FMLA Clock Running: How to Run FMLA Leave Concurrently with Time Off due to a Work-Related Injury

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All of us have a tendency to compartmentalize issues that occur in the workplace. When it comes to a work-related injury, employers in Ohio often compartmentalize the issue by placing it in the “workers’ compensation” box without realizing that the injury, and any resulting time off from work, may also trigger the FMLA’s leave requirements. In fact, a work-related injury that results in three consecutive days off work will most likely also constitute a “serious health condition” under the FMLA.

Why does that matter? Well, any time that an employee takes off for a work-related injury (that also constitutes a serious health condition) can, *and should*, be counted against the 12 weeks of unpaid FMLA leave to which the employee is entitled under federal law. If you fail to designate the time off work as FMLA leave, then the employee may be able to take his full allotment of FMLA leave even after an extended period of temporary total disability.

For example: Let’s say that one of your employees suffers a serious workplace injury and is off work on temporary total disability for 18 weeks. His doctor then releases him to return to work light duty (consistent with your light duty job offer). If you have not properly designated that employee’s time off as FMLA leave, the employee can reject your offer of light duty work and may be entitled to up to 12 additional weeks of unpaid FMLA leave.¹ And you would also be required to keep the employee on your health insurance through those 12 additional weeks of unpaid leave and return him to his former job when he finally returns to full-duty work.

So how do you make sure that an employee’s FMLA leave runs concurrently with his time off work due to a work-related injury?

Step 1. Make sure that your employee handbook expressly states that FMLA leave runs concurrently with any time off work for a work-related injury that also constitutes a serious health condition.

Step 2. Understand which employees are eligible for FMLA leave. In order to be eligible under the FMLA, an employee must have worked for you for at least 12 months; must have at least 1,250 hours of service during the 12 month period immediately preceding the leave; and, must work at a location where you have at least 50 employees within a 75 mile radius.

Step 3. Understand when a work-related injury constitutes a serious health condition. Under the FMLA, a serious health condition exists where there is a period of incapacity of more than three consecutive, full calendar days that also involves:

¹ In certain situations, you may be able to retroactively designate time off from work as FMLA leave. However, the best practice is to designate time off as FMLA leave as soon as you have sufficient information to do so to avoid any potential claim that your retroactive designation prejudiced the employee’s FMLA rights or constituted retaliation for filing a workers’ compensation claim.

- 1) treatment two or more times, within 30 days of the first day of incapacity, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) on referral of the health care provider; **or**
- (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

As mentioned above, this is not a hard standard to meet in the context of a workers' compensation claim.

For example: Let's say an employee injures her lower back at work; reports the injury; and then leaves work to go to see her doctor. Her doctor diagnoses her with a herniated disc and takes her off work for a week. Her doctor also refers her to a physical therapist for a series of PT sessions beginning two weeks after the injury. In this example, the employee's injury constitutes a serious health condition under the FMLA because the employee has a period of incapacity of three or more days and is going to receive treatment at least two times within 30 days (first by her doctor and then by a physical therapist).

Step 4. Properly document the FMLA leave with an FMLA Eligibility Notice (Form WH-381 or its equivalent) **and** an FMLA Designation Notice (Form WH-382 or its equivalent). Both notices are required to commence FMLA leave. While the FMLA notice and certifications requirements can be complex and frustrating when you are dependent upon the employee to provide you with the necessary information, your access to medical records under Ohio's workers compensation system makes the FMLA process for a work-related injury somewhat simpler. The important thing to remember is that you do not have to wait until the employee requests leave. You, as the employer, can complete the FMLA designation process.

Under the FMLA, an employer must provide an FMLA Eligibility Notice to an employee "when an employee requests FMLA leave, *or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason.*" An employer must provide an FMLA Designation Notice "[w]hen the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason."

If an employee suffers a work-related injury and misses three consecutive workdays, you have acquired sufficient knowledge to provide an FMLA Eligibility Notice. In many instances, you may also have received sufficient information through the BWC's electronic claims file to send out the Designation Notice at the same time. If a physician takes an employee off work for more than three days and recommends or requests additional treatment within 30 days, then you have sufficient information to send an Eligibility Notice and a Designation Notice and start the clock running on the employee's 12 weeks of FMLA leave.

If you have any questions about this topic or need assistance with your solicitation policy or any other labor and employment matter, please contact one of the listed Roetzel attorneys.

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