



## To Return an Employee to Work, or Not? Details and Dilemmas at the End of Medical-Disability Leave, and When Leave Seems to Never End

by Jillian Barron

Although most employers are sympathetic to their employees' medical difficulties and generally are aware of the obligation to provide medical and disability leave under some circumstances, they may not realize the full scope of their obligations in this tricky area. When facing difficult return-to-work situations at the end of FMLA leave, compliance with the FMLA's technical rules can be critical to avoiding potential liability. And the FMLA is not the end of the story—the ADA and state disability law may require extended leave even when FMLA eligibility does not exist or has been exhausted. Below are a few of the important points employers should keep in mind in addressing return-to-work and extended-leave issues.

**To require a fitness-for-duty "certification" before returning an employee to work after medical FMLA leave, an employer must have laid the appropriate foundation.** FMLA regulations set the prerequisites:

1. a uniformly-applied policy or practice that requires all similarly-situated employees who take leave to submit certification that they are able to resume work
2. notice of the certification requirement was given to the employee at the time the employee's leave was designated as FMLA-qualifying (the "designation notice")
3. the certification may be required only with regard to the particular medical condition that necessitated the leave
4. an employer may additionally require that the certification address the employee's ability to perform the essential functions of his/her job, but only if, at the time of the designation notice, the employer provided the employee a list of the essential functions and notice that the certification must address them
5. certifications for return from periods of intermittent FMLA leave may be required no more often than every 30 days, and only if there is a reasonable belief that, due to the medical condition on which leave was based, the employee's performance of his/her duties will involve a significant risk of harm to the employee or others

Courts have held that an employer's failure to comply with some FMLA notice requirements may be excused where an employee suffers no prejudice as a result. Still, employers that have followed the rules will be best protected if they later refuse an employee's return to work based on a failure to provide certification.

**Under the FMLA, certification triggers the employer's duty to return an employee to work, even where independent information indicates the employee may not be fully fit to perform his/her position.** As a recent Washington appeals court case illustrates, where an employer has not requested specific certification of an employee's fitness to perform the essential functions of his/her job, a certification is sufficient when it simply states that the employee may return to work. In *Chaney v. Providence Health Care*, 165 Wn. App. 578 (2011), the employee's personal physician completed a certification stating the employee could return to work "as soon as Employer allows." The employer nevertheless terminated the employee. It justified its decision on the grounds that the certification was vague, and a physician the employer had selected to evaluate the employee's fitness for duty was of the opinion the employee's medication prevented him from safely performing his job. The court disagreed. It held that the employee's physician's certification was all that was required under the FMLA, and its submission entitled the employee to return to work.

**An employer's options when it questions the validity of a certification are limited.** As *Chaney* notes, an employer may seek clarification from an employee's healthcare provider of the meaning of a certification, but may not request *additional* information or delay the employee's return to work pending contact with the provider. Further, unlike with certifications of an employee's *need* for FMLA leave, an employer may not require second or third opinions on a fitness-for-duty certification. Thus, an employer concerned that an employee is not really fit for duty despite a healthcare provider's certification must nonetheless return the employee to work. If the returning employee's performance subsequently displays problems that appear to be medically based, the employer may then have grounds, under the ADA, to require a fitness-for-duty exam focused on the specific performance deficiencies observed, or may simply need to provide accommodation.

**The ADA and state disability law often require extended post-FMLA or non-FMLA medical leave be provided; the exact length of such leave depends on the circumstances.** The EEOC and courts have made clear that unpaid leave is a form of reasonable accommodation that may be required when a disabled employee is temporarily unable to perform his/her job. Such accommodation requires consideration of the circumstances on a case-by-case basis and generally may be denied only when it would create undue hardship for the employer, or would not enable the employee to perform the job within the foreseeable future. Further, though the ADA does not explicitly require reinstatement to the same or an equivalent position following leave, as does the FMLA, the EEOC has taken the position that reinstatement following disability-based leave is required unless the employer can establish undue hardship. Applying these principles, the EEOC has challenged employer policies that set a blanket time limit on leave for all employees, such as a specified number of months after which employment will be terminated if employees have not returned to work. (There are no express regulations governing fitness-for-duty certifications at the end of disability-based, non-FMLA leave, but such certifications should be tailored to ensuring an employee is able to perform the essential functions of the job, with or without accommodation.)

Employers thus must consider granting leave, even when the FMLA does not apply or an employee's FMLA entitlement has been exhausted, if leave is necessitated by an employee's disabling condition. It is best to set a specified period of leave based on a healthcare provider's prognosis, while advising that an extension will be considered if requested and supported by medical documentation. However, particularly when multiple leave extensions occur and hiring a temporary replacement is impractical, an employee's continued absence may create an unreasonable burden on coworkers and the organization. At that point, the employer will probably be safe filling the employee's position. Even then, if the employee is expected to be able to return at a specified time, the employee should simply be notified that his/her position is no longer available but he/she will be considered for any open positions when he/she is able to return. Ultimately, courts have held, if it is unclear if or when the employee may be able to return, the employer need not provide ongoing leave of indefinite duration.

When in doubt about their obligations with regard to leave and return to work, employers would do well to consult with counsel.

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