



Presented below is a hypothetical situation, based on a compilation of questions related to state and federal leave laws, received by the Associated Industries In-house Counsel Department. Read about the situation, and then decide what you would do ...

You make the call.

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The Employer's Dilemma – Part One: Jill Brown has worked at your company as an administrative assistant for the last ten years on a Monday through Friday, 7:00 am to 4:00 pm schedule. She is an exemplary employee and person. Her performance reviews show that she is technically skilled, reliable, and dedicated to the company. She has never used all of her sick leave or vacation time.

She married a very nice gentleman with two children over a year ago. The children are now ages 16 and 20. Their mother passed away several years ago. The youngest child has recently been diagnosed with leukemia and now needs a great deal of medical attention. During the months of January, February, and March, Jill called in sick four times. Each call was placed before the beginning of her work day on a Friday morning. Each absence was occasioned by her need to care for her sixteen year old step-child.

Obviously, you will treat this employee with all fairness, but you are seeing a pattern. Are there any factors in this context that may lead you to think these days off are protected? What should you ask her at this point? What would you do with any information received? May you count these absences as occurrences under your attendance policy?

A.I. In-house Counsel Responds – Part One: The Washington State Family Leave Act (WFLA) and the federal Family Medical Leave Act (FMLA) provide up to twelve weeks of unpaid, job-protected leave for qualified employees who require leave from work for certain medical reasons, including leave to care for certain family members who have a serious health condition.

All employers who employ 50 or more employees for at least 20 workweeks annually within 75 miles of the employer's worksite must provide state and federal family leave to their employees. To qualify for state and federal Family Leave, the employee must work for the employer for at least 1,250 hours during the last 12 months before the leave.

In addition, the Washington Family Care Act (WFCA) provides that if an employer has a policy which entitles an employee to sick leave or other paid time off, the employer must allow an employee to use any or all of the employee's choice of available sick leave or other paid time off to care for a child (including a step-child) with a health condition that requires treatment or supervision.

In this case, the employee is concerned about Jill's pattern of absences over the past several months, occasioned by Jill's need to care for her ill step-child. There are several factors in the scenario which suggest these absences may be protected under state and/or federal leave acts, or may qualify for coverage under the Family Care Act.

First, we will assume the employer has more than 50 employees and otherwise meets the qualifications necessary to provide state and federal family leave. Second, Jill has worked more than 1,250 hours in the past year (she's been full time for ten years), and is therefore a "qualified" employee for purposes of state

and federal leave laws. Third, we know that the employer provides paid leave and that Jill has unused sick and vacation time available.

At this point, the employer should meet with Jill and gather some basic information – the questions should be general enough to protect Jill's privacy (and her family's privacy) but establish the reason for Jill's absences, including who was ill and whether the family member has a "serious health condition" that qualifies Jill for state or federal family leave.

Any information obtained from Jill should be kept in a medical information file, separate and apart from Jill's personnel file, as all medical information regarding an employee or employee's family must be maintained under separate cover and in strict confidence.

Here Jill's absences would likely be protected. State and federal leave laws provide that a qualified employee may take leave to care for an immediate family member (spouse, son/daughter, or parent) who has a serious health condition. The term son or daughter includes a biological child or stepchild who is under the age of 18 years.

State and federal leave may also be granted for employees to provide physical and psychological care to a family member. Where psychological comfort and reassurance would be beneficial to a child (including a stepchild) with a serious health condition, such care would establish a qualifying event for purposes of leave.

Because Jill's absences would most likely be considered "protected" under state and federal leave laws, the employer should not count these absences as "occurrences" under the employer's attendance policy. Furthermore, when an employer acquires knowledge that an employee's absence may be for an FMLA-qualifying event, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days. Here, the employer probably had sufficient knowledge that Jill's absences may be FMLA-eligible and failed to provide her with the required notice within five days. Therefore, the employer should not count these four absences against any of her FMLA leave, or WFLA leave.

The Employer's Dilemma – Part Two: In April the physician for Ms. Brown's 16-year-old step child certified that the child has a serious health condition for which she needs additional care and treatment in the form of at least one day of outpatient care per week. Given the father's travel schedule, the only person able to ensure the child receives treatment is Ms. Brown. Thus, she has received certification requesting intermittent leave in the form of a four day work week for the next year. Is this leave protected by the FMLA? Does she need to obtain agreement from the employer regarding this schedule? May she be reassigned?

A.I. In-house Counsel Responds – Part Two: As noted above, this employer is covered under the state and federal family leave acts, and Jill is a "qualified employee" entitled to twelve weeks of unpaid job-protected leave for qualifying reasons, including intermittent leave to care for her step-child with a serious health condition.

Here, a physician has provided proper certification that Jill's step-child has a serious health condition for which she needs periodic treatment and for which Jill needs to take intermittent leave. For intermittent leave or leave on a reduced leave schedule taken to care for a child with a serious health condition, the law requires that there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.

In this case, the physician has certified the need for leave, and since Jill is the only person who can provide the necessary care to the child (given the father's travel schedule), this would qualify Jill for an intermittent or reduced leave schedule as she has requested.

Next, in order to take intermittent leave, Jill must make a reasonable effort to schedule the treatment (and her leave) so as not to unduly disrupt the employer's operations. Jill and the employer should discuss her leave plans and determine what work schedule would best accommodate the needs of all parties involved.

Because Jill will be working on a reduced leave schedule that is foreseeable based on the child's planned medical treatment, the law permits the employer to transfer Jill temporarily, during the reduced leave schedule, to an available alternative position for which Jill is qualified and which better accommodates her recurring periods of leave than her current position. Such a transfer may include altering Jill's existing position to better accommodate her reduced leave schedule. Any alternate or modified position must have equivalent pay and benefits, but does not have to have equivalent duties.

Finally, if the employer chooses to transfer Jill to a different position during her reduced leave schedule to better accommodate the parties' needs, the employer must place Jill in the same or equivalent job as the job she left when her need for reduced leave schedule ends.

There are many state and federal leave laws which affect the workplace. Please call our in-house counsel should you have any questions about how these laws apply to your workplace or to request sample leave policies.

-- Angela Hayes, Associated Industries In-house Counsel