"Unfit" for Duty: What May Districts Require?

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INTRODUCTION

In addition to the responsibility to provide a quality public education to the children residing within their district, boards of education are often one of the largest employers in their respective communities. As employers, boards of education must ensure that their workforce operates effectively, even during occasions of staff shortages. Chronic staff absenteeism not only affects smooth operation of the district on a day-to-day basis, but can impact the quality and continuity of educational services for children. Accordingly, boards must be vigilant in monitoring staff attendance and job performance. However, where attendance and performance concerns stem from staff members' serious and recurrent health and mental conditions, boards must be thoughtful in their response. Below are some of the legal considerations that impact on an employer's response to serious, and sometimes quirky, employee health concerns that affect fitness – and "fit" – for duty.

I. Entitlement to Leave – The Family Medical Leave Act of 1993 (FMLA)

The Family & Medical Leave Act of 1993 (29 U.S.C. 2601, *et seq.*) and its implementing regulations (29 C.F.R. Part 825) [hereinafter "FMLA"] "generally require private sector employers of 50 or more employees, and public agencies, to provide up to 12-workweeks of unpaid, job-protected leave [or to substitute appropriate paid leave if the employees have earned or accrued it] to eligible employees for certain specified family and medical reasons; to maintain eligible employees' pre-existing group health insurance coverage during periods of FMLA leave; and to restore eligible employees to their same or equivalent positions at the conclusion of their FMLA leave."

Because of the nature of family medical leave, employees are generally allowed to return to work based solely on the expiration of leave and not the employee's mental or physical wellness. Particularly in situations where leave is used intermittently, the employer must properly calculate the use of leave and proactively consider a course of action if leave is exhausted.

A. **Eligible Employee**: A person who has been employed for at least twelve (12) months (need not be consecutive), performed at least **1,250 hours** of service during the 12-month period immediately preceding the leave, **and** is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. All full-time teachers are deemed to meet the 1,250 hour test (this is a rebuttal presumption).

B. When is FMLA Used? An eligible employee may take leave for a number of reasons, including:

1. The employee is needed to provide physical and/or psychological care for spouse, child or parent with a "serious health condition"; or

2. The employee's own serious health condition makes him/her unable to perform the functions of his/her job.

C. Intermittent or Reduced-Leave Schedule: Leave may be taken intermittently (*i.e.*, leave in separate blocks of time for a single qualifying reason) or on a reduced-leave schedule (*i.e.*, reducing the employee's usual weekly or daily work schedule) under certain circumstances.

1. The employer has *discretion* whether to grant such leave for the employee to care for a new born child or due to the placement of a child with the employee through adoption or foster care.

2. The employer must grant such a leave schedule for care of a family member or the employee's own serious health condition.

3. An employee may also take FMLA leave on an intermittent or reduced-leave schedule for Qualified Exigency Leave.

4. Finally, Military Caregiver Leave may be taken on an intermittent or reduced-leave schedule when medically necessary.

5. Intermittent leave may necessitate a temporary change in work assignment, however the job must be one for which the employee is qualified and have equivalent pay and benefits.

6. The taking of leave intermittently or on a reduced-leave schedule results in the total reduction of the twelve (12) or twenty-six (26) weeks only by the amount of leave actually taken.

7. The employee must make a "reasonable effort" to schedule treatment so as not to disrupt unduly the employer's operations.

8. Employers are not required to account for FMLA leave in increments smaller than one hour, just because their payroll systems are capable of tracking smaller time increments. Thus, an employer may choose to account for FMLA leave in any increment not to exceed one hour, so long as it matches the smallest increment used by the employer to track any other type of leave.

D. **Concurrent Leave Allowed**: The employer may require an employee to substitute (*i.e.*, "run concurrently") any of his/her earned or accrued paid leave (e.g., sick leave, personal leave, assault leave, vacation leave, compensatory time, family leave) for unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for use of such leave. The employee is always entitled to unpaid FMLA leave if he/she does not meet the employer's conditions for taking paid leave. The employer may waive any procedural requirements for the taking of any type of paid leave.

The employer can require leave taken for an injury or illnesses that qualifies for workers compensation coverage to count against an employee's FMLA leave entitlement.

E. **Critical Definitions Under the FMLA that Affect Fitness for Duty**.

1. Serious Health Condition: A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that involves in-patient care or continuing treatment by a health care provider.

    a. A visit to a health care provider is not necessary for each absence, and each absence need not last more than three consecutive, full calendar days.

    b. Mental illness resulting from stress or allergies may be serious conditions, but only if specific conditions are met (*i.e.*, the treatment is by a health care provider or by a provider of health care services on referral by a health care provider).

    c. Substance abuse may be a serious health conditions if specific conditions are met (*i.e.*, the treatment is by a health care provider or by a provider of health care services on referral by a health care provider). Absence due to an employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

    d. Definition includes a chronic serious health condition, which:

        i. requires periodic visits (*i.e.*, at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

        ii. continues over an extended period of time (including recurring episodes of a single underlying condition); and

iii. may cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

2. Essential Functions. An employee is "unable to perform the functions of his/her position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position. Additionally, an employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

3. Fitness-For-Duty Certification Under the FMLA. Prior to returning to work, an employer may require an employee who takes leave for a serious health condition to provide the employer with a fitness-for-duty certification that specifically addresses the employee's ability to perform the essential functions of his/her job.

   a. The fitness-for-duty certification may only apply to the particular health condition that caused the employee's need for FMLA leave.

   b. If an employer requires a fitness-for-duty certification, it must be uniformly applied to all similarly-situated employees (i.e., same occupation, same serious health condition) returning from leave for their own serious health condition, and a list of the employee's essential functions must be provided to him/her at the time his/her leave was designated as FMLA leave.

   c. If reasonable safety concerns exist, the employer may, under certain circumstances, require an employee to submit a fitness-for-duty certification before he/she returns to work from intermittent FMLA leave.

   d. The employer may require the cost of the certification be borne by the employee.

   e. The employer may not ask for a second or third opinion for such certifications. An employer's health care provider, human resource professional, leave administrator, or management official may contact an employee's health care provider for clarification of the fitness for duty certification, so long as it does not delay the employee's return to work.

II. Entitlement to Accommodation – the Americans with Disabilities Act of 1990 (ADA)

The Americans with Disabilities Act of 1990 ("ADA") prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. Since the law stresses the importance of accommodating an eligible employee's environmental needs, a board of education must carefully examine whether an employee is truly disabled and whether the disability can be safely and efficiently accommodated in the workplace. Doing so requires a general understanding the key definitions in the ADA.

A. What is a "Disability"?

A physical or mental impairment that substantially limits one or more major life activities.

1. Substantially Limits: EEOC considers a physical or mental impairment to be a disability only if the condition significantly restricts a person from completing a major life activity.

2. Major Life Activity: the definition includes, but is limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A).

3. The determination of whether an impairment substantially limits a major life activity must be made without considering the ameliorative effects of mitigating measures such as medication; medical supplies, equipment or appliances; prosthetics; hearing aids and cochlear implants; mobility devices; or assistive technology; reasonable accommodations or auxiliary aids or services.

4. Kleptomania, pedophilia, exhibitionism, voyeurism, etc. are excluded under the definition of "disability."

5. An impairment that is episodic or in remission is a disability if it substantially limits a major life activity when active. 42 U.S.C. § 12103(4)(D).

III. Entitlement when Injured at Work – Ohio's Workers' Compensation Law

The Ohio Workers' Compensation law, Ohio Revised Code Chapter 4123, provides that every employer with one or more employees must have workers' compensation insurance for its full time, part time, or seasonal workers. This "no-fault" insurance applies for any employee who is injured in the course of or arising out of his/her employment.

- ✓ Self-inflicted injuries or injuries suffered while under the influence are not covered.

- ✓ Employers often ease personnel back into the work world through assignment to "light duty" work.

The Bureau of Workers' Compensation ("BWC") oversees much of the decision making process on when an employee returns to work. However, where an employer is asked to consider work modifications such as light duty or other means to accommodate a returning worker, the employer must take care to assess if the change in assignment or workload is appropriate.

IV. Entitlement to Retirement – Public Employee Disability Retirement

Under R.C. 3307.63, a member participating in the state teachers retirement system who 1) has elected disability coverage; 2) has not attained age 60; and 3) is determined by the state teachers retirement board to qualify for a disability benefit, must be retired on disability.

Under R.C. 3309.40, a member who has elected disability coverage who is determined by the school employees retirement board to qualify for a disability benefit and has not attained age 60, must be retired on disability.

An employer cannot force an employee to seek a disability retirement; the application for disability retirement is left to the employee. However, should the disabling condition cease, the employee is no longer eligible for retirement and may return to the employer's workplace, so long as the employee returns to employment during the first five years following the effective date of disability benefits. In that situation, the employer must relocate an employee whose return was unexpected, potentially provide additional training if the employee has been absent for some time, and possibly determine a suitable but comparable assignment if the work environment has changed.

V. Fitness-for-Duty Examinations

A fitness-for-duty examination is a medical examination of a current employee to determine whether he/she is physically and/or psychologically able to perform the essential functions of his/her job.

Fitness-for-duty examinations may occur under the following circumstances:

- ✓ The employee seeks to return to work after an extended leave of absence for a serious illness or injury (*i.e.*, the employer is confirming the employee can meet the physical requirements of the job).

- ✓ The employee's conduct on the job gives the employer reason to question whether the employee is able to safely perform the job (*e.g.*, an employee passes out at work and the employer requires the employee to be examined to make sure he/she does not pose a safety risk).

Additionally, pursuant to the ADA, an employer may require an employee with a disability to submit to a fitness-for-duty examination if the exam is job-related and consistent with business necessity. This standard is normally met if an employer has a reasonable belief that: (1) the employee's condition may prevent the employee from performing the essential job functions; or (2) the employee poses a direct threat to his/her own safety or the health or safety of others. The District's belief must be based on facts, not on stereotypes or assumptions, about the employee's physical and/or mental condition. The District is responsible for paying for the fitness-for-duty examination.

A. **Legal protection for the Employee**. *Ohio Rev. Code § 4112.02* provides, in relevant part, that it is "an unlawful discriminatory practice: (A) [f]or any employer, because of the . . . disability, . . . of any person, to discharge without just cause . . . or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Under the statute, a "disability" includes "being regarded as having a physical or mental impairment." *Ohio Rev. Code § 4112.01(A)(13)*

An employer must provide a Genetic Information Nondiscrimination Act of 2008 (GINA) "safe harbor" notice with the request for medical information. The Notice must state that "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II, including the Board of Education, from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by law. To comply with this law, we are directing that you not provide any genetic information when responding to this request for medical information (unless the request pertains to you requesting FMLA leave for purposes of caring for an immediate family member with a serious health condition). "Genetic information," as defined by GINA, includes an individual's or family member's genetic test, the fact that an individual or an individual's family member sought or received genetic services or participated in clinical research that includes genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services".

B. **Legal Protections for the Employer**. Fitness-for-duty examinations are not adverse employment actions in the context of civil rights statutes. *See Harrison v. City of Akron, 43 F. App'x 903, 905 (6th Cir. 2002)*

An employer's requirement that an employee submit to a psychiatric evaluation to determine whether the employee could continue to fulfill the essential functions of the position is not tantamount to a perception by the employer that the employee is disabled. *Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 810-11 (6th Cir. 1999)*.

VI. Some Scenarios

A. "Working" while on FMLA

Facts

A Board employee serves both as a teacher and as the head softball coach. She is currently pregnant and will be on maternity leave during the softball season. The employee has expressed interest in returning as a softball coach even though she will be on FMLA leave during that time period. She has six weeks of paid sick leave.

Does the Board have to let her coach?

B. Intermittent FMLA and the Excessive Absenteeism Policy

Facts

Teacher with a continuing contract has exhausted his sick leave. The collective bargaining agreement ("CBA") permits discipline for excessive absenteeism, however, the teacher takes unpaid Family & Medical Leave Act ("FMLA") leave whenever he uses sporadic and/or intermittent (*i.e.*, not for a continual period of time) leave, attributable to his chronic condition. His annual FMLA entitlement is nearly over, and his sporadic schedule is both exhausting your sub pool and negatively impacting his students.

What can the District do?

C. The Working Retired

Facts

A Bus Driver informs the Superintendent that she plans to retire soon after the start of the school year, but wants to use sick leave (and get paid but not work) until her retirement date. Superintendent: "You can't take sick leave unless you are sick." Bus Driver: "Ok, I'll get documentation from my doctor." The Bus Driver then tells the Superintendent that she and her husband have sold their home and they plan to move out of state. Soon after, Bus Driver

requests FMLA leave through her retirement date. The employee obtains two medical certifications, which claim: (1) Bus Driver has back problems that prevent her from sitting for extended periods of time and are made worse by the vibrations and motion of a bus. The condition may last for a single continuous period of time, or due to periodic flare ups, 2 to 4 times per year, each lasting 2 to 4 days; (2) The back condition and medication makes Bus Driver unable to drive. The back condition may last 5 months, but that episodic flare ups are expected.

Is the employee faking it??

D. Determining Essential Job Functions

Facts

An elementary teacher was involved in a serious car accident that damaged her spinal cord, causing a condition known as "cervical myelopathy." As the employee's condition worsened, the employer required her to submit to a fit-for-duty examination. The examiner recommended the following accommodations: (1) No standing for more than one hour per day; (2) No continuous speaking; (3) Alternate sitting, standing, and walking; (4) Minimal stairs; and (5) Use of ambulatory aids such as a cane, and under extreme circumstances, an electrical scooter as needed.

The District attempted to accommodate the teacher. Not yet satisfied, the teacher obtain three subsequent opinions, which found that the teacher "should not be required to verbally control resistant behavior in students that persists after initial warning." The Board agreed to make accommodation for the restrictions on standing, minimal stairs, use of ambulatory aids, and hot work environments. However, it could not accommodate her request to avoid disciplining resistive students. Ultimately, the Board requested medical clearance to return the teacher to duty. When she failed to obtain such clearance, the Board terminated her employment, and the teacher sued.

Did the Board overreact?