

Avoid Common Myths When Coordinating FMLA and STD Leave

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By Allen Smith

When coordinating leave requirements, employers often think immediately of juggling Family and Medical Leave Act (FMLA) requirements with the Americans with Disabilities Act (ADA), workers' compensation statutes and state leave laws. Employers also should remember to coordinate the FMLA and other mandated leave with short-term disability (STD) leave plans and avoid some of the common misconceptions about FMLA/STD leave, management attorneys say.

Myth #1: STD leave is job protected.

Many employers as well as employees continue to think that the mere receipt of STD benefits automatically grants employees a right to job-protected leave, even though this isn't true, Frank Alvarez, an attorney with Jackson Lewis in White Plains, N.Y., told *SHRM Online*. "While employers can design STD programs in such a manner, there is no legal requirement that they do so," he explained. "FMLA, ADA and state law are the potential sources of job-protection during periods of leave, not STD benefits." Alvarez said this myth can come back to bite employers.

"Misunderstanding this concept generally puts employers down the road toward failing to spot other important FMLA and ADA distinctions. Employers and employees must both recognize STD is primarily a monetary benefit that has little to do with job protection."

Matthew Effland, an attorney with Ogletree Deakins in Indianapolis, agreed this is one of the main myths about coordinating STD and FMLA leave. "For the most part, STD is a pay status, not a job status," he said. Employees are not entitled to FMLA unless they have worked for an employer for 12 months, he reminded. Also, someone must work 1,250 hours in 12 months to be eligible under the FMLA at a work site that has at least 50 employees within a 75-mile radius.

Joan Gale, an attorney with Seyfarth Shaw in Chicago, added that "confusion remains that FMLA and STD always run concurrently," even though this is not always true. "An employee might be eligible for one but not the other," she emphasized. "And an employee may become eligible for FMLA while on non-FMLA STD leave, in which case none of the time already taken counts against FMLA entitlement!"

Gale agreed many employers operate under the mistaken belief that they can never

terminate employees who are on STD leave. In fact, whether an employee on STD leave can be terminated “depends on a variety of issues, such as whether FMLA applies, and if so, whether it has been exhausted, whether the employee has an ADA disability, whether the STD plan requires the employee to be employed to collect STD—most do, but not all—the employer’s business needs and the reason for the termination,” among other factors.

That said, Gavin Appleby, an attorney with Littler Mendelson in Atlanta, remarked that “most employers realize that any STD leave is highly likely to be FMLA-covered. “

Myth #2: FMLA and STD leave can’t run concurrently.

Some aren’t sure whether FMLA and STD leave can be run concurrently, or think they can’t, even though they can. If someone on STD leave is an eligible employee with a serious health condition, the STD and FMLA leave “can be run concurrently and in most cases probably should be,” Effland said.

Myth #3: STD doctor’s note = FMLA medical certification.

Another common myth, according to Alvarez, is that employees satisfy their obligations to provide FMLA medical certification by supplying doctors’ notes supporting their application for STD benefits.

“Employers can choose to accept such information,” he said, but he added that “they can also require more. One reason to require more is that STD benefits are sometimes denied and, when that happens, employers are left with little or no information supporting the need for FMLA leaves.”

Also, employers might have difficulty convincing STD carriers that it is legally permissible for them to share medical information submitted in support of STD benefits applications to determine whether someone’s condition qualifies for FMLA, he stated. “In these situations, employers find themselves operating in the dark, without any medical documentation” supporting employees’ need for FMLA leave.

However, Rachel Andrews, SPHR, director of human resources for Shooting Star in Teton Village, Wyo., noted that in her experience the STD paperwork goes beyond FMLA certifications rather than the other way around. “I recommend to keep the paperwork separate only because the STD carrier may want more information than what the FMLA requires and the less information you have for the government to audit, the better,” she noted. “But it is best to have both sets of forms in the disability packet so it all gets filled out at once. It can be repetitive,” so the employer or whoever is dealing with the paper work needs to sit down with the employee “and explain it fully.”

Andrews added that while “it can be very burdensome, making sure all the paperwork for both STD and FMLA is filled out and all the documentation is there, in the long run will make things much easier if you have to release someone from a position if they exceed the time frame where their job is protected.”

Carolyn Plump, an attorney with Mitts Milavec in Philadelphia, agreed that “it is best to require employees to complete separate paperwork for the FMLA and STD. This is because often an employer initially does not have sufficient information when a request for leave is made to determine whether an employee’s leave will qualify as FMLA, STD, both or neither.”

But Robin Shea, an attorney with Constangy, Brooks & Smith LLP in Winston-Salem, N.C., said “there are no ‘right or wrong’ answers to this. I am personally in favor of keeping paperwork burdens to a minimum. If I were the administrator, and if an STD approval provided enough information for my employer to determine that the employee qualified for FMLA leave, I would personally not ask for an FMLA medical certification. However, a benefits administrator might feel more comfortable having all of the paperwork separate, and that is fine too.”

“You can definitely use the FMLA paperwork instead of STD,” Megan Norris, an attorney with Miller Canfield in Detroit, said. However, “using STD instead of FMLA is more problematic,” she cautioned, because certain information must be conveyed for the FMLA that might not appear on STD paperwork. Norris warned, “you cannot ask certain information for FMLA” that could be asked for STD purposes.

“So in granting or denying FMLA, you want to be able to say that you stayed within the FMLA boundaries.”

Effland also cautioned that without FMLA paperwork at the outset, the employer might have “no foundational paperwork” for future determinations and might wind up feeling “stuck” if someone has a chronic serious health condition and seeks intermittent leave. The employer then might have to take the time to ask for FMLA certification “at the back end” and accept what a doctor has to say later.

Don’t forget about the ADA’s boundaries either, Plump reminded, noting that “any time an employer requests additional information it runs the risk of violating other laws, such as the ADA,” which includes strict prohibitions on disability-related inquiries and medical examinations.

The ADA also requires that disability-related information be kept in separate, confidential medical files. Employers that want more information about someone’s condition than is provided for STD leave should request that information separately “because of medical privacy,” Jennifer Redmond, an attorney with Sheppard Mullin in San Francisco, told *SHRM Online*. She recommended setting up “two distinct processes” for STD and FMLA leave paperwork, though the paperwork could be received by the same person, and keeping the files for the paperwork separate. If medical information makes its way into the wrong file, Redmond warned, there might be violations of the ADA or FMLA or a privacy claim.

There also should be a protocol for how an organization will use STD paperwork as a trigger for its FMLA obligations, Redmond added. An employer that receives STD paperwork probably would be on notice that the person has FMLA leave, assuming that the person is eligible for FMLA leave and the FMLA covers the worksite, she observed. Redmond suggested having a checklist of what constitutes an FMLA serious health condition at the ready when receiving STD leave paperwork, then passing that information “to the other side of the house or the other side of the brain” if the same person is receiving STD and FMLA leave paperwork. “The discipline in treating them as different is as important as in the workers’ compensation process,” Redmond remarked.

Linda Hollinshead, an attorney with Duane Morris in Philadelphia, also feels more comfortable with getting FMLA certifications. “I generally recommend to employers that they view the provision of STD benefits purely as an insurance-based—or, at times, self-funded—funding source,” she said. “An employee’s receipt of disability benefits does not, in and of itself, automatically render an employee eligible for a leave of absence. Instead, the employee must still qualify for FMLA leave and, if the employee also happens to be

eligible for disability benefits—or, in the case of a work-related injury, workers’ compensation benefits—the employee is then fortunate to receive compensation during what would otherwise be an unpaid FMLA leave. Therefore, even where an employer wishes to offer STD benefits, I recommend that the employer continue to follow the FMLA certification process in order to determine whether the person’s absence qualifies for leave.”

Hollinshead observed that to qualify for disability benefits, carriers sometimes require employees to disclose a diagnosis. Under the FMLA, an individual does not have to identify a diagnosis but instead is required to provide supporting medical facts, she added. “While a diagnosis is one of the examples of information a health care provider may provide on the medical certification form in support of the employee’s request for FMLA leave, a ‘diagnosis’ is not in fact required to be provided in order to be approved for FMLA leave,” she said.

While the FMLA regulations permit employers to consider information provided by employees in connection with applications for disability benefits, the regulations say that to the extent the standard of information is higher for disability benefits than what is required for FMLA leave, “the employer must be sure to inform the employee that the additional information is needed only in connection with the receipt of those disability benefits, not FMLA leave,” Hollinshead added.

Be aware as well of state law requirements. In some states with state-run paid disability insurance (e.g., California, Hawaii, New Jersey, New York and Rhode Island), the employee rather than the employer files the paperwork for the state’s disability insurance, “so there is no paperwork integration,” remarked Myra Creighton, an attorney with Fisher & Phillips in Atlanta. But she said that the payment of STD benefits from an employer’s STD plan always should be a trigger to consider designating leave as FMLA.

“An employee who wants FMLA can be required to apply for STD,” Gale added. “Most will want it, but it’s possible that an employee will not want to apply for STD and provide the paperwork that may be required to get STD but still want FMLA leave.”

Myth #4: Employers can impose any limits on the substitution of paid vacation or personal leave.

Effland said that when he started to bring to the attention of his clients a provision in the FMLA regulations ([29 C.F.R. § 825.207\(d\)](#)) that prohibits employers from imposing any limits on the substitution of paid vacation or personal leave, some were “caught off guard.”

Section 825.207(d) states that “because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee’s accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave.” The regulation does note though that “employers and employees may agree, where state law permits, to have paid leave supplement the disability benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee’s salary.”

Usually, employers and employees will want to agree to run paid leave so employees out on STD leave can receive full pay and aren’t left worse off financially, and so that employers can winnow down the employees’ accrued paid leave, noted Katharine Parker, an attorney with Proskauer Rose in New York. Before the FMLA regulations were revised to permit employers and employees to agree to use paid leave during STD leave, many

employers had policies requiring this anyway, she noted. So, the regulations' revision to permit employers and employees to agree to this was "really helpful," she said.

However, Appleby said "the administrative headaches" of employees' use of paid leave while they receive STD benefits "might outweigh any benefit." He added that "more progressive employers do not seek to force the use of paid leave as quickly as possible, because doing so may be an overreaction to employees who arguably take improper advantage of the FMLA."

Gale agreed that "some companies allow employees to use accrued paid leave to supplement STD, but that makes for some difficulties in recordkeeping—for example, a fraction of a vacation day to supplement STD that is less than 100 percent."

For companies that want to run paid leave with short-term disability leave, Gale recommended putting this in their FMLA and STD policies and then consider putting it as an option in a request-for-leave form. For example, an employer might state on the form, "if you will be paid STD benefits that are less than 100 percent of your salary, do you want to use your accrued paid time to make up that difference? If so, please indicate whether you are authorizing the company to use all of your accrued paid time or if you want to hold back any of that time." The language should be fine-tuned to fit with a company's policies, she noted.

Myth #5: Return-to-work requirements can be imposed after any STD leave.

Alvarez said that another common myth among employers is the belief that "they can impose return-to-work requirements, such as a comprehensive fitness-for-duty evaluation, in any instance when employees are returning to work following a leave during which they received STD benefits."

Not so, he cautioned. "These return-to-work practices must be aligned with the FMLA rules concerning fitness-for-duty certifications, not to mention the ADA rules regarding medical examinations."

Even though there are some myths about how to coordinate STD and FMLA leave, the challenges of coordinating STD and FMLA leave pale in comparison with other coordination-of-leave hurdles, according to Appleby, who said that FMLA/STD leave coordination is "one of the areas where the FMLA is not that difficult to administer."

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