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Worker Injured on the Job? Don't Forget Potential FMLA Rights

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When an employee gets injured on the job, employers know to provide information about workers compensation coverage. But employers would be wise to remember to also consider whether the injury constitutes a "serious health condition," triggering additional obligations under the federal Family and Medical Leave Act (FMLA) or similar state leave statutes.

Workers compensation laws and the FMLA serve different purposes: one provides medical benefits and wage replacement while the other offers job protection. In particular, workers compensation generally allows an employee who is injured in a work-related incident to receive payments for reasonable medical care and a portion of their lost wages resulting from that injury. How much they receive and for how long depends on the particular state's workers compensation law and the kind of injury they experience.

But if such an injury also constitutes a "serious health condition" within the meaning of the FMLA, the employee has additional rights and the employer has additional obligations. The FMLA entitles eligible workers who experience a "serious health condition" to take up to 12 weeks of unpaid leave during a 12-month period, and in most circumstances, be entitled to return to their same job. The employer must notify the employee regarding the employee's

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eligibility within five days of learning of the potentially FMLA-qualifying condition and must provide certain other information regarding leave benefits and obligations. Failing to do so can have consequences.

A recent federal appellate case serves as a reminder that when an employee is injured on the job, the employer should consider the applicability of both workers compensation and the FMLA. The case involved an employee who sustained an injury to her knee while performing housekeeping services for a hospital cleaning service in Georgia. The employer commenced workers compensation coverage for the accident. The employee went to the doctor's office, accompanied by the employer's representative. She initially received a medical excuse from work for four days however, she needed 11 more days off to recover and was required to use accrued leave. The employer's representative accompanied the employee to her follow-up appointments following her injury. The employee was initially released to return to work with restrictions not to squat, kneel, or climb, and was given a light-duty position that accommodated those restrictions. Shortly thereafter, the employee was provided with a cortisone shot, referred to a course of physical therapy for six to eight weeks, and a few weeks later was released to full duty without restrictions. However, before returning to her full-duty position, unbeknownst to the doctor, the employer required her to pass an essential functions test, consisting of various physical tasks including squats. The employee experienced knee pain during the test and could not complete the test. At that time, the employee asked if she could use accrued and sick vacation leave to allow additional recovery time and then perform the essential functions test again. Her supervisor refused and the employee was fired. At no time was the employee informed of her FMLA rights or given the opportunity to take FMLA leave to recover from her knee injury. The employee thereafter sued for interference with her FMLA rights.

The trial court granted summary judgment in favor of the employer but the federal appellate court overturned that ruling, allowing the case to proceed to trial. The court noted that workers compensation benefits are not a substitute for FMLA leave. "[P]roviding workers compensation benefits cannot absolve an employer of all obligations under the FMLA." Indeed, an absence under workers compensation and leave under the FMLA may run concurrently. The same principle applies to a light-duty assignment as well. The court rejected the employer's argument that the employee's acceptance of a light-duty position relieved the company of its FMLA obligations. As the court noted, the employee was entitled to decline the light-duty offer and opt for unpaid FMLA leave instead; however, she was never notified of her rights under the FMLA or given an opportunity to take FMLA leave to rehabilitate her knee.

When should a company inform an employee of his or her FMLA rights? As soon as it becomes aware the employee has a condition that potentially qualifies as a "serious health condition." Let's walk through that analysis.

Section 101(11) of FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves:

1. inpatient care in a hospital, hospice, or residential medical care facility; or
2. continuing treatment by a health care provider."

Inpatient care is easy to identify; however, as the Department of Labor has noted, employers often have more difficulty ascertaining situations that qualify as a serious health condition under that second prong, involving "continuing treatment by a health care provider."

And no wonder – it's complicated. In developing the final regulatory definition of "serious health condition," the Wage and Hour Division established

separate definitions for: (1) periods of incapacity due to pregnancy and prenatal care; (2) a chronic serious health condition (such as asthma, diabetes); (3) a permanent or long-term condition for which treatment may not be effective (such as Alzheimer's, strokes, terminal diseases); and (4) to receive multiple treatments (including recovery from) either for restorative surgery after an accident or other injury, or for a condition that would likely result in *a period of incapacity of more than three consecutive calendar days* in the absence of medical intervention or treatment (such as dialysis, chemotherapy, etc., section).

In addition, the three-day incapacity rule coupled with "continuing treatment" portion of the definition was clarified at section 825.114(a)(2)(i) to mean: "A period of incapacity (*i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

1. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a 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."

An employer is legally responsible for knowing when the FMLA might apply based on the facts available to it. In the case involving the housekeeping worker, once the employer was aware that the employee experienced an on-the-job injury that incapacitated her for more than three days and that she was supposed to have continuing physical therapy, the employer was on notice that she had a

potentially FMLA-qualifying condition. That knowledge triggered the employer's obligation to provide notice to the employee of her eligibility for and rights under the FMLA.

Bottom line: employers should provide FMLA notices when an employee has a condition that could potentially qualify them for FMLA leave, regardless of other leaves and benefits that may apply.

Navigating FMLA rights and obligations is tricky. If you need assistance with that or other workplace issues, contact your Akerman attorney.
