

# WORK COMP INSIGHTS

## FMLA and Workers' Compensation – Common Questions Answered

The federal Family and Medical Leave Act (FMLA) and state workers' compensation laws may both cover an employee who suffers a serious health condition while on the job. The Department of Labor (DOL) has issued revised regulations that implement the FMLA. Though the interplay between the FMLA and workers' compensation leaves was addressed within those regulations, a number of DOL letter rulings have also clarified the interaction of these laws.

This BCG Advisors, Inc. Risk Insights will answer common questions regarding employee leaves that qualify for protection under both the FMLA and workers' compensation laws.

### **Does FMLA leave run concurrently with a workers' compensation absence?**

The employee's FMLA leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a "serious health condition." Thus, an employee could receive workers' compensation benefits to replace lost wages, while at the same time having health benefits maintained under the FMLA. However, if appropriate, the employer must be sure to designate this leave as FMLA-qualifying leave and must give notice of the same to the employee. If the employer fails to designate this leave as FMLA leave, the employee may still be entitled to FMLA leave once the workers' compensation absence has ended.

### **Can an employer require an employee to substitute accrued paid leave if the employee is on workers' compensation and FMLA leave?**

Since the workers' compensation absence is already

considered paid leave, the FMLA provision for substitution of the employee's accrued paid leave for unpaid FMLA leave does not apply. More specifically, if the employee has elected to receive workers' compensation benefits, the employer cannot require the employee to substitute any accrued paid leave for any part of the absence that is covered by the payments

under a workers' compensation plan. However, an employee is also precluded from relying upon the FMLA's substitution provision to insist upon receiving both workers' compensation and accrued paid leave benefits during such an absence. However, employers and employees may agree, where state law permits, to have paid

leave supplement the disability plan or workers' compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

### **What benefits is an employee entitled to while on concurrent workers' compensation and FMLA leave?**

If the employer designates the workers' compensation absence as FMLA leave, then the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave, nor to any right, benefit or position of employment other than that to which he or she would have been entitled had the employee not taken the leave. Thus, an employee on FMLA leave does not accrue seniority or employment benefits during the absence by operation of the FMLA. Nevertheless, in addition to the group health benefits guaranteed under the FMLA, an employee on

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**Recent DOL letter rulings have clarified the interaction between FMLA and workers' compensation laws.**

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FMLA leave, whether paid or unpaid, may be entitled to additional benefits while absent, depending on the employer's established policy for providing such benefits when employees are absent on other forms of leave.

## **How may an employee on concurrent workers' compensation and FMLA leave pay for group health coverage? For other non-health benefit premiums?**

An employee who is receiving payment as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. It is important that the employer make such arrangements with the employee in advance of the leave or shortly after the leave begins since the FMLA provision for recovery of the employer's share of health insurance premiums does not apply. That is, the FMLA statute only authorizes the recovery of the employer's share of insurance premiums that are paid to maintain coverage for the employee under a group health plan during any period of unpaid leave. Leave taken pursuant to a workers' compensation plan is not unpaid leave within the meaning of the FMLA. Likewise, an employer will also want to make prior arrangements for employee payment of other non-health benefit premiums when an employee is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave. Again, neither the FMLA statute nor its regulations provide for the employer's recovery of any such premiums paid during a paid leave as opposed to during an unpaid leave.

## **What may an employer do if it questions the adequacy of a medical certification?**

If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the employee's health care provider in the manner in which the workers' compensation statute provides. Further, the revised FMLA regulations also provide that an employer can contact an employee's health care provider to authenticate or obtain clarification of the medical certification, so long as the employer has first given the employee a chance to cure any deficiencies.

## **Is an employee required to return to a "light duty" job when it is not the same job or is not equivalent to the job the employee left?**

If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job, the employee may decline the employer's offer of a light duty job if it is not the same or is not an equivalent job to the job the employee left. However, as a result of turning down such light duty job, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the FMLA entitlement is exhausted. Additionally, when the workers' compensation benefits cease, the employee may elect or the employer may require the use of accrued paid leave.

If the employee accepts the light duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the employee retains the right to the original or to an equivalent position. However, the period of time employed in a light duty assignment cannot count against FMLA leave entitlement. The right to restoration is held in abeyance during the period of time the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FMLA leave year. Restoration is dependent on the employee's ability to perform the essential functions of the same or equivalent position at the end of FMLA leave.

## **What happens to an employee on concurrent workers' compensation and FMLA leave once the FMLA leave entitlement has run out?**

If the employee is unable to return to work or is still in a light duty job after the FMLA leave entitlement has run out, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (if the employee is a "qualified individual with a disability") for any further relief or protections. Please contact BCG Advisors, Inc. with any questions.