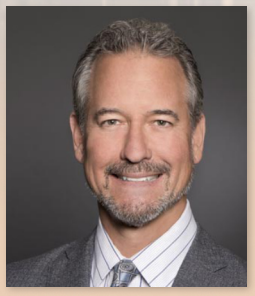
An Employee Exhausted Their 12 Week FMLA/CFRA Leave Time What Should You Do?



Jonathan Fraser Light is the Managing Attorney at LightGabler, which serves almost 3,000 small and large public and private sector employers (for-profit and non-profit) in a variety of industries. He may be reached at jlight@lightgablerlaw.com.

An employee has exhausted their FMLA/CFRA protected 12 weeks of leave time. Now they want more time off. What should the employer do? The first question is whether the employer expects the employee to return after the leave. If not, the employer can take a much more lenient approach: If the employer does not terminate, it almost certainly cannot get sued for wrongful termination.

After FMLA/CFRA exhaustion, the employer has somewhat less of a duty to hold the exact position the employee occupied when they went on leave. The employer is obligated, however, to conduct an analysis of whether the employer can "reasonably accommodate" the employee's continued leave, or whether it creates an "undue hardship" under the Americans with Disabilities Act (ADA) or equivalent state law.

I almost always recommend that the employer allow the employee to extend their leave another 2-4 weeks after the 12 weeks has been exhausted. It is difficult to prove true "undue hardship." If the leave continues for yet another round, the employer still has options.

If the employee is in a difficult-to-fill position, or in a senior leadership position, or the position requires special client-specific training, then the undue hardship analysis is more favorable to the employer. Otherwise if it's a regular line worker who is rather interchangeable, then the employer has a greater obligation to try to accommodate.

If the leave is work-related, then the employee has continuing protections under the Worker's Compensation (WC) laws. The key benefit of having exhausted FMLA/CFRA leave during a WC leave is that the employer may stop paying its share of medical insurance premiums. If the employer has forgotten to give the FMLA/CFRA notice, then the employer must start the 12 weeks running before ending payment of the employer's share of premiums. The notice cannot be retroactive. Sometimes months go by before the employer realizes that it never gave the notice, and then we finally give the notice to start the 12 week clock.

We can also indicate to the employee that the employer will continue to hold the position for this new 30-day leave time requested. "If it continues after that date, however, we will need to begin to look to fill the position." Or, if it has already been a couple of rounds of extended leaves beyond

FMLA/CFRA, the employer can go right to, "You have now been out on leave for a total of XX months, including xx extensions of your original leave. We need to begin looking to fill the position. If you are able to return by your next leave end date, we will reinstate you. If not, however, and we have found a suitable candidate, we will need to fill that position." Sometimes employees miraculously recover and get a doctor's note returning them to work right away.

Another alternative is to indicate that "We cannot continue to hold the exact position you are in, but we won't terminate. Rather, we will leave you on a leave of absence, and we will see what we have available when and if you are able to return." Sometimes that goes on indefinitely at no real cost to the employer. Otherwise, after some period of time, and if there is a legitimate basis for saying so, the employer can indicate that the passage of time has created a hardship, we need to fill the position, and we don't foresee anything else available."

It is not unheard of for an employee to be on leave for a year or more, especially if it is work-related. Even if it is not work-related, if it is not costing the employer anything to have that employee remain on the books, then leaving them in that status minimizes risk. The moral of the story is to avoid outright terminations of employees on leave whenever possible.

Be prepared to justify, in writing, why it creates an undue hardship for them to continue out on leave. The employer is entitled to continue to receive doctor's notes and for finite leave time frames – not open-ended. Be wary of the employee who is released with restrictions that you may be able to accommodate. The employer must make a good faith effort to enter into an "interactive dialogue" to determine if there is a reasonable accommodation available other than a leave of absence. There may be light duty options, or eliminating one or two pieces of someone's job description either temporarily or permanently. Make sure to train your supervisors not to tell a worker who is out, "Call us when you're 100%, and we will get you back to work." That's not the legal standard, and the employer may be able to accommodate someone who is at 85% capacity.

The best strategy is to take a conservative approach when it comes to leaves. Disabled employees likely will get the benefit of the doubt when going up against the employer. Plaintiff attorneys love disability cases because of the sympathy factor. A jury, or even an arbitrator, will likely feel some sympathy toward the disabled employee. So, whether in court or in arbitration, it's not a safe place for employers.