

FMLA REQUIREMENTS STILL APPLY WHEN STD IS INVOLVED

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When an employee's request for a medical leave may qualify for both unpaid leave under the Family and Medical Leave Act ("FMLA") and compensation under an employer's Short Term Disability ("STD") plan or policy, it can be tempting to allow the STD process to drive the administration of the leave. After all, a reduction in paperwork is always welcome, and the employer is permitted to rely on information received through the STD process when determining whether the employee is entitled to FMLA leave.

However, there are a number of FMLA notice requirements and other considerations that should be kept in mind when processing a claim for medical leave:

- **FMLA eligibility should be determined before moving on to the FMLA and/or STD entitlement determination.** Within five business days of receiving notice that an employee's leave may be for an FMLA-qualifying reason, the employer must provide the employee with notice of the employee's eligibility to take FMLA leave. Thus, it is important to ensure that the eligibility analysis for FMLA purposes is conducted, and the employee is informed of his/her eligibility status, prior to moving into the determination of whether the employee's health condition entitles the employee to leave (under the FMLA and/or STD policy).
- **FMLA eligibility can be attained during an STD leave.** Depending on the circumstances, an employee who is not eligible for FMLA leave when an STD or other medical leave begins may become eligible for the FMLA's protections during the leave (such as when an employee who began STD leave after 11 months of employment hits the all-important 12 months of employment mark during that leave, assuming the employee also meets the other tests for FMLA eligibility). Thus, the employer must remain alert concerning the employee's eligibility status so that, if and when an employee becomes FMLA-eligible during the middle of a non-FMLA leave, the employee is given the appropriate FMLA notices and protections. Importantly, only that portion of the leave that occurs after the employee becomes FMLA-eligible can be deemed FMLA leave.

- **Giving notice only of the employee's STD obligations is not sufficient.** Even if the employee will be required to provide medical substantiation exclusively by completion of STD paperwork (and not through a separate FMLA certification), it is still necessary to provide an FMLA-eligible employee with notice of the employee's rights and responsibilities under the FMLA. Although the DOL's suggested notice (Form WH-381) does not have to be used, all of the information reflected in that form notice should be included in whatever written communication is provided to the employee.
- **It may be beneficial to obtain an FMLA certification in addition to the required STD documentation.** Even though employers are permitted to rely on information received through the STD process in order to determine an employee's entitlement to FMLA leave, the information required by the STD process is not always the same as the information that can be required for FMLA purposes (e.g., the standards for leave entitlement may be different; the STD paperwork may not discuss a need for intermittent leave). Accordingly, consider requiring employees to submit an FMLA certification (Form WH-380-E) so as to assist in managing the FMLA aspects of the leave.
- **An FMLA designation notice may be required even before an STD determination is made.** The STD can, unfortunately, be protracted; sometimes, additional medical information is needed, or an STD claim is denied and goes through an extended appeal process. Yet under the FMLA, as soon as the employer has enough information to know whether the leave is being taken for an FMLA-qualifying reason, the employer has only five business days to provide notice to the employee as to whether the leave will be designated and counted as FMLA leave. Note also that, if more detailed medical information is needed for purposes of an STD determination than is necessary (or permitted) for purposes of an FMLA determination, then the employee should be notified that the additional information is required only for purposes of STD.
- **Notice of FMLA exhaustion must be given, even if the employee remains on STD (or LTD) leave beyond the FMLA entitlement.** When an employee exhausts his/her 12-week FMLA entitlement during the applicable 12-month period, the employer must provide written notice to the employee concerning such exhaustion within five business days of being placed on notice that the employee will need to remain on leave after such exhaustion. Accordingly, even if an employee is permitted to remain on leave (such as through an extended STD or LTD leave, or other non-FMLA leave), this FMLA notice is required.

Overlooking the foregoing FMLA requirements can be costly, including the potential for expensive and time-consuming litigation based on claims of FMLA interference and/or retaliation.

Accordingly, it is imperative to carefully coordinate the administration of FMLA and STD leave.

MEET THE TEAM



Christy E. Phanthavong

Chicago

[christy.phanthavong@bclplaw.co](mailto:christy.phanthavong@bclplaw.com)

[m](https://www.linkedin.com/in/christyphantavong)

[+1 312 602 5185](tel:+13126025185)

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