



Office of General Counsel

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To: Indiana trial court judges
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Guidance on a judge's responsibilities regarding employee use of FMLA

Indiana trial courts have an obligation to offer benefits under the Family Medical Leave Act (FMLA). Many trial courts rely on the county to assist in the administration of FMLA benefits. Even if the trial court relies on the county to assist them with FMLA, it is important for the courts to know the FMLA requirements and to require regular updates from court employees concerning the status of their FMLA. The interplay between FMLA and the ADA can cause complications for courts if they are not receiving necessary updates and documentation from both the employee and the county.

Every court should know who their employees are required to notify if they have an FMLA qualifying event. This is determined by the employee handbook. Some courts have their own handbook and other courts rely upon the county handbook. For those courts who have their own handbook, it is important to review who the employee is expected to notify concerning their need for FMLA. For those courts that rely upon the county handbook, it likely requires that all employees notify the county human resources department or the county auditor; this means that it is possible a court employee could take FMLA leave without the court being notified of the request or the details of that request.

Every court should ensure that they are included in the FMLA request and administration process; how involved the court is in this process can vary based upon the preference of the court. FMLA leave and the associated medical documentation is confidential. The court should have a designated individual who helps manage these requests for court employees. The designated court staff member could be the managing judge, a court administrator, or a lead court reporter. Typically, the Chief Probation Officer fulfills this role for probation staff.

General Terms of FMLA

Eligibility

A court employee is eligible for FMLA benefits if they have worked full-time for the court and/or county for at least twelve (12) months and have worked 1,250 hours during the twelve (12) month period immediately preceding the FMLA leave. FMLA provides eligible employees with twelve (12) weeks of job protection for the following reasons:

- The birth of a child or placement of a child with the employee for adoption or foster care
- To care for a spouse, child, or parent who has a serious health condition
- For a serious health condition that makes the employee unable to perform the essential functions of their job
- For a call to covered military active-duty status or any qualifying exigency arising out of the fact that a spouse, child, or parent is a military member on covered active duty

Leave Entitlement

FMLA benefits can be utilized as an extended leave, intermittently, or as a reduced schedule. This allows employees to take the entire 12 weeks off all at once, or they can take a day or two at a time, or they may need to leave work late or come in early.

FMLA is not a paid benefit. FMLA only provides job protections. Employees may choose, or the court may require, that the employee use accrued paid leave during their FMLA covered absences. The accrued paid leave would run concurrently with the FMLA protections. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. If the county is administering FMLA leave for court employees, it is important for the court to know if the county is administering the FMLA in a way that is consistent with the court's desired terms and conditions of employment—which may be different than the county's practice. FMLA also entitles the employee to unpaid leave if that is necessary because the employee does not have enough benefit time.

If an employee exhausts their 12 weeks of FMLA leave, and they are unable to return to work, then the employer may terminate the employee if necessary. However, prior to terminating any employee for exhausting FMLA, the court should communicate with the employee about the status of their condition and determine whether there is any accommodation that could be provided that would allow the employee to return to employment. This may include considering remote work as an accommodation.

If the employer decides to extend an employee's FMLA leave beyond 12 weeks, then the employer will have to provide that same extension to other employees in the future. It is important to be consistent. If the county is administering FMLA, it is important that the court is involved in this decision making. The county should not be making these decisions for court employees as it impacts the work of the court.

Notice

Employees must comply with the employer's usual and customary requirements for requesting leave and provide enough information to determine whether the FMLA applies to the leave request. Court employees are employees of the court and not the county; however, often the county administers FMLA. The usual and customary requirements for leave are going to be specified in the employee handbook. It is important that the court and court employees know who they are required to give notice to.

Employees are not required to use the words FMLA or medical leave in order to trigger a requirement to provide FMLA benefits. If the employer is aware of a situation that may qualify the employee for FMLA benefits, then the employer must give the employee notice of their rights under the FMLA.

It is recommended that if any employee misses three (3) consecutive days and indicates that this leave is due to illness, the employer should automatically provide any eligible employee with a notice of their eligibility for FMLA. If your court relies upon the county to administer FMLA, then the employee should be directed to reach out to county human resources to obtain the necessary FMLA paperwork or the court can reach out to county human resources and request that they reach out to the employee with this information. It is important that the court ensure that employees are properly notified of their rights under the FMLA, it will be important for the court to follow up with the employee or county human resources and make sure that proper notice was given.

Employers are required to do the following:

- 1) Post a notice explaining rights and responsibilities under the FMLA. This notice can be contained on an employee intranet or a poster can be posted in employee break areas. Court's should ensure that court employees are receiving proper notice.
- 2) Include information about the FMLA in their employee handbooks.
- 3) When an employee requests FMLA leave or the employer acquires knowledge that leave may be for an FMLA qualifying reason, then the employer must provide the employee with notice of their eligibility for FMLA leave and their rights and responsibilities under the FMLA; and
- 4) The employer must notify employees whether their leave is designated as FMLA leave and the amount that will be deducted from their FMLA entitlement.

If the county is assisting the court with providing the necessary notice requirements to court employees, the court should ensure that they are receiving copies of these notices. The court also needs to know if an absence is covered by FMLA and how much FMLA leave time an employee is using. The FMLA policy within the handbook should direct court employees to provide the court with this information.

Protections Provided

Employees are entitled to maintain their insurance coverage during any FMLA leave. If an employee is on unpaid FMLA leave then the employee will have to make arrangements to pay the employee portion of their benefits during that unpaid leave.

Employees are entitled to job restoration following FMLA leave. The employee must be restored to the same job or to an equivalent job. The employee is not guaranteed to be able to return to the actual job held prior to their leave. An equivalent job means a job that has the same pay, benefits, and other employment terms and conditions as their prior job. An employee returning from FMLA leave cannot be required to requalify for any benefits the employee enjoyed prior to the leave.

Interference

It is unlawful for an employer to interfere with, restrain, or deny the exercise of or attempted exercise of any right provided under the FMLA. The employer also cannot terminate or discriminate against any employee for opposing any practice, or because of involvement in any proceeding related to the FMLA. Courts should not rely solely on the county to properly administer FMLA benefits because if the county does not provide proper notice and in any way interferes with the employees' exercise of their rights under the FMLA, the court could be held liable—because although the county may be assisting with FMLA, the court is responsible for the terms and conditions of employment for court employees.

Limitations to FMLA Protections

An employee on FMLA leave is not protected from actions that would have impacted their employment if the employee was not on FMLA leave. For example, an employee on FMLA leave can be terminated if the employer needs to downsize due to funding, or if there are performance concerns unrelated to the FMLA leave and unrelated to a disability, or if the employee commits an ethical violation. FMLA does not protect employees from being held accountable for bad behavior unrelated to their need for FMLA.

The ADA & FMLA Interplay

Any time that an employee notifies the employer of a need for FMLA protections, the employer should be aware that the Americans with Disabilities Act may also be involved. FMLA protections are eligible for employees with a serious health condition and that serious health condition would also trigger the requirements of the ADA. Often times ADA protections and FMLA protections are triggered by the same events.

Courts should always engage in the interactive process as required by the ADA when an employee indicates they have a condition that is limiting their ability to function in the workplace. The employer is required to converse with the employee to determine if there is an accommodation that can be provided that would allow them to meet the essential functions of

their job. However, if there is no reasonable accommodation that can be provided, then FMLA leave may be necessary.

If an employee exhausts their FMLA leave, and the employer is requesting that the employee return to work. It will be necessary for the employer to again engage in the ADA interactive process. If it is possible for the employee to return to work with an accommodation that allows them to meet their essential functions, then the employer needs to provide that accommodation. The employer should not terminate an employee who has exhausted their FMLA without first engaging in the interactive process to determine if there is an accommodation available. If the county is administering the FMLA for the court it is important to know when an employee's FMLA benefits will be exhausted and the employee's medical status, so that the court can engage in the interactive process and make the determination about whether or not there is a reasonable accommodation available. The court should not leave it to the county to engage in this ADA interactive process because only the court will know what the essential functions are for the court employee, and only the court will know how best to accommodate the employee.

Remote Work and FMLA

The COVID-19 pandemic required courts to convert work to remote, and as a result remote work has become more available and may now be viewed as a reasonable accommodation in certain circumstances. If an employee has an FMLA qualifying circumstance, it is possible that remote work could be provided as an accommodation. Using remote work in this fashion can be beneficial to both the employee and the employer. It will allow the employee to remain productive and decrease the chance that they will exhaust their FMLA leave and benefit time.

Not all jobs can be performed remotely, but if an employee has a job where the essential functions can be performed remotely it may be beneficial to consider remote work as a temporary accommodation for a limited amount of time. For example, if an employee has a spouse receiving chemotherapy and the employee needs to attend these appointments, the employee could take FMLA leave, or—if both the employee and the employer want—remote work could be utilized. If the county is administering FMLA leave, it is possible that the court would not know the specifics of an employee's FMLA leave. If the county does not provide remote work as an accommodation in these circumstances, then the employee would likely not know this was an option for them. Courts should be actively involved in the administration of FMLA to ensure that this option is made available to court employees if the court wishes to do so.

Under the ADA, courts will be required to consider whether remote work is a reasonable accommodation. If an employee is out on FMLA leave and wishes to return but has requested a remote work accommodation, the court should process this request under the ADA. If the essential functions of the employee's job can be performed remotely, then the court should consider providing this accommodation rather than forcing the employee to exhaust their FMLA.

If an employee is forced to exhaust their FMLA, ultimately resulting in their termination, it could result in liability if they could have instead maintained their employment if only remote work had been offered. The county may have a different policy on remote work than the court, therefore, it is essential that the court be involved in these discussions and the court should be given status updates on the employee's medical condition and anticipated return.

Although employers are not required to provide remote work. The expansive use of remote work during the pandemic has opened the door for remote work to be considered a reasonable accommodation. Therefore, courts should always engage in the interactive process and consider remote work as an accommodation if necessary. Employers should not force an employee to work remotely in lieu of using FMLA leave, if an employee would prefer to take the time off and use their FMLA benefit then they must be permitted to do so.