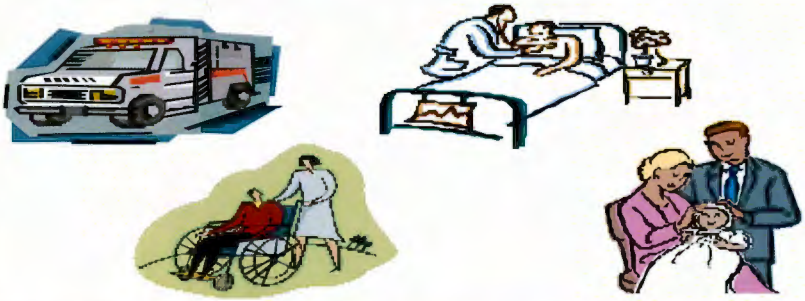
C S E A

GETTING A HEALTH-RELATED LEAVE FROM WORK

APPLICABLE STATUTES



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Introduction

Leaves from work needed because of injury or illness to the employee or a family member, or because of the birth or adoption of a child have been addressed by Federal and State statutes over the years, as well as by collective bargaining agreements. Some statutes provide for time off with pay, under certain circumstances; others assure employees of job security while taking time off without pay. Still others provide for insurance compensation while an employee is unable to work. And some statutes govern and restrict the circumstances upon which public employers can require sick or injured employees to take leave, with or without pay, and the conditions upon which they can terminate a public employee because of excessive absences.

This pamphlet discusses the statutes which have major impact regarding such leaves and discusses employee rights and options under these laws. It also discusses the interplay between statutes, and with the terms of collective bargaining agreements, which remain the primary source of CSEA-bargaining unit employees' leave rights.

Leave Under Federal and State Statutes

1. Disability Statutes

The relevant disability statutes are the Americans with Disabilities Act (ADA) and the New York State Human Rights Law. The Human Rights Law is likely to be the more favorable to disabled employees seeking leave.

A. ADA

The ADA is a federal statute that applies to employers, including public employers, of 15 or more employees. It protects employees with physical or mental disabilities from discrimination in the workplace. In this connection, it requires an employer to provide an employee with reasonable accommodation. Reasonable accommodation is a change in working conditions that would allow disabled employees to perform their jobs.

An employer may establish attendance and leave policies that are uniformly applied to all employees – regardless of disability – but may not refuse leave needed by an employee with a disability, if other employees get such leave. An employer may also be required to make adjustments in application of its leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodation may include leave flexibility and unpaid leave. However, at its discretion, an employer may choose to substitute paid leave, such as sick leave or vacation, for the unpaid leave.

A uniformly applied leave policy does not violate the ADA when it has a more severe impact upon an individual because of his/her disability. However, if an individual with a disability requests a modification of such policy as a reasonable accommodation, the employer may be required to provide it, unless doing so would impose an undue hardship. A proposed modification that would require a breach of the terms of a collective bargaining agreement, *e.g.* seniority provisions, may be deemed an undue employer hardship, thereby precluding the particular accommodation.

The ADA only protects those employees who can perform the essential functions of their jobs, and it is the employer's prerogative to reasonably determine those functions. Furthermore, the ADA only obligates the employer to come up with reasonable accommodations that might, among other arrangements, include periods of leave, but provision of leave, *per se*, is not guaranteed under the ADA. Also, unlike FMLA, the ADA does not guarantee employees the right to return to the same, or an equivalent, job at the end of the leave; it permits employers to enforce uniformly applied policies, denying reinstatement following illnesses or disability, which are not otherwise discriminatory.

Under the ADA, employers are limited in their ability to inquire about the illnesses or injuries for which employees have taken leave. Each medical inquiry must be vital to the employers' business and narrowly formulated to prevent unnecessary intrusion into the employees' medical information. An employer's general application of a medical inquiry policy to all employees, regardless of their employment duties, may be overly broad and therefore violate the ADA.

A person seeking relief under the ADA must first seek help from the United States Equal Employment Opportunity Commission (EEOC). Thereafter, he/she may be authorized to sue in court.

B. New York State Human Rights Law

The Human Rights Law is a New York State statute which, among other things, prohibits discrimination against disabled employees or job applicants by employers of four or more employees. It expressly provides for "reasonable accommodations" which includes "modified work schedules." The obligation to make such reasonable accommodation is, as in the case of the ADA, applied only if the accommodation would not impose an undue hardship upon the employer.

Interpretations of the State Human Rights Law are likely to be more favorable to disabled employees seeking leave as a reasonable accommodation than interpretations of the federal ADA.

A person seeking relief under the Human Rights Law may seek help from the State Division of Human Rights or directly file action in a state court.

2. Family and Medical Leave Act (FMLA)

The FMLA is a federal statute that provides that all but the most highly paid employees of an employer may take up to twelve weeks of ***unpaid*** leave after the birth of a child, after placement of a child with an employee for adoption or foster care, when an immediate member of the employee's family has a serious health condition, or when the employee has a serious health condition that

prevents the employee from doing his or her job duties.

Employees who take leave to care for a newborn or adopted child may not take leave intermittently or work a reduced schedule; however, employees who take other FMLA leave may do so when medically necessary.

Employers may substitute leave accruals for *unpaid* leave for employees on FMLA leave; the employer may also require employees to utilize leave accruals while on FMLA leave. Also, FMLA leave and Workers' Compensation leave may run ***concurrently*** upon proper notice from the employer.

An employee accrues no seniority while on FMLA leave, but is entitled to coverage under the employer's health insurance plan as if he/she had been working a regular schedule. An employee is also entitled to benefits [such as bidding on a shift], as if he/she had been working a regular schedule.

Where the FMLA absence is scheduled in advance, an employee must provide the employer with at least 30 days notice. When the absence is not foreseeable, the employee must give notice as soon as possible, usually within two business days. And when the time to take the leave is optional, the employee must try to take the leave during a time that would be least disruptive to the employer's operations.

An employee is not required to give the employer his or her medical records. An employee may be required to provide an employer with a supporting medical certification from the employee's health care provider explaining the personal or family illness, its expected length and other medical information about the illness. An employer may request a second opinion, and even a third (but no more), but it must pay the costs of obtaining these additional opinions. If the first two opinions are in conflict, the third expert must be selected jointly by the employer and the employee. The third medical opinion is binding.

Absent extenuating circumstances, an employer must notify an employee of whether or not he or she is eligible to take FMLA leave within five business days of the employee's request for leave or the employer's discovery that the employee may be eligible for such leave. If the employer finds the employee is not eligible, the employer must provide at least one reason for its finding.

If an employer fails to timely designate leave as FMLA leave, and notify the employee of the designation, it may do so retroactively. If the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA, the employer may be held liable for the employee's damages.

Coverage is limited to employees of an employer with at least 50 employees within a 75 mile radius who worked at least 1,250 hours, exclusive of time off, during the year preceding the leave and who have worked at least 12 months for the employer.

Upon expiration of an employee's leave, he/she is entitled to restoration to the same or a similar position. In most cases, to be similar, the position must be at the same location, on the same shift, and have the same pay, benefits, and responsibilities.

Complaints alleging violations of the FMLA may be filed with the U. S. Department of Labor or brought directly to court in a civil action.

3. Workers' Compensation Law

Workers' Compensation is a State law that creates an insurance program paid for by the employer that provides cash benefits and medical care to employees who suffer work-related injuries or illnesses. The benefits received under the Workers' Compensation Law are the exclusive remedy against the employer for injured workers; it bars all other civil actions against the employer related to the injury that has been or may be compensated. However, the Workers' Compensation Law ***does not*** prohibit a qualified employee with a disability from filing a discrimination charge under the ADA.

To receive benefits, the employee must notify the employer, in writing, of his/her injury or illness within 30 days of the onset of such injury or illness.

The Workers' Compensation payments are equal to two-thirds of the injured or sick employee's average weekly salary, subject to a maximum between $300 and $792.07 based on the date of the accident. If the

employer pays the employee his/her full compensation during the period of disability, the employer may receive the Workers' Compensation payments as partial reimbursement.

Fully covered medical treatment is provided, but only by a physician who has been authorized to provide it by the Workers' Compensation Board.

The Workers' Compensation Law contains no prohibition of an employer firing an employee while he/she is on Workers' Compensation leave *(but see the discussion of Civil Service Law §71 elsewhere in this booklet).*

4. Comparison of Leave Requirements Under the ADA, the FMLA and Workers' Compensation Law

	DISABILITY STATUTES	FMLA	WORKERS' COMPENSATION
Length of Leave	Varies, depending on "undue burden" on the employer.	Up to 12 weeks in a 12-month period.	Varies, depending on length of incapacity.
Light Duty Requirement	Employer may be required to provide light duty as a reasonable accommodation, depending upon the availability and feasibility of such work.	Employer cannot require FMLA-eligible employee to take light duty job, but employee may do so if one is available. FMLA leave is counted only for hours of work missed.	May be required to be performed by an employee, if offered.

5. New York State Disability Benefits Law (DBL)

DBL is a New York State Law, covering private sector employers and their employees only. Local governments may volunteer to be covered.

DBL provides an insurance program, under the supervision of the Workers' Compensation Board, to which covered employees can be required to contribute up to sixty cents a week. The benefit provided is compensation of one-half the employee's average weekly wage, up to a maximum of $170 a week for up to 26 weeks in a single period of a disability not suffered in the course of employment.

6. Involuntary Leave - Civil Service Law Article 5 (Applicable to Public Employees Only)

A. *Ordinary Disability, Temporary Leave - Civil Service Law §72*

An appointing authority may place an employee on involuntary leave based upon the employee's inability to perform the duties of his/her position due to a mental or physical disability that is not work-related.

The employee must be given written notification ***both before and after*** a medical examination, and is entitled to a hearing before an independent hearing officer on the question of his/her fitness to work. The proposed leave cannot be imposed until a final

determination is made by the appointing authority following the hearing officer's report and recommendation. The employee may then appeal the appointing authority's determination to the State or municipal civil service commission having jurisdiction, and that Commission's determination may be challenged in court.

The employee may be placed on involuntary leave, prior to notice, hearing and a final determination ***only*** when the appointing authority determines that there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property, or would severely interfere with operations.

An employee who has been placed on leave pursuant to this statute may apply for a medical examination within one year after the leave of absence commenced, or thereafter at any time until his/her employment is terminated. If the medical officer certifies that the employee is fit to perform the duties of the position, the employee will be reinstated to the position. If the employee is denied reinstatement, he/she may appeal to the appropriate civil service commission or the State. That Commission's determination is reviewable in court.

Section 72, read in conjunction with the ADA, requires public employers to make a reasonable accommodation to the known physical and mental limitations of an otherwise qualified employee to enable him/her to perform the essential duties of the position, unless the accommodation would impose an undue hardship on the operations of the public agency.

B. Ordinary Disability, Permanent Separation - §73

Section 73 provides: "When an employee has been continuously absent from and unable to perform the duties of his position for one year or more [365 consecutive days] by reason of a disability other than a disability resulting from occupational injury or disease..., his employment status may be terminated." However, he/she is entitled to a hearing at which he/she can advance arguments as to why the appointing authority should exercise discretion not to fire him/her. The employee might argue, for example, that his/her services should not be terminated because he/she is able to perform light duty and expects to be able to resume full duty at some time in the future. The employee is also entitled to a hearing to contest any of the facts found by the appointing authority in justification of the termination.

Within one year after the recovery from the disability, the employee may apply to the appropriate civil service department or municipal commission for a medical examination. If upon such medical examination the employee is certified as fit to perform the duties of the position, he/she shall have certain rights of reinstatement or placement on a preferred list for his/her former position in his/her former department or agency.

C. Occupational Injury or Illness - §71

An employee who has been separated from service because of a disability resulting from an occupational injury or disease is entitled to a ***cumulative*** leave of

absence for at least one year, unless the disability is of such a nature as to permanently incapacitate the employee from performing the duties of his/her position. However, if an injury that the employee suffered was the result of an assault that took place in the course of his or her employment, such leave of absence shall be for at least two years. Within one year of recovery from the disability, the employee may apply for a medical examination. If, upon such examination, the employee is found to be fit to perform his/her former duties, the employee is entitled to certain rights of reinstatement or placement on a statewide preferred list. If deemed unfit, the employee is entitled to a hearing to contest the determination.

Pursuant to the rules of the Civil Service Commission and court decisions, an employee may be fired after being absent from work, or unable to perform his/her duties for one year by reason of disability resulting from occupational injury or disease. However, the rules of the Civil Service Commission also provide that an employee may apply for restoration to duty from Workers' Compensation leave, and shall be restored to duty if the appointing authority finds him/her medically fit. Furthermore, an employee is entitled to: (1) a hearing if deemed unfit and not restored to duty; and (2) a predetermination hearing before he/she can be terminated by reason of a one year absence. The employee cannot be terminated prior to the issuance of a decision following such a hearing; this may occasion an extension of the one year period, as long as the employee is not responsible for any delay in securing the decision.

7. Collective Bargaining Agreements

Notwithstanding these statutes, the primary sources of employees' rights to leave are specified in collective bargaining agreements. The rights afforded by statute can be supplemented by the terms of agreements, and most agreements contain provisions affording such benefits. This booklet cannot discuss the specifics of such contractual provisions, as they vary from agreement to agreement. Employees who have questions about leave entitlements should ask their Local or Unit officers and their Labor Relations Specialists (LRS) to be sure that both their contractual and statutory rights and entitlements are reviewed and understood. Employer conduct not consistent with these rights should be reviewed with the employee's Unit or Local officers and LRS to ensure proper and timely filing of grievances, improper practice charges and lawsuits, where appropriate.