



Don't Let Your LOAs Leave You DOA

Written by Kelly E. Dempsey

Imagine a scenario where an employer has a long-time reliable employee that suddenly has a stroke of bad luck and is diagnosed with stage four cancer after being relatively asymptomatic and having never been diagnosed with cancer previously. The employee works with a team of medical professionals to come up with a game plan for beating this terrible disease. The employee quickly begins what will hopefully be life-saving treatment as soon as a game plan is mapped out.

The claims start rolling in and the treatment starts taking its toll. The employee starts missing an hour here and there for appointments – and then a few hours for appointments and sickness – and then full days of work during treatment. When the employee is at work, the employee struggles to perform normal job functions and the employee is now unable to work because the rigorous chemotherapy regimen.

The employee decides it's time to take a leave of absence to focus on treatment. To the dismay of the employee, though, the employee doesn't have any additional leave available under The Family and Medical Leave Act (FMLA), since the full allotment of FMLA leave was recently exhausted while the employee and the employee's spouse were finally bringing home their new adopted baby that they had waited so long for. Is this pulling at your heart strings yet?

The employer recalls that sometime in 2016, the U.S. Equal Employment Opportunity Commission issued guidance on a leave associated with The Americans

with Disabilities Act (ADA)!. Ah ha! The employer tells the employee they have just the solution – take a leave under ADA and the employment and leave situation can be re-evaluated in a few months.

The employer tells the employee not to worry about anything except becoming cancer-free; the health plan coverage will continue as long as the employee needs it, even though the last of the employee's paid time off is exhausted and no additional FMLA is available. In other words, the employer, via its health plan, is taking care of its employee, as so many employers try so hard to do. The employee is then signed up for the short-term disability policy which will help replace some income during the leave, and the employee is all set – there is continuing health plan coverage and some income replacement to boot. All is well.

Fast forward in time. Three months have passed, and the employee is making miraculous recovery. The employee is not ready to come back to work yet, but things are looking up and the employee is respected to return to work at some point in the near future. With the end of the health plan year approaching, the employer is attempting to get its ducks in a row for renewal season, which includes a stop-loss policy renewal. The cancer treatment





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claims are continuing to roll in and, as expected, the dollars keep adding up – but unfortunately, as anticipated, stop-loss is going to become a factor before renewal (ugh).

Claims are filed with the stop-loss carrier and all the typical supporting documents are provided. During the stop-loss carrier's review, the carrier starts scratching its head. This individual has been on a non-FMLA leave of absence for over three months. The health plan document discusses FMLA and COBRA, but no other types of leave. Why was this employee still on the plan? Why was COBRA not offered when plan

coverage seems to have terminated? The stop-loss carrier questions the employer and requests additional documentation to support eligibility; the carrier even generously says the employee handbook is acceptable.

As everyone knows, the stop-loss policy is underwritten based on the plan document alone; anything contained within the employee handbook is entirely separate from the plan document and the stop-loss underwriting generally won't take into account anything within the employee handbook. The employer thinks "boy, am I lucky!" *queue the suspenseful music*

The employer pulls out the employee handbook and skips to page 42 – Employer Leave Policies. The employer starts reading, "In addition to FMLA, employees that have exhausted paid time off and FMLA may be eligible for an additional extended leave of absence; referred to as non-FMLA leave. This non-FMLA leave is created to comply with the ADA's requirement to provide a leave of absence as a reasonable accommodation and will be offered in addition to FMLA.

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Thus the non-FMLA leave will not run concurrently with FMLA. Additional information regarding how to request this leave and the additional requirements associated with this leave is further detailed herein.”

The employer’s wheels start turning: okay, this ADA leave doesn’t run concurrently with FMLA – great, that helps, but where’s the part about continuing health plan coverage? That must be in this handbook somewhere. The employer starts frantically turning pages looking for those magical words “employees are entitled the health plan benefits during a non-FM LA leave of absence.”

But alas, no such wording is contained within the 163-page employee handbook. The employer’s internal dialogue starts racing. “How can this be? We never meant for our employees to be out sick and not have health coverage. Doesn’t the ADA say we have to provide coverage to employees while they’re out on leave?” So you ask, “What now?” The bottom line is that there is no stop-loss reimbursement for the cancer claims, and quotes for renewal just added a few extra zeros.

No need to review the gory details in depth – but one can imagine what happened during the plan and stop-loss renewal. The employer’s bank account is looking bleak, as are the proposed stop-loss renewal rates. The employer starts shopping other options despite having been with the same stop-loss carrier for years.

All the while, the employer just thinks “*How did I end up here? All I wanted was to take care of my employees and give them the best benefits possible. Where did I go wrong?*”

It’s intuitive to think that a leave of absence from employment is coupled with a continuation of health plan coverage, especially if the leave is illness related; to the dismay of many, however, a continuation of coverage (other than COBRA) isn’t always coupled with a leave of absence. As shown in the scenario above, many employers struggle to align their health plan documents with their employee handbooks (and other internal policies) which subsequently increases the potential for a gap to arise between all the relevant documents.



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While most federal and state laws do not require a continuation of coverage, employers can choose to provide the benefit of continued coverage – but if the employer wants to ensure stop-loss reimbursement, the terms of continuation of coverage need to be clearly spelled out not only in the employee handbook, but also in the health plan document. The health plan document is key to showing proof of continued coverage, especially in a situation where stop-loss is relevant.

Many employers don't even realize they have gaps between their policies and the health plan documents until it's too late. All it takes is one large medical event - a cancer claim, an ESRD diagnosis, premature twins, a transplant – to discover that the documents the employers has aren't airtight, and may not even align with the employer's intent.

In summary, most employers need to do some homework. Go back to the office and take a look at the health plan document and the employee handbook. Do the two documents reference the same types of leave? Do the documents clearly indicate when coverage under the health plan is maintained during a leave? Do the terms of these documents meet the intent of the employer? What does the stop-loss policy say about eligibility determinations? Can the handbook be used to document eligibility in the health plan? What (if any) changes need to be made to minimize or eliminate gaps, to the extent possible?

Don't let large unexpected claims leave you dead on arrival. Do the leg work now, and figure out what needs to be done to avoid being caught by surprise. ■

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References:

1 <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>

