Legal Matters®

Employment Law
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What happens if a boss thinks a worker is abusing medical leave?

Tom Seeger was a phone technician in Cincinnati who took medical leave from his company due to a herniated disc. While he was on leave, he attended an Oktoberfest celebration downtown, and ran into several co-workers. The co-workers later told the company that they had seen Seeger at the party, and that he didn't seem terribly impaired.

The phone company responded by firing Seeger for abusing his medical leave.

Seeger was upset. He claimed that he was following his doctor's orders, and the mere fact that he could walk a short distance at a party didn't mean that he wasn't in frequent pain or that he was able to return to work.

This type of dispute is arising much more frequently than in the past, and is leading to a lot of lawsuits.

The federal Family and Medical Leave Act allows

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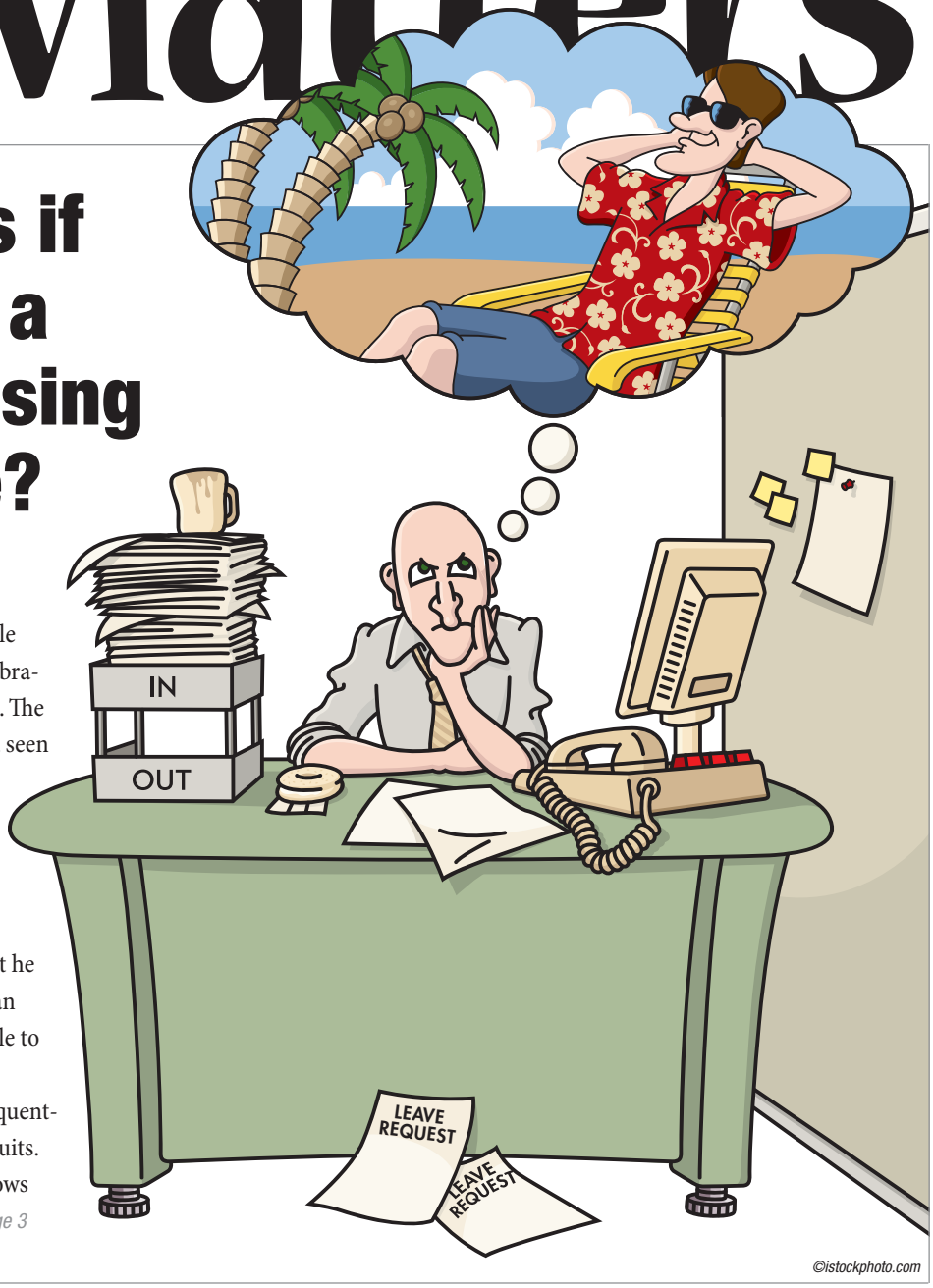

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Alcohol testing could lead to discrimination claim

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Many companies have substance abuse policies that require workers who have problems with drugs or alcohol to submit to random testing.

If the worker fails a test, that can often be grounds for termination.

But a recent case from New Jersey shows that companies need to be very careful in how they handle such policies.

The case involved a woman who had worked for ExxonMobil for more than 30 years. She began to suffer from depression after her husband died, and while co-workers noticed a change in her demeanor, her performance apparently never suffered. Soon afterward, she voluntarily told a company nurse that she was an alcoholic and needed to enter a rehab program.

When she returned from her hospitalization, ExxonMobil required her to submit to random alcohol testing. Some 10 months later, she failed a breathalyzer test and was fired. She sued for disability discrimination.

An appeals court sided with the woman. It said the basis for the testing and termination was the employee's voluntary disclosure of her disability, and not any inadequate job performance on her part.

Therefore, the testing was discriminatory, because while the use of alcohol wouldn't result in discipline for other employees, alcoholics could be punished even if their performance wasn't affected.

'Undocumented worker' program causes legal issues

A new government program that allows certain undocumented immigrants to receive temporary work authorizations is creating legal issues for both workers and employers.

The program is called "Deferred Action for Childhood Arrivals," or DACA. It allows undocumented workers who were born after June 15, 1981 and were under 16 when they arrived in the U.S. to receive authorization to stay and work here.

Applicants must (1) have a high school diploma or G.E.D., (2) be currently enrolled in high school or an equivalency program, or (3) be serving in or honorably discharged from the military. They must also have a clean criminal history (although they can have minor traffic violations on their record, or an arrest for driving without a license).

The program could be a good opportunity for such workers and for employers who want to hire them, but it does come with risks.

The program could be a good opportunity for certain workers and for employers who want to hire them, but it does come with risks.

First, employers are still required by federal immigration law to terminate known undocumented workers. This creates a tricky situation when workers who are filing for DACA start asking their employers to provide documentation so they can prove their employment history. If employees disclose that they are filing for DACA, the employer in theory is required to terminate them, and can't rehire them until they officially receive work authorization.

At the same time, employers are not allowed to engage in "profiling" to determine who might be undocumented; if they do, they could be sued for discrimination. So employers need to be careful not to be too proactive and assume that workers are applying for DACA.

Once a current employee receives DACA authorization and presents it to the employer, other issues can arise. For instance, now the employer knows that when the worker was first hired, the worker misrepresented his or her immigration status on an I-9 form. As long as the prior documents appeared to be genuine and the employer had no reason to suspect that the worker was unauthorized, the employer can simply correct the information on the I-9 form and keep the employee.

On the other hand, what if the company has a policy that punishes or terminates employees for providing false information on an employment application? If the company allows a DACA employee to get away with a misrepresentation, but later punishes another employee for lying, it could potentially be charged with discrimination.

If you have any questions about this program or about undocumented employment in general, we'd be happy to assist you.

What if a boss thinks a worker is abusing medical leave?

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many employees to take up to 12 weeks of unpaid leave if they have a serious medical problem, or are caring for a family member who does. It even allows them to take time off in short increments if necessary. (Some states have similar laws of their own.)

This is a very valuable benefit to workers who need time off due to an injury or illness. But as employees' awareness of the law has increased, some companies have started to suspect that workers are abusing the privilege – that is, that they're taking time off from work even though they don't really need it, and their "vacations" are making it harder for companies to plan ahead and manage their workflow.

In a growing number of cases, workers are being fired for "medical leave fraud." Some companies are even hiring investigators to follow employees around if they suspect the workers are lying about their medical problems.

Of course, in some cases it can be hard to know who's right. But a growing number of courts are deciding that employers have the right to fire workers for fraud as long as they have at least some grounds to believe that the employee was abusing the privilege.

For instance, a federal appeals court in Seeger's case said that the phone company acted properly because it made a "reasonably informed and considered decision" before it fired him.

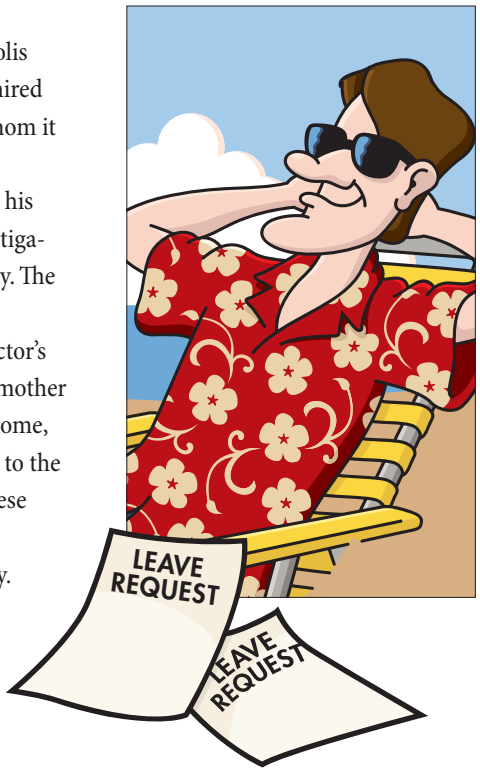
The court emphasized that it wasn't necessary that the phone company made the *right* decision. It said it was entirely possible that Seeger wasn't malingering at all, and that the phone company simply made a mistake. But it said the company couldn't be sued as long as it investigated the situation, actually believed Seeger was doing something wrong, and had some reasonable basis to back up its conclusion.

In another recent case, a factory in Indianapolis was facing a problem with absenteeism, and it hired a private investigator to follow 35 employees whom it suspected of abusing medical leave.

One of those employees took time off to take his mother to a medical appointment, but the investigator reported that he didn't leave his house all day. The employee was fired.

The employee responded by submitting a doctor's note, a letter from the nursing home where his mother lived, and the sign-out sheet from the nursing home, all suggesting that he really did take his mother to the appointment. But the company believed that these documents were suspicious and inconsistent.

A federal appeals court sided with the factory. It said that the company's investigation wasn't perfect, but regardless of who was right, the company had a right to fire the employee if it had an honest belief that he was abusing his leave.



These rulings are bad news for employees, because they indicate that employees can potentially be fired for a misunderstanding, even if they did nothing wrong. They certainly suggest that any employee who takes family or medical leave should keep as many records as possible in case their right to the time off is questioned.

On the other hand, the decisions don't give free rein to businesses, either. A business still has to make a careful decision before firing someone on leave, and it has to be sure it has solid evidence for its actions, in case those actions trigger a lawsuit. Firing someone on the basis of a mere suspicion of abuse, without carefully documenting the evidence, is a good way to get into legal trouble.

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Worker may get transfer to be closer to medical care

A secretary with the U.S. Forest Service might be entitled to a job transfer so she can live closer to available medical treatment for her vision problems, a federal appeals court recently decided.

The employee, who worked in Texas, suffered brain damage in a fall at work that resulted in her losing the left half of her field of vision. She requested a hardship transfer to an office in Albuquerque, New Mexico, where she would have access to specialists who were qualified to provide therapy for her injury.

The government denied her request, claiming it had no open position in Albuquerque. Her performance suffered because of her vision problems and she was forced to accept a demotion.

She sued for disability discrimination, and the court allowed the suit to go forward. According to the court, even if the woman could perform the essential functions of her job without receiving therapy in Albuquerque, a transfer could nevertheless be considered a reasonable accommodation for her condition.

Companies are sued in court despite arbitration agreements

Arbitration agreements – in which workers and employers agree that any job disputes will be decided out of court by a neutral third party – are increasingly being used by businesses that want a quicker and more private way to resolve disputes.

But any such agreement needs to be worded and presented very carefully. Many businesses are finding that their agreements don't protect them nearly as well as they thought.

For instance, a woman in Maine who was visibly pregnant during a job interview sued a prospective employer for pregnancy discrimination after she was turned down for a job.

The company said the case should go to arbitration, as required in its online job application.

But a federal appeals court decided that the arbitration requirement was unenforceable because it didn't clearly say that it applied to unsuccessful job *applicants*, as well as to people who were actually hired for a job.

The arbitration agreement referred only to "your employment," "the employment process," and "pre-employment disputes." Therefore, the court said, it applied only to people who were actually hired.

In another case in California, a court rejected an arbitration requirement because it was "buried" in an employment handbook, and it wasn't clear that the employee had ever actually read it or agreed to it.

The arbitration provision appeared on pages 36 and 37 of a lengthy employee manual that had been distributed to employees several years before the dispute arose.

The court said that for the provision to be enforceable, it would have to be more than a small piece of "boilerplate" tucked into a detailed handbook that the employee had signed off on as a whole.

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