Employment and Breast Cancer: Knowing Your Rights

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For Living Beyond Breast Cancer
What We Will Cover Tonight

➤ Your rights to keep your job.
➤ Income while you are on leave.
➤ Privacy rights under HIPAA.
Your Rights to Keep Your Job

- Family and Medical Leave Act (FMLA)
- Disability Discrimination Laws
  - Federal (Americans with Disabilities Act)
  - State (Pa. Human Relations Act)
  - Local (Philadelphia Fair Practices Ordinance)
Basic Employment Law

- Fundamental rule: An employer can fire or not hire you for almost any reason (employment at will)
- Broad exceptions from rule
  - Union contract
  - Civil service protection in gov’t jobs
- Also specific exceptions – FMLA, ADA
FMLA-Protected Leave

- Serious health condition of son, daughter, spouse, parent
- Employee’s own serious health condition renders him/her unable to perform essential functions of job
FMLA: What Does the Worker Get?

• Job preservation (12 weeks in 12-month period)
• Health insurance continues during leave.
• Reinstatement to same or equivalent job.
• All employee benefits must be reinstated.
FMLA Eligibility: Is the “Employee” Covered?

All three of the following are required.

• Employer employs at least 50 WORKERS WITHIN 75 MILES of worksite.
• Employee worked for employer AT LEAST 12 MONTHS (need not be consecutive, but before 7-year break in service).
• Employee worked AT LEAST 1250 HOURS in previous 12 months (ave: 25 hours/50 weeks)
FMLA Eligibility: “Serious Health Condition”

- Breast cancer should usually be covered. Examples:
  - Inpatient care (overnight stay)
  - More than 3 consecutive full calendar days of incapacity and treatment at least twice by a health care provider
  - Multiple treatments for condition that would require more than 3 days absence if left untreated (cancer treatments is example)
What is “Leave” under FMLA?

• Another way to look at it: PROTECTION FROM BEING FIRED FOR ABSENTEEISM.

• Can’t “count” as absenteeism under no-fault disciplinary policy.

• “Leaves” can be very short periods of time.
FMLA Intermittent Leave and Reduced Schedule Leave

- Intermittent: leave taken in separate blocks of time for a single qualifying reason (i.e., asthma attacks)
- RSL: change in number of work hours (usually from full-time to part-time)
- Some detailed rules that we will touch on today
FMLA Intermittent Leave and RSL

- Must be “medically necessary” – “such medical need can be best accommodated” through intermittent or RSL.
- For planned medical treatment, must make reasonable effort to not disrupt employer.
FMLA Intermittent Leave and RSL

- Employee may be transferred while on this kind of leave.
- Complex counting rules for increments
- If normal schedule includes mandatory OT, may need to use FMLA to get down to 40 hours!
Is FMLA Leave Paid?

SEPARATE ISSUES: Job Protection vs. Income

- FMLA provides job protection, not pay
- But worker can force employer to combine FMLA leave with paid leave (such as sick, vacation, personal)
- Conversely, FMLA can save job while receiving STD/LTD.
Substitution of Paid Leave

- Paid leave can run concurrently with unpaid FMLA leave.
- Determined by employer’s conditions of employer’s normal leave policy (i.e., might not be able to use sick pay for parental leave)
- Employer’s procedural requirements also apply, except an employee who does not meet them still gets unpaid FMLA leave.
Health Benefits While on FMLA Leave

- Treat benefits the same as if the employee were at work (i.e., can be employee contribution)
- If employee is 30 days late on payments, employer can cancel, with 15 days notice.
- Employer has to restore benefits upon return, so might have to pay employee’s share to maintain coverage.
- If employee doesn’t return, she may have to pay employer’s premiums.
FMLA: The Notice “Dance”

1) Employee gives notice of need for leave
2) Employer gives eligibility/rights and responsibilities notice (Form WH-381)
3) Employee gives medical certification (WH-380)
4) Employer gives designation notice (WH-382)
(1) Employee Gives Notice of Need for Leave - Timing

- If foreseeable: can be required to give 30 days advance notice.
- If not foreseeable: notice as soon as practicable.
(1) Employee Gives Notice of Need for Leave – Say What?

- At least enough info to make employer aware she needs FMLA leave, when, and how much.
- She doesn’t have to mention the FMLA.
- BUT the employer can insist that she comply with its “usual and customary notice and procedural requirements.”
(2) Employer must give Eligibility/ Rights and Responsibilities Notice

- Should say whether you are eligible for FMLA leave, and if not, why not.
- Employer tells worker its requirements (medical cert., that paid leave will be substituted, etc.)
- Employer provides information (who gets payments of medical premiums, who answers questions, etc.)
(3) Employee Provides Medical Certification  
– Employer Demands More!

• Employee must produce “complete and sufficient” certification.
• “Insufficient” if “vague, ambiguous or non-responsive.”
• Employer complaining about sufficiency must state in writing what is wrong and give worker 7 calendar days to cure.

Tip: Make sure you get the written notice of insufficiency and provide to doctor.
(4) Employer Must Provide Designation Notice

• Employer must designate leave as FMLA qualifying or not.
• Timing: 5 business days after medical cert., absent extenuating circumstances.
• BUT employer allowed to retroactively designate if no harm to employee.
Other Medical Certifications that the Employer May Require

- Employer can choose a doctor for a second opinion.
- A third doctor can break a tie.
- Employers can also ask for recertifications, fitness for duty notes.
Enforcement of FMLA Rights

- Demand letter
- U.S. Department of Labor
- Lawsuit
Disability Discrimination Laws

- **Federal law (ADA)** applies to all employers with 15 or more employees; enforced by EEOC
- **State law**: 5 or more employees; enforced by PHRC
- **Local law**: 1 or more employees; enforced by PCHR
Who is Covered by the ADA?

• Qualified individual with a disability: a person with a disability who, with or without reasonable accommodations, can perform the essential functions of the job in question

• Disabilities are chronic medical conditions that affect a person’s ability to engage in major life activities.
You Don’t Need To Be Disabled Now To Be Covered by ADA

- ADA protection if:
  - Have a **record** of such impairment; or
  - Being **regarded** as having such impairment.
What is a “Reasonable Accommodation” for a Disability?

Employee is otherwise qualified for job but needs some adjustment from the employer in order to perform the work because of disability:

- Special equipment
- Reassignment of some job duties.
- Changes to work schedule.
- Transfer to a vacant job.
What are Limits on Reasonable Accommodations?

• Accommodation is not required if it would be an undue burden on the employer.

• Whether an accommodation is required is decided on a case-by-case basis.

• An employer may offer a reasonable accommodation other than the one that the employee is requesting.
ADA Rules on Disclosing Disabilities During Hiring Process

- Applicants do not have to reveal their disabilities during the interview process.
- Employers are not allowed to ask questions about disabilities or require applicant to take a physical until after they have given a conditional offer of employment.
ADA Rules on Medical Exams and Questions

- Medical exams cannot be required by an employer unless they are “job related.”
- Same standard for questions about nature or severity of a disability.
- Medical information is to be kept in separate files and treated confidentially.
- Supervisors and managers: “need to know” – restrictions or accommodations.
Filing a Disability Discrim Charge

- ADA – with EEOC, within 300 days
- State – with PHRC, within 180 days
- Local – with PCHR, within 300 days

Best to file charge within 180 days.
No lawyer needed, but helpful.
Possible Types of Income While You Are On Medical Leave

- Employer-provided disability (STD/LTD)
- Unemployment compensation
- Social Security Disability/SSI
- TANF (cash assistance) benefits
Employer-provided disability (STD/LTD)

- Optional with employer whether they provide these benefits (except in New Jersey).
- Your rights are defined by the plan bought by the employer. *Ask your employer for a “summary plan description” (SPD)(the rules booklet).*
Employer-provided disability (STD/LTD)

- Usually the most favorable benefits.
- BUT insurance company decides whether you get them.
- Typically time-limited (based on policy).
- Talk to your HR Dept about making an application.
- Make sure your doctor cooperates.
Social Security Disability Benefits

- Supplemental Security Income (SSI)
  - Single - $698/mo
  - Couple - $1,048/mo
  - Plus $22.10 ($33.30) state supplement
  - Comes with Medicaid
  - Based on financial need as well as disability

- Social Security Disability Insurance (SSDI)
  - Based on work and earnings
  - See your Social Security earnings statement for benefit amount
  - 5 month wait
  - Comes with Medicare
Definition of Disability

– Inability to do substantial gainful activity that exists in significant numbers in the national economy

– Caused by a physical or mental impairment that will last at least 12 mos. (or result in death)

– (Same definition for SSDI and SSI)
Qualifying for SSI/SSDI

- Five Step Analysis for Determining Disability
  - 1. Are you working and earning $1,010/mo?
  - 2. Do you have a severe impairment?
  - 3. Does your impairment meet SSA’s list of disabling conditions?
  - 4. Can you do any work you did previously?
  - 5. Can you do any other kind of work?
Qualifying for SSI/SSDI, cont.

- Breast cancer = severe impairment
- But must be disabling for 12 mos. or more

- “Compassionate Allowance” for
  - 19. Breast Cancer - with distant metastases or inoperable or unresectable
  - Quick approval with medical evidence
  - [www.ssa.gov/compassionateallowances](http://www.ssa.gov/compassionateallowances)
Qualifying for SSI/SSDI, cont.

- If don’t meet Compassionate Allowance criteria, SSA’s “Listing” for Breast Cancer (13.10):
  - A. Locally advanced cancer, including inflammatory cancer,
  - B. Cancer with metastases to the supraclavicular or infraclavicular nodes, to 10 or more axillary nodes; OR
  - C. Recurrent cancer (except local recurrence that remits with chemo).
  - OR your functioning is so impaired you can’t do any job
  - MUCH easier to qualify at age 55
Qualifying for SSI/SSDI, cont.

• Or: Breast cancer can be considered under SSA’s “Listing” for Soft Tissue Sarcoma (13.04):
  – A. With regional or distant metastases; OR
  – B. Persistent or recurrent following initial antineoplastic therapy.
How to Apply and Appeal

• Call 1-800-772-1213 to get application started
  – Benefits effective the month after month of application
• Note: SSDI has 5 month wait
• Then go to one of 9 local office for interview, etc. (Go to www.ssa.gov to search by zip code)

• Denied? Appeal within 60 days – hearing before an Administrative Law Judge. You probably should get a lawyer.
UC Benefits – General Requirements

- Financial eligibility
- Qualifying reason that you are not working (such as you are physically unable to work)
- “Able and available” for work
- Looking for work
UC Benefits - Issues

- You *can* get UC while on medical leave. But you must meet all the requirements.
- Must tell the employer that you can’t do your job for medical reasons and give opportunity to accommodate.
- Must apply for at 2-3 jobs per week.
UC Benefits – Making an Application

- Apply by phone (888-313-7284) or online (www.paclaims.state.pa.us).
- You have to indicate that you “voluntarily quit” for medical reasons.
- Usually, a maximum of 26 weeks of benefits.
TANF – cash assistance

- Must have minor children.
- Income must be below grant level ($403 for family of 3).
- Resources must be less than $1000 (not including house or car).
- Your illness may exclude you from work requirements.
Privacy Rights - HIPAA

- Health information cannot be released without patient consent.
- Patients have the right to access their medical records, including copies.
For Legal Assistance

- Community Legal Services/Philadelphia Legal Assistance (see handout) (or call 215-981-3700)
- Lawyer Referral Information Service of Philadelphia Bar Ass’n (215-238-6333)
- National Employment Lawyers Ass’n
  [www.nela.org](http://www.nela.org) – “Find a Lawyer”