Employment: Missing Work and Your Rights Under Federal Law

While many people with epilepsy are able to maintain regular employment without interruption, others may need to miss work because of seizures, changes in medication, or to visit a doctor for regular monitoring. Some people fear that they will lose their jobs if they take time off, either because they will violate the employer’s attendance policy or the employer just will not want to keep an employee on the payroll who cannot be at work 100% of the time. Federal laws and some state laws may, however, protect you in such a situation as long as you do some advance planning. These federal laws are known as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

Under the ADA, employers with 15 or more employees may not discriminate against a qualified individual on the basis of his disability. Employers must provide a reasonable accommodation, if necessary, as long as it does not impose an undue financial or administrative burden on the employer. One reasonable accommodation may be time off for medical reasons. This may be a reasonable accommodation even if the employer has its own attendance policy and taking the leave would normally violate the policy. While employers can continue to enforce attendance policies as long as they apply the policy in the same way for all employees, the ADA may require the employer to make a reasonable modification to the policy if necessary to provide an individual with a disability a reasonable accommodation.

Flexible leave policies may also be considered as a reasonable accommodation when an individual with a disability may require time off due to their disability. Under the ADA, an employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave or leave without pay, where this will not cause an undue hardship.
To take leave as a reasonable accommodation, the employee must request it. While the request need not be in writing, it is often helpful to put it in writing. Also, the request needs to be made in advance. Employees should keep in mind that even if taking leave would be the best accommodation available, employers are not required to provide it if another effective accommodation is available or if providing the leave would impose an undue financial or administrative burden on the employer. You may also be entitled to leave as a reasonable accommodation under your state’s law. If you believe your rights have been violated, you may file a complaint with the Equal Employment Opportunity Commission (the federal agency responsible for enforcing the employment provisions of the ADA) by calling (800) 669-4000 (voice) or (800) 669-6820 (TDD). While you are not required to have an attorney to file a complaint, you may wish to consult a local attorney to learn how the law applies in your particular situation and for advice on how to proceed.

For information on obtaining a referral to an attorney in your area that may be able to provide specific advice or representation, please visit the website for the Jeanne A. Carpenter Epilepsy Legal Defense Fund, at www.epilepsylegal.org, or call our Epilepsy and Seizures 24/7 Helpline toll free at 1-800-EFA-1000 (1-800-332-1000). For general legal information about this and other employment discrimination issues, such as reasonable accommodations, and the definition of disability, please visit our website at http://www.epilepsy.com/get-help/epilepsy-seizures-247-helpline, or call our Epilepsy and Seizures 24/7 Helpline. Alternatively, you may contact the EEOC or visit the agency’s website, www.eeoc.gov. See in particular the EEOC’s Questions and Answers about Epilepsy in the Workplace -- http://www.eeoc.gov/laws/types/epilepsy.cfm.
If you need to take time off work because of your own medical condition or that of a family member, you may also be entitled to leave under FMLA. The FMLA allows qualified employees to take up to 12 weeks of unpaid leave during a 12 month period for medical reasons, the birth or adoption of a child, incapacity related to pregnancy or childbirth, or to care for a child, spouse, or parent who has a “serious medical condition”. A “serious medical condition” is an illness, injury, impairment, or physical or mental condition which requires either an overnight stay in a medical facility or continuing treatment by a health care provider, when such treatment results in the inability of the employee to continue work, or the inability of the family member to attend school or other daily activities.

To be able to take leave under FMLA, you must have worked for a covered employer for one or more year(s), and a minimum of 1,250 hours within the previous 12-month period. Your employer is covered if it employs 50 or more employees within 75 miles of your location.

If you qualify for leave under FMLA, you do not need to take your leave all at once. You may request a reduced work schedule with fewer hours or days as an alternative instead of a leave of absence. For example, you may request several hours off per week for medical appointments or delay the start of your workday by one hour during a change of anticonvulsant medication if you require regular medical monitoring. Being placed on ‘light duty’ or given alternate job assignments does not constitute FMLA leave and does not count towards your statutorily mandated 12 weeks of unpaid leave.

Employers may request certification from your physician or the medical provider caring for your family member and can request re-certification from your physician once every six months. The physician’s note should include the condition, duration of the condition, and in cases of family member care, for what purposes the employee is needed to provide care. Employees should specifically request FMLA leave from
their employer and in cases where advance planning is possible, such as expected births or medical procedures, must give 30 days notice to the employer. In cases where such notice is not possible, an employee is required to provide notice as soon as possible and make all efforts to comply with the employer’s normal leave policies.

While you are on leave, your employer is not required to pay you your salary. However you may choose or your employer may require you to take available paid leave concurrently with FMLA leave. If taking paid leave during the FMLA leave period, you must comply with your employer’s polices regarding paid leave. Depending on the terms of the policy, you may also be able to get benefits under a private short-term disability insurance policy.

Employers are, however, generally required to continue payment of employee benefits for the duration of the leave. The law also guarantees that an individual will have the opportunity to return to the same or an equivalent position with the same benefits, pay, and other conditions of employment when the leave is over, unless the employer can show that returning the individual to his old job would cause “substantial and grievous economic injury.” Employers are also prohibited from adversely affecting seniority benefits as a result of taking FMLA leave or from terminating or otherwise discriminating against employees for requesting leave. Employers are permitted to require ‘fitness for duty’ certification before allowing an employee to return to work following FMLA leave, so long as such certification is required of all returning employees.

When an individual requests leave, a covered employer is required to notify that individual of his or her eligibility for leave under the FMLA. If an employee is not entitled to FMLA leave, the employer must articulate a reason for ineligibility. Furthermore, employers must notify employees as to whether requested
leave is to be designated as FMLA protected, and if so, how much of it will count against that employee’s leave entitlement. Some employers allow employees to take more leave or provide more generous benefits than FMLA requires. State law may also offer additional protections.

Congress extended FMLA protection to cover (1) those caring for qualified service members, and (2) family members of certain members of the National Guard, Reserves, or the regular armed forces. Military Caregiver Leave provides leave for family members of covered service members who have become injured or ill, or whose injury or illness was aggravated, in the line of duty, while on active duty. This covers care of current service members and former service members who have been out of service for less than five years. Family members providing care will be entitled to up to 26 weeks of leave in a single 12-month period. Qualifying Exigency Leave provides protection for the families of members of the National Guard, Reserves, and the regular armed forces on active duty in a foreign country. This extends the normal 12-week FMLA provision for in the case of any ‘qualifying exigency’ arising out of active duty, including “(1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and employee.” More information on these new forms of military leave can be found online at http://www.dol.gov/whd/fmla/finalrule/factsheet.pdf. For more information about your rights under the FMLA, contact the Wage and Hour Division of the U.S. Department of Labor (DOL) at (866) 4-USWAGE (866-487-9243), TTY: (866) 487-9243, or visit the DOL website, http://www.dol.gov/dol/topic/benefits-leave/fmla.htm. If you believe your rights under the FMLA have been violated, you should contact your local Wage and Hour Office of the U.S. Department of Labor. Contact your state’s Department of Labor.
for information about your state’s law. Also, as mentioned above, you may contact the Jeanne A. Carpenter Epilepsy Legal Defense Fund for legal assistance, or call our Epilepsy and Seizures 24/7 Helpline at 1-800-332-1000.

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