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 **Client Testimonial:**

"The support and expertise offered by the staff of UTCA is unparalleled. If your organization is serious about reducing costs, UTCA should be on your speed-dial."

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## UTCA's Topic of the Month



**August 2004**

### Avoiding Unemployment Costs After FMLA Expires

One area of law that can create inconsistencies and various conflicting concerns is the Family and Medical Leave Act regulations, commonly known as FMLA and unemployment insurance. We are frequently asked: Can people collect while they are still employees and out on leave? What if they are not eligible for FMLA because of their length of service and quit their jobs, can they collect? What if they can't return? What if they are not able and available for full time work upon their return but want light duty, or a different job? If we don't have light duty, are they eligible for unemployment?

The real question is whether or not you can protect yourself as an employer and how to do so, thereby avoiding the financial obligation of providing benefits to an employee who is not readily performing services, to say nothing of creating a disincentive to returning to productive employment.

Generally speaking, FMLA mandates that covered employers (50 or more employees) provide eligible employees (i.e. 12 months of employment, at least 1250 hours of employment within last 12 months) with up to 12 weeks of leave for birth, adoption of a child, a serious health condition or to care for an employee's family member with a serious health condition.

Typically, when employees are out on FMLA they are not eligible for unemployment compensation, since the leave is voluntary in nature and they are not "able and available" for full-time work. At the end of the leave, FMLA requires the employee's position be available to them. If at that time however, the employee informs you they are not capable of coming back to work in any capacity, and you then terminate their employment, in all likelihood they will be eligible for unemployment because you are not terminating them for "misconduct". In theory, they should be disqualified because they are not "able and available" to seek and accept full time work which is a simultaneous requirement of all eligible claimants. More often than not, claimants experience sufficient recoveries once their UI claims are filed or soon after learning their positions must finally be filled with an able bodied worker. Employers may be able to protect themselves if they are willing to extend the leave (non-FMLA) or if the separation is considered a voluntary quit as opposed to a discharge. A resignation letter must be tendered to provide the best protection from UI liability in this instance.

A more common occurrence is when you have held an employee's job in compliance with the FMLA and they want to return upon the

expiration of the FMLA but to a different or light-duty position. What are your obligations? In this situation you have complied with the FMLA requirements but for unemployment purposes you would be required to accommodate the light duty restrictions. If you cannot or will not, then the employee would be eligible to collect. States vary as to whether or not an employee must ask for light duty (the majority do require a request for light duty and supporting medical documentation) and whether an employer must offer it when they become aware of the health issues (a small minority require light duty to be offered). However the bottom line is the same. If you do not have light duty available, it would be wise not to separate the employee from employment but instead monitor the doctor's notes and "dates and time frames" listed on any medical documentation. You should not accept an "open-ended" note and require specific dates and specific restrictions, continually updating the documentation upon expiration.

Finally, remember any time away from work or time for which the employee is not available to work (vacation, personal reasons, child-care) can still be protested on a week-to-week basis if a partial claim for unemployment has been established. In order to obtain disqualifications on a week-to-week basis, you must contact UTCA and provide us with the details. This information will then be forwarded to the appropriate office within the agency and charges will be protested for the week(s) in question.

We hope this is helpful information. Do you have questions about this topic? We can be reached at the numbers below:

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This article can also be viewed and downloaded on-line at our web site: <http://www.utca1.com> by clicking on the Topic of the Month (TOM) Tab and entering your client password information. Please contact UTCA is you wish to obtain a TOM password.

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