

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Terminating Employees on Leave - What Should a Nonprofit Employer Consider?

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Scenario:

Susan has been employed with your nonprofit for around three years. She has been a fantastic employee for most all of her career; however, over the last couple of years, she has not been performing well. Over the past year, she has been out of the office for weeks at a time; has not been meeting deliverables and deadlines; and has not been the best contributor in her role. Last month, Susan requested and was approved for leave for her own serious health condition. While Susan was on leave, the problems presented by her deficient performance were exacerbated and you discovered an error that cost your organization a significant amount of money. As a result, you decide that you want to terminate Susan's employment while she is on leave. You don't have a Human Resources leader and have always managed employment issues yourself.

So, What Now?

Terminating an employee under regular circumstances is stressful, but terminating an employee on medical leave can add to this stress because it is more complex. This does not mean that an employee on medical leave cannot be fired. In Georgia, employees are "at will", meaning that either the employee or the employer can end the employment relationship for any *legal* reason, with or without cause, but laws and public policy provide some protections for employees on medical leave. These employee protections require additional employer considerations when deciding whether to terminate an employee on medical leave. These job protections when on medical leave can arise from either state or federal law.

For example, the federal Family Medical Leave Act (FMLA)¹ applies to organizations with 50 or more employees and includes very specific regulations regarding how an employer must manage an employee's eligible medical leave. If applicable, the FMLA allows for up to 12 weeks of unpaid protected leave for an employee due to the employee's medical condition. But even if your nonprofit employs less than 50 people, you should also consider whether the protections under the federal Americans with Disabilities Act, and its amendments (ADA)² apply. Employers

¹ You may read more about the FMLA, and its requirements at: [Fact Sheet #28: The Family and Medical Leave Act | U.S. Department of Labor \(dol.gov\)](#).

² The ADA requires that employers accommodate employees who have a physical or mental impairment that substantially limits a major life activity to allow them to perform the essential functions of their job. Leave can be

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with 15 or more employees must comply with the ADA. The goal of this article is to help nonprofits navigate the complexities of scenarios like Susan's and offer guidance on how to proceed in compliance with applicable laws and regulations.³

Why is the nonprofit terminating the employee?

The first thing you want to consider is whether your organization has a valid reason for terminating Susan. Because Susan is on medical leave, you must also consider whether you increase your organization's potential legal exposure if you terminate Susan's employment during her medical leave. The organization should be able to articulate specific and objective reasons for terminating Susan that are unrelated to Susan's medical leave, while considering how the reasons and timing of her leave might impact the termination decision. Before moving forward with the decision, ask yourself these types of questions: is Susan being terminated for a violation of policies? Performance issues? Attendance issues unrelated to leave? Or something else?

If Susan is taking medical leave under the FMLA or the ADA, Susan's job is likely protected from termination related to that leave. Thus, while you should be careful not to violate the law, you may terminate Susan regardless of her leave status if there is a legitimate reason, unrelated to her medical leave, that neither constitutes discrimination, interference nor retaliation under the applicable laws. Examples of legitimate reasons include:

- If Susan would have been terminated regardless of her leave because of excessive absenteeism (not related to her medical leave) or poor performance (that is unrelated to her use of medical leave or caused by her medical condition), she may be terminated before, during or after her leave (with proper consideration of potential issues)
- If Susan was on a performance improvement plan prior to taking leave and had enough time to make significant improvement in her performance, but did not do so prior to her leave, she may be terminated upon her return from leave. The best practice here is to have made the decision to terminate prior to the start of Susan's leave, but the leave interfered with the timing of the termination.
- If serious issues related to Susan's performance occurred prior to her leave, and are not due to her medical condition, and this comes to your attention during the leave, Susan may be terminated during her leave, or immediately upon her return.
- If insubordination, fraud or other prohibited conduct by Susan takes place while Susan is on leave, Susan may be terminated during her leave, or immediately upon her return.

an accommodation under the ADA. You may read more about the ADA at: [Facts About the Americans with Disabilities Act | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](#).

³ Please note that this article does not address employment actions under Georgia's workers' compensation statute. Please reach out to an attorney to address questions specific to workers' compensation.

In summary, you must have a legitimate reason for Susan's termination unconnected to her medical leave. In many cases, however, terminating an employee on medical leave or who has recently returned from medical leave may lead to a lawsuit against your organization because of the close proximity of time between the leave and the termination. You must make sure that the bases for termination are substantiated, documented and for reasons other than requesting or taking leave. In addition, if Susan is on medical leave as an accommodation for a disability under the ADA, you must also consider what and how much you know about Susan's disability, whether her prior absences or performance deficiencies were related to her disability and whether similarly situated non-disabled persons have been treated more favorably in response to their performance problems, like having been allowed time to improve or subjected to discipline less than termination. If it appears that Susan may be able to establish a causal connection between her request and/or need for leave and her termination, you could face a lawsuit. Accordingly, strongly consider whether termination is the best and necessary decision, and consult legal counsel if possible, to help walk you through these considerations.

Considerations With Possible Reasons for Termination?

1. Potential Termination For Violation of Attendance and Absenteeism Policy: *In light of the above, you must consider the possible impact that Susan's absences prior to her job-protected leave may have with respect to a termination decision –*

- Do you have policies addressing attendance and absenteeism, and have you enforced them consistently?
- Did Susan violate any attendance or absenteeism policies prior to taking medical leave? And if so, were the violations or the absences and attendance issues addressed with Susan prior to her taking leave?
- Do you know if some or all of Susan's absences are related to the health condition for which she took medical leave?
- Were Susan's absences approved?

If Susan's absences are to be considered part of the basis for her termination, it is important to consider the answers to the above questions. For example, if Susan's absences were unaddressed prior to her taking medical leave, terminating her in part or full based on her prior absences could give the inference of discrimination and/or retaliation for engaging in protected activity by taking medical leave. Similarly, if Susan's absenteeism was addressed and she was previously disciplined, basing a termination decision on such leave may also be considered discriminatory and/or retaliatory for engaging in protected activity. Your key takeaway is to carefully consider every aspect of the termination basis for acting.

Best Practices:

- Ensure that your nonprofit has an attendance policy that sets forth the requirements for taking time off and notifying the employer of an absence.

- Consistently apply your attendance policy to all employees.
- When employees take time off, it is important to understand the reason for the leave and then, to determine whether it is protected leave, or not.
- Situations where leave may be protected may also include: jury duty, certain personal medical issues, to care for family members who have certain medical conditions, and military leave. Each of the laws that provide protected leave have various triggers, including number of employees, specific reason for the leave, and length of the leave, to name a few. Please consult an attorney to discuss your specific situation.

2. Potential Termination for Performance Reasons: *Assuming that the absences do not provide Susan protections from termination, or are not the basis for termination, are there performance issues that form the basis for termination?*

- A. Is there documentation regarding performance issues? It is important that performance issues are clearly documented for all employees. Ideally, this is documentation that is initiated at the time that the performance issues first arise. Was Susan made aware of these performance issues? Failure to document and/or failure to document at the time of the performance deficiencies may result in increased exposure for potential litigation for your organization if Susan challenges the termination.

Best Practices:

- Document performance issues consistently for all employees.
- Document performance issues when they first commence, or when you first become aware of the issues.
- Provide sufficient detail in documentation so that the deficiencies are clear and include documentary evidence, if available.
- Ensure that performance evaluations address performance issues that occurred during the evaluation period.

- B. Have you informed Susan of the performance deficiencies? Specifically, were you aware of the performance deficiencies prior to Susan's leave? Were the issues addressed prior to her leave? Has there been a new or intervening finding or occurrence related to the performance deficiencies during Susan's leave?

As performance issues are identified, it is important to discuss them with Susan. These discussions should take place close in time to the identified performance issue, be held in private with a witness present, and include a clear communication of the performance issue, as well as the performance expectation. Try to identify what caused the performance issue, including whether the deficiencies are related to the issue for which the employee took medical leave, and determine whether there are steps available to help remediate the situation and improve performance short of termination. An employee is more likely to challenge a termination action when the employee was not informed or had no knowledge that the organization had issues with the employee's performance.

Best Practices:

- Ensure that poor performance is addressed in a timely manner with employees; do not wait for the annual performance review to discuss issues that have come up over the evaluation period. Similarly, do not fail to address performance issues during evaluations.
- Be prepared for the performance discussion. Include details and clearly state what the expectation is going forward. Stick to facts, not feelings, in performance discussions with employees.
- Try to identify the root cause of the performance issue and assist the employee in identifying a way to improve performance and succeed. If the cause is related to a medical condition, consider whether a reasonable accommodation is necessary to allow the employee to perform the essential functions of the job. Be aware that, under the ADA, reasonable accommodations are required if they will allow an employee to perform the essential functions of the job. This could include flex time or allowing time off for medical treatment. Under the FMLA, intermittent leave may be required. That is, the employee may not have to take off a full block of time and instead may take leave intermittently.
- Provide employees regular feedback on performance and make employees aware that the organization considers the employee to have deficient performance, and that continued performance issues could result in discipline up to and including termination. If performance issues persist, be sure to inform the employee in writing of possible consequences, including termination.

- C. Has the organization provided Susan with the support and tools she needed to meet her performance expectations? Have you put Susan on a performance improvement plan ([PIP](#)) or otherwise tried to assist her in the improvement of her performance? If Susan is on a plan, what progress did she make prior to her leave? Is termination the only answer?

If performance issues continue, consider next steps, which may include a PIP. A PIP must be in writing and specific as to: the performance issues, the expected performance improvements, the time in which the improvements must be demonstrated (which must be a reasonable time period), and a schedule for regular follow-ups to discuss status of improvements identified in the PIP. Usually, regular meetings are held with the employee to discuss performance, upcoming deadlines/deliverables. Each meeting should include a clear indication to the employee as to whether performance is meeting the PIP requirements, or not. If the PIP is not successfully completed, then termination for performance is usually the result.

Best Practices:

- Ideally, the manager and the employee should reach an agreement on the terms of the PIP, including the improvement requirements and the timeframe which agreement is documented by the employee's signature on the PIP. However, if the employee will not agree to the PIP, the manager may still impose it and hold the employee accountable for the PIP expectations.

- The employee should be informed that failure to meet the PIP requirements could result in termination.
- The PIP must be reasonable both with respect to the requirements to establish acceptable performance, and to the timeframe within which the improvements must be demonstrated by the employee.
- The PIP should be in writing with written status updates following periodic meetings with the employee.

D. Has Susan made any complaints relating to working conditions, bullying, harassment, discrimination or retaliation, or otherwise engaged in any protected activity?

Again, while Georgia is an “at will” state employer, an important caveat is that employment may not be terminated due to an unlawful reason. An unlawful reason may include discrimination against a disabled person, retaliation for engaging in protected activity like taking leave under federal or state laws, or raising a concern regarding working conditions.

Best Practices:

- Make sure to have a business-related legitimate reason to support the termination.
- Ensure that the termination decision is not based on or related to the request for leave, the reason for the leave and/or the actual leave.
- Please consult with an attorney if there is any doubt regarding the legitimacy of the basis for the termination decision. Mistakes can result in expensive litigation and damages payable to the terminated employee.

E. Are there any other employees with performance issues that have not been addressed?

Ensure that your employees are all being treated similarly in terms of performance issues. Performance issues need to be addressed with all employees who have not performed as expected. Inconsistent treatment of employees with potentially similar performance issues raises litigation risks for your nonprofit.

Best Practices:

- Ensure that you have policies in place that address performance and consequences of inadequate performance.
- Policies must be enforced consistently and fairly.
- Performance problems need to be addressed in the same manner for all employees.

Conclusion

After considering the above, give some additional consideration to whether the root cause of the performance issue is the result of the underlying medical condition or the protected leave. If you decide that Susan would have been terminated regardless of and unrelated to her job protected medical leave and the underlying medical condition, you may provide Susan written notice of her termination during her leave, or immediately upon her return from leave. As

discussed herein, the considerations that must be given to deciding whether to terminate an employee while on leave should not be taken lightly, and the considerations discussed above are not exhaustive. Organizations must consider the individual circumstances of each potential employee termination, each time. Comply with the law. Avoid taking actions for which you cannot objectively articulate the reasons. Avoid terminations that cannot be justified outside of the medical issue and the accompanying leave. With careful navigation of the termination process during an employee's medical leave, nonprofits are more likely to ensure compliance with applicable employment laws and act in a fair and non-discriminatory manner. But don't hesitate to consult an attorney during any part of this process.

For more information and general guidance on the topic, please see: [So You Need to Let An Employee Go](#).