

Accommodating frequent restroom breaks

by Jacob M. Monty

Monty & Ramirez, LLP

Q *One of our employees has Crohn's disease. His manager said that some days he spends anywhere from one to two hours in the bathroom during his shift. He also misses days when he has flare-ups. I have encouraged him to fill out Family and Medical Leave Act (FMLA) paperwork, but he hasn't done it. Should he be clocking out for the time he spends in the restroom?*

A Crohn's disease is a protected disability under the Americans with Disabilities Act (ADA), so you are required to offer the employee a reasonable accommodation. One type of reasonable accommodation you may offer is allowing him to take unpaid break or leave time as needed.

Generally, employers must pay employees for breaks ranging from five to 20 minutes. However, breaks lasting longer than 20 minutes can be unpaid. Thus, you may require your employee to clock out if he believes a bathroom break will exceed 20 minutes during his shift.

Q *We have an exempt employee who hasn't completed his 90-day probationary period, so he hasn't accrued any paid time off (PTO). He recently went home sick after working only one hour. Do we have to pay him for the full eight-hour workday?*

A Yes. If the exempt employee worked for part of the day, you have to pay him his full day's salary. The Fair Labor Standards Act (FLSA) prohibits employers from taking partial-day deductions from exempt employees' salaries. If, on the other hand, the employee was absent for the entire day and performed no work, you would be permitted to deduct a full day's pay as long as you have a bona fide leave plan.

A bona fide leave plan provides for a reasonable number of absences due to sickness without loss of pay. While there's no strict rule for how many days are considered "reasonable," the U.S. Department of Labor (DOL) has stated that bona fide leave plans include plans that provide five days of PTO per year after employees work one full year for the company.

Q *Can an employer require job applicants to take a personality assessment as part of the application process?*

A Generally, yes, but you should take precautions to avoid legal trouble. The assessment should identify personality traits that contribute to success in the particular job being filled. Guidance from the Equal Employment Opportunity Commission (EEOC) states that if a test ends up screening out members of a protected group, the employer should determine whether there is an equally effective alternative selection procedure that wouldn't disproportionately exclude those applicants.

Additionally, you must provide reasonable accommodations if necessary. For example, a candidate who cannot read who is applying for a job in which reading isn't necessary should be given the opportunity to take the test with reading assistance. To avoid legal problems, ask an attorney to review your personality assessment before implementing it.

Q *We are a property management company with maintenance workers who travel to different properties and visit the central office periodically but not regularly. They are the only employees who visit or work from the properties. Do we have to post the federal and state employment rights notices at each property, or is one posting at the central office sufficient?*

A You must post the federal and state notices at each property.

Jacob M. Monty of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He is the managing partner of the Houston office and may be contacted at jmonty@montyramirezlaw.com or 281-493-5529.