







LEAVE ME ALONE!
Handling Employee Leave
Issues Without Getting Sued

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FMLA BASICS REFRESHER

- FMLA provides eligible employees of covered employers with up to 12 workweeks of job-protected leave within a designated 12 month period for certain qualifying reasons
- Eligible Employees: 12 non-consecutive months / 1250 hours worked within the preceding 12 months
- Covered Employers: 50 employees within 75 miles
- Qualifying Reasons:
 - Birth or placement of a child
 - Spouse, child, or parent with a serious health condition
 - Employee's own serious health condition
 - Spouse, child or parent on active duty and a qualifying exigency arises
 - Spouse, child or parent that suffers serious illness in line of duty



COMMON FMLA MISTAKES: POLICIES AND TRAINING

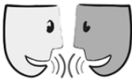


- Not having a written FMLA policy
 - Notice Posting
 - Policy must be in employee handbook
 - No handbook?
- Not training managers to recognize potential FMLA situations
 - Employees not required to specifically request "FMLA" leave
 - Consequences of failure to designate



COMMON FMLA MISTAKES: NOTICE





- Failing to follow the FMLA's notice requirements, in whole or in part
 - Requiring 30 days advance notice
 - Designating as FMLA leave within 5 days
 - Allowing employees 15 days to return healthcare provider certification form
- Failing to communicate with employees who are on leave

COMMON FMLA MISTAKES: NOTICE





- Notice-related problems:
 - Failing to designate qualifying leave as FMLA leave
 - Treating non-qualifying leave as FMLA leave
 - Accepting incomplete medical certifications
 - Not keeping track of the amount of FMLA leave employees use

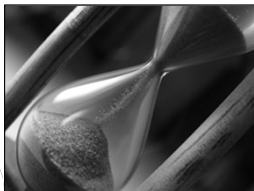
COMMON FMLA MISTAKES: INTERMITTENT LEAVE

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• Failing to Appropriately Understand and Manage Intermittent Leave

- When Required vs. When Optional
- Notice requirements
- Employees must make reasonable effort to schedule leave without disruption to business
- Use of Temporary Transfers
- Policing Abuse
- Lack of Communication
- Tracking the amount of intermittent FMLA used
- Requiring periodic recertification of the need for leave



COMMON FMLA MISTAKES: AMOUNT OF LEAVE

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• Forcing employees to take more leave than necessary

- Old Rule: Employer could require employees to use FMLA in increments consistent with Employer's leave policy.
- New Rule: Employers may not require employees to take more FMLA leave than necessary to address the circumstances that cause the need for leave.
- Employers must account for FMLA leave in the shortest period of time that their payroll systems use.



COMMON FMLA MISTAKES: TERMINATING EMPLOYEES ON LEAVE

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- Employees on FMLA entitled to reinstatement to the same or an "equivalent" position
- May terminate an employee on leave if the same decision would have been made if the employee was not on leave
- RIFs
- Performance issues known about prior to leave – do not evaluate during leave
- Performance issues discovered during leave – investigate, but do not take action until employee returns from leave
- Fraudulent use of FMLA



COMMON FMLA MISTAKES: JOB RESTORATION

- Requiring an employee to be "100% Healed" before returning to work
- Automatically terminating an employee who fails to return to work at the end of a leave





FMLA DO'S AND DON'TS

- DO have a written policy
- DO train supervisors and managers
- DO follow notice provisions religiously
- DON'T forget to track FMLA time
- DON'T allow employees to abuse intermittent leave
- DO pay employees on leave correctly
- DON'T forget the ADA





MEDICAL LEAVE: NOT JUST THE FMLA ANYMORE

- Leave of absence as a reasonable accommodation under the ADA / ADAAA?
- Difference between FMLA leave and ADA leave?
- Will my employees ever come back to work?





ACCOMMODATION LEAVE, An Example





Just Our Luck Corp. has 53 employees. Myrtle, *Just Our Luck's* Payroll Clerk, is in the last week of her 12 week maternity leave under the FMLA. *Just Our Luck's* HR Manager, Charlie Personnel, sent Myrtle a letter informing her of the day on which her FMLA leave expires, informing her she is out of personal, sick, and vacation time, and asking her to contact him to confirm her return to work date.

ACCOMMODATION LEAVE, An Example (cont.)





Charlie Personnel also highlights *Just Our Luck's* FMLA policy, which says that employees who fail to return from FMLA leave will be terminated. After Myrtle receives the letter, she calls Charlie and tells him she can't come back to work at the end of her FMLA leave because she slipped a disc in her back during childbirth and may need surgery.

IS MYRTLE OUT OF "LUCK?"



- Obligation to give an employee beyond 12 weeks of FMLA?
- Interactive process
- What should Charlie say?



HOW MUCH ADDITIONAL LEAVE?



- Indefinite leave?
- Leave for 2 weeks?
- Leave for 2 months?
- Leave for 2 years?
- What about a policy that caps leave?

UNDUE HARDSHIP

“Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.”

Potential factors:

- Nature and cost of accommodation
- Overall financial resources of facility
- Type of operation of the employer
- Impact of accommodation on operation of facility

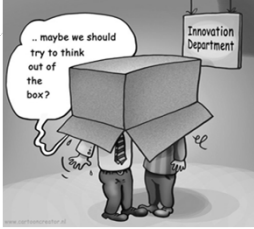



DO'S AND DON'TS OF DISABILITY LEAVE



DISABILITY LEAVE DO:





- Get medical documentation
- Ask questions about return to work date
- Assess whether you can provide anything short of leave
- Think outside the box
- Document, document, document

DISABILITY LEAVE DON'T:



- Terminate just because FMLA leave has ended
- Document via text (unless you print it)
- Deny an accommodation without examining it
- Underestimate "undue hardship"
- End the discussion – put the ball in the employee's court, if possible



LEAVE UNDER THE WORKERS' COMP STATUTE





WHEN WORKERS' COMP LEAVE IS ALLOWED





- You must grant leave under workers' comp whenever the comp doctor places the employee on leave
- If the employee is on "light duty" and you do not offer "light duty," then the employee will be on leave
- Paid leave when going to doctor at employer's direction

HOW IS WORKERS' COMP LEAVE DIFFERENT?



- Must be reported to the State
- Always paid (usually via your insurance carrier)
- Maximum length of leave is established by statute
- May run intermittently (like FMLA)
- MMI v. "disability"



WORKERS COMP DO'S AND DON'TS



DO:

- Complete a report of injury ASAP
- Get copies of medical documentation regarding the employee's injury and need for leave
- Run FMLA concurrent with workers' comp
- Communicate with the employee and your insurer throughout the leave
- Bring the employee back to work when possible



WORKERS COMP DO'S AND DON'TS

DON'T:

- Pay a workers' comp employee his / her regular salary while on leave
- Ignore workers' comp employees while they are on leave
- Forget the interplay between workers' comp and FMLA/ADA
- Assign a workers' comp employee duties outside of his/her restrictions
- Terminate a workers' comp employee without talking to your lawyer




OTHER LEAVE ISSUES: PREGNANCY

- Young v. UPS
- Employers required to accommodate pregnant employees in the same way they accommodate non-pregnant employees
- Apply leave of absence policies uniformly
- Do not force pregnant employees to take leave
- Consider whether your sick leave and non-FMLA leave of absence policies have a disproportionate impact on pregnant employees
 - Ceiling on the number of sick days that can be used
 - Denying sick leave during first year of employment
 - Job-related and consistent with business necessity




OTHER LEAVE ISSUES: DISCRIMINATION

- Don't forget about Title VII, the ADEA and other anti-discrimination statutes
- Develop and apply non-FMLA leave of absence policies uniformly
- Examples of problematic policies/practices:
 - Maternity leave policies
 - Denying requests for leave for religious reasons




OTHER LEAVE ISSUES: FLSA/EXEMPT EMPLOYEES



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- Misunderstanding the requirements of the FLSA when docking the pay of exempt employees on leave
- FLSA does not mandate any type of leave
- Exempt employees required to be paid for entire week in which any work performed
- Deductions from salary must be made in accordance with a bona fide plan for providing sick leave benefits
- May not make deductions for partial day absences
- FMLA exception

OTHER LEAVE ISSUES



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- **USERRA**
 - Provides unpaid leave up to 5 years for service in the uniformed services
 - Reemployment rights
 - Protection of seniority and benefits during leave
- **Jury Duty**
 - Alabama law: Paid leave for full-time employees, unpaid leave for part time employees
 - Federal law: FLSA provides for unpaid leave for employees serving on a federal jury
- **Voting Leave**
 - Alabama law: One hour of unpaid leave to be taken at a time of the employer's choosing

QUESTIONS?



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