

Family & Medical Leave and the ADA – “New” Considerations for Employers



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What comes to mind when you think of the FMLA?

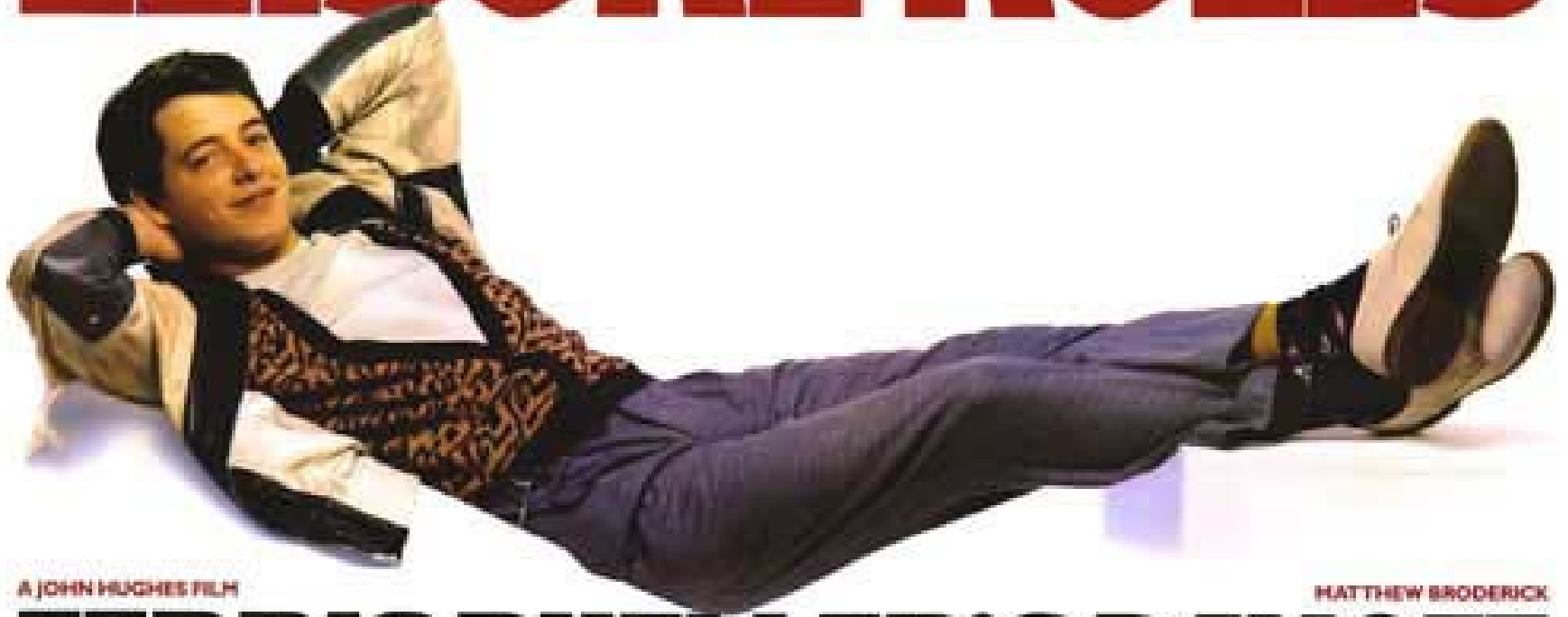


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FAKING OUT PARENTS

- 1. Fake a Stomach Cramp**
- 2. Moan and Wail**
- 3. Lick Palms**



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The FMLA Request

- Request must be sufficiently specific to allow you to deduce that the employee is requesting leave
- No need to specifically mention “FMLA”
- However, you do not have to be “clairvoyant”
- Start the process if the employee asks for time off due to an issue that may be covered by the FMLA



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The FMLA Request - Example

- Willis v. Coca-Cola Enterprises, Inc., (445 F. 3d 413 5th Cir. 2006)
 - Employee called in sick without stating specifics
 - Employer placed employee on leave and told her she could not return to work until she was released by her doctor
 - Employee was silent and out for more than a week → terminated under 3 day no call/no show policy
 - No FMLA protection – because no notice that absences were because of a “serious health condition”

Your Immediate Reaction Is Important



- Express caring, sympathy
- Do not be overtly skeptical
- Watch your facial expression

FMLA Notice Requirements

- Get the forms and fill them out correctly
- Equitable Estoppel – if you are silent about whether leave is covered, you may be equitably estopped from later challenging eligibility ← by Courts, not by Regs
- However, “new” Regulations say – retroactive designation is allowed ... unless harm by failure to timely designate



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FMLA Notice Requirements

- Trick – You can require employees to comply with usual and customary notice/procedural requirements for requesting leave
 - Require requests to be in writing
 - Designate certain people to receive requests
 - Non-compliance → delay or deny leave
 - BUT must be clear, written and well distributed

THE FORMS – Form #1 – Form WH-381 (Part A)

Notice of Eligibility and Rights &
Responsibilities
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



OMB Control Number: 1215-0181
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

_____ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.



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THE FORMS – Form #1 – Form WH-381 (Part A)

- Must provide Notice of Eligibility and Rights and Responsibilities (Form WH-381) within 5 business days once you have enough information that the leave is qualifying
- Unless extenuating circumstances



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**THE FORMS – Form #1 –
Form WH-381 (Part A)
Is the employee “eligible” for FMLA?**

- 3 Parts:
 1. “Employer”
 2. Employee has worked for 12 months
 3. Employee has worked 1,250 hours
- If eligible, continue to Part B

Is the Employee “Eligible”? - “Employer”

- Who are “Employers”?
 - Public Agencies – local, state, and federal including schools
 - Private - employers with 50 or more employees in 20 or more work weeks in the current or preceding calendar year, including joint employers
- Site Test – the employee must work at a location where at least 50 employees are employed within a 75 mile radius (roads, not as the crow flies)



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Is the Employee “Eligible”? - “Employer”

PEOs and Joint Employment – no joint employment unless the PEO:

1. Exercises control over the client company's employee;
2. Has authority to hire, fire or supervise employees; or
3. Benefits from work performed by the client's employees.



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Is the Employee “Eligible”? - “12 Months” and “1250 Hours”

- The 12 months do not need to be consecutive
- However, break-in-service of 7 years does not need to be counted unless:
 - Employee was fulfilling military obligations; or
 - A period of approved absences or unpaid leave (education or child-rearing) or a written agreement or collective-bargaining agreement shows the intent to rehire



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Is the Employee “Eligible”? - “12 Months” and “1250 Hours”

- USERRA -- time spent fulfilling military obligations is counted towards both the 1250 hour and 12 month requirements
- Determination made when leave is scheduled to begin, not when the employee asks
- Employee not eligible at the beginning of leave may begin FMLA once he meets eligibility requirements



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Is the Employee “Eligible”? - “12 Months” and “1250 Hours”

- Now, time on paid or unpaid leave counts towards the 12 month requirement if they remain on the payroll and receive other benefits
- Unused vacation/sick time does not count
- 1250 Hours counted as of year at issue – prior years do not count



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[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____. (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request is/_____ is not enclosed.
- _____ Sufficient documentation to establish the required relationship between you and your family member.
- _____ Other information needed: _____
- _____
- _____

No additional information requested

If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

- Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.
- You will be required to use your available paid sick, vacation, and/or other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.
- _____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We have/_____ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.
- While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
 - _____ the calendar year (January – December).
 - _____ a fixed leave year based on _____
 - _____ the 12-month period measured forward from the date of your first FMLA leave usage.
 - a "rolling" 12-month period measured backward from the date of any FMLA leave usage.



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THE FORMS – Form #1 – Form WH-381 (Part B)

Critical components:

- Require medical certification – 15 day turnaround
 - If the employee provides incomplete certification, you must provide 7 days to cure
- Additional information and/or documents you will need to determine whether the employee’s situation qualifies
- Contact information of your “point person” re: health insurance



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THE FORMS – Form #1 – Form WH-381 (Part B)

Critical components:

- Require use of available vacation/sick time
- “Key Employee” Designation – can deny job restoration if restoration would cause “substantial and grievous economic injury”
- Require periodic status reports
- How you calculate the leave period – calendar, “rolling”, other



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THE FORMS – Form #2 -- Form WH-380-E Employee with Serious Health Condition

Certification of Health Care Provider for
Employee's Serious Health Condition
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last



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The Medical Certification



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The Medical Certification



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THE FORMS – Form #2 -- Form WH-380-E Employee with Serious Health Condition

- Critical Component -- Accurate and up to date description of "essential job functions" for health care provider to analyze the need for leave
- The rest is completed by the employee and his health care provider



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Getting The Most Out Of the Certification Process

- May obtain a second (and third?) opinion:
 - If have a reason to doubt the validity of the medical certification, may seek a second opinion from a health care provider designated by the employer at the employer's expense
 - If certification and second opinion differ, then a third opinion may be obtained, selected jointly by the employer and employee, at the employee's expense
 - The third opinion is then binding



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QUALIFYING EVENT – “Serious Health Conditions”

- Same definition/standard for employee and family member bases
- “Serious health condition” = illness, injury, impairment or physical or mental condition that involves either:
 1. Inpatient care
 2. Continuing treatment by a healthcare provider



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QUALIFYING EVENT – “Serious Health Conditions” - “Inpatient Care”

- “Inpatient Care” = an overnight stay in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care



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QUALIFYING EVENT – “Serious Health Conditions” - “Continuing Treatment”

1. Period of incapacity lasting more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
 - Treatment 2 or more times by or under the supervision of a health care provider; or
 - One treatment by a health care provider + continuing regimen of treatment (e.g., prescription medication, physical therapy)
 - Now, must be:
 - In-person visits – not over the phone or Internet
 - “Continuing regimen” may be taking prescription drugs
 - First visit must be within 7 days of first incapacity
 - Both visits must be within 30 days of the first day of incapacity



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QUALIFYING EVENT – “Serious Health Conditions” - “Continuing Treatment”

2. Period of incapacity for pregnancy or for prenatal care
3. Period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity
 - Visit to health care provider not necessary for each absence
 - Must visit a healthcare provider at least twice a year



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QUALIFYING EVENT – “Serious Health Conditions” – “Continuing Treatment”

4. Period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective
 - Only supervision by a health care provider is required, rather than active treatment
5. Absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than 3 days if not treated



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What Does Not Qualify As A “Serious Health Condition”?

- “Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease...” 29 C.F.R. § 825.113(d)
- Employee not “incapacitated” for more than three days where physician merely gave instructions to keep him relaxed and to avoid rambunctious play and where he just laid on the couch for a few days and watched movies and read books. *Johnson v. Kmart* (E.D. Mich. 2009)



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What Does Not Qualify As A “Serious Health Condition”?

- Alcohol abuse not a “serious health condition” where the employee did not go into inpatient care, she only decided to check herself into the hospital after she violated substance abuse policy, and her alcohol abuse did not affect her work performance or incapacitate her. *Ames v. Home Depot USA, Inc.* (7th Cir. 2011)
- Back injury not a “chronic health condition” that rendered employee “incapacitated” where released to normal duty and no evidence of pain or disability or continuing treatment in the future. *Taylor v. Autozoners, LLC* (2010).

THE FORMS – Form #2 – Other Bases for Leave

- The other types of leave also have their own forms, but they are basically completed by the employee or third-party
- Nothing critical for you to do with those



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Qualifying Event – “Pregnancy”

“New” Provisions:

- Expectant mothers may take leave before birth for prenatal care or if unable to work
- Husbands may take leave if their expectant spouses are incapacitated (including psychological comfort)
 - Not apply to boyfriends, fiancés, or even unwed fathers
- Both mother and father get up to 12 weeks for a newborn child with a serious health condition even if both are employed by the same employer



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THE FORMS – Form #3 -- Form WH-382

Designation Notice

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



OMB Control Number: 1215-0181
Expires: 12/31/2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided.
We received your most recent information on _____ and decided:

Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

We are requiring you to substitute or use paid leave during your FMLA leave.

You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position is is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.



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THE FORMS – Form #3 -- Form WH-382 Designation Notice

- Notifies the employee whether you approve his FMLA leave request (i.e., whether the circumstances qualify)
- Must complete within 5 business days after the employee gives you enough information to determine whether the circumstances qualify for FMLA leave (unless extenuating circumstances)



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THE FORMS – Form #3 -- Form WH-382 Designation Notice

- Critical Components:
 - CHECK - “We are requiring you to substitute or use paid leave during your FMLA leave.”
 - CHECK - “You will be required to present a fitness-for-duty certificate to be restored to employment...”
 - Consider attaching list of essential functions of the job (e.g., job description)

Gathering Additional Information

– Form #3 -- Designation Notice

- Be specific about what information you need
- Authentication – is this your product and your signature?
- Clarification – “What do you mean by this?” ... “I can’t read your handwriting” ... “The application is incomplete”
 - Need HIPAA release – if employee refuses, can delay/deny leave
 - Clarification permitted where merely stated “depression” and listed medications; form should include explanation of medical conditions, likely duration, facts supporting diagnosis, and whether condition prevented her from performing essential job functions. *Coffman v. Ford Motor Co.* (S.D. Ohio 2010).

Gathering Additional Information

– Form #3 -- Designation Notice

- Contacting the Health Care Provider:
 - Contacting Persons:
 - Employer's health care provider, HR, leave administrator, management official
 - NOT employee's direct supervisor
- Second and Third Opinions -- if employee is seeking leave for his own health condition and you doubt the need for leave



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Recertification

- May request every 30 days or longer if the minimum duration of the condition is longer
- Less than 30 days in some circumstances:
 - Request for extension of leave
 - Significant change in circumstances
 - Doubt about validity of prior certification
- BUT only in connection with an absence



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Intermittent and Reduced-Time Leave

- Periodic absences or times off of work OR part-time schedule
- Counting/Tracking – use shortest increment allowed for other leaves (but no longer than an hour)
- Tricks:
 - *Fitness for Duty Certification* – can require FFDC upon return from an absence up to once every 30 days if reasonable safety concerns exist (harm to himself or others)
 - *Scheduling Treatments/Appointments* - must make reasonable efforts to avoid undue disruptions to your operations
 - *Authentication and Clarification*
 - *Temporary Transfer* – when leave is foreseeable based upon planned treatment (e.g., chemotherapy)

Enforcing Attendance Policies Under The FMLA

- *Garraway v. Solomon R. Guggenheim Found.*, (S.D.N.Y. 2006) – Denied employer’s summary judgment where employer terminated employee under attendance policy without ascertaining if additional leave was required
- *Brown v. E. Me. Med. Ctr.*, (D. Me. 2007) – Employer won summary judgment -- “FMLA did not provide a blanket excuse for the employee’s persistent pattern of tardiness or require an employer to suggest intermittent leave to an employee who was repeatedly late for work”



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Pay and Benefits During Leave

- Health Insurance Benefits – You are responsible for paying your portion; employee responsible for paying hers
- Bonuses – Now, goal-based bonuses (e.g. perfect attendance, hours worked, products sold) may be disqualified as long as employees on non-FMLA leave are treated the same way



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Reinstatement Rights

- Same or “equivalent position” - same benefits, pay, working conditions, privileges, location, shift, status
- Not absolute – “no greater rights than others”
 - Lay offs – employee would have been selected regardless of leave (e.g., seniority/last in-first out)
 - Misconduct discovered during leave or shortly after return to work. *Cracco v. Vitran Express, Inc.* (7th Cir. 2009)
 - Rolling out tougher performance goals (across the board)



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Reinstatement Rights

- Fitness for Duty Certification
 - Must have checked the box on the form
 - Can seek authentication and clarification
 - No right to second or third opinion
 - If employee refuses, employee loses FMLA protection



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Recordkeeping Requirements

- 3 years
 - Basic employment information
 - Dates of Leave
 - Notice provided
 - Premium payment of benefits
 - Leave designation disputes
- Records related to medical certifications should be kept separately

Leaves Of Absence Under The ADA

- With ADAA's expansion of "disability", must consider the ADA
 - If the employee is not eligible for FMLA in the first place
 - After an employee has exhausted FMLA
- How long?:
 - No definite time limit on leaves of absence
 - The courts have not been particularly helpful either

Leaves Of Absence Under The ADA

- My General Rule -- the longer or the more indefinite the leave is, the less likely that leave is a reasonable accommodation that does not cause undue burden on the employer
 - E.g., *EEOC Guidance* – 12 days of leave over 2 months, one to two day increments, calling out morning of requested leave – not required to retain employee
- Employees are required to perform the “essential functions” of the job, and most courts hold that attendance is an essential function



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Leaves Of Absence Under The ADA

- Find the Balance – accommodating absences vs. attendance as an essential function – multiple erratic, unpredictable absences
 - *Gore v. GTE South, Inc.* (M.D. Ala. 1996) – summary judgment for employer where employee absent for 43 hours, and 8 tardies over a 6 month period - absences were too sporadic and unpredictable
 - *Zillyette v. Capital One Financial Group* (M.D. Fla. 1998) – 35 absences over a 6 month period – employee not “qualified” under ADA

Light Duty Assignments

- FMLA
 - Cannot force light duty assignments under FMLA
 - Light duty work does not count against FMLA time
- ADA – light duty can be “forced” as a reasonable accommodation

**If you do things correctly, FMLA and
ADA don't have to be like this...**



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They might even look something like this...



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QUESTIONS?



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