

# Leaves of Absence and the Family & Medical Leave Act



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***“Oscar, the owner of the company, is telling me I need to fire his assistant right away! Oscar says she’s been terrible for a long time and he’s just had it with her ...”***

***“But Oscar doesn’t have any documentation and he’s never talked to her about her performance. Oscar says he just gives her dirty looks when she messes up ...”***

***“Worse, her performance evaluations are good. Oscar also just gave her a 10% raise, but he did that because her husband just got laid off and she has 4 kids ...”***

***“Even worse, she just told us she needs surgery next month, and Oscar mistakenly told her she will get FMLA even though we don’t have 50 employees in Florida...”***

***“What should I do?”***



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# Types of FMLA Leave

1. Employee's own serious health condition that makes him unable to perform essential function(s) of the job
2. Birth and care for newborn child
3. Adoption or foster care, and to care for the newly placed child
4. Care for employee's spouse, son/daughter, parent, or "in loco parentis" with a serious health condition
5. Military care giver - serious health condition
6. Qualifying military exigency



# The FMLA Request

- Request must be sufficiently specific to allow you to understand 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



# 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 sick leave (but not FMLA) 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 Reaction Is Important**

- Express caring, sympathy
- Do not be overtly skeptical
- Do not say anything about burden on department
- Watch your facial expression



# 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 to employees





# 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



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

- Parts (each should be in your handbook):
  1. “Employer”
  2. Site Test
  3. Employee has worked for 12 months
  4. Employee has worked 1,250 hours during 12 months before leave starts
- If eligible, continue to Part B



# Is the Employee “Eligible”? – Covered “Employer” and Site Test

- 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)



# Is the Employee “Eligible”? - “12 Months”

- 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



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

- 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





# **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**
- **Employee not eligible at the beginning of leave may begin FMLA once he meets eligibility requirements**
- **Determination made when leave is scheduled to begin, not when the employee asks**



# Is the Employee “Eligible”? - Requests Before Eligible

- *Pereda v. Brookdale Senior Living Communities*, (11<sup>th</sup> Cir. 2012)
  - Well before her due date, employee notified her employer of her pregnancy and need for maternity leave
  - Would be eligible when baby due and maternity leave would be begin
  - Employee fired 3 months later – before eligible
  - Held - Could still be FMLA interference ...  
Because employee would be eligible when leave scheduled to begin



**[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.



# **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**



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

Critical components:

- Require use of available vacation/sick time
- Require periodic status reports
- How you calculate the leave period – calendar, “rolling”, other
- “Key Employee” designation



# Key Employees

- “Key Employee” = salaried employee who is among the highest paid 10% of all employees within 75 mile radius
  - \$\$\$ compensation counts
  - Future value incentives like options don’t count
- Can deny job restoration if restoration (not absence itself) would cause “substantial and grievous economic injury” (not ADA “undue hardship”)
- BUT must notify up front – or cannot deny reinstatement to a key employee





# MEDICAL CERTIFICATION FORM – 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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# **MEDICAL CERTIFICATION FORM - Employee “Serious Health Condition”**

- Your 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



# **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



# **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



# **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)
  - 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



# **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





# **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



# 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)



# 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.* (7<sup>th</sup> 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).



# 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



# **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



# Qualifying Event – “Pregnancy”

Nuances:

- 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



# More on Husbands & Wives

- 12 weeks combined total if for:
  - Birth
  - Adoption or foster care
  - Serious health condition of parent
- 12 weeks each if for:
  - Serious health condition of child
  - Employee's own serious health condition





# Other Qualifying Events – Military Exigency

- 12 weeks
- When employee's spouse, son/daughter, or parent is on or called to "covered active duty"
- "Covered Active Duty" =
  - For Regular Armed Forces – deployment to a foreign country
  - For Reserves and National Guard – deployment to a foreign country under call in support of contingency operation
- For common issues when military members deploy
  - Attending military ceremonies/briefings, financial/legal arrangements, arranging for childcare or parental care



# Other Qualifying Events – Military Caregiver Leave

- 26 weeks
- When needed for employee to care for a covered service member with serious injury or illness – line of duty or aggravated
- Injured/ill service member must be employee’s spouse, son/daughter, parent, or next of kin
- “Covered Service Member” =
  - Current member of Armed Forces undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on the temporary disability retired list, for a serious injury or illness
  - Veteran honorably discharged within 5 year period before the family member first takes military caregiver leave to care for the veteran and who is undergoing medical treatment, recuperation, or therapy for a qualifying serious injury or illness



# 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)
- Within 5 business days after the employee gives you enough information to determine whether the circumstances qualify for FMLA leave (unless extenuating circumstances)



# 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., up to date 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





# Missteps & Estoppel

- Estoppel = employer causes employee to believe leave is covered and employee relies on that (e.g., schedules surgery)
- Examples:
  - If supervisor mistakenly tells an employee “you are eligible” even though not eligible
  - If you don’t respond and employee takes leave
  - If your handbook omits one of the eligibility requirements (e.g., 1,250 hours)
- By Courts, not by FMLA or its Regulations



# Recertification

- May request every 30 days or longer if the minimum duration of the condition is longer
  - BUT only in connection with an absence
- 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



# 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
    - No more than employee requires – i.e., can't force them to take longer than they need



# Intermittent and Reduced-Time Leave

## 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”



# Pay and Benefits During Leave

- Health Insurance Benefits – You are responsible for paying your portion; employee responsible for paying his
  - Can recuperate if employees doesn't return
- Bonuses – 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



# 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.* (7<sup>th</sup> Cir. 2009)
  - Rolling out tougher performance goals (across the board)





# Reinstatement Rights

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



# **Americans With Disabilities Act (ADA)**



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# Leaves of Absence Under the ADA

- Must consider the ADA:
  - If the employee is not eligible for FMLA in the first place
  - After an employee has exhausted FMLA
  - Especially with ADAAA's broad definition of "disability"



# Leaves of Absence Under the ADA

- For only “qualified persons” with either:
  - Actual “disability”; or
  - “Record of disability”
  - NOT employees “regarded as” being disabled
- Consider other accommodations:
  - Light duty
  - Transfer to a different “regular duty” position
  - Work at home???



# Leaves Of Absence Under The ADA

- How long???
  - No definite time limit in statute or regulations
  - The courts have not been particularly helpful either...
- EEOC's Rules:
  1. Can't say: "we will always terminate after \_\_\_\_ months"
  2. Can't say: "no leave in first \_\_\_\_ months on job"
  3. Must make fact-specific determination every time
    - a. *Is Employee "Qualified"?* - attendance is generally an "essential function"
    - b. *Undue Burden on Employer* – Do you really need the employee during the time of the request leave? Can you get by without him?



# Leaves Of Absence Under The ADA

- Multiple erratic, unpredictable absences???
- Balance “accommodating absences” vs. “attendance as an essential function”
  - *EEOC Guidance* – not required to retain employee who missed 12 days over 2 months, taken in 1-2 day increments, kept calling out morning of requested leave
  - *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



# Leaves Of Absence Under The ADA

- General Rules
  - Don't have to accommodate indefinite leave
  - Multiple leaves can eventually be “indefinite”
  - The longer the leave, the less likely that leave is a reasonable accommodation that does not cause undue burden on the employer
  - Consider other accommodations – light duty, non-light duty transfer, etc.





# Leaves Of Absence Under The ADA

- *Amsel v. Texas Water Development Bd.* (5<sup>th</sup> Cir. 2012)
  - Employee could not say when he would be cleared to return to work
  - “Indefinite leave is not a reasonable accommodation”
  - Determine whether employees is “qualified person with a disability” at the time when request made – not in the past or overall tenure (where employee had taken leave and come back, worked at home, etc.)
- *Santandreu v. Miami Dade County* (11<sup>th</sup> Cir. Mar. 21, 2013)
  - Employee already took over 1 year of leave asked for another 6 months
  - Employee could not prove he would return to work at end of additional 6 months, so the request was properly denied
  - No more kicking the can down the road...
- *Wilson v. Dollar General Corp.* (4<sup>th</sup> Cir. May 17, 2013)
  - Summary judgment for employer where employee failed to show 2 day extension of leave would enable him to perform essential job functions
  - Employee could not prove if or when he would ever be able to return to work



# ADA – Medical Certifications

- Can require medical exam or get “certification” from healthcare provider of disability and need for leave ...  
But
- All exams/inquiries must be “job-related” and “consistent with business necessity”
  - Can’t exam/ask too much – beyond the scope
  - Just enough to determine whether employee can perform job-related functions or really needs leave
  - E.g., fitness for duty and proof of need for leave or other accommodation



# ADA – Medical Certifications

- Everything collected must be confidential
  - Stored separately from personnel file
  - Can only use information for those reasons
  - Keep almost all information in Human Resources
  - But supervisors/managers may know about work restrictions and necessary accommodations
  - And first aid/safety personnel may know if the disability may require “emergency treatment”



# ADA – Medical Certifications

- Nothing else
- No EEOC-approved forms (like FMLA), although you can use a short form similar to FMLA certification
- No rules that specifically permit employers to have direct contact with employee's healthcare provider to authenticate or clarify information



# ADA - Reinstatement

- Reinstatement to the same position because accommodations designed to help employee do his job
- If employee can't do that, vacant position
  - Do not have to bump
  - Employee must be qualified for that position
  - Next lowest position – don't demote multiple levels unless have to



# ADA - Benefits

- The ADA does not require maintenance of health insurance ...  
... unless other employees receive health insurance during leave under the same circumstances...
- What are the eligibility requirements in your health plan?
  - Hours worked threshold – does leave count?
  - Other eligibility requirements?
  - Does plan expressly cover employees out on sick leave? Disability leave?



# QUESTIONS?



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