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Where ADA and FMLA Overlap: Leaves, Accommodations and Headaches, Oh My!

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Welcome

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- For HRCI and CLE credit please complete the feedback survey
- Use Q&A box for any questions during the program
-  Tweet questions to #fmlawebinar



- FMLA and ADA Overlap
 - Handling Employee's Requests Not to Work OT
 - Employee Exhausts FMLA leave, Sporadic Absences Continue Thereafter
 - I'll Come to Work, but Not for *That* Supervisor
 - The Age-Old Question: When FMLA Leave Expires, How Much Additional Leave is Required under the ADA?
- *Lightning Round!*

Why Are We Even Here?

■ What's the Importance of this Webinar?

1. The majority of unscheduled absences are related to the illness of employees or their family members. As a result, either the FMLA or ADA – or both – may be implicated.
2. Violations of these laws cost you money – they may result in back pay, reinstatement, retroactive benefits, compensatory damages, and punitive damages, *not to mention a drain on your people and operations*
3. You maintain a healthier workplace when you recognize the need for and ensure that employees receive the benefits and protections these laws provide

Handling Employee's Requests Not to Work OT

Freddy Doesn't Work Past 40

- Freddy is one of your front-line managers
- Suffers from fibromyalgia
 - May need to arrive up to 4 hours late during flare ups
 - Unable to walk, sit for continuous period of time
 - Doc note advises no OT, 8 hours/max per day
- What applies here? FMLA? ADA? Or both?

Problem with Viewing Matter under ADA?

- Sam, storage supervisor for Connecticut DOT
- Cluster headaches: OT contributed to condition
- ER: If cert states he can't work OT, have to resign
- Certification: Can't work over 8 hrs./day: OT "precipitates" headaches
- Applied for disability retirement, but sought reinstatement w/ intermittent leave *whenever* OT assigned
- DOT said No; Sam resigned

Leave Allowed When Medically Necessary

- ER: Employee can only take FMLA leave when actually incapacitated by headaches
- Court: FMLA permits leave when “medically necessary”
- Regs: asthma example – “can take leave to avoid onset of illness...when pollen count exceeds certain level” (*29 CFR 825.115(f)*)
- DOL: FMLA leave available even though condition is permanent and employee unlikely to return to full employment in near future
- Court acknowledged FMLA does what ADA cannot
Santiago v. Dept. of Transportation (D. Conn. Sept. 25, 2014)

***Cheryl “Kneeds” Regular, Reliable
Attendance***

Cheryl “Kneeds” Time Off

- Cheryl, service employee in Co. café
- Chronic absenteeism
 - Year 1: 7 unexcused absences (after all paid leave used)
 - Ben the boss schedules a meeting with Cheryl to discuss her absences
 - Issues discipline for her unexcused absences
 - For the first time, Cheryl acknowledges that her absences are due to her stress and depression, and specifically, the medication she is taking, which causes her to be sleepy
- Does the ADA require us to rescind the discipline?

Cheryl “Kneeds” Time Off

- The Story Continues . . .
 - Late in Year 1: Cheryl injures knee throwing out trash
 - Year 2:
 - Continuous/intermittent FMLA leave b/c of knee
 - Exhausts FMLA leave by early September
 - Latest medical documentation indicates long-term condition, surgery may be necessary
- Can the Company require Cheryl to be 100% healed before returning to work?

Cheryl “Kneeds” Better Excuses

- Rest of Year 2: 12 absences for a variety of reasons
 - Car troubles
 - Daughter is truant, have to find her
 - Some are knee-related, but several more are ordinary “sick” days
- Dec 17 is the last straw: Cheryl calls 15 min. after shift starts to report she will be an hour tardy: “I was Christmas shopping and must have lost track of time! On my way now...”
- No discipline on file, though manager verbally warned her once in October
- At what point is Cheryl subject to termination, if ever?

The Basic Premise

- “An employee who is unable to come to work on a regular basis is unable to satisfy any of the functions of the job in question, much less the essential ones.”
 - *Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir. 1999), *cert denied*, 528 U.S. 1050 (1999).

What About Her Medical Condition?

- What about the knee? We can't terminate because of the knee, right!?!?
- Regular attendance is generally an essential job requirement
- Need not accommodate erratic or unreliable attendance especially where no anticipated date by which employee could have been expected to attend work regularly
 - *Basden v. Professional Transport. Inc.*, 714 F.3d 1034 (7th Cir. 2013)

Take This Job and Restructure It!

Why You Gotta Be So Rude?

- Leia, in receivables department for years
- Darth, her manager, doesn't seem to like her. He's curt and abrupt (but not with others)
- One day, Darth grabs Leia's arm and yells at her
- Leia – panic attack
- Diagnosis: adjustment disorder
- Her doctor: she needs a new department and manager and will be taking leave until these demands are met (she's out of FMLA)

Sure, no problem, right? Is this a reasonable accommodation? Is it even a disability?

Jobs Are Not “Stress-Free”

Is it a disability?

- Generally not. Even post-ADAAA, courts have generally rejected stress at work as constituting a disability.
 - Inability to work under a particular supervisor not a disability. *Higgins-Williams v. Sutter Med. Foundation* (Cal. Ct. App. 2015)
 - Employee’s acknowledgement that she could work other jobs undermined her claim – job-specific stress is not a disability. *Adetimehin v. Healix Infusion Therapy, Inc.* (SD Tex 2015)
 - **But see**, *Palmerini v. Fidelity Brokerage Svcs LLC*, (D.N.H. July 9, 2014) (summ. judgment denied due to breadth of ADAAA definition)
- **EEOC guidance:** “stress, in itself, is not automatically a mental impairment.” *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*

Is changing managers a reasonable accommodation?

- Generally not. Applies regardless of whether harassment was from the supervisor himself or from coworkers
 - *Schwarzkopf v. Brunswick Corp.*, 833 F. Supp. 2d 1106 (D. Minn. 2011); *Tomlinson v. Wiggins*, (W.D. Ark. May 16, 2013).
 - No requirement to create a new position for the employee

Simply Reject “Stress-Free” Claims?

- What should you do?
 - **Don’t simply reject these claims.** Engage in the interactive process!
- Why?
 - It’s your job (the ADA requires it) Consider her suggestions and alternatives
 - You may actually find an solution to keep the employee working

Simply Reject “Stress-Free” Claims?

- You're not required to provide a new manager or create a new job, but you could consider:
 - Is there a sensible open job elsewhere in the organization
 - Would a limited amount of ADA (and/or FMLA) create calm?
 - Would redistributing non-essential functions separate her from the provocative manager/coworkers?
 - Would your EAP help?

Where FMLA Ends, the ADA Begins!

Some of the most Difficult Scenarios: Depression, Anxiety

- Rebecca, one of your accounting specialists
- Medical issue: depressive disorder, generalized anxiety disorder
- Based on her conditions, Rebecca instructed by doc to refrain from “stressful” activities
- At same time, performance issues: keying errors, coding errors, payments to the wrong vendors
- Takes periods of STD and exhausts FMLA leave within 5 months
- When FMLA leave expired, she submitted updated STD documents supporting continued need for leave – no specifics

Extended Leave Beyond FMLA

- Company forgets about Rebecca for two months (while she remains on leave), at which point HR starts poking around
- Series of monthly doctor's notes
 - Update 1: “Unable to work. Appointment in one mo.”
 - Update 2: “Under my care. Still suffering from anxiety. Follow up in 5 weeks. No return imminent.”
 - Update 3: “Adjusting medications for apnea, depression. Needs continued leave from work. Appointment in 4 weeks.”
- What did the Employer do wrong here? How do we fix it?
- Can we terminate employment?

What Information is an Employer Entitled to?

- Medical condition or facts at issue (no diagnosis!)
- How condition affects employee's ability to perform essential job functions; and what job functions
- Whether doctor can identify any accommodations that would help employee perform job functions
- Expected date upon which employee can perform essential job functions
- Will requested leave allow employee to perform essential functions in near future?

This Isn't a Free Hall Pass

- “...the ADA does not require an employer to provide leave for an indefinite period of time because an employee is uncertain about the duration of his condition.
 - *Santandreu v. Miami Dade Cnty*, 2013 U.S. App. LEXIS 5542 (11th Cir. 2013)
- Employee “must provide an expected duration” for the leave he needs. Otherwise, employer “cannot determine whether an employee will be able to perform the essential functions of the job *in the near future*”
 - *Murphy v. Samson Resources Co.*, 2013 U.S. App. LEXIS 9328 (10th Cir. 2013)

EEOC Position on Indefinite Leave

- EEOC:
 - Employers have no obligation to provide leave of *indefinite* duration
 - Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations.

EEOC Fact Sheet, "Applying Performance and Conduct Standards to Employees with Disabilities" (Question 21)

“Costs” to Employer: Undue Hardship?

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive client service and increased client dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees
- Increased stress on overburdened co-workers
- Lower morale

But really, how does this work?

- Give serious consideration to employee's request
- Interview supervisory staff to determine:
 - How employee's work has been absorbed and may continue to be performed
 - What are the hardships created by the absence (deferred projects, disproportionate amount of work, quality issues, client problems)?
- Document the alternatives you have examined to extend leave and the undue hardship
- Before termination, justify—with documentation—the rationale for the decision

A Note about Inflexible Leave Policies

- Grace: Assistant Professor at Kansas State University
 - After signing a one-year contract to teach but before fall classes started, diagnosed with cancer
 - She requested and was granted a six-month leave of absence. Afterward, she asked for more time off, promising to return by the summer term
 - University’s leave policy limited employees to *no more* than six months of leave. When Grace could not return, KSU terminated her employment
- Court dismissed ADA claim: six-month leave policy is “more than sufficient to comply with the Act in nearly any case” *Hwang v. Kansas State Univ.*, 2014 WL 2212071 (10th Cir. May 29, 2014)

A Gentle Reminder...

- When a triggering event occurs (e.g., a request for leave), engage in the interactive process with the employee to determine whether any accommodations exist that would enable the employee to perform the essential functions of his job
- The determination of whether a requested leave must be granted as a reasonable accommodation requires a fact-intensive inquiry
- Beware of automatic termination policies & examine “no fault” attendance policies
- Don’t assume leave is the only option – consider reassignment too!

The image features a dark background with a grid of glowing orange squares and rectangles. Several jagged, purple lightning bolts are scattered across the scene, some appearing to strike the text. The text 'LIGHTNING ROUND' is written in a white, stylized, hand-drawn font with a slight shadow effect.

LIGHTNING
ROUND

Benefits

After an employee exhausts FMLA leave and remains on leave (aka “ADA leave”), is an employer required to continue his/her health benefits?

Benefits

Benefits other than health benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of unpaid leave

- ⚡ How do you treat other employees on unpaid leaves of absence?
- ⚡ Review language in your Benefits Plan

Returning to Work

After an employee returns from FMLA or ADA, is an employer required to return him/her to the same position?

Returning to Work

- ⚡ FMLA: Return employee to same or equivalent position
- ⚡ ADA: Must keep the position open for employee return absent an undue hardship (and don't forget rule about reassignment)

Medical Certification

Does FMLA or ADA allow the employer to obtain a broader scope of medical information about the employee's condition?

Medical Certification

- ❗ ADA: Only medical examinations or inquiries regarding an employee's disability that are job-related and limited to determining ability to perform the job and whether an accommodation is needed and would be effective
- ❗ FMLA: Medical certification of the need for leave and cannot exceed what is allowed under the FMLA regulations

Thanksgiving!

How many Native Americans were present at the first Thanksgiving?

“Love to Take Medical Leave”



Love to Take Medical Leave . . .
Love to Take . . . Medical Leave . . .

Love to take medical leave cause it's good
Love to take leave like a good employee should

Cause it's leave . . .
for me . . . so good!

*Cause it's leave for me and a leave for you
Let's skip work and drive to Kalamazoo*

*Love to take medical leave when I'm able
My reason for leave, it's more like a fable.*

*Take that leave all night long
My doc says I have IBS, She Can't Be Wrong*

*Turkey turkey dee and a turkey turkey dap
I take medical leave when I need a nap*

*Thanksgiving . . . is a special night
Intermittent leave . . . I say dynamite!*

That's right!

*Leave for you and a leave for me
Can't believe that I tried to use a fake MD*

*Gobble gobble gee and gobble gobble gam
I post my migraine at the bar on Instagram*

*Leave for me with Thanksgiving pie
I once took leave for an eyelash
in my eye*

*I may take leave cause I had too much gravy
The Village People had a song called "In The Navy"*

*Gobble gobble gee, and gobble gobble giggle,
I wish a fake cert only cost a nickel*

*I can't come in til my symptoms abate,
But I'm higher than a balloon in the Macy's parade*

Oh I love medical leaveon . . . Thanksgiving!



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A Cruise Aboard the Love Boat is Not Protected by the FMLA, Even When the Doc Says It's a Good Idea

By Jeff Nowak on August 19, 2015

Posted in Abuse of FMLA leave, Court Decisions, Interference

This post has nothing to do with [Netflix](#) and its new, generous parental leave policy. Or GOP presidential candidate Carly Fiorina's latest [position](#) on paid leave. Sorry to disappoint.

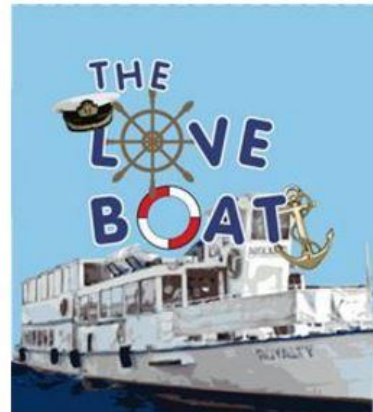
But it does involve an exotic boat cruise. And of course, the FMLA. Tantalizing? Jump aboard the Love Boat to find out...

The Facts

Lucy worked for the State of Washington Employment Security Department. During her employment, Lucy suffered from and was given intermittent FMLA leave for migraine headaches, a condition which is covered by the FMLA. The following year, in January 2011, Lucy submitted a doctor's note excusing her from work for a two-week period for "FMLA vacation," presumably because of her migraines.

Per the plan, Lucy headed off a few weeks later on a two-week boat cruise. Her excursion flew under her employer's radar until her step-father (huh!?) unwittingly shared the news with Lucy's co-worker that Lucy and her husband were spending two weeks away on the Love Boat. This drew the employer's skepticism about Lucy's need for FMLA leave (and likely some expletives, too). As a result, the employer reached out to Lucy's doctor directly, expressed "some concern" about the two-week vacation and posed a number of questions to Lucy's doctor about her medical condition.

The doctor failed to timely respond, and when he finally did, he indicated that Lucy was not incapable of working during the time she was on the cruise. After her termination, however, Lucy's physician sent



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About Jeff Nowak

Jeff Nowak is co-chair of the labor and employment practice at Franczek Radelet, where he represents employers in all aspects of employment law. His clients praise him as a trusted business partner who is acutely aware of their business goals and the impact employment decisions have on their operations. A staunch advocate and effective litigator for his clients, Jeff also isn't afraid to be candid with clients where compliance issues or litigation must be resolved to meet business objectives. He is a nationally-recognized leader in the FMLA and ADA, and his passion for the FMLA shows through on this blog.

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