

Interplay of FMLA, ADA, Workers' Comp and other laws

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1

AGENDA

- A.** Family and Medical Leave Act (FMLA)
- B.** Americans with Disabilities Act (ADA)
- C.** Worker Adjustment and Retraining Act (WARN)
- D.** Older Workers' Benefit Protection Act (OWBPA)
- E.** Age Discrimination in Employment Act (ADEA)
- F.** Title VII and Sexual Harassment
- G.** Pregnancy Discrimination Act (PDA)
- H.** Uniformed Services Employment Reemployment Rights Act (USERRA)

2

Family and Medical Leave Act (FMLA)

To be eligible for FMLA benefits, an employee **must**:

- work for a covered employer;
- have worked for the employer for a total of 12 months;
- have worked at least 1,250 hours over the previous 12 months; and
- work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

3

Family and Medical Leave Act (FMLA)

A covered employer must grant an eligible employee up to a total of **12 workweeks** of **unpaid** leave during any 12-month period for one or more of the following reasons:

- for the birth and care of a newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for a spouse, son, daughter, or parent with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.
- A covered employer also must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a "single 12-month period" to care for the servicemember.

4

Family and Medical Leave Act (FMLA)

PAY WHILE ON LEAVE

- The employer may require employees to “substitute” (run concurrently) accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave.
- An employee’s ability to substitute accrued paid leave is determined by the terms and conditions of the employer’s normal leave policy.

MAINTENANCE OF HEALTH BENEFITS

- A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work.
- If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.
- In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

JOB RESTORATION

- Upon return from FMLA leave, an employee must be restored to the employee’s original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions.

5

Family and Medical Leave Act (FMLA)

“**Serious health condition**” means an illness, injury, impairment, or physical or mental condition that involves either:

- Inpatient care (*i.e.*, 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; **or**
- Continuing treatment by a health care provider, which includes:
 - (1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that **also** includes:
 - treatment **two or more times** by or under the supervision of a health care provider; **or**
 - one treatment by a health care provider with a **continuing regimen of treatment** (*e.g.*, prescription medication, physical therapy); **or**
 - (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; **or**

6

Family and Medical Leave Act (FMLA)

“**Serious health condition**” means an illness, injury, impairment, or physical or mental condition that involves either:

- (3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires **periodic visits** to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
- (4) A 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; or
- (5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

7

Family and Medical Leave Act (FMLA)

Verifying Intermittent Leave: Working with Healthcare Providers

- In verifying intermittent leave and its need, the employer, when having a reason to doubt the validity of the certification provided by the employee or his doctor, may require, at their expense that the eligible employee obtain the opinion of a second health care provider – Employer cannot use Dr that they use regularly
- If the first two health care providers differ in opinion, a third opinion, which is final and binding, may be obtained as the expense of the employer.
- The employer may require recertification on a recurring and reasonable basis. For example, a change in the employee's condition or a significant length of time may be a reasonable basis.
- Recertification can be requested no more often than every thirty (30) days. However, if the duration of the leave and/or intermittent is longer than 30 days, then that is the frequency permitted for recertification. In all cases, an employer may request recertification every six (6) months

8

Americans With Disabilities Act (ADA)

- Applies to employers with 15 or more employees
- It is unlawful to discriminate against a job applicant or employee because of an actual or even perceived physical or mental disability or medical condition. Employers must provide reasonable accommodations to a “qualified” individual with a physical or mental disability or medical condition
- Employees must be able to perform the “Essential Functions” of the position with or without a “Reasonable Accommodation”

9

Americans With Disabilities Act (ADA)

- Definition of a disability:
 - An impairment that substantially limits one or more major life activities
 - A record of a substantially limiting impairment
 - Being regarded as having a substantially limiting impairment
- ADA Amendments Act (ADAAA):
 - Effective January 1, 2009
 - Did NOT change definition of disability
 - Broadened “Major Life Activities” and “substantially Limits”

10

Americans With Disabilities Act (ADA)

- Major Life Activities under ADAAA
 - Caring for oneself
 - Performing Manual Tasks
 - Seeing, Hearing, Eating, Sleeping, Walking, Standing, Lifting
 - Bending, Speaking, Breathing
 - Reading, Concentrating, Thinking
 - Communicating
 - Working

11

Americans With Disabilities Act (ADA)

- ADAAA Expansion of “Major Life Activity” definition
- The operation of a “Major Bodily Function”:
 - Immune System
 - Special sense organs and skin
 - Normal cell growth
 - Digestive, Bowel, Bladder
 - Neurological, Brain
 - Respiratory, Circulatory, Cardiovascular, Endocrine
 - Reproductive functions

12

Americans With Disabilities Act (ADA)

- **Essential Functions:**
 - Employer's Judgment
 - Terms of a written position description
 - Terms of a CBA
 - Experience of current or past employees
 - Amount of time spent performing the function
 - Consequences of not performing the function

13

Americans With Disabilities Act (ADA)

- **Reasonable Accommodations:**
 - One that allows performance of essential job functions
 - Need only provide an effective accommodation; No requirements to provide every accommodation requested or the "best" accommodation
 - Need not change essential functions
 - Need not incur an "Undue Hardship"
- **Reasonable Accommodations:**
 - Modified work schedule, reassigning non-essential functions, making facilities accessible, reassignment to vacant position,
 - Sick/FMLA leave

14

Americans With Disabilities Act (ADA)

- “Interactive Process”:
 - Following a request for a reasonable accommodation, the burden is on the employer to initiate an informal, interactive process with the employee
 - The purpose of interactive process is to determine if there is an effective accommodation
 - The Employer may need, as part of interactive process to ask questions about the disability and seek medical information
 - The EEOC has said that “the Employer may seek appropriate medical documentation to learn...whether and to what extent the disability is affecting the employee’s conduct and what accommodations may address the problem.”

15

Americans With Disabilities Act (ADA)

- “Interactive Process”:
 - Face-to Face Meeting
 - Include HR if applicable
 - Check safety rules to assure accommodation will comply with safety standards
 - Third Party analysis
 - Doctor input with knowledge of job description
 - Web Resources

16

Americans With Disabilities Act (ADA)

- Request for time off as accommodation:
 - Comply with FMLA (Regular or intermittent)
 - Employers need not allow time off beyond FMLA for indefinite period – A given time after MAY still be required
 - Courts have recognized that “an employee who does not come to work cannot perform the essential functions of his/her job.”
 - However, courts want to see an interactive process, and not have employers “pull the trigger” too early

17

Americans With Disabilities Act (ADA)

- Actions not required:
 - Lower production or performance standards
 - Excuse violations of conduct rules
 - Remove an essential function
 - Actions that would result in an “Undue Hardship”

18

Americans With Disabilities Act (ADA)

- The basic "Undue Hardship" Factors:
 - The nature and cost of accommodation
 - Longevity of the accommodation
 - Overall financial resources of the business
 - Cost of hiring temporary employee
 - Cost of accommodation
 - The effect the accommodation would have on the resources of the business
 - Burden on other employees
 - Logistics
 - The impact the accommodation would have on the business
 - Employee morale
 - Customer/clients
 - Direct threat of harm

19

Americans With Disabilities Act (ADA)

- Permissible inquiries:
 - Pre-Hire – Can you perform the essential functions (and/or meet attendance requirements) of the job with or without a reasonable accommodation
 - Can give "fit-for duty" exam following leave or if objective evidence
 - Can send for medical exam if employer believes the employee may pose a direct threat to themselves or others
 - Can request appropriate medical info if employee requests a reasonable accommodation

20

Americans With Disabilities Act (ADA)

- Recent trends
 - Susceptibility to miscarriage can be a “perceived impairment”
 - Good performance reviews can be evidence of “Qualified”
 - Good case for employer – 6th circuit said excellent reviews did not make employee qualified for “work from home” accommodation because working from home caused mistakes
 - Accommodation trends
 - Flexible schedules and leave have been favorable to employees
 - Employers more successful with good documentation and interactive process
 - Marijuana – employer can still enforce conduct rule
 - Punctuality is essential function of a job

21

Americans With Disabilities Act (ADA)

- Recent trends (con’t)
 - Supervisor cannot know medical info without consent
 - Information about reasonable accommodation must be private
 - Disclosure to supervisor to extent for work restrictions
 - Disclosure for workers comp and insurance purposes
 - Accommodation trends
 - Flexible schedules and leave have been favorable to employees
 - Employers more successful with good documentation and interactive process

22

Age Discrimination in Employment Act (ADEA)

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age

- Applies to employers with 20 or more employees, including state and local governments
- Applies to job applicants and employees
- It is unlawful to discriminate against a person because of their age with respect to any term, condition or privilege of employment including hiring, firing, promotion, layoff, compensation, benefits, job assignments and training

23

Age Discrimination in Employment Act (ADEA)

- Job notices, advertisements and pre-employment inquiries
 - Cannot include age preferences in job notices or advertisement
 - Unless BFOQ
 - Can require to be at least 18
 - Not technically illegal to ask age of applicant
 - However, will be heavily scrutinized and may have chilling affect
- Benefits
 - The Older Workers Benefit Protection Act (OWBPA) prohibits employers from denying benefits to older workers
 - Very limited exception if cost of reduced benefits for older employee is same as cost for full benefits to younger employee

24

Age Discrimination in Employment Act (ADEA) and Older Workers Benefits Protection Act (OWBPA)

- Waiver of ADEA rights
 - As part of a settlement (severance, court case, admin action, etc)
 - ADEA and OWBPA requires specific min standards to be spelled out
 - In writing and understandable
 - Specifically refer to ADEA
 - Not waive future claims
 - In exchange for valuable “consideration”
 - Advised in writing to consult attorney
 - Provide at least 21 days to consider and 7 days to revoke after signing

25

Older Workers Benefits Protection Act (OWBPA)

- In addition to minimum standards for waivers:
 - Must make other disclosures for RIF or plant closing:
 - Disclose to all affected employees information including criteria for selection to participate in separation program (“decisional unit”)
 - Identify the age and position of employees who were and were not selected to participate to the

26

Pregnancy Discrimination Act

- EEOC enforcement guidance – July 2015
- Not a law, but guidance
- Relates to 1978 PDA (Amendment to Title VII) and ADA
- Amended EEOC's 1983 Compliance Manual
 - Investigators' manual provides procedures and policies that EEOC investigators must follow when investigating charges filed by employees

27

Pregnancy Discrimination Act


- Fundamental PDA requirements:
 - (1) and employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions; and
 - (2) women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work
 - PDA prohibits discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth
 - Can only be intentional pregnancy discrimination if those responsible for taking adverse action knew the employee was pregnant
 - Employment decisions based on stereotypes or assumptions violate Title VII

28

Pregnancy Discrimination Act

- **Past Pregnancy:**
 - Discrimination based on past pregnancy, childbirth or related medical conditions
- **Potential or intended pregnancy:**
 - Cannot discriminate with regard to job opportunities or benefits because a woman might get pregnant
 - Cannot discriminate because of intention to get pregnant
 - Infertility treatments can implicate Title VII and PDA
- **Medical Condition related to pregnancy:**
 - Employers must provide same benefits for pregnancy related medical conditions as for other conditions
 - Title VII protects employees from discrimination for having (or not having) an abortion
- **Parental Leave:**
 - Leave related to pregnancy can be limited to women;
 - But, leave must be provided to similarly situated men and women – i.e. leave beyond normal recuperation time must be extended to both men and women

29



Questions and Discussion

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30