

Labor and Employment 2018 Symposium

Leaves and Accommodations Update

Dorsey Speakers

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1. PowerPoint Presentation prepared by Dorsey & Whitney LLP

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.

Leaves and Accommodations Update

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Overview:

- **Brief Refresher:**
 - Family and Medical Leave Act (“FMLA”)
 - Americans with Disabilities Act (“ADA”)
 - Workers’ Compensation Laws
 - State & Local Leave Laws
 - Other Laws to Bear in Mind
- **Tricky Intersections & Other Trouble Areas**
- **Potentially Problematic Policies**
- **Practical Tips**



FMLA – A Refresher

- **FMLA provides unpaid leave for employee’s own or family member’s serious medical condition**
 - **Up to 12 weeks in a 12-month period**
 - Rolling vs. calendar year
 - Employer may select OR most beneficial to employee
 - **Block or intermittent (where medically necessary)**
 - **Medical certifications**
 - Second opinions
 - Recertification



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FMLA – A Refresher

- **FMLA protects employees from “interference” with exercising FMLA rights**
 - **Employer cannot deny employees their right to leave**
 - Provide notice of rights
 - Designate leave as FMLA
 - **Employer cannot use the FMLA leave against the employee**
 - Negative attendance treatment
 - Other adverse treatment

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ADA – A Refresher

- The ADA prohibits employment discrimination “against a qualified individual on the basis of disability.” 42 U.S.C. 12112 (a).
- An individual has a “disability” when s/he:
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment



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ADA – A Refresher

- Employees must be “qualified” to be protected by the ADA:
 - “can, with or without reasonable accommodation, perform the essential functions of such position”
- Failure to provide reasonable accommodation is discrimination, unless the accommodation would impose undue hardship
 - Interactive process to determine the accommodation
- ADA may require an employer to suspend or modify its policies (including attendance) to accommodate a disabled worker

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Workers' Comp – A Refresher

- **Workers' compensation statute provides exclusive remedy for on-the-job injuries**
- **Employers are prohibited from obstructing employee rights to benefits (MN Stat. 176.82)**
 - **Cannot discharge or threaten to discharge in retaliation for seeking benefits**
 - **Cannot intentionally obstruct employee benefits**
 - **Must offer continued employment where available within the employee's physical limitations**



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State & Local Sick Leave

Effective **July 1, 2017**, Sick and Safe Time Ordinances in Minneapolis and St. Paul create access to time off work for employees across these cities.

- Applies to full-time, part-time, and temporary employees, as well as paid interns, who work at least 80 hours per year within city limits.
- Employees accrue one hour of leave for every thirty hours worked.
- Employers may cap annual accrual at 48 hours and total "bank time" accrual at 80 hours.
- Leave may be used for the mental or physical health condition of the employee or a family member (broadly defined); absences due various issues relating to domestic abuse, sexual assault or stalking; and for various public health and weather-related issues.



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State & Local Sick Leave

- **A PTO plan can satisfy ordinance requirements *if* the plan:**
 - provides employees at least as much leave as required by the ordinance, and
 - allows employees to use the leave for all of the reasons and under the same conditions required by the ordinance.



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State & Local Sick Leave

- **Paid sick-leave requirements continue to grow across the United States**

- **States:**

- Arizona
- California
- Connecticut
- Maryland
- Massachusetts
- Oregon
- Vermont
- Washington



- **Counties and Cities:**

- Austin, TX
- Berkeley, CA
- Cook County, IL
- Washington, D.C.
- St. Paul, MN
- Minneapolis, MN



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State & Local Sick Leave

- **Pushback:**
 - Sixteen states have enacted laws that preempt city and county ordinances on wage and/or leave issues
 - (Source: *National Partnership for Women & Families*)
 - The state laws effectively bar local governments from adopting their own workplace rules
- **Takeaway for employers with multi-state operations:**
 - Two broad options:
 - Set policies state-by-state or locality-by-locality
 - Find common accrual rate that satisfies the most generous state or locality where you do business, then apply everywhere



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Other Laws to Bear in Mind ...

- **Military Leave Laws**
- **Voting / Jury Duty Leave Laws**
- **Pregnancy Discrimination Act**



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Tricky Intersections & Trouble Areas

Notice



Notice

- Eligible employees seeking FMLA leave may be required to give:
 - 30-day advance notice of the need to take FMLA leave when the need is “foreseeable”;
 - Notice “as soon as practicable” when the need to take FMLA leave is not foreseeable;
 - Sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons; and
 - Timely notice that a past absence was for FMLA reasons, if the employer was not made aware of the reason in the first instance.





Notice

SCENARIO 1: The “Absence Excuse” for Termination

Eli Eisenmann is a difficult employee. While his performance is generally good, he has trouble getting along with his peers, and most of his co-workers have complained about his rude behavior. Indeed, Eli’s personality is so abrasive that his supervisor, Sam, is uncomfortable confronting him. Sam has not provided any feedback regarding his workplace conduct.

One afternoon, Eli tells Sam that he has a severe pain in his side and he needs to leave work. The next two days, Eli does not report for work at his scheduled time. Company policy states that two consecutive “no call, no shows” will be treated as job abandonment.

The following day, Eli calls to say that he has appendicitis and will be out for a week. Sam, looking for an excuse to get rid of Eli, tells him that because he didn’t give written notice of his need for leave, his employment was terminated under the Company’s “no call, no show” policy.




Notice

- [Sarnowski v. Air Brooke Limousine Inc., No. 06-2144 \(3d Cir. December 12, 2007\)](#)

- A formal, written request is not required to provide sufficient notice of an employee’s intent to take protected leave.
- DOL regulations only require that an employee “provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.”
 - May provide FMLA-qualifying notice before knowing the exact dates or duration of the leave they will take.
- The 30-day statutory notice requirement is designed to be flexible, and an employee is not required to give greater notice than is “practicable.”





Practice Tips:

- Avoid relying upon absences that potentially arise from medical conditions as grounds for dismissal.
- Address performance or workplace issues promptly and directly – treat these issues separately from requests for leave.
- Avoid treating leave requests from “problem employees” differently than you would similar requests from others.
- Ensure attendance policies include carve-outs for protected leaves!



Notice

SCENARIO 2: Preemptive Strike

Company Z's Engineering group has a big project due in six months. Sayid, the Engineering supervisor, is getting worried about meeting the deadline because 2 of the team's 8 employees are out on medical leave.

Just when he thought things couldn't get worse, another employee, Evelyn Eastwood, tells Sayid that she's pregnant and is submitting a 30-day FMLA notice.


Sayid reviews Evelyn's personnel file and discovers that she's only been with the company for 11 months. Since she hasn't passed the 12-month threshold for FMLA eligibility, Sayid decides to terminate her and hire another employee to ensure adequate coverage through the big deadline.





Notice

- [Reynolds v. Inter-Industry Conference on Auto Collision Repair, No. 08-CV-2115 \(N.D. Ill. Jan. 22, 2009\)](#)
 - As the FMLA requires employees to give 30-day notice of leave, “it would be illogical to interpret the notice requirement in a way ... that exposes them to retaliation, or interference, for which they have no remedy.”
 - DOL regulations provide that the determination of whether an employee has worked the requisite 1,250 hours to be eligible for leave is made as of the date leave is to begin, not as of the date of the leave request. See 29 C.F.R. 825.110(d)
 - “An employer has no legitimate interest in being able to terminate an eleventh month employee simply for requesting foreseeable leave for which he is eligible”



Practice Tips:

- **While granting FMLA leave can be difficult, especially where multiple requests are submitted simultaneously, working around FMLA absences is less cumbersome than defending against a lawsuit!**
- **Preemptively terminating employment to avoid the accrual of leave entitlement may send the wrong message to your workforce.**





Notice

SCENARIO 3: Atypical Behavior

Ernesto Endres has worked for Company Z for ten years, and he has always been an exemplary employee who is well-liked by all. Following a 3-day blackout in Center City, Ernesto suddenly begins showing up late for work. While at work, he is uncharacteristically quiet and withdrawn, and he is observed engaging in odd behavior, such as moving lamps from his co-workers' offices into his own.

A few days after the blackout, Ernesto's supervisor Sam accidentally turns off his office light while Ernesto is in the room, and Ernesto begins yelling at Sam incoherently and runs out of the office.

Ernesto misses work the following two days. After he fails to return any of Sam's calls, Sam decides to terminate Ernesto's employment.



Notice

- **Stephenson v. Hyre Electric Co., No. 06-3410 (7th Cir. Oct. 16, 2007)**
 - Actual notice may not be necessary where the employer has “constructive notice” of an employee’s need for FMLA leave.
 - Courts may find constructive notice where “clear abnormalities” in the employee’s behavior alert the employer to a potential serious health condition, especially where the employee is not capable of communicating the need for leave himself.
- **Under the ADA: Employers must reasonably accommodate known disabilities**
 - Can be constructive notice here as well!





Practice Tips:


- FMLA regulations permit retroactive designation of leave provided that the employer and employee mutually agree to do so and doing so “does not cause harm or injury to the employee.”
- Absent extenuating circumstances, employers must notify employees in writing whether leave will be counted as FMLA leave within five business days after the employer becomes aware of such need.
 - What if the employee doesn’t want the leave to be designated as FMLA?



Tricky Intersections & Trouble Areas:

The FMLA and the ADA






FMLA and the ADA

SCENARIO 4: Where FMLA Ends and ADA Begins

Estelle Embers started working for Company Z a year after developing back pain. She was promoted steadily, but after five years, she was diagnosed with a degenerative back and spinal condition and underwent surgery.

Estelle took FMLA leave – but on the last day underwent a second surgery that would keep her from returning for two to three months. Estelle asked for an extended leave; Company Z said no, terminated her employment, and invited her to re-apply for work after she was medically cleared to work.

Estelle does not reapply: She sues under the ADA.




FMLA and the ADA

- Severson v. Heartland Woodcraft Inc., 872 F.3d 476 (7th Cir. 2017)
 - A long-term leave of absence is NOT a reasonable accommodation
 - “[A]n extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”


However ...





FMLA and the ADA

- [Leanne Ferrante v. Costco Wholesale Corp., 2010 WL 724032 \(W.D. Wash. Feb. 25, 2010\)](#)
 - Even though FMLA leave is exhausted, an employee may still be entitled to reasonable accommodation under the ADA.
 - Where a supervisor arguably has knowledge of an employee's alleged disability, a triable issue may exist over whether the employer regarded the employee as disabled.
 - Where an employer has a long history of tolerating absences, but decides to impose discipline only after it may have learned of an alleged disability, an employee may have a viable retaliation claim under the ADA.



Practice Tips:

- Enforce attendance policies consistently and equitably – and document the enforcement.
- If an employee makes it clear that they are only seeking FMLA leave, avoid additional inquiries related to ADA coverage.
- However, if an employee volunteers information that suggests he may need an accommodation – or where you know a potential disability is at play – it is usually best to engage in an interactive process and determine if the extended leave is reasonable.
 - Duration of leave request?
 - Open-ended leave?





FMLA and the ADA

SCENARIO 5: Where Leave Turns Into a “Work from Home” Accommodation Request

While out on a 2-month medical leave, Emiko Eguchi, a salesperson, asked her supervisor Sandy to send her client files so she could work from home. Sandy refused, stating that it was “company policy” that no one is allowed to work from home.

After Emiko returned at the end of her leave, she had trouble reconnecting with her clients. She failed to meet her sales goals for several months and was fired.

Emiko sued, claiming that her employer failed to accommodate her by refusing to allow her to work from home.



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FMLA and the ADA

- ***Fuller v. Interview, Inc.*, 2014 WL 2601376 (S.D.N.Y. May 14, 2014)**
 - The court denied the employer’s motion for summary judgment, holding that a reasonable fact finder could conclude plaintiff made an accommodation request when she asked her employer to send work home.



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Practice Tips:

- As with leave requests, accommodation requests may be made informally.
- The employer's general policies – including attendance expectations – may need to be set aside to provide reasonable accommodation unless doing so would cause undue hardship.
- Undue hardship must be based on an “individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.”



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Practice Tips:

- **Concerns that non-disabled employees may expect similar treatment does not qualify as an undue hardship**
 - *Miles v. Northcott Hosp. Int'l, LLC*, 963 F. Supp. 2d 878 (D. Minn. 2013)
 - Employer asserted allowing employee to work from home would cause undue hardship.
 - Stated it was “company culture” to work from the office.
 - If Plaintiff's request was granted, others would have to be allowed to work from home as well.
 - Court held that a reasonable jury could conclude no undue hardship existed despite the employer's concerns.



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Tricky Intersections & Trouble Areas

Medical Certification



Medical Certification

- **Requests for Medical Documentation under the ADA:**
 - Disability-related inquiries and medical examinations are permitted when “job-related and consistent with business necessity.”
 - Question is whether the employer “has a reasonable belief, based on objective evidence, that:
 - (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or
 - (2) an employee will pose a direct threat due to a medical condition.”





Medical Certification

- **Requests for Medical Documentation under the FMLA:**
 - Employers may require an employee to provide medical certification to support the need for leave due to a serious health condition.
 - FMLA regulations set what content of certification form may include. (Best practice is to use the DOL's form as template.)
 - If certification information is incomplete, request that the employee provide additional information in writing. Employee gets seven days to cure.
 - Inform employee of consequence for failure to provide certification or to cure.



Medical Certification

- **Generally, may require recertification no more frequently than the duration of the prior certification or every 30 days, whichever period is longer.**
- **Regardless of the duration of the original certification, the employer may require recertification every six months in connection with an absence.**





Medical Certification

- **More frequent recertification may be required if:**
 - The employee requests an extension of the leave.
 - The circumstances described by the previous certification have changed significantly.
 - For example, changes in the duration or frequency of absences or the nature or severity of the illness.
 - The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
 - For example, catching the employee in activity contrary to stated medical issue.



Medical Certification

SCENARIO 6: The Doctor's Note

Mary returned to work after FMLA leave for surgery. Back at work, she found that her medication caused her to feel fatigued at the end of the day. As a result, she began leaving at 4:30 instead of 5:00 every day. Mary's supervisor, Abdul, did not ask for medical certification for the reduced schedule.

Six months later, though, Abdul is fed up. He informs Mary that she needs to start working a full eight-hour day. Mary then brings in a note from her doctor stating only that she occasionally may need reduced hours due to her medical condition. Abdul tells Mary that she must complete new FMLA paperwork within 15 days, including a medical certification from her doctor specifying 1) precisely how much time off she will need on a monthly basis, and 2) how long her need for intermittent leave will last.

Mary fails to complete the paperwork, and when Abdul asks about it, she says she has been busy and forgot about it. Abdul gives her a warning stating that if she doesn't submit it within a week, she could be fired. Mary still fails to turn in the paperwork, and her employment is terminated.


Mary sues alleging unlawful interference with her FMLA rights and retaliation.





Medical Certification


- **Ridings v. Riverside Medical Center, No. 06-4328, 7th Cir. August 11, 2008**):
 - Employers must give notice of a requirement for medical certification each time a certification is required.
 - Regulations permit an employer to request certification at a later date if the employer "has reason to question the appropriateness of the leave or its duration."
 - The employer "cannot be deemed to retaliate against an employee by asking her to fulfill her obligations" under the FMLA.



Practice Tips:


- Give the employee written notice of the need to provide medical certification or recertification. Provide proper forms.
- State in the notice AND in your FMLA/ADA policies the consequences of failing to provide certification – follow through on those consequences.
- An employee has 15 days to provide the medical certification, absent unusual circumstances. Follow up with the employee.
- Require that the certification contain adequate information. Follow up on any vague language.





Practice Tips:


- **Communication is key. An employer may:**
 - Ask questions to confirm whether the leave needed or being taken qualifies for FMLA purposes.
 - Contact the health care provider for purposes of “clarification” and “authentication” of the medical certification after the employer has given the employee an opportunity to cure any deficiencies.
 - BUT such contact must be made through a health care provider, a human resources professional, a leave administrator, or a management official. The employee's direct supervisor may NOT contact the employee's health care provider.
 - Employers may not ask health care providers for additional information beyond that required by the certification form.



Practice Tips:

- Under FMLA regulations, “authentication” means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document. No additional medical information may be requested.
- “Clarification” means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.





Practice Tips:

- **Implement “call-in” policies.** The FMLA and ADA allow employers to ask employees to give periodic reports on status and intent to return to work after leave.
- **Make sure BOTH your FMLA and ADA policies outline clear expectations, and provide copies of these policies to employees who may have leave/accommodation needs.**
- **As with any policy, apply consistently and in a non-discriminatory manner.**



Tricky Intersections & Trouble Areas:

Intermittent Leave





Intermittent Leave

Scenario 7: Migraine Headaches

Acme Company uses rotating shifts for its manufacturing employees, one of which starts at 11:00 p.m. and continues through 7:00 a.m. Every employee is asked to work the “night owl” shift one day every other week.

Employee Eva Engels has submitted FMLA paperwork stating that she needs intermittent leave of up to 3 days per month for migraine headaches. Every time Eva is asked to work the night-owl shift, she takes a day of FMLA leave, claiming that she has a migraine. Her supervisor, Sasha, has heard that she jokes with her co-workers that she plans to get a migraine each time she has to work that shift.

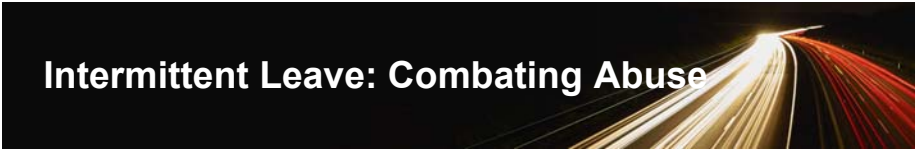
Sasha investigates and discovers that Eva has been out hiking, horseback riding, and mountain biking on the last three days she took intermittent leave. Sasha terminates Eva’s employment, and Eva sues.



Intermittent Leave


- Vail v. Raybestos Prods. Co., No. 07-3621 (7th Cir. July 21, 2008).
 - Persuaded that the employer had an “honest suspicion” that the employee was abusing leave the Court found that the employer had not violated its employee’s FMLA rights by terminating the employee.
 - The employee must demonstrate that she took the leave “for the intended purpose of the leave,” 29 U.S.C. § 2614(a)(1).
 - An employer can defeat a FMLA claim by showing that the employee did not take leave for the “intended purpose.”
 - An employer is under no obligation to reinstate an employee returning from FMLA leave if the refusal is based on the “honest suspicion” that the employee was abusing the leave.





Intermittent Leave: Combating Abuse

- Draft good job descriptions that contemplate regular attendance, especially for jobs where attendance is a crucial requirement.
- Require employee needing FMLA/ADA leave to follow the employer's usual and customary call-in procedures for reporting absences.
- Utilize medical recertification opportunities (once every 30 days).
- Contact an employee's health care provider for purposes of clarification and/or authentication of the medical certification if needed, but only after the employer has given the employee an opportunity to cure any deficiencies.



Practice Tips:

- Insist that the employee provide certification from a health care provider that she has a serious medical condition.
- The employer may insist that the employee visit another medical provider (at the employer's expense) for a second opinion.
- If the two medical assessments are in conflict, the employer may insist upon a third opinion (again at its expense) by a third medical provider.
- Investigate!





More Tricky Intersections:

- **SCENARIO 8: The Mash-Up**

- Eddie has worked at All Star Electric Company as a field electrician for 12 years. Eddie's job requires him to work on electrical lines in the field, including duties that involve climbing poles and driving heavy equipment.
- Last year, Eddie was in a terrible car accident and suffered a number of lasting injuries from which he continues to recover. Eddie used up his FMLA leave allotment and took an additional 3 months off of work. Because Eddie has been such a loyal employee, All Star allowed him to take this time, but it did not obtain any paperwork supporting the accommodation.
- Eddie recently called in and said he will be ready to come back to work – but with restrictions that require him to sit at a desk – in 2 weeks. At the time Eddie calls, there is an open Office position at half Eddie's salary. All Star, however, really needs an additional field electrician, and the Field Department doesn't have the budget for a new hire.
 - Can All Star let Eddie go and hire a new person for his role?
 - Can All Star set a deadline by which Eddie must return to work in his role?
 - What if Eddie's car accident occurred while he was performing business for All Star?



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Top 10 Take-Aways

- 1) **Adopt clear policies with notice, certification, and call-in requirements PLUS consequences for violations**
- 2) **Be aware of circumstances that may provide constructive notice of an employee's leave or accommodation needs**
- 3) **Obtain clear medical certification stating the scope and duration of all medical leaves**
- 4) **Carefully track intermittent leave use**
- 5) **Follow up where the amount or timing of leave is inconsistent with certification or is suspicious**



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Top 10 Take-Aways

- 6) When one type of protected leave is exhausted or unavailable, be sure to consider what other options may apply
- 7) Explain in your policies how various types of leave will work together
- 8) When considering undue hardship related to leave as an accommodation, evaluate all aspects of the role and options for covering it
- 9) Engage in a thorough interactive process prior to discharging an employee on protected medical leave
- 10) Do not use leave or attendance issues as a way to avoid addressing performance problems



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Questions?



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Thank you!

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