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LABOR & EMPLOYMENT
PRACTICE AREA COMMITTEE

FMLA AND ADA: The Advanced Class

Presented by the Labor & Employment PAC

Introduction

Chandra Davis

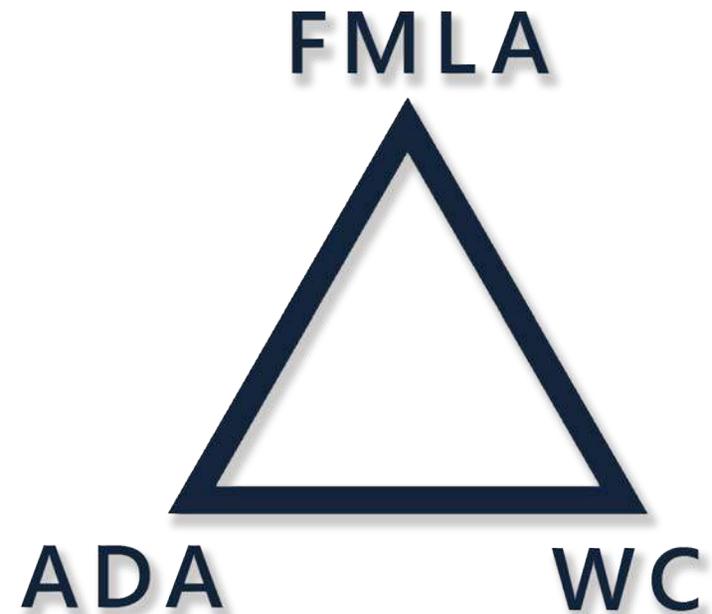
Chandra Davis

The Employment Law Solution: McFadden Davis, LLC



Introduction

- ADA and FMLA leave keeps HR personnel up at night, asking questions such as:
 - Did we properly engage in the interactive process?
 - Was the employee entitled to light duty?
 - Did we allow that employee enough leave?
- “Bermuda Triangle”



Introduction

- Uncertainty: ADA, FMLA, and short-term and long-term disability
- SHRM Study: 58% of respondents reported uncertainty about whether an employee who requested FMLA leave was also covered by the ADA



FMLA

Kelly Folger

Kelly Folger

Andrews Lagasse Branch & Bell, LLP



Legislative History/Policy

- FMLA was enacted “to balance the demands of the workplace with the needs of families”
- Reflects Congress’ concern that the primary responsibility for family care mainly falls on women and that such responsibilities greatly affect the working opportunities of women more than men



Basis for Leave

- FMLA entitles eligible employees to take up to twelve work weeks of leave during any twelve-month period for specific reasons
- Reasons include:
 - Serious health condition of the employee
 - Serious health condition of a child, spouse, or parent
 - Birth of a child and to care for the child
 - Placement of a child with the employee for adoption or foster care
 - A “qualifying exigency” arising out of the fact that an employee's family member is on active duty in the Armed Forces
 - To care for an injured service member or veteran during rehabilitation



Basis for Leave

- A “serious health condition” under the FMLA is “an illness, injury, impairment, or physical or mental condition” that involves:
 - Inpatient care in a hospital, hospice, or residential medical care facility
 - Continuing treatment by a health care provider



Application

- FMLA applies only to employers with 50 or more employees
- An employer is excluded from the FMLA if fewer than 50 employees work within a 75-mile radius from the worksite



Eligibility

- Not all employees of employers with more 50 employees are entitled to FMLA
- To be eligible for leave under the FMLA or CFRA, an employee must meet all of the following criteria:
 - Be employed by the employer for at least 12 months as of the date leave commences
 - Be employed for at least 1250 hours of service during the 12-month period immediately preceding commencement of the leave



Reinstatement

- At the conclusion of an FMLA leave, an employee is generally entitled to be reinstated to either the same position occupied before the leave, or an equivalent position with equivalent pay, benefits, and other terms and conditions of employment



ADA

Barbara Johnson

Barbara Johnson

Potter & Murdock, P.C.



Legislative History/Policy

- Congress found that discrimination and prejudice deny disabled persons the opportunities available to other members of free society
- The ADA was enacted to eliminate discrimination against persons with disabilities in all aspects of their daily lives
- ADA prohibits disability discrimination in employment, government services, housing, and public accommodations



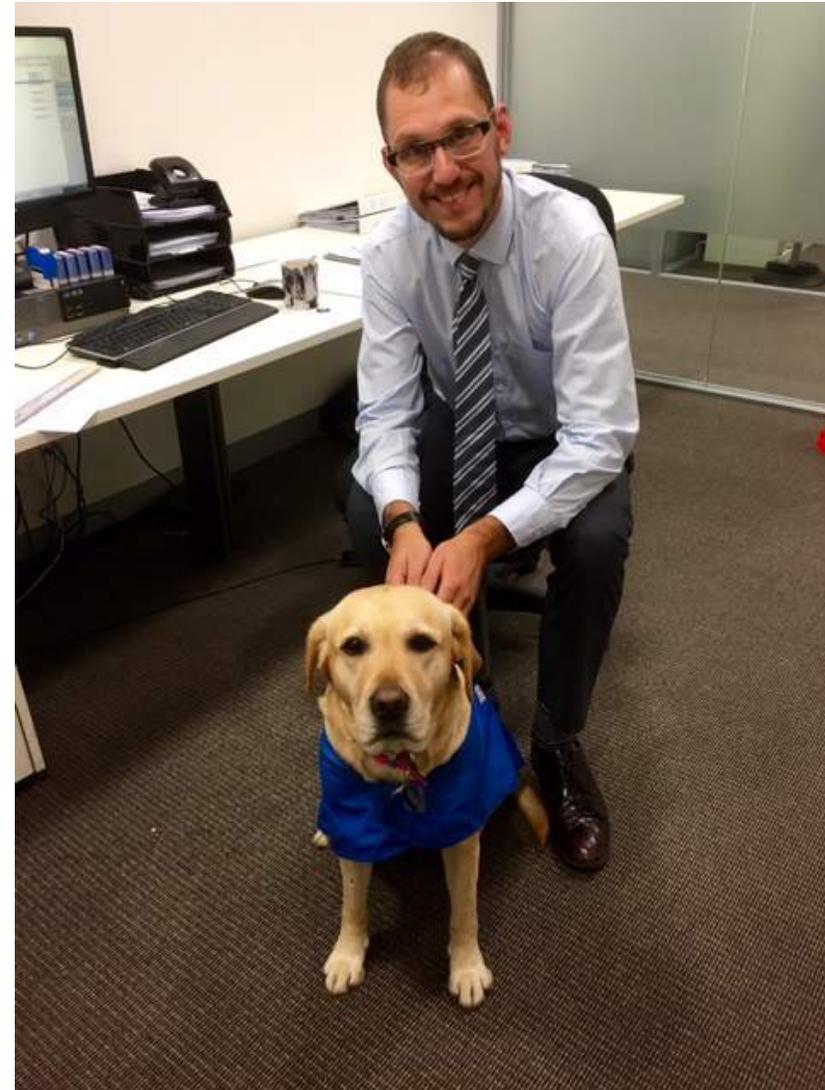
Application

- Title I of the ADA applies to all employers with 15 or more employees on each working day of at least 20 weeks of either the current or preceding year
- Employee has burden to establish employer as “covered employer” under ADA (*Escribano-Reyes v. Professional Hepa Certificate Corp.*)



Eligibility for ADA Protection

- Title I of the ADA applies to employees who are qualified individuals with a disability
- A qualified individual is able to perform the essential functions of a job with or without a reasonable accommodation
- ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment



Eligibility for ADA Protection

- ADA Amendments Act of 2008 (ADAAA)
- ADAAA provides that “‘disability’...shall be construed in favor of broad coverage of individuals...to the maximum extent permitted by the terms of this chapter”



Prima Facie Case

- To establish a prima facie case of discrimination, plaintiff must demonstrate that:
 - Plaintiff is disabled within the meaning of the ADA;
 - Plaintiff is a qualified individual able to perform the essential functions of the job; and
 - Employer terminated or refused to rehire plaintiff because of his or her disability.



Reasonable Accommodations

- Employers must make “reasonable accommodations” to enable an employee or applicant with a known disability to perform a position's essential functions
- Failure to provide reasonable accommodations constitutes discrimination under the ADA



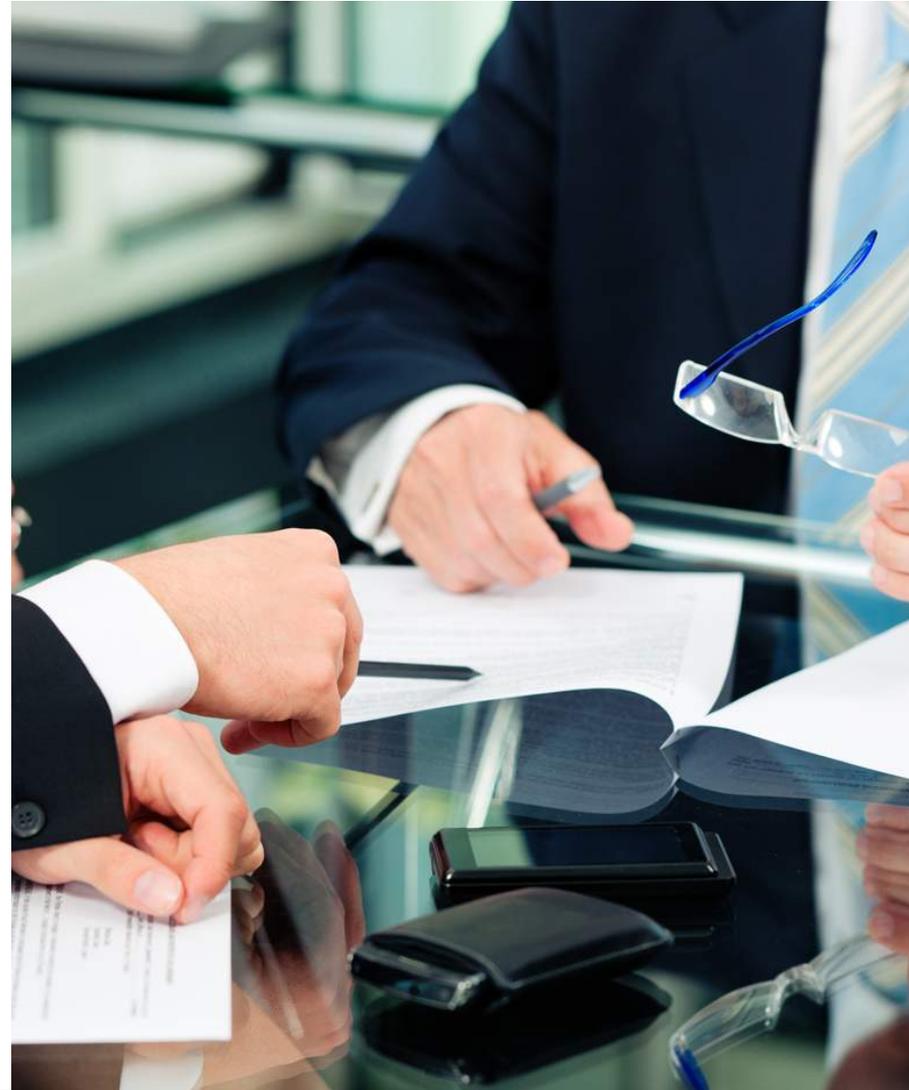
Interactive Process

- ADA requires that employers engage in an interactive process
- Process to determine the nature of the accommodation necessary to enable the individual to perform the position's essential functions
- Courts have held that the employer's duty to provide reasonable accommodations is a continuing one and not met by a single effort (*McAlindin v. County of San Diego*)



Undue Hardship

- Employer must provide a reasonable accommodation for a disabled employee unless doing so would constitute an undue hardship
- Factors of undue hardship can include:
 - Nature and costs of the accommodation
 - The financial resources of the organization
 - Type of operation
 - Size of the business



ADA Protection for Associated Persons

- An individual who has a relationship with someone who has a disability is protected
- Employer cannot discriminate against someone merely because she is associated with someone with a disability
- Employer does not need to accommodate associated individual



Workers' Compensation

Dinita James

Dinita James

Gonzalez Law, LLC



History

- Had its origins in 2050 B.C. in ancient Sumer (present day Iraq)
- The ancient Sumerian law assigned compensation for a worker's specific body parts
- Slowly trickled to the United States, with Wisconsin passing the first comprehensive workers' compensation law in 1911



Model

- Covered employers include all employers with one or more employee
- Workers' compensation statutes generally apply to accidental injuries that occur on the job
- Coverage is limited to injuries that "arise out of" and "in the course of" the employment relationship
- Preexisting injuries that are aggravated and accelerated by work conditions may also be covered



No-Fault System

- Workers' compensation is a no-fault system that is usually the exclusive remedy for workplace injuries
- Employee may not sue the employer for any other benefits if the employee receives workers' compensation



Leave

- When an injury is deemed to fall within the workers' compensation scheme, leave may be required



Key Differences in Laws

Kelly Folger and Chandra Davis

The Laws as Kitchen Tools

- FMLA is like a steak knife
- ADA is like a rubber spatula



Application

- FMLA applies to employers with 50 or more employees within a 75 mile radius
- ADA applies to employers with 15 or more employees
- Workers' compensation applies to most employers, even small ones, with just one employee



Covered Individuals

- FMLA applies to employees who have serious health conditions
- ADA applies to employees who are disabled
- Workers' compensation applies to any employee who has a work-related injury



Leaves of Absence

- ADA is not a per se leave statute
 - Require reasonable accommodation for disabled employees. Such accommodations can include leaves of absence
- Even if an employee has exhausted FMLA leave, they may be entitled to additional leave if they are disabled and need such leave as a reasonable accommodation



Leaves of Absence: ADA

- ADA does not have a specified time limit on the length of a leave of absence
- Limit based on possible undue hardship to the employer
- Reasonable accommodation even when it is not certain to successfully improve the employee's condition as long as it could plausibly allow the employee to return to work (*Humphrey v. Mem'l Hosp. Ass'n*) 239 F.3d 1128, 1136 (9th Cir. 2001)



Indefinite Leaves Under ADA

- Most courts hold that indefinite or prolonged leaves of absence are not required as an accommodation
- Several cases have examined the employer's policies and the individual circumstances in determining whether a lengthy leave should have been granted as a reasonable accommodation
 - *Garcia-Ayala v. Lederle Parenterals, Inc.*
 - *Rascon v. US West Communications, Inc.*



Leaves of Absence: Workers' Compensation

- Under worker's compensation, an employee may also be entitled to a leave of absence under state workers' compensation legislation
- Benefits usually begin after a certain statutorily-defined period of absence resulting from a work-related injury
- No specific limit on the amount of leave an injured worker can have



Intermittent Leaves

- Under FMLA, an employee has the absolute right to an intermittent leave for the employee's serious health condition or to care for a family member with a serious health condition
- Under ADA, intermittent leave may be considered a reasonable accommodation
- An employer still has a potential undue hardship defense



Employee Notice

- Under the FMLA:
 - Foreseeable Leave = 30 days' notice
 - Unforeseeable leave = “as soon as practicable” notice



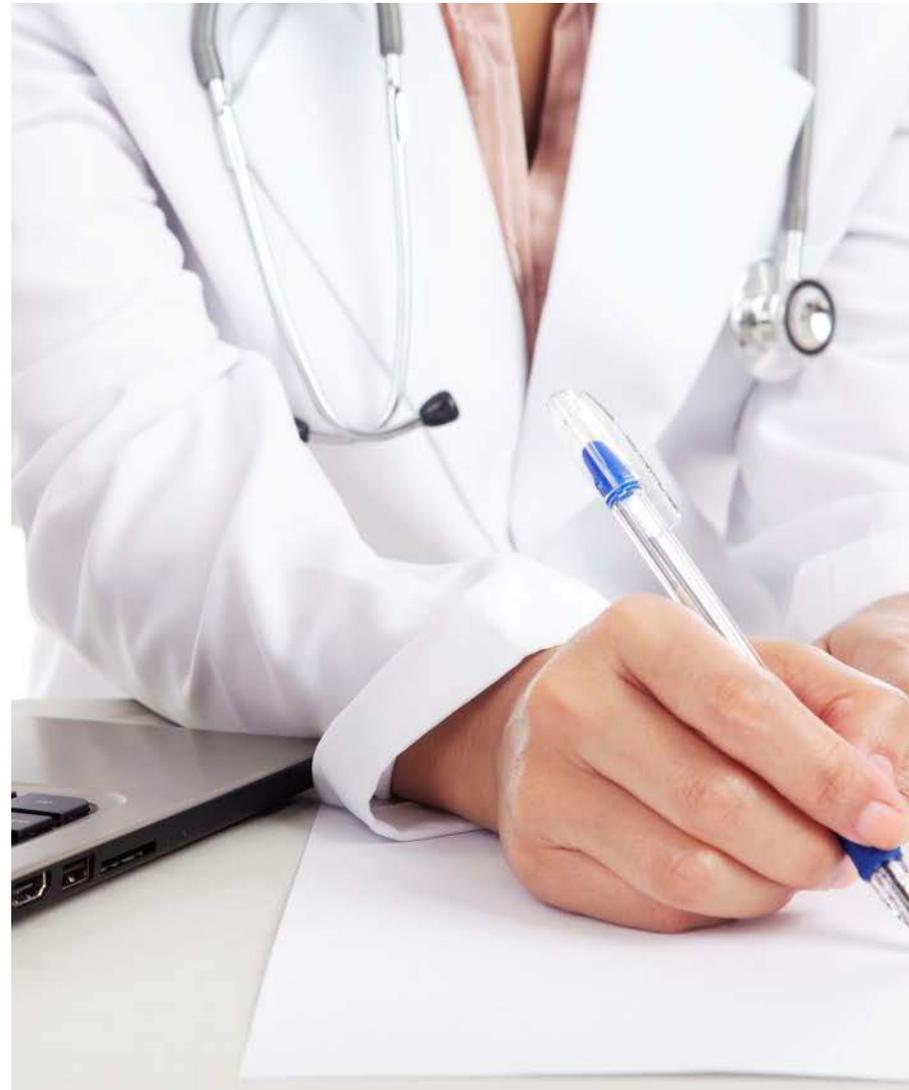
Employee Notice

- Under the ADA:
 - No specific notice requirements
 - Enforcement guidance on reasonable accommodation and undue hardship under the ADA provides that an employee is obliged to request a reasonable accommodation



Documentation to Take Leave

- What Can An Employer Ask?
 - Under the FMLA, employer may request an initial medical certification following an employee's notice of the need for a leave of absence



Documentation to Take Leave

- **Under the ADA** Employer cannot ask about the details of the medical condition
 - *Karraker v. Rent-A-Center, Inc.*
 - EEOC: personality tests are fine
psychological tests are not
 - Medical examination or test of an employee must be job-related and consistent with business necessity
 - Medical information kept separately



Benefits While on Leave

- FMLA leave
 - ✓ Employer must maintain an employee's coverage under any employee's group health benefit plan subject to payment of premiums
 - ✓ Coverage may be terminated during an FMLA leave only under *very specific* circumstances



Benefits While on Leave

- ADA
 - ✓ Generally not required to continue health coverage or other benefits during a leave of absence
- Where an employee is out on workers' compensation leave, but not FMLA leave
 - ✓ Benefit eligibility requirements depend of the terms of the employers' health insurance plan



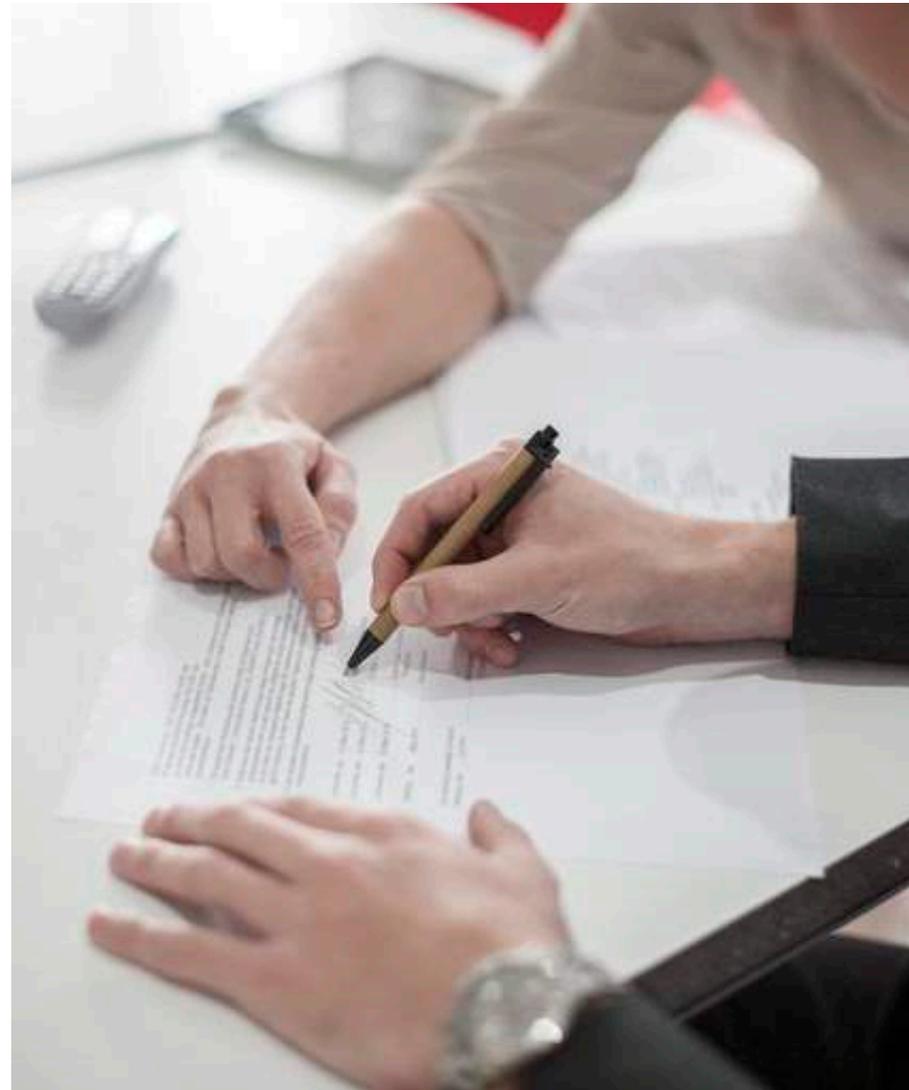
Return to Work

- Varies between the three laws
- Under FMLA same or similar job.
- Under ADA an employee who is disabled may request a reasonable accommodation
- Under worker's compensation leave, employer should offer light duty work if available
 - Employee's entitlement to wage replacement benefits eliminated



Fitness for Duty Certification

- Generally required after workers' compensation leaves
- FMLA only required with a health condition that caused the employee's need for FMLA leave
 - Employer must give notice
- ADA fitness for duty certifications
 - Reasonable belief that employee's ability to perform essential job functions may be impaired



Real World Complications

Jim Beyer, Courtney Bohl, and Barbara Alexander

Jim Beyer

Infosys, Ltd



Courtney Bohl

AECOM



Barbara Alexander

Exelon



Medical Marijuana

Barbara Johnson and Dinita James

Medical Marijuana

- Majority of states now allow medical marijuana
- Current Issues: How does the use of medical marijuana affect an employee's rights and an employer's responses under other laws, and in particular, the FMLA and the ADA?



FMLA

- Chronic conditions can be grounds to take FMLA leave
- Employees using medical marijuana during an FMLA leave is irrelevant and generally does not pose a problem for most employers
- Becomes questionable if an employee seeks to take intermittent FMLA leave to smoke medical marijuana



FMLA

- Could be problematic in the context of an employer's zero tolerance drug free workplace policy
- Employers need to be very careful with drug testing employees who return from an FMLA leave



ADA

- Do employers have to accommodate medical marijuana as a reasonable accommodation?
- Majority of courts that have addressed this issue have said “no”
- Held that an individual who uses illegal drugs is not a “qualified” disabled person entitled to reasonable accommodation



ADA

- Because marijuana is illegal under federal law, courts have held that employers have no obligation under the ADA to tolerate off-duty use of medical marijuana
- Some courts have been going in the opposite direction
- Massachusetts Supreme Court became the first court to hold that an employer cannot terminate an employee for off-duty use of marijuana for medical purposes where such use is legal under state law
- *Barbuto v. Advantage Sales and Marketing, LLC* - may represent a change at least in state courts interpreting state disability laws modeled after the ADA



State Laws

Dinita James and Kelly Folger

Hypotheticals

Talk Amongst Yourselves



Hypothetical 1: Sarah's Request

- Sarah Jones has worked for ABC Company for nearly fifteen years as a sales representative. Until recently, Sarah's performance was fully satisfactory.
- Her sales numbers show a downward trend, she has complained about not feeling well, and customers have complained about her lack of attention to their accounts. Her supervisor, Joe Jones, has noticed the downward trend and is ready to give Sarah disciplinary counseling.
- However, as soon as Sarah sets foot in Joe's office, she tells him that earlier she saw her doctor, who told her to take a week off immediately to rest. The doctor also told her to reduce her work to a part-time schedule because of her medical condition. Sarah explains that she has been diagnosed with Epstein-Barr disease, a condition that makes her extremely lethargic at times.
- Sarah's request comes at the worst possible time. The company's advertising sales force is spread very thin, everyone is extremely busy, and training someone new to pick up the accounts that Sarah will be unable to service is out of the question. Plus, Joe has never heard of Epstein-Barr disease and has no idea if it is a temporary or permanent condition or if it could affect her ability to properly work her accounts.



Hypothetical 1: Questions

- Is the company obligated to give her the time off immediately or can it ask her to wait?
- If she takes the week off, what must Joe do, if anything, to comply with the FMLA? Can he ask for a doctor's note?
- Must he grant her request for a reduced schedule? Must he grant an ongoing request after her FMLA leave is exhausted?
- If he allows her request for a part-time schedule, can he reduce her pay and group health benefits to those normally given to part-time employees?
- While Sarah is out on either the week-long leave or the part-time leave, if Joe finds someone who will do Sarah's job on a full time basis, can he let Sarah go or must he find her another job? What if Sarah exhausts her FMLA leave?
- Should Joe still give Sarah disciplinary action?



Hypothetical 2: Silvia and the SWAT team

- Breaks leg while jogging and has surgery.
- Unable to return to SWAT team position when FMLA leave is exhausted.
- Requests light duty. Request denied. Return to position or be deemed to have resigned.
- Appeals to police chief and provides medical certification that she needs physical therapy for 1-2 mos before she can RTW. Requests light duty or any other available leave. Request denied.



Hypothetical 2: Questions

- What are the city's obligations to Silvia when she is not able to return to work at the end of her leave but may be able to in the future?
- What should the police department have done if Silvia was cleared to return to work with restrictions?
- What should the city do if Silvia is only temporarily unable to perform the essential functions of her position?
- What if she is unable to perform essential functions in the long term?



Questions?

Thank You