

Managing Attendance in the Face of the ADA and FMLA

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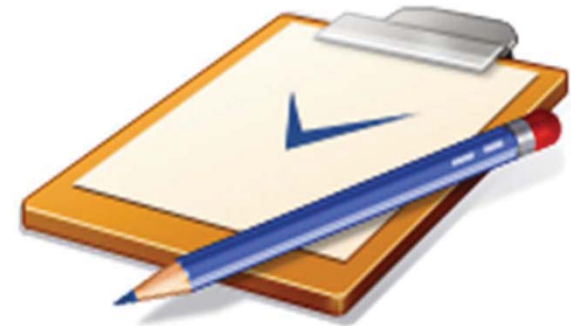
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Tip #1



Get Your Policies in Order

Policies – No Fault Policies

Points Based Attendance Policies

- Replace with Discretionary Leave Policies
- EEOC maintains that points-based policies violate the ADA
- Regardless, these policies are difficult to defend because the points don't add up
- No Fault Policies promote FMLA Abuse

Fixed Leave Policies

- Beware of policies that establish a limit on leave durations (LOA policies, personal medical leaves, short-term, long-term disability)
- Review benefit plans and other policies that state that an employee will be terminated upon expiration of set period.
- At a minimum, add language stating, “additional leave may be available as an accommodation under the ADA.”

FMLA Policies

- If you are a covered employer, make sure your FMLA Policy has been updated since March 2013 when changes to the FMLA regulations went into effect.
- An employer's FMLA policy must include at a minimum all information on DOL's FMLA Poster.
- Failure to have current FMLA policy can have costly ramifications, via penalties or employee claims.

Light Duty Policies

- Make sure that light duty policies are not limited to occupational injuries.
- EEOC has brought lawsuits alleging that if light duty is offered as an accommodation for work-related injuries, then the failure to offer light duty as an accommodation to a disabled individual violates the ADA.

Tip #2



Require Medical Certifications for Leave Requests.

Health Care Provider Certifications under the FMLA

- Require a Complete and Sufficient Certification
- If you want a 2nd opinion, you must obtain with the initial certification in the 12-month period.
- Recertify as often as permitted under the law.
 - ✓ In general may recertify at least as often as every 30 days unless certification establishes a longer period.
 - ✓ Need not wait longer than 6 months to recertify.

More Frequent Recertification

- FMLA permits recertification more frequently when:
 - 1) the employee requests an extension of leave beyond the date originally specified in the certification,
 - 2) if circumstances have changed significantly or
 - 3) if the employer receives information that casts doubt on the initial certification.

ADA Health Care Provider Certification

- ADA permits employers to require a certification for an employee who is seeking an accommodation, unless need for accommodation is known or obvious.
- Most frequently the condition is not known or obvious.

ADA Health Care Provider Certification

- May require an employee who is seeking accommodation to submit information from a treating physician opining as to:
 1. whether the employee has a physical or mental impairment,
 2. the nature and anticipated duration of the impairment,
 3. whether accommodations will enable the employee to perform the essential functions of the job,
 4. and the duration of the suggested accommodations.

- Must limit inquiries to the condition for which accommodation is being requested.



Tip #3

**Inform Employees of Notice
Requirements and
Hold them Accountable!**

FMLA Notice

- Foreseeable:
 - ✓ 30 days in advance

- Unforeseeable or intermittent:
 - ✓ As soon as is practicable
 - ✓ Establish a written rule in your policy that as soon as is practicable will generally mean providing written notice by midnight of the next business day, but allow extension if extenuating circumstances.
 - ✓ Require completion of notice form to avoid changing of story later.

Call-In Procedures & FMLA

- In 2013 Courts have consistently struck down FMLA claims where:
 - 1) Employees failed to follow the employer's customary call-in procedures; or
 - 2) Employees neglected to provide enough facts to indicate that an absence might be covered by FMLA.
- Be very specific as to employee's call-in obligations and what information must be provided – i.e. length of anticipated absence and enough information determine if FMLA may apply



Tip #4

Take the Time to Investigate Abuse

Williams-Grant v. Wis. Bell (EDWI 9/30/13)

- Wisconsin Bell Telecommunications Specialist
- Medical Issues – You name it, she had it
- Flare-ups – Required intermittent leave beginning in 2003
- Would stop calling in when ran out of FML, check to see when annual FMLA would replenish, resume calling in
- ER did its homework – studied attendance patterns for 6 months
- Then surveillance 2 separate days 1 mo. Apart – on first occasion traveled to church for one hour, second occasion went to vacation home

Takeaways

- When abuse is suspected, take time to investigate.
- Don't let fear of a rationale handicap your ability to challenge employees.
- Use a methodical approach when confronting employees with the facts – asking their story first, before showing your hand.

Tip #5



**Ensure that Job Descriptions and Postings
Reflect Essential Job Functions**

Essential Job Functions

- Not all job functions are essential.
- Take the time *NOW* to determine which job functions are essential.
- You are not required to reallocate essential job functions as an accommodation under the ADA.
- Consider functions such as regular attendance, the ability to work all or certain shifts, handling stressful situations, the ability to interact with the public and lifting requirements (for certain positions).
- Attach to the healthcare provider certification form that you use for ADA requests, as well as to your Fitness for Duty forms.



Tip #6

**Don't Require "Full Duty" Release Before
Permitting Employee to Return to Work**

Fit for Duty Releases

- When seeking medical recertification from treating provider, inquire as to when employee is anticipated to be able to perform all “essential functions of his/her job” as opposed to when employee is expected to be released to “full duty”.
- Rather than asking if an employee can perform all job duties, ask whether an employee is able to perform all job duties with or without accommodation.
- If accommodations are required, ask what accommodations the employee will require.

Tip #7



Maintain Excellent Documentation Relating to Absences & Leaves

Documentation

- Documentation is key to your defense in any change of discrimination or medical related lawsuits, whether it's an FMLA, ADA, Disability or other claim.
- Require your managers to share information with the business area responsible for leaves concerning ALL accommodations that they extend.
- Communicate with employees about and the timeframe for which a particular accommodation is being extended and the next deadline for providing a medical or other update.

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Navigating Labor and Employment Law

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**Get Your House in Order
Before the DOL Comes
Knocking:
What You Need to Know Before a
FMLA or FLSA Investigation**

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October 24, 2013

Why the Concern?

- Rise in On-Site DOL Investigations
 - ✓ Increased focus of administration
 - More DOL investigators hired
 - Launch of the DOL “We can help” campaign in 2010

- Promise of Future Increase in Investigations
 - ✓ DOL Branch Chief for FMLA recently announced plan to increase on-site FMLA investigations

What Does a DOL Visit Involve?

➤ How Does it Start?

- ✓ Many possible triggers: complaint(s), strategic decision
- ✓ DOL may call first...or just show up at your door
 - Employers may ask DOL to come back later

➤ What Does it Involve?

- ✓ Typical: interviews, inspection of policies and records, inspection of premises

➤ Penalty for Non-Compliance?

- ✓ STEEP: corrective action + back wages + civil penalties + increased risk of litigation + bad publicity

First Things First: An Overview of How to Respond to a Surprise Visit

- Reschedule the Unannounced Inspection
- Designate a Company Point Person
- Contact Legal Counsel
- Negotiate the Documents to be Produced
- Assemble and Organize the Documents to be Produced
- Prepare Key Employees for Interviews
- Keep in Constant Communication with the DOL

FMLA Compliance Checklist

- Make sure you “prominently” display the DOL’s new 2013 FMLA poster
 - ✓ Can be viewed by employees AND applicants
- Make sure you have an up-to-date FMLA policy
 - ✓ Must comply with DOL’s February 2013 regulations
 - ✓ Should include contents of FMLA poster
 - ✓ Include policy in employee handbook if you have one
- Train your managers
 - ✓ Compliance, proper procedures, identifying risk

FMLA Checklist cont.

- Have an FMLA packet ready to give employees (all forms should comply with 2013 regulations)
 - ✓ Company's FMLA policy
 - ✓ DOL's notice of eligibility and rights and responsibilities
 - ✓ DOL's designation notice
 - ✓ Medical certification forms for health care providers
 - ✓ Company's fitness-for-duty certification

FMLA Checklist cont.

- Include GINA safe harbor provision on FMLA forms (DOL model forms DO NOT include!)
- Prepare compliant FMLA correspondence ahead of time
 - ✓ Certification and recertification
 - ✓ Failure to provide certification
 - ✓ Insufficient/incomplete certification
 - ✓ Employee's return to work
 - ✓ Second/third opinions

FMLA Checklist cont.

- Conduct Periodic Self-Audits
 - ✓ Involve counsel to completely assess compliance
- Get Your Records in Order Now
 - ✓ Maintain for three years
 - ✓ Document everything!
 - Dates of FMLA leave and amounts of leave taken
 - FMLA correspondence
 - Notices, certifications, fitness-for-duty certifications
 - Designations and records of designation disputes
 - Benefit documents

Resolution of Current FMLA Problems

- Payment of civil penalties for past violations
- Agreeing to take corrective action
 - ✓ Changing policies and practices to be compliant with statute and regulations
 - ✓ Manager training
- Agreeing to make employees whole for violations
 - ✓ Remove discipline considering FMLA leave from employee's record
 - ✓ Pay employees for any time lost as a result of violation

FLSA Checklist

- Make sure you have clear time-keeping policies
- Make sure policies are communicated to employees
- Train your employees on time-keeping policies and procedures
- Train your managers to enforce time-keeping policies and procedures
- Take prompt remedial action to remedy violations

FLSA Checklist cont.

➤ Conduct Periodic Self-Audits

- ✓ Review exempt classification decisions
 - Don't assume highly skilled or highly paid workers are exempt
- ✓ Ensure compliance with applicable state laws
 - Many states have additional wage and hour laws that must be followed
- ✓ Review how you calculate employees' regular rate
 - Count all remuneration unless specifically excluded
- ✓ Aggressively seek "off the clock" work and take remedial action
 - Make sure non-exempt employees record ALL time worked
- ✓ Evaluate wage deductions
- ✓ Make sure non-exempt employees receive the required minimum wage

FLSA Checklist Cont.

- Prominently display an up-to-date FLSA poster
- Get your records in order now
 - ✓ Maintain for 3 years
 - ✓ Document everything!
 - Keep all time and payroll records
 - Should document all hours worked, breaks taken
 - Should confirm employees were paid for all hours worked
 - No records = presumption against employer

Resolution of Current FLSA Problems

- Payment of civil penalties for repeated or willful violations
- Agreeing to take corrective action
- Agreeing to pay back wages
 - ✓ Way to avoid DOL litigation if violation is found
 - ✓ Form WH-56
 - Settlement document – no admission of liability
 - Employer representative agrees to pay back wages listed
- Releasing future claims
 - ✓ Form WH-58
 - Presented to each employee when back wages tendered
 - Employee waives future claims upon signature
 - Release of wage claims NOT effective absent DOL audit

Questions?

Hot Topics in Labor and Employment Law

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October 24, 2013

Non-Compete Agreements: The Basics

- Common provisions
 - Prohibit working for competitor within geographic area
 - Prohibit soliciting customers / prospective customers
 - Prohibit soliciting employees
 - Prohibit use / disclosure of confidential information / trade secrets
- Allow an employer to protect itself against unfair competition by a former employee

Non-Compete Agreements: State Law

- Law varies state-to-state
 - ✓ Location of employment relationship
 - ✓ Choice of law provision
- Missouri
 - ✓ Confidential information / trade secrets
 - ✓ Customer contacts / goodwill
 - ✓ Workforce stability
- Illinois
 - ✓ Confidential information / trade secrets
 - ✓ Near permanent business relationships

Non-Compete Agreements: Recent Decisions

➤ Whelan Security Co. v. Kennebrew

- Geographic restriction on working for a competitor is enforceable if necessary to protect customer contacts
- Non-solicitation provision need not have a geographic restriction, but employer must show significant contact between employee and customer

➤ Fifield v. Premier Dealer Services, Inc.

- At-will employee who signs a non-compete agreement at the beginning or during employment must remain employed for 2 years or else the agreement is not enforceable

Employer Considerations

- If you have employees with non-competes, do the agreements meet the current state of the law?
- Do you have classifications of employees who should be given non-compete agreements?
- Are you considering hiring someone subject to a non-compete agreement?

The Affordable Care Act: A Snapshot

- Rolled out over a 4 year period
 - Provisions already in effect: kids with pre-existing conditions covered (adults covered in 2014); no lifetime coverage caps; 26 and under can stay on parents' plan
 - Provisions for employers taking place now and next year

How does the Affordable Care Act affect employers?

- It depends on the employer's size
- Small businesses
 - ✓ No requirement to provide coverage
 - ✓ May be eligible for tax credits
 - ✓ May be required to give notice to employees
- Big businesses
 - ✓ Required to provide affordable coverage or be subject to shared responsibility penalties
 - ✓ Required to give notice to employees

Small Business vs. Big Business

- What is a small business?
 - Fewer than 50 full-time equivalent employees (FTE)
- To calculate FTEs, look to preceding year:
 - Count all full time employees (30 or more hrs / week)
 - Add all part time monthly hours worked divided by 120
 - Ex: 45 full time employees plus 50 part time employees who work a combined 1,000 hours / month
 - $45 + (1,000 / 120) = 53$ FTE
- BUT – for purposes of determining penalties, the first 30 full time employees are not counted

Small Business Provisions

- Must give notice to employees if covered by FLSA
 - ✓ Different sample notices provided by the DOL for employers who provide insurance and those who do not
 - ✓ Notice requirement effective October 1, 2013
- May be eligible for tax credits if:
 - ✓ Fewer than 25 FTEs
 - ✓ Average wages below \$50,000
 - ✓ Employer pays at least 50% of premium cost

Big Business Provisions

- “Employer mandate” has been delayed until 2015
- When effective, it requires employers with 50 or more FTEs to provide affordable coverage
- Two components: access to coverage and affordable coverage
- Failing to comply with either component results in a “shared responsibility fee”

Criminal Background Checks: EEOC Guidance

- April 2012 Enforcement Guidance
- Recommended policy included:
 - Determine specific criminal offenses that may demonstrate unfitness
 - Determine an appropriate duration for exclusion based on criminal offenses
 - Conduct an individualized assessment before reaching a decision

Criminal Background Checks: EEOC Enforcement

- EEOC v. Dollar General Corp.
- EEOC v. BMW
 - Issue: Whether employer's criminal review process disproportionately impacted minorities
- EEOC v. Freeman
 - Issue: Whether an employer's criminal review process disproportionately impacted African-Americans, Hispanics and males
- EEOC v. PeopleMark, Inc.
 - Issue: Whether employer's alleged policy against hiring convicted felons was unlawful

Same-Sex Marriage: What it means for employee benefits

- United States v. Windsor (June 2013): Supreme Court struck down DOMA, which provided a definition of “spouse” and “marriage” for purposes of federal benefits
- DOMA unconstitutional under 5th Amendment because it denied equal protection to same sex married couples
- “[R]egulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’”

Impact of Windsor

- DOL guidance: for federal regs, “spouse” means anyone lawfully married under any state law and “marriage” includes a same-sex marriage that is legally recognized under state law
 - Look to where the marriage took place, NOT where the spouse or couple live
 - Does NOT include domestic partnerships or civil unions
- Where will it come up?
 - ERISA – employee benefit plans, retirement plans, etc.
 - FMLA – can take leave for same-sex spouse’s health condition

Employee or Independent Contractor?

- Significant issue that has garnered attention on national and state level as potential source of revenue
 - ✓ IRS
 - ✓ Division of Employment Security
- Different agencies may use different criteria to determine employee vs. independent contractor
- Existence of an independent contractor agreement does not necessarily control

IRS – Who is an employee?

- IRS – Control Test
 - ✓ Behavioral Control
 - ✓ Financial Control
 - ✓ Type of Relationship
- Consequences of Misclassification
 - ✓ Back taxes
 - ✓ Penalties

State Law – Who is an Employee?

- Missouri Division of Employment Security
 - ✓ 20 factor test
- Illinois Division of Employment Security
 - ✓ Control / discretion over the performance of services?
 - ✓ Outside the usual course of business or place of business?
 - ✓ Independent trade, occupation, profession, business?
- Consequences of Misclassification
 - ✓ Payment of unpaid unemployment contributions
 - ✓ Penalties
 - ✓ Personal liability (Illinois)

“Contributing Factor” in Missouri

- Daugherty (Mo. 2007): Missouri Human Rights Act claims determined by “contributing factor” test, not the “motivating factor” test used for Title VII claims
 - MAI 31.24: was the protected classification (race, age, disability, religion, etc.) a “contributing factor” in adverse employment decision?
- DeWalt (E.D. Ct. App. 2013): No definition of “contributing factor” for the jury

“Contributing Factor” in Work Comp Retaliation Claims?

- “Contributing factor” only applies to MHRA claims
- Templemire (W.D. Ct. App. 2012): Missouri Supreme Court held in Hansome (1998) that work comp retaliation claims require “exclusive causal relationship,” so bound by that precedent – no contributing factor
- Supreme Court denied transfer, but probably will reconsider at some point in the future

Defending a Charge of Discrimination: Time is of the Essence

- Farrow (Mo. Aug. 27, 2013): untimely charge of discrimination not a bar to discrimination lawsuit where employer did not file a lawsuit seeking judicial review of MCHR's right to sue letter or raise timeliness issue in position statement
- Before Farrow: okay to raise timeliness in responsive pleadings
- Going forward: raise timeliness in position statement. If right to sue letter issued incorrectly: consider beating former employee to court

Questions?