

Ogletree
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presented by
OGLETREE DEAKINS'
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FMLA & ADA Compliance

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FMLA v. ADA

FMLA

- Provides up to 12-weeks of job-protected leave only for eligible employees (per leave year)
- Applies to both work and non-work related injuries
- Quantity of work may need to be adjusted due to protected leave
- Quality of work not impacted
- Requires employers to provide unforeseeable and foreseeable intermittent leave
- Applies to both work and non work-related injuries
- **Does not allow employer to consider their business needs in approving leave***
- Prohibits retaliation

ADA

- Employer must reasonably accommodate qualified applicants and employees
- Accommodation may involve foreseeable time off work or workplace accommodations
- No statutory time limit on leave
- Applies to both work and non work-related injuries
- Allows employer to consider its business needs
- Prohibits retaliation



FMLA/ADA: A Game Of Hot Potato

FMLA Compliance:

- Who in your organization is tasked with FMLA notice and tracking compliance? Or do you use a TPA?
- Who in your organization is tasked with ensuring prohibitions against FMLA retaliation and interference are followed?
- Who in your organization is tasked with investigating potential FMLA abuse?
- Are supervisors trained on FMLA policy – and what constitutes notice of a potential FMLA absence?
- Are supervisors trained on the consequences of not reporting or protecting potential FMLA absences?

FMLA/ADA: A Game Of Hot Potato

ADA Compliance:

- Who in the organization communicates with employee regarding the expiration of their FMLA leave?
- Who engages in the interactive process with employees to explore accommodations?
- Who in the organization makes decisions related to ADA accommodations?
- Who and how are ADA decisions communicated to an employee?
- Are ADA decisions documented and summarized in a privileged manner?

A blue binder with a white label that reads "EMPLOYEE HANDBOOK" is the central focus. It sits on a wooden desk. To its right is a stack of papers with a yellow binder clip. In the foreground, there are several other binder clips: a blue one on the left, a yellow one in the center, and a silver one at the bottom left. A pen is also visible at the bottom left. The background is a plain, light-colored wall.

EMPLOYEE HANDBOOK

Take a Fresh Look at Your Written Policies

Munger v. Cascade Steel Rolling Mills, Inc. (Oregon 2021)



Employer posted notices and emailed FMLA policy to employees. Policy clearly stated that employees must call third party FMLA administrator to report/request FMLA and notify supervisor of absences.



Employee submitted doctor's note and reported absences to employer. Employer reminded employee via email that he needed to contact administrator to request FMLA. Employee did not. Employee terminated under point policy



Court upheld employer's right to require employees to comply with specific written FMLA notice requirements – even dual reporting requirements

***Miceli v. JetBlue Airlines* (1st Cir. January 28, 2019)**

- Employee was certified for intermittent FMLA due to her own medical condition.
- Employee reached 10 points under attendance policy (calling for termination). She complained that FMLA TPA had not approved several absences as FMLA.
- *Employee sent email 2 months earlier to manager saying that she hoped: “for those of us with disabilities to be met with compassion and reasonable accommodations made if difficulties are faced.”*
- Employer had written accommodation policy with dedicated accommodation request process that employee did not utilize.

Was JetBlue On Notice Of The Need For An Accommodation – What The Court Said

- “Although [Miceli] had access to these materials, she chose not to travel along either of the designated avenues”.
- “[Miceli’s] complaints about [the TPA’s] alleged incorrect coding of her absences and her email noting that people with disabilities are entitled to reasonable accommodation are far removed from any specific statement that JetBlue could reasonably ... interpret as a request for a specific accommodation.”

Lessons Learned



Consider how you are communicating your FMLA and ADA policy (and retention of and proof of the same)



Update policy to include a specific procedure to follow to request/report FMLA absences or request ADA accommodation



Require employees to sign off/acknowledge the FMLA and ADA policies



Train and educate supervisors

FMLA/ADA Reminder

EEOC recently sued employer who failed to engage in interactive process and/or provide accommodations under attendance point policy to employees who exhausted FMLA but still needed intermittent absences.

“[The EEOC] remains steadfast in ensuring employers engage in the interactive process”

Don't forget about ADA obligations when FMLA exhausted or employee not eligible

**KS CLE Code:
DOROTHY**

Do We Really Have To Send Out The FMLA Notices If We Give The Time Off & Do Not Take An Adverse Action – No Harm No Foul?



March 14, 2019 U.S. DOL Opinion Letter (and September 10, 2019)

- “An employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA ... even if the employee would prefer the employer delay the designation.”
- An employer may provide more generous leave benefits (than required by FMLA) by allowing employee to take more leave after (not before) FMLA is exhausted.

Hannah P. v. Coats, et al. (4th Cir. February 19, 2019)



Lessons Learned



Confirm employee is FMLA eligible.



For any potentially qualifying FMLA absence, timely send BOTH the Notice of Rights & Responsibilities and the Designation Notice (whether work related or not).



If employee drops the hot potato (with medical certification), consider whether or not to go ahead and designate as FMLA (employer has the choice*).



Employee cannot knowingly waive their FMLA rights unless or until they receive both notices.



Retain copies of all FMLA notices sent in employee medical file.



Automatic Exclusions Under the ADA

***Siewertsen v. Worthington Industries* (6th Cir. 2019)**

- Deaf employee was demoted from shipper position after employer advised by 3rd party expert that not being able to hear was a safety risk for those operating forklifts.
- Employer claimed essential function was ability to hear audible commands.
- 6th Circuit upheld jury verdict in favor of employee in ADA failure to accommodate claim.

Woodruff v. Ohio Department of Transportation (S.D. Ohio 2021)

“Legal opioid use is not disqualifying under federal law so long as essential functions can be performed safely notwithstanding use.”

“An employer cannot automatically disqualify [employee] because of opioid use without considering if there is a way for [employee] to do the job safely and effectively.”

“To remove [employee] for safety reasons, the evidence must show that [employee] poses a significant risk of substantial harm” – not simply remote or speculative risk.

Wirtes v. City of Newport News **(4th Cir. 2021)**

Police detective requested an accommodation for his back relating to heavy belt detectives were required to wear. Detective requested to wear a shoulder strap instead of belt.

Employer instead offered detective transfer to another position (with same pay). Detective eventually accepted transfer and resigned.

“Every circuit court to have addressed this issue has concluded that an employer fails to accommodate its qualified disabled employee when it transfers that employee from a position they could perform if provided with reasonable accommodations to a position they do not want.”

ADA Reminder

Follow the accommodation priority list:

- **Is there a reasonable accommodation available in the employee's current position?**
- **Is there an open, available position that employee is qualified to perform?**
- **Is a leave of absence reasonable?**

Lessons Learned

- Do not take adverse action against disabled employee unless or until you have concluded they cannot perform essential functions with or without reasonable accommodations in their current job.
- Do exercise care in how you define essential functions and safety hazard.
- Blanket exclusion rules based on type of disability or accommodation that do not allow for individualized assessment are rarely defensible.
- Do not make assumptions – might have to give an accommodation a try.
- Do not leave employee out of the individualized assessment.
- Follow the accommodation priority list.

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TOTO**



How Long is Too Long for an Extended Medical Leave?

Forge v. Sisters of Charity Leavenworth (D. Kan. 2019)

- Employee took 3 months of FMLA. Then requested 2 additional 30-day extensions (5 months).
- 3rd note: ***“Sara is 90% recovered but needs an additional 30 days for therapy. I anticipate Sara will be able to return at that time.”*** SCL was actively recruiting for a number of positions.
- Court: SCL “did not have an expected end date ... or a reasonable estimate of when plaintiff could resume duties.”
- As a matter of law, SCL not required to grant additional 30 days. AND, opined, that 2 prior extensions also not required by ADA.

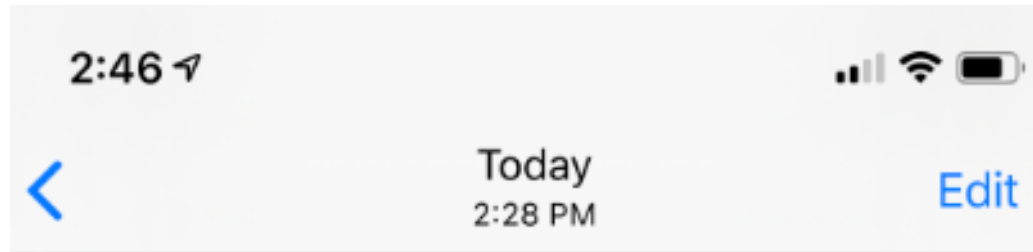
Lessons Learned

- **Jurisdiction matters!**
- Don't default to relying on business needs unless or until you determine that leave is for a definite period of time and that request is reasonable
- After FMLA expires, carefully consider what legal obligations you have and approve extension in only 30-45 day increments
- Ask HCP to fully explain reason for change in RTW dates

Margaritas and FMLA?



Text Messages Between HR



Messages



KF

“Is he serious!?” 2:34 PM >

SE

OMG 2:40 PM >

You Be The Jury

Can company show that it made a reasonably informed and considered decision (“honest belief defense”)?



Reminders

- In potential FMLA abuse situations:
 - Be deliberate and timely
 - Do not overreact
 - Remember there could be a legitimate explanation
 - Consider all relevant information
 - Give employee opportunity to respond to allegation



A panoramic view of the Kansas City skyline under a clear blue sky. The foreground shows a lush green park with a winding river, trees, and a paved path. The middle ground is a dense urban area with various buildings. The background features several prominent skyscrapers, including the One Kansas City Place and the Bank of America Tower.

THANK YOU!

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