



Stop the Madness! Effective Ways to Protect Your Organization Against FMLA Abuse

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Presented by



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Agenda

- Intermittent FMLA Leave: There is Hope, Right?
- Intermittent ADA Leave: Ensuring That Employees Perform Essential Job Functions
- Effective Use of the Honest Belief Defense
- The Manager:
Destroyer of Good HR Practices



Intermittent FMLA

There is Hope, Right?

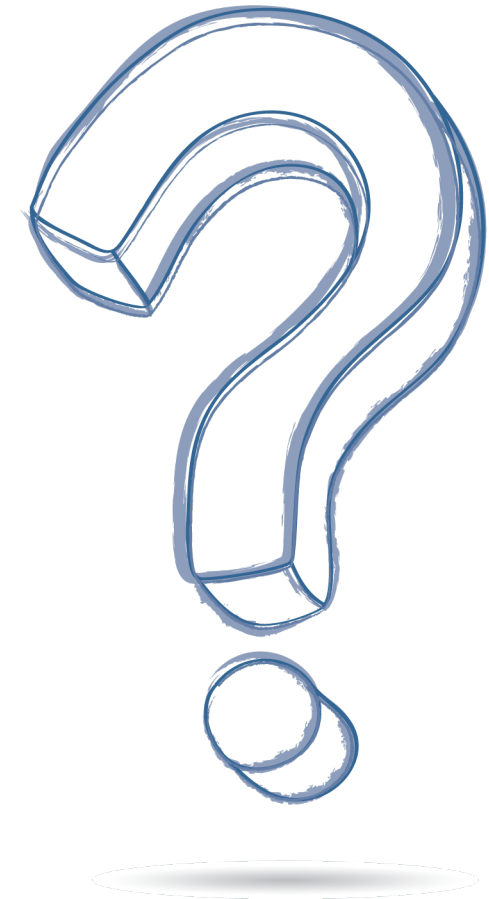
Oscar the Operator is Often Out of the Office

- Oscar, warehouse operator, Avascular Necrosis
- Needs leave when condition flares up (Certification 3x/mo., 1 day each)
- Here come the issues:
 - Occasionally reports his absences after shift starts (rule = 1 hour before shift)
 - Absent 3 of the past 8 Fridays
 - Additional absences, but documentation is shoddy
 - Used FMLA for vacation denial
 - Absent 5 days (on 5 different occasions) over the past month for FMLA condition
 - Leaves work after he receives certain assignments (“If you assign me to that rotation, I’m taking FMLA . . . “)



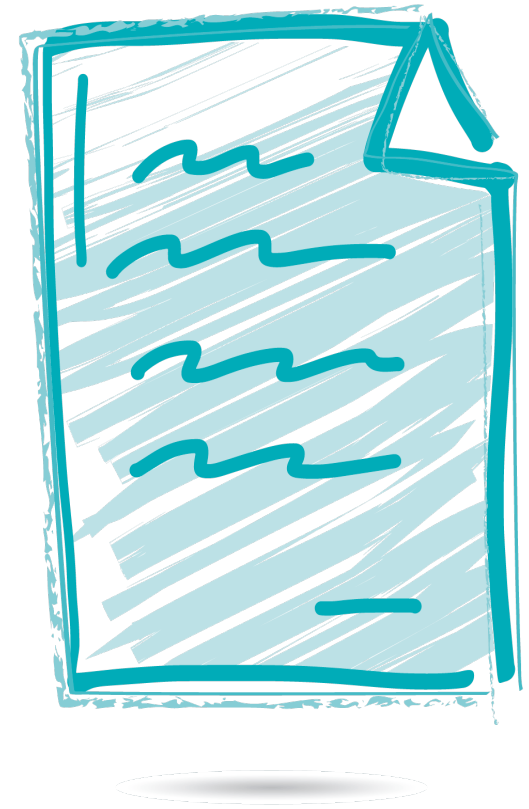
So Many Issues. Where Do You Start?

- Oscar:
 - Reports absences late
 - Potential non-FMLA absences here?
 - Pattern of absences (Fridays)
 - Suspect use of FMLA after vacation denial
 - Increased frequency of absences
 - Is a bit of a jerk (“If you assign me to that rotation . . .”)
- Where do you start?



Decide How Aggressive You Want To Be

- *Key question: Who's taking the call?*
 - What is your strategy for employees reporting their absences? (Centralized v. decentralized)
 - Fairly broad right to talk directly to employee, have right to know:
 - **Medical facts:**
 - What is the reason for absence?
 - Treatment or unplanned absence?
 - Have you previously taken leave for this reason?
 - Time periods involved (start and expected return)
 - Questionnaire/script: Train managers to use effectively



Call-in Policy – Particularly for Unforeseeable Absences

- Employee must comply with your usual and customary notice and procedural requirements for requesting leave *absent unusual circumstances*
 - What’s is your call-in policy?
 - Foreseeable (30 days in advance)
 - Unforeseeable: Call “x” hours before shift
 - If employee does not follow, FMLA may be delayed or denied
- What’s the script when the employee calls in late?



Meet With the Employee To Set Expectations

- At the time leave is approved, meet with employee:
 - Expectations for reporting absences, walk employee through call-in procedures, sign-off on process
 - Review FMLA policy (e.g., use of concurrent paid leave, recertification, outside employment, fraud)
 - Specific discussion about planned medical treatment
 1. Scheduling expectations should be set up in advance
 2. Once local HR/manager know of potential appointments, scheduling expectations should be set in advance to avoid surprises
 3. Advise employee of notice requirements and enforce them
 - What is appropriate manager response for a tardy request?
 - ✓ What are the doctor's office hours?
 - ✓ Can this be scheduled around work day? If not, why not?



[EMPLOYER LETTERHEAD]

ACKNOWLEDGMENT OF ABSENCE

I, [Employee Name], certify that my absence on [Date(s) of absence] was due to the reason stated in the Medical Certification or Leave of Absence Request Form I submitted to the Company on [Date] in connection with my Family Medical leave.

I understand that absence taken due to the serious health condition set forth in the Medical Certification or Leave of Absence Request Form will be counted against my leave entitlement under the FMLA and the Company's personnel policies. I also understand that providing false or misleading information about my absence will result in disciplinary action, up to and including immediate termination.

Signature

Employee Name (Please print)

Date

*Personal
Certification
upon return
from any leave
of absence*

FMLA Recertification: Suspicious Pattern, Exceeding Frequency

Remember Oscar: 3 of 8 Fridays, 5x in past month, used FMLA for vacation day

29 CFR §825.308 (Recertifications)

... the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern



FMLA Recertification: Suspicious Pattern Format

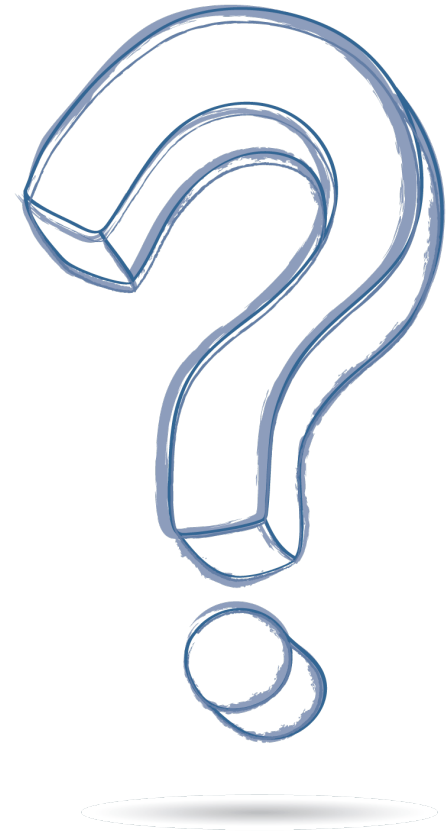
Goals:

- At the very least, notify employee that pattern has been observed
- Some employees will refuse/fail to complete – **basis for denying leave**
- Some medical providers will refuse to affirm that the suspicious pattern is consistent with the employee's medical condition and need for leave – **basis for denying leave, within parameters of the inconsistency**
- If recertification requested at a 12-month increment (*i.e.*, at the “annual” medical certification stage – see 29 CFR §825.305(e)) and medical provider affirms suspicious pattern, second/third opinion process can interrogate the pattern

FMLA Recertification: Suspicious Pattern Format

SAMPLE QUESTIONS

- Is Employee's absence pattern detailed above consistent with his/her serious health condition and need for leave? _____ Yes _____ No
- If you answered "Yes," please explain why the Employee's absence pattern is consistent with his/her serious health condition and need for leave:
- If you answered "No," please explain why the Employee's absence pattern is not consistent with his/her serious health condition and need for leave:



Failure To Respond To Employer's Inquiries

- Let's assume Oscar does not provide a response
- How does the employer respond?
 1. Can FMLA leave be denied and discipline issued?
 2. If so, what do you discipline?
 - Going forward only?
 - Discipline previous absences? But how far back?



What do the regulations tell us?

Options For Denying Leave/Issuing Discipline

1. Deny **all leave** covered by the recertification request (29 C.F.R. 825.313(c))
2. Deny all leave time that **exceeds** the initial certification (giving credit to the frequency/duration provided in initial certification)

What if employee returns recertification and doctor doesn't give the employee a free pass?



- Decide who is taking the call and how aggressive you will be. ***Set the Stage!***
- Importance of call-in policies and how to address late call-ins
- Importance of initial discussion after approval
- Personal certification
- Use of recertification: Clear approach to patterns and exceeding frequency

Let's Recap

***Intermittent ADA Leave:
Ensuring That Employees Perform
Essential Job Functions***

Keith Is Always Late For Work

- Meet Keith. He works for you.
- He's been late for work **60 times in two years.**
- But he says that's due to his disability and you should accommodate him.
- What disability? Clinical depression and anxiety disorders.
- What did he say when he called in for his absences?



Keith Texts His Manager To Explain Why He Was Late...

Texts to his manager include:

- I'm on my way but going to be past the 10 minutes [grace period], had [yoga] class this morning.
- I forgot my phone so I had to turn back to get it.
- Mental hijacking
- A [viral] bug
- Stuck in traffic!
- Waiting for stalled buses!
- I had to pull over, I feel ill!
- I got lost in the center downstairs
- Just grabbing coffee before I come up!
- Delayed train!
- More traffic jams!

Maybe. Not Always.

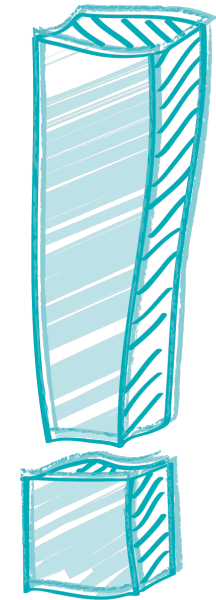
“Full-time presence at work is **not an essential function** of a job simply because an employer says that it is. . . . An employer must tie time-and-presence requirements to some other job requirement.”

Hostetler v. College of Wooster (6th Cir. 2018)



Good News!

- Employer won in Keith's case!
- Court:
 - Regular and predictable on-site attendance is an essential function of the position
 - “Maintaining appointments and showing up on time [are] essential functions” of his job. “He must arrive to work predictably and promptly.”
 - “No evidence that a reasonable accommodation would enable him to fulfill the essential functions of his job.”



Albright v. Trustees of the University of Penn. (E.D. Pa. Oct. 18, 2019)



Employees who are “chronically, frequently and unpredictably absent may not be able to perform one or more essential functions of the job.”

EEOC Guidance: Applying Performance and Conduct Standards to Employees with Disabilities

More Good News!

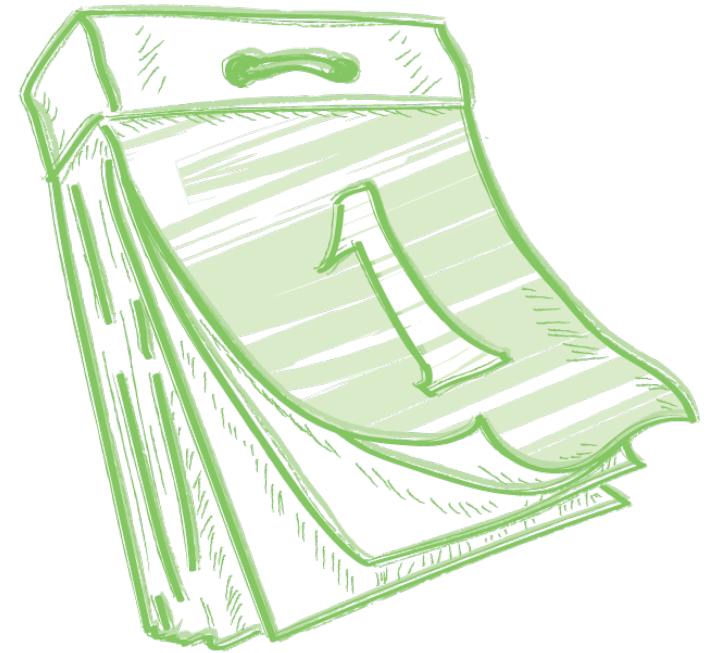
Most courts agree: *regular, reliable attendance is an essential function*

- Unreliable attendance not reasonable for cosmetics counter employee. Significant that “discipline for lateness began before ...her medical leave.”

Vitti v. Macy’s Inc. (2nd Cir. Dec. 21, 2018)

- Employer wins where employee absent 59% of the time = nowhere near “reliable”

Popeck v. Rawlings Co. (6th Cir. Oct. 16, 2019)



And It's Not Just Attendance!

Courts have upheld employer's refusal to excuse essential functions in:

- **Overtime.** Working more than eight hours/day essential to truck driver's job. 40 hour maximum not reasonable if job demands more.

Faidley, 889 F.3d 933 (8th Cir. 2018) (en banc)

- **Telecommuting.** Rejects attorney's request to work from home. "A general consensus exists among courts that jobs often require face-to-face collaboration."

Yochim v. Carson (7th Cir. Aug 15, 2019)

- **Reassignment.** The "ADA...does not require an employer to reassign a qualified disabled employee to a vacant position when [it] would violate...[their] policy of the employer to hire the most qualified candidate." Caution: significant circuit split on this issue.

EEOC v. St. Joseph's Hosp., Inc., (11th Cir. 2016)

Suggestions

Helpful points of consideration from the EEOC:

- Standard: employer's "judgment as to which functions are essential"

The EEOC also considers the:

- Actual work experience of employees
- Time spent performing a function
- Consequences of not requiring that an employee perform a function and
- Terms of a collective bargaining agreement

EEOC Guidance: *Your Responsibilities as an Employer* (Aug. 1, 2008)

Dealing with the FMLA Abuser

Gone Fishing

- Tom, hernia and reflux
- Certification: flare ups 1-2 times/mo.
- October 19: Urgent care for stomach pain
- NP placed Tom off work through October 22
- October 21: Pre-planned fishing trip with work colleagues
 - Goes on the trip
 - Video of him taken, “I’m not out here.”
 - Video posted to Facebook
- You know is abusing FMLA leave, but can you prove it? Do you need proof?



Honest Belief Defense

What's Honest Belief, again?

- **Some courts:** no job protection if there is an honest suspicion of abuse

“Honest belief/suspicion” standard:

An employer “need not conclusively prove that (the plaintiff) has misused her leave; an honest suspicion will do.”

- **Good news:** Even when employee is on an approved leave, the employer can take action against him/her!
- **Big caveat:** this comes from courts so (1) need to consider the facts on case-by-case basis (not easy) and (2) constantly changing.



The 2019 “Honest Belief” List

“Couldn’t speculate” why, on her *four* different FMLA certifications, there seemed to be “white out” used on parts of them ***Egler v. Am. Airlines, Inc.*, (E.D.N.C. Feb. 21, 2019)**

Was on FMLA for a shoulder injury and explained away how he bravely golfed while injured by telling HR “80 percent of your swing is legs and core” ***LaBelle v. Cleveland Cliffs, Inc.* (6th Cir. Sept 13, 2019)**

Often missed Fridays to get carwashes, haircuts and breakfast and, while out on his adventures, lost a trailing private investigator ***Prichard v. Hyundai Motor Manufacturing of Alabama, LLC*, (M.D. Ala. 2019)**

Posted threats on Facebook that a coworker whom he called a “SCUMBAG” was going to “waltz[] down the dock [and] have an accident,” or was it, ***Shinn v. FedEx Freight, Inc.*, (3d Cir. Aug. 22, 2019)**

Couldn’t recall whether the recorded Facebook video of him fishing and saying “I’m not here!” was actually him or not. ***Dunger v. Union Pacific Railroad Co., et. al.* (C.D. Cal. June 3, 2019)**

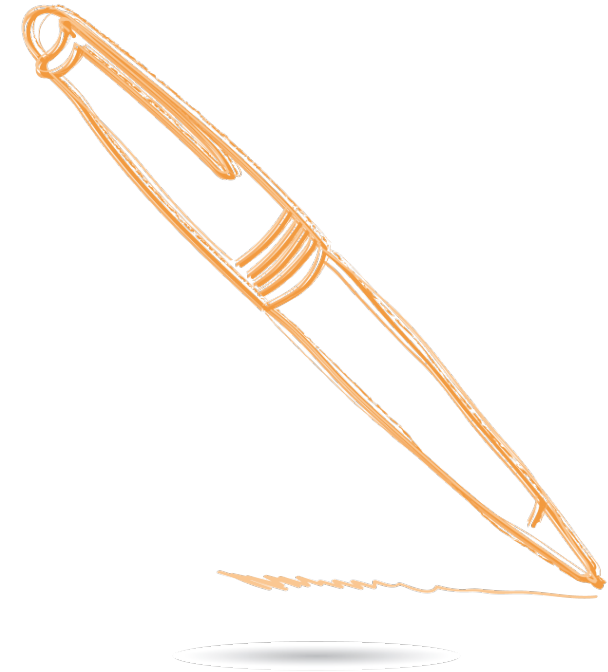
Honest Belief – Practical Steps

- Courts look for complete/exhaustive investigation
- Employers *lose* when there is no sense of “due process” or there is a rush to judgment
- What is a complete investigation of the facts?
 - Get complete facts, gather information, mindful of state law
 - Meet with Tom upon his return, and during meeting:
 - 1) Confirm his request for a leave of absence
 - 2) Confirm the need to be off work and unable to work during requested period
 - 3) Confirm his whereabouts
 - 4) Confirm he understands how seriously you take fraud
 - 5) Ask if he left the area during his leave, confront with reason for leave on Oct 21
 - 6) Confront with information
 - 7) Show Facebook entries if he denies
- Independent level of review?

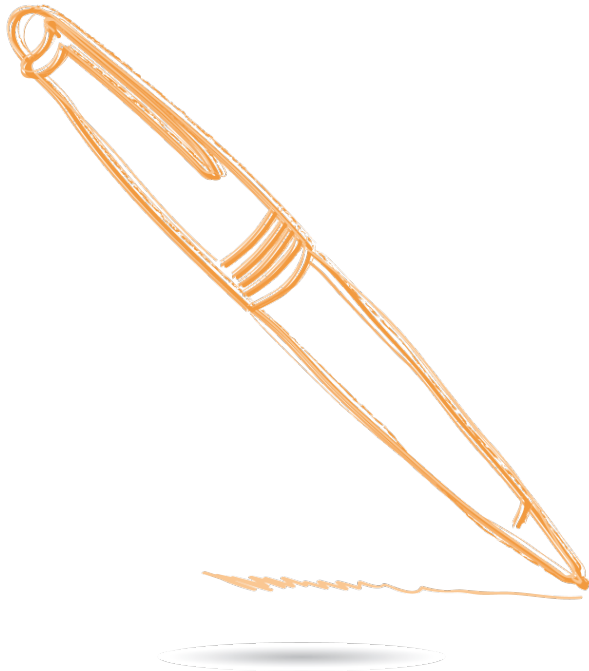
***The Manager:
Destroyer of Good HR Practices***

Watch Yourself With That FMLA Leave!

- Karen is a surgical technician
- Sometimes she goofs. Like:
 - She gave a surgeon a syringe with the wrong fluid. Oops!
 - She entered the surgery room unsterilized. Oops!
 - And often failed to respond to on-call requests. Oh, Karen!
- Her employer wrote her up and eventually terminated her for those goofs



Watch Yourself With That FMLA Leave!



- But Karen also had an FMLA leave she used intermittently.
- And that’s why she was fired, she said
- Her proof, she says, is:
 - A co-worker comment that she “**needed to watch herself**” regarding her FMLA usage
 - A supervisor asked her:
 - **to reschedule** her FMLA
 - if additional time off was “FMLA too”
 - That she was often written up right after using intermittent FMLA



[F]ront-line managers...sometimes engage in improper communication with employees about motives or personal lives, and it's exactly these types of behaviors that can lead to discrimination and wrongful termination claims and introduce liability for organizations.”

Helen Applewhaite, FMLA Branch Chief
Department of Labor

Well...

- Reminder: Karen says she was told she
 - “**Needed to watch herself**” regarding her FMLA use
 - Could consider rescheduling time
 - Was written up (close in time to FMLA usage)
- **What are the courts saying?** Employer lost where the employer said:
 - You’ve taken “too many days off.”
Troiano v. Cty. of Allegheny (W.D. Pa. 2017)
 - “You know...you’ve missed a lot of work.”
Coleman v. AmeriHealth Caritas (E.D. Pa. 2017)
 - “Not a good time to take leave,” and urges her to read the book titled, *No More Hysterectomies*
Drew v. Quest Diagnostics (S.D. Ohio 2012)



No! Not Here

Karen's termination was appropriate because:

- They documented her performance issues ***and just her performance issues.***
 - No mention of FMLA
 - No discussion of the challenges her time off caused
 - And that's why she was fired, she said
- They counseled her *nine* times about their expectations around her performance and the impact of failing to meet expectations

Bottom line: Employer's feedback was professional and unrelated to the FMLA

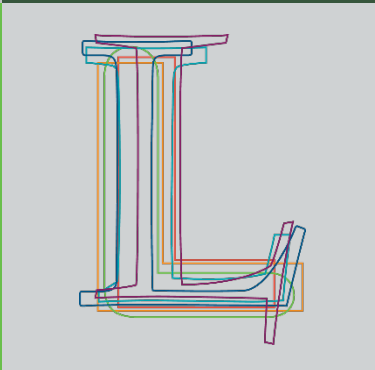
Beckley v. St. Luke's Episcopal-Presb. Hosp. (8th Cir. May 16, 2019)

Suggestions

- **Simple. Be a pro! Keep it professional.** Discuss the job and its requirements, not the medical condition and the need for leave (duh)
- That should happen in:
 - Responses to leave requests
 - Performance evaluations
 - Emails about the employee
 - Employment discussions
 - And everywhere else

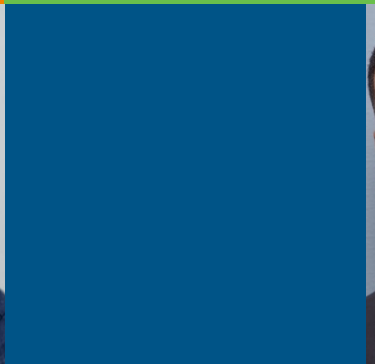
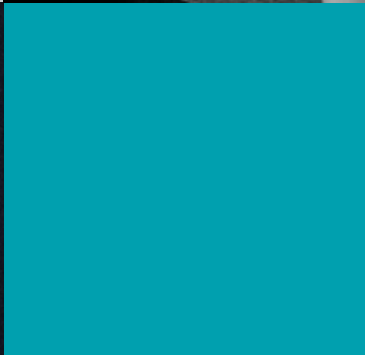
Remind managers that they can be held individually liable under the FMLA: Supervisors liable after denying leave beyond “temporary” period and telling employee she could take “only...one FMLA” leave

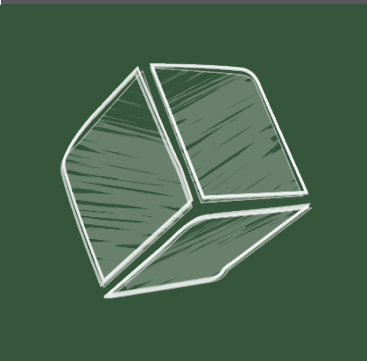
Aguirre v. State of California (N.D. Cal., 2017)



Questions?

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