ASSOCIATION OF CORPORATE COUNSEL

Title: The FMLA After 14 Years - - Managing Family and Medical Leaves of Absence: Statutory Entitlements, Employer Commitments, and Reasonable Accommodations
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Presented by ACC's Employment & Labor Law Committee, sponsored by Jackson Lewis LLP
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Moderator: Christine Williams, Senior Counsel, Northrop Grumman Corporation

(Chris Williams): Thank you very much. Good morning to those of you on the East Coast – excuse me, good afternoon to those of you on the East Coast, good morning to those of you who are a little farther west, and welcome to the ACC Webcast, "Managing Family and Medical Leaves of Absence: Statutory Entitlements, Employer Commitments, and Reasonable Accommodations." Today's Webcast is sponsored by ACC's Employment and Labor Law Committee and Jackson Lewis LLP.

My name is (Chris Williams). I'll be your moderator for the Webcast, and I'd like to point out a couple of things that should be on your screen.

First of all, over on the left-hand side, you will see under "Links," number one is a Webcast evaluation. We'd appreciate it very much if at the end of the Webcast you would click on that link and if you would fill out the evaluation, it gives us useful information to improve future Webcasts. Also under that is the "Questions Box." You can type a question in that box at any time during the Webcast; we'll answer as many as we can. And after you type your question in that box, just hit "Send" and we will be able to see your question.

Now, we have with us today two very knowledgeable and experienced speakers. Frank Alvarez is a Partner in the White Plains, New York Office of the national workplace law firm, Jackson Lewis LLP. Frank is the National Coordinator of Jackson Lewis' Disability, Leave, and Health Management Practice Group, which assist employers in complying with the challenging array of federal and state laws that protect injured and ill employees, the most notable being the Americans With Disabilities Act and the FMLA. He is also the author or the new FMLA InfoPAK being published by ACC.

Eric Tilles is Assistant General Counsel and Manager of Ethics and Compliance of Arkema, Inc., where he is responsible for providing legal advice concerning all aspects of employment, labor, employee benefits, ethics, and compliance. He has been a lecturer (at law at) the University of Pennsylvania Law School where he taught employment law, and he's also the Chairman of the Delaware Valley ACC Chapter's Ethics and Compliance Committee. He clerked for Chief Judge A. Leon Higginbotham at the U.S. Court of Appeals for the Third Circuit and for Senior Judge James L. Latchum in the District of Delaware. Mr. Tilles received his Bachelor of Science Degree from the New York State School of Industrial and Labor Relations at Cornell and his Law Degree from the University of Pennsylvania Law School.

Just another reminder, you can type your question in the question box at any time, and we will answer as many of those as we can during the Webcast. I've already advised you of whom our panel members are.

Frank, I'm going to turn it over to you to give us our introduction.

Frank Alvarez: Thanks very much, (Chris) and hello to everyone out there. I'm very happy to be here today talking about the FMLA in particular, but more specifically, I think everybody who comes to this call is really focused on the larger issue of leave management. Leave management has really become a major issue for employers. It's fascinating in the sense that not too long ago when many of us started our careers as lawyers, there was no FMLA, there was no ADA, and the state law protections were rather limited.

Today, we deal with, on a day-to-day basis, a very challenging puzzle and array of federal and state laws and regulations, and I'm sure many people listening to this call realize that the calls you get from your clients are really situation driven and you need to come up with the right answers to what people have in the way of entitlement and obligations in – with respect to leave.

What we really wanted to focus on in the context of this introduction is that, while we'll be talking about the FMLA in some great detail, it has to be viewed within the context of the overall leave management challenge and absence management challenges because it really does no good to get an FMLA claim all right and to lose an ADA case. And there are many institutional challenges to doing that, including the lack of technology or training that managers have to supervise, you know, absences that pop up on an occasional basis.

We'll be talking a lot about intermittent FMLA leave, which is a thorn in everybody's sides. But just from the get-go, we wanted to emphasize that this is part of a larger issue, and you need to look at it from the perspective of analyzing what all your legal obligations are.

On Slide 5, we basically provide kind of a framework, an analysis of how you should go about dealing with absence management issues, and I submit to you that if you follow this simple three-step approach that you will be in a much better position to analyze all of your legal obligations. And what the approach is rather briefly is that the first thing you should be doing about it is thinking in the frame of what entitlements exist to be absent from work.

Most notably, the FMLA or state FMLA or pregnancy leave laws, they essentially impose a strict liability theory that if somebody's entitlements – entitled to those absences and leave, you must provide it. And hardship is really not an issue. There (are a key employee exception) under the FMLA, but I've yet to see it used in practice effectively by an employer. So the first thing you should be thinking about is what entitlements exist.

The second thing, once you've fulfilled all those entitlements, you should be thinking about is what commitments you made, because most of the employers I deal with on a day-to-day basis actually provide more generous policies than what is absolutely required under the FMLA. And to fail to follow those policies on a consistent basis will yield a disparate treatment or retaliation claim. So, that's the second question you should be asking yourself.

Notice I haven't mentioned really the ADA at this point because you are really trying to take care of most of your issues through the entitlement concept and through your policies. The ADA, though, comes in, in step three. In step three, you need to consider, once you've exhausted all entitlements and leave commitments that you make under your policies, whether any additional time off may be required under the ADA or various state disability discrimination laws as a reasonable accommodation.

And here what we're really focused on is whether additional unpaid but job-protected leave can be provided and whether doing so poses an undue hardship. And essentially here where the law has gone is whether the leave that's needed beyond the entitlement and beyond the commitments is one that's sought for a definite or indefinite duration, but there is some case law in the First Circuit and in the Sixth Circuit that calls into question whether even a leave for an indefinite duration is reasonable. And so you need an individualized assessment process at the end of your leave policies to determine whether additional leave is appropriate and whether it poses an undue hardship.

So, that by frame of reference is the takeaway that you should all be thinking about even as you go through FMLA. We don't want you to have blinders on. We want you to have this peripheral vision so that you get to the end of the leave management situation in one piece without any legal issues at all.

(Chris Williams): Thank you very much, Frank. Eric, you're going to talk to us a little bit about the basics, right?

Eric Tilles: Thank you, (Chris), and thank you, Frank. I'm going to follow up with Frank's recommendation of following the three-step approach. And in line with that approach, we're going to start the real substantive discussion today on the FMLA basis. Not going to – hopefully not going to spend a lot of time on the basics. We'll have time towards the end of the talk to get into some more of the developing case law and potential action by the Department of Labor.

At any rate, the FMLA basics – you start off with, you know, who are eligible employees. And there the rules are relatively simple. You need somebody who's been on payroll for a calendar year. The courts have made clear that that's – that that is cumulative time, meaning that if somebody works for you for two months in each of six years, that will equal twelve months, and so they will meet that requirement. And then, somebody who's worked for you for 1,250 hours in the prior twelve months before requesting leave. That's the basics for eligibility.

Somebody who is eligible, then, can accumulate and have a balance of unpaid leave for up to twelve workweeks. And when we say "unpaid," what we mean is that the law doesn't require you to pay it – pay for that time; however, we'll discuss later, sometimes there are policies and procedures that employers will put in place so that employees actually do get paid for that time, for example, by exhausting vacation pay.

Employees receive or receive an entitlement for the twelve workweeks in a twelve-month period for a number of reasons. The first is birth, adoption, or foster care of a child, meaning, you know, they take responsibility for a child in some way. And that will trigger the twelve-week entitlement. Second, to care for a child, spouse, or parent with a serious

health condition. And third, for the employee's own serious health condition that renders the employee unable to perform the functions of his or her job.

Now, the phrase "serious health condition" unfortunately has not been given the substantive meaning that most people thought that it should receive. And if you take a look at the Department of Labor regulations, some parts of the definition I think everybody accepts as being fully legitimate, you know, such as in-patient care, given the purposes of the Family and Medical Leave Act care, for pregnancy and prenatal care. However, other aspects of the definition relate to, for example, somebody who is ill for more than three days, goes to the doctor and gets a continuing regimen of treatment, which could simply be antibiotics.

Without going through in detail what those items are, I'll just let you know that if you want to review those definitions, they can be found at Section (825114) of the CFR. Now, the leave doesn't have to be taken all at one time. It can be taken intermittently or on a reduced schedule. Generally speaking, when we say, "reduced schedule," we're talking about a schedule where the employee knows that they're going to be out on a regular basis. Dialysis or chemotherapy are examples of that.

"Intermittently" means basically the employee calls in whenever the underlying serious health condition triggers, and I think many of us have seen that with regard to diabetes, migraine – those type of ailments. While somebody is out on leave, whether it being intermittent, reduced, or continuous, they are entitled to continue health insurance coverage.

Moving onto the paid leave aspects of the FMLA basis, as I said, it's up to the employer in terms of whether or not the – somebody on FMLA is going to be either required or given the option of taking accrued vacation or other paid time off. Now, if you provide short-term disability for employees, then that short-term disability will (be) the underlying pay for the FMLA leave until the short-term disability is exhausted.

Where short-term disability is exhausted or you're not providing it, it is then possible to require an employee to exhaust vacation while they're on leave. At the – what all this leads up to is the employee's right to getting their job back at the end of the leave. And what that means is that it may not be the exact same job, but it certainly has to be an equivalent position, same pay, benefits, working conditions, et cetera.

Employees have some general obligations. Specifically, the regulations say that employees must provide at least 30 days notice. Generally speaking, that is something that employers usually (do not get and the employees and the courts) are quick to rely on the permission that the leave is not foreseeable, employees must give notice as soon as practicable. Employees must make reasonable efforts to schedule intermittent or reduced leave so as to avoid undue interruption. And the regulations permit employers to require employees to recertify the need for a leave on a – no more frequently than every 30 days. In addition, employees are required to give notice of intent to return so that the employer has an appropriate amount of time to reintegrate the person back into the workforce.

In addition, going on to the next slide, there are some general obligations – employer obligations. We all need to have notice and posting of FMLA rights, we need to have a

policy spelled out in a handbook or other written document, we need to meet specific notice obligations, notifying employees that a leave is being treated as an FMLA leave, which rolls into the designation. And we also have to keep records for a minimum of three years of FMLA usage.

So, that was a very quick overview of FMLA basics. We'll get back into some of the meatier issues later in the presentation. And now, I think Frank is going to pick up on prohibited acts under the FMLA.

Frank Alvarez: Thanks, Eric. Under the prohibited acts, what I wanted to get across here is that there are really two theories of claims under the FMLA. One is for interference with an individual's right to take FMLA leave. And here, what's very fascinating about this and very challenging is that intent is really irrelevant. In the most basic FMLA claims, what's at issue is the fact that an employee was entitled to job-protected leave potentially on an intermittent basis, but was somehow penalized for taking that leave or was somehow denied those absences.

What's critical to understand here, because it's essentially what I consider a strict liability analysis, is that employers' have to spot those absences, and failure to spot those absences can result in liability. Intent here is generally irrelevant. So, what that means to you as a takeaway today is that, you know, you're only able to help your clients based upon the information that they give you about absences. So, they first of all have to spot all the absences, and if they've already penalized people for being absent because they didn't spot it, then you're going to have exposure as an organization under theory of interference with their entitlement to FMLA leave.

This is what has caused, in my opinion, so much challenge under the law because, you know, despite what people might think, it's very difficult for managers on a day-to-day basis to understand the nuances of what a serious health condition is and when somebody might be entitled to take that time off, it is really in operation an exercise where managers are seeing somebody who hasn't attended the problem, and they may not realize that the reason that the person's out is serious enough and may be – to be covered under the FMLA. In fact, it may be viewed, objectively speaking, and as not very serious at all.

But this goes to the definition of a serious health condition, including chronic conditions such as asthma or migraine headaches or conditions that – where somebody's absent for more than three consecutive calendar days and gets some sort of continuing treatment and care from a healthcare provider. Not easy stuff for people to spot as being protections under the FMLA, and they really lead to interference claims.

Eric Tilles: I agree, Frank. I think first-line supervisor sensitivity is, perhaps, the best defense here.

Frank Alvarez: You have to bubble up, you know, the absence. The call that the supervisor gets that, "I'm going to be out sick again today because I have asthma," or "My son has asthma," that's something that has to be translated at least into a sensitivity that there is a potential FMLA protection there, or else all the great legal advice that you can give is going to be essentially worthless because you're not recognizing the entitlement. It's not as if, you know, it's a classic EEO case where somebody's recognized because of their gender or their

age or their race. You know, this is – this is tougher, and because it's tougher, I think you need to be more aggressive in terms of the education that takes place.

Eric Tilles: Exactly. And then, communication is the key.

Frank Alvarez: Yes. And systems oftentimes, Eric, in many companies, don't allow for the communication. It could be that companies are fragmented in many operations around the country and they don't have people who they can give information to, and it just – or maybe it's the passage of time in order for the – how quickly that information bubbles up, but it's a real challenge to get that information, even if it's (spotted), up – transferred to the people who can give good advice.

The second theory, though, is retaliation. And this is one that's much – everybody on this phone, I think, is probably used to dealing with from Title VII or the ADA or ADEA. You know, it's essentially – it's a theory that you purposely punish somebody because they exercise their right. Here, intent is relevant. And I think the best advice to the people listening today is that you – like any other EEO retaliation risk, you have to be prepared to articulate a legitimate non-discriminatory explanation for what you are doing in terms of adverse employment actions following an employee's use of FMLA leave.

Eric Tilles: Of course, here, the normal non-discriminatory or non-retaliatory explanation of, "Well, we did it because the person had an absenteeism problem," doesn't really fly.

Frank Alvarez: Right. In fact, it may get some prejudgment for a plaintiff in a case. And it's interesting you raised that because I think what is – some employers still don't understand, or at least managers don't understand, is that learning to get by without somebody during an FMLA leave is really not a legitimate non-discriminatory reason under the FMLA because it's essentially punishing somebody for exercising their right. We often will see some cases that are problematic in the sense that they – the timing of a – of a disciplinary action is just about set, and then somebody goes out on leave. And those cases can be very challenging.

Employers have to make decisions about how to deal with those issues. And I personally think that, well, it may be bad form telling somebody that they're terminated while they're on leave, it's also bad form to – not to give some hint that there's a major disciplinary issue or performance issue that needs to be addressed when they return to work.

Moving to remedies, just briefly, I think the big thing to know here is that, you know, remedies under the FMLA are essentially (may call) type remedies with back pay and reinstatement. But the – there's also an opportunity for liquidated damages and attorneys' fees. And liquidated damages is, you know, essentially twice the amount of monetary damages caused by the violation, and it really follows the FLSA in that regard.

And the other point wanted to make was individual liability. Under the FMLA, there can be individual liability for corporate officers, managers, and supervisors who are involved in the case. And if that's not a motivation to have some training on the FMLA provisions, I really don't know what is. But that's – that is something I think people don't realize because they equate this with a Title VII type of a claim which there rarely is individual liability.

The next thing I guess I'll move to is what was really the meat of this presentation when we start talking about FMLA medication certifications and then we move to apply those concepts to day-to-day practice. I think our goal here was to raise some of the issues that are on a daily – day-to-day basis are the most, you know, practical ones that you're dealing with.

So, in the next slide, we start talking about FMLA medical certifications. And with those FMLA medication certifications, what you should know is that there is essentially three types of FMLA medical certifications. The first is an initial certification, and initial certification supporting the need for leave is one where you can certainly require it if somebody's employee is out for their own serious health condition or with a serious health condition of a covered family member. And the issue here that's different from second – from recertification's and return-to-work certifications, which we'll address in some of the other slides, is that the – you can get a second or third opinion on an initial medical certification.

So, the process, quite quickly, is that you would ask an employee to take what's commonly referred to as the WH-380 Form that the Department of Labor publishes. It's a certification of healthcare provider, and on that form, healthcare provide would have to identify the – you know, which category of the definition of (serious) health condition is prompting this employee or the employee's covered family member to be out of work.

And if there were a need to intermittent leave, they would have to state the medical reason for it. One of the problems is just the forms because I find – and Eric, I'm not certain if you've also seen this that, you know, these forms really don't give you as much information to make a meaningful, informed judgment about intermittent – the need for intermittent leave.

Eric Tilles: I agree. And I think it's at the point that was raised by a number of commentators in response to the recent Department of Labor request for information, that the forms simply just don't do the job sufficiently for putting employers on notice.

Frank Alvarez: Yes, and I know ACC filed their comments on behalf of its members and, you know, as did about 15,000 other entities. There were more than 15,000 comments that were submitted to the Department of Labor. And you're right, according to the 160-page report that has already been submitted in response (by) the Department of Labor, there's uniformity of opinion that the certification forms that are being used right now really don't help employers.

And keep in mind, another thing that's going on here is that the FMLA rules for medical certifications are different from the ADA rules for medication examinations ((inaudible)). So, theoretically, you can have an entitlement to get more information or to get a second opinion from a specific doctor of your choosing or a third opinion from a doctor of your choosing under the FMLA because it's – excuse me, under the ADA because it's job-related and consistent with business necessity, but the FMLA dictates certain rules that would restrict your ability to follow what the ADA would permit.

So, you have to, again, have peripheral vision in this way.

Eric Tilles: And then in addition to the ADA, you may have Workers' Compensation right – rights under the Workers' Compensation Act to additional information to help you evaluate the situation.

Frank Alvarez: Right.

Eric Tilles: So, you need to – you need to keep in mind all of the various regulatory (schemes) that a particular situation may be triggering.

Frank Alvarez: Right.

(Chris Williams): Frank, let me interrupt. I know we're going to save our questions mostly for the last ten minutes, but a question just came in that is absolutely on point here, and asks about whether an HR rep who handles benefits is not allowed to contact the medical provider for clarifications or confirmation once the employee submits the FMLA medical certification.

Frank Alvarez: A very good question. I was just going to mention this, that there're certain rules on clarification of healthcare, you know, of medical certifications. And the FMLA regulations say that the employer cannot contact the doctor, that the employer can retain a healthcare provider of its own choosing to contact the employee's healthcare provider with the employee's permission.

So, it is a limited right. It seems to me that employers routinely violate that provision in the sense that they have members of their organization contacting healthcare providers of the employee, sometimes with the employee's permission. But technically, that violates the FMLA regulations.

(Chris Williams): Thank you.

Eric Tilles: And you can see that that's specifically addressed at the bottom of the slide on the screen.

Frank Alvarez: Yes. One thing also to keep in mind with medical certifications – again, I mentioned the ADA rules, but you can have other parallel benefit systems in place. Might be Workers' Compensation, it might be short-term disability or salary continuation program. And keep in mind you can have more onerous type of requirements, you know, uniform policy for submitting medical documentation than would be permitted under the FMLA in order to get those benefits.

So, but, you have to set that up nicely by having some very clear guidelines of what's uniformly required. And if an employee fails to comply with those medical certification requirements, the response should not be to treat the leave as being unprotected. It should be that they might compromise their entitlement to those benefits, such as short-term disability or Workers' Compensation – whatever the case might be.

So, it's a – it's an important point that raises the issue of integration of certain benefit systems because what I see, Eric, I don't know if you see this as well, that employers are trying to simplify this by having integrated systems, but ((inaudible)) while they're doing

that, they're (also) – can't lose sight that there are certain protections that exist independent of (FTD) or Workers' Comp.

Eric Tilles: And it's – I believe that that's exactly right. I have some of our locations where they have a very strictly monitored short-term disability policy where if they employee is out for more than one day in order to qualify for payment, they need to come in with a doctor's note. And if they don't do that, they don't get paid under short-term disability, regardless of whether they meet the fifteen days that you get under the FMLA. And it may be a (protected) leave, but it will then be an unpaid leave.

Frank Alvarez: Right. And just – yes, I know (Chris) has just underlined on Slide 15 some medical recertification rules. Just on this, keep in mind that if somebody's out for a long-term leave, you can get recertification on a reasonable basis. That's usually not going to be more frequently than every 30 days. There're some specific rules on that we won't harp on because we want to talk about what everybody I'm sure is waiting for – some more intermittent leave stuff. But it's – there are no second or third opinions on that recertification requirement.

And the last thing on this slide is also fitness for duty certifications, or sometimes referred to as return-to-work certifications. You can require under the FMLA that people submit a return-to-work or a fitness-for-duty medical certification if it's uniformly required for people who go out on leaves. It's referenced in your policies to show that it's uniformly required. And that you give notice of this at the – at the beginning of the leave, and it's done – and that notice can easily be provided through what's called the WH-381 Form, the employer response to an employee's request to leave form because it says there right on the – on the form that the employee shall or shall not be required to provide a fitness-for-duty certification at the end of their leave.

Eric Tilles: But this is a certification from their own physician.

Frank Alvarez: That's right.

Eric Tilles: This is not a certification from the employer's physician saying, "I clear this person – I certify this person for work safely." This is simply their own doctor saying, "From what I know about the job and the person's position, I'm going to return him to work."

Frank Alvarez: Right. And it also, you know, can get confusing because the ADA on the one hand may permit a second or third opinion, but you can't get a second or third opinion under this FMLA rule if they're returning from FMLA.

Eric Tilles: Correct.

Frank Alvarez: Essentially all the employee has to do is bring in a doctor's slip that says, "Released to return to work. No restrictions" and you cannot delay job restoration under those circumstances.

Eric Tilles: And honestly, this drives so many of my managers up a wall because we have some manufacturing locations where safety is our number one priority, and you have somebody who's been out with a hurt back or a slipped disc or something, their doctor signs off, "Sure,

I'll put him back to work lifting 50 pounds," and we're looking at the person saying, "Well, this is the fourth time in two years that they've been out." But under the FMLA, we may have no regress.

Frank Alvarez: Now, one thing in the – one nugget or nuance in the FMLA regulations on this point is that the regulations say that an employer cannot insist on anything more than a simple statement of the employee's ability to return to work. But that doesn't mean that you can't have a uniform policy subject to the FMLA requirements of insisting, which generally asks and requests employees to provide information that would substantiate in a meaningful way their ability to return to work.

I haven't seen any case where merely requesting that (creates) liability. But again, requires a lot of training and education and knowledge in the nuances because if you ((inaudible)) policy, all of a sudden somebody's going to want to run with it and you have to be real careful with that.

Eric Tilles: Yes.

Frank Alvarez: Moving to beyond the FMLA basics, Eric, I think you're going to take us through some of these real thorny intermittent and reduced leave schedule issues?

Eric Tilles: Well, I'll start us off.

Frank Alvarez: Yes.

Eric Tilles: As I talked about earlier under the basics, the FMLA permits employees to take leave on an intermittent or reduced leave schedule. I think most employers don't have a problem accommodating reduced leave schedules because you work it out with the employee ahead of time and you can basically do some planning.

The intermittent – the especially intermittent leaves that is on the schedule is the type of leave that really is a thorn in most employers' side and, Frank, I think you'd agree that that is where most of the comments to – in response to (VOO) requests for information (went).

Frank Alvarez: Oh, absolutely, I mean the – it was no question that the Department of Labor heard loud and clear – loud and clearly that employers were frustrated by intermittent leave, and it seems as though the theme, according to their report, that ran through much of the comments was the frustration with the – with the intermittent leave provisions.

Eric Tilles: And the reason for that is absolutely clear because if you have somebody who has a chronic serious health condition as that's defined under the (ranks), such as severe migraine headaches, they can take off every Friday or every Monday for the rest of their lives and never run out of FMLA. It is a sanctioned absenteeism (rate) of at least twenty percent.

Frank Alvarez: Yes, and I think what exacerbates the concern is that when you're dealing with intermittent leave, you're usually dealing with chronic conditions that are not obvious. I mean somebody's at work one day and they're out the next. Somebody's coming in on time and they're late the next. And people associate those types of activities oftentimes with abuse of your leave rights.

And it's hard for employers because of the medical examination rules that we just went through, Eric, for them to really combat that because there're so many restrictions on the type of medical information that they can get. They want to adopt a (trust but verify) approach, but they're frustrated to doing that. And what I've seen in my practice is that in some instances you can – this intermittent leave can become contagious in an organization …

Eric Tilles: Yes.

Frank Alvarez: … where people start realizing that if they have a specific type of note, an employer might find itself powerless to really make a discerning inquiry.

Eric Tilles: And what exacerbates the problem is you can't ask for a doctor's note every time somebody's absent for a single day if they've already been certified as having a chronic condition.

Frank Alvarez: Now, one of the things you can do, and we should just clarify here that the right to intermittent and reduced leave schedules exists when an employee has his or her own serious health condition that prevents them from doing their job and requires intermittent leave, but also if a covered family member has a serious health condition that prevents – that requires them to care for that family member on an intermittent basis.

But at least with regard to circumstances where it's their employee's own serious health condition, the regulations do provide an opportunity for employers where that leave is going ((inaudible)) the leave is going to be foreseeable usually for planned medical treatment to consider transferring an employee – that employee to an alternative position with equivalent pay and benefits, perhaps different duties, for the period of time that the person needs that intermittent leave if the transfer would better accommodate the expected anticipated need for leave.

So, that's one right that an employer might have. You know, I think there's a real question as to whether that right exists when you're taking intermittent leave to care for a covered family member. If you read the regulations, it seems to be limited to an employee's own serious health condition. The other thing that an employee has to do is to attempt to schedule appointments for planned medical treatment in a manner, which would minimize the disruption on the employer's operation. So, there's something there in terms of an opportunity to work with some employees who have a need for intermittent leave, but there's not a heck of a lot.

Eric Tilles: Yes, because I think most employers see the abuse situations where the employee is not going to the doctor. You know, they just wake up in the – or, you know, call the employer that morning and say, "My condition has acted up again and I can't come in." And then, the employer's left scrambling trying to cover.

Frank Alvarez: One other thing on this before we move to a case real quickly that illustrates some of the challenges, but keep in mind that the need for intermittent leave must be a medical need. There must be medical – you're only entitled to intermittent leave if it's medically necessary. So, oftentimes if you are going to attempt to have a second or third opinion or

some, you know, probing of the need, what you're focused on is the medical necessity for the leave on an intermittent basis. And what I find sometimes is that it's not only the need for the leave, but how much leave the employee's seeking.

I mean if they need to have – if they're having difficulty getting out of bed in the morning, does that mean they need to be out the whole day? So, that may be an area where some of the people on the phone can focus in on in terms of their practice.

Eric Tilles: All right. So, moving on to the next slide, we wanted to highlight the issue of "What is a serious health condition?" And what types of, you know, training and sensitivity do your frontline supervisors need? What types of communication lines do you need from your frontline supervisors to your HR and/or medical department? And, you know, the (Spangler) case, I think, is a wonderful example of the traps that are here for the unwary. Here you have a case where you have the plaintiff, the employee, and saying that she needed time off for depression again. And that that simple statement that "I need time off for depression again" was sufficient to survive some rejudgment in the eyes of the Eighth Circuit because that was a potentially valid request for FMLA leave.

How many and, you know, if you think about your own workplaces, how many of your frontline supervisors would immediately clue in to this throwaway comment and contact HR to say, "Well, is this going to be a protected leave?" And, you know, you have different Circuits applying different standards for certainly – and, you know, I'd like to hear your views on it, but Frank, do you think the Eighth Circuit is extreme in this conclusion?

Frank Alvarez: Well, I really don't think it's extreme, I don't think it's too much of an aberration because, you know, one of the things they look to is the history that was going on here. And, you know, this person had been out repeatedly over a period of years for medical reasons, and they – you know, they – it seems to me that there's a movement in the cases where they're holding employers accountable in somewhat of a distressing way for the totality of knowledge that's out there based upon the pattern of absences and the information that they're getting.

You know, it really is a hard thing for employers to do, but I don't think that (Spangler) is really an aberration. I also found what's fascinating about this case – what's so instructive about the case is that they won the ADA claim and lost the FMLA. The court accepted the fact that answering inquiries from other banks regarding cash services and, you know, being there to be a customer service type of person was an essential function. You know, so, it really did create a hardship on the organization, which ended up helping them win the ADA claim. But they lost the FMLA claim because it's an entitlement theory.

So, going back to what we said earlier, Eric, I think that this is a case that illustrates that you have to have that peripheral vision on both the FMLA and the ADA.

Eric Tilles: I agree. Moving on to our last slide concerning beyond FMLA basics, I think we've already addressed the no-fault attendance policies and how you can't hold an absence – a protected FMLA absence against an employee for no-fault attendance policies, you can't hold it against them for bonuses and incentives, for attendance. The FMLA truly undercuts those types of efforts.

Under return to work, we talked a little bit about some of the issues employers face in terms of having to accept employees' physician certifications if somebody is fit to return to work, I think that there is some argument to be made both under the Occupational Safety and Health Act and under the Americans With Disabilities Act that where you have a truly reasonable, objective belief that the person is a threat to themselves or others, that you may be able to get them in front of an employer's doctor, but that – that's a very gray area right now and people should understand that there's probably a risk associated with that.

Frank Alvarez: I agree with all that. I guess I would just highlight that, by no fault attendance policies, what we really mean is what's – we're focusing on are those policies in which you get a certain number of absences each year and what – and if you're – if you're considering, you know, under that type of policy any absence that would be covered under the FMLA, you can have a major issue in terms of interference.

And what I find there is that the problem comes up because people aren't really – they know it's a neutral policy, so, you know, if you get ten occurrences in a year, somebody's not really all too concerned at the first, second, third, fourth occurrence they focus on when you get down the line, but they may be counting in those earlier occurrences things that are covered FMLA absences and then they kind of bubble up when you're taking disciplinary action down the road. So, I think that that's a concern that employers need to have.

Eric Tilles: OK. Frank, why don't you move ahead with what we can – or may expect in the future legislative and regulatory proposals?

Frank Alvarez: Well, I think what we're seeing, unfortunately, is a number of things that are being considered that will likely exacerbate employers' challenges under the – to manage absences. And I say this with a prefatory remark that, you know, I think everybody agrees that the Family Medical Leave is a great law. I mean it's sort of motherhood and apple pie, if you will, to have protections for people who are too ill to work.

But the devil's in the details of this law, and that's why you saw 15,000 comments submitted to the Department of Labor. And you – what you have right now are some proposals that seem to expand the rights (for the) absence on an occasional basis, which is precisely the type of circumstance that is driving employers most – you know, driving most of their frustration.

So, you have some legislation that's taken the form of requiring paid sick days each year. You know, there's a proposal in Congress that's pending that would be for – would require that people provide seven paid sick days. Now, sometimes that's going to, you know, just be consistent with what employers are already doing, but with the – with the detail that law that creates some problem is that he circumstances under which you're required to provide it may go beyond what you normally may permit it to be. So, we'll have to see how that develops and take a close look at that.

The other thing is that, you know, the FMLA protections could be expanded to people who work a fewer number of hours in – where they're currently permitted, and so part-time employees might be entitled to a prorated amount of FMLA leave, which employers will, you know, have to, again, have it managed much more closely, and right now they don't have to be concerned about that.

And then, we, I think, may see an expansion of FMLA in the context of a paid family leave statute. We've already seen this in some states like California where a kin to a state-mandated disability benefit program where they're a payroll deduction that goes to provide some compensation if somebody's out on leave because they can't work due to an injury or an illness, they may get protection and they may get compensation if they're out for a covered family leave.

So, those are some. There are others, but those are some of the regulatory proposals that we're seeing. AND the only other thing I'd add is that there also is some significant talk about the ADA and amending the ADA, but that's probably the subject for a whole (another) Webcast, so I won't go too far into that.

Eric Tilles: I guess the biggest disappointment is the response of the Department of Labor to all the comments they received.

Frank Alvarez: Yes, I think, you know, you say disappointment, and I'd be interested to hear more of what disappointed you, but I think the reality is, is that the DOL received so many comments and they already have 161-page report out. These comments were due I think on February 16, and by June they issued a report. They didn't say anything about what they were really going to do. You know, you'd think glean some guidance in some of the tone of the response that they're going to attempt to try to address some concerns that employers have with intermittent leave and the medical certification process.

But I think, you know, the issue of what they believe that can do, as an agency within the constraints of the statute is one that will lurk. But I thought what was promising is that they did refer to the fact that the single most serious area of friction between employers and employees seems to be the use of unscheduled intermittent leave, which probably resonates with you and others on the call.

Eric Tilles: Yes, and what we're hearing out of Washington now is that the Department of Labor doesn't think it has – even if it wanted to make regulatory changes, they don't think they have enough time, given what's left of the Bush administration, to really put anything together and get it – get it adopted prior to a change in Presidents. So, they're just holding off.

Frank Alvarez: Yes and there's probably no political stomach at all for amendments to the ADA – to the FMLA, as well, as (a) statutory means.

But, so, final thoughts on these issues, and again, here we say on this slide, you know, developing integrated absence management programs. I hope people have taken – gotten the point and take away from this call that there is a need to integrate and to have that peripheral vision. But the most important thing with respect to the FMLA is to think of it as an entitlement.

It's a different mindset from what we're normally used to (viewing) in terms of an intent-based statute. And, you know, I think you need to put together – I like to see employers put together a number of people on a committee, people who are responsible for FMLA and (FTD) and Workers' Comp and reasonable accommodation and to have them focus on the

real tough leave issues and to come up with a plan to communicate more effectively because without that, it's really hard.

And the other thing that I think is important is that training that you talked about earlier, Eric.

Eric Tilles: So, (Chris), what are the burning questions that we have to get to?

(Chris Williams): Well, I bet you could have predicted that there are a lot of questions on intermittent leave. So, let me try to get through some of those. One of them is, "If someone's been certified for intermittent leave, can you require recertification's? And how often can you require recertification, if at all?"

Frank Alvarez: Well, you can – you can – you can get certifications for intermittent leave. You – the regulations say that you can get them …

Eric Tilles: Every 30 days?

Frank Alvarez: … well, on a reasonable basis, usually no more frequent than every 30 days unless there's an extension – a need for an extension of the leave. With intermittent leave and chronic conditions, there's also something if, say, if somebody has a defined period of time – six weeks or so in which – in which the condition is going to occur, there is in the regulations a suggestion that you cannot get recertification until that initial period of time for which intermittent leave has been certified has elapsed.

Contrast that with a period, which I think we see more frequently which is that there's an open-ended time for need for intermittent leave. Doctors don't know how long it's going to be needed, and in that instance, there's an opinion letter from the Department of Labor directly on point which says that you can get leave in those – recertification's in those circumstances every 30 days.

Eric Tilles: And one thing to keep in mind, though, with a chronic condition is that you may also have the employee asking for some type of reasonable accommodation, saying that this chronic condition rises to the level of disability under the Americans With Disabilities Act, in which case you can then go through and extend it into (active) process to get more information than would otherwise be gotten under the FMLA process.

Frank Alvarez: Yes, I just spoke about this exact situation with a client this morning. And I made the point, though, that the repercussions of failing to cooperate in that medical certification is that essentially the person loses their right to a reasonable accommodation. It may not be if you're – if you're going beyond what's permitted by the certification requirements, that they lose their right to an FMLA job-protected leave.

So, again, you have to discern between those two. So, those are some, I think, (Chris), answers to those questions.

(Chris Williams): OK, another intermittent leave question. "What's the smallest increment of time that someone can take on intermittent leave?

Eric Tilles: It hasn't been measured yet.

(LAUGHTER)

Eric Tilles: No, I'm kidding.

(Chris Williams): They can't measure periods that small?

Eric Tilles: It's the smallest amount of time that you'd normally measure ((inaudible)).

(Chris Williams): OK.

Frank Alvarez: Yes, that your systems can allow for tracking, essentially.

(Chris Williams): OK. "If someone's been certified for intermittent leave, and they just call in sick or they come in late, can you require that employee to tell you whether they took that time as FMLA leave? Or how do you know whether time-off for someone who's been certified for intermittent leave is FMLA leave?"

Frank Alvarez: Well, from my perspective, you know, you want to almost to look ahead. And if somebody's going to try to claim protection for that day as an FMLA, you want to be in a position to either say, one, the employee didn't satisfy his or her notice requirement to put you on notice of the reasons that they were out, such that you could figure out that it was FMLA qualified.

If somebody just says they're sick, that's not going to be enough if that's all you know. But you better be real careful that that is all you know because it might be that there is other conversations like the depression again you know, a statement that's in (Spangler) or that somebody is saying, you know, to a supervisor, and other compensations that they have this asthmatic condition or migraine headaches which are giving them problems and that the totality of circumstances are enough that you do know.

But I don't like to create FMLA situations where they don't exist.

Eric Tilles: Exactly.

Frank Alvarez: But at the same time, you want to be careful that you have a record that's pretty clean that there was no FMLA protections, and some employers will go about trying to address that by shifting the responsibility onto the employee for requesting FMLA leave. I think that only gets you so far, Eric, because it's the employer's obligation to designate something as FMLA, and that's triggered by having sufficient knowledge that the reason that they're out is FMLA qualified.

Eric Tilles: Right. I think your best bet is simply ask the employee, "Why were you out?" You know, don't, you know, reference any prior or underlying condition. Just, you know, straight out, "Why were you out?" You know, if they say, "Well, I had the flu that day," then, you know, feel free to treat it as an absence. And if they say, you know, "It was my migraine," or asthma or whatever it is, then you need to think about it a little bit more.

(Chris Williams): Thanks. We have time maybe for one more question. Before I get there, though, I just want to remind people that if we didn't get to your particular question during the Webcast, the speakers will make their best effort to answer any unanswered questions in writing and that would be posted on the ACC Web site. So, you may be able to get an answer even if we didn't have time for you while we're on the air.

The last question that I want to ask is about taking absences into account in doing a pay or performance review. Can the time off for FMLA be used as a reason to reduce someone's pay raise or performance evaluation?

Eric Tilles: No. I would say – I would say absolutely not. You have a different – you have a way around that, Frank?

Frank Alvarez: Well, (it's) certainly performance evaluation, it can't be a negative factor in anything. I mean that's expressly stated in the regulations. What's interesting sometimes is if there's bonuses, there's a whole issue of bonuses that there's a lot of law developing as to whether it's a productivity-based bonus or essentially a bonus that rewards presence at work and, you know, it's a fairly complicated analysis there. But you might – there are some bonuses in which you can essentially, you know, consider the fact that somebody was not at work and contributing or towards the productivity required for that bonus.

Salary increase, you know, you might be able to look at what they are doing. But, you know, it really – you have to be very careful.

Eric Tilles: Or if they have set goals for the year and they didn't meet those goals, you know, they may say, "Well, I didn't meet those goals because I was on FMLA." I don't know that you need to buy into that in the review. You basically say, "Here were your goals for the – for the year and you didn't meet them, and so we're only going to rank you a two instead of a three."

Frank Alvarez: Yes, there's always an issue of proof as to what resulted in them failing to meet the goals. If they're goals that are for a closer period of time – monthly goals, and somebody was out for two weeks during that period of time …

Eric Tilles: Correct.

Frank Alvarez: … for – and they didn't meet the goal, you can't nick them in terms of performance or give them discipline for that because, you know, that's protected. And I have seen charges with the Department of Labor that have kind of quotas or sale quotas that where people were unable to meet them because they were absent from work. And the Department of Labor takes the view that you cannot penalize them for that if they're out on FMLA leave.

(Chris Williams): Thank you both, Frank and Eric. This has been a very informative ACC Webcast. Once again to our listeners, please go to the Webcast evaluation link – it's on the left-hand side of your screen, and please fill out the evaluation so that we can take that into account in scheduling future Webcasts. Thank you very much. Have a great day.

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