

# We Don't Have To Do That, Do We?: Managing your Obligations under Disability and Leave Laws



**April 29, 2019**  
Woodruff Arts Center  
Rich Theatre

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# FMLA - The Basics

- Entitlement
- Who is eligible?

# FMLA Basics – Qualifying Reasons

- Birth or placement of child
- To care for spouse, son, daughter or parent with a serious health condition
- Employee's own serious health condition
- Qualifying exigency
- Care for injured service member

# FMLA - The Basics

- Maintain insurance
- Return employee to same position or to substantially equivalent position
- Can require employee to use any paid leave entitlement

# FMLA – The Basics

No Greater Rights

# Serious Health Condition

- Inpatient care – overnight stay
- Continuing treatment
  - >3 days incapacitated AND
  - treatment by a health care provider (HCP) two or more times within a 30 day period; OR
  - treatment once with continuing regimen

# Serious Health Condition

- Pregnancy or prenatal care
- Chronic conditions
- Permanent/long-term incapacity
- Multiple treatments



# FMLA Continuous Leave

- Foreseeable: Require 30-days advance notice and, if not given
  - Ask employee to explain
  - Delay or deny FMLA leave if employee fails to follow policy
- Unforeseeable
  - “As soon as practicable” but . . .
  - *Must comply with usual call in procedure absent unusual circumstances*



# FMLA Intermittent/Reduced Schedule Leave

**Required** when **medically necessary** for serious health condition

Qualifying exigency

Legal Proceedings, etc. related to adoption or to foster care placement

# Managing FMLA Intermittent Leave

- Require Leave Request form
- Designate FMLA absences to run clock
- Require complete certification forms
- Utilize frequency and duration from medical certification
- Require second opinion

# Managing FMLA Intermittent Leave

- Attempt to require schedule that least disrupts operations
- Consider transferring employee if leave is for foreseeable ***planned*** medical treatment
- Use substitution of paid leave policy

# Managing FMLA Intermittent Leave

## Identify the Problem Child

- Track patterns of absences
- Use recertification as appropriate
- Investigator

# THE AMERICANS WITH DISABILITIES ACT





# ADA: Disability

- Physical or mental impairment that substantially limits a major life activity
- A record of such impairment
- Regarded as having such impairment



# What is a “Major Life Activity”?

- Caring for oneself
- Performing manual tasks
- Eating
- Sleeping
- Seeing
- Hearing
- Learning
- Major bodily functions
- Reading
- Concentrating
- Thinking
- Communicating
- Working
- Walking
- Standing



# Major Bodily Functions

- Brain Function
- Kidney Function
- Endocrine Function
- Skin
- Respiratory Function
- Digestive function
- Liver function

# ADA Reasonable Accommodation

Must reasonably accommodate a disabled employee or applicant unless doing so is an undue hardship or creates a direct threat

# Reasonable Accommodation

- Equal opportunity to be considered for jobs
- Enable employee/applicant to perform essential functions
- Has equal opportunity to enjoy equivalent benefits

# Reasonable Accommodation Essential Function – Factors to Consider

- Position exists to perform the function
- Limited number of employees can perform function
- The function highly specialized
- Employer's judgment
- Written job description
- Consequences of not requiring person to perform the function
- Actual experience of individuals in position
- Terms of CBA

# Reasonable Accommodation

## Examples of Essential Functions

- Working rotating assignments
- Travel
- Lifting
- Oral communication
- Standing/walking
- Ability to handle stress
- Ability to meet deadlines
- Presence in the workplace
- Attendance/Punctuality

# Reasonable Accommodation

## Examples of Essential Functions

- Working rotating weekends
- Working rotating shifts
- Overtime
- Sustained concentration
- Following directions

# Types of Accommodations

Think practically when assessing the type of accommodation that may be possible or necessary.

Examples include:

- Special chairs
- Software
- Keyboards
- Noise cancelling headphones



# Types of Accommodations

- Change in schedules
- Ability to eat at regular intervals, take breaks, take medications
- Eliminate non-essential function
- Modification of policies
- Working from home
- Assistive devices
- Service/emotional support animal
- Transfer

# Modifications of Policies

A disability neutral policy does not excuse an employer from its accommodation obligation.

- No work at home.
- No transfer if have recent write-up.
- 100% healed policy.
- Inflexible leave policies.
- Inflexible attendance policies

# Light Duty

Created Light Duty  
v.  
Light Duty Positions

# Transfer to A Vacant Position

- Only if cannot accommodate in current position.
- In some circuits must give qualified disabled employee preference over *more* qualified applicants.
- Need not create a new position.
- Need not promote the employee.
- Need not violate seniority provisions of CBA unless exceptions are commonly made.

# Not Reasonable

- Eliminating essential functions
- Indefinite leave
- Excusing misconduct
- Lowering performance or production standards
- Giving new supervisor
- Creating a new position
- Work when I feel like it schedule
- Unlimited breaks

# Notice of Request for Accommodation

## Request + Medical Condition

- Change or adjustment needs to be made because of a medical condition
- Having difficulty performing job because of medical condition
- Presents a doctor's note stating limitations

# Interactive Process

- Determine the “essential functions” of the position.
- Obtain employee’s agreement regarding essential functions.
- Consult with disabled employee regarding limitations.
- Identify potential accommodations.
- Select and implement accommodation that enables employee to perform essential functions.



# What If It Doesn't Work?

- Interactive process extends beyond the first attempt.
- Determine whether other reasonable accommodations are available.
- Document reason first accommodation failed; i.e., employee unable to do job.

# Employee Failure to Cooperate

- Unresponsive to communications.
- No show for meetings.
- Does not provide requested medical documentation.
- Rejects a reasonable accommodation.
- Abandons or fails to show up for alternative work without valid explanation

# Undue Hardship

- Nature and net cost of accommodation.
- Overall financial resources of the employer.
- Accommodation's impact on employer's operations or on coworkers.

# Direct Threat

- Employee must not pose an imminent risk of substantial harm.
- Fear of a future harm is not sufficient.
- Evaluation of risk should be based on reasonable medical judgment and available objective evidence.

# Questions



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# Thank You



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