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2018 FISHER PHILLIPS ANNUAL LABOR AND EMPLOYMENT LAW SEMINAR
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The Unusual Complications When Dealing With FMLA/ADA, And Workers' Compensation Leaves

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What Will We Cover?



- The Basics of FMLA
- The Complications
- Potential Actions that Can Get the Company in Trouble
- The Reinstatement Requirement
- Additional Leave under the ADA
- ADA Basics
- The Interactive Process
- Determining When Leave Can Finally End
- Intermittent/Reduced Leave

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The FMLA Basics



- FMLA provides for:
 - 12 weeks unpaid leave
 - For a Serious Health Condition
 - For the employee or a close family member
 - For Eligible Employees – Someone who:
 - Has worked for 12 months
 - Has worked 1,250 hours in 12 months before is leave needed)
 - Requires Continuation of Health Insurance
 - Requires Job Reinstatement

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FMLA Documentation



- FMLA is very document oriented.
- Give notice of Rights & Responsibilities within 5 business days of learning of need for leave:
 - **Supervisors need to know to alert you!**
- Ask for medical documentation at the same time
- Employee has 15 calendar days to provide medical documentation from health care provider
- **Tip:** Note the deadline on your calendar and follow up promptly if the medical document is not received. Give a new specific deadline and state consequences (termination) for failure to comply.

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FMLA Documentation



- Company reviews medical documentation and, if need for leave is confirmed, issues a Notice of Designation of Leave within 5 business days
- **Tip:** Make sure that on the Notice of Designation, you check the box that makes clear that the employee must have a “fitness for duty evaluation” to return. You must attach the job description to the Notice.

** FP has an FMLA kit with instructions that you may want to consider using.*

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What Makes The Law So Complicated?



Bob sustains a broken wrist while at work. After six weeks, the worker's comp doctor certifies that Bob can return to work. According to the doctor, Bob's broken bones have healed properly and there will be no residual impairment. Bob claims, however, that he does not believe he can safely do his job because of pain in his wrist. Bob refuses to return to work.

What do you need to consider?

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It's Just a Request For Time Off From Work. What's the Big Deal?



- Bob's ailing wrist involves:
 - State workers' compensation laws.
 - FMLA:
 - Is Bob's injury a Serious Health Condition?
 - Is Bob an eligible employee under the FMLA?
 - Does Bob have any leave time available?
 - Did you designate his time away as FMLA leave?
 - ADA:
 - Is Bob's injury a disability?
 - What reasonable accommodation, if any, is required?
 - Company policies

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Where Does This Leave You?



- Leave laws are complicated.
- You avoid (or better manage) most leave of absence problems by maintaining hyper-communication with the employee and documenting all of these communications – not just for the Company's file, but written communications with the employee at every step of the process.
- **Most legal problems can be avoided (or at least managed) with good communications.**

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What Gets You In Trouble?



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Speaking “Unwisely” to Employees Who Request Leave or Accommodation



- “Those dates you say you need to take off are a terrible time for the Company to have to deal with being short-staffed.”
- “Are you sure you need that much time off?”
- “You’re really going to take paternity leave?”
- “Accommodation? You want us to hire someone else to do the parts of your job you don’t like?”
- “You must check in with me twice a week so you stay connected to what’s going on in the department.”

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Case Study



- Kathy is on FMLA for alcohol rehabilitation. Kathy's supervisor feels the department is short-handed. He goes to HR to ask for permission to terminate Kathy due to difficulty in getting the work done in the department. Everyone is simply spread too thin, mistakes are being made, and customers are starting to complain. In other words, Kathy's absence is causing an undue hardship.

Is this a valid reason to terminate Kathy?

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Case Study Analyzed



- When an employee is on FMLA leave, it does not matter if the employee's time away is making it difficult for the Company to get the work done properly.
- The employee gets the leave and is entitled to reinstatement at the end of the leave.
- The employer must find some way to cover the workload in the employee's absence.
- "Undue hardship" is a defense in an ADA claim, not in an FMLA claim.

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Case Study



- Kathy's supervisor comes back to HR again to ask to terminate Kathy on the basis of misconduct. He found 6 checks in Kathy's desk that should have been deposited immediately. Kathy has been written up about this issue before.

Is this a basis to terminate Kathy?

What else do you need to know?

Terminating a Leave-Taker



- "Optics" are almost always bad
- Timing kills in retaliation litigation
- How close in time will the discharge be?
 - Right after the request for leave
 - While on leave
 - Right after the employee's return date from leave
- The closer the proximity, the greater the inference of retaliation

Why Might You Terminate Someone on Leave?



- Misconduct:
 - In connection with leave request
 - Committed prior to leave, discovered previously
 - Committed prior to leave, discovered during or after leave
 - Committed during leave
- Poor performance
- RIF/Job Elimination



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Terminating Leave-Takers for Misconduct



- “Easier” cases
 - In connection with leave request – phony documentation
 - While employee is on leave – sets up new business
 - Misconduct committed just after employee returns
- “Could-be-tough” cases
 - Misconduct committed **before** request or commencement, but discovered **after** request or commencement

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Terminating Leave-Takers for Misconduct



- “Toughest” cases:
 - Misconduct committed **before** request or commencement, discovered **before** request or commencement, but no action/investigation until **after** leave requested or begins

Terminating Leave-Takers For Pre-Leave Poor Performance



- “We knew he wasn’t cutting it, but just hadn’t gotten around to dealing with it. Before he disappears for 12 weeks, this seems like a good time.”
 - Was the employee on **any** notice?
 - Is there any record of counselling or documentation?
 - Was the employee given a deadline to improve?
 - Is the employee on a performance improvement plan?
 - If not, now is almost certainly **NOT** a good time!
 - Invites a **VERY BAD** litigation experience

Dealing With Less-Than-Ideal Situations



- **No prior documentation?**
 - Don't start just after leave request
 - Don't "play catch-up" during leave
 - No "old" write-ups delivered first day back from leave
- **Address performance issues **after** leave is over**
 - "Pick up from where we were when leave began"

Dealing With Less-Than-Ideal Situations



- **PIP in place?**
 - Consider extending deadline
 - "We gave him a meaningful chance to succeed after he returned"
 - NOT: "The deadline was going to expire while he was out, he wasn't meeting the PIP before he left, and so we just went ahead with things."

Failing to Reinstate to the Same Pre-Leave Job



- FMLA doesn't specify that you must return the employee to the "very same job" – it says "equivalent position"
 - "One that is **virtually identical** to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort responsibility and authority."
- One person's "equivalent position" is someone else's "demeaning demotion"
- **Safest move:** Return the employee to the **very same job**

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Case Study



- John is your CFO. He began leave in February due to cancer treatments. John has stayed in close communication with you and has come back for a short period, left again, came back, and is now out again.
- You have filled John's position temporarily by others in the office and from other divisions.
- Your sense is that John is not going to be able to return to work due to the aggressive nature of his cancer.

What do you do?

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Case Study Analyzed



- These are difficult decisions.
- If you fill John's position, you run the risk that you have violated the FMLA by not returning him to his job if he is able to return.
- If you don't fill the position, you run the risk that you won't have a CFO until after you engage in an appropriate search.
- The best process is to have get updated information from John about whether he plans and believes he will be able to return to work. You might have to get updated medical information.

Case Study Analysis



- If he says yes, and his doctor does not say no, you should hold the job open for John but arrange for a backup or other process until you have definitive information that he cannot return.

Can You Terminate a Leave Taker if the Job Has Been Restructured?



- There is no prohibition on restructuring
- But: Position offered upon return must be “substantially equivalent”
- Purposely tough standard
 - “Same or substantially similar duties and responsibilities”
 - “Substantially equivalent... effort, responsibility and authority”
- Human nature: expectation of returning to same job
- Addition of duties can be spun as negative action
- So can reduction of duties

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Safest Plan For Job Restructuring



- Defer major efforts while occupant is on FMLA leave
- Limit restructuring to “tweaks”
- Tie any restructuring into broad reorganization (department-wide)
- Don’t restructure **only** the leave-taker’s job

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The “Trade Up in Quality” Failure-to-Reinstate



- The temporary replacement was outstanding and performed **much** better than regular employee
- Employer keeps replacement in job
- Offers to reinstate leave-taker to another position
- Employer thinks its move is defensible because the alternative position is “substantially equivalent”
- Leave-taker doesn’t agree
- Plaintiff probably wins resulting lawsuit fairly easily

Case Study



- John, the CFO, exhausts his 12 workweeks of leave but is unable to return at the end of his leave. His doctor says he needs 4 more months of treatment.

Can the Company hire a new CFO in this circumstance?

The Leave-Taker Who Can't Return



- The Company cannot automatically terminate employees who don't return at the end of 12 workweeks
- Instead, the employer must make an individual determination of why the employee cannot return
- The Company must remember that the employee may be entitled to an ADA accommodation (of extra leave) if the employee can't perform essential elements of job at end of leave

ADA: The Basics



- ADA requires that you provide a reasonable accommodation to an employee with a disability
- A reasonable accommodation could be additional time off to recuperate or recover from a medical condition, surgery, etc.
- The Company must enter into the **interactive process** with the employee when the employee requests an accommodation

The Requirements of the Interactive Process (in General)



- Conduct initial dialogue with employee, in-person if possible
- Elicit information from the employee about abilities, restrictions, and limitations caused by the medical condition
- Ask treating doctor for information on nature and length of restrictions
- Ask the employee to identify a desired accommodation
- Consider the feasibility of what the employee wants
- **Document the process and outcome**

Tips For a Defensible Interactive Process



- Get employee sign-off on essential functions of the job:
 - **Having an accurate job description is very helpful**
- Have employee identify which functions he can't perform
- Don't ask the employee's doctor for a **diagnosis** - just get limitations and expected duration
- If employee's doctor isn't clear, consider writing a letter or sending a form with questions
- Consider an IME (Independent Medical Examination):
 - Must be at no cost to employee

Tips For a Defensible Interactive Process



- If employee isn't offered the accommodation he asked for, provide written explanation
- If first accommodation doesn't work, investigate, document why it failed and why #2 ought to succeed
- If no feasible accommodation would enable the employee to perform the current position, identify other possible vacant positions



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When Can You Declare the Interactive Process Over?



- When the accommodation has been successful
- When the employee no longer needs an accommodation
- When no "reasonable" accommodation can be identified
- When the only reasonable accommodation(s) would constitute an "Undue Hardship"
- When the employee would be a "Direct Threat" of harm to self or others even with (or without) an accommodation
- When the employee fails to cooperate with the Interactive Process

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When is an Accommodation “Not Reasonable”?



- When it requires lowering a quality or quantity standard
- When it excuses an employee from performing an essential job function
- When it requires employer to tolerate misconduct
- When it creates a new job for the employee
- When it requires the employee to be given a new supervisor (or maybe a “kinder, gentler” one)
- When it permits an employee to stay out on leave indefinitely

Case Study



- In the last case study, John’s doctor advised that John needed 4 more months of leave to complete his cancer treatments and recuperate.

Must you grant this much additional leave?

If so, must you keep John’s job open?

Additional Leave as Accommodation Under ADA



- Additional leave must be granted unless it would impose an “Undue Hardship”
 - This is a very tough standard to meet
 - 14/30/45 more days almost never likely to sink the Company
 - Even 4 months is probably not going to be viewed as “unreasonable”
 - **Problem:** When employee’s doctor keeps saying he “needs just a little more time”
 - 30 days becomes 60 - 60 becomes 90 - and so on

Additional Leave as Accommodation Under ADA



- Employer need NOT grant **indefinite, open-ended leave** – such a leave is not a “reasonable accommodation”
- The leave must be for a **limited and finite period** of time
- The purpose of the additional leave has to be to allow the employee to recover and be able to return to work within the finite period

What do you do when the leave turns into “another 30 days” or “we will evaluate John’s ability to return at his next appointment”?

Dealing With Multiple Requests For Additional Leave



- There is no real “magic bullet”
- Ask the doctor **why** he believes the next few weeks of leave will permit the employee to return?
 - **Use counsel to help you draft questionnaire to doctor**
- Consider: Are you being “played,” or is the employee’s recovery really that hard to forecast? Sometimes you have unpalatable choices:
 - Terminate the process – argue what’s being sought is indefinite, open-ended leave
 - Live with it

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Intermittent & Reduced Leave



- This is one of the most difficult aspects of FMLA/ADA administration.
- Intermittent or reduced schedule leave for serious health conditions must be provided under FMLA if medically necessary.
- You must give employee a summary of leave taken every 30 days, if requested.
- Cannot require “minimum” leave increments; increments must be in smallest amounts your system can calculate.
- If the employee’s condition also qualifies as a disability under the ADA, you may need to allow intermittent or reduced leave beyond the 12 weeks of FMLA leave if it is a reasonable accommodation if it does not pose an undue hardship.

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Tips For Managing Intermittent Leave



- Take advantage of your right to temporarily transfer the employee.
 - You may transfer an employee taking **planned** intermittent leave for medical treatments or to recover from a serious health condition to an “alternative position” if this would make the employee’s periodic absences less disruptive to the Company’s operations.
 - Employee must receive pay and benefits while in the alternative position that are equivalent to those available to the employee when doing his or her regular job.



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Case Study – Test Your Knowledge



- Your facilities manager called and said that he wants to terminate Suzanne due to excessive absenteeism.

What are the questions you need to ask?

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Case Study Analyzed



- Why has Suzanne been absent?
- How many absences? Over what period of time?
- What documentation do you have of the absences?
- If medical reasons, have you reported the information to HR? If no, why not?
- If yes, was the time away properly documented as FMLA or ADA leave?
- Has Suzanne exhausted her leave rights? When?
- Analyze the Company's risks of terminating now.

Summary



- FMLA and ADA issues are some of the most complicated issues that all types of employers have to deal with.
- Train supervisors/managers to alert HR about an employee's time away from work for personal or family reasons.
- Document FMLA/ADA leave promptly using forms that are employer-oriented.
- Document the interactive process under ADA.



Summary



- Keep the lines of communication open to ensure you understand the employee's needs and can act promptly when necessary.
- When complications arise or others within the Company get anxious about an employee's ability to return or need for more time off or discovered misconduct, consult counsel early to ensure you make good decisions.
- Remember, if it "feels" like the right answer (i.e., if common sense is telling you to make a particular decision), you are probably wrong.

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Final Questions

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The slide features a red header bar with the Fisher Phillips logo on the right. Below the header is a large image of several white, 3D question marks scattered on a light surface. The text "Final Questions" is centered below the image. At the bottom, there is a red footer bar containing the website "fisherphillips.com" on the left and the slogan "ON THE FRONT LINES OF WORKPLACE LAWSM" on the right.



THANK YOU

FOR THIS OPPORTUNITY

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