


Navigating the Treacherous FMLA Seas
A Map for Handling the Most Common and Troublesome FMLA Issues

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Finding Your FMLA Compass

Before *After*



Agenda

- What is sufficient notice of a “serious health condition”?
- Intermittent Leave—When is enough, enough?
- Intersection of FMLA and ADAAA



4 FMLA Triggering Events

- **Non-Military**

- #1: Birth or Placement of a child, and to care for the child
- #2: Care for serious health condition of employee, or employee's spouse, child, or parent

- **Military**

- #3: Qualifying exigency because employee's spouse, child, or parent is a covered military member
- #4: Care for covered service member with a serious injury or illness, who is a spouse, child, parent, or next of kin of employee

Angelina

- 41 Year-Old Salaried Sales Manager
- Married to Brad, a Sergeant First Class in the U.S. Army
- 4 Children



Angelina's Voicemail



- *"Hi Tom. This is Angie. Listen, I am feeling awful this morning, so I am not coming into work. I will let you know when I feel better."*

Angelina's Voicemail



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FMLA POSTER

Employees must pro-
determine if the leav-
timing and duration
employee is unable
perform daily activi-
by a health care pro-
family leave. Empl-
leave is for a reason

employer to
and the anticipated
may include that the
member is unable to
continuing treatment
the need for military
if the requested
ly taken or certified.

What is Sufficient Notice of a Serious Health Condition?

If Brad calls in and tells you that he is intoxicated and suffering from a nervous breakdown, is this sufficient to trigger FMLA leave?

- *Scobey v. Nucor Steel-Arkansas*

MAYBE NOT

What is Sufficient Notice?

- Must explain the reasons for the needed leave “so as to allow the employer to determine that the leave qualifies under the Act.”
- Not necessary to “expressly assert rights under the Act or even mention the FMLA.”
- “The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take off for a serious health condition.”

What Is a Serious Health Condition?

- An illness, injury, impairment or physical or mental condition that involves:
 - **Option #1:** Inpatient Care or
 - **Option #2:** Continuing Treatment by a Health Care Provider.
- **Option #1:** “Inpatient care”—overnight stay in hospital, hospice, or residential medical care facility, including
 - any period of incapacity (inability to work or perform, attend school, or perform other regular daily activities)
 - any subsequent treatment in connection with such inpatient care.

What Is a Serious Health Condition?

- **Option #2: "Continuing Treatment"**—includes
 - **Type #1:** Incapacity > 3 days + subsequent treatment or period of incapacity, requiring 2 or more treatments in 30 days;
 - **Type #2:** Any period of incapacity due to **pregnancy** or **prenatal care**;
 - **Type #3:** Incapacity due to **chronic serious health condition**;
 - **Type #4:** **Permanent or long-term incapacity** due to condition for which treatment may not be effective (e.g., Alzheimer's, severe stroke, terminal stages of disease).
 - **Type #5:** Conditions requiring multiple treatments (e.g., chemotherapy, kidney dialysis, physical therapy).

What Is Not a Serious Health Condition?


- **Unless complications arise,**
 - common cold
 - the flu
 - ear aches
 - upset stomach
 - minor ulcers
 - headaches (other than migraines)
 - routine dental or orthodontia problems
 - periodontal disease
 - conditions for which cosmetic treatments are administered (acne or plastic surgery)



Willis v. Coca Cola


- Willis (who is pregnant) calls supervisor and says she was sick and would be unable to come to work that day—does not state sickness is tied to pregnancy
- Next day (Tuesday), Willis calls supervisor to find out where to report, and supervisor says she can not return until she secures a medical release.
- Willis tells him that she has a doctor's appointment on "Wednesday."
- Willis does not show up to work on Tuesday, Wednesday, Thursday, Friday, Monday, Tuesday, and Wednesday.
- CC sends two employees to reclaim her company car on Thursday, after terminating her for violating "No Call/No Show" Policy.
- Willis sues, claiming that CC interfered with her FMLA rights.






Willis v. Coca Cola

- The Court addressed the question of whether the employer had sufficient notice of FMLA request.
- "A complaint of sickness will not suffice as notice of a need to take FMLA leave."
- "Requiring an employer to undertake to investigate whether FMLA-leave is appropriate each time an employee . . . is 'sick' is quite inconsistent with the purposes of the FMLA."
- **Persuasive to Court:** "Willis stated explicitly in her deposition testimony that she did not tell her supervisor that she was sick due to complications in her pregnancy and did not assert that she clearly linked her sickness and her pregnancy."



Satterfield v. Wal-Mart Stores


- Satterfield did not report to work because she was having "pain in her right side."
- Satterfield's mother delivered a note to Wal-Mart, stating that she "was having a lot of pain and . . . wouldn't make it in to work that day." Mother tells manager that she did not know "what was wrong with that girl because if somebody is having pain in that particular area of the body, if it's not appendicitis, then I have no idea what it is."
- Wal-Mart eventually terminates Satterfield for absenteeism.
- Satterfield sued Wal-Mart for interfering with her FMLA rights.



Satterfield v. Wal-Mart Stores (5th Cir. 1998)


- Court looked at the information that employer had at the time it terminated Satterfield:
 - (1) Mother's Note—Satterfield "was having a lot of pain in her side, and would not be able to work that day"
 - (2) Mother's Statement—Satterfield was "sick", "she didn't know what was wrong with that girl," and "appendicitis" comment.
- Court's Holding
 - "While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant."
 - "No rational trier of fact could conclude that this was sufficient to reasonably apprise Wal-Mart of Satterfield's request to take time off for a serious health condition within the meaning of the FMLA."

Brad's Voicemail



- *"Hi Joe. This is Brad. As you know, Angelina has had a really bad back for a few years now. This morning it flared up, and she can't get out of bed. She needs my help, so I am not coming in. I'll bring in a note from her doctor if you need me to."*

What if Angelina requests leave to care for son Maddox who has been diagnosed with a serious illness.



What Would You Do?

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Chronic Health Conditions

- A condition which:
 - requires periodic visits (at least twice a year) for treatment by HCP, or by a nurse under direct supervision of a HCP;
 - continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).


What To Do?

- Implement a Leave Request Policy
 - all requests
 - must be in writing, stating reasons, anticipated duration, and anticipated start date
 - must be made to a particular person (e.g., HR Manager)
 - may include exception if employee is incapable of following policy
- Review and consistently apply the FMLA's requirements related to proper certification of employee absences.
- Before taking action, measure twice cut once.




Certification Rules

- Request for Certification must
 - be in writing
 - state the anticipated consequences of failure to provide
 - be made within 5 days of employee making request, or within 5 days of leave commencing (if need for leave is unforeseeable)
- Employee must return complete and sufficient certification within 15 days
- If certification incomplete or insufficient,
 - employer shall advise employee in writing what additional info is needed
 - employee has 7 days to cure any deficiency



Certification Rules

- When Can You Request?
 - **#1:** When employee requests leave for serious health condition, or serious illness or injury;
 - **#2:** When employer has reason to question the appropriateness of the leave or its duration;
 - **#3:** When need for leave lasts beyond a single leave year, may request in each subsequent leave year;



Recertification Rules

- When Can You Request?
 - **#1:** Employee requests extension of leave
 - **#2:** Circumstances described by previous certification have significantly changed (e.g., duration or frequency of absence, the nature of the illness);
 - **#3:** Employer receives information that casts doubt upon stated reason for leave; and
 - **#4:** Every 6 months

Intermittent Leave: When Is Enough Enough?



Intermittent Leave

- FMLA leave may be taken “intermittently or on a reduced leave schedule.”
- Intermittent leave based on serious health condition must be medically necessary
- Examples
 - occasional leave for medical appointments
 - leave of several days over 6 months for chemotherapy
 - leave for pregnant employee to attend prenatal exams or for periods of severe morning sickness
 - leave for employee with chronic serious health condition that renders him unable to perform essential functions of position

Intermittent Leave

- If an employee needs leave intermittently **for planned medical treatment**, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer’s operations.
- If an employee needs intermittent leave that is foreseeable, employer may require the employee to transfer temporarily to an available alternative position which better accommodates recurring periods of leave.
- The alternative position must have equivalent pay and benefits.
- When employee no longer needs intermittent leave, employee must be placed in the same or equivalent job as the job he left when the leave commenced.

Pop Quiz

- Angelina requests intermittent leave because she is diagnosed with cancer, and needs chemotherapy. As a result of intermittent leave, Angelina falls below the 1,250 hours requirement.
- Can you deny Angelina intermittent leave after she falls below 1,250 hours requirement?

Answer

- No
- “The 1,250-hour eligibility test is applied only once on the commencement of a series of intermittent absences, if ALL involve the same FMLA-qualifying serious health condition during the same 12-month FMLA year . . . even if the 1,250-hour calculation is not met at some point in the 12-month period during the series of related intermittent absences.”


Pop Quiz

- Brad suffers from diabetes which he claims triggers diarrhea. He asks that he be able to intermittent leave for necessary restroom breaks.
- Is Brad entitled to FMLA intermittent leave?

Answer

- No
- Fifth Circuit held that employee was not entitled to FMLA intermittent leave because he was not asking for an excused absence, but rather unfettered permission, while at work, to take necessary restroom breaks.
- Is Brad entitled to any other leave?

FMLA



ADA

WORKERS' COMP


FMLA Regulations

- “The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA.”
- “An employer must therefore provide leave under whichever statutory provision that provides the greater rights to employees.”
- “ADA’s ‘disability’ and FMLA’s ‘serious health condition’ are different concepts, and must be analyzed separately.”

Back to Angelina



- *Angie is placed on bed rest for 5 months as a result of pregnancy-related complications.*
- *After FMLA 12-weeks expires, Angie fails to return to work.*
- *Angie asks for an additional month of leave.*
- *What do you do?*




U.S. Equal Employment Opportunity Commission

PRESS RELEASE
10-1-09

D.R. Horton Sued By EEOC For Disability Discrimination

Major Builder Fired Employee With Severe Pregnancy Complications, Federal Agency Charges

SEATTLE — A Fortune 500 home builder and land developer which identifies itself as the nation's largest home builder refused to accommodate an employee's pregnancy-related disability and unlawfully fired her because of it, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit filed today.



U.S. Equal Employment Opportunity Commission

PRESS RELEASE
9-29-09

SEARS, ROEBUCK TO PAY \$6.2 MILLION FOR DISABILITY BIAS

Federal Court Approves Largest Monetary Amount Ever in Single EEOC ADA Suit; Employees Allegedly Terminated Based on Inflexible Workers' Compensation Leave Exhaustion Policy

CHICAGO - The U.S. Equal Employment Opportunity Commission (EEOC) today announced the entry of a record-setting consent decree resolving a class lawsuit against Sears, Roebuck and Co. (Sears) under the Americans With Disabilities Act (ADA) for \$6.2 million and significant remedial relief.

The consent decree, approved this morning by Federal District Judge Wayne Andersen, represents the largest ADA settlement in a single lawsuit in EEOC history. The EEOC's suit alleged that Sears maintained an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, in violation of the ADA.

"The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodations requirements of the ADA are over." *EEOC Regional Attorney*

The End

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