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# **The Case of the Missing Employee: Addressing Chronic Absenteeism**

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# Topics and Initial Thoughts

- FMLA, ADA, and Real-World Strategies
- Initial Thoughts:
  - One size never fits all.
  - No good deed goes unpunished.
  - Underdeveloped area of law that requires patience!



# What is the cost of one absence day?

- Financial: you pay a sick leave day at the current contract rate, which may be much higher than when the sick day was earned
- Financial: in addition to the sick day, in many cases, you ALSO pay the cost of a substitute
- Instructional: A classroom substitute doesn't advance instruction
- Efficiency: If no substitute is appropriate, other employees are doing more work with fewer bodies. Sometimes, work goes undone.



# What about chronic absenteeism?

- Long term substitute may not be available or appropriate
- Burden on other employees
- Impact on morale
- Public school sick days were never intended as long term income replacement for chronically ill or disabled employees



# You cannot address absenteeism until you are in compliance with FMLA and ADA

Want to non-renew the maintenance man who hasn't worked all year?

Where are you with FMLA?

Where are you with ADA?



# Who should do this work?

- Board should have awareness this goes on in the background; not a board job to administer this; not going to be on the agenda
- Board makes **policy**; better practice is to let FMLA be sole source of all “leaves of absence” in your district (many still have old, pre-FMLA policies PLUS FMLA policies)
- Principals should have general knowledge of FMLA to spot issues
- Real work with forms and employees is handled by central office administrative staff—ASBA and CGWG does summer training on FMLA



# Topics and Initial Thoughts

- FMLA, ADA, and Real-World Strategies
- Initial Thoughts:
  - One size never fits all.
  - School districts lag behind industry in this area
  - No good deed goes unpunished.
  - Underdeveloped area of law that requires patience!



# Family and Medical Leave Act

*A quick refresher*

Let's hear  
it for the  
**F**riday-**M**onday  
**L**ease **A**ct!



# Why is FMLA important

- FMLA absences can't be "counted against" employees for absentee purposes
- FMLA isn't (necessarily) paid leave, but it entitles an employee to job protection and job restoration.
- The employer has a duty under the law to offer FMLA when anyone in the organization has knowledge about an employee's situation that might qualify for FMLA.
- We cannot terminate an employee for excessive absences until we have exhausted their FMLA job protection, and evaluated the situation for additional legal complications such as ADA (Americans with Disabilities Act).
- **It is in the district's best interest to designate qualifying leave as FMLA leave.**



**A bad situation:  
termination due to  
absences, then FMLA raised  
as an issue!**



# Employee Eligibility & Entitlements under the FMLA

- FMLA provides 12 weeks of unpaid leave to an employee for a qualified event, or 26 weeks of unpaid leave for a qualified military event.
- To be eligible under the FMLA, an employee must have:
  - Worked for the employer for at least 12 months over the last seven years;
  - Worked at least 1,250 hours during the year preceding the start of leave, and;
  - Been employed at a worksite where the employer employs at least 50 employees within a 75 mile radius.
- Leave can be taken:
  - All at once.
  - Intermittently.



# Reasons for Taking Leave

- The FMLA entitles eligible employees to take up to twelve (12) weeks of unpaid, job protected leave during a twelve month period as a result of
  - the employee's **serious health condition**; or
  - to take care of an immediate family member who has a **serious health condition**; or
  - For the birth and care of the employee's newborn child or for the placement of a son or daughter for adoption or foster care; or
  - Military exigencies; or
  - Up to 26 weeks to care for military service member injured in the line of duty.



# Real Examples of Serious Health Conditions

- Heart attacks.
  - Heart conditions requiring heart bypass or valve operations.
  - Most cancers.
  - Back conditions requiring extensive therapy or surgical procedures.
  - Strokes.
  - Severe respiratory conditions.
  - Spinal injuries.
  - Appendicitis.
  - Pneumonia.
  - Emphysema.
  - Severe arthritis.
  - Severe nervous disorders.
  - Injuries caused by a serious accident on or off the job.
  - Ongoing pregnancy.
  - Miscarriage.
  - Complications or illnesses related to pregnancy, such as severe morning sickness.
  - The need for prenatal care.
  - Childbirth.
  - Recovery from childbirth.
- In addition, the following conditions might be serious health conditions if their characteristics are consistent with the other requirements for serious health conditions:
- Restorative dental or plastic surgery after an injury or removal of cancerous growths.
  - Mental illness.
  - Allergies.



# Notice Obligations

- **Poster:** Post in conspicuous place – AM's best practice: place a copy in the Handbook!
- **Policy:** Distribute FMLA policy to all employees
- **Eligibility Notice:** Within five days of employee's notice of need for FMLA, distribute Notice of Eligibility & Rights and, where applicable, Medical Certification – WH-381 and WH-380 E & F;
  - With the Eligibility Notice, the employer is required to provide a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.
- **Designation Notice:** Within five days of Employer having knowledge that leave qualifies as FMLA, notify employee of approval of leave – WH – 382.
- **Fitness:** Need for Fitness for Duty – WH – 382.



# Employee Obligations

- **Foreseeable leaves:** 30 days advance notice unless not practical.
- **Unforeseeable leaves:** As soon as practical (generally verbal notice within 1-2 business days of learning of need to take FMLA).
- **First-Time User/ Occurrence**
  - Employee must provide “sufficient notice” for employer to understand that employee needs FMLA leave.
- When an employee is certified for FMLA leave and seeks additional time off for the same reason, the employee must specifically reference to qualifying reason (i.e., health condition) or the FMLA.
- Employees can be required to comply with the employer’s call-in procedures, including calling in to a specific person, unless medically unable to do so.



# Intermittent Leave

- Intermittent/reduced schedule leave may be taken when medically necessary to care for a seriously ill family member, or because of the employee's own serious health condition.
- Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval, and we do not recommend that you agree due to disruption of instruction for students.
- An employer can request that the intermittent leave or reduced schedule fit the employer's schedule, if it is possible.
- An employer can transfer the employee to another position which better accommodates the leave; but he or she must be returned to the same or equivalent position at the end of the leave.
- An employer cannot require an employee to take more time off than he or she needs.





# Summary of Deadlines

Event	Your Deadline
Employee gives notice of a potentially qualifying need for leave	Within <u>5 days</u> , must provide notice of eligibility and medical certification request form.
Employee returns completed request form	<u>15 days</u> , or longer if employee communicates a need for additional time
Designation Notice	<u>5 days</u> after return of medical certification form
Recertification	Exceptions exist, but no sooner than <u>30 days</u> unless a need to do so arises



# Why are these deadlines important?

- If the central office doesn't know an employee has missed work until right before payroll, the district will almost always be out of compliance with respect to statutory deadlines
- Any information a supervisor or secretary has about why an employee is out, is imputed to the entire organization
- The only way to ensure FMLA compliance is to bring daily absence administration into the central office, which can screen for FMLA situations and respond directly with the employees.
- The building and/or the supervisor shouldn't be having FMLA conversations with employees, they should spot a possible issue and send to the central office.



# Expiration of FMLA Leave

- Upon the expiration of his or her FMLA leave, an employee is entitled to be returned to the same position he or she held at the beginning of leave, or to “an equivalent position.”
- The employee has no right to reinstatement if the employer can show that termination/lay-off would have occurred in the absence of the FMLA leave.
- The employee has no right to reinstatement under the FMLA if he or she is unable to perform the essential functions of the position because of his or her condition.
- Where an employee is not capable of returning to a position at the end of his or her FMLA leave, an employer may still have a duty to extend the leave or reinstate the employee in a modified or different position under the ADA.



# FMLA Fraud

- Annual timing:
  - Employee takes FMLA every summer when school gets out.
  - Employee takes FMLA the same week every year.
  - Employee has medical flare-up adjacent to days off, holidays or between Thanksgiving and New Year.
  - Unreal circumstances.
  - Employee is out of PTO and wants to take a vacation.
  - Consistent exhaustion of leave time.
  - Employee has exactly 12 weeks of health problems every year.
- In a retaliation cases, the relevant question is:
  - Whether the employer had a genuine good faith belief of fraud or poor performance based on particularized facts.



# Two Types Of FMLA Claims

- Interference.
  - Employee claims that he/she was denied an FMLA benefit (leave, reinstatement, etc.).
  - Merits often will turn on:
    - Whether the individual was eligible for and entitled to the FMLA benefits.
    - Whether the reinstatement was to an equivalent job.
    - Whether the process was followed.
- Retaliation.
  - Employee claims that he/she suffered an adverse employment action because the employee requested or took leave.
  - Merits often will turn on:
    - Employer's legitimate reason.
    - Evidence that supervisors were frustrated by the leave.
    - Time period between leave and adverse action.



**12 weeks of FMLA are over. Can we  
fire the employee yet?**

**NO! When FMLA is over, or if  
FMLA doesn't apply, go to ADA**

# Americans with Disabilities Act

## *A quick refresher*



# Employee Eligibility and Entitlements under the ADA

- To qualify under the ADA , an employee must:
  - Be disabled as defined under the ADAAA,
  - Be otherwise qualified for the position,
  - Be able to perform the essential functions of the job, with or without reasonable accommodation, and
  - Be employed by an employer that employs 15 or more employees.
- A person is disabled if he or she:
  - Has a physical or mental impairment that substantially limits one or more major life activities/is associated with someone disabled,
  - Has a record of such an impairment, or
  - Is regarded as having such an impairment.
- Eligible employees are entitled to a reasonable accommodation under the ADA unless it would be an undue hardship.





# Major Life Activities (non-exhaustive)

- Walking
- Seeing
- Hearing
- Communicating
- Breathing
- Learning
- Eating
- Sleeping
- Bending
- Speaking
- Lifting
- Reaching
- Standing
- Sitting
- Caring for oneself
- Working
- Interacting with others
- Concentrating
- Reading



# Major Life Activities

## Operation of Major Bodily Functions

- In addition to the previous list of major life activities, under the ADA Amendments Act, § 4(a), the ADA will now include the operation of major bodily functions.
- The purpose of adding major bodily functions is to make it easier to find that individuals with certain types of impairments have a disability.



# Major Life Activities

## Operation of Major Bodily Functions

- Functions of immune system
- Normal cell growth
- Digestive functions
- Bowel and bladder functions
- Neurological and brain functions
- Respiratory functions
- Circulatory functions
- Endocrine functions
- Reproductive functions



# Record of Disability

- Previous mental impairment.
- Recovered alcoholic.
- Recovered drug user.
- Former cancer patient.
- Previous back surgery.



# Regarded as Disabled

- An individual who has no impairment at all, but is treated as having a substantially limiting impairment is covered; or
- An individual who has an impairment, but one that is not substantially limiting, is covered if the employer incorrectly believes the impairment was substantially limiting.



# Employer's Obligation Reasonable Accommodation

- It is an affirmative obligation.
- The burden is on applicant/employee to request an accommodation.
- To enable the individual to perform the essential functions of job.
- Without creating an undue hardship to employer or to co-workers.



# Reasonable Accommodation

- A physical, mechanical, electronic or procedural device.
- That allows an employee with a disability to perform to the employer's expectations and standards.



# Examples of Accommodations

- Making facilities accessible/usable.
- Modified work schedules.
- Flexible leave policies.
  - Must do accommodation analysis at end of any leave.
  - Will additional time foreseeably result in employee being able to return to work.
- Job restructuring.





# Examples of Accommodations

- Reassignment to vacant position.
- Acquire/modify equipment.
- Modify tests, training, policies.
- Provide qualified readers/interpreters.



# Leave as a Reasonable Accommodation

- EEOC: “Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability.”
- Under ADA, a hard and fast rule is not recommended. Employer must consider whether continued leave will be an undue hardship. Its policies and practice are important in evaluating this issue.
- A leave of absence may not be reasonable under the ADA if it is indefinite, particularly after a reasonable time.



# Additional excused leave is the most common ADA accommodation in school districts

- This applies when the medical professional certifies that the extra time would allow the employee to return to work
- This would not apply if the medical professional “cannot predict” or is “unable to state when or if” the employee could return.



# Two Types Of ADA Claims – Discrimination

- **Typical Scenarios:**
  - **Adverse employment action because of medical condition or performance related to medical condition.**
  - **Retaliation after employer learns of medical condition.**
  - **Retaliation after employee requests reasonable accommodation.**
  - **Fitness for duty exams.**
  - **Adverse action based on fear of behavior associated with condition/medication.**
  - **Comments: “crazy,” “psycho,” “gimp,” “crippled.”**
- **Merits often will turn on:**
  - **Whether the individual was “qualified.” Could he/she perform the essential job functions?**
  - **Whether employer had knowledge.**
  - **Employer’s legitimate reason.**



# Two Types Of ADA Claims – Failure to Accommodate

- **Typical Scenarios:**
  - Employee's requested "accommodation" is denied.
  - Employee quits (is constructively discharged) because of medical condition.
  - Adverse employment action because of performance related to medical condition.
- **Merits often will turn on:**
  - **Interactive dialogue.**
  - Whether employee has actual disability or a record of disability.
  - Defenses including undue hardship.



# **Practical Tips for Managing Employee Absenteeism**

# Biggest Mistakes Under the ADA

- Assuming that compliance with the FMLA is enough
- Not identifying and documenting essential job functions
- Not documenting performance or conduct deficiencies
- Not engaging in an interactive process to identify possible accommodation
- Not considering reassignment or additional unpaid leave with job restoration as a reasonable accommodation





shift work shift disorder



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### Symptoms - Shift Work Disorder - National Sleep Foundation

<https://sleepfoundation.org/shift-work/content/shift-work-disorder---symptoms> ▼

**Shift work** sleep **disorder** can affect your physical health, productivity, and safety. Should you or a loved one seek help? Learn more here.

### What is Shift Work? - Shift Work Disorder - National Sleep Foundation

<https://sleepfoundation.org/shift-work/content/what-shift-work> ▼

**Shift work** is work that takes place on a schedule outside the traditional 9 am – 5 pm day. It can involve evening or night **shifts**, early morning **shifts**, and rotating ...

### Shift work sleep disorder - Wikipedia

[https://en.wikipedia.org/wiki/Shift\\_work\\_sleep\\_disorder](https://en.wikipedia.org/wiki/Shift_work_sleep_disorder) ▼

Shift work sleep disorder (**SWSD**) is a circadian rhythm sleep disorder characterized by insomnia and excessive sleepiness affecting people whose work hours ...

### Avoiding Shift Work Sleep Disorder (SWD) On the Night Shift: Tips for ...

[www.webmd.com/sleep-disorders/features/night-shift-sleep](http://www.webmd.com/sleep-disorders/features/night-shift-sleep) ▼

They all are at risk for **shift work** sleep **disorder**. If you work at night or often rotate **shifts**, you may share that risk. Working at night or irregular **shifts** can keep you ...

### Shift Work Disorder Overview - Sleep Education

[www.sleepeducation.org/essentials-in-sleep/shift-work](http://www.sleepeducation.org/essentials-in-sleep/shift-work) ▼

**Shift work disorder** is when you have difficulty sleeping because of your work schedule, especially second **shift** (evening **shift**), third **shift** (overnight) and the ...



# Certification

Regulations permit an employer to contact an employee's HCP to authenticate or clarify information required by a certification form

- Cannot contact to obtain additional info
- Direct supervisors may not contact HCP
- Only health care providers, HR professional, leave administrator or management official may contact HCP
- If an employer believes a certification is incomplete or insufficient to make a serious health condition determination, employers must notify employees in writing of the deficiencies and specifically identify the missing/insufficient information.
- Employers must provide employees with seven calendar days to correct the problem.



# Second Opinions

- The regulations to the FMLA specifically provide that “[a]n employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer’s expense.”
- Pending receipt of the second opinion, the employer must continue to provisionally designate the employee’s leave as FMLA leave. As a result, all group health benefits must be maintained while the leave is provisionally designated as FMLA.
- The Company has the right to select the health care provider who will furnish the second opinion, provided, the healthcare provider selected is not employed on a regular basis by the employer.
- In particular, the “employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion.”



# Second Opinions

- Employer must pay the costs of the obtaining the second opinion and must reimburse employee “for any reasonable ‘out of pocket’ travel expenses incurred to obtain the second...opinion.”
- If the opinion of the healthcare provider who furnishes the second opinion is the same as the employee’s provider, FMLA leave must be granted.



# Third Opinions

- However, “[i]f the opinions of the employee’s and the employer’s designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer’s expense.”
- Such a third opinion is final and binding.
- The expenses associated with obtaining the third opinion must be borne by the Company.
- The third health care provider must be “designated or approved jointly by the employer and the employee.” Both parties have an obligation to act in good faith to attempt to reach agreement on whom to select for the third opinion.



# Beware of making contact with an provider or requesting a second or third opinion!

- Your administrative staff are trained by Kristen and Missy to **\*\*only\*\*** do this at the direction of the lawyer who is assisting your district
- There are a lot of ways this can go wrong. This is not a “self-help” situation.



# Hypothetical No. 1

- Susan has been out on FMLA leave for 8 weeks after injuring her back in a car accident. Her coworkers are claiming she is a fraud because she has posted pics of herself on Facebook riding in a boat on vacation in Mexico, holding her grandkids, and posted about taking classes at the local community college. Her employer terminates her because they believe she is fraudulently using leave.
- She has sued her employer alleging FMLA interference and retaliation. What are her chances of success?



# Hypothetical No. 1

- The FMLA does not afford an employee greater rights than she would have if she was not on FMLA leave other than protected leave/reinstatement.
- In February 2013, a federal judge in Michigan dismissed the lawsuit finding that the Medical Center had terminated the nurse for its honest belief that she had abused leave and not for taking leave.
  - But: To prove this, you need to have particularized facts to support that contention. Each case is different, but this may even include private investigators, medical consultants, and first-hand knowledge of the underlying facts leading to the abuse of FMLA allegation.



## Hypothetical No. 2

- Lindsay has been out on leave due to surgery to remove a brain tumor. While she was out, another employee has been filling in for her handling accounts receivable. She has found so many mistakes in the records, she has lost count. She also found “revealing” pictures of Lindsay’s husband on her computer. She is not expected back from leave for another 3 weeks.
- The Company decides to wait until her leave expires. On the day she is due back, it informs her that her employment is terminated for misconduct.
- Which side has the better position? Plaintiff’s counsel or defense counsel?





# Hypothetical No. 2

- Risk of retaliation claim
- Lessons from ***Adams v. Fayette Home Care***: Employee showed patient images of husband's genitals stored on cell phone. Patient told another nurse and asked employee not to come back. But, employee just started FMLA leave. *These fact patterns never are simple, are they?*
- So, did Fayette investigate and terminate Adams' employment immediately (if the alleged facts are indeed true), or wait until Adams returned from FMLA leave (*ahem*, two months later) to terminate employment?
- In this instance, Fayette decided to wait until Adams' FMLA leave ended before confronting her with the allegations and terminating her employment.
- Court: Was the decision to wait 2 months until her return to work before calling the incident to her attention and terminating her employment indicative of discriminatory motive?



# Hypothetical No. 2

- Court: “that [Fayette] sat on the allegations for two months before reporting them to Adams does not suggest a sinister motive on its part. Fayette knew the full duration of Adams’s FMLA leave in advance; if it sought to retaliate, it had no reason to wait until the leave ended. And Adams was recovering from a major surgery during her leave.”
- Consistency is key.
- Timing can be a challenge.
  - When do you confront an employee on FMLA leave with evidence of performance issues or (as in this case) deplorable conduct that is uncovered while the employee is on leave?
  - The more conservative approach is the one followed here by the employer: Don’t contact the employee while she is on leave, and deal with the issue immediately upon her return to work.



# Timing

Before rushing to hit the termination button, consider a couple of factors:

- ***How egregious is the conduct?*** Surely, the more egregious, the more reason for the employer to act swiftly.
- ***Why is the employee on FMLA leave?*** In other words, are we talking bunion surgery or major heart surgery? *Note:* If the employee is in a hospital bed *or could be* at any moment, call off the dogs!
- ***In the same vein, is the employee suffering from a serious health condition that might make it difficult to communicate or prevent them from effectively responding to an investigator's questions (e.g., depression)?*** If so, I encourage you to tread lightly and deal with the situation after you have some confidence that the employee can adequately respond to the investigation.
- ***What is the employer's typical practice or policy in these situations?*** Employers typically do well in Court when they can establish that they handled the particular situation in the same manner as a similar situation in the past.



# Hypothetical No. 3

- Jake is a maintenance employee who took 12 weeks of FMLA leave due to cancer. He developed an infection during leave and has said that he needs 6-8 weeks of leave or more as a result.
- What are the employer's obligations?

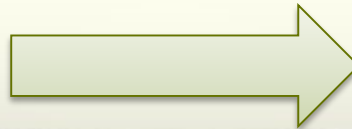


# What if FMLA is exhausted?



**FMLA**  
**12 Weeks**

**ADA**  
**4 Weeks?**



# Hypothetical No. 3

## FMLA & ADA Intersect!

- EEOC Interpretative Guidance indicates leave is a reasonable accommodation
  - Nearly every circuit agrees
  - Must be granted unless undue hardship
- Reasonable Accommodations
  - Obligations did not change
  - Determined on a case-by-case basis
  - Employer allowed to define essential functions



# Undue Hardship

- Do not have to provide an accommodation if it will cause an undue hardship
- Undue hardship is not limited to financial difficulty, but includes anything that would be unduly extensive, substantial, or disruptive or fundamentally alter the nature or operation of the business.
  - Significant loss in productivity • Decrease in customer responsiveness • Deferred projects • Lost sales • Increased burden on management • Temporary employees or overtired/overworked co-workers • Complexity of employee's job, size of the facility, and other factors all relevant



# Interactive Process

- Employer must engage in good faith.
- Document each step of interactive process.





# Hypothetical 4:

## Methadone

- Employee had car accident 15 years ago and has since suffered from chronic, unmanaged back pain. Began taking Benzodiazepine, Tricyclics, and Methadone. After reporting memory loss, blurred vision, and slurred, he was diagnosed with polysubstance usage.
- Could he take FMLA leave for polysubstance usage?

*Poper v. SCA Americas, Inc.*, No. CIV.A. 10-3201, 2012 WL 3288111, at \*3 (E.D. Pa. Aug. 13, 2012)



# Hypothetical 5: Multiple Choice

- Frank has a history of abusing the absence and tardiness policy. He has received a number of written warnings. Last month, he was given a final warning for attendance.
- Frank has a history of hypertension. In September, he was hospitalized for three weeks because of the condition. This absence was covered by the Company's FMLA policy. His job requires heavy lifting and exertion. Last Friday, Frank's wife spoke with Jim, Frank's supervisor, informing him that Frank's blood pressure was elevated and that Frank would not be in to work. Jim asked no questions. When Frank failed to return to work or call in on Monday, Jim terminated him. Tuesday morning, Frank's doctor sent a fax stating that Frank was hospitalized Friday afternoon for his hypertension which had flared up on Thursday of last week.



# Hypothetical 5: Multiple Choice

- Discharge Frank because his wife failed to give enough notice of Frank's condition for the supervisor to make a decision that Frank was suffering from a serious health condition.
- Discharge Frank because his wife failed to tell Jim that Frank was hospitalized.
- Reinstate Frank because he had a serious health condition and notified the Company



# Hypothetical 5: Multiple Choice

- Reinstate Frank because he had a serious health condition and notified the Company.



# Hypothetical 6: Multiple Choice

- Missy is a bookkeeper who works Monday through Friday for a school district. Missy has intermittent FMLA for migraines. The certification covers a five-month period. In the past three months, Missy had seven FMLA occurrences. Three of her occurrences fell on a Monday. Two coincided with a scheduled day off. The district suspects Missy is abusing her FMLA. Additionally, her co-workers are becoming increasingly tired of “covering” for Missy when she is out of the office. Missy calls in on the following Monday, stating that she has a migraine and needs to use FMLA leave.



# Hypothetical 6: Multiple Choice

- Require Missy to complete recertification but do not deny her leave while waiting for the recertification.
- Require Missy to complete recertification and deny her leave while waiting for the recertification.
- Missy has a valid FMLA leave. The Company cannot take any action without violating the law.
- The Company should terminate Missy for fraud.



# Hypothetical 6: Multiple Choice

- Require Missy to complete recertification but do not deny her leave while waiting for the recertification.



# Hypothetical 7: Multiple Choice

- Cindy has been out for ten weeks on FMLA leave. She is claiming that her supervisor's style has caused her severe depression. The doctor has moved her return to work date back. Cindy has been a poor employee since the Company hired her. She complains about everything and claims that her supervisor harasses her. When asked what form the harassment takes, she says he yells at everyone, including a number of male employees. She admits that none of her supervisor's behavior is sexual in nature. The Company just received a slip from her doctor saying that he is putting her on indefinite leave and suggesting we discharge or discipline the supervisor. Her supervisor is fed up with Cindy and wants to fire her.





# Hypothetical 7: Multiple Choice

- If she cannot return to work at the end of her leave, you can automatically terminate her.
- Seek to accommodate her by transferring her to another position.
- Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.
- You cannot discharge her because her complaint of harassment is protected activity under Title VII, and she will have a retaliation claim against the Company.



# Hypothetical 7: Multiple Choice

- Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.
  - Under ADA, we would only have to give additional leave as an accommodation *if that additional leave would permit the employee to return to work.*
  - We sometimes will quote the employee's own doctor in the termination notice letter we give the employee



# Hypothetical 8

- Brenda has worked for All-Star Grocery for 25 years. She has been a terrific employee and the local TV station recently did a feature on how much the community loves her, and how many of the store's customers go to see Brenda exclusively, despite its slightly higher prices.
- Brenda gets sick and needs to take FMLA. The Company, very concerned for Brenda, gives her all the FMLA forms she needs and approves the leave without question. Because they trust Brenda so much, they don't make her provide a certification, despite maintaining a policy to the contrary.
- When her leave is expired, she still is not ready to return to work. The doctors say she will need to be off for at least another 2 months.
- The Company wants to provide her with paid leave during that time.



# Hypothetical

- Problems?
  - Deviated from the policy and did not require a certification.
  - Granted her an additional 2 months of leave.
  - Gave her paid leave.
- Any of this illegal?
- Of course not. But...

**NO GOOD DEED GOES UNPUNISHED.**

**Make sure you treat your best and your worst employee exactly the same!**



# Hypothetical 9

- Sara works a sedentary job as a customer service representative. She can sit or stand while answering questions on a wireless headset set. She has used all of her PTO. Around Labor Day, she presents a physician's note stating that she is totally disabled because of a flare-up of an old back injury that required two prior surgeries. She is granted FMLA leave for eight weeks.
- During the fifth week of leave, her coworkers and supervisors see that Sara has posted photos on her Facebook page showing her on a Pub Crawl on Saturday night. The pictures show Sara drinking beer, smoking cigarettes, smiling, bending, and one photo that appears to show her dancing.
- HR calls her in and asks her whether she can return to work. Sara says she cannot bear to sit for eight hours. They show her the pictures and ask how she can be out partying and not able to work. She has no answer other than to say she was in pain the whole time.



# Hypothetical 9

- Terminate her for FMLA fraud.
- Do not terminate because the Company cannot prove FMLA fraud, or that she wasn't in pain.
- Offer Sara an accommodation of working less than eight hours a day.



# Summary

- School districts have low employee awareness of FMLA
- School districts have low management/administration awareness of FMLA
- School districts are unaware of the complexity of the interaction of FMLA and ADA, which could mean litigation
- What you do not know is costing you money in lost productivity, sick days and substitute cost

Probably, district employees need more training in this area!



# Questions?



# Business Driven. People Powered.



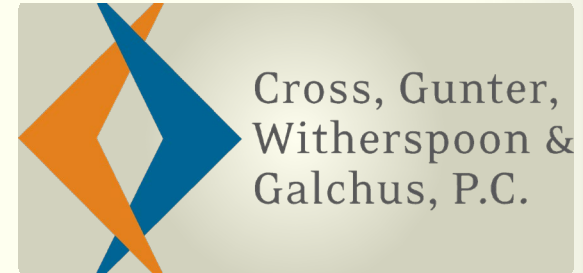
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