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FMLA AND ADA: TRICKY LEAVE SITUATIONS

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ABOUT HSB

HSB is a full-service law firm with 115+ attorneys in five office locations across the Carolinas. Deep background and experience in municipal law.



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BEFORE WE GET STARTED

- Feel free to jump in with questions
- The presentation slides will be shared with you following the event

Disclaimer: This presentation is provided for information only and not to be taken as legal advice. All situations are different and you should speak with legal counsel for specific advice.

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OVERVIEW

- Employee medical leave requests are usually one of the biggest topics that our clients seek our counsel on.
- They often require the input of legal counsel because one request can implicate the following:
 - Family and Medical Leave Act
 - Americans with Disabilities Act
 - Worker’s Compensation
 - Short Term Disability
 - Pregnancy Accommodations Act
 - Employer policies like PTO, vacation, comp time, etc.

OVERVIEW

- Today’s presentation is intended to be a general overview, you could spend hours and hours on just the FMLA alone.
- Today’s presentation is also intended to give you a framework for how to analyze leave requests with some examples.
- Now, onto the basics.

BASICS: WORKER’S COMPENSATION

- A no-fault, essentially social security/insurance type program providing health care costs and wage replacement to workers injured on the job.
- Lost wages, payment of medical bills, etc. all handled through insurance carrier
- Anti-retaliation provision – can’t fire someone because they got hurt on the job
- Employer must allow employee a reasonable period of time to demonstrate that he will be able to perform his duties after injury.

BASICS: FMLA

- Federal law that gives eligible employees unpaid, job-protected leave for certain medical conditions or to care for certain loved ones with medical conditions.
- Arguably the most difficult employment law to correctly apply. The law is dense, the process is cumbersome, and there are substantial grey areas in eligibility.
- For example, within bullet point #1 alone:
 - "eligible"
 - "job-protected"
 - "certain medical conditions"

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BASICS: FMLA

- Tips I've learned through years of dealing with these issues:
 - Get comfortable with and utilize the DOL forms!
 - Make sure employee is eligible
 - You can run other forms of paid leave concurrently with FMLA
 - There are ways to push on employees that abuse it
 - Every municipality needs a lawyer they can call about FMLA issues, it can be that complicated.

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BASICS: ADA

- For our purposes today, the ADA provides disabled employees with reasonable accommodations so that they may still perform the essential functions of their job.
- One universally recognized accommodation is a leave of absence from work.
- The primary difficulty comes from whether a leave of absence from work is warranted and to what extent?
- We will also briefly discuss light duty and other accommodations.

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BASICS: ADA

- Is someone's medical issue a disability?
 - Since 2009, almost certainly yes
- ADA leave of absence – usually only comes into play when employees has exhausted all other options – sick leave, FMLA leave, etc.
- Any ADA leave is unpaid, don't have to guarantee reinstatement
- Have to go through interactive process and determine whether granting leave is reasonable and whether an undue hardship – no hard and fast rules on amount of time, etc.

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PREGNANCY, FMLA AND ADA

- Pregnant Workers Fairness Act (effective June 2023), South Carolina Pregnancy Accommodations Act, Pregnancy Nondiscrimination Act
- PWFA, ADA and SC PAA require employers to accommodate pregnant employees with job modifications before, during and after pregnancy
 - Inability to perform essential functions of the job will be more strictly analyzed
 - Do not recommend denying accommodation unless the majority of essential functions cannot be performed (obviously this is a case by case analysis)
 - Employers should consider how to balance those essential functions that cannot be performed
 - Interactive process required by PWFA and ADA

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NURSING MOTHERS

- PUMP Act, SC Lactation Support Act and ACA
 - PUMP act requires employers to permit an employee to take a break to nurse every time the mother needs one for reasonable amounts of time.
 - DOL guidance anticipated soon for clarification.
- ADA Accommodation for longer and more frequent breaks

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SHORT TERM DISABILITY

- Voluntary insurance program selected by some employees
- Operates like normal insurance program – employee submits claim and insurance company decides whether covered. If so, can provide wage replacement while out of work.
- No mandates on employer to keep job open, anti-retaliation, etc.
- Some organizations allow PTO, etc. to make up difference

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COMP TIME, PTO, ETC.

- Paid time off allowed for local governments under the FLSA.
- Not all employers have it and specific policy rules vary.
- Generally given in lieu of overtime pay.
- Employees generally allowed to use as they see fit.
- PTO/Sick Leave/Vacation – voluntary benefits provided by employer. I recommend everyone have an attorney review their time off policies annually.

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EXAMPLE 1

- Monday morning, text message from Employee that she broke her ankle snow-skiing over weekend. Cannot currently walk and is getting in to see doctor this week for treatment.
 - Workers comp? No.
 - In the interim, employee can use available company-provided leave. None available? unpaid leave as accommodation (ADA).
 - Start FMLA analysis process *FIRST*
 - Send Notice of Eligibility either way
 - Can backdate if ends up eligible

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EXAMPLE 1 (CONT.)

- Employee is approved for and goes out on FMLA. Schedules surgery for two weeks out, and has a 6 week recovery time.
- Must hold job open, but it is unpaid.
- Depending on policy, may be able to get paid through PTO or short-term disability.
- Employee returns at scheduled time with note with light duty restrictions...

EXAMPLE 1 – LIGHT DUTY

- How do you handle light duty requests?
 - First, check your policy/handbook to see what it provides.
 - Generally, light duty is offered as an accommodation to an employee, not a guarantee (although employees think it is).
 - You must go through the ADA interactive process.
 - Can you grant without undue hardship to business?

EXAMPLE 2

- Report of on-the-job injury – employee suffered back injury and goes to hospital/urgent care
- File comp report with carrier and they will take over worker's compensation side.
- Doctor says employee is out for several weeks and will continue to be evaluated.
- Ok, so what to do now?

EXAMPLE 2 (CONT.)

- Start FMLA analysis – it can run concurrently. Lets say you designate FMLA from start of first day out.
- 12 weeks pass and employee's comp claim is still ongoing, getting paid comp benefits and doctor's notes putting employee out and it seems like employee is satisfied to just stay out of work and collect comp benefits.
- What to do now?

EXAMPLE 2 (CONT.)

- Exhausted FMLA, Exhausted all company time off and still not at work.
- Now, we have two issues:
 - Workers comp says you have to give someone a reasonable amount of time to show they can come back and do the job
 - ADA says employee is disabled and can get an unpaid leave of absence as an accommodation
- So now, we start interactive process with employee – what is reasonable? What are the hardships on business? What is doctor saying about return?

A QUICK WORD ON DOCTOR'S NOTES

- FMLA – Medical Certification Form
 - Can seek clarification/authentication
 - Can seek second or third opinion
- ADA
 - If necessary to confirm disability and ability to perform job/needed accommodations
- Can generally require a return to work certification/fitness for duty for all types of leave

FRONTLINE SUPERVISORS MUST BE TRAINED ON WHAT TRIGGERS FMLA AND ADA

- Most important juncture for ensuring compliance
- Requests most often brought to supervisors
- Employees are not required to request FMLA or ADA leave to trigger protections
 - No magic language required
- Frontline supervisors often miss cues of when FMLA or ADA rights are triggered
- A leave request framed as FMLA request may actually trigger ADA if the employee has a disability that is also a serious health condition and could work with a modification to job

SUPERVISORS CAN ASK

- How can I help you?
- Let's get HR involved to make sure we are doing what we need to help you.
 - HR can determine if the employee is eligible for FMLA leave and, if so, what information employee has to provide on specific forms
 - HR knows process for verifying need for ADA leave from provider before engaging in interactive process with employee
- Stay away from medical information.
- Never communicate with employee's treatment provider.
- Supervisors should be trained not to ask any questions or make any comments about the condition or illness, disability or feasibility of the request, deny or grant the request or make any promises but instead take the issue to HR.

ROLE PLAY TRAINING WITH SUPERVISORS

- I'm having trouble getting to work on time because of my new medications.
- I cannot work more than 12-hour shifts because of my condition.
- I cannot comply with the grooming policy because of a skin condition.
- I have cognitive problems and need to write down instructions.
- I have been diagnosed with cancer.

HUMAN RESOURCE ROLE

- Handle communications with employee once request is made to supervisor until accommodation determined.
- Verify condition and limitations/restrictions with treatment provider.
 - Never communicate with treatment provider.
 - Provide job description with request for information.
 - Can send HIPAA form to provider at employee's request but obligation remains with employee to ensure it is returned timely.

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HUMAN RESOURCE ROLE (CONT.)

- Consider possible accommodations once treatment provider's response received. (Supervisor input required here.)
- Engage in interactive process with employee.
- Document process and decision made.
- Tell supervisor what can and cannot be shared with coworkers who inquire as to why the accommodated employee is getting something different or being treated specially.

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