

Employer's Have Rights Too!

(FMLA, ADA and other Medical Leave)

Victor O. Cardwell, Esq.

cardwell@woodsrogers.com

Woods Rogers PLC

10 S. Jefferson Street

Wachovia Tower, Suite 1400

Roanoke, Virginia

540.983.7529

540.983.7711 (Facsimile)

www.woodsrogers.com

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FMLA

A Twelve-Step Self-Help Program

STEP 1

- Believe it or not, this is a benefit – NOT a punishment!

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STEP 2

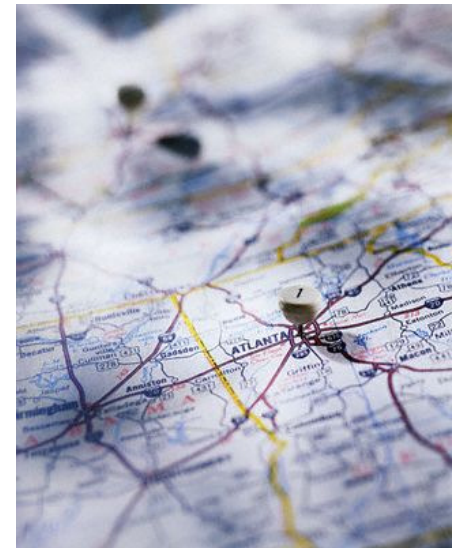
- ER notice obligations
- EE notice obligations
 - Foreseeable? (30 days)
 - Unforeseeable? (as much as practicable)
 - Call-in policies

FMLA

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STEP 3

- Eligible for FMLA?
 - 12 months
 - 1250 hours
 - 50 or more EEs w/in 75 miles



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STEP 4

- Is the leave FMLA qualifying?
 - Birth, Adoption, Foster Care
 - Family member's serious health condition
 - Personal serious health condition
 - Military Caregiver Leave
 - Qualifying Exigency Leave

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STEP 4 (continued)

- FMLA qualifying leave
 - “Care for” a “family member”
 - Serious health condition
 - Inpatient care
 - 3+ day incapacity and continuing care
 - Prenatal care/pregnancy



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STEP 5

- Proper designation
 - ER responsibility to designate
 - Designate if must substitute paid leave
 - Retroactive designation?

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STEP 6

- Is EE using available paid leave concurrently with unpaid FMLA leave?



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STEP 7

- Have you certified the health condition?
 - Required by regulations
 - Federally-required forms

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STEP 8

- Maintain group health benefits during FMLA leave
 - ER's obligation can cease:
 - If and when employment would have terminated
 - When EE confirms he/she will not return from leave
 - When EE fails to return after exhausting leave
 - EE fails to make timely premium payments
 - caution

A Twelve-Step Self-Help Program

STEP 9

- Has the employee provided a fitness-for-duty report?
 - Important protection for ER, EE and co-workers



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STEP 10

- Reinstatement to same or equivalent position?
 - No greater right if worked continuously
 - If the job has changed, employer give opportunity to be retrained
 - Employees entitled to unconditional raises and other benefits

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STEP 11

- Are We Keeping The Required Records?
 - Basic payroll and identifying data
 - Dates FMLA is taken or Hours of FMLA if <1 day
 - Copies of EE notices
 - All documents describing EE benefits, ER policies
 - Premium payments of EE benefits
 - **Records of any FMLA disputes**
 - Records relating to medical certification, etc.

FMLA

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STEP 11 – (continued)

- The good news for supervisors-- H.R. is tracking
- Supervisor needs returning EE to bring a Return to Work Certification then send to H.R.

FMLA

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STEP 12

Importance of Confidentiality

- ADA Issues/Harassment**
- HIPAA privacy issues**
- Respect for Others**

Additional Topics

- ER and EE's responsibilities regarding intermittent leave or a reduced work schedule
- EE's responsibility while out on leave to keep the employer informed of anticipated return to work

AMERICAN'S WITH DISABILITIES ACT

ADA – Definition of “Disability”

- Physical or mental impairment that substantially limits one or more major life activities
- A record of such impairment
- Being regarded as having such impairment

ADA - Accommodations

- Requires ERs make reasonable accommodations
 - Job restructuring, modified work schedule, making existing facilities readily accessible, and providing leave

ADA – Undue Hardship

- ER need not offer requested accommodation if it would constitute an “undue hardship.”
 - Undue hardship is defined as “requiring significant difficulty or expense.”

ADA – Medical Exams/Inquiries

- Prohibited at pre-offer stage
 - Pre-offer inquiries as to ability to perform essential functions, with or without reasonable accommodations, permitted
- Post-offer physicals
 - May require after job offer but only if:
 - All applicants are examined regardless of disability
 - Results kept confidential
 - Examination results are not used for any prohibited purpose
 - Must be job-related and supported by business necessity
 - Inquiries relate to whether individual is able to perform job

ADAAA

- Preserves the framework of who is deemed “disabled”
- Expanded definition of several key terms; and
- Overturned controversial Supreme Court decisions that narrowed scope of ADA

Key Provisions:

New Definition of Major Life Activities

- Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, **breathing, learning, reading, concentrating, thinking,** communicating and working
- Definition includes operation of major bodily function

Key Provisions: Definition of Disability

- Rule of Construction: Definition of disability shall be “construed in favor of broad coverage”



Key Provisions: Definition of Disability

- Impairment that is episodic or in remission is a disability if it would substantially limit major life activity when active

Key Provisions: Mitigating Measures

- Disability determination shall be made without considering mitigating measures such as medication, medical supplies, equipment or appliances
- Ordinary eyeglasses or contact lenses are excluded from the mitigating measures provision (i.e., person not disabled)

Impact of ADAAA

- Disability threshold much lower
- Cases will focus upon:
 - Discrimination analysis
 - Has ER reasonably accommodated
- Management must exercise greater care when making personnel decisions for EEs with health impairments or medical conditions.

EEOC 9/08 Guidance

What should ERs do if EE requests accommodation for first time in response to counseling or low performance rating?

- ER may still go forward with discipline or rating based on past performance
- Should engage in “interactive process” to discuss how medical impairment may be affecting performance and what accommodation could help
- ER may seek appropriate medical documentation

EEOC 9/08 Guidance

What if employee's disability causes violation of conduct rule?

General rule: ER may follow its conduct rules and impose discipline on individual even if violation was caused by individual's disability

You are the Expert!

- Bank teller with Tourette Syndrome that results in him frequently shouting and making loud noises that distract other tellers and upset customers

ANSWER

CALL HR

- Bank may terminate
- Because behavior not compatible with essential function of good customer service and is unduly disruptive

You Are the Expert!

- EE is meeting job expectations. Takes medical leave for pregnancy before the birth of the child due to complications.
 - FMLA eligible? When?
 - What happens when the FMLA leave expires and the EE is still out of work?
 - What if the EE were not meeting job expectations?

ANSWER

CALL HR

- FMLA protected leave, pre-natal and post-natal. Part of the child birthing process.
- FMLA leave expires while EE is out. The EE may be entitled to additional leave. Need to apply the practice consistently. Is the ADA in play?

You Are the Expert!

- EE's spouse is actively dying. EE takes leave to be with spouse.
 - FMLA leave?
- As a result of spouse's condition, now EE is diagnosed with depression.
 - What happens now?

ANSWER

CALL HR

- If the EE is FMLA eligible, then FMLA
- EE is now diagnosed with depression, the FMLA also applies.
 - What about the ADA?
 - BONUS QUESTION:
 - Is EE leave FMLA protected after spouse passes?

You Are the Expert!

- You are ready to terminate EE for *documented* poor work performance.
- Before you can say: “***YOU’RE FIRED!***”
- EE tells you they have MIGRAINES and that has effected their work. Requests FMLA and ADA paperwork, accommodation.
 - What do you do?

ANSWER

CALL HR!

- EE's job performance has caused termination meeting.
- Work **VERY CLOSELY** with HR.
- Engage EE - **INTERACTIVE PROCESS**
- If **DOCUMENTATION** is solid and company policies followed--We can act;
- If not, we may have to do a little more work.

QUESTION and ANSWER!

- Anytime you have an EE medical issue
 - CALL HR.
 - They are on your side.
 - I like lawyers...but I would not want to spend quality work time with them, if I can avoid it.

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