



## Avoiding ADA/FMLA Landmines

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Presentation To Lancaster County  
Association For Human Resource  
Management  
September 11, 2008



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A Brief Update on Legal Developments Under FMLA



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FMLA Expands to Include Military Leave Provisions



- Eligible employee who is the spouse, son or daughter, or parent of a member of the Armed Forces may receive 12 weeks for a “qualifying exigency” after the family member is notified of an impending call or order to active duty, or if the service member is on active duty.

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## FMLA Expands to Include Military Leave Provisions



- Eligible employee who is the spouse, son or daughter, parent, or “next of kin” of a member of the Armed Forces may receive 26 weeks of unpaid leave during a single 12-month period to care for a service member who is undergoing medical treatment or recuperation or therapy.

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## FMLA Expands to Include Military Leave Provisions



- The restriction to a single 12-month period limits this type of leave to a one-time use.
- Combination of leaves limited to a total of 26 workweeks.

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## FMLA Expands to Include Military Leave Provisions



- All other provisions of the FMLA, i.e. use of intermittent leave, use of leave by husbands and wives combined, requirements of medical certifications, restoration to employment, and the requirement of use of paid leave, etc., apply in full force to any leave taken under these new provisions.

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## Proposed Revisions to Current Regulations



... To be continued

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## ADA RESTORATION ACT



- FINDING: "...as a result of these Supreme Court cases [*Sutton v. United Airlines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*], lower courts have incorrectly found cases that people with a range of substantially limiting impairments are not people with disabilities."
- Purpose: "to provide a new definition of 'substantially limits' to indicate that Congress intends to depart from the strict and demanding standard applied by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and by numerous lower courts."

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## General Principles Regarding FMLA/ADA and Attendance



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## ADA



- Modified work schedules such as flex time or part-time may be a reasonable accommodation under the ADA

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## FMLA



- Where FMLA leave is requested to care for a sick family member or the employee has a serious medical condition, leave may be taken intermittently

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## FMLA



- Intermittent or reduced leave is available
- When medically necessary due to planned and/or unanticipated medical treatment
  - For recovery from treatment or recovery for a serious health condition
  - To provide care or psychological comfort to an employee's immediate family member with a serious health condition

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## FMLA



Request for intermittent FMLA leave may involve time off, late arrivals, breaks or early departures for chronic serious health conditions such as asthma, epilepsy, diabetes and injuries

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## An Employees' Absences Under FMLA are Protected



- Cannot be counted as an occurrence under employer's attendance policy
- An employee may not be penalized under a perfect attendance program for FMLA absences.

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## Leaves of Absences as a Reasonable Accommodation Under ADA



- Courts have uniformly held no obligation to give disabled employee an indefinite leave under the ADA.
- Employer's ability to grant leave as a reasonable accommodation will depend on employer's leave policies, ability to cover during the employee's absence, and length of time the position can remain vacant.

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## Blanket No Restrictions Policies Under ADA



A Federal District in PA recently certified a nationwide class of current and former UPS employees who were absent from work for medical reasons and were not allowed to return unless "100% healed." *Hohider v. United Parcel Service, Inc.*, 243 F.R.D. 147 (W.D. Pa 2007)

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## Is Attendance an Essential Function Under the ADA?



- In *Holly v. Clairson LLC*, 449F. 3d 1247 (11<sup>th</sup> Cir 2007) Court held strict punctuality is not an essential function

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## Employee Notice of Need For Intermittent FMLA Leave



- "As soon as practical" means generally within no more than one or two working days of learning of the need to leave, except in extraordinary circumstances

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## Call Out Procedures and the FMLA



- Employer may require employee to comply with usual reporting procedures for calling out, subject to FMLA requirements

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## FMLA



- Employer policy requiring employee to report intermittent leave within one hour of start of shift violates FMLA'S one to two day notice rule – Department Of Labor Opinion Letter, January 15, 1999, FMLA - 101

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## FMLA



- Providing two weeks notice of vacation leave when applied to FMLA absence violates FMLA Solovey v. Wyomissing Valley Health Care System, 396 F. Supp 2d 534 (M.D.PA 2005)

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## FMLA



- Applying requirement that only employee call off when applied to FMLA absences violates the FMLA

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## Challenging Suspicious Absences for Chronic Serious Health Conditions



- In a Department Of Labor opinion letter from 5/25/04, the Department Of Labor acknowledged the suspicious nature of the Monday/Friday intermittent absence and supported an employer's request for recertification from employee
- Nothing in FMLA prohibits employer from including a record of employee's absences in medical certification form and asking specific questions such as whether a particular medical condition necessitates the observed pattern

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## Tips for Controlling Absenteeism



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## TIPS



### 1. Know what your Company policies say

- FMLA
- Attendance
- Reporting absences
- Occurrences defined
- ADA

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## TIPS



### 2. Be consistent in application of your attendance policies

- Treat employees the same
- Do not be too lenient
- Do not be afraid to ask an employee why she/he is off work
- Do not be afraid to request medical documentation

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## TIPS



### 3. Document attendance issue as formal discipline

- Discuss policy
- Identify absences
- Discuss how absences are impacting department/company
- Identify patterns
- Advise employee of consequences

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**TIPS**



4. In cases of intermittent leave for planned medical treatment, insist that the employee take reasonable effort to schedule appointments outside of work hours

- If employee denies ability to do so, seek verification/documentation from physician through employee that this is the case

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**TIPS**



5. In cases of intermittent leave for treatment or recovery, transfer employee temporarily to alternate position for which she/he is qualified

- must pay equivalent pay and benefits, but not duties
- Employee must be restored to former job when she/he able to return

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**TIPS**



6. Confront abusive FMLA leaves, including chronic conditions

- Surveillance
- Seek recertification that medical condition is consistent with pattern of abuse

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**TIPS**

7. Add an anti-moonlighting provision to your leave policies

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**Hypothetical #1**

John is hired by ABC Company as night shift maintenance technician. Night shift maintenance technicians work from 11 p.m. to 6:30 a.m. ABC Company has an attendance policy for these workers that works on a point system, with each occurrence counting for points which follows a progressive disciplinary system. A number of points depends on what it is for a absence, a tardy, a failure to call in before the start of the shift, or some combination of the two. Employees get 10 paid vacation days (which require 15 days notice and approval of the supervisor), 10 sick days and five personal days (which require 10 days notice and approval). Employees who provide the required notice to take paid time off do not incur points under the attendance policy.

One year after he is hired, John informs his supervisor that he has Lupus. He has a note from his doctor which explains that he has the condition, and that the condition will flare up from time to time. When John is feeling well, he can perform all of his job duties. However, when his condition is affecting him, he is not able to work. John cannot predict in advance when his condition will be a problem.

ABC Company does not do pre-employment physicals of its employees, but the supervisor thinks that John should have told them about his Lupus during his interview.

John applies for intermittent FMLA leave. He also makes a request for reasonable accommodation under the ADA, asking that his absences caused by Lupus be accommodated.

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Can the absences count against the attendance policy under the ADA?  
The FMLA?

Can ABC Company force John to use his paid time off when he misses work?

If ABC Company agrees not to count the absences under the attendance policy, can it still give John points if he fails to call in before the start of his shift?

If John misses one day a week, how long will it take for him to use up his FMLA?

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Twice during the year, John is hospitalized for four weeks. As a result, between these leaves and the day-to-day absences, he runs out of FMLA. Under the ADA, does ABC Company have to accommodate John's future absences?

ABC implements an attendance incentive policy under which any employee with no absences for a month earns a bonus of \$100. Employees with absences get nothing. Paid vacation days and holidays do not count as absences for purposes of the bonus, but other absences, including paid sick days, do. If John misses time while he is on FMLA leave, does he lose his bonus?

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### Hypothetical #2

John has been employed by the Company for approximately ten years. John works on the third shift and overtime is mandatory. The Company has a no-fault attendance policy. Under this attendance policy, absences due to FMLA leave are not counted; however, all other substances, including all other health-related absences, are considered "points." An employee is progressively disciplined as he or she accumulates points within a calendar year.

John knows that his next absence this year will result in a two-week suspension, with termination to follow if he is absent again before January. John also has been frequently tardy in 2008 and his next tardy will result in a week's suspension under the Company's policy. Despite the fact that the Company has posted its required FMLA notice in the workplace, and included an FMLA policy in its handbook, John has never requested FMLA leave.

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### Hypothetical #2 (cont'd)

John suffers from Multiple Sclerosis (MS), and the disease has become progressively worse during the course of the past year. The Company is aware that John suffers from MS. In addition, John has commented to his supervisor that he is tiring easily and having trouble managing the more strenuous aspects of his job due to his health condition.

On Friday, April 11, 2008, John called the Company's automated employee call-in line and left a message stating that he would be absent because he is "sick again." John returned to work on Monday, April 14th, but was 30 minutes late. He told his supervisor that he had trouble getting going that day because he was still feeling sick.

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## Hypothetical #2 (cont'd)



On April 18, 2008, the Company's HR Management met with John to advise him that he would be suspended for three weeks – two weeks for his last absence and one week for his latest incident of tardiness. John then stated that he had been absent on April 11<sup>th</sup> due to dizziness and fatigue associated with MS. At this point, he produced an FMLA medical certification form completed by his physician. The medical certification form stated that:

- John needs to be absent "periodically" due to complications from his MS;
- John has difficulty getting up for work because the MS medication he is taking disrupts his sleep and causes him to be disoriented when he awakens;
- John was late on April 14<sup>th</sup> because it took time for the dizziness from his MS medication to dissipate after he awoke, so that he could drive;
- That all but one of John's absences over the past year, including his absence on April 11, have been related to MS symptoms and that most of his tardiness incidents have likewise been associated with his MS; and
- John should be given "light duty" limited to 40 hours per week.

(The Company only maintains light duty positions for employees who have had on-the-job injuries.)

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## Hypothetical #2 (cont'd)



- In light of the FMLA, may the Company proceed as planned with John's suspension?
- Are John's absences qualifying under the FMLA?
- Is the Company entitled to further information regarding John's health condition?
- Is the Company required to designate John's absences/tardiness for the past year as FMLA?
- Would your answer differ if the Company did not have its mandatory postings and a copy of the FMLA policy in the handbook?
- Is John disabled under the ADA?
- Must the Company grant John's request for a light duty position?
- What are the ADA implications of John's request for light duty?
- If the Company suspends John, and John subsequently sues the Company under the FMLA, to what would he be entitled?

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