The Interplay of the ADA and FMLA

How Much Leave is Too Much?

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FMLA Leave Entitlement

- 12 weeks/year for eligible employees
  - Birth
  - Adoption
  - Serious Health Condition
  - Military Family
- May be taken
  - All at once
  - In chunks
  - Intermittently

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FMLA Leave Entitlement

- Practice Pointer
  - Employer decision to grant "FMLA leave" for non-FMLA eligible reason DOES NOT count against an employee's 12 weeks/year annual entitlement

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Recent FMLA Cases of Note

- Use the "rolling" 12-month method to calculate FMLA leave.
- In *Caggiano v. Illinois Dept. of Corrections*, 2016 WL 362383 (N.D. Ill. Jan. 29, 2016), the department of corrections maintained an FMLA policy, but it failed to inform employees how the 12-month FMLA period was defined.
  - If an employer fails to identify which method it is using to calculate an employee's FMLA leave, the 12-month option that provides the most beneficial outcome to the employee is used.
  - Had the department of corrections used the "rolling" 12-month method, the employee would have exhausted his leave.
- If you change methods, make sure to give your employees 60 days' notice prior to making the switch.

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Failure to Advise That FMLA Leave May Be Denied for Failing to Turn in a Certification

- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
  - Fed Ex offered Wallace FMLA leave and verbally asked her to complete FMLA form
  - Wallace failed to return form and was terminated for two consecutive days' absence after form was due
  - Fed Ex failed to notify Wallace of the consequences of failing to return the form

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- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
  - Fed Ex violated 29 CFR 825.305(d) for failure to notify about the consequences of failing to return the form – Wallace testified she would have returned the certification had she known
  - 825.305(d) – "At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification."

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What is Sufficient "Notice" Under the FMLA?

- *Festerman v. Wayne County*, 611 F. App'x 310 (6th Cir. 2015)
  - Standard is whether the employee has given the employer enough information for the employer to reasonably conclude that an FMLA-qualifying event has occurred.
  - Calling in "sick" is not sufficient. Neither is a doctor's note which fails to provide specifics about an employee's need for leave or needed treatment.

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What is Sufficient "Notice" Under the FMLA?

- *Festerman v. Wayne County*, 611 F. App'x 310 (6th Cir. 2015)
  - However, a doctor's note that simply states an employee's need for leave combined with other knowledge regarding an employee's health condition can be sufficient notice.
  - In essence, employers are held to a "totality of the circumstances" standard when determining whether they had sufficient notice of an FMLA condition.

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Can Individuals Be Liable for FMLA Violations?

- *Graziadio v. Culinary Institute of America*, 817 F.3d 415 (2d Cir. 2016)
  - The Second Circuit reversed the trial court, finding there to be sufficient evidence from which a jury could conclude that an HR manager was an "employer" in economic reality and under the FMLA.
  - "An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees." 29 C.F.R. § 825.104(d).

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Can Individuals Be Liable for FMLA Violations?

- The Court examined four factors:
  - (1) Power to hire and fire employees
  - (2) Level of supervision and control over employee schedules and conditions of employment
  - (3) Control over determining employee's rate of pay
  - (4) Control over employee's records
- Court found there was enough evidence to submit the issue to a jury because the HR manager (a) reviewed the employee's FMLA paperwork, (b) determined its adequacy, (c) controlled the employee's ability to return to work, and (d) sent the employee nearly every communication regarding her leave and employment.

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Leave As A Reasonable Accommodation Under the ADA

Basic Principle – Employees Are Entitled To "Reasonable" Accommodation Unless It Results In An "Undue" Hardship

- There are no hard and fast rules about what is "reasonable" or "undue"

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How do we decide when a leave request is reasonable?

- **Threshold Question:** Would additional leave help the employee be able to return to work in the near future?
- Certain and Brief Leave is Almost Always Reasonable and Not Undue
- The More Uncertain Length Of The Leave, The More Unreasonable It May Become
- Indefinite Leave is Not Reasonable

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How do we decide when a leave request would be an undue hardship?

- Best evidence is actual experience
- A few factors to consider:
  - Losses in productivity
  - Lower quality or less accountability for quality
  - Lost sales
  - Delayed projects
  - Increased burden on co-workers or management

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EEOC Strongly Dislikes Hard And Fast Rules About Duration Of Leave Policies - It Claims They Violate The ADA

- One of EEOC's six national priorities identified by EEOC's Strategic Enforcement Plan

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Simply Satisfying the FMLA 12 Week/Year Rule May Not Satisfy Leave as a Reasonable Accommodation Under The ADA

- EEOC settled with Interstate Distributor for $4.85 million who had such a policy
- EEOC settled with Princeton Healthcare for $1.35 million who had such a policy

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Length of Leave Must Be Tailored To Each Individual

- In May 2016, Lowe's settled a disability discrimination suit brought by the EEOC for $8.6 million.
- Lowe's had been using a 180-day (and then a 240-day) maximum leave policy.

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Intermittent Leave: Not Just An FMLA Issue

- EEOC settled with Pactiv, LLC for $1.7 million in part because Pactiv failed to consider intermittent leave as a possible accommodation for employees with disabilities.

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Lesson:

The Hallmark of the ADA is Engaging in the "Interactive Process"

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Question:

What Is The Cost In Terms Of Dollars And Flexibility Of Allowing An Employee To Remain On Leave?

Versus

What Is The Cost In Terms Of Dollars And Flexibility Of Discharging An Employee While On Leave?

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