THE SOME-TIME POWER OF THE DOCTOR’S NOTE: WHERE EMPLOYMENT LAW AND DISABILITY RIGHTS MEET

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Topics

- FMLA and ADA basics
- How the FMLA, ADA, and personnel policies impact absenteeism issues
- Parameters of employer contact with health care providers
- Practical guidance on how to handle doctor’s notes and leave issues, including case studies
Family Medical Leave Act

- **Employer Coverage**
  - Private sector employers with 50 or more employees
  - Public Agencies
  - Public and private elementary and secondary schools

- **Employee Eligibility**
  - Employed by covered employer
  - Worked at least 12 months
  - Have at least 1,250 hours of service during the 12 months before leave begins
  - Employed at a work site with 50 employees within 75 miles
Special Rules for School Employees

- Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply.
  - The usual requirements for employees to be “eligible” do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles.
  - For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually a school board) within 75 miles.
Qualifying Leave Reasons

- Eligible employees may take FMLA leave:
  - For the birth or placement of a child for adoption or foster care
  - To care for a spouse, child, or parent with a serious health condition
  - For their own serious health conditions

- Military Leave
  - Because of a qualifying reason arising out of the covered active duty status of a military member who is the employee’s spouse, child, or parent (qualifying exigency leave)
  - To care for a covered service-member with a serious injury or illness when the employee is the spouse, child, parent, or next of kin of the covered service-member (military caregiver leave). Up to 26 weeks of leave is allowed for this type of FMLA leave.
Amount of Leave

- Eligible employees may take up to 12 weeks of FMLA leave:
  - for the birth or placement of a child for adoption or foster care;
  - to care for a spouse, son, daughter, or parent with a serious health condition; and
  - for the employee’s own serious health condition.
What to Look For*

1. Employee specifically requests FMLA leave
2. Employee requests time off for:
   - Surgery
   - Medical procedure
   - Medical reasons
   - Pregnancy or maternity leave
   - Treatment
     - Chemotherapy
     - Radiation
     - Physical Therapy

*(not all-inclusive list)
What to Look For*

3. Employee requests time off for sick child, parent, or spouse
4. Employee misses 3 or more days of work
   - You may or may not know reason for absences. ASK!
5. Employee misses work sporadically due to chronic conditions
6. Employee requests leave for reasons related to family service member

*(not all-inclusive list)
What to Look For

Err on the side of caution!

Even if FMLA ultimately not at issue, you should still document your efforts.

Even if no FMLA, must provide other types of leave as your policies provide.

Even if no FMLA, must consider leave under the ADA.
Contact with Health Care Providers

- You can require the employee to provide a medical certification from his/her health care provider.

- Contact between an employer and employee’s health care provider must comply with HIPAA.
Can I call the doctor to verify?

- If an employee submits a complete and sufficient certification signed by a health care provider, the employer may **not** request additional information from the health care provider.

- The employer **may** contact the employee's health care provider for purposes of **clarification and authentication after** the employer has given the employee an opportunity to cure any deficiencies.
Who can make the contact on behalf of the employer?

- Under no circumstances may the employee's direct supervisor contact the employee's health care provider.
- The contact must be made by the HR professional, leave administrator, or a management official.
- Employers may not ask the health care provider for additional information beyond what is contained on the form.
Authentication

- Authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.
  - No additional medical information may be requested, and the employee's permission is not required in order to request authentication.
Clarification

- Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form.
  - Contact between the employer and the employee's health care provider for purposes of clarification must comply with the requirements of HIPAA
  - If an employee chooses not to provide the employer with authorization to clarify the certification with the employee's health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.
When to give employees FMLA paperwork

• When absenteeism becomes a problem:
  ○ Give notice to the employee of available rights under FMLA
  ○ This shifts the burden to the employee to request leave and certify

• Train those employees who are responsible for managing attendance on what signs to look for and what paperwork to give
Americans with Disabilities Act (ADA)

- Applies to all employers with 15 or more employees.
- Protects individuals with disabilities from discrimination.
- Requires “reasonable accommodation” if needed in order to perform “essential functions” of a job.
  - It is critical to develop a description of “essential functions of the job” for every position.
  - Update your job descriptions and include the physical demands of positions.
Who is protected under the ADA?

- A qualified individual:
  - With a physical or mental impairment or disability;
  - With a record of such a disability; or
  - Who is regarded as having such a disability.

- An employee who is associated with a person with a disability.
What is a ‘disability’?
- A physical or mental impairment which substantially limits a major life activity
- Record of such an impairment
- Regarded as having an impairment

Almost any medical condition could be a disability under the ADA.
REASONABLE ACCOMMODATION
Employer’s Obligation with Respect to Reasonable Accommodations

- It is an affirmative obligation.
- The burden is on applicant/employee to request an accommodation.
- Purpose is to enable the individual to perform the essential functions of job.
- An accommodation is not reasonable if it creates an undue hardship to employer or to co-workers.
Identifying Accommodations- Interactive Process

- Verify essential functions of job.
- Identify physical/mental abilities & limitations in relation to essential functions.
- Consult with employee to identify potential accommodations & assess effectiveness.
- Consider preference of employee & choose accommodation that best serves needs of both employer & employee.
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.
Undue Hardship

Factors to be considered:

- Size of employer.
- Expense of accommodation in relationship to resources of employer.
- Number of employees at worksite.
- Employer’s budget for other items.
Additional Leave Time

- You must consider additional time off of work (may be unpaid) as a reasonable accommodation when:
  - Employee’s FMLA leave for his/her own serious health condition has been exhausted
  - Employee is not eligible for FMLA leave and is not released to return to work
  - Employees has exhausted his/her paid leave and is not released to return to work

- Engage in an interactive process with employees.
Additional Leave Time

• You may not:
  ○ Automatically terminate employees who have not been released to return to work upon exhaustion of their FMLA leave
  ○ Automatically terminate employees who have exhausted all of their paid leave and are still not released to return to work
Additional Leave Time

- How much leave team is sufficient for a reasonable accommodation?
  - There is no clear answer.
  - Look at each situation on a case-by-case basis. Consider:
    - The position of the employee
    - How much time has the employee already been off of work?
    - Undue hardship considerations
    - What does the doctor say?
      - How much leave does the employee need?
      - When will the employee be released to work.
    - Look to past situations. Be consistent or be able to make distinctions that justify different treatment.
Consider Your School Policies/Practices and Other Laws

- **Know your policies**
  - Do your policies provide for sick leave or other paid leave for medical conditions?
  - Do you have policies that provide for unpaid leaves of absence?
  - Have you provided additional time off to others in the past?

- **Arkansas Teacher Fair Dismissal Act & Due Process considerations**
  - Even if you follow the provisions of the ATFDA and due process in terminating employees for excessive absenteeism, you **must** adhere to the ADA and FMLA, if applicable, before you discharge employees with absenteeism problems.
Health Provider Contact Under the ADA

- As part of interactive process, it may be necessary for employer to request documentation about the nature, severity, and duration of the employee’s medical condition.
- You may ask the employee to provide you with certain information from health care provider. (BUT, often you do not receive the information you are seeking.)
- You may contact the health care provider directly to seek the information. (BUT, there are guidelines.)
Your employee, Bruce Wayne, a paraprofessional with Best School District, has been on FMLA leave for 12 weeks for his own serious health condition following a car accident. He has exhausted all FMLA leave. When your bookkeeper speaks with Mr. Wayne to notify him that he will need to present fitness for duty certificate, Mr. Wayne tells the bookkeeper that his doctor has not released him to return to work. Mr. Wayne says he does not know when he will be ready to return to work.
Two days later, Mr. Wayne’s wife brings the bookkeeper the following doctor note:

To Whom It May Concern:

I feel that Bruce Wayne can perform his paraprofessional duties if given time to perform these duties. He does not have the flexibility of a 20 year old any more, but given time, he can skillfully perform his duties at school.

Sincerely,

Dr. Funny Bone

How do you handle?
Cinderella has been your varsity cheerleading coach for 5 years now. She just took her 8 weeks of FMLA leave for her pregnancy and the birth of her child. She has been back at work for a couple of months. During the week of April 26, Cinderella is absent on Monday, Tuesday, Wednesday, and Thursday. She tells the secretary at the high school that her daughter is ill. When you speak to the building principal about this, he casually mentions that Cinderella also missed a couple of days earlier in the month with migraine headaches.

How should you handle this?
CASE STUDY #3

You recently hired Meredith Grey to teach biology at your school. She’s been here for a couple of months and the students love her. Unfortunately, she just got word that her mother is sick. Meredith notifies you that she needs to travel out of state to care for her ailing mother.

How do you handle?
Mr. Ratburn is employed by Best School District as a third grade teacher and has cancer. He is not eligible for FMLA leave. He has exhausted all available paid leave. Thus far, Best School District has given Mr. Ratburn 9 weeks of unpaid leave. Mr. Ratburn has not been very diligent in keeping BSD apprised of his return-to-work status. After multiple letters and calls to Mr. Ratburn, he finally provides BSD with the following note from his physician:
To Whom It May Concern:

Nigel Ratburn has been under my care since September 2014. I have evaluated Mr. Ratburn’s return-to-work status. Mr. Ratburn should be able to return to work in 4 weeks.

Sincerely,

Dr. Quack

How should you handle?
CASE STUDY #4

Would your plan of action be different if this is the doctor’s note you had received?

To Whom It May Concern:

Nigel Ratburn has been under my care since September 2014. I have evaluated Mr. Ratburn’s return-to-work status. Mr. Ratburn will not be able to return for at least 8 months and possibly longer.

Sincerely,

Dr. Quack
QUESTIONS?