Concurrent Session – Wednesday, 1:30-2:30 pm

Strong FMLA/ADA Policies & Practices: Keys to Avoiding Liability

About the Speakers

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FMLASource, a ComPsych program
- Attorney and CLU, CPCU
- Helps employers strategically minimize the cost and frequency of FMLA absences as well as ADA and other types of leave

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Sun Life Financial
- In-house U.S. employment counsel for Sun Life & legal advisor to Sun Life’s Absence Management Solutions product and sales teams
- Advises Sun Life on employment law issues, including FMLA, ADA and other leave laws

Both James and Marjory are experts and frequent speakers on best practices for employers

Overview

Employers tend to get in hot water when:
- They don’t have clear policies and practices;
- They don’t effectively communicate those policies and practices to employees; and
- They don’t enforce them consistently
Good FMLA Policy Basics

- Eligibility requirements
- 12-month calculation method
- Requirements for bonding leave/placement/adoption
- Call-in procedure
  - Clear how and whom to notify
  - Substitution of paid leave
  - Medical certification procedure
- Intermittent leave requirements
  - Advance notice
  - What information is required
  - Outside work clause
  - Employee obligations
  - Benefits during leave
  - Fitness for duty requirements

Agenda: Policies That Help Employers Win

- Call-in and notice procedures
- Attendance
- Job abandonment
- Disciplinary procedures
- Anti-harassment and anti-discrimination
- Investigation practices
- Interactive process/reasonable accommodation
- Job descriptions
- Limited disclosure of medical information

Call-in & Notice Procedures

- DOL FMLA regulations expressly allow employer notice and call-in procedures!
- Notice requirement can apply to (1) initial application and (2) individual absences of approved intermittent leave
- Can require employee to stay in contact during leave
  - Cage v. Avis Budget Co. (N.D. Ohio 3/20/17)
  - Smith v. Concentra, Inc. (N.D. Illinois 3/1/17)

Types of notice requirements:
- Who to call
- When to call
- What must be disclosed
Call-in & Notice Procedures

Can require employee to notify BOTH the employer and outsourced absence management administrator

- Perry v. American Red Cross Blood Services, TVA Region (6th Cir. 06/01/16)
- Duran v. Stock Building Supply West, LLC (9th Cir. 1/12/17)
- Alexander v. Kellogg USA, Inc. (6th Cir. 1/4/17)
- Scales v. FedEx Ground Package System, Inc. (N.D. Illinois 1/24/17)
- Acker v. General Motors, LLC (5th Cir. 4/10/17)

Call-in & Notice Procedures & Employer Culture

- Some employers want to help employees submit FMLA leaves, not create obstacles
- Legally, this may make sense for continuous leaves (to exhaust it faster)
- But, what about intermittent absences?

Call-in & Notice Procedures: Devil Is in the Details

- Must be able to prove employee was given and aware of the procedures
- Establish policy in a handbook and advise employee in writing in leave approval letters
- If employee fails to comply, remind them (in writing)—always
- Make it clear what information is required (which leave, episode or treatment)
- Managers must document
- Must be consistent in application

Must be clearly communicated in writing.
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Call-in & Notice Procedures: Waiver Issues

Foye v. Septa (E.D. PA 3/28/17)
- Employee did not submit documentation for FMLA on time
- Employer assigned “points” for unexcused absences
- Employment terminated
- Employer had practice of sometimes accepting late FMLA paperwork
- Court says: “Indulgences do not become revisions to the Policy”

Contrast:
- Evidence that employer had, on other occasions, agreed to reclassify absences as FMLA leave even if notice procedures not followed
- This was 1st time employer had refused to change
- Summary judgment denied on FMLA retaliation claim

Attendance Policies

- Options: Precise “point” systems vs. more discretionary
- Mention that regular, reliable and predictable attendance is essential job function
- Make sure you do not count absences FMLA-protected absence or absences protected by state or local leave laws!
- Preserve freedom to “redesignate” excused as unexcused (and vice versa) based upon new information without being a waiver
- Notice procedures are important here too!

Job Abandonment Policies

If absent for 3 consecutive days, no call/no show—job abandonment

Johnson v. Royal Chemical Co., Ltd. (N.D. Ohio 1/31/17)
- Employer had policy that failure to report to work or notify employer for 3 consecutive days is job abandonment & voluntary resignation
- Court said no evidence of pretext because employee was terminated for violating the policy (not for disability)

State expressly: No call/no show = voluntary resignation as of the third consecutive day

Boadi v. Center for Human Development, Inc. (D. Massachusetts 3/6/17)
- 3 day no call/no show = voluntary resignation
- Employee was in hospital and did not call
- Employer did not know and applied policy—voluntary resignation
- Court upheld, even though after 3rd day employee reached out to employer Court said no longer an employee because of policy
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**Disciplinary Action Policies: Keep Your Options Open**

**Poulsen v. Humana Insurance Co. (10th Cir. 1/5/17)**
- Humana had progressive discipline Policy: Coaching first then PIP
- Employer did not coach—put employee directly on PIP after outburst at work
- Employee argued this was evidence of pretext
- Court said that policy indicated progressive steps did not have to be followed for a “critical offense” and employee could be terminated
- Therefore, no pretext

**Policies with Specific Grounds for Immediate Termination**

  - Termination for failure to file full report of every accident
  - Termination for using leave to be in jail
- Feise v. North Broward Hospital District (11th Cir. 3/24/17)
  - Policy prohibited sleeping at work
  - Policy “required” termination for falsification of safety checklists

**No Policy? Employer loses.**

  - Teacher fired for sharing keys & no policy prohibiting
- Varguez v. Smith’s Food & Drug Centers, Inc. (D. Arizona 4/4/17)
  - Employee fired for using override number to clock himself into work & no policy prohibiting
- Jones v. Gulf Coast Health Care of Del. (11th Cir. 4/19/17)
  - Employee fired for posting photos of trips to Busch Gardens & St. Martin—no employer policy limiting travel while on medical leave
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Harassment & Discrimination Policies

• Good procedures help to prove good faith
• Can require employee to report violations to specific department or person (with choices)

  Cooper v. C.R. Corp (d/b/a McDonald’s) (11th Cir. 2/9/17)
  • Employee had “lazy eye” that wandered
  • Store manager mocked, called him “loulayered” and said “If you don’t like what I say, you can go home”
  • Employer’s policy said harassment had to be reported to manager or to HR
  • Employee reported harassment to the District Manager
  • Court said that because he did not follow the policy he did not put employer on notice of harassment
  • Therefore, no evidence of retaliation because Employer not on notice

Investigation Practices/Policies

• Always interview the accused
  
  Dewitt v. Southwestern Bell Tel. Co. (10th Cir. 1/18/17)
  (Simply interviewing employee can defeat allegation of pretext arising out of unfair investigation)
  Caldwell v. KDSO-TV (9th Cir. 1/16/17) Employer denied summary judgment as did not consult employee and advise him of performance issues before selection in RIF

• Does not have to be perfect
• Test is good faith—not whether correct
• If manager has been accused of discrimination or harassment: remove from decision-making process

  Wellein v. Wal-Mart Streets, Inc. (E.D. Washington 1/17/17)(HR & higher level manager)
  Dewitt v. Southwestern Bell Tel. Co. (10th Cir. 1/18/17)(3rd line supervisor)

Courts Like Processes

  Dewitt v. Southwestern Bell Telephone Co. (10th Cir. 1/18/17)
  • Code of Business Conduct: Listed failure to remove service plan from customer’s account after cancellation is terminable offense (“cramming”)
  • Day in Court: Internal “hearing”
  • Last Chance Agreement: One more incident may lead to termination

  BUT: Failure to follow procedures can be evidence of pretext:
  • Alcozar-Murphy v. ASARCO (D. Arizona 2/27/17)
  • Caldwell v. KDSO-TV (9th Cir. 1/16/17)

  • Where employer also failed to follow internal procedures before FMLA leave failure to do so after leave is not evidence of bias
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**Reasonable Accommodation Policy**

- Have a policy
- Have a standard memo/form reflecting willingness to engage in interactive process
- Make the employee get the medical documentation!
- You can ask for more medical information if the response is unclear

**Have document requesting medical documentation**

- Describe medical condition & how affecting job
- Identify accommodations and why they will help
- State how long they will be required

**Cases – Reasonable Accommodation Policy**

**Balgley v. New York City Health and Hospitals Corp. (S.D.N.Y. 1/10/17)**

- Employer had Discretionary Extended Leave Policy
- To be eligible for extended leave, employee had to have “exemplary performance”
- Employee’s performance rating was “Satisfactory”
- Employee argued that he “believed” that employees with similar performance were granted extended leave
- Court concluded this “threadbare allegation” was not enough to show pretext or survive summary judgment

**Calaman v. Carlisle HMA, LLC (M.D. Pennsylvania 3/24/17)**

- Employer had policy stating that employee could request “Personal” or “General Medical Leave” beyond FMLA leave but no job protection on such extended leave
- Court: Even if extended leave was ADA accommodation, no job protection because of policy
- Court emphasized that employee signed documents agreeing she had no job protection
- Employer filled her job while she was on leave and told her that there was no job when she was released to return
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Cases – Reasonable Accommodation Policy

**Dugger v. Austin State University (E.D. Texas 02/06/17)**
- Employer had ADA policy requiring employee to notify both manager and HR and supply detailed medical information within 14 days
- Employer argued ADA claim should be dismissed because employee did not comply with policy and therefore did not provide sufficient notice
- Court disagreed saying that adequacy of request for accommodation is question of federal law

Job Descriptions: Essential Job Functions

- Review job descriptions for ADA purposes
- A job description prepared before request for accommodation entitled to more deference
- "Essential Job Functions" is a magic phrase!
- Use it in performance evaluations & warnings
- Use it in all communications about accommodation requests
- It is never too late! You can revise job descriptions

**Wickware v. Johns Manville (10th Cir. 1/17/17)**

Job Descriptions: Cases

**Slayton v. Sneaker Villa, Inc. (E.D. Pennsylvania 3/20/17)** deny summary judgment
- Regular, reliable and predictable attendance not in job description
- Ability to travel is in job description but as a "requirement," not an essential job function

**Crain v. Roseville Rehab. & Health Care (C.D. IL 3/21/17)** deny summary judgment
- "requirement" of lifting ≠ essential function
Limit Disclosure of Medical Information

Poulsen v. Humana Insurance Co. (10th Cir. 1/5/17)
• Humana used outsourced absence management provider
• As a result, supervisor did not know of diagnosis/medical condition
• Insulated supervisor from retaliation claim

Contrast:
Holtrey v. Collier County Board of County Commissioners (M.D. Fla. 1/12/17)
• Manager shared FMLA health information at staff meeting
• Coworkers made fun of the employee

But see:
Perez v. Denver Fire Department (D. Colorado 3/20/17)
• No ADA violation for sharing medical info volunteered by employee

Best Practices: Good Documentation

- Communicate in writing
- Show you are willing to engage in interactive process (sample memo)
- Document the interactive process once it occurs
- Performance or conduct issues—document, document, document

Why is documentation so important?
- Avoids disputes later about who said what
- Managers not always clear—can make it clear in follow-up writing
- People forget & managers leave
- Think about future uses of the document—jury, lawyer

Other Best Practices

- Enforce policies consistently . . . BUT humanely
- Ensure that you adequately communicate and disseminate policies
- If you decide to deviate from process, document that you are doing so as courtesy
- Fix your policies if you become aware of weakness
- Provide management training
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Q&A

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