



FMLA & ADA Case Law Update

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Employee Notice of the Need for FMLA Leave



Johnnie Walker



Recognizing Employee's Need for FMLA Leave

- Johnnie Walker, a bus operator with sickle cell anemia: Poor attendance, last-chance agreement
- After, he called off work, stating two things:
 - He “had to go to the hospital”
 - He “did not have a babysitter”
- Dispatcher recorded his reason in the log as “NO BABYSITTER,” resulting in two attendance points and termination
- Johnnie submitted an FMLA request later the same day, and the employer eventually approved the leave for that date
- Despite this approval, the employer later informed him that the absence counted toward discipline, and he was ultimately terminated



Poll Question: Is the Termination Legit?

- A. Yes, of course. Johnnie suffers the consequences because of his inconsistent excuses for his absence
- B. Yes, because Johnnie didn't follow the process while on his LCA
- C. No, Johnnie put the Employer on notice of the need for FMLA leave. Employer needs to hit the breaks before termination.



Notice Sufficient; Attendance Points a Problem

- Johnnie provided enough information during the call to alert employer that his absence could qualify for FMLA protection, even though he never used the term “FMLA” and gave conflicting information
- Court: Employers are prohibited from assigning attendance points to absences later deemed FMLA-protected. Reasonable jury could conclude that the employer interfered with his FMLA rights and retaliated against him

+3 Unexcused absence

+2 Late by 15 minutes

+1 Left 15 minutes early

Walker v. SEPTA (3rd Cir. July 2025)



Insights for Employers

- It's the frustrating situations that always get you
- Notice can develop informally over time, especially when leave is due to worsening conditions
- Employers have obligation to inquire further if notice is ambiguous or contradictory
- Once aware of a potentially qualifying reason, employers must inform employees of their rights
- Be mindful of your "logs"!



FMLA and Performance Issues



Performance Improvement Plans

- Jan, long-tenured service manager; significant personal hardship (two deaths in family)
- Rotator-cuff injury and took approved FMLA leave; upon return, received a routine quarterly performance review rating her “two out of three” for performance
- Later needed a second surgery and planned to take another period of approved FMLA leave
- One day before FMLA began, Jan issued a PIP, despite minimal prior documentation of performance issues
- During her leave, the employer:
 - Reassigned management and placed another manager into her position
 - Manager completed eval during her leave, rating her “one out of three” while noting her leave status
 - Told no management positions were available, leading to her termination



Timing of PIPs and Termination Decision

- Keith promoted at aircraft manufacturer from production to Manufacturing Engineer; required analytical judgment, advanced IT knowledge
- Keith briefly took approved FMLA leave and returned to work
- Within his first three months as an ME, significant gaps in understanding core concepts, concerns about ability to perform basic ME tasks despite training
- Took leave again for mental health; decision made during leave to put him on a PIP
- Upon return, Keith required repeated retraining, additional shadowing, and continued to struggle with basic analytical concepts, including understanding aircraft issues beyond the use of IT tools.
- Within 60 days after leave, terminated

Cooper v. Airbus Americas (S.D. Ala. 2025)



Poll Question: Who Wins?

- A. Employer wins both cases
- B. Jan wins, Keith loses
- C. Jan loses, Keith wins
- D. Employees win both cases



What's the Difference?

- Timing of PIP can be a killer
 - Jan: PIP one day before FMLA leave began
 - Keith: PIP decided during leave
- How you implement the PIP can make or break you
 - Jan: PIP seemed to be a sham, as it was issued one day before leave and then performance used to eliminate her position during leave
 - Keith: Employer made conscious decision NOT to term during leave, but issue the PIP upon return and then give Keith a chance to succeed
- Difference: Employer gave Keith clear expectations & chance to succeed under the PIP (60 days)



PIPs & Termination Decisions

- *You're under the microscope* – ensure PIP objectives truly are objective
- If employee requests leave in middle of PIP = ***DON'T CUT PIP SHORT!***
- Like *Keith's* case, show clear expectations, follow-up meetings, warning prior to termination decision, opportunity to turn it around
- Upon return to work, pick up where you left off, ensuring employee cannot reasonably allege they were set up to fail
 - Discuss with managers the need for a fair shake
 - Conduct and document regularly-scheduled meetings upon return, ensuring employee has clear feedback on performance and expectations moving ahead
 - If you didn't plan to terminate prior to leave, don't terminate upon return



Timing Alone Comes with Risks in '26

- Bob, store manager; after return from a 30-day medical leave, he was transferred from managing a Mega Hub to managing a smaller store
- Bob claimed the transfer constituted FMLA retaliation
- Employer's Motion for Summary Judgment was denied because facts showed the transfer decision was not "final" before Bob started leave and because he was demoted the day he returned to work
- The "close temporal proximity" between the dates of leave and the adverse action supported a "strong suggestion" of retaliation
- Summary judgment not appropriate

Persichini v. AutoZoners (D. Mass. 2025)



Medical Certification: Pregnancy



Peggy's Morning Sickness

- Peggy, pregnant, experienced significant morning sickness during her first trimester that caused multiple absences and an early departure from a shift
- After Peggy missed five workdays in just over a week due to reported morning sickness, the employer provided her with FMLA notices and requested medical certification from her physician
- Medical certification details: Davis's obstetrician certified her condition as "pregnancy," noting it was high-risk due to lupus and approving FMLA leave for prenatal appointments and post-childbirth recovery
- Doctor expressly answered "NO" to whether the condition would cause episodic flare-ups preventing her from working and did not reference morning sickness



Poll Question: Let's assume Peggy's very next absence is for morning sickness. Given the certification, are you approving FMLA leave for morning sickness?

1. Yes, she's been reporting morning sickness, so it must be covered even if the Doc doesn't say so.
2. No, doctor was given ample opportunity to certify morning sickness, and specifically noted "NO flare-ups" and said nothing about morning sickness.



Peggy's Morning Sickness

- Employer approves FMLA for prenatal visits and childbirth
- The following week, Peggy needs time off for morning sickness
- Relying on medical certification, employer denies FMLA leave, concluding that the absence fell outside the scope of the certified FMLA leave
- Seventh Circuit:
 - FMLA entitlement is not strictly limited to the precise terms of a medical certification and revived Davis's claims
 - Employer knowledge mattered: Employer knew Peggy was experiencing morning sickness; jury could find employer should have recognized the certification was incomplete and given her an opportunity to supplement it before denying FMLA coverage

Davis v. IL Dept. of Human Services (7th Cir. 2025)



I Like to Take My FMLA Around the Holidays



Andrew's Patterns of Absenteeism

- Andrew, railroad conductor; work assigned on an as-needed basis
- Andrew approved for intermittent FMLA for major depression and insomnia (estimated ~1 episode/month, short duration)
- RR: lots of weekend and holiday staffing; issued Andrew a warning letter citing a pattern of FMLA use on weekends and in conjunction with other days off, cautioning that continued misuse could result in discipline
- Around the same period, RR implemented an automated system to flag employees whose FMLA usage suggested a pattern of extending time off, particularly when leave coincided with weekends or scheduled days off
- Individualized reviews by Benefits Manager, who evaluated medical information and usage patterns and could issue warning letters or recommend discipline



Combatting Misuse over the Holidays

- During the winter holidays, RR observed a sharp increase in FMLA usage, with approximately 10 percent of the workforce marked off on Christmas Day and a substantial number again on New Year's Day
- RR conducted individualized reviews of employees who took intermittent FMLA leave during multiple holidays, examining leave histories across other major dates such as Thanksgiving and Independence Day
- RR then charged numerous employees with FMLA dishonesty while excluding employees with conditions such as cancer, terminal illness, or late-term pregnancy from discipline
- Ultimately, hundreds were reviewed, and a subset was disciplined
- Andrew was terminated as part of this process, given his history of misused FMLA leave and his latest pattern



Poll Question:

Does Andrew Have a Viable FMLA Claim?

- A. Nope, he legitimately got busted, FMLA claims dismissed!
- B. Yes, jury should decide whether he was inappropriately singling out for using FMLA



Andrew's Claims Go to a Jury

- Two concerns for the Court:
 - Reliance on holiday timing and aggregate statistics did not inherently establish misuse and that RR's investigation could be viewed as selectively incomplete
 - More significantly, RR's "systematically better treatment" of employees with other serious medical conditions—such as cancer, terminal illness, or late-term pregnancy—supported an inference of retaliatory intent, because those employees were categorically exempted from discipline despite exhibiting similar leave patterns

Brown v. BNSF Railway Company (N.D. Tex. 2025)



What Were You Thinking!?!



Friend, Have You Ever Heard About FMLA Leave?

- Kim: received positive reviews, but as her health worsened, she needed time off
- Supervisor told her to “take whatever time you needed,” even though no formal FMLA request was made at that point
- Discipline amid medical issues: Later received an oral warning and then a written warning citing focus, reliability, and professionalism; later became basis for a claimed PIP
- Mixed messages about FMLA: Kim asked HR about FMLA and was given paperwork, yet her supervisor repeatedly told her FMLA paperwork was unnecessary and reassured her about job security, even as managers increasingly questioned her health and absences



PIP, What?


- While on medical leave for surgery, Kim was reassured she “need not worry” about her job
- After returning to work, she was told no intermittent FMLA was on file and to manage absences informally; issue of lost paperwork?
- PIP used to justify termination:
 - The employer later asserted Kim had been on a PIP and failed to improve
 - Kim: What PIP? [She was unaware of any PIP and believed she remained in good standing]
 - Kim terminated for alleged failure to progress under the PIP rather than for her medical leave
- Court: This is a mess. Summary judgment denied.



**WHAT
WERE
YOU
THINKING** ?



Insights for Employers

- How Much Notice do you need? Managers ignored clear signs that Kim had provided enough information to trigger FMLA notice obligations
- Managers:
 - Overlooked medical information that could have supported Kim's need for intermittent FMLA leave
 - Then...repeatedly told her she didn't need FMLA for absences and should just coordinate with her supervisor instead
- FMLA process issues: Told Kim her original FMLA forms were "missing" but never advised her to resubmit them
- Failed to properly remove her FMLA-related absences from evaluations
- New supervisor questioned her health in a hostile manner and only documented performance issues after she renewed her FMLA inquiries
- PIPs! 



ADA Issues



Leave as a Reasonable Accommodation



Leave as an Accommodation

- Lee, Account Executive at local news station; pregnant with twins; diagnosed with placenta previa and placed on bedrest
- Employer approved remote work during late pregnancy
- Delivered twins in February, 12 weeks of FMLA leave
- Complications from childbirth, surgery just weeks after childbirth; caused severe pain and limited standing, walking, and driving
- In June, one month after FMLA ended, HR rep, Cyndi, contacted Lee to ask about her recovery; Lee: “They’re extending my STD benefits.”
- Then, Lee texted Cyndi, “Please do not contact me regarding a return to work date when I have been classified as unable to return and still have short-term disability plus bonding leave.” In the same text, Lee provided her lawyer's contact information.



HR's Response

HR's response in late July:

“You have been on leave from work since February 23, 2022. You were provided with 12 weeks of leave under our FMLA policy which expired on May 17 You applied for and received benefits under our Short-Term Disability policy. This policy provides a money benefit, but it is separate from job-protected leave.”

The letter also highlighted Nexstar's earlier attempt to reach out and noted:

“A directive not to contact you is not acceptable.”



Leave as an Accommodation

- Lee responded on August 4:
 - “Still under intense care” and had another surgery scheduled in a few days
 - Added that her recovery time would be about four-to-six weeks followed by another potential surgery in October
- On August 15, the employer terminated Lee: “Since you have been off work since February 23 and given the critical nature of the Account Executive position, we can no longer hold your job.”

Coffman v. Nexstar Media (4th Cir. July 22, 2025)



Poll Question: Who Wins?

- A. Lee: She needed more time off, and it was a modest extension, so the employer should have provided the leave.
- B. Employer, Cause We Don't Know When Lee is Coming Back!



The News Station, and It Ain't Close

- Several important nuggets from the Court:
 - Accommodation not reasonable because, at the time of her termination, Lee had been absent for six months and could not provide an approximate return-to-work date
- Court:
 - ADA leave is “that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question”
 - Debate concerns whether she can return at any point in the near future – five months into her absence, the best she could offer was: “I probably will be released in September or October.”



Near-Perfect Response from the Employer

- Provided Lee remote work for eight weeks leading up to childbirth
- Provided FMLA Leave/parental leave
- 6 weeks after childbirth, supervisor checks in with Lee, asks about her recovery
- On going dialogue with Lee about return to work
- By month 4, the employer is pressing for updated information
- By month 6, need a “return date”
- When employee still could not provide an estimate of a ***date in the near future***, she was terminated



Other Key Aspects of the Case

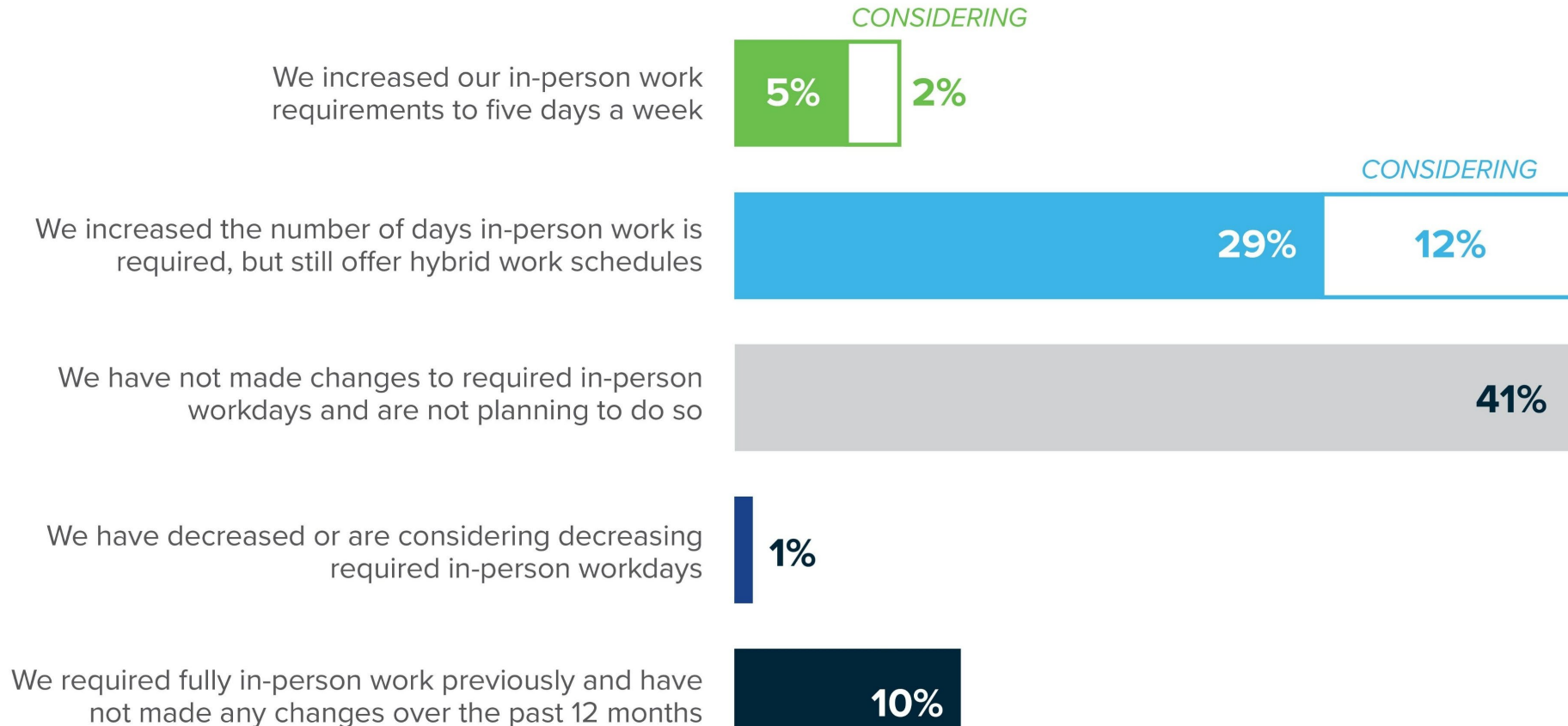
- Dialogue about whether STD benefits constitute protected ADA leave
- Employees cannot delegate the interactive process to their attorneys



Remote Work



Which of the following best describes any changes your organization has made over the past 12 months to the number of days that employees are required to work in person at a fixed worksite or office?



Remote Work Considerations

- Why is in-person presence critical to the job, and how do we prove it? How do you communicate it to employees?
- Danger ahead!
 - Inconsistent approaches to in-person requirement (we say it, but we don't really mean it or enforce it)
 - You are treating the same positions differently
 - Radius policies (if you live within “x” miles from HQ, you need to report in-person)
 - Managers who undermine your approach
- What alternatives are you willing to offer, and will you fight for them?
- What if the commute seems to be the sole/main issue?



EEOC FAQs on Remote Work (for Federal Employees)



EEOC Guidance – Effectiveness, Re-evaluation

- Effectiveness—not employee preference—controls telework decisions:
 - Telework is required only if it effectively enables the employee to perform essential job functions
 - Requests based on convenience, generalized anxiety, or quality-of-life concerns—without a functional limitation tied to job performance—do not require telework under the ADA
- Telework accommodations **may be reevaluated** as circumstances change
 - Employers may reassess or modify previously granted telework arrangements when there are material changes in job duties, operational needs, medical information, or legal standards



EEOC Guidance – Pandemic Impact, Employee has to Attempt!

- Pandemic remote work did not redefine essential job functions
 - *Temporary suspension of in-person work during COVID-19 does not establish that physical presence is non-essential*
 - Employers may require in-person attendance where current operational realities show it is necessary for *supervision, collaboration, teamwork, or other interactive responsibilities*, provided *job descriptions* and documentation support that conclusion
- Telework not required if in-office accommodations are effective
 - If an employee can perform essential functions successfully in the workplace with reasonable in-office accommodations, telework is generally not required
 - Employers *may use trial or temporary accommodations, not required to accept unsupported assertions that an in-office accommodation will fail without first attempting the accommodation before rejecting it as ineffective*



EEOC Guidance – Accommodating the Commute

- There is *generally no duty to accommodate commuting* itself
 - The ADA *typically does not require employers to accommodate how employees commute to work*
 - While employers may need to adjust work conditions (e.g., schedules, parking) in some cases, telework is required only if it is the only effective accommodation
 - Employers may scrutinize requests and deny or rescind telework if evidence undermines the claimed need, so long as the process is individualized and non-retaliatory

EEOC FAQs, “Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities” (page 28)



In-Person Presence Must Be Critical to Job



Is In-Person Presence Essential?

- Kimberly procurement agent for New Mexico General Services Department (GSD)
- Purchasing, contract admin, vendor coordination, procurement compliance, largely computer- and document-based
- Plaintiff diagnosed with MS and chronic migraines
- During pandemic, GSD implemented an agency-wide telework policy; Kimberly performed 100% of her procurement duties remotely for more than three years
- GSD hailed everyone back to the office, Kimberly requested intermittent remote work on days when migraine medication temporarily impaired safe driving
- GSD denied request, asserting that 100% in-person attendance was an essential function, relying on a blanket policy prohibiting telework for non-managerial employees
- Request was rejected without individualized analysis of her job duties



Problems . . .

- Court: All kinds of problems here
 - GSD’s HR director admitted she could not identify any essential function of the procurement agent role that required in-person presence
 - Kimberly’s successful remote work for more than 3 years weighed heavily in her favor
 - GSD simply made mechanical application of its return-to-office policy without job-specific analysis

Decision

- Reasonable jury could find in-person work not essential to job, intermittent remote work could be reasonable accommodation
- Court emphasized that telework “cannot be presumed unreasonable” under the ADA, case-by-case assessment is critical
- Summary judgment denied

Hunt-Brown v. New Mexico Gen. Servs. Dept. (D.N.M. Feb.2025)



Navigating the Commute



Issue with the Commute to Work

- Allison, Director of Career Services at dental school, MedQuest
- Diagnosed with generalized anxiety disorder with panic attacks, migraines
- Medical documentation:
 - Her condition interfered with concentration and caused mental distress
 - Could render her incapacitated, specifically triggered by driving/commuting
 - Remote work would reduce panic and improve concentration
- Instead of fully remote work, MedQuest proposed:
 - Relocating Allison to a more private office and providing a sound machine
 - Allowing remote work after off-campus appointments
 - Permitting use of PTO, sick leave, or unpaid leave as needed
 - Offering transportation expense reimbursement during anxiety “flare-ups” if campus presence was required



Poll Question:

**Allison: Your proposed alternatives don't address my commute, and that's the problem.
Who wins?**

- A. Allison: The employer offered no accommodations for her commute
- B. Dental school: Employers are not responsible for the commute to/from work



It Comes Down to the Commute

- Here, interactive process was thorough, but came down simply to the issue of the commute:
 - ***“None of the proposed accommodations, however, would have relieved Allison of the need to commute to work five days per week.”***
- Previous remote work has an impact on the court:
 - Allison successfully worked remotely for an extended period = request for remote work as “facially reasonable”
 - Temporary COVID-era arrangements do not automatically redefine essential functions, but they weaken arguments that remote work is infeasible
- Focus on “why” remote work is requested: Pay close attention to whether the employee identifies a specific trigger (here, commuting/driving) that interferes with job performance

Faulkner v. MedQuest (W.D. Ky. 2025)



Here's Your Opening Toward Compliance Success, Friends!



Taylor – Give It a Try!

- Taylor employed as Patient Services Rep in call-center: verified patient demographics and insurance, billing assistance, and document scanning
- Role required prolonged seated work at a fixed workstation and continuous phone use
- Plaintiff had various conditions, including rheumatoid arthritis and lupus: chronic, lifelong, and affected stamina, pain levels, and immune function
- Plaintiff took FMLA leave due to worsening symptoms
- Upon return, physician:
 - Stated Taylor could not sit in office workstation due to pain
 - Recommended working from home in a recliner and cited immunosuppressed status



Taylor

- IHC offered alternative accommodations:
 - Reducing her exposure to others by removing a shared appliance from her office to increase privacy, and
 - Allowing her to select a chair (at IHC's expense) to address her pain while at her workstation
- Taylor refused to select a chair, claiming it “was not her responsibility” and stating that she was holding off because she hoped to be approved for remote work instead
- Court: ADA claims dismissed:
 - Taylor's refusal to provide necessary input prevented IHC from evaluating whether the chair would adequately accommodate her condition
 - Demanding a single, preferred accommodation and then halting discussion was inconsistent with an employee's obligations under the ADA
 - Even assuming remote work might have been reasonable in some circumstances, Taylor's failure to participate in the process foreclosed further exploration of alternatives



Themes in 2026 for Remote Work

- In-person presence is critical: like *Hunt-Brown* case, how do you show it? Tough to simply argue we're all "100% in the office, so that means you, too"!
- Some jobs just have to be done in person: supervisors, educators, hospitality, manufacturing, health care
- Evolving (and troubling) theme: If remote work done over an extended period, request for remote work facially reasonable
- Robust interactive process and alternative accommodations for the win! ***Get to yes!***
- Performance issues may be a path to rein in remote work
- Even a top-notch interactive process doesn't insulate you from the lingering "commute" debate



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By Jeff Nowak of Littler

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Guidance & Solutions for Employers

When an Employee Abruptly Requests FMLA Leave after Being Given a Sucky Work Assignment, Can He Safely Be Terminated?

By Jeff Nowak on September 6, 2024

POSTED IN [ABUSE OF FMLA LEAVE](#), [INTERFERENCE](#)

Meet Ray.

Ray is to the FMLA as Patrick Mahomes is to football. Ray is an FMLA pro, having taken FMLA leave a total of 158 times over three years. No joke. F-M-L-A simply rolled off Ray's tongue, enabling him to take leave on countless occasions.



As the story goes, Ray started his latest FMLA journey with a three-week leave of absence for pneumonia.

Ray worked as a mechanic, regularly operating and repairing the loin-puller machine for his employer, a pork-production company. Ray must have loved that loin-puller machine, since he got really salty upon his return to work when his boss told him he would be assigning Ray to a different machine at the plant.

ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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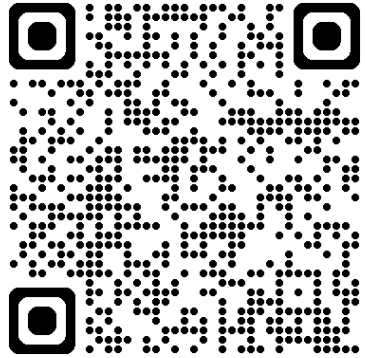
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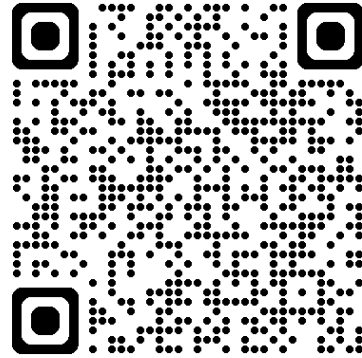
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