Don’t Give Leave a Bad Name:
Recognize, Learn and Do Better!

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Speakers

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Welcome to an Interactive Experience

01 Introductions

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Scenario #1

- Employee requested 2 weeks of PTO because her child was having surgery
- Manager granted the PTO
- Employee returned to work as scheduled
- Two weeks later, employee lets manager know she will need to take one day off per week for that same child because the child requires weekly follow-up appointments
- Manager tells employee that she can take the time as long as she finds someone to cover her shifts

Scenario #1 Discussion Points

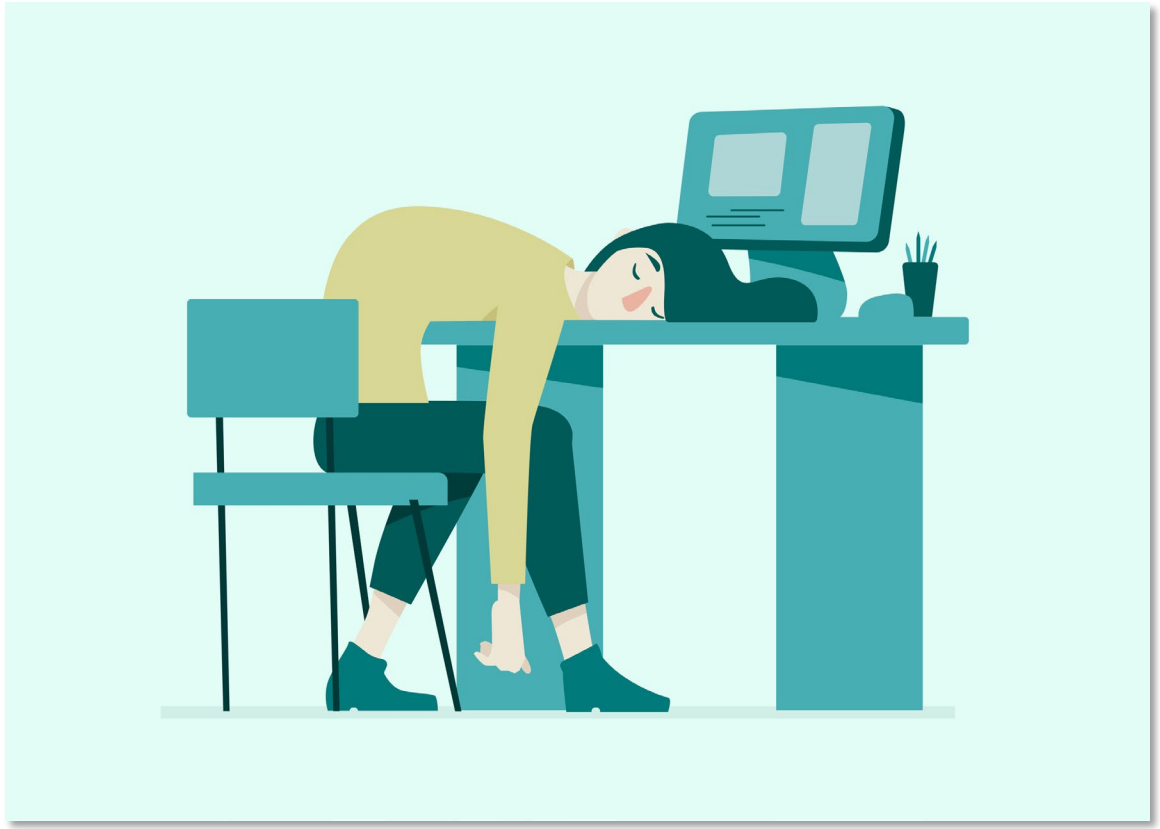
What went wrong:

- Family member medical condition, but no assessment for FMLA
- Time is not being tracked
- Employee is not informed of their eligibility, rights and responsibilities
- Manager puts it on the employee to find coverage

How to fix it:

- Retroactively track and designate FMLA time (if it doesn't harm employee)
- Inform employee of eligibility, rights and responsibilities and designation
- Employee does not have to find shift coverage
- Determine if PTO should be restored
- Consider if any other leaves (state FML, state PFML, etc.) are in play

Scenario #2



- After 2 years of solid performance, employee's performance declines over a 6-month period:
  - Sleeping at their desk
  - Not completing tasks
  - Coming in late
- Employer does not initiate discussion with employee to protect employee's privacy
- Employee takes a leave that is approved for FMLA
- Employee returns from leave and the same behavior persists
- Employee is put on a performance improvement plan and taken off high-priority projects

Scenario #2 Discussion Points

What went wrong:

- No initial discussions with the employee to understand behavior
- Didn't address behavior until after using FMLA, which could be seen as retaliatory
- No interactive process initiated

How to fix it:

- Initiate interactive process
- Determine if employee is a qualified individual with a disability
- If appropriate, accommodate employee
- Document everything, including performance issues
- Reinstate employee to project(s) if appropriate

Scenario #3

- Employee requests FMLA to care for registered domestic partner
- Employee submits supporting paperwork confirming a serious health condition exists and is granted 10 weeks of FMLA
- Employee returns to work
- Two months later, employee requests 4 weeks for care for a minor child. Two weeks are approved, and two weeks are denied FMLA protection due to exhaustion of FMLA time

Scenario #3 Discussion Points

What went wrong:

- Federal FMLA was approved for a non-qualified relationship
- Employee should have had all 12 weeks available under FMLA, so all 4 weeks of care for the child should have been approved

How to fix it:

- Retroactively designate first leave as non-FMLA time
- Grant the employee's first leave as job-protected administrative leave
- Approve second leave to care for child
- Send out updated communications (designation notice)
- Update internal policies if needed

Scenario #4

- Employee has an approved intermittent claim for FMLA
- Employee calls in multiple days, but does not reference FMLA because they want to "save" it to use in a few months when their parent is having a procedure
- Employer inputs leave as PTO; does not designate leave as FMLA
- Employee receives verbal warning for unplanned absences

Scenario #4 Discussion Points

What went wrong:

- As the employee already knew about FMLA, they should have referenced it
- Employer should have inquired enough to confirm if the absence(s) may qualify for FMLA
- Employees may not delay or choose to not use FMLA

How to fix it:

- Retroactively designate time as FMLA time
- Determine if any other leaves apply
- Send out updated communications (e.g., designation notice)
- Reframe verbal warning to coach employee on how to report intermittent absences related to an approved leave
- Consider whether internal policy documentation should be updated

Scenario #5

- Employee is approved for intermittent FMLA usage of 3x/month lasting 2 days each time, but then takes a 4th time and some absences are 3 days
- Employer believes they are using it for routine childcare and that there may not be any medical condition at all, so they seek a 2nd opinion
- Employer gets back medical documentation that is not clear, so they send it to the in-house Legal department to consider if they should act
- Legal takes 12 business days to respond

Scenario #5 Discussion Points

What went wrong:

- The only formal course of action would be recertification, as you can't seek a 2nd opinion if you have already certified
- Employers should take the opportunity to talk to the employee about their usage and ensure they understand it may only be used for the reason on the certification
- Employers must respond within 5 business days of receiving sufficient information

How to fix it:

- Leave already approved should remain approved, unless actual fraud is uncovered
- Does 2nd opinion documentation offer enough information to count as recertification?
- If frequency/duration is changing, send updated documentation
- Consider what other options employee may have for time off for routine childcare

Scenario #6

- Employee has a long-standing history of kidney issues and has used all FMLA for this condition
- Employee is going to have kidney surgery
  - The two-week absence is covered by STD
  - FMLA is exhausted, so it is considered a non-job-protected absence
  - The employee has 3 points counted against the well-documented absence policy
- After returning to work, the employee takes 2 days off because their car breaks down and then a third day when their dog eats a battery, resulting in the employee reaching 8 points toward the absence policy
- The employee is terminated in accordance with the written policy

Scenario #6 Discussion Points

What went wrong:

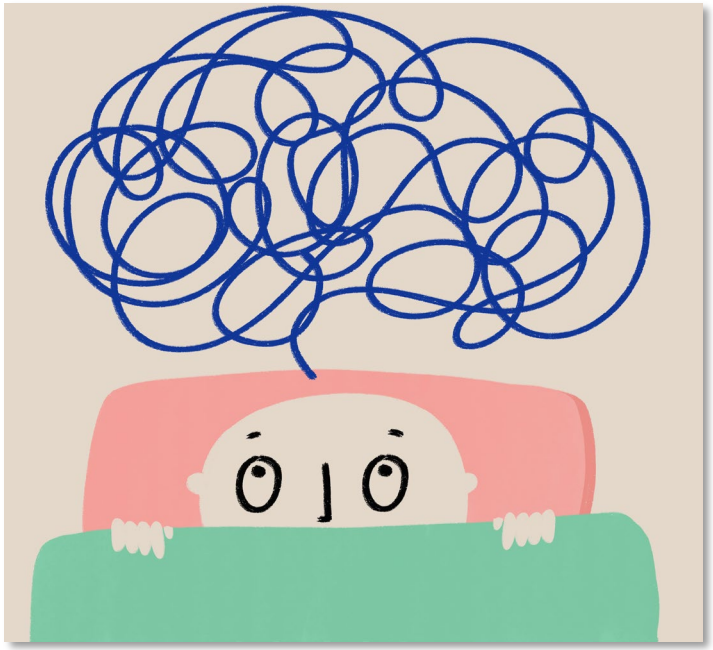
- When FMLA was exhausted, should have triggered interactive process under ADA
- Absent undue hardship, 2 weeks of additional leave could have been a reasonable accommodation

How to fix it:

- Reinstate, back pay, update records
- Have a review process in place prior to termination to ensure all points were awarded validly
- Training

Scenario #7

- Employee uses 12 weeks of FMLA with absence increments of between 1 and 3 weeks each. Their calendar is tracked rolling backward.
- Multiple months after they had exhausted their FMLA, they have a back injury. Not noticing FMLA time had been regained, the employer starts the ADA interactive process and gives the employee the option between absence as an accommodation (shorter recovery time) or stay at work with accommodation/adjustments (longer recovery time but can keep working). The employee chooses the absence as an accommodation.
- Employer realizes that FMLA rolled back on during ADA accommodation leave and decrements FMLA accordingly. Employee is not notified.
- A few months after the employee returns from continuous leave, they request a one-week leave to care for their parent who is having planned surgery. Employee is told they have no FMLA time available.



Scenario #7 Discussion Points

What went wrong:

- Employee was not notified that leave was being designated under the FMLA as entitlement rolled back on
- Employee could have made a different decision if they had known that time was being designated/decremented under the FMLA

How to fix it:

- Grant the leave without decrementing/retroactively designating FMLA because doing so will harm employee
- Document decisions/designations in writing

Scenario #8

- Employee is a union member in a position with scheduled step promotions; employee's next promotion is scheduled to occur in 2 years
- Employee is deployed to active duty for 3 years and takes a leave covered by USERRA
- Employee returns to work and is restored to the position they had when they went on leave, with the same pay, benefits and terms of employment as if they had not gone on leave

Scenario #8 Discussion Points

What went wrong:

- Employee should have received the promotion if it was reasonably certain they would have been promoted if they had not gone on leave (Escalator Principle)
- Employer is responsible for providing reasonable training to employee

How to fix it:

- Train employee for promotion
- Promote employee
- Adjust pay accordingly

Scenario #9

- Employee is a U.S. Army Reservist with the same employer since 2000
- Employee was called to active duty in 2001 when President Bush declared a National Emergency as a result of the 9/11 attacks. Employee served 2 years
- Employee was ordered to remain on active duty for an additional 3 years due to Operation Enduring Freedom and Operation Iraqi Freedom
- Employee returns to work
- Two months later, employee verbally informs employer they need 2 weeks of leave for annual training
- Employee is told they have exhausted USERRA leave and cannot go on leave

Scenario #9 Discussion Points

What went wrong:

- None of the service the employee performed is subject to the 5-year limit
- The annual training is also not subject to the 5-year limit

How to fix it:

- Adjust records/system accordingly
- Training

Scenario #10

- Employee applies for short-term disability benefits and is denied because the medical documentation they submitted was not sufficient
- The employer's STD plan is an ERISA-governed plan
- The employer sends the employee a simple half-page denial notice that tells the employee their request for benefits is denied and they have 60 days to request an appeal.
- Notice does not include any content other than denial dates and appeal timeline

Scenario #10 Discussion Points

What went wrong:

- Letter is not ERISA compliant
- Denial reason
- Provision citation
- Perfecting Your Claim section needed
- Appeal timeline is minimum 180 days
- Other required ERISA content

How to fix it:

- Send out new letter with all the correct information
- Extend appeal rights to be 180 days from date of new letter
- Create ERISA template/automated solution to ensure required content is included in letters moving forward
- Ensure correct ERISA information is included in the plan and SPD

Scenario #11

- Employee requests PWFA leave due to pregnancy limitations
- Employer sends out form requesting information substantiating the need for leave:

3. *Existence of impairment*.
   a. Does the employee have a physical or mental impairment(s)? ☐ Yes ☐ No
   b. Is the impairment related to pregnancy or childbirth? ☐ Yes ☐ No
      i. If yes, are there complications?
      ii. If yes, describe the complications (Do not answer without patient consent in CA, ME, or RI):_____
      _____
      iii. Estimated Delivery Date: __/__/__ Actual Delivery Date: __/__/__
4. Please list impairment(s) *(Note: Some state laws may prohibit providing a diagnosis)*:
   _____

Scenario #11 Discussion Points

What went wrong:

- This is the wrong form
- Impairment is not needed for PWFA
- Sometimes medical documentation is not needed at all

How to fix it:

- Alert the employee that the wrong form was sent
- Send the correct form, if a form is needed

Scenario #12

- Employer has a policy requiring an affidavit proving the family relationship for common law marriages
- Employee applies for FMLA leave to care for a common law spouse but doesn't submit an affidavit proving that spouse is a common law spouse
- Employee does not currently live or work in a common law state
- FMLA leave is denied

Scenario #12 Discussion Points

What went wrong:

- Employer required documentation of relationship for just one type of relationship and not all
- An affidavit is not required – a simple statement from the employee should suffice, per the FMLA
- Current state of residence is not relevant. If the employee entered into the common law marriage in a common law state, that is still a common law marriage

How to fix it:

- Update the policy
- Approve the leave

Certification Forms

Employer Policies

THANK YOU!