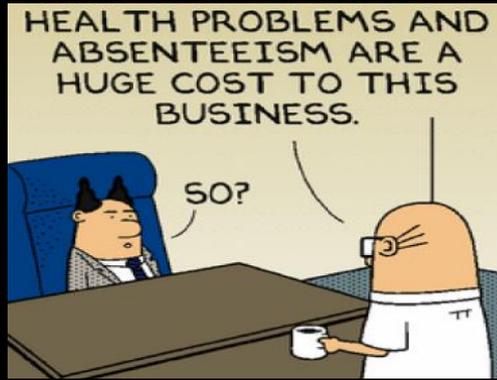


“Out on Disability”

How to Provide Legally-Required Employee Leaves of Absence While Avoiding Leave Abuse



Presented By:
Scott Hetrick



FMLA vs ADA: What's the Difference?

The Family & Medical Leave Act is a ***guaranteed leave*** law.

Eligible employees of covered employers ***must*** be given ***job-protected*** leave for five defined reasons, one of which is the employee's own "serious health condition."

The Americans with Disabilities Act is ***not*** a guaranteed leave law.

The ADA requires "accommodation" of employee "disabilities" which ***might*** include a leave of absence for a ***reasonable*** period.

What About Workers' Comp?

- “Workers’ comp” laws require **medical and wage-replacement benefits** for employees injured in the line and scope of employment, and some states (including Florida) forbid discharge in **retaliation** for claiming those benefits.
- These laws **are not** guaranteed leave laws like the FMLA or reasonable accommodation laws like the ADA.
- Courts have ruled these laws **do not require an employer to hold a worker’s job** during recuperation and do not prohibit an employer from firing an employee because he cannot perform the job due to the injury.

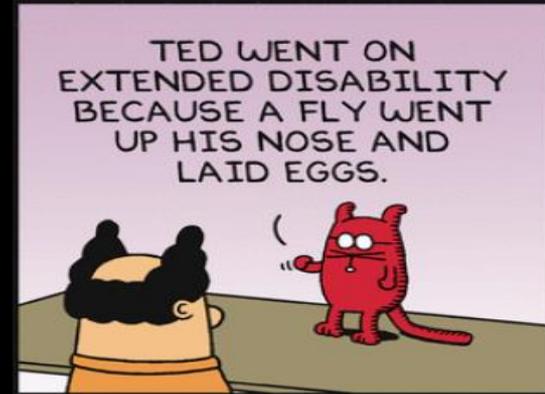
Best Practices – Setting the Ground Rules

- Adopt policies concerning attendance expectations, notification of absences and tardiness, FMLA leave, and other medical leave
- Maintain accurate records of hours worked and attendance policy compliance
- Address attendance problems early and how any claimed disability or medical/health condition affects attendance and what accommodations may be needed
- Train managers and supervisors about the employer's and employee's respective rights and obligations under applicable laws and leave policies
- Conduct regular audits of leave requests, particularly open-ended ones



ADA & FMLA

What health or medical conditions trigger application of the laws?



FMLA “Serious Health Condition”

- Includes **any** illness, injury, impairment, or physical or mental condition involving one of the following **six** circumstances:
 - ✓ inpatient care (e.g. overnight stay in a hospital)
 - ✓ pregnancy, childbirth and related medical conditions
 - ✓ chronic conditions
 - ✓ permanent long-term conditions
 - ✓ multiple treatments for restorative surgery after an injury or for serious conditions in treatment
 - ✓ incapacity of more than three consecutive full calendar days and “continuing treatment”

No Particular Duration of Incapacity Required for Some Conditions

- 1) any absence due to ***inpatient care*** including any period of incapacity or any subsequent treatment
- 2) any absences for medical treatment or any period of incapacity because of ***pregnancy, childbirth and related medical conditions***
- 3) any absences for medical care or any period of incapacity because of a ***chronic condition***
- 4) any absences for medical care or any period of incapacity because of a ***permanent long-term condition*** for which treatment may not be effective
- 5) any absence to receive or recover from ***multiple treatments*** for restorative surgery after an injury or for serious conditions which need to be treated

“Over 3 days” + Continuing Treatment



A serious health condition also includes a situation when the person is incapacitated for ***more than three consecutive full calendar days*** and receives “***continuing treatment***”.

For purposes of this condition **only**, the first (or only) in-person treatment visit to the health care provider must take place within ***seven days*** of the first day of incapacity.

What is “Continuing Treatment”?

The person must either

- be seen and treated in-person by the healthcare provider or health professional ***two or more times within 30 days of the first day of incapacity***, unless circumstances beyond the person’s control prevent the follow-up visit, or
- be seen and treated by the healthcare provider or health professional at least once, which results in a ***regimen of treatment*** under the supervision of the health care provider.

The “regimen of treatment” usually requires prescription medication or specialized therapy or equipment.



What Is Not “Continuing Treatment”?

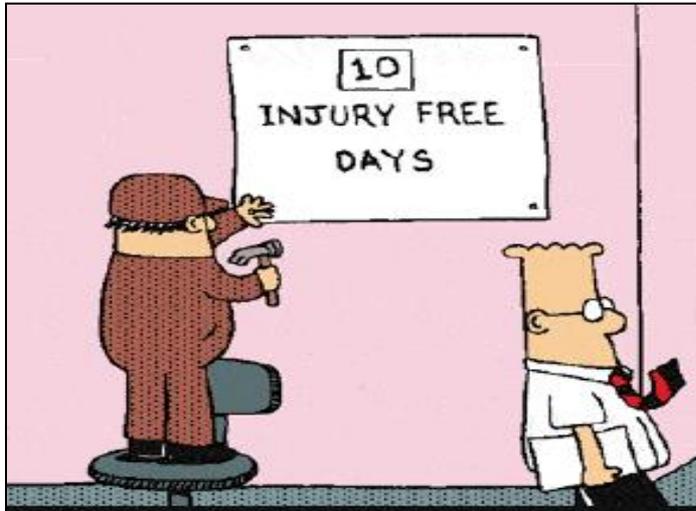
These “treatments” cannot substitute for the second visit to the healthcare provider:

- taking of over-the-counter medications such as aspirin, antihistamines, or salves; or
- bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.



Special Circumstances

A “serious health condition” may result from **occupational or on-the-job-related injuries** and illnesses which might also qualify for workers’ compensation insurance benefits.



ADA “Disability” Defined

A “disability” is a bodily “**impairment**” that “**substantially limits**” one or more of a person’s “**major life activities.**”

An **impairment** is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or any mental or psychological disorder.

Determining **substantial limitation** involves a common-sense assessment of how the impairment affects the person’s **ability to perform** a major life activity as compared to most people in the general population, **without** considering most **mitigating measures**.

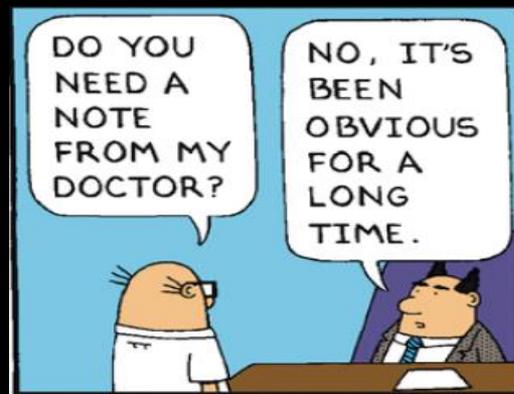
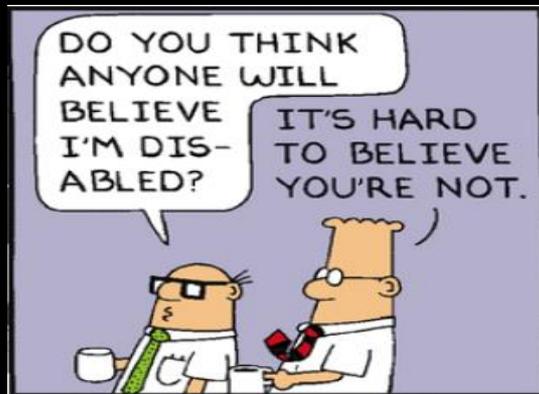
“Transitory and Minor” Conditions?

In general, temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered actual ADA “disabilities.”

Examples: common cold, seasonal or common influenza, sprained joint, minor and non-chronic gastrointestinal disorders, broken bone that is expected to heal completely, appendicitis, seasonal allergies that do not substantially limit a person even when active.



“Reasonable Accommodation” Under The ADA



Work With Us, Please

Over a four year period, Sheila missed over 200 days of work taking leave due to complications in three pregnancies. Her employer also allowed her to work from home and part-time.

When she returned from her last leave, her boss tried to document an alternative work schedule in writing, but Sheila refused to sign. She was not disciplined for this and kept working for several more months.

When she called to request to work at home exclusively for two weeks, her boss again asked her to sign a letter stating that she would contact him on Friday of each week to give notice of her schedule for the following week. She refused, quit, applied for long-term disability benefits, and then sued.

Work With Me, Please

On October 17, 2011, while on the way to a client's office, Carl lost his footing and fell, breaking bones and tearing tendons in both legs. He was unable to put any weight on his left leg for six weeks. His doctor predicted he would not be able to walk normally for at least seven months, even with surgery, bed rest, pain medication, and physical therapy, and might be off work for a year.

Carl was eager to return to work, and suggested he start working part-time from home and then build up his hours gradually to full-time. But the employer never followed up. Instead, on December 1, 2011, the employer fired Carl in order to install another analyst in the position.

Employee must **cooperate** in the “**interactive process**” and cannot unreasonably refuse requests for information or accommodations offered.



Employer is not required to provide an employee the accommodation of her choice if there is **another reasonable** accommodation.

“Undue Hardship”

Employers do not have to make an accommodation if it will create an **undue hardship** on the operation of the business. Some factors in determining if an undue hardship exists:



- impact on employer’s operations or
- other employees
- number of employees
- number of facilities
- nature and net cost of proposed accommodation
- employer’s resources

“Light Duty”: ADA & Workers’ Comp

Two potential “reasonable accommodations” other than leave:

- Job restructuring (eliminating or modifying non-essential job functions)
- Reassignment to a different *vacant* position (*not* the *creation* of a new one).

Caution: Workers’ comp insurers often urge employers to place injured employees in a “light duty” job. If the job is **created**, the job should always be considered **temporary** and cease to exist when the need no longer exists.

EEOC: Leave is an Accommodation

Per the EEOC, several situations arise where an employee should be allowed a leave of absence as a reasonable accommodation:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis), rehabilitation services, or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of Braille or to learn sign language.

Vast majority of courts agree, in principle.

Seventh Circuit Pushes Back

Severson v. Heartland Woodcraft, Inc. (7th Cir. Sept. 20, 2017)

A “long-term leave of absence cannot be a reasonable accommodation” because those are “expressly limited to those measures that will enable an employee to work.”

“Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”

The court rejected the EEOC’s position that the length of the leave is irrelevant in determining reasonableness, concluding the EEOC’s view would transform the ADA “into a medical-leave statute—in effect, an open-ended extension of the FMLA.”

Leave – How Long is Reasonable?

Most courts don't go that far – if the employee provides an end-date to the leave, whether the leave is “too long” is a **fact question** for the jury.

“There is no bright-line rule defining the maximum duration of leave that can constitute a reasonable accommodation.”

Cleveland v. Federal Express Corp. (6th Cir. 2003)

- 6 months leave could be reasonable for a nurse to treat lupus. *Cleveland*
- 6 months leave was not a required accommodation for a police officer in a small town. *Epps v. City of Pine Lawn* (8th Cir. 1999)

How Long is Too Long? Some Factors

EEOC says medical leave is reasonable when the leave

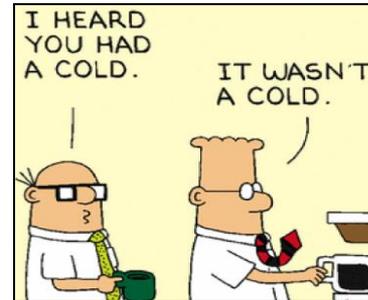
- ✓ is of a definite, time-limited duration;
- ✓ is requested in advance;

and

- ✓ is likely to enable the employee to perform essential job functions when she returns.

Courts usually consider:

- how much leave has already been taken;
- estimated duration of requested extra leave;
- the likelihood of the employee's return in the reasonably near future.



Indefinite Leave Not Reasonable

Worker's request for "indefinite leaves of absence so that he could work at some uncertain point in the future ... was not reasonable. The ADA covers people who can perform the essential functions of their jobs **presently** or in the **immediate future.**" *Wood vs. Green* (11th Cir. 2003)

"[T]aking leave without a **specified date to return** or, in this case, with the intent of **never returning** is not a reasonable accommodation." *Moss v. Harris County Constable* (5th Cir. 2017)

Employee cannot "circumvent the ADA's protection against requests for indefinite leave by making successive requests for short periods of leave. The ADA does not empower employees to hold their employers hostage for indefinite periods in this manner." *Wilson v. Dollar Gen. Corp.* (W.D. Va. 2012)

Leave of Absence Best Practices



- Promptly respond to requests for time off for health-related reasons
- Require employees to be as specific as possible when describing the reason for a leave request and how much time off is requested or needed
- Require medical documentation in all appropriate cases
- Mandate employee cooperation with employer's information requests and scheduling needs
- Deny foreseeable leave requests when employee has no good reasons for not providing enough notice

Leave of Absence Best Practices

- Maintain written records of all interactions with employees relating to the leave
- Maintain leave request documentation and other records relating to the absence and any suspicious activity by the employee
 - Medical documentation
 - Notes of conversations
 - Text messages
 - Emails
 - Voice mail messages
 - Social media posts

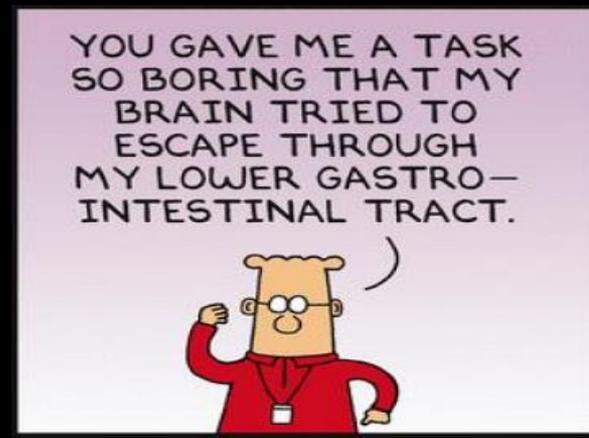
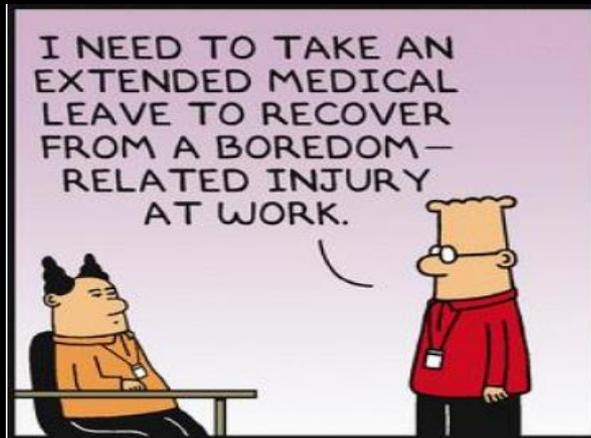


Leave of Absence Best Practices

- Require regular reporting by employee concerning status and intent to return to work
- Reach out to employee on a regular basis concerning status, how much leave remains available, whether employee has paid insurance premiums, etc.
- Communicate timely with employee when leave expires
- Communicate timely when any “expected return” date goes by without employee showing up



FMLA Medical Certifications of the “Serious Health Condition”



Medical Certification Requirements

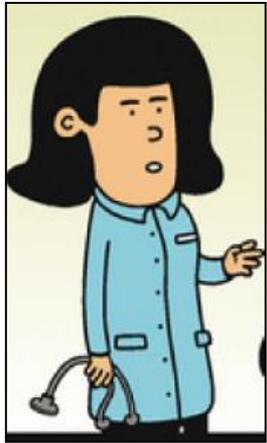
- Employer may request certification of the “serious health condition” orally or in writing (recommended).
- Requests should be made within five business days after the employee’s request for leave or after the leave begins.
- Medical certification forms allow healthcare providers to offer more complete statements about medical facts, symptoms, diagnoses, or continuing treatment.



Certification Requirements

- Employer must allow the employee **at least 15 calendar days** to return the certification and explain consequences for failure to return.
- Employee must provide the certification by the deadline, unless circumstances prevent him from doing so despite his **diligent, good faith efforts**.
- Employer **may** allow additional time for employee to provide the certification (extra 15 days recommended).
- If the employee **fails to return** the certification, by the deadline, the employer may deny the FMLA leave (or withdraw any conditional designation).

“Incomplete” or “Insufficient” Certifications



The certification must be both “**complete**” and “**sufficient**” to permit employer to designate an absence as FMLA leave.

A certification is considered

- ✓ **incomplete** one or more of the applicable entries have not been completed;
- ✓ **insufficient** if the information provided is vague, ambiguous, or non-responsive.

A “Sufficient” Certification Has

- the name, contact info, and type of medical practice/ specialization of the healthcare provider giving the certification
- an approximate date on which the serious health condition commenced and its probable duration
- a description of medical facts about the person’s health condition
- information sufficient to establish the employee cannot perform essential job functions as well as the nature of any other work restrictions, and the likely duration of such inability
- a statement of the medical necessity for any “intermittent or reduced schedule leave” (if requested) and an estimate of the frequency and duration of the episodes of incapacity

"Incomplete" or "Insufficient" Certifications

- Employer must advise employee, **in writing**, what additional information would make the certification complete or sufficient.
- Employee must provide the additional information **within seven calendar days**, unless prevented from doing so despite his **diligent, good faith efforts**.
- If deficiencies are not cured by the deadline, the employer may deny the FMLA leave (or withdraw any conditional designation).

Authentication and Clarification

Employer may contact the health care provider for two very limited purposes:

- “authentication” -- verification that the information contained on the certification form was completed or authorized by the health care provider who signed the document; or
- “clarification” -- seeking to understand the handwriting or the meaning of a response on the certification.



- Authentication or clarification questions to the health care provider **only** may be asked by
 - ✓ a health care provider of the employer's choice;
 - ✓ a human resources professional;
 - ✓ a leave administrator; or
 - ✓ a management official (other than the employee's direct supervisor).
- Employer may not ask for additional information beyond what is on the form.



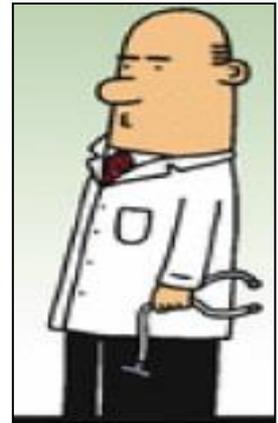
Considering Other Information for FMLA Leave

Employer may request & consider additional medical information ***beyond*** what the FMLA allows when the employee:

- has a job-related illness or injury **covered by the workers' compensation laws**, to the extent those laws allow information to be obtained from the workers' comp doctors; or
- seeks benefits under a **paid leave policy** or **disability plan** that requires greater information to qualify for payments or benefits, so long as the worker is told why more information is necessary; or
- has a "serious health condition" that also qualifies as an ADA "disability."

Annual Medical Certification

- If the serious health condition creating the need for leave lasts beyond the “leave year” (the 12-month period), the employer may require a new medical certification in each subsequent leave year.
- The same rules concerning notice, deadlines, completeness and sufficiency apply to these annual certifications.



Request Re-Certification When ...

- Employee requests extension of FMLA leave, regardless of how long employee has been absent.
- Employee has been absent longer than predicted, or absent 30 days, whichever period is longer.
- Six months have passed, and employee is absent or has been absent due to a long-lasting condition.
- Any time when circumstances have changed significantly (*e.g.*, the duration or frequency of the absence or the nature or severity of the illness or complications).



Request Re-Certification When ...

- Employee has increased use of intermittent leave beyond use originally predicted by employee or her health care provider.
- Employee has begun taking intermittent leave in a new suspicious pattern (such as Mondays/Fridays or after every holiday).
- Employee took intermittent leave for days when his request for a vacation or a personal day was denied.
- Employee has requested to convert intermittent leave to continuous leave, or vice versa.
- Employer has new reason to doubt basis for absence.

Leave of Absence Best Practices

- Maintain accurate records of leave time
- Involve company doctor in questionable requests
- Require leaves to run concurrently when lawful
- Follow the FMLA certification and re-certification process whenever applicable
- Provide employee's health care provider with a record of employee's absences and ask whether pattern of absences is actually related to the serious health condition

The image shows two forms from the U.S. Department of Labor, Wage and Hour Division, related to the Family and Medical Leave Act (FMLA). The top form is a "Designation Notice (Family and Medical Leave Act)" which is a document an employer provides to an employee. The bottom form is a "Certification of Health Care Provider for (Family and Medical Leave Act)" which is a document a health care provider provides to an employer. Both forms include the WHD logo and the text "U.S. Department of Labor Wage and Hour Division".

Pay & Benefits while on ADA or FMLA Leave of Absence



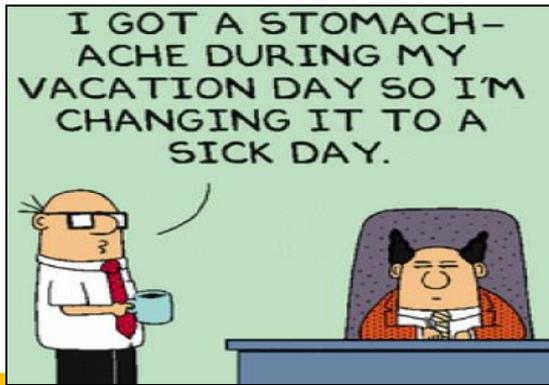
Paid vs. Unpaid Leave

- The FMLA and ADA do not require *paid* leave.
- Employee may **elect**, and employer may **require** employee to use available paid leave at the same time as the employee takes FMLA leave.
- Employer can **deny** use of paid leave if the reason for absence does not qualify under its policy.
- Of course, paid leave used under circumstances which **do not qualify as FMLA leave** does not count against the employee's FMLA leave entitlement.



Paid vs. Unpaid Leave

- Employees are entitled to enjoy benefits of state laws providing more than the FMLA or ADA requires.
- Employee may collect benefits under disability insurance plan during an FMLA leave of absence.
- Employee might collect workers' compensation benefits during a FMLA leave due to an on-the-job injury which qualifies as a "disability" or "serious health condition."



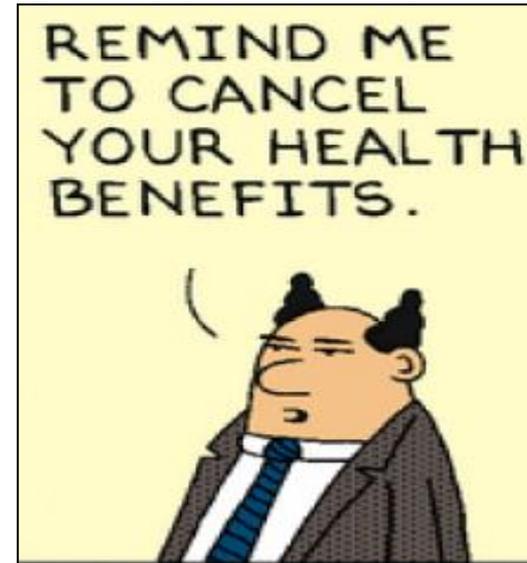
- If state law permits, employers and employees may agree to have paid leave supplement any disability insurance plan benefits, or workers' compensation benefits, while on FMLA leave.

Health Insurance – FMLA Rules

- Employer must maintain employee's group health insurance **under existing coverage level** throughout any FMLA leave as if employee were not absent, and provide access to any new coverage offered to other employees.
- Employee must comply with all group health plan requirements, including **prompt payment of all insurance premiums** employee usually pays.
- Employee can drop health insurance coverage during FMLA leave, but must be re-instated after leave on the same terms as before the leave began.

Ending Health Insurance/COBRA

- Once FMLA leave is exhausted without a return to work, an employee's health insurance can be canceled, just as it can for any employee not meeting the insurance plan's definition of "actively employed" .
- "COBRA" events triggering continuation coverage include significant reduction in hours, not just termination.
- Employers should inform the insurer the employee is no longer eligible and send COBRA notice to employee in this situation.



Other Employee Benefits

- Entitlement to other benefits while on FMLA leave must be determined **by the employer's established policy** for providing such benefits when the employee is on other forms of leave.
- ADA requires provision of all employment benefits to employee on disability leave only to the same extent provided to other employees on other leaves of absence.
- **Be consistent** – if employees on non-FMLA or non-ADA leave cannot accumulate additional sick pay or vacation pay or receive paid holidays, then employees on FMLA or ADA leave also do not enjoy those benefits.

Leave of Absence Best Practices



- Send COBRA notice cutting off health insurance when permitted
- Require “fitness-for-duty” certifications before employee returns to work
- Engage in interactive process concerning any post-leave medical restrictions
- Consistently enforce disciplinary consequences for abusers of leave policies

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