

# FMLA

## Honest Belief, Recertification and Investigating Abuse



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# Statistics



- **At any given time, 10.7% of the U.S. workforce is on FMLA leave**
- **2013 DOL Survey – 3% of worksites reported suspicion of abuse**
- **2007 SHRM study – 39% of HR professionals reported granting leave that was perceived to be illegitimate**
- **What about you?**

# Investigating Abuse: Honest Belief



- Different types of abuse from case law:
  - Working a second job
  - Shopping/running errands
  - Failing to take care of family member for whom they are supposed to be
  - Taking/extending a vacation
  - Partying or other recreational activities
  - Engaging in manual labor
- Often reported by co-workers/seen on SM



# Honest Belief Rule



- **What is it?**
  - Found in case law
  - An employer may terminate an employee on FMLA when the employer has good reason to conclude the employee was not using his leave time for its intended purpose – in other words, employer had an honest belief that the employee was misusing leave.
- **What if belief is mistaken?**
  - Proceed with caution

# Investigating Abuse: Honest Belief



- Intermittent Leave
  - Episodic flare-ups?
  - Be sure certification is complete and sufficient/understandable
    - ✦ Example: Employee with asthma
      - CHCP says 3 x per month, lasting 1 day
        - What if employee took 6 days off in a month?
        - What if employee took 10 days off in a month?
- What do you do when frequency/duration significantly exceeds the info provided by provider?

# Recertification



- **Recertification may be appropriate when:**
  - Employee requests extension of leave;
  - Circumstances provided by the provider on the previous certification have changed significantly;
  - Employer receives information that casts doubt upon the continuing validity of the certification
- Regulations allow employers to provide record of employee's absence pattern and ask if leave is consistent with such pattern (29 CFR 825.308(e))



# Using Surveillance



- *Tillman v. Ohio Bell Telephone-*
  - Hired a P.I. to conduct surveillance
    - ✦ Saw employee running errands/working in garage on days he took intermittent leave
  - Employer kept close track of dates employee took FMLA leave compared them to proximity to weekends, holidays, scheduled vacation- he often took leave immediately prior to or after days he wasn't scheduled to work
  - Independent medical doctor reviewed certification, job description, and surveillance - concluded actions were not consistent of those suffering supposed medical condition (severe back pain).
    - ✦ No SHC that prevented him from doing his job.

# CASE LAW



- *Williamson v. Parker Hannifin Corp.* (N.D. Al. 2002)
  - Leave to care for ill-father approved
  - Employee went out of town, saw his mother
  - Employer called, mother stated employee was at state park
  - Employer confronted employee about camping, employee did not rebut
    - ✦ Termination upheld as lawful.
      - Employee wasn't using leave for ill father which was intended and stated purpose of leave.



# CASE LAW



- *Moughari v. Publix Super Markets, Inc.* (N.D. Fla. 1998)
  - Co-workers reported employee using some of his leave time to start new business
  - Employee not being candid with manager about leave
  - MSJ granted
    - ✦ Termination for good reason (suspected abuse) did not violate FMLA

# CASE LAW



- *Morgan v. Orange County, Florida* (11<sup>th</sup> Cir. 2012)
  - Employee failed to follow call-in procedures by not talking to his direct supervisor and failing to report each day of his absence.
  - Four months prior, employee requested to take vacation, requests were denied due to staffing. Employee went on cruise during his leave.
  - Terminated for failing to follow call-in policies and “fraud or dishonest behavior” about his plans to travel during FMLA leave.
  - Employer acted on an honestly held belief that employee engaged in misconduct warranting termination.

# Reports from Co-workers



- *Lineberry v. Richards* (E.D. Michigan 2013)  
“Excruciating pain”



# Vegas, Baby!



- *Ballard v. Chicago Park Dist.* ( 7<sup>th</sup> Cir. 2014)
  - “Care” does not require medical treatment and not restricted to particular place



# Tried and True HR Practices



- Communicate early
- Communicate consistently
- Document, document, document
- Be firm, but fair
- Use legal counsel when necessary