

***Third Thursday Briefing:***  
**Family and Medical Leave Act (FMLA)**  
**and**  
**the Americans with Disability Act (ADA)**

**October 17, 2013**

The webinar will begin shortly. Please stand by.  
You will not hear any audio until we begin.  
The slides and a recording will be sent to you  
after the event.

# Today's Presenters



Honor Costello



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# FMLA: A Review of The Basics

- Leave Eligibility
  - Covered Employer: 50 employees
  - Eligible Employee:
    - Employed for 12 months
    - Worked 1,250 hours in prior 12 months
    - Employed at site with 50 employees (or within 75 miles)

# Purpose & Length of FMLA Leave

- 12 Weeks
  - Employee’s serious health condition
  - Family member’s serious health condition
  - Birth or placement of a child
  - Military service-related “qualifying exigency”

# Military Caregiver Leave – 26 Weeks

- Eligible Employees:
  - spouse, parent, child or next of kin of a covered servicemember with a serious illness or injury
- Covered Servicemembers are:
  - Current servicemembers or veterans
- Calculated Based On A Single 12-Month Period
- ***A Combined*** 26 weeks of leave
- Recertification Not Permitted

# Employee FMLA Rights

- Job Restoration After Leave
- Maintain Group Health Care Benefits
- Other Benefits (per company policy)
- No Retaliation
- Notice of Rights & Obligations
- Use of Other Leave with FMLA Leave

# FMLA Process

- Notice: Employee provides notice of need
- Eligibility: Employer has 5 days to determine eligibility
- Certification: If requested, employee has 15 days to provide medical certification
- Designation: Employer has 5 days to designate
- During Leave: Updates from employee
- End of Leave: Return to Same or Nearly Identical Position

# DOL Forms

(<http://www.dol.gov/whd/fmla/>)

## FORMS



- [WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition \(PDF\)](#)
- [WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition \(PDF\)](#)
- [WH-381 Notice of Eligibility and Rights & Responsibilities \(PDF\)](#)
- [WH-382 Designation Notice \(PDF\)](#)
- [WH-384 Certification of Qualifying Exigency For Military Family Leave \(PDF\)](#)
- [WH-385 Certification for Serious Injury or Illness of Current Servicemember -- for Military Family Leave \(PDF\)](#)
- [WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave \(PDF\)](#)



# Review of Intermittent Leave

- Use of Intermittent Leave:
  - Employee's own serious health condition
  - Family member with a serious health condition
  - To care for a newborn or newly placed adopted or foster care child
    - only with employer approval
- Must be medically necessary
- Calculating Intermittent Leave

# Strategies for Dealing with Intermittent Leave

- Require reasonable scheduling for planned treatments/events
- Temporary transfer to alternative job
  - Note: Limitations on transfers
- Recertification, where appropriate

# The ADA Basics

- Employers Covered: Employers with 15 or more employees
- Individuals Covered
  - Persons with a disability
  - Persons with a record of a disability
  - Persons “regarded as” disabled
- Two Basic Requirements:
  - Non-discrimination
  - Reasonable accommodations, absent undue hardship

# What is “Undue Hardship”?

- Undue Hardship means “significant difficulty in or expense in, or resulting from, the provision of the hardship”
- Factors
  - Substantial disruption to operations
  - Financial difficulty
- Must be assessed on case-by-case basis

# The Definition “Disability”

A physical or mental impairment that “substantially affects” one or more of life’s major life activities (or one with a record of, or who is regarded as, having such an impairment).

# The ADA Amendments

- Broadened the Definition of Disability
  - Effect of impairment need not be as great
  - Episodic impairment, ones in remission qualify
  - Ignore mitigating measures
  - Temporary impairments can qualify

# “Major Life Activity”

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Bending
- Lifting
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working

## But wait, there's more . . . .

A “major life activity” also includes the operation of a “major bodily function” including:

- Immune system
- Special sense organs and skin
- Normal cell growth
- Digestive
- Genitourinary
- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive functions
- Operation one organ



# Temporary Impairments

- Temporary conditions may not qualify if they are non-chronic of short duration, with little residual effects
- Sliding scale – the more severe the impairment the less the duration needs to be
  - Can no longer say impairments lasting less than 6 months do not qualify

# So Who is “Disabled” Now?

## The Easy Ones:

- Blindness
- Deafness
- Epilepsy
- Cancer
- Diabetes
- Multiple Sclerosis
- Muscular Dystrophy
- Cerebral Palsy
- Schizophrenia
- Bi-Polar
- PTSD
- Depression

# So Who is “Disabled” Now? (cont.)

## The Tough Calls:

- Obesity
- Stress & Anxiety
- Back pain
- Carpel Tunnel
- Claustrophobia

# Checklist for Addressing Leave Requests

## Ask the Following

- How long has the employee worked?
- What is the reason for leave?
- For employee's health condition or others?
- Serious medical condition, disability, both?
- Have similarly situated employees been given leave?
- If covered by ADA, is there another accommodation available instead of leave?

# Hypothetical No. 1

- Employer grants an employee suffering from depression 12 weeks of FMLA leave. Two weeks before that leave expires, the employee provides a doctor's note indicating that the employee needs an additional three weeks of leave. Is the employee entitled to the additional leave? And if so, why?

## Hypothetical No. 2

- Employee submits medical certification from his health care provider stating that he suffers from periodic migraine headaches that are likely to occur 2-4 times per month. However, the employee always takes leave on Fridays or Mondays and the employer suspects he is not really suffering from migraines on those days but trying to extend his weekends. Is there anything the employer can do?

## Hypothetical No. 3

- Employee is pregnant, and has been out on leave for 8 weeks due to a medical condition related to her pregnancy. The Company has properly designated the leave under the FMLA. After the baby is born, the Employee asks for an additional 12 weeks of leave under the FMLA. Is she entitled to the leave she seeks?

## Hypothetical No. 4

- In 2012, employee took 26 weeks to care for his daughter who suffered severe burns while on active duty in Afghanistan. In 2013, the employee requests another 26 weeks because his daughter has been subsequently diagnosed with post-traumatic stress disorder due to the same incident. Is the employee entitled to another 26 weeks of leave for injuries sustained by his daughter in the same incident?



## Hypothetical No. 5

- Sam is a long-time employee for a large employer and is covered by the FMLA. Sam has been off work for hip replacement surgery for 12 weeks. His wife is on disability leave from her job recovering from cancer. Upon Sam's return to work, he asks for 4 weeks leave as an accommodation to care for his wife. Is Sam entitled to leave?

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