



**Dinsmore & Shohl** LLP  
ATTORNEYS

## Managing Employee Leave Requests

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# KEY REMINDERS





# FMLA

- 50 employees (for private sector) and all public sector employers
- employee must be “eligible”
- serious health condition (of employee or family member) or birth of a child
- 12 weeks of leave in 12-month period



# ADA

- 15 employees
- no “eligibility” requirement



# ADA

- **disability: 1) a physical or mental impairment that substantially limits one or more major life activities; 2) a record of such an impairment; 3) being regarded as having such an impairment**



# ADA

- **reasonable accommodation: includes permitting use of accrued paid leave, providing additional unpaid leave**



## TITLE VII/PDA

- prohibits discrimination on the basis of sex, which includes on the basis of pregnancy or pregnancy-related medical condition
- equal treatment, not preferential treatment
- apply leave policies equally



# OHIO'S PREGNANCY REGULATION

- “Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.” O.A.C. ¶ 4112-5-05(G)(2)
- appears to require preferential treatment



# WORKERS' COMPENSATION

- O.R.C. § 4123
- injured in the course of and arising out of his/her employment
- temporary total disability compensation (TT)
- employee cannot return to former position
- compensation may be terminated if employee rejects employer's written job offer for suitable employment



# MANAGING LEAVES



1. When does a workers' compensation injury qualify as a disability under the ADA and/or a serious health condition under the FMLA?
2. How much leave must an employee be granted?
3. How should leave be designated and calculated?



4. What are the concerns and options when an employee returns to work?
5. When must/should an employer offer light duty?
6. When can an employer require an employee to submit to a medical examination?
7. What must an employer do with medical records?



## Employee's condition

- occupational injury vs. disability vs. serious health condition
- being unable to work



## How much if any leave

- **reasonable accommodation = effective accommodation**
- **employer's choice under ADA, not employee's choice**
- **FMLA: 12 workweeks (60 days)**



## How much if any leave

- **intermittent leave versus regular and predictable attendance**
- **ADA: additional leave or a modified work schedule beyond the FMLA 12 weeks**
- **ADA undue hardship defense (not under FMLA)**



## How much if any leave

- ADA does not require indefinite leave
- Pregnancy under Title VII
- Pregnancy under Ohio law (how much is sufficient)



## Designating and calculating leave

- **workers' compensation leave can be counted toward FMLA 12 weeks (run concurrently)**
- **employee receiving workers' compensation benefits cannot be required to exhaust other available paid leave such as vacation time or sick leave**
- **employees on FMLA leave may be required to exhaust paid leave**



# Returning to work

- **FMLA requires job restoration**
- **ADA may require reasonable accommodation to the returning employee**
- **Is employee “qualified” under ADA (able to perform the essential functions)**
- **The “interactive process” under the ADA**



## Light duty

- **offer of suitable employment to cut off workers' compensation**
- **ADA does not require employer to create position**
- **subtle distinctions between furnishing light duty (which the EEOC does not generally require) and making reassignment to vacant positions or job restructuring (which may be required)**



## Light duty

- **other reasonable accommodations required under ADA**
- **under FMLA, cannot force employee to take light duty**
- **employee cannot waive FMLA rights**
- **temporary transfer under FMLA where employee on intermittent or reduced schedule**



# Medical examinations

- **ADA return-to-work physical must be job-related and consistent with business necessity**
- **FMLA “fitness-for-duty” certification “need only be a simple statement of an employee’s ability to return to work.” FMLA permits only one fitness for duty certification**



# Medical examinations

- **objective and individualized inquiry**
- **compared to ADA and workers' compensation, FMLA is rather restrictive with respect to obtaining medical information**



# Medical records

- **Workers' Compensation permits more employer access and discovery**
- **medical records confidential and separate from other records**



# TIPS TO AVOID LIABILITY

- 1. Know which laws apply to your company**
- 2. Have written policies (employee rights and obligations)**
- 3. Centralize decision making**
- 4. Train supervisors and managers**
- 5. Have system for tracking absences (protected vs. not protected)**
- 6. Document interactions with employees**



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