

Leave of Absence Best Practices

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Available Leaves to Consider

- FMLA
- ADA
- Workers' compensation
- State/local paid sick leave
- State/local paid parental leave
- USERRA
- Other company leaves...



The FMLA

- Notice
- Reinstatement
- Intermittent Leave
- Intermittent/reduced schedule—“medically necessary”?
- Exceptions to reinstatement
 - Inability to perform an essential function
 - Layoffs, closures, etc.
 - Fraudulent use “key employee”

Intermittent/Reduced Schedule Leave

- Planned/unplanned medical treatments
- Recovery
- For care or comfort to a family member with a serious health condition
- As related to a chronic condition

Intermittent/Reduced Schedule Leave

- **Employee must make reasonable efforts to schedule treatments to avoid disruption**
- Employer may transfer employee to alternate position
 - For foreseeable and planned treatments
 - Equivalent pay and benefits, but not duties
 - Only where transfer will better accommodate recurring leave periods

FMLA – Impact on Health Benefits

- Health (medical, dental, vision, EAP, health FSA)
 - Must offer plan on same terms, same cost
 - Premium Payment Issues
 - Timing of payment and failure to pay
 - Restore benefits upon return
 - Not returning is a COBRA qualifying event if loss of coverage

FMLA – Impact on Retirement Benefits

- Service calculations
 - Paid leave – count all service up to 501 hours
 - Unpaid leave – do not count leave toward
 - Eligibility service
 - Vesting service
 - Hours requirement for employer contributions



FMLA – Impact on Retirement Benefits

- Service calculations (cont'd)
 - Count leave to avoid
 - A break in service; and
 - Meet last day requirement
 - Maternity and paternity – credit to avoid break in service



ADA Inquiries: The Big 5

- ~~Disabled?~~
- Qualified?
- Accommodation?
- Reasonable?
- Undue Hardship?



The ADA

- ***Reasonable accommodation*** has expanded to include:
 - Gender identity
 - Service and emotional support animals
 - Scent-free workplace
 - Telecommuting/travel
 - Dress codes
 - Hidden disabilities



ADA Leave – Impact on Benefits

- Must provide the same benefits that are provided for employees on other leaves
- Plan terms control
- Absent clear Plan terms, past practice may control



The ADA

- But reasonable accommodations are not required if there is an:
 - ***Undue hardship*** or ***direct threat***



Undue Hardship

- Action requiring “significant difficulty or expense”
- Consider:
 - Nature and cost
 - Impact on the facility’s operation
 - Overall financial resources
 - Type of operation



Leave as a Reasonable Accommodation

- When does it become indefinite?
 - Courts consider:
 - (1) The amount of time requested
 - (2) The degree of certainty of the employee's ability to return to work on a specified date
 - (3) The employer's current sick leave policy

The Interactive Process

- It takes two to tango!



The FLOW of Accommodation

- The request
- Substantiation
 - Ask for proof of the need
- Examining reasonableness
- Amount to an undue hardship?



Workers' Compensation

- State laws differ
- Many preclude termination during workers' compensation leave
- Light duty is allowed



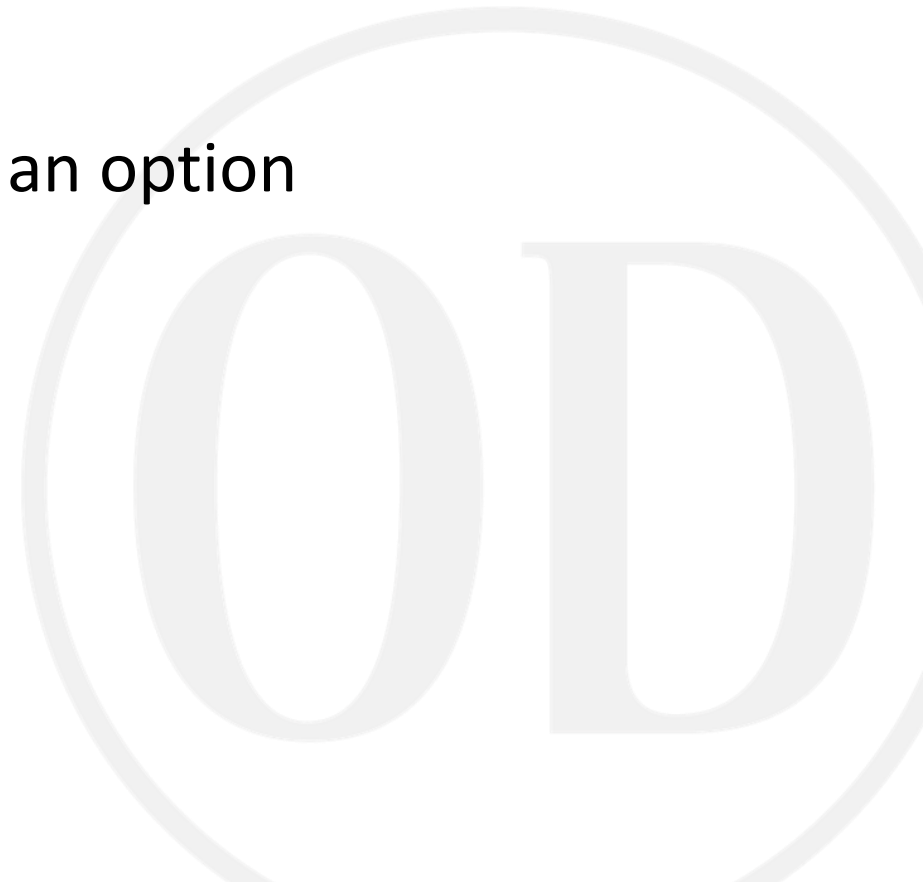
USERRA

- Return to work after
 - Service
 - Fitness exams
 - Service-related disability
- Two-year extension for disability
- Documentation upon (30+ day leaves)
- Avoid harassment claims



USERRA – Impact on Health Benefits

- Health Benefits
 - COBRA-like continuation rights for 24 months
- Health FSA
 - Qualified reservist distributions are an option
 - Taxable, income tax withholding



USERRA – Impact on Retirement Benefits

- Service credit if reemployed toward:
 - Eligibility, vesting, and contributions
 - Leave cannot create a break in service
- Make-up contributions
 - Must permit employee to contribute make-up deferrals and after-tax contributions
 - Employer must contribute missed matching and profit-sharing contributions

USERRA – Impact on Retirement Benefits

- Loans may be suspended – no one-year limit
 - Can extend term for period of military leave
 - Repayment options (re-amortize v. balloon payment)
- Distributions
 - Qualified reservist distributions – if called to active duty for at least 179 days
 - Deemed severance – if absent for more than 30 days
- Differential pay – *may* treat as compensation

Other Leave

- Paid sick and parental leave
- Company provided leave
- Collective bargaining agreement leave



Interaction Between Leave Laws

- When managing leave, remember:
 - ***The Big Picture***
 - Purpose of laws
 - ***Fundamentals***—be familiar with applicable law, and your policies
 - ***Process***—develop a standard methodology

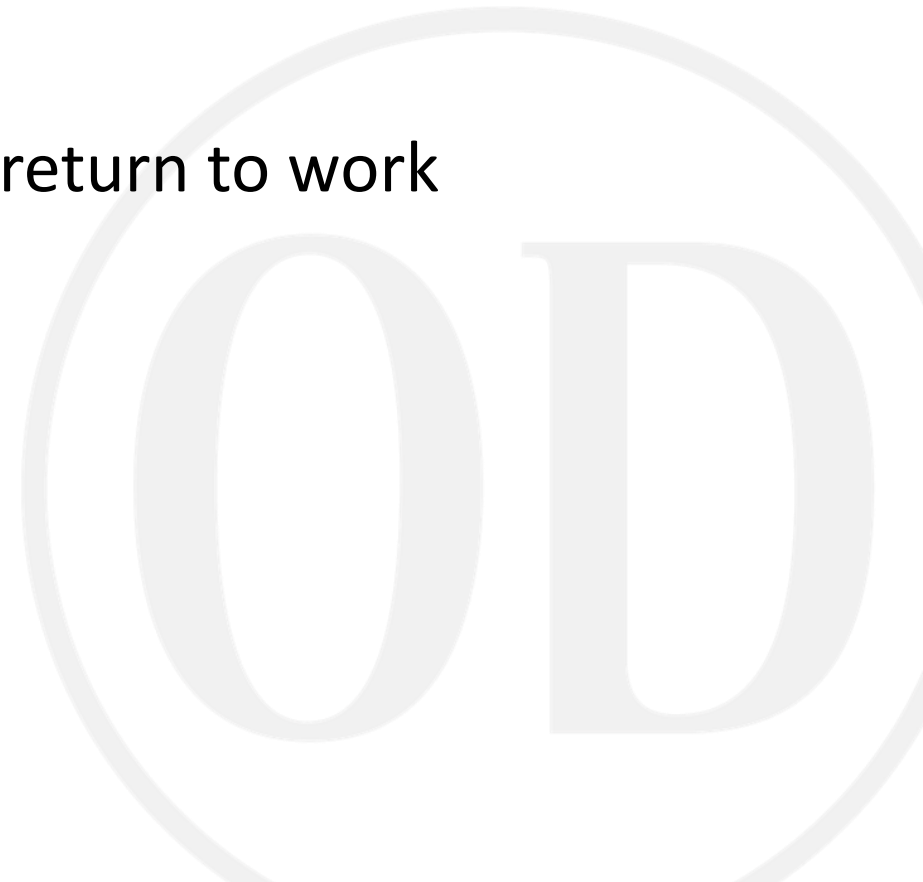
Interaction Between Leave Laws

- Document responses to reinstatement and accommodation efforts
 - Litigation preparation
 - Permits concurrent review
 - Instills “process” notion
- Don’t presume or play doctor



Managing Inconsistent Obligations Under Leave Laws

- Return to work
 - Job availability
 - Light duty
- Challenging certification of ability to return to work
- Intermittent leave



Notification and Communication

- Can require health care provider to certify the “medical necessity”
- Can ask questions of the employee:
 - Whether intermittent leave is “necessary”
 - Whether better notice is possible
 - Get a schedule of treatments
 - Can require employee to work with you on dates of treatment (but doctor’s orders ultimately control)



Medical Questionnaires & Fitness-for-Duty Certifications

- Requested during or after leave?
- Job-related?
- Consistent with business necessity?
- Requested by a medical provider?
- Part of the ADA interactive process?



Reassignment Requests

- FMLA guarantees “equivalent” job
- May be an ADA accommodation
- May not be appropriate...
 - USERRA may preclude
 - Workers’ compensation
 - Other company leaves



Conducting Return-to-Work Interviews and Medical Assessments

- May consider STD/LTD/FMLA information
- HIPAA release
- ADA considerations



Can I Terminate an Employee Who Does Not Return From Leave?

- Yes, but consider is there any:
 - PTO/vacation left?
 - Other leave left?
 - Duty to extend leave under the ADA?
 - Limiting workers' compensation law?



Step 1: Know the Employee's Leave Entitlement

- Comply with any state/local laws requiring leave time more generous than FMLA
- Comply with any contractual requirements setting leave entitlements (e.g., CBA)
- Be consistent with how company leave policies have been administered (to avoid claims of disparate treatment)



Step 2: Essential Communications at the Start of Leave

- Notify employee of expected communications during the leave
- Communicate with employee's supervisor to understand how employee's work will be covered during the leave



Step 3: Essential Communications During the Leave

- Communicate with employee's supervisor about any issues associated with the employee's absence and work coverage
- Communicate with leave administration group for any changes in medical condition or leave status
 - Return to work with restrictions possible?
 - Any changes requiring extension of leave?

Step 4: Engage in Interactive Process for Leaves Beyond Mandatory Job-Protected Leave

- Any accommodation to enable employee to return to work?
- How much additional leave is needed and why?
- Why did initial return to work date prove inaccurate?
- How likely is it employee will return after the extension?
- Any medical documentation supporting the request?
- What effect will additional leave have on the business?

Best Practices for Return-to-Work Policies

- Know the employee's leave entitlement
 - Comply with state/local laws that require more generous leave
 - Comply with any contractual requirements (e.g., CBA)
 - Be consistent when administering leave
- Interactive process considerations
- Modified/light duty available

Best Practices for Return-to-Work Policies

- Essential communications during leave with:
 - Supervisor about any issues with the employee's absence and work coverage
 - Leave administrator about any changes in medical condition or leave status
 - Supervisor regarding return to work with restrictions, if possible
 - Employee about changes requiring extension of leave

Best Practices for Return-to-Work Policies

- Don't make *assumptions*
 - It *rarely* hurts to seek more medical information...
 - “They never proved it” only works if you've actually asked for proof...



Best Practices for Return-to-Work Policies

- Revise your “other” policies
 - “Personal leave” policies after FMLA
 - Strengthen requirements for PTO, sick leave, etc.
 - Create a well thought out call-out policy
- Implement and update accurate job descriptions
 - Enables doctors to evaluate ability to perform essential functions

Thank You!

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