



OHIO
ASSOCIATION for
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2016 Annual Convention

Employment Law Session

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What Are You Missing? Spotting FMLA and Disability Discrimination
Issues in Workers' Compensation and Personal Injury Cases

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WHAT ARE YOU MISSING?

*Spotting FMLA and Disability Discrimination Issues in
Workers Compensation and Personal Injury Cases*

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What Are You Missing?

Often when a person suffers a work place or other personal injury, associated employment issues arise. Frequently employers do not understand or respect an employee's rights associated with the injury.

For example, employees of mid to large size business may be required to provide FMLA leave. And, nearly all employers are required to provide reasonable accommodations and are not permitted to discriminate against seriously injured employees.

The purpose of this presentation is to assist the workers' compensation attorney or personal injury attorney spot potential violations of their injured client's rights in the workplace.

Family Medical Leave Act

GENERALLY

The FMLA is a federal law that requires an employer to grant up to twelve (12) weeks of unpaid leave to workers for an employee's serious health condition, among other things.

Family Medical Leave Act

EMPLOYER COVERAGE

- ▶ All state and federal employees
- ▶ Private employers that have fifty (50) or more employees in current or preceding calendar year
 - ▶ Counted if name appears on payroll for 20 or more calendar weeks, regardless of whether receive compensation
 - ▶ Weeks need not be consecutive
 - ▶ Part time and full time employees
 - ▶ Counted if on leave of absence (including disciplinary suspension) as long as reasonable expectation of recall
 - ▶ Not independent contractors

Family Medical Leave Act

EMPLOYER COVERAGE

- ▶ All employees of Single Employers counted
 - ▶ Two or more entities can be considered a single employer if “integrated enterprise”
 - ▶ Common management
 - ▶ Interrelation between operations
 - ▶ Centralized control of labor relations; and
 - ▶ Degree of common ownership/financial control

Family Medical Leave Act

EMPLOYER COVERAGE

- ▶ All employees of Joint Employers counted
 - ▶ Generally
 - ▶ Where there is an arrangement between employers to share an employee’s services or to interchange employees
 - ▶ Where one employee acts directly or indirectly in the interest of the other in relation to the employee
 - ▶ Where employers not completely disassociated and controls employee
 - ▶ Temporary employees generally counted
 - ▶ Professional Employer Organization (PEOs) generally not covered unless ability to affect terms and conditions of employment
 - ▶ Joint employees counted for both employers

Family Medical Leave Act

EMPLOYEE COVERAGE

- ▶ Employed for at least twelve (12) months at location with fifty (50) employees within a seventy-five (75) mile radius
 - ▶ Measured by surface miles, using surface transportation over streets etc. using the shortest route
 - ▶ Twelve (12) months need not be consecutive; seven (7) year look-back period
- ▶ Employed for at least 1,250 hours during the twelve month period immediately preceding commencement of leave
 - ▶ Hours measured under FLSA's "suffered or permitted to work" standard (e.g., must count "off-the-clock" work)

Family Medical Leave Act

QUALIFYING SERIOUS HEALTH CONDITIONS

- ▶ Must be incapacitated (e.g., unable to perform normal daily activities)
- ▶ Inpatient Care (i.e., overnight stay in medical facility)
- ▶ Continuing Treatment
 - ▶ Incapacity and treatment
 - ▶ Chronic conditions
 - ▶ Permanent or long-term conditions
 - ▶ Conditions requiring multiple treatments

Family Medical Leave Act

CONTINUING TREATMENT

- ▶ Incapacity and treatment
 - ▶ More than three consecutive full days
 - ▶ Treatment two or more times; or
 - ▶ Treatment on at least once occasion and given continuing regime of treatment
 - ▶ First visit must be in-person
 - ▶ Additional treatment must be within thirty (30) days

Family Medical Leave Act

CHRONIC CONDITIONS

- ▶ Requires periodic visits at least twice a year
- ▶ Must continue over an extended period of time
- ▶ Can be episodic

Family Medical Leave Act

INTERMITTENT LEAVE

- ▶ Needs to be medically necessary
- ▶ Employer may require employee to temporarily transfer during period intermittent leave required
 - ▶ Must have equivalent pay and benefits
 - ▶ Need not have equivalent duties
 - ▶ May not be transferred to position that would discourage taking of leave
- ▶ Calculation of leave
 - ▶ Only amount of leave actually taken counts
 - ▶ Actual workweek is the basis of the leave entitled taking into account employee's regular work schedule or weekly average over prior twelve (12) month period
 - ▶ Leave counted in smallest increment used to calculate leave

Family Medical Leave Act

EMPLOYER REQUIRED NOTICES

- ▶ Notice of Eligibility
- ▶ Notice of Rights and Responsibilities
 - ▶ Leave will be designated against FMLA entitlement
 - ▶ Substituted leave
 - ▶ Requirements to certify leave
 - ▶ Notice that will require health insurance premium payments and obligation to repay if do not return to work
 - ▶ Status as a "key employee"
- ▶ Designation Notice
- ▶ Failure to provide notice is an interference claim

Family Medical Leave Act

EMPLOYEE NOTICE REQUIREMENTS

- ▶ **Foreseeable v. Unforeseeable**
- ▶ **Initial Notice:** No need to specifically mention the FMLA. Instead, the employee need only provide enough information to alert employer that the condition may be FMLA qualifying.
- ▶ **After Leave Granted:** Employee must specifically mention the FMLA or the condition for which leave was granted.

Family Medical Leave Act

CERTIFICATION OF LEAVE

- ▶ Must be provided notice of certification requirement within five (5) business days; employee must return certification within fifteen (15) calendar days
 - ▶ Clarification and Authentication
 - ▶ Second and Third Opinions
 - ▶ May require annually, including second or third opinions
- ▶ **Recertification**
 - ▶ No more often than every thirty (30) days
 - ▶ More than thirty (30) days if initial certification more than thirty (30) days
 - ▶ At least every six (6) months
 - ▶ Less than thirty days if: requests extension of leave; circumstances changed; pattern of abuse; reason to doubt continuing validity
 - ▶ No second or third opinions

Family Medical Leave Act

FITNESS FOR DUTY

- ▶ May require fitness for duty certification if all employees must do so
- ▶ Must certify able to return to work
- ▶ May require certification of ability to perform essential functions of provide list of such duties no later than time of designation
- ▶ No second or third opinions permitted
- ▶ Designation notice must advise employee that fitness for duty required
- ▶ Not permitted for each intermittent leave absence, but permitted every thirty (30) days if safety concerns exist
- ▶ Employee may be terminated if fail to provide fitness for duty certification

DISABILITY DISCRIMINATION

- ▶ Federal Law: American with Disabilities Amendments Act (ADAA)
- ▶ Ohio Law: R.C. 4112.02
- ▶ Coverage: Fifteen (15) employees for ADAA; Four (4) employees for R.C. 4112.02; Ohio also recognizes public policy tort for employers less than four employees
- ▶ Disability is a “physical or mental impairment that substantially limits one or more...major life activities.”
 - ▶ Actual disability
 - ▶ Record of disability
 - ▶ Regarded as being disabled
- ▶ Under ADAA Construed in favor of broad coverage; determination of disability should not demand extensive analysis
- ▶ Broad range of major life activities including major bodily functions

Americans with Disabilities Amendments Act

- ▶ Substantially Limited
 - ▶ Does not have to impact work
 - ▶ Compares abilities of employee to average person in general population
 - ▶ Need not severely restrict or significantly restrict performance of major life activities
 - ▶ Do not consider mitigating factors (except for eye glasses)
- ▶ “Regarded As”
 - ▶ Does not include minor or transitory conditions (e.g., in proper circumstances those lasting six (6) months or less)

Americans with Disabilities Amendments Act

Medical Inquiries

- ▶ Pre-offer: No medical inquiries
- ▶ Post-offer: May require medical exam, but may not exclude from employment unless job related and consistent with business necessity
- ▶ During employment: Not permitted unless reason to doubt ability to perform essential functions of position or present a direct threat

Americans with Disabilities Amendments Act

REASONABLE ACCOMMODATION

- ▶ Employee must be able to perform essential functions of position with or without a reasonable accommodation
- ▶ Employee has duty to request accommodation
- ▶ Employer must engage in interactive process in order to determine appropriate accommodation
 - ▶ Unpaid Leave beyond FMLA; leave up to a year not *per se* unreasonable; indefinite leave not reasonable; intermittent leave generally not reasonable
- ▶ Need not provide if Undue Burden
 - ▶ Significant difficulty or expense in relation to size of employer

Americans with Disabilities Amendments Act

LIGHT DUTY

- ▶ If an employer provides light duty for industrial injuries, that employer must also provide light duty for disabling non-industrial injuries

WAGE AND HOUR CLAIMS

CHECK FOR WAGE AND HOUR VIOLATIONS!

Although not technically related to workplace or other personal injuries, investigating FMLA and disability discrimination claims often results in discovery of wage and hour violations. These claims are rampant and can be very high value, as they typically can be brought as class actions.

Most of our wage and hour class actions have started as investigations of FMLA and disability discrimination claims. In the last two years we have recovered over \$10 million for our clients from such wage and hour lawsuits.

WAGE AND HOUR CLAIMS

"HOT" WAGE AND HOUR CASES

- ▶ **Bonuses:** If an employee gets a non-discretionary performance bonus (attendance bonus), the employer must pay overtime on that bonus. Many, if not most, do not. This is particularly prevalent in the fracking and oil service industry.
- ▶ **Travel Pay:** Many employers who require overnight travel do not pay for travel time. This is illegal. This is common in the construction industry.
- ▶ **Route Drivers:** Drivers who deliver products to grocery stores are often classified as "sales" personnel and not paid overtime. This is improper.
- ▶ **Home Health Aids:** Last year all home health aids were determined to be eligible for overtime. Many home health companies are still not paying overtime.
- ▶ **On The Horizon:** In 2017, millions more workers will be entitled to overtime. Employers will try to avoid overtime!

Questions?

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Decision-Making Skills in Employment Cases

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