



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

FMLA, ADA, and Workers' Compensation in the Time of COVID (and its aftermath)

(with apologies to "Love in the Time of
Cholera"*)

*without endorsement or criticism of the novel or the film

Presented by:
Celynda L. Brasher

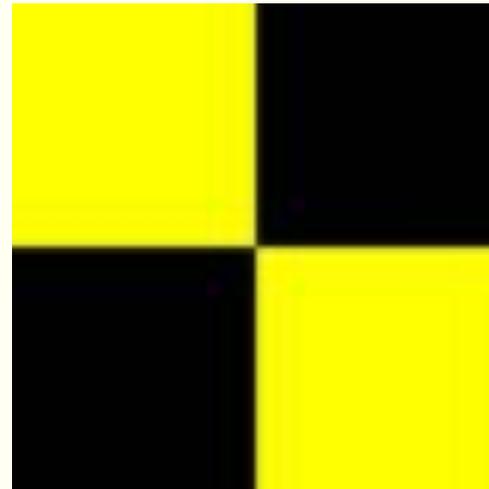
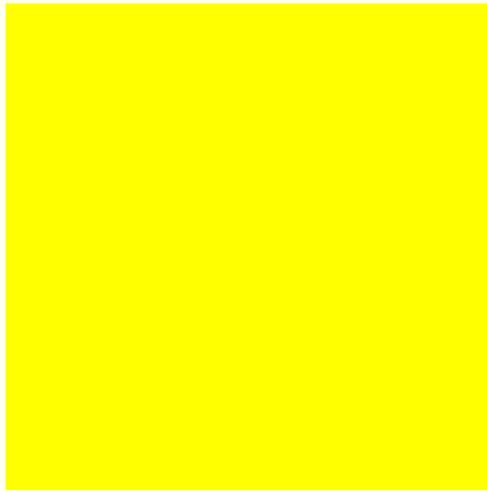
Date:
March 25, 2021

DIFFERENT
BY DESIGN



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COOPER MOHAN JACKSTADT P.C.

Cholera or Contagion



Presented by:
Margaret A. Hesse

Date:
March 25, 2021

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Agenda

Review legal requirements for leave under:

- MO Workers' Compensation Act
- The Family and Medical Leave Act
- Americans with Disabilities Act

Practical application



Legal Leave Entitlements

- Workers' Compensation Law
- Family Medical Leave Act (FMLA)
- Americans with Disabilities Act
- Discrimination laws
 - Pregnancy Discrimination Act
 - Title VII/ADEA
 - Missouri Human Rights Act

Missouri Workers' Compensation Law

- Applies to employers with 5 or more employees
- AND public schools
- Statute requires Districts to maintain workers' compensation insurance for employees
- Employee is entitled to leave to recover from injury or disease that occurred during the course and scope of employment

Workers' Comp: Amount of Leave

- Workers' comp leave is divided into two categories:
 - TPD = temporary partial disability (employee is working half days, etc.)
 - TTD = temporary total disability (employee is not working)
- Rate is 2/3 of the employee's average weekly wage for 13 weeks prior to the accident, up to the state maximum
- Can claim entitlement to TTD for eight years (no more than 400 weeks = 7.69 years)

Workers' Comp: Combination of Leave

- District can allow OR require employees to use paid leave concurrent with workers' comp leave
 - Allows employees to “double dip” aka get paid TTD and PTO
 - BUT also forces employee to “burn” through leave
- District can allow OR require employees to use FMLA leave concurrent with workers' comp leave
- Must be included in the policy

 So → check policies/handbook!

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Workers' Comp: Light Duty

- If employee is released to work with restrictions (light duty):
 - Can give employee light duty work, if such work is available
 - BUT District is not required to “invent” light duty work
- If District does not have light duty work, employee is entitled to stay home and collect TTD

The Family and Medical Leave Act (FMLA)

- Who is a covered employer under the FMLA?
 - ALL public agencies
 - ALL public and private elementary and secondary



FMLA Entitlement

- Provides qualified employees with up to 12 work weeks (and up to 26 work weeks for military caregiver leave) of unpaid, job-protected leave per 12-month period for certain reasons
- Leave can be in blocks or intermittent
- Requires group health benefits be maintained during the leave for qualified employees
- Provides job protection and reinstatement rights

FMLA Entitlement

- 12-month period
 - Different methods for determining period
 - District may require or allow employee to first exhaust all paid leave
 - OR may require or allow employee to run FMLA concurrent with paid leave

 **Check your policies!!**
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FMLA Entitlement

- Birth/care/placement of child
- To care for employee's spouse, son or daughter, or parent who has a "serious health condition"
- Employee is unable to work because of employee's own "serious health condition"
- Qualified exigency leave or to care for a service member

Serious Health Condition

- Employee is entitled to FMLA leave for “serious health condition”
- An illness, injury, impairment, or physical or mental condition that involves:
 - Inpatient care in a hospital, hospice, or residential medical care facility; or
 - Continuing treatment by a health-care provider

FMLA Process

- Employee requests FMLA- now what??
- Determine employee eligibility
- Employee must:
 - Have been employed for 12 months
 - Worked at least 1,250 hours during the preceding 12 months
- If the employee is not eligible, given written notice of that and follow any other District policies applicable to the situation

FMLA Process

- Determine whether the employee is requesting the leave for a covered reason
- The employee should receive the following documents:
 - A copy of the District's FMLA policy
 - A filled-out Form WH-381 ("Notice of Eligibility and Rights & Responsibilities")
 - The appropriate certification form, depending upon the qualifying event
 - Copies of current DOL-approved forms may be found at: <http://www.dol.gov/whd/fmla/>

FMLA Process

- Along with providing the documents, inform the employee that he or she must return the fully-completed certification form to the Human Resources department (or your District's equivalent employee) within 15 business days.
- Advise the employee that failure to return the completed certification on time may result in the denial of FMLA leave for some or all of the employee's absences.

FMLA Process

- Once employee returns paperwork:
- First, make sure that the certification is proper.
 - Did an FMLA-authorized health care provider submit the certification?
 - Did the health care provider include all the requested information?
- The employee must have an opportunity to cure any deficiencies in the certification before further action is taken. Cure periods are at least 7 days.

FMLA Process

- If District becomes aware that the employee might have experienced an FMLA-qualifying event:
 - Send the employee a letter indicating that he or she might qualify for FMLA leave
 - Enclose the appropriate certification form and the Notice of Eligibility and Rights & Responsibilities
- From there, follow the same steps above

FMLA Summary

- If your organization is required to offer FMLA, consult legal counsel when questions arise
- Lots of pitfalls with this process!

The Americans with Disabilities Act (ADA)

- Prohibits Districts from taking adverse action against employee with a disability
- Disability = “Physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.”
- Employee must be qualified to perform essential functions of job, with or without reasonable accommodation

Reasonable Accommodation

- Reasonable accommodation: “[A]ny change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”
- Typical accommodations:
 - Special furniture (desk, keyboard, chair)
 - Modified breaks (longer breaks, more frequent breaks)
 - Shorter walking distances (clear parking spot, moving desk)



Leave under the ADA

- Equal Employment Opportunity Commission (“EEOC”) – agency tasked with interpreting the ADA and issuing guidance
- EEOC issued guidance regarding leave as a reasonable accommodation in 2016.
- “[T]o provide general information to employers and employees regarding when and how leave must be granted for reasons related to an employee’s disability”

Common Scenario

- Employee has chronic illness. He has exhausted all sick leave, personal days, taken all FMLA.
- Employee cannot return to work because of illness and wants to extend leave.
- Employee cannot return and thus, cannot perform essential functions of job, so it's okay to fire him, right?
- OR, if a teacher, can fire because it is excessive/unreasonable absence under Teacher Tenure Act, right?

EEOC Guidance - Requirements

- EEOC states that employer “must consider providing **unpaid leave**” as a reasonable accommodation, beyond leave allowed by employer’s policies, “so long as the leave does not create an **undue hardship.**”
- Also, may not penalize employee for using leave as reasonable accommodation
- Accommodation requirement supersedes existing District policies

Undue Hardship

- Undue hardship = “An action requiring significant difficulty or expense.”
- Factors to consider:
 - ✓ Nature/cost of accommodation
 - ✓ Overall financial resources of employer
 - ✓ Impact on expenses/resources and operation of business
 - ✓ Number of employees and type/location of facilities
 - ✓ Type of operations

Undue Hardship: EEOC Guidance

- Factors suggested by EEOC:
 - ✓ Amount/length of leave
 - ✓ Frequency of leave
 - ✓ Flexibility of leave
 - ✓ Whether intermittent leave is predictable or not
 - ✓ Impact on coworkers and job duties
 - ✓ Impact on operations and/or ability to serve clients

ADA Interactive Process

- Step one: Employee asks for leave
- Step two: District determines if sick leave, personal leave, FMLA, disability leave applies (also determine if this is a worker's comp issue!)
- Step three: If not, District should initiate interactive process
- Step four: Contact physician (with release) regarding:
 - Need for leave (nature and severity of condition)
 - Amount and type of leave required
 - Whether other reasonable accommodations may be effective

Indefinite Leave

- Courts have held that indeterminate/indefinite leave is not a reasonable accommodation and/or constitutes undue hardship
- BUT courts hesitate to apply bright line rules



EEOC Guidance - Return to Work

- Districts are prohibited from requiring employees to return to work on condition that they have no restriction (100% healed, no restriction policies invalid)
- If employee with restrictions poses safety risk, still cannot terminate unless District can show individual is “direct threat”
- Accommodations required upon return to work (interactive process restarts)
- Reassignment may be required (accommodation of last resort)

ADA: Best Practices

- Check policies - bright line rules may violate ADA
- Carefully consider requests for leave
- Remember the interactive process (for both leave and return to work)
- Call your lawyer!



Discrimination

- Discrimination = adverse action
- Typically, termination, demotion, etc., but can be denial of benefit aka leave
- With regard to leave, common way to violate law is to treat employees differently
- Solution → make sure to treat employees consistently
- Example: If you allow male employee unpaid leave under certain circumstances, must allow unpaid leave under same circumstances to female employees

Discrimination: Pregnancy

- Supreme Court decided key pregnancy discrimination case, *Young v. UPS*, in 2015
- UPS driver requested accommodations while pregnant (did not want to lift packages, etc.)
- Supreme Court held that employer must offer accommodations to pregnant employee if it offers similar accommodations to a large number of non-pregnant employees

Discrimination: Pregnancy

- Supreme Court said that it is pregnancy discrimination to deny accommodation provided to those “similarly-situated”
- Moral of the story for leave → If you allow an employee to work from home or take half days, etc. because of certain physical restrictions, you should allow pregnant employee with similar physical restrictions the same leave accommodations

Discrimination: Best Practices

- Treat everyone consistently!
- Have one person analyzing leave requests, when possible
- Check policies





Navigating Employee Leaves of Absence

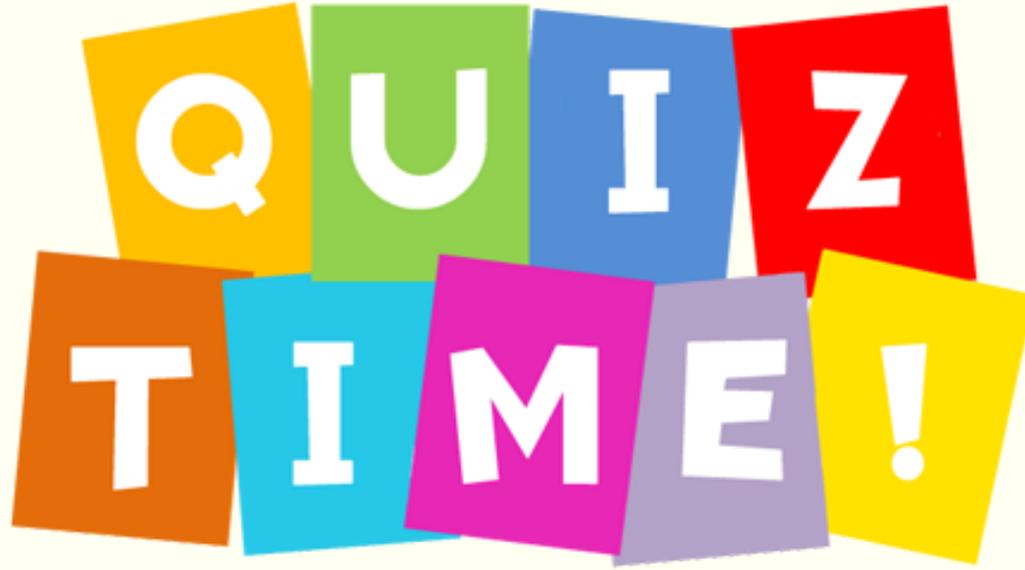
BEST PRACTICES

Leave Considerations

- Think about legal requirements when processing leave request
 - Is worker's comp also triggered?
 - Is this an FMLA request?
 - ADA request?
 - Am I treating this employee like I treat other employees in similar circumstances?
- When in doubt, call HR, central office, etc.!

Best Practices

- Know/comply with the law!
- Know/comply with your policy/handbook!
- Treat similarly-situated employees in the same manner!
- Think before you act!
- Look before you leap!
- Get help/advice when needed!
- Document, document, document!



HYPOTHETICALS

Hypothetical No. 1

Employee just started with your District three weeks ago. Employee advises his supervisor that he has Crohn's disease, and it is flaring up. Employee states that he may need to have surgery in a few months and wants to know if he can have the time off for the surgery. Must you grant a leave of absence?

HELLO
my name is

Newbie

Hypothetical No. 2

Employee has worked for the District for 10 years as a full-time teacher. Employee's husband has also worked for the District for several years as a full-time teacher. Employee advises that her 17-year-old son is having surgery and she and her husband need to take time off from work to care for the son. Do they both get a leave of absence and how much? Are the employees entitled to take more time off work if the son is not recovered after 12 weeks?



Hypothetical No. 3

Employee has worked for the District for 13 months and has worked 1300 hours in the last 12 months. Employee is a custodian. Employee seriously injures his back on the job and the employer-authorized physician has authorized the employee to be off work for at least 4 weeks.

Hypothetical No. 3

- Must you allow the employee to be off work?
- Can you/should you designate the time off work as FMLA leave?

Hypothetical No. 4

After 4 weeks, the employer-authorized physician states that the employee can return to work with a 10-pound lifting restriction, no bending, no stooping, no overhead reaching, no climbing, no squatting, no pushing, no pulling, and with a ten-minute break every 30 minutes. These restrictions are to be in place for at least 4 weeks.

Hypothetical No. 4

- Must you bring the employee back to work?
- What happens if you cannot accommodate these restrictions?
- Can you/should you continue to designate the time off work as FMLA leave?

Hypothetical No. 5

The employee has now been off work for 8 weeks. The employer-authorized physician now states that the employee can return to work with no restrictions. But the employee goes to see his own physician and that physician states that the employee is not ready to return to work and must be off work for another 4 weeks.

Hypothetical No. 5

- Must the employee return to work?
- Is the employee allowed to take additional time off under FMLA?

Hypothetical No. 6

After 12 weeks, the employee's physician states that the employee can return to work, but with restrictions of no lifting more than 50 pounds. The employer-authorized workers' compensation physician states that the employee can return to work with no restrictions.

Hypothetical No. 6

- Must you accommodate these restrictions?

Hypothetical No. 7

A year later, the employee states that his back is still bothering him. He goes back to his own doctor who states that he now needs surgery.

Hypothetical No. 7

- Is the employee entitled to more time off work?
 - * work comp?
 - * FMLA?
 - * ADA?

Hypothetical No. 8

The employee takes 6 weeks off work and returns to work with the same restrictions as before.

Six months later the employee learns that he has stomach cancer. The employee tells you that he needs time off work to start getting chemotherapy, which will be followed by radiation therapy.

Hypothetical No. 8

- Must you allow the employee to take more time off work?
 - * work comp?
 - * FMLA?
 - * ADA?

Hypothetical No. 9

The employee's doctor originally states that the employee needs 6 weeks off work. You allow the employee to take the time off. At the end of the 6 weeks, the doctor says the employee needs another 6 weeks off. You grant that.

Hypothetical No. 9

At the end of the second 6-week leave, the doctor states that the employee needs 3 more weeks off. You grant the leave. At the end of the leave, the doctor states that the employee needs more time off work, but he doesn't know when or if the employee will be able to return to work.

Can you now terminate the employee's employment?



QUESTIONS

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