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THE ALPHABET  
SOUP OF FMLA,  
ADA, & WORKERS'  
COMP

MASA/MOSPRA Spring  
Conference 2024

- ❑ Family and Medical Leave Act
- ❑ Americans with Disabilities Act
- ❑ Worker's Compensation
- ❑ Interaction between Various Types of Leave
- ❑ 6 Tricky Scenarios

## AGENDA

# FAMILY & MEDICAL LEAVE ACT

- ❑ Covered employee entitled to take up to 12 weeks of unpaid leave within one year period
  - ❑ Up to 26 weeks to care for an injured covered service member
- ❑ Continuation of District-paid health benefits
- ❑ Reinstatement to same job at end of leave
- ❑ Paid leave may be used at the same time an employee takes FMLA leave, if reason covered by paid leave policy.
- ❑ District may require use of paid leave during FMLA leave – review policy.

## LEAVE ENTITLEMENT

- ❑ Employee has 12 months of service time
  - ❑ Does not need be consecutive -12 months in 7-year period
- ❑ Worked 1,250 hours during last 12-month period
  - ❑ 12-month period chosen by District (calendar year or rolling period)
  - ❑ Hours actually worked (Not paid or unpaid leave)
  - ❑ Rebuttable presumption full-time teacher meets actual hours requirement

## ELIGIBILITY REQUIREMENTS

- ❑ Birth/adoption of child
- ❑ Employee's own serious health condition,
- ❑ Serious health condition of employee's spouse, child, or parent
- ❑ Certain military-related leave

## TYPES OF COVERAGE

- ❑ Leave for the birth of a child, for the placement of a child for adoption or foster care, and to bond with newborn or newly placed child
- ❑ Men and women have same right to FMLA leave to bond with child
  - ❑ Must be taken within one year of the child's birth or placement
  - ❑ Must be taken as a continuous block of leave (unless the employer agrees to allow intermittent leave)

## BIRTH & ADOPTION

## General Rule

- ❑ District employees both married parents  
→ only allowed 12 weeks leave combined
- ❑ District employees both unmarried parents  
→ each employee get 12 weeks leave
- ❑ Prenatal Rule
  - ❑ Mother may use FMLA for prenatal care
  - ❑ Married father can only use for prenatal care to care for incapacitated mother

# PARENTS AND BIRTH & ADOPTION

## Definition -

- ❑ Illness, injury, impairment, physical or mental condition
- ❑ Involves either:
  - ❑ An overnight stay in a medical care facility, or
  - ❑ Continuing treatment by a health care provider
- ❑ Prevents performance of the functions of the employee's job

# SERIOUS HEALTH CONDITION

- ❑ First visit to the healthcare provider must occur within 7 days of the start of incapacity
- ❑ Second visit to the healthcare provider must occur within 30 days of the start of incapacity
- ❑ Chronic conditions require at least 2 visits to the healthcare provider a year

## CONTINUING TREATMENT

- ❑ Examples of illnesses that may qualify as a “serious health condition” under FMLA:

Cancer, diabetes, epilepsy, back/spinal injury, bipolar disorder, major depression, anxiety disorders (including panic disorder and PTSD)

- ❑ Different than ADA definition of “disabled” and workers’ compensation “work-related” injury

## EXAMPLES OF SERIOUS HEALTH CONDITION

- ❑ Leave allowed to care for employee's spouse, child, or parent with serious health condition:
  - ❑ Health condition prevents family member from participating in school or other daily activities
- ❑ "Parent" defined to include biological parent or individual who stood *In Loco Parentis*:
  - ❑ Day-to-day responsibilities to care for or to financially support a child
  - ❑ Biological/legal relationship is not required

SPOUSE, CHILD, PARENT

- ❑ Employee is not required to mention FMLA
- ❑ Employee should give at least 30 days notice when foreseeable
- ❑ Otherwise, next business day (and in same method as non-FMLA leave)

## EMPLOYEE FMLA REQUEST

- ❑ Notice of Eligibility
  - ❑ Confirms or denies eligibility for coverage
- ❑ Request for medical certification
- ❑ Review submitted documentation
- ❑ Designation Notice
  - ❑ Designates amount of approved leave
  - ❑ Designates block or intermittent leave
  - ❑ Notifies if fitness-for-duty exam will be required prior to returning to work

## DISTRICT RESPONSE

- ❑ District must request medical certification within 5 business days of employee's FMLA request
- ❑ Review District's FMLA policy for school-specific deadlines, timelines, and administrative oversight (e.g., who should be handling the FMLA review)

## MEDICAL CERTIFICATION

- ❑ Employer may contact employee's healthcare provider directly for clarification and authentication
  - ❑ Must give employee written notice of what clarification is needed
  - ❑ Must allow employee 7 days to cure deficiency on their own
  - ❑ Only HR or central office administrator should contact healthcare provider (not supervisor)
- ❑ Employee is not required to permit healthcare provider to communicate with District, BUT if employee denies permission and does not clarify a discrepancy, District may deny FMLA leave request

## CONTACTING MEDICAL PROVIDER

- ❑ District may seek a recertification of medical information during leave
  - ❑ If FMLA leave duration unknown
    - not more often than every 30 days
  - ❑ If FMLA leave duration known
    - not until the end of known duration

## RECERTIFICATION

- ❑ The general rule about recertification has three exceptions which permit District to immediately seek a recertification from the employee:
  - ❑ Employee requests a leave extension
  - ❑ Circumstances necessitating leave change
  - ❑ District receives information disputing the validity of an earlier certification

## RECERTIFICATION EXCEPTIONS

# SCENARIO A



- ❑ During FMLA leave, District will continue to provide health, life, vision, and dental insurance coverage for eligible employees
- ❑ Employee contribution to premium
  - ❑ District has no obligation to pay employee contribution
  - ❑ But, should be consistent with other types of unpaid leaves

## HEALTH BENEFITS

- ❑ If District covers employee contribution to health insurance during FMLA leave, District can recover costs from future pay checks
- ❑ If employee fails to return, District may recover paid health premiums
  - ❑ Except in certain circumstances beyond control of employee
- ❑ District may recover other insurance premiums (e.g., life insurance, dependent coverage) submitted on behalf of employee, either upon employee's return or employee's failure to return after FMLA leave has ended

## RECOVERY OF PREMIUMS

- ❑ Employee entitled to intermittent leave if medically necessary per certification
  - ❑ Equivalent to 12 weeks in 12 months
- ❑ Structure leave to minimize disruption to school operations
  - ❑ Employee must work with District to schedule intermittent leave
  - ❑ Reduced schedule options
- ❑ Temporary change to job position permitted but use sparingly
  - ❑ Pay and benefits must remain the same
  - ❑ Retaliation claim without employee consent

## INTERMITTENT LEAVE

- ❑ Minimum increment for intermittent leave must be the same as shortest period of time used by District to track other types of unpaid leave
  - ❑ Cannot be greater than one hour
- ❑ District cannot require employee to take more leave than is necessary to address medical condition

## MINIMUM LEAVE INCREMENTS

- ❑ If physically impossible for employee to start or end work mid-way through a shift, the entire period employee is forced to be absent may be counted against total FMLA allotment
  - ❑ E.g., field trips
- ❑ Apply the exception sparingly

## MINIMUM LEAVE EXCEPTION

- ❑ At end of FMLA leave, employee entitled to return to the same or an equivalent position with no loss in benefits that accrued prior to the leave
- ❑ If not returned to same job, a nearly identical job must:
  - ❑ offer same shift or general work schedule
  - ❑ be at geographically proximate worksite
  - ❑ involve same or substantially similar duties & status
  - ❑ include same level of skill, effort, and authority
  - ❑ offer identical pay, including OT and bonus opportunities
  - ❑ offer identical benefits (life, health, and disability insurance; sick leave, vacation, pensions, etc.)

## RETURN TO WORK

- ❑ Main job is to teach and instruct students in a class, a small group, or an individual setting.
  - ❑ Includes classroom teachers, athletic coaches, driving instructors, and special education assistants, e.g., American Sign Language (ASL) interpreters.
- ❑ Teacher assistants or aides who do not have as their main job actual teaching or instructing are not instructional employees.
  - ❑ Counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, and bus drivers also are not instructional employees.

# INSTRUCTIONAL EMPLOYEES

- ❑ If instructional employee seeks FMLA leave with a duration longer than 1 week and with an end/return date within the last 3 weeks of a semester, District may require employee to continue taking leave until end of semester
- ❑ In that case, only the period of leave until the employee is ready and able to return to work can be charged against employee's FMLA leave entitlement
- ❑ Instructional employee needs intermittent leave for 20% or more of their working days during the period they need leave, the District can grant the intermittent leave request or provide the employee with a choice between transferring to an alternative position or taking FMLA leave "for a particular duration," i.e., for a set amount of time. It is up to the employee to choose which option they prefer when the employer applies this rule.

## INSTRUCTIONAL EMPLOYEES



ADDITIONAL PROTECTIONS

- ❑ Interference claim only requires proof that District denied employee FMLA entitlements
  - ❑ Unlawful for District to interfere with, restrain, or deny exercise of or attempt to exercise any right provided under FMLA
- ❑ No requirement to prove intent to interfere with FMLA rights

## INTERFERENCE

- ❑ Employee must demonstrate that District intentionally discriminated against employee for having exercised rights under FMLA
- ❑ Examples of adverse employment action
  - ❑ Change in duties or location
  - ❑ Change in position
  - ❑ Discipline and termination

## RETALIATION

- ❑ Employee is required to use FMLA leave for its medically certified purpose
- ❑ FMLA contains no requirement that employee on FMLA leave must stay at home during entire leave time
- ❑ Misuse occurs if employee is not using leave time for intended purpose

## MISUSE OF FMLA LEAVE

# AMERICANS WITH DISABILITIES ACT

A decorative graphic consisting of several parallel white lines of varying lengths, slanted diagonally from the bottom-left towards the top-right, located in the lower right quadrant of the slide.

- ❑ Prohibits discrimination on the basis of disability
  - ❑ Civil rights law
  - ❑ Guarantees that persons with a disability enjoy same opportunities as non-disabled persons
- ❑ A person with a disability:
  - ❑ Has a physical or mental impairment that substantially limits one or more major life activity;
  - ❑ Has a history or record of such an impairment;  
or
  - ❑ Perceived as having such an impairment.

## OVERVIEW

- ❑ Prohibits discrimination against a “qualified individual with a disability” – a “QID”
- ❑ QID is a person who:
  - ❑ Has a disability and
  - ❑ Can perform the essential functions of the job with or without reasonable accommodation

## OVERVIEW

- ❑ Definition of Disability
  - ❑ a physical or mental impairment that substantially limits one or more major life activities
- ❑ Examples of Impairments
  - ❑ Cancer, diabetes, bipolar disorder, blindness, severe asthma
- ❑ Examples of Possible Impairments
  - ❑ Temporary injury or illness with long-term conditions (broken foot versus flu)

# DISABILITY

- ❑ Caring for oneself:

- ❑ performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working

AND

- ❑ Operation of a major bodily function:

- ❑ immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions

# MAJOR LIFE ACTIVITY

- ❑ District obligated to go through interactive process
  - ❑ Determine whether or not there is a reasonable accommodation
- ❑ Reasonable accommodation
  - ❑ Modifying physical structures or equipment
  - ❑ Modifying or eliminating non-essential duties
  - ❑ Reassigning to more suitable, vacant position for which the employee is qualified and can perform the essential functions and duties
  - ❑ Permitting use of accrued paid leave
  - ❑ Providing additional unpaid leave for treatment and recovery
  - ❑ Modified work schedule

# REASONABLE ACCOMMODATION

- ❑ Not a “reasonable accommodation” if request would create an undue hardship on District
- ❑ Undue hardship is individualized, fact-intensive analysis of “difficulty and expense”
  - ❑ Cost of accommodation
  - ❑ Overall financial resources
  - ❑ Impact of accommodation
- ❑ Expense of accommodation is difficult to demonstrate successfully

## UNREASONABLE ACCOMMODATION

- ❑ Consider alternative accommodation
- ❑ Requirement to provide a “reasonable accommodation” does not mean that District must provide specific accommodation requested by employee if another accommodation will work
- ❑ Respond in writing to employee regarding their request for a “reasonable accommodation” and include possible alternatives that were considered

## ALTERNATIVE ACCOMMODATION

- ❑ Request submission of ADA reasonable accommodation form
  - ❑ Employee and healthcare provider
  - ❑ Medical information
- ❑ Review submitted documentation and job description
- ❑ Interactive process
- ❑ Written approval describing reasonable accommodation with specifics

## DISTRICT RESPONSE

- ❑ Employer may contact employee's healthcare provider directly for clarification and authentication
  - ❑ Should give employee written notice of what clarification is needed
  - ❑ Should allow employee opportunity to cure deficiency on their own
  - ❑ Only HR or central office administrator should contact healthcare provider (not supervisor)
- ❑ Employee is not required to permit healthcare provider to communicate with District, BUT if employee denies permission and does not clarify, District may determine whether requested accommodation is reasonable based on only provided information

## CONTACTING MEDICAL PROVIDER

- ❑ Employee must demonstrate that District intentionally discriminated against employee for having exercising rights under ADA
- ❑ Examples of adverse employment action
  - ❑ Change in duties or location
  - ❑ Change in position
  - ❑ Discipline and termination

## RETALIATION



# WORKERS' COMPENSATION



- ❑ Covers “work-related” accidents and injuries that arise “out of” or “in the course of” employment
- ❑ Employee is entitled to state mandated benefits
- ❑ Number of injuries that could be considered “work-related” such as back/spinal injury, knee injuries and potentially mental injuries such as anxiety disorders (including panic disorder and PTSD)

## OVERVIEW

- ❑ District required to obtain and maintain work comp insurance coverage
- ❑ Both employee and District have reporting obligations for all work-related injuries
- ❑ Injured employee may be entitled to lost wages and certain disability benefits
- ❑ Implications of light duty / return to work on ADA accommodations
- ❑ Implications of replacing injured employee

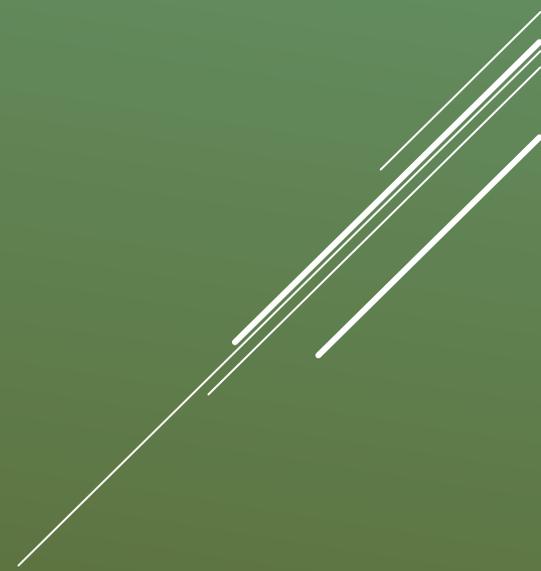
## OBLIGATIONS

- ❑ Employee must demonstrate that District intentionally discriminated against employee for having exercising rights under the workers' compensation laws
- ❑ Examples of adverse employment action
  - ❑ Change in duties or location
  - ❑ Change in position
  - ❑ Discipline and termination

# RETALIATION



# INTERACTION BETWEEN VARIOUS TYPES OF LEAVE



- ❑ Leave under FMLA, ADA, and Work Comp should be properly classified as soon as possible
  - ❑ Inappropriate classification leads to liability
  - ❑ Failure to classify properly can lead to employee's being lawfully away from work longer than they otherwise would be
- ❑ Leaves under FMLA, ADA, and Work Comp cannot count toward employee's absence total for discipline

## LEAVE CLASSIFICATION

- ❑ Leave under FMLA and Workers' Compensation may run concurrently
  - ❑ Injury both “work-related” and a “serious medical condition”
- ❑ If employee is out for FMLA-qualifying reason, District should designate the time off as FMLA
  - ❑ Workers' compensation leave
  - ❑ Disability leave
  - ❑ Time off for medical treatment

## FMLA & WORK COMP LEAVE

- ❑ Leave under FMLA and ADA may run concurrently
  - ❑ Condition both “disability” and employee’s own “serious medical condition”
- ❑ If employee is out in connection with an ADA disability, District may:
  - ❑ Designate all time off as FMLA leave (assuming it constitutes a serious health condition)

## FMLA & ADA LEAVE

- ❑ Light duty under Work Comp is NOT intermittent leave, and cannot be counted toward the FMLA entitlement
- ❑ Light duty can affect what type of accommodations are considered reasonable under ADA and interactive process

## LIGHT DUTY AND FMLA/ADA

- ❑ Goal is to limit liability, not create liability
- ❑ Do not seek information about reasons for leave, except:
  - ❑ Doctor's FMLA certification
  - ❑ Additional information about ADA disability if the employee requests a reasonable accommodation
- ❑ Must consider possible reasonable accommodations
  - ❑ Additional leave
  - ❑ Reassignment to a vacant position
- ❑ Short-term or long-term disability

## LIMIT LIABILITY

- ❑ Termination may occur if:
  - ❑ Employee is unable to return at end of 12 weeks (FMLA)

**AND**

- ❑ No reasonable accommodation which will allow employee to perform essential functions of position

**AND**

- ❑ Consideration is given to extending leave for a reasonable additional period of time

TERMINATION (FMLA  
ELIGIBLE)

- ❑ Termination may occur if:
  - ❑ No reasonable accommodation which will allow employee to perform essential functions of position

**AND**

- ❑ Consideration is given to extending leave for a reasonable additional period of time

TERMINATION (ADA ONLY)

- ❑ FMLA and ADA leave cannot be counted as absence for adverse employment actions (but may be used to deny perfect attendance incentive)
- ❑ Timing of negative evaluations
- ❑ Do not create jobs due to employee's limitations

## TERMINATION ISSUES

- ❑ Consistency not Exceptions
  - ❑ Strong performer
  - ❑ Long-term employee
  - ❑ Sympathetic employee
- ❑ Retaliation & Discrimination Claims
  - ❑ FMLA
  - ❑ ADA (failure to accommodate or retaliation)
  - ❑ State Law (MHRA)
  - ❑ Workers' Compensation

AREAS OF GENERAL  
CONCERN



# SCENARIOS



Mary is a District secretary who has been coming into work late off and on for the last month. She tells the principal that she has been late because of intense back pain on certain mornings, which she says started ever since the building created a new high-density central filing system where she often has to stoop down to lower filing shelves. A month later, Mary requests leave to have minor back surgery. Mary has worked full-time for the District for 5 years. While Mary is on leave, the principal contacts HR and requests that Mary be fired for poor job performance.

## SCENARIO # 1

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?

## QUESTIONS SCENARIO # 1

New to the District this school year, Peter is diagnosed with cancer. Peter fills out FMLA paperwork requesting two weeks leave while he is having surgery and recovering. Stacey in HR determines that Peter is not eligible for FMLA because he just started teaching at the District this school year. Stacey denies Peter's request for FMLA leave. After two weeks, Peter has used all of his sick days but he is still not able to return to work for an additional two weeks. Stacey then processes Peter for termination because he cannot perform the functions of his job and isn't eligible for FMLA leave.

## SCENARIO #2

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?

## QUESTIONS SCENARIO #2

Janice submits a doctor's note to HR, stating that Janice needs to be away from work for 4-6 weeks to receive periodic treatment for postpartum depression. HR instructs Janice to fill out the proper paperwork for a FMLA leave of absence. Janice does not turn in any of the requested paperwork. After 3 weeks, Janice's supervisor contacts HR and requests that Janice be terminated since no paperwork has been submitted requesting or granting leave for Janice.

## SCENARIO #3

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?
- ❑ Does your analysis differ if Janice is a teacher? If yes, how?

## QUESTIONS

### SCENARIO #3

Mark, a classroom teacher, suffers from depression and anxiety. Mark submits a doctor's note to HR, stating that he may need up to four days off per month due to flare ups of his depression and/or anxiety. Mark requests a reasonable accommodation under the ADA for up to four days off per month.

## SCENARIO #4

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?

## QUESTIONS SCENARIO #4

Sarah is a 20-year paraprofessional in a high needs classroom. Sarah is appropriately trained in restraint, and this is listed on her job description as an essential duty of the position. Sarah has regularly assisted with restraints since becoming trained. Sarah was recently denied workers' compensation coverage for an injury that she claimed was work related. She has now returned to work with a medical release that states that she cannot lift more than 10 lbs., cannot restrain students, and cannot stand on her feet for more than 10 minutes at a time. She has used her FMLA leave intermittently to care for her spouse who suffers from a serious health condition. The supervisor is stating that Sarah was not a good employee prior to her injury, and others are getting tired of doing her work.

## SCENARIO #5

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?

## QUESTIONS SCENARIO #5

Angie was hired 2 months ago to serve as a building attendance secretary. You have received several parent complaints since Angie took the position. The complaints are that Angie is rude and disparaging when she calls parents to check on their student's absence; she is unkind to student; and, she is not responsive to parents who call into the office. You have verbally addressed the concerns with Angie, have identified improvements that are expected, and have notified her that any further concerns could be job threatening. Angie brings in a doctor's note two days later. The note states that Angie suffers from severe anxiety which is triggered by her having to interact with parents and the public.

## SCENARIO #6

- ❑ What are the issues?
- ❑ How could or should this be handled?
- ❑ What other information would be helpful? How would you obtain that information?

## QUESTIONS SCENARIO #6

# Thank You!

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