Handling FMLA Abuse and Employee Discipline Documentation, and an Update on Ambush Union Elections

AWPA Operations Meeting

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General Overview of the Family and Medical Leave Act

• The FMLA requires covered employers to provide up to 12 weeks of unpaid leave to eligible employees who have serious medical conditions, need to care for a family member, or need to care for a newborn, adopted, or foster child.
General Overview of the Family and Medical Leave Act (cont’d)

- **Covered employers:** Businesses employing 50+ employees each working day during a year.

- **Eligible employees:** Employees who:
  - work for a covered employer for at least 12 months;
  - worked 1,250 hours in the last year; and
  - work at a jobsite where 50+ employees are employed in a seventy-five mile radius.

- **Note:** An employee’s “eligibility” is based on whether he or she has met the requirements above as of date that leave would begin.
When Family or Medical Leave Could Apply

• Employee or family member is hospitalized.
• Employee is absent more than three consecutive days.
• Employee or spouse is having a child or adopting one.
• Employee or family member has chronic serious illness (asthma, diabetes, etc.) or illness that requires multiple treatments (cancer, kidney disease, etc.).
Manufacturers’ Toolkit for Abuse of Family or Medical Leave

- **Tip #1:** Request certification and recertification for each condition requiring leave.
- **Tip #2:** Make sure that certification or recertification is complete and sufficient.
- **Tip #3:** Use second and/or third opinions if you have a reason to doubt the validity of certification.
Manufacturers’ Toolkit for Abuse of Family or Medical Leave (cont’d)

- **Tip #4:** Require compliance with call-off/notice procedures.
- **Tip #5:** Call out the private investigator.
Tip #1: Certification and Recertification

• Certification for Employee or Family Member with Serious Health Condition
  — Employers can require certifications to provide:
    • Health provider’s contact information;
    • Date the serious health condition began and how long it will last;
    • Facts about the condition;
    • Facts demonstrating that leave is appropriate; and
    • *Estimated frequency and duration (F&D) of expected incapacity due to the condition.*
Tip #1: Certification and Recertification (cont’d)

• **Recertification for Employee or Family Member with Serious Health Condition**
  
  — Employers can request recertifications if:
  
  • Employee requests an extension of leave;
  
  • Circumstances described by the previous medical certification have changed *(e.g., the F&D of absences have increased)*; or
  
  • Employers have information that “casts doubt” on the validity of the leave.
Tip #2: Ensure Required Forms are Complete and Sufficient

- Employer is entitled to a “complete and sufficient” certification or recertification
- Examples of “incomplete” or “insufficient”
  - Missing information
  - Unsigned
  - Vague, ambiguous, or non-responsive answer (e.g., frequency and duration information)
Tip #2: Ensure Required Forms are Complete and Sufficient (cont’d)

- Procedure for requesting:
  - Written notice to employee describing information needed
  - Provide employee seven days to obtain required information
  - Unless not practicable notwithstanding employee’s diligent good faith effort

- Failure to provide information = basis on which to deny leave

- Complete certification, especially on F&D issues, is effective tool to manage later abuse
Tip #3: Requesting Second and Third Opinions

• Obtaining Second Opinions for Certifications
  — Used when employer has reason to doubt the validity of medical certification.
  — Process:
    • Employer selects doctor.
    • Cannot use doctor that employer regularly uses.
    • Employer pays.
    • Pending receipt of the second opinion, employee provisionally entitled leave.

• Obtaining Third Opinions for Certifications
  — Used when second opinion disagrees with initial certification.
  — Process:
    • Employer and employee jointly select the doctor.
    • Employer pays (again).
    • Third opinion is final and binding on both employee and employer.
Tip #4: Required Compliance with Employer’s Call-Off Procedures

- Employee has intermittent leave certified.
- Employer can require employee invoking that leave to comply with internal call-off procedures (e.g., call X minutes/hours prior to shift, call particular number/person, etc.).
  - Except in “unusual circumstances”
- If have more than one condition, may be required to state the condition requiring leave.
Tip #4: Required Compliance with Employer’s Call-Off Procedures (cont’d)

• Uniform discipline for these violations very important.

• Calling in “sick” not sufficient where condition is certified.
  — Whether sufficient for first instance of leave will depend on circumstances.

• FMLA also requires employees to provide 30 days notice to employers when leave is foreseeable (i.e., scheduled surgery).
Tip #5: Private Investigators

- Employer suspecting abuse permitted to investigate
- Retaining firm to follow the employee on leave may reveal malingering, moonlighting, or other abuse
- Usually hit or miss; almost always costly
- Does your FMLA or other policy expressly say leave is for leave?
FMLA and “No Fault” Attendance Policies

• Policy drafting: account for FMLA
• Policy administration: ensure no points assessed for FMLA protected absences
• Particularly problematic for intermittent leaves
• Documentation of reason for absence on call in line or otherwise
• If any occurrence is covered, termination fails
Outsourcing FMLA Administration?

• Is it right for your company?
• Have a written agreement
• Review it carefully
  — Match the marketing materials
  — TPA comply with law
  — 2nd/3rd opinion process: when triggered; who pays
  — Indemnification provisions
Question: Who is this girl and what does she have to do with best practices for effective discipline documentation?

Answer: You do not want it too “hot” (or too much)! You do not want it too “cold” (or the wrong kind)! You want your documentation to be just right!
Proper Grounds for Discipline

- Performance
- Misconduct
  - Sudden
  - Progressive
- Time and attendance
- Each has slightly different documentation considerations.
Performance-Based Discipline/Termination: “Goldilocks” Documentation

• Announced, documented performance standards for relevant work group.

• Written performance evaluations or counseling on the performance standard at regular, periodic intervals.
  — Not doing an evaluation is equivalent of giving the employee a clean record

• Completed performance evaluation instrument covering the entire evaluation period.
  — Don’t focus on just recent behaviors

• Substantive and/or contemporaneous examples of the particular performance problem(s).
  — Including a clear explanation of the performance deficiency.
Sudden Misconduct Incidents: “Goldilocks” Documentation

- Written, published policy or rule.
- Notice to employee of rule.
- Investigation of alleged incidents and documentation of results (i.e., investigator’s memorandum, witness statements, or physical evidence).
- Final termination paperwork.
Progressive Misconduct Incidents: “Goldilocks” Documentation

• Written, published policy or rule and progressive discipline policy.

• Notice to employee of both.

• Progressive disciplinary steps relative to the misconduct.

• Documentation of other incidents of misconduct:
  — For the employee.
  — For other employees to show consistent application of rule.

• Depending on severity of each individual incident, documentation of investigation of prior incidents and company response.

• Watch out for documentation showing similar conduct that resulted only in informal counseling, and not progressive discipline.
What Should Be in Disciplinary Documentation?

- Who is involved or witnessed the incident?
- What happened?
- When did it happen?
- When did the supervisor speak to the employee?
- Where did the event happen?
- Why is this event being documented?
- What will happen to the employee?
- How is the employee expected to behave in the future?
- Signature of the employee.
What Should Not Be in Disciplinary Documentation?

- No exaggeration.
- No sarcasm or extraneous comments.
  - “Just the Facts”
- No admissions.
  - “Harold’s disability made it hard for him to do his job.”
- No legal conclusions.
  - “Harry was fired for sexually harassing Sally”
- No prior drafts should be kept.
- Witness statements should be signed and dated.
Ambush Elections: The Quick NLRB Election Process

1. **The Election**
   - Employee Signs Card: *Yes*
   - Union Petition for Vote & Petition Hearing
   - Employees Vote - Yes or No
   - Union Wins if 50%+1 Vote: *Yes*
Ambush Election
Results to Date

NLRB Petitions Filed 4/14 to 8/30 (2011 to 2015)

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9.6% increase in petitions over 2014

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Ambush Election
Results to Date (cont’d)

NLRB Petitions By Unit Size,
4/14 to 8/30 (2011-2015)

32% increase in small unit elections

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Ambush Election
Results to Date (cont’d)

Days from NLRB RC Petition to Election, 4/14 to 8/30/15 (n=365 elections)

Average of 25.4 days

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Key Takeaways

- FMLA
  - Employers do have tools
  - Use the one appropriate to the circumstances
- Documentation
  - Take the time to get it “just right”
- Ambush election
  - Vigilance and prior preparation is now more than ever the name of the game