

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

## AWPA Operations Meeting

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*Presented By:*

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**VORYS**

# 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



# Effective Discipline Documentation



**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.

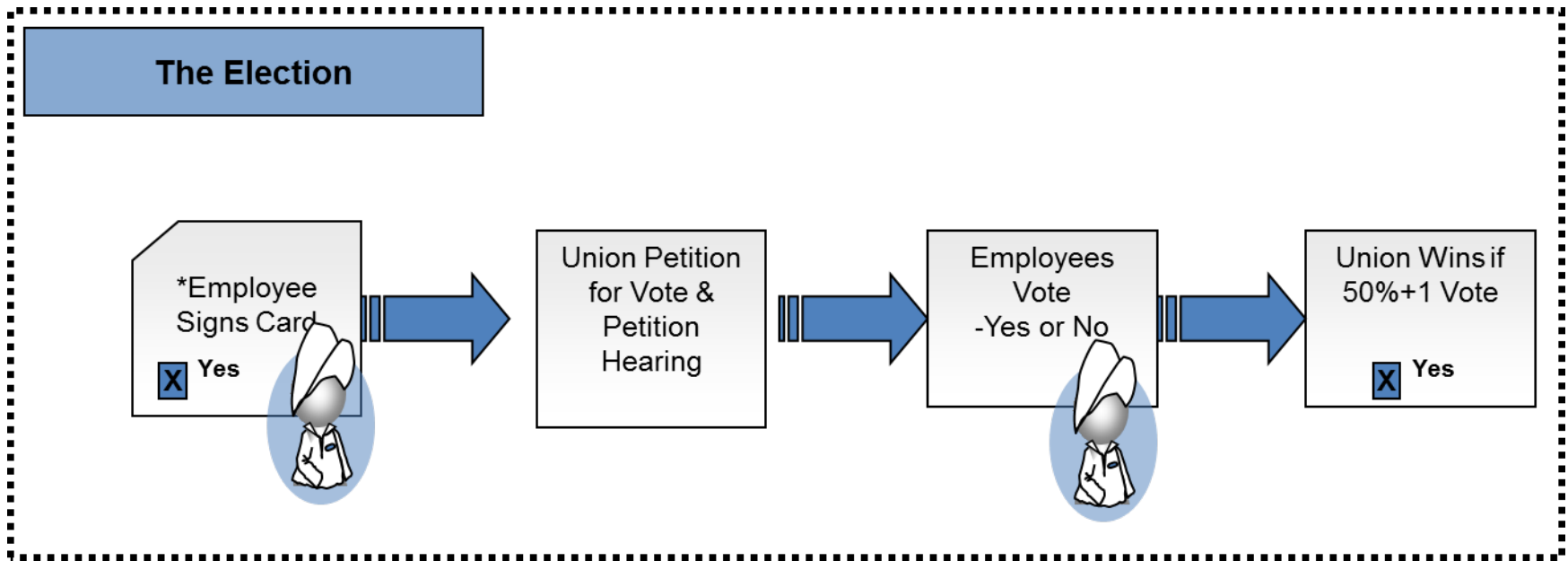
# What Should Be in Disciplinary Documentation?

- 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.

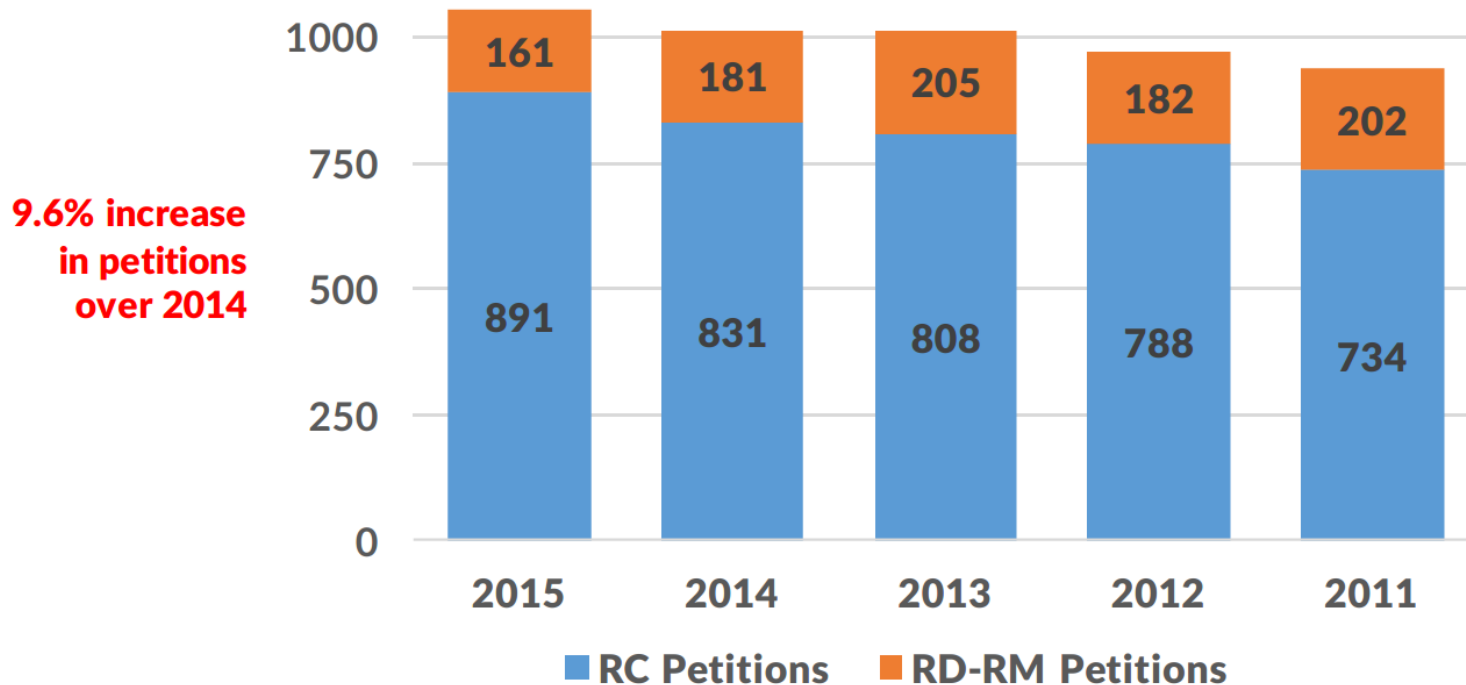
# Ambush Elections: The Quick NLRB Election Process





# Ambush Election Results to Date

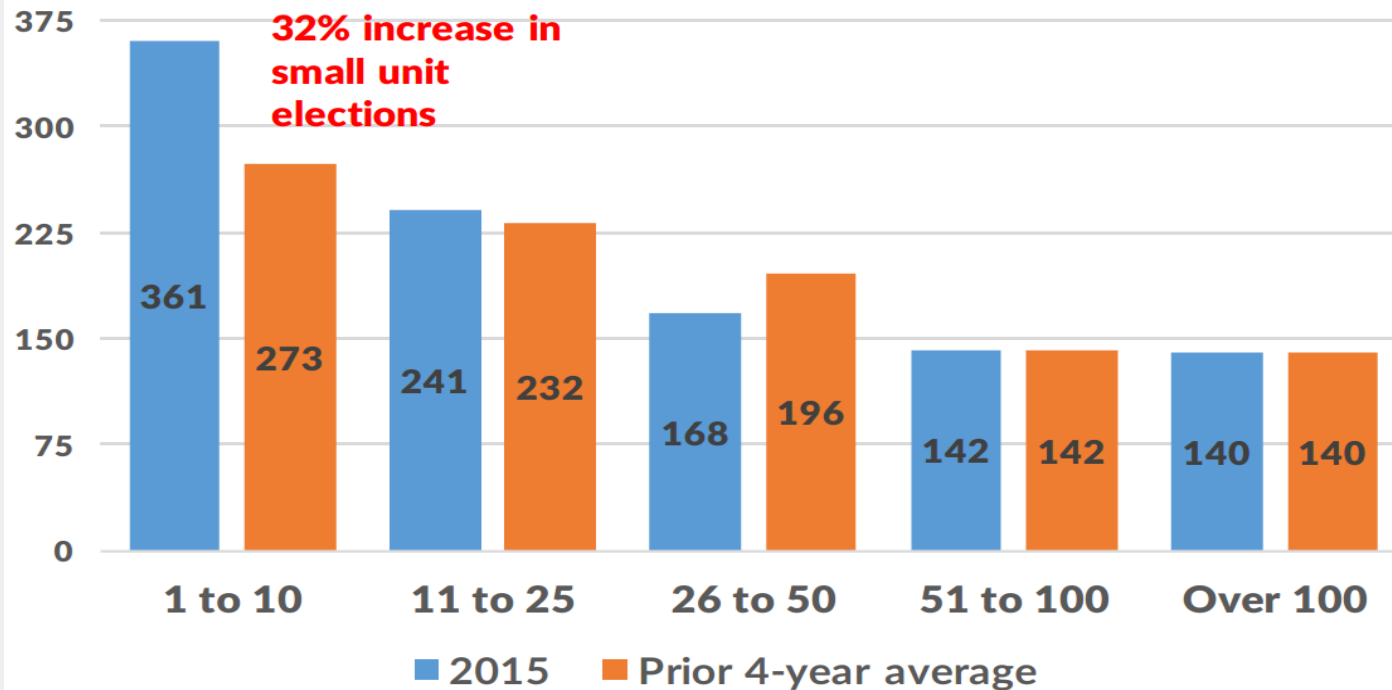
**NLRB Petitions Filed 4/14 to 8/30 (2011 to 2015)**



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# Ambush Election Results to Date (cont'd)

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

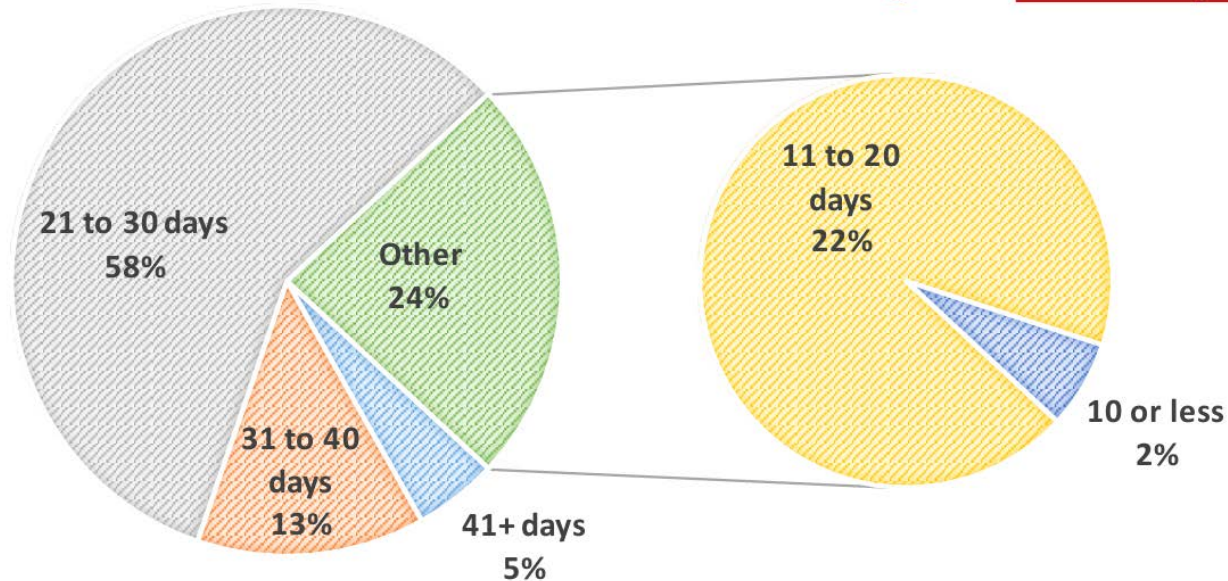


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# Ambush Election Results to Date (cont'd)

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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# QUESTIONS



# 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