



MUNICIPAL HR BOOT CAMP

TMHRA PRE-CONFERENCE ★ MAY 16, 2023
Moody Gardens Hotel and Conference Center



RAISING THE BAR *with* TEXAS MUNICIPAL HR

TMHRA ANNUAL CONFERENCE ★ MAY 17-19, 2023
Moody Gardens Hotel and Conference Center

FMLA/ADA/WC



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Today's Discussion Points

- FMLA
- ADA
- Workers' Compensation
- Return to Work



Supervisors can be Liable

- Under most applicable employment laws, supervisors are the “employer”
- Beware: potential individual liability for supervisors who violate the FMLA, FLSA, etc.
- Educate supervisors on City’s policies



FMMLA



Supervisors Play Important Role in Keeping City Compliant With FMLA

- FMLA is both an employee right and an employer obligation
- These are legal policies/issues
- Supervisors are the City's eyes and ears – critical that they inform HR
- Supervisors can be sued individually and can be personally liable





FMLA Basics: Coverage

- Public agencies are covered employers without regard to number of employees
- Individuals “acting in the interest of an employer” are individually liable for FMLA violations



FMLA Basics: Benefits of FMLA

- 12 weeks of job protected leave – can't discipline or take other adverse action because EE requested/took leave (§825.220)
- Same or equivalent job upon return (§§825.214, 825.215)
- Continuation of group health insurance (§825.210)
- Unpaid – best practice is to require unpaid FMLA to run concurrently with sick, then vacation leave; and, also run concurrently with workers' comp leave (§825.207)



FMLA Basics: Employee Eligibility

- 50 or more EEs, within 75 miles; includes F/T, P/T, and employees on leave
- 12 months of employment (within past 7 years)
- 1,250 hours of service (include OT) during 12 months prior to leave
- Not already taken 12 or more weeks leave within previous 12-month period
- EE must provide 30 days' notice if foreseeable; otherwise, as soon as practicable



FMLA Covers Same-Sex Spouses

- All legally married couples, whether opposite-sex or same-sex, and including those married under common law, are entitled to FMLA if other eligibility requirements met. 29 C.F.R. §825.102.
- *Obergefell v. Hodges* (U.S.S. Ct., June 26, 2015)



FMLA Basics: Qualifying Reasons for Leave

- EE's own serious health condition (SHC) that prevents EE from working
- To care for a spouse, child, or parent with a SHC
- Incapacity due to pregnancy, prenatal medical care, or child birth
- To care for EE's child after birth, or placement for adoption or foster care (must conclude within 12 months of birth/placement)
- Military family leave



FMLA Basics: Employee's Notice Requirements



- If need for leave is foreseeable – at least 30 days' advance notice (§825.302)
- If need for leave is not foreseeable – as soon as practicable under facts & circumstances, usually within time set out in City's usual & customary notice requirements applicable to such leave (§825.303)



FMLA Basics: Key Definitions

- **Serious health condition (SHC)** – illness, injury, impairment or physical or mental condition that **involves inpatient care** (§825.114) or **continuing treatment** (§825.115) by a **health care provider** (§825.125)
- **Spouse, Parent, Child** (§825.122)
- **In loco parentis** (§825.122) – persons *in loco parentis* include those with day-to-day responsibilities to care and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.
- **Intermittent leave / reduced schedule leave** (§825.202) – FMLA taken in separate blocks of time due to a single qualifying reason / schedule that reduces usual number of hours per workday (normally from F/T to P/T)



What is a SHC that involves continuing treatment by a health care provider?

5 Possibilities:

- Incapacity & treatment - Inability to work, go to school, or perform other regular daily activities for more than 3 consecutive full calendar days, that also involves either:
 - 2 doctor visits (1st within 7 & 2nd within 30 days of 1st day of incapacity)
 - 1 doctor visit with regimen of continuing treatment (within 7 days of 1st day of incapacity)
- Pregnancy & prenatal care
- Chronic conditions
- Permanent or long-term conditions
- Conditions requiring multiple treatments





FMLA Leave Year – 12 weeks of FMLA in 12-month period

- Most cities use a rolling 12-month period measured backward from the date of any FMLA leave to determine FMLA eligibility.
- Each time an employee takes FMLA leave, the remaining leave entitlement is the balance of the 12 weeks that has not been used during the past 12 months.



Why Is It Critical for Supervisors to Care if Absence Is FMLA Qualifying?

- Ability to address attendance issues
- FMLA-qualifying absences are protected, even if not designated as FMLA
- To prohibit “protected” absences of indefinite duration
- To show consistency & comply with law

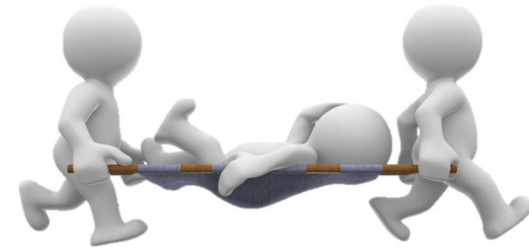


Does EE Have Choice to Not Designate Absence as FMLA?

- City may place EE on FMLA leave if absence due to SHC
- Have & enforce consistent policy - if absence is FMLA-qualifying, then designate as FMLA (& provide required notices)
- It is *not* EE's choice – make sure supervisors know this!



Intermittent FMLA Leave



- FMLA allows for "intermittent absences, *i.e.*, smaller, separate periods of time off
- FMLA can be taken in small chunks of time if:
 - Medically necessary
 - Because of qualifying exigency
 - For planned medical treatment, or
 - As otherwise approved by employer
- Certification must set out reasons for & schedule of intermittent leave; if unforeseeable, then an estimate of frequency & duration of absences.
- Can't require employee to bring doctor note for each intermittent FMLA absence.
- Intermittent leave may be undue hardship, but not acknowledged under FMLA.



Scheduling Planned Medical Treatment – Intermittent Leave

- Employee is ordinarily expected to consult with supervisor and try to schedule treatment so as not to disrupt unduly City's operations, subject to the approval of treating HCP.
- Consult should be done prior to scheduling in order to work out treatment schedule that best suits both employee and City.



City's Required FMLA Notices (§825.300)

Please Notice This



- Poster in plain view for all EEs/applicants to see
- General notice in EE Handbook
- Notice of Eligibility / Rights & Responsibilities Notice
- Designation Notice



DOL Forms/Certifications



Notice of Eligibility / Rights & Responsibilities

ALWAYS make sure EE has worked 1250 hours!

- City must notify EE of eligibility to take FMLA w/in 5 business days (absent extenuating circumstances) from date of:
 - EE's request for FMLA OR when City learns absence may be FMLA-qualifying
- Must provide separate notice for each FMLA-qualifying event
- Sets out City's expectations, EE's obligations, & consequences if not met
- Include blank Certification form & job description – EE has 15 days to return completed Certification
- Retroactive designation – if EE is continuously absent/not harmed by designation (825.301(d))



Designation Notice (§825.300(d); DOL Form WH-382)

- When HR has enough information to determine if absence FMLA-qualifying (typically upon receipt of Certification), HR must notify EE if leave is or is not FMLA
- Must be given **w/in 5 business days**, absent extenuating circumstances
- If information in Notice changes, HR must notify EE w/in 5 business days
- Must include if FFD certification will be required



How Do Supervisors Know Which Absences are Covered by FMLA Certification?



- Length of absence set out in Certification, which supervisors don't usually see
- Frequency & length of intermittent leave – how is this tracked?
- How much information does HR share with supervisors?
- Who is responsible for recording FMLA absences in timekeeping system?
- Have employee say “FML”, or if multiple certifications, “FML 1”, “FML 2”, etc.



Certifications (§§825.305, 825.306, 825.307)

- Types of certification forms
- What must they contain?
- What if unclear or incomplete? (§825.305)
- How long are they valid? (generally, yr.; §825.300(d)(1))
- Recertifications (§825.308)
- Fitness for duty certification (§825.312)
- Failure to provide certification (§825.313)



What HR Does After Notification by Supervisor

Sends FMLA packet to employee

Requests return of certification within 15 days

Follows up with employee if certification not turned in

Reviews certification

May ask employee to clarify ambiguous information and/or complete an incomplete certification



What HR Does After Notification by Supervisor (Cont.)

HR may, in some circumstances, contact health care provider

Supervisors are PROHIBITED from contacting health care provider

HR will advise employee and supervisor if FMLA is approved or not approved

HR will advise supervisor of dates of approved leave and, for intermittent absences, timing and duration



Medical Certifications and Other Required Documentation

- Employee responsible for all costs.
- If employee fails to provide within 15 days, City may deny leave until provided. If employee never provides, employee not eligible for FMLA protections.
- HR may contact HCP to clarify/authenticate after giving employee chance to cure.

CERTIFIED



Consequences to Employee for Failing to Provide FMLA Certification

- If employee fails to timely explain reasons for leave, FMLA leave may be denied/delayed up to 30 days.
- Employee may also be subject to disciplinary action in accordance with City policy.
- If employee fails to respond to reasonable inquiries, City can deny FMLA leave protection. This means absence is not job-protected & absence may be unexcused.
- If employee fails to provide requested documentation, use of sick leave and other paid benefits may be disallowed.



Designation of FMLA Leave When Employee Refuses to Provide Certification

- If employer has sufficient information to designate leave as FMLA immediately after receiving notice of employee's need for leave, employer may provide employee with designation notice at that time. §825.300(d)(2).
- While a medical certification is not required to designate absence as FMLA, it is advisable to have a policy, applied consistently, requiring certification. Refusal can be insubordination, and under City policy, can cause employee to be ineligible for paid leave benefits for the absence.



Don't be Afraid to Follow-up on Suspicious Absences & Impose Discipline for Misuse of FMLA



- Encourage supervisors to contact HR if they have reason to believe absence is not legitimate.



City May Request Recertification If:

- Employee requests an extension of leave,
- Circumstances described by previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications, a pattern of unscheduled absences),
- City receives information casting doubt on employee's stated reason for absence or validity of certification.



FMLA Leave Entitlements – How to Calculate

WHO SAID THERE WOULD BE MATH IN HR?



Calculation on Workweek basis (§825.205(b))

- Actual workweek is the is the basis of leave entitlement
- Fractions! Fractions! Fractions!
- Intermittent: If an employee takes off 8 hours from 40 workweek – 1/5 week
- Reduced leave – 4-hour days – ½ week
- Can convert fractions to hours only if conversion “equitably reflects” regular schedule
- What if: variable schedule?
- What if: unable to work scheduled overtime?



Increments of FMLA leave (§825.205)

- City must use shortest amount of time; not greater than one hour
- Exempt employees – if leave used, can deduct pay (825.206)



ADA



What Happens if No FMLA or if 12 Weeks of FMLA Runs Out?



Additional leave may be reasonable accommodation under ADA if it:

- Enables EE to return to work & perform essential job functions
- Does not cause City undue hardship

See Reasonable Accommodations Policy



ADA: Duty of Reasonable Accommodation – Supervisors’ Challenge: Communication

- Absent undue hardship, must provide reasonable accommodation to otherwise qualified individual with disability
- Undue Hardship – critical that supervisors weigh in
- Undue Hardship - supervisors often reach this conclusion w/o proper analysis
- Documentation is critical



ADA: Requests for Accommodations - Written Policy Recommended

- Have written policy - require requests be made to HR, not supervisor
- Why? Supervisors likely not fully aware of duty to engage in interactive process and/or fail to engage in appropriate reasonable accommodation analysis
- Duty to engage in interactive process even for unreasonable requests
- Risk of being too willing to accommodate by eliminating essential job functions
- Even with policy, EEs may go to supervisors; so, train supervisors to recognize requests & forward to HR



ADA: Leave as Reasonable Accommodation - Best Practices to Avoid Potential Liability

Perform **individualized analysis** in each case

Engage in **interactive process** & focus on interactive dialogue with employees

Focus on reasonableness of accommodation & undue hardship, not disability

Train supervisors to recognize accommodation requests & respond appropriately

Review & update job descriptions – make sure accurate, up-to-date, & include regular & timely attendance as essential job function

Always consider extension of leave as reasonable accommodation & provide time off unless undue hardship



ADA: Leave as Reasonable Accommodation - Best Practices to Avoid Potential Liability

Document undue hardship

Revise return to work policies/practices requiring full release with no restrictions

Include “saving” language in long-term absence policy, *e.g.*, exceptions will be made as necessary to comply with applicable law, including ADA.

Update “form” letters to employees at or near end of approved leave

Create protocols & formalize process for dealing with accommodation requests

Inject flexibility into policies & practices

Document what you did/did not do & why



ADA: Some Impairments Will Almost Always Qualify as a Disability



- Deafness, blindness, intellectual disability, missing limbs or mobility impairment requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, PTSD, OCD, and schizophrenia.



Words: Hurtful and Expensive

EEOC v. Bobrich Enterprises d/b/a Subway (5th Cir. 2009)

- Supervisor made jokes about store manager with hearing aids, asking in meetings and at Christmas party if her “ears” were on. She complained but conduct continued. EEOC filed suit for hostile work environment in violation of ADA. Fifth Circuit upheld \$150,000 jury award.
- Jokes/kidding about disability or physical appearance, even if playful and not meant as hurtful, not OK. Supervisors NEVER make such comments, but if made and asked to stop, then immediately STOP and apologize.



Disability: Duty to Provide Reasonable Accommodation

- Under the American with Disabilities Act (ADA), employers must provide reasonable accommodation to qualified applicants and employees, unless doing so would result in undue hardship.



Disability: What is a reasonable accommodation under the ADA?

- A change to work environment or in way things customarily done that enables individual with a disability to enjoy equal employment opportunities.
- Reasonable accommodation removes workplace barriers for individuals with disabilities.
- Barriers may be physical obstacles (such as inaccessible facilities or equipment) or policies, procedures, or rules, *e.g.*, when/where work is performed, when breaks are taken, or how essential or marginal functions are performed.



Disability: Duty of Reasonable Accommodation under ADA

- Absent undue hardship, employer must provide reasonable accommodation to otherwise qualified individual with a disability (includes applicants, PT and probationary employees).
- Generally, individual with disability must inform employer that accommodation is needed.
- When employee requests accommodation & need is not obvious, employer (i.e. HR) may request documentation.
- Communicate!



Overlap



Overlap Between FMLA, ADA, Workers Comp

- Under expanded ADAAA, an employee with a serious health condition (SHC) under FMLA is likely to have ADA-protected disability
- Many on-the-job workers' comp illnesses/injuries are also SHC under FMLA and/or disability under ADA



Differences between FMLA & ADA

- **Covered Employers:** FMLA – 50 employees; ADA – 15 employees
- **Waiting period:** FMLA – 12 months; ADA - no waiting period
- **Medical condition:** FMLA – “serious health condition”; ADA – “disability”
- **Who is covered:** FMLA – leave for EE, spouse, child & parent; ADA - covers EE
- **Length of absence:** FMLA -12 weeks of leave; ADA - reasonable accommodation/no “undue hardship”
- **Resulting hardship:** FMLA – too bad!; ADA – no duty to provide if “undue hardship”
- **Light duty:** FMLA - EE can decline light duty assignment under FMLA; ADA – light duty or job reassignment may be a reasonable accommodation (w/comp - refusal of light duty may impact right to further income benefits)





Workers' Comp – Anti-Retaliation

- 451.001 - LABOR CODE
 - Police, Fire, EMS protected



Texas Workers' Compensation Act

- Prohibits adverse action/retaliation against worker who:
 - Files a workers' compensation claim in good faith
 - Hires a lawyer
 - Institutes a proceeding under the Act
 - Testifies in a proceeding under the Act

Only First Responders are Protected by Anti-Retaliation law



Neutral Long-Term Absence Policy

- Employer policy provided for termination after 1-year absence
- Applied across the board
- Termination not retaliation for filing workers' comp claim.
- *Haggar Clothing Co. v. Hernandez* (Tex. 2005)
- No blanket applicability under ADA/ADAAA



Return to Work

DON'T LET THE EMPLOYEE JUST SHOW UP AND START WORKING!



Fitness-for-Duty/ Return to Work Certification

- Employee can be required to provide “fitness-for-duty” certification before returning to work if FMLA leave due to employee’s own SHC, but only if advance notice given.
- Must specifically address employee’s ability to perform essential job functions set out in Designation Notice (or in attached job description), but limited to health condition that caused FMLA leave.
- Employee responsible for costs & not paid for time or travel costs.
- HR (not supervisor) may contact HCP to clarify/authenticate, but can’t delay employee’s return to work while contacting HCP.

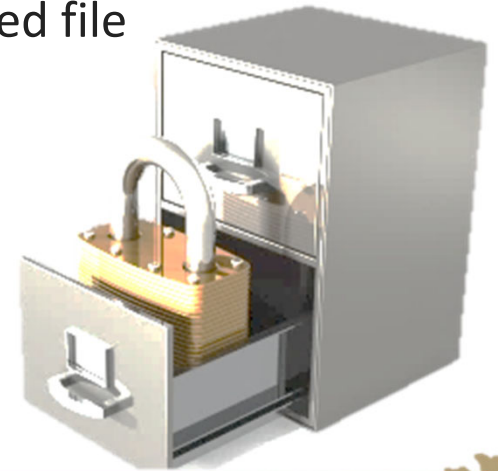


Confidentiality



Confidentiality of Medical Information & Records is Critical

- Medical records include employee & supervisor's emails & texts, doctor's notes, FMLA certifications, & ADA records
- Supervisors must maintain confidentiality of employee health & other information
- Doctor's notes, FMLA certifications, etc., must be kept in locked file cabinet **in HR**, separate from employee's personnel file
- Supervisors - don't gossip with peers or subordinates
- Breach is a violation of law – potential personal liability – watch out!!



FMLA: Confidentiality of Medical Information – “Need to Know”

- FMLA regulations strictly limit who is in “need-to-know” zone.
- Only authorized EEs should have access and only on strict “need-to-know” basis.
 - HR staff who determine FMLA eligibility
 - Supervisors/managers needing info on work restrictions/accommodations
- Supervisors don’t have “need-to-know” based solely on their status as a supervisor
- Ask: What is legitimate business reason for disclosure to particular individual or group of individuals?
- “Need-to-know” zone can vary on case-by-case basis



Confidentiality of Medical Information

- In certain cases, supervisors may need to know additional medical information. Under FMLA, employee medical information can be shared *only* with:
 - Supervisors who need to know of an employee's work restrictions,
 - Staff responsible for safety and first aid to the extent action may be required on their part, and
 - Government investigators inquiring as to the City's compliance with the FMLA, ADA, and so on.





HIPAA Privacy Rule & Protected Health Information (PHI)

- Covered entities (those that routinely handle PHI) must take certain steps to avoid improperly disclosing confidential information.
- HIPAA Privacy Rule does not apply to a covered entity when it is acting as an ER
- PHI does not include employment records maintained by covered entity in its capacity as ER.
- Under HIPAA, HCP can disclose PHI directly to their patient; this is what normally occurs with FMLA. EE obtains completed FMLA Certification from HCP and turns in to City.
- If, instead, HCP provides Certification to City, HCP has responsibility to obtain authorization from EE to share PHI.
- HIPAA should not impede disclosure of medical information necessary to establish FMLA.



ADA's Confidentiality Requirements (29 C.F.R. §1630.14(c)(1))

- ADA & FMLA confidentiality provisions nearly identical.
- ADA covers information obtained at request/demand of City about applicant/EE medical condition/history/exam (includes FMLA Certifications).
- Typically, unsolicited, voluntarily disclosed medical information not protected although supervisory discretion/confidentiality should still be maintained.
- Medical information must be maintained in separate medical files and must be treated as a confidential medical record.
- Exceptions limited to the following:
 - Supervisors and managers may be informed regarding necessary restrictions on work or duties of EE and necessary accommodations;
 - First aid and safety personnel may be informed, when appropriate, if disability might require emergency treatment; and
 - Government officials investigating ADA compliance shall be provided relevant information on request.



Choose Your Words Carefully, Including in “Confidential” Emails

- Supervisor said in “confidential” email that applicant’s “wife has cancer and requires [a] lot of his time at home” and he’s “at least 56 and has his own medical problems.”
- Overruling trial court, 5th Circuit says jury to decide if employer discriminated on basis of age or violated ADA’s prohibition of discrimination on basis of association with someone who is disabled. *EEOC v. DynMcDermott Petroleum Operations Co.* (5th Cir. 2013)
- Lessons: Words matter, so be careful what you say, write, email, text, etc. Labeling email “confidential” doesn’t make it so. Descriptions such as “over the hill” & “past his shelf life” & names liked “old fart” & “Grandpa” can lead to age claims.



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- Like FMLA, ADA regulations strictly limit who is in “need-to-know” zone.
- Only authorized employees/supervisors should have access & only on strict “need-to-know” basis.



Internal Processes/Best Practices



4 Easy FMLA Steps for Supervisors

Listen for reasons but don't ask for details

Notify HR ASAP if absence might be FMLA-qualifying

Make sure absences tracked; report to HR excessive, suspicious, or non-tracking absences

Record FMLA absences in timekeeping system



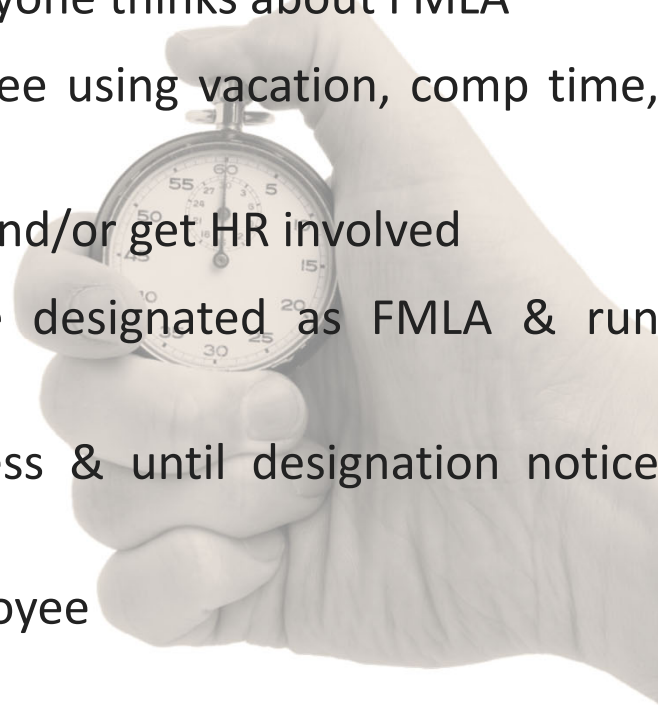
FMLA & ADA: 12 Traps for Supervisors

- Uncertainty about FMLA basics
- Negative comments about leave/disability
- Higher level supervisor relying on subordinate supervisor's reason for discipline without conducting own investigation – “cat's paw” liability
- Failure to timely designate & track FMLA-covered absences
- Intermittent FMLA Leave
- Not knowing which absences are covered by FMLA certification
- Recognizing what is sufficient “notice” under FMLA & ADA
- Inaccurate Job Descriptions
- Failing to recognize accommodation requests and/or engage in interactive process
- Failing to consider leave as reasonable accommodation
- Sharing confidential medical information outside “need-to-know”
- Not getting HR involved
- **Remember, Supervisors Can be**



Supervisors Often Fail to Timely Designate & Track All FMLA-Covered Absences

- Employee misses weeks/months before anyone thinks about FMLA
- Supervisors don't think "FMLA" if employee using vacation, comp time, subs, w/comp
- Supervisors need to know when to notify and/or get HR involved
- Make sure workers' comp absences are designated as FMLA & run concurrently
- Can't count absences toward FMLA unless & until designation notice issued
- Retroactive designation – can't harm employee



What Is Sufficient “Notice” to Supervisor Under FMLA & ADA? No Magic Words Required

- Lots of case law
- EE must provide *just enough* information to put City on notice of potential SHC or disability
- Simple statements such as “I’m sick” usually not enough
- Absences due to medical reasons may be enough
- Request for work modifications for medical reasons likely enough



Make Sure Supervisors Require Compliance with Call-In Procedures

- Enforce normal call-in procedures for reporting absences, tardies & requesting leave, *e.g.*, contacting specific supervisor by certain time
- Notice may be given by EE's spokesperson if EE physically unable to do so personally
- If EE does not comply with call-in procedures & no unusual circumstances justify, FMLA-protected leave (& paid time off) may be delayed/denied. EE also subject to discipline
- Be careful of enforcing policies that are stricter than allowed by FMLA



Hospitalization, Calls from Son, & Unintelligible Employee Should Have Clued-In Clueless Supervisor About Need for FMLA



Employee unexpectedly hospitalized due to mental health condition. Son called supervisor four times over course of week to advise that mom in hospital and “unintelligible”. Supervisor told HR that employee did not call-in personally. Supervisor and HR knew mom in hospital but fired her anyway. Court found *willful* FMLA violation and awarded liquidated damages *doubling* back pay award. \$284,000 total! *Boadi v. Center for Human Development* (D. Mass. 2017).



Employees Must Check In Periodically While on FMLA

- Employees must check in periodically with City regarding their status and intent to return to work.
- City must inform employees of call-in requirements.
- If employee discovers amount of leave originally anticipated is no longer necessary, must provide City with reasonable notice (*i.e.*, within two business days) of the changed circumstances if foreseeable.



Supervisor Harassed Employee for Using FMLA – Use Caution When Communicating with Employees on FMLA

Employee took intermittent leave for severe depression. Supervisor reacted negatively, telling her she needed to be at work, questioned if she was really sick because he “couldn’t see anything wrong with her,” threatened to fire her if she kept using FMLA, and then fired her for minor rule violations. Liquidated damages awarded to employee. *Hite v. Vermeer Mfg.* (8th Cir. 2006).





Don't Bug Me, I'm on FMLA - Excessive Job-Related Calls to Employee Violates FMLA

Reasonable amounts of contact between employer and employee during FMLA leave, e.g., getting passwords, determining status of pending projects, & identifying others to fill in during absence are OK, but too much violates FMLA. *Vess v. Scott Medical* (N.D. Ohio 2013).



Create and Follow Reliable System for Recording Reasons for Absences



Do you have a reliable system?



If so, is it consistently followed?



Risks of lost text messages



Risks of uniformed/untrained supervisors



Consider departmental “point” person for leave & absences



Consider Departmental Point Person



City Leave & Absence Coordinators



Supervisors are weak link



Helps standardize processes among departments



Highlights issues and concerns, especially attendance problems



Smaller group, so helps with challenge of ongoing FMLA training/updates for all supervisors



Use Care When Communicating About FMLA & ADA-related Topics

- Negative comments can be used against City
- Negative comments make summary judgment less likely for City
- Emails & texts can be treasure trove (not the good kind!)
- Untrained supervisors (& HR) can create liability
- Simply discouraging FMLA leave is violation of FMLA regulations.



Examples of “discouraging” acts:

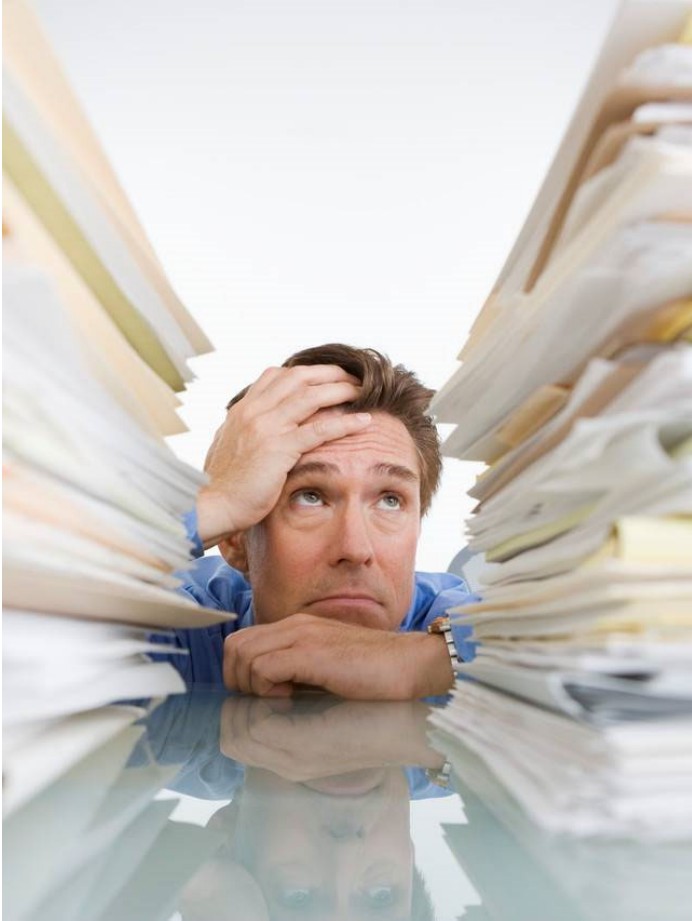
- Pressuring employee to take leave at another time
- Suggesting employee work from home instead of taking leave
- Suggesting employee ask other family members to help out



Negative Comment in Supervisor's Email About FMLA Leave Means Case Gets to Jury

Wells Fargo had well-documented reasons to fire poorly performing employee, but supervisor's email complaining of her FMLA leave means case goes to jury. Making matters worse, supervisor said in deposition he "not really familiar with FMLA leave" because he was "on the front line." *Stewart v. Wells Fargo Bank* (N.D. Ala. March 14, 2017).





Completed Certification Forms:

Make sure forms are readily available to employees

Make sure employees know who/where to turn them in

Who determines “need to know”?

Where are they maintained?



False FMLA Information to EE Results in Liquidated Damages - Parent of Special Needs Child Entitled to FMLA to Make Arrangements for Care of Child.

Mother used FMLA intermittently two days a week to care for autistic child. After 5 months, ER ended all work-from-home because of financial difficulty; notice given Friday, to take effect Monday. HR told EE (falsely) that FMLA only covers medical appointments and therapy. EE unable to make alternate child care arrangements on such short notice and was fired on Monday. Court upheld retaliation claim & liquidated damages because giving false information did not demonstrate good faith. *Wink v. Miller Compressing Co.* (7th Cir. Jan. 9, 2017).



Pay Differentials and FMLA

Nurse signed a “Weekend Option Agreement” allowing a 30% pay differential, which required her not to miss more than six weekend shifts or she would be ineligible for the enhanced pay option for one year. She subsequently took FMLA and missed more than six weekend shifts, and her pay differential was discontinued. She continued to clock in under the pay differential and was terminated for falsification of records. Court granted summary judgment to ER since pay differential was specifically based on attendance and non-FMLA absences were treated the same way. *Flowers v. McCartney*, No. 4:17CV00604 (Jan. 8, 2019)



Take-Aways: Harmonize all statutes



Review policies to incorporate provisions of FMLA, ADA, Workers' Comp, §143.081 — especially those related to accommodation requests— both for new hires and for current employees

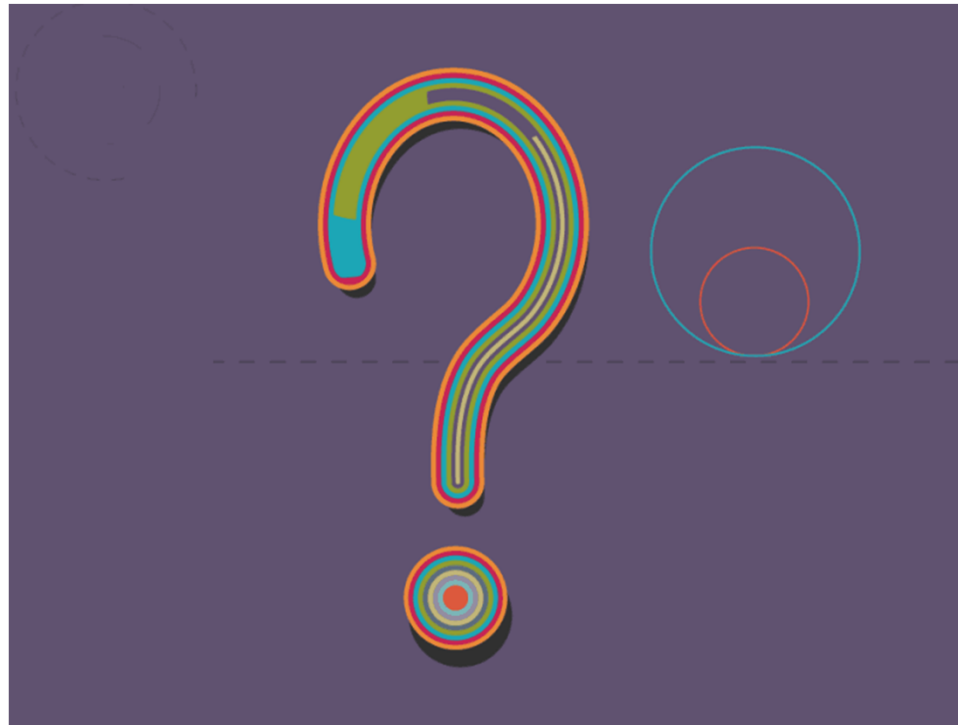
Make sure accurate job descriptions are in place for all employees

Create protocols for dealing with accommodation requests

Maintain Confidentiality!



Questions?





MUNICIPAL HR BOOT CAMP

TMHRA PRE-CONFERENCE ★ MAY 16, 2023

Moody Gardens Hotel and Conference Center



RAISING THE BAR *with* TEXAS MUNICIPAL HR

TMHRA ANNUAL CONFERENCE ★ MAY 17-19, 2023

Moody Gardens Hotel and Conference Center

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thank you!



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