

 **FRANCZEK RADELET**  
Attorneys and Counselors

**Employer Best Practices: “Leave” as a Reasonable Accommodation Under the ADA**

August 31, 2011

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**Welcome**

- Link to a feedback survey to be distributed following the program, also available from main page of webinar
- For HRCI and CLE credit please complete the feedback survey
- Use Q&A box at the bottom of the screen for any questions during the program



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**About Franczek Radelet**

- National labor and employment practice
- Counsel and represent employers exclusively in all aspects of labor and employment law
- With 50+ attorneys, it is one of the largest, single-office labor and employment boutiques in the country

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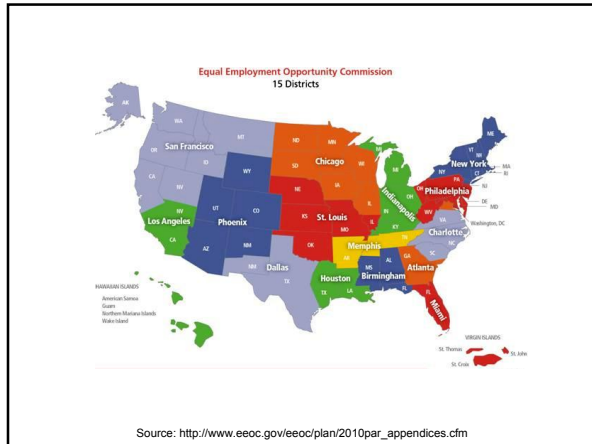
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**Agenda**

- Leave as a Reasonable Accommodation: the 10,000 ft. view
- The Use of Automatic Termination Provisions
- Practical applications of leave issues: 3 case studies
  - The end of FMLA...but the beginning of ADA?
  - How many extensions must we provide?
  - Death by 1,000 paper cuts – Intermittent absences
- Will the EEOC Offer Guidance on Leave as Reasonable Accommodation? – June 8, 2011 Commission Hearing
- Questions

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**Leave as Reasonable Accommodation**

- Obligation to provide reasonable accommodation to help employees perform essential functions of job
- Examples of reasonable accommodations:
  - Modified work schedules
  - Accommodating equipment
  - Reassignment to a vacant position
  - Shift non-essential duties
- Leave of Absence (including leave beyond an employer's permitted number of days off) can be considered a reasonable accommodation

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Leave as Reasonable Accommodation

- Employers must provide leave unless it is an undue hardship
- Undue hardship: Significant difficulty or expense
- Based on several factors, including:
  - Nature and cost of the accommodation needed
  - Overall financial resources; size, number of employees, and type and location of facilities of the employer; the effect on expenses and resources of facility
  - Type of operation of the employer
  - Impact of the accommodation on operations

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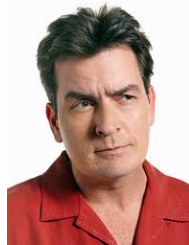
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Automatic Termination Provisions

- One of your main copy editors, Charlie, who can be a bit of a drama king, has been out on FMLA leave for work-induced stress
- FMLA expired; short-term disability about to expire
- Automatic termination policy: after short-term disability expires at 26 weeks




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**EEOC POSITION ON  
AUTOMATIC TERMINATION PROVISIONS**

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EEOC Position on Leave Policies

- Maximum leave policies not sufficient to satisfy employer’s duty of reasonable accommodation
- Policies must incorporate case-by-case assessment and employer’s duty for reasonable accommodation
- No automatic credit for past leave granted
- Reasonable accommodation may include assignment to temporary light duty position, additional leave, reassignment

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**CASE STUDIES**

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The End of FMLA

- Sally, project manager; divorce, issues w/kids
- Takes FMLA leave for stress and depression; medical certification = “out indefinitely”
- Employer doesn’t hear from Sally
- Coming up on 12<sup>th</sup> week of FMLA leave
- Sally’s supervisor = “Can I look for a replacement for Sally...knowing her, there is no way she’s coming back.”

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**Employer/Employee Obligations**

- Does employer have obligation to communicate?
- Is it best practice to communicate?
- Personnel policy changes under ADAAA
  - Obligation not to discriminate, reasonable accommodation
  - Examples: Leave of Absence
- What are employee's obligations?
- What does employer's communication look like?

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**Correspondence to Employee**

As of [date], you will have exhausted all FMLA leave available to you. Presently, you have no additional leave time available. We understand that you currently are unable to work through \_\_\_\_\_. As such, we expect you to return to work the following workday, \_\_\_\_\_. If you fail to report for work on your expected return date and have not contacted us, we will presume that you have voluntarily resigned your employment.

If you are not able to return to work by the above date, or if you believe you may need some assistance or accommodation to resume your normal job duties, or if there is any other information about your return to work that you wish to call to our attention, you must contact [contact name / telephone no.] as soon as possible before this date.

Before returning to work, you will be required to provide a return-to-work certification from your health care provider confirming that you are able to perform the essential duties of your position and are able to return to work.

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**How many extensions must we provide?**

- Pumps 'R Us: manufacturer of water pumps (75 employees; 20 office ees; 6 account executives)
- John, account executive
- Responsible for 15 key accounts: regular communication with customers (phone/visits), fully understand their operations and needs, 1/2 of time on the road, key contact with the customer
- Ruptured disc in back – surgery, used 12 weeks of FMLA leave; requested another 4 weeks – granted
- After doctor appointment, cannot come to work. Requests another 6 weeks ("Doc thinks I will be pretty close at that point...")

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**What Information is an Employer Entitled to?**

- Medical condition at issue
- How condition affects employee's ability to perform essential job functions; and what job functions?
- Whether doctor can identify any accommodations that would help employee perform job functions
- Expected date upon which employee can perform essential job functions
- Will requested leave allow employee to perform essential functions now or in immediate future?
- Other relevant questions relating to performance/job

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**"Costs" to Employer: Undue Hardship?**

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive customer service and increased customer dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees
- Increased stress on overburdened co-workers
- Lower morale

(Mercer, 2006/2010 Surveys on the Total Financial Impact of Employee Absences)

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**Intermittent Leave...After FMLA**

- Susan, assembly line producing baseball cards
- FMLA leave for past 9 mos. = G.I. issues
- Intermittent migraines – exhausted FMLA balance
- 6 absences over past two months; 1-2 days each
- Lack of notice puts strain on employer: the line needs all employees present; no time to plan
- Medical documentation: Treatments have not controlled conditions, no predictability, no change in the future
- What information does employer want?
- What are the employer's options?

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**Light Duty**

- Let's assume that the Company has a few light duty positions that it maintains for employees who suffer workplace injuries (e.g., proofing baseball cards)
- Further assume that Susan's doctor informs employer that Susan is undergoing treatment; expects to control within 3 months
- In meantime, doctor asks employer to consider alternative, temporary jobs in controlled setting
- Does employer have to consider light duty job for Susan?

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**Is EEOC Guidance Coming?**

- June 8, 2011: Commission held hearing on use of leave as reasonable accommodation
- Expert testimony – employee and employer perspectives
- Differ on employer/employee obligations, but agree on need for EEOC guidance
- Likelihood of EEOC guidance?

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Home > Abuse of FMLA Leave > Will Employers Soon Use GPS to Catch FMLA Abuse?

**Will Employers Soon Use GPS to Catch FMLA Abuse?**

Posted by Jeff Frank on July 22, 2011

Earlier this week, the folks at the **Texas Employment Law Update** highlighted a case that the U.S. Supreme Court is which the high court will consider whether law enforcement placement of a GPS device on a suspect's vehicle without a warrant constitutes an unreasonable search in violation of the Fourth Amendment. This case led the authors to wonder about whether an employer might surreptitiously use GPS to track an employee who is suspected of abusing leave under the Family and Medical Leave Act.

Clearly, FMLA abuse can literally turn a workplace on its head. I have worked with many an in-house counsel and HR professional who would do just about anything – ahem, anything – to bring these FMLA abusers to justice. But GPS? It's an interesting thought, but presently does not enjoy the support of any case law. The closest the courts have come to address the issue has involved the use of private investigators to follow employees using FMLA and to report their findings to the employer. However, as our friends in Texas point out, data from a Global Positioning System may very well be the next frontier for discovery during litigation. For instance, might we subpoena GPS or "OmniStar" data during the discovery period so as to defend our employer clients in the future? If we can locate do so, absolutely!

Published by FRANCZEK RADELET (Attorneys and Counselors)

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Questions?

- Survey available at the end of the program and survey will also e-mailed to attendees later this afternoon.
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