Complying with the FMLA and ADA When Your Employee is Dealing with a Mental Health Condition

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ATTORNEYS & COUNSELORS

Your **Webinar** Hosts



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Agenda

Mental Health Condition Meets Performance Standards

The Employee who Thinks They Can Work Even Though They Can't

Leave as a Reasonable Accommodation – When is Enough Plenty?

The Need for Intermittent Leave

Employer's Right to Obtain Medical Documentation and What To Do When the Employee Fails to Provide

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The Basic Data – Behavioral Health

36%

59%

reported high levels of stress, with extreme fatigue/feeling out of control

cite stress and personal relationship issues as their most common reason for absences of Americans have an anxiety disorder

18%

(Anxiety and Depression Association of America) of Americans experience depression

9.5%

(Centers for Disease Control and Prevention)

Source: ComPsych

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Depression

- Ruth: one of your therapists; recently hired
- One month into her hire, sporadically late to work and missed couple of days for vague reasons
- Abrupt with her co-workers, known to have an "attitude"
- Meet with Ruth:
 - Discuss concerns with her attendance and issue verbal warning
 - At end of mtg, reports that she has long suffered from depression
 - Several of her fellow therapists are creating stressful working environment
 - Longtime employees; clicky with each other
 - Won't collaborate on patients
 - Because of stressful situation, doctor thinks she should change her schedule so she doesn't have to be around any of them

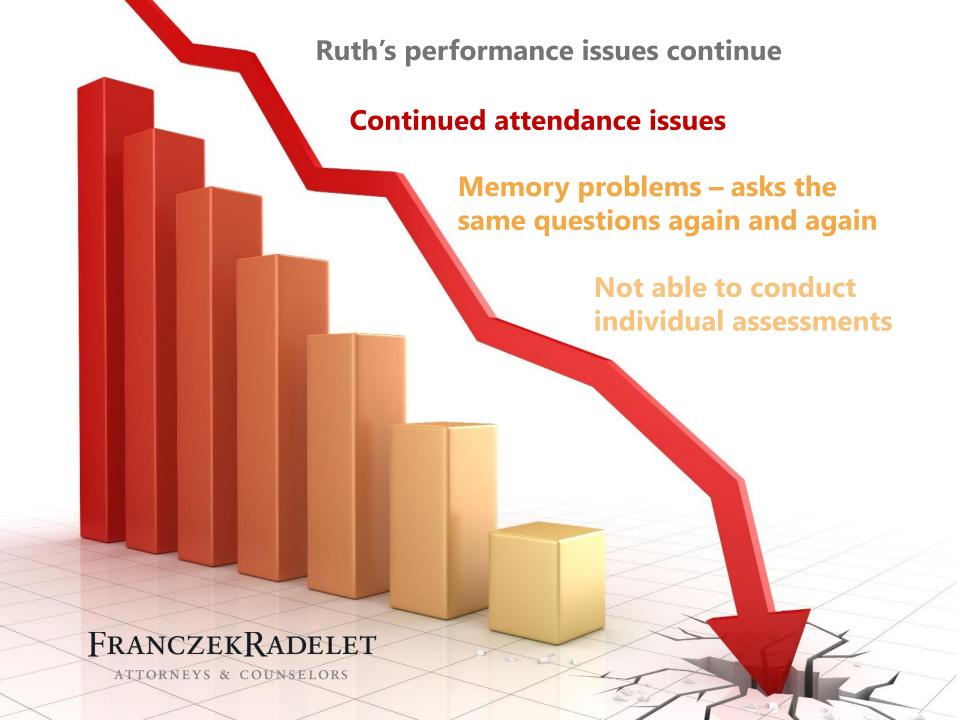
Can an Employee Insist on Stress-Free Workplace?

- Required to accommodate work-related stress?
 - Courts regularly find that ability to get along with co-workers, work under stressful conditions are essential job functions
 - Bradford v. City of Chicago (7th Cir. 2005): unreasonable to request move away from others
- Need to put into job description? No, but...
 - Ability to work on a team, ability to lead meetings
- How do you respond to Ruth?









Continued Performance Issues

- Response
 - Supportive and empathetic, but not a counselor
 - Responsibility?
 - Recognize situations in which an employee's behavior is creating difficulties or concerns in the workplace
 - Engage in the *interactive process* to identify assistance that will help employee perform job
 - Consistently apply discipline

Two-Part Conversation with Ruth

- First, treat this as a conversation about *performance*:
 - Reference previous conversation: "As you will recall, we met on [DATE] and discussed our concerns about . . ."
 - Discuss what you have observed most recently
 - Express concern about how her work does not meet your expectations; What are your expectations?
- Second, transition to the *interactive process*:
 - Is there anything we can do to help you improve in these areas?
 Invite the conversation
 - Be prepared for an emotional reaction, whether it is surprise, anger, denial or defensiveness
 - Give the employee time to talk, be empathetic when necessary, and remain focused on the performance issue itself



Two-Part Conversation with Ruth

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But:

- Be open to discussing modifications to the job that will help the employee succeed
- Gather information about accommodation requests
- If you don't have answers, tell the employee you need time
- Follow-up with documentation
 - Recap discussion regarding performance, expectations in the future
 - During our conversation, I asked how we could help you
 - You said . . .
 - We will make every reasonable effort to help you succeed
 - Here are the modifications we will provide . . . (www.askjan.org)
 - Implementation and how you will follow-up



Think about How You Phrase Communication

What to Avoid	Instead
"How's your health?"	"How can we help you?"
"You seem depressed."	"You're not your usual self lately."
"Snap out of it."	"Do you want to talk about it?"
"Think positive."	"It's always OK to ask for help."
"I know exactly what you're going through."	"It's hard for me to know what you are going through, but I can see it's distressing you."



Stressed? Who? Me? No! Why? What? Totally Fine. Totally Fine.

- "Anxious" Hank: long-time star in your shipping department
- Always wound tightly but different lately. He has:
 - Thrown tantrums, smashing the merchandise
 - Screamed at another employee who then threatened to quit
 - Was heard twice crying in the bathroom
- Work and morale suffering
- Meet with Hank:
 - Behavior unacceptable behavior; can we help?
 - Hank: "I'm fine! Just anxious! Same as always. I don't need anything. Maybe a switch to decaf. Don't worry."

Does he Need to Claim that he has a Condition?

- Is it obvious to you?
- Here, it's unclear but courts say: employers have "heightened" responsibility with mental health conditions
 - Walters v. Mayo Clinic Health Sys. (W.D. Wis. 2014)
 - Brady v. Wal-Mart Stores (2nd Cir. 2008)
 - Responsible even when employee "does not consider himself to be disabled"
 - <u>EEOC</u>: Employer still responsible when they know about: 1) the disability; 2) workplace problems; and 3) the disability preventing the employee from requesting the leave



No "Mind Reader" Requirement

Any help for employers? Yes!

- Walz v. Ameriprise Financial (8th Cir 2015): Employer has "no duty to guess"
- Koessel v. Sublette Cty. Sherriff's Dept. (10th Cir. 2013): Even where disability obvious, not required to "anticipate the employee's need and affirmatively offer accommodation"

So we may need to initiate the leave, but he says he's fine Can you ask him to take a leave? Can you force him to?

Can We Force Hank to Take Leave?

Can you ask him to take a leave? Can you force him to?

- If Hank can't do his job FMLA/ADA protects him
- If Hank is not actually ill no right to FMLA Walker v. Trinity Marine Products (8th Cir. 2013)

How do We Know What Hank Needs?

- Engage in the interactive process . . . even if you think Hank won't talk to you
 - Employer must engage in "a meaningful dialogue with the employee to find the best means of accommodating that disability"
 Tobin v. Liberty Mut. Ins. Co. (1st Cir. 2005)
 - Valid claim for "failure to accommodate itself" even where no adverse action
 Orr v. City of Rogers (W.D. Ark. 2017)



Leave as Reasonable Accommodation

- Johnny, finance specialist, anxiety disorder
- Cannot work long days during year-end crunch
- End of year 2016 was a mess he missed tons of work in December, went missing at work
- Take a turn for the worse; uses/exhausts FMLA leave
- As FMLA is nearing its end, informs you that he will need additional time off
- Vague doctor's note:
 - "Under my care . . . "
 - Adjusting meds
 - Will stay in touch and re-evaluate in 2 to 3 months

Dealing with Vague Doctor's Notes

- Whitaker v. Wis. Dept. of Health Serv. (7th Cir. 2017)
 - Bad back
 - Exhausted FMLA leave, employer leave
 - Attendance essential to the position
 - Doctor's note insufficient Did not explain:
 - Whether Whitaker was receiving treatment
 - Likely effectiveness of the treatment
 - Medical likelihood that leave would enable her to return to work regularly
 - Not qualified under ADA!

EEOC Position on Indefinite Leave

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- Will re-evaluate in 2 to 3 months: is this leave of *indefinite* duration?
- EEOC 2016 Technical Resource:

"Indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so it does not have to be provided as a reasonable accommodation."

Severson v. Heartland Woodcraft

- Ray: suffered from a chronic back condition, limited his ability to walk, bend, lift, sit stand, move and work
- One particular flare up = 12 weeks of FMLA leave
- Ray informed employer: condition not improved, needs surgery
- Terminated

Severson v. Heartland Woodcraft

(7th Cir. Sept 2017)

- Employee not qualified under the ADA
 - A couple of days or even a couple of weeks may be appropriate, but leave spanning multiple months is not
 - Inability to work for a multi-month period removes a person from the class protected by the ADA

Takeaways

- What's the message to employers?
 - Employers can be more aggressive on extended leaves of absence in Illinois, Wisconsin and Indiana (7th Circuit)
 - But in all cases:
 - Engaging in the ADA's Interactive Process is Essential
 - 2. Assess how the absence is impacting your business

Johnny Needs
Intermittent Leave
to Deal with his
Mental Health
Condition

13

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Johnny Needs Intermittent Leave

- Instead of asking for 2-3 months off, let's assume Johnny makes the following request:
 - Leave of absence twice/week (4 hours each day) to obtain Electroconvulsive Therapy to address anxiety, depression
 - He's also worried he may have flare-ups requiring unpredictable time off work
- Provides doctor's note:
 - "Under my care for lifelong condition"
 - Treatment twice per week must work half days, and "expect that his condition will improve substantially within two months"
 - May have flare ups requiring intermittent leave

What About His Medical Condition?

- We can't terminate because the timing is awful, right!?!
- Regular, reliable attendance is an essential job requirement
- Don't need to accommodate erratic or unreliable attendance especially where no anticipated date by which employee could have been expected to attend work regularly

Basden v. Professional Transport. Inc., 714 F.3d 1034 (7th Cir. 2013)

What Steps Do We Take?

- 1. Interactive Process: Do you have the info you need?
- 2. Discuss impact with your managers
 - a) How has Johnny's work been absorbed (and in the future)? Challenge them: How can we accommodate?
 - b) How absence (now and in future) impacts:
 - Productivity in position, department?
 - Lower quality and less accountability for quality
 - Lost sales?
 - Less responsive client service/increased client dissatisfaction
 - Deferred projects Increased burden on management staff
 - Not morale!



What Steps Do We Take?

- www.franczek.com
- 3. Consider what accommodations, if any, can be provided and them discuss with Johnny
- 4. Can you meet Johnny halfway?
- Discussion with Johnny:
 - Detail expectations/concerns
 - Offer accommodation(s) and specifics (e.g., leave for treatment)
 - Explain impact of his unpredictable absences on your operations and that you cannot accommodate then
 - We will check in after short period of time (2-4 weeks?) to discuss whether accommodation is effective
- 6. Document!



Employees who Refuse to Provide Medical Certification

Natural Light . . . It's Not Just for Fraternity Parties Anymore

- Sunny, junior salesperson, works in an internal office
- Requests move to an open corner office
- Corner offices reserved for Sales VPs; Request denied
- Showing signs of fatigue, and anxiety; trouble organizing her thoughts and decision making
- Tells her manager the lack of natural light in her office is "making [her] crazy"

You ask her to get a medical exam. She says, "I don't need to go to a doctor. Just give me the open corner office."

Can You Force Sunny to Obtain a Medical Exam?

Yes, as long as:

- It's job-related and consistent with business necessity, and
- She seems unable to perform the essential functions of her job, and/or she's a direct threat

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under The Americans With Disabilities Act (ADA) (June 27, 2000)

Can You Force Sunny to Obtain a Medical Exam?

- Can you send her to your own doctor? Yes, but:
 - Documentation must be "insufficient"
 - Must explain insufficiencies, and allow opportunity to cure
 - "Should consider" contacting the employee's doctor first
- Can Sunny argue that "unnecessary mental-health examinations" violate the ADA?
 - No, as long as the exam is "job related and consistent with business necessity"

Painter v. III. Dept. of Transportation (7th Cir. December 6, 2017)

The Medical Condition is . . .

- You receive a completed medical form
 - Diagnosis: Seasonal Affective Disorder
 - Cure: Natural light (photons, not the beer)
- You ask to discuss her condition but she's too frantic and distracted to have a conversation
 - Now what?
 - How do we engage in the interactive process with someone who can't do it?

Still Need to Try

- Employer should still continue to engage with Sunny
 - When there is a "communication breakdown,"
 courts will ask why it happened
 - Communication "even more difficult in a case involving an employee with a mental disability, ... necessary accommodation is often nonobvious to the employer."

Ekstrand v. School Dist. of Somerset (7th Cir 2009)

Practical Tips

- What do you do?
 - Try again to engage
 - If she won't talk to you, talk to yourself
 - Ask yourself: do you have a possible solution?
 - Would it be an undue hardship?
 - Here: request corner office move

"Oh Rest Ye FMLA Abusers"

Sung to the tune "God Rest Ye Merry Gentlemen" by Bare Naked Ladies

I woke up at 4:30 with a scratched cornea
It was better than last week, I swore I had a hernia
Oh what excuse I could concoct to avoid my overtime
Oh, tidings of FMLA . . . FMLA . . . Oh, tidings of FMLA

My doctor's note made clear I could take off whenever I'd like
That didn't please my boss, who told me,
"Buddy, Go take a Hike!"

I think I'll find a lawyer, isn't that the American Way?

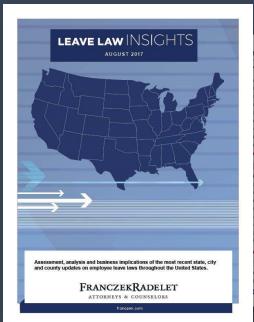
Oh, tidings of FMLA . . . FMLA . . . Oh, tidings of FMLA

Law of Wonder, Law of Light
Law that will help me get out of work tonight
But if I'm not careful, come tomorrow,
I'll need a new worksite

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Leave Law Insights provides subscribers regular updates on any leave of absence legislation that has been signed into law. Our analysis will cover paid and unpaid leave laws and ordinances at the federal, state, city and county level. In a timely and cost-effective manner, this resource will relieve the seemingly endless task of tracking leave of absence laws, so that attention can be turned to more strategic opportunities for your organization.



Franczek Radelet's Compliance in Accommodations and Leave Management (CALM) Service gives employers and TPAs timely access to an innovative and experienced attorney dedicated to assisting employers in effectively managing employees with medical conditions.

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Home > Medical Certification > Can an Employer Require That an Employee Submit FMLA Certification from a Specialist to Support the Need for FMLA Leave?

Can an Employer Require That an Employee Submit FMLA Certification from a Specialist to Support the Need for FMLA Leave?

By Jeff Nowak on November 4, 2016 Posted in Medical Certification

When it comes to FMLA medical certification, my clients have many complaints.

One beef, in particular, is vague medical information they receive on a certification completed by the employee's primary care physician. This is particularly true where the employee's mental health is at issue. Employers (rightfully) complain that they deserve medical information from a specialist who is far more knowledgeable about the employee's specific medical condition. As a result, my clients ask me whether they can require that the employee return initial certification or fitness-for-duty certification from a specialist.

I have been a bit reluctant to give the green light. Until now.

Facts

Take the case of Erica, a community outreach worker for the City of Milford. Erica had a knack for taking a leave of absence after she was disciplined or coached about her performance. Coincidence, I'm sure. On one such occasion, Erica requested a continuous leave of absence due to "severe anxiety." In support of her leave, Erica submitted certification from her primary care doctor, who indicated that Erica was "under care of psychiatrist and therapist."

Given the psychiatric nature of the problems that led to Erica's leave of absence, the City's HR Director required that Erica submit a "new" certification from her "treating psychiatrist." Even more, she told Erica that she also would be required to provide fitness-for-duty certification from the same psychiatrist to confirm that she is able to perform the duties of her job at the conclusion of her leave.



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About Jeff Nowak

Jeff Nowak is co-chair of the labor and employment practice at Franczek Radelet, where he represents employers in all aspects of employment law. His clients praise him as a trusted business partner who is acutely aware of their business goals and the impact employment decisions have on their operations. A staunch advocate and effective litigator for his clients, Jeff also isn't afraid to be candid with clients where compliance issues or litigation must be resolved to meet business objectives. He is a nationally-recognized leader in the FMLA and ADA, and his passion for the FMLA shows through on this blog.

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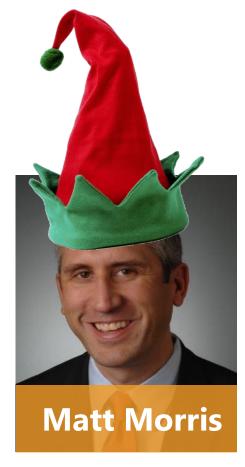


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