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

March 9
2018

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Meet Your **Speaker**

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Mental Health Condition Affecting Performance

Depression

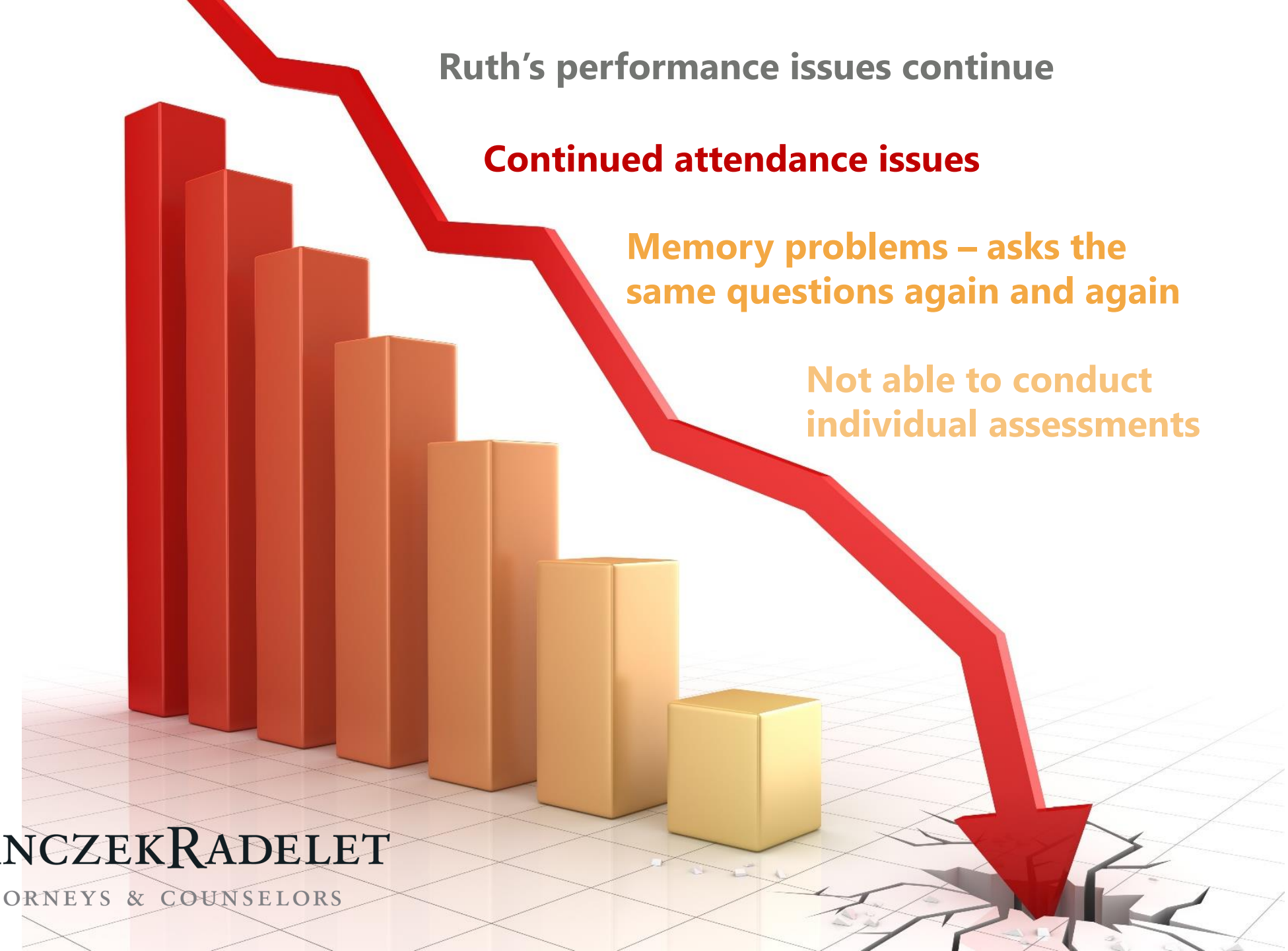
- Ruth: one of your therapists; recently hired
- One month into her hire, sporadically late to work and missed couple of days for vague reasons; has an “attitude”
- Meet with Ruth:
  - Discuss concerns with her attendance and issue verbal warning
  - At end of meeting, reports that she has long suffered from depression
  - Fellow therapists are creating stressful working environment
    - Longtime employees; clicky with each other
    - Won’t collaborate on patients
    - Dr: adjust schedule so she doesn’t have to be around 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?

WORLD'S
BEST
BOSS
EXIT

Like a boss



Ruth's performance issues continue

Continued attendance issues

Memory problems – asks the same questions again and again

Not able to conduct individual assessments

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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?

Two-Part Conversation with Ruth

- 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

- 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

Two-Part Conversation with Ruth

- ***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.”

Johnny Needs Intermittent Leave to Deal with his Mental Health Condition

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Leave as Reasonable Accommodation

- Johnny, finance specialist, anxiety disorder
- Cannot work long days during year-end crunch
- End of year 2017 was a mess – he missed tons of work late in year, went missing at work
- Takes a turn for the worse; uses/exhausts FMLA leave
- As FMLA is nearing its end, Johnny informs you of the following:

Johnny Needs Intermittent Leave

- Johnny's 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)

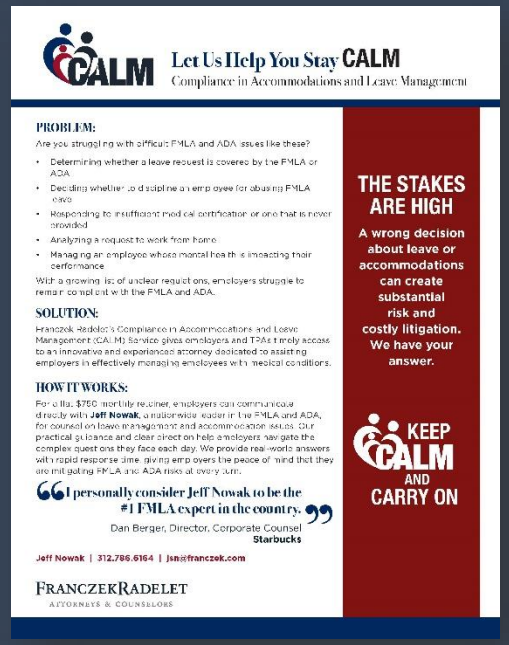
What Steps Do We Take?

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?

3. Consider what accommodations, if any, can be provided and them discuss with Johnny
4. Can you meet Johnny halfway?
5. 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!*

Leave Law Insights and CALM



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.

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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