

December 12,  
2018

# Six Ways Your Managers are Causing FMLA & ADA Lawsuits, and How to Train Them to Stop

FRANCZEK RADELET  
ATTORNEYS & COUNSELORS

# Your **Webinar** Hosts



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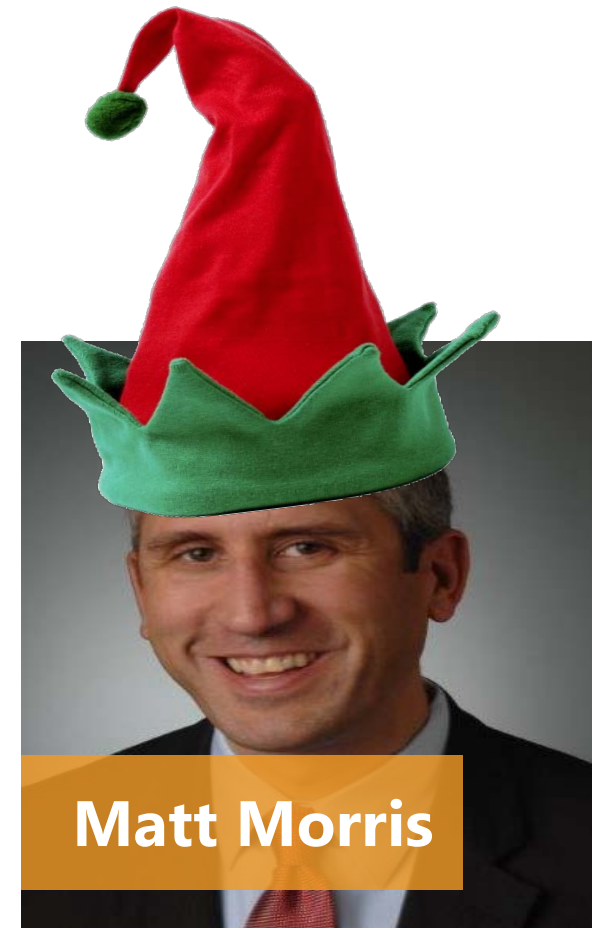
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# Welcome

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made available after webinar

For SHRM, HRCI and CLE credit  
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Use Q&A box for any questions  
during the program

Tweet questions to #FMLAwebinar 

If you are experiencing audio issues,  
please email Morgan Coakley at  
[mcc@Franczek.com](mailto:mcc@Franczek.com)

## Let's start with a story . . .



This is Jake, one of  
your managers.

He manages Debby.

Jake wants to fire  
Debby because she  
took FMLA leave.

How do we know?



**He wrote it down!**

Jake's email to HR:  
"[W]e need to move  
to termination as  
soon as possible for  
several reasons  
[including that  
Debby] submit[ted]  
a request for medical  
leave."



Then one day,  
Debby sued.

*(Spoiler alert: she  
won!)*

Jake is deposed.

And he told us why he  
did what he did...







“I’m not really familiar with the FMLA because I’m on the front line.”

An open book with two blank, aged, cream-colored pages. The book is bound in the center, and the edges of the pages show some wear and discoloration. The text 'AAAAAGH!' is written in a large, bold, black, sans-serif font across the middle of both pages. The 'A's are slightly slanted to the right.

AAAAAGH!



***Your Managers Are  
KILLING You!***

***And it's no defense that  
your HR Department  
is stretched too thin!***

## **Consider this case:**

The manager:

- Told employees they looked “old” and “should wear their dentures”
- Told an employee that a stroke victim looked “weak”
- Collected FMLA paperwork from an employee . . . then left it in his car for months.

Court: the remote HR department's non-involvement (one HR person for 120 stores and 3,600 employees) = evidence of interference

*Abdelmassih v. Mitra LLC* (E.D. Pa., 2018)

"[F]ront-line managers...who are often unaware of what is protected by the FMLA . . . are uninformed about their role in the process.

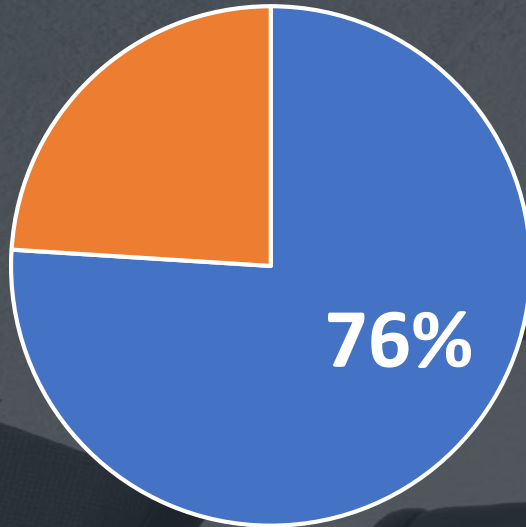


Helen Applewhaite

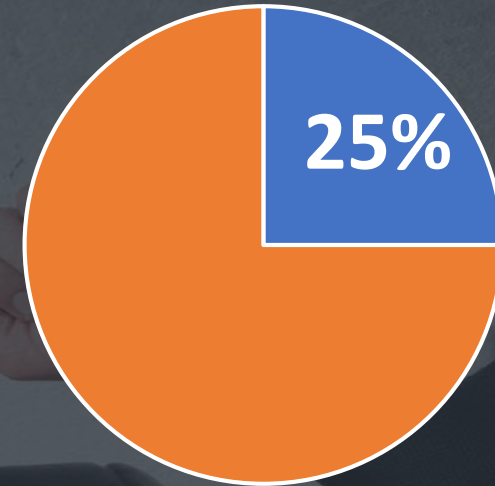
DOL's FMLA Branch Chief

"They also sometimes engage in improper communication with employees about motives or personal lives, and it's exactly these types of behaviors that can lead to discrimination and wrongful termination claims and introduce liability for organizations."

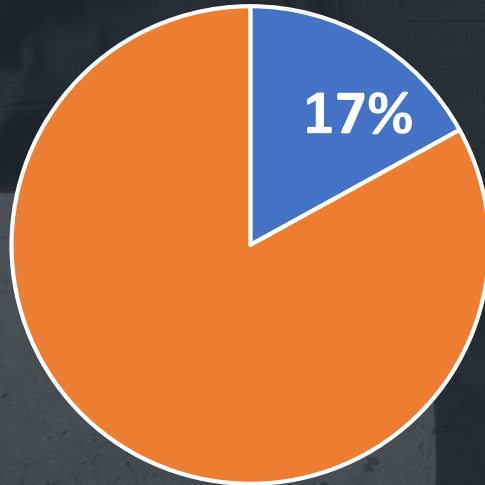
***Toxic Boss***



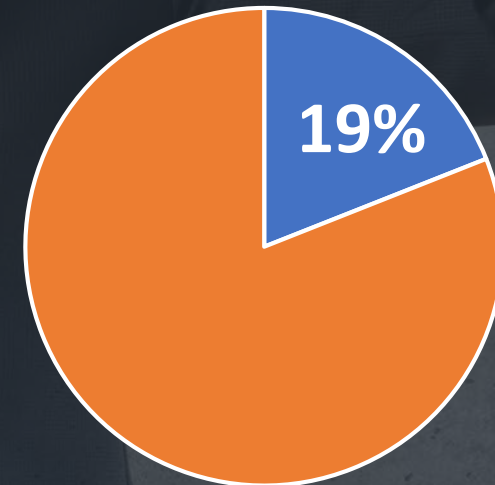
***Power Hungry Boss***



***Incompetent Boss***



***Boss as Mentor***





# Agenda

We'll address each of the six different ways your managers create FMLA liability:

**Review Recent Cases**

**Provide Examples of What To Do**

**Provide Training Tips on What Your Managers Need to Know**

# The 6 Types of FMLA/ADA Offenders



The  
Space Case



The  
Lazybones



The Head Stuck  
in the Book



The  
Over-sharer



The  
Badgerer



The  
Troublemaker

# Meet the Offenders

The  
Space Case



Knew/should have known there was a medical condition, yet did nothing

The  
Lazybones



Knew of the leave but failed to redirect to proper channels

The Head Stuck  
in the Book



Does not recognize patterns of FMLA abuse

The  
Over-sharer



Failed to respond to the request appropriately

The  
Badgerer



Improperly contacted employees during leave

The  
Troublemaker



Tainted the termination decision





*Type One:*  
*The Space Case*



## *The Migraine Headache*

- Mikyla, registered nurse
- Charge nurses aware of migraine headaches, medication
- Frequent call-offs: some = migraine; some = headache
- Vague attendance logs noting “headache” as reason for absence
- ***FMLA Problem:*** These facts sufficient to trigger the company’s obligation to investigate further as to whether Mikyla needed FMLA leave

*Brown v. Cox Health* (W.D. Mo. Jan 2016)



## Sick Leave Combined with More Serious Reasons

- Shawn, registered nurse
- Suffered from congenital heart condition
- Left work early to go to ER due to irregular heart beat
- Canceled next two shifts and called in “sick” on another shift
- Doctor’s note: “absence due to heart condition”
- Terminated for violated time/attendance policy
- **FMLA Problem:** employer had enough information about health condition that it should have inquired about need for FMLA leave

*Fitzgerald v. Shore Medical Center* (D.N.J. March 2015)





## Help Managers See How Serious Health Condition Is *Different* than Being “Sick”

An illness, injury or physical or mental condition that involves:

- Inpatient care (i.e., an overnight stay)
- *A period of incapacity for more than 3 consecutive calendar days and “continuing treatment”*
- Any period of incapacity for pregnancy or prenatal care (or prenatal visits, morning sickness)
- *Chronic serious health condition*
- Absences for treatment (e.g., chemotherapy)



## SHC or Not?

### Typically not SHC:

- Common cold or flu
- Earache
- Upset stomach
- Ordinary dental work
- Non-migraine headaches

### Typically are SHC:

- Chronic conditions, cancer
- Depression/mental health issues
- Significant illnesses (*more* than 3 days)
- Treatment for a medical condition
- Pregnancy-related absences

# Case study: Fred's Bad Back

- Fred calls into his manager before his shift to report off work
  - Reports that he has been dealing with a bad back and won't be in today
  - Next day: Calls off sick again (says it's the "same thing as yesterday")
  - He reports to work the following day
- Is the two-day absence covered by the FMLA?





# Employer's Duty to Inquire Further

- "The Employer may find it necessary to inquire further to determine if the leave is because of a serious health condition . . ." 29 C.F.R. 825.302(c)
- Fairly broad right to talk directly to employee, have right to know:
  - **Medical facts:**
    - What is reason for absence?
    - Treatment or unplanned absence?
    - Have you previously taken leave for this reason?
    - Time periods involved (start and expected return)
- Questionnaire/script: Discuss intake during training



# That's What They Can Ask, but What Should They Ask?

- Does the supervisor need to know? If not, don't tell the supervisor!
- In centralized leave operations, let TPA/leave ops obtain the medical info
- Consider training on a short script. Some elements:
  - If you feel you may require a leave, contact [NAME / NUMBER]
  - Explain: no need to talk to the supervisor about it, and
  - That the supervisor is now out of it
    - Must use the proper channels (business processes); the supervisor will not follow up





## Handling the Employee who Requests FMLA Leave and Walks Off the Job

- How do you respond to employees who request FMLA leave after they already have arrived?
- Think back to the *script*
  - Reason for leave
  - When did condition begin?
  - What brought it on? (In other words, why an issue now?)
  - Consider additional break, accommodations to keep them at work
- Should they report to HR before leaving?



## Leaving Early for Doctor Appointments

- Scheduling expectations should be set up in advance
  - Once local HR/manager know of potential appointments, scheduling expectations should be set in advance to avoid surprises
  - Advise employee of notice requirements and enforce them
- What is appropriate manager response for a tardy request?
  - What are the doctor's office hours?
  - Can this be scheduled around work day? If not, why not?



## But Always Include a Very Specific Directive to Managers

- FMLA process is triggered by the employee:
  - Provide sufficient information to make employer aware of need for FMLA-qualifying leave
  - Not required to refer to F-M-L-A
- Requests for leave that *may* be covered by FMLA must be reported
  - ***Signs*** of a serious health condition (*not only lengthy absences*)
  - Focus in on comments from employees



*Everyday  
with the*

**ADA**

Americans with  
Disabilities Act

# Recognizing an Accommodation Request

What is an accommodation request?

- When an applicant or employee requests a change at work for a reason related to a medical impairment
- Can it be signs of behavior change? Yes!



# What Triggers an ADA Request?



- Notes from health care providers
- Knowledge of disability benefits
- Worker's compensation injuries
- Use of mitigating measures such as medication, medical equipment, low vision devices, prosthetics, hearing aids, mobility devices, assistive technology, etc.
- Discussion with employee regarding issues performing functions of the position
- Email request for assistance due to physical or mental issues
- Prolonged or frequent absences



## Recognizing an Accommodation Request

An employee is disciplined for poor performance. In response, he says “it’s because I have depression and I can’t concentrate with all these distractions.”

**Is this an accommodation request?**



## *Offering Support*

***“Is there anything we can do to support you in performing job duties or meeting performance requirements?”***

- No mention of disability or accommodation  
no worrying about ADA medical inquiry
- Extends support
- Opens the door to engage in the interactive process
- Good management practice overall





*Type Two:*  
*The Lazybones*



## Call Me . . . Maybe?

- Company policy: Employee must call in all absences
- Eugene has an FMLA leave for back pain, etc.
- And he does call . . . sometimes. And sometimes he just texts his supervisor.
- Eugene's texts did not follow policy but still may be an acceptable "method of communication" due to manager's pattern of accepting them.

*Hudson v. Tyson Fresh Meats, Inc.* (8th Cir. 2015)



## Case Study: Clancy is Clueless

- Terrence needs leave for sickle cell anemia and diabetes.
- His manager, Clancy says: he could make a written application for FMLA.
- Terrence doesn't apply but keeps telling Clancy of his absences. Clancy on notice but doesn't follow up with HR.

**Is Clancy's employer on notice of an FMLA request?**



## Case Study: Clancy

- Terrence needs leave for sickle cell anemia and diabetes.
- His manager, Clancy says: he could make a written application for FMLA
- Terrence doesn't apply but keeps telling Clancy of his absences. Clancy on notice but doesn't follow up with HR
- **Answer: Yes. Because of Clancy's behavior.**

*Preddie v. Bartholomew Consol. Sch. Corp.* (7<sup>th</sup> Cir. 2015)



## Also, Can't Hide Behind Policies . . .

Actual knowledge trumps failure to follow policies

- Employee's son made multiple phone calls regarding need for leave. Employer held to have known and assessed liquidated damages.
- Jury: no good basis for termination
- Lost wages and liquidated damages over \$284,000

*Boadi v. Center for Human Development, Inc.* (D. Mass 2017)



# Training Lazybones

- First, What we just said about telling the employee to use the proper channels – do that
- What if the employee won't contact the leave team? Or tells the supervisor everything?
  - Supervisor should still be trained to report the information to the responsible center/division



# Training Lazybones

- What if the supervisor *is* responsible for the leave?
  - Supervisor needs a standard set of questions to ask
  - Does supervisor need to ask about the medical condition? Not necessarily. Could come on the medical certification.
- Regardless, train the supervisor to close with:  
*“Is there anything else you’d want me to know?”*





*Type Three:  
The Head Stuck  
in the Book*



## Case study: Fred's IBS

- Fred is one of your direct reports
- Suffers from irritable bowel syndrome
  - You know that he will be absent 2 days/mo; 1 day ea.
  - Past three months:
    - 3x/2x/4x
    - Almost all on M or F
  - Recently, he requested a vacation day that was denied, but then called off FMLA on the same day

***Is there any problem here?***



## Manager's Role in Patterns of Absenteeism

- **Deputize** Your Managers: *You are our eyes and ears!*
- Key in on patterns:
  - Excessive frequency, duration
  - Friday/Monday absences
  - After a denied vacation day
  - Extending holidays
  - Outside activities conflicting with work
- **Work with HR:** Manager must know what to do when these patterns occur. Where do you want them to go?





## ***How Do You Respond?***

- Employee working other job or playing recreational activity
  - Coworker informs you about the situation, upset that they have to carry the load while employee on leave
-



## Responding to Patterns of Absenteeism

- ***Inform HR!***
- In response, HR will:
  - Gather facts from employee reporting conduct (and may need your help in doing so)
  - Interview other employees with knowledge
  - Discuss directly with employee
  - Determine if there is an “honest belief” that the employee is/was engaging in misuse of FMLA



## *Type Four: The Over-sharer*



## The Manager Said *What?*

Your manager receives a leave request that may be protected by the FMLA/ADA. In response, your supervisor:

- Sighs. *Cimino v. Magee-Women's Hospital* (W.D. Pa. 2017)
- Says, "You know . . . you've missed a lot of work."  
*Coleman v. AmeriHealth Caritas* (E.D. Pa. 2017)
- Responds that the employee has taken "too many days off."  
*Troiano v. Cty. of Allegheny* (W.D. Pa. 2017)
- Makes comments about the insurance costs related to the leave.  
*Yeger v. Inst. of Culinary Educ., Inc.* (S.D.N.Y. 2017)



## The Manager Said *What?*

- Brenda, 15-year employee; needs leave for hysterectomy
- Boss: “Not a good time to take leave,” urges her to read the book titled, *No More Hysterectomies*
- During leave, Brenda learns partner has cancer
- HR calls Brenda: RIF’d b/c client contract lost
  - Termination might be a “blessing in disguise” . . . “would not be able to give 100% to her job anyway”

*Drew v. Quest Diagnostics (S.D. Ohio 2012)*





## You kept your pregnancy from me . . .

*Jersey Mike's:*

- Pregnant candidate, hired
- Days after she starts, she tells her manager that she's pregnant
- Manager responds with this text:





## The Examples Continue . . .



Sent an email saying “your continued absence compromises our work”

*Diamond v. Hospice of Fla. Keys, Inc.* (11th Cir. 2017)



Discloses his condition to his coworkers at a staff meeting. When he returns, his coworkers make obscene gestures about it.

*Holtrey v. Collier Cty. Bd. of Cty. Comm’rs* (M.D. Fla. 2017)



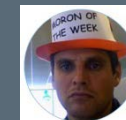
Managers emailing each other about having a “back up plan” and needing to terminate employee.

*Benz v. Crowley Maritime Corp.* (11<sup>th</sup> Cir. 2018)



“Move forward with termination . . . Submitted a request for medical leave.” Our “Jake” example.

*Stewart v. Wells Fargo* (11th Cir. 2017)



# Training the Over-Sharer

- Train the supervisor to react calmly and with empathy
  - Consider role playing
  - Supervisor should keep emotional response in check
- Consider a practiced, standard response
  - For example: “The company and I fully support your ability to take leave when it’s necessary . . . please let me know how I can be of help”
  - In particular where there is a history of poor, impulsive reactions (e.g., Ugggh!)





***And this, too!***

## **Shouldn't**

- Talk to coworkers and subordinates about the details
  - Email employee, or anyone, about the effect the leave will have
  - Reference the leave in the employee's performance review
-



## *Type Five: The Badgerer*





***Nope.  
Not a badger.  
A badger-er.***



## Work During FMLA Leave

- Joan, manager in Ethics Department
- Requested time off – removal of cyst from her neck
- During two-month FMLA leave, employer required her to perform 20 to 40 hours of work updating compliance cases, revising a safety review project and dropping off files at the office
- Returns to work, resigns
- ***FMLA problem?***

*Smith-Schrenk v. Genon Energy Services* (S.D. Tex. 2015)



## Work During FMLA Leave

- Tammy, Assistant Director at senior living center
- FMLA leave to care for husband after surgery
- Employer called her during leave:
  - Between three and ten times to discuss work-related matters
  - One call discussed hiring of Assistant Residence Director
  - Each of the calls lasted between five and thirty minutes
- Tammy sued, alleging that employer interfered with her FMLA leave by requesting that she work during her leave
- ***FMLA problem?***

*Bryant v. Dept. of Aging and Disab. Svcs (5th Cir. 2015)*



## Work During FMLA Leave

- Joan: Although there is no right under the FMLA “to be left alone” or be allowed to skirt the employer’s “discrete inquiries,” ***asking or requiring an employee to perform work while on leave can constitute interference***
- Tammy: Limited number of calls cannot reasonably be considered as interfering with an employee's FMLA leave. Also, no clearly established law prevented employer from occasionally calling employee while on leave.

# Training the Badgerer

## *Cannot:*

- Condition continued employment on completing work while on FMLA leave
- Coerce or require an employee to work while on FMLA leave

## *Can:*

- Contact an employee on FMLA leave to request a password to access a file or locate paperwork
- Request update on where a particular matter was left
- Ask to pass on institutional knowledge



# Training the Badgerer

- **General rule:** Leave employee alone!
- If the supervisor must reach out, contact HR first
- Any communication about work assignments:
  - Be concise
  - Not require a significant amount of time and
  - Not require employee to travel to the workplace
- If employee agrees to work:
  - **Must be voluntary:** employer should communicate that the work is not required
  - **Document** any voluntary agreement
  - **Compensate** to avoid wage and hour issues





*Type Six:  
The Troublemaker*





## So Much for Those HR Policies . . .

- Steve, 18-year “top notch [sic]” employee, intermittent leave for a neck injury.
- Denied promotion, bad performance review for absenteeism.
- Steve involved in a dangerous safety incident and admits fault!
- Six managers conclude (conspire?) to fire him.
- Never asked for his side of the story and were inconsistent on treatment of the safety violations of others.
- Steve prevails on FMLA and ADA claims

*Smothers v. Solvay Chemicals, Inc., (10th Circuit 2014)*



## Returning Employee to Work

- Rosana, customer service representative
- Back injury, diagnosed with “quadratus lumborum myofascial pain”
- Took FMLA leave for just over 2 weeks, and upon return, hours reduced to 32 hrs. per week
- Terminated several months later for “inappropriate conduct” because of a difficult relationship with a new direct manager who had assumed the position a month earlier
- Equivalent position: Did employer have legit reason for reducing hours upon Rosana’s return? Jury must decide

*Jones v. Aaron’s Inc. (11th Circuit Sept 2018)*



## Supervisors Violating Policies and Treating Employees Differently

- FMLA claims against HR Director herself, as an individual, allowed because she “played an important role” in and had “sufficient control” over firing.
  - *Graziadio v. Culinary Institute of America* (2d Cir. 2016)
- “Cat’s paw” liability where lower-level supervisor bullied plaintiff regarding her work and her leave.
  - *Marshall v. The Rawlings Co. LLC*, (6th Cir. 2017)
- \$55,000 settlement for providing (not leave) accommodations for other non-disabled employees, or in this case, non-pregnant employees
  - *EEOC v. First Call Ambulance Svc, LLC*, (M.D. Tenn. 2016)

# Training the Troublemaker

## 3 Things:

- Again, train them not to say stupid stuff.
- HR, anytime there is a leave involved, consider that a “red flag.” Look that case over twice!
- Manager should be documenting what happened. Make sure you review it. May reveal bullying, bad decisions, etc.



# Ensure Your Training Addresses These Six Issues



The  
Space Case

Know what constitutes an FMLA request. Forward to the right people!



The  
Lazybones

Don't sit on information. Follow up with administrator.



The Head Stuck  
In the Book

Be our eyes and ears for FMLA misuse.



The  
Over-sharer

Control yourself! 😊 Provide script on what to say.



The  
Badgerer

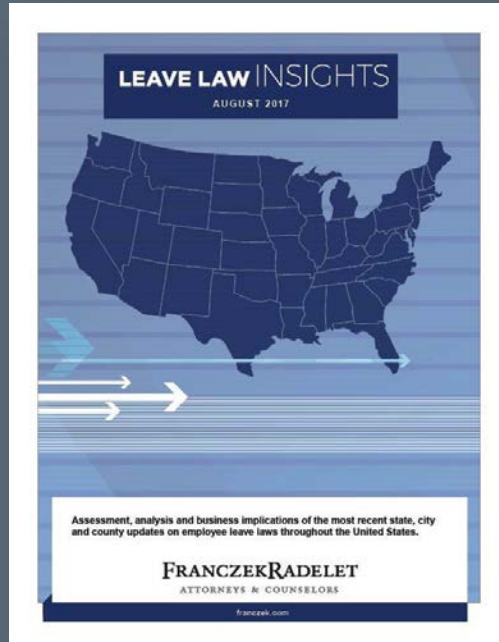
Don't bother FMLA users. If you must, be cautious and considered.



The  
Troublemaker


Keep them out of it! Pay extra attention if they're involved.

# Leave Law Insights and CALM



LEAVE LAW INSIGHTS	
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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**.

**Let Us Help You Stay CALM**  
Compliance in Accommodations and Leave Management

**PROBLEM:**  
Are you struggling with difficult FMLA and ADA issues like these?

- Determining whether a leave request is covered by the FMLA or ADA
- Deciding whether to discipline an employee for abusing FMLA leave
- Responding to insufficient medical certification or one that is never provided
- Analyzing a request to work from home
- Managing an employee whose mental health is impacting their performance

With a growing list of unclear requirements, employers struggle to remain compliant with the FMLA and ADA.

**SOLUTION:**  
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.


**HOW IT WORKS:**  
For a flat, \$750 monthly retainer, employers can communicate directly with **Jeff Nowak**, a nationally recognized FMLA and ADA expert, for counsel on leave management and accommodation issues. Our practical guidance and clear direction help employers navigate the complex questions they face each day. We provide real-world answers with rapid response time, giving employers the peace of mind that they are mitigating FMLA and ADA risks at every turn.

**“I personally consider Jeff Nowak to be the #1 FMLA expert in the country.”**  
Dan Berger, Director, Corporate Counsel  
Starbucks

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**THE STAKES ARE HIGH**  
A wrong decision about leave or accommodations can create substantial risk and costly litigation. We have your answer.

 **KEEP CALM AND CARRY ON**

The 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.

# FMLA Insights

Guidance & Solutions for Employers

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## 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.



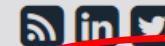
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### About Jeff Nowak

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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***“Oh Rest Ye Bumbling Managers”***

***Sung to the tune “God Rest Ye Merry  
Gentlemen” by Bare Naked Ladies***

*I hired a volatile manager, his name was Ross*

*He's always on a power trip, people call him "The Boss"*

*He tends to fire those with da gout or chronic IBS*

*Oh tidings of FMLA . . . FMLA . . . Oh tidings of FMLA*

*Ross told his secretary "It's a bad time for medical leave"*

*Then he gave her a parting gift,  
a book called "No More Hysterectomy"*

*I'm worried what next slur he'll use at our 3pm meeting*

*Oh tidings of FMLA . . . FMLA . . . Oh tidings of FMLA*

*This law is a wonder, this law is chore  
It makes me scared to hire employees anymore  
But if I don't train (or fire) Ross, come tomorrow  
I will find the DOL at my front door!*

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# Your **Webinar** Hosts



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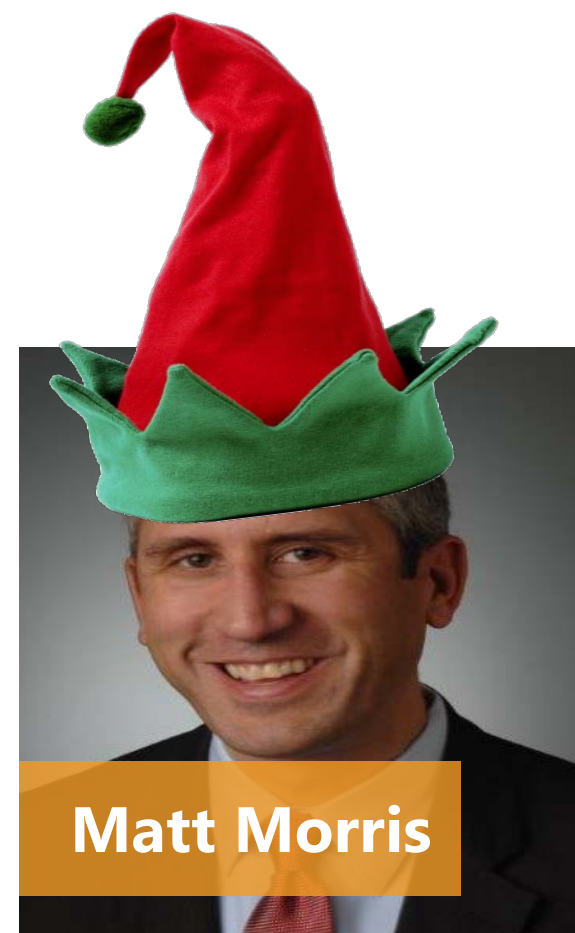
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# Six Ways Your Managers are Causing FMLA & ADA Lawsuits, and How to Train Them to Stop

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