

# **Cerebral Palsy Associations of NYS 2019 ANNUAL CONFERENCE**

## **The ABC's of the ADA, FMLA & NYPFL**

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# What Will We Cover?

- ◆ Disability Leave Management Overview
- ◆ Family and Medical Leave Act (“FMLA”)
- ◆ New York State Paid Family Leave (“PFL”)
- ◆ Reasonable Accommodations
  - Americans with Disabilities Act (“ADA”)
  - New York State Human Rights Law (“NYSHRL”)
- ◆ Leave as a Reasonable Accommodation
- ◆ Testing Your Knowledge and Understanding
- ◆ Q&A

# **Disability Leave Management Overview**

# Disability Leave Management: 3 Questions

**Is the employee “entitled” to be absent with job protection?**

- FMLA or State leave entitlements, such as NYS Paid Family Leave.

**Has Company “committed” to providing additional job-protected leave?**

- Evaluate policies and past practices (always provide what you say you will).

**Is additional leave required as a reasonable accommodation for employees with disabilities?**

- Exhaustion of FMLA entitlement and/or PFL, paid time off is not always the end of the analysis.
- Additional leave may be a reasonable accommodation under ADA, NYSHRL, County/City statutes.

# Leave vs “Paid” Leave

2 *different* questions to be addressed concurrently:

- ◆ Is employee entitled to time away from work with right of reinstatement?
  - FMLA
  - PFL
  - ADA
  - Company Policy
- ◆ Is employee entitled to be paid during time away from work?
  - Vacation, Paid Time Off, PFL
  - Short-Term Disability, Long-Term Disability, Workers’ Compensation

# 10 Key Concepts for Effective Disability Leave Management

1. The effective administration of disability leave management is complicated as it requires you to understand when an employer's obligations are triggered.
2. Even though this is a complicated issue, once you understand how each of these laws works separately and together, you simply have to follow the same steps each and every time.
3. The company will not be able to effectively administer disability leave unless you have a "system" in place which you follow every single time without exception.

# 10 Key Concepts

4. Does your organization delegate the administration of disability leave to managers or supervisors? It shouldn't! Human Resources should handle this process.
5. The medical information that is part of disability leave management is confidential and only Human Resources should be privy to it.

NOTE: This means employees must directly deal with Human Resources on disability leave issues and should not be asked to give Managers certifications and medical information.

# 10 Key Concepts

6. Human Resources will track critical information for each employee on leave.

◆ **For FMLA:**

- when they applied for FMLA,
- if FMLA certification was returned,
- whether they qualify for FMLA,
- if they received final approval for FMLA, and
- What are the terms of the leave.

◆ **For ADA:**

- what accommodation was requested,
- whether doctor confirmed they are disabled,
- whether accommodation is reasonable, and
- What are the parameters of the accommodation.

# 10 Key Concepts

7. Human Resources will track each employee who is on a disability leave in order to meet required deadlines.
8. Managers and supervisors should be mindful of the “Disability Leave Process” so you are familiar with next steps.
9. Communications with employees must be in writing (to prove that letters were sent on time and information was requested).

# 10 Key Concepts

10. Managers and supervisors are responsible for knowing basic information about employee leave:
  - ◆ **For FMLA:**
    - If an employee has been approved for FMLA and whether it's consecutive or intermittent.
    - If intermittent, what are the parameters.
    - If consecutive leave, when will employee return to work.
  - ◆ **For ADA:**
    - If any employee has requested an accommodation and whether such accommodation has been approved by Human Resources.
    - What the parameters of the accommodation are (for how long?)
    - How is employee going to modify the way they do their job.



# **FMLA Leave**

# FMLA Basics: Entitlements

- ◆ The Family Medical Leave Act (FMLA) entitles **eligible** employees to take up to 12 weeks of unpaid leave in each 12-month period for certain reasons.
- ◆ Continuation of health insurance benefits for the employee during the leave period (employee must pay their portion).
- ◆ Restoration of the employee to the same or equivalent position after the leave period.
- ◆ No “retaliation” for taking or requesting leave.

# FMLA Basics: Is The Employee Eligible?

- ◆ Employee must have worked for the Agency for a total of 12 months (need not be consecutive: measured over 7 years).
  - Work as a temporary employee is counted.
- ◆ Employee must have worked at least 1,250 hours over the previous 12 months. Does not include:
  - paid or unpaid vacation leave/sick leave
  - paid or unpaid parental leave
  - paid or unpaid holidays/personal leave
  - FMLA leave periods
  - furloughs or suspensions
- ◆ Employee must work at a site that has 50 or more employees within a 75-mile radius.

# FMLA Basics: Qualifying Reasons

- ◆ The employee's own serious health condition.
- ◆ Birth/adoption/foster placement of a child.
- ◆ To care for a spouse, child or parent with a serious health condition.
- ◆ To address a “qualifying exigency” related to spouse, son, daughter, or parent's military service.
- ◆ To care for spouse, son, daughter, parent or next-of-kin who is a covered military service member (up to 26 weeks in one 12-month period).

# Who Is A “Parent” or “Child”?

- ◆ Anyone who stands “in loco parentis” (standing in place of parent).
- ◆ Therefore, a “parent” need not be the biological parent, the custodial parent. It can be someone who “stands in the shoes” of a parent:
  - Where employee has financial responsibility for child, or
  - No financial responsibility but reasonable for providing care.

# Serious Health Condition

- ◆ A serious health condition (“SHC”) is an illness, injury, impairment or physical or mental condition that involves in-patient care.
  - Inpatient Care: overnight stay at hospital, hospice, residential medical facility, including any period of incapacity.
  - Incapacity: inability to work, attend school or perform other regular daily activities due to the SHC, treatment for the SHC, or recovery from treatment/SHC.

# Serious Health Condition

- ◆ An illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider.
  - Treatment: includes examination to determine if SHC exists. Does not include routine physical exams, eye exams, or dental exams.
  - Continuing Treatment: A period of incapacity of more than 3 consecutive full calendar days AND any subsequent treatment or period of incapacity related to same condition, that also involves:
    - treatment 2 or more times within 30 days of the first incapacity, or
    - treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment.

# Serious Health Condition

- ◆ A serious health condition may be a chronic condition if:
  - Requires periodic visits (defined as 2 X per year),
  - Continues over extended period of time (including recurring episodes of a single underlying condition), or
  - May cause episodic rather than a continuing period of incapacity (for example, epilepsy).

# Qualify Exigencies

## ◆ Military Family Members

- to take care of family matters (not medical issues; estate attorney, child care arrangements, handling remains of deceased service member, etc.).
- when employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

# FMLA Basics: How Leave Can Be Used

## ◆ Single Blocks:

- Carpal tunnel surgery out 6 weeks.

## ◆ Intermittent:

- Single qualifying reason; Repeated short periods of time in as little as one-hour increments.
- Carpal tunnel surgery out 6 weeks and off every Monday and Wednesday afternoon for PT.

## ◆ Reduced Schedule:

- Reduced hours per day or days per week.
- Carpal tunnel surgery out 6 weeks and returns to work 35 hours/week (less than regular full-time schedule).

# Employee Notice Requirement

- ◆ Employee must give notice of need to take FMLA
  - 30 days in advance if foreseeable (birth, adoption, surgery, planned medical treatment). If employee does not provide 30 days notice you may request they explain why they did not provide the 30 days notice.

OR

- “as soon as practical”.

# How Do You Know When The FMLA Is In Play?

- ◆ Employee gives appropriate notice if information is sufficient to show FMLA might apply.
- ◆ No “magic” words – employee doesn’t need to reference the FMLA.
- ◆ Notice may come from employee or from a third party.
- ◆ Calling in “sick” is not sufficient notice of need for leave under FMLA.

# FMLA Paperwork: A 5-Step Process

- ◆ Step 1: Notify employees of their FMLA eligibility and rights and obligations (leave, health insurance, job restoration).
- ◆ Step 2: Evaluate medical or other certifications once received.
- ◆ Step 3: Designate absence as FMLA qualifying or not qualifying.
- ◆ Step 4: Request medical recertification when applicable.
- ◆ Step 5: Inquire about return to work or need for extended leave.

# Step One: Notify

- ◆ Human Resources sends letter to employee who has requested FMLA leave, or where employer believes employee may have a qualifying reason to take FMLA leave.
- ◆ Human Resources must send information to employee within 5 business days of employer learning about possible need for FMLA.
- ◆ Sent by mail, hand delivery or e-mail (proof of delivery).
- ◆ Notifies employee of their eligibility.

# Step Two: Certifications

- ◆ Request employee provide certification demonstrating need for leave.
- ◆ Once received, Human Resources will review eligibility form and accompanying certifications to determine if it is complete.

# Medical Certification

- ◆ Can require employee to provide “complete and sufficient” certification.
- ◆ Must give employee at least 15 calendar days to return medical certification.
- ◆ Can get recertification, generally no more frequently than every 30 days (in connection with an absence) unless:
  - The circumstances change, or
  - There is a reason to doubt the original certification.
- ◆ Under no circumstances may an employee’s supervisor contact the healthcare provider (HCP).
  - Human Resources can do this.

# “Complete” and “Sufficient” Medical Certification

- ◆ Certification is “incomplete” if one or more of the applicable entries have not been completed.
- ◆ Certification is “insufficient” if the information provided is vague, ambiguous, or non-responsive.
- ◆ Certification that is not returned constitutes a failure to provide certification.

# “Complete” and “Sufficient” Medical Certification

- ◆ Human Resources must advise an employee if it finds a certification incomplete or insufficient.
  - Shall state in writing what additional information is necessary to make the certification complete and sufficient.
  - Employee has 7 calendar days to cure — unless not practicable despite the employee’s diligent good faith efforts.
  - If not cured, the Company may deny the taking of FMLA leave.

# Medical Certification — Clarification and Authentication

- ◆ Human Resources may contact HCP for “clarification and authentication” of the medical certification.
  - “Authentication” means providing the HCP a copy of the certification and requesting verification that the information was completed and/or authorized by the HCP.
  - “Clarification” means contacting the HCP to understand the handwriting on the medical certification or to understand the meaning of a response.

# Certification of Intermittent Leave

- ◆ If unforeseeable intermittent leave, employee may be required to submit information sufficient to:
  - Establish medical necessity for intermittent leave, and
  - Estimate the frequency and duration of the episodes of incapacity.
- ◆ If not provided, certification may be deemed “incomplete” and/or “insufficient”.
  - Human Resources will follow the “cure” process.

# Step Three: Designation Notice

- ◆ Must be in writing.
- ◆ Must be sent within 5 business days after employee submits any requisite certifications.
- ◆ One of 3 dispositions:
  - Approved.
  - Additional information needed.
  - Not approved.
    - Employee is not FMLA eligible.
    - FMLA does not apply to request.
    - FMLA allotment exhausted for applicable 12 month period.

# Step Four: Recertification

- ◆ General Rule: not required until 30 days, or for duration of condition, whichever is longer.
  - In connection with an absence.
  - E.g., if certification says duration 45 days – no recertification until 45 days expires.
- ◆ If duration is 6 months or longer (e.g., chronic or permanent) then every 6 months.
  - In connection with absence.
- ◆ More frequently if:
  - Employee asks for an extension of leave.
  - Changed circumstance (e.g., duration or frequency of absence).
  - Receive information casting doubt on employee's reason for absence.
- ◆ 15 calendar days to provide recertification.
- ◆ No 2nd or 3rd opinions allowed on recertification.

# Step Five: Return to Work

- ◆ FMLA is “job-protected” leave.
- ◆ If the employee can return within exhaustion period, they must be restored to same or equivalent position unless:
  - “Key Employee” and restoration would cause “substantial and grievous economic injury”.
  - Position no longer exists (for reasons unrelated to FMLA leave).
  - Employee would otherwise have been terminated (for reasons other than FMLA leave).
- ◆ “Equivalent position” is read strictly.
  - Equivalent as to job duties, location, shift, and pay.

# Return to Work – “Key Employee”

- ◆ Exempt, eligible employee who is among highest paid top 10% within 75-mile radius.
- ◆ May deny restoration (if standard met); may not deny leave.
- ◆ Restoration (not absence) must cause the employer “substantial grievous economic injury”.
- ◆ Must designate as “Key Employee” in initial Eligibility Notice.
- ◆ Must give written notice of “substantial grievous economic injury” (and reasons for determination) as soon as the employer determines it exists.
- ◆ Must give Key Employee opportunity to return within “reasonable time”.
- ◆ Key Employee may request restoration later; substantial grievous economic injury must be established (again) at that time.

# The “Contingent” Nature Of Employer FMLA Rights

- ◆ An employer’s right to manage and control FMLA leave is linked to an employee fulfilling his or her FMLA leave obligations.
- ◆ However, employees have no leave obligations under the FMLA unless employers:
  - Tell employees what they must do, and enforce these obligations.
  - Even then, employees receive legal protections once they fulfill their notice obligations unless employers provide notice of additional obligations.

# What If FMLA Has Been Exhausted Or Does Not Apply?

- ◆ Paid Family Leave (“PFL”)
- ◆ Agency Leave Policies
- ◆ Reasonable Accommodation
  - The Americans with Disabilities Act
  - New York State Human Rights Law
  - County/City Statutes



**New York Paid Family Leave**

# New York Paid Family Leave Law

- ◆ New York PFL provides:
  - Paid leave benefit; and
  - Job protected leave.
- ◆ Combines elements of NY short-term disability leave and FMLA Leave, but key differences make this a compliance challenge.

# Funding NY PFL

- ◆ The cost of PFL is funded by employee payroll deductions.
- ◆ The 2019 payroll contribution rate is **0.153%** of an employee's gross weekly wage.
- ◆ The maximum amount an employee will pay for NY PFL in 2019 is **\$107.97**.

# Reasons For Leave

- ◆ **Care for Family Member:** When paid leave is necessary to provide care, including physical or psychological care, to their family members due to a family member's serious health condition;
- ◆ **Bond with Child:** To bond with their newborn children during the first year of the child's life, or, in the case of adoption or foster care placement, for the first year after the placement of a child with the employee; and
- ◆ **Military Qualifying Event:** For any qualifying reason as provided for under the federal Family and Medical Leave Act arising from the employees' spouse, domestic partner, child, or parent being on active military duty, or, alternatively, being notified of an impending call or order to active military duty.

# How Much Leave Is Available?

## ◆ January 1, 2019:

- **10 weeks** paid at **55%** of the employee's average weekly wage or 55% of the state average weekly wage (**\$746.41**), whichever is less.

## ◆ January 1, 2020:

- **10 weeks** paid at **60%** of the employee's average weekly wage or 60% of the state average weekly wage, whichever is less.

## ◆ January 1, 2021:

- **12 weeks** paid at **67%** of the employee's average weekly wage or 67% of the state average weekly wage, whichever is less.

# NYPFL “Entitlements”

- ◆ Pay, as discussed on the previous slide.
- ◆ Job Restoration – similar to FMLA.
- ◆ Continued health insurance – similar to FMLA.
- ◆ Intermittent leave, **but no partial day absences**.
- ◆ Cannot lose any employment benefit accrued prior to the date on which the leave commenced – similar to FMLA.
- ◆ No accrual of seniority or employment benefits during PFL, but cannot discriminate against PFL leave takers – similar to FMLA.

# NYPFL – FMLA Comparison

| NY PFL  | FMLA  |
|---|---|
| 12 weeks of paid leave (by 2021).   | 12 weeks of unpaid leave.   |
| Applies to all Employers subject to NYSWC Law regardless of size.   | 50 or more employees in a 75 mile radius.   |
| Covered after 26 weeks of employment (after 175 <sup>th</sup> day for part time employees).   | Covered after 12 months and 1,250 hours of work.  |
| Family member means the employee's child, parent ( <b>including parent-in-law</b> ), <b>grandparent, grandchild</b> , spouse, or <b>domestic partner</b> .              | Family Member means the employee's spouse, son, daughter, or parent.                                |
| If offered by the employer, employees may supplement PFL benefits up to their full salary or wages with accrued vacation, or personal leave time during the paid leave. | An employer may compel an employee to substitute paid time off for unpaid family and medical leave. |

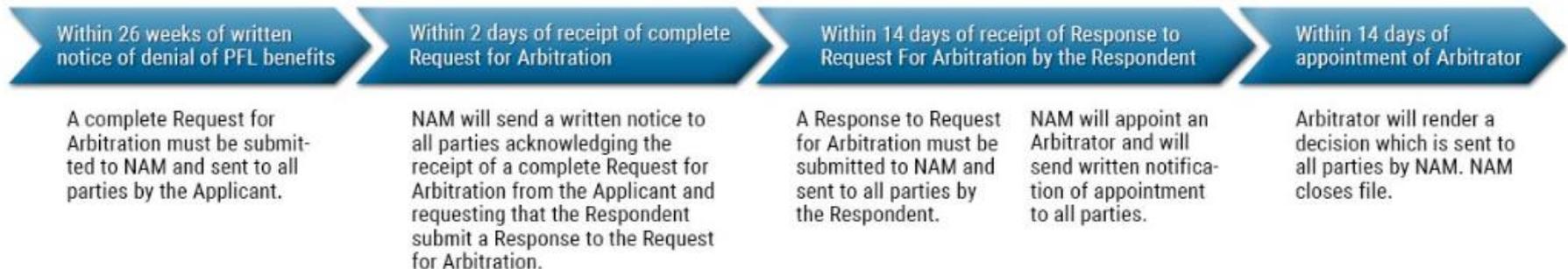
# NYPFL Dispute Resolution

- ◆ Any claim-related dispute, including eligibility, benefit rate, and duration of paid family leave is subject to arbitration.
  - An arbitrator is an independent, third-party who will make a final and binding determination.
- ◆ Disputes regarding discrimination and retaliation are handled by the Workers' Compensation Board.
  - There is a two-year statute of limitations.

# NYPFL Arbitration Process

- ◆ All requests for arbitration can be initiated by submitting a complete Request for Arbitration to National Arbitration and Mediation (“NAM”) and the responding party along with a filing fee of \$25 - <http://www.nyspfla.com>.
- ◆ Typically resolved by “desk arbitration” unless the arbitrator, after review of the parties' submissions, finds further development of the record necessary.

## Timeline for PFL Arbitration Process



# **Reasonable Accommodations and the Interactive Process**

# Americans With Disabilities Act

- ◆ Prohibits discrimination on the basis of disability, AND
- ◆ Requires employers to make reasonable accommodations that allow the employee to perform the essential functions of the job without imposing an undue hardship on the employer.
- ◆ The definition of “**disability**” is a physical or medical condition that substantially limits a major life activity without regard to corrective measures.
- ◆ **Reasonable accommodations** are sometimes necessary to help a disabled employee perform the job.
- ◆ What is **reasonable** depends upon the circumstances.
- ◆ Employer has a duty to “**interact**” with the employee/doctor where necessary to determine what accommodation might help.
- ◆ Additional leave beyond FMLA is often reasonable.

# Reasonable Accommodations in New York

- ◆ New York State Human Rights Law defines disability as “any physical, mental, or medical impairment that may be identified by medically acceptable diagnostic techniques”.
- ◆ Employers have the duty to consider reasonable accommodations once the need for the accommodation *is known* to the employer.
- ◆ Reasonableness is determined by:
  - Efficacy or benefit provided toward removing impediments
  - Convenience or reasonableness for employer
  - Hardships, costs, or problem for employer
- ◆ Employer has the duty to request documentation concerning the accommodation.

# What is a “Interactive Process”?

- ◆ Defined as a process by which:
  - The employer and the employee engage in a written or oral dialogue;
    - May be in person, in writing, by telephone, or via electronic means;
  - In good faith;
  - Concerning the employee’s accommodation needs;
  - Potential accommodations that may address the needs; and
    - This includes alternatives to the requested accommodation.
  - The difficulties that such potential accommodations may pose for the employer.

# 4-Step Interactive Process

- ◆ Step 1: The employer's obligation to engage is triggered.
  - Employer learns directly or indirectly that an individual requires an accommodation.
  - Could be because of a performance decline and a reasonable basis to believe the issue is related to a disability.
- ◆ Step 2: The employer is on "notice" and must approach the individual to initiate the interactive process.
  - If the individual does not reveal that they need an accommodation, no further action is required.
  - If the individual does need an accommodation, the employer must proceed to Step 3.

# 4-Step Interactive Process

- ◆ Step 3: The employer must communicate in good faith in a transparent and expeditious manner to consider the individual's needs and the possible accommodations that would enable them to perform the essential functions of his/her job without creating an undue hardship.
- ◆ Step 4: Once a conclusion is reached, the employer must promptly notify the individual whether the accommodation is granted or denied.
  - Best practice is for the notice to be in writing.
- ◆ **\*\*\*Note**: The obligation is continuing. Once on notice, if an individual's circumstances change over time the employer must re-engage and start over.

# Engaging in “Good Faith”

- ◆ Factors for determining good faith include, but are not limited to:
  - Whether the employer has a policy informing employees on how to request accommodation based on a disability;
  - Whether the employer responded to the request in a timely manner in light of the urgency and reasonableness of the request; and
  - Whether the employer sought to obstruct or delay the interactive process or in any way intimidate or deter the individual from requesting the accommodation.
- ◆ An indeterminate delay may have the same effect as an outright denial.

# Undue Hardship

- ◆ Factors for determining undue hardship include, but are not limited to:
  - the nature and cost of the accommodation;
  - the overall financial resources of the facilities involved - as well as the number of persons and the effect on expenses and resources, or the impact of the accommodation on the operation of the facility;
  - the overall financial resources of employer including the size, number of employees, and type and location of facilities of the employer;
  - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer.
- ◆ The measure of cost will require a case-by-case analysis.
- ◆ If asserting cost – the employer will be expected to disclose financial documents to assess the alleged financial hardship.
  - Failure to provide financial documents may result in an adverse inference.

# The Interactive Process: The Request

- ◆ Questions to document the reason for accommodation request:
  - What, if any, job function is the employee having difficulty performing?
  - What, if any, employment benefit is the employee having difficulty accessing?
  - What limitation is interfering with the employee's ability to perform job or access employment benefit?
  - Has the employee had an accommodation in the past for this same limitation?
  - Is yes, what was it and how effective was it ?
  - If the employee is requesting a specific accommodation, how will that accommodation assist the employee ?
- ◆ Questions to clarify accommodation requests:
  - What specific accommodation is the employee requesting?
  - If the employee is not sure what accommodation is needed, does the employee have any suggestions about what options can be explored?
  - Is the employee 's accommodation request time sensitive?

# The Interactive Process: The Documentation

- ◆ May an employer request medical documentation to determine if a medical condition is a disability?
  - Yes, if the medical condition is not obvious or otherwise known, employers can request medical documentation sufficient to establish that the individual's condition is a disability.
- ◆ Basic Rule: Requests for medical information from employees must be “job-related and consistent with business necessity.”
- ◆ EEOC Guidance says this standard generally is met if employee requests reasonable accommodation.
- ◆ Managers and Supervisors should never speak with doctors or their offices – all communications should be in writing from Human Resources.

# Confidential Nature of Medical Information

- ◆ The ADA requires strict confidentiality regarding any medical information an employer learns during the reasonable accommodation process.
- ◆ Information can be confidential even if:
  - it contains no medical diagnosis or treatment course, and/or
  - it is not generated by a health care professional.
- ◆ Documentation containing medical information regarding an employee must be maintained **separate** from any personnel file.

# The Interactive Process: The Impact

- ◆ Employer analyzes impact of requested accommodation.
  - Would it create an undue hardship?
  - Would it relieve employee from performing an essential job function?
  - Would it create a direct threat to safety of employee or others?
- ◆ Employee and employer evaluate and consider appropriate accommodations.
  - The employee is not entitled to accommodation of his/her choice.
  - Employers may propose alternative accommodations that effectively accommodate the employee's disability.
  - Employers who grant some accommodations before (finally) denying tend to win accommodation cases.

# The Interactive Process: The Conclusion

- ◆ **Employer Accepts:** Employer can accept the proposed accommodation, and then must provide it as agreed.
- ◆ **Employer Rejects:** Employer may reject the proposed accommodation for certain lawful reasons.
- ◆ **Employer offers alternative accommodation:** Employer may offer an alternative, effective accommodation.
- ◆ **Employee Abandons:** If employee becomes non-responsive during the Interactive Process, including for example, the employee does not submit medical documentation to support the need for accommodation, the employee may be determined to have abandoned the Interactive Process.
  - No duty to provide accommodation unless the need for the accommodation is obvious.
  - Employee can always re-start the process.

# Types of Accommodation Requests

- ◆ Telecommuting
  - Consider frequency and ability to monitor productivity standards remotely.
  - Is need for physical presence in the workplace an essential job function?
  - If available to some, likely must be available to others.
- ◆ Light Duty
  - What does light duty mean for that position?
  - Consider whether “heavy duty” is an essential function of the job.
  - Not required to convert a temporary light duty position into permanent one.
  - But, if employer provides light duty to some, likely must provide it to others.
- ◆ Supervisor Change
  - Not required to change an employee’s supervisor.
  - May be required to alter supervisory methods (*i.e.* communicating assignments).

# Types of Accommodation Requests

## ◆ Chemical Sensitivities

- Does it impact a major life activity (*i.e.* breathing)?
- Is performance of essential functions impacted?
- Irritant-free environment generally not a reasonable accommodation, but removal of particular irritant could be.

## ◆ Reassignment

- Vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location).
- If there is no vacant equivalent position, reassign the employee to a vacant lower level position.
- Employee must be qualified for the new position, but need not be the most qualified candidate to obtain the position.

## ◆ Leaves of absence . . .

# **Leave as a Reasonable Accommodation**

# Leave as a Reasonable Accommodation

- ◆ We must speak with the employee.
  - How much more leave is needed?
  - Is the additional leave sought for a definite or indefinite duration?
  - Will employee be able to return to work performing their essential job functions?
    - What work restrictions will exist?
    - Do restrictions impact essential or marginal job functions?
    - Can restrictions be accommodated?
- ◆ After speaking with the employee...
  - What operational hardship is being experienced due to the employee's current absence?
  - Will operational hardship change if employee stays on leave?

# Key Points To Document In Employee Leave Requests

- ◆ Date FMLA or other leave entitlements will be exhausted.
- ◆ Impact of failing to return to work (on employment status and benefits).
- ◆ Willingness to explore reasonable accommodations.
- ◆ Help employees return at or before end of leave entitlement period.
- ◆ Willingness to consider additional leave after FMLA/other leave entitlement is exhausted.
- ◆ Desire to know how much more leave is needed and whether it is for a definite or indefinite period.
- ◆ Deadline for employee to provide information.
- ◆ Obligation of employee to communicate if unable to provide the requested information.

# Leave as Reasonable Accommodation After FMLA Exhaustion

- ◆ At the conclusion of an employee's FMLA leave, we need to find out if the employee will be returning to work.
- ◆ If employee will not return to work following FMLA, we need to find out why.
- ◆ Is the employee requesting additional leave as a reasonable accommodation for a disability?
  - If no, no leave is available and employee may be terminated.
  - If yes, we need medical documentation to support leave. Send employee:
    - Healthcare Provider Certification
    - Job Demands Analysis or Job Description
  - Give employee deadline to return the Healthcare Provider Certification.

# Medical Certification Supporting Leave

- ◆ Has employee returned the Certification?
  - If employee has not returned the Certification by the deadline, send employee follow-up letter and provide new deadline.
  - If employee still fails to return Certification, send letter indicating employee's failure to submit requested supporting documentation and terminate employee.
  
- ◆ Does Certification support a reasonable accommodation?
  - If yes, send employee letter approving leave as a reasonable accommodation.
  - If no, send follow-up communication attempting to clarify the information requested.

# Exhaustion of Leave of Absence

- ◆ Roughly 2 weeks before expected conclusion of leave, send letter to employee indicating conclusion of leave.
  - Remember the goal is to actively manage these leave situations.
- ◆ Is employee ready to return to work after leave expires as designated?
  - If no and employee requests additional leave, continue to conduct and document the reasonable accommodation analysis.
    - By continuing to follow-up with the employee on leave, we can turn a single 6 month leave into 3 two month leaves of absence.
    - Simply put, we look better and will be able to end the employee's employment sooner if they cannot return.

# Employee Is Ready to Return to Work

- ◆ Returning from leave may not be the end of the story.
- ◆ Does the medical documentation indicate restrictions on the return to work?
  - If no, employee returns to work in same/equivalent position.
  - If yes, Human Resources must engage in reasonable accommodation process.
- ◆ Can the Agency implement accommodations enabling performance of essential job functions?
  - If yes, implement accommodations. Employee returns to work in same/equivalent position.
  - If no, ensure undue hardship analysis is documented.

# Open Position for Which Employee is Qualified?

- ◆ If the employee cannot perform his/her own job, what do we do?
- ◆ If implementing an accommodation would be an undue hardship, can the Agency identify an open position for which the employee is qualified?
  - If yes, place employee in open position.
  - If no, conduct Human Resources and legal review of situation to analyze defensive position for employee termination.

**Time to Test Your Knowledge and Understanding**

# Consider This

- ◆ You supervise Frank, an event support person in the Development office. You notice that many of Frank's calls with potential event attendees and donors are less than a minute long. The callers Frank assists usually end up calling back with the same question. When they call back, they ask to speak to someone other than Frank. You decide to meet with Frank to discuss this issue.
- ◆ When you meet with Frank he tells you that sometimes he has trouble hearing the callers. When he asks them to repeat themselves, they get frustrated and some hang up the call.
- ◆ During the meeting Frank asks you to repeat yourself as well. When you speak, Frank seems to lean in with his left ear turned towards you.

# What Should You Do?

- ◆ Based on your meeting with Frank, you believe he may be hearing impaired. You are also concerned Frank's interactions with attendees and donors will have a negative impact on the Agency.
- ◆ Should you:
  - Ask Frank if he is hearing impaired?
  - Discipline Frank for how he handles the customer service calls?
  - Document your conversation with Frank?
  - Report your concerns to Human Resources?
- ◆ Without any further action, is the Agency "on notice" of Frank's disability?

# Case Study

- ◆ Jessica has been employed with the Agency for approximately three years as a Direct Care Professional. She consistently received average performance evaluations. Criticisms in these evaluations repeatedly discuss her drastic mood shifts and her inability to work with co-workers. Jessica advises you that she recently has been diagnosed with Bipolar Disorder.

# Case Study

- ◆ Jessica continues to show severe changes in her mood despite the fact that she has been prescribed medication to partially alleviate these symptoms. The House manager observes (and reports to you) that Jessica is extremely happy and energetic at some points (*i.e.* manic) and appears severely depressed at other times. Jessica now comes to you to discuss possible accommodations. You and the House manager decide that longer and more frequent breaks would be a reasonable accommodation to help Jessica stabilize her mood when she feels overwhelmed.
- ◆ The House manager observes Jessica frequently taking breaks that last between 15 and 35 minutes. During such breaks, she does not appear to be calming herself down; rather, she is on the phone discussing reality TV with her girlfriend. Co-workers are frustrated by and tired from handling Jessica's work while she is on break.
- ◆ How would you advise the House manager to handle this issue?

# Case Study

- ◆ You and the House manager speak with Jessica about the nature of her breaks and ask whether she is using the breaks to avoid her work responsibilities. Jessica responds that she is not improperly using her break time and further requests that the Agency permit her to make additional phone calls during work hours to doctors and others for needed support. You agree to allow this, within reason.
- ◆ Jessica continues to fall behind in her work because she is now making additional calls to her girlfriend and other friends (not her doctors). Jessica's productivity continues to decline. You schedule a meeting with her and the House manager to discuss this issue. During the meeting, Jessica argues that every call she makes was directly related to the accommodations previously approved by management. Jessica goes on to criticize you and the House manager. At first, the criticism is related to the accommodations provided to her, but then turns to criticism of how she and other employees believe the Agency handles accommodation issues poorly.

# Issue Spotting

- ◆ Taking advantage of the accommodation.
- ◆ Correlation between her disorder and her performance.
- ◆ Further accommodations?

# Case Study

- ◆ The Agency issues Jessica a note-to-file regarding her performance. In response, Jessica states that she believes her interpersonal skills and productivity issues stem from her disorder and that she believes the disciplinary warning has been issued because the Agency now knows she suffers from a mental disorder. As proof, she argues her performance evaluations were better before the Agency learned of her medical condition.

# Case Study

- ◆ The following day, the Group Home conducts its monthly meeting. Jessica is not invited to attend because the manager decided to provide Jessica with this extra time to complete her work. The manager planned to update Jessica on the meeting later that same day. Jessica learns about the meeting and comes to you stating she feels her manager is retaliating against her once again. Jessica believes the manager did not invite her because of the stigma associated with mental disorders, coupled with the fact that Jessica complained about the accommodations (or lack thereof) provided to her. While Jessica is speaking to you, you glance at your phone and see an email from the manager begging you to let him terminate Jessica based upon her lack of productivity and poor attitude.
- ◆ After a brief conversation with Jessica, wherein you explain to her the reason why she was excluded from the monthly meeting, Jessica begins to raise her voice. At first she complains about her disorder, the accommodations provided, and how she feels her exclusion was further retaliation for complaining. Her frustration seems to get the best of her when she exclaims that you are an ignorant narcissist who has no business handling employee relations.

# Case Study

- ◆ Three weeks later, Jessica's productivity continues to decline; however, the symptoms of her Bipolar Disorder appear to have subsided. The manager again approaches you to discuss Jessica's termination.
- ◆ When the manager asks you to terminate Jessica's employment, what questions should be asked of the manager?
- ◆ Should you recommend that Jessica remain employed?
- ◆ Should you recommend termination?

# Questions?



# Thank You

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