PART 1: THE ACTS

I. INTRODUCTION

The Family and Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), Public Employee Disability Act ("PEDA"), and Illinois Workers' Compensation Act provide public safety employees with a variety of leave of absence rights. However, there are times when these laws provide conflicting and overlapping obligations with regard to employee leaves. It is vital that employers are aware of each Act's provisions regarding leaves of absence. Each leave request submitted by an employee should be considered carefully and consistently with regard to each applicable Act. Once the employer determines what Act applies, the specific requirements of that Act must be applied correctly.

This seminar will review employee leave entitlements provided by the FMLA, ADA, PEDA, and IL Workers' Compensation Act. Eligibility for military leaves will also be covered. We will also touch on other relevant statutes affecting employee leaves. Finally, we will review accommodation issues which will inevitably come into play when assessing leave requests.

II. PURPOSE OF ACTS PROVIDING EMPLOYEE LEAVES

A. The Family and Medical Leave Act of 1993 entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance under the same terms and conditions as if the employee had not taken leave.

   1. The FMLA is administered by the Wage and Hour Division of the U.S. Department of Labor.

B. Title I of the Americans with Disabilities Act is a federal civil rights law that prohibits discrimination in employment based on disability.

   1. The ADA is enforced by the U.S. Equal Employment Opportunity Commission.

   2. Prohibited discrimination may include, among other things, firing or refusing to hire based on a real or perceived disability, segregation, and harassment based on a disability.

   3. Covered employers are required to provide reasonable accommodations to disabled job applicants and employees with disabilities, unless doing so would cause undue hardship.

C. The Illinois Public Employee Disability Act was established to provide employees engaged in certain occupations with duty disability benefits that exceed existing pension and workers' compensation benefit payouts.

D. The IL Workers' Compensation Act provides a system of benefits to most employees who experience work-related injuries or occupational diseases.

1. Generally, benefits are paid regardless of fault.

2. The IL Workers' Compensation Commission is the State agency that administers the judicial process that resolves disputed workers' compensation claims between employees and employers.

III. OVERVIEW OF THE FMLA, ADA, PEDA, AND WORKERS' COMPENSATION LAWS

A. Covered Employer

1. Public employers constitute "employers" for purposes of all four Acts.

B. Eligible Employees

1. FMLA

   a. Protects employees who satisfy the following requirements:

      i. Employed by a covered "employer" as defined in the Act;

      ii. Employed for at least 12 months by the employer;

      iii. Worked at least 1,250 hours in the 12 month period immediately preceding the request for leave; and

      iv. Employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

   b. Only time actually worked by the employee will count toward FMLA minimum time requirements:

      i. Time spent on an unpaid vacation leave or on paid leaves, such as vacation, sick, or disability leave are not considered "hours of service."

      ii. "Light duty" does not count toward leave time but does count as time worked.

2. ADA

   a. Protects not only those currently employed, but also applicants for employment.

   b. Extends protections to a "qualified individual" with a disability who can:

      i. Satisfy the requisite skills, experience, education, and other job related requirements of the employment position; and

      ii. Perform the essential functions of such position with or without a reasonable accommodation.

iii. A job function may be deemed essential if:

(a) The position exists to perform the function;

(b) There are a limited number of employees available who could perform the function; or

(c) The function is highly specialized.

3. PEDA

a. "Eligible employee" means any full-time law enforcement officer or firefighter employed by the State, any unit of local government, State-supported College or University, or other public entity.

Note: PEDA excludes any police officers or firefighters employed by the City of Chicago.

4. Workers' Compensation Act

a. Protects all employees whose injury, disability, or death was caused or arose out of and in the course of their employment.

i. Generally, employment must be principally localized within the state in which the employee is seeking coverage/benefits.

ii. Illinois law does not cover independent contractors.

C. Covered Conditions

1. FMLA

a. Employees are entitled to FMLA leave only for the following reasons:

i. A serious health condition that renders the employee unable to perform the essential functions of his or her job.

(a) "Serious Health Condition" means an illness, injury, or impairment or physical or mental condition that involves:

(1) Inpatient care in a hospital, hospice, or residential medical care facility; or

(2) Continuing treatment by a health care provider.

(b) The serious health condition must include a period of incapacity (*i.e.*, absences from work, school, or

other regular daily activities) which meets one of the following requirements:

(1) Is due to inpatient care;

(2) Lasts three or more consecutive calendar days and also involves treatment by a health care provider for at least two visits within the first 30 days, or treatment on at least one occasion on which regimen of continuing treatment or doctor supervision;

(3) Is due to pregnancy or prenatal care;

(4) Is due to a chronic serious health condition which: (a) requires at least two visits to a health care provider; (b) continues over a period of time; and (c) may cause episodic rather than continuing periods of incapacity.

(5) Is due to a permanent or long-term condition for which treatment may not be effective; or

(6) Requires multiple treatments

(7) Does not include minor conditions, *i.e.*, cold, flu, upset stomach, etc. without complications, nor does it include cosmetic conditions.

(c) The birth or placement of a son or daughter for adoption or foster care, or to care for the child.

(1) "Son" or "Daughter" is defined to include a biological, adopted, or foster child, a step-child, legal ward, or a child of a person standing in the place of a parent;

(2) The child must be under the age of 18 or incapable of self-care because of a mental or physical disability;

(3) Entitlement expires 12 months after the triggering event (*i.e.*, birth or placement of child for adoption or foster care).

(d) The care of the employee's son, daughter, spouse, or parent with a serious health condition.

(1) "Spouse" is defined as a husband or wife as defined or recognized under state law for the

purpose of marriage, including common law marriages;

(2) Domestic partners are not covered;

(3) "Parent" is defined as a biological parent or person standing in the place of a parent when the employee was a child. Parents-in-law are not included in the definition.

2. ADA

Individuals must have a disability **or** have a history of a disability **or** are regarded as having a disability in order to be entitled to ADA protection.

a. **Disability:** A physical or mental impairment that substantially limits one or more of the major life activities of an individual.

i. Does not include temporary, short-term conditions.

(a) Individual does not have to establish that the condition is permanent.

(b) Impairment must last longer than a few months.

ii. Major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and, in some instances, working.

(a) Impairment does not have to affect the individual's ability to work in order to be covered by the ADA.

(b) A low bar for establishing a "disability."

iii. Employer cannot take mitigation measures into consideration when determining whether an individual is disabled under the ADA.

(a) This includes devices and medications which might ameliorate the effects of the disability;

(b) Only glasses and contact lenses may be considered;

(c) Very broad definition of "disability."

iv. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

v. "Regarded as" disabled:

(a) Provides that an individual subjected to a prohibited action because of an actual or perceived impairment will meet the "regarded as" definition unless the impairment is transitory and minor.

3. PEDA

a. Whenever an eligible employee suffers any injury in the line of duty causing him to be unable to perform his duties.

3. Workers' Compensation Act

a. Conditions which arose out of and in the course of the employment relationship, including:

i. Temporary or permanent conditions;

ii. Traumatic injuries or repetitive trauma injuries;

iii. Mental or physical injuries;

iv. Occupational diseases.

b. No severity requirement.

D. Leave Entitlements

1. FMLA

a. Employees are entitled to up to 12 weeks of **unpaid** leave and insurance benefits must be maintained during this period.

i. Leave may be taken on an intermittent basis on a reduced schedule, if medically required. For example, chemotherapy treatment, doctor's appointments, pre-natal examinations, recovery from a serious illness, or during flare-ups of a chronic condition.

(a) Intermittent leave following birth or placement for adoption of a healthy child is not guaranteed.

ii. Employees are required to give 30 days' notice, if possible.

iii. Light duty time does **not** count as leave time.

b. Designation of Leave Time

i. Employers may designate leave taken by an employee as FMLA, even though the employee has not requested FMLA leave.

ii. If an employer runs an FMLA leave concurrent with another leave, the employer must provide the employee of prior notice of this decision.

iii. However, if an employer learns, after a paid leave has commenced, that the leave is being taken for an FMLA-qualifying reason, the employer may designate the leave as FMLA.

iv. An employer's failure to designate a leave as FMLA will **not** result in the employee's entitlement to an additional FMLA leave upon the expiration of the original leave, so long as the employee cannot show an individualized harm due to the employer's failure to follow notification rules.

v. An employer cannot refuse to provide FMLA leave because an employee did not specifically request it.

vi. We recommend using the Department of Labor FMLA designation forms, found at http://www.dol.gov/whd/fmla.

c. Recertification of Need for Leave

i. An employer may ask an employee to recertify the qualification for leave under the following conditions:

(a) The employee requests an extension of leave;

(b) The employee's (or family member's) health condition has changed;

(c) The employer receives new information that casts doubt on the certification; or

(d) Once every six months.

ii. An employer must provide at least 15 calendar days to receive the employee's response from their physician (possibly longer under some circumstances).

d. If an employee is unable to return to work upon expiration of the FMLA leave, the employer may:

i. Terminate the employee;

ii. Recoup the cost of the insurance paid during this time period unless the employee did not return to work for one of the following reasons:

(a) The continuance, recurrence, or onset of a serious health condition as defined by the FMLA; or

(b) Other circumstances beyond the employee's control.

e. Although a leave under the FMLA is unpaid, the employer must continue all health insurance and other benefit coverage (such as retirement contributions) during the FMLA leave on the same basis as the employee received prior to the leave.

i. However, the employer can require the employee to continue to pay their share of the health insurance premium that would have been required if not on leave.

ii. Employees are not entitled to accrue other benefits, such as sick or vacation leave, or seniority while on FMLA leave.

Note: An employer's policy or collective bargaining agreement may, however, allow employees to accrue sick leave, vacation, or seniority while on FMLA leave.

2. ADA

a. Under the ADA, an unpaid leave may be considered to be a reasonable accommodation.

i. The ADA does not require a specific minimum or maximum entitlement to leave.

ii. However, the duty to provide a leave may often require more leave than is provided for and required under the FMLA.

iii. If an employer can accommodate the employee's disability at the workplace, the employer is not obligated to provide the employee with an unpaid leave. Disabled employees are not necessarily entitled to the particular accommodation of their choice.

iv. Employers need not provide the "best" available accommodation or the exact accommodation requested. An accommodation is sufficient if it meets the job-related needs of the person being accommodated.

v. Other potential reasonable accommodations include:

(a) Temporary transfer;

(b) Providing an accessible work site;

(c) Adjustment of training or policies;

(d) Job restructuring;

(e) Part-time work schedule; and/or

(f) Reassignment to a vacant position.

vi. Unreasonable accommodations include:

(a) Creation of a new job for the employee;

(b) An accommodation that is an undue hardship, considering: the nature and cost of the accommodation, employer financial reserves, the location where the employee works, and the operations of the employer.

(c) Anything prohibitively expensive or disruptive.

b. When requesting an accommodation, an employee does not have to use any "magic words." All that is necessary is that the employee provide the employer with sufficient information to conclude that a reasonable accommodation is necessary.

i. Someone other than the employee or applicant may make the request on the individual's behalf.

ii. The request does not need to be made in writing.

c. Once a request is made, the employer must engage in an "interactive process" to identify the precise limitations resulting from the disability and any potential reasonable accommodations.

i. Goals of the interactive process:

(a) Analyze job functions to establish the essential and non-essential job tasks;

(b) Identify any barriers to the employee's job performance;

(c) Learn the employee's precise limitations;

(d) Whether the requested accommodation is truly necessary; and

(e) The most effective accommodations.

ii. An employee who refuses to participate in the interactive process may lose his or her right to a reasonable accommodation.

d. Unlike the FMLA, leave may only be taken for the employee's own disability and not to care for others.

e. An employee is not entitled to leave where the employer can demonstrate the leave will constitute an undue hardship upon the employer.

f. An employee is typically not entitled to an indefinite leave.

    i. A leave is not reasonable where the employee's ability to return to work is not foreseeable.

    ii. An employee's continuous requests for leave after the expiration of prior leaves may constitute a request for indefinite leave.

g. Employers have no duty to continue insurance or other benefits while the employee is on an ADA leave.

h. An employee entitled to leave pursuant to the FMLA may not qualified as "disabled" for purposes of the ADA

i. Documentation:

    i. An employer may generally ask the individual requesting an accommodation for information regarding their disability.

    ii. Documentation will be sufficient when:

        (a) It describes the nature, severity, and duration of the employee's impairment;

        (b) It describes the activity or activities which the impairment limits;

        (c) It describes the extent to which the impairment limits the employee's ability to perform the activity or activities; and

        (d) It substantiates why the requested reasonable accommodation is needed.

    iii. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for a reasonable accommodation. Documentation also may be insufficient where:

        (a) The health care professional does not have expertise to give opinion about the employee's medical conditions and limitations imposed by it;

(b) The information does not specify the functional limitations due to the disability; or

(c) Other factors indicate that the information provided is not credible or fraudulent.

iv. The EEOC states that employers cannot ask for documentation when:

(a) Both the disability and need for a reasonable accommodation are obvious; or

(b) The individual has already provided the employer with sufficient information to substantiate that he or she has an ADA disability and requires a reasonable accommodation.

j. Requiring an employee to see a health care provider chosen by the employer.

i. Per EEOC guidance, employers can require this if the employee provided insufficient documentation from his or her doctor.

ii. The employer should first explain to the employee why the documentation is insufficient and allow the employee an opportunity to provide missing information in a timely manner.

3. PEDA

a. The employee will continue to be paid on the same basis as prior to the injury, with no deduction from sick leave credits, comp time, or vacation, or service credits in a pension fund during the time the employee is unable to perform his duties as a result of the injury, but **not longer than one year** in relation to the same injury.

b. At any time during this period, the public employer may order, at the expense of the employer, physical or medical exams to determine the degree of disability.

c. During this period, the employee shall not be employed in any other manner, with or without monetary compensation. Being employed forfeits continuing compensation from the time such employment begins.

4 Workers' Compensation Act

a. Workers' compensation is **not** a job preservation statute.

b. During a period of temporary total incapacity, the employee is not obligated to work and is entitled to an average from 66.66% of the employee's average weekly wage.

i. Temporary Total Incapacity: the temporary period after an accident during which the employee is incapacitated for work which exists until the employee is as far recovered as the injury will permit, or the employee has reached maximum medical improvement.

ii. Once the employee has reached maximum medical improvement, entitlement to leave is no longer applicable, although the employee may still be entitled to other benefits under the Act.

c. If the employee is released for light duty work, the employee may still be entitled to leave under the FMLA (if not already exhausted) or the ADA.

i. The employer cannot require the employee to accept a light duty position or accept a reasonable accommodation if the employee is still entitled to leave under the FMLA.

ii. However, an employee's refusal to accept light duty work may result in the loss of workers' compensation benefits.

E. Rights Upon Return from a Leave

1. FMLA

a. The employee is entitled to reinstatement to the same or equivalent position as the employee held at the commencement of the leave.

i. The employee is entitled to reinstatement even if a replacement employee is hired or the job has been restructured to accommodate the employee's absence.

ii. Equivalent Position: a job that carries virtually identical pay, benefits, and working conditions, including privileges, prerequisites and status, as the employee's prior job.

b. Employers may not adversely consider FMLA leave when making any decisions as to hiring, firing, discipline, or promotion.

c. Fitness for duty certifications may be required so long as it is a part of a uniformly-applied policy, procedure, or practice.

i. Employers can require only once every 30 days in the case of intermittent leave.

2. ADA

a. Upon return from a leave, the employee is entitled to the position he or she held prior to the leave, assuming the employee is still qualified for the position.

i. The employer may have a duty to transfer the employee to another position if the employee is no longer able to perform the essential functions of his or her previous position.

ii. Unlike the FMLA, such a transfer can be to a position with lower pay and benefits if no equivalent position exists.

b. An employer may be required to suspend or modify attendance requirements as a reasonable accommodation.

i. However, an employee's inability to maintain regular attendance may negate the employee's ability to claim the he or she is a qualified individual with a disability **<u>if</u>** attendance is an essential job function.

ii. If the employee is not a qualified individual, the employer has no duty to accommodate.

3. Workers' Compensation Act

a. No maintenance of job is required.

b. Employees are not typically entitled to the same position they held prior to the injury (although a loss of pay and/or benefits may affect their workers' compensation benefits).

c. Employers may not retaliate against an employee for filing a workers' compensation claim.

IV. ILLINOIS MILITARY LEAVE OF ABSENCE ACT

A. Any full-time employee of the State of a unit of local government who is a member of any reserve component of the U.S. Armed Forces or of any reserve component of the Illinois State Militia, shall be granted leave from his or her public employment for any period actively spent in military service, including:

1. Basic training;

2. Special or advanced training, whether or not within the State, and whether or not voluntary; and

3. Annual training; and

4. Any other training or duty required by the U.S. Armed Forces.

B. During any of these leaves, seniority and benefits shall continue to accrue.

C. During leaves for annual training, the employee shall continue to receive their regular compensation.

D. During leaves for basic training, for up to 60 days of special or advanced training, and for any other training or duty required, if the employee's daily rate of compensation for military activities is less than their regular compensation as an employee, they shall receive their regular compensation as a public employee minus the amount of their base pay for military activities.

E. Violations of the Act constitute a civil rights violation under the Illinois Human Rights Act, which prohibits discrimination in employment based on an individual's military status.

PART 2: The ABCs of the FMLA

I. What is a "Serious Health Condition"?

A. "Serious health condition" means an illness, injury, impairment or physical or mental condition that involves: (i) inpatient care in a hospital, hospice or residential medical care facility; or (ii) continuing treatment by a health care provider.

1. "Inpatient care" means an overnight stay in a hospital, hospice or residential medical care facility, including any period of incapacity (*i.e.*, inability to work, attend school or perform other regular daily activities), or any subsequent treatment or recovery in connection with such inpatient care.

2. "Continuing treatment" means serious health condition involving continuing treatment including any one or more of the following:

a. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:

i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist by a health care provider, a nurse under direction of a health care provider, or by a provider of health care services (e.g., a physical therapist) under orders or on referral by a health care provider; or

ii. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of a health care provider.

"Treatment by a health care provider" means an in-person visit to a health care provider that must take place within seven days of the first day of incapacity.

Periodic leaves for chronic conditions require at least two visits for treatment by a health care provider, or by a nurse under direct supervision of a health care provider, per year.

b. A period of incapacity due to pregnancy or prenatal care;

c. A period of incapacity due to a chronic serious health condition which:

i. Requires periodic visits (at least twice per year) to a health care provider;

ii. Continues over a period of time; and

iii. May cause episodic rather than continuing periods of incapacity.

d. A period of incapacity due to a permanent or long-term condition for which treatment may not be effective;

e. A condition requiring multiple treatments; or

f. Absences attributable to incapacity due to pregnancy or prenatal care or a chronic serious health condition that do not require treatment from a health care provider during the absence and do not last more than three consecutive, full calendar days (*e.g.*, a pregnant employee is unable to report to work due to severe morning sickness).

II. FMLA Rules Specific to Military Leave

A. Qualifying Exigency Leave

Eligible employees may take up to 12 weeks of leave in a 12-month period for any "qualifying exigency" while the employee's spouse, son, daughter, or parent is on active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation.

Qualifying exigencies include:

1. Short-notice deployment (for up to seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation);

2. To attend military events related to the covered active duty or call to covered active duty status;

3. For childcare and school activities;

4. To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status or to act as the covered military member's representative before a federal, state or local agency to obtain, arrange, or appeal military benefits while the covered military member is on active duty or call to active duty status;

5. To attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or the covered military member's child or stepchild, provided that the need for counseling arises from the active duty or call to active duty status of the covered military member;

6. To spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment (for up to five days for each instance of rest and recuperation);

7. To attend post-deployment activities and address issues arising from the death of a covered military member while on active duty status;

8. To address other events which arise out of the covered military member's active duty or call to active duty status provided that the employer and the employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave; and

9. To care for the parent of a military member who is incapable of self-care. The parent must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who acted as the parent to the military member when the member was under 18 years of age.

B. Military Caregiver Leave

The FMLA allows eligible employees to take up to 26 weeks of job-protected leave in a single 12-month period to care for a covered service-member and covered veterans with a serious illness or injury.

1. A covered service-member is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness; and

2. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service.

A serious injury or illness means:

1. In the case of a current member of the Armed Forces, an injury or illness that was incurred or aggravated by the covered service-member in the line of duty and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and

2. In the case of a covered veteran, an injury or illness incurred in the line of duty on active duty (or existed before active duty and was aggravated in service) and manifested itself before or after the member became a veteran, and is:

    a. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service-member unable to perform duties;

b. A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow gainful occupation because of a disability related to military service; or

c. An injury, including psychological injury, because of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

i. To care for a covered service-member or veteran, the eligible employee must be the spouse, son, daughter, parent (excluding in-laws) or next of kin of the covered service-member.

"Next of kin" is the nearest blood relative other than the service-member's spouse, parent, son or daughter, in the following order of priority: blood relatives who have been granted legal custody by court decree or statute; brothers and sisters; grandparents; aunts and uncles; and first cousins, unless the service-member has designated another blood relative as his or her nearest blood relative, in writing, for purposes of military caregiver leave under the FMLA.

ii. An eligible employee is entitled to 26 workweeks of leave to care for a covered service-member or veterans with a serious injury or illness during a single 12-month period.

a. The "single 12-month period" begins the first day an employee takes leave to care for a covered service-member or veteran and ends 12 months after that date, regardless of the employer's method for determining 12 workweeks of leave for FMLA-qualifying reasons. If an employee does not take all 26 weeks of leave to care for a covered service-member during the 12-month period, the remaining time is forfeited.

b. An employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason(s) during the single 12-month period including time taken to care for a service-member.

Example: An employee who takes 16 weeks to care for a service-member may take an additional 10 weeks of FMLA leave to care for a newborn child. But, the employee may not take more than 12 weeks to care for the newborn child during the single 12-month period even if he or she took fewer than 14 weeks of FMLA leave to care for a service-member.

c. The employer retains the responsibility for designating the leave as FMLA-qualifying, paid or unpaid, and giving the employee notice of the designation.

d. Leave that qualifies as both service-member care leave and leave to care for a family member's serious health condition cannot be designated to count as both types of leave simultaneously.

e. A husband and wife who are eligible for FMLA leave and work for the same employer may be limited to a combined total of 26-weeks of leave.

III. Recommendations for an Employer's Effective Use of the FMLA

A. Placing an Employee on FMLA Leave

1. Employers may designate leave taken by employee as FMLA, even though the employee has not requested FMLA leave.

2. Regulations require employers to designate leave as FMLA leave once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason.

3. Starts running the clock on the 12 (or 26) weeks of statutory leave.

4. Can use FMLA to address employee with absentee problems. If you place employee on FMLA leave, you are entitled to medical information concerning his/her absences.

B. Retroactive Designation

1. Employers may retroactively designate leave as FMLA leave by providing the affected employee with the general written designation notice, provided the employer's failure to timely designate leave does not cause harm or injury to the employee. An employer and employee can also mutually agree that the leave be retroactively designated as FMLA leave.

   Note: employers usually have 5 business days within which they must designate.

C. Running Accrued Paid Leave Concurrently with FMLA Leave

1. Employees may choose to substitute, or the employer may require the employee to substitute accrued paid leave for the unpaid FMLA leave term. Employer has to provide notice of this requirement in FMLA eligibility notice.

2. Both the employee and the employer must satisfy any procedural requirements of the paid leave policy in connection with the receipt of such payment.

   Example: If the employer's policy requires an employee to give five days' notice prior to using accrued vacation days, an employee on FMLA leave cannot use or be required to use vacation time until after the expiration of the five-day leave period.

3. All forms of paid leave are now treated the same and permit employees to use accrued time without limiting employees to using, for example, only vacation or personal leave time for family leave purposes.

4. Employees who are on paid disability leave or workers' compensation leave are not on unpaid leave status. Accordingly, while such leaves count against an employee's FMLA leave, an employee on workers' compensation or paid disability leave cannot be required to substitute paid leave while out of work. However, employers and employees may agree to supplement disability or workers' compensation with an employee's accrued, unused sick, vacation or personal leave. Check your CBA provisions for ability to run accrued paid leave simultaneously with workers' compensation.

D. Counting the 12 Workweeks of Leave

1. The fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave.

2. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

3. If for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.,* a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.

E. Employee Notice Requirements

1. The FMLA was formerly construed to permit employees to provide their employers notice of the need for FMLA leave up to two business days after the commencement of an absence, even if they could have provided notice more quickly.

2. Regarding foreseeable leaves, employees must provide at least 30 days advance notice before FMLA leave is to begin. Examples, leave for expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service=member.

3. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

4. The revised regulations provide that an employee who needs to take an unforeseeable FMLA leave must, absent unusual circumstances (*e.g.,* emergency medical treatment), comply with the employer's usual and

customary notice and procedural requirements for requesting leave. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, the employer may delay or deny the employee's FMLA leave request.

5. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.

F. Medical Certification – for serious health conditions

1. Employers may obtain a statement or description of medical facts regarding the patient's health condition for which FMLA leave is requested. Such facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation, or any other regimen of continuing treatment. We recommend using the DOL Certification of Health Care Provider forms.

2. Employers should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter or, in the case of unforeseen leave, within five business days after the leave commences.

3. Employees must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable to do so under the circumstances despite the employee's diligent, good-faith efforts or the employer provides more than 15 days to return such certification.

4. Complete and sufficient certification

    a. The employee must provide a complete and sufficient certification. A certification is incomplete when one or more of the applicable entries is not completed. The certification is insufficient when the information contained in the certification is vague, ambiguous, or non-responsive.

    b. If an employer deems a certification incomplete or insufficient, the employer must allow the employee seven days to cure the deficiencies. If the deficiencies are not cured by a resubmitted certification, the employer may deny the FMLA leave.

5. Authentication and clarification

    a. When an employee submits a complete and sufficient certification, the employer may contact the health care

provider to clarify or authenticate the certification after the employee has been given an opportunity to cure any deficiencies. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator or a management official. However, under no circumstances may the employee's direct supervisor contact the employee's health care provider.

i. Authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.

ii. Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form.

iii. If an employee does not provide an employer with authorization allowing the employer to clarify the certification, the employer may deny the FMLA leave request if the certification is unclear, as the employee is responsible for providing the employer a complete and sufficient certification and to clarify the certification if necessary.

G. Recertification

1. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.

   Exceptions: An employer may request recertification in less than 30 days if:

   i. The employee requests an extension of leave;

   ii. Circumstances described by the previous certification have changed significantly (*e.g.*, the nature or severity of an illness changes); or

   iii. The employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification (*e.g.*, an employee who says he needs four weeks to recover from knee surgery plays in the employer's softball league three weeks after the surgery).

2. The employee must provide the requested recertification within the timeframe requested by the employer, which must allow at least 15 calendar days after the employer's request (unless impracticable under the circumstances). Unless specified otherwise, requests for recertification requested by the employer is at the employee's expense.

3. Additionally, in all cases, an employer may request a recertification every six months in connection with an absence by an employee even if the certification indicates that the employee will need an intermittent or reduced schedule for a period in excess of six months (*i.e.,* for a lifetime condition).

H. Fitness for Duty Certifications

1. Employees who are returning from leave for their own serious health conditions may be required to obtain and present a certification from their health care providers that the employee is able to return to work pursuant to a uniformly-applied policy or practice applicable to all similarly-situated employees.

2. An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave.

3. The employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. To require this certification, the employer must provide the employee with a list of the essential functions of the employee's job and must indicate in the designation notice that the certification must address the employee's ability to perform these essential functions. The employer may only seek fitness for duty certification with regard to the particular health condition that necessitated the employee's leave.

4. The employer may contact the employee's health care provider for clarifying and authenticating the certification, but clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while making contact with the employee's health care provider.

5. The cost of the certification is borne by the employee.

6. Additionally, an employer is not entitled to a fitness for duty certification for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to certification for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took leave. "Reasonable safety concerns" means a

reasonable belief of significant risk of harm to the individual employee or others, considering the nature and severity of potential harm and the likelihood that potential harm will occur.

I. What To Do If the Employee Cannot Return to Work

1. Recoup the cost of the employer portion of insurance paid during FMLA leave unless the employee did not return to work for one of the following reasons:

    a. The continuance, recurrence or onset of a serious health condition as defined by the FMLA; or

    b. Other circumstances beyond the employee's control.

2. Evaluate the employee under the Americans with Disabilities Act (ADA)

    a. Higher standard for leave as a reasonable accommodation than provision of FMLA leave

    b. An indefinite leave of absence, beyond the required 12-week FMLA leave, is not a reasonable accommodation required by the ADA

PART 3: DEBUNKING THE MYTHS OF EMPLOYEE LEAVES

MYTH: "EMPLOYEES ARE EXCUSED FROM WORK BECAUSE THEY ARE OUT ON WORKERS' COMPENSATION LEAVE"

REALITY: The Illinois Workers' Compensation Act only provides compensation, not leave, to employees who suffer an injury, disability, or death in the course of their employment.

A. Illinois Workers' Compensation Act ("IWCA")

1. The IWCA is NOT a job preservation statute.

    a. The IWCA does not require employers to retain or reassign an employee who is medically unable to return to his or her assigned position.

    b. An employer may terminate an employee for excessive absences, even if the absences are caused by a compensable work-related injury (after allowing for FMLA and conducting an ADA analysis).

    c. An employer may implement a neutral attendance policy that can operate as a valid non-pretextual basis for termination of employment as long as the policy does not distinguish between employees who miss work due to a compensable work-related injury and employees who miss work for other medical issues. *See Hess v. Clarcor*, *Inc.,* 603 N.E.2d 1262 (Ill. 2nd Dist. 1992)

2. The IWCA's purpose is solely to provide compensation to injured workers if and when they cannot work.

    a. During a period of temporary total disability, the employee is not obligated to work and is entitled to receive 66 2/3% of their average weekly wage in temporary total disability ("TTD") benefits.

    b. Even if an employee exhausts his or her available paid leave under the employer's policies, the employee may still be entitled to benefits under the IWCA (i.e*.,* TTD benefits and medical benefits).

3. If an employee is released for light duty work or work with restrictions, the employee may still be entitled to leave under the Family and Medical Leave Act (FMLA), if not already exhausted, or as a reasonable accommodation per the Americans with Disabilities Act (ADA).

    a. Unless policies state otherwise, unpaid FMLA leave can and should be run concurrently while an employee is off work due to a period of temporary total disability.

    b. An employer cannot require an employee to accept a light duty position or accept a reasonable accommodation if the employee is

still entitled to leave under the FMLA and is certified for leave by his or her physician. 29 C.F.R. § 825.702(d)(1).

c. However, an employee's refusal to accept light duty work may result in the loss of workers' compensation benefits under the IWCA.

d. An employer cannot require an employee to substitute paid leave during their FMLA leave if the employee is also receiving compensation from workers' compensation and/or a disability benefit plan. However, the employer may offer the employee the option to use his or her paid leave to supplement workers' compensation benefits.

4. If an employee exhausts FMLA leave while still receiving workers' compensation benefits **and** is unable to return to work with or without a reasonable accommodation, then an employer may be able to terminate the employee, after conducting an ADA analysis.

5. An employer is not required to maintain an employee's position while they are receiving benefits under the IWCA.

a. Absent other leave protections, employees are not typically entitled to the same position that they held prior to the work-related injury (although a loss of pay and/or benefits may affect their workers' compensation benefits).

6. The IWCA's Anti-Retaliation Protections

a. Section 4(h) of the IWCA prohibits the refusal to "rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by the Act."

b. The IWCA provides for criminal penalties for an employer, individually or through an insurance company, that discharges or threatens to discharge an employee **because of** the exercise of rights or remedies granted by the Act.

MYTH: "THE ADA OBLIGATES EMPLOYERS TO PROVIDE INDEFINITE LEAVE"

REALITY: The ADA does not require employers to accommodate an employee's disability by providing indefinite leave.

A. The Americans with Disabilities Act ("ADA")

See Employer-Provided Leave and the Americans with Disabilities Act, published by the EEOC on May 9, 2016 (Appendix 1).

B. Leave as an Accommodation under the ADA

1. Under the ADA, an unpaid leave is generally viewed as a reasonable accommodation when it enables an employee to return to work following the leave.

    a. If employers have existing leave policies and provide leave for disabilities, employers should consider those existing policies when engaging in the interactive process with employees.

    b. Unlike the FMLA, the ADA does not require an employee to have worked a specific number of hours to be eligible for a leave.

    c. Unlike the FMLA, leave under the ADA may only be taken for the employee's own disability and not to care for others.

    d A short-term leave of absence for cancer treatment, alcoholism, mental health treatment, etc. are all typically considered reasonable accommodations under the ADA.

    e. An employee is not entitled to leave where the employer can demonstrate that the leave will constitute an undue hardship on the employer.

2. An employee is not entitled to an <u>indefinite</u> leave of absence under the ADA.

    a. Employers may need to grant leave beyond their maximum leave policies as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that the employee's request would cause an undue hardship.

    b. A leave is not reasonable where the employee's ability to return is not foreseeable.

    c. An employee's continuous requests for leave after the expiration of prior leaves may constitute a request for indefinite leave.

3. An employee must be able to demonstrate that he or she is a qualified individual who can perform the job with or without a reasonable accommodation, including a leave of absence.

4. Recent EEOC cases from this calendar year highlight the EEOC's position on leave as a potential reasonable accommodation under the ADA:

    a. In January 2018, a Mississippi company focused on rural health care settled a disability discrimination lawsuit brought by the EEOC for $85,000. The lawsuit alleged that a social worker employee became ill and was hospitalized as a result of liver failure. During that same month, she sought, and the employer approved, her request for leave to cover her absence while she underwent a liver transplant. The employee had a successful liver transplant and was scheduled to return to work in mid-September 2012. However, prior

to her anticipated return date, the employee requested an additional four weeks of leave to allow for her recovery from post-operative complications. Despite the employee having more than four weeks of available sick leave, the employer denied the request and subsequently fired her after her company-approved leave was exhausted.

b. In January 2018, a Detroit casino settled a disability discrimination lawsuit filed by the EEOC for $140,000 as the result of the casino denying an employee's request for additional leave as a reasonable accommodation under the ADA. According to the allegations, the employee requested an additional four weeks of extended leave to return to work following a stress-anxiety-related collapse on the job. The casino denied the employee's request and terminated him after his leave under the FMLA was exhausted.

c. In January 2018, the EEOC filed a disability discrimination lawsuit against a North Carolina corporation that designs, manufactures, sources, and retails home furnishings. The EEOC alleged that an employee underwent an operation to have his toe amputated and subsequently developed peripheral neuropathy in both feet. The employee, who had been out on short-term disability, informed the employer that he needed additional leave (approximately two months) to recover fully. The employer in turn denied the request for additional leave and terminated the employee because he was not able to return to work. The litigation is pending.

5. An employer has no duty to continue insurance or other benefits while an employee is on ADA unpaid leave, unless it does so for an employee on non-ADA unpaid leaves.

6. An employer should always obtain sufficient medical documentation from the employee to make a determination regarding a request for ADA accommodation, including leave.

a. However, an employer may not subject an employee with a disability to different conditions for use of sick leave than it does employees without a disability and must treat employees requesting leave under the ADA the same as an employee who requests leave for reasons unrelated to a disability.

MYTH: "AN EMPLOYEE HAS NO RIGHT TO RETURN TO HIS OR HER SAME POSITION FOLLOWING FMLA OR ADA LEAVE"

REALITY: Under the FMLA and ADA employees are entitled to reinstatement to the same or equivalent position, with equivalent pay, benefits, and other employment terms, upon their return to work.

A. The Family and Medical Leave Act ("FMLA")

1. At the end of an employee's FMLA leave, the employee is entitled to reinstatement to the same or equivalent position as the employee held at the start of his or her leave.

2. However, if an employee is laid off during the course of taking FMLA leave, the employer's responsibility to continue FMLA leave and restore the employee ceases at the time the employee is laid off, provided that the employer has no continuing obligations under any other statute.

    a. An employer has the burden of showing that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to job restoration.

    b. Restoration to a job slated for lay-off is not considered an equivalent position if the employee's original position is not slated for lay-off.

3. If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration.

B. The Americans with Disabilities Act ("ADA")

1. Upon return from an ADA leave, the employee is entitled to the position that he or she held prior to the leave, assuming the employee is still qualified for the position.

    a. An employer cannot require an employee with a disability to return from an ADA leave with no medical restrictions.

    b. An employer may have a duty to transfer the employee to another position if the employee is no longer able to perform the essential functions of his or her previous job.

    c. Unlike the FMLA, an employer may transfer an employee to a position with lower pay and benefits if no equivalent position exists when the employee returns.

    d. If reassignment is required, an employer must place the employee in a vacant position for which he or she is qualified, without requiring the employee to compete with other applicants for open positions.

    e. An employer may be required to suspend or modify attendance requirements as a reasonable accommodation. However, an employee's inability to maintain regular attendance may jeopardize status as a qualified individual.

    f. If the employee is not a qualified individual, the employer has no duty to accommodate the employee.

MYTH: "I ONLY NEED TO ALLOW MATERNITY LEAVE IF IT IS IN THE PERSONNEL MANUAL"

REALITY: Eligible employees are entitled to parental leave under the FMLA and may receive additional protections under the ADA and Pregnancy Discrimination Act (PDA).

A. Leave Available Under FMLA

1. Pursuant to the FMLA, men and women are eligible for 12 weeks of unpaid leave to care for a newborn, an adopted child, or to place a child in foster care during the first year following birth, adoption or placement.

2. Employees are entitled to maintenance of their health coverage while on FMLA leave.

B. Potential Accommodations under the ADA

1. Although pregnancy itself is not a disability, pregnant workers may have pregnancy-related impairments that qualify as disabilities under the ADA.

2. Based on EEOC guidance, a number of pregnancy-related impairments are likely to be disabilities, even though they are temporary, and may include impairments such as carpal tunnel syndrome, gestational diabetes, pregnancy-related sciatica, and preeclampsia.

3. An employer must provide an individual with a reasonable accommodation because of a pregnancy-related disability, unless doing so would result in an undue hardship.

4. The EEOC cites the following as potential accommodations under the ADA that may be necessary for a pregnancy-related disability:

    a. Redistributing marginal or nonessential functions;

    b. Modifying workplace policies;

    c. Modifying an employee's work schedule;

    d. Allowing an employee to telecommute if feasible;

    e. Granting leave in addition to what an employer would normally provide under a sick leave policy;

    f. Purchasing or modifying equipment to allow an employee to sit or stand while working; and

    g. Temporarily reassigning an employee to light duty.

C. Pregnancy Discrimination Act ("PDA") Protections

1. The PDA requires employers to treat pregnant employees or employees with related medical conditions in the same manner it treats other employees who are similar in their ability or inability to work.

2. The EEOC has issued guidance addressing employers' obligations to pregnant workers under the PDA. *See Questions and Answers About the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues* (Appendix 2).

3. The PDA prohibits an employer from forcing a pregnant employee who is able to perform her job to take leave. Similarly, an employer may not require a pregnant employee to remain on leave until the baby's birth.

4. An employer that allows temporarily disabled employees to take disability leave or leave without pay must allow a pregnant employee to do the same. Employers must hold open a job for a pregnancy-related absence the same length of time that jobs are held open for employees on sick or temporary disability leave. Similarly, an employer must provide the same benefits of employment to women affected by pregnancy, childbirth, or related medical conditions that it provides to other persons who are similar in their ability or inability to work.

5. In *Young v. UPS*, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015), the U.S. Supreme Court examined whether an employer must create a light duty position for pregnant employees. The Court held that there is no per se requirement to create a light duty position, but an employer may be required to create a light duty position for a pregnant employee if it has previously created light duty positions for employees who suffer on-the-job-injuries.

6. Employers that elect to provide parental leave (which is distinct from medical leave associated with childbearing or recovering from childbirth) must provide such parental leave to both men and women on the same terms.

7. The PDA also protects pregnant workers from discrimination based on current, past, or potential pregnancies. The EEOC has advised that:

    a. An employer may not fire a woman because of pregnancy.

    b. An employer may not exclude a woman from a job involving processing certain chemicals out of concern that exposure would be harmful to a fetus if the employee became pregnant. Risks to fetus or mother do not justify sex-specific job restrictions.

    c. An employer may not discriminate against an employee because of her breastfeeding schedule.

D. The Illinois Pregnancy Accommodation Act ("IPAA") (Public Act 98-1050)

1. Applies to all Illinois employers employing one or more employees.

2. Protects part-time, full-time, and probationary employees, as well as job applicants.

3. Covers employees who are pregnant, have recently given birth, or who have a medical or common condition related to their pregnancy or childbirth.

    a. A “common condition related to pregnancy or childbirth” is defined as “a condition that commonly develops as a result of pregnancy or childbirth, or the physiological changes or processes that accompany pregnancy or childbirth.” 56 Ill. Admin. Code 2535.20.

    b. Examples of common conditions related to pregnancy or childbirth include: backaches, cramping, headaches, morning sickness or nausea, frequent urination, sleeplessness, fatigue, lifting impairments, physical imbalance, swollen ankles, feet or fingers, and lactation.

    c. Examples of medical conditions related to pregnancy or childbirth include: gestational diabetes, preeclampsia, post-partum depression, ectopic pregnancy, miscarriage, hypothyroidism and toxoplasmosis.

4. Employers must make reasonable accommodations for any medical or common condition of a job applicant or employee related to pregnancy or childbirth.

5. Employers may not refuse to reinstate an employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to her original job or an equivalent position upon the employee signifying her intent to return or when the need for a reasonable accommodation ceases.

    a. The IPAA provides a list of possible accommodations, including, but not limited to, job restructuring or a part-time or modified work schedule, and leave.

    b. It is unlawful for an employer to fail to reinstate the pregnant employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits, unless the employer can demonstrate that doing so would impose an undue hardship on the employer.

6. Employers may not require an affected individual to take leave under any leave or policy of the employer if another reasonable accommodation can be provided.

7. Similar to the PDA, employees affected by pregnancy or pregnancy-related conditions should be given the same leave accommodations as other employees who are similar in their ability/inability to work.

8. *See Pregnancy Fact Sheet*, published by the Illinois Dept. of Human Rights (Appendix 3).

MYTH: "DIFFERENT TYPES OF LEAVE MUST BE RUN SEPARATELY"

REALITY: Absent employment policies to the contrary, FMLA leave can, and should, be run concurrently with workers' compensation or paid time off.

A. The Intersection between Workers' Compensation and FMLA Leave

1. Unless an employer's policies state otherwise, unpaid FMLA leave can be run concurrently while an employee is off work due to a period of temporary total disability.

2. Section 825.702(d)(2) of the DOL regulations expressly provides that, "[a]n employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer)."

B. ADA Leave and Paid Time Off ("PTO")

1. Short-term leaves of absence as an ADA accommodation may be required on a separate basis, such as when an employee has exhausted all available PTO and is ineligible for other forms of unpaid leave.

2. Unless an employer's policies state otherwise, ADA leave may run concurrently with other forms of leave or benefits, such as short-term disability benefits or available paid leave.

C. Concurrent Use of FMLA Leave and PTO

1. An employer's policies will determine whether an employer can require available paid leave to run concurrently with unpaid FMLA leave. If an employer's policies require accrued paid leave to run concurrently with unpaid FMLA leave, then an employer can require both paid leave and unpaid FMLA leave to run at the same time.

   Note: Section 825.207(d)(1)-(2) of the DOL regulations provides that when employees are receiving benefits under a short-term disability or workers' compensation plan, the choice to substitute paid leave for unpaid FMLA leave is inapplicable because such benefit plans already provide compensation and the leave, therefore, is not unpaid.

2. However, without such a policy mandating that available paid leave and unpaid FMLA leave run concurrently, an employee can decide whether to have available paid leave run with his or her unpaid FMLA leave.

MYTH: "AN EMPLOYER CANNOT REQUIRE AN EMPLOYEE TO DESIGNATE LEAVE AS FMLA LEAVE"

REALITY: The FMLA requires employers to designate leave as FMLA leave if the employer has knowledge that the leave qualifies as FMLA leave.

1. An employee does not get to choose when an FMLA-qualifying leave is designated as such.

    a. Pursuant to §825.300(d) of the FMLA, "[t]he employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee … [w]hen the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances."

2. Accordingly, once an employer has sufficient notice and information of a FMLA-qualifying leave, an employer must designate the leave as FMLA, regardless of whether an employee wants his or her available FMLA leave to apply.

MYTH: "FMLA LEAVE DOES NOT APPLY BECAUSE WE DID NOT DESIGNATE IT AS FMLA LEAVE IN TIME"

REALITY: The FMLA allows employers to retroactively designate leave as FMLA leave.

A. FMLA Leave Notice Requirements

1. An employee is generally required to give notice of his or her need to take FMLA leave, but need not specifically reference the FMLA. Notice is sufficient if the employee provides enough information to let the employer know that the FMLA may apply.

2. Pursuant to DOL regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five (5) business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances.

3. The designation notice provided to the employee must also state whether paid leave will run concurrently with available FMLA leave and whether the employer will require the employee to provide a fitness-for-duty certification to return to work.

    a. Note: In order to obtain a thorough and complete fitness-for-duty certification, the employer must attach the job description to the certification when issuing it.

    b. *See Employer Notification Requirements under the Family and Medical Leave Act*, issued by the Wage and Hour Division of the DOL (Appendix 3).

4. Additionally, if the specific amount of FMLA-qualifying leave is known, the designation notice must also include the number of hours, days, or weeks that will be counted against the employee's available FMLA leave.

B. An Employer May Retroactively Designate Leave as FMLA

1. DOL regulations provide that retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave and notifies the employee of the designation.

2. However, an employer may be liable if an employee can show that he or she suffered harm or injury as a result of the failure to timely designate the leave as FMLA.

3. Further, an employee and an employer may agree to retroactively designate an absence or period of absences as FMLA-protected.

MYTH: "AN EMPLOYEE WHO HAS EXHAUSTED ALL AVAILABLE PAID AND UNPAID LEAVE CAN KEEP MISSING WORK AND HAVE THOSE ABSENCES EXCUSED IF I JUST DOCK THEIR PAY"

REALITY: Absent a contrary employer policy or practice, an employee is not entitled to miss work after exhausting all available paid and unpaid leave.

A. No State or Federal Laws Require Employers to Provide "Dock Days"

1. Unless specifically provided for in an employer's policies, a "dock day" practice or policy is not required under any state or federal law.

2. A voluntary practice of providing "dock days" to employees sends the message that unauthorized absences will be tolerated and granted.

3. If an employer wishes to implement a "dock day" policy or practice, an employer should attempt to limit the circumstances under which employees may be eligible for such "dock days" and the number of "dock days" an employee may use.

4. Avoiding or at least limiting the availability of "dock days" is a valuable tool to minimize an employee's seemingly endless pattern of disruptive unexcused absences.

MYTH: "I HAVE TO PAY AN EMPLOYEE FOR ALL ACCRUED, UNUSED PERSONAL AND SICK DAYS UPON THEIR SEPARATION FROM EMPLOYMENT"

REALITY: Employers do not have to provide employees with severance pay, holiday pay, or payment for accrued and unused sick or personal days.

A. The Illinois Wage Payment and Collection Act ("IWPCA")

1. The IWPCA governs the payment of wages to employees and the deductions that an employer can make from an employee's paycheck.

2. The IWPCA provides that, “all final compensation, including bonus payments, vacation pay, wages, and commissions must be paid” by the next regularly scheduled payday following an employee’s separation from employment.

3. Unless otherwise provided for in an employer’s policies, employment contract, other agreement, or statute, an employee is not entitled to severance pay, holiday pay, or payment for accrued and unused sick or personal days.

B. The Illinois Employee Sick Leave Act (“IESLA”)

1. Effective January 1, 2017, but does not require payout for unused sick time.

2. The IESLA provides that employees may use personal sick leave benefits provided by the employer for absences due to illnesses, injuries, or medical appointments of certain family members on the same terms upon which the employee is able to use personal sick leave benefits for the employee's own illness or injury.

   a. Covered family members are the employee's child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent.

3. An employer may request written verification of the employee's absence from a health care professional if such verification is required under the employer's employment benefit plan or paid time off policy.

4. An employer may limit the use of personal sick leave due to family members’ illnesses, injuries, or medical appointments to an amount not less than the personal sick leave that would be earned or accrued during six months at the employee's then current rate of entitlement (or half of the employee’s maximum annual grant if sick leave benefits are based on years of service).

5. The IESLA does not prevent employers from offering sick leave benefits above and beyond what the Act requires, and it does not extend the maximum period of FMLA leave to which an employee is entitled, regardless of whether the employee receives sick leave compensation during that leave.

6. The IESLA also prohibits retaliation against employees who use or attempt to use personal sick leave benefits, file a complaint with the IDOL or allege a violation of the Act, cooperate in an investigation or prosecution of an alleged violation of the Act, or oppose any policy or practice or act that is prohibited by the Act.

MYTH: “USE IT OR LOSE IT VACATION POLICIES ARE NO LONGER LAWFUL”

REALITY: Employers may have "use it or lose it" vacation policies as long as employees have (1) notice of such policy and (2) a reasonable time to use vacation days.

A. The IWPCA and Vacation Policies

1. Section 5 of the IWPCA states that "no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation."

2. Accordingly, terminated employees (and those who otherwise separated from employment) must be paid for earned, but unused vacation days.

3. Employers may continue to require that vacation days be taken or lost, provided (1) the employer allows a reasonable amount of time for the employee to take the vacation days and (2) the employee has notice of the contract or policy.

B. Recent Changes to the Illinois Department of Labor Regulations Do Not Alter the IWPCA in this Regard

1. Pursuant to Section 300.520(e) of the regulations, "an employment contract or an employer's policy may require an employee to take vacation by a certain date or lose the vacation, provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of the contract or policy provision."

    a. Therefore, "use it or lose it" vacation policies that require an employee to use vacation by a certain date are expressly permitted.

    b. However, an employer's policies or contract must clearly state this restriction, set a clear fixed end date for use of vacation, and provide the employee with a reasonable opportunity to take their accrued vacation days prior to the end date that would trigger the loss of their remaining vacation days.

2. Pursuant to Section 300.520(h), "an employer cannot effectuate a forfeiture of earned vacation by a written employment policy or practice of the employer."

    a. Therefore, an employer may not implement a policy that states that an employee will forfeit all accrued, unused vacation upon their separation from employment.

    b. An employer is required to pay the monetary equivalent of all earned and unused vacation to an employee upon their separation, pursuant to the requirements of the IWPCA as outlined above.

3. See *Vacation FAQs*, issued by the Illinois Dept. of Labor (Appendix 4).

C. Note for those Employees Participating in IMRF

1. The Illinois Municipal Retirement Fund has, in the past, treated accrued sick time and vacation time payments to retirees as pension "spikes" and has required local governments to make an additional payment to IMRF to cover those earnings.

2. However, Public Act 100-0411, which took effect August 25, 2017, has corrected the problem with regard to payments of unused vacation time. The Act amends the Pension Code to exclude payments of unused vacation time made in the final 3 months of the final rate of earning period in determining any assessment to the unit of local government for "spiking" payments.

3. Additionally, with regard to sick time, any accrued sick leave payments made after 30 days of an employee's retirement does not have to be reported to IMRF as earnings.

MYTH: "STATE AND FEDERAL LAW REQUIRES EMPLOYERS TO PROVIDE EMPLOYEES WITH LUNCH AND REST BREAKS"

REALITY: State law, in certain circumstances, requires one lunch break, which, under federal law, must be paid if it is under 20 minutes.

A. The Illinois One Day Rest in Seven Act

1. Pursuant to Section 3 of the Act, employers are required to provide employees who work a minimum of 7 ½ hours per shift an unpaid 20-minute break no later than 5 hours into the shift. 820 ILCS 140/3.

2. Neither state nor federal law require other rest periods, including morning and afternoon breaks.

3. Does not apply to employees who monitor individuals with developmental disabilities and/or mental illness, and who, in the course of those duties, are required to be on call during an entire 8 hour work period (but those employees must be permitted to eat a meal during the 8 hour work period while continuing to monitor those individuals).

B. Supplement with FLSA Regulations

1. Rest periods of 5-20 minutes must be counted as hours worked, paid as working time, and may not be offset against other working time.

2. However, "bona fide meal periods" are not working time and are thus not compensable. 29 CFR § 785.19. For a break to constitute a bona fide meal period, the employee must be "completely relieved of duty for the purpose of eating regular meals." The employee is not relieved of duty if he or she is required to perform any duties, including passive activities such as sitting by a telephone.

3. In order to accomplish this, employers should require employees to eat meals away from their work areas, and refrain from calling employees back to duty during meal breaks or other “off the clock” rest breaks. Employees who “volunteer” to work through meal breaks should either be prohibited from doing so or paid for their time, so as to avoid claims for unpaid wages and overtime. If the employee performs any work during the meal period, the entire period becomes compensable.

4. As a general rule, bona fide meal periods must be 30 minutes or longer. For a shorter meal period to be non-compensable, several conditions must be satisfied:

    a. Work-related interruptions must be intermittent and minimal;

    b. The length of the period must be sufficient “to eat a regular meal at a time of day when meals are normally consumed;”

    c. The employer and employee have an agreement that the time given is sufficient to consume a regular meal; and

    d. The arrangement does not violate state or local laws.

5. In light of FLSA regulations, the safest course of action for employers is to compensate employees for meal periods less than 30 minutes.

PART 4: RECENT FMLA AND ADA DEVELOPMENTS

A. FMLA

1. An employee's unusual or abnormal behavior may place an employer on notice that the employee may have a condition qualifying for FMLA leave. *Valdivia v. Twp. High Sch. Dist. 214*, 16 C 10333, 2017 WL 2114965 (N.D. Ill. May 15, 2017).

   a. Plaintiff Noemi Valdivia became extremely distraught and began crying uncontrollably at work after hearing several derogatory remarks at work. Valdivia approached her supervisor while crying uncontrollably and explained that she was confused and overwhelmed, she had not slept in weeks, had not been eating, and was losing weight. Her supervisor responded by asking whether she was going to resign or continue working. Valdivia issued a resignation letter "due to medical reasons." She attempted to rescind her letter of resignation, but was told that her replacement had already been hired. Less than two weeks later, Valdivia was hospitalized for four days for depression, anxiety disorder, and insomnia.

   b. The U.S. District Court for the Northern District of Illinois held that "clear abnormalities in the employee's behavior may constitute constructive notice of a serious health condition." Valdivia's allegations regarding her regular uncontrollable crying at work, and her comments that she was overwhelmed, afraid, not sleeping or eating, and unsure if she could continue to work were sufficient to plausibly allege that the employer had adequate notice that she had a serious medical condition that would qualify for FMLA leave and interfered with her FMLA rights by failing to provide her with notice that she had a right to take job-protected FMLA leave.

   c. Best Practices for Compliance

      i. An employee's unusual or abnormal behavior in the workplace may be sufficient to place an employer on notice that the employee may have a condition which qualifies him/her for FMLA leave, thereby triggering the employer's obligation to notify the employee of his/her eligibility and rights under the FMLA.

      ii. Note that an employee must still submit medical certification to support the need for FMLA leave.

      iv. If faced with an employee who displays abnormal behavior, observable changes in their physical or mental condition, or uncharacteristic or unusual conduct, consult legal counsel to discuss potential compliance obligations under the FMLA and the ADA.

2. Granting an employee FMLA unpaid leave, but not paid leave, is not a "retaliatory adverse action" when the employer acts in accordance with its usual FMLA policies and procedures. *Freelain v. Village of Oak Park*, Case No. 16-4074 (7th Cir. Dec. 6, 2017).

    a. Plaintiff Rasul Freelain claimed he suffered migraines, sleeplessness, and stress due to sexual harassment he encountered at work. Freelain took several weeks to recover, exhausting his paid sick leave days. After returning to work, his wife was diagnosed with cancer. Freelain took several intermittent unpaid FMLA leave days to assist his wife to doctor's appointments, as he did not have any remaining paid sick leave days. Freelain argued that his earlier sick leave should not have been deducted from his sick leave balance because his injuries were due to the working environment, in accordance with the employer's administrative leave policy. His employer ultimately agreed and reimbursed his sick leave balance, although it took several months to do so. Freelain alleged that his employer retaliated against him for exercising his rights to leave under both the ADA and the FMLA.

    b. The U.S. Court of Appeals for the Seventh Circuit denied Freelain's ADA and FMLA retaliation claim, holding: "granting an employee's FMLA rights to unpaid leave consistent with the statute's explicit terms cannot constitute a retaliatory adverse action under the FMLA itself . . . at least without evidence that the employer deviated from its normal paid leave practices and targeted him for unpaid leave because he asserted his statutory rights." Because the FMLA only guarantees unpaid leave, "a reasonable worker would not be dissuaded from using FMLA on the pain of losing sick days." Therefore, the fact that Freelain's FMLA leave was unpaid could not constitute a retaliatory adverse action.

    c. Best Practices for Compliance

        i. While employers are not required to grant employees paid FMLA leave, employers should nonetheless be sure to follow their usual policies and procedures.

        ii. Should an employer refuse to allow an employee to use paid leave days during an FMLA leave but allow others to do the same, a court may infer that the employer has engaged in a retaliatory adverse action in violation of the FMLA's anti-retaliation provision.

3. An employee could not show her employer committed a "willful" FMLA violation to trigger the extended three-year statute of limitations period. *Sampra v. United States Dept. of Transportation*, Case No. 17-2621 (7th Cir. April 24, 2018).

    a. Plaintiff Sara Sampra was an FAA field officer at Midway Airport in Chicago, in which she worked daytime hours. Although Sampra's

job description stated field work required up to 100% travel, she spent nearly all her time in the office reviewing and authorizing project proposals. Sampra took a three-month FMLA leave. While she was on leave, the supervisor who had given her a desk assignment was transferred to a new department. Upon Sampra's return, her new supervisor determined that he would assign Sampra's desk duties to himself and assigned her to an overnight field project at Chicago's O'Hare Airport. Given her new assignment to overnight field work, Sampra claimed her employer violated the FMLA by failing to return her to a position equivalent to the position she held before taking FMLA leave.

b. The U.S. Court of Appeals for the Seventh Circuit dismissed Sampra's claims, holding she failed to file her complaint within the FMLA's two-year statute of limitations period. Although the FMLA provides an extended three-year statute of limitations period for "willful" violations, the court held Sampra failed to provide any evidence suggesting her employer willfully violated the FMLA. The court applied the *Fair Labor Standards Act's* definition of "willful" to mean where "the employer must have known that, or shown reckless disregard for whether, its conduct was prohibited by the statute." Here, Sampra did not provide evidence showing that her supervisor either knew his conduct would violate the FMLA or showed reckless disregard.

c. The court also held that, while the supervisor knew the FMLA "was in the picture," such knowledge is not sufficient to show willfulness. Instead, the supervisor believed he was complying with the FMLA when he restored Sampra to the same job title and pay she had before taking FMLA leave. The court noted that, at worst, the supervisor may have acted negligently when he failed to consult the FMLA regulations.

d. Best Practices for Compliance

i. While knowledge of the FMLA's general existence is insufficient to show an employer "willfully" violated the FMLA, thus defeating the extended three-year statute of limitations period, employers should be cognizant of FMLA regulations when evaluating an employee's request for leave.

ii. A FMLA violation that is not "willful" still may be filed within the two-year statute of limitations period.

B. ADA

1. The ADA is not a medical leave entitlement. *Severson v. Heartland Woodcraft, Inc.*, 14-C-1141, 2015 WL 7113390 (E.D. Wis. Nov. 12, 2015), aff'd, 15-3754, 2017 WL 4160849 (7th Cir. Sept. 20, 2017).

a. Plaintiff Raymond Severson took a 12-week medical leave under the FMLA to deal with serious back pain. On the last day of his leave, he underwent back surgery, which required that he remain off work for another two or three months. Severson asked his employer to continue his medical leave, but by then he had exhausted his FMLA entitlement. The employer denied his request and terminated his employment.

b. The U.S. Court of Appeals for the Seventh Circuit held the termination did not violate the ADA. The court reasoned: "[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement." The ADA forbids discrimination against a "qualified individual on the basis of disability." A "qualified individual" with a disability is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position." The term is expressly limited to measures that will enable the employee to work. The court found that an employee who needs long-term medical leave *cannot* work and thus is not a "qualified individual."

c. Best Practices for Compliance

i. Medical leave spanning multiple months may prevent an employee from establishing that they can perform the essential functions of their job. Thus, the employee would not be entitled to the protections afforded by the ADA.

ii. Employee requests for medical leave or other accommodations should still be evaluated on a case-by-case basis. Employers should engage in the interactive process obligations under the ADA to determine whether the request for leave is reasonable and/or if another, alternative accommodation may be appropriate.

2. An employee's request for 12 months of leave in addition to the five months of short-term disability leave already taken may not be a facially reasonable request. *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017).

a. Plaintiff Taymari Delgado Echevarría was diagnosed with a brain tumor, severe depression, and extreme anxiety. Her doctor recommended that she stop working. After taking an approved five-month leave of absence using short-term disability program, Echevarría requested an additional 12 months of leave. Her employer determined that her medical documentation did not support continuation of her disability benefits and terminated her employment.

b. The U.S. Court of Appeals for the First Circuit found that the "sheer length" of Echevarría's leave extension request, when coupled with the five-month leave she had already been provided, "jumps off the page" as unreasonable. Assuming Echevarría was a qualified

individual under the ADA, compliance with a request for such "a lengthy period" of medical leave imposes obvious burdens on an employer.

c. Best Practices for Compliance

i. A long or open-ended request for medical leave (especially after an initial period of leave) may be unreasonable on its face.

ii. However, the ADA requires that employee accommodation requests be evaluated individually, and there is no bright-line rule for assessing reasonableness.

3. An employee's vague medical documentation regarding the need for continued leave may be insufficient to show they could perform their job duties with or without a reasonable accommodation. *Whitaker v. Wisconsin Dep't of Health Services,* 849 F.3d 681 (7th Cir. 2017).

a. Plaintiff Joyce Whitaker filed a disability form with her employer seeking an accommodation for chronic back pain after several consecutive FMLA leaves of absence. Whitaker exhausted her available FMLA leave, as well as a 30-day unpaid leave to care for her father and for her own personal illness. Her employer informed her that if she failed to return to work upon the conclusion of the 30-day leave, the termination process would begin. Whitaker did not return to work on her expected date, but she did submit notes from her doctor requesting additional time off for medical leave. The notes did not provide any detail on her condition, her course of treatment, or the likelihood of her recovery. Whitaker was then terminated.

b. The U.S. Court of Appeals for the Seventh Circuit held Whitaker failed to provide evidence that she could perform the essential functions of her position with or without an accommodation. Whitaker's position required regular attendance, and she did not offer any evidence regarding the effectiveness of her course of treatment or the medical likelihood of her recovery. Furthermore, the medical documentation did not provide sufficient evidence to show that had the Department given her additional unpaid leave, she would have been able to return to work on a regular basis.

c. Best Practices for Compliance

i. Treat all employee requests for medical leave as a request for a reasonable accommodation (unless first eligible for leave under the FMLA).

ii. If an employee's request cannot be granted under the FMLA or the employer's leave program, promptly engage in the ADA interactive process to determine the feasibility of

providing the leave as a reasonable accommodation without causing an undue hardship. Seek clarification or more information necessary to make an informed decision.

iii. If an employee requests an extension of a leave of absence, employers should request additional information supporting the need for leave.

iv. Employers may ask the employee's health care provider to respond to questions designed to enable the employer to understand: 1) the need for leave; 2) the amount and type of leave required; and 3) whether reasonable accommodations other than (or in addition to) leave may be effective for the employee.

4. An employer's interactive process to identify a reasonable accommodation may defeat a claim of ADA discrimination and retaliation. *Brown v. Milwaukee Bd. of Sch. Directors*, 855 F.3d 818 (7th Cir. 2017).

a. Plaintiff Sherlyn Brown, a school principal, underwent knee surgery and claimed she could not be in the vicinity of "potentially unruly students" for several years. The school district worked with Brown to identify a possible new position, but many were unsuitable because they required being in the vicinity of "potentially unruly students." As Brown neared the end of a three-year leave of absence, the school district provided her doctor a list and asked for an update on her restrictions. In response, her physician explained that Brown "should not be put in a position where she is responsible for monitoring and controlling students that may become uncontrollable." Having determined that Brown could not perform the essential functions of any available position, and that the only possible position would have constituted a promotion, the school district terminated her employment.

b. The U.S. Court of Appeals for the Seventh Circuit held Brown did not provide sufficient information to assist the school district in accommodating her broad request for an accommodation. Ultimately, after several years of leave, it was not possible to accommodate her work restriction. The court also held an employer does not have to accommodate a disabled employee by promoting him/her to a higher level position. In the case of a promotion, an employer can hire the most qualified candidate.

c. Best Practices for Compliance

i. An employer should consistently communicate its understanding of an employee's work restrictions through the ADA interactive process and evaluate possible reasonable accommodations.

ii. The ADA interactive process may continue even after an initial request for leave has been granted.

iii. When presented with ambiguous or contradictory information supporting the need for an accommodation, an employer should seek clarification to ensure its understanding of the restriction.

PART 5: LEAVE SCENARIOS

Scenario 1

Barb Lahey is the Business Manager at the Sunnyvale Fire Department. Last year, she sustained a serious and permanent back injury in a car accident traveling between two of the Village's locations. Barb requested and was granted workers' compensation benefits.

a. Is Barb eligible for FMLA leave?

b. If so, how should the Village proceed in processing her request?

c. Can the Village require Barb use her PTO while on FMLA leave?

At the end of Barb's FMLA leave, she was still unable to return to work. Barb submitted a request for an extra 2 weeks of leave so that she could complete her physical therapy sessions recommended by her doctor. Barb's request was accompanied by a doctor's note that stated after these additional two weeks, Liz would be able to return to work without restrictions.

d. Is the Village required to grant Barb's request for an extra 2 weeks of leave?

e. When Barb returns after her 14 weeks of leave, can the Village assign her to a Business Assistant position?

After the additional two weeks of leave, Barb submits yet another request for additional leave. Barb's request is accompanied by a note from her doctor stating that Barb is still experiencing pain, and is unable to return to work. Barb's doctor states that she will be re-examined in three months to determine whether she will be able to return to work.

f. Is the Village required to grant Barb's second request for additional leave?

g. How should the Village respond to Barb's second request?

Scenario 2

Richard Christy is a firefighter for the Bloomfield Township Fire Department. Richard was seriously injured when his ex-boyfriend, in a jealous rage, tried to run Richard over with their car. Bloomfield Township has a five-week paid personal leave policy for its firefighters and a Township policy providing for indefinite unpaid personal leave.

a. If Richard tells the Township that he needs to be off work as a result of his injuries for three months, what should the Township advise him about his rights to leave? What kind of leave is Richard entitled to? How much leave is he entitled to?

b. What kind of documentation of the need for leave can the Township insist that Richard provide?

After three months, Richard's body has recovered but, unfortunately, he is now abusing prescription pain killers and he wants to seek out-patient treatment for substance abuse. He tells the Township that now he wants his five weeks paid personal leave.

c. Is substance abuse be considered a serious health condition for FMLA purposes?

d. Can Bloomfield Township tell Richard that his paid leave ran concurrently with his initial three months of leave?

e. Does your answer change if Richard has short-term disability insurance which provides him with benefits during the first three months off?

Eventually, Richard uses up his statutory leave and goes on indefinite unpaid personal leave pursuant to the Township's policy. After thirteen months, Richard has still not returned and the Township wants to terminate his employment.

f. Can the Township proceed to terminate Richard?

The Township now receives an anonymous call saying that Richard hurt himself in a single car drunk driving incident and that the story about being abused by his boyfriend is pure fiction.

g. What should the Township do with this information?

h. If the Township decides that its indefinite unpaid leave policy is too burdensome, can it eliminate the policy? What impact would that have on Richard?

Scenario 3

Jim Alvon is a custodian for the Village. While cleaning floors one day, Jim is blinded in one eye when a bleach bottle explodes. Jim requires leave to recover from his injuries.

a. What kind of leave is Jim entitled to?

b. What are Jim's obligations to the Village with regard to or during his leave?

c. What if the Village was just about to terminate Jim's employment for poor performance, and, in fact, the very morning that Jim was injured, his supervisor, Hal, met with Human Resources to discuss the procedure for meeting with Jim and advising him that he was being discharged? Can the Village proceed with the termination even though Jim is off work on leave as a result of his accident? Why or why not?

The Village decides not to terminate Jim and he eventually returns to work. One day, several weeks after Jim's return to work, Jim's supervisor, Hal, visits the night shift where Jim works and finds Jim's partner working while Jim stands around. When questioned, Jim says he cannot do his job any more.

Hal asks Jim to bring in a doctor's note explaining his limitations, but Jim does not get around to it for several weeks. When he does, the doctor's note is vague and says only that Jim is unable to work "custodian jobs" and should "be careful around cleaning solvent." Hal sets up a meeting with the HR Manager for Hal and Jim to explore the job duties Jim can perform and what the Village can do to enable Jim to do his job. Jim cancels the first meeting. The meeting is rescheduled and Jim no shows.

Jim hasn't worked in a month now. Hal wants to replace Jim. The Village is worried, though, because it has learned that Jim has hired a lawyer to represent him in litigation against the Village.

d. What kind of leave is Jim on now?

e. Does your answer change if Jim still has two weeks of FMLA leave left?

f. Is the Village harassing Jim by setting up the meeting with him? After all, hadn't Jim already provided a doctor's note?

After not working for a full month, Jim shows up at work one day and says he is ready to return to his job.

g. How should the Village respond to Jim's appearance at work? What are the Village's options?

Scenario 4

Adam Andrews is a secretary for the Rochester Hills Fire Department. Andrews was diagnosed with carpal tunnel syndrome, which he claims resulted from the typing he does in connection with his job. Andrews takes eight weeks off for carpal tunnel surgery and recuperation.

While Andrews is off on leave, the Department where Andrews works is badly damaged by fire. The Village lays off most of the office staff from the Department, although some staff are transferred to other buildings. Andrews is not one of those lucky staff members transferred.

Andrews now claims that he was discriminated against on the basis of his disability and retaliated against for having filed a workers' compensation claim. Furthermore, he says he was on FMLA leave at the time of his termination, so he is entitled to his position or an equivalent position now that he wants to return to work.

a. What kind of leave was Andrews on?

b. Does the fact that Andrews was on leave at the time of the layoff mean that his termination violated any laws (FMLA, workers' compensation, Americans with Disabilities Act)? Why or why not?

c. Is the fact that Andrews was not transferred to another center evidence of illegal conduct by the Village?

Suppose the Mayor learns that Andrews' supervisor, the Fire Chief, told Andrews before he went on leave not to file a workers' compensation claim because the Village does not like employees who do that and cannot afford it anyway.

d. Does this mean that the Village must exempt Andrews from the layoff?

Scenario 5

Jessica is a battalion chief at the Waterview Fire Department. This year, the Department is rolling out brand new procedures which Jessica has been intimately involved with planning

Jessica has recently learned she's pregnant with her first child and unfortunately for her, this has been a very difficult pregnancy. During the second trimester, she began suffering from severe sciatica. She informed her supervisor, who was sympathetic to her situation, but has no idea what he can do for her. Jessica is hesitant to take any time off because of the priority placed on the new procedures, so she requests that she be given a standing desk.

a. Is the Department required to provide Jessica with a standing desk?

Jessica remains at work, however the standing desk does not alleviate her pain. Jessica is noticeably uncomfortable at work and, in an effort to help Jessica, her supervisor Andy calls Jessica into his office and tells her to take two weeks of leave to help get treatment for her sciatica. Jessica declines Andy's offer, but Andy insists and instructs Jessica not to show up to work the next day.

b. Did Andy act properly in that situation?

c. How could Andy have better handled that situation?

Jessica eventually does take FMLA leave the week before the birth of her child. While Jessica is gone, the Department hires Erin, a long time battalion chief to take over implementation of the plan. Erin does an absolutely incredible job of promoting and developing the new procedures. Andy is so impressed with Erin that he would like to keep her on as a battalion chief with the Department when Jessica returns. In order to make this work with the Department's budget it would require Jessica to take a 15% pay cut. Further, Jessica's job duties would be split evenly between her and Erin.

d. Can Jessica's available PTO run concurrently with her unpaid FMLA leave?

e. Can the Park District require Jessica to take a pay cut and share duties upon her return?

While conducting an audit of its personnel records, the Department discovers it never designated Jessica's leave as FMLA leave.

f. Can the Department make that designation six months later?

Jessica resigns her employment and requests pay for her remaining unused vacation and sick leave days.

g. How should the Department respond?