

# EMPLOYMENT LAW UPDATE

2014

HOLLAND & HART<sup>LLP</sup>



TM

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FMLA Family Feud

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# Speakers

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# Scenario One

**Math Is Hard!**



# Counting Amount of FMLA Leave Used

- Pretty simple when an employee works a “regular” workweek or uses leave in weeklong increments
- Can be difficult when employee’s schedule is irregular and use of leave is intermittent



# Bob the Team Leader

- Best Games graphics development team
- Supervises team and is exempt under FLSA
- Hours of work vary from week to week
  - Average 50 hours/week (8:00am – 6:00pm – works through lunch)
  - Sometimes 60 hours/week if important project deadline approaching





# Migraines and Missed Work

- Bob suffers from migraines
- Took 3 weeks of FMLA in June for inpatient treatment
- Returned to work but has used FMLA intermittently
  - Unpredictable – usually 20 hours leave per episode
  - Over past 8 weeks, has missed 160 hours (but not during busy weeks leading up to project deadlines)
- Best Games uses a “rolling” 12-month period





# Your Boss Wants to Know . . .

- How much FMLA Bob has left “before we can fire him?”



## Consider . . .

- What steps do you need to take to calculate the amount of leave Bob has used?
- If Bob continues to use intermittent leave at the same pace, when will he exhaust his FMLA leave bank?



# This Makes My Head Hurt!

- Entitled to 12 weeks of FMLA
  - 29 C.F.R. § 825.200
- Actual workweek is basis of leave entitlement
  - 29 C.F.R. § 825.205(b)(1)
- If schedule varies from week to week and employer can't determine how many hours employee would have worked, use weekly average of hours scheduled over past 12 months
  - 29 C.F.R. § 825.205(b)(3)



# Common Mistakes

- Automatically setting FMLA leave bank at 480 hours (12 weeks X 40 hours)
- When Bob misses 20 hours, can't assume he's used  $\frac{1}{2}$  week of FMLA
- When Bob misses 160 hours, can't assume he's used 4 weeks of FMLA



# You Do The Math!

- 3 weeks for inpatient treatment in June
- 160 hours during regular (non-busy) 50-hour workweeks ( $160/50 = 3.2$  workweeks)
- Total so far = 6.2 weeks
- Has 5.8 workweeks remaining (290 hours if regular workweeks or roughly 350 hours if busy workweeks)
- If Bob continues to take average of 20 hours/week, he'll will run out of FMLA in about 3 ½ months (14.5 weeks)



## Scenario Two

**No Ring? No Problem!**



## Juan and Thad

- Juan requests FMLA leave to care for partner's son, Charlie.
- Juan is in same-sex relationship with Thad, but no indication they are married.
- They live as a family, sharing parenting and financial responsibilities.
- Charlie is seven and has Crohn's disease.
- Thad's job requires travel.
- Juan needs leave to care for Charlie.





# Same-Sex Relationship Without Marriage

Does the fact that Juan and Thad are not married disqualify Juan from FMLA leave for this purpose?



Photo: Sarah Dixley



## Relationship to Child

- No. Answer turns on whether Juan is *in loco parentis* relationship with Charlie.
- Department of Labor recognizes eligibility of same-sex partners (whether married or not) to take leave to care for a partner's child provided they meet *in loco parentis* requirement.



## ***In Loco Parentis***

- Refers to someone with day-to-day responsibilities to care for or financially support child.
- Factors include:
  - age of child;
  - degree to which child is dependent on person;
  - amount of financial support provided;
  - extent to which duties commonly associated with parenthood are exercised.
- FMLA does not restrict number of parents a child may have.



## Lack of Legal Obligation

Does the fact that Juan is not a biological or adoptive parent of Charlie, and is not legally obligated for Charlie's care, disqualify Juan for FMLA leave for this purpose?



## What If No Legal Obligation?

**No. Answer does not ride on legal obligation, but rather depends on facts, such as day-to-day care or financial support.**



# Shared Custody



**Charlie's mother, who still shares custody with Thad, lives four blocks from Juan and Thad. Would Juan be entitled to leave to take care of Charlie during periods when Charlie is in his mother's custody?**





# What If Charlie's Mother Has Joint Custody?

Yes. The FMLA allows an employee time off needed to care for a family member. This includes a situation where an employee may be needed to substitute for others who normally care for the family member.





# Certifications/Documentation

What certifications or documentation can an employer request to confirm Juan's relationship with Charlie?



## Certifications/Documentation

- An employer may require the employee giving notice of need for leave to provide reasonable documentation or a statement of family relationship.
- This may take the form of a simple statement from the employee.



# Certifications/Documentation

What certifications or documentation can you request to confirm Charlie's serious health condition?

MEDICAL CENTER

NAME \_\_\_\_\_ AGE \_\_\_\_\_  
ADDRESS \_\_\_\_\_ DATE \_\_\_\_\_

Rx

\_\_\_\_\_  
SIGNATURE

LABEL  
REFILL 0 1 2 3 4 5 PRN NR



# Medical Certification

- **An employer may require medical certification from a health care provider that includes the following:**
  1. **Name, address, telephone number, and fax of health care provider and type of medical practice/specialization.**
  2. **Approximate date on which the serious health condition commenced and its probably duration.**
  3. **Statement or description of medical facts, including information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, and any referrals for evaluation or treatment.**
  4. **Frequency and duration of leave required.**
  5. **If an employee requests leave on an intermittent basis for planned medical treatment, information sufficient to establish the medical necessity for such intermittent leave and an estimate of dates and duration of treatments.**



## Scenario Three

**It's Déjà vu All Over Again!**



# Sally The Bookkeeper

- Bookkeeper/AP manager
- Spends-a-Lot Inc.
- Cube farm
- 8:00 to 5:00, rare OT
- Essential functions
  - Attention to detail
  - Problem solving
  - Communicating
  - Computer use



# Sally Misses A Lot of Work

- Intermittent leave for fibromyalgia and migraines
- Much more frequent last year
- Often last minute call-ins
- Only occasionally supported by doctor's note
- FMLA nearly gone
- CFO (Sally's boss) beginning to ask questions about options

AND

- You saw Sally at yoga class last week on a day she was on FMLA leave for fibromyalgia episode!





# Is Sally Abusing FMLA Leave?

- **Recertification?**
  - every 6 months
  - changed circumstances (frequency or duration)
  - Info casts doubt on stated reason or validity
- **Transfer to another position?**
- **Require her to substitute paid leave?**



## Is Sally Abusing FMLA Leave?

- **Second and third opinions?**
  - Employer selects doc, at employer's expense
  - If opinions conflict, must accept first opinion or agree to third opinion by doc jointly selected
  - Must attempt in good faith to reach agreement
  - Third opinion is binding
- **Fire her for abusing leave by going to yoga?**



## Scenario Four

**She's Baaaack!!!**



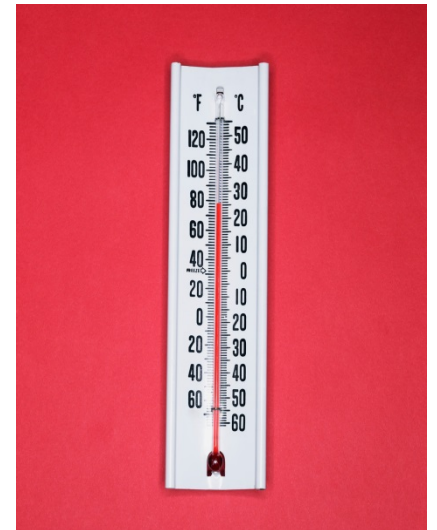
## **Sally Uses All Her FMLA Leave**

- You confronted Sally about yoga while on FMLA
- She then takes two weeks of FMLA to recover from episode of chronic fatigue
- Doctor preemptively issues certification to cover leave
- You are frustrated, but counting the days
- She returns to work on last day of FMLA leave



# Released to Return to Work, And . . .

- Needs accommodation:
  - Enclosed office due to stress caused by noise
  - Temperature in office must be 72 degrees +/- 2 year around
  - Incandescent, not fluorescent lighting
  - Time off every day, in addition to meal period, to attend therapeutic yoga classes



## What is Spends-A-Lot To Do?

- Accept the accommodations as reasonable and necessary!
- Keep Sally on leave while you assess?
  - Paid or unpaid?
- Additional questions to doctor
- Evaluation by specialist of employer choice
- Assess essential functions of position
- Assess reasonableness of the accommodation



**Thank You!**

**QUESTIONS?**

