

# *Does Anyone Come to Work Anymore?*

Balancing Employee Rights With Workplace Needs



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## *Presenter*



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The background is a dark green color with several abstract, light green shapes that resemble flowing liquid or smoke. These shapes are positioned in the upper right and lower left corners, creating a sense of movement and depth. The text is centered in the middle of the frame.

**What Do Employees Want?**

*As much leave as possible...preferably paid*



## ***But also...***

- The time off to care for their health needs and those of their family
- Job security when faced with emergencies
- Continued benefits
- Flexibility to take care of personal business

**What Do Employers Want (and Need)?**

## *Employers*

- A healthy, stable, productive workforce
- Happy employees (and bosses)
- Attorney avoidance – zero complaints or lawsuits



# Employers Rights to Leave



## *Sources of Rights*

- Employer policies
- State law
- Federal law

## *Employer Policies*

- No required leave in West Virginia for private employers
- The terms and conditions of any leave provided must clearly define the terms and conditions of how the benefits are earned and paid. WV Code section 21-5-9(3)

## *State Laws*

- West Virginia Human Rights Act
- Legislature and public service leave
- Volunteer firefighter and emergency medical service leave
- Civil air patrol leave
- Workers' compensation

## ***West Virginia State and Local Government Employees***

- State employees have rights to annual leave, court, jury, and hearing leave, holidays, and sick leave, plus paid leave for organ donation
- All government employees may also earn compensatory time
- Special leave rules for paid firefighters

## *Federally-Mandated Leave*

- Family Medical Leave Act (FMLA) (including intermittent leave)
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- The Americans with Disabilities Act (ADA)
- Pregnant Workers Fairness Act (PWFA)
- Special circumstances: (like COVID-19)
- Federal contractors – paid sick leave

## **FMLA**

- Are you a covered employer?
- Is the employee eligible?
- How much leave is available?
- Paid or unpaid (or both)?
- What about other sources of leave?

## *Other Rights*

- To be advised of the consequences of noncompliance with requests for documentation, recertification, or second or third opinions

## *Covered Employers*

- All public agencies – local, state, federal, and schools
- Private employers with 50 or more employees for at least 20 work weeks in the current or prior calendar year, including joint employers and successors



## *Eligible Employee*

- Employed for at least 12 months
- Worked 1,250 hours in the prior 12 months (not counting vacation, sick, or PTO)
- At a worksite with 50 employees within 75 miles

## *Employees' Rights – FMLA*

- Can refuse to sign a medical authorization
- Job restoration
- Intermittent leave or reduced leave schedule

## *Employees' Rights Under the ADA*

- A reasonable accommodation but not necessarily the preferred one
- Engagement in the interactive process
- Not required to provide medical records
- Illegal drug use is not an accommodation

## *ADA Coverage*

- All employers with 15 or more employees
- State and local government regardless of the number of employees
- All employment practices
- Under the ADA, disability is easier to establish

## ***Pregnant Work Fairness Act***

- Employers with 15 or more employees
- Interactive process required
- Cannot require leave if another accommodation allows an employee to work
- Leave may be a reasonable accommodation
- Permits only limited inquiries as for the need for accommodation permitted
- Employee does NOT have to be able to perform the essential functions of the job to be accommodated
- Accommodations are “temporary”

# Employers' Rights

## *Review Your Policies*

- Check your policies to make sure they indicate whether or not an employer can accrue leave while on paid or unpaid leave, like workers' compensation
- Set forth expectations for payment of employee contributions for benefits during absences, paid and unpaid

## *Creating Policies*

- Employers decide what types of leave to provide, how much and how leave is accrued, how it is used, if it can be carried over from year to year, and whether and to what extent employees will be paid for accrued leave upon separation from employment
- Options: Vacation, sick, paid time off, bereavement, pet bereavement, birthdays



## *Creating Policies (cont.)*

- More terms to consider:
  - Call out procedures and job abandonment
  - Requiring documentation of absences for medical reasons
  - Proof of jury duty
  - Advance notice for the use of paid leave

## *Enforcement of Policies*

- You have policies – FOLLOW and ENFORCE THEM CONSISTENTLY
- If you require doctor's notes for absences, make sure they are provided
- Watch for and address suspicious patterns of leave – employees who are “sick” on Fridays, Mondays, or before or after holidays
- Prohibit or restrict outside employment while on leave
- If vacation days require pre-approval, enforce this
- Enforce call-out procedures

## *Use Rights Provided by Law*

- Require documentation of the need for FMLA and ADA accommodations
- Request medical certification upon notice of the need for FMLA leave within 5 days or notice of leave
- 15 calendar days to obtain a medical certification for a serious medical condition
- 7 calendar days to cure deficiencies
- Second opinions (or third)(you pay)

## *Employers' FMLA Rights*

- To determine if the leave is paid or unpaid
- Whether the leave is concurrent with other available leave
- Require fitness for duty certification at the end of leave if required for similarly situated employees

## *Intermittent Leave*

- You decide whether to permit it for a healthy parent and child
- You can require an employee to schedule planned medical treatment to minimize disruptions at work
- Understand and hold employees accountable for terms of leave
- Request re-certification

## *Another Definition of FMLA?*

- Friday – Monday Leave Absences (FMLA)

## *Employers' Rights Under the ADA*

- Require applicants or employees to perform the essential functions of the job with or without accommodation
- Establish job requirements such as education and experience that are job-related
- Define the essential functions of the job
- Select an accommodation after engaging in the interactive process

## *Employers' Rights Under the ADA (cont.)*

- Refuse an accommodation that would be an undue hardship
- Job creation is not required
- Require a medical examination (sometimes)
- Request documentation from the employee's health care provider about the duration of need for accommodation and recommendations
- But fitness for duty may be a problem



## *Employers' Rights Under the PWFA*

- Can refuse accommodation that causes an undue hardship
- Accommodations must be reasonable
- Restricted rights to medical documentation

## *And What About...*

- Arrests/Criminal court appearances
- Domestic violence
- Personal legal issues – lawsuits or family law matters
- Inclement weather
- Educational leave

## *Leave As An Accommodation*

- There are limits
- Myers v. Hose, 50 F.3d 278 (4th Cir. 1995)(employer not required to provide time to cure a disability)
- But maybe not under the PWFA

## *Leave As An Accommodation (cont.)*

- n. In Syllabus Point 4 of *Haynes v. Rhone-Poulenc, Inc.*, 206 W.Va. 18, 31, 521 S.E.2d 331, 344 (1999), the West Virginia Supreme Court of Appeals held that under the WVHRA a "required reasonable accommodation may include a temporary leave of absence that does not impose an undue hardship upon an employer, for the purpose of recovery from or improvement of the disabling condition that gives rise to an [\*22] employee's temporary inability to perform the requirements of his or her job." The Court further explained that, in the context of the case before it, by "disabling condition" it referred to "a totally disabling medical condition of limited duration, so that following a temporary leave of absence for treatment and improvement, it is reasonably foreseeable that the plaintiff is likely to return to work." *Id.* at 344 n.17.
- [Wilson v. Sedgwick Claims Mgmt. Servs., 2013 U.S. Dist. LEXIS 164329, \\*21-22](#)

## *How Long is Too Long?*

- It is true that, "in some instances[,] additional medical leave may be a reasonable accommodation[,] " but "it is only reasonable where it is finite and will be reasonably likely to enable the employee to return to work." Kitchen, 552 F. Supp. 2d at 595 (internal quotations omitted); see also Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 465 (4th Cir. 2012) (recognizing an employer is not required "to give a disabled employee an indefinite period of time to correct a disabling condition that renders him unqualified."); Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) ("We therefore hold that reasonable accommodation [\*19] does not require the [defendant] to wait indefinitely for [plaintiff's] medical condition to be corrected. . . "); Haynes, 206 W. Va. at 31, n.17, 521 S.E.2d at 344, n.17 (explaining "by disabling condition, we refer to a totally disabling medical condition of limited duration, so that following a temporary leave of absence for treatment and improvement, it is reasonably foreseeable that the plaintiff is likely to be able to return to work.") (emphasis added).

## *How Long is Too Long? (cont.)*

- Inasmuch as Ms. Coffman's August 4, 2022, email failed to provide Nexstar with a definitive date upon which she could reasonably be expected to return to work, the Court concludes any additional period of unpaid leave -- especially after an additional three months of leave had already been provided -- would not have been a reasonable accommodation permitting Ms. Coffman to perform her essential job functions. *Coffman v. Nextstar Media, Inc.*, WVSD 2023)

## *Request for Leave Before Discipline*

- Employee is failing an improvement plan: Just before the final review meeting, the employee requests medical leave
- Should you go forward with the meeting?
- It depends...

## *Considerations*

- How good is your documentation of the employee's performance issues?
- Did you have any notice of the existence of a medical issue?
- Can your workplace function without the employee for the anticipated length of need?
- How risk-adverse are you?



**If you choose to wait...**

## *How Long Do We Have to Wait?*

- ...Fourth Circuit and Supreme Court precedent...provide[s] that the third element of causation for a prima facie case can be established if the "'temporal proximity between [\*17] an employer's knowledge of protected activity and an adverse employment action' was 'very close.'" ...While there is no bright line timeframe to establish causation for a prima facie case, the Fourth Circuit has held that a one-month period between the protected activity and an adverse employment action is sufficient to create a jury question regarding the causation prong of a prima facie case. See *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 247 (4th Cir. 2015)
- *Brooks v. Fast Change Lube & Oil Inc.*, 2022 U.S. Dist. LEXIS 96736, \*16-17

## Or When Can I Fire Him?

- provides that the third element of causation for a prima facie case can be established if the "'temporal proximity between [\*17] an employer's knowledge of protected activity and an adverse employment action' was 'very close.'" *Shields v. Fed. Express Corp.*, 120 Fed. Appx. 956 (4th Cir. 2005) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001)) (per curiam); see also *Yashenko*, 446 F.3d at 551. While there is no bright line timeframe to establish causation for a prima facie case, the Fourth Circuit has held that a one-month period between the protected activity and an adverse employment action is sufficient to create a jury question regarding the causation prong of a prima facie case. See *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 247 (4th Cir. 2015)
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## Abuse of Leave

- Secondary employment
- Vacation or social engagement
- Personal business

### About a Nurse



*"Nurse Barnes' winning excuse was original, well-written and believable, even though no one saw the alien ship that abducted her."*

## *Suspicion of Abuse of Leave*

- Gossip (sightings of employee)
- Social media
- Non-responsiveness to legitimate requests for information
- Surveillance? BE VERY CAREFUL

## So...

- Light duty?
- Restoration of position?
- Key employees?
- Paid and unpaid leave exhausted?

## ***Can You Contact an Employee on FMLA About Work Issues?***

- *Vess v. Scott Medical Corp.*



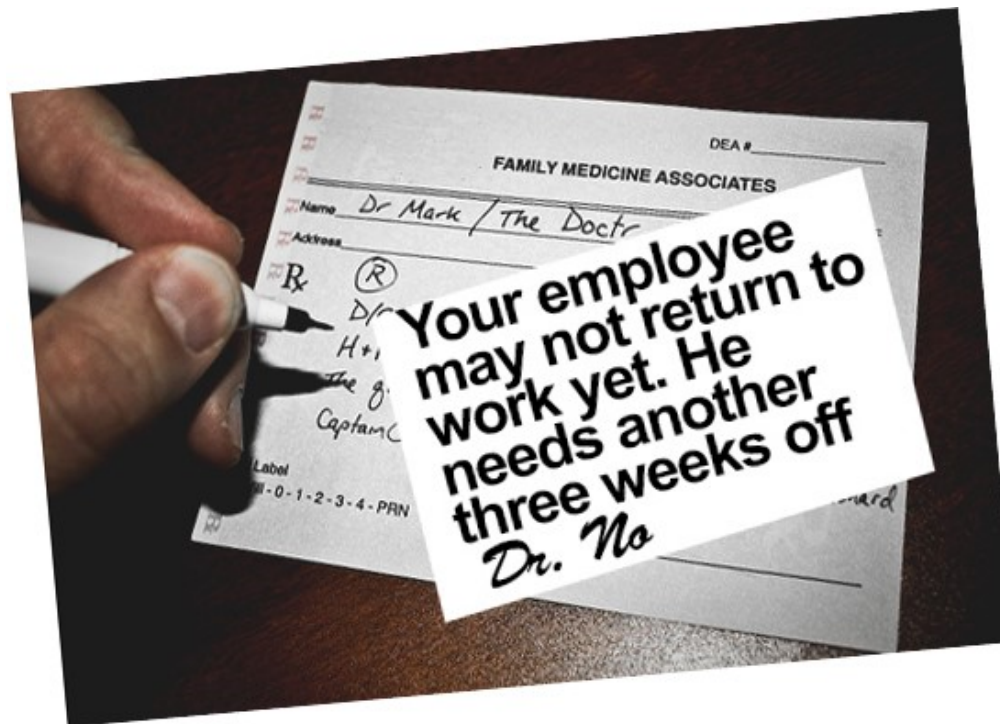
## ***Can you Require a Fitness for Duty Exam if an Employee off for a Psychiatric Condition Threatened his Coworker Prior to the Start of his Leave?***

- *Owusu-Ansa v. Coca-Cola Co.*





## FMLA's Over – Now What?



## *FMLA: Department of Labor (DOL) Resources*



## *The Government is Here...to Help?*

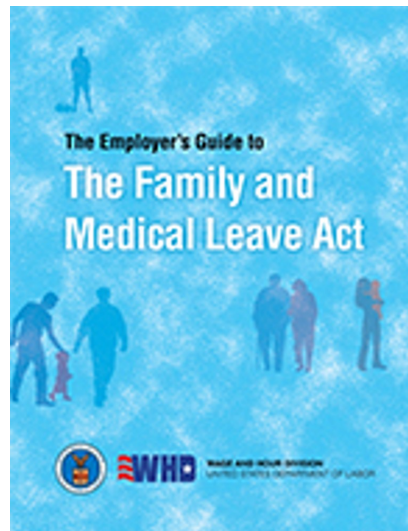
- In fiscal year 2023, the Wage and Hour Division [concluded 334 FMLA compliance actions with violations and recovered more than \\$987,000 in back wages](#) for 395 workers
- In fiscal year 2022, the Wage and Hour Division [investigated 780 FMLA complaints and recovered more than \\$870,000 in back wages](#) for violations ranked most significant



## *The Government Can Help*

- The U.S. Department of Labor has forms for:
  - Eligibility Notice – FMLA
  - Rights & Responsibilities Notice
  - Designation Notice
  - Certification forms of healthcare providers for serious health conditions (for both employees and employees' family member)
  - Certification of Military leave forms

## Government Resources



<https://www.dol.gov/agencies/whd/fmla/employer-guide>



## ***ADA Resources***

- The Job Accommodation Network:
  - <https://askjan.org/>
- Workplace Accommodation Toolkit
  - An A-to-Z list of disabilities and accommodations
  - Training – online and in person
  - A library of links to law, guides, sample policies, and checklists
  - Live chat or calls
  - AND – it's all free!

## *Advice*

- Run the FMLA clock down



## *Advice*

- Thoroughly document the reasons for the termination of any employee on FMLA or requesting or receiving an accommodation





## *Stay On Top of it!*

- Know your employee!
- Know your manager!
- Designate and document ALL FMLA-qualifying leave
- Keep leave records separate from personnel files
- Keep the leave chronology at your fingertips
- Keep consultation resources at your fingertips
- FML is almost never “stand-alone”
  - ADA, WC, STD, LTD, pre-existing issues

## *Advice*

- Undue Hardship
  - Fill vacancy immediately if you deny added leave on this basis



May you someday  
be as creative at work  
as you are with your  
excuse for not coming  
into work tomorrow.



somee cards



*Questions?*



## *Presenter*



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