

Employee Sick Leave: Developing, Implementing, and Enforcing Your Policy*

A. The Costs of Workplace Sick leave Abuse

Sick leave is considered to be a necessary benefit in most workplaces. Failure to provide sick leave would facilitate the spread of illness in the workplace, lowering productivity and morale. Despite the pressure for excellent attendance to improve client service and operating efficiencies, a well-conceived and administered sick leave program can augment job performance.

Some firms, however, experience an undue level of sick leave abuse by employees who manipulate and violate sick leave and attendance policies. It has also been reported that unscheduled absenteeism can cost up to an average of over \$600 per employee per year. This cost is exclusive of such “indirect costs” as overtime pay for co-workers, undue reliance on temporary personnel, missed deadlines, and diminished productivity. Determining if, when, and why employees exploit leave and time off is a fundamental point of inquiry. To that end, firm administrators should try to identify sick leave trends. For example, is sick leave usage higher on Mondays and/or Fridays, in particular departments, or among those who work for certain attorneys. Do particular attorneys ignore firm attendance policies? Do workplace practices or policies encourage absenteeism? Do children’s illnesses impact staff attendance? Finding the root causes of sick leave abuse facilitates the identification of a cure(s).

B. What is an Attendance Violation?

An essential component of any sick leave program is an effective policy governing attendance and tardiness. Examples of attendance policy violations may include the following:

- Any unexcused absence or tardiness.
- No-show(s)/no call(s).
- Repeated absenteeism and/or tardiness which exceed policy limits.
- Violation of “no fault” policies which limit the number of absences or tardiness incidents within a specified period.
- Unauthorized departure, including early departure.
- Failure to notify the designated contract person.
- Failure to provide adequate advance notice of absence or tardiness.
- Unauthorized breaks.
- Excessive breaks.
- Meal period abuse/failure to take a required meal break.
- Failure to duly report to work following an authorized leave of absence.
- Time recording violations.
- Failure to submit required medical certification(s).

* Note: This document does not purport to comprehensively address all pertinent legalities regarding sick leave, attendance, and related issues. Rather, this brief analysis is designed to provide accurate and authoritative information with regard to the subject matter covered. It is provided with the understanding that it does not constitute the rendering of legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Note further that this document may not be reproduced without permission of the author.

- Violation of sick leave or time off policies.
- Violation of leave of absence policies.
- Attendance "fraud."
- Overtime abuse.
- Failure to adhere to specified schedule.
- Insubordination related to attendance, etc.

C. Attendance and Punctuality "Rules of the Road"

An attendance and tardiness policy should, inter alia, address the following points:

- Regular and prompt attendance during all scheduled hours of work and at staff meetings is expected.
- Every employee is required to report for work each scheduled workday unless prevented by illness, disability, personal emergency, or unless the employee's absence has been pre-approved by his/her supervisor.
- If the employee cannot work as scheduled for legitimate reasons, such as illness or personal emergency, it is the employee's responsibility to personally and immediately notify the designated contact person as soon as the employee knows that (s)he will be absent, and to do so within the specified time frame.
- Specify the circumstances in which advance notice of absence or tardiness will be required.
- If the employee anticipates or knows that (s)he will be late, the employee must immediately advise the designated contact so that schedule adjustments can be made.
- The employee is responsible to personally speak with the designated contact or with an alternative designee.
- The employee must report to the designated contact each day of absence unless on an approved leave of absence or approved sick leave, and the designated contact is aware of the probable length of time off.
- In all cases of lateness or absence, the employee must be able to adequately explain the absence or lateness.
- Paid sick leave will not be provided without justification acceptable to the Company for that time off.
- Depending on the circumstances, the employee may be required to provide a firm-designated physician's statement, or other physician's statement acceptable to the firm in connection with any illness.
- A firm-approved or designated physician's release to return to work may also be required after any absence due to illness or injury.

- Any employee who fails to report for work without proper advance notification to the designated contact should be notified that (s)he is subject to separation from employment as a “voluntary quit” in the absence of an explanation acceptable to the firm.
- Employee use of leave under federal FMLA or DCFMLA will not be a negative factor in any employment action.
- Necessary reasonable accommodation will be provided to otherwise qualified employees with disabilities in terms of their need for leave and time off under the ADA, DCHRA, and other laws, as applicable.
- In the absence of statutory requirements, all absences, paid or unpaid, and tardiness, except in emergency circumstances which (in the firm’s sole discretion) were truly beyond the employee’s control, will be included as part of the employee’s attendance record and considered as an important factor in evaluating performance and qualification for rate increases, bonuses, and promotions.
- Any unexcused absence or tardiness, repeated absence or tardiness, abuse of firm policy regarding time off or leave of absence, any failure to give adequate timely advance notice of absence or lateness, or leaving work early without permission, as determined by the firm in its sole discretion to have been unacceptable, can result in disciplinary action, including the immediate termination of employment.

D. Approaches to Encouraging Appropriate Sick Leave Use

Companies employ a variety of strategies to encourage employees to use sick leave programs properly. Some companies utilize cash incentives or other benefits. The following are incentive statistics from the HR Center Personnel Program Inventory Survey, recently developed by the International Personnel Management Association (IPMA):

- 58 per cent cash out sick leave at retirement;
- 45 per cent offer cash or pay for unused sick leave;
- 33 per cent offer sick leave banks;
- 11 per cent convert sick leave to vacation time;
- 9 per cent convert sick leave to insurance at retirement;
- 3 per cent convert sick leave to disability insurance; and
- 2 per cent convert sick leave to cover proactive wellness program expenses.

Many employers utilize reliability and punctuality criteria (lawfully applied) in the employee’s periodic performance review. Other employers schedule unreliable employees in a manner that maximizes the firm’s legitimate coverage needs.

A number of employers (including unionized employers) have adopted Paid Time Off (PTO) or Paid Days Off (PDOs) policies, which combine sick leave, vacation, personal days, and possibly other paid leave. The theory is that employees no longer have an incentive to lie about sick leave use under such programs. However, the end result of such policies is that sick leave and other

“contingent” leave benefits are converted into entitlements, and there is no assurance that employees will be more reliable than under traditional sick leave systems. In fact, PTO-type policies may actually increase indirect costs and foster a loss of control over employee attendance.

Some companies have attempted to address sick leave abuse by providing attendance bonuses, incentive programs which periodically recognize the accomplishments of employees who have maintained excellent attendance, and sick leave incentive programs. Note, however, that a sick leave incentive or recognition program could be implemented in a manner that would violate the federal or District of Columbia Family and Medical Leave Acts (FMLAs). Further, critics of sick leave incentive programs maintain that incentives effectively bribe employees to maintain good attendance, rather than encouraging them to achieve that voluntarily. Another common objection is that such programs, in effect, punish employees who have legitimate reasons to be out of work. Parents of young children may perceive (and resent) the “favoritism” that they believe is provided to their childless co-workers who do not need sick leave to care for periodically sick children.

E. Sick Leave Policy Basics

Although most employers provide paid sick leave, it generally is not required by law. Consequently, employers who elect to provide sick leave have the discretion to establish which employees are eligible, how much leave will be allowed, and whether such leave will be paid. Generally, sick leave entitlements may differ between full-time and part-time personnel, exempt and non-exempt personnel, and management and employees. Entitlement also may vary with length of service.

The firm should implement a clear written policy setting forth when leave may be taken, policy requirements, their rationale, and precisely how to comply. Some sick leave policies are written narrowly and cover only employees who require time off to recover from a personal illness or injury. Other policies are written broadly to provide time off to attend doctors’ appointments or to care for an ill spouse, parent, child, or other family member. Note further that sick leave which can be used for any reason (e.g., under PTO and PDO programs) may be treated as a vacation-type entitlement by the wage/hour authorities and considered to be a terminal benefit when employment ends.

One means of preventing an employee from taking excessive days off is to require a physician’s certification of illness as a condition of receiving sick leave pay. Firms which require medical certification should be aware of applicable confidentiality requirements. Firms covered by DCFMLA and federal FMLA, should implement medical certification requirements in accordance with those statutes.

Other policy basics include uniform (and humane) enforcement, early intervention in response to abuse or compliance shortcomings, (acknowledged) documentation of policy violations, counseling, warning, other write-ups, and the “interactive process” (in response to requests for accommodation). Documentation of accommodation may include, for example, the analysis/availability of reasonable accommodations where that has been offered, requested, provided, modified, or denied, and the rationale for such actions. Employees should also be put

on notice that paid sick leave is not considered to be time worked for the purpose of calculating overtime.

District of Columbia employers may determine the manner in which sick leave is accrued. For example, sick leave can be accrued indefinitely or the employer may “cap” the accrual of sick leave to limit the employer’s potential costs. Accrued sick leave may be carried over and “banked” for later use, or cashed out on a percentage basis each year. Generally, accumulated unused sick leave does not have to be cashed out when an employee is terminated or voluntarily quits employment. Perhaps, the best practice is to make plain in the policy statement that sick leave is only for the employee’s use during employment and is not a terminal benefit. However, as indicated above, an exception to this rule may arise if the employer allows sick leave to be taken for any reason, or has consolidated sick leave with vacation, holiday, and/or personal days, bereavement leave, etc., into a PTO-type benefit. As indicated, the risk is that employees who have accrued PTOs and have not used such leave at the time of separation from employment may be entitled to monetary compensation for the entire amount of accrued but unused leave.

The District of Columbia Court of Appeals long ago held that where an employer has put employees on notice of a new policy limiting the payment of accrued leave upon termination, those employees who continue to work for the employer after receiving such notice are deemed to have effectively agreed to abide by the new policy. However, such an interpretation would not be accepted in all jurisdictions, and it could well be modified in the District of Columbia.

F. The Legal Landscape—Selected District of Columbia Laws**

In order to administer sick leave policy and confidently discipline employees with attendance shortcomings, it is critical to understand the applicable legal context, to develop effective policies regarding sick leave, time off, attendance, and tardiness, and to implement those policies uniformly and in a sensitive manner.

Applicant Screening and Handbook Policies: As a threshold matter, however, a critical aspect of any program to control sick leave abuse is lawful and effective applicant screening to avoid inadvertently bringing the “problem employee” into the workplace in the first place. This includes the effective use of a comprehensive (lawful) employment application containing job-related inquiries, and a background check. The preparation of an up-to-date employee handbook which establishes “employment-at-will,” maximizes firm prerogatives, provides appropriate policies and standards of conduct, and implements appropriate compliance activities is also essential, as are well-written position descriptions, among other measures.

In assessing any sick leave request and taking appropriate action, the firm administrator must be cognizant of relevant legal considerations. This is because a firm’s sick leave policy cannot impinge on employee rights under applicable law, including the federal and District of Columbia Family and Medical Leave Acts (FMLA) and the District of Columbia Human Rights Act

** Note: The discussion in sections “F” and “G” represent neither an exhaustive review of all statutes noted, nor a comprehensive (much less exhaustive) list of potentially relevant federal, state, or local enactments. The observations made in these sections are presented merely to provide a framework for analysis of basic employer obligations in administering a sick leave program.

(DCHRA). Rather, employees must be afforded all rights to leave and time off to which they are entitled under applicable law. For example, employers covered by federal FMLA and/or DCFMLA must evaluate whether an employee's expressed need for sick leave qualifies as a "serious health condition" under these enactments, which would trigger the protections and entitlements of these laws. A brief review of selected statutes which may come into play in assessing employer obligations to provide time off and leave due to illness are summarized below.

- **District of Columbia Human Rights Act (DCHRA):** DCHRA broadly prohibits employment discrimination, and creates protected categories for employees based on the following characteristics: race; color; national origin; sex; marital status; religion; age; disability; sexual orientation; personal appearance; matriculation; family responsibilities; and political affiliation.

Sex Discrimination: Sex discrimination for purposes of the DCHRA includes gender discrimination, pregnancy discrimination, and sexual harassment. Employers may not make recruitment, hiring, assignment, promotion, compensation, or layoff decisions based upon an individual's sex. Nor may employers differentiate in any terms, conditions, and privileges of employment because of sex except where "business necessity" can be proved (i.e. where sex-based distinctions are essential to the business' functioning).

Pregnancy: The Pregnancy Anti-Discrimination Act amended the DCHRA to include employment discrimination based on pregnancy, childbirth, and related medical conditions as part of DCHRA's prohibition on sex discrimination. A woman temporarily unable to perform the functions of her job due to a pregnancy-related condition must be treated in the same manner as any other temporarily-disabled employee. The DCHRA requires that a pregnant woman be granted the same fringe benefits as non-pregnant employees insofar as the pregnant woman and her nonpregnant coworkers are similarly able or unable to work. Furthermore, a woman may not be rejected for employment, discharged, or forced to take leave solely because of her pregnancy. Pregnancy discrimination also constitutes unlawful marital status discrimination in the District of Columbia, as does discrimination based on parenthood.

Disability: The DCHRA prohibits employers from discriminating against employees because of a disability. Disability is defined as a physical or mental impairment that substantially limits one or more major life activities of an individual having a record of such impairment or being regarded as having such an impairment. Employer responsibilities under the DCHRA are similar to those under the ADA. Thus, excessive absenteeism, even if caused by injury or illness, may provide defensible justification for discipline, including termination, if it significantly interferes with or causes an undue hardship on the performance of the position in question. However, reasonable accommodation must be provided through job restructuring or physical renovation when an employee's physical or mental impairment prevents satisfactory performance in a pre-existing structure. District of Columbia regulations also expressly provide that the employer must retain an employee who has become physically disabled while on the job, provided that a reasonable accommodation can be made.

Family Responsibilities/Familial Status: Family responsibilities in the DCHRA connotes a responsibility or potential responsibility to provide support to persons in a dependent relationship. DCHRA's prohibition on family responsibilities discrimination has been interpreted to provide that the number of children or other dependents an employee has may not affect the retention or advancement of that individual. Such family responsibilities are not considered to be job-related, and may not be a factor in employment decisions. While it is not clear whether this nondiscrimination obligation includes an affirmative duty to reasonably accommodate an employee by providing a flexible work schedule to, for example, facilitate the care of an ill parent, the D.C. Family and Medical Leave Act (DCFMLA) plainly grants qualifying employees 16 workweeks of family leave during any 24-month period for, inter alia, the care of the employee's family member who has a "serious health condition."

- **The District of Columbia Family and Medical Leave Act of 1990:** The DCFMLA is applicable to employers of 20 or more employees. It provides eligible employees with the right to take leave for certain family and medically-related reasons. While on leave, certain re-employment and benefit rights of the eligible employee are protected, as well. DCFMLA applies to any individual who has been employed by the same employer for a minimum of one year without a break in service and who has worked at least 1,000 hours during the 12-month period immediately preceding the request for family or medical leave.

Covered employees are entitled to a total of 16 workweeks of family leave during any 24 month period for: (1) the birth of a child of the employee; (2) the placement of a child with the employee for adoption or foster care; (3) the placement of a child with the employee for whom the employee permanently assumes and discharges parental responsibility; or (4) the care of a family member of the employee who has a "serious health condition." "Family member" includes a person to whom the eligible employee is related by blood, legal custody, or marriage, a foster child or other child for whom the employee permanently assumes and discharges parental authority, or a person with whom the employee maintains a "committed relationship". When the leave is taken for birth or placement of a child, the leave expires 12 months following the event.

A serious health condition is a physical or mental illness, injury, or impairment that involves either inpatient care in a hospital, hospice, or residential healthcare facility, or continuing treatment or supervision at home by a healthcare provider or other competent person. Family leave may be taken on an intermittent basis when medically necessary.

The medical leave provisions of the DCFMLA apply to employees who have become unable to perform the functions of their position due to a serious health condition. As in the case of family leave, a qualifying employee may take medical leave for up to 16 workweeks during a 24-month period. Medical leave also may be taken intermittently when medically necessary.

Generally, family and medical leave consist of unpaid leave. However, in certain circumstances, paid leave time provided by the employer may be used while an employee is on family and medical leave. With respect to family leave, an employee has the discretion to elect to use paid family, vacation, personal, or compensatory leave provided by the employer as family leave. The paid time that is used will count against the 16 workweeks of allowable family leave. With respect to medical leave, an employee has the discretion to use any paid medical or sick leave provided by the employer as medical leave. Upon mutual agreement by both the employee and

employer, paid vacation, personal or compensatory leave may be used as medical leave. All paid time used as medical leave counts against the 16 workweeks of allowable medical leave.

If the need for leave is foreseeable, the employee must give the employer prior notice. In the event that the employee is to undergo planned medical treatment, the employee is required to make a reasonable effort to schedule the treatment so as not to unduly interfere with the employer's productivity. The treatment schedule is subject to agreement by the employee's medical provider.

For family leave and medical leave requests, an employer may require certification of the illness by the healthcare provider.

- the date on which the serious health condition commenced;
- the probable duration of that condition;
- the appropriate medical facts within the healthcare provider's knowledge that would entitle the employee to qualify for FMLA leave; and
- for purposes of medical leave, the certification must include an explanation of the extent to which the employee is unable to fulfill the duties of his/her position;
- for purposes of family leave, the certification must include an estimate of the amount of time that the employee will need to care for the family member.

Note: An employer may inadvertently waive the certification requirement by failing to properly articulate policies requiring the production of appropriate medical documentation.

If an employer has reason to doubt the validity of the certification, the employer may, at its own expense, require that the employee obtain a second medical opinion of a health care provider approved by the employer. If the second opinion differs from the original certification, the employee may obtain the opinion of a third health care provider mutually agreed upon by the employer and employee, the cost of which will be born by the employer. The opinion of the third health care provider is final and binding. The employer may require that the employee provide subsequent re-certifications of illness on a reasonable basis. Note that employer use of certification information requested for family or medical leave is limited to making decisions with regard to leave requests. Employers must keep confidential such medical information that is obtained for leave purposes.

Employees taking family or medical leave will not lose any employment benefit or seniority accrued before the leave commenced. Employees, however, are not entitled to accrue any applicable seniority or employment benefit (other than health care benefits) during the time that the family or medical leave is taken. During any period of family or medical leave, the employer is required to maintain the employee's group health plan coverage at the same level and under the same conditions as if the employee did not have a break in service. An employer may require the employee to continue to make any contributions to a group health plan that the employee would have made if the employee had not taken leave. If the employee is unable or refuses to make the proper contributions to the group health plan, the employee may forfeit the health plan benefit until (s)he is reinstated after leave has been taken and resumes regular payments to the plan.

Upon return from family or medical leave, with narrow exceptions, the employee is to be restored to the employment position held by the employee when the leave commenced, or to an equivalent position with equivalent benefits, pay, seniority, and other terms and conditions of employment. Note: An employer's policies addressing other employment/business activities of the employee while on FMLA leave may come into play in this regard.

- **The District of Columbia Workers' Compensation Act:** The D.C. Workers' Compensation Act protects the employer and the employee in the event that the employee suffers an accidental job-related injury. Generally, the employee receives the benefit of virtually guaranteed compensation for an accidental job-related injury in exchange for releasing the employer from liability for most all tort claims that might arise from the circumstances leading to the occupational injury. This law provides employees with compensation for lost earning capacity caused by occupational injury, disease, disability, or death arising in the course of employment. Employers should carefully consider the advisability of taking adverse personnel action against an employee who has filed a workers' compensation claim or participated in a workers' compensation proceeding, because such action may be viewed as retaliatory. It is also unlawful to terminate or otherwise retaliate against an employee for filing a workers' compensation claim or for testifying in a workers' compensation proceeding.

The nature and extent of disability leave and job protection that are to be provided to occupationally-injured employees may raise difficult legal questions. In this regard, for example, employers must be particularly careful because worker's compensation enactments typically contemplate returning the employee to work at the earliest time, which orientation may come into conflict with employee rights under federal and local FMLA laws and disability rights enactments.

Accordingly, if a worker's compensation injury constitutes a "serious health condition", the absence may be counted as federal or DCFMLA leave if so designated in a timely manner. Such designation would trigger the employee's FMLA entitlements to return to the same or an equivalent job, which provides greater rights to the claimant than exist under the District's workers' compensation law. Further, an occupational injury may create employer non-discrimination and accommodation obligations (by providing leave and otherwise) due to disability under the DCHRA and the Americans With Disabilities Act (ADA).

G. The Legal Landscape - Selected Federal Laws

- **Title VII of the Civil Rights Act of 1964:** Title VII, which is applicable to employers having at least 15 employees, bars employment discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions), and national origin with regard to applicant screening, hire, compensation, promotion, classification, training, apprenticeship, referral for employment, discipline, discharge, and other terms, conditions and privileges of employment, and employment opportunities.

Pregnancy Discrimination: The Pregnancy Discrimination Act amendments to Title VII provide that sex discrimination includes discrimination on the basis of pregnancy. Accordingly, a pregnant employee must be treated the same as any other employee. Accordingly, when a female employee becomes unable to work due to pregnancy, childbirth or related medical

condition, her (temporary) disability is to be treated on the same basis as other such disabilities. Further, an employee may not be terminated because she is pregnant. Nor may an employer refuse to hire an applicant because she is pregnant if she is able to work and qualified for the position. Reliance on stereotyped assumptions regarding pregnant women also will be regarded as unlawful discrimination.

An employer providing leaves for disabilities also must provide leaves for pregnancy-related disabilities on the same basis. Pregnant employees may not be required to begin their maternity leaves at a preset time, and employers may not require a pregnant employee to remain on leave for a specified time. An employer may require a pregnant employee to produce medical verification of her continued ability to work, so long as such verification is also required from other employees who anticipate taking disability leave in the future. Likewise, an employee returning from disability leave due to maternity may be required to submit medical verification of her ability to work, so long as other employees returning from disability leave also are required to submit such verification.

Under Title VII, an employee's job must be held open for her while on disability leave for maternity on the same basis and to the same extent that jobs are held open for employees on other disability leaves. In short, employers must treat pregnancy-related disability leave on the same basis as it treats other disability leaves. Although Title VII requires employers to treat pregnant employees the same as other employees requesting disability leave, it does not provide for preferential treatment. Employers subject to the federal FMLA and DCFMLA must also comply with those laws.

Parental Leave: EEOC's position in its Policy Guidance on Parental Leave (1990) is that Title VII does not prohibit employer policies that deny or severely restrict parental leave to care for a newborn or newly-adopted child. However, EEOC interprets Title VII to prohibit employers from establishing policies that treat male and female employees differently when such employees request time off from work to care for a newborn child. Such "parental leave" must be distinguished from "disability leave" that is provided to female employees who cannot work because of pregnancy or related medical condition, or that is provided to male employees due, for example, to a prostate operation. And, as indicated, employees of either sex may qualify for Family Leave under the federal FMLA or DCFMLA, as applicable.

- **Federal Family & Medical Leave Act of 1993:** To be eligible for federal family and medical leave, an employee must have worked for the employer for at least 12 months (the months need not be continuous), for at least 1,250 hours in the 12 months prior to the first day of leave, and there must be 50 or more employees employed at or within 75 miles of the employee's work site.

Eligible employees are entitled to up to a total of 12 workweeks of FMLA leave per 12-month period. Leave due to the birth of a child or placement of a child with the employee for adoption or foster care must be concluded prior to the end of the 12-month period after the birth or placement, unless state or District of Columbia law requires, or the employer permits, leave to be taken for a longer period.

Federal family and medical leave may be taken by an employee for any of the following reasons: (1) the birth of a son or daughter of the employee; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition; or (4) due to a "serious health condition" of the employee that prevents the employee from working. Both fathers and mothers are entitled to FMLA leave to bond with a newborn child, a newly-adopted child, or a child placed in the employee's foster care.

The definition of a "serious health condition" under the federal FMLA is very broad. Many medical conditions may be deemed serious health conditions as defined by the FMLA. Employers can make this determination by requiring a certification from a healthcare provider that an employee or an employee's spouse, child, or parent has a serious health condition.

By definition, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility; or continuing treatment by (or under the supervision of) a healthcare provider. A serious health condition involving continuing treatment by a healthcare provider is defined by the FMLA regulations as including any one or more of the following:

- A period of incapacity (i.e. inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involved treatment two or more times by a healthcare provider, or treatment by a healthcare provider on at least one occasion that results in a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). Taking over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercise, and other similar activities that can be initiated with a visit to a healthcare provider, are not, by themselves, sufficient to constitute a regimen of continuing treatment for purposes of family and medical leave.
- Any period of incapacity due to pregnancy or for prenatal care. (The federal FMLA recognizes pregnancy as a special case that is treated differently from other serious health conditions. For example, the FMLA's implementing regulations expressly provide that certain pregnancy-related conditions, "specifically including those by a pregnant employee unable to report to work because of severe morning sickness", qualify for FMLA leave "even though the employee...does not receive treatment from a healthcare provider during the absence, and even if the absence does not last more than three days.")
- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy).

- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's disease, major stroke, or a disease's terminal stages).
- Any period of absence to receive multiple treatments (including any period of recovery from such treatments) by a healthcare provider (e.g., for restorative surgery after an accident or other injury), or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment, such as chemotherapy or radiation treatments for cancer, physical therapy for severe arthritis, or kidney dialysis.
- Federal FMLA leave may be taken to receive treatment for substance abuse. However, an absence due to employee use of an illegal substance is not covered.
- The regulations state that unless complications arise, the common cold, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease are examples of conditions that generally do not meet the definition of a serious health condition and do not qualify for FMLA leave.

Note: When federal FMLA leave is taken for medical reasons, an employer may require a certification from the healthcare provider of the person requiring care, whether it be the employee or the employee's spouse, child, or parent. The Department of Labor has developed an optional form for obtaining medical certification from healthcare providers that is intended to meet the requirements under the FMLA and the regulations. Note further that federal law provides for notification requirements in the employee handbook, and otherwise.

If an employer doubts the validity of the certification for leave due to a serious health condition, it may require a second opinion from a healthcare provider designated or approved by the employer. Where the second opinion differs from the original certification, the employer may require the opinion of a third healthcare provider approved jointly by the employer and the employee. The employer must bear the costs of the second and third opinions. The opinion of the third provider is final and binding on both parties.

Intermittent leave is leave taken in separate blocks of time for a serious health condition that requires treatment periodically, rather than for one continuous period of time. When planning medical treatment requiring intermittent leave, the FMLA requires that the employee consult with the employer. The employee must make a reasonable effort to reschedule when an appointment may unduly disrupt the employer's operations, subject to the approval of the healthcare provider. A reduced leave schedule is also available to employees under the FMLA. Such a leave schedule reduces an employee's usual number of hours per workweek or per workday. For example, an employee recovering from a serious health condition may only work part-time because (s)he has not recovered sufficiently to return to full-time duties.

Leave due to the serious health condition of an employee or family member may be taken intermittently or on a reduced schedule only when medically necessary. However, leave due to the birth or replacement of a child with an employee generally may not be taken intermittently or on a reduced schedule unless the employee and the employer agree to such a schedule. If an

employee requests intermittent leave or leave on a reduced leave schedule due to a planned medical treatment, the employer may require that the employee transfer temporarily to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave.

An employee requesting leave need not expressly assert rights under the FMLA or even mention the FMLA in order to be eligible for such leave. However, some notice is required. An employee giving notice of a need to take unpaid FMLA leave must explain the reasons for the leave so as to allow the employer to determine whether or not the leave qualifies under the FMLA.

Generally, the employer has a duty to designate the leave as FMLA-qualifying, and to inform the employee of this designation. Where the necessity for leave is foreseeable, the employee is required to provide the employer with at least 30 days' notice.

Federal FMLA leave is unpaid. However, an eligible employee may elect, or the employer may require, the substitution of any accrued paid vacation leave, personal leave, or family leave (if the employer provides paid family leave) for any part of the twelve-workweek period of leave due to the birth or placement of a child or to care for the employee's child, spouse, or parent who has a serious health condition. The paid leave and the FMLA leave can be charged concurrently. An employer may not unilaterally substitute an employee's accrued paid vacation for any part for the employee's FMLA leave without giving the employee notice of this substitution. An employer also can require an employee to substitute accrued sick leave for any part of the twelve-workweek period if the employee is out due to his own serious health condition.

An overtime-exempt employee must be paid his/her full salary for any week in which the employee performs any work. The salary can be reduced for complete days of absence due to illness or personal reasons. However, under the Fair Labor Standards Act private sector employers cannot reduce an exempt employee's pay for a partial day of absence. A special rule allows an employer to make otherwise impermissible deductions for partial days of absence where the absence qualifies as FMLA leave. However, such deductions can only be made where the employer is required to provide FMLA leave. An employer not covered by the FMLA who grants partial-day leaves to exempt employees cannot make any deduction for such partial-day absences. Similarly, if a private sector employer is covered by the FMLA and grants a partial-day leave to an exempt employee who is ineligible for such leave, the employer cannot make a deduction from the employee's salary for the partial-day absence. Note: Counsel should be consulted in such situations because local law may not follow federal policy in this area, and since FMLA questions often involve overlapping statutory coverages which present sophisticated compliance questions.

The federal FMLA requires that an employer restore an employee to his/her same position or to an equivalent position with equivalent benefits, pay, and other terms and condition of employment. If an employee is no longer qualified for his or her original position due to inability to perform an essential function of the position on account of a physical or mental condition, including the continuation of a serious health condition, the employee may have no right to restoration to another position under the federal FMLA, but may have such a right under the ADA or other applicable law.

Where the employee is qualified to return to his/her original position, the employee must be reinstated to the same geographically approximate work site where the employee had previously worked and ordinarily is entitled to return to the same shift or the same or equivalent work schedule. The requirement that an employee be restored to the same or equivalent job with the same or equivalent benefits, terms, and conditions of employment does not extend to “intangible immeasurable aspects of the job,” such as perceived loss of future promotional potential.

During FMLA leave, the employer is required to maintain coverage under any group health plan for the duration of the leave at the level and under the conditions which coverage would have been provided had the employee not taken leave. The employer is required continue to pay premiums as though the employee had continued working. If an employee elects not to retain health coverage during FMLA leave, benefits must be resumed in the same manner and at the same level as were provided when the leave began, without any qualifying period, physical examination, exclusion of pre-existing conditions, and the like, immediately upon the employee’s return to work. The employee remains responsible for the continued payment of his/her share of the health premiums during the FMLA leave. Particular regulations govern late premiums, coverage lapse for employee non-payment, and employer rights in that regard.

During a federal FMLA leave, there can be no loss of any employment benefit accrued prior to the date on which such leave commenced. However, employees are not entitled to accrue seniority or employment benefits during the period of FMLA leave or to any rights other than those rights or benefits to which they would have been entitled had they not taken FMLA leave. If an employee desires to continue life insurance, disability insurance, accident insurance, or other types of benefits during family and medical leave, the employer is required to follow the same policies for continuing such benefits as are provided for other types of unpaid leave. The employer may recover the premium paid for any coverage for the employee if the employee fails to return from leave at its expiration for reasons other than the continuation, recurrence, or onset of a serious health condition, or other circumstances “beyond the employee’s control”.

- **Americans With Disabilities Act of 1990 (ADA):** ADA prohibits employment discrimination against individuals with disabilities in employment, and failure to provide reasonable accommodation where required. The ADA’s employment provisions cover employers with at least 15 employees and establish detailed employer obligations vis a vis employees with covered “disabilities”.

Employment Practices Regulated by ADA: Covered employers may not discriminate against a “qualified individual with a disability” because of the disability in any aspect of employment, including application, testing, hire, assignment, evaluation, disciplinary action, promotion, layoff/recall, discharge, training, compensation, leave, and benefits. An employer may not limit, segregate, or classify job applicants or employees in a way that adversely affects their opportunities or status because of their disabilities. It is also unlawful for an employer to use a referral agency or participate in a training or apprenticeship program that subjects qualified applicants or employees with disabilities to prohibited discrimination. The ADA further prohibits the use of employment tests, qualification standards, or other selection criteria that screen out, or tend to screen out, an individual or a class of individuals with a disability, unless such criteria are proved to be “job-related” for the position in question and are required by “business necessity”. The ADA, like many other anti-discrimination statutes, prohibits both intentional discrimination

and unintentional discrimination (i.e. discrimination resulting from apparently neutral practices that are discriminatory in their impact).

Reasonable Accommodation: Employers have a legal obligation to make “reasonable accommodations” for the known physical and/or mental limitations of an otherwise qualified applicant or employee if the accommodation will permit the individual to perform the “essential functions” of the job. Employers are not required to make accommodations that would cause “undue hardship”. However, employers must be flexible and are required to make an individualized assessment of the employee’s ability to perform the essential functions of the job in question in each instance.

In 1999, the EEOC issued an Enforcement Guidance regarding Reasonable Accommodation and Undue Hardship Under the American With Disabilities Act, which provides comprehensive policy guidance regarding an employer’s legal obligation to provide “reasonable accommodation”. The purpose of the Enforcement Guidance is to assist employers and individuals with disabilities to understand their rights and responsibilities under the ADA. Note, however, that in some respects, EEOC has taken positions that conflict with judicial interpretations of the ADA. While the Enforcement Guidance does not have the force of law, it has been considered by the courts in determining whether an employer has complied with the ADA.

What is “reasonable accommodation” will vary, depending on the circumstances. According to the ADA, however, “reasonable accommodation” may include the following:

- Making existing facilities accessible;
- Job restructuring, leaves of absence, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities;
- Modifications or adjustments to a job application process, training materials or policies;
- Modifications or adjustments to the work environment, or the manner or circumstances under which the position held or desired is customarily performed, providing qualified readers or interpreters; or
- Modifications or adjustments to provide a qualified employee with a disability with equal benefits and privileges of employment as those enjoyed by other similarly situated employees without disabilities.

Individualized Analysis and the “Interactive Process”: Requests for accommodation must be evaluated on a case-by-case basis, taking into consideration the employer’s resources, the employee’s relevant abilities, the essential requirements of the job, and the employee’s functional limitations. Employees need not expressly request an “accommodation” to activate the employer’s duty to accommodate. Employers should initiate the “interactive process” of determining whether an accommodation is needed and possible once the employee provides

sufficient information to inform the employer that (s)he is having difficulty in progressing or performing his/her job because of a physical or mental impairment which may constitute a “disability” within the meaning of the ADA.

Coverage: To be protected by the ADA, a person must not only have a disability but must also be “qualified”. An employer is not required by the ADA to hire or retain an individual who is not qualified to perform the job in question. A qualified individual with a disability is a person who has the requisite skill, experience, education, and the other job-related requirements of the position in question, and who, with or without reasonable accommodation, can perform the “essential functions” of that position. Note: Some federal circuit courts of appeals and the EEOC would require that a once-qualified employee with a disability be reassigned to another position as a reasonable accommodation, even though that individual can no longer perform the essential functions of his/her original position.

What is a “Disability”? An individual with a disability is one who:

- Has a physical or mental impairment that substantially limits one or more major life activities (e.g., seeing, hearing, walking, talking);
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

If an impairment creates a substantial limitation of a “major life activity” such as seeing, hearing, walking, reproduction, etc., an individual will be considered disabled. If no other major life activity is affected by an individual’s impairment, federal courts will ordinarily consider whether the impairment substantially limits an individual’s ability to engage in the major life activity of working. It is insufficient to prove that the impairment merely limits an individual in the performance of only a particular job, or a narrow range of specialized employment. Rather, an individual must show that he/she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.

The following conditions or practices generally are excluded from the federal definition of disability. They include: homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Environmental, cultural, and economic disadvantages are not in and of themselves covered.

A medical “impairment” may not be a “disability” under the law. Whether an individual has a disabling impairment depends upon the particular facts of each case. Temporary, non-chronic impairments or conditions that have little or no long-term impact, such as broken limbs, sprained joints, concussions, appendicitis, and influenza ordinarily are not viewed as covered disabilities, as is the case with short-term treatments which have no long-term impact.

Corrective or Mitigating Measures: The Supreme Court has held that, under the ADA, corrective or mitigating measures must be considered when determining whether an impairment substantially limits a major life activity. Specifically, the Court has held that a disability exists only where an impairment actually substantially limits a major life activity, not in those situations where the impairment “would” or “could” be substantially limiting if mitigating measures were not taken. An individualized inquiry must be made which evaluates the individual’s limitations in their “corrected” state, and which considers any negative side effects of the corrective measures (e.g., the side effects of the medications).

In March 1997, EEOC issued a Guidance as to the application of the ADA to persons with mental disabilities. That Guidance, which does not have the same force as formally-issued regulations, attempts to effectively broaden the definition of mental impairment.

Note that the ADA also protects individuals with a record of impairment (i.e. individuals who have a history of, or have been classified or misclassified as having a mental or physical impairment that substantially limits one or more major life activities). This prohibition protects individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Frequently-occurring fact patterns include, for example, individuals with histories of mental or emotional illness, heart disease, cancer, and persons who have been misclassified as mentally retarded.

Employee Medical Examinations: Under the ADA, employers may require existing employees to submit to medical examinations or to respond to medical inquiries, but not for the purpose of determining whether an employee has a disability or to ascertain the nature or severity thereof. Rather, medical examinations or inquiries must be “job related” and required by “business necessity”. The employer may request that an employee undergo a medical examination when the employee is having difficulty adequately performing the job, when the employee has become disabled, when an examination is necessary to determine appropriate reasonable accommodation(s), or when such examinations or medical monitoring is required by other law.

H. Conclusion:

As the foregoing analysis suggests, questions involving firm obligations to provide sick leave may be relatively simple and straight forward. However, the implementation of sick leave policy may present difficult questions regarding the applicability, nature, and extent of employer and employee obligations under multi-layered statutory schemes. Counsel should be consulted in the development of policies in this area.