MANAGING LEAVE ISSUES WHILE NAVIGATING THE OVERLAP BETWEEN FMLA, ADA, GINA, WORKERS COMPENSATION AND LEAVE POLICIES

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I. OVERLAPPING LAWS

A. Federal, State, and Local laws may all apply to leave issues.

B. Many times multiple contractual rights or policies provide greater rights than laws.

C. Best Practices require employers to analyze all "rights" and take action based on the option that favors the employee the most.

D. Case law needs to be reviewed to evaluate when an employee may be terminated for excessive leave.

II. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

A. The Family and Medical Leave Act requires covered employers to provide eligible employees with unpaid, job-protected leave for certain periods of time, for specific family and medical reasons. The Company may adjust its FMLA policy to comply with applicable state law, in the event it provides a more generous or additional benefit.

1. Eligible Employee

To be eligible for FMLA leave, you must have been employed by a Company for at least 12 months, have worked at least 1,250 hours during the 12-month period preceding the start of the leave, and work at a location where the Company employs 50 or more employees within 75 miles.

2. 12-Week FMLA Leave

Eligible employees are entitled to use up to 12 workweeks of unpaid leave during any rolling 12-month period for one or more of the

following reasons:

a. The birth of a child and in order to care for such child (within 12 months after the birth of the child);

b. The placement of a child with you for adoption or foster care, and to care for a newly placed child (within 12 months of the placement of the child);

c. To care for your spouse, domestic partner, child, or parent with a serious health condition;

d. You have a serious health condition that makes you unable to perform your job duties; or

e. A qualifying exigency related to your spouse, son, daughter, or parent being on active duty (or having been notified of an impending call or order to active duty) in the Armed Forces, National Guard or Reserves in support of a contingency operation.

B. Under the "rolling" 12-month period, each time an employee takes FMLA leave, the remaining leave entitlement would be the balance of the 12 weeks which has not been used during the 12-months immediately preceding the date on which FMLA leave is anticipated to be used. For purposes of a leave based on a qualifying exigency, the leave is available during a single 12-month rolling period, starting on the first date of leave.

C. If your spouse also works for a Company and you both become eligible for a 12-week leave under paragraphs a or b above, or for the care of a sick parent under paragraph c above, the two of you together will be limited to a combined total of 12 workweeks of leave in any rolling 12-month period.

D. Eligible employees may take all 12 weeks of his/her FMLA leave entitlement as qualifying exigency leave or the employee may take a combination of 12 weeks of leave for both qualifying exigency leave and leave for a serious health condition.

E. When taking a leave based on a qualifying exigency, you will be required to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the military member is on active duty or call to active duty status in support of a contingency operation and the dates of the covered military member's active duty service.

F. With respect to 12-week FMLA Leave, the following definitions apply:

1. Serious Health Condition: means an illness, injury, impairment or physical or mental condition that involves one of the following:

a. Hospital Care: Inpatient care in a hospital, hospice or residential medical care facility, including any period of incapacity relating to the same condition.

b. Absence Plus Treatment: A period of incapacity of more than three full consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves either: (1) treatment two or more times (within that same period of incapacity and provided the first visit takes place within seven days of the first day of incapacity) by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider; or (2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (first visit to health care provider must take place within seven days of the first day of incapacity).

c. Pregnancy: Any period of incapacity due to pregnancy, or for prenatal care.

d. Chronic Conditions Requiring Treatment: A chronic condition which: requires at least two periodic visits for treatment per

year by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider; which condition continues over an extended period of time; and may cause episodic rather than a continuing period of incapacity.

e. Permanent/Long-Term Conditions Requiring Supervision: A period of incapacity which is permanent or long-term due to a condition for which treatment may be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.

f. Multiple Treatments (non-chronic conditions): Any period of incapacity to receive multiple treatment (including any period of recovery) by a health care provider or by a provider of healthcare services under orders of, or on referral by, a health care provider, either 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 full consecutive calendar days in the absence of medical intervention or treatment.

2. Qualifying Exigency: includes the following broad categories: (a) short notice deployment; (b) military events and related activities; (c) childcare and school activities; (d) financial and legal arrangements; (e) counseling; (f) rest and recuperation; (g) post deployment activities, including reintegration activities, for a period of 90 days following the termination of active duty status; and (h) additional categories that are agreed to by the employer and employee within this phrase.

3. Contingency Operation: means short-notice deployment issues, military events, childcare/school activities, financial/legal arrangements, counseling, rest/recuperation, post-deployment activities and other activities arising out of active duty (provided that

the employer and the employee agree upon timing and duration of leave).

4. Covered Military Member: means your spouse, son, daughter or parent who is on active duty or called to active duty status. Son or daughter, for purposes of a covered military member, is defined as your biological, adopted, foster, stepchild, legal ward, or child for whom you stood in loco parentis, who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. Note that this definition is different from other sections of this FMLA policy.

5. Parent: means a biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to you when you were a son or daughter, but does not include parents-in-law.

G. The Family and Medical Leave Act ("FMLA") and Uniformed Services Employment and Reemployment Rights Act ("USERRA") require certain protections to be provided to eligible employees requiring leave to take care of their own serious medical condition, to care for particular family members who have a serious medical condition, to care for a new baby or adopted baby, to care for a particular relative military service member in a qualifying exigency, or to care for a covered service member.

H. Pretext Versus Honest Belief Rule.

1. *Fatemi v White.* Expanding examples of reasons to terminate after the fact is not "pretext."

2. *Curly v City of North Las Vegas.* Tolerating misconduct for years does not show pretext when employer ultimately decides to terminate.

3. *Burton v Freescale Semiconductor, Inc.* A sudden and unprecedented campaign to document a specific employee's deficiencies in effort to justify a decision that has already been made could raise an inference of pretext.

4. *Yazdin v Conmet Endoscopic Technologies, Inc.* The honest belief rule is inapplicable when the employer fails to make a reasonable informed and considered decision.

5. *Sklyarsky v Means-Knaus US Partners.* The employee's opinion about his work performance is irrelevant. Employer won on summary judgment when the decision maker honestly believed the plaintiff was performing poorly.

6. *Marshall v The Rawlings Company LLC.* The court reconciled the honest belief rule with the cat's paw theory, holding that the "honest or sincerity" of a decision-maker's belief is irrelevant if that belief is based on the influence of a biased lower-level supervisor.

7. *Brown v Excelda Manufacturing Company, Inc.* Written warnings are not adverse action. The court granted summary judgment for the employer, holding that the plaintiff failed to produce evidence that the supervisor intended to have the plaintiff fired.

8. *Severson v Heartland Woodcraft, Inc.* The court held that, "If as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical leave statute – in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term 'reasonable accommodation'."

I. 26-Week Military Caregiver Leave

An eligible employee is entitled to use up to 26 workweeks of unpaid leave during any single 12-month period to care for a covered spouse, son, daughter, parent, or next-of-kin service member who is injured or recovering from an injury suffered while on active military duty making the service member unable to perform the duties of the office, grade, rank, or rating, or when receiving medical treatment, recuperation, or therapy, even if the service member is on the temporary disability retired list. Same goes here.

1. For purposes of the 26-week Military Caregiver Leave, the "single" 12-month period begins as of the date the leave commences and ends

12-months after that date. Any unused amounts are forfeited. In addition, if you and your spouse both become eligible for a leave under the Military Caregiver provision or under a combination of Military Caregiver provision and a 12-week leave, the two of you together will be limited to a combined total of 26 workweeks of leave in any rolling 12-month period.

2. Military Caregiver Leave may be permitted more than once if necessary to care for a different covered service member (or the same service member with multiple injuries or illnesses) up to a combined total of 26-workweeks in a rolling 12-month period. Nothing in this paragraph shall be construed to limit the availability of leave during any other 12-month period and this 26-week period of Military Caregiver Leave is in addition to other types of approved FMLA leave. However, your total available leave time in any rolling 12-month period may not exceed a combined total of 26 workweeks, including FMLA time off taken for any other reason.

3. With respect to Military Caregiver FMLA Leave, the following definitions apply:

    a. Covered Service Member: means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy from an injury or illness occurring in the line of active duty and/or during active duty, who is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

    b. Outpatient Status: means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

c. Next of Kin: means the nearest blood relative of that individual (regardless of age). You are required to provide confirmation of the relationship upon request. The Service Member may designate the blood relative who is considered his/her next of kin; otherwise, the following order generally will apply: blood relatives granted custody by law, brother/sister, grandparents, aunts/uncles, and then first cousins.

d. Serious Injury or Illness: means an injury or illness incurred by the Service Member in the line of duty on active duty in the Armed Forces that may render the Service Member medically unfit to perform the duties of the Member's office, grade, rank or rating.

4. Notification and Reporting Requirements

a. All requests for leaves of absence should be submitted at least 30 days in advance of the start of the leave, except when the leave is due to an emergency or is otherwise not foreseeable. If the leave is not foreseeable, employees should provide notice as soon as practicable, which generally means either the same day or the next business day that you learn of the need for leave, in the absence of any unusual circumstances. If there are any delays in employees notifying Companies of their need for leave (e.g., more than five days from the first day of their leave), employees time away may not be protected and their leave may be denied.

b. In processing employees' request for leave, Companies should determine if the leave qualifies for FMLA protection. In all cases in which employees are seeking leave under this policy, they should also provide their employer notice consistent with the Company's established call-in procedures, so long as no unusual circumstances prevent them from doing so. Failure to cooperate or otherwise provide compliant notice may result in loss or delay

of FMLA protections.

c. If employees are seeking leave due to an FMLA-qualifying reason for which a Company has previously granted them FMLA-protected leave, employees should specifically reference the qualifying reason or need for FMLA leave at the time of their request to be away from work. It is not sufficient to simply "call in sick" without providing additional information which would reasonably cause a Company to believe their absence/time away from work may qualify as an FMLA qualifying event.

d. A company should inform employees requesting leave whether they are eligible under FMLA. If they are not eligible, the company should provide a reason for the ineligibility. If they are eligible, the notice will specify any additional information required as well as the employees' rights and responsibilities.

e. The requested additional information and/or certification supporting the need for leave, such as the applicable health care provider's medical certification of a serious health condition affecting the employee or an immediate family member, must be provided within 15 days from the request, or within a reasonable time thereafter upon request for an extension. You are required to timely submit this information on the forms provided to you; failure to provide necessary certifications or supportive documentation requested may result in loss or delay of FMLA protections.

f. If a company finds reason to doubt the validity of the certification, it may require, at its own expense, a second medical opinion from a health care provider designated or approved by the company, but not regularly employed by the Company. Should the second opinion differ from the original certification provided by the employee, a company may, at its own expense, require that the employee obtain a third opinion.

The opinion of the third health care provider, designated or approved by both the company and the employee, is final and binding. A company may also require recertification of the continued need for leave every 30 days while the employee is on leave.

g. During the leave, employees may be required to report periodically on their status and their intention to return to work. Any extension of time for their leave of absence must be requested in writing prior to their scheduled date of return to work, together with written documentation to support the extension.

5. Intermittent Leave. An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt a Company's operations. If leave is requested on an intermittent basis, however, a Company may require employees to transfer temporarily to an alternative position which better accommodates recurring periods of absence or to a part-time schedule, provided that the position offers equivalent pay and benefits. Employees must make an effort to schedule a leave so as not to unduly disrupt business operations.

6. Light Duty Work Assignments. Voluntarily performing in a light duty capacity while on FMLA leave does not count against an employee's 12-week FMLA allotment. In effect, your right to restoration is held in abeyance during the period of time that you are performing in a light duty capacity.

7. Concurrent Use of Unused Accrued Vacation and Coordination of Benefits. Employees may be required to substitute any unused accrued vacation for unpaid leave under this policy, and any such vacation must be taken concurrently with an employee's FMLA Leave.

For example, all time missed from work that qualifies for FMLA Leave and workers' compensation may be counted toward an employee's FMLA Leave.

During FMLA leave, a Company should maintain the employee's health coverage under any group health plan maintained by the Company on the same terms as if the employee had continued to work. Once an employee's accrued vacation is exhausted, a company may require all employees pay the amount normally deducted from the employee's wages to continue health insurance premiums. Companies reserve the right to terminate health insurance if the employee is more than 30 days' late in paying the amount normally deducted from the employee's wages.

8. Return to Work. Employees' failure to either return to work on the scheduled date of return or to apply in writing for an extension prior to that date may be considered a resignation of employment effective as of the last date of the approved leave. An employee on FMLA leave who provides notice of their intent not to return to work upon expiration of a leave may lose their entitlement to FMLA leave and related benefits.

   a. If an employee does not return to work at the expiration of the family and medical leave, a company may require the repayment of health insurance premiums paid on the employee's behalf during the leave period. Reimbursement will not be required if the employee does not return from leave because of the continuance, recurrence or onset of a serious health condition that prevents the employee from performing his or her job or because of further circumstances that are beyond the employee's control.

   b. If employees return from their leave on or before being absent for the full period to which they are entitled, they may be restored to the same or to an equivalent position to the one

they held when the leave started. Employees have no greater right to reinstatement or to other benefits and conditions of employment than if they had been continuously employed during the FMLA leave period. In determining whether a position is "equivalent" Companies should looks at whether the position had substantially similar terms and conditions of employment and whether the position entails similar duties, skills, efforts, responsibilities, authority, privileges and status.

c. If the leave was due to an employee's own serious health condition, employees are required to submit a fitness for duty certification from your health care provider, in accordance with our normal policies and practices applicable to other leaves of absence, certifying that they are able to resume work and perform the essential functions of the job, either with or without a reasonable accommodation. A list of the essential job functions should be made available to the employee for compliance with this requirement.

d. If a reasonable job safety concern exists, employees also may be required to provide a fitness-for-duty certification up to once every 30 days before returning from an intermittent or reduced schedule FMLA leave related to an employee's own serious health condition. Generally, a returning employee will be permitted to return to work within two business days of the Company's receipt of a valid fitness-for-duty release.

9. Key Employees. Certain highly compensated key employees may be denied reinstatement when necessary to prevent "substantial and grievous economic injury" to a Company's operations. A "key" employee is a salaried employee who is among the highest paid 10% of employees at that location, or any location within a 75 mile radius. Employees should be notified of their status as a key employee, when applicable, after they request a FMLA Leave.

10. Prohibition Against Retaliation. If employees feel they have been the victim of any retaliation for exercising rights under this policy, they are encouraged to contact the proper authority so that the matter can be promptly investigated and remedied as appropriate.

III. AMERICANS WITH DISABILITIES ACT (ADA)

A. The law applies to employers with 15 or more employees. However, the Michigan Persons with Disabilities Civil Rights Act applies to all Michigan employers.

B. A "disability" is a physical or mental impairment that substantially limits one or more major life activities. This includes employees who have a record of an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability.

C. Employees must be able to perform essential job functions with or without reasonable accommodation. *EEOC v Ford,* Essential functions generally are those that are determined in the employer's judgment or a written [job] description.

D. Questions for the Jury (unless arbitration provision in employment agreement):

1. *EEOC v. Kroger.* The jury gets to decide whether an employee that has a serious back injury is capable of performing essential lifting functions.

2. *Keith v. County of Oakland.* The jury gets to decide if a deaf lifeguard is unable to do marginal or essential job functions.

3. *Gleed v. AT&T Mobility Services.* Employee that was not allowed to sit at work to accommodate a disability was a question for the jury since a pregnant woman was allowed a chair.

4. *Acker v General Motors, LLC.* FMLA requests alone don't trigger ADA. A request for an ADA accommodation would be to assert that he was

able to perform the essential functions of his job with a reasonable accommodation.

5. *EEOC v.* Dolgencorp, LLC. Don't steal and sue. If the jury believed that the termination decision was made based on the employer's honest belief that the employee violated the anti-grazing policy, the disability would not have been the "but for" cause of the termination.

6. *Blatt v Cabela's Retail, Inc.* The plaintiff's gender dysphoria (a/k/a Gender Identity Disorder) was a disability because, as her doctor attested, it substantially limited her major life activities, including interacting with others, reproducing, and social and occupational functioning. It did not merely affect how she identified herself sexually.

7. *Kubik v Central Michigan University Board of Trustees.* If decision was made before Pregnancy = No Claim & 5 Month Gap. The court ruled that in the context of pregnancy-discrimination claims, a plaintiff has the burden to show that "(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision."

E. Safety defense.

1. *Michael v. City of Troy.* An employer's determination that an employee cannot safely perform his job function is objectively reasonable when the employee relies on a medical opinion that is objectively reasonable.

2. *Henschel v. Clare County Road Commission.* An excavator who lost a leg in a motorcycle accident can't safely operate the excavator.

F. Reasonable accommodations.

1. Employers do not have to agree to employee's specific request and are free to offer other reasonable accommodations.

2. The ADA requires employers to re-assign to a vacant position if available. Michigan law does not have this requirement. Plaintiff attorneys should only bring claims in federal court.

G. Associational Discrimination.

1. Expense (cost of insuring).

2. Disability by association (fear employee may contract the disability or fear employee is genetically predisposed to develop a disability).

3. Distraction (an employee has been somewhat inattentive at work because of the disability of the associated person).

4. Employees Not Covered by the Family and Medical Leave Act. The Americans With Disabilities Act ("ADA"), ensures equal opportunity in employment for qualified persons with disabilities. Any employee who becomes disabled and is unable to work, with or without a reasonable accommodation, may be granted a leave of absence as a reasonable accommodation in accordance with the Disability Accommodations policy.

IV. GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

A. GINA is a federal law that protects people from genetic discrimination in health insurance and employment. Genetic discrimination is the misuse of genetic information.

B. What is genetic information?

1. Genetic information includes any health conditions and risk for developing certain health conditions.

2. Who doesn't apply to GINA?

a. Employers with fewer than 15 employees are not included in GINA.

b. GINA's employment protections do not apply to US Military and Federal Employees.

V. WORKERS' COMPENSATION

A. Workers' compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his or her employer for negligence.

B. In Michigan, workers' compensation is governed by the Michigan Workers' Disability Compensation Act. The Worker's Disability Compensation Act (WDCA), MCL 418.101 et seq., requires that employers provide compensation to employees for injuries suffered in the course of an employee's employment, regardless of who is at fault. MCL 418.301(1); Pro-Staffers, Inc v Premier Manufacturing Support Services, Inc, 252 Mich App 318, 323; 651 NW2d 811 (2002). In return for this almost automatic liability, employees are limited in the amount of compensation they may collect, and, except in limited circumstances, may not bring a tort action against their employer. MCL 418.131; Pro-Staffers, Inc, supra at 323.

C. The WDCA prevents retaliation against workers who file claims for worker's compensation benefits. MCL 418.301(14); Chiles v Machine Shop, Inc, 238 Mich App 462, 469; 606 NW2d 398 (1999). To establish retaliation, a plaintiff must show that: "(1) he asserted his right for worker's compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." Id. at 470. The plaintiff bears the burden of showing that a causal connection existed between the filing of a worker's compensation claim and the adverse employment action. Id.

D. However, under the WDCA, Employers are not required to keep jobs open and can terminate employment at will. This is common if your work restrictions prevent return to work for an extended period of time. However, even if the state WDCA law does not provide for job restoration, if the employer is subject to the ADA, they may be required to grant leave as an accommodation.

VI. LEAVE POLICIES

A. Time recording policy should accurately describe what constitutes hours worked for non-exempt employees. For example, unpaid meal breaks consist of at least 30 minutes of uninterrupted work and breaks lasting 20 minutes or less constitute compensatory time. Thus, policies should not implement an automatic deduction of half-hour meal breaks, even if employee works during the lunch period. Employees must be paid for any hours worked.

1. Conditional certification of a class action was granted when employees argued that employer's timekeeping system left employees with no method for tracking meal breaks, that supervisors required them to work through breaks with little recourse, and that the employer prioritized patient-care responsibilities over the ability of its workers to take meal breaks.

2. Travel time is designated as hours worked, depending on the underlying facts, place of origination, and destination. Commuting to and from work, for example, is not compensable. Traveling all in a day's work (e.g., from job site to job site), however, is considered compensable.

VII. DEFENDING UIA & DISCRIMINATION CLAIMS

A. Identify policy violations

B. Identify non-discriminatory reasons for separation

C. Write correspondence confirming facts

D. Give employees an opportunity to respond