



**Your Irreplaceable Workforce Management Partner**

## **Today's Presenter:**

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## Leaves of Absence

## OVERVIEW:

- Background
- Non-FMLA Employer
- Benefits???
- Issue and Correction
- Anything else?
- WOW – we have problems
- A new development
- FMLA employer
- FMLA eligible employee
- WOW – we now have bigger problems
- Where did this go south?

## Background:

Local salon in Allegheny County. Desperate for employees to help stylists. Open 6 days a week 7-7. Salon attends a local career fair where soon-to-be high school graduates are also attending via a school program. Salon receives a resume from a senior. Salon hires graduating senior to be a low-level gopher. Employee stocks shelves, takes out trash, cleans everything, etc. Little to no customer contact. She works less than 20 hours a week and is not eligible for any benefits.

Turns out new employee is on the autism spectrum but very high functioning (just a bit awkward) and has a multitude of physical disabilities – ranging from a heart defect to a rare genetic issue that causes her to be physically slow and a bit uncoordinated (e.g. she walks slower than average and can not alternate steps going up and down stairs.) She requires two surgical procedures a year because she needs her stomach valve dilated to allow for the passage of food (a symptom of her genetic problem). These procedures take her out of work for about a week each time. She has a multitude of doctors appointments. The employer did not know all of this when they hired her but it became obvious and she has been open about her medical issues because she needs time off for appointments and surgeries.

She is a great employee. She is 18 but does NOT play on her phone during working hours (the employer thinks this is nothing shy of a miracle.) She ALWAYS shows up early. She is kind and, although awkward, is friendly to customers (contact is infrequent). She generally knows about her appointments months in advance and gives the employer plenty of notice so that they don't put her on the schedule. She is a hard worker. She has received glowing performance reviews and raises over the last 18 months.

## NON-FMLA employer:

- Roughly 35 employees
- Everybody is a happy clam.
- 18 year old (who is now almost 20) LOVES her job. She never thought anyone would hire her. She is relatively inexperienced and accepts whatever happens at work – she would not know one way or another if the employer was following employment laws. She just knows they are kind to her.
- Employer is kind and means well. They try to follow the law. They are small enough that they have NO internal HR. They would never intentionally deny an employee what is legally required. But they don't always know, what they don't know.
- Are we good?
- If not, what concerns are we looking at?

## Benefits???:

- Employee is not eligible for benefits. Handbook is quite clear that you have to work at least 20 hours/week for health insurance, life insurance, PTO, salon discounts, etc.
  - Is that okay?
    - Yes and no. Federal law is not implicated. State law is not implicated.
- BUT employer is in Allegheny County. The Allegheny County Paid Sick Leave Ordinance is implicated.
  - Any employer with 25 or more employees is subject to this law. This employer is covered.
  - Employees can be part time or full time and are eligible so long as they are working within Allegheny County. This employee is covered.
  - Conditions covered include medical treatment or preventative care. Employee's medical concerns and need for time off are covered.
  - She should earn one hour of paid time off for every 35 hours worked. She works 15 hours/week. She has one hour of paid time off earned in a little over 2 weeks. She can start using time after 90 days of employment.
  - Doctor's note for surgeries not appointments (absence must be 3 days or more to require a note)

## Issue and Correction:

- Handbook is illegal on its face – needs revised.
  - This law is enforced by the County and if an investigator showed up, this is Exhibit A and it's NOT in your favor. We probably don't have the right poster/notice up either – we need to fix that.
- Employer administration of Allegheny Paid Sick Leave Law has been non-existent due to ignorance (not intentional)
  - Certainly going forward we fix it – for this employee and everyone else. We are not going to rely on the naivete of a young disabled employee to ignore this. Clearly she should have had paid time off over the last 18 months and will be eligible for paid time off going forward.
  - Ideally we retroactively fix it – if we have enough information. Employee typically worked the same 3 days for a 5 hour shift each time. That makes it easier. We'd have to look back at our timekeeping records to count up paid time owed. We'd have to see if we have records for when she asked to be off the schedule because of her medical needs (she also asked off to go to the beach over the summer – so we need to be able to distinguish the reason for the time off.) Unfortunately, most of the time off requests were verbal, so there may be little to no records.
  - We could talk to her and see if she wants us to just pay out the 20 or so hours she would have earned last year or to roll them over to this year (to count towards the max of 40 sick leave hours).
  - We don't panic – this is an inexpensive problem to fix. She earns \$15/hour x 20 hours (approx.) = about \$300.
  - We look to see if others are impacted.



## Anything else?:

- We clearly have an Americans with Disabilities Act (ADA) situation and a Pennsylvania Human Relations Act (PHRA) situation (15/4). Multiple qualifying disabilities.
- Do we have problems? We seem to already be accommodating her. The employer seems to be willing to accommodate her slightly slower/unbalanced gait. They love her.
- In the first three months of her employment, she one time made the comment to her direct supervisor (who is the lowest level supervisor in the building) that she prefers evening shifts (2-7 – rather than 7-12) to allow her medicines time to kick in in the morning so she doesn't feel as dizzy (doesn't want to risk passing out), her blood pressure and heart rate can regulate, etc. She attends cardiac rehab therapy 2x/week because she is trying to avoid the necessity of a pacemaker surgery. The supervisor had said no problem.
- Typically, she does work evenings but recently one of the morning gophers quit and they've been putting the employee on more morning shifts to cover. They hired a guy who can cover the evenings but can't cover the mornings.
- Multiple employees – including other supervisors – have seen this employee in the morning and commented to her and others that she looks ill and she's had to sit down so she doesn't pass out.
- Direct supervisor is a great, kind lady. She has no recollection of the conversation about mornings because it's been so long ago.
- Now where are we?

## Wow – we have problems:

- This when, if you call legal counsel, they start to cringe.
- Employer is an ADA and PHRA covered employer (15/4)
- Employee has multiple disabilities.
- Employer has knowledge of these disabilities every which way – from the employee directly, from observation, and arguably received an employee request for accommodation.
  - Knowledge to direct supervisor and arguably to any other supervisor is the same as if the employee had told the owner or president of salon about all of this.
- Could we have avoided hiring her? Or found out all of this in advance of extending an offer of employment?
- Total and complete failure to engage in the ADA mandated interactive process and to document.
  - What should we have done?
    - We can ask an open-ended question (are you okay?) Which is what happened and she divulged her medical problems.
    - At that point, we should have been documenting (and possibly seeking medical proof) to establish that we know and we are accommodating – because the employer did accommodate.
    - The request for evenings should have been documented and probably honored or discussed as part of the interactive process.
    - We clearly have a supervisor training issue.
- Keep records separate from employment file.

## A new development:

- The salon had multiple owners. The majority owner is retiring and her shares of the salon have been purchased by a large national chain. The chain already has multiple salons in Allegheny County and across the nation.
- The national salon is a federal contractor. They send their transition HR team into the salon – because now they will be the employer.
- HR transition team is very sophisticated and meets with each employee. This employee is so nervous during the meeting (she later explains that she thinks they won't want her and she will lose the job she loves), she can't even remember her home address and telephone number, when they ask. She also does not know what township she live sin. Side note, poor memory/intellect is also a symptom of the genetic condition.
- Because they are OFCCP contractors, they are required to track certain traits (gender, disability, veteran status, etc.). They ask this employee if she “identifies as a veteran” (no) and if she “identities as being disabled.” She responds yes.
- After the meetings, the HR transition team returns to their home base – never to be heard from again.
- What do we have going on now?

## FMLA employer:

- Employer is now covered because it is part of the larger national chain – which has WAY more than 50 employees.
- There are more than 50 employees within a 75 mile radius – even though there are not 50 employees within that particular salon.
- The employee, if she works at least 12 months (does not have to be consecutive) and 1250 hours within the last 12 months for the employer is now eligible for FMLA (and still eligible the Allegheny County Paid Sick Leave).
- Employer is certainly on notice that she likely has multiple FMLA qualifying conditions.
- She does not have enough hours (FMLA qualifying averages out to about 24 hours a week)

## FMLA Eligible Employee:

- But let's say she did have enough hours. We would want to run that FMLA clock. We would:
  - Need an FMLA poster/notice (handbook needs updated) (time of hire or when employer becomes covered and redistributed.)
  - Provide form WH-381 Eligibility and Rights and Responsibility Notice (says she has enough hours and medical certifications required; benefits and paid leave addressed) MUST be provided within 5 business days of request for leave. (Request may be vague...)
  - Provide Employee with WH-380E Medical Certification. (Note other certs exist.) Generally, MUST be turned in within 15 calendar days.
  - Provide Employee with WH-381 Designation Notice (Leave approved/not approved, incomplete info) MUST provide within 5 days of having sufficient information.
  - Taken in increments as small as timekeeping system permits (not more than 15 minutes).

## WOW – we now have bigger problems:

- IF an 18 year old cannot remember address/phone number and identifies as disabled – we should be proactive under the ADA.
  - Never a good strategy to be an ostrich with your head in the sand.
  - If you have enough information to “wonder if you should follow up” – you probably do have enough information.
- HR transition team should not have left town to never be heard from again.
- This should have been another bite of the apple for the employer to try to document and open up the ADA interactive process.
- Think about how this looks to a jury, investigator or anyone else.

## Where did this go south?:

- She wasn't quite as good on the morning shift – too sick.
- New guy was faster better – but did play on his phone...
- Employer eventually just kept reducing employee's hours until she had nothing left. (Wimpy way of firing.)
- When she asked, they said they didn't need her anymore.
- She was HEARTBROKEN. Turned out she also suffered from anxiety and depression which were severely aggravated by this turn of events.
- Guess who had an uncle who was an attorney.... Who was indignant on her behalf when he heard her story.....

Thank you for attending!