



**Leave Laws and Terminations:
An Ethical Perspective**

Legal and Ethical Fun for the Legal Practitioner



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Intersection of Leave Laws

Roadmap:
EEOC as Catalyst
Problem: Clients Are People
Enter the IPRC
Solutions: We have them!
But...
Caveats and Limitations



Intersection? Was There a Sign?

- Employer-Provided Medical/Sick Leave
- Family & Medical Leave Act (FMLA)
- Americans with Disabilities Act, etc. (ADAAA)



Here's Your Sign: Bang Head Here





Catalyst: EEOC

- Two employer-leave policies at issue:
 - Requiring employees to disclose confidential medical information in order to be approved for sick leave; and
 - Requiring the automatic termination of employees who failed to return to work following the exhaustion of their allotted sick and FMLA leave.
- What's the beef?
 - These policies violate the ADA because employer did NOT consider:
 - whether the reason for FMLA leave = disability; and
 - If so, whether more leave could be reasonable accommodation.
- Result?
 - Two recent (2013) cases: \$6.85 million in settlements



Problem: Clients Are People

- Often employers want to (with good reason) get rid of people who are not good workers
- These bad workers are sometimes those who take FMLA leave (and sometimes are not "bad")
- Employers don't believe these workers are REALLY ill or injured
- Employers see opportunity to fire these bad apples when they don't return from FMLA leave



Problem: Clients Are People

Scenario:

- Client, Acme, Inc., has employee, Judy, who is currently out on FMLA leave following birth of child
- CEO tells you to prepare severance agreement for Judy, as CEO is convinced she will not return after FMLA because she is "milking the system"
- CEO has been frustrated compliance generally, especially in the employment dept., and has told you not to bother him with "that liberal claptrap" when giving advice about employees



Rule 2.1: Advisor

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."



Rule 2.1: Advisor

"In general, a lawyer is not expected to give advice until asked by the client."

"However, when a lawyer knows that a client proposes a course of action that is *likely to result in substantial adverse legal consequences* to the client, the lawyer's duty to the client (under Rule 1.4: Communication) may require that the lawyer offer advice if the client's course of action is related to the representation."



Rule 1.4: Communication

"A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."

"A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."



Rule 2.1: Advisor

"A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted."

"A lawyer may initiate advice to a client when doing so appears to be in the client's interest."



Rule 2.1: Advisor

Scenario:

- Client, Acme, Inc., has employee, Judy, who is currently out on FMLA leave following medically difficult birth of child
- CEO tells you to prepare severance agreement for Judy, as CEO is convinced she will not return after FMLA because she is "milking the system"
- CEO has been frustrated with having to comply with leave laws, and has told you not to bother him with "that liberal claptrap" when giving advice about employees



How to Address with Client: Sick Leave Policy

- Change policies (and train management) so they don't ask for information about the specific nature and extent of the medical condition that requires the employee to take leave.
- It is enough for sick leave that an employee says they are, well, sick, and can't come to work.
- You are still free to follow your limits on the amount of sick leave an employee is entitled to (but note the caveats below).



How to Address with Client: Sick Leave Policy

- You are still free to ask employees to get a doctor's certification that the medical condition is serious enough to qualify for FMLA leave.
- Again, you don't want or need to know the specific nature or extent of the condition.
- It suffices that the doctor says it's serious enough (use a form the doctor can sign for this purpose).



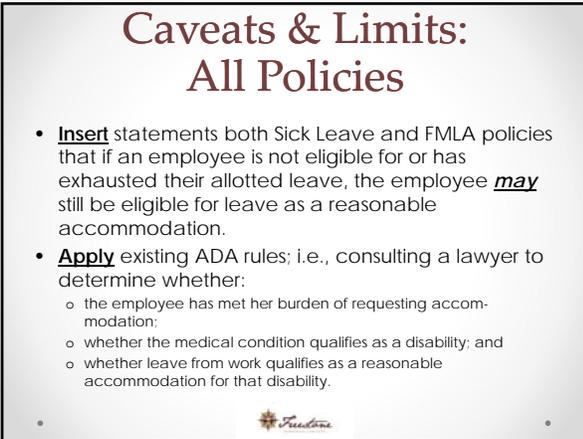
How to Address with Client: ADA Policy

- Some wisdom from fly fishermen...



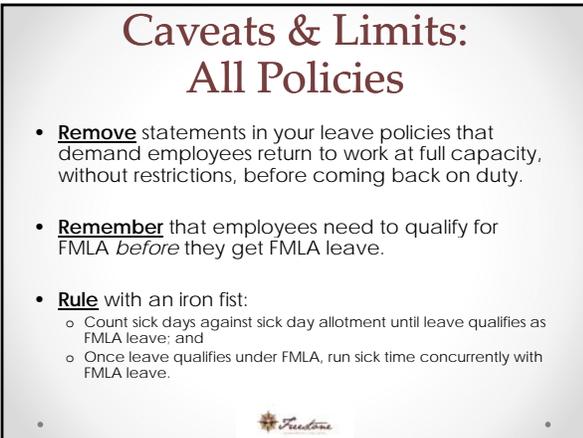
Caveats & Limits: All Policies

- **Insert** statements both Sick Leave and FMLA policies that if an employee is not eligible for or has exhausted their allotted leave, the employee **may** still be eligible for leave as a reasonable accommodation.
- **Apply** existing ADA rules; i.e., consulting a lawyer to determine whether:
 - the employee has met her burden of requesting accommodation;
 - whether the medical condition qualifies as a disability; and
 - whether leave from work qualifies as a reasonable accommodation for that disability.



Caveats & Limits: All Policies

- **Remove** statements in your leave policies that demand employees return to work at full capacity, without restrictions, before coming back on duty.
- **Remember** that employees need to qualify for FMLA *before* they get FMLA leave.
- **Rule** with an iron fist:
 - Count sick days against sick day allotment until leave qualifies as FMLA leave; and
 - Once leave qualifies under FMLA, run sick time concurrently with FMLA leave.



Severing Ties: Termination & Severance

Roadmap:

- Severance: Statutory Guidance
- Organization as Client
- Truthfulness: How Much Truth?
- Lawyer's Role: Employer vs. Employee
- Rights of 3rd Parties vs. Idaho Code



So You Want to Fire Stevie...

- In Idaho, employers may not require or make an agreement with an employee to do any of the following:
 - Pay any portion of WC claims.
 - Contribute to the cost or other security maintained for or carried for securing payment for workers' compensation.
 - Contribute to an employer-maintained benefit fund or department.
 - Waive any rights to compensation under the Idaho workers' compensation law.
 - An agreement requiring employees to waive their rights to workers' compensation is void.
 - In addition, employers face misdemeanor charges if they make a deduction from the employee's compensation to pay for certain workers' compensation costs. (*Idaho Code § 72-318 (2011)*).



Rule 1.13: Organization as Client

"In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."



Problem: Clients Are People

Scenario:

- Client, Acme, Inc., has employee, Judy, who is currently out on FMLA leave following birth of child
- CEO tells you to prepare severance agreement for Judy, as CEO is convinced she will not return after FMLA because she is "milking the system"
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Rule 4.1: Truthfulness

"In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."



Rule 4.1: Truthfulness

"A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

"This rule refers to statements of fact. A party's intentions as to an acceptable settlement of a claim are ordinarily NOT considered statements of material fact."



**Rule 4.2: Parties
Represented by a Lawyer**

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”



**Rule 4.2: Parties
Represented by a Lawyer**

Employer’s Lawyer:

“The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”



**Rule 4.2: Parties
Represented by a Lawyer**

Employee’s Lawyer:

“This Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

BUT...

“Consent of the organization’s lawyer is not required for communication with a former constituent.”



**Rule 4.3:
Unrepresented Parties**

"In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

"When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."



**Rule 4.3:
Unrepresented Parties**

"The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."



**Rule 4.3:
Unrepresented Parties**

"This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.

"So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations."



Problem: Clients Are People

Scenario:

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Rule 4.4: Rights of 3rd Parties

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference.



Idaho Code 44-201(2): Employer Liability Protection

- IF:
 - An employer provides a description of a current/former EE's performance to a prospective employer of that EE; AND
 - the employer does so at the request of either the current/former EE, or the prospective employer of that EE, AND
 - the description is honest,
- THEN: the former employer is immune from civil liability in Idaho for disclosing the info, or the consequences thereof.
- Number 2 is needed to get the rebuttable presumption of "good faith", but it is not required to get the immunity under my read of the statute. That is, you could conceivably show "good faith" another way.





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