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An Apple a Day & Other Tips for Managing Employee Health Issues

National School Board Association

School Law Practice Seminar

October 22, 2015

Shelli L. Anderson
312.786.6119
sla@franczek.com

Dana Fattore Crumley
312.786.6583
dfc@franczek.com

This paper provides practical guidance, including "step-by-step" processes for managing the most challenging employee health issues that occur in the school setting.

I. AMERICANS WITH DISABILITIES ACT (ADA)

- The ADA was enacted to prohibit discrimination against an employee on the basis of either a real **or perceived** disability.
- To comply with the ADA, an employer must provide an otherwise qualified applicant or employee with a reasonable accommodation, which allows the employee to complete the essential functions of the job.
- **Disability** (42 USC § 12102)
  - Physical or mental impairment that substantially affects or more major life activities.
- **Major Life Activities** (42 USC § 12102)
  - Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

II. INTERACTIVE PROCESS AND REASONABLE ACCOMMODATIONS

- **Disability (**42 USC § 12102):
  - Physical or mental impairment that substantially limits one or more major life activities;
  - A record of such impairment; or
  - Being regarded as having such an impairment.
- **Reasonable Accommodation (**29 CFR § 1630.2): Change in work environment that removes a workplace barrier for an individual with a disability.
- What constitutes a "reasonable" accommodation, and what exceeds the employer's obligation?
  - *Childers v. Hardeman Cnty. Bd. of Educ.*, 2015 WL 225058 (W.D. Tenn. Jan. 15, 2015) – A teacher requested that she be allowed to return to her previous non-classroom position as an accommodation.
  - Held: Employers **do not** have a duty to create new jobs or displace existing employees from their positions in order to accommodate a disabled individual
- The timing of a request for a reasonable accommodation is key.
  - *Klemme v. West Irondequoit Cent. Sch. Dist.*, 69 F. Supp. 3d 335 (W.D.N.Y. 2014): Teacher's subpar performance and attendance issues led to denial of tenure, after which time she revealed a neurological condition and requested an accommodation.

- Held: A plaintiff must at least inform the district of her condition in order to trigger an obligation to engage in the interactive process; because she did not do so until after she was denied tenure, no ADA violation found.

- **29 CFR § 1630.2**: "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an ***informal, interactive process*** with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."

III. MENTAL HEALTH UNDER THE ADA

- **Mental Impairment** (29 CFR 1630.2(h)(2)
  - A mental impairment is a mental or psychological disorder such as: an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- The EEOC's guidance on the ADA makes it clear that all mental impairments do not necessarily rise to the level of a disability. Thus, an employee with a mental impairment must also have major life activity that is substantially affected by the impairment in order for the impairment to rise to the level of a disability.
- The EEOC's guidance also states that certain traits or behaviors, themselves, are not mental impairments. Thus, although stress may be a result of an employee's mental impairment, stress itself is usually not a mental impairment.
  - Similar traits or behaviors that may be associated with mental impairments, but likely are not impairments themselves are: irritability, chronic lateness, or poor judgment.
- **Accommodating a Mental Impairment**
  - There is no difference in the way districts should approach providing accommodations to employees with mental impairments.
  - Employees and applicants must be qualified to perform the essential functions of the job.
  - Districts are also required to engage in the interactive process described above with respect to these employees and applicants.
  - A district, however, is not required to provide an accommodation that would cause an undue hardship for the district.

IV. THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

- **Coverage** (29 USC § 2611)
  - The FMLA generally applies to employers with 50 or more employee within a 75 mile radius.
  - With respect to school districts, however, this is not required. Thus, all school districts are covered by the FMLA. (29 CFR § 825.600)

- **Employee Eligibility** (29 USC § 2611-12)
    - An employee is eligible for leave if he or she has worked for the district at least 12 months and has completed at least 1,250 hours of service for the district within the previous 12-month period
    - Eligible employees are entitled to 12 workweeks of leave during any 12-month period for the following reasons:
        - The birth or a son or daughter of the employee and in order to care for such son or daughter;
        - The placement of a son or daughter with the employee for adoption or foster care;
        - To care for the spouse, son, daughter, or parent of the employee if such spouse, son, daughter, or parent has a serious health condition;
        - To care for the serious health condition of the employee;
        - For certain exigencies or illnesses and injuries related to having an immediate family member in the armed forces.
- **Serious Health Condition** (29 USC § 2611)
    - As stated, an employee may use his or her FMLA leave to care for the serious health condition of him or herself or the serious health condition of an immediate family member.
    - According to the Act, a serious health condition is one that is "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."
    - The regulations define a serious health condition further to include:
        - A period of incapacity for more than three consecutive dates;
        - Any period of incapacity for pregnancy or prenatal care;
        - A chronic serious health condition; or
        - Absences for treatment (such as chemotherapy). (29 CFR § 825.114)
- **Caring for a Family Member** (29 CFR § 825. 124)
    - Related to the definition of a serious health condition is the definition of caring for a family member. The regulations define "caring for" as being available for a family member who is unable to "care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care."

V. INTERMITTENT LEAVE (29 CFR § 825.601)

- Like all other eligible employees, school district employees are entitled to take intermittent leave under the FMLA when they do not need leave for an extended period of time.
- Districts have a couple of options for "instructional employees" who need intermittent leave for more than 20% of their total number of working days. The district can either:
  - (1) require the employee to take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or
  - (2) temporarily transfer the employee to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position
- Additionally, when an employee takes FMLA leave "for a period that ends with the school year and begins the next semester" the leave is treated as a consecutive leave, not an intermittent one. The employee's available leave, however, will not be affected by the summer months in which the employee is not required to report to work.

VI. ABUSE OF FMLA LEAVE

- **Employee Notice** (29 CFR § 825.302-03)
  - **Foreseeable FMLA Leave**—when an employee knows that he or she will need to use FMLA leave, the employee is required to provide the district with at least 30 days' advance notice of the need for the leave. Where 30 days' advance notice is not practicable, the employee must provide the district with notice as soon as is practicable.
  - **Unforeseeable FMLA Leave**—at times, there may be instances where an employee will avail him- or herself of FMLA leave that was not planned. In this instance, the employee must provide notice as soon as is practicable.
  - **Complying with Employer Policy**—in both cases, where an employee's leave is foreseeable or unforeseeable, the employee must comply with the employer's policy for requesting time off. Thus, if an employer has a call-in policy, the employee must abide by such policy. However, if the employee is incapable of calling in due to a medical emergency, the employee must call-in when his or her conditional has stabilized and he or she is able to use a telephone.
- **Certification and Recertification**
  - **Initial Certification** (29 CFR § 825.305)—the district may require employees to support the need for FMLA leave with a medical certification issued by a health care provider. A district can require that such

certifications be returned within five business days of the district's request for certification. In the case of an unforeseen FMLA leave, the district can require the employee to return the certification within five business days after the leave commences.

1. The employee's certification must be complete and sufficient. Thus, an employee must provide a medical basis for the need for leave that sufficiently explains the employee's condition. If the employee's certification is incomplete or insufficient, the district should require clarification and completion of the certification.

- **Recertification** (29 CFR § 825. 308)—once an employee is out on leave, the district may request recertification of the employee's condition and need for leave. However, such recertification is limited to every 30 days. The district must allow an employee 15 days after its request to return the recertification to the district.

- **Fitness for Duty Certification** (29 CFR § 825. 312)—prior to returning to work from FMLA leave related to an employee's own serious health condition, the district can require that the employee provide a fitness for duty certification. In order to complete this, the district must provide the employee's health care provider with a list of the essential functions of the job. The health care provider is then to review these job functions and determine whether the employee is able to complete the essential functions or his or her job. The district may not request second or third opinions in relation to a fitness for duty certification.
  - When an employee takes intermittent leave, the district is not entitled to a fitness for duty certification for each increment of leave taken by the employee. Instead, an employer may request a fitness for duty certification once every 30 days for employees who take intermittent leave if a reasonable safety concern exists.
- **Honest Belief Defense**
  - The FMLA provides job protection to employees. This means that when they return from their leaves, they are entitled to reinstatement or a similar position is such position is available and the employees are qualified.
  - A district may, however, refuse to reinstate an employee where it has an "honest disbelief" that the employee used their leave lawfully.
  - *Jaszczyszyn v. Advantage Health Physician Network*, 2012 WL 5416616 (6th Cir. 2012):
    1. The Sixth Circuit stated: "[S]o long as the employer honestly believed in the proffered [lawful] reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless."

- *Lineberry v. Detroit Medical Center*, 2013 WL 438689 (E.D. Mich. 2013):
    1. Here the employee was granted leave for a condition involving her back. The employer later found Facebook pictures of the employee drinking and on a sports boat. The employee was then discharged due to dishonesty.
- *Hyldahl v. Michigan Bell Telephone Co.*, 2012 WL 5359257 (6th Cir. 2012):
    1. The employer in this case suspected that the employee was abusing her intermittent leave to extend her weekends. Surveillance of the employee revealed that she was going to the dentist, getting haircuts, and engaging in other activities. The employer believed the employee was committing "FMLA fraud," and terminated the employee.
    2. The court, in this case, however, stated that the employer could not demonstrate that its decision to deny FMLA leave was based on "good faith" and "reasonable grounds." The issue here was that the employer could have requested a second opinion of the employee's certification. Such a certification would have established reasonable grounds on which to discharge the employee.

VII. THE INTERSECTION OF THE FMLA AND THE ADA

- There may be times where an employee exhausts his or her FMLA leave, but has not yet recovered from his or her injury or illness. If this is the case, the employee may be suffering from a disability. In these instances, districts need to be careful not to take adverse actions against employees who cannot immediately return to work after the expiration of their FMLA leave.
- Instead, an employer should engage in the interactive process discussed above to determine if a reasonable accommodation can be given to the employee. Such an accommodation could be the extension of leave.
- **REMEMBER**: a district is not required to provide an accommodation that creates an undue hardship.

VIII. PREGNANCY DISCRIMINATION

- The Pregnancy Discrimination Act of 1978 (42 USC § 2000e(k))
    - Amendment to Section 701 of Title VII
    - "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit

programs, as other persons not so affected but ***similar in their ability or inability to work***…"

- The EEOC's 2014 Guidance: Broadly interpret "disability" when a pregnant employee requests an ADA accommodation.
- Cases to Note:
  - *EEOC v. Bayou City Wings* (S.D. Tex. 2013): Female workers were laid off after the third month of their pregnancies.
  - *EEOC v. Muskegon River Youth Home* (E.D. Mich. 2012): Employee notified company once she learned she was pregnant; the company required her to produce certification from her doctor that she was capable of continuing to work (settled $$/10-yr consent decree).
  - *EEOC v. Savi Technologies* (E.D. Va. 2014): Rescinded job offer day after candidate informed company of recent childbirth
  - *EEOC v. The Lash Group* (D. Md. 2014): An employee suffered from post-partum depression, and the employer failed to provide additional leave beyond FMLA. Additional unpaid leave ***may*** be an accommodation.
- Supreme Court's Ruling in *Young v. UPS*, 135 S.Ct. 1338 (2015): A crucial decision for "light duty" requests
  - UPS Policy: We only give light duty to "on-the-job" injuries, those disabled under the ADA, and those who lost their Dep't of Transportation certifications
  - Held: Plaintiffs alleging pregnancy discrimination may use the *McDonnell-Douglas* burden shifting framework. If an employee's pregnancy creates some temporary inability to work, just like an on-the-job injury, the employer must consider a reasonable accommodation
- **Check your local laws!**
  - States are increasingly drafting legislation that requires employers, including schools, to grant reasonable accommodations to pregnant employees.
    - California Code §§ 12945(a)(3)(A); 12945(a)(3)(C): An employee may request a transfer to a different job or less strenuous position if the request is reasonable
  - **Note**: Under the ADA, an employer need not consider such a request!

IX. ALCOHOL AND SUBSTANCE ABUSE IN THE WORKPLACE

- More common than most would think.
- School districts, as state actors, must have **reasonable suspicion** to investigate drug/alcohol abuse at work.
  - More than a "hunch" but less than probable cause

- Specific and articulable facts which, together with reasonable inferences, would lead to you believe drugs/alcohol are involved

- When do you have enough evidence to investigate and conduct a drug or alcohol test?
  - **Observable Behavior**: Slurred speech, coordination, mood or attitude
  - **Observable Traits**: Blood shot eyes, alcohol on the breath, excessive perspiration
- Investigations in Action: *Donegan v. Livingston*, 877 F. Supp. 2d 212 (M.D. Pa. 2012): Teacher came to working smelling like alcohol after leaving long, rambling voicemail for principal the previous night.
  - Held: Teachers have a "reduced expectation" of privacy in the workplace, and a forced Breathalyzer fell under the "special needs" exception to the Fourth Amendment
  - "Similar to railroad workers, teachers' privacy to ingest substances at work is diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."

X. MEDICAL AND RECREATIONAL MARIJUANA

- Keep updated on developments in your state.
- Despite the new landscape for legalization and decriminalization, employers still have wide discretion to discipline employees for marijuana use.
- Colorado Supreme Court in *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015): Employee with medical marijuana prescription tests positive for THC.
  - Held: An activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under the statute.
  - For employment purposes, federal prohibition trumps state legalization
- Washington Supreme Court in *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736, 257 P.3d 586, 588 (Wash. 2011): Applicant had a prescription for marijuana to treat migraines and failed an initial drug test
  - Held: Washington's medical marijuana statute did not regulate private employer conduct.
  - Also, the law did not create a "clear public policy" prohibiting discharge for medical marijuana.

XI. WORKER'S COMPENSATION AND THE ADA

- The following provides general guidelines regarding the overlap between the ADA and workers' compensation laws. However, because workers' compensation laws vary state-by-state, consult your state code before taking action.

- **The Purpose of Workers' Compensation**: To provide prompt and fair settlement of employees' claims against employers for occupational injury and illness.
    - For example, Illinois Workers Compensation Act (820 ILCS 305 *et seq.*) provides many forms of relief including:
        - Medical care that is reasonably required to cure or relieve the employee of the effects of the injury;
        - Temporary total disability (TTD) benefits while the employee is off work, recovering from the injury or temporary partial disability (TPD) benefits while the employee is recovering from the injury but working on light duty for less compensation;
        - Permanent partial disability (PPD) benefits for an employee who sustains some permanent disability or disfigurement, but can work;
        - Death benefits for surviving family members.
    - No fault requirement for workers' compensation benefits
- **The Purpose of the ADA**: Permit employees with disabilities to perform the essential functions of the job with reasonable accommodations
    - Most often, an employee "coming off" workers' compensation will request an accommodation
    - Example: While an employee may lose TPD or TTD benefits, he or she may request additional unpaid leave as a reasonable accommodation for the lingering effects of the workplace injury.
    - Question: Does the injury in question qualify as a "disability" as defined?
- Mistakes to Avoid with Workers' Compensation
    - Employers may not inquire into an applicant's worker's compensation history prior to extending a conditional offer of employment.
    - Do not assume that an individual with an occupational injury is necessarily "disabled."
    - Ask: Does this injury "substantially limit" a "major life activity?"
    - Require any returning employees to have a medical exam or "fitness for duty" examination prior to returning to work.

XII. EMPLOYEE RECORD CONFIDENTIALITY

- Districts are bound by the ADA, the Health Insurance Portability and Accountability Act (HIPAA), and the Genetic Information Nondiscrimination Act (GINA) to keep employee medical records confidential. The protections of employee confidentiality extend to employee records obtained through the FMLA process.
- Districts should maintain employee medical files separate from employee personnel files.
- Only **limited** information concerning an employee's disability or health condition may be shared with supervisors on a **need-to-know** basis. The same rule applies for emergency personnel, if an employee's disability or medical condition may require emergency treatment.