A top-down view of a desk with a laptop, glasses, a pen, and a mouse. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The mouse is at the top left.

Work**Smarts** Half-Day Seminar

Planting and Weeding the Garden: Fresh Takes on Time Off Benefits and Leave Management

Sue Willman and Randi Winter

 Spencer**Fane**[®]

Gather Your Gardening Tools: Today's Agenda

Part 1: Cultivating New Varieties of Annuals: Trends in Time Off and Leave Benefits

- Unlimited PTO
- Sabbaticals / Extended Time Off
- Mandatory Paid Leave
- Paid Parental Leave
- Phased Retirement

Gather Your Gardening Tools: Today's Agenda

Part 2: Keeping the Perennial Weeds at Bay: Managing Recurrent Time Off and Leave Challenges

- Ensuring employees unplug
- Addressing performance/conduct problems concurrently with leave
- Workers' compensation leaves
- Replacing employees on leave
- Terminating employees on leave

Gather Your Gardening Tools: Today's Agenda

Part 3: Preparing for Fall Garden Maintenance: Ensuring Ongoing Compliance

- State and Local Paid Sick Leave
- Categories of Other State-Specific Leave
- Non-FMLA Medical Accommodation Leaves



Part 1: Cultivating New Varieties of Annuals: Trends in Time Off and Leave Benefits

Unlimited Paid Time Off (UPTO)

- **The Concept**

- A vacation policy that allows employees to take as much time off work as they want as long as it does not interfere with ability to complete work and does not disrupt operations

Unlimited Paid Time Off (UPTO)

- **Types of Paid Time Off**

- Traditional (Separate Paid Vacation + Paid Sick Day Allotments)
 - 51% of Employers (2021)
 - 49% of Employers (2020)
- Limited Paid Time Off (LPTO)
 - 41% of Employers (2021)
 - 44% of Employers (2020)
- Unlimited Paid Time Off (UPTO)
 - 4% of Employers (2021)
 - No Available Data (2020)

Unlimited Paid Time Off (UPTO)

- **Level of Employee Interest**

- 72% of employees express interest in it
- 50% of employees would prefer UPTO to earning a higher salary

- **Level of Employer Interest**

- Started to catch on around 2015
- 4% offer UPTO (2021) – Netflix, Twitter, LinkedIn, Oracle, GrubHub, Indeed, Hubspot, Evernote, VMWare, and a number of small companies (<100 or so)
- Might be as high as 9%

Unlimited Paid Time Off (UPTO)

- **Presumed Benefits for *Employers***

- Saves money – no payout of unused PTO upon separation
- Attracts talent; is recruiting tool
- Retains talent; reduces turnover
- Reduces attendance tracking and saves administrative time
- Eliminates need for and to police and enforce an attendance policy
- Improves staffing flexibility by encouraging (and perhaps necessitating) cross-training
- Eliminates December rush of employees “using it or losing it”

Unlimited Paid Time Off (UPTO)

- **Presumed Benefits for *Employees***
 - Improves employee motivation and engagement
 - Improves time management by employees
 - Increases productivity
 - Helps create better work/life balance for employees
 - Reduces stress and improves self-care, mental health and wellness
 - Avoids burnout by allowing employees to rejuvenate and reenergize
 - Results in greater job satisfaction
 - Increases employee empowerment
 - Increases employees' level of trust in employer and loyalty

Unlimited Paid Time Off (UPTO)

- **Myth #1**

- It's unlimited – employees can take as much time off as they want as long as they get their work done.

- **Truth:**

- Only a “reasonable” amount of UPTO can be used, and employer decides the issue.
- UPTO has to be scheduled in advance – unscheduled absences not normally covered.
- UPTO has to be approved – supervisors can deny requests due to conflicting requests, busy periods, critical projects, etc.

Unlimited Paid Time Off (UPTO)

- **Myth #2**

- Employees take far more time off under an UPTO policy than an LPTO policy.

- **Truth:**

- So far, the stats suggest that employees actually take off *less* time under an UPTO policy than under an LPTO policy – in 2019, employees took less UPTO per year (13 days) than they took LPTO (15 days).
- Underuse may be a bigger problem than overuse.

Unlimited Paid Time Off (UPTO)

- **Myth #3**

- UPTO is suitable for all jobs.

- **Truth:**

- UPTO is probably not realistic for many jobs (particularly hourly jobs), such as:
 - Commission-only jobs
 - Jobs inter-dependent on each other
 - Jobs with ongoing and frequent deadlines
 - Customer-facing jobs
 - Jobs performed by employees at customers' work sites
 - Tech support jobs
 - Customer service jobs
 - Call centers
 - Manufacturing, warehousing, distribution jobs

Unlimited Paid Time Off (UPTO)

- **Myth #4**

- Employers no longer have to track an employee's time off.

- **Truth:**

- Tracking is necessary to determine how much UPTO an employee is using and if it is reasonable or unreasonable.
- Tracking is necessary so that adequate staffing is in place to cover employees on UPTO; some employers now use a scheduling app to communicate who is on UPTO and when, and who is covering for them, so that other employees know.
- Tracking is still necessary for jobs that are not covered by the UPTO policy.
- If you want to determine utilization and evaluate the effectiveness of the program, you have to track in order to collect the data.

Unlimited Paid Time Off (UPTO)

- **Myth #5**

- UPTO improves productivity, morale, loyalty, engagement and empowerment, and reduces stress, burnout, and turnover.

- **Truth:**

- There does not appear to be any hard data yet to prove or disprove the above presumptions.
- Whether or not the presumptions are actually true is likely driven by how supportive the work culture and leadership is of the UPTO concept.

Unlimited Paid Time Off (UPTO)

- **A Two-Edged Sword**

- Some employees take too much (abusers).
- Some employees don't take enough:
 - Feelings of guilt about being gone override benefit of the time off;
 - Fear of use because not clear how much is reasonable and how much is too much;
 - Fear that use will be viewed as disloyal and result in lost career opportunities; and/or
 - Fear of retaliation by supervisor.
- Employees lose stockpiling benefit because no PTO is paid out upon separation.
- Co-workers who regularly cover for absent employee can get resentful.
- Employees compete to show commitment and loyalty by not taking PTO.
- Conflicts arise due to overlapping time off requests.
- Denial of PTO requests can result in resentment when work obligations limit flexibility and availability of LPTO – is it really a benefit or is it a scam if you can't fully use it?
- It's not suitable for all jobs.

Unlimited Paid Time Off (UPTO)

- **Bottom Line**

- In some workplaces and for some jobs, it works well – but mostly not yet.
- Employees don't necessarily disconnect while on PTO anyway – 59% of employees do work-related business while on vacation – so what is benefit of giving even more PTO?
- There is higher degree of employee skepticism about UPTO now than before.

Unlimited Paid Time Off (UPTO)

- **Questions Employees Starting to Ask About UPTO**

- Do I trust the employer enough to believe they will actually grant my UPTO requests?
- Do I know what is a “reasonable” amount of UPTO? Does the employer provide any guidance so that I know how much is acceptable and how much is too much?
- If my UPTO request has already been approved, how do I know the employer won’t change its mind at last minute or at crunch time?
- Is it unfair for employers to offer a “phantom” benefit that has no monetary value if unused?
- How will I be perceived by my supervisor and co-workers if I use UPTO?

Unlimited Paid Time Off (UPTO)

- **Elements of Effective UPTO Program**

- Strong cultural commitment to it
- Strong leadership buy-in and commitment (walk the talk)
- Appropriate branding (“unlimited PTO,” “flexible time off,” “responsible time off,” “non-accrual vacation,” “flexible vacation,” “anytime PTO,” etc.)
- Eligibility (which jobs, tenure requirements, etc.)
- Exclusions (e.g., time off covered by other paid time off benefits, leaves of more than X days for medical purposes, FMLA leave?, etc.)
- Minimum increments for use
- Conditions for use (reasonable duration, reasonable total amount per year, work must be done/caught up, who will cover duties, absence won’t be disruptive, etc.)

Unlimited Paid Time Off (UPTO)

- **Elements of Effective UPTO Program**

- Request process
- Approval process (including how “distribution of time slots” will be determined)
- Abuse investigation process
- Non-compliance events:
 - Not scheduling in advance; taking unscheduled time off
 - Not following request and approval process
 - Not ensuring timely and full performance of job duties prior to use of UPTO
 - Failure to absorb fair share of assigned workloads
 - Taking an unreasonable amount of UPTO or taking UPTO too frequently

Unlimited Paid Time Off (UPTO)

- **Elements of Effective UPTO Program**

- Consequences for non-compliance:
 - Disciplinary action/discharge?
 - Suspend future use of UPTO? For how long?
 - Convert employee to LPTO?
- Transition plan (from LPTO to UPTO)
- State Law Considerations

Unlimited Paid Time Off (UPTO)

- **Alternatives to UPTO**

- Increase amount of LPTO
- LPTO + Mandatory Paid Leave
- Extra Week of PTO (in 2022 and 2023 Only) if taken at one time
- Increase number of paid holidays
- Offer paid or partially paid (e.g., 2-4 weeks) of FMLA leave
- Allow negative LPTO balances

Sabbaticals

- **The Concept**

- An extended period of leave available as a benefit to long-term employees, which may be paid or unpaid.
- Not just for professors anymore!
- “Sabbaticals are companies’ latest weapon against the Great Resignation.” – Fortune.com on March 22, 2022

Sabbaticals

- Consider the Purpose? Rest, rejuvenate, volunteer, education, creative
- Objective criteria (e.g., five years of continuous service, not on PIP, etc.)
- Paid, partially paid, or unpaid?
- Four weeks? Three months?
- Written policy and procedure
 - Eligibility
 - Application Process
 - Decision-making Process
 - Benefit details
 - Expectations while on leave and on return

Sabbaticals Potential Pitfalls

- Don't let protected leave impact eligibility
- Maintaining employee benefits: check your plan language
- What happens when multiple employees in same dep't request leave?
- Overwhelming the co-workers left behind
- Use it or lose it?
- Discretionary approval/denial
- PTO accrual
- Payment of benefit premiums

Unpaid Annual Leave

- **The Concept**

- An extended period of unpaid leave available once a year, typically in “non-peak” periods.

Unpaid Annual Leave

- Useful for jobs with “peak” and “non-peak” periods
 - Agriculture / Farming
 - Tax / Accounting
- Voluntary → Furlough → Layoff → Reduction in Force
- Eligibility for unemployment benefits
- Personal travel to foreign countries: visit family?
 - Quarantining: Treat everyone equally
- Payment of benefit premiums

Mandatory Paid Leave

- **The Concept**

- A required (and paid) vacation with total disengagement each year for at least 5-10 consecutive work days
- Is usually a component of an employer's LPTO policy but could be a separate policy and benefit

Mandatory Paid Leave

- **Purposes/Goals**

- Detect and prevent internal fraud
- Detect productivity, work flow, and efficiency issues
- Improve employee morale and productivity
- Improve work quality
- Increase staffing flexibility and availability with cross-training
- Manage business turndown and slow periods
- Help employees manage stress; prevent burnout
- Reduce employee guilt when time off is taken
- Reduce employee resentment when other employees take time off
- Reduce/help manage contingent liability and costs of payout of unused PTO upon separation of employment

Mandatory Paid Leave

- **Key Provisions of MPL Policy**
 - Application and Exceptions
 - Risk-sensitive positions only?
 - Full-time employees only?
 - Minimum length of service requirement?
 - Minimum accrual entitlement requirement?
 - Good cause exceptions to be permitted?

Mandatory Paid Leave

- **Key Provisions of MPL Policy (Continued)**

- Duration

- How many consecutive work days?
 - Usually at least 5-10 consecutive work days, excluding holidays
- Must they all occur during same work week?
- Will paid holidays count as part of it?

Mandatory Paid Leave

- **Key Provisions of MPL Policy (Continued)**

- Requesting and Scheduling

- Written request (with reason for absence?)
- Written approval; will there be multiple/layered approvals required?
- How far in advance must it be requested? Will it depend on length of the absence?
- Process for resolving conflicting requests
- Periods excluded (e.g., busy season), periods required (e.g., shutdown between Christmas and New Year's), and periods encouraged (e.g., slow months)

Mandatory Paid Leave

- **Key Provisions of MPL Policy (Continued)**

- Restrictions During/Conditions of Leave

- Process for ensuring that all duties and responsibilities are delegated or assigned to another suitable and approved employee before going on leave
- Total disengagement while on leave:
 - No performance of duties or responsibilities
 - May not enter premises
 - May not use or access employer's systems
 - May not use employer's e-mail system
 - May not use employer's phone or voicemail systems
 - May not accept work-related communications from other employees

Mandatory Paid Leave

- **Key Provisions of MPL Policy (Continued)**

- Other Provisions/Issues/Considerations

- Whether other paid or unpaid block leaves will satisfy the MPL requirement (e.g, FMLA leave, STD leave, non-FMLA medical leave, worker's compensation leave, etc.)
- Statement that unexcused, unapproved, and/or unscheduled time off is not eligible to satisfy the MPL requirement
- Whether MPL time off will be advanced if employee has not accrued sufficient PTO
- Statement that unused MPL is not carried over and not paid upon separation – is only earned when it is actually used?
- Will there be any acceptable alternatives (such as job rotation in lieu of being off work)?

Mandatory Paid Leave

- **Key Provisions of MPL Policy (Continued)**

- Other Provisions/Issues/Considerations (Continued)

- Statement that other legally-mandated leaves are not diminished by the MPL requirement
- How MPL integrates with other paid time off policies (such as LPTO, UPTO, electronic disconnect policies, etc.)
- Impact of existence of union contract
- Supervisory training to ensure supervisory commitment and enforcement
- Consequences for non-compliance by employees
- Consequences for non-enforcement by supervisors

Paid Parental Leave

- **The Concept**

- A period of paid leave available to both mothers and fathers at some point following the birth, adoption, or placement of a foster child.
- Distinct from leave available to new mothers for recovery from pregnancy, child birth, or related medical conditions.
- Often overlaps with parenting leave required under state or local law.

Paid Parental Leave

1 in 4 mothers	return to work ten days after childbirth. (Source)
1 week	is the average amount of time new fathers take. (Source)
30% of women	drop out of the workforce within a year of giving birth without access to paid family leave and one in five do not return for more than a decade. (Source)
Longer leaves	lead to women reporting an overall improvement in mental health, fewer postpartum depressive symptoms, and a reduction in severe depression. (Source)
65% of new parents	admit to having trouble juggling parenting with career demands. (Source)
52% of women	feel concerned they will be judged for taking leave or asking for flexible hours. (Source)
66% of women	in the job market are looking for flexible scheduling and family planning benefits. (Source)
Over 70% of companies	that offer paid leave report an increase in employee productivity and positive impact on employee morale. (Source)

Source: Bobbie “Take our Leave” Playbook – 2022
Four months paid leave + eight months bonding.

Paid Parental Leave

- No federal paid parental leave (for now)
- Currently required in seven states + D.C.
- Legislation passed and programs pending in three additional states
- Can employers provide more leave to women? It depends.
- Employers may provide leave for pregnancy, child birth, and related medical conditions exclusively to women.
- But leave to care or bond with a new child must be made equally available to all employees.

Paid Parental Leave: Drafting Policies

- Birth + Adoption + Fostering?
- Differentiate between medical leave to recover from pregnancy and childbirth vs. parental leave
- Provide the same amount of leave to care/bond to men and women
- Alternative: Provide same amount of leave to “primary caregiver” regardless of gender
- Does company culture support the policy features? I.e., don’t pay “lip service” to paternity leave
- What if both parents work for the same company?

Phased Retirement

- **The Concept**

- A path to retirement that allows an employee to slow down and ease or transition into retirement over a period of time rather than a sudden and abrupt departure
- A broad range of flexible retirement arrangements (both informal practices and formal workplace policies) which allow employees approaching normal retirement age to reduce work hours in current job or work for their employers in a different capacity until and/or after retirement

Phased Retirement

- **Types of Phased Retirement**

- Informal through informal, ad hoc practices **or** formal with a formal workplace policy and process
- Variations:
 - Working fewer hours in current job; part-time schedule
 - Sharing job with another employee (job-sharing)
 - Taking more time off (paid or unpaid)
 - Transferring to different, lower job with fewer responsibilities and stress
 - Transferring to a different, but part-time job
 - Working as a temporary or seasonal employee
 - Working “on call” or only handling limited special assignments/projects
 - Retiring and then getting rehired as employee and work up to 999 hours to retain pension
 - Retiring and then becoming independent contractor or consultant to employer
 - Taking unpaid leave for limited period of time (e.g., 1-2 months) to “try out” retirement

Phased Retirement

- **Elements of Formal Phased Retirement Program**

- Written policy that is communicated and emphasized as a benefit
- Clear eligibility requirements (e.g. position-eligibility, minimum age requirement, and other requirements that comply with ADEA)
- Application process and proposal from employee; interactive discussion with employee
- Approval process and non-discriminatory selection criteria (but no guarantee)
- Duration of transition period (e.g., at least 6 months, no more than 5 years, etc.)
- Written information on retirement, health, and other benefits and impact that phased retirement will have on them (presumably there will be continued access to them)
- Written description of agreed upon plan (with reiteration of “at will” status)

Phased Retirement

- **A Concept Whose Time Has Come?**
 - Been in existence as a concept since around 2000, but just recently garnering more attention
 - Seems to be gaining momentum and popularity, but is still a relatively under-the-radar concept

Phased Retirement

- **Historical Perspective**

- Pre-1930'ish – employees retired when they could no longer physically work
- 1930-1999'ish – employees retired at a normal retirement age of 65 and survived on pension/retirement plan and Social Security
- 2000 and Beyond – retirement is a continuum:
 - At one end are “long-haulers” – who intend to work their entire lives:
 - May ultimately suffer from work stress and need to slow down; and/or
 - May ultimately become less physically or mentally capable of meeting work demands of current job
 - At the other end are “financially independent early retirees” – who want to retire early and enjoy a longer retirement:
 - May need supplemental income to meet their desired lifestyle and expected longevity
 - May need to work in order to relieve boredom

Phased Retirement

- **The Projected Labor Shortage Due to Aging Population**

- 10,000 Baby Boomers turn 65 each day
 - Began in 2011 and will continue until 2030
- By 2030:
 - Baby Boomers will outnumber Gen Z (under 18)
 - Baby Boomers will *all* be older than 65
 - A tidal wave of turnover is in the makings
- By 2060:
 - Will only be 2.5 working age adults for every retirement-age adult
 - In 2020, it was 3.5 – so significant decrease in those who are available to work and who will contribute to Social Security system

Phased Retirement

- **The Appeal of Phased Retirement to *Employees***

- Provides more money to cover a longer period of expenses since people are living longer
- Provides ongoing sense and satisfaction of productivity
- Easier to continue working since most jobs no longer require physical activity
- Provides opportunity for employees to experiment and “test drive” what will retirement will feel like
- Working provides stronger mental/emotional health
- Self-worth and identity are tied to work; retirement is a jarring change and sense of loss with grieving process
- Employees can continue to stay socially connected to work relationships
- Provides opportunity for better home-life balance; may relieve loneliness
- Changes in benefit and Social Security laws have made it easier to continue working after reaching retirement age without losing benefits

Phased Retirement

- **The Appeal of Phased Retirement to *Employers***

- Preserves expertise and institutional knowledge that can be shared with others through:
 - Mentoring
 - Training
- Provides needed staffing and is an incentive for employees to delay retirement (particularly when there is a brain drain due to retiring Baby Boomers plus departures due to “The Great Resignation”)
- Becomes part of succession planning strategies and process
- Reduces costs associated with hiring and training new employees
- Benefit plans can be modified to continue benefits as another incentive to retain talent

Phased Retirement

- **Employee Interest in Phased Retirement**

- Per a 2019 SHRM benefits survey, 29% of workers age 61-66 are planning phased retirements
- Per other surveys:
 - 20% of workers age 65+ in 2019 were still working (it was only 10% in 1985)
 - 36% of retirement-age workers either gradually reduce hours (17%) or plan to continue to work part-time indefinitely (19%) – only 64% retire abruptly
 - 53% of workers age 65-68 who are still working want to continue working full-time (33%) or part-time (20%)
 - Women more likely to phase into retirement (25% of retirees) compared to men (16%)

Phased Retirement

- **Employer Interest in Phased Retirement**

- 15% of employers offer phased retirement through informal practices
- 6% of employers offer phased retirement through a formal policy and process
- 82% of retirees indicate that their employers did nothing to help them transition to retirement (66%) or they were not sure their employers did anything (16%)
- May be reluctance by some employers to consider a phased retirement program:
 - Due to concerns and perhaps misapprehensions about ADEA risks;
 - Due to challenges with: (1) wanting to keep employee still at top of their games with experience and skills that are hard to replace; and (2) wanting to part ways with employees who have “retired in place” signaled by loss of interest in their work and drop in productivity, just hanging on, working only due to financial need or to keep benefits, and continual delays in picking a retirement date)



Part 2: Keeping the Perennial Weeds at Bay: Managing Recurrent Time Off and Leave Challenges

Ensuring Employees Unplug

- “Nearly half of U.S. employees say they work while on vacation.” – Safety & Health Magazine, April 28, 2022.
- 1 in 3 workers feel they are expected to answer calls or texts.
- Set the expectation up front and in writing
- Transparency in policy
- Model the policy
- Cutting off access to work email and networks
- “Right to Disconnect” laws

LOA Complicated by Performance/Conduct Issues

- **Common Situations**

- Prior to Leave – Active Written Discipline or PIP Pending
- At Time of Leave Request – Performance, Conduct, or Policy Violation Issue Involved
- While on Leave – Performance/Conduct Issues Discovered

LOA Complicated by Performance/Conduct Issues

- **Employer Priorities**

- Address or continue addressing legitimate performance, conduct, and policy violation issues
- Minimize risk of retaliation and discrimination claims

LOA Complicated by Performance/Conduct Issues

- **Key Concepts**

- An employee is never entitled to any greater rights or protection than they would have had if leave had not been requested.
- An employee's exercise of a legal right (e.g., requesting a leave of absence to which they may be legally entitled) does not normally defeat legitimate, non-discriminatory adverse actions of an employer against that employee.

LOA Complicated by Performance/Conduct Issues

- **Situation #1**

- Employee is on a 90-day PIP, has not been making acceptable improvement, and has been orally notified of continued performance issues. At 75-day mark, employee requests FMLA leave. What do you do?

LOA Complicated by Performance/Conduct Issues

- **Situation #1A**

- Employee is on a 90-day PIP, has not been making acceptable improvement, and has been orally notified of continue performance issues. At 75-day mark, employee requests FMLA leave. What do you do?
 - Grant FMLA leave.
 - Notify employee that:
 - The FMLA leave will not count as part of the 90-day PIP period; and
 - The PIP will continue after employee returns from leave for the remaining 15 days and probably won't be extended.
 - When employee returns from leave:
 - Provide recap of performance as it stood during first 75 days of PIP;
 - Explain expectations for remaining portion of PIP;
 - Tell employee you'll take into account the full 90 days of the PIP when determining if employee successfully completed the PIP;
 - During remaining portion of PIP, don't nit-pick performance issues.

LOA Complicated by Performance/Conduct Issues

- **Situation #1B**

- Same as Situation #1, but employee doesn't request FMLA leave until the last day of the PIP period (or after end of PIP period but before you have a meeting with employee to terminate the employee's employment). What do you do?

LOA Complicated by Performance/Conduct Issues

- **Situation #1B**

- Same as Situation #1, but employee doesn't request FMLA leave until the last day of the PIP period (or after end of PIP period but before you have a meeting with employee to terminate the employee's employment). What do you do?
 - Do you have documentation or evidence (preferably by e-mail) of the date the termination decision was made or can you prove that the termination decision was made before FMLA leave was requested?
 - Is the meeting to terminate employment scheduled to occur within a few work days after end of the PIP period?

LOA Complicated by Performance/Conduct Issues

- **Situation #1B**

- If “yes” to both questions, meet with the employee immediately and let employee know that, prior to the employee requesting leave, a decision had already been made to terminate the employee’s employment. Then decide whether to take risk and terminate employment.
- If “no” to either question (but particularly to first question), decide whether to take risk and terminate employment immediately, or:
 - Continue employment and grant FMLA leave;
 - Wish employee well with their medical situation and recovery, and tell employee that their health is highest priority at the moment;
 - Let employee know that you still need to meet with the employee to discuss their employment status and outcome of the PIP, but that the meeting will take place at a later appropriate time.
 - If employee doesn’t resign prior to or upon expiration of FMLA leave, then meet with employee on first day released back to work to terminate employment (unless you don’t want to take any risk and prefer to give employee an extension to the PIP).

LOA Complicated by Performance/Conduct Issues

- **Situation #2**

- Employee is placed on FMLA leave or non-FMLA accommodation leave under ADA. While on leave, you discover that employee has seriously disregarded duties (e.g., didn't deposit checks, failed to file critical government reports by deadlines, falsified reports, failed to fill customer orders, etc.). What do you do?

LOA Complicated by Performance/Conduct Issues

- **Situation #2**

- Employee is placed on FMLA leave or non-FMLA accommodation leave under ADA. While on leave, you discover that employee has seriously disregarded duties (e.g., didn't deposit checks, failed to file critical government reports by deadlines, falsified reports, failed to fill customer orders, etc.). What do you do?
 - Provide prompt written notification to employee that:
 - You have discovered some performance irregularities while employee has been on leave;
 - You are suspending employee pending further investigation and/or a decision regarding the matter;
 - You are running the suspension concurrently with employee's leave;
 - Employee's health is their highest priority at the moment, so discussion with the employee about the performance issues will be postponed until an appropriate later time.
 - If employee doesn't resign prior to or upon expiration of leave, then meet with employee on first day back at work to get employee's side of story;
 - Then make decision as to what action would be appropriate (e.g., PIP, termination, written reprimand, counseling, etc.).

LOA Complicated by Performance/Conduct Issues

- **Situation #3**

- Employee is involved in an accident at work in which property is damaged by the employee (e.g., using pallet jack to lift goods but then ramming into shelving and dropping and damaging the goods). You immediately schedule a meeting to interview the employee and get an incident report but also to suspend the employee pending investigation. When the employee appears for the meeting, he/she states that he injured his back during the incident, is in too much pain to work, and is applying for FMLA or worker's compensation leave. What do you do?

LOA Complicated by Performance/Conduct Issues

- **Situation #3**

- What do you do?
 - Interview employee unless immediate medical evaluation is needed.
 - Notify employee that:
 - You'll process leave paperwork but that you're also suspending employee pending further investigation and disposition;
 - The employee's suspension will run concurrently with FMLA/medical leave;
 - Employee's health and recovery is his top priority at the moment; and
 - At an appropriate later time, you'll meet again with employee to discuss the matter.
 - Schedule medical appointment for the employee to be examined (and treated if necessary).
 - Notify work comp carrier and file First Report of Injury with State.

LOA Complicated by Performance/Conduct Issues

- **Situation #3**

- What do you do? (Continued)
 - Process FMLA paperwork for the leave if FMLA-eligible or process ADA medical paperwork if not FMLA-eligible.
 - Place employee on FMLA leave (or, if applicable, non-FMLA medical leaves as accommodation under ADA).
 - Await decision from work comp carrier to approve or deny the claim.
 - If denied:
 - Make decision regarding employee's employment.
 - When employee is released to return to work, meet with employee to communicate decision about employee's employment status.
 - If approved, follow guidance to be discussed in section on workers' compensation leaves.

Workers' Compensation Leaves

- **Special Leave Considerations**

- Governed by state law
- State work comp (WC) statutes have retaliation and wrongful discharge protections for public policy reasons, with considerable variation among the states
- Most don't technically prohibit termination of employee while on WC leave or require reinstatement to any job upon completion of WC leave
- However, court cases often impose limitations on employer's ability to terminate an employee who is on WC leave so difficult to terminate while on leave without substantial risk - arguably stronger job security protections than FMLA or ADA provide

Workers' Compensation Leaves

- **Key Concept**

- Maximum Medical Improvement (MMI) – when employee:
 - Has fully recovered and can return to work with no restrictions; or
 - Has recovered as much as possible and no further medical treatment will be effective, at which time employee is typically released from ongoing medical care with permanent restrictions

Workers' Compensation Leaves

- **Rules of Thumb for Leaves Covered by Work Comp Laws**
 - Place on leave (FMLA leave or non-FMLA accommodation leave under ADA)
 - Extend leave in increments (usually until next doctor's appointment) with reinstatement rights for a cumulative period of X months (perhaps 6 months)
 - After 6 months, continue extending leave in increments but without guaranteed reinstatement rights

Workers' Compensation Leaves

- **Rules of Thumb (Continued)**

- Continue leave until employee reaches MMI:
 - If employee is released to RTW with no restrictions, determine if employee can be placed in an open job for which employee is qualified (prior job or some other job)
 - If employee is released to RTW with restrictions, and find out if:
 - They are permanent; or
 - Temporary (and if so, for how long or whether for indefinite period of time).

Workers' Compensation Leaves

- **Rules of Thumb (Continued)**

- Initiate the ADA reasonable accommodation process to determine if the work restrictions can be reasonably accommodated without causing undue hardship:
 - In current job;
 - In alternative job that is open and for which employee is qualified and which meets the restrictions.
- If reasonable accommodation is not possible in current job or any other open job, then terminate employee's employment.

Workers' Compensation Leaves

- **Challenges**

- The possibility of granting a very lengthy leave of absence
- Not being able to permanently replace the employee in that job (carrying an FTE on the books and unable to replace because of budgeting constraints)
- Holding the employee's regular job open for him/her (although you can temporarily fill it), as opposed to holding "a" job open (one for which employee is qualified) as permitted by ADA

Replacing Employees on Leave

- **Key Concept**

- When someone takes an extended leave of absence, who should cover their workload?
 - Co-workers
 - Boss
 - Temp
 - Additional permanent employee
- Transparency and Communication
- Expectations on return

Terminating Employees on Leave

- Is the leave “protected”?
- Does the employee have a contractual right to return?
- Business needs / changes
- Misconduct or performance issues discovered while person is absent.
 - Investigation
 - Timing of termination decision
 - Communication

Terminating Employees on Leave

- **Situation #1**

- Employee notifies HR that he needs FMLA leave for foot surgery. Surgeon estimates employee will be out for 4-6 weeks.
- Employee has returned early from previous FMLA leaves. Asks to do so again. HR tells him: “No, not without written permission from your doctor.”
- Employee applies and is approved for salary continuation program.
- While on FMLA, employee takes annual beach vacation with family. Shortly after he returns, he applies for FMLA again, this time for knee surgery.

Terminating Employees on Leave


- **Situation #1 (cont.)**

- HR's internal commentary on employee's request for salary continuation policy:
 - "Is he serious?"
 - "OMG."
- Same day as request, HR learns of beach vacation. Video recordings show employee walking, driving, and carrying luggage on vacation.
- Employee terminated for lying about need for FMLA leave.
- Termination upheld?

Terminating Employees on Leave

- **Situation #1 (cont.)**

- No! Retaliatory discharge in violation of FMLA, ADA, and state law.
- \$1.74 million jury verdict reduced to \$1.3 million.
- Affirmed by Massachusetts' highest court in *DaPrato v. Mass. Water Resources Auth.*, 123 N.E.3d 737 (Mass. 2019).



Part 3: Preparing for Fall Garden Maintenance: Ensuring Ongoing Compliance

State and Local Paid Sick Leave

- Typically covers qualifying illness, injury, and domestic abuse for both employee and specific family members.
- More than 25% of U.S. jobs have guaranteed paid sick leave. – NYU on Feb. 10, 2022.
- No federal paid sick leave requirement
- Number of states and municipalities requiring paid sick leave increasing.
- At same time, number of states banning municipal paid sick leave also increasing.

Other State-Specific Leave Categories

- Bereavement
- Domestic abuse
- Victim and witness testimony
- Jury duty
- Voting
- School / day care conferences / activities
- Military and veteran
- Organ, bone marrow, and/or blood donation
- Election officials / Legislative duties

Non-FMLA and ADA Medical Leaves

- **Key Considerations**

- Whether the employee **will recover** during the leave and be able to return to work and perform all essential job duties;
- Whether the recovery will occur **within the reasonably identifiable future**; and
- Whether it is **reasonable to hold a job open** (any open job for which employee is qualified) starting with the employee's current job and then those most equivalent to employee's current job (in terms of job grade, pay level, duties, shift, etc.).

Non-FMLA and ADA Medical Leaves

- **Key Policy Provisions That are Minefields**

- Automatic termination of employment upon exhaustion of FMLA leave (without determining if additional leave would be reasonable)
- Maximum duration of leave (without determining if an extension beyond the cap would be reasonable)
- Maximum duration of leave (if employer desires to terminate employment before the max is reached)
- Minimum length of service requirements to qualify for leave
- Refusal to return employees to work from leave if released with restrictions (without determining if the restrictions can be reasonably accommodated)

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

1. Always apply FMLA and state leave laws first.
2. If employee does not meet FMLA eligibility requirements or has exhausted FMLA leave, you must still evaluate whether it is reasonable and not an undue hardship to grant non-FMLA or ADA medical leave as an accommodation.

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

3. If an employee is not yet eligible for FMLA leave, a non-FMLA leave is probably a reasonable accommodation in most cases, with a duration of anywhere from 4-6 weeks (and perhaps up to at least 12 weeks or 3 months).
4. Likewise, if an employee has exhausted FMLA leave and is not yet again eligible, at least one non-FMLA leave extension is probably a reasonable accommodation in most cases, with a duration of anywhere from 4-6 weeks (and perhaps up to 12 weeks or 3 months – in addition to the 12 weeks of FMLA leave – for a maximum leave period of 6 months).

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

5. If your leave policies include a maximum duration for leave (e.g., a 6-month cap or a 1-year cap), granting leave for at least that duration is arguably a reasonable accommodation. Otherwise, your cap would be meaningless.
6. Likewise, if your policies include such a cap, and if the employee has been on leave for the maximum period, you must still evaluate whether it would be reasonable and not an undue hardship to grant additional leave beyond the cap (i.e., make an exception to your policy as an accommodation).

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

7. If you provide paid time off benefits (e.g., PTO, CTO, vacation, sick days, personal days, floating holidays), granting leave until those benefits are exhausted is almost always a reasonable accommodation.
8. Likewise, if you provide group STD or LTD benefits, granting non-FMLA leave for the period of time those benefits are payable might be a reasonable accommodation (unless your policies clearly state that eligibility for or receipt of such benefits is not a guarantee of continued employment and that a job will not necessarily be held open while the employee is on leave and receiving such benefits).

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

9. The more total leave an employee needs (including FMLA and other leave taken in past 12 months), the stronger the argument that it is unreasonable to grant the leave (especially if the combined total would be more than 6 months (continuous or in the aggregate)).
10. It is advisable to grant leaves in increments (usually of 1 month or 30 days, or until next doctor's appointment if the appointment is within the next 60 days), and then obtain detailed, updated medical information at that time, and reevaluate if granting another extension is reasonable and not an undue hardship. Each time you grant an extension, it counts as an accommodation, and the more times and ways in which you accommodate, the stronger your defense position is.

Non-FMLA and ADA Medical Leaves

- **Rules of Thumbs for Non-FMLA/ADA Medical Leaves**

11. A non-FMLA leave for an unknown or indefinite period of time (after granting an initial continuous leave, whether FMLA or non-FMLA, plus perhaps one short extension thereafter) is ***usually not*** a reasonable accommodation.
12. The date of a follow-up doctor's appointment to "re-evaluate" is not a true projected recovery or return to work date. It is nothing more than a "placeholder" date. A series of such "placeholder" dates usually converts the leave to one of "unknown or indefinite" duration. Obtain more, detailed medical information from the health care provider as to diagnosis, prognosis, treatment schedule, future appointments, projected recovery date, work restrictions, and projected frequency and duration of future absences after returning to work, etc.



Questions?



WorkSmarts

Top Tips

- Establish written policies and procedures for time off and leave benefits.
- Revisit and update policies regularly.
- Know where your employees are residing and working and keep up to speed on applicable state and local laws.
- Ensure your workplace culture truly supports use of time off and leave benefits.

Thank You



Sue Willman

Partner | Kansas City

816.292.8162 | swillman@spencerfane.com



Randi Winter

Partner | Minneapolis

612.268.7007 | rwinter@spencerfane.com