

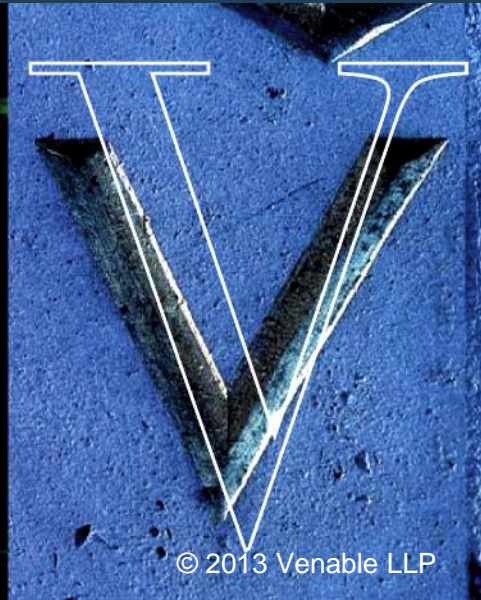
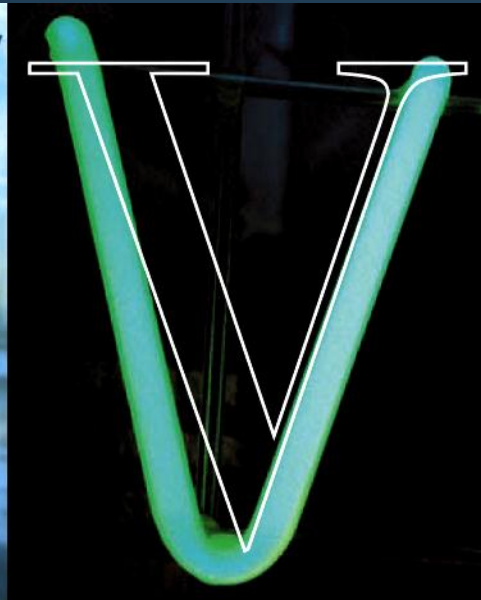
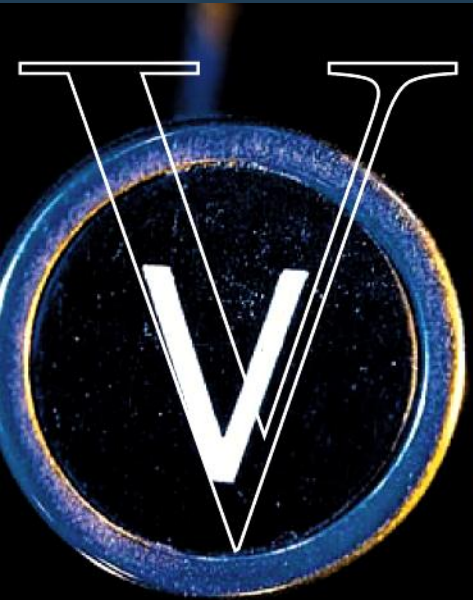
## Employee Leaves of Absence and Other Accommodations Under the Law: What Every Nonprofit Needs to Know

Tuesday, June 25, 2013  
12:30 p.m. – 2:00 p.m. EDT

Venable LLP  
Washington, DC

Moderator:  
Lisa M. Hix, Esq., Venable LLP

Panelists:  
Megan H. Mann, Esq., Venable LLP  
Marina B. Blickley, Esq., Venable LLP



# Upcoming Venable Nonprofit Legal Events

July 23, 2013 – [Evaluating Your Nonprofit's Options under the Affordable Care Act: The Pros and Cons of Health Insurance Alternatives for Your Employees](#)

August 8, 2013 – The Roadmap to HIPAA Compliance: What Your Nonprofit Needs to Know (details coming soon)

August 21, 2013 – [The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations](#)



# Agenda

- Overview of ADA & FMLA
- Policy & Practical Pointers
- Example Requests for Leave or Other Accommodations
  - Discussion of Select Issues Related to Such Requests
- Questions



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# **Americans With Disabilities Act (ADA)**

# ADA – Does It Apply?

- Employers with 15 or more employees
- All employees
  - No minimum tenure
  - No minimum hours worked
- State laws
  - Many jurisdictions have similar laws with lower employee thresholds



# ADA Overview

- Prohibits discrimination on the basis of disability
  - Including record of disability or regarded as being disabled
- Requires employers to provide a “reasonable” accommodation to allow qualified individual with a disability to perform essential functions of the job



# ADA – Qualified Individual with a Disability

- “Disability”
  - Physical or mental impairment that substantially limits one or more major life activities



# ADA – Physical or Mental Impairment

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine
- Any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities





# ADA – Major Life Activity

- Includes:
  - (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
  - (ii) operation of a major bodily function (e.g., immune system functions, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions)



## ADA – Substantially Limited

- Whether a person is “substantially limited” will depend upon:
  - The nature and severity of the impairment
  - The expected duration of the impairment
  - The actual or expected permanent impact of the impairment
- EEOC contemplates a comparison between the individual and the performance of the same activity by the general population



# ADA – “Substantially Limited” Analysis

- ADAAA dictates that the analysis should not be extensive
- Episodic or remission – Is disability if it would substantially limit when active
- May be disability even if expected to last less than 6 months
- Mitigating measures:
  - Should not include ameliorative effects (e.g., medication, equipment; but not glasses/contacts)
  - BUT, does include non-ameliorative effects of mitigating measures (e.g., negative medication side effects/treatment burden)



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# **Family and Medical Leave Act (FMLA)**

# What does FMLA provide generally?

- Total of 12 (or 26 for servicemember family leave) workweeks of unpaid leave during any 12-month period
- Permits eligible employees to:
  - Care for a new child
  - Care for a close family member with a serious health condition or who is a covered servicemember
  - Deal with their own serious health conditions
  - Handle qualifying exigencies arising out of the fact that a close family member is on or being called to active duty in the armed forces



## FMLA – Does It Apply?



- Employers with 50 or more employees
- Employees
  - 12 months with employer and 1,250 hours
  - 50 or more employees within 75 miles of employee's worksite
- State laws
  - May have lower triggers and different leave benefits
  - E.g., DCFMLA applies to employers with 20 employees and provides 16 weeks of medical leave **and** 16 weeks of family leave over 24-month period



# FMLA – Obligation on Employers

- Provide leave
- Maintain benefits as if the employee were not on leave
- Restore the employee to his or her job, or an “equivalent position”
- Do not “interfere” with FMLA rights or discriminate against an employee
- Provide employees with FMLA information, including by posting FMLA notice in “conspicuous places” where it can be seen by applicants and employees



# FMLA: Tending to the Growing Family

- Leave for parent (father, mother, or someone standing in loco parentis) to care for a child following birth, adoption, or foster care placement
  - Applies equally to men & women
- Must be taken within the 12 months following the birth or placement of the child with the employee





## FMLA – Serious Health Condition

- Illness, injury, impairment, or physical or mental condition that involves:
  - Inpatient care in a hospital, hospice, or residential medical care facility; or
  - Continuing treatment by a health care provider



# Serious Health Condition: Continuing Treatment

- (1) Incapacity & treatment: Incapacity for 3 full days and subsequent incapacity or treatment for the same condition
- (2) Pregnancy or prenatal care (including morning sickness)
- (3) Chronic conditions: Any period of incapacity or treatment that requires periodic visits over an extended period of time and may cause episodic rather than continued incapacity (e.g., diabetes)
- (4) Permanent or long-term conditions: Incapacity which is permanent or long-term due to a condition for which treatment may not be effective and for which individual is under continuing supervision of a health care provider (e.g., terminal disease)
- (5) Conditions requiring multiple treatments (e.g., chemotherapy)



## Covered Active Duty

- Employee's spouse, son or daughter of any age, or parent is on covered active duty (or has been notified it is impending)
- Deployment in a foreign country



# Active Duty & Qualifying Exigencies

- (1) Short-notice deployment
- (2) Military events & related activities
- (3) Childcare and school activities
- (4) To make/update financial/legal arrangements
- (5) Counseling
- (6) Rest and recuperation (spending time with the military member who is on short-term R&R leave)
- (7) Post-deployment activities
- (8) Parental care



# Caring For a Covered Servicemember

- Up to 26 weeks to care for a covered servicemember with a serious illness or injury
  - Incurred in the line of active duty or existed before but was aggravated by active duty service
- Includes covered veterans who were discharged or released from the armed forces (except if for dishonorable discharge) during the 5-year period preceding the leave start date



# ADA v. FMLA Coverage

- Some conditions protected under ADA will not be protected under FMLA – may not require continuing treatment or inpatient care
- Some conditions protected under FMLA will not be protected under ADA – not serious enough, or too temporary
- The end of FMLA leave may trigger the ADA process
- When ADA and FMLA apply, employees must receive the most beneficial rights and protections



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# Policy and Procedures

# Steps for Managing the Interplay

- Determine what, if any, laws apply to the individual (ADA? FMLA?)
  - Don't forget to check state laws!
    - Workers' compensation
    - Discrimination and leave laws
- Understand the rights and obligations of both employee and employer under those laws
- Develop a strategy for dealing with overlapping coverage





# ADA Policy

- Provide “reasonable” accommodation unless it would pose an “undue burden”
  - Identify to whom requests for accommodations should be directed
  - Managers should be educated on identifying accommodation requests
- Prohibit disability discrimination
  - Disability-related questions or medical examination only if “job related and consistent with medical necessity”



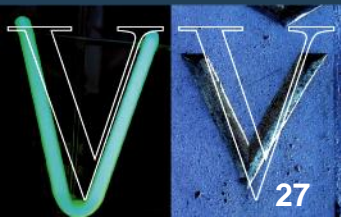
# ADA – Reasonable Accommodation

- Accommodation requested (e.g., requested change in work environment due to medical condition)
  - No magic words required
- Examples of request:
  - “I’m having trouble getting to work at my scheduled time because of the medical treatments I am undergoing”
  - “I need 13 weeks off to get treatment for a back problem”
- Example of insufficient request:
  - “I would like a new chair because the one I have is not comfortable”



# ADA – Reasonable Accommodation

- Engage in an “interactive process”
  - Back-and-forth communication with employee
  - Request medical documentation – verify disability, functional limitations, and need for accommodation
    - May request additional information if documentation is insufficient and the disability and/or need for accommodation is not obvious
  - May ask for employee’s suggestion on what accommodation is needed



## ADA – Reasonable Accommodation

- Employers are not required to change performance or conduct standards, BUT conduct rule must be job-related and consistent with business necessity
- Example:
  - Employee with Tourette’s syndrome causing uncontrolled speech and vocal tics violates conduct standards
  - Depends on whether behavior is disruptive to co-workers or incompatible with job (e.g., customer service)



# ADA – Reasonable Accommodation

- Not required to remove an “essential function” of the job
  - Most important/critical job duties
  - Removal of an essential function would fundamentally change the job
  - Not just the function most commonly performed
- Remember to review and update job descriptions



# ADA – Reasonable Accommodation

- BUT may require restructuring non-essential functions:
  - Reallocating or redistributing marginal job functions
  - Altering when and/or how a function is performed
- Examples
  - Assistant manager who cannot drive to deposit money at the bank
  - Deaf billing clerk's ability to make business or personal phone calls



# ADA – Reasonable Accommodation

- Not required to provide the accommodation requested by employee if another accommodation would be effective
- Employers are not required to endure an “undue hardship”
  - Action requiring significant difficulty or expense
- Document the process!



# FMLA Policy/Procedures

- Notice/information to employer & other employee duties
- Notice/information to employee & other employer duties
- Leave entitlement calculations
- Intermittent/reduced schedule leave
- Pay status
- Return to work
- Employee benefits
- *Note:* If you are not a covered employer and you have a family and medical leave policy, do not call it a “FMLA” policy and be wary of imposing restrictions on your organization unnecessarily





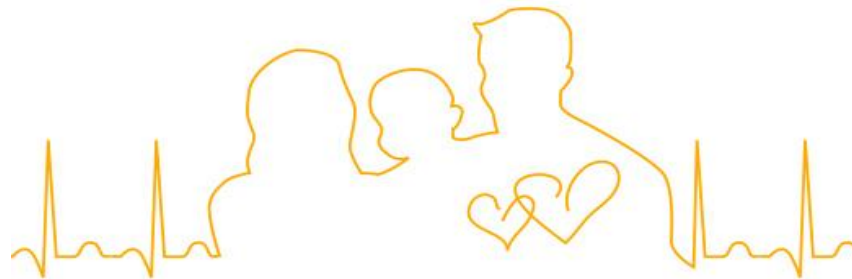
# The Employee's Duties

- Notice may be verbal or written and does not need to include term “FMLA”
- Where the need for leave is foreseeable, the employee must give 30 days' notice
- Make a reasonable effort to schedule treatment so as not to disrupt employer's operations
- If not foreseeable, the employee must give as much notice as possible
- Comply with a certification request
- Seek a second opinion at the request of the employer



# Employer Notification Requirements

- Display FMLA notice
- Provide employees with general notice about FMLA in the employee handbook or other written material about leave and benefits
- Notify employees concerning
  - Eligibility status, rights, and responsibilities
  - Whether specific leave is designated as FMLA and the amount of time that will count against FMLA leave entitlement



## Notification Requirements (cont'd.)

- Eligibility Notice (oral or written) within 5 days of request
  - Inform employee of eligibility status
  - If not eligible, state at least one reason why
- Every time an employer provides an Eligibility Notice, it must also provide a Rights and Responsibilities Notice
  - Employer's designated 12-month period for counting entitlement
  - Any certification requirement and consequences of failing to do so
  - Information regarding paid leave substitution policy
  - Instructions for making arrangements for any premium payments for maintenance of health benefits that employee must make during leave
  - Designation of key employee
  - Right to job restoration



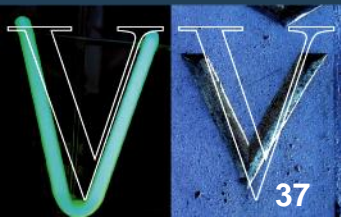
# Calculations

- 12 month period: four methods of calculation (calendar, fixed, measured forward, rolling)
- Leave entitlement
  - Leave may be taken in whole weeks or even in periods of less than one hour
  - Only the amount of time *actually* taken may be counted against an employee's leave entitlement



## Intermittent/Reduced Schedule Leave

- For new child care, employee and employer may agree to intermittent/reduced schedule leave, but it is not a guaranteed right under the law
- Intermittent/reduced schedule leave may generally be taken for serious health condition, qualifying exigency, and servicemember family leaves
- Employer may require such employee to transfer temporarily to an available alternative position with equivalent pay and benefits if it better accommodates the recurring periods of leave



# Pay During Leave

- The leave may be unpaid
- Employees may elect to use accrued paid time off
- An employer may require employees to use accrued paid time off



## FMLA – Return to Work

- May only deny return to work if employee's job would have been eliminated or employee would have been terminated for other reasons; may deny return to work for key employee under specific circumstances
- May have uniformly applied rules that require employees to provide fitness for duty certifications with respect to particular health condition that caused need for FMLA leave



## FMLA Written Policy Tips

- Include all FMLA-required information!
- Explain how leave will be measured (i.e., on a rolling 12-months basis or otherwise)
- Include a statement on how the employer will deal with husband/wife employee teams
- Generally describe the circumstances under which fitness-for-duty certifications will be required upon return to work or at least a statement reserving the right to require them
- Policy should contain statement regarding when substitution of paid leave will be required





## FMLA Written Policy Tips (cont'd.)

- How employee contributions to health insurance and other benefit premiums will be handled
- A statement regarding additional rights to leave under state or local laws
- A statement that nothing changes the employee's at-will status



# FMLA – Employee Health Coverage

- Obligation to make available continued health coverage on same terms and conditions as when the individual was active
- Obligation ends if employee exhausts FMLA leave, fails to return following FMLA leave, or fails to pay premiums
- Employer may (a) permit employee to choose whether to continue health coverage while on FMLA leave, or (b) require employee to continue coverage
- Employer may provide for pre-pay, pay-as-you-go, or catch-up
  - Pre-pay may not be the sole option
  - Must provide options at least as favorable as for non-FMLA leaves
- If employee chooses pay-as-you-go but fails to pay, employer may discontinue coverage or, alternatively, continue coverage and recoup payments upon return to employment



# FMLA and COBRA

- Generally, the COBRA period does not start until FMLA leave ends (either through exhaustion of the FMLA period, or an employee's clear intention not to return to work)
- COBRA period begins at end of FMLA period, even if state law provides a longer leave period than FMLA
- COBRA period begins at end of FLMA period, even if employee declines health coverage during the FMLA period, or loses coverage due to non-payment of premiums during the FMLA period
- The rules discussed above relating to health coverage during a leave period, and the interaction of COBRA with leave periods, are specific to FMLA leave. Non-FMLA leaves differ.

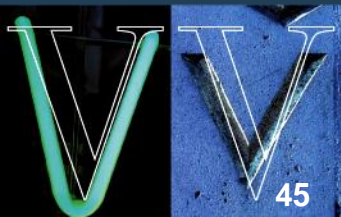




# **Discussion of Select Issues Related to Leave & Other Accommodations**

# ADA Right to Leave

- May require leave of absence to obtain treatment or recuperate
- Right to leave arises when individual's disability precludes him/her from performing the essential functions of the job
- If an accommodation would not be effective, it need not be made (only if employee is expected to be able to return to work)



# Reduced Schedule & Intermittent Leave

- Possibly required by both ADA and FMLA
- ADA
  - Employee must show that new schedule would enable employee to perform essential functions of job
- FMLA
  - Intermittent/reduced schedule leave may generally be taken for serious health condition, qualifying exigency, and servicemember family leaves
  - For new child care, employee and employer may agree to intermittent/reduced schedule leave
  - Employer may require such employee to transfer temporarily to an available alternative position with equivalent pay and benefits if it better accommodates the recurring periods of leave



## Special Issue – Attendance

- FMLA-protected absence may not be counted for purposes of discipline under an absenteeism policy
- ADA
  - Enforcement of leave and attendance rules not illegal, but must evaluate request to modify rule
  - Unpredictable/unreliable (e.g., request to leave whenever the employee feels sick)
    - Most courts find that reliable, predictable attendance is an “essential function”
    - Consistency is key



# Transfer of Employee

- ADA
  - Does not permit transfer for the convenience of the employer
    - If accommodation is not available, must consider reassignment to a vacant position
    - Not required to create a new position
- FMLA allows transfer to alternative position under certain conditions





# Teleworking



## ■ ADA

- Depends on whether essential functions can be performed off-site
- Considerations include: ability to supervise, need to work with certain equipment, requires face-to-face interaction, etc.
- Becoming more and more likely to be considered “reasonable”
  - But, may consider other effective accommodations!



# Don't Forget State Laws!



- Small employers may be covered under state laws
- Many states have enacted their own disability discrimination legislation
  - E.g., Maryland recently enacted an amendment to its disability law to require accommodations for pregnancy-related conditions
- Many states have family and medical leave laws which may provide greater protections
  - E.g., many states cover domestic partners



# Questions?

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