

Nonprofit Organizations Committee Legal Quick Hit:

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

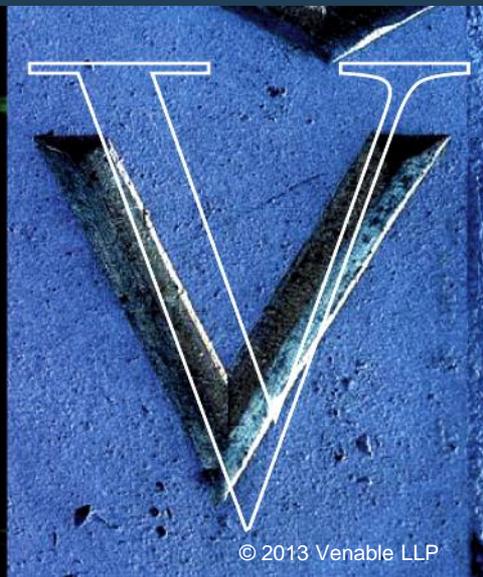
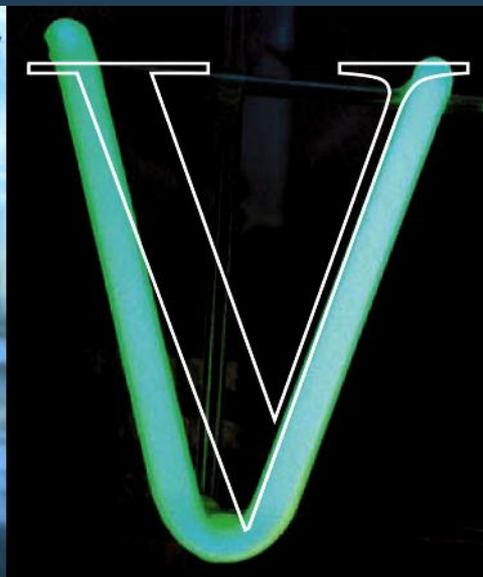
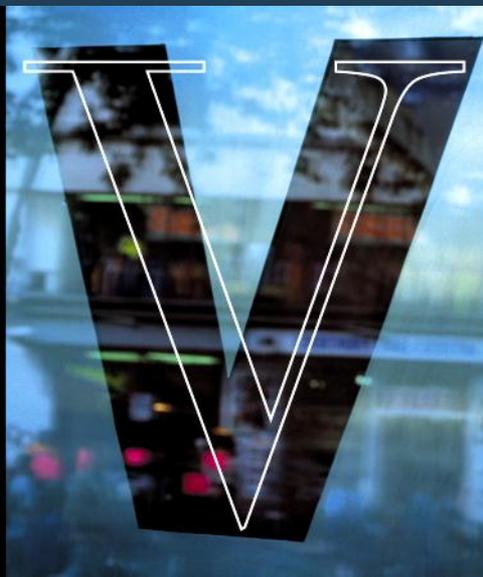
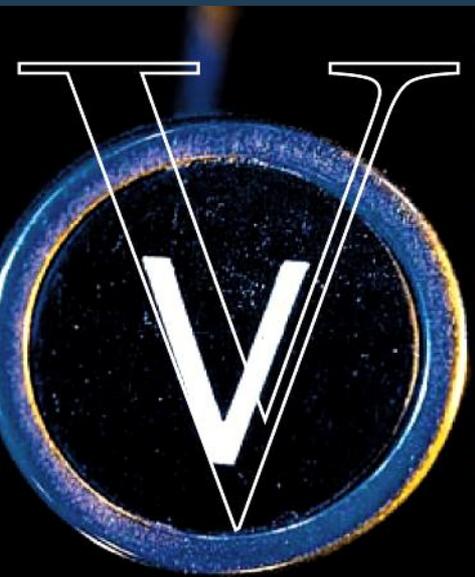
MODERATOR: JEFFREY S. TENENBAUM, ESQ.

PRESENTERS: MEGAN H. MANN, ESQ.

MARINA B. BLICKLEY, ESQ.

TUESDAY, SEPTEMBER 10, 2013

3:00 p.m. EDT



Agenda

- Americans with Disabilities Act
 - Overview & Practical Pointers
- Family and Medical Leave Act
 - Overview & Practical Pointers
- Questions



VENABLE[®] LLP

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



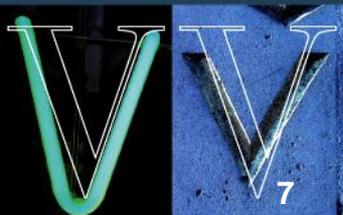
ADA – Qualified Individual with a Disability

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



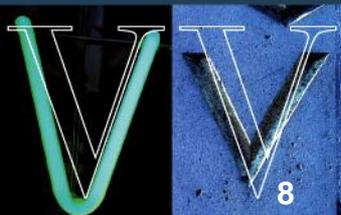
ADA – Physical or Mental Impairment

- 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.



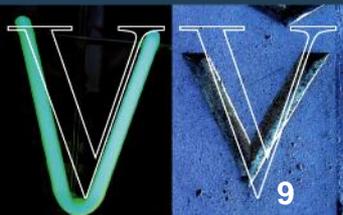
ADA – Major Life Activity

- 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).



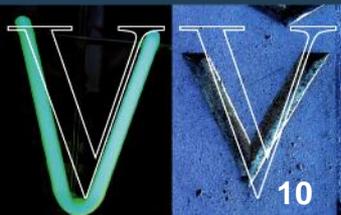
ADA – Substantially Limited

- 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
- Not an extensive analysis
 - EEOC contemplates a comparison between the individual and the performance of the same activity by the general population



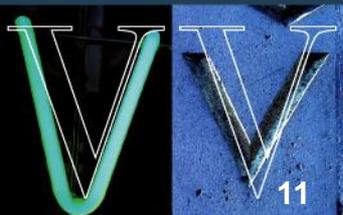
ADA Policy

- 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

- 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
- BUT may require restructuring non-essential functions:
 - Reallocating or redistributing marginal job functions
 - Altering when and/or how a function is performed



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 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!

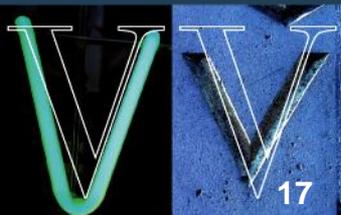




Family and Medical Leave Act (FMLA)

What does FMLA provide generally?

- Leave
 - 12 weeks (or 26 for servicemember family leave) during a 12-month period
 - Job protection
 - Benefits maintenance
- Allows employees to:
 - Care for new children
 - Deal with a serious health condition (the employee's or his/her close family member)
 - Handle certain situations 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?

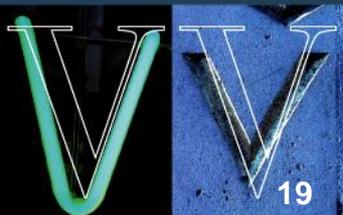


- Employers with 50 or more employees
- Employees
 - 12 months with employer and 1,250 hours
 - 50 or more employees within 75 miles of employee's worksite
- State laws
 - May have lower triggers and different leave benefits
 - *E.g.*, DCFMLA applies to employers with 20 employees and provides 16 weeks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



FMLA – Qualifying Leave

- **New Child**: 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 and women and must be taken within the 12 months following the birth or placement of the child with the employee
- **Serious Health Condition**: Leave to tend to the employee's or close family member's condition (*Note*: Same-sex spouse may now be covered)
 - 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
- **Servicemember Illness or Injury**: Up to 26 weeks to care for a covered servicemember with a serious illness or injury
 - Incurred in the line of active duty or was pre-existing 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



FMLA – Qualifying Leave Continued: Qualifying Exigency Leave

Time to attend to certain circumstances arising out of the fact that the employee's spouse, son or daughter of any age, or parent is on covered active duty (or has been notified it is impending):

- (1) Short-notice deployment
- (2) Military events and 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



FMLA – Employer Obligations

■ Information & Communication:

- Post a FMLA notice in “conspicuous places” where it can be seen by applicants and employees
- Provide FMLA information in the employee handbook or other written material about leave/benefits
- Respond to FMLA inquiries and notify employees of their rights and obligations under the law and the company’s policy
- Types of information to provide:
 - 12-month period used for calculating leave (calendar, fixed, measured forward, rolling looking back)
 - Payment status: Employees may elect to use accrued paid time off or an employer may require employees to use accrued paid time off
 - For individual inquiries: Eligibility status, rights, and responsibilities; whether specific leave is designated as FMLA and the amount of time that will count against FMLA leave entitlement



Employer Obligations Continued ...

■ Interference:

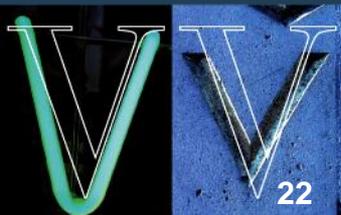
- Do not “interfere” with FMLA rights or discriminate/retaliate against an employee for exercising FMLA rights

■ Benefits:

- Maintain benefits as if the employee were not on leave

■ Restoration:

- Restore the employee to his or her job, or an “equivalent position”
- 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



FMLA: The Employee's Duties

■ Give Notice:

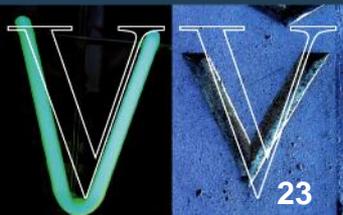
- 30 days if the leave is foreseeable (if not, as much as possible)
- May be verbal or written and does not need to include term “FMLA”

■ Information & Certification:

- Provide enough information to permit employer to assess whether leave is FMLA-covered and update as necessary/to the extent required/permitted by law
- Comply with a certification request
- Seek a second opinion at the request of the employer

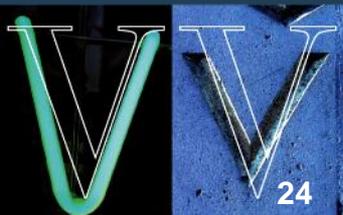
■ Schedule Leave:

- Inform/communicate with employer
- Make a reasonable effort to schedule treatment so as not to disrupt employer's operations



Intermittent/Reduced Schedule Leave

- Leave may be taken in the same increments of time used to calculate other forms of leave (*e.g.*, 15 minutes, 1 hour, 1 day).
- However, the shortest increment of time may not be greater than one hour. In other words, if an employer only permits other forms of leave to be taken in whole day increments, the employer must permit employees to take FMLA leave in one hour increments.
- Employers may not deduct or account for more time than is used.
- 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, but it is not a guaranteed right under the law.
- 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.



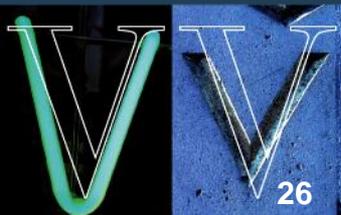
FMLA Written Policy Tips

- Explain the FMLA policy generally. *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.
- Explain how leave eligibility will be measured (i.e., calendar year, etc.).
- Consider including 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.
- Statement regarding when substitution of paid leave will be required.
- How employee contributions to health insurance and other benefit premiums will be handled.
- Statement regarding additional rights to leave under state or local laws
- Statement that nothing changes the employee’s at-will status.



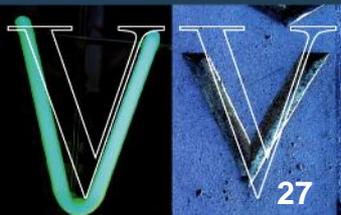
ADA v. FMLA Coverage

- 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.



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



Questions?

Jeffrey S. Tenenbaum, Esq.

jstenenbaum@Venable.com

t 202.344.4793

Megan H. Mann, Esq.

mhmann@Venable.com

t 212.370.6260

Marina B. Blickley, Esq.

mbblickley@Venable.com

t 703.760.1927

To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings, www.Venable.com/nonprofits/events.

