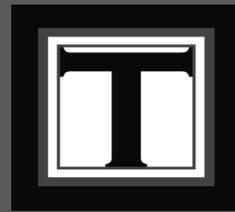


Avoiding HR Pitfalls: Legal Guidance for School Business Officials

SWMSBO Conference

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Michigan School Business Officials

Caution

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Future legal developments may affect these topics.

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Agenda

- **FMLA**
- **ADA Accommodation Requests**
- **Title IX**

Family Medical Leave Act

Common Pitfalls

- Allowing FMLA without analyzing whether employee is entitled to it
- Failing to issue designation notice
- Failing to follow certification process
- Not knowing what to do if employee does not return at end of FMLA period

Eligibility – Threshold Qs

- Employed for at least 12 mos
- Employed for at least 1,250 hrs
- At least 50 employees within 75 miles of employee's worksite

Qualifying Leave Reasons

1. Birth of child to care for the child
2. Child placement for adoption or foster care
3. To care for spouse, child, or parent with **"serious health condition"**
4. Employee's **"serious health condition"** that makes employee unable to perform essential job functions
5. Employee's spouse, child, or parent is in active military duty (or notified of such upcoming duty), and a **"qualifying exigency"** occurs
6. To care for spouse, child, parent, or next of kin who is a covered servicemember and who has a serious injury or illness

Serious Health Condition

- Inpatient care (overnight stay in hospital, hospice, or residential medical care facility), or
- Continuing treatment by a health care provider

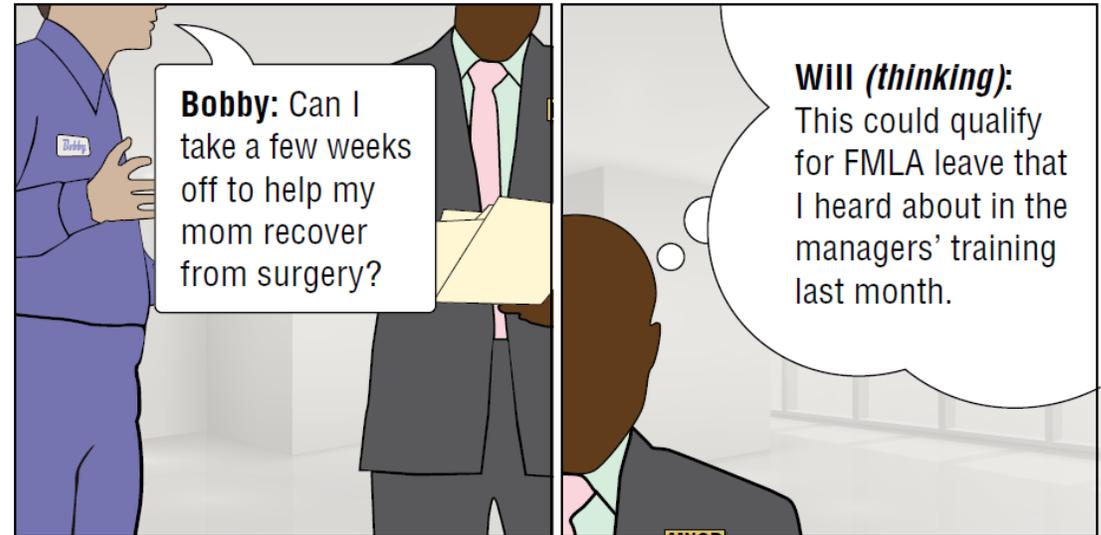


Qualifying Exigency (examples)

- Short-notice deployment: less than or equal to 7 days
- Event sponsored by the military (e.g., ceremony)
- Making or updating financial or legal arrangements (e.g., updating will)
- Arranging for childcare or new school enrollment; attending meetings with staff (e.g., student discipline)
- Attending post-deployment activities (e.g., arrival ceremony)

When Is FMLA Triggered?

- Employee requests FMLA leave, or
- Employer knows that employee's leave *may* be for an FMLA-qualifying reason



FMLA Triggered – Now What?



Within 5 business days after FMLA is triggered, must provide employee with:

- FMLA eligibility notice, and
- Rights and responsibilities notice

Certification

May require only for:

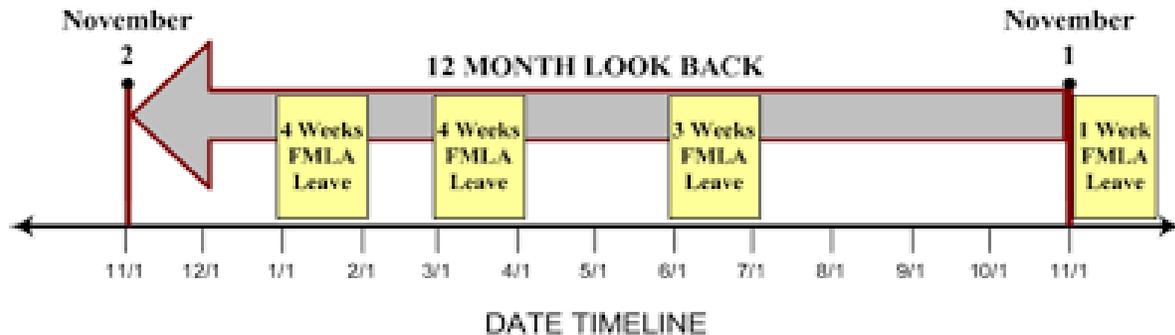
- Serious health condition (employee and family)
 - Military qualifying exigency
 - Covered servicemember with a serious injury or illness
- Must return within 15 calendar days (or longer deadline in policy), unless not practicable
 - If not returned, employer may deny FMLA leave
- Serious health conditions
 - May require 2nd cert from employer-chosen provider, at employer expense
 - If 1st and 2nd certs differ, may require 3rd cert, at employer expense, from jointly selected provider
 - Employer must provide designation notice to employee within 5 business days of having enough info to determine eligibility

Leave Entitlement

- 12 workweeks of unpaid leave per 12 months (26 if to care for covered service member with a serious injury or illness)
- Intermittent or on reduced-leave schedule if medically necessary
- Employer may require, or employee may choose, that accrued leave run concurrently with FMLA leave



12 Months



Calendar year

Fixed 12-month leave year (usually employment anniversary date)

Rolling forward year

Rolling backward year

If employer fails to choose method, must use method most beneficial to employee

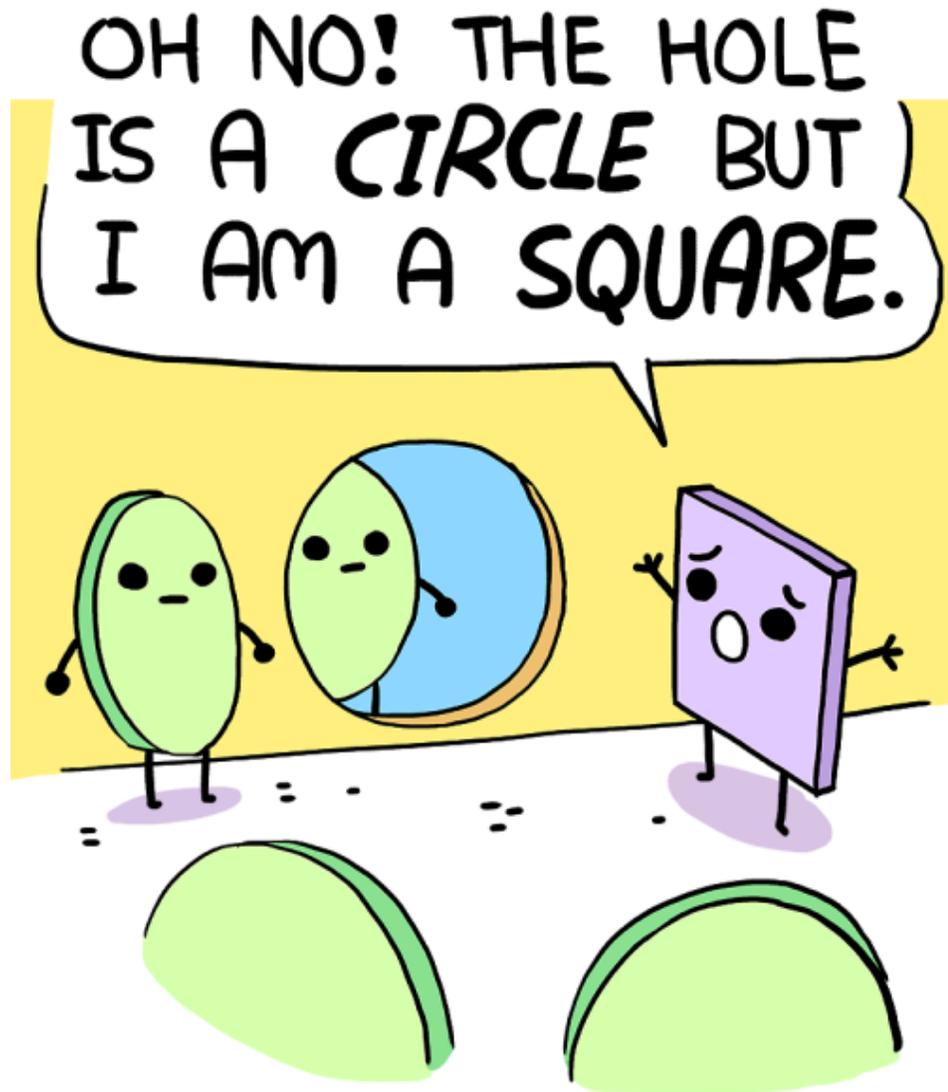
Need 60 day notice to change method

Returning from Leave

- Right to return to same or equivalent position
 - Note: Employee has no greater right to reinstatement than if was not on FMLA (e.g., discharge or layoff)
- Fitness for Duty certification: permissible for own serious health condition *if* flagged requirement in designation notice
 - Uniform policy or practice required
 - Certification must state:
 - able to resume work
 - can perform essential job functions
 - Usually, may not require fitness to return certification for intermittent leave

Special School EE Rules

- Intermittent/reduced leave schedule or semester end leave: instructional EEs
- Restoration: all EEs
- Summer break does not count against FMLA leave if not required to report during summer break



Instructional Employees: Intermittent and Reduced Leave

- If leave is foreseeable based on planned medical treatment + employee would be on leave for more than 20% of leave period working days, ER may require EE to choose:
 - **Option 1: take consecutive leave**
 - **Option 2: transfer to position better suited for recurring leaves**
- Ex: employee needs leave 2/5 days each week

Instructional Employees: Semester End

- If leave will end ≤ 3 weeks before semester end, in certain circumstances may require employee to stay on leave until semester end
- FMLA leave is only charged for days employee needs FMLA leave (other days to end of semester are not)
 - **Permissible to require additional leave days, but do not charge against FMLA days available**

All Employees: Restoration

- How employee will be restored to “equivalent position” is governed by school board policies and practices
- Policies must:
 - **Be in writing,**
 - **Be made known to employee before employee takes FMLA leave, and**
 - **Clearly explain restoration rights**

Record-Keeping

Must keep FMLA-related documents for 3 years, including:

- EE written FMLA leave requests
- ER notices (eligibility, rights and responsibilities, and designation)
- FMLA leave dates for each EE
- Certifications (separate confidential file; not personnel file)

ADA Accommodation Requests

Common Pitfalls

- Failing to recognize request for reasonable accommodation
- Failing to initiate interactive process
- Conflating ADA reasonable accommodation process with FMLA, worker's comp, or short-term disability issues
- Not thinking "out-of-the-box" when considering accommodations

Title II of the ADA

- Prohibits employment discrimination by public entities against **qualified individuals** on the basis of disability-enforcement based on Title I procedures
- Discrimination includes “not making **reasonable accommodations** to the known physical or mental limitations of an otherwise qualified individual with a disability” unless the employer can demonstrate that the accommodation would “impose an undue hardship on the operation” of the employer

Disability

Definition

A physical or mental impairment that substantially limits one or more major life activity

A record of such impairment

Being "regarded as" having such impairment by the employer

A few examples:

- Mobility impairments
- Loss of limb
- Blindness
- Mental illness
 - Anxiety
 - PTSD
 - Depression
- Traumatic brain injury
- Diabetes
- Deafness

Qualified Individual

- A person who possesses the requisite skill, experience, education, or other job requirements and
- who, with or without **reasonable accommodation**, can perform the **essential functions** of the position that s/he holds or wants.



Essential Functions

- The fundamental job duties of the position (not marginal duties). Factors to consider: (1) does the job exist to perform the function; (2) are there a limited number of employees who can perform the function; (3) is the function highly specialized
 - Example: Teachers are hired to teach students, supervise students, create lesson plans, grade work, maintain and record grades, etc. Driving is probably not an essential function of a teaching position.

Reasonable Accommodation



Equality

Equity

Any change in the way a job is performed or policies and procedures that is necessary to allow a person with a disability to do the job and that does not create an **undue hardship** on the employer.

- The statute defines reasonable accommodation via a non-exhaustive list of examples

Interactive Process

- Informal meeting
- Dialogue
- Obtain records from employee if necessary
- Include HR, employee, and supervisor or someone familiar with details of the job



Outcome of Interactive Process

Determine if Employee is entitled to accommodation

Disability?

Impact on performing essential functions?

Is Accommodation needed to perform essential functions?

If yes:

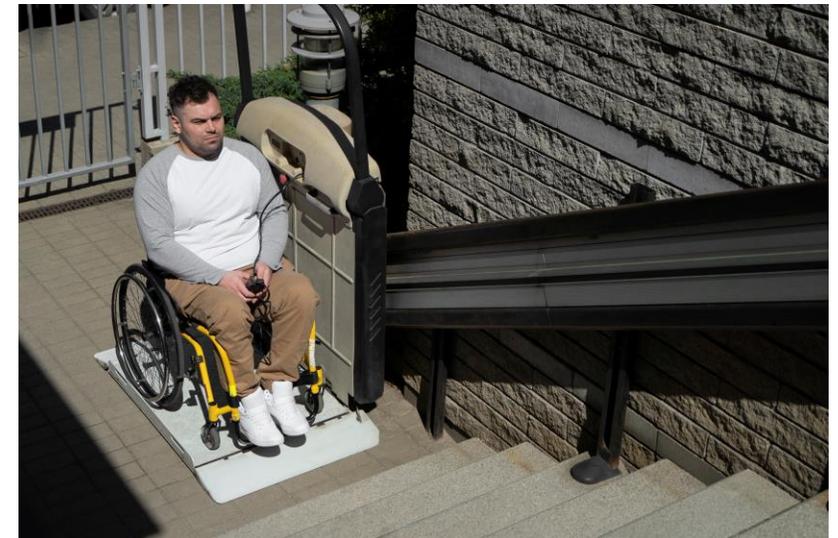
- What accommodation does employee want?
- Other effective accommodations?
- Memorialize accommodations
- Be clear that this is an evolving process—effectiveness is the goal

Medical Records

- District may ask for medical documentation ONLY if disability and/or need is not obvious
 - Limited in scope
 - Related only to request for accommodation
 - Can be from relevant medical personnel
- District should think outside the box because difficult to defend failure to accommodate claims
- Employee should provide ideas about what type of accommodation(s) would work

Providing an Accommodation

- District ultimately chooses the accommodation so long as the choice is *effective*
- Accommodation needs can change, and if they do, the interactive process should begin again
- An employee can have more than one accommodation



Examples of Accommodations in School Setting

- Small refrigerator in classroom
- Loop system in classroom
- Stool to sit on during instruction
- Unpaid medical leave
- Training provided in accessible location
- Providing specific parking spot
- Allowing flexible schedule (playground duty after school rather than in morning, specific planning period)
- Large print docs

Denying Accommodation Request

- Never have to eliminate an essential job function
 - Ex: teachers must supervise children, so no obligation to eliminate this duty, but would have to change the way it is done if necessary
 - Teachers in most traditional schools must teach in person, so generally no obligation to allow telecommuting
- Undue Hardship
 - Accommodation would require significant difficulty or expense
 - Nature and net cost of accommodation
 - Overall financial resources of the school and of the district
 - Impact on operations and ability of other employees to do their jobs

Checklist for Best Practice

- Train site supervisors to recognize disability-related issues so they can refer employee to HR
- Train employees on where to find policies and procedures related to disability-related requests
- Create a template interactive process letter, request for reasonable accommodation, accommodation plan, medical release

Checklist for Best Practice

During interactive process meeting:

- Discuss the disability and the limitations it causes
- Discuss the actual duties the employee performs
- Discuss ways to accommodate the disability-related needs
- Document the meeting—who is present? How long did you meet? What is the outcome?

Checklist for Best Practice

- If accommodation is necessary, draft an accommodation plan to memorialize the accommodations so that HR, employee, and supervisor(s) as needed know what is expected and acceptable
- Revisit accommodations as needed

Personnel Records: Medical Files

- **ADA** requires medical records to be collected and maintained on separate forms and in separate medical files apart from rest of EE's personnel records
- **FMLA** requires that records/ documents relating to medical certifications and medical histories be maintained as "confidential medical records in separate files/records from the usual personnel files"

Title IX Sexual Harassment

Common Pitfalls

- Over or under identifying Title IX applicability
- Forgetting the “trriage” meeting that MUST occur
- Analysis of whether Title IX Coordinator should sign formal complaint
- Forgetting to send evidence memo before investigation report

Definition of Sexual Harassment Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (stricter definition than TVII)

Quid Pro Quo

Recipient's *employee* conditions an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.

Only applicable to employee as Respondent; not applicable to Respondent volunteer, student, etc.

Hostile Environment

- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person’s equal access to the recipient's education program or activity.”
- “Education program” is any location, event, or circumstance over which the recipient exhibits substantial control over both the Respondent and the context in which the harassment occurred.

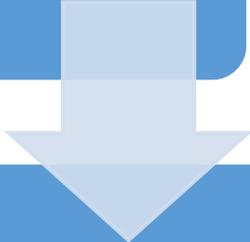
Equal Access

- Reactions to sexual harassment may vary
- Assess from perspective of reasonable person in complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class, quitting an extracurricular
- No concrete injury required
- Do not have to show that complainant dropped out of school, failed a class, had a panic attack, or otherwise reached "breaking point"

Two Phases of Responsibility

Actual Knowledge

Any employee
learns of possible
sexual harassment



Coordinator must
contact alleged
victim to discuss
supportive
measures and other
TIX information

Formal Complaint

- Coordinator receives signed formal complaint
- Grievance process initiated
- Notice letters go out

Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact alleged victim to discuss “supportive measures”
 - Inform alleged victim of “supportive measures” available whether Formal Complaint filed or not
 - Explain process for filing Formal Complaint

Supportive Measures

- Available before, during, and after investigation, **and** if no Formal Complaint filed
- Must be:
 - Non-disciplinary
 - Non-punitive
 - Individualized
 - Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party

Formal Complaint

- A document filed and signed by a complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting that District investigate the sexual harassment allegation.

34 CFR §106.30

Complainant's Status

- Complainant must be participating in or attempting to participate in school's education program or activity at the time the Complainant files a Formal Complaint
- But nothing in the regulations prohibits a Title IX Coordinator from signing a Formal Complaint when the Complainant is not currently participating or attempting to participate in the school's programs

Coordinator Signing Complaint

Key Question:

- Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



If Formal Complaint Submitted: Investigation

- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video
- Identify disputed facts and follow up
- Review police records if available
- If necessary, place employee on paid administrative leave



Digital Evidence Considerations

- Review acceptable use policy
- Cut access to email and school computers/servers
- Stop automatic delete function
- Collect school electronic devices
- Consider access to personal electronic data



CAUTION:

Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography,

CALL LAW ENFORCEMENT

- **Do not** view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

Interviewing Employee Respondent

- Follow Board policy and CBA
- Union representation
- Another administrator
- Direct employee to provide truthful responses
- Engage the conversation
 - Start broad
 - Eventually narrow
- Pursue "I don't recall"



NLRB v Weingarten **420 US 251 (1975)**

- Employee has right to union representation at investigatory interview which might reasonably result in disciplinary action
- MERC has same standard
- Violation is an unfair labor practice of "interference" with union activity
- Employer controls the interview

WEINGARTEN RIGHTS

**IT'S YOUR
RIGHT**

**TO UNION
REPRESENTATION**

Remember

- Must give parties equal opportunity to present witnesses, inculpatory/exculpatory evidence
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence
- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, in writing
 - Notice must be given a sufficient time in advance so that a party may prepare for interview

What Evidence May Parties Access?

- Evidence memo shares everything, including:
 - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
 - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX Grievance Process is prohibited

Investigation Report



Investigator must objectively evaluate evidence

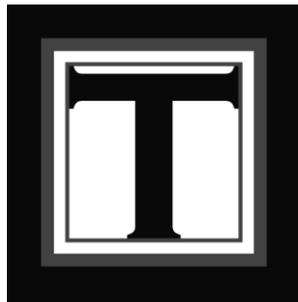


Report must fairly summarize relevant evidence



Upon completion of report, Investigator sends report to Complainant, Respondent, and Decision-Maker.

QUESTIONS



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