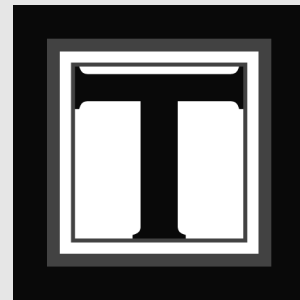


# Employee Leave and Compensation: Get It Right or Pay the Price

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These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

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Future legal developments may affect these topics.

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# Agenda

- ADA Review
- FMLA Review
  - Collective Bargaining Agreements
- Compensation for Extra-Duty Services

# Title I of the Americans with Disabilities Act (ADA)

- Applies to public school districts (via Title II)
- Protects employees with a *disability*
- Reasonable accommodations when necessary to perform essential functions of the position
- Interactive process is key
- Unpaid leave is often considered a reasonable accommodation
- Work from home is more often a reasonable accommodation since COVID-19



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# What Is a Disability?

## Specific legal definition:

- Actual disability
  - Qualified person with a physical or mental impairment
  - That substantially limits one or more major life activity
- Regarded as having a disability
- Record of disability

# Determining Disability

- Is it obvious?
- If person wants a reasonable accommodation and it is NOT obvious, can ask for limited medical information
- ADA's definition is specific—it is not the same definition as applied in Social Security Disability cases, long-term disability benefits, worker's compensation, etc.
- Don't create a presumption of knowledge by making statements (in writing or verbally) that will be interpreted as belief that employee has disability

# Request for Reasonable Accommodation: What Now?

- Do not ignore request—does not have to be in writing, does not have to use “magic words”
- Do have written policy/procedure and ensure site admin is trained to refer to HR immediately
- Do not allow site-based accommodations that haven't been through the process
- Interactive Process

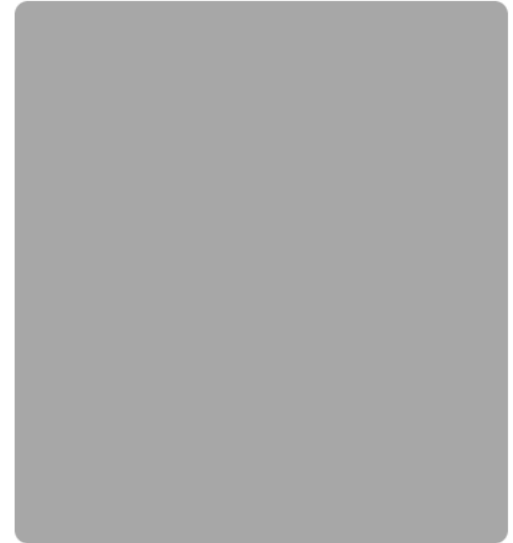
# Interactive Process





# Reasonable Accommodation: Remote Work Factors to Consider

- Employer's ability to supervise the employee adequately;
- Duties require use of certain equipment or tools that cannot be replicated at home;
- Need for face-to-face interaction and coordination of work with other employees;
- In-person interaction with outside colleagues, clients, or customers is necessary; and
- Requirement that the employee have immediate access to documents or other information located only in the workplace.



# Reasonable Accommodation: Leave of Absence

- An RA is any change to the way a task is performed
- Employer chooses RA if there are more than one effective RA
- Leave is an RA of last resort (even if it is the one the employee wants)
- Cannot require return only if released with no restrictions
- Do not have to provide indefinite leave
- If an employee is out of FMLA leave, move to RA under ADA if continued need for leave

# FMLA



## The Family and Medical Leave Act

# Who Is Eligible?

12 weeks of unpaid leave is available over a 12-month period for eligible employees who:

- Worked at least 12 months for a covered employer;
- Worked at least 1,250 hours immediately before leave begins;
- Worked at location where employer has at least 50 employees within 75-mile area.

# Basics of Leave

- New child
- Serious health condition
- Spouse, child, parent serious health condition
- Special rules for military related leave

- Allowed under specific circumstances
- Can be taken intermittently in some circumstances
- Have policies and follow them—do not default to FMLA every time someone says they need time off for medical reason



**FAMILY AND MEDICAL  
LEAVE**

# Know Your Policies and CBA Terms



Employer may enact policies that provide *greater* protections than the FMLA and if it does, it must comply with those policies



Employers may not enact policies that provide *fewer or less beneficial* protections than FMLA



Terms of a CBA may create greater rights than offered by FMLA and must be honored (most do)

# What Should Be In Your CBA?

- Concurrent use of sick/paid leave and FMLA leave
  - Mandatory bargaining subject
- Return-to-work certification requirement or
- Fitness-for-duty examination
- RIGHT to substitution—accrued paid leave substitutes for unpaid leave so that EE is not entitled to use all paid leave before using FMLA leave

# Notice of Eligibility

## Form WH-381

- Combines Notice of Eligibility and Notice of Rights and Responsibilities
- Give within 5 days of
  - Employee request for FMLA leave, or
  - Employer becomes aware that leave may be for an FMLA-qualifying reason

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf>



# Designation Notice

## Form WH-382

Tells employee if FMLA leave request is approved

- Within 5 business days of when employer has enough information to determine leave qualifies for FMLA

If leave is determined not to be FMLA, notice may be a simple written statement

<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-382.pdf>

# Medical Certification

## Form WH-380E

- Notify EE if certification is required
- Request within 5 business days of notice or beginning of leave, if unforeseen
- Employee must return certification within 15 calendar days (with some good faith exceptions)

# Maintain Benefits

- Maintain group health benefits through leave period
- Same terms and conditions as if employee were continuously employed
- If employee chooses not to retain coverage during leave, employer must restore same coverage on reinstatement



# Job Restoration

## **Same or equivalent job**

- pay
- benefits
- terms and conditions

## **No greater right to reinstatement than if employee continued to work**

Bonuses predicated on specified goal may be denied if goal not met

## **Key employee exception**



# Concurrent Leave

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Employer may designate that paid leave runs concurrently with unpaid FMLA leave

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Notify EE *early* in the process (with Designation Notice)

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Check Board Policy and CBA to ensure substitution of paid leave allowed

# Special Rules for Schools



# Instructional Employees

- Those whose principal function is to teach and instruct students in a class, small group, or individual setting
  - includes teachers, athletic coaches, driving instructors, and special education assistants



# Intermittent Leave School Rule

If eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to:

- Care for family member with serious health condition OR
- Care for a covered service member OR
- Employee's own serious health condition AND
- It is foreseeable based on planned medical treatment AND
- Employee would be on leave for more than 20 % of total number of work days over the leave period ...



## **Intermittent Leave School Rule**

Employer may require employee to choose to either:

- Take leave for a particular duration, not greater than the duration of planned treatment OR
- Temporarily transfer to alternative position with equivalent pay and benefits that better accommodates recurring leave

# Leave at End of School Year for Teachers

- Leave taken for a period that ends with the school year and begins the next semester is consecutive leave, not intermittent.
- Summer vacation is not counted against the employee's FMLA leave entitlement.

# End of Academic Term School Rule

Eligible instructional employee requires leave during the last 3 weeks of term for following reasons:

- Birth of a child
- Placement of a child for adoption or foster care
- Care for a spouse, child, or parents with a serious health condition
- Care of a covered service member

*School may require continuous leave until end of term if leave lasts more than 5 working days*

# End of Academic Term School Rule

Eligible instructional employee begins leave *more than 5 weeks* before the end of a term and

Leave will last at least 3 weeks and

Employee would return to work during the 3-week period before the end of the term

*School may require employee to continue taking leave until the end of the term.*

# End of Academic Term School Rule

Eligible instructional employee requires leave during the last 5 weeks of term for following reasons:

Birth of a child

Placement of a child for  
adoption or foster care

Care for a spouse, child, or parents  
with a serious health condition

Care of a covered service  
member

Leave will last more than 2 weeks and

Employee would return to work during the 2-week period before the end of the term

School may require employee to continue taking leave until the end of the term.

# End of Academic Term School Rule

*Academic term* means school semester

Cannot have more than two “academic terms” each year for FMLA purposes

Extension does not count against FMLA time

# Compensation for Extra-Duty Services

## Michigan Payment of Wages and Fringe Benefits Act:

“Wages”: all earnings of an employee whether determined on the basis of time, task, piece, commission, or other method of calculation for labor or services. MCL 408.471(f)

Wages must be paid either bi-weekly, or monthly in accordance with the regularly scheduled pay period.

## **Non-Exempt Employees and Overtime**

The Fair Labor Standards Act (FLSA) requires that employers pay non-exempt (hourly) employees overtime for each hour they work over 40 hours in a seven-day period.

Hiring non-exempt employees, such as custodians, paraprofessionals, bus drivers, and other non-exempt employees for extra-duty services in addition to their regular duties may require the payment of overtime.



# Non-Exempt Employee and Overtime (cont.)

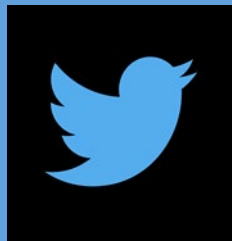
If a non-exempt employee is working for a nominal fee, (less than 20% of what the school would otherwise pay to hire someone to provide the same services), the FLSA's overtime requirements do not apply.

Check any collective bargaining agreement that could grant overtime on a more frequent basis, such as after 8 hours of work over a 24-hour period.



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