

# Introductions

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# Sick Leave, FMLA and ADA Post-Pandemic

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# Sick Leave



- School Code (105 ILCS 5/24-6)
- CBA
- Board Policy

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# Legitimate Uses

- “Sick leave shall be interpreted to mean personal illness, mental or behavioral health complications, quarantine at home, or serious illness or death in the immediate family or household.”
- “Sick leave shall also be interpreted to mean birth, adoption, placement for adoption, and the acceptance of a child in need of foster care.”



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# “Mental Health Days”



- “Mental or behavioral health complications”
- Special problems
  - Planned days off
  - Coincide with breaks
- Confirm through licensed mental health professional

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# Sick Leave Abuse

➤ The “smoking gun”

OR

➤ Look for a pattern



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# “Smoking Gun”

- *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997)
  - Employer hired investigator to videotape employee off duty.
  - The video depicted the employee performing physical activities she claimed she was incapable of performing at work.
  
- *Ohio Turnpike and Infrastructure Commission*, 2023 BNA LA 4 (Jan. 2, 2023)
  - On October 10, 2022, employee reported that he contracted COVID pneumonia and would be out through October 25, 2022.
  - Employer later discovered photos on Facebook dated October 21, 2022, showing the employee on a hunting trip in another state.



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# Pattern of Use

- *Kinsella v. Am. Airlines, Inc.*, 685 F. Supp. 2d 891 (N.D. Ill. 2010)
  - Husband and wife worked at American Airlines together
  - Employer identified a pattern of husband and wife taking sick days at the same time and that the wife's sick days often occurred around her days off.
  
- *Municipality of Penn Hills*, 118 BNA LA 1806
  - “[A] single day of sick leave is of little significance, and a possible pattern of sick leave abuse must be assessed over a period of time. But if the time period examined is too short, any ‘pattern’ that appears may be too ambiguous to be reliable. Even if taking 12 Mondays off in 12 months would indicate sick leave abuse, taking three Mondays off in three months is more equivocal. This is simply an application of the statistical principle that the smaller the sample, the less reliable are the conclusions that can be drawn. It seems to me problematical to base a finding of sick leave abuse, as the Municipality does, on five ‘pattern’ absences in a relatively short three month period. I note that over the last three calendar months of the year 2002, Grievant had no ‘pattern’ absences. Thus the Grievant’s attendance record would appear more favorable if viewed over a longer time frame.”



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# Potential Pitfalls

- The Employee Sick Leave Act
  - “An employer shall not deny an employee the right to use personal sick leave benefits in accordance with this Act or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using personal sick leave benefits, [or] attempting to exercise the right to use personal sick leave benefits. . . .”
- Grievances
- Discrimination claims



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# Combating Sick Leave Abuse

- Communicate the legitimate use of leave to employees
- Talk with the union if absenteeism is becoming a problem
- Maintain good records and review for patterns of abuse
- Require that employees certify the appropriate use of leave
- Discipline

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# FMLA Basics

- Employed for at least 12 months
- Employed for at least 1,000 hours during 12 months preceding leave (only actual hours worked, so sick and vacation days don't count)
  - Generally, FT teachers are presumed to meet threshold under law
- Worksite where 50+ employees are employed within 75 miles



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# Types of FMLA Leave

- Continuous
  - E.g., 3 consecutive weeks
- Reduced schedule leave
  - An FMLA leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. This is a change in the employee's schedule for a period of time, normally from full-time to part-time.
- Intermittent
  - FMLA leave taken in separate blocks of time due to a single qualifying reason.



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# Intermittent FMLA leave



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# Employer Options

- Temporary transfer
- Recertification
- Special rules for instructional employees



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# Temporary Transfer

- Applicable to non-certified employees
- Planned medical treatment
- Temporary transfer to an alternative position that better accommodates the need for intermittent leave
- Equivalent pay and benefits



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# Recertification

- Typically no more than every 30 days
- May request sooner than 30 days if:
  - The employee requests an extension of leave
  - Circumstances have changed significantly
  - The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
- Confirm pattern of absence



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# Special Rules for Instructional Employees

- Intermittent leave that is foreseeable based on planned medical treatment.
- On leave for more than 20% of the total number of working days over the period the leave would extend.
- Employer may require employee to choose:
  - Take leave in one continuous block; or
  - Temporarily transfer to an alternative position



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# The ADA and Leaves of Absence

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# Background

- The EEOC has long taken the position that adjustments to an employer's leave policy, such as granting an extension of leave after an employee exhausted leave under the policy, is a reasonable accommodation.
- But, the EEOC has also said that granting extensions of leave for an indefinite time period is not a reasonable accommodation.



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# Seventh Circuit Weighs In

- In *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7<sup>th</sup> Cir. 2017), the employee exhausted his FMLA leave and then requested a two-month extension so he could recover from surgery and return to work.
- The employer denied the employee's request and terminated him. The employee sued under the ADA alleging that the employer failed to grant him a reasonable accommodation by refusing to extend his leave. The EEOC filed a brief on the employee's behalf arguing the employer should have granted the leave request.
- The court held that the ADA did not require the employer to grant an employee a multi-month leave of absence after he exhausted his FMLA leave.
- **“The ADA is an antidiscrimination statute, not a medical-leave entitlement.”**



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# Where Does That Leave Us?

- We know that a multi-month leave of absence after the exhaustion of all available leave is not (typically) a reasonable accommodation.
- We know that requests for an extended leave of absence for an indefinite time period are not (typically) reasonable accommodations.
- Requests to extend leave for a short-period of time with a definite return date are likely reasonable accommodations.



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# Temporary Illness/Incapacity Policy

- Board Policy 5:180 (for those that subscribe to PRESS)
  - “If illness, incapacity, or any other condition causes a teacher or other **licensed employee** to be absent in **one school year**, after **exhaustion of all available leave**, for **more than 90 consecutive work days**, such absence may be considered a permanent disability and the Board may begin dismissal proceedings subject to State and federal law, including the Americans with Disabilities Act.”



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# Tips for Managing Board Policy 5:180

- Confirm whether Board Policy 5:180 applies.
- Send notice to the employee upon the exhaustion of all available leave that the employee is subject to Board Policy 5:180.
- Board-approved leaves likely toll the application of Board Policy 5:180.
- Request periodic updates.
- Prior to end of the 90-day period, warn employee that failure to return may result in dismissal.
- Require physician certification before returning employee to work.



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# Hypotheticals



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# Whole Lotta Leave

Collin Schick, a custodian in the District, has been out on medical leave for several months due to chronic back pain. He has exhausted all of his paid sick days and his time off under the *Family Medical Leave Act*. You asked him for a medical update on his ability to return to work, and Collin provided a doctor's note that said he can return to work without any restrictions in six weeks. What should you do in response to the doctor's note? Can Collin be terminated since he is out of leave?



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# Salt Life

Jessica Smith entered five sick days for May 15 – May 19. You requested that Jessica provide a doctor's note to certify her absence. Jessica provided a note from a licensed professional counselor stating that Jessica was suffering from mental health complications from all of the stress she was experiencing at work, and the counselor recommended Jessica take off work for five days. Two weeks later you learn that Jessica had spent the week of May 15<sup>th</sup> in Mexico at an all-inclusive resort. Can Jessica be disciplined for misusing sick leave?



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# Questions and Answers

*We thank you for your time!*



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# Presenters:

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