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# Legal Update

Attorney Tom O'Day

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## This Presentation

- Survey of important laws, issues

## Next Hour's Presentation

- Interactive with focus on non-competes, labor unions, accommodations

# Audience participation!

- Questions



- Experiences

# Overview

HR Audits

FLSA White Collar Exemptions

Independent Contractors

Federal Staffing Standards

Joint Employer

Internal Investigations

Social Media

Union Activity

FMLA & ADA

Non-Compete Restrictions

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# HR Audits

# Audit Checklist

- ✓ Employment Practices  
Liability Insurance
- ✓ Recruitment & Hiring
- ✓ Documentation & Record-Keeping
- ✓ Policies & Procedures
- ✓ Compensation & Benefits
- ✓ Performance Management
- ✓ Training & Development
- ✓ Employee Relations
- ✓ Healthy & Safety
- ✓ Legal Compliance
- ✓ Technology & Data Security
- ✓ Diversity, Equity, & Inclusion

## Cemex Decision

NLRB issued decision in 2023 that says:

“Under the new framework, when a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer must either recognize and bargain with the union or promptly file an [\[petition\]](#) seeking an election. **However, if an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and—rather than re-running the election—the Board will order the employer to recognize and bargain with the union.**”

# Audit Checklist

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# FLSA White Collar Exemptions

# FLSA White-Collar Exemption Requirements: A Refresher

## Salary basis test

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed

## Salary level test

The amount of salary paid must meet a minimum specified in the regulations

## Duties test

Primary duties must involve executive, administrative, or professional duties, as defined in regulations

# Major Changes

Salary Increase To Take Effect in 2 Phases

**Minimum salary increases** from  
\$35,568/year (\$684/week) to:

1. **07/01/2024**: \$43,888/year (\$844/week)
2. **01/01/2025**: \$58,656/year (\$1,128/week)

**64.91%** increase over current salary floor

- Automatic adjustments (increases) every 3 years based on current wage data, beginning 07/01/2027
  - But may be delayed if warranted by unforeseen economic or other conditions
- No changes to the duties tests or the salary basis requirement for the exemptions

# What To Do Now?

- Identify all exempt employees and current salary levels
- Identify employees in each job title below projected salary level and potential salary level
- Identify total cost to raise salaries to minimum level
- Evaluate options:
  - Increase salary so affected employees retain exempt status (assuming they satisfy the duties test)
  - Reclassify as non-exempt/overtime-eligible and pay overtime
  - Reclassify as non-exempt and adjust hourly pay rate to account for anticipated overtime (so overall pay is consistent and reclassification is cost-neutral)
  - Reduce hours to avoid overtime, shift work to other employees
  - US DOL Resources available [here](#) (including FAQs, Small Entity Compliance Guide)

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# Independent Contractors

# Employee vs. Independent Contractor

Employee: Under the common law, anyone who performs services for another is your employee if you can **control** what will be done and how it will be done.

Independent Contractor: Under the new DOL rule, independent contractor status is based on the “totality of the circumstances.”

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# Practical Tip

# Create a spreadsheet of your service providers

- Exempt status for FLSA purposes
- Independent contractors
- Mark it attorney-client privileged at the top
  - You are creating this to seek legal advice



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# Federal Staffing Standards

# CMS Finalizes Federal Minimum Staffing Standards for Nursing Homes

- April 22, 2024, the Centers for Medicare and Medicaid Services (CMS) adopted this new rule.
- Requires long-term care facilities to:
  - Ensure the presence of a registered nurse on-site 24/7; and
  - Provide a minimum of 3.48 total nurse staffing hours per resident day.
- Hardship Exemptions
- Staggered Implementation

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# Joint Employer

# New Rule: Joint-Employer Status

Each entity has employment relationship with employee and each codetermine essential *terms and conditions of employment*

Essential terms:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. Assignment of duties to be performed;
4. Supervision of the performance of duties;
5. Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
6. Tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

# Avoiding Joint Employer Relationships

- Clear contracts and Agreements
- Limit Control
- Separate Management Structures
- Avoid Share Resources
- Independent Operations
- Documentation and Record-Keeping
- Training for Manager

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# Internal Investigations

# Conducting Internal Investigations



Preparation & Planning



Conduct Interviews



Collect Evidence



Analyze & Decide



Report & Action



Follow-Up



Documentation & Record-Keeping

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# Social Media



# Review Social Media Policies

Your policy is now a liability—must review.

# Employee Use of Social Media



Understand legal boundaries



Develop a clear policy



Focus on professional accounts



Use monitoring tools wisely



Respect boundaries



Focus on relevant content



Regularly review and update policies

## When Questionable Conduct Occurs

- Use caution before disciplining the employee.
- Consider whether the employee's post is related to working conditions or terms of employment.
- Review applicable social media policies to determine whether they might be interpreted as restricting the employees' ability to engage in protected activity.
- Consider consulting counsel before taking action against the employee.

# Social Media Training

- Make sure employees understand the policies in place around the use of social media, tie it to resident privacy and rights.
- Be mindful of NLRA and employee rights in balance with patient rights when conducting training.

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# Union Activity

# Union Activity & Scrutiny of Workplace Rules

- *Cemex* decision changed how employers need to handle union organizing
- Carefully review workplace rules to ensure:
  - (1) Legitimate and Substantial Business Need
  - (2) Narrow-Tailoring
- Document decision-making process and discussion of above factors
- Key Rules to Review:
  - Social Media, Personal Conduct, Conflicts of Interest, and Confidentiality

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# FMLA & ADA

# Americans with Disabilities Act & Interactive Process

- Disability under the ADA:
  - A physical or mental condition that substantially limits a **major life activity**.
  - A history of a disability.
  - “Regarded” as having such an impairment.
- Accommodations must be reasonable and effective.
- Back-and-forth discussions with employees requesting accommodations  
Sufficient medical documentation
- Requiring a second opinion



# Family and Medical Leave Act

- Know the basics and stay updated.
- Develop clear policies.
- Prepare documentation and maintain records.
- Manage leave requests effectively.
- Support employees.
- Understand return to work obligations.
- Monitor and evaluate employees on leave.
- Seek legal advice.

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# Non-Compete Restrictions

# Types of “restrictive covenants”

- Confidential Information Restriction/Non-Disclosure Agreement
- Employee Non-Solicitation Restriction
- Resident/Member/Patient Non-Solicitation Restriction
- Referral Source/Vendor Non-Solicitation Restriction
- Geographic Non-Compete Restriction



# BREAK

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# Legal Update

(part 2)

Attorney Tom O'Day

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## Wisconsin Statute Section 103.465:

Restrictive covenants in employment contracts. A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

# Judicial Interpretation: “Reasonably necessary”



# Court Changes

- Restrictive covenant law changes rapidly
- These changes affect the drafting and enforcement of restrictive covenants
- Wisconsin restrictive covenant law has seen significant change in the past two decades

## *Star Direct: Continued Significance*

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If your old employee non-solicitation restriction is not divisible from other restrictions in an agreement, you will need to update agreements for current individuals

# *Star Direct: Practical*

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## SAMPLE Restrictive covenant terms:

- Employee shall not provide Restricted Services to any Competitor within 25 miles of the Lodi office of ABC Corp.
- Employee shall not, directly or indirectly, solicit any customer of ABC Corp.
- Employee may not disclose Confidential Information at any time following the end of employment.

# *Star Direct: Practical*

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SAMPLE Restrictive covenant terms:

- Employee shall not provide Restricted Services to any Competitor within 25 miles of the Lodi office of ABC Corp.
- ~~Employee shall not, directly or indirectly, solicit any customer of ABC Corp.~~
- ~~Employee may not disclose Confidential Information at any time following the end of employment.~~



# *Star Direct: Practical*

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SAMPLE Restrictive covenant terms:

- A. ~~Employee shall not provide Restricted Services to any Competitor within 25 miles of the Lodi office of ABC Corp. and shall not, directly or indirectly, solicit any customer of ABC Corp. and may not disclose Confidential Information at any time following the end of employment.~~

# *Star Direct: Practical*

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Include severability clause in the agreements

Examples:

- “Severability. The obligations imposed by this Agreement are severable and should be construed independently of each other. The invalidity of one provision shall not affect the validity of any other provision.”
- “Separate and Divisible Covenants. The covenants contained in this Agreement are intended to be separate and divisible covenants, and if, for any reason, any one or more thereof shall be held to be invalid or unenforceable, in whole or part, it is agreed that the same shall not be held to affect the validity or enforceability of any other covenant or part of this Agreement.”

# Next steps for LeadingAge entities

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1. Decide internally how aggressive you want to be with new confidentiality, employee/resident non-solicitation and geographic non-compete language.
2. Review current agreement to determine if the restrictions are divisible from each other
3. Revise agreements to use with new individuals providing services immediately
4. Decide internally if organization wants to ask current individual service providers to sign new agreement
  - If agreement is divisible, does organization want to pay additional cost (monetary or human resource cost) to obtain new agreement?
  - If agreement is not divisible, organization will likely want to have them sign a new agreement

- Individual State Laws?
- Federal Trade Commission?
- National Labor Relations Board?

# Types of “restrictive covenants”

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# Labor Unions

# The Labor Landscape in 2024

Last year, we witnessed continued increases in employee activism, protected concerted activity, union organizing activities, and *many* Board decisions. Here's what the numbers tell us.

- Union representation petitions were up by 3% in Fiscal Year 2023. ULP charges increased by 10%.
- The average union win rate for representation petitions in FY 2023 was 76%. This is still high so far in 2024.
- There is a very real youth movement. Younger employees have different workplace issues, which unions can exploit.

# Organizing Activity Keeps Rising

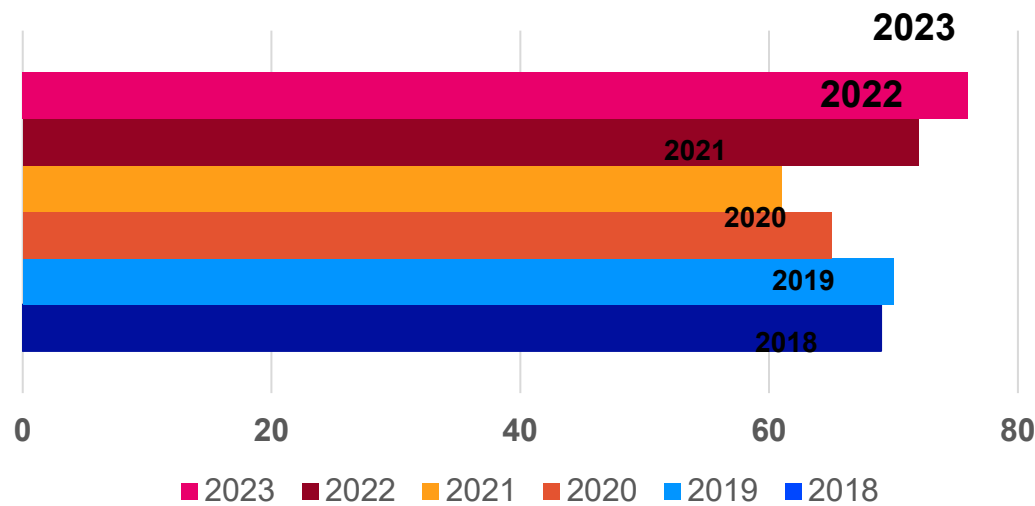


- Over **2,500** petitions filed during FY 2023
- FY 2022 saw a **53%** petition increase and a **19%** ULP increase (up from 1,638 petitions filed in FY 2021)
- Dramatic increase in Employer-filed petitions after being asked to voluntarily recognize a union, although the pace of the rise is slowing
- Strikes are WAY up



# Unions are Winning

Percentage of NLRB Union Representation Elections Won by Union



[www.nlr.gov](http://www.nlr.gov)

- Unions prevailed in **76%** of elections in 2023. That continues today.
- Unions have won more than **60%** of all elections in each of the past 17 years.

#StandUpUAW

**UAW** @UAW · Sep 14  
WHICH SIDE ARE YOU ON?  
#StandUpUAW

Survey Question	Response
WHICH SIDE DO YOU SYMPATHIZE WITH MORE?	
UNITED AUTO WORKERS	75%
U.S. AUTO COMPANIES	19%
NEITHER	2%

**BREAKING NEWS**  
BIDEN SPEAKS WITH AUTO LEADERS; STRIKE DEADLINE JUST HOURS AWAY; AUTO WORKERS SEEK PENSIONS, 40% PAY HIKE  
ESEBRO, WILL BE TRIED IN OCTOBER, PER THEIR REQUESTS FOR SPEEDY TRIAL;

**LIVE**  
**CNN**  
7:48 PM ET  
ERIN BURNETT  
OUTFRONT

1,147 3,982 19.3K 3.5M

# What Has Changed?


- Pent up worker demands, exacerbated by the challenges of the pandemic.
- Issues driving union interest: voice, respect, work life balance issues, “lack of recognition”, especially with essential workers.
- Most effective messages bring public shame to “progressive” employers, like Starbucks, Amazon, Apple.
- Current labor market makes it easier to speak out and protest.
- Social media is a game-changer. With it, immediate communication with colleagues across different geographic areas and easy access.
- The rise of the “independent” and “local” union, and the rejection of large traditional unions (who may join the effort later, like with Workers United). Undercuts employer argument of the problems of a “third party”.

# What Really Matters...

## National Labor Relations Act (NLRA)

### General Counsel

[Traducir página al español](#)



The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

On July 22, 2021, Jennifer A. Abruzzo began serving as General Counsel for the National Labor Relations Board. Ms. Abruzzo had previously served as Assistant General Counsel, Supervisory Field Attorney, Field Attorney, Supervisory Field Attorney, Counsel, Deputy General Counsel, and Acting General Counsel. Prior to her appointment as General Counsel, Ms. Abruzzo was the General Counsel of the Communications Workers of America.

**The Washington Post**  
*Democracy Dies in Darkness*

**ECONOMY**

## The lawyer who could deliver on Biden's wish to be the most pro-union president

Biden's general counsel of the National Labor Relations Board, Jennifer Abruzzo, is wielding her power in new ways

By [Lauren Kaori Gurley](#)

Updated October 17, 2022 at 1:41 p.m. EDT | Published October 15, 2022 at 7:00 a.m. EDT



Content from YouTube



# NLRA § 7: Rights of Employees

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities** for the purpose of collective bargaining or other mutual aid or protection.

National Labor  
Relations Act  
(NLRA)

# NLRA § 8(a)(1): Unfair Labor Practices

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

National Labor  
Relations Act  
(NLRA)

# Sources of Legal Guidance

- Case Law
- NLRB Board Decisions
- NLRB General Counsel Advice Memorandums
  - Only provide guidance
  - The NLRB Board and courts are not required to decide cases based on these memorandums

National Labor  
Relations Act  
(NLRA)



# New Organizing Tactics

## QR Codes, E-Cards, Text Messages, Apps & More



It's Syd from Working America. COVID has shown CEOs get richer, even when the rest of us are going broke. What do you think is the best way to change that?



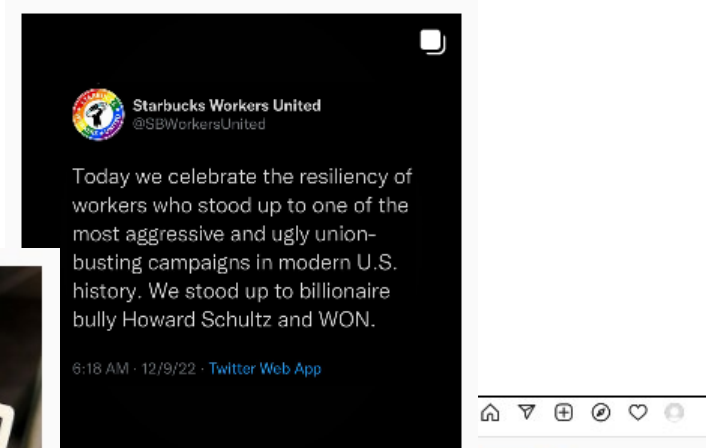
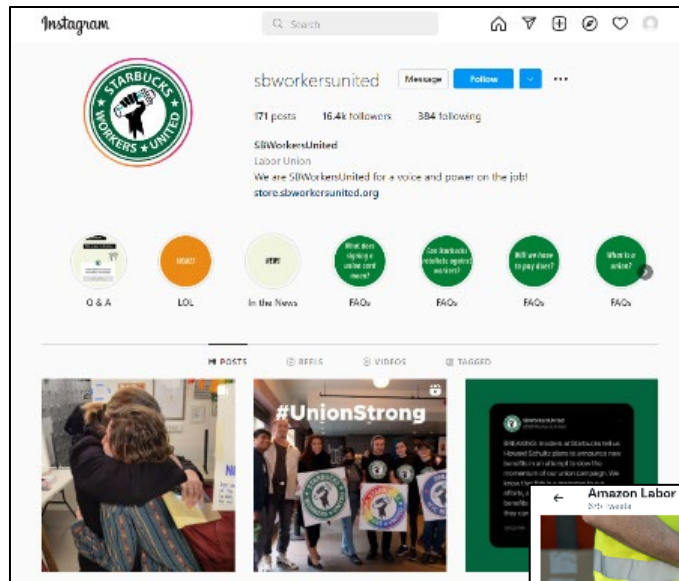
About the Union Strong Mobile App | Connect Instantly

<https://www.unionstrongapp.com/about>

Web With the Union Strong app your updates hit the front screen of your members' phones instantly. Through push notifications, tags, and geo-location, your messages reach the ...

A screenshot of a "Union Authorization Card" form for UFCW Local 1000. The form includes fields for Name (First and Last), Phone, and Email. It has two radio button options: "Yes, I want a union and I hereby authorize United Food and Commercial Workers International Union, or its chartered Local Union (U) to represent me for the purpose of collective bargaining." and "Yes, keep me informed!". There is a signature line and an "Employer Name/Address" field. A small disclaimer at the bottom states "We will never contact your employer for any reason. Your information is private and secure." and a button labeled "I want a union!".

# The Social Media Connections



# Top News Stories

- According to a Bloomberg Law report, collective bargaining agreements negotiated in 2023 yielded the highest average pay raises in decades. Union contracts provided workers an average first-year wage increase of 6.6%. With signing bonuses and other lump-sum payments factored in the average jumped to 7.3%. The calculations are based on over 950 CBAs ratified in 2023 that cover 2.8 million union-represented workers. Comparatively, contracts negotiated in 2022 provided a 5.7% average increase, while 2021 contracted averaged a mere 3.7%. Although raises were higher across all sectors, the largest wage increases occurred in state and local government union contracts.
- Union membership continued its overall decline, according to a Bureau of Labor Statistics report. Overall union membership dropped from 10.1% in 2022 to 10% in 2023, signaling a continued decline since it peaked in the 1950s. The private sector union membership rate remained at 6.0%, the same as the 2022 rate. The report also indicated the industries with the highest union membership rates, including transportation and utilities, construction, motion pictures and sound recording, and education and health services. Despite the overall decline, union membership increased across many southern states, where union membership is traditionally low.

# News & Analysis: Strike News

- 2023 strike activity was the highest single-year total in 20 years, according to a Bloomberg Law report. The database recorded 347 work stoppages in 2023, marking the first time since at least 1990 that annual strikes increased three years in a row. May and September saw the most strike activity. Most strikes in 2023 occurred while unions were negotiating successor contracts rather than first contracts. The report also confirmed that the Service Employees International Union (SEIU) and the International Brotherhood of Teamsters (IBT) called the most strikes, initiating 99 and 43, respectively. The report further highlighted the trend of shorter strikes, with two-thirds resolving within seven days of their start date.
- Expiring contracts in 2024 signal another potential wave of labor unrest after 2023's record-breaking strikes. The series of strikes in 2023 may embolden the more than 1.1 million workers covered by large union contracts expiring in 2024. Two of the largest employee groups with expiring contracts—U.S. postal workers and rail workers—have contracts that either ban or severely restrict workers from striking, limiting the possibility of large-scale walkouts. However, a combined 55,000 workers in two of the nation's largest public school districts, Los Angeles and Chicago, may walk off the job, as could 30,000 aircraft machinists at Boeing. If employees strike in 2024 at similar rates to 2023, employers may be more willing to make bargaining concessions to avoid a prolonged work stoppage.

# Be prepared

- Risk analysis on site
  - Employee engagement
  - Policies
- Manager training
- Direct communication with your employees
- Do not be afraid

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# Reasonable Accommodations and Intermittent Leave

# Mental Health and the ADA

In 2021, 37.2% of EEOC charges included disability claims

- With almost 30% alleging discrimination based on mental health conditions
- This is a nearly 50% increase in mental health-related claims since 2011

Notable increases in subcategories in the last 10 years

- Anxiety disorder claims have doubled
- Post-traumatic stress disorder claims have tripled

# Triggering FMLA

- Employee does not need to submit formal application for FMLA leave to apply
- There is no strong defense in support of “the employee did not request FMLA”
- Employer will be placed on notice of employee’s need of FMLA when:
  - Employee requests time off for FMLA reason
  - Absent more than 3 days due to FMLA reason
  - Absent for work-related injury or illness
  - Known pattern of absences due to FMLA reason



# FMLA Interplay

- DOL’s new guidance (May 2022)
  - Clarifies FMLA rules apply to mental health-related leave
  - FMLA eligibility and general coverage requirements remain the same
  - Describes when a mental health condition can be a “serious health condition”



# FMLA Accommodations

- There is no undue burden or hardship analysis or defense available for employers under the FMLA
- The FMLA does not entertain the concept of “essential functions”
- This has real consequences on the workplace
- An employee is entitled to take the leave, consistent with the medical certification

# ADA Amendment Act (“ADAAA”)

- Considerations in cases
  - Employee must be a qualified individual with a disability who can perform the essential job functions of the position with or without an accommodation
  - Employer and employee must engage in an interactive process to identify potential accommodations
  - Employer must offer reasonable accommodations to employees



# Wait, leave is an accommodation?

- Once FMLA expires, or if employee not eligible for FMLA, additional protection may be available under the ADA and WFEA.
- Leave of absence may be requested as an accommodation.
  - Extended complete leave of absence or intermittent leave of absence
- EEOC Position on Leave as Accommodation:
  - Maximum leave policies (*e.g.*, 12 months) violate the ADA.
  - Employer must provide continued leave until it becomes an “undue hardship.”
    - Measured by the impact on the employer or other employees
  - Employer should include information about disability leave in any letter sent to an employee nearing end of leave period.

# Addressing Intermittent Leave Needs



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- Provide for flexible schedule
- If the current job in which the person is employed does not allow for intermittent leave, or it cannot be accommodated without undue hardship, must consider other similar jobs
- Look to vacant positions which the employee is qualified to perform
- Reassignment to another position could be a reasonable accommodation

# Undue Hardship Analysis

- Significant difficulty or expense to the organization as a whole
- Case-by-case assessment
- Factors considered include:
  - Nature and cost of the accommodation
  - Overall financial and operational resources of the company and the location/facility
  - Impact of the accommodation on operations



# Disruption!



# Interactive Process

- Employer and employee must engage in the “interactive process” to determine reasonable accommodation.
- The “interactive process” may include:
  - Asking questions of the employee about what accommodations may help them eliminate workplace barriers; and/or
  - Asking for documentation from the employee’s health care provider regarding the employee’s limitations.
- Not always a one-step process; may go on for weeks or even months.





# Legal analysis of Requests for Leave: Courts vs. EEOC

- Attendance at work is key.
- Courts combine review of whether individual can perform essential function of job and whether intermittent leave accommodation is undue hardship.
- EEOC focuses on whether intermittent leave poses undue hardship. EEOC also does not consider attendance as essential function.
- **All** agree that continuous leave of indefinite nature is not reasonable.



# EEOC Guidance



- Employers may need to modify time/attendance requirements, but need not accept irregular, unreliable attendance or grant open-ended schedules.

# TIPS



**BE FLEXIBLE**



**DO NOT MAKE ASSUMPTIONS ABOUT ANYTHING**



**COMMUNICATE WITH EMPLOYEE AND, THROUGH EMPLOYEE, MEDICAL PROVIDER**



**MONITOR LEAVE OR ACCOMMODATION AND REVISIT, IF NEEDED**



**DOCUMENT PROCESS, EXCHANGES WITH EMPLOYEES**



**DOCUMENT THE DISRUPTION/BURDEN THE ACCOMMODATION MAY HAVE**

# Take Aways

## Update Employee Job Descriptions.

- Add “regular and predictable attendance”
- Add “personally interacting and treating” patients or customers
- Add “ensure patient safety”

## Quantify Workload Impact, Where Possible.

- What is the disruption?

## Engage in the Interactive Process.

## “Try out” Intermittent Leave Accommodations.

## Avoid Maximum Leave Policies/Practices.

