Labor & Employment Law: Significant Developments for the Home Health Care Industry

Introduction

• Home health care labor & employment issues:
  › Wage & Hour issues
    – Payment of overtime/minimum wage
    – Travel time
  › Independent Contractor Status
  › Managing Leaves of Absence

Home Health Care Industry: Wage and Hour Issues
Massachusetts Employers - Overtime

• Home health care employees in MA are entitled to overtime – there is no companionship exemption under MA law
  › Time and a half for hours over 40 in a workweek
  › Different than current status of federal law, but a proposed change to that federal exemption is being considered by the DOL (more on that later)

Hours Worked: Travel Time (Mass. and Federal)

• Travel time spent by an employee traveling as part of the employer’s principal activity must be counted as hours worked (29 C.F.R. § 785.38), and those hours must be counted in determining if overtime is owed
  › May be paid at a lower rate than working time
    – For example, travel time could be compensated at minimum wage, and time with clients at a higher rate

• Ordinary home to work travel (and back) is not compensable (29 CFR §783.35)
  › Ordinary travel from home to first work site of the day is not compensable
  › Ordinary travel from last work site of the day to home is not compensable
  › However, compensation for home to work travel may be required if it exceeds “ordinary” levels (such as a one-day assignment to a much more distant work site)
  › Employer and employee may agree that any home to work travel time over a certain amount is compensable (and therefore that less than that amount is not compensable)
Hours Worked: Travel Time (Mass. and Federal)

- Although ordinary home to work travel is not compensable (29 CFR §783.35), it may become compensable if employee performs more than de minimis work before leaving home in the morning (or after arriving home in the evening)
  - For example, if employee reads a client’s file, prepares for her first assignment, or spends time doing required paperwork before leaving home (spending more than 5-10 minutes)
  - Performing work such as this before leaving home can result in the time spent on these tasks and the travel time to the first work site becoming compensable
  - Taking work calls on the way to the first site, if more than de minimis, may start compensation clock

Hours Worked: Travel Time (Mass. and Federal)

- After arriving at first work site, all time worked during the day, including travel time between work sites/assignments, is compensable
- Exception: If gap between assignments is large enough for employee to use time for her own purposes then such time is not compensable
  - Generally at least two hours of free time in order for that time not to be compensable
- Federal law requirement applies in Massachusetts

Hours Worked: Sleep Time

- Federal law (applicable in MA) allows certain sleep time to be excluded from the total hours worked. 29 CFR §785.22.
  - Only where an employee is required to be on duty for 24 hours or more,
  - The employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, “provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night’s sleep.”
Hours Worked: Sleep Time cont’d

- In this instance, any interruptions to sleep must be compensated, and if the employee cannot get at least 5 hours’ sleep time during the scheduled period the entire time period is working time.
- If on duty for less than 24 hours, all time must be paid, even if some is spent sleeping. 29 CFR §785.21.

Hours Worked: Working Time In the Smart Phone Era

- All working time must be compensated and counted towards determining if overtime is owed.
- Checking a blackberry, smartphone, or email for more than a de minimis amount of time is compensable.
- Scheduling systems which require employees to call in may result in compensable time.
- Contact with clients after hours may result in compensable time.

Hours Worked: Working Time in the Smart Phone Era

- Reduce risk of liability by:
  - Training supervisors
  - Establishing and enforcing policy prohibiting work outside of work hours (or requiring employee to obtain advance notice before performing such work)
  - Ensuring that any required tasks outside of regular work hours are recorded, reported, and compensated
  - Requiring employees to certify that all time is recorded on time sheets or other reporting document
  - Consider providing smart phones and remote access only to exempt employees.
**Hours Worked: Meal Periods**

- Under Massachusetts law:
  - Must give 30 minute, unpaid meal break if employee works more than six hours in a day
  - Meal break must be paid if employee’s movement is restricted or employee must perform any work during the break.

**Penalties: Employers Cannot Afford to Be Wrong**

- Under MA law, a violation of wage laws results in severe penalties:
  - Mandatory treble damages – even if a mistake, and not intentional
  - Mandatory award of attorney’s fees to the successful plaintiff – Even if only partially correct
- Audit wage and hour practices – you cannot afford to be wrong!

**Exemption Status Under the FLSA**

- Only helpful if state law does not conflict – not applicable in Massachusetts
- Fair Labor Standards Act § 213(a)(15)
- Minimum wage and maximum hour requirements shall not apply to “any employee employed in **domestic service employment to provide companionship services** for individuals who (because of age or infirmity) are unable to care for themselves...”
Exemption Status Under the FLSA
Requirements for the Exemption

**Domestic service employment**
- Services of a household nature performed by an employee in or about a private home (private or temporary) of the person by whom he or she is employed

29 C.F.R. § 552.3

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**What is a private home?**

**ASK:** Who has the ultimate management control of the unit and is the unit maintained primarily to facilitate assistance?

**Factors**
- Whether the client lived in the unit before beginning services
- Who owns the unit
- Who manages and maintains the unit
- Whether the client would be allowed to live in the unit without provision of assistance

- The relative difference in the cost/value of the services provided and the cost of maintaining the unit
- Whether the service provider uses any part of the residence for the provider’s business purposes

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**Private home:**
- Facility originally financed and built by family members of the residents, was privately funded, not open to the public, and organized as a non-profit corporation
- Homes where employer had no property interest, clients selected and purchased own furniture, clients decided whether to have housemate, employer paid rent from client’s trust account
- “A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel…”
- “A fixed place or abode of an individual or family.”

**Not a private home:**
- Adult home for the elderly where facility controlled clients’ diets/activities and had ultimate responsibility for maintaining the residence
- Homes leased by mentally disabled adults, who could only remain in these homes for as long as they continued to use the company’s health care services
- Shared living facilities owned and operated by the employer, a for-profit corporation
- “A dwelling house used primarily as a boarding or lodging house for the purpose of supplying [domestic] services to the public, as a business enterprise…”
Exemption Status Under the FLSA
Requirements for the Exemption

• Companionship services
  • Services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs
  • May include household work related to the care of the aged or infirm person: meal preparation, bed making, washing of clothes, and other similar services
  • May also include the performance of general household work that does not exceed 20 percent of the total weekly hours worked

29 C.F.R. § 552.6

Exemption Status Under the FLSA
Requirements for the Exemption

Exemption does not apply to “trained personnel” (29 C.F.R. § 552.6)
Companionship services do not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

Key is whether the service provider has obtained training comparable in scope and duration to a registered or practical nurse. Trained personnel do not include home health aides, certified nursing assistants, alternate living unit providers, and medical assistants.

Trained personnel can qualify as covered domestic service employees if providing only companionship services in a private household (as opposed to administering medication, making diagnoses, and other actions requiring use of practical nursing judgment).

Long Island Care at Home v. Coke
127 S. Ct. 2339 (2007)

• Facts:
  › Ms. Coke, a “home health care attendant” providing services to elderly and infirm individuals, sued her former employer, Long Island Care at Home, alleging failure to pay minimum wage/overtime under FLSA
  › Ms. Coke was not employed by the families using her services
  › Ms. Coke worked over 40 hours each week
  › Limited issue: Whether 213(a)(15) applied to companionship workers paid by third party (i.e., employer or agency other than the family or household using their services)
Long Island Care at *Home v. Coke*  
127 S. Ct. 2339 (2007)

- Court relied on 29 C.F.R. §552.109:
  - “Employees who are engaged in providing companionship services ... and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements.... Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.”
- Holding: exemption applies to home health care workers employed by third parties
- Unanimous decision (9-0) for the employer

Long Island Care at *Home v. Coke*  
127 S. Ct. 2339 (2007)

- Ms. Coke was a home health attendant, so the *trained personnel* exception was not at issue.
- Ms. Coke provided services to clients in their personal residences, so the *private home* requirement of the exemption was not at issue.

Thus, these qualifications to the exemption were not resolved by the Supreme Court.

Other DOL Guidance

- 1999 DOL Opinion Letter:
  - Exemption does not apply to employee who provides companionship services to a resident in a private home and a resident in a nursing home in the same week
  - Overtime pay would be based on total hours worked in the workweek
Proposed Changes to Federal Exemption

- DOL has filed a notice of proposed rulemaking; the comment period has ended and the DOL is examining the comments; no final regulation has yet been issued
- Proposed rule:
  - Extend minimum wage and overtime regulations to all in-home care workers employed by third parties
  - Only workers employed by households (not third parties) to perform fellowship and protection duties will continue to be exempt from minimum wage and overtime under federal law
  - No significant change for Mass. employers, who are already required to pay minimum wage and overtime

Exemption Status Under the FLSA

Requirements for the Exemption

- Fair Labor Standards Act § 213(b)(21)
  - Maximum hour requirements shall not apply to "any employee who is employed in domestic service in a household and who resides in such household."
  - Same domestic service definition as in § 213(b)(15).
  - Applies to live-in domestic service workers.
  - Proposed rule will affect live-ins as well with regard to overtime; also require more burdensome recordkeeping requirements

DOL Guidance on 213(b)(21)

2005 DOL Opinion Letter:
- Live-in LPN/RN qualifies for domestic service exemption of 213(b)(21)
- Services provided:
  - Companionship, meal preparation, personal hygiene assistance; AND
  - Changing of catheter, monitoring of ventilator, periodic suctioning.
- This exemption does not excuse the employer from paying the live-in worker minimum wage rates for all hours worked
  - Can exclude by agreement with worker the amount of sleep time, meal time, and other periods of complete freedom from all duties
  - Sufficient duration to permit employee to make effective use of time
  - When interrupted, must be paid for time worked
Exemption Status
Bona Fide Professional Employees

- RNs may be considered exempt, in any event, under section 213(a)(1) of the FLSA (and Mass. law) as BONA FIDE PROFESSIONAL EMPLOYEES, provided that all "learned professional" tests are satisfied, including:
  - Paid on a salary or fee basis of at least $455.00 per week
  - Must be one or the other, not a hybrid
  - Fee basis: payment of an agreed sum for a single job, regardless of time required for completion
  - "Uniqueness of services": the task performed during each visit need not be the same to qualify for professional exemption, e.g., RN responding to the immediate changing needs of a patient

Exemption Status
Bona Fide Professional Employees

- Have a primary duty that includes the following elements:
  - perform work requiring advanced knowledge (i.e., work that requires the consistent exercise of discretion and judgment, as opposed to performance of routine work);
  - the advanced knowledge must be in a field of science or learning;
  - the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (i.e., professions where specialized academic training is a standard prerequisite for entrance into the profession).
    29 C.F.R. § 541.301(a)

Exemption Status
Bona Fide Professional Employees

- Registered nurses who are registered by the appropriate state examining board generally meet the duties requirements of the "learned" professional exemption. 29 C.F.R. § 541.301(e)(2)
- LPNs, nurse aides, and other similar health care employees generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. Also, LPNs generally have limited discretion and few supervisory duties.
Home Health Care Industry: Independent Contractor Status

Massachusetts – Independent Contractors

• MA Independent Contractor Law creates a presumption that a work arrangement is an employer-employee arrangement
• MA test is for determining worker status for purposes of state income tax withholding, state wage-hour laws, workers compensation, and the maintenance of payroll records
• MA law establishes a rigid, three-part test that must be met by the employer for a business to overcome presumption of an employment relationship

Massachusetts – Independent Contractors cont’d

• Business must demonstrate:
  › the worker is free from the employer’s control and direction in performing the service, both under a contract and in fact;
  › the service provided by the worker is outside the employer’s usual course of business; and
  › the worker is customarily engaged in an independent trade, occupation, profession or business of the same type.
Some Important Aspects of MA Law

- A worker who performs the same type of work that is part of the normal service delivered by the business may not be treated as an independent contractor (prong 2 of the test).
- This is a problematic change to the second part of the test: there used to be an exception if the work was performed outside of all places of business of the enterprise.
- According to AG, a contract or job description indicating that a worker is free from supervisory direction or control is required (but is not sufficient) to establish independent contractor status.
- An independent contractor must represent him or herself to the public as being in business to perform the same or similar services.

Some Important Aspects of MA Law

- An employer’s failure to withhold taxes, contribute to unemployment compensation, or provide workers compensation may not be considered when determining worker status (i.e., employer’s subjective belief is irrelevant).
- The law creates broad liability for both business entities and individuals, including corporate officers and those with management responsibility over affected workers.
- A similar, but not identical test exists in the unemployment insurance law (independent contractors may work either outside of the employer’s normal course of business or away from the worksite). M.G.L. c.151A.
- But - Mass. DOR will continue to accept IRS determinations of status.

Consequences of Misclassification

- Income tax liability and penalties for amounts that should have been withheld from “wages”.
- Employer FICA and FUTA contributions.
- State unemployment insurance payments.
- Potential overtime pay and other wage claim liability.
- Workers compensation insurance premiums (and potential tort liability for workplace injuries).
- Other civil and criminal liability (treble damages and attorney’s fees).
Standards for determining work status under federal law

- Even under federal law, different standards apply – FLSA, NLRA, Title VII, etc.
- In fact, term "employee" is even defined slightly differently for FICA, FUTA and federal income tax withholding purposes
- Principal test applied by IRS – the "common law test"
- Common law test examines the extent that the business retains the right to direct and control the worker with respect to when, where and how work is performed
  › Also called the "control test" – examines extent that a business retains the right to direct and control a worker with respect to when, where and how work is performed

The Twenty Factors

- IRS has developed list of twenty factors to be used as an analytical aid in applying the common law test
- No one factor is decisive and the degree of importance of each depends on the occupation and factual context in which services are being performed

Twenty Factors

- Instructions
- Training
- Integration
- Services rendered personally
- Hiring, supervising, and paying assistants
- Continuing relationship
- Set hours of work
- Full-time required
- Doing work on employer’s premises
- Order of sequence set
- Oral or written reports
- Payment by hour, week, month
- Payment of business and/or traveling expenses
- Furnishing of tools and materials
- Significant investment
- Realization of profit or loss
- Working for more than one firm at a time
- Making service available to general public
- Right to discharge
- Right to terminate
Enforcement

• AG may issue civil citation or institute criminal prosecution for both intentional and unintentional violations of the Independent Contractor Law

• Willful violations can result in fines up to $25,000 or imprisonment for up to one year for a first offense, and fines up to $50,000 or imprisonment for up to two years for subsequent violations

• Non-willful violations can result in fines up to $10,000 or imprisonment for up to six months for a first offense, and fines up to $25,000 or imprisonment for up to one year for subsequent violations

Enforcement cont’d

• Upon criminal conviction, or following three civil citations for intentional violations, employers may be barred from public works projects for up to two years

• Employees also may institute private actions for themselves and others similarly situated for treble damages, attorneys’ fees and costs (MANDATORY)
Key Message:

- **Involves H.R. Early**
- **Late** H.R. involvement has consequences:
  - Creates legal exposure
  - Reduces likelihood you can achieve your goal for this employee
  - Increases likelihood you will subject yourself to more legal problems from employee

Key Areas of Concern

- Leaves
- Sporadic attendance
- Tardiness
- Employee failure to communicate re: dates/times of absences
- Indefinite absences
- Medical needs

Leave Analysis

- Determine the levels of legal protection – there are generally two types:
  - Statutory (e.g., FMLA, ADA, Workers’ Compensation, state law (M.G.L. 151B))
  - Contractual (Policies)
Leave Analysis cont’d

• What are the reasons for the leave – this will determine employee’s eligibility for each type of leave protection.
• What can the employer require from employee – notices, medical certification, etc.?
• What benefits?
  • When does each protection end?
  • Evaluate reinstatement rights.

Time off Requests: What to do?

• When a supervisor or manager has an employee who takes time off from work, it is essential that an employer determine whether the time off is protected or not.
• Any time off must be reported immediately to those who determine whether it is protected – HR.
• Also, certain types of time off trigger obligations for the employer to send out notices to the employee – it is essential that HR be notified.
• Leaves of absence are complicated and the law places numerous obligations on employers, and thus on managers and supervisors.

Time Off Requests: What to Do? (cont’d)

• DO NOT:
  • Argue with the doctor.
  • Speculate about the employee’s possible illness
  • Automatically reject requests for accommodations – e.g., schedule changes, relaxing attendance rules, time off requests, intermittent leaves, change in job, etc.
Time off Requests: What to Do (cont’d)

• DO:
  › Report information to HR.
  › Get as much information as you can.
  › Engage in the “interactive process.”
  › Be patient.

Federal Family and Medical Leave Act

• In brief, the Federal Family and Medical Leave Act of 1993 (“FMLA”) provides:
  › Twelve weeks of unpaid leave for employees in a twelve-month period (more if military caregiver leave)
  › Leave may be taken for the birth, adoption or placement of foster child
  › Leave may be taken to care for a spouse, son, daughter or parent with a serious health condition

FMLA cont’d

› Leave also may be taken if a serious health condition renders the employee unable to perform the functions of his/her position
› Provides for continuation of health insurance benefits for the employee during the leave period
› RESTORATION OF THE EMPLOYEE TO THE SAME OR EQUIVALENT POSITION UPON TIMELY RETURN FROM THE LEAVE
FMLA: Military Related Leave

- Leave may also be taken for two types of Military Family Leave:
  1. Qualifying Exigency Leave: Employees with a spouse, son, daughter, or parent on "Covered Active Duty" may use leave for qualifying exigencies which may include short-notice deployment, military events and related activities, arranging for alternative childcare and certain other childcare and school activities, addressing certain financial and legal arrangements, attending certain counseling sessions, attending post-deployment activities, rest and recuperation, and other activities that the employee and the employer agree upon.

FMLA: Military Related Leave cont’d

- Military Caregiver Leave: A special leave of up to 26 weeks during a "single 12-month period" for employee who is the spouse, child, parent, or next of kin of a Covered Servicemember to care for a Servicemember.

Employee Eligibility

- To be eligible for federal FMLA leave, an employee must be employed by a covered employer:
  - For at least 12 months; and
  - For at least 1,250 hours in the 12 months immediately preceding the commencement of leave.
  - Employed at a worksite within 75 miles where at least 50 employees work.
**What Constitutes A “Serious Health Condition/Serious Illness”?**

- Under the FMLA, a serious health condition means an illness, injury, impairment, or physical or mental condition
- Example: Inpatient hospital care, continuing care for incapacity, prenatal care, chronic incapacity

**Calculating Leave Entitlement**

- 12 Weeks Leave in 12-month Period
  - Federal FMLA provides that eligible employees may take up to 12 weeks of leave in any 12-month period for any one or more qualifying events (assuming no military caregiver leave is involved)
  - Many employers provide that the 12 weeks of FMLA leave may be taken during any rolling 12-month period beginning with an FMLA qualifying event; therefore the amount of leave an employee is entitled to is calculated by subtracting any FMLA leave taken in the 12 months prior to the date the leave starts

**Intermittent and Reduced Schedule Leaves**

- Intermittent and Reduced Schedule Leave Defined
  - Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason.
  - Reduced leave schedule reduces an employee’s usual number of working hours per workweek for a period of time, usually from full-time to part-time.
Intermittent and Reduced Schedule Leaves cont’d

• Temporary Transfer of Employees on Intermittent or Reduced Schedule Leave
  › An employer may temporarily transfer an employee on intermittent or reduced schedule leave to an available alternative position for which the employee is qualified.
  › Special rules apply.

Designating Leave as FMLA Leave

• Employer Must Designate Leave As FMLA Leave
  › It is an employer’s responsibility to designate leave, paid or unpaid, as FMLA leave and to give an employee notice of the designation.
  › If the information that is available is insufficient to make this determination, then it is incumbent upon the EMPLOYER to inquire further in order to obtain enough information to make this determination.
  › Failure to designate leave as FMLA may lead to unfortunate results
  › A few days “here and there” may seem like nothing … but!
  › Employers want the 12 week clock to begin running as early as possible

Use of Paid Leave for Unpaid Leave

• Employer may require that employees use any paid leave they have as part of FMLA leave (except for leave that qualifies as Massachusetts Maternity Leave Act leave).
• Paid disability leave may run concurrently with FMLA leave.
• Paid workers’ compensation leave may run concurrently with FMLA leave.
Continuation of Health Benefits While Out on FMLA Leave

• Employers must maintain the employee’s medical coverage under any group health plan as if the employee continued to be employed.

Job Restoration Following FMLA Leave

• Employees Generally Entitled to Restoration to Same or Equivalent Position
  › The regulations state an “equivalent position” is one which has “the same pay, benefits, and working conditions, including privileges, prerequisites and status”; and

Interaction of FMLA and ADA

After most medical leave rights have been exhausted or no longer exist, there is one type of medical leave protection that will almost always exist:

*ADA/151B’s duty to accommodate.*

Key point: Compliance with FMLA does not necessarily mean that the employer has complied with ADA obligation to reasonably accommodate the employee’s “disability.”
A continued leave of absence beyond the 12 week FMLA period may be required as a reasonable accommodation.
Duty of Reasonable Accommodation Under the ADA and M.G.L. c.151B

Americans With Disabilities Act ("ADA")/ M.G.L. c.151B

• The Basic Prohibition:
  › An employer may not refuse to hire, promote or continue to
    employ or otherwise discriminate against:
    – A qualified individual with a disability
    – Who is able to perform the essential functions of
      the position
    – With or without reasonable accommodation
    – Unless such accommodation would cause the employer
      undue hardship, or
    – Pose a direct threat to the health or safety of the individual
      or others

ADA cont’d

• First Question: Does the person have a disability?
  › A person is considered to have a disability if the person:
    – Has a physical or mental impairment which substantially
      limits one or more of that person’s major life activities, or
    – Has a record of such an impairment
    – e.g., person with a history of cancer, that is, currently in
      remission, or a person with a history of mental illness
ADA: Reasonable Accommodation

- Under the ADA, employers must provide an otherwise qualified employee with a disability with a reasonable accommodation to help him/her perform the essential functions of the job in question unless to do so would impose an undue hardship on the employer.

Duty To Accommodate

- Employers are required to provide reasonable accommodations to employees with physical or mental disabilities.
- Widely recognized by courts: a leave of absence is a type of accommodation. But how long?
- Reasonable accommodations are not required if the accommodation would result in an “undue hardship” to the employer, or if it would endanger the safety of the employee or others.
- Establishing an “undue hardship” is difficult for employers in most circumstances.

Application:
What To Do With Ms. Porter?
Hypothetical

• Your employee, Mary Porter, has been employed with your company for the last six months as a home health aide.
• Recently, she was diagnosed with Multiple Sclerosis (“MS”).
• Her physician placed her on an extended leave of absence for the purpose of ascertaining whether her condition will respond to medication and, if so, at what levels.

Hypothetical cont’d

• After 30 days of being off work, no medications have enabled her to return to work. Her physician continues to search for a drug that will help, and the physician continues to provide medical slips stating that she needs additional time off.
  > Doctor has not specified a definite return date: “Will reassess on next visit in 60 days”

Questions Re: Ms. Porter’s Time Off Work

• How much time off work must you give her?
• When can you replace her?
• When can you terminate her employment?
Application to Ms. Porter

- Assess the levels of legal protection. FMLA? ADA?
- Assess her current medical status and prospects for returning to work.
  › If her physician placed her on an indefinite leave, contact the employee and inquire about her medical status and her prospects for returning to work.
  › Offer to speak to her physician if she cannot answer some questions.
  › Let the employee (or her doctor) fail to cooperate. Any breakdown in the interactive process should be on the part of the employee.

Application to Ms. Porter

- Commonly, and frustratingly, the doctor’s note will not provide a definite return date (e.g., “will re-evaluate on next visit in 60 days”)
- Keep pressing for a definite return date, because in most cases an indefinite leave of absence will not be required as a reasonable accommodation
  › Thus, the failure of the doctor to specify a definite return date is not necessarily a bad thing

Application to Ms. Porter

- If her physician placed her on a finite leave of relatively short duration, the company should wait for the leave to end. When it ends, seize the opportunity to assess the employee’s current medical status and prospects for returning.
- If she can perform some type of work, offer her an open position or offer her the opportunity to apply for an open position.
- It is not enough to direct her to a website or list of jobs – employer has take an active role.
- If she can perform no work and the physician needs more time to adjust the medication, ask how much time – probe and make inquiries.
Application to Ms. Porter

• DOCUMENT YOUR INTERACTIONS WITH THE EMPLOYEE AND HER DOCTOR.
• Send follow up letters to the employee and to the physician to confirm what was discussed and to set forth your understanding of the situation.

Application to Ms. Porter

• Assess whether to replace Ms. Porter
  › Take into consideration the need to complete her work, whether it is feasible to employ a temporary employee, whether other employees can perform her job functions, and how long the hiring process will take to fill her position.
  › Is there a definite return date specified by her doctor
  › How many extensions have you given her?
    – This does not have to go on forever
• Replace her when it is necessary and when it does not appear she will return to work before a replacement is hired.

Key Points

• Involve HR (and your lawyer) early and often
• Essential to determine whether time off is protected
• Immediately report any time off to HR
• Do not automatically reject requests for time off (or other requests for medically-related accommodations) – no matter how inappropriate they may appear
  › You do not want to appear to be hostile or even reluctant to grant required leave of absence
  › Patience, though frustrating, is essential