

EMPLOYEE ISSUES
DISCIPLINE AND MEDICAL

PRESENTED BY:

THE KRIZNER GROUP

— AN EMPLOYMENT LAW BOUTIQUE —



Relationship Health – Think CDC!

- Communication
- Documentation
- Consistency

Communication Levels

The first “C” of the CDC of the employment relationship is communication. Communication occurs in the following ways:

- General employment expectations – Organization-wide policies that typically apply to all employees (think “Employee Handbook)
- Position-centric expectations – focus is the obligations and responsibilities of the position or related positions (can be the job description, but also can be position-focused procedures)
- Individual employee communication – individual goals, disciplinary measures, performance documentation, including PIP documents

Documentation Musts

- Necessary to Ensure
 - *Documentation of expectations*
 - *Documentation of meaningful interactions*
 - *Documentation of plans or strategy for employee or department*
 - *Documentation of changes to SOP*
 - *Documentation of above average and suboptimal employee performance*

Consistency Considerations

- Consistency matters at different levels of the employment process, including the following.
 - *Consistent communication of information and expectations*
 - *Consistent training of new employees or people new to positions*
 - *Consistent application of performance standards to all similar employees*
 - *Consistent classification of employee performance (positive and negative)*
 - *Consistent documentation of employee performance*

Disciplinary Discretion

Many counties (and other organizations) use the concept of progressive discipline as a means to guide the process for addressing correction of employees. Most policies include:

- Verbal warning (sometimes documented)
- Written warning
- Suspension
- Termination
- Some policies include other options demotion or probation

Disciplinary Discretion

- Progressive discipline policies also provide for discretion based on
 - *Offense severity*
 - *Repeated behavior or multiple frequent offenses*
 - *Employee performance*
 - *Employer longevity*
 - *Position or need sensitivity*

Disciplinary Documentation

- For each level of discipline, there should be documentation that
 - *Clearly describes the behavior or issues with the employee's performance*
 - *Outlines any prior efforts at correction or discipline*
 - *Plainly describes the impact the behavior/poor performance has on the organization*
 - *Clearly describes the actions the employee must take or standards the employee must meet to correct the issues*
 - *Outlines any provisional measures for the employee (probation, etc.)*
 - *Clearly establishes a basis for discretionary decisions*

Completing the Paperwork

Regardless of the amount of verbal effort put into a corrective action, the failure to properly document can result in such effort being wasted or lost. Be sure that at the conclusion of the corrective action or assessment process your documentation has the following.

- Clear descriptions of the issues (with specific examples and citations to policy where possible), prior efforts to correct the issues, and the effect of the issues on the organization.
- Clear directions and instructions to the employee, including deadlines for employee.
- Objective, appropriate language – no expressions of hostility or improper threats and no language that indicates correction is a foregone conclusion.

Are You Willing to Risk It?

A supervisor comes to you to report that she has had continuing performance issues with an employee. She thinks termination would save the company time. You review the employee's file and see that there are vague suggestions for improvement in the employee's evaluations for the past three years but the employee was marked as meeting expectations. You ask the supervisor what she has done to advise the employee of the issues or correct the performance. The supervisor responds that the employee admits his performance is subpar they have verbally discussed corrective measures. However, she has not issued any write ups or other documentation.



One Goal, Different Paths

You have the following options in working to complete the necessary documentation:

1. Internal documentation processes for less critical issues
2. Sending an email containing specific information and securing an agreed upon understanding
3. Development of corrective action or performance improvement documents
4. Regular evaluation processes
5. Short-term, goal centered documentation to establish communication on key issues

Dos or Musts of Corrections

- Use specific policies/policy examples that demonstrate poor behavior or performance
- Provide specific examples of behavior issues or performance problems
- Provide specific instructions and expectations on how the employee will or must correct the performance or behavioral issues
- Establish a timeline or deadlines for corrections to be completed
- Allow for input, but not control of process from employee
- Require the employee to sign at least to acknowledge receipt of document

Do Nots of Evaluations/Corrections

- Minimize issues
- Complete the document in anger
- Be vague about issues or corrections
- Create a 90 day contract
- Overcommit your ability to oversee the process or meet with the employee

Not this Use this

- Tardy
- Bad attitude
- Makes too many mistakes

- Employee has failed to appear at work at the scheduled time on X out of XX workdays causing delay in [XXX] or scheduling issues because [XXXX].
- Employee has consistently resisted specific instructions such as [include examples] and frequently fails to communicate about work progress.
- Employee has made several errors in completing the projects required of him, including (provide examples) which has led to XX projects being late.

Not this Use this

- Talks a lot

- Loses tools

- Bad driver

- Employee frequently must be directed to return to work and has not completed XX projects in a timely manner.

- Employee has failed to properly care for his tools, resulting XX lost or damaged tools, costing \$XXX

- Employee has not exercised proper caution while operating equipment/vehicle resulting in \$XXX in damage to County vehicle alone

Don't Cross the Line

- Legal issues occur when supervisors volunteer excuses for poor performance or disciplinary issues, are frustrated, or are unprepared
 - *Don't presume medical conditions without proper basis*
 - *Don't downplay initial communications (if done properly)*
 - *Eliminate emotion from discussion (even if a break is necessary)*
 - *Come to the discussion with expectations and a plan, but be willing to be adaptable*

The Four stages of FMLA leave

Reporting/Initiation

Notification/Determination

During Leave

Return to Work/End of Leave

WHO should know?

Employee medical information is protected by the Americans with Disabilities Act – Need to Know type of situation.

Supervisors often have information initially and need some information to understand leave issues and potential undue hardship concerns.

HR **MUST** know as soon as there is a potential basis for FMLA leave or accommodation.

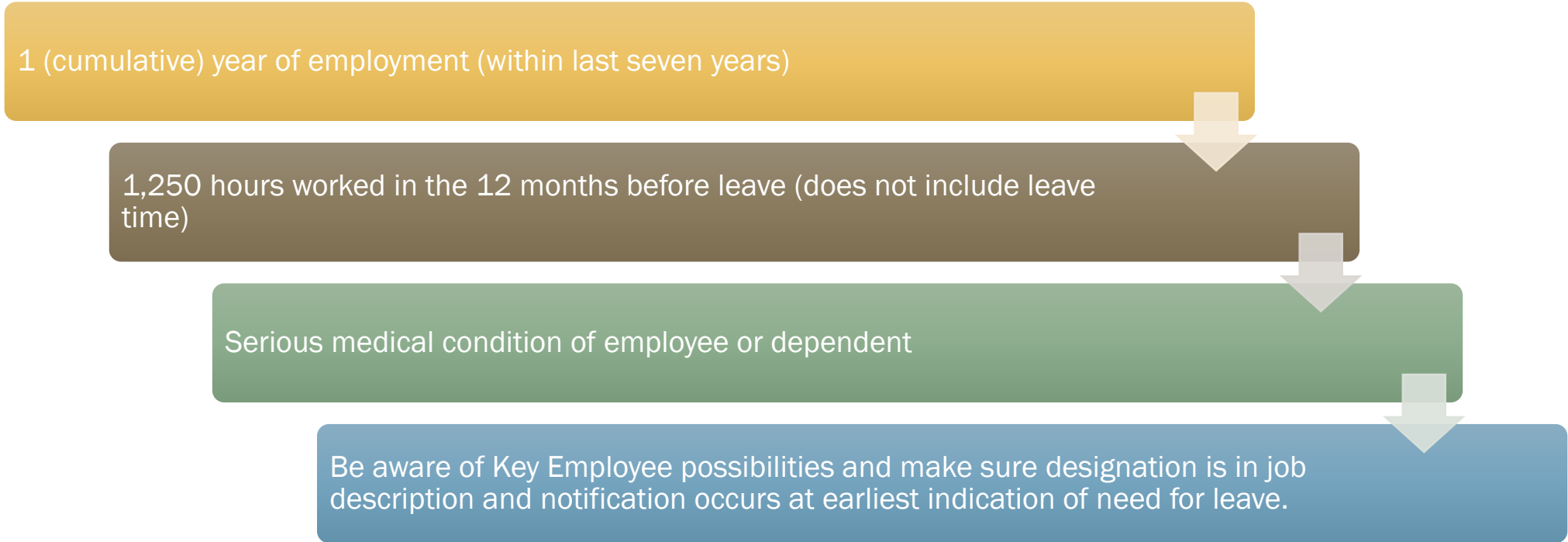
HR **MUST** know if issues during leave to complete recertification.

Awareness issues

This morning, a supervisor called to tell you that she has no choice but to terminate Betty. You ask what the issue is and the supervisor tells you that Betty has been missing work sometimes as much as two days a week to care for Betty's daughter who has been diagnosed with a debilitating medical condition. The supervisor states that initially she had agreed to allow Betty some flexibility in the schedule but now the absences are piling up, work is falling behind, and the supervisor is concerned Betty is taking advantage of her willingness to be flexible.

Qualification questions

1 (cumulative) year of employment (within last seven years)



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graph TD; A[1 (cumulative) year of employment (within last seven years)] --> B[1,250 hours worked in the 12 months before leave (does not include leave time)]; B --> C[Serious medical condition of employee or dependent]; C --> D[Be aware of Key Employee possibilities and make sure designation is in job description and notification occurs at earliest indication of need for leave.];
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1,250 hours worked in the 12 months before leave (does not include leave time)

Serious medical condition of employee or dependent

Be aware of Key Employee possibilities and make sure designation is in job description and notification occurs at earliest indication of need for leave.

What are examples of a serious medical condition under the FMLA?

A - Conditions requiring an overnight stay in a hospital or other medical care facility

B - Conditions that incapacitate you or your family member

C - Chronic conditions

D - Pregnancy

E - All of the above.

And on the third
day . . .

- Generally, the time to begin FMLA is after the third day of an employee's absence BUT
 - *Look to existing policy as to when a medical note is required*
 - *Use common sense about circumstances*
 - *Address the possibility of intermittent leave appropriately*

Making the right choice

TRUE OR FALSE –

An employee can elect not to use FMLA.

During Leave Duties

- Is the employee following proper policies (notification, etc.)?
- Is employee providing updated information if requests change?
- Are absences/actions consistent with medical certification?
- Is the FMLA leave being tracked?
- Important to establish clearly who evaluates/tracks the above and on what information – consistency is mandatory.

After the leave is gone

Two Week (or equivalent)
Trigger

Remind, Request, Receive,
Review

- Remind employee of end date
- Request intent to return or not
- Receive current medical certification and fitness for duty
- Review information and, if employee cannot return to full duty, begin reasonable accommodation process.

Is AI an Answer?

- AI is a great tool for initial information and can even be helpful in crafting some of the language contained in employee documentation. However, please be aware of the following limitations.
 - *AI cannot effectively create documentation that does not exist, i.e., it will not change when documentation was created or change the past.*
 - *AI primarily operates on the information it receives from you – incomplete or inaccurate information will create similar results. Get HR involved if you have concerns about what you need to ask or know.*
 - *AI usage, like every other nonprivileged communication, is discoverable, meaning that in a claim, the opposing attorney can ask about it.*

Need More?

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