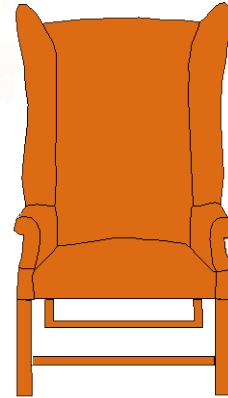


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ADA, FMLA

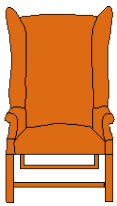
Restrictive Covenants

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Americans with Disabilities Act ("ADA")

ADA: Who is Covered?

- Covered Employers
 - Applies to employers who have 15 or more employees in 20 or more workweeks in the current or preceding calendar year
 - Ohio's disability law applies to employers who have 4 or more employees
 - Illinois law applies to employers with 1 or more employee
- Covered Individuals
 - Individual must have a "disability"
 - Must be a "qualified individual"

ADA: What Is a Disability?



- Physical or mental impairment that substantially limits one or more major life activities
 - See *Barlia v. MWI Veterinary Supply Inc.* for definition of "substantially limits"
- Having a "record of" such an impairment
- Being "regarded as" having an impairment
 - Note: "Impairment" is any physiological disorder or condition...or any mental or psychological disorder...
 - Pregnancy related impairments See *Latowski v. Northwoods Nursing Ctr.*

ADA: What Is a Disability?

- “Regarded as” Disabled
 - An individual is regarded as disabled if he or she “has been subjected to an action prohibited under this Act [ADAAA] because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*”
 - Does not include transitory and minor impairments
 - Lasting or expected to last for six months or less



ADA: Who Is Qualified?

- Examine the individual's ability to perform the job at the time of the employment decision
- Must have the requisite skills, experience, education, licenses, etc.; and
- Be able to perform the essential functions of the job, either with or without reasonable accommodation
- Essential functions of the job
 - Essential function vs. marginal function
 - Job descriptions and performance reviews
 - Time spent on function
 - Consequences of not requiring someone to perform function
 - Actual experience

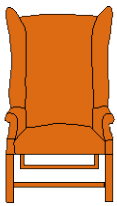
Retention of Employees

- Employer never has to retain an employee in a position if not “qualified.”
- To be “qualified,” employee must satisfy the requisite skill, experience, education, and other job-related requirements, and be able to perform the essential (or fundamental) functions of a position (with accommodation, if needed).
- DOCUMENT poor performance. Satisfactory performance is evidence that an employee is qualified – see *Mobley v. Miami Valley Hosp.*

ADA: Essential Functions

- Ability to Handle Stress/Get Along with Others
- Ability to Work Independently
- Attendance/Punctual Performance
- Ability to Stay Awake
- Ability to Work Overtime
- Ability to Work a Specific Shift
- Ability to Work Rotating Assignments





Recognizing Accommodation Requests

- Accommodation request is a request for some sort of change for a medical reason; request need not be in writing and need not contain any “magic words”
- “Tips” for recognizing requests
 - Oral request is sufficient
 - Individual does not have to use the words “disability” or “disabled”



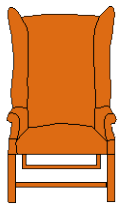
Interactive Process

- Employer and Employee's Duty to Engage in Interactive Process
 - Once employee makes request (or once employer has reason to know) of need, employer must engage in the interactive process
- Factors to consider whether leave request must be granted
 - Is request is reasonable?
 - Would leave be effective?
 - Is there an alternate accommodation that would be effective (employers have to provide an effective accommodation, not necessarily an employee's preferred accommodation)?
 - Would leave pose an undue hardship?

ADA: Reasonable Accommodation

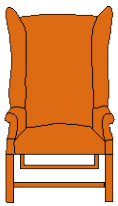
- Employers must provide a reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability unless it can be shown that the accommodation would impose an undue hardship
- Removal of workplace barriers
 - Physical obstacles
 - Procedures or rules
 - Job restructuring; modified schedule; unpaid leave; reassignment; acquiring or modifying equipment; changing exams, training materials, or policies; providing qualified readers or interpreters





Best Practices for Employers

- Engage in the interactive process in good faith
- Train all supervisors and managers to recognize reasonable accommodation requests
- Document all performance concerns
- When deciding whether to grant leave, consider how long it will take to replace the employee and train her replacement



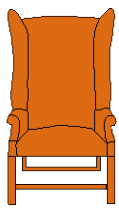
Family and Medical Leave Act ("FMLA")



FMLA: Basic Questions You Need to Ask

- Is this person an eligible employee?
- Is the leave for an FMLA-qualifying reason?
- Does the employee have FMLA time available?

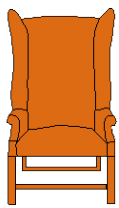




FMLA: Who Is Covered?

- Covered Employer
 - 50 or more employees for 20 or more calendar weeks in current or preceding calendar year
- Eligible employee
 - 12 months
 - 1,250 hours worked in previous 12 months
 - 50 or more employees within 75 miles of work site





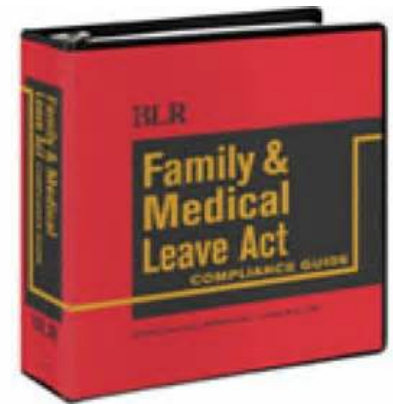
FMLA: What Does It Provide?

- 12 weeks of job-protected leave for family and medical reasons every 12 months (or 26 workweeks for Military Caregiver Leave):
 - Employee's Serious Health Condition
 - Care for Family Member w/ Serious Health Condition
 - Birth or Placement of Child
 - Military Caregiver Leave
 - Qualifying Exigency Leave



FMLA: What Does It Provide?

- Continuous vs. intermittent/reduced schedule
- Reinstatement to the same or “equivalent” position
 - But...consider the ADA's requirement that an employee be returned to his or her same position unless holding the position open is an undue hardship
- No retaliation and no interference





Restrictive Covenants --Recruiting

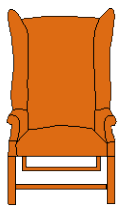
Evaluate the enforceability of any applicant's restrictive covenants

Weigh the benefits versus the risks

Do not impose overly broad restrictive covenants

Do not impose overly broad confidentiality agreements that act as de-facto unlimited non-competes; consider time limits.

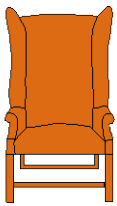
Consideration – *Fifield*



Restrictive Covenants -- Separation

- Act quickly in enforcement actions
- Obtain any forensics needed
- Consider venue for filing
- Consider claims for breach of restrictive covenant agreements; trade secret misappropriation; violations of Defend Trade Secrets Act

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Questions?

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