

**K**AMER  
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ATTORNEYS AT LAW

**6<sup>th</sup>** ANNUAL  
**LABOR**  
**EMPLOYMENT**  
**SEMINAR**

**K**amer Zucker & Abbott is pleased to announce its 6<sup>th</sup> Annual Labor and Employment Seminar. This year's program will provide important information on a wide variety of topics affecting employers, including some of the most recent legal developments at both the federal and state levels. Specifically, this year's presentation will focus on leave of absence issues, discipline and discharge, wage and hour, and workplace privacy.

In addition, we have brought back this year, by popular demand, our mock trial which has traditionally enjoyed overwhelming positive feedback from our attendees. This year's twist, however, is that we will be presenting a mock arbitration hearing, presided over by Arbitrator Gregory J. Kamer. The cast of characters for the arbitration will feature many of our support staff and attorneys, and it should be a very entertaining and informative presentation.

We anticipate a very successful program this year, and we hope that you can make arrangements to join us.

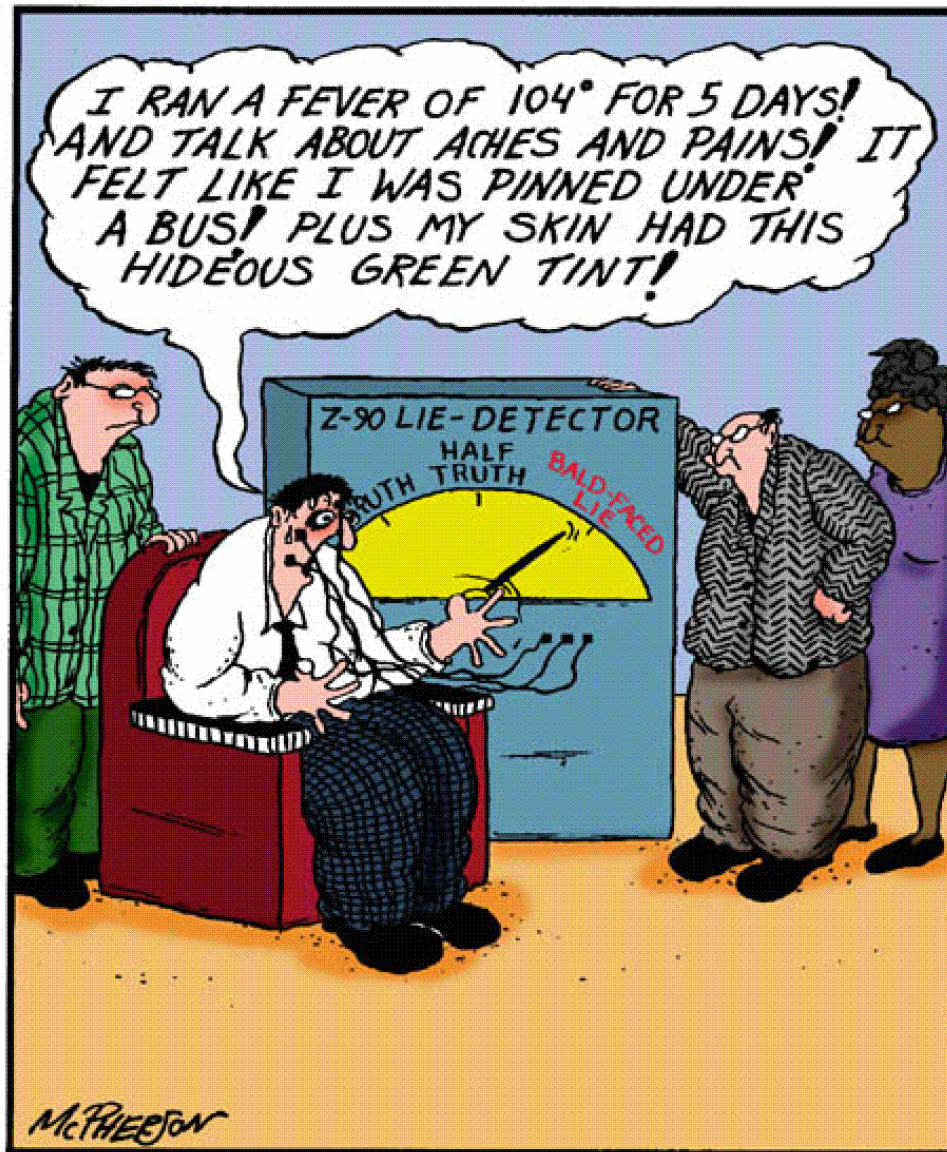


**Friday, October 17, 2003**  
**Caesars Palace**  
**8:00 a.m. to 3:30 p.m.**



# Resolving the Ten Most Frustrating Leave of Absence Issues

*Carol Davis Zucker*



Standard procedure after taking sick leave at Maxwell Global Industries.

Why is this so  
complicated?

What are the  
stakes?



# Why Awareness Is Important

- Overlapping legal & policy obligations.
- Manager/supervisor personal liability for FMLA violations.
- Liability & problems arise from failure to coordinate workers compensation issues with ADA/FMLA obligations.
- Risk of retaliation or interference claims.
- Point-based “no fault” absenteeism policies can violate FMLA or ADA if not properly framed and administered.

# Legal & Policy Considerations

*The many sources of employer obligations when it comes to employee leave time.*

- Family Medical Leave Act.
- Workers Compensation.
- Americans With Disabilities Act.
- Company leave policies.
- Company absenteeism policies.
- Collective bargaining agreements.



# 10. Leave for On-the-Job Injuries.

- Likely qualifies for FMLA also if the condition is reason employee cannot perform essential functions.
- Designate as FMLA leave, to run concurrently with workers compensation leave (“start the clock”).
- Cannot force employee to substitute paid leave for workers compensation benefits.
- If residual impairment, ADA may require leave as accommodation.

## 9. Ready – But Not Ready – to Return to Work.

- If FMLA, cannot force to return to work.
- Require re-certification.
- If exhausted FMLA, evaluate for disability accommodation & ADA interactive process.
- Offer position in writing – with job description & functions.
- If is plausible that leave may assist in returning to do job, grant leave.



## 8. Doctor: "My Patient Needs Leave But I Won't/Can't Tell You Why." (a.k.a. the cryptic doctor's note)

- If note or circumstances reveal possible FMLA purpose, provisionally designate as FMLA, notify employee.
- Require employee obtain medical certification from Health Care Provider (HCP)(FMLA & ADA).
- Provide HCP w/job description/functions.
- Inform employee of consequences of failure to obtain medical certification.

## 7. “You should have known I needed FMLA leave.”

- For absenteeism, do not give “point” or make personnel decision if there is indication of “disability” (ADA) or “serious health condition” (FMLA) – until this is evaluated.
- Approve provisional FMLA leave subject to medical certification.
- If FMLA, designate & provide notice to employee (e.g., WH - 381).
- If not FMLA, evaluate possible ADA “disability” and engage in interactive process.

## 6. The Monthly “Will Re-evaluate in 30 Days . . . .” Doctor’s Notes.

- Provisionally designate as FMLA leave if available/eligible.
- Require HCP medical certification or re-certification, as appropriate.
- Consider getting second or third opinion.
- If not FMLA-eligible, engage in ADA interactive process – alternative effective accommodations to time off; if plausibly could lead to return, grant leave.

## 5. Serial or Pattern Time Off: “It’s my FMLA and I’m entitled to it!”

- For FMLA, definition of “12-month” period is critical – if not selected, definition applies that is “most favorable to employee.”
- Calculate leave entitlement for each period of leave, keeping track of FMLA “count.”
- Medical certification and re-certification.
- Consider second or third opinion.

4. “You can’t fire me . . . I just learned my disability made me do it . . . and I need time off to get better . . .”

- Require HCP certification, follow FMLA process if eligible.
- Provisionally designate as FMLA.
- Freeze-frame discipline process – inform employee that will resume disciplinary process upon return from leave.
- “Disability” may be excuse – ADA process.

### 3. Intermittent or Reduced Leave I: “The Non-Supervising Supervisor.”

- If FMLA-eligible, is the leave arrangement medically necessary?
- If FMLA –
  - & supervisor is not fulfilling job requirements, can reduce salary by hours not worked.
  - & is another better-suited job, can transfer temporarily.
- If not FMLA, but suffering from ADA “disability” and not fulfilling essential functions, is there another effective accommodation?

## 2. Intermittent & Reduced Leave II: “I can only work a limited number of hours each week.”

- If FMLA-eligible, require medical certification, re-certification - is this medically necessary?
- Designate time not working as FMLA leave, & start “counting.”
- If FMLA, if there is another more suitable job, consider temporary transfer.
- If not FMLA-eligible, consider ADA (“disability,” is he/she performing “essential functions,” & whether there are other effective accommodations).



# 1. Intermittent and Reduced Leave III: The "*Intermittent* Intermittent Leave."

- If FMLA-eligible, require HCP medical certification and re-certification.
- If FMLA, designate as FMLA, start counting.
- If FLSA-exempt, consider reduction in salary.
- How "foreseeable" is need for today's leave?  
Require prior notification.
- Require periodic HCP re-certification.
- If not FMLA-eligible, evaluate ADA – e.g., whether predictable attendance is "essential function," whether alternative effective accommodation.

# The Solution: Adopt a Multifaceted Management & Compliance Strategy



Image: [www.freeimages.co.uk](http://www.freeimages.co.uk)

# “Equipping” Yourself to Utilize a Multifaceted Strategy

- Coordinate workers comp, response to other employee injury/illness, and leaves.
- Review/revise all leave policies.
- Review or revise attendance policies.
- Distribute policies & have proof you did so.
- Post policies, including DOL FMLA poster.
- Have and use medical certification forms.
- Develop/update functional job descriptions.
- Train managers.

# Leave & Attendance Policies

- Decide how generous you want to be.
- Define “12-month period” for FMLA eligibility.
- Coordinate standards for non-FMLA sick or medical leave with FMLA’s requirements.
- Policies re: working while on leave, re-certifications, and return-to-work certifications.
- Concurrent running of FMLA with paid leave taken for FMLA purpose (e.g., sick leave, vacation, etc.) where possible.
- Ensure FMLA or disability-related time off are not “points” under attendance policy.

# Medical Certification

- Require use in all cases (WH-380)
- Always couple use of a certification form with an *accurate* job description.
- Require appropriate re-certification of conditions prompting need for leave.
- Require employees to provide physician-completed forms, or obtain employee consent to obtain directly from physician.

# Posters/Forms/Documentation

- Post DOL's FMLA Poster.
- Medical certification form.
- Job description – use with medical certification, for ADA interactive process.
- Leave request form.
- Form to approve/deny leave, designate as FMLA, return to work, etc.
- Document:
  - Oral FMLA designations & confirmations.
  - Conversations w/employee & confirmations.

# Time Off Notification

