

Family and Medical Leave: Human Resources Training

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Federal and State LOA Requirements

- DOES ANYONE NEED TO SHOW UP TO WORK ANYMORE?
- Summary of Bases for Protected Leave:
 - To vote in a federal or state election.
 - To obtain literacy education.
 - To donate bone marrow or organs.
 - To serve as a volunteer firefighter, volunteer peace officer or emergency rescue personnel.

Federal and State LOA Requirements

- **Summary of Bases for Protected Leave:**
 - To serve in the military, civil air patrol or state national guard.
 - To spend time with your spouse when he/she is on leave from military deployment.
 - To serve on a jury or grand jury.
 - To serve as a witness pursuant to subpoena.

Federal and State LOA Requirements

- **Summary of Bases for Protected Leave:**
 - To seek legal, medical, child care or housing as a result of sexual assault or domestic violence.
 - To attend court proceedings as a victim of a serious crime or covered family member who was a victim of a serious crime.
 - To attend school disciplinary proceedings.
 - To attend school activities.

Federal and State LOA Requirements

- **Summary of Bases for Protected Leave:**
 - To recover from/seek treatment for work-related injuries.
 - To recover from/seek treatment for employee's "serious health condition".
 - To provide care to a covered family member with a "serious health condition".
 - To recover from/seek treatment for pregnancy disability (including childbirth).

Federal and State LOA Requirements

- Summary of Bases for Protected Leave:
 - To take time off as a result of a “qualifying exigency”.
 - To care for an injured/disabled military service member.
 - To take time off as a reasonable accommodation for treatment of a physical or mental disability.
- Many employers provides additional leave not required by law, such as:
 - Personal leave & bereavement leave

FMLA & Paid Sick Leave

Jurisdictions with Paid Sick Leave Programs

Connecticut – first state (passed in 2011)

California – second state (part of CA Healthy Workplaces, Healthy Families Act of 2014) – became effective 1/1/15.

Massachusetts – became effective 7/1/2015

Oregon - became effective 1/1/16

FMLA & Paid Sick Leave

Municipalities with Paid Sick Leave Programs

San Francisco – *first municipality, followed by:*

Washington, DC **Seattle**

Philadelphia **Milwaukee (voided by state legislation)**

- These leave programs do not change FMLA administration, other than providing a source of paid leave for “substitution” purposes.

FMLA & Paid Sick Leave

Jurisdictions with Paid Disability Insurance

California

Hawaii

New Jersey

New York

Rhode Island

Commonwealth of Puerto Rico

FMLA & Paid Sick Leave

Jurisdictions with State Family Temporary Disability Insurance

California – first in the nation in 2002

Washington (2007)

- But delayed implementation first in 2009 and then in 2012
- Currently set to commence in 2015

New Jersey (2008)

Laws Have Different Requirements

- Each LOA law may contain its own requirements concerning:
 - How much time off an employee may take;
 - What notice requirements the employee must meet;
 - What documentation an employer can require to verify the need for leave;
 - Whether the employee can take the leave intermittently or through a reduced schedule; and
 - Whether the leave is paid or unpaid and, if unpaid, whether the employee must or may use any PTO available.

Compliance With LOA Laws Is Important

- LOA laws are “strict liability” & highly technical statutes
- Technical violations can trigger damages, including attorney’s fees
- Violations can also trigger tort claims (e.g., wrongful termination) resulting in punitive damages
- LOA laws may allow for individual liability! (*FMLA*, *but not CFRA*)

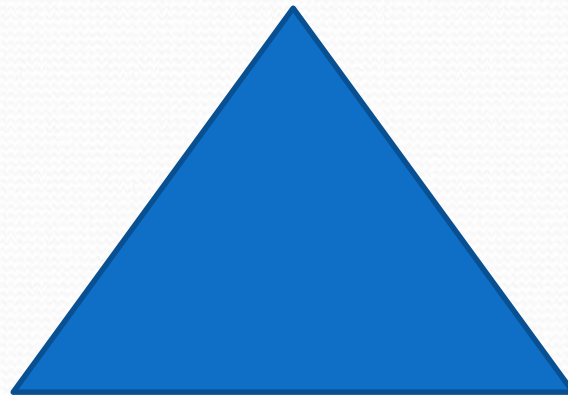
Compliance May Be Difficult

- LOA laws may overlap, but at times they do so with inconsistent requirements.
- Compliance with just one law is not sufficient.
- Where one law's requirement ends, another law's requirements may begin.

Bermuda Triangle

- The Bermuda Triangle is real:

FMLA/CFRA/PDL



Workers' Comp.

ADA/FEHA

Complexities of LOA Administration

- Length of Leave Issues
- Medical Certification Issues (including second and third medical opinions)
- Re-certification Issues
- Compensation & Benefits Issues

Complexities of LOA Administration

- Notice & Designation Issues
- Reinstatement & Fitness for Duty Issues
- Calculation/Tracking Issues
- Intermittent or Reduced Leave Schedules

Length of Leave Issues

FMLA

- Up to 12 workweeks for medical leave, bonding leave, family care leave and/or “qualified exigencies”
 - After 12 months & possibly every 12 months thereafter
 - Can be taken intermittently & through a reduced schedule (except bonding leave)

Length of Leave Issues

FMLA

- Up to 26 workweeks to care for spouse, child, parent or next of kin who is military member undergoing medical treatment, or on temp. disability retired list, due to serious illness/injury
 - Per service member, per injury

Length of Leave Issues

CFRA

- Up to 12 workweeks for personal medical leave, bonding leave and/or family care leave
 - After 12 months & possibly every 12 months thereafter
 - Can be taken intermittently & through a reduced schedule (including bonding leave)

Length of Leave Issues

CFRA

- Unlike FMLA, does NOT include pregnancy related disabilities
- Unlike FMLA, does include same-sex registered domestic partners and spouses
- CFRA does NOT permit 26 weeks of leave for injured service members or 12 weeks for exigency leave

Length of Leave Issues

CFRA vs. FMLA

- Employers must comply with both FMLA and CFRA
- There are differences:
 - ▶ <http://www.fehc.ca.gov/pdf/FMLA-CFRARegsTable-2.pdf>

Length of Leave Issues

CFRA, FMLA, BOTH OR NEITHER?

- An employee takes 26 weeks of leave to care for his nephew who was injured during active military duty?
- An employee takes 26 weeks of leave to care for his spouse who was injured during active military duty?

Length of Leave Issues

CFRA, FMLA, BOTH OR NEITHER?

- An employee takes 14 weeks of leave to care for his brother (injured during active military duty), then 12 weeks to bond with a foster child?
- An employee takes 14 weeks of leave to care for her brother (injured during active military duty), then 12 weeks for the birth of her child?

Length of Leave Issues

CFRA, FMLA, BOTH OR NEITHER

- An employee takes 10 weeks of leave to care for his male spouse?
- An employee takes 10 weeks of leave to care for her male spouse & then 8 weeks to care for her mother?
- An employee takes 1 week of leave for fertility treatment, 8 weeks of leave for her pregnancy & then needs 6 weeks because the newborn is born very sick.

Length of Leave Issues

CFRA, FMLA, BOTH OR NEITHER

- An employee takes 14 weeks of leave to care for her grandmother who raised her when she was a child?
- An employee takes 2 weeks of leave to care for his “baby”, a Boston terrier recovering from surgery?
- An employee takes 1 week of leave for counseling following the death of his Boston terrier?

Length of Leave Issues

PDL

- Entitles an EE to take up to 4 months of leave per pregnancy
- Unlike FMLA & CFRA – no length of service or hours worked requirement
- Unlike FMLA & CFRA – no worksite employee count requirement

Length of Leave Issues

PDL

- PDL may be taken intermittently & through a reduced leave schedule
- Runs concurrently with FMLA? Yes or No??
- Runs concurrently with CFRA? Yes or No??

Length of Leave Issues

PDL

- With FMLA
 - Runs concurrently if employee is FMLA eligible
 - BUT will not run concurrently if employee is not FMLA eligible

Example: EE needs the 11th, 12th and 13th week of employment off as PDL. FMLA runs or not?

Length of Leave Issues

PDL

- With CFRA
 - Does NOT run concurrently with CFRA.
 - EXCEPT - if EE exhausts 4 months and remains disabled by pregnancy, ER may allow early use of CFRA leave.
 - Good or Bad idea?

Length of Leave Issues

FMLA, PDL & CFRA

- If employee is FMLA/CFRA eligible then:
 - Employee may take up to 4 months of PDL
 - First 12 work weeks of PDL is FMLA
 - After PDL/FMLA exhausted, up to 12 workweeks is available for CFRA leave

Length of Leave Issues

FMLA, PDL & CFRA

- If employee is not eligible for FMLA during PDL then:
 - Employee may take up to 4 months of PDL
 - FMLA & CFRA leave then available for other qualifying reasons
 - As noted – FMLA and CFRA do not always run concurrently

Length of Leave Issues

ADA/FEHA

- ERs are required to provide accommodations to employees with physical or mental disabilities
 - Unless undue hardship
- ADA/FEHA are NOT leave of absence statutes
- However, a LOA may be a reasonable accommodation

Length of Leave Issues

ADA/FEHA

- Unlike FMLA & CFRA, ADA/FEHA do not have length of service or work hours pre-requisites
- Small employers and worksites are also covered
- Thus, LOA may be required for EEs ineligible for FMLA/CFRA

Length of Leave Issues

ADA/FEHA

- And LOA may be required for EEs who have exhausted FMLA/CFRA and PDL.
- HOWEVER – if FMLA/CFRA and PDL have been exhausted, ER may be able to offer light duty assignment or other accommodations in lieu of LOA.
- *Cannot compel light duty to avoid FMLA, CFRA or PDL*

Length of Leave Issues

ADA/FEHA

- So how much leave must be given under ADA/FEHA?
- How much must be given if the EE has already exhausted FMLA/CFRA leave?
- How much must be given if the EE **also** exhausted an employer's discretionary/personal leave policy?

Length of Leave Issues

EEOC Position

- EEOC Guidance from October 2002
 - No clear guidance!
 - Provide leave as needed (flexibility) leave & position open unless it is an undue hardship for the ER!!
 - Does that sound like indefinite leave???

Length of Leave Issues

EEOC Position

- EEOC Commissioners called meeting in September 2011 to address issue
 - Heard from ER and EE advocates on problems caused by lack of clarity.
 - Promised to issue further guidance. (BUT NONE YET PROVIDED!)

Length of Leave Issues

EEOC Position

- EEOC lawsuits and commissioner statements shed light on EEOC's approach.
- Inflexible leave period, even if ER provides a substantial amount of leave, is not sufficient.
- Individualized analysis on leave accommodations is needed, even with a generous ER policy.

Length of Leave Issues

What requests may not be reasonable?

- Requesting leave each time the ER is about to terminate the EE. (*Humphrey v. Memorial Hosps. Ass'n*, 9th Cir. 2001 case)
- Requesting additional leave if prior leave was granted and was unsuccessful in enabling EE to return to work to perform job duties (*Kimbrow v. Atlantic Richfield Co.*, 9th Cir. 1990 case under WA law)

Length of Leave Issues

What requests may not be reasonable?

- Kimbro ruling adopted by California court in FEHA case:
- Hanson v. Lucky Stores, Inc. (1999 CA case):
“We hold that a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties.”

Length of Leave Issues

WORKER'S COMPENSATION?

- EE with occupational injury may be entitled to leave
 - Cal. Labor Code section 132a – as basis for right.
- ER may not terminate employee on WC leave unless:
 - ER reasonably concludes the EE is permanently disabled from performing the job, or
 - EE will be disabled for such a long time that termination is necessary in light of demonstrated business realities

Length of Leave Issues

WORKER'S COMPENSATION?

- ER must have evidence the injury is “permanent and stable to permit a prognosis with reasonable medical certainty.”
- Like ADA/FEHA, EE with occupational injury may be entitled to leave beyond FMLA/CFRA.
- Note, however, rejection of light duty assignments may terminate right to LOA under WC Act.

Length of Leave Issues

WORKER'S COMPENSATION?

- Light duty certification must be made by independent medical examiner.
- But note also, if the EE is on FMLA/CFRA leave too– the IME opinion that the EE could return to work has NO bearing on right to continue FMLA/CFRA leave!!

Length of Leave Issues

What to do when an employee exhausts FMLA/CFRA/PDL but can't return to work

- Terminate employee?
- Find additional leave under employer policy (e.g., personal leave)?
- Grant additional leave beyond policy?

Reasonable Accommodation Needed for Family Leave Too??

Under Title VII & ADA – Caregiver Discrimination

- Federal EEO laws do not prohibit discrimination against caregivers per se
- According to EEOC – there are circumstances where discrimination against caregivers might constitute unlawful disparate treatment
- Women (including new moms) still more likely to be primary caregiver in the workplace

Reasonable Accommodation Needed for Family Leave Too??

Under Title VII & ADA – Caregiver Discrimination

- Discrimination against caregivers can violate Title VII if it is a form of sex discrimination – a particular concern re new moms
- Discrimination against caregivers can violate ADA– a particular concern re new mom with an infant with a disability
- EEOC guidance to investigators sheds light on what “evidence” may prove unlawful discrimination

Reasonable Accommodation Needed for Family Leave Too??

Under Title VII & ADA – Caregiver Discrimination

Evidence of Sex or Disability Discrimination

- Comments about the reliability of working mothers
- Evidence that a woman was subjected to less favorable treatment after having a baby
- Evidence that female workers w/o children received more favorable treatment than female caregivers
- Evidence that female caregivers were steered to lower-paying or less prestigious jobs

Reasonable Accommodation Needed for Family Leave Too??

Under Title VII & ADA – Caregiver Discrimination

Evidence of Sex or Disability Discrimination

- Evidence that male workers with caregiving responsibilities received more favorable treatment than female workers
- Evidence that an employer/manager deviated from company policy when taking a challenged action against a female caregiver worker
- Evidence that the employer's asserted reason for the challenged action is "credible" to the EEOC.
- Evidence of gender stereotyping about caregivers

Medical Certification Issues

FMLA/CFRA/PDL

- ER has right to certification
 - Must given notice of need for certification in writing
 - Notice must state consequences of not providing cert.
- Timing of Request
 - Within 5 days of notice from EE
 - If unforeseeable, within 5 days of start of leave

Medical Certification Issues

FMLA/CFRA/PDL

- EE must provide certification within 15 days of request
 - Unless 15 days not practicable despite EE's diligent, good faith efforts
- EE must provide complete certification and be given opportunity to cure defects

Medical Certification Issues

FMLA/CFRA/PDL

- ER cannot ask for more info. than authorized by law
- EXCEPT add'l information may be obtained if:
 - LOA runs concurrently with WC
 - LOA runs concurrently with company paid-leave program
 - ER seeks information during ADA/FEHA reasonable accommodation process

Medical Certification Issues

FMLA/CFRA/PDL

- Note that CFRA does not permit treating health care provider to disclose diagnosis w/o EE's consent
 - Due to CA Confidentiality of Medical Information Act
- AND EE need not consent to disclosure

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

- Employer may challenge medical certification:
 - Authentication process
 - Clarification process
 - Second & third medical opinion process
 - (CFRA/PDL limit this right.)

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

- **Authentication**: verify that the doctor completed or authorized & signed the certification
- **Clarification**: seek understanding of the handwriting or meaning of a response
- Authentication does NOT require EE consent
- Clarification directly with doctor DOES.

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

- ER may contact health care provider to authenticate the certification through:
 - Another health care provider
 - An HR professional
 - A LOA administrator
 - A management official
- EE's direct supervisor may NOT authenticate, however.

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

Second and Third Medical Opinions

- CFRA does NOT permit these for family care leave
- PDL does NOT permit these for pregnancy leave
- FMLA does NOT permit these for service member leave
- Thus, in California – only for EE's personal medical leave

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

Second and Third Medical Opinions

- ER may require EE to obtain a second medical opinion
- ER selects health care provider
- ER may not select doctor it “regularly” contracts with, unless access is limited in geographic area.

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

Second and Third Medical Opinions

- Third opinion must be consulted if first and second opinion differ.
- NOTE – the process can be expensive!
 - ER bears fees for 2nd and 3rd medical opinion.

Medical Certification Issues

FMLA/CFRA/PDL – Certification Process

Second and Third Medical Opinions

- Process can take time too!
 - LOA must be granted provisionally during process until final determination.
- Medical file – EE must permit doctors access to relevant medical records from employee's physician

Medical Certification Issues

ADA/FEHA

- In connection with requests for accommodation - if disability and need for accommodation are obvious – no medical documentation may be requested.
- If disability and/or need for accommodation are NOT obvious, ER may request appropriate medical documentation.

Medical Certification Issues

ADA/FEHA

- ER entitled to documentation to establish that EE has a disability and needs a reasonable accommodation.
- ER may require documentation about disability and the functional limitations come from an appropriate health care or rehabilitation professional.

Medical Certification Issues

ADA/FEHA

- ER should specify what types of information is needed regarding the disability, its functional limitations, and the need for reasonable accommodation.
- EE can be asked to sign a limited release allowing ER to submit a list of specific questions to the health care or vocational professional.

Medical Certification Issues

ADA/FEHA

- ER may require EE to submit to examination by health care provider of ER's choice if the ER is unable to obtain information from EE's medical provider
- However – ER should first advise EE why information is deficient and provide EE opportunity to provide missing information through EE's doctor.

Certification Issues – Recertification under FMLA

- ▶ If leave expires and employee seeks extension.
- ▶ If minimum duration of leave is *more than* 30 days, can re-certify during the leave when:
 - Circumstances in certification have changed significantly; or
 - Information “casts doubt” upon continuing validity or reason for absence.

Certification Issues – Recertification – under FMLA

- ▶ In all cases employer may request recertification every six months.
- ▶ Even if the medical certification indicates that the employee will need leave for a period in excess of six months (*e.g.* , for a lifetime condition).
- ▶ Note – recertification not permitted for leave to care for covered service member.

Certification Issues – Recertification – under FMLA

- Recertification entitles employer to same information as in initial certification **PLUS**
- May provide health care provider a record of the employee's absence pattern and ask if the SHC and need for leave is consistent with such a pattern.

Recertification – under PDL & CFRA

- NO RIGHT to Recertification under CFRA unless employee seeks extension of leave upon expiration
- NO RIGHT to Recertification under PDL unless employee seeks extension of leave upon expiration **AND employer “has similar requirements for other similarly situated employees.”**

Re-Certification Issues

ADA/FEHA

- ADA and FEHA do not expressly provide a right to re-certification and do not expressly prohibit an employer from seeking re-certification
- However – likely acceptable if reasonable and needed to verify continuing validity of reasonable accommodation requests.

COMPENSATION DURING LEAVE

- **FMLA/CFRA/PDL leave – unpaid.**
- **Under certain circumstances - employee may substitute paid leave OR employer may require employee to substitute paid leave.**
- **Substitution means – FMLA/CFRA/PDL & paid leave run concurrently.**

COMPENSATION DURING LEAVE

- **FMLA – generally ER may require substitution of paid leave during FMLA leave & EE may elect to use leave at his/her option.**
- **PDL – ER may require substitution of paid SICK leave, but not VACATION**
- **CFRA – Same as FMLA – except ER may only require use of sick leave for employee's CFRA medical leave**

COMPENSATION DURING LEAVE

- EE must be notified of any procedural requirements in use of paid leave
- If EE does not comply with procedural requirements – EE may be denied pay
- BUT – EE still eligible for unpaid leave.

COMPENSATION DURING FMLA LEAVE

Notes on Procedural Requirements in Connection with Denying Substitution

- Two weeks “advance” notice requirement to use vacation leave held to violate FMLA
 - Issue – leave that is not foreseeable
- Employees who violate paid leave policies – can be disciplined
 - Even if also on FMLA at the same time

COMPENSATION DURING LEAVE

PAID DISABILITY BENEFIT PLANS

- If Employee's leave is covered by a paid disability benefit plan:
 - Neither Employer nor Employee may not require substitution of other accrued paid leave
 - Parties may agree to substitution of paid leave, where state law permits, to have paid leave supplement disability plan benefits.

COMPENSATION DURING LEAVE

PAID FAMILY LEAVE

- ER may require EE to use vacation OR mutually agree to use accrued sick leave during 7-day waiting period
- Once PFL benefits kick-in (or SDI for that matter)
 - employer and employee may agree to integration of PTO with the SDI/PFL benefits.

COMPENSATION DURING LEAVE

WORKERS COMPENSATION BENEFITS

- If Employee is receiving WC benefits during leave:
 - Neither Employer nor Employee may not require substitution of other accrued paid leave
 - Parties may agree to substitution of paid leave, where state law permits, to have paid leave supplement WC benefits.

COMPENSATION DURING FMLA LEAVE

WORKERS COMPENSATION BENEFITS

- If health care provider certifies Employee may work light duty job & Employee rejects the assignment:
 - Employee loses WC benefits BUT
 - Employee can remain on FMLA leave until the time is exhausted
 - At this point – regular paid substitution rules apply

COMPENSATION DURING LEAVE

COMMISSIONED EMPLOYEES

- **Draw Payments**

- Typically not a “wage” – but rather an advance on expected earnings
- Can be stopped during FMLA leave – assuming no discrimination re other leaves of equivalent terms
- Consider language in commission plans addressing pro-ration of draw payments for LOAs.

COMPENSATION DURING LEAVE

COMMISSIONED EMPLOYEES

- **Commission Payments**

- Earned based on the terms of the commission plan/agreement
- Earnings received while an employee is on FMLA leave are wages that should be paid (without delay due to leave)
- **Issue for employers:** – what if an employee works on account, goes on FMLA leave and another employee takes over account.
 - Who earns commissions then?

Compensating Exempt Employees on Intermittent or Reduced Leave Schedule

- Executives, administrative, professional & computer employees (“white collar” exempt employees) are generally paid same salary regardless of hours worked in the week
- However, unpaid FMLA leave for white collar exempt employees does not jeopardize the FLSA exemption.
- Salary deductions can be made.
- DLSE opinion letter 2002-03-01 says this is okay (for CFRA leave that runs concurrently with FMLA).

Compensating Exempt Employees on Intermittent or Reduced Leave Schedule

What are your options?

- Convert to hourly employee during the FMLA leave period and pay for hours actually worked or:
- Make appropriate adjustments to the weekly salary on the basis of the percentage of time the employee takes off as leave.

HYPOTHETICAL

- John is a Financial Analyst for ABC Company
- John has worked for ABC Company for 12.5 months
- John's offer letter indicates the regular workweek is a 40 hour week
- Over the past year, John has missed work occasionally (one to three days every few months) due to migraines

- Having just completed one year, John was given his annual performance review by the new CFO Mary
- John was given a poor review and told he was being placed on a PIP
- The next day, John calls out sick, claiming he is having a serious migraine due to work-related stress
- John misses two days that week

- The following Monday John returns with a doctor's note stating he is under doctor's care for migraines
- Sam, the HR Manager, provides John with FMLA paperwork
- John returns the paperwork later that week
- The FMLA certification states he has a SHC

- The FMLA certification states John may take time off “as needed” when his migraines flare up
- The certification estimates John’s migraines are likely to flare up 1 to 2 times a month for 2 to 4 days each time
- Sam accepts the certification and designates leave as FMLA
- Sam notifies John he has 480 hours of FMLA leave

- Over the next month, John takes off the following time:
- Wk 1 – 2 days
- Wk 2 – 1 day
- Wk 3 – 2 days + leaves after 2 hrs on 1 day
- Wk 4 – Leaves after 4 hrs 1 day and misses the next

- Occasionally, when he is off, Mary calls him to check on the status of reports he was working on during the week
- John occasionally spends 1-2 hours on days when he is home with a migraine revising these reports
- John also works late on other days to make up for missed time
- Mary knows this, but does not tell Sam

- Sam asks John for a re-certification of his leave
- John provides the re-certification
- Mary wants Sam to get a second opinion now
- John refuses to go to another doctor
- Mary now wants to fire John for insubordination

Questions?

- ▶ Was John initially eligible for leave?
- ▶ Was the initial certification sufficient?
- ▶ Was Sam correct in his calculation of the maximum hours of leave to which John is entitled?

Questions?

- ▶ Could John have been offered to work from home or make up time in the week in lieu of taking LOA?
- ▶ Could Mary make John stay late to complete a report one night if he has taken FMLA/CFRA leave earlier in the week?
- ▶ Could Mary still hold John accountable for turning in quality work during the weeks he is out with migraines?

Questions?

- ▶ Could John be disciplined for exceeding the time he was authorized by his doctor to be off?
- ▶ Did Sam have the right to seek re-certification?
- ▶ Can John be fired if he refuses to submit to the second medical opinion?
- ▶ Should Mary or Sam have done anything differently in managing in the situation?