



# Oh, What a Tangled Web We Weave When

Advising employers on how to avoid getting caught in the ever-expanding web of employee leave laws is both challenging and fraught with peril. However, while the web is indeed sticky, it leaves room for creativity that, combined with some old-fashioned common sense and a lot of forethought, can keep employers and their counsel from getting trapped.

**BY NATALIE C. ROUGEUX**

# We Decipher Employee Leave

**T**here once was a lovable pig and an erudite spider who saved his life. ... Well, you know the story. And, yes, the title of this article is loosely borrowed from Walter Scott's epic poem "Marmion" and not E.B. White's *Charlotte's Web*. However, when it comes to employee leave laws, employers can learn a lot from Charlotte. She was creative, proactive, and wise. She treated others equally. And, she did not simply occupy the web in which she was destined to live, but she used it to weave a message that saved the day. Accordingly, this article: (1) briefly describes some of the key employee leave laws that make up the tangled web in which most employers must operate; (2) describes a few of the stickiest issues that employers face when managing employee leaves of absence; and (3) concludes with suggestions on how keeping Charlotte in mind may make a heroine (or hero) out of you.

Before getting started, however, allow me to offer a few suggestions. First, if you have not read *Charlotte's Web* recently (or at all), I encourage you to do so. Its lessons are well worth remembering. Second, I caution you to read not only the cases cited or briefly discussed here, but to also research the case law in your jurisdiction. These cases are always fact-specific

and, while no *Charlotte's Web*, often better than fiction. Finally, state laws regarding employee leave, workers compensation, and fringe benefits may provide additional or overlapping protections. Thus, they too should be consulted.

## **The Web in Which We Live—A (Very) Basic Overview of Key Employee Leave Laws**

### *Family Medical Leave Act*

The Family Medical Leave Act (FMLA) applies to private employers with 50 or more employees within a 75-mile radius and to all public agency employers regardless of size. The act specifically applies to individuals who have been employed by a covered employer for at least one year and worked at least 1,250 hours in the previous 12 months. They are entitled to up to 26 weeks of leave per year to care for a covered service member with a serious injury or illness and up to 12 weeks of leave per year for the following: (1) to give birth and/or to care for a newborn son or daughter; (2) to place a son or daughter up for adoption or in foster care; (3) to care for the employee's own serious health condition; (4) to care for a spouse, child, or parent who has a serious health condition; or (5) to accommodate a qualifying military service exigency. A serious health condition is an illness, injury, impairment, or physical/mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider.

FMLA leave is unpaid and, depending on the type of leave, may be taken on a continuous, intermittent, or reduced schedule basis. However, if the employer complies with certain designation and notice requirements, he or she may elect or the employer may require that the company's paid leave benefits (such as sick leave, vacation, or paid time off) run concurrently with FMLA leave. Both employees and employers must also comply with the FMLA's notice requirements. Specifically, employees must give 30 days' notice of their need for leave or, if unforeseeable or for military exigency leave, as soon as practicable. Employers must

provide general notice to employees of their FMLA rights and, absent extenuating circumstances, timely notification of their eligibility for FMLA leave and the designation of their leave under the FMLA. Finally, absent unequivocal notice that the employee does not intend to return to work or a failure to timely return to work at the conclusion of leave, employees must be reinstated to their prior position or an equivalent position. Employees returning from FMLA leave due to their own serious health condition may be required to submit a written fitness for duty certification demonstrating that they can safely perform the essential job functions, with or without a reasonable accommodation.

### *Americans with Disabilities Act*

Under the Americans with Disabilities Act of 1990 (ADA), employers with 15 or more employees may not discriminate against any qualified individual with a disability who (1) currently has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. Absent a showing of undue hardship, employers must also provide reasonable accommodations that will enable employees with a current disability or a history of a disability to perform their essential job functions. A reasonable accommodation is defined as modifications or adjustments (1) to the work environment or the manner or circumstances under which the position is customarily performed or (2) that enable a qualified individual to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities. It is the employee's responsibility to request accommodation. However, "the employee does not have to mention the ADA or use the phrase 'reasonable accommodation.' Plain English will suffice."<sup>1</sup>

Finally, the ADA prohibits medical examinations and inquiries except in limited circumstances. However, an employer may request medical information sufficient to establish the existence of a disability and/or the adequacy of a reasonable accommodation. If such information is requested, the employee should be given sufficient time to provide it.<sup>2</sup>

### *Pregnancy Discrimination Act*

Title VII of the Civil Rights Act of 1964 was amended in 1978 to include the Pregnancy Discrimination Act (PDA). The PDA prohibits employers with 15 or more employees from discriminating against employees on the basis of pregnancy, childbirth, and related medical conditions. Thus, such employees must enjoy equal treatment for all employment-related purposes and benefits, to include the application of leave of absence policies. Some pregnancy-related impairments may also be covered as disabilities under the ADA, thereby requiring the provision of a reasonable accommodation unless doing so will place an undue hardship on the company. Accordingly, the Equal Employment Opportunity Commission (EEOC) has warned that it may be "very risky" for ADA-covered employers to deny accommodations to pregnant women who suffer from temporary impairments related to pregnancy.

### *Uniformed Services Employment and Reemployment Rights Act*

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to virtually all employers and contains detailed requirements regarding the provision of military leave. Employees must give prior notice (oral or written) of their need for military leave. However, unlike the FMLA or ADA, employees are not required to

request, or obtain the employer's permission for, such leave. Rather, employees must only give the employer clear and specific notice of pending service and the dates of leave required. Employees must also be promptly reinstated upon returning from a military leave of absence, the specifics of which depend upon such factors as the duration of leave and when the employee returned from service. However, unlike the FMLA or ADA, pursuant to which an employer may terminate or refuse to reinstate an employee who is unable to perform the position's essential functions, USERRA requires that an employer first assist an employee with a service-connected disability to perform his or her position or an equivalent position. If reinstatement is not possible despite these reasonable efforts, the employee must be reinstated to a position that is the nearest approximation of his or her prior position in terms of status, pay, and seniority.

### *State Workers Compensation and Other Laws*

Some states have upheld neutral absence control policies, pursuant to which employees may be terminated after exceeding a defined period of leave, regardless of the reason.<sup>3</sup> According to the EEOC, however, such policies violate the ADA's requirement that employers conduct an individualized assessment to determine whether an extension of leave may be a reasonable accommodation. Thus, while such policies may be permissible in the context of defending a workers compensation retaliation claim, they must also comply with the ADA. Workers compensation policies must also be consistent with the FMLA's light duty, fringe benefit, and moonlighting provisions. Finally, all employer leave and attendance policies must comport with applicable state laws, many of which mirror or expand upon the protections provided by federal law.

### **Don't Get Caught: Sticky Issues When Managing Employee Leave Laws**

This article could address any number of issues related to the management of employee leave, to include for example the definition of a serious health condition or disability, the retroactive designation of leave, the investigation of suspected abuse of statutory leave, the impact of the Supreme Court's decision in *United States v. Windsor*<sup>4</sup> on the definition of spouse under the FMLA. ... The list goes on (and on, and on). Moreover, the governing case law is too voluminous and varied to do it justice here. Accordingly, set forth below is a brief description of just a few of the issues that commonly perplex employers when managing employee leave, together with a small sampling of some recent, representative cases.

#### *Leave as a Reasonable Accommodation*

According to the EEOC, Congress did not coordinate the FMLA with the ADA, leaving ambiguities about what happens after a disabled employee exhausts his or her FMLA leave. The EEOC has also recognized that Congress may need to address conflicts between the ADA, FMLA, and employer policies because "it is not coherent now." According to the EEOC, however, "permitting the use of accrued paid leave, or unpaid leave, is a form of a reasonable accommodation when necessitated by an employee's disability."<sup>5</sup> Thus, the EEOC has emphasized that employers need to relax no-fault leave policies and, absent an undue hardship, grant leaves of absence or extended leaves of absence when needed to treat a covered disability. Employers who have recently failed to comply (or, perhaps, were unaware of this requirement) include (1) Verizon Wireless, which agreed to pay

\$20 million to settle an EEOC lawsuit alleging that the company's no-fault attendance policy violated the ADA; (2) Interstate Distributor Co., which agreed to pay \$4.85 million to settle an EEOC lawsuit alleging that the company's policy of automatically terminating employees after exhausting FMLA violated the ADA; and (3) REDC Default Solutions LLC, which agreed to pay \$50,000 to settle an EEOC lawsuit alleging that the company refused an employee's request for a "short amount of additional" leave to recover from a stroke.

But, what constitutes a reasonable leave of absence? What about the need of employers (and, particularly, smaller employers) to efficiently run their operations? Isn't that what the FMLA was for? Isn't that why the FMLA was limited to employers with 50 or more employees? And, what about court decisions that continue to hold that, because attendance is an essential job function, employees (even if disabled) may be terminated for excessive absenteeism?<sup>6</sup> On the other hand, is it really that difficult to grant a few days, weeks, or even a month of leave (or extended leave)? It depends, making this the most complex of the sticky issues currently trapping employers in the employee leave law web.

All is not lost, as there is now an (almost) clear rule that indefinite leave is not a reasonable accommodation.<sup>7</sup> Thus, for example, the Eastern District of Missouri recently held that a to-be-determined return to work date constitutes indefinite leave that need not be accommodated.<sup>8</sup> However, what types of requests fall under indefinite leave is not always clear.<sup>9</sup>

Absent clear evidence that a requested leave is indefinite, employers must analyze whether granting a leave of absence or extended leave of absence will place an undue hardship on the company. Whether an undue hardship exists requires a multifactor and fact-specific analysis. A large body of existing case law illustrates these factors being applied to various workplace accommodation situations. The EEOC's website also offers numerous examples of lawsuits and settlements involving cases in which the commission felt that the employer got it wrong.<sup>10</sup> Suffice it to say that meeting the employer's burden to establish an undue hardship is difficult. To make matters worse, many employers get caught unaware by this developing issue. Having finally gotten their arms around the FMLA, they are now puzzled by how to analyze this new requirement to grant additional, undefined leave under the ADA. Small employers that did not cut their teeth on the FMLA are even more disadvantaged.

So, what is a practitioner and his or her client to do? First, use

requested? How much time has already been granted? What is the prognosis for return at the conclusion of leave? Will customer service, employee morale, production, etc., truly suffer? You get the picture. Finally, if the employer denies leave because of the undue burden it will cause, make sure that it can prove why.<sup>11</sup>

#### *Notice Requirements (Darned if You Do, Darned if You Don't)*

As noted above, employees must notify the employer of their need for a leave of absence or other accommodation. Under the FMLA, whether an employee gave timely notice may be a tricky issue. However, if applying the "no jerk rule," maybe not. For example, in *Clinkscale v. St. Therese of New Hope*,<sup>12</sup> a nurse had a workplace panic attack, was directed by human resources to go home, immediately provided a doctor's note requesting a one-week leave of absence, and was nonetheless terminated for job abandonment. Under these circumstances, the court had no trouble finding that the employee met her obligation to notify the employer "as soon as practicable" of her need for FMLA.

More difficult than determining *when* information was provided is determining *what* information was provided and whether it was sufficient to put the employer on notice that FMLA leave or an ADA accommodation may be warranted. In general, employers may rely on existing information to reach a reasonable conclusion. Thus, for example, the Eleventh Circuit recently held in *Crawford v. City of Tampa*<sup>13</sup> that an employee who was absent for alleged depression and anxiety, but who did not specifically identify an underlying medical condition, failed to put the employer on notice of needed FMLA leave. Thus, the court permitted the employer to rely on the information that it had (or lack thereof) without seeking additional information regarding the employee's medical condition or mental health.<sup>14</sup>

That being said, we must remember that employees need not specifically state they are seeking FMLA leave or requesting a reasonable accommodation. For example, in *Byron v. St. Mary's Med. Ctr.*,<sup>15</sup> the employee called in to work, said that she was going to the emergency room, and was told "get yourself taken care of and don't worry about it." The employee later notified the employer that she had been diagnosed with acute pancreatitis and would provide the company with a copy of her discharge papers. Upon reporting to work the next day, however, she was terminated for excessive absences. In denying summary judgment, the court held that the employer was "expected to gather any additional information that it might need to determine

**Absent clear evidence that a requested leave is indefinite, employers must analyze whether granting a leave of absence or extended leave of absence will place an undue hardship on the company.**

common sense and apply the "no jerk rule." While not contained in any law treatise that I've seen, failure to comply with this critical rule may cause a judge or jury to find a way—any way—to rule against the employer. Second, ask yourself and your client: What are the company's operational needs? Will granting leave be less burdensome than terminating the requesting employee, hiring a replacement, and then training that replacement to do the prior employee's job? What has the employer done in similar situations? How much time is being

whether the FMLA applied," reiterating that an employer "cannot claim ignorance where it is self-imposed."<sup>16</sup> Similarly, in *Fries v. TRI Mktg. Corp.*,<sup>17</sup> the employee sent her supervisor a text message on Friday informing her that she was in the emergency room, returned to work the following Tuesday with a visible catheter, and presented a doctor's note excusing her absences. According to the court, these facts were sufficient to put the employer on notice that she needed FMLA leave. Notably, the court in *Byron* also went to arguably great

lengths to find that the employee's condition constituted a serious health condition under the FMLA. Specifically, the court held that, because the employee's genital herpes, interstitial cystitis, and urination issues were temporally linked and affected the same organ system, the focus should have been on the cumulative adverse effects of those related conditions and not just the incapacitation at issue.<sup>18</sup> Did I mention the "no jerk rule"?

In light of the cases above, the cautious employer may be inclined to request additional information regarding any absence and, upon receiving that information, analyze whether leave, an excused absence, or other accommodation may be appropriate. However, employer attendance, leave, and return-to-work policies must comply with the ADA's prohibitions against medical inquiries. Thus, for example, Dillard's Inc. recently agreed to pay \$2 million to settle an EEOC lawsuit alleging that the company's return-to-work policy violated the ADA.<sup>19</sup> Under the company's policy, it only excused health-related absences if the returning employee provided a doctor's note stating the nature of the absence (such as migraine, high blood pressure, etc.). Remember, as well, to be careful what you ask for. The obligation to provide leave or comply with the employer's FMLA notice requirements is one thing. However, employees are also protected from discrimination on the basis of disability and pregnancy, both of which may be revealed through ill-advised questioning or requests for medical documentation. If the employer has no knowledge of such matters, it cannot possibly use them as a basis for discrimination.

Once again, therefore, what is a practitioner and his or her client to do? As before, start with common sense (and the "no jerk rule"). It is also a good idea to determine what the company's collective knowledge is by talking to managers, administrators, and other individuals who may have had contact with the employee (without violating the employee's privacy).<sup>20</sup> Further, put aside technicalities where appropriate and analyze the information available within the appropriate context.<sup>21</sup> Finally, if unable to determine whether an employee may need FMLA or a reasonable accommodation, ask! However, unless absolutely necessary, ask not about the employee's medical condition but simply whether they are requesting a leave of absence or may need another accommodation. If left with no choice but to seek potentially protected information, be specific about what is requested (and not requested) and state the legitimate business reason for the request.

### *Using the Web to Your Advantage: Concurrent Application of Benefits*

The underlying reason for a leave of absence may qualify an employee for protections under a combination of the laws identified above, under other federal or state laws outside the scope of this article, and/or under the employer's policies. Thus, employers must be careful to comply with all applicable laws while simultaneously following their written policies.<sup>22</sup>

Sticky issues also abound when employers require or permit employees to exhaust any available vacation, paid time off, sick leave, or other fringe benefits before commencing a statutory leave of absence. For example, permitting such "pre-leave" use of paid-time-off benefits may result in extended absences in which employees first exhaust their vacation/paid-time-off or sick leave, then take 12 weeks of FMLA leave and/or another leave of absence permitted by the company's policies, and then request still more leave as a reasonable accommodation under the ADA. The lengthier the permitted absences, the more difficult it may become to later establish that the provision of extended leave will

place an undue hardship on the company.<sup>23</sup> Further, employees may re-acquire FMLA leave time each year (as defined by the company's policies) and, depending on the employer's policy, may also continue to acquire vacation, sick leave, or other fringe benefits. Thus, if not carefully and concurrently managed, these leaves of absence can result in what feels like a never-ending cycle of absences.

In light of the above, a better option may be to require, whenever permissible, that employees concurrently use any paid and unpaid time off/leave benefits. Even if taking this approach, however, employers may still need to relax their attendance policies. At the very least, they should apply them equally.<sup>24</sup>

### *Reinstatement Rights*

As noted above, employers have a statutory duty to reinstate employees from an FMLA or USERRA-protected leave of absence. Further, while the ADA does not contain an express reinstatement requirement, granting a leave of absence as a reasonable accommodation would be meaningless absent some form of resulting job protection. Finally, employees who return from a leave of absence due to pregnancy, childbirth, or a work-related injury must be treated the same as other similarly situated employees and in compliance with any state workers compensation or other employee leave laws. Seems easy, right? Employee goes on leave. Employee calls employer and says he or she is ready to return to work. Employer reinstates employee to former job. Unfortunately, it is not always so easy.

Employers often struggle with what to do when the position has been eliminated or modified due to operational or financial reasons. Under the FMLA, an employee has no greater right to his or her position than he or she would have had if leave had not been taken. Under USERRA, reinstatement is not required if the employer's circumstances have so changed as to make it impossible or unreasonable. The ADA does not specifically address leaves of absence and, as such, is silent on this issue. For similar reasons, so is the PDA. In short, however, it is the employer's burden to prove that the employee would have been laid off even had he or she not taken a protected leave of absence. For example, the employer may demonstrate that the employee's former department, division, or function no longer exists and/or that it had an objective reason for the downsizing or restructuring decision.<sup>25</sup> Most compelling, however, is evidence of a formal decision-making process with oversight by and input from individuals with no knowledge of the employee's protected leave status and that contains as many objective criteria as possible. However, any criteria that the protected leave may have impacted (such as sales/production quotas or attendance) must be appropriately adjusted.<sup>26</sup> That is not to say that subjective criteria such as leadership skills, teamwork, initiative, etc., should be excluded. The employer should merely balance these where possible with objective (i.e., provable) criteria and appropriate oversight. Evidence that other employees were on leave or had recently taken a leave of absence and were not laid off is also helpful. Needless to say, the position must also have been truly eliminated.<sup>27</sup>

Another frequently encountered problem is what to do when an employee can no longer perform the essential job functions. How to respond will depend in part on the basis for leave. For example, as noted above, USERRA contains certain retraining, reassignment, and related obligations that an employer may have when reinstating a returning veteran with a service-connected disability. But, what about disabilities unrelated to military service? Must the employer consider other positions for which the disabled employee may be qualified? The

answer to this question seems to be an unqualified “yes,” as the ADA specifically identifies “reassignment to a vacant position” as a possible reasonable accommodation. However, if such a position exists, must the employer assign the disabled employee to that position, or can it select the most qualified employee or applicant? In *EEOC v. United Airlines, Inc.*,<sup>28</sup> the Seventh Circuit recently agreed with the EEOC to hold that, absent an undue hardship, employers “must appoint employees with disabilities to vacant positions for which they are qualified,” even if they are not the most qualified. Court decisions on this issue still vary from circuit to circuit. However, the Seventh Circuit based its opinion on the Supreme Court’s decision in *U.S. Airways, Inc. v. Barnett*<sup>29</sup> regarding reassignments under the ADA in the context of a seniority system. Further, the Supreme Court recently declined to review *United Airlines*, and the EEOC’s position on this issue is clear. Accordingly, employers should proceed with caution.

Finally, the EEOC is increasingly scrutinizing employer return-to-work certification and related policies. Specifically, it is aggressively pursuing 100 percent healed policies, i.e., those that condition reinstatement upon a full release. According to the EEOC, such policies violate the ADA’s requirement that employers perform an individualized assessment to determine whether a reasonable accommodation may permit an employee to perform the essential functions of his or her position despite any continuing physical or mental limitations. Court decisions vary on whether such policies constitute a per se violation of the ADA.<sup>30</sup> However, to avoid the risk and expense of litigation or an EEOC investigation, employers should modify their return-to-work, attendance, and leave of absence policies as appropriate. For example, rather than stating that “employees will be reinstated only upon submission of a full duty release,” the policy may state something like “employees may be required to submit documentation establishing that they are able to return to work, with or without reasonable accommodation.”

### **Retaliation and Murphy’s Law**

The Supreme Court recently held in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*<sup>31</sup> that employees claiming retaliation under Title VII must prove that, but for engaging in protected activity, the employee would not have suffered the adverse employment action at issue. As a result, some speculate that retaliation claims may lose their favored status among employees and plaintiff’s lawyers. Even if true (and, I’m not optimistic), change is slow. Further, retaliation claims are easily alleged (even if not proven), as anyone who engages in protected activity is covered. Finally, when it comes to retaliation claims, employer-side attorneys believe that Murphy’s Law reigns (the plaintiff’s bar, of course, refers to this problem as “pretext”). Specifically, in the leave context, employers must often address a misconduct issue that occurs immediately after an employee requests leave or returns from leave or, worse, that is discovered while the employee is on leave. As with most things, timing is everything. Equally important are the overall circumstances (need I remind you of the “no jerk rule”?), consistency, and proper management training.

“Bad facts” likely to get an employer in trouble include such things as a negative reaction by the decision-maker to the employee’s request for leave, termination for an alleged violation that is readily disputed and/or following an investigation that is easily challenged, or a termination that is done in an arguably harsh way. For example, in *Bagi v. AT&T Mobility Servs.*,<sup>32</sup> when the employee requested a six-week leave of absence for a hysterectomy, her supervisor allegedly

responded by asking her to return to work earlier or reschedule the surgery. Soon thereafter, the employee attended a golf outing that her supervisor claimed was forbidden, but that the employee claimed was permitted. The company investigated and sided with the supervisor, who decided (on the day the employee was to commence leave) to terminate her employment. However, the company permitted the employee to take leave, during which she tried without success to ascertain whether her job was in jeopardy. Two days after returning from her leave of absence, she was terminated. According to the court, all of these facts could lead a reasonable jury to conclude that her employer retaliated against her for taking FMLA leave. Similarly, in *Pagán-Colón v. Walgreens of San Patricio, Inc.*,<sup>33</sup> the employee was hospitalized and, despite his efforts to inform the company of his whereabouts, terminated for job abandonment. Thereafter, the company investigated the employee’s claim that he had not abandoned his job, during which it failed to review video evidence that would have supported the employee’s description of events. Having concluded that other employees contradicted the employee’s rendition, the company then re-terminated him for dishonesty during an investigation. According to the court, these facts were sufficient to support the jury’s verdict against the employer.

Procrastination of employee discipline can also lead to trouble, as it may be difficult to explain why the company failed to discipline a horribly performing employee until after he or she requested or returned from a leave of absence.<sup>34</sup> Thus, the proactive employer can avoid Murphy’s Law by simply addressing performance or conduct issues as they arise.<sup>35</sup>

Consistency with company policy is also critical.<sup>36</sup> This principle applies to both written and unwritten policies or practices. Further, it not only applies to the company’s leave policies, but to any policy being used to justify the employment action at issue. Finally, consistency requires—at the very least—consistency in the reason for separation.<sup>37</sup>

Of course, consistency is difficult to achieve unless management is trained on the company’s obligations and policies. Absent such training, management may also make statements that place the company in a precarious position. For example, in *Quinlan v. Elysian Hotel Co. LLC*,<sup>38</sup> after the employee informed her supervisors that she was pregnant, they talked to her about the difficulties of balancing a full-time job and being a new mother, informed her that her workload would not change because of her pregnancy, and assured her that she did not have to return to work following the birth of her child. Further, one of her supervisors frequently asked about her plans to work after the birth and allegedly implied that “[she’d] maybe be better off staying home.”<sup>39</sup> After returning from maternity leave, her position was eliminated. Not surprisingly, the court denied summary judgment on her PDA discrimination claim. (Her FMLA claim failed only because it was not developed in her briefing to the court.). Oh, and don’t forget to train the CEO.<sup>40</sup>

### **“Some Pig!” Written Policies and Other Suggestions**

As noted above, this area of law is fact-specific, ever changing, and extremely broad. Again, therefore, this article merely scratches the surface. However, while each situation will require further research and analysis, keeping just a few of Charlotte’s characteristics in mind can do wonders. Specifically:

- **Seek knowledge, and stay informed.** Because of the complexities associated with employee leave laws, one must either

follow the topic closely or consult with somebody who does.

- **Be proactive.** In addition to staying current on the law, advise clients to centralize leave administration where possible and advise them of the dangers associated with inadequate management training, the importance of timely addressing leave requests and workplace conduct/performance issues, and the benefits of addressing issues head on rather than taking a wait-and-see approach (for example, when trying to determine whether leave may or may not be needed or desired).
- **Put it in writing.** In the famous words of Charlotte: “Trust me, Wilbur. People are very gullible. They’ll believe anything they see in print.” As lawyers well know, what is in print is also subject to challenge, enforcement, or maybe even misconstruction (whether intentional or unintentional). However, as Wilbur learned, printing the right message can also save one from slaughter. Thus, employers should have in place and frequently review written leave and conduct policies to ensure compliance with applicable law and consistency with the employer’s actual practices. Any written communications to employees before, during, or after a leave of absence should also be reviewed to ensure consistency with legal requirements (and the “no jerk rule”).
- **Remember that this area of law is, in fact, a web.** Watch out for the intersection of various leave laws and draft policies that recognize the overlapping nature of employer and employee obligations. For example, the company’s FMLA policy should not state that “failure to return to work at the conclusion of leave will result in termination from employment,” but something like “failure to return to work at the conclusion of leave or an extension of leave, with or without reasonable accommodation, may result in termination from employment.” Attendance policies requiring the provision of a doctor’s note should also specify that only information sufficient to establish that the absence is excused, not information regarding the employee’s treatment or medical condition should be submitted. As noted above, 100-percent-healed or full-duty reinstatement policies should also be eliminated. Finally, recommend that policies require the concurrent use of leaves of absence and/or fringe benefits where permitted.
- **Treat employees equally.** In layman’s terms, this principle is simple. Employment law, however, is loaded with issues related to whether employees, policies, situations, managers, departments/units, and other factors are truly comparable. Making this determination requires careful analysis and an understanding of the law in your jurisdiction.
- **Be wise.** Knowing the law is critical. However, don’t forget to step back and think about how a proposed course of action will look to a jury, arbitrator, government investigator, judge, or opposing counsel. Is it fair and justifiable? Does it make sense? Is the employer overreacting (a common issue when examining extensions of leave and undue hardship)? In other words (last time, I promise) seek first to comply with the “no jerk rule.”
- **Be creative.** Keep in mind that almost every leave situation is different and may require one to think outside the box. Further, think ahead. While the web of employee leave laws is indeed sticky, it leaves room for creativity that, combined with some old-fashioned common sense and a lot of forethought, can keep an employer from getting trapped (and, where the situation warrants, maybe even set its own trap).

Upon reading this article, some of you may—like Mrs. Arable—conclude: “I don’t understand it, and I don’t like what I don’t understand.” Like it or not, however, consider also this exchange from *Charlotte’s Web*: “What’s miraculous about a spider’s web?” said Mrs. Arable. “I don’t see why you say a web is a miracle—it’s just a web.” “Ever try to spin one?” asked Dr. Dorian.” ☺



*Natalie C. Rougeux is board certified in labor and employment law by the Texas Board of Legal Specialization and is certified as a senior professional in human resources. She is also the managing member and CEO of Rougeux & Associates PLLC, a boutique employment law firm located in New Braunfels, Texas. Together with three other attorneys and “Waldo the office dog,” Rougeux represents employers throughout Texas. © 2014 Natalie C. Rougeux. All rights reserved.*

## Endnotes

<sup>1</sup>*EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009).

<sup>2</sup>*See EEOC v. Raeford Farms, Inc.* (E.D.N.C., No. 713-CV-00183-D, filed Aug. 30, 2013) (alleging that the employer violated the ADA by refusing an employee’s request to be transferred to another position, placing her on a leave of absence pending receipt of a doctor’s note establishing her anemia, and terminating her employment without giving her sufficient time to provide the requested documentation).

<sup>3</sup>*See, e.g., Matter of Torrance v. Loretto Rest Nursing Home*, 61 A.D.3d 1124 (N.Y. App. Div. 2009); *Hephmer v. M&S Mfg.*, No. 257122, 2005 Mich. App. LEXIS 3124 (Mich. Ct. App. Dec. 13, 2005); *Haagar Clothing Co. v. Hernandez*, 164 S.W.3d 386 (Tex. 2005).

<sup>4</sup>*United States v. Windsor*, 133 S. Ct. 2884 (2013).

<sup>5</sup>*See* [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html).

<sup>6</sup>*See, e.g., Basden v. Prof'l Transp. Inc.*, 714 F.3d 1034 (7th Cir. 2013).

<sup>7</sup>*See, e.g., Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012) (request by neonatal intensive care unit nurse for unspecified number of unplanned absences was unreasonable); *Brangman v. AstraZeneca, LP*, No. 12-351, 2013 U.S. Dist. LEXIS 85922, \*29 (E.D. Penn. June 19, 2013) (“The ADA does not require employers to grant indefinite or open-ended disability leave.”); *Alston v. Microsoft Corp.* 851 F. Supp. 2d 725, 733-34 (S.D.N.Y. 2012) (“Requiring an employer to keep an employee on an extended leave of absence with no indication of whether or when the employee will return constitutes an undue hardship.”).

<sup>8</sup>*Ousley v. New Beginnings C-Star, Inc.*, No. 4:09CV1957, 2011 U.S. Dist. LEXIS 118946 (E.D. Mo. Oct. 14, 2011).

<sup>9</sup>*See, e.g., Shelton v. Bridgestone Metalpha, U.S.A., Inc.*, No. 3-11-0001, 2012 U.S. Dist. LEXIS 64282 (M.D. Tenn. May 8, 2012) (a request for “two to six months” of extended leave was not indefinite as a matter of law).

<sup>10</sup>*See, e.g., “Miso to Pay \$90,500 to Settle EEOC Disability Discrimination Lawsuit”* (employer denied an employee’s request for leave to resolve post-partum depression and, contrary to its insistence that her position was critical, waited more than one month after her anticipated return-to-work date to fill it).

<sup>11</sup>See, e.g., *Shelton*, 2012 U.S. Dist. LEXIS 64282, at \*13 (noting the employer's failure to submit evidence that granting the requested leave would have placed an undue hardship on the company).

<sup>12</sup>*Clinkscale v. St. Therese of New Hope*, 701 F.3d 825 (8th Cir. 2012).

<sup>13</sup>*Crawford v. City of Tampa*, 464 Fed. Appx. 859 (11th Cir. 2012) (unpublished).

<sup>14</sup>See also *Miles v. Nashville Elec. Serv.*, No. 12-6028, 2013 U.S. App. LEXIS 9548 (6th Cir. May 9, 2013) (unpublished) (despite a history of mental health-related FMLA leave that included an episode in which the employee ran screaming from the company's building, the employer was entitled to rely on the employee's resignation without further inquiring into her mental health); *Righi v. SMC Corp. of Am.*, 632 F.3d 404 (7th Cir. 2011) (employee's e-mail to supervisor that he needed "the next couple days off" was insufficient to put the employer on notice that FMLA may be required); *Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034 (8th Cir. 2010) (an employee who never mentioned that he had depression or was taking an antidepressant failed to put the employer on notice that he needed leave as a reasonable accommodation).

<sup>15</sup>*Byron v. St. Mary's Med. Ctr.*, No. 11-13445, 2012 U.S. Dist. LEXIS 129058 (E.D. Mich. Sept. 11, 2012).

<sup>16</sup>*Id.* at \*19.

<sup>17</sup>*Fries v. TRI Mktg. Corp.*, No. 11-1052, 2012 U.S. Dist. LEXIS 56169 (D. Minn. Apr. 23, 2012).

<sup>18</sup>*Byron*, 2012 U.S. Dist. LEXIS 129058, at \*13-15.

<sup>19</sup>*EEOC v. Dillard's Inc.* (S.D. Cal. 2012, No. 08-CV-1780).

<sup>20</sup>See, e.g., *Towns v. Ne. Miss. Elec. Power Ass'n.*, 478 Fed. Appx. 244 (5th Cir. 2012) (unpublished) (knowledge of employee's condition by the company's workers compensation and short-term disability administrator was sufficient to trigger the company's FMLA obligations).

<sup>21</sup>See, e.g., *Saenz v. Harlingen Met. Ctr.*, 613 F.3d 576 (5th Cir. 2010) (notice from employee's mother that the employee was in the hospital, and describing her daughter's treatment and condition did not require that the employer be "clairvoyant to ascertain whether FMLA might apply").

<sup>22</sup>See, e.g., *Sechler v. Modular Space Corp.*, No. 4:10-CV-5177, 2012 U.S. Dist. LEXIS 54478 (S.D. Tex. Apr. 18, 2012) (even though the company met its obligation to provide leave as a reasonable accommodation under the ADA, a fact issue remained on whether it also met its FMLA obligations).

<sup>23</sup>See, e.g., *Carmona v. Sw. Airlines Co.*, 604 F.3d 848 (5th Cir. 2010) (upholding jury finding of disability discrimination and noting that, under the company's lenient attendance policies, the employee's seven years of irregular and frequent absences was permitted by policy and governing law).

<sup>24</sup>See, e.g., *Bravo v. Kobitz*, No. 12-2848, 2013 U.S. Dist. LEXIS 73379 (D.N.J. May 23, 2013) (employee who was terminated for being an "abuser of time" after being denied the same opportunity as other employees to purchase additional vacation time was permitted to pursue FMLA retaliation claim because, had she not taken FMLA, she would not have exceeded her available sick time).

<sup>25</sup>See, e.g., *Harris v. Dallas Indep. Sch. Dist.*, 435 Fed. Appx. 389 (5th Cir. 2011) (unpublished) (no liability where employee's position was eliminated because of budget cuts).

<sup>26</sup>See, e.g., *Pagel v. TIN, Inc.*, 695 F.3d 622 (7th Cir. 2012) (performance standards may need to be adjusted to avoid penalizing an

employee for a protected absence).

<sup>27</sup>See, e.g., *Payne v. Goodman Mfg. Co.*, 726 F. Supp. 2d 891 (E.D. Tenn. 2010) (denying summary judgment because, while there was evidence that the employee who was selected for layoff was the poorest performer and the least qualified, there was also evidence that she was soon replaced).

<sup>28</sup>*EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) (cert. denied).

<sup>29</sup>*U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>30</sup>*Compare Solomon v. Sch. Dist. of Philadelphia*, No. 12-3436, 2013 U.S. App. LEXIS 16638 (3rd Cir. Aug. 12, 2013) (unpublished) (plaintiff cannot rely on the mere existence of a 100 percent healed policy, but must demonstrate that the policy was applied to his or her detriment in violation of the ADA) with *Dunavant v. Frito Lay*, No. 1:11-0028, 2013 U.S. Dist. LEXIS 30690 (M.D. Tenn. Mar. 5, 2013) (noting that "100 percent healed policies can constitute a *per se* violation of the ADA.").

<sup>31</sup>*Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013).

<sup>32</sup>*Bagi v. AT&T Mobility Servs.*, No. 1:12-CV-214, 2013 U.S. Dist. LEXIS 54478 (W.D. Mich. Apr. 17, 2013).

<sup>33</sup>*Pagán-Colón v. Walgreens of San Patricio, Inc.*, 607 F.3d 1 (1st Cir. 2012).

<sup>34</sup>See, e.g., *Jones v. Bracco Ltd. Partnership*, No. 11-4117, 2013 U.S. Dist. LEXIS 28731 (D.S.D. Feb. 26, 2013) (summary judgment denied because performance deficiencies were "post hac rationalizations" that were raised for the first time when terminating an employee while on leave).

<sup>35</sup>See, e.g., *Hughes v. Blue Cross Blue Shield of Kansas, Inc.*, No. 12-2339, 2013 U.S. Dist. LEXIS 95160 (D. Kan. July 9, 2013) (summary judgment granted where termination was for conduct addressed both before and after protected leave); *Armendariz v. Redcats USA, LP*, 390 S.W.3d 463 (Tex. App.—El Paso 2012, no pet.) (summary judgment granted on workers compensation retaliation claim because the company consistently applied its attendance policy both before and after the employee's workplace injury).

<sup>36</sup>See, e.g., *Echostar Satellite LLC v. Aguilar*, 394 S.W.3d 276 (Tex. App.—El Paso 2013, pet. filed) (summary judgment denied in workers' compensation and FMLA retaliation case where the employer did not uniformly apply its neutral absence control policy and repeatedly deviated from its employee leave policies when administering the plaintiff's leave of absence).

<sup>37</sup>See, e.g., *Pagán-Colón*, 607 F.3d at 16-17 ("[A]fter it became clear that Pagán could show that no [job] abandonment occurred, Walgreens changed the basis for his termination to his supposed dishonesty during its investigation of his two-week absence. The jury could reasonably have deemed these shifting explanations to be a red flag suggesting that Walgreens' decision to dismiss Pagán was motivated by retaliatory animus.").

<sup>38</sup>*Quinlan v. Elysian Hotel Co. LLC*, 916 F. Supp. 2d 843 (N.D. Ill. 2013).

<sup>39</sup>*Id.* at 848.

<sup>40</sup>See *Fries v. TRI Mktg. Corp.*, No. 11-1052, 2012 U.S. Dist. LEXIS 56169 (D. Minn. Apr. 23, 2012) (CEO testified during his deposition that the employee's threat to sue for FMLA retaliation was "a little bit" of the reason for her termination)