

2018 ACHRO FALL TRAINING INSTITUTE:

The Absent Workforce: Practical Solutions to Combat Misuse, Abuse and Excessive Use of Leave
October 11, 2018



SHAW SEMINARS
HR CONSULTING

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SHRM-CP | SHRM-SCP
RECERTIFICATION PROVIDER
2018

Shaw HR Consulting is recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CPSM and SHRM-SCPSM.

For This Training Please Use Code:
18-HZEME
1 credits

IPMA-CP
Certified Professional

IPMA-SCP
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Conference Materials

- Visit www.shawhrconsulting.com
- Scroll down and click on: **“Click Here to Download Conference Materials”**
- Type in the conference code **ACHRO-18**, as well as your email, and click Submit.
- Information is located at bottom of table of contents handout.
- An automatic download will start and download word version documents!



General Information on Session

- I have not read your Personnel Rules or Collective Bargaining Agreements and best practices may conflict with your organization’s rules or policies, so
- Before changing any practices, you are encouraged to consult with your legal counsel to determine if there are any meet and confer obligations and/or regulations that must be taken into consideration before changes are made.
- I am not an attorney.
- I knowingly violate every PowerPoint rule – so that you have a tool and resource that you can reference in the future.
- Enjoy!



Leave Management

Leave Types:

- FMLA/CFRA Approved Leave
- Reasonable Accommodations Leave
- Abuse / Misuse of Leave
- Excessive Use Leave



Leave Management

FMLA/CFRA Leave:

- **FMLA/CFRA** leave will always be reasonable under FEHA/ADA when qualified
 - **Accepted Workers' Compensation Claims**
 - Recommend you designate. (Sample 4)



Leave Management

FMLA/CFRA Leave:

- **When you have concerns about Family Care Leave**
 - **Surveillance** if you think they are misusing it...
 - **Recertification:** if use is outside of HCP form needs
 - Can request at end of leave period/certification OR if the use is inconsistent with the FMLA/CFRA certification for personal and family care (Sample 7)



Leave Management

FMLA/CFRA Leave:

- **When you have concerns about Employee's Own Medical Leave**
 - **Concerns Over Misuse / Abuse of Leave**
 - **Second / Third Opinions:** If you have concerns that the FMLA/CFRA leave is not medically needed, consider a Second Opinion option
 - For Personal Medical Condition Only
 - CFRA does not allow Second Opinions for Family Care
 - (Samples 5, 6)
 - **Recertification:** if use is outside of HCP form needs
 - Can request at end of leave period/certification OR if the use is inconsistent with the FMLA/CFRA certification for personal and family care (Sample 7)



Leave Management

Reasonable Accommodation Leave:

Criteria that Makes Leave Reasonable Outside of FMLA/CFRA:

1. Know Duration
2. Expected to Support Return to Work
3. Availability of Substitutes



Leave Management

Reasonable Accommodation Leave:

- If you know it is reasonable, designate the leave as Reasonable Accommodation Leave (sample 8)
- If you are UNSURE if leave is reasonable, get into the disability interactive process to gather data needed to evaluate the leave need/request (samples 9, 10)
 - More on this later...



Leave Management

Abuse / Misuse or Excessive Use of Leave:

Use the Hallway™ protocol for persons outside of FMLA/CFRA:

- Abuse / Misuse of leave, and
- Excessive Use of Leave



Leave Management

Abuse and Misuse of Leave: (Persons NOT under FMLA/CFRA coverage)

First, identify WHO will be invited into the Hallway:

1. Identify Highest Users of Time Off
2. Identify Concern for Abuse or Misuse of Leave Persons


Select a data point and pull those folks into your Hallway (outside of FMLA/CFRA)

- Exclude pregnancy and accepted workers' compensation leaves
 - 65 days for 2 years in a row?
 - Exhaust all FMLA for 2 years in a row?
 - Other
- BE CONSISTENT, use data not complaints!

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The Foyer

Discuss with Employee:

- Why are they triggering the Organization?
- What can they expect?
- What do they need to do?
- What will you do?
- Send Leave Management Letter (Sample 3) & Leave Questionnaire (Samples 9, 10)
- Move down the Hallway




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INTERACTIVE PROCESS HALLWAY




Interactive Process Hallway

- Door #1** • **Gather Data:** Obtain Clear Medical Work Restrictions; May determine an EFJA document needs to be created
- Door #2** • **Research Accommodations:** Call/email/discuss with employee and supervisor the restrictions and begin exploring accommodation ideas
- Door #3** • **Schedule Meeting & Prepare:** Schedule meeting and invite the right people to attend; confirm attendance in advance; prepare notes for meeting; meeting and make decisions
- Door #4** • **Do What You Said You Would Do:** After meeting, implement decisions; do what was said would be done



Interactive Process Hallway




Door #1

Obtain Necessary Documentation / Information


- Medical Questionnaire with:
- Serious medical condition impacting work (yes / no answer)
- Clarification on past and future expected leave needs (sample 9, 10)
- Permanent or temporary leave needs

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Interactive Process Hallway




Door #1

Interactive Process Hallway

Obtain Necessary Documentation / Information

- If the questionnaire is not completed (Sample 9, 10), you have two options:
 1. **CLOSE DOWN THE HALLWAY**
(sample 11)
 2. **CONTINUE DOWN HALLWAY**




Requesting Medical Related Information


- **California Confidentiality of Medical Information Act** (CA Civil Code Sec. 56.10.8(b)):
 - (B) Describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.
- **California Code of Regulations (CCR)** (tit 2 § 11069(d)):
 - The employee must also “cooperate in good faith” and provide “reasonable medical documentation” identifying the existence of the disability and the related work restrictions, if requested.
- **Federal Law:**
 - In just the most recent case, the Western District of Washington emphasized that the obligation under the Americans with Disabilities Act (“ADA”) to engage in good faith interactive dialogue when seeking an accommodation that will permit an employee with a disability to perform his or her job applies to employees as well as employers. [Huge v Boeing Co. \(W.D. Wash. March 4, 2016\)](#)

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Interactive Process Hallway




Door #1

Interactive Process Hallway

Obtain Necessary Documentation / Information


- If the questionnaire (Sample 9, 10) doesn't seem logical:
 - **CONTINUE DOWN HALLWAY**



Interactive Process Hallway

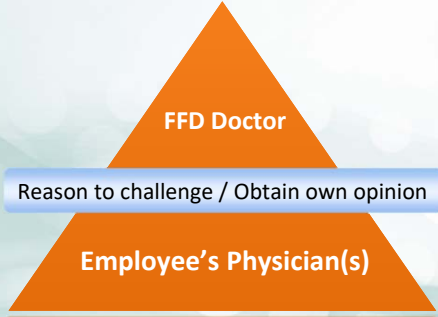
Door #1

- Fitness for Duty Examinations are often a good tool to utilize when there are significant intermittent leave issues.
(Samples 12 & 13)




Fitness for Duty Examinations:

The FFD Examination



- FFD Doctor's opinion is used to make decisions
- Overrides personal doctor**
- Must have observable reason to believe that additional information is needed and/or cannot rely on personal doctor's opinion

*** CBA/MOU or Personnel Rules may modify this*



Fitness for Duty Examinations

Why you can do a FFD Examination?

Employer can coordinate a Fitness for Duty examination with a qualified Health Care Provider (physical or mental impairment) in the event that they determine that the need to do so is job related and consistent with business necessity (42 USC § 12112(d)(4)(A), 42 USC § 12101 et seq. (ADA); Gov. Code § 12940(f)(2) (FEHA) and there are objective facts that:

- **Safely:** The employee may have a medical or psychological condition that could result in a direct physical threat or other liability to themselves, a co-worker or the public.
- **Fully:** The employee may have a medical condition or injury that impacts their ability to perform the essential functions of their classification fully and it is unclear as to what type of reasonable accommodation is necessary.



Fitness for Duty Examinations:

Medical Records Release Note for FFD Exams:

- You cannot require employee to release medical records under FFD examination (unlike 2nd/3rd Opinion under FMLA/CFRA). However,
 - California Confidentiality of Medical Information Act (CMIA)
 - Civil Code 56.10: Health care provider cannot have the records unless the employee authorizes the release except under certain limited conditions.
 - Civil Code 56.20(b): “No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. **However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.**”




Interactive Process Hallway




Door #2

Engage, Interact and Explore Together

- Ensure applicant/employee is aware of process
- Talking and/or informal meeting with applicant/employee
- Seek applicant/employee opinions and interests
 - **Research ideas of employee/applicant, department or organization before accommodations meeting**
- Consult with professionals in the field for assistance to identify reasonable accommodation options
- Use Resources: Colleagues, attorneys, WC examiners, consultants
- No Decisions, but research options




Interactive Process Hallway



**Schedule Accommodations Meeting /
Have the Right People Involved in
Decisions:**

- **Long-Term decisions:**
 - Human Resources
 - Workers' Compensation / Risk Management
 - Employee's Manager / Supervisor
 - Employee
 - Employee Representative of choice
 - **PERB found in SEIU v Sonoma County Superior Court – EE's are entitled to union representation at IP meetings**
 - Facilitator & Note Taker



Leave Management

**Use the Disability Interactive Process to evaluate if
you can provide Long-Term Leave Accommodations:**

Is the leave reasonable to provide?

- Known duration
- Expected to support full return to work with regular and reliable attendance
- Availability of substitutes
- Rely on data from Door # 1



Leave Management

At the REASONABLE ACCOMMODATIONS MEETING, TAKE NOTES. Notes should include:

1. Purpose of meeting / Reason for Meeting
2. Documents relied on (EFJA, Medicals)
3. Summaries of discussions between all parties relating to:
 - Modified work
 - Extended leave of absence
 - Alternate work
4. Summarize outcomes/decisions or next steps
5. Signatures of all attending parties



Leave Management



Door #4

Post-Meeting Activities / Close Process Correctly

- Place all documents in the accommodations file
 - Process Letters (Summaries of events, meeting invites)
 - Meeting Notes Templates
- Complete Post Meeting Agreements
 - Inform others that need to know of a result
 - Complete post meeting forms, letters, etc.
- Identify Next Steps of the Interactive Process
 - Check-ins
 - Medical Separation / CalPERS Retirement Application
 - Etc.



Leave Management

Results of a Consistently Applied Leave Management Program:

- **Reduced** unnecessary leave by both employees in and outside of your leave program.
- **Support** of employees who are too disabled to work full-time to find an alternative, such as retirement or part-time work.
- **A More Respectful** workplace for those employees who come to work everyday when not sick.
- **Make Room** in your workplace for those that really need leave to take it, without guilt or frustration by rest of workgroup



In Closing...

1. **Develop It:** Develop and implement a comprehensive Disability Management program
2. **Staff it:** Have sufficient persons in your organization knowledgeable enough to manage your program
3. **Consistently Apply it:** Be disciplined in consistently applying your program across your organization – even when it is unpopular
4. **Document it:** Document everything



The above will ensure you make good decisions organizationally, and when you don't, you will know it.

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