

# THE TEN DEADLY SINS OF MANAGING MEDICAL LEAVES AND ACCOMMODATIONS

---

BETH DE LIMA



Copyright HRM Consulting, California, 2019. All Rights Reserved.

Copyright 2013-Present Wolf Creek Holdings, LLC. Used under license by Leave Management Solutions, LLC

# Contents

<b>About The Author .....</b>	<b>5</b>
<b>#1. Incorrectly Calculating The Normal Work Week For FMLA/CFRA And PDL .....</b>	<b>6</b>
<b>#2. Retroactively Designating Leave When The Employer Failed To Provide The Eligibility Or Designation Notice Within Five Days.....</b>	<b>8</b>
<b>#3. Allowing An Employee To Exceed The Parameters Of Their Existing Medical Certificate Leave Schedule .....</b>	<b>9</b>
Do Not Forget the ADA .....	10
<b>#4. Not Recognizing The Need To Manage The Transition From FMLA/ADA .....</b>	<b>11</b>
Real World Case Study:.....	12
Mike’s case study proves the point: .....	12
<b>#5. Skipping The Determination Of Whether The Employee Really Is A Qualified Individual With A Disability.....</b>	<b>13</b>
Let’s try to understand this from June’s case study. ....	14
Here is the solution.....	14
Let’s refer back to the definition of Quality Individual With a Disability .....	14
The answer is tricky - “Not if June keeps extending it!” .....	14
<b>#6. Not Maintaining Appropriate Documentation Confirming The Employer Engaged In A Good Faith Interactive Meeting With The Employee .....</b>	<b>15</b>
Let’s try to understand what is a Good Faith Interactive meeting. ....	15
<b>#7. Not Maintaining Appropriate Documentation That An Objective Undue Hardship Analysis Was Conducted If Denying An Accommodation .....</b>	<b>17</b>
What is Undue Hardship? .....	17

<b>#8. Not Consistently Applying The Company’s Policies And Procedures When Managing Performance-related Issues For FMLA, ADA, On-the-job Injuries, And Pregnancy Disability Protected Employees ...</b>	<b>18</b>
<b>#9. Not Investigating Harassment, Discrimination, And Retaliation Complaints Of An Employee Protected Under These Regulations (As Well As Complaints Made During Counseling Sessions That Were Not Previously Mentioned).....</b>	<b>20</b>
<b>#10. Failure To Listen .....</b>	<b>21</b>
<b>Leave Management Solution is At The Forefront of Helping HR Managers And Their Employers Remain Compliant And Worry Free.....</b>	<b>23</b>
Free Discovery Consultation .....	23
Membership .....	23
Online coaching and mentoring .....	24
<b>Live Workshop:</b> A Road Map to California Medical Leaves and Accommodations.....	24
<b>Clients Are Raving About It .....</b>	<b>25</b>

## About The Author

Speaker, Beth Brascugli De Lima, M.B.A., SPHR-CA, SHRM-SCP is founder, president, and principal of HRM Consulting, Inc., a California-based human resource consulting and training firm.

Ms. De Lima has extensive experience in all areas of employment regulation compliance including the Americans with Disabilities Act (ADA), Fair Employment and Housing Act (FEHA) Family Medical Leave Act (FMLA), California Family Rights Act (CFRA), Pregnancy Disability, PDL and Workers' Compensation. Ms. De Lima is a recognized expert regarding Medical Leave Management employment regulation compliance, specifically on HR Industry Standard of Care as it relates to Integrated Medical Leave and Accommodation Challenges and provides expert testimony for both plaintiff and defense regarding Human Resource Best Practices and Standards of Care. Ms. De Lima has been providing corporate consulting, training, and Expert Witness testimony on a national basis since 1993.



For more information, visit: [www.leavemanagementsolutions.com](http://www.leavemanagementsolutions.com)



The use of this seal confirms that this activity has met HR Certification Institute's® (HRCI®) criteria for recertification credit pre-approval.

HRM Consulting, Inc / Leave Management Solutions, LLC, are recognized by SHRM to offer Professional Development Credits (PDCs) for the SHRM-CP® or SHRM-SCP®.

This program is valid for 12 PDCs for the SHRM-CP® or SHRM-SCP®. For more information about certification or recertification, please visit

[www.shrmcertification.org](http://www.shrmcertification.org).

# Introduction

Since my early years, I have been travelling the length and breadth of the country, training HR professionals in these complex regulations. ***After 28 years and training thousands of HR folks, I noticed a strange pattern.*** During the session breaks, attendees often asked nearly the same kind of questions.

Even after having all this incredible information, something was missing. HR pros were still struggling to implement Medical Leaves and Accommodation in their organization efficiently. It was crystal clear that *information alone was not going to be enough.*

They needed something much more than information.

The need of the hour was a *System...*

A **system** that is easy to follow.

A **system** that is practical and devoid of legalese.

A **system** that is built upon the foundation of HR standards of care.

A **system** that encapsulates both Federal and California specific regulations.

It was something on the lines of - “give a man a fish and you feed him for a day; teach a man to fish and you feed him for a lifetime.”

In other words, instead of troubleshooting and solving the challenges of HR professionals, why not give them a **system** they can use to solve their problems themselves?

The answer came in the form of the Integrated Medical Leave and Accommodation Management System™ and the Compliance Blueprints™

You'll soon learn more about this unique methodology but first, let us dive right into the 10 deadly mistakes.

Thanks,

The Leave Management Solutions Team/  
Beth De Lima, MBA, SPHR-CA, SHRM-SCP

# #1. Incorrectly Calculating The Normal Work Week For FMLA/CFRA And PDL

...and not keeping track of all actual intermittent leave used, including for exempt employees.

**When you are calculating normal work week, one size-fit-all approach doesn't work.**

Work schedules vary, and not all “normally scheduled work weeks” are 40 hours per week. When leave is taken in less than one-week increments, as in a reduced work schedule or intermittently, you need to determine the Normal Work Week, including for salaried/exempt employees.



**When calculating the Normal Work Week, you need to include:**

- Mandatory overtime
- Actual hours worked (an average over the last 12 months immediately prior to the start of the leave)
- Estimated average weekly work hours for exempt employees, as agreed between the supervisor and the employee

Which means:

An employee who works 32 hours a week has 384

An employee who works 40 hours a week has 480

An employee who works 50 hours a week has 600 total hours of FMLA/CFRA leave (same for PDL;  
50 x 17 1/3 weeks for PDL)

## #2. Retroactively Designating Leave When The Employer Failed To Provide The Eligibility Or Designation Notice Within Five Days

Under the Family and Medical Leave Act (FMLA), eligible employees can take up to 12 weeks of job-protected, unpaid leave. Remember, the clock starts ticking on the day of the first absence, not the date on which you officially notify employees that their leave falls under the FMLA.

Your job as an HR manager is to temporarily designate the FMLA/CFRA leave if you believe it qualifies as a Serious Health Condition, pending receipt of the medical certificate.

Employees do not get to choose to use or not use FMLA/CFRA unless the employer has a specific policy allowing them that option. (Remember you cannot require the employee to fill out the federal DOL FMLA forms in CA.)

Your employer has the right and the obligation to designate leave as FMLA/CFRA!

The employer is obligated to send the Designation Notice confirming leave within five business days from receipt of sufficient information to determine qualifying leave.

SO

Temporarily designate the FMLA/CFRA leave if you have enough information to believe the employee has a qualifying Serious Health Condition, pending receipt of the medical certificate,

THEN

Once you have received the medical certificate you will formally designate the leave, including any conditionally granted leave as FMLA.

OR

The employer should send an eligibility notice indicating the reasons for not granting leave.

HOWEVER

Don't RETROACTIVELY designate leave to the first-day leave began IF you have not sent the Eligibility and/or Designation Notice on time. Instead, FMLA/CFRA leave will start the date you send the notice if you missed the five-day deadline.

### #3. Allowing An Employee To Exceed The Parameters Of Their Existing Medical Certificate Leave Schedule



Whether you like it or not, some employees treat FMLA like a blank check to get leaves whenever they want.

**When you allow an employee to exceed the parameters of their existing medical certificate leave schedule, you are unknowingly encouraging intermittent leave abuse.**

First, let's try to understand the law:

---

Employers are not required to protect time off under FMLA that is not supported by a medical certificate.

**Here is the step-by-step process prevent intermittent leave abuse:**

1. Request the employee to “cure” his medical certificate and confirm the need for additional time off. The employee gets seven days to cure the FMLA medical certificate under FMLA.
  - a. If the employee informs you within seven days of the curing notification that he needs more time, he can receive an additional SEVEN days.
2. If the employee does not return the “cured” medical certificate within the extended seven-day period, you can deny them protection under FMLA for the time not “cured.”
3. If the employee decides to change his mind and take the time to cure the FMLA medical certificate, you then retroactively protect the FMLA leave that was previously denied and count it toward the yearly FMLA total. This should result in the employee exhausting FMLA sooner.

Post 7/7 days, a company representative, not the employee’s supervisor, can speak to the employee’s health care provider with employee’s permission/HIPPA form signed. Then, you can deny the excessive FMLA leave if the employee is not curing the leave by providing an updated medical certificate. If the employee does not provide a cured FMLA medical certificate, move forward with the ADA Good Faith Meeting process.

## Do Not Forget the ADA

If you deny the exceeded leave time under FMLA (because the employee did not cure the certificate,) you will need to engage the employee in the interactive process under the ADA to determine if it is an undue hardship. Remember, when FMLA ends, ADA begins.

## #4. Not Recognizing The Need To Manage The Transition From FMLA/ADA



**Perhaps, this is the most common and costliest mistake made. A California case highlights the point.**

A California jury, finding that her former employer had violated the ADA, awarded a former drug addiction counselor more than \$4.5 million in damages. In this case, the Human Resource (HR) manager thought the employer had satisfied its medical leave obligations by complying with FMLA but did not account for potential accommodations under the American With Disabilities Act (ADA) or FEHA.

Unless the employee is determined to not be a Qualified Individual with a Disability or it is an undue hardship to accommodate the employee, always take ADA into account.

**Remember the golden rule** - When FMLA ends, ADA begins (including with workers' compensation, and when PDL is exhausted,) all the time, every time.

Let's try to understand this with regards to a real-world case scenario.

## Real World Case Study:

### The Employer's Obligations Concerning Workers' Compensation And ADA

Mike is a full-time employee who was injured and is now going to be on Workers' Compensation leave for more than three months. His employer has not yet designated FMLA for this medical leave. What are the employer's obligations concerning Workers' Compensation and the ADA?

If Mike has a need to leave for his own Serious Health Condition (SHC), FMLA will apply if he is eligible.

The FMLA and Workers' Compensation run concurrently. The only scenario it doesn't run concurrently is if the employer has a union contract that prohibits that.

***The FMLA compliance obligations start the day the employer is aware the employee may be eligible. It also means that even if the supervisor is aware and HR isn't.***

Moreover, when FMLA ends, ADA begins EVEN with Workers' Compensation.

Once FMLA is exhausted, you will need to engage the employee in the interactive process under the ADA to determine if it is an undue hardship to provide the additional leave days required under Workers' Compensation as an accommodation under ADA. The employee will need to provide a medical certification confirming the need for the leave as an accommodation.

And that the leave will allow Mike to return to work on the date identified by the medical provider. Then he will be able to perform the essential functions of their job once the need for leave has expired.

## Mike's case study proves the point:

After the FMLA has expired, the ADA process begins, all the time, every time, no matter what, until you determine the employee is not a Qualified Individual with a Disability or it is determined to be an undue hardship to accommodate.

## #5. Skipping The Determination Of Whether The Employee Really Is A Qualified Individual With A Disability



**This may sounds obvious but many HR professionals skip this vital step.** You can avoid a lot of heartbreak in the future if you determine this early on.

First, let's try to understand what 'A Qualified Individual with a disability' actually means:

**A *qualified individual with a disability*** is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.

Now here is when the complexity arises.

Suppose you have an employee with an unpredictable absence. And they have no way of confirming if or when they would be able to return to work and perform the Essential Functions. What do you do?

## Let's try to understand this from June's case study.

June turned in a medical certificate stating she needed to be off work for 30 days. At the end of 30 days, there was another doctor note continuing the absence for another 30 days. This cycle is now continued for another two months, with no apparent end. What can you do?

## Here is the solution

If eligible, June is protected under FMLA for up to 12 weeks per annual 12-month period. In the case of June the FMLA leaves are exhausted, hence the ADA begins. If June is unable to provide a valid return-to-work date, she may not be a Qualified Individual with a Disability.

## Let's refer back to the definition of Quality Individual With a Disability

The Qualified Individual with a Disability must be able to perform the essential functions of the job with the accommodation.

Now ask yourself this question - "Does the leave accommodation allow an opportunity for June to return to work and perform the Essential Functions the end of the leave?"

## The answer is tricky - "Not if June keeps extending it!"

And this simplifies your problem, isn't it?

It's SIMPLE - You are not required to accommodate unpredictable or unreliable attendance.

---

CAUTION: it is very important to fully explain this to the employee and document it during the Good Faith Interactive Meetings. You must also document the objective Undue Hardship Analysis process.

An employer must determine if the individual's medical condition meets the ADA definition of "disability" and they are a Qualified Individual with a Disability.

## #6. Not Maintaining Appropriate Documentation Confirming The Employer Engaged In A Good Faith Interactive Meeting With The Employee

***OR there is a failure to engage the employee in a Good Faith Interactive Meeting (Hint - emails do not qualify as Good Faith Interactive Meetings).***

**The cost of ignoring the Good Faith Interactive Meeting can be huge.**

A California school district will pay more than \$200,000 to a teacher who alleged that the district failed to provide reasonable accommodation for her disability. The California Department of Fair Employment and Housing (DFEH) [settled with the district](https://hrwatchdog.calchamber.com/2018/04/quick-meeting-not-good-faith-interactive-process/) after finding cause to believe that a violation of the Fair Employment and Housing Act (FEHA) occurred. (Source: <https://hrwatchdog.calchamber.com/2018/04/quick-meeting-not-good-faith-interactive-process/>)

**When employees have disability-related restrictions, the law requires an interactive process, and that process is more than just a short meeting.** This includes having clear records of attempting to/or providing effective reasonable accommodation(s) to disabled employees.

### Let's try to understand what is a Good Faith Interactive meeting.

A Good Faith Interactive Meeting is a step-by-step process between the employee and the employer (usually HR) of:

1. Identifying the Essential Job Functions
2. Analyzing the standard method of performing the Essential Job Functions
3. Determining whether the employee's mental or physical disability impacts their ability to perform those standard methods

4. Evaluating the potential accommodations recommended by the employee, supervisor or person most knowledgeable about the job, as well as both the employee's and the employee's medical provider's recommendations, as well as the research HR performed;
5. Discussing all of this interactively with the employee;
6. Determining an agreed-upon accommodation or further clarifying additional research until a conclusion can be reached regarding whether there are any accommodations that could be made.

Engaging in such an interactive process helps organizations identify reasonable accommodations to offer to their employees.

Document the Good Faith Interactive Meeting and have the employee, and everyone in attendance, sign an acknowledgment that interactive meeting notes are taken are accurate.

The documentation will be important evidence that the employer engaged in an “interactive process” and acted in good faith. Document your research to attempt to identify accommodation.



## #7. Not Maintaining Appropriate Documentation That An Objective Undue Hardship Analysis Was Conducted If Denying An Accommodation

A disabled employee asks her employer for an accommodation. After engaging in the interactive process, it becomes clear that the accommodation requested is going to be challenging. The good news is an employer can say “no” to an accommodation request because it creates an undue hardship.

### What is Undue Hardship?

Undue hardship is an accommodation action that causes substantial difficulty or expense on the employer when assessed in view of several factors. Under the Americans with Disabilities Act, covered employers have no responsibility to make accommodations for persons with disabilities if said action would impose an undue hardship on the employer’s business operations.

An Undue Hardship Analysis allows an objective evaluation of the organization’s ability to accommodate the method in which the essential functions are performed.

This includes evaluating tools, equipment, and methodologies, as well as reduced work schedules and leave, company policies, or even transferring employees to alternative positions AND the impact any accommodation would have.

Once you have worked with the employee, using the employee’s job description, to determine the suggested accommodations, it is time to determine if any of those potential accommodations are an undue hardship for the employer to accommodate.

It is important to ensure you are very clearly and precisely documenting how and why the employer is impacted by the accommodation and why the accommodation(s) would be an undue hardship, with solid, objective data to support it.

**Remember, Undue Hardship is your employer’s protective shield. A failure to appropriately document Undue Hardship Analysis can cause serious liability for your organization.**

## #8. Not Consistently Applying The Company's Policies And Procedures When Managing Performance-related Issues For FMLA, ADA, On-the-job Injuries, And Pregnancy Disability Protected Employees

When an employer takes an adverse action against an employee on FMLA leave, the Department of Labor takes the position that it becomes the employer's burden to prove that the employee would have been disciplined or terminated regardless of the request for, or use of, FMLA leave.

**Hence it is extremely vital for you to hold employees accountable for performing Essential Functions of their job.** You need to ensure that they comply with the company policies and regulations.

A plan wherein the employee feels some degree of ownership is more likely to be accepted than a plan that is imposed.

**Under ADA, FMLA, PDL, and Workers' Compensation, this is a FORMAL discussion to:**

- CLARIFY expectations;
- DEFINE how an employee has been performing on the job; and
- GUIDE improvement of his or her performance!

Always ask - *"Is there anything I should know that is impacting your ability to perform the functions of your job?"*

When an employee is accommodated, it is very important to follow-up weekly, then monthly for at least three months, with BOTH the employee and the supervisor, independently.

This allows you to verify the accommodation is effective in supporting the employee in FULLY performing the essential functions of their job.



Employees are still expected to meet the minimum qualifications of the job, including minimum performance standards (of the Essential Functions,) with the accommodation.

- If they cannot, the accommodation is not working.
- If another accommodation cannot be found that works, including an alternative job position, the employee is not a Qualified Individual with a Disability.

Employers can terminate employees on leave (intermittent, reduced work scheduled) or with accommodations if they discover that an employee has violated company policy or if there is evidence of poor-performance problems, insubordination, prohibited behavior or fraud.

Termination can also happen if it is determined the accommodation does not, in fact, allow the employee to perform the functions of their job and there is no other accommodation available.

**Hence it is extremely vital that employees should participate with their supervisors in the confirmation of the performance goals and performance development plans upon verification of the accommodation..**

## #9. Not Investigating Harassment, Discrimination, And Retaliation Complaints Of An Employee Protected Under These Regulations (As Well As Complaints Made During Counseling Sessions That Were Not Previously Mentioned)

The best-drafted policies are meaningless unless you have an investigation protocol in place that mandates a prompt and thorough investigation of any complaints of harassment, discrimination, and retaliation.

Any such complaint must serve as a warning sign.

The experience of an employee bringing up a medical issue during performance management, suspension, or termination meetings is not uncommon. If an employee identifies disability, harassment, retaliation, discrimination, or even a hostile work environment as a reason for their inability to perform the functions of their job, and this has led to potential personnel action, an investigation is mandatory.

- Retroactively review suspensions, terminations, and performance write-ups.
- If it is determined the employee's (supervisor/HR) did not comply with your companies' policies and procedures for responding to and implementing these regulations, rescind any relevant impacts to the employee.
- Document, document, document and record all conversations regarding the organization's efforts to help the employee gain access to the protection of these regulations.

You need to start looking at rescinding previous counseling, performance write-ups, or other personnel actions related to lack of performance once the employer knew or should have known about the potential need for an accommodation.

This because more important if you determine that the employee had provided enough information that the employer knew, or should have known about a potential disability, and the employer did not respond.

**Remember, an inadequate investigation can hurt worker morale and expose your employer to litigation. On the other hand, a thorough investigation can help to alleviate office tension and may shield your company in the event of a lawsuit.**

## #10. Failure To Listen



**Last but not the least - Employees will hold you responsible for how they feel about their jobs.**

As Roy E. Moody says, “The greatest motivational act one person can do for another is to LISTEN:”

Be sure to listen to your employee. Don’t err on the side of the Workers’ Compensation Insurance Company or your Third Party Administrator.

**ALWAYS ask the employee** - *“Is there anything impacting your ability to perform the essential functions of your job?”*

If the answer is yes, it is your job to be the advocate for the employee, in compliance with the company’s policies and state and federal regulations.

---

When in doubt - ERR ON THE SIDE OF THE EMPLOYEE

# Leave Management Solution is At The Forefront of Helping HR Managers And Their Employers Remain Compliant And Worry Free

Here Are A Few Ways We Can Help You Navigate You Through The Complex World Of Managing Medical Leaves And Accomodations

## Free Discovery Consultation

Want to take the confusion and stress out of Medical Leaves/Accommodations?

Schedule a [30 minute Discovery Consultation](#) so you can determine the tools, coaching, and consulting to fit your needs.

## Membership

Become a member of Leave Management Solutions and start saving time and energy in managing Medical Leaves and Accomodations

1. **Copy/Paste document templates:** A library of the most up-to-date document templates such as forms, letters, checklists, and flow-charts which are 100% compliant to State and Federal laws.
2. **Weekly coaching calls:** Receive weekly coaching and mentoring on the most nagging issues in managing Medical Leaves and Accommodations by none other than Beth herself
3. **Membership privileges:** Get special membership privileges such as special discounts, priority access to our products and services.

### Online coaching and mentoring

HRCI/SHRM-certified credit meetings the second and fourth Wednesday of every month for  
timely answers to your most pressing questions and best practice  
leave/accommodation  
guidance and tips.

### Live Workshop: A Road Map to California Medical Leaves and Accommodations

Discover the methodology for integrating medical leaves and accommodations efficiently and effectively implementing multiple state and federal regulations with your company policies, procedures, and union contracts.

This two-day interactive “In the Trenches” workshop is ideal for HR professionals who are:

- Concerned about the ever-changing compliance requirements of FMLA/CFRA, ADA/FEHA, PDL and Workers' Compensation
- Seeking proven strategies for handling related performance management and harassment, discrimination and retaliation challenges
- Interested in saving time and money
- Ready to reduce their stress by being trained on the latest HR industry standards of care

As an added bonus, you'll learn how to handle performance management issues for employees on intermittent or ongoing medical leaves and accommodations, and the tricky (correct) responses to related harassment, discrimination, and retaliation complaints.

**JOIN THE WEBINAR NOW**

## Clients Are Raving About It

**“Nobody can make this topic as approachable as Beth does.”**

Beth’s advice is more practical and useful on a day-to-day basis. It’s as if you talk to a chef who gives you a recipe. Beth gives her input from her 25 years of experience in this field. She is asked by the attorneys to speak on this topic and uniquely qualified to talk on this subject. She weaves the subject with real-world stories you can relate to. Nobody can make this topic as approachable as Beth does.

Human Resource Consultant

**“Beth’s approach is easy to understand, comprehensive, and enlightening.”**

Anyone who needs to administer leaves of absence for their company should attend this workshop. Beth’s approach is easy to understand, comprehensive, and enlightening. Participants indeed obtain everything they need to administer leave of absence policies and procedures to staff after attending this workshop. Furthermore, Beth offers one-on-one guidance following participation in the seminar through her website, discussion groups, and posts. She is extremely knowledgeable, and this information is an extremely critical part of the human resources function.

Human Resource Consultant – Next Level Strategy

**“She was not only able to assist us with avoiding a discrimination lawsuit; she was able to do so with great efficiency and professionalism.”**

Ms. De Lima exceeded all of my expectations for our debacle. She was not only able to assist us with avoiding a discrimination lawsuit; she was able to do so with great efficiency and professionalism. In less than two weeks from our initial contact, we were able to have our issue resolved satisfactorily for both parties. The process was quiet, quick and smooth. Ms. De Lima was a delight to work with – extremely professional, bright and to the point. If we were to encounter another similar type of situation, she would be my first call.

**“Incredibly valuable and immediately applicable.”**

WOW! This was such a good seminar on leave management. Incredibly valuable and immediately applicable. [Beth] intensively dives into FMLA/ADA process step by step, very useful.

HR Associate, Cumulus Networks

## Contact Information

Leave Management Solutions, LLC

PO Box 2625/304 East Highway 4

Murphys, CA 95247

866-838-7188

[info@leavemanagementsolutions.com](mailto:info@leavemanagementsolutions.com)

[LeaveManagementSolutions.com](http://LeaveManagementSolutions.com)

Copyright HRM Consulting, California, 2019. All Rights Reserved.

Copyright 2013-Present Wolf Creek Holdings, LLC. Used under license by Leave Management Solutions, LLC

