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- Equity partner with Laner Muchin in Chicago.
- Legal practice is concentrated in handling a variety of employment and traditional labor matters and disputes, as well as collective bargaining negotiations, on behalf of management.
- Advisory Council Member and presenter for the Illinois Restaurant Association and an active member and presenter on behalf of the Illinois Hotel & Lodging Association.

A photograph of the Houston skyline, featuring several prominent skyscrapers. In the foreground, there is a river with a bridge and some greenery. The image has a semi-transparent overlay.

# A Discussion of Recent ADA and FMLA Cases and Their Practical Implications

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0 - HOUSTON

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# DOL Agency Update

- DOL FMLA Opinion Letters:
  - 1.) An employee may qualify for FMLA leave after donating an organ. (Aug. 28, 2018.)
  - 2.) An employee's attendance points under a no-fault attendance policy can be "frozen" during the leave. (Aug. 28, 2018.)
  - 3.) Employees may not decline FMLA leave nor can they choose how they want the leave to be classified. Employers must not delay the designation of FMLA leave. (Mar. 14, 2019.)

# EEOC Agency Update

- EEOC: Recovered \$505 million and filed 199 merit lawsuits, 84 based on disability, in the FY 2018.

# How Much ADA Leave is Required?

- Courts have ruled differently as to whether long-term or indefinite leaves of absence are reasonable accommodations. Need to know the jurisdiction you are in and the facts of the particular case.
- In *Heartland v. Severson*, the Seventh Circuit held on the facts at hand that a long term or undefined leave of absence is not a reasonable accommodation. 872 F.3d 476, 482 (7th Cir. 2017).
- By contrast, other courts have found an accommodation is reasonable based on whether it is an undue hardship, regardless of length. See *Estep v. Forever 21 Retail, Inc.*, (D. Or. Nov. 13, 2018).

# How Much ADA Leave is Required? (cont'd)

- In *EEOC v. Midwest Gaming*, a district court in Illinois held that, despite *Severson*, it is still a fact-specific assessment regarding whether a leave is a reasonable accommodation. *EEOC v. Midwest Gaming & Entm't, LLC*, No. 17 C 6811 (N.D. Ill. May 25, 2018).
- **Takeaway:** Reasonableness of long-term absences are still a case-by-case analysis.

# Is Obesity a Disability Under the ADA?

- Historically, courts and the EEOC have stated that obesity is generally *not* a disability.
- However, the Northern District of Illinois held that employers could still be liable if they “regard” an obese applicant as disabled. See *Shell v. Burlington Northern Santa Fe Railway Company*, No. 15-cv-11040 (N.D. Ill. Mar. 5, 2018).
- **Takeaway:** Obesity is still typically not a disability, but making employment decisions based on perceived health complications associated with obesity could violate the ADA.

# How Does an Employer Know An Employee Needs FMLA?

- Employees do not need to expressly assert FMLA rights. 29 CFR 825.301.
- Some notice is still required. Where an employee was diagnosed with a condition seven years ago, the employee still needs a showing of a “serious health condition.” *Guzman v. Brown Cty.*, 884 F.3d 633 (7th Cir. 2018).
- Where an employee submitted a counseling letter recommending leave but failed to follow her employer’s medical certification requirements, no violation of the FMLA occurred. *Dulany v. Brennan*, 736 Fed.Appx. 199 (10th Cir. 2018).



# Requiring Notice for Returning from FMLA Leave

- Employees do not have to return to work when cleared for light-duty if they have FMLA leave remaining.
- However, employers may require employees to notify the employer of the employee's intent of returning. *Stein v. Atlas. Indus.*, No. 17-3737 (6th Cir. Apr. 9, 2018).
- **Takeaway:** Implement notification procedures for employees returning from FMLA.



Thank You