**NEUTRAL ABSENCE CONTROL POLICY**

An absence control policy that is neutral on its face (otherwise known as a "facially-neutral absence control policy") can sometimes help in situations with employees who miss so much time from work that their work is simply not getting done, and the work of the entire department or even company can be delayed. In such cases, having a neutral absence control policy can sometimes help. The idea is to set an outside limit on the overall amount of absenteeism that an employee can have before being subject to being replaced due to unavailability for work. The neutrality of the policy can help an employer demonstrate that if an employee out on potentially job-protected leave is replaced, the work separation had nothing to do with whatever caused the leave to occur, but rather had to do with the limit being reached under the policy. There are certain things that should not be counted toward such a policy, such as military leave, [jury duty](http://www.twc.state.tx.us/news/efte/jury_duty.html), witness duty, time spent voting (up to two hours per election), and time missed from regular or alternative duties for work-related medical examinations or care (that is work time). Moreover, few policies are exception-proof, and this is one such policy. Special situations exist in which a company might need to take extra care. For example, the [FMLA](http://www.twc.state.tx.us/news/efte/family_and_medical_leave_act_fmla_.html)prescribes up to twelve weeks of job-protected leave for eligible employees of covered employers. Employers with 15 or more employees are covered by the [ADA](http://www.eeoc.gov/laws/types/disability.cfm) and may need to allow more time for employees with disabilities than normally provided under the policy if to do so would be a reasonable accommodation for such employees.

Case law generally supports the use of neutral absence control policies. In the area of workers' compensation, in which avoidance of retaliatory discharge liability under Chapter 451 of the Texas Workers' Compensation Act is of great importance, a leading case is *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994) ("Uniform enforcement of a reasonable absence-control provision, like the three-day rule in this case, does not constitute retaliatory discharge."). Under the ADA, which can require extended leave if such an accommodation is "reasonable", i.e., can be made without undue hardship to the business, an important case for Texas employers is the Fifth Circuit's decision in *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) ("... courts are in agreement that regular attendance is an essential function of most jobs.") The court in *Hypes* concluded that when attendance in the workplace is necessary for productive work to be accomplished, an employee who cannot be present at work on a regular basis is "not otherwise qualified" to perform the job. Similarly, the Fifth Circuit ruled in 2003 that "[re]porting on time and regular attendance is (*sic*) an essential function of any job." (*Smith v. Lattimore Materials Co.*, 287 F. Supp. 2d 667, 672 (E.D. Tex.), affirmed, 77 F. App'x 729 (5th Cir. 2003)). See also *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), citing the Fifth Circuit's *Hypes* decision with approval and collecting similar cases from other circuits. Still, in *Carmona v. Southwest Airlines*, 2010 WL 1010592 (5th Cir. 2010), even though a disabled employee missed 33% - 50% of the workdays in each month, he was able to prevail on his ADA claim due in part to evidence that his job involved flexible scheduling and that other employees had been treated more favorably under the employer's point-based attendance policy than he had been. As these cases show, each case is different, and slight differences in facts can sometimes produce vastly different outcomes. Ultimately, application of a neutral absence control policy is a balancing act that requires an equal mix of consistency, discernment, and readiness to be flexible when needed. Without a doubt, any employer with a case like this involving any kind of leave protection law should seek the counsel of an experienced employment law attorney prior to taking adverse action against an employee.

(Suggestion: if adopted, this policy may be titled something like "Limitations on Leaves of Absence". The period of six months is not any kind of requirement, but is only an example. Courts have found in favor of employers in cases involving periods as short as several weeks, and in the *Carrozzo* case cited above, the neutral policy that supported a finding of non-discrimination under Chapter 451 was a three-day no-call, no-show rule.)

**LIMITATIONS ON LEAVES OF ABSENCE**

With the exception of leaves of absence for military duty, no leave of absence, by itself or in combination with other periods of leave, may last longer than six months. Any employee who for any reason or combination of reasons misses a total of six months of work in a twelve-month period, or a total of nine months of work in an eighteen-month period, will be separated from employment due to unavailability for work, subject to any reasonable accommodation duties the company may have under the ADA or similar law. Any employee so separated will be eligible for rehire and will be able to apply for any vacancies that may exist at any given time, depending upon qualifications and availability of job openings.