



HR's Guide to Leave Laws: Simplifying ADA, FMLA & Workers' Compensation

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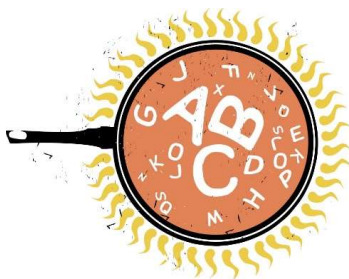
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Leave Compliance Alphabet Soup

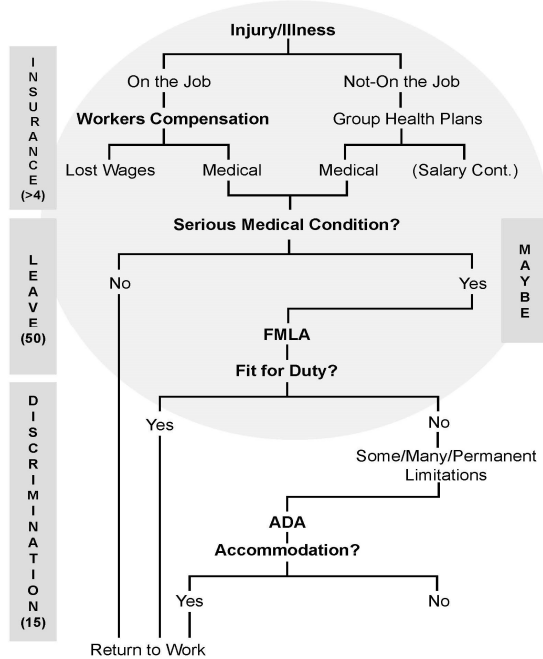
FMLA

ADA



Worker's Compensation





What Protections Are Provided by Each

» FMLA –

- » This law offers employees up to 12 weeks of job protection.
- » It also prohibits employers from discriminating or retaliating against an employee for taking FMLA leave.

» ADA –

- » The ADA is an anti-discrimination statute that also requires employers to take affirmative steps to offer disabled workers reasonable accommodations.

» Worker's Compensation –

- » Provides compensation for injured employees at work.
- » Do worker's compensation laws offer employees job protection?





The Family Medical Leave Act: Refresher

- » Provides up to 12 weeks of unpaid leave (26 weeks for military caregiver leave).
- » Right to continue health insurance benefits with employee paying the same premiums as active employees.
- » Right to reinstatement.

The Family Medical Leave Act: Refresher

◆ Covered employers

50 or more employees (total) during 20 or more weeks of the current or preceding calendar year.

◆ Covered employees

Worked total of 12 months (need not be consecutive).

AND

Worked at least 1,250 hours during the preceding 12 months.

◆ Up to 12 weeks

- » Birth or care of newborn.
- » Adoption or foster care.
- » Family member with serious health condition.
- » Employee's own serious health condition.
- » "Qualifying exigency" arising out of the employee's parent, child, or spouse called to active duty.

◆ Up to 26 weeks

- » Care for a family member who has incurred an injury/illness while on military duty.



Common FMLA Pitfalls

- ◆ Failing to designate leave period.
- ◆ Failing to notify employees of their FMLA rights.
- ◆ Granting FMLA leave to ineligible employees.
- ◆ Misunderstanding of what qualifies as a serious health condition.
- ◆ Inconsistent treatment of employees.
- ◆ Disciplining or terminating employees after a medical disclosure or FMLA request.
- ◆ Failure to recognize a reasonable accommodation request.
- ◆ Failure to engage in and document the ADA interactive process.
- ◆ Failure to train managers on FMLA and ADA.



Employer Notice Requirements

- » FMLA poster.
- » Electronic posting of poster.
- » Handbook or if no handbook a general notice to new hires.
- » Multilingual requirement.
- » Eligibility Notice.
- » Rights & Responsibilities Notice.
- » Designation Notice.



Eligibility Notice

- » When an employee requests FMLA leave or when an employer acquires knowledge that an employee's leave may be for an FMLA reason, the employer must notify the employee of his eligibility to take leave within five business days, absent extenuating circumstances.



Employee Notice Requirements

- » Employee may be required to comply with the employer's usual notice & call-in procedures (e.g., employee to contact a specific individual).
- » Scheduling planned medical treatment - when planning medical treatment, employee must consult with employer & make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operation (subject to the HCP's approval).



Notice of Unforeseeable Leave

- » Employee must provide notice to employer as soon as practicable under the facts & circumstances.
- » Employer's usual & customary notice requirements are applicable (e.g., call to a designated number or individual, or written notice).
- » If extenuating circumstances exist, employee need not follow these customary notice requirements.



Health Care Provider Certification

- » Make request within 5 business days from time employee gives notice of leave.
- » If leave is unforeseeable, employer should request it within 5 business days of the commencement of leave.
- » Employee must submit within 15 calendar days of the request unless such is not practicable (employers can have a longer deadline).
- » At the time the employer requests certification, it must also advise an employee of the anticipated consequences should the employee fail to provide an adequate certification; it is important to put this in writing so the employer can show the employee was advised of the consequences of the failure to turn in the certification in a timely manner.



Health Care Provider Certification

- » Employee cannot be required to grant consent allowing employer to communicate directly with physician.
- » Obtaining a completed HCP form is the employee's responsibility.
- » Employer (HR or Company nurse) (not employee's direct supervisor) may contact HCP for authentication or clarification purposes only.



Health Care Provider Certification

- » Employer (not employee's direct supervisor) may contact HCP for authentication or clarification purposes.
 - » Authentication – providing the HCP with a copy of the certification & requesting verification that the information contained on the certification form was completed &/or authorized by the HCP who signed the document.
 - » Clarification – contacting HCP to understand handwriting on medical certification or understand meaning of a response.



Return to Work

- » As a general rule, an employee is entitled to be returned to the same or an equivalent position.
- » Equivalent position
 - » Virtually identical (duties, pay & working conditions).
 - » Excludes bonuses like perfect attendance, production/safety bonus unless paid to employees on non-FMLA.
 - » If an employee who used paid vacation leave for a non-FMLA purpose would receive a bonus payment, then the employee who used paid vacation leave for an FMLA protected purpose also must receive the payment.
 - » However, if an employer counts unpaid leave against attendance bonuses, the employer may deny the bonus to an employee who takes a portion, or all, of his/her FMLA leave as unpaid.



Common FMLA Challenges

If an employee mentions a serious health condition and a supervisor/manager does not recognize the time off as FMLA qualified, Employer might be found to violate the FMLA. Employers who discipline or retaliate against an employee for absences that should be counted as FMLA absences will be found non-compliant with the FMLA and will be liable for all penalties and fines.



Common FMLA Challenges: Exhaustion of PTO Before Using FMLA

Common Scenario:

Employee requests FMLA leave while she has available PTO time. Employer informs the Employee that she cannot take FMLA leave until she has used all of her vacation, sick, and other paid time off (PTO).

Result: Employers cannot require this. Instead, employers can require employees to use their accrued PTO concurrently with their FMLA leave time in order to get paid. Employers can also count worker's' comp or short-term disability leave as part of the employee's FMLA time – but in that case, employees cannot be asked to use their accrued PTO.



FMLA Leave and No-Fault Attendance Policy

General Legal Principles

- » FMLA prohibits employers from:
 - » “interfering with, restraining, or denying” an employee’s exercise of FMLA rights.
 - » “discriminating or retaliating against an employee ... for having attempted to exercise FMLA rights.”
- » Employers, therefore, cannot consider “FMLA leave as a negative factor in employment actions” and must provide an employee who takes FMLA leave with the same benefits that “an employee on leave without pay would otherwise be entitled to receive.”
- » FMLA leave cannot be counted against employee under a no-fault attendance policy.
- » FMLA does not entitle an employee to superior benefits or position simply because he or she took FMLA leave.



What Happens if FMLA is Exhausted?

- » If the employee does not return to work after expiration of leave for a non-medical reason (i.e., lack of transportation, desire to stay home longer with a healthy newborn), the employer is free to advise the employee that he/she must return to work or be terminated.
- » If the employee does not return to work due to the employee's disability (as defined by the ADA), then a reasonable accommodation may be required (at minimum, the employer must engage in the interactive process with the employee).



Keys for Employers

- » Use proper FMLA forms.
- » Require employees to provide notice.
- » Train HR, managers & supervisors on FMLA.
- » Consistent application.
- » Keep good records.



Honest Belief Defense

FMLA prohibits retaliation against an employee for exercising FMLA rights.

An employer's honest belief that an employee misused FMLA leave can defeat a retaliation claim.

- » Absolute certainty not required.
- » Belief should be in good faith.
- » Conduct a proper investigation.
- » Give employee opportunity to explain.
- » Different judicial circuits apply honest belief defense differently.





Dunger v. Union Pacific Railroad Company (C.D. Cal. 2019)

- » Railroad worker on approved intermittent FMLA leave for hernia/ injuries.
- » On the day he took intermittent leave, his co-worker posted a video of him on a fishing trip on Facebook live.
- » Dunger's boss saw the video; Dunger initially stated he could not recall whether it was him in the video.
- » Employer terminated him.
- » Dunger sued alleging FMLA interference and retaliation.
- » Court ruled in favor of employer on summary judgment.
 - » Concluded the employer had a legitimate basis to conclude that Dunger had dishonestly misused his leave by going fishing.

But Be Careful!!



» **If the FMLA Certification says an employee needs rest and relaxation due to stress, it is consistent with the FMLA certification for the employee to be resting on the beach!**

- Caution: if employers are hostile when they suspect misuse of FMLA, employees can get defensive and suspicious, which can lead to lawsuits.
- Massachusetts jury awarded \$2 million to an employee accused of FMLA abuses because the employer did not investigate in good faith - it started its fact finding with a “presumption of wrongdoing.”
- *DaPrato v. Mass. Water Res. Auth., No. SJC-12651, 482 Mass. 374 (June 5, 2019).*





Americans with Disabilities Act: Refresher

- ◆ Prohibits discrimination based on disability.
- ◆ Must be able to perform essential functions of job with or without a reasonable accommodation.
- ◆ Applies to all terms and conditions of employment.
- ◆ Applies to applicants for employment (if a hearing-impaired applicant needs an interpreter for an interview, the interpreter must be provided).

Defining Disability: the ADA's 3-Pronged Approach

- » **Prong 1: An Actual Disability**

- » Physical or mental impairment that substantially limits one or more major life activities.
- » This is the ADA issue most commonly encountered.

- » **Prong 2: A Record of Disability**

- » History of impairment.

- » **Prong 3: "Regarded As" Having A Disability**

- » "Perceived as" having a disability.
- » Disability is to be construed in favor of broad coverage of individuals to the maximum extent permitted under the ADA.



Who is Protected?

Americans with Disabilities Act (ADA)

Qualified Individuals with Disabilities:

- » Cannot be discriminated against in any aspect of employment.
- » Cannot be retaliated against.
- » Employee must be provided *reasonable accommodation* unless it imposes *undue hardship* on the employer.



A Qualified Individual with a Disability...

Has a disability as defined by the ADA:

- » Physical or mental impairment that substantially limits one or more *major life activities*;
- » A record of such impairment; or
- » Is “regarded as” having such impairment(s).

Satisfies the skill, experience, education, health, and safety requirements of the position; and

Can perform the *essential functions* of the job with or without *reasonable accommodation*.



“Major Life Activities”

Examples:

- » Caring for oneself.
- » Performing manual tasks.
- » Seeing.
- » Hearing.
- » Eating.
- » Sleeping.
- » Walking.
- » Standing.
- » Lifting.
- » Bending.
- » Speaking.
- » Breathing.
- » Learning.
- » Concentrating.
- » Reading.
- » Thinking.
- » Communications.
- » Working.



The Interactive Process

- » Required even if you believe there is no accommodation that would enable the employee to perform the job.
- » Must be requested by employee or someone on employee's behalf.
- » If the employer knows the employee has a disability that is affecting work, the employer should take the first step in initiating the interactive process.
- » Note that it is essential to engage in the interactive process even if the employee's disability clearly makes them unqualified to perform the essential functions of their position either with or without a reasonable accommodation.



The Interactive Process

- » Employer is obligated to engage in the interactive process by working with the employee to:
 - » Determine limitation.
 - » Assess the need for an accommodation.
 - » Provide a reasonable and effective accommodation.
- » An employer must discuss with a disabled worker what reasonable accommodation(s) will allow that worker to perform essential job functions.
- » Can consist simply of a discussion or series of discussions.



The Interactive Process

Recognize an accommodation request.

1

Gather information.

2

Explore accommodation options.

3

Select an accommodation.

4

Implement the accommodation.

5

Monitor the accommodation.

6



Obligations of Each Party

Employer Responsibilities

- Is individual qualified?
- Does the individual have a covered disability?
- Is a reasonable accommodation possible?

Employee Responsibilities

- Must perform job.
- Must adhere to standards of conduct.
- Must inform employer of need for reasonable accommodation.
- Must provide supporting “relevant” documentation.



Reasonable Accommodations

- ◆ Analysis is fact-specific.
- ◆ Do not have to provide the best or most expensive accommodation.
- ◆ Do not have to create a job.
- ◆ Do not have to lower productivity levels.

» Examples

- ◆ Leave of absence (*** add'l non-FMLA time off, granted after FMLA expires*).
- ◆ Equipment / furniture.
- ◆ Frequent breaks / schedule changes.
- ◆ Work from home.
- ◆ Reassignment.



Reasonable Accommodation

Examples of Reasonable Accommodation:

- » Making existing facilities accessible;
- » Job restructuring;
- » Part-time or modified work schedules (*e.g., leave but not indefinite leave*);
- » Acquiring or modifying equipment;
- » Providing qualified readers or interpreters;
- » Reassignment to a vacant position;
- » Possible use of a service animal or emotional support animal.



Undue Hardship

- » An action requiring significant difficulty or expense considering:
- » Nature and cost of the accommodation;
- » Overall financial resources, number of persons;
- » Employed, effect on expenses and resources, impact on operation;
- » Overall financial resources, size of the business, and number, type, location of its facilities;
- » Type of operation.



Things to Remember

» Recommended Actions:

- » Recognize potential disability.
- » Be aware that any accommodations requested by employees will need to be evaluated for reasonableness.
- » Try to have a standardized process.
- » Engage in an ongoing dialogue as facts change.



Interplay Between Statutes

ADA

- » Leave can be an accommodation under the ADA.

Family and Medical Leave Act (“FMLA”)

- » Covered employees: 12 months’ service and 1,250 hours worked during preceding 12 months.
- » Covered employer: 50+ employees.

Remember...

- » After an employee exhausts FMLA, they may be entitled to additional leave as an ADA reasonable accommodation OR a non-FMLA eligible employee may be entitled to ADA leave as an accommodation.



The Cost of Getting it Wrong

- » Average Cost to Defend an FMLA Lawsuit: \$150,000 - \$200,000
- » Average Cost to Defend a Charge of Discrimination: \$8,500 - \$13,500
- » Average Cost to Settle an FMLA Lawsuit: \$35,000 - \$65,000
- » Average Cost to Settle a Charge of Discrimination: \$ 15,000 - \$30,000

The ADA & FMLA both provide for prevailing party attorneys' fees. That means that a successful claim results in not only the payment of the employee's damages, but also pay the employee's attorney! Attorneys' fees for litigation a case through trial could reach \$100,000-\$150,000.





Worker's Compensation & ADA

A form of insurance providing wage replacement and medical benefits to employees who are injured on the job.

Retaliation against employees who exercise Worker's Compensation rights is prohibited.

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Worker's Compensation - Florida

- » Applies to employers with 4 or more employees
 - » Construction Industry – 1 or more employees
 - » Agricultural Industry – 6 regular employees and/or 12 seasonal employees who work more than 30 days during a season and/or more than a total of 45 days in the same calendar year
 - » Must post a notice advising employees of their rights under the Worker's Compensation statute
- » Incurs an injury/illness that arises out of and in the course/scope of the employment relationship
- » Pre-existing condition that is aggravated or accelerated by workplace



Worker's Compensation

- » What's Required?

- » Leave

- » Medical indemnity & supplemental benefits

- » Can an employee use Worker's Compensation leave to care for others?

- » No

- » Medical examinations/inquiries are permitted to determine compensability of an accident, as well as return to work status (*i.e.*, fitness for duty)



Worker's Compensation

- » Duty to accommodate injury?
 - » Restricted/Light Duty
 - » Reassignment
- » Is light duty only permitted for a worker's compensation injury?
- » Intermittent leave?
 - » No (big distinction)



Worker's Compensation – Return to Work

- » Law does not require employer to hold an employee's job open while out on worker's compensation leave

HOWEVER

- » It is **unlawful** to terminate an employee for exercising their rights under the law
 - » Extends beyond filing a claim
 - » Employee can take steps to pursue a claim without filing (*e.g.*, "I want to submit a worker's compensation claim.")



Worker's Compensation

- » The prohibition of retaliation does not mean that an employee who files a worker's compensation claim can never be terminated.
 - » Ensure that an employee off work due to a work-related injury receives at least the same consideration / accommodations as employees who have missed work for non-work-related injuries.
 - » For example, if an employee with cancer was permitted to take a year of job-protected leave per a company policy or practice, ensure the same accommodation is extended to a similarly-situated employee off work due to a work-related injury.
 - » Fact specific inquiry – are the employees similarly-situated

Production Worker	Company Controller
Easier to guarantee the employee a return to work.	May have business need to hire a replacement and not be able to reinstate.



Key Takeaways

- » Questions regarding the approval of leave are often complicated, so do not rush to a decision, and thoroughly evaluate the request.
- » Document, document, document!
 - » *A best practice is to utilize the same e-mail thread when communicating with an employee regarding requested leave.*
- » Involve Human Resources for guidance and to ensure consistency.
 - » *Note: Many states have additional laws governing employee leave. This training does not include each of these state-specific laws and it is imperative to communicate with HR to ensure compliance from state to state.*
- » When necessary, seek the opinion of employment counsel to ensure compliance.



QUESTIONS



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Thank you!

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