

MANAGING EMPLOYEE REQUESTS UNDER THE ADA AND FMLA

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A TALE OF TWO STATUTES



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THESE STATUTES ARE APPROXIMATELY 25 YEARS OLD.

WHY DO WE STILL TALK ABOUT THEM SO MUCH?

AND WHY DO THEY CAUSE EMPLOYERS SO MUCH GRIEF?!

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ADA CLAIMS CONTINUE TO RISE

From 2003 through 2016, the percentage of disability discrimination claims before the EEOC continued to increase:

2003: **18.9%** of all EEOC charges alleged disability discrimination

2016: **30.7%** of all EEOC charges alleged disability discrimination

Number of claims fell slightly in 2017.

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NE FEPA CLAIMS CONTINUE TO RISE, TOO

From 2003 through 2016, the number of disability discrimination claims before the NEOC has also continued to increase:

FY 2014: 348 charges involving disability as the basis

FY 2015: 389 charges involving disability as the basis

FY 2016: 409 charges involving disability as the basis

FY 2017: 403 charges involving disability as the basis

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FMLA CLAIMS CONTINUE TO RISE

Between 2012 and 2014 alone, lawsuits under the Family and Medical Leave Act jumped over 26%:

2012: 291 FMLA lawsuits

2014: 1502 FMLA lawsuits

2017: 1165 FMLA lawsuits

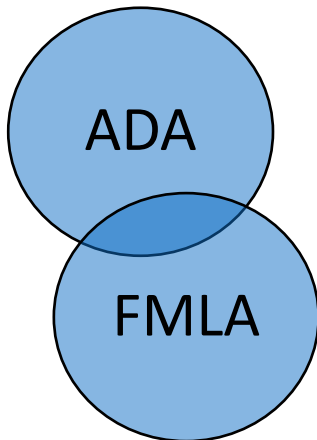
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TODAY'S AGENDA

1. Objectives and Overview of the ADA and FMLA
2. Key Compliance Steps Under Each Statute
3. Strategies for Dealing with Recurring Issues and Problem Areas

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THE DIFFERENT OBJECTIVES OF THE ADA AND FMLA



- ADA: prohibits discrimination against individuals who are “qualified individuals with a disability”
- FMLA: sets leave standards for employees for the birth/care of a newborn child, placement of a child for adoption/foster care, for care of an immediate family member with a serious health condition, and for the employee’s own serious health condition

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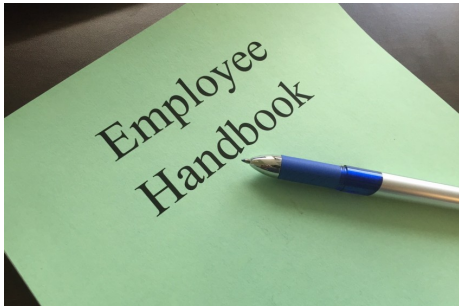
The Americans with Disabilities Act (ADA)	The Family and Medical Leave Act (FMLA)
At least 15 employees*	At least 50 employees*
No eligibility period	Employed for at least 12 months and worked at least 1,250 hours during the prior 12-month period
No specific limit on amount of leave – what’s “reasonable”	12 workweeks of leave in a 12-month period*

NOTE: STATE AND LOCAL LAWS MAY PROVIDE BROADER PROTECTION THAN FEDERAL LAWS

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IS AN EMPLOYER REQUIRED TO HAVE WRITTEN POLICIES ADDRESSING THE ADA AND FMLA?

EMPLOYER POLICIES AND BEST PRACTICES



ADA: written policy *strongly recommended*.

FMLA: *yes*. Employer must post notice that sets forth FMLA rights *and* distribute that notice either through a handbook or other policy guides.

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**MUST THE EMPLOYEE COOPERATE
WITH THE EMPLOYER?**

MUST THE EMPLOYEE COOPERATE?



ADA: **yes.** Employees must cooperate and engage in the interactive process.

FMLA: **yes.** Employers may deny FMLA coverage or continuation of FMLA leave if employees fail to cooperate with medical certification or recertification process.

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MUST THE EMPLOYEE COOPERATE?

Ortiz-Martinez v. Fresenius Health Partners,
853 F.3d 599 (1st Cir. 2017)

- Upon returning from leave for a work-related injury, the employee submitted a form indicating she could return to work with restrictions while she continued with treatment, but did not indicate what specific accommodation(s) were needed.
- The company requested more information regarding the medical restrictions and what specific accommodations were being requested.
- However, the employee failed to provide the requested information and failed to respond to the company's multiple attempts to contact the employee.
- The employee sued for failure to accommodate her in violation of ADA.
- **Failure to cooperate?**

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MUST THE *EMPLOYER* – & *HR* - COOPERATE?

Graziadio v. Culinary Inst. of America,
817 F.3d 415 (2d Cir. 2016)

- Employee sued employer and the HR Administrator under the FMLA.
- *The FMLA permits individual liability.*
- The Court of Appeals remanded the case to the trial court on the employee's FMLA claim, finding there was an issue of fact for the jury on whether the employer and HR Administrator cooperated with the employee regarding the employee's return-to-work date and what information the employee needed to submit, and whether the employer refused to approve FMLA leave.

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**CAN THE EMPLOYER REQUIRE PERIODIC
UPDATES FROM THE EMPLOYEE?**

PERIODIC UPDATES PERMITTED* UNDER THE ADA

An employer may request periodic updates:

- from employees on *open-ended leave* of absence
- from employees taking *more leave* than originally requested
- where employer has *reasonable belief* that employee's condition will impair employee's ability to perform the job or will pose a direct threat

BUT NOT

from those on leave for a specified period of time.

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PERMISSIBILITY OF UPDATES UNDER FMLA

Employer may request recertification where:

IF LEAVE IS <u>MORE THAN</u> 30 DAYS	IF LEAVE IS <u>LESS THAN</u> 30 DAYS
Employer must wait until the minimum leave period expires before requesting recertification of the employee's serious health condition.	1. Employee seeks to extend leave; 2. Circumstances in prior certification have changed significantly; or 3. Employer receives information that raises concerns about validity of prior certification

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PERMISSIBILITY OF UPDATES: EXAMPLE

Graham v. BCBS of Tennessee, 521 Fed. Appx. 419 (6th Cir.)

- The employee's original medical certification for intermittent leave for a chronic condition indicated absences would occur approximately once a month.
- The employee subsequently took FMLA intermittent leave for migraines 4 times in one month.
- The company asked the employee to provide a re-certification.
- The employee's physician eventually stated he could not provide a clear frequency or duration of the employee's absences.
- The employee missed the next 28 days of work and did not submit a re-certification.
- When no re-certification was provided to support the increased frequency of absences, the company terminated the employee.
- The employee filed suit – outcome?

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**AFTER TAKING LEAVE, MUST EMPLOYEES
BE RESTORED TO THEIR SAME JOB?**

JOB RESTORATION RIGHTS

ADA

ADA: employee who takes leave as a reasonable accommodation can return to same position, *unless* holding the position open would impose an undue hardship.

FMLA

FMLA: job protection rights for 12 weeks. Employee *must* be restored to same or equivalent position.

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JOB RESTORATION RIGHTS ... ALWAYS?

Attiboge-Tay v. Southeast Rolling Hills LLC,
2013 WL 5954685 (D. Minn.)

- The employee returned from 12 weeks of FMLA leave for knee replacement surgery, and provided the company with a note indicating she was unable to kneel, squat, or lift more than 50 lbs.
- The employee requested additional leave or accommodations to allow her to do the job (nurse).
- The employer rejected the requests, terminated the employee, and then was sued under the ADA.
- The District Court ruled in favor of the employer:
 - Accommodating the 50 lbs. lifting restrictions = employee couldn't perform essential functions of the job
 - Additional leave request = undue hardship because employer had already paid \$\$\$ to replace her during FMLA leave
 - Employee's continued absence = negatively affected her co-workers' performance

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CAN THE EMPLOYEE BE TRANSFERRED OR REASSIGNED TO A DIFFERENT POSITION AS PART OF THE ACCOMMODATION PROCESS?

TRANSFER OR REASSIGNMENT



ADA: As a reasonable accommodation, an employee may be reassigned or transferred to a job that pays less or has different benefits, *if there is no vacant, equivalent position.*

FMLA: provides job protection rights.
If temporarily transferred to alternative position to better accommodate an employee's intermittent/reduced leave schedule, the employee must receive equivalent pay and benefits.

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TRANSFER OR REASSIGNMENT

***Cravens v. BCBS of Kansas City*, 214 F.3d 1011 (8th Cir.)**

- (ADA) “An employer may reassign an employee to a lower grade and paid position if the employee cannot be accommodated in the current position and a comparable position is not available.”

***Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir.)**

- (ADA) After leave of absence, employee was unable to perform her normal nursing duties. Employer tried to find an alternative position, but employee turned down the offered position and thus was not a qualified individual under the ADA.

***Wanamaker v. Westport Bd. of Educ.*, Civ. No. 3:11-1791 (D. Conn.)**

- (FMLA) Employee was moved from computer teaching position to full-time classroom teacher position.

***Breneisen v. Motorola, Inc.*, 512 F.3d 972 (7th Cir.)**

- (FMLA) Employee was moved from process analyst position to production position, with same pay/benefits but required heavy lifting and manual duties.

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**WHAT IF THE EMPLOYEE CAN'T DO
THE JOB OR RETURN TO WORK AT THE
END OF THE LEAVE PERIOD?**

EFFECT OF INABILITY TO DO THE JOB

ADA: employees entitled to a reasonable accommodation to help them perform the essential functions of their position.

FMLA: IF employee cannot do the job or is unable to return to work after exhausting FMLA leave, and IF employee is not covered by the ADA, the employee can be terminated once FMLA leave is expired.



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EFFECT OF INABILITY TO DO THE JOB

Whitaker v. Wisconsin Dep't of Health Services,
849 F.3d 681 (7th Cir. 2017)

- Employee exhausted available FMLA leave, did not return to work on expected date, and submitted doctor's notes requesting additional time off for a medical leave.
- The notes did not provide any detail regarding condition, course of treatment, or estimated recovery.
- Employee was fired and then sued, claiming the employer should have considered her request for an accommodation of unpaid leave rather than terminate her.
- The court found:
 - Employee provided no proof that she could fulfill the requirement of regular attendance, even with an accommodation.
 - Employee's request for an open-ended leave accommodation was not reasonable and would have imposed an undue burden on the employer.

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INFLEXIBLE LEAVE AND “MAXIMUM” LEAVE



INFLEXIBLE LEAVE AND “MAXIMUM” LEAVE

U.S. Equal Employment Opportunity Commission, Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016):

***“Example 11:** An employer covered under the FMLA grants employees a maximum of 12 weeks of leave per year. An employee uses the full 12 weeks of FMLA leave for her disability but still needs five additional weeks of leave. The employer must provide the additional leave as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship. The Commission takes the position that compliance with the FMLA does not necessarily meet an employer's obligation under the ADA, and the fact that any additional leave exceeds what is permitted under the FMLA, by itself, is not sufficient to show undue hardship. However, there may be legitimate reasons that establish undue hardship, such as the impact on an employer's operations from the leave already taken and/or from granting additional leave....”*

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CASE EXAMPLE

Severson v. Heartland Woodcraft, (7th Cir. Sept. 2017)

- Employee suffered from a chronic back condition that limited his ability to walk, bend, lift, sit stand, move and work.
- One particular flare up = 12 weeks of FMLA leave.
- Employee informed employer: condition not improved, needs surgery.
- Employee was terminated.
- The Court held the employee was *not qualified* under ADA:
 - A couple of days or weeks may be appropriate, but leave spanning multiple months is not.
 - Inability to work for a multi-month period removes a person from protection of the ADA.

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CASE EXAMPLE

Billups v. Emerald Coast Util. Auth. (11th Cir. 2017)

- Billups was injured on the job and had an unknown RTW date.
- Company policy generally allowed 6 months of leave but included individual assessment.
- Accommodations are to allow employee to “perform the essential functions of their *jobs presently or in the immediate future.*”
- Policy was not applied inflexibly due to individual assessment.

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CASE EXAMPLE

Hill v. Asian Am. Drug Abuse Prog. (Cal. Sup. Ct. Jan. 2018)

- Hill requested a leave of absence beginning January 4, 2015 initially for a broken arm but evolving into a mental health situation.
- Medical documentation supported leave until April 11, 2015.
- Employee was terminated March 31, 2015.
- Jury awarded \$4.5M in economic losses and punitive damages finding.

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CASE EXAMPLE

Ruiz v. Paradigm Works Group (S.D. Cal. Feb. 2018)

- Employee suffered an accident at her home.
- Employer granted three consecutive leaves of absences = 14 weeks.
- Employee requested additional 6 weeks of leave.
- Employer terminated employment because no assurance of return-to-work date.
- Federal trial court held:
 - Employee failed to show 6 additional weeks of leave was reasonable.
 - Even a finite leave is not a reasonable accommodation unless *“it is likely that at the end of the leave, the employee would be able to perform his or her duties.”*

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LEAVE AS REASONABLE ACCOMMODATION: WHAT HAVE WE LEARNED?

- Employers can be more aggressive on extended leaves of absence in Illinois, Wisconsin and Indiana (states within the employer-friendly Seventh Circuit).
- Nebraska employers still need to act with caution.
- But in all cases:
 - Engaging in the ADA's interactive process is essential.
 - Assess how the absence is impacting your business.

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ARE MEDICAL CERTIFICATIONS AND INQUIRIES PERMITTED?

“DOCTOR, DOCTOR, GIVE ME THE NEWS...”

ADA	FMLA
Medical inquiries permitted only if job-related and consistent with business necessity, to determine whether the employee can perform the essential functions of the position and whether accommodation is needed.	When FMLA leave is requested, employees may be required to submit a medical certification from their health care provider (optional FMLA Form WH-380).

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“DOCTOR, DOCTOR, GIVE ME THE NEWS...PLEASE!”

ADA	FMLA
Independent medical exams before employee returns to work as part of FFD certification are permitted only if job-related and consistent with business necessity.	A FFD certification at end of FMLA leave permitted if employer has a uniformly-applied practice of requiring such certification for ALL employees. FFD certification does NOT include a medical exam.

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“DOCTOR, DOCTOR, GIVE ME THE NEWS ... PRETTY PLEASE!”

What if the Medical Certification is woefully lacking?

Hansler v. Lehigh Valley Hospital Network, 798 F.3d 149 (3d Cir. 2015)

- The employee requested intermittent FMLA leave (two days a week for one month) after experiencing shortness of breath, nausea, and vomiting
- Medical certification failed to state the nature or duration of employee’s condition.
- The employee subsequently took several days off work.
- The employer terminated the employee—without seeking additional information from the employee about the medical condition.
- The employee filed suit alleging violations of the FMLA.

Outcome? Different under the ADA?

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CASE EXAMPLE

Stragapede v. City of Evanston (7th Cir. 2017)

- Water service worker with the City of Evanston:
 - Short-term memory problems following severe head trauma
 - After months of leave, released by neurologist with a work “trial”
 - City alleged additional performance issues related to his memory loss and terminated him
- Jury: \$225k in compensatory damages; \$354k in back pay.
- Employee could perform essential job functions, not a direct threat.
- Employer could not rely on neurologist’s report:
 - Conducted several months after initial exam.
 - Based on info provided by City, not an actual exam of employee.

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DO YOU HAVE TO ALLOW EMPLOYEES TO WORK FROM HOME?

CASE EXAMPLE

Meacham v. Memphis Light, Gas (6th Cir. Feb. 2018)

- Andrea, in-house attorney, requested work from home because on bed rest.
- No work-at-home policy, but employer denied Andrea's request.
- Andrea stood her ground...while working at home.
- Court held:
 - Job description was 20 years old!
 - Employer allowed work-at-home before (and even for Andrea)!
 - No engagement in interactive process – big mistake!

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CASE EXAMPLE

Morris-Huse v. GEICO (M.D. Fla. Jan. 2018)

- Susan, Supervisor, deals with random attacks of vertigo, chronic bouts of dizziness and imbalance.
- Requested work from home, ultimately denied.
- Court: In-person presence required, ADA claim denied.
 - Directed technical, clerical employees.
 - Conducted team meetings.
 - Monitored employees.

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TELECOMMUTING FACTORS TO CONSIDER

- Ability to supervise the employee equally
- Whether face-to-face interaction and coordination of work with other employees is necessary
- Whether any duties require use of certain equipment that cannot be replicated at home
- Whether in-person interaction with outside colleagues, clients, or customers is necessary
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

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WHAT IF YOU DISCOVER AN EMPLOYEE'S POOR PERFORMANCE WHILE THEY ARE OUT ON LEAVE?

TEMPORAL PROXIMITY

Degner v. Juneau County (W.D. Wis. March 2018)

- Employer argued that performance issues discovered during FMLA leave were “final straw” that led to termination after leave
- Years of inaction on performance issues and solid reviews undermined employer’s argument and created triable issues for a jury.

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CASE EXAMPLE

Boadi v. Center for Human Dvpmnt. (D. Mass. 2017)

- Grace hospitalized due to sudden mental health issues.
- Son reported hospitalization, HR sent FMLA paperwork.
- Supervisor to son: “you can’t call on mom’s behalf, don’t call again.”
- Drafted termination letter for NC/NS; another supervisor signed letter.
- Grace released from hospital, certification supported leave for 1 month, but terminated a short time later after submitting certification.
- Jury:
 - Grace entitled to leave, son gave notice, no good basis for termination.
 - Lost wages and liquidated damages over \$284,000.

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CASE EXAMPLE

Stewart v. Wells Fargo, (N.D. Ala. 2017)

- Clients complaining, Debby only met 11% of sales quota.
- Debby requests leave after being warned about performance.
- Debby returns: more client complaints, poor sales numbers, not trying anymore.
- Boss in an email: outlines performance issues, states termination “justified because Debby submits a request for medical leave.”
- **Takeaways:**
 - FMLA 101
 - How does Debby compare with other employees?

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CASE EXAMPLE

Wink v. Miller Compressing Co. (7th Cir. 2017)

- Tracy approved to work from home 2 days/wk. to care for autistic son; time not worked = FMLA leave.
- Employer changed “work-at-home” policy; Tracy to report next day.
- Tracy: could not find care for her special needs child this quickly; reported to work, but left early to care for son.
- Tracy terminated; HR: your FMLA only covered treatment and therapy.
- Jury award: \$120,000k+ (back pay and liquidated damages).

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CASE EXAMPLE

Jackson v. BNSF Railway Co. (N.D. Tex. 2017)

- Michelle: overwhelmed by the volume of work.
- Put on PIP, took FMLA leave shortly thereafter and remained out of work with no estimated return date.
- While on leave, Michelle attended a Beyoncé concert...in the employer’s luxury suite.
- Manager: please report to work and explain yourself.
- Michelle did not respond, terminated.
- Court: Honest suspicion of abuse, Michelle refused to cooperated, FMLA claims dismissed.

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FIGHTING FMLA ABUSE

- 1. Require that employees complete a written leave request form for all absences.*
- 2. Prepare a list of probative questions you ask all employees when they request time off.*
- 3. Enforce call-in procedures.*



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FIGHTING FMLA ABUSE



- 4. Certify ... and Recertify.*
- 5. Follow up on Certification.*
- 6. Have employee complete a Personal Certification.*

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SAMPLE PERSONAL CERTIFICATION

[EMPLOYER LETTERHEAD]

ACKNOWLEDGMENT OF ABSENCE

I, [Employee Name], certify that my absence on [Date of Absence] was due to the reason stated in the Medical Certification or Leave of Absence Form I submitted to the Company on [Date] in connection with my Family Medical Leave.

I understand that absence taken due to the serious health condition set forth in the Medical Certification or Leave of Absence Request Form will be counted against my leave entitlement under the FMLA and the Company's personnel policies. I also understand that providing false or misleading information about my absence will result in disciplinary action, up to and including immediate termination.

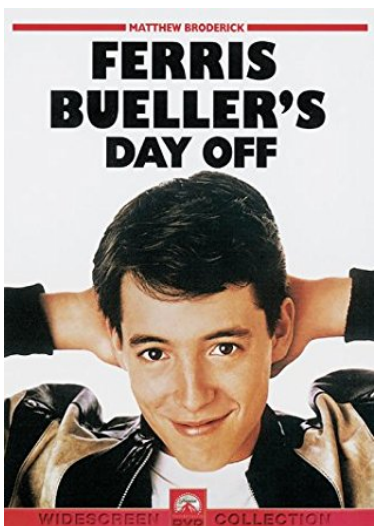
Signature

Date

Employee Name (please print)

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FIGHTING FMLA ABUSE



7. *Check in on your employee.*
8. *Follow up on patterns of absences.*
9. *Employees should schedule medical treatment around your operations.*
10. *Conduct a comprehensive audit of your FMLA practices.*

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TOP 5 MISTAKES MANAGERS MAKE WHEN EMPLOYEES HAVE REQUESTED A REASONABLE ACCOMMODATION

MISTAKE #1

Failure to Engage in the “Interactive Process”

- Obligation to engage in “interactive process”
- Employers should document the “interactive process” and have it in writing rather than verbal
- Employers need to understand what the “interactive process” requires

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WHAT IS THE “INTERACTIVE PROCESS”?

- Back and forth process
- What accommodations the employee requires to be able to perform essential functions of his/her job
- Information from employee’s healthcare provider
- Need to determine if can provide that accommodation or “undue burden”
- Legal determination

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WHAT SHOULD YOU DO IF THE INDIVIDUAL DOES NOT PROVIDE SUFFICIENT DOCUMENTATION?

- Explain why documentation is insufficient
- Allow individual an opportunity to provide the missing information in a timely manner
- Documentation is insufficient if fails to specify existence of ADA disability and/or fails to explain need for reasonable accommodation

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MISTAKE #2

Failure to Adequately Document Engaging in the “Interactive Process”

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SAMPLE LETTER TO EMPLOYEE

Dear _____

Thank you for contacting us to request an accommodation based on your medical condition. I am enclosing a copy of our policy on providing employees with reasonable accommodations under the ADA. Pursuant to this policy, since your disability is not obvious, we are requesting that you obtain medical documentation of your disability from your health-care provider as well as documentation of any relevant functional limitations and your need for an accommodation. We have enclosed a letter for you to provide to your health-care provider and have also enclosed a copy of your job description so that he/she can see the essential functions of your position.

Please return the requested documentation from your health-care provider to us as soon as possible so that we can assess whether we can provide you with an accommodation. Feel free to contact us with any questions you may have.

Very truly yours,
HR Professional

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SAMPLE LETTER TO EMPLOYEE'S DOCTOR

Dear Dr. _____:

Our employee, _____[name of employee] has informed us he/she has a medical condition and that he/she requires an accommodation under the ADA and/or state law. Enclosed is a copy of _____[name]'s job description for his/her position as _____[job title].

Please provide _____[name of employee] with medical documentation that he/she can provide to us demonstrating that his/her medical condition would qualify as a "disability" within the meaning of the ADA and/or state law as well as the specific functional limitations that he/she has and the requested accommodation that he/she requires to enable him/her to be able to perform the essential functions of his/her position.

Thank you for your cooperation and assistance as we engage in this interactive process.

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MISTAKE #3

Failure to Recognize a Request for a Reasonable Accommodation Under the ADA

- The ADA requires employers to provide a "reasonable accommodation" to a "qualified individual with a disability"
- Legal decision that managers should not be making
- Best left to HR in conjunction with in-house or outside counsel
- To determine what is a reasonable accommodation under the ADA, first need to determinate if the employee is disabled.

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PROPER RESPONSE TO REQUEST FOR REASONABLE ACCOMMODATION

- Recognize that request is for a “reasonable accommodation”
- First need to determine if the employee has a disability under the ADA/or state law
- Then need to engage in the “interactive process” with the employee
- Provide Accommodation if not an undue burden

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EMPLOYEES DO NOT NEED TO USE THE WORDS “REASONABLE ACCOMMODATION”

- If an employee states that they need to take additional time off to get their medications right, this could be a request for a “reasonable accommodation”
- If an employee states that they need to get up and walk around during meetings because sitting aggravates their chronic back condition this could be a request for a “reasonable accommodation”
- If an employee requests frequent bathroom breaks because of a medical condition this could be a request for a “reasonable accommodation”

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WHAT ARE SOME EXAMPLES OF “REASONABLE ACCOMMODATIONS?”

- Job Restructuring
- Ergonomic equipment or furniture
- Additional leave of absence even after the 12 weeks of FMLA leave
- Modifications to a work schedule such as providing a part-time work schedule
- Modifications to an employment policy

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DO YOU HAVE TO PROVIDE THE SPECIFIC ACCOMMODATION REQUESTED?

- If there is another accommodation that will equally enable the employee to perform essential functions of position employer may provide that accommodation rather than the one that the employee has requested as long as it is effective

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MISTAKE #4

Failure to Provide Additional Leave Time as a Reasonable Accommodation

- Not Providing Additional Leave Time After 12-weeks of FMLA leave
- Need to determine every request for a reasonable accommodation on an individual basis to determine if to provide it would be an undue burden

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MISTAKE #5

Failure to Understand What's an Undue Burden



Undue Burden =
significant difficulty or
expense

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FACTORS TO EVALUATE

- Nature and cost of accommodation needed
- Overall financial resources of facility making the reasonable accommodation
 - Number of persons employed at this facility
 - Effect on expenses and resources of the facility
- Overall financial resources
 - Size,
 - Number of employees,
 - Type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- Type of operation of the employer
 - Structure and functions of the workforce
 - The geographic separateness
 - Administrative or fiscal relationship of the facility involved in making the accommodation to the employer
- Impact of the accommodation on the operation of the facility

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WHAT IS *NOT* AN UNDUE BURDEN?

- Employees' (or your customers') fears or prejudices toward the individual's disability
- Negative impact on the morale of other employees

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WHAT SHOULD EMPLOYERS DO WHEN FACED WITH A REQUEST FOR A REASONABLE ACCOMMODATION?

- Engage in the "Interactive Process"
- Review your ADA accommodation policy and ensure compliance with such policy.
- Request medical documentation substantiating the disability and the need for an accommodation.
- Take the medical documentation to HR and legal and discuss whether you can provide such a reasonable accommodation or whether it would be an "undue burden" to provide it.
- The requirement to provide a "reasonable accommodation" does not mean that you have to provide the specific accommodation the employee requested if there is another accommodation that would work as well.
- Respond in writing to the employee regarding their request for a "reasonable accommodation"
- Document, Document, Document

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WHEN CAN YOU DISCIPLINE AN EMPLOYEE WHO CLAIMS HE OR SHE HAS A DISABILITY?

WHAT CAN YOU DO?

- You may discipline for:
 - Poor performance
 - Absenteeism
 - Tardiness
 - Violation of Workplace Conduct Policies
 - Violation of Workplace Violence Policy
 - Violation of other Workplace Policies
 - Even if reason for violation is due to disability

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DISABILITIES AND DISCIPLINE

- Sally Sticky Fingers steals money from the office.
- She claims that she did this because she has a disability, Kleptomania.
- Can you discipline her?



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DISABILITIES AND DISCIPLINE

- Tina Tamperer works for your clinic and tampers with and incapacitates medical equipment.
- You catch her and Tina claims she did this because of her psychiatric disability.
- Can you discipline her?



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WHAT EMPLOYERS NEED TO DO

1. Well-drafted ADA Accommodation Policies
2. Well-established procedures for engaging in “the interactive process”
3. Procedures for determining whether to provide disabled employees with the accommodations they have requested
4. Provide training to managers

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ARE SERVICE ANIMALS OR EMOTIONAL SUPPORT ANIMALS REQUIRED?

SERVICE ANIMALS AND ESAS

Do I have to allow a service animal in the workplace under the ADA?

- Generally, yes. Service animals are trained to do a specific task for the employee. They are trained to sense and react, to see, to hear, to detect upcoming seizure or low blood sugar. They are trained to do a task for the employee.
- No specific professional training is required and a vest or ID tag is not required.
- Employers do not need to attend to or care for the needs of the service animal.
- When it is not obvious that the animal is a service animal, the only two questions an employer can ask are:
 - 1) is the service animal required because of a disability? and
 - 2) what work or task has the service animal been trained to perform?
- Other than those two questions, employers cannot require documentation for the animal, require a demonstration, or inquire about the specific disability.

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SERVICE ANIMALS AND ESAS



- Emotional support animals provide comfort just by being with the person.
- Can be in response to a physical or mental disability but no special task is performed by the animal to assist the person.
- The DOT in 2003 broadened the rules allowing ESAs on airplanes.
- The Fair Housing Act requires allowing ESAs in housing so that affects campus housing, government housing, etc.

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SERVICE ANIMALS AND ESAS

Are ESAs required to be allowed in the workplace under the ADA?

- Probably not, but no specific requirement or exclusion is found in the ADA
- Employers need to engage in interactive process, as animals present in the workplace (other than service animals) can be a hardship, dangerous, unsanitary, and contrary to health codes; look at inconsistency between rules for members of the public and those for employees
- Address whether other accommodations can be made short of allowing an ESA

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QUESTIONS?

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These materials and program are being offered as an outline of general information on the subject to assist in development and implementation of employment practices and policies. They are offered for educational and informational purposes only and are not intended as legal advice.

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