

ADA, FMLA AND WORKERS' COMPENSATION

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ADA	FMLA
<ul style="list-style-type: none"> • Prohibits discrimination • Requires reasonable accommodation 	<ul style="list-style-type: none"> • Right to up to 12 weeks' leave <ul style="list-style-type: none"> ○ Serious health condition of self or family (spouse, parent, child) ○ Childbirth, adoption • Rights in addition to any other rights under federal, state, or local law.

WHAT EMPLOYERS ARE COVERED?

ADA	FMLA
<ul style="list-style-type: none"> • All public employers • Private employers with 15 or more employees • Also-Employment agencies <ul style="list-style-type: none"> ○ Labor organizations ○ Joint management labor committees • EXCLUDED: <ul style="list-style-type: none"> ○ U.S. and political subdivisions ○ Indian tribes ○ Tax-exempt private clubs ○ States not subject to damages but may be enjoined. 	<ul style="list-style-type: none"> • All private employers with 50 or more employees during this year or prior year. • All public employers • Include leased temporary and part-time employees. • Aggregate related companies. • States not immune.

IF THE EMPLOYER IS NOT COVERED, END OF INQUIRY.

WHAT EMPLOYEES ARE COVERED UNDER ADA?

- Three tests—all must be met.
 1. Disabled
 - a. Physical or mental impairment which substantially limits a major life activity; or
 - b. A record of such an impairment; or
 - c. The employee is regarded as having such an impairment.
 - i. What is an impairment?
 - A physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems; or
 - Any mental or psychological impairment.
 - ii. Temporary non-chronic impairments of short duration with little or no longer term or permanent impact are probably not impairments.
 - iii. Consider the effect of mitigating factors to determine if a major life activity is substantially limited; and
 2. Otherwise qualified
 - a. Experience
 - b. Training
 - c. Expertise
 - d. Licenses; and
 3. Must be able to perform the essential functions of the job with or without accommodation.

WHO IS AN “ELIGIBLE EMPLOYEE” UNDER FMLA?

1. Must have worked for employer for at least 12 months; and
 2. Must have worked 1,250 hours in the year preceding the start of the leave; and
 3. Must work at a site where employer employs 50 employees within 75-mile radius.
- Key date for hours-worked test is start of the leave, not when leave is requested. Time of request is used for 50/75 test.
 - Hours worked—use FLSA rules—only actual hours worked. Vacations, holidays, and sick not counted.
 - FLSA-exempt employees who have been employed for 12 months are eligible unless employer can show they have not worked 1,250 hours in last year.
 - “Radius” is street miles, not as crow flies.

FMLA QUALIFYING REASONS

1. Serious health condition of self, spouse, parent, child.
 - a. What is a serious health condition?
 - i. Any illness, injury, impairment, or physical or mental condition involving:
 - Any period of incapacity involving in-patient care (overnight in hospital); or
 - Any period of incapacity involving the inability to attend work, school, or other daily activities for three consecutive days if continuing treatment by a healthcare provider is required; or

- Continuing treatment for a chronic condition which would result in a 3-day period of incapacity if left untreated; or
 - Continuing treatment by a healthcare provider for the prenatal care.
- ii. You need not be totally disabled to qualify.
- iii. Diagnosis and examination constitute long-term treatment. Also examinations and tests to determine the existence of a serious health condition.
- iv. To qualify for care giver leave, you must actually be involved in giving care.
2. Birth or adoption of child.

MEDICAL EXAMS AND INQUIRIES

ADA	FMLA
<ul style="list-style-type: none"> • Pre-Offer <ul style="list-style-type: none"> ○ No questions or exams <ul style="list-style-type: none"> ▪ No workers' compensation history questions ○ But can inquire regarding ability to perform job functions, with or without accommodation ○ Can ask for a demonstration of how applicant would perform job. • Post-Offer/Pre-Hire <ul style="list-style-type: none"> ○ Yes, if <ol style="list-style-type: none"> 1. All employees in same job category must undergo, and 2. Job-related and consistent with business necessity, and 	<ul style="list-style-type: none"> • Medical certification can be required by employer for serious health conditions—not birth, adoption, or foster care. • Employer must give notice of need for and timing of certification • FMLA protection only as great as certification. • Use DOL form • Employer may only get: <ol style="list-style-type: none"> 1. Date SHC began and estimate of duration. 2. Diagnosis 3. Brief statement of treatment regimen 4. Whether in-patient hospitalization necessary.

<p>3. Information kept separate and confidential, and</p> <p>4. Results are used consistent with the Act.</p> <ul style="list-style-type: none"> • Post-Hire <ul style="list-style-type: none"> ○ 2, 3 and 4 above ○ Tests for illegal drug use are not medical exams—only test for illegal drugs. ○ Agility tests are not medical exams. 	<ul style="list-style-type: none"> • If employer doesn't specify essential job functions to doctor, doctor may rely on employee's description. • If employee fails to provide certification, leave is not FMLA protected. • If doubts about certification, second opinion at employer expense from physician selected by employer. • If disagreement, employer and employee agree on third physician at employer expense and that opinion is final. • Employer may get periodic recertifications. • Employee must return at end of 12 weeks or no protection from FMLA.
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WHAT FMLA GIVES AN EMPLOYEE

1. Leave of up to 12 weeks—may be taken in pieces.
 - a. Continuation of group health plan benefits—as though employee had been continuously employed during FMLA leave. Coverage stops when:
 - i. Employee tells employer he doesn't intend to return at end of leave; or
 - ii. Employee fails to return from leave; or
 - iii. FMLA leave is exhausted.
 - b. Employee's share of premiums must be paid by employee to employer.

- c. Other benefits do not need to continue to accrue during FMLA
 - i. Vacation
 - ii. Seniority
 - iii. Pension
 - d. But earned benefits cannot be lost because of FMLA leave.
2. Return-to-work rights.
- a. To same or equivalent position with equivalent pay, duties, terms, and conditions.
 - b. With certain raises
 - i. Annual (e.g., CBA)
 - ii. Cost of Living
 - iii. Any raise an employee on leave of absence without pay would have gotten.
 - c. Reinstatement in same or nearby worksite.
 - d. To same shift or equivalent schedule.
 - i. Put employee where he would have been had he kept working.
 - ii. No new qualification period for benefits. NOTE: This means employer may have to modify some plans to insure restoration on return or pay costs on behalf of employee subject to recovery on return.
3. Key employees (top 10 percent in compensation) may be denied reinstatement.
- a. Under conditions where reinstatement (not leave) would cause “substantial and grievous economic injury.”
 - b. Not “undue hardship.”

ADA—HOW DOES EMPLOYEE ASSERT RIGHTS?

- Generally—Employee must request accommodation.
 - No magic language necessary
 - Employer need not be mindreader.
 - But employer must be mindful of the “obvious.”
 - Generally—Employee must specify an accommodation
 - Initial burden is on employee.
 - Duty to communicate—the interactive process.
 - Mutual duty—avoid punitive damages.
 - Reasonable accommodation doesn’t mean the one the employee requests.
 - Generally extends only to essential functions.
 - Past actions on accommodation do not bind employees—good deeds will not be punished.
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SOME AREAS OF OVERLAP

1. Changing job duties.

ADA	FMLA
<ul style="list-style-type: none">• Removing marginal job functions (not essential functions) is a possible accommodation.• Elimination or reallocation of an essential function is not reasonable.• Is freedom from stress a reasonable accommodation? No.• Is lowering production standards a reasonable accommodation? No.• What about a “bossectomy?” No.	<ul style="list-style-type: none">• No requirement.

What if you place an employee on light or restricted duty to work harder or demonstrate he can perform essential functions? Is that person then “regarded as” having a disability? No. Does he have a legal right to continued light duty? Generally, no.

2. Changing work schedules apply to both statutes.

ADA	FMLA
<ul style="list-style-type: none"> • Employer must consider changing hours when work is done. • Employer must consider assignment to part-time. • But employer generally need not turn a full-time position into part-time or create new part-time positions. • Need not give employee open-ended flexible work schedule. 	<ul style="list-style-type: none"> • Working part-time or allowing sporadic absences must be granted for employee who has or is caring for person with serious health condition if it is “medically necessary.” • Not available for birth or adoption. • FMLA gives employee right to time off, not release from performing essential functions of job.

HYPOTHETICAL: Qualified individual with a disability which also is a serious health condition asks for leave. What do you do?

Apply both statutes

ADA	FMLA
<ul style="list-style-type: none"> • Consider leave of limited duration. • Offer open part-time position with no benefits. 	<ul style="list-style-type: none"> • If serious health condition, reduced leave schedule (part-time in current job) with benefits. • After 12 weeks of leave, offer reinstatement to same or equivalent position • Reevaluate under ADA. • Right to FMLA is absolute. Employer may not require ADA accommodation in lieu of FMLA, but ADA may require that accommodation be offered.

3. Reassignment to new position.

ADA	FMLA
<ul style="list-style-type: none"> • If employee can't perform essential functions of current position, reassign to appropriate vacant position. <p>BUT</p> <ul style="list-style-type: none"> • No duty to violate a legitimate seniority policy even if not collectively bargained. • No duty to create new position. • No duty to create light duty position as accommodation. • No duty to promote, including part-time to full-time. • No duty to transfer if employee has been successfully accommodated in current position. 	<ul style="list-style-type: none"> • No analysis.

4. Leaves of absence.

ADA	FMLA
<ul style="list-style-type: none"> • No duty to provide open-ended leave. There must be reasonably foreseeable return date. • Analyze: <ul style="list-style-type: none"> ○ Employer's policies ○ Ability to cover absence ○ Length of time position can be left vacant 	<ul style="list-style-type: none"> • Twelve "weeks" in a "year" • Generally unpaid • May require use of paid leave for FMLA qualifying leaves • Look at terms of employer policy. If paid sick can only be taken for employee, then employer need not let it be taken for FMLA for care of family member.