

A Seminar a Day Keeps the FMLA and ADA at Bay

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HR Deciphering Employee Leave Requests



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EMPLOYEE MEDICAL LEAVE AND ACCOMMODATION REQUESTS

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Statutory Obligations

- Family and Medical Leave Act
- Americans with Disabilities Act
- Pennsylvania Human Relations Act
- Erie County Human Relations Act

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FMLA Review

- Who is covered?
 - The FMLA covers private employers with 50 or more employees and all public agencies*.
- Which employees are eligible?
 - An eligible employee is any employee of a covered employer who:
 - *Works at a location that has 50 employees within a 75-mile radius;
 - Has worked for the employer for at least 12 months (need not be consecutive); and
 - Has worked for the employer for at least 1,250 hours during the 12-month period immediately preceding commencement of the leave.

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FMLA Review

- Covered employers under the FMLA are required to provide up to twelve weeks of unpaid leave in a twelve-month period to “eligible” employees for certain qualifying reasons, including:
 - **the employee's own serious health condition** which prevents the employee from performing the essential functions of his or her job;
 - to care for the employee's immediate family member with a serious health condition; and/or
 - The birth of the employee's child or placement for adoption or foster care.

29 U.S.C. §2601 et. seq.

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FMLA - Intermittent Leave Review

- When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee’s usual weekly or daily work schedule.
- When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer’s operation.

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ADA Review

- In general, Title I of the ADA prohibits discrimination against applicants and employees on the basis of a disability, history of having a disability, and/or perceived disability.
- Also be aware of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment.

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ADA and Leaves of Absence

- The ADA requires covered employers to make reasonable accommodations for a qualified applicant or employee with a disability if doing so would allow the applicant or employee to perform the essential functions of a particular position unless the accommodation would result in “undue hardship” to the employer.
42 U.S.C. §12101 et seq.

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FMLA NOTICE REQUIREMENTS



Employee Notice Requirements

- Employees should notify the employer as soon as possible each time FMLA is needed and respond to questions from the employer so it can determine whether the leave request is FMLA-qualifying.
- Failure to provide enough or failure to comply with the employer's policies for requesting leave (absent unusual circumstances) may result in unprotected leave.
- Notice to the employer may be verbal or written and need not refer specifically to the FMLA, though it must include enough information to allow the employer to determine whether the leave is FMLA-qualifying.



Foreseeable vs. Unforeseeable FMLA

- Foreseeable:
 - 30 days' advance notice or as soon as practical.
 - Failure to provide timely notice without reasonable excuse may justify delay in the employer's approval of FMLA.
- Unforeseeable:
 - As soon as possible and practical, general within the time required by the employer's usual and customary notice requirements.
 - Failure to provide timely notice without reasonable excuse may justify denial or delay in approval of FMLA.

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Employer Notice Requirements

- General Notice
 - Poster and Employee Handbook or Other Leave Policies
- Eligibility and Rights and Responsibilities Notice
 - Must be provided within 5 business days of the initial request for FMLA-qualifying leave in a 12-month leave year.
 - Notice of employees' rights and responsibilities must be provided with each eligibility notice.
- Designation Notice
 - Must be provided within 5 business days of determining leave is FMLA-qualifying.

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EMPLOYER'S RIGHT TO MEDICAL INFORMATION



Know Your Limits



Employers' Rights to Medical Information before Granting Leave

- Both the ADA and FMLA limit an employer's access to an employee's medical information.
 - FMLA: Certification of Serious Health Condition
 - ADA: An employee may only be subjected to medical examinations or medical inquiries if they are job-related and consistent with business necessity.

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FMLA: Certification of a Serious Health Condition

- The employer may require the employee to submit a certification from a health care provider to support the employee's need for FMLA leave to care for a covered family member with a serious health condition or for the employee's own serious health condition.
- If the employer requests medical certification, the employee is responsible for providing a *complete and sufficient certification*, generally within 15 calendar days after the employer's request.

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FMLA: Certification of a Serious Health Condition

- The employer must notify the employee each time a certification is required. Notice must be included with the written notice of FMLA rights and responsibilities given to the employee when leave is first requested.
- If the FMLA certification lasts beyond a single FMLA leave year, new medical certification may be requested each new FMLA leave year.
- If the certification is incomplete or insufficient, the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient. The employee must provide the additional information to the employer within seven calendar days, in most circumstances.

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FMLA: Certification of a Serious Health Condition

- **Recertification**
 - In general, an employer may request an employee to provide recertification no more often than every 30 days and only in connection with an absence by the employee.
 - If the certification indicates a minimum duration of longer than 30 days, the employer generally must wait until that minimum duration expires before requesting recertification.
 - In all cases where the condition is of an indefinite duration, the employer may request recertification for absences no sooner than every six months.

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FMLA – Employee Failure to Provide Certification of Serious Health Condition

- If the employee does not provide the requested certification within the time required or fails to provide a complete and sufficient certification despite the opportunity to cure any deficiencies, the employer may deny the employee's request for FMLA leave.

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Medical Inquiries or Examinations under the ADA

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

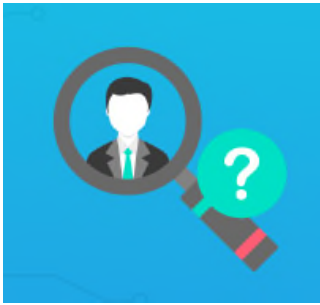
42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c).

- Also note that the Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members.

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Medical Inquiries or Examinations under the ADA



- Three stages:
 - **Pre-offer**: An employer **may not** ask any disability-related questions or require any medical examinations, even if related to the job.
 - **Post-offer**: An employer **may** ask disability-related questions or require medical examinations, as long as it does so for ***all*** entering employees in the same job category.
 - **During employment**: An employer **may** make disability-related inquiries and require medical examinations ***only if*** they are **job-related and consistent with business necessity**.

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What is a “disability-related” inquiry?

- A "disability-related inquiry" is a **question (or series of questions) that is likely to elicit information about a disability**.
- Disability-related inquiries may include the following:
 - asking whether an employee has/had a disability, how the employee became disabled, or questions about the nature or severity of an employee's disability;
 - asking an employee to provide medical documentation regarding a disability;
 - asking a co-worker, family member, doctor, or another person about an employee's disability;
 - asking about an employee's genetic information;
 - asking about prior workers' compensation history;
 - asking about prescription drugs or medications, past, present, or future; and,
 - asking **broad** question about employees' impairments that is likely to elicit information about a disability.

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What is a “disability-related” inquiry?

- Questions that are not likely to elicit information about a disability are **not** disability-related inquiries and, therefore, are not prohibited under the ADA.
- Questions that are permitted include the following:
 - General questions about an employee’s well-being (e.g. How are you? Are you feeling ok today?);
 - Questions about non-disability impairments (How did you break your arm?); and
 - Inquiries as to whether the employee can perform the job (Can you assist in lifting patients when needed?)

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Communicable Diseases and Medical Inquiries

- When screening for COVID-19:
 - ✓ Ask **all** employees questions intended to screen for COVID-19.
 - ✗ **May not** ask individual employee such questions **unless** the employer has a **reasonable belief**, based on **objective evidence**, that an employee has symptoms of COVID-19.
- When screening for COVID-19 exposure, employers:
 - ✓ **May** ask employees’ if they have been a close contact of someone with COVID-19 or COVID-19 symptoms.
 - ✗ **May not** ask employees’ about their **family members’** symptoms or COVID-19 positive status (GINA).

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INTERPLAY BETWEEN FMLA AND ADA



Leave as a Reasonable Accommodation

- The employee is not FMLA eligible or has exhausted FMLA and other employer-provided leave.

Now what?



- Consider the ADA –**
- Does the employee have a disability?
 - What, if any, reasonable accommodations are available?

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MENTAL HEALTH AND ADDICTION



Don't Rule Out FMLA or ADA



not every disability
is visible

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FREQUENTLY ASKED QUESTIONS




The Questionable Doctor's Note - FMLA

Medical Clinic
Dr. John Smith, M.D.

Name: _____ DOB: _____
Address: _____ Date: _____

- Medical reason for missing work
- Any absence time required
- Refer to your company's doctor's note policy

X [Doctor Signature]



Fake Doctor's Note

FMLA - Questioning the Doctor

- Once the employer has received a complete and sufficient certification of serious health condition, the employer **may not** request *additional* information from the health care provider beyond:
 - **Authentication** (Is this your signature? Did you complete / review this form?)
 - **Clarification** (The printing is hard to read. Is that a 6 or an 8?)

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FMLA – Other Options (Second Opinion)

- If the employer has received a complete and sufficient certification but has a reason to doubt that it is valid, the employer may require the employee to obtain a second medical certification.



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FMLA – Other Options (Recertification)

- Remember the general rule - The employer may request recertification no more often than every 30 days or the minimum stated duration of the serious health condition, whichever is greater, and only in connection with an absence by the employee.
- However, in all cases, including cases where the condition is of an indefinite duration, the employer may request a recertification for absences every six months.

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FMLA Recertification (cont.)

- The employer may request a recertification in less than 30 days only if:
 - The employee requests an extension of leave;
 - The circumstances described by the previous certification have changed significantly; or
 - The employer receives information that causes it to doubt the employees stated reason for the absence or the continuing validity of the existing medical certification.



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FMLA Recertification (cont.)

- In general, the employer may ask for the same information in a recertification as that permitted in the original medical certification.
- However, an employer may provide the health care provider with a record of the employee's absences and ask if the serious health condition and need for leave is consistent with the leave pattern.



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The Questionable Doctor's Note - ADA

Medical Clinic
Dr. John Smith, M.D.

Name: _____ DOB: _____
Address: _____ Date: _____

- Medical reason for missing work
- Any absence time required
- Refer to your company's doctor's note policy

X [Doctor Signature]



Fake Doctor's Note

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ADA – The Interactive Process

- Once an employer is on notice that an employee may need a reasonable accommodation, the employer has an obligation to engage in the **interactive process** to determine whether a reasonable accommodation is available.
- Ask for the information you need, i.e. job-related and consistent with a business necessity.
- Communication should focus on trying to understand enough about the employee's health challenges to fashion an accommodation. This can include asking the doctor to describe how the disability limits employee's ability to do the job and what other effective accommodations may be available.

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ADA – The Interactive Process

- You have more options under the ADA. Remember, the employer's duty is to provide an effective accommodation, when possible. The employer is not obligated to provide the employee's preferred accommodation when other effective accommodations exist.

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Undue Hardship

- When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship.
- **Considerations for Undue Hardship**
 - The amount and/or length of leave required
 - Frequency of the leave
 - Whether there is any flexibility with respect to the days on which the leave is taken
 - Whether the need for intermittent leave on specific dates is predictable or unpredictable?
 - Impact of absence on co-workers and whether job duties are being performed satisfactorily and in a timely manner.
 - Impact on employer's operation

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Indefinite Leave

- If an employee is unable to provide a timeframe for returning to work, an employer is generally not required to grant the leave as a reasonable accommodation.
- This would be considered an undue hardship.
- What happens if expected return date arrives and employee requests additional leave as they are not yet ready to return to work?

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Leave Policies

- Employers should revise any policies which limit the amount of the leave employees can take when an employee needs additional leave as a reasonable accommodation.
- Employers must consider providing unpaid leave to an employee with a disability if the employee requires it, and so long as it does not create an undue hardship for the employer.
- This is true even where:
 - The employer does not offer leave as employee benefit;
 - The employee is not eligible for leave under the employer's policy, or
 - The employer has exhausted the leave the employer provides as a benefit.

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EMPLOYER TAKEAWAYS



Be Prepared for Leave of Absence Requests

- Review and update job descriptions – make them accurate and realistic. Identify the essential job functions and qualifications.
- Designate a company representative (and a backup) responsible for compliance with the ADA, FMLA, and other leave laws. Make the designated representative(s) known throughout the company – but also give alternative avenues for discussions about accommodation.

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Be Prepared for Leave of Absence Requests

- Train HR and supervisors.
 - Educate supervisors about the basics of leave of absence laws (and others).
 - Highlight the confidentiality issues present in medical and disability leaves.
 - Cultivate the right culture within your management group.
 - Make the supervisors issue-spotters – not experts. Help them understand their role and yours. Tell supervisors they don't own these issues.

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Be Prepared for Leave of Absence Requests

- **Review and Update Your Leave Policies**
 - Eliminate language which suggests termination from employment is automatic at the exhaustion of a leave of absence.
- **Review and Update Your FMLA Leave Policies, Forms, and Practices**
 - Ensure notices are being provided;
 - Designate leave in a timely manner;
 - Require and pursue doctor's certification when appropriate;
 - Warn employees of consequences of non-compliance.

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Be Prepared for Leave of Absence Requests

- **Document the ADA process with each employee.**
 - Consider developing a form for requesting an accommodation – but remember that a verbal request for an accommodation, and sometimes even just your knowledge, without the use of any specific words, is enough to initiate the employer's ADA interactive process obligations.
 - Document each step of the ADA accommodation process, including all communications with the employee, medical providers, and others; all accommodations considered; and reasons for denying any requested accommodation.

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Be Prepared for Leave of Absence Requests

- Document the ADA process with each employee (continued)
 - Develop a medical assessment form for completion by the employee's health care provider. This should allow for flexibility in designating the information needed from the provider for the specific employee, his or her disability limitations, and his or her position.

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Tips for Employers

- Determine if FMLA leave is applicable and available.
- If not, promptly engage in interactive process.
- Determine amount of leave requested and expected date to return to work.
- Determine if leave request would cause undue hardship.
- If FMLA is not applicable or has been exhausted, employer may be able to cease providing paid health insurance for the employee during the leave.
- Document and create a favorable narrative.

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Thank You!

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