

# How to Respond to Requests for Leave

## Under the ADA or FMLA



# Presented by:

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# FAMILY AND MEDICAL LEAVE ACT



# Coverage of Employers

A private employer is covered under the FMLA if it has **50 or more** employees on its payroll for 20 or more calendar workweeks (which do not need to be consecutive) in either the current or preceding calendar year (29 U.S.C. § 2611(4)(A)(i) and 29 C.F.R. § 825.104).

Public agencies are covered regardless of the number of employees they have.

# Employee Eligibility

To be eligible for leave under the FMLA, an employee must have worked for:

- At least **12 months** (which need not be consecutive).
- At least **1,250 hours** during the 12 months before the first day of the requested leave.

An eligible employee must also work at a worksite that has at least 50 employees either:

- At that worksite.
- Within 75 miles of that worksite.

(29 U.S.C. § 2611(2).)

# Eligible Employees Are Entitled to:

Up to 12 workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job.



# Military Family Leave under the FMLA

- Qualifying exigency leave
- Military caregiver leave





# Caregiver Leave

- Up to 26 workweeks of military **caregiver leave** in a single 12 month period to care for a covered service member who has a serious injury or illness that was incurred **or aggravated** in the line of duty on active duty
- Employee must be the spouse, son, daughter, parent, or next of kin of the service member.





# Substitution of Paid Leave

- Employer may require an employee to use up paid leave during FMLA leave
- Employer may count sick leave and vacation time toward an employee's FMLA leave entitlement.

## Benefits: During Leave

Although FMLA leave is unpaid (unless paid leave is substituted), the employer must continue to provide the employee coverage under its group health plan during the leave period under the same terms as if the employee were working the employee's regular schedule (29 C.F.R. § 825.209).

# Return to Same or Equivalent Position

Employees returning after FMLA leave have the right to return to the same position held before the leave or to an equivalent position with equivalent:

- Pay
- Benefits
- Working conditions
- Privileges
- Status

(29 C.F.R. §§ 825.214 and 825.215(a).)

## Equivalent Position (cont'd)

The position must involve the same or substantially similar duties and responsibilities, including:

- Skill
- Effort
- Responsibility
- Authority

(29 C.F.R. § 825.215(a).)

# Fitness-for-Duty Certification

Employers may require employees who are on leave because of their **own serious health condition** to provide fitness-for-duty certification, as long as the employer:

- Applies this request uniformly to all similarly-situated employees.
- Only seeks information regarding the particular health condition that caused the employee's need for FMLA leave.
- Advised the employee in its designation notice that the employer would require a fitness-for-duty certification to return to work (and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job).

(29 C.F.R. § 825.312.)



# The Americans with Disabilities Act



# What the ADA Requires

## No Discrimination

- **Employers must not discriminate against a qualified individual with a disability.**
- **Disability means an individual:**
  - Has a disability, has a record of having a disability, or is regarded or perceived as being disabled;
  - Has the skills and qualifications for his/her job; and
  - Can perform the essential functions of the job despite the disability, either with or without reasonable accommodation.
- **Protection applies in recruiting, hiring, placement, training, job assignment, promotions, pay increases, application of policies, other facets of employment.**





# What the ADA Requires

## No Harassment

- Consider what you know about other forms of harassment—sex, race, religion, age—same principles apply.
- Includes comments, jokes, cartoons, e-mails, images, and more.
- Mistreatment by co-workers of an associate who is being accommodated in some way.





# Reasonable Accommodation Under the ADA

- ADA requires employers must provide reasonable accommodations to qualified individuals with disabilities unless doing so would cause an undue hardship.
- A change in the work, workplace or application process that helps make it possible for an individual with a disability to perform or apply for a job.



# Definition of Disability

Physical or  
mental  
impairment.

Substantially  
limits one or  
more of the  
major life  
activities of  
the individual.



# "Major Life Activities"

- Caring for oneself
- Eating
- Sitting
- Performing manual tasks
- Sleeping
- Reaching
- Seeing
- Breathing
- Lifting
- Hearing
- Walking
- Bending
- Speaking
- Standing



# "Major Life Activities"

- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working





# ADA Disability?

- Not a demanding standard; broadly construed to expand coverage
- Focus is whether impairment substantially limits compared to most in general population, but must ignore mitigating measures (exception for ordinary eyeglasses)
- For episodic impairments – covered even when inactive
- Need only limit one major life activity



# EEOC Guidance

## Disability

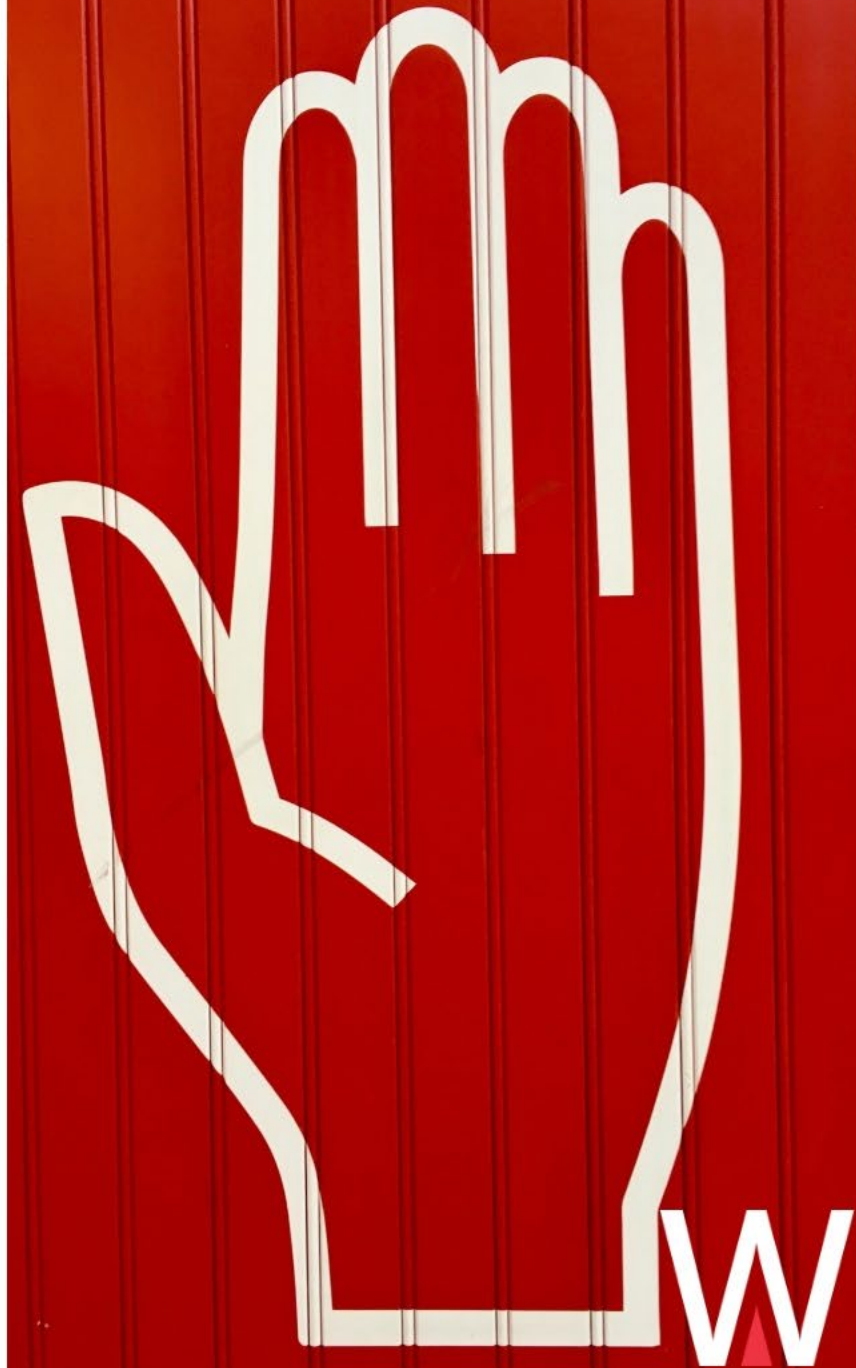


Deafness, blindness, intellectual disability, partially or completely missing limbs or mobility impairments requiring the use of wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.



# Some Explicit Exclusions from the Definition of Disability

- Current illegal drug use
- Pedophilia
- Exhibitionism or Voyeurism
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorder resulting from current illegal use of drugs.



# What Is The Interactive Process?



Individualized process involving:

- Exchanging information about employee's work restrictions
- Identifying the appropriate workplace accommodations
- Reaching a mutually satisfactory decision about the reasonable accommodation to be provided



# When Is the Interactive Process Triggered?

- Employee requests an accommodation.
  - No “magic words” are required.
  - Can be oral or written.
- Someone requests an accommodation on the employee’s behalf.
- No request, but the disability or need for an accommodation is known to the employer.

# Undue Hardship

- The nature and cost of the accommodation needed
- The overall financial resources of the facility making the reasonable accommodation (the number of persons employed at the facility, the effect on expenses and resources of the facility)
- Type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer
- The impact of the accommodation on the operation of the facility

# Communicating With The Employee

- Always respond to an accommodation request promptly.
- Ask the individual relevant questions regarding:
  - The nature of the disability and the precise job-related limitations resulting from the disability.
  - The problems posed by the workplace barrier at issue.
  - What type of reasonable accommodation is needed.





# Selecting an Accommodation

If more than one accommodation is available, the employer can choose the accommodation, if it is effective, that:

- Is less expensive or burdensome.
- Is easier to provide.
- Requires the employee to remain on the job instead of providing unpaid leave.



# Individualized Assessment



## Do

- Assess each person on an individualized basis.
- Communicate with that person about their disability, restrictions, abilities.
- Perform additional evaluations (medical, essential functions of job, etc.).

## Don't

- View everyone with a similar disability the same way.
- Generalize about disabilities.
- Assume.



# Accommodation May Include:



- Providing special equipment
- Modifying work schedule
- Removing barriers to performance
- Restructuring job duties
- Reassigning nonessential tasks
- Exchanging nonessential assignments with other employees
- Redesigning procedures for as long as employee is disabled and requires accommodation

# More Examples of Reasonable Accommodations

- Permitting the use of accrued paid leave.
- Providing unpaid leave.
- Reassignment to another vacant position for which the employee is qualified.
- Altering supervisory methods, such as the method of communicating assignments.
- Providing equal access to information communicated in the workplace.
- Providing equal opportunity to participate in employer-sponsored training.
- Other similar accommodations.

# Examples of Unreasonable Accommodations

- Changing a primary job responsibility or eliminating an essential function of the position.
- Lowering production standards.
- Providing paid leave beyond what the employer provides to similarly-situated employees.
- Providing personal use items the employee needs to accomplish daily activities both on and off the job, such as a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices.
- Excusing a violation of a uniformly-applied employee conduct rule that is job-related and consistent with business necessity (for example, conduct rules relating to violence, stealing, or destruction of property).



# Working From Home Post-COVID

- “The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job’s essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee’s essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.”
- EEOC FAQs D.15

# EEOC Sues Employer Over Working From Home

- EEOC filed pandemic-related case involving a work-from-home arrangement
- Plaintiff was a health and safety manager who worked from home for four days a week during the initial phases of the pandemic
- After employees returned to work in June 2020, she requested an accommodation of working from home two days a week because of chronic obstructive lung disease and hypertension
- Employer allowed others to work from home but denied the plaintiff's request
- EEOC pointed to the employer's previous remote working arrangements as evidence that the requested accommodation was reasonable
- Case was settled

# Action Items

- Review job duties and job descriptions
- Do they need to be updated post-pandemic?
- Is in-person contact an essential function?
- Ensure that accommodation requests are being handled consistently

# A Less Stressful Work Environment?

- Identify the job functions the employee is unable to perform:
  - \_\_\_\_\_ (blank)
- Describe other relevant facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):
  - A less stressful work environment

# A Less Stressful Work Environment?

- Identify the job functions the employee is unable to perform:
  - She needs less criticism and stress
- Describe other relevant facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):
  - A less stressful work environment

# Is “Stress” a “Serious Health Condition?”

- It depends.
- According to the Department of Labor, mental illness resulting from stress may be a serious health condition if other conditions are met.
- Some courts have found that stress, without any evidence of mental illness, cannot constitute a serious health condition.
- At least one court has held that stress that causes a mental health condition qualifies as a serious health condition.
  - panic attacks, ongoing medical treatment, anti-anxiety meds and anti-depressants

# Lesson

- If stress is identified as the serious health condition, be extra cautious if the FMLA certification indicates other symptoms/diagnoses.
  - Depression
  - Anxiety
  - Ongoing treatment
  - Medication

# ADA Concerns

- At least one court has held that anxiety and depression, likely stemming from an employee's concerns about possibly getting fired, may qualify as a disability.
  - employee was unable to maintain nutritional needs, resulted in significant weight loss
  - had difficulty caring for her children
  - sleep pattern deficits

*Huiner v. Arlington Sch. Dist.* (D.S.D. Sept. 26, 2013).

- But there is also authority to support the proposition that it is unreasonable to place an employee in a stress-free environment or immunize him from criticism

*Marino v. U.S. Postal Serv.*, 25 F.3d 1037 (1<sup>st</sup> Cir. 1994)



# Suspicious Conduct While on FMLA Leave

- Often arises in connection with intermittent leave
- Conditions such as migraines, back pain

# Intermittent Leave

- Available to care for an immediate family member with a serious health condition or because of the employee's serious health condition when "medically necessary"
- "Medically necessary" - must be a medical need for the leave and leave can best be accomplished through an intermittent or reduced leave schedule
- Includes medical treatments or recovery from treatment

# Intermittent Leave

- Transferring Employees on Intermittent Leave.
  - May transfer employee to position with equivalent pay and benefits that better accommodates the need for leave.
  - The alternative position must have equivalent pay and benefits but need not have equivalent duties.
  - Can transfer to part-time job with same hourly rate of pay and benefits, as long as employee is not required to take more leave than necessary.
- Birth or Adoption of a Child.
  - Intermittent leave not required to be offered.
  - Only if employer agrees.

# Intermittent Leave

- Employee must make reasonable effort to schedule leave to minimize disruption.
- Increments. An employer must account for leave by using increments that are no greater than the shortest period of time the employer uses to account for other kinds of leave, provided it not greater than one hour.
- Employer may not reduce FMLA leave entitlement by more than the amount of leave actually taken.

# Monday or Friday or Weekend Absences (*Tillman v. Ohio Bell Tel. Co.* (6<sup>th</sup> Cir. 2013))

- 2006 - employee diagnosed with lumbar degenerative disease, a chronic back condition
- supposedly caused employee exacerbated pain 2–3 days per month
- doctor prescribed medication (which did not impair his ability to work) and physical therapy
- employee attended 2 physical therapy sessions and was supposed to do home exercises
- granted intermittent FMLA leave (fully paid) to be used when the pain flared up or for doctor's appointments

## *Tillman (cont.)*

- over period of 2-3 years, employee took paid FMLA leave for at least 2 or 3 days per month during most months
- employee's FMLA leave days regularly fell on Fridays and/or weekends and were frequently adjacent to already-scheduled days off or holidays

## *Tillman (cont.)*

- co-workers and supervisors complained
- company initiated investigation, which included surveillance
- employee was observed conducting personal errands, working in his yard and garage, and bending and lifting pieces of wood trim and carrying them into his house on dates he was on FMLA leave

## *Tillman (cont.)*

- employer interviewed the employee
  - employee explained that he used FMLA on weekends for convenience because he did not have time to do his home exercises during the week
  - said maybe his doctor had given him a Cortisone shot on the days he was observed or he may have been under the influence of Oxycodone or Percocet and unable to operate a company vehicle (although he was observed driving his family around)



## *Tillman* (cont.)

- employer denied employee's request for FMLA leave for his absences on the dates on which he was observed and terminated employee
- employee sued, claiming interference with FMLA leave and retaliation for using FMLA
- employee's retaliation claim failed because the employer had an honest belief that the employee had abused his FMLA leave and violated the company's code of business conduct
- employee's FMLA interference claim failed because employee did not show that he was entitled to leave on the dates he was observed by the investigator

## Tips for Dealing with Abuse

- Don't accept incomplete, unclear, unauthenticated, or internally inconsistent certifications
- Don't be afraid to seek 2nd, 3rd opinions where appropriate
- Seek recertification if you receive information that raises questions about the employee's stated use of leave
- Track patterns of intermittent leave usage, follow up with doctor
- Require employees to follow regular call-in policies

# Certification

- Employer has five business days to request a medical certification.
- Employee must return within 15 calendar days unless not practicable despite diligent effort.

# Certification

- Employee must provide a “complete and sufficient certification.”
- Incomplete means one or more entries have not been completed.
- Insufficient means information is vague, ambiguous or non-responsive.

# Incomplete/Insufficient Certification

- Request to cure deficiency must be in writing and must specify why certification is incomplete/insufficient.
- Employee has 7 days to cure the deficiency, unless not practicable despite the employee's diligent, good faith efforts.
- If deficiency not cured, employer may deny leave.

# Authentication/Clarification

- If authentication/clarification still needed, the employer (but not the employee's direct supervisor) may contact the employee's health care provider to authenticate/clarify certification but cannot request additional medical information.
- If the employer doubts certification, the employer may require a second opinion at its own expense.
  - Employer chooses health care provider, but it cannot be a provider that the employer employs or contracts with on a regular basis.
- The employer must obtain a third opinion if the two opinions conflict.

# Recertifications

- Generally, an employer cannot request recertification more often than 30 days.
- An employer cannot automatically request recertification every 30 days.
- An employer may request recertification every 6 months for a continuing condition, but the request must be in connection with an absence.

# Recertification Permitted More Often

- If there is a request for extension of leave
- If there are changed circumstances
  - increase in FMLA absences
  - pattern of using FMLA leave in conjunction with scheduled days off
- If the employer “receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.”



# Information That Casts Doubt

- “Information that casts doubt on the employee’s stated reason for the absence” may be information the employer receives (possibly from other employees) about the employee’s activities that appear to be inconsistent with the employee’s health condition and FMLA leave.
  - An employee playing in the company softball game while on leave for knee surgery.

# Recertification Requirements

- Employee has at least 15 calendar days to provide, unless not practicable despite employees diligent, good faith efforts
- No second or third opinions
- May provide health care provider with employee's attendance record and ask if absences and need for leave are consistent with the employee's serious health condition



# Questions?

## How to Respond to Requests for Leave

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