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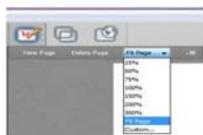
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**The ADA, FMLA/Leave of Absence  
& The Rehab Act: An Update**

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### What We Will Examine During This Presentation

- Family and Medical Leave Act (FLMA)
- Americans with Disabilities Act (ADA)
- American with Disabilities Act Amendment Act (ADAAA)
- Rehab Act
- Workers Compensation laws (state).

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### Leave Is Usually The Main Cause Of Confusion

- So let's define it as:  
*Any period when an employee is excused from reporting to regularly scheduled work duty.*



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### The Family and Medical Leave Act of 1993

- Allows eligible employees up to 12 weeks off during an FMLA "year"
- For specific reasons or conditions
- Leave is unpaid, but paid leave *does* run concurrently
- With reinstatement and benefits rights.

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### Employees Who Are Eligible For Leave Under FMLA

- 12 months (52 weeks) of total employment with the employer
- 1,250 hours worked in 12 month period preceding the start of FMLA
- Employer has 50 or more employees
- 12 weeks unpaid leave
  - Own serious health condition
  - Seriously ill family member
  - Child/Adoption/Foster Care

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### Serious Health Conditions

- “Chronic Conditions”
- Conditions requiring “multiple treatments”
- “Continuing Treatment”

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### Care for A Family Member

- To care for a child, spouse, or parent who as a serious health condition
- Requires medical certification
- Can be “for emotional support”

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### Covered Family Members

Spouse	Daughter	Son
Adopted Child	Mother	Father

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### People Not Covered:

Aunt	Ex-Spouse	Fiancé
Son's Girlfriend	Legal Guardian	Brother
Roommate	Neighbor	Best Friend
Grandparents	Foster Child	
Sister-In-Law	Same Sex Domestic Partner	

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### Newborn, Foster Care, and Adoption

- To care for a newborn child (note: this oftentimes blends with the mother's own "serious health condition")
- To care for an adopted or foster child- this is one who is received or placed in foster/adoptive care

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### FMLA Regulations Require:

- “Same or equivalent job on return”
- Time on FMLA leave “not counted” under safety/attendance bonus programs

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### FMLA’s Effect On Attendance Policies

- FMLA defines “protected absences”
  - CANNOT:  count absences under attendance rules, or for determining attendance bonuses
  - CAN:  count absences towards production incentives.

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### FMLA: Required Accommodations

- ➔ No requirement for accommodation to facilitate job performance
- May temporarily transfer to “alternative position” to facilitate intermittent leave.

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### The Americans with Disabilities Act of 1990 (ADA)

- Covers: Employers with 15 or more employees
- Covers: Applicants and employees
- Covers: Qualified individual with a disability
- Requires Reasonable accommodations

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### EEOC's Perspective on the ADAAA's Real Focus

"The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, *not* whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part **should not demand extensive analysis.**"

29 CFR 1630.1(c)(4).

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### Some impairments will virtually always impose a substantial limitation on a major life activity:

- **deafness** substantially limits *hearing*;
- **blindness** substantially limits *seeing*;
- an **intellectual disability** (formerly termed mental retardation) substantially limits *brain function*;
- **partially or completely missing limbs or mobility impairments** requiring the use of a wheelchair substantially limit *musculoskeletal function*;

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**Some impairments will virtually always impose a substantial limitation on a major life activity:**

- **cancer** substantially limits *normal cell growth*;
- **diabetes** substantially limits *endocrine function*;
- **epilepsy** substantially limits *neurological function*;
- Human Immunodeficiency Virus (**HIV**) **infection** substantially limits *immune function*;
- **multiple sclerosis** substantially limits *neurological function*;
- **muscular dystrophy** substantially limits *neurological function*;

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**Some impairments will virtually always impose a substantial limitation on a major life activity:**

- **major depressive disorder,**
- **bipolar disorder,**
- **post-traumatic stress disorder,**
- **autism,**
- **cerebral palsy,**
- **obsessive compulsive disorder, and**
- **schizophrenia**

all substantially limit *brain function*.

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**Suggested Approach To ADA Accommodations:**

- Can the employee be accommodated in the current position?
- Will the employee be able to perform the job if marginal functions are removed?
- Can the employee be transferred to an existing vacancy?

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### Suggested Approach to ADA Accommodations:

- Call the ADA Hotline:  
(800) 949 4-ADA
- Call Job Accommodation Network  
(800) 526-7234
- Ask the employee and engage in the interactive process.

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### Accommodations Under the ADA

- Must be “reasonable”
  - Not “reasonable” if there is an undue cost to the employer
  - Undue cost is in relation to all the assets of the entire employer’s organization
  - Employer gets to choose if multiple accommodations will work
- Average accommodation: <\$100
- Often the easiest accommodation is leave
- “Continuing Treatment”

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### Effect on Attendance Policies

- ADA says the employer can enforce attendance policies if:
  - regular job attendance is an “essential job function,” and
  - the policy is consistently applied

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### Effect on Attendance Policies

- But:
  - Additional leave may be a reasonable accommodation if attendance is not an essential function of the job

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### Leave and the ADA

- The ADA does not specifically require employers to grant leave to their employees
- The ADA does require employers to provide reasonable accommodations, which may include some form of leave.

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### Most Employers Already Have a Leave Policy

- Most employers permit paid leave for:
  - sickness
  - vacation
  - personal days
- Others have a unpaid leave, permitting the employee to be absent, but without pay.



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### Comparing the FMLA and the ADA

- The ADA does not provide an effective remedy for the serious ill employee who needs leave
- The FMLA fills this gap
- It does not fill the gap perfectly.

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### Defenses Are Different Under ADA and FMLA

- Under the ADA, providing a reasonable accommodation is excused when doing so would impose an undue hardship on the employer
- There is no such defense under the FMLA, leave must be granted regardless of the burden.

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### Frequently Asked Questions

Q: Are all employees covered by the ADA also entitled to leave under the FMLA?

A: No. Employees protected by the ADA must also qualify for FMLA leave. This can depend on several factors—for example—length of service. Also, an individual must be employed by an FMLA-covered employer with 50 or more employees to obtain FMLA leave.

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### Frequently Asked Questions

Q: Is an FMLA "serious medical condition" the same as an ADA "disability"?

A: No, these are not the same. An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. Some FMLA "serious health conditions" may be ADA disabilities. For example, most cancers and serious strokes are covered by the ADA. Others, like routine pregnancies, are not.

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### Frequently Asked Questions

Q: Is there a conflict between the FMLA provision allowing employers to ask for certification that an employee has a serious health condition and ADA restrictions on disability-related inquiries of employees?

A: No. If an employee requests leave under the FMLA, employers don't violate the ADA by asking for the information in the FMLA certification form.

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### Frequently Asked Questions

Q: Does the FMLA's limit of 12 workweeks of leave in a 12- month period mean that the ADA also limits employees to 12 weeks of leave per year?

A: No. The FMLA does *not* mean that more than 12 weeks of unpaid leave automatically imposes an undue hardship for purposes of the ADA.

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### Frequently Asked Questions

Q: Does an employer's policy that terminates an employee who has exhausted their 12 weeks of FMLA leave comply with the ADA?

A: No. The ADA requires an individualized assessment of each person's accommodation. Any bright lines that operate to cut off or end an accommodation violate the ADA.

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### Frequently Asked Questions

Q: How do the ADA and the FMLA compare regarding intermittent or occasional leave?

A: Under the ADA, a qualified individual with a disability may work part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer.

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### Frequently Asked Questions

Q: What are employees' reinstatement rights under the ADA and the FMLA?

A: Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship.

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### Frequently Asked Questions

Q: Do the ADA and the FMLA require an employer to continue an employee's health insurance coverage during medical leave?

A: Under the ADA, an employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status. The coverage must be on the same terms normally provided to those in the same leave or part-time status.

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### Frequently Asked Questions

Q: If an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and as an ADA reasonable accommodation?

A: If an employee requests time off for a reason related (or possibly related) to a disability (e.g., "I need six weeks off to get treatment for a back problem"), the employer can (and probably should) consider this a request for ADA reasonable accommodation as well as FMLA leave.

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### Frequently Asked Questions

Q: As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?

A: An employer may offer an employee a reasonable accommodation other than the leave requested under the ADA, as long as it is effective. For example, an employer may offer an assistive device, an opportunity to work reduced hours in the employee's current job, or a temporary assignment to another job, if these are effective accommodations. BUT:

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### Frequently Asked Questions

Q: As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?

A: But, if the individual is “eligible” for leave under the FMLA and has a serious health condition that prevents him/her from performing an essential job function, the employee has the *right* to take a leave of absence of up to 12 workweeks in 12 months, even if the employee could continue working with an effective reasonable accommodation.

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### Frequently Asked Questions

Q: Does the ADA require an employer to give an employee time off to care for a spouse, son, daughter, parent, or other person with a disability?

A: The ADA does not require a covered employer to give an employee time off to care for a spouse, son, daughter, parent or other individual with a disability with whom the employee has a relationship. But an employer is required to provide leave on the same terms as it normally provides leave to employees who need to care for someone who is ill.

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### Frequently Asked Questions

Q: As an accommodation, can an employer make arrangements for a sign language interpreter for an individual who is deaf and require that employee to pay for the interpreter services?

A: No. The employer is never allowed to require the employee to pay for the cost of an accommodation. An employee may, however, offer to pay part of a cost that would otherwise make the accommodation unreasonable under the undue hardship test. The employer may not coerce this payment.

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## Questions

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Session Evaluation  
Your feedback is important to us

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## Thank You!

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