



**ADA Audio Conference Series  
November 12, 2019  
Leave Under the ADA and FMLA**

This session is scheduled to begin at  
2:00pm Eastern Time

Real-Time Captioning and the PowerPoint Presentation are available through the Webinar Platform.  
Audio Connection is available through the webinar platform/telephone/Mobile App.

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**OR**

Join the session by opening the session link in a browser on your mobile device.



\*\*The accessibility of the mobile app is limited for voice over users and no captioning is displayed.

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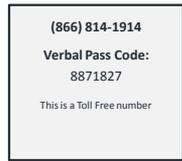
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## Listening to the Audio via Telephone

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## Captioning



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- The caption screen can be accessed by choosing the "CC" icon in the Audio & Video panel.



- Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

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## Submitting Questions



- If you are listening by phone you will be instructed by the Operator on how to ask a question.
- Webinar participants may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area. You will not be able to see the question after you submit it but it will be viewable by the presenters.
- If you are connected via a mobile device you may submit questions in the chat area within the App
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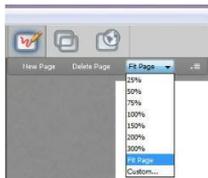
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## Customize Your View



Resize the whiteboard where the presentation slides are shown to make it smaller or larger, by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”.



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## Customize Your View, *continued*



- Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or “stretch/shrink”.
- Each panel may be detached using the  icon in the upper right corner of each panel.

8

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## Setting Preferences

- Depending on your system settings you may receive visual and audible notifications when individuals enter/leave the webinar room or when other actions are taken by participants. This can be distracting.
- To turn off notifications (audible/visual)
  - Select “Edit” from the tool bar at the top of your screen
  - From the drop down menu select “Preferences”
  - Scroll down to “General”
    - select “Audible Notifications” Uncheck anything you don’t want to receive and “apply”
    - Select “Visual Notifications” Uncheck anything you don’t want to receive and “apply”
  - For Screen Reader User – Set preferences through the setting options within the Activity Window (Ctrl+slash opens the activity window)

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## Technical Assistance



- If you experience any technical difficulties during today's session:
  - In webinar platform: Send a private chat message to the host by double clicking "Great Lakes ADA" in the participant list. A tab titled "Great Lakes ADA" will appear in the chat panel. Type your comment in the text box and "enter" (Keyboard - F6, Arrow up or down to locate "Great Lakes ADA" and select to send a message ); or
  - By Email [webinars@ada-audio.org](mailto:webinars@ada-audio.org); or
  - Call 877-232-1990 (V/TTY)

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## Employer-Provided Leave and the ADA

Sharon Rennert  
Senior Attorney Advisor  
ADA/GINA Division  
U.S. Equal Employment Opportunity  
Commission



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## Leave as an Employee Benefit Leave as Reas. Accommodation



- Employee with disability entitled to same paid (or unpaid) leave offered as employee benefit, on same terms, to other similarly-situated employees (no disparate treatment)
- Employee with disability may be entitled to **unpaid leave** as a **reasonable accommodation** when employee is not covered by an employer's leave program, has exhausted leave under such a program, or has exhausted other possible leave options (e.g., FMLA, worker's compensation)

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## Request for Leave Because of Medical Condition



- All requests for leave for a medical condition – including use of employer leave program and FMLA – also constitute a request for reasonable accommodation
- In many instances, request can be addressed by an employer’s leave program or FMLA or workers’ compensation
- But, if not (or if not completely), then must address leave as a reasonable accommodation request

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## ADA and FMLA: Potentially Overlapping Legal Obligations



- Remember that FMLA and ADA serve different purposes: Former is strictly about leave and conditions for granting or denying it. Latter is an antidiscrimination law and leave happens to be a type of reasonable accommodation
- FMLA’s “serious health condition” is broader than ADA’s definition of disability, but expanded definition means many more FMLA-eligible conditions are also disabilities

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## Request for Leave Because of Medical Condition (cont.)



- If request needs to be addressed as one for leave as reasonable accommodation, employer should engage in an “*interactive process*.” Information needed depends on the circumstances, but may include:
  - Specific reason(s) employee needs leave
  - Form of leave (block of time or intermittent)
  - When the need for leave will begin and end
- Carefully think about specific information you need and ask questions that will get you that information

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## Interactive Process



- Employers may request documentation from the employee's health care provider to:
  - Confirm or explain if the medical condition is a disability, consistent with the ADAAA (if unclear)
  - Help the employer understand the need for leave, the amount and type of leave required, any contingencies that may affect the amount of leave needed, and whether other reasonable accommodations may be effective for the employee to eliminate need for leave or to shorten the period when leave is needed

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## Interactive Process (cont.)



- Interactive process may need to be reinitiated during the leave period (Example: requested extension) or when employee is about to return to work
- Requested extension of leave: questions for employee (and health care provider) should build on initial information employer received and new information obtained from employee

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## Can Employer Choose Leave Over Reasonable Accommod. that Permits Employee to Keep Working?



- Gray area of the law
- EEOC's view: No, unless reasonable accommodation that permits employee to keep working causes undue hardship and leave only viable alternative
- While employer has right to choose between 2 effective accommodations, accommodation that **permits employee to work** is more effective than leave

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### Cannot Penalize Employee for Using Leave as a Reas. Accom.



- Essentially punishing employee for using a reasonable accommodation and therefore renders leave ineffective
- May also lead to allegation of retaliation or disparate treatment (e.g., no negative consequence for use of maternity/paternity leave of similar duration)
- If leave is extensive may need to “prorate” when doing performance evaluations, or delay the evaluation

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### Request to Extend Leave/What If Additional Leave Exceeds Employer’s Maximum Leave Policy



- Should re-open interactive process
- Cannot summarily reject request because it is more than what was originally requested or it will exceed a maximum leave policy (reasonable accommodation includes modifying policies) – in this case to permit employee extra time off unless it causes undue hardship

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### Request to Extend Leave/Maximum Leave Policies (cont.)



- Rejection of leave extension requires individualized assessment; facts about the additional leave and its impact on employer operations that show an undue hardship or that the employee is no longer qualified

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## Maximum Leave Policies: Use of Form Letters to Signal Upcoming End of Leave



- Consider sending (or modifying) such letters to remind employees about the policy but also to invite requests for extensions of leave
- May state that any extensions are up to the employer, will be decided on a case-by-case basis, and best to submit requests well in advance of the end of the leave period, if possible, to permit employee sufficient time to provide any necessary medical documentation employer may request to evaluate whether to grant an extension

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## Interactive Process & Return to Work



- Employers should continue to engage in the interactive process as needed:
  - an employee requests a reasonable accommodation (including reassignment) to return to work, or
  - the employee's doctor imposes work restrictions when the employee returns to work (work restrictions = request for accommodation)

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## Interactive Process & Return to Work (cont.)



- In particular, employers may ask:
  - what specific accommodation(s) the employee needs;
  - why the accommodation(s) is/are needed;
  - how long the employee may need the accommodation(s);
  - possible alternative accommodation(s) that might be effective for the employee (including reassignment if employee no longer qualified, with or without accommodation, to stay in current job)

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## 100% Healed Policies



- Cannot require that an employee be 100% healed or have no restrictions in order to return to work
- If employee can safely and adequately perform the essential functions of the position with reasonable accommodation, then employee is qualified to return to her position even if not 100% healed
- Employer response to doctor imposing work restrictions: may re-open interactive process

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## Reassignment



- If employee can return to work but not to current job, ADA requires employers to consider possibility of reassignment
- Looking for equivalent, vacant position that employer intending to fill
- Employee must be qualified for new position (can perform essential functions with or without reasonable accommodation)
- Non-competitive (EEOC view and most courts agree)

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## Undue Hardship



- Relevant factors in determining if providing leave (or extending leave) would result in undue hardship may include:
  - Amount and/or length of leave needed;
  - Frequency of the leave;
  - Any flexibility regarding when leave is taken;
  - Whether the need for intermittent leave is predictable;
  - Impact of the employee's absence on ability to get work performed in a timely and appropriate manner;
  - Impact of employee's absence on business operations, including coworkers' ability to do their jobs, and employer's ability to provide timely, effective customer service, or otherwise accomplish work objectives.

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## EEOC's Reasonable Accommodation & Leave Resources



- **Employer-Provided Leave and the Americans with Disabilities Act**  
<https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>
- **Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act**  
[www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html)  
(See "Leave" under "Types of Reasonable Accommodations")

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## EEOC Leave Resources



- **The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964**  
[www.eeoc.gov/policy/docs/fmlaada.html](http://www.eeoc.gov/policy/docs/fmlaada.html)
- **Enforcement Guidance on Pregnancy Discrimination and Related Issues**  
[www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)  
(See Section II.B., Reasonable Accommodation)

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## EEOC Leave Resources



- **Enforcement Guidance: Workers' Compensation and the ADA**  
[www.eeoc.gov/policy/docs/workcomp.html](http://www.eeoc.gov/policy/docs/workcomp.html)  
(See "Return to Work Decisions" and "Reasonable Accommodation")
- **The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities**  
[www.eeoc.gov/facts/performance-conduct.html](http://www.eeoc.gov/facts/performance-conduct.html)  
(See "Attendance Issues")

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## Questions



- You May Type and Submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area

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## Contact Information Sharon Rennert



- 202-663-4676
- [Sharon.Rennert@eeoc.gov](mailto:Sharon.Rennert@eeoc.gov)

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**Thank you for participating in today's  
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**Next Session:** December 10, 2019  
"The Air Carrier Access Act (ACAA) and Travelers with  
Disabilities: Travel by Air with Service Animals"

Register at: [www.ada-audio.org](http://www.ada-audio.org) or call 877-232-1990 V/TTY

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