

Leave and Absence Issues: Complying With FMLA and Overlapping Laws

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Lindabury, McCormick & Estabrook, P.A.

Council on Education in Management

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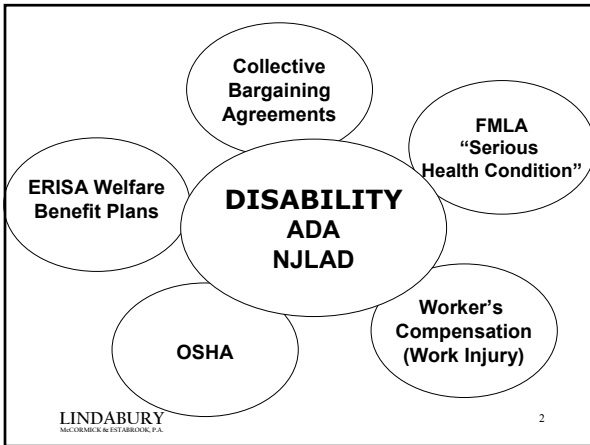
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Goal

- Understand the obligations of each law separately
- FMLA: 12 weeks of leave during a 12-month period for serious health condition.
- ADA and NJLAD: reasonable accommodation of disability, which may include leave.
- Workers' Compensation: system for compensating employees for workplace injuries and illnesses.

Family And Medical Leave Act of 1993



FMLA: Eligible Employees

- works at a work site with 50 employees or more or is employed by an employer who has 50 or more employees within a 75-mile radius of that work site,
- has worked for the employer at least 12 months, and
- has worked at least 1250 hours over the previous 12-month period

FMLA: Coverage and Eligibility

- "Eligible employees" are entitled to up to 12 weeks of leave in a 12-month period for:
 - the birth and care of new born child
 - placement of a child for adoption or for foster care
 - to care for the employee's spouse, child, or parent with a serious health condition
 - and for a serious health condition that makes the employee unable to perform the functions of the employee's position.

Serious Health Condition

- An illness, injury, impairment, or a physical or mental condition that involves one of the following:
 - inpatient care (overnight stay),
 - continuing treatment by a health care provider that includes



Serious Health Condition (cont'd.)

- a period of incapacity requiring absence from work, school, or other regular daily activities of more than three days and subsequent treatment of or incapacity from such illness
- any period of incapacity or treatment due to a chronic serious health condition, or

Serious Health Condition (cont'd.)

- a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, or
- any period of absence to receive multiple treatments or for a condition that would likely result in a period of incapacity of more than three days if left untreated, or
- incapacity due to pregnancy or for prenatal care

Continuing Treatment

- two or more visits to a health care provider,
- single visit to a health care provider that results in a regimen of continuing treatment, or
- under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition of disability which cannot be cured.

Serious Health Condition ? (cont'd.)

- | | |
|--------------------------------|------------|
| Heart attack? | Cancer? |
| Orthodontia? | Acne? |
| Substance abuse? | Stress? |
| Appendicitis? | Allergies? |
| Pneumonia? | Arthritis? |
| Voluntary treatment? | Cold? |
| Cosmetic treatment? | Flu? |
| Routine physical examinations? | |

Care for a Family Member

- Spouse, child, parent
- Family member must have serious health condition
- Includes both physical and psychological care
- Includes situations where employee
 - fills in for others
 - makes arrangements for changes in care

New Jersey Domestic Partnership Act

Domestic Partners:

1. Two persons of the same sex (or of opposite sex if both are over the age of 62)
2. Criteria:
 - Common residence
 - Jointly responsible for each other's common welfare
 - Agree to be jointly responsible for each other's basic living expenses
 - Not related by blood or affinity
 - Choose to share each other's lives in a committed relationship of mutual caring
 - Both over 18 years of age
 - Neither person a partner in a domestic relationship terminated within 180 days (except in case of death)
3. Jointly file an Affidavit of Domestic Partnership 13

New Jersey Domestic Partnership Act (cont'd)

Is a "domestic partner" a spouse under the NJFLA?
Under the FMLA?

Yes:

- Clearly stated public policy to treat domestic partners as spouses for myriad purposes.
- Amending laws dealing with health, benefits, discrimination and caring to include domestic partners.

No: A number of statutes have been amended to include domestic partners but not NJFLA.

My guess: domestic partner = spouse under leave laws

FMLA

vs.

NJFLA

Similarities Between FMLA and NJFLA

- Purpose
- Unpaid
- Intermittent/reduced
 - Do not duly disrupt employer operations
 - Count only time actually used
 - Employer must agree to intermittent/reduced schedule leave for birth or adoption
 - Can transfer employee to alternate position during period of intermittent or reduced schedule leave

Differences Between FMLA and NJFLA

- No leave for an employee's serious health condition under NJ law.
- No leave to care for an employee's parent-in-law under federal law.
- Employee with 1000 hours worked in past 12 months eligible under the NJFLA; FMLA requires 1250 hours worked in past 12 months.
- NJFLA limits family leave to 12 weeks in any 24-month period. The FMLA allows 12 weeks in any 12-month period of time.
- No leave for foster care under NJFLA .

Differences Between FMLA and NJFLA's Treatment of Intermittent/Reduced Schedule Leave

- NJFLA: birth/adoption leave can continue following the one-year anniversary of the birth or placement for adoption so long as such leave commenced before the anniversary date. (Not so under FMLA.)
- NJFLA: intermittent/reduced schedule leave cannot exceed 24 consecutive weeks.
- Under NJFLA the total time within which intermittent leave is taken cannot exceed a 12-month period of time for each serious health condition.

Substitution of Paid Leave

FMLA and NJFLA leaves themselves are unpaid.

- Employee may elect, or employer may require, an employee to substitute accrued paid leave for any part of leave provided under the FMLA.
- Where substituted paid leave of less than 12 weeks is available, the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave provided equals 12 weeks.
- An employee is entitled to substitute paid FMLA leave only under circumstances provided by the employer's plan. The employer may waive the plan's requirements and allow substitution.
- An employee is entitled to substitute paid vacation, paid personal leave and paid time off without limitation.

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FMLA

Company Disability
Plan or Incidental
Absence Policy



- **CAN'T** Count as Absence
- Need Not Pay

- **CAN** Count as Absence
- Must Pay **IF** Qualify

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**If Qualify under FMLA and
If Qualify under Employer Disability/
Incidental Absence Plan:**



FMLA and Disability/Incidental Absence

- **Can't** Count as Absence
- **Must** Pay

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**If Qualify under FMLA
But Not Qualify under Employer Disability/
Incidental Absence Plan:**



FMLA and Disability/Incidental Absence

- **Can't Count as Absence**
- **Need Not Pay**

Employer Notice Requirement

♦ **Posting**

- The employer must post in a conspicuous space an approved notice that summarizes the pertinent provisions of the FMLA and provides information on the filing of a charge. If an employer fails to post the notice and an employee fails to give proper advance notice of a FMLA leave, the employer cannot take adverse action.
- If a "significant portion" of workers are not literate in English, the employer must provide the information in the notice in a language in which the employees are literate.

Employer Notice Requirement

♦ **Handbooks and Policies**

- If the employer has any written guidance concerning leave, wages, attendance and similar matters, information concerning FMLA rights and employee obligations and any requirement for fitness-for-duty certification must be included in the handbook or other document.
- If such documentation has not been given to employees, the employer must provide written guidance to any employee who requests a FMLA leave.

Employee Notice

- An employee “requesting” unpaid FMLA leave must explain the reasons for the needed leave so that the employer can determine that the leave qualifies under the FMLA.
- An employee need not expressly assert FMLA rights, but only needs to state a qualifying reason for the needed leave.
- For paid FMLA leave, the employer's usual policy for notification should apply.
- If the need for leave is foreseeable, an employee must give 30-days notice before taking leave (or as soon as practicable) if the need for leave is unforeseeable the employee must notify the employer as soon as is practicable.

Employee Notice (cont'd)

- If the FMLA leave is based on the serious health condition of the employee or to care for a family member, the employee must make a reasonable effort to schedule treatment so as to not unduly disrupt the employer's operations.
- In all instances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, based on information provided by the employee. If the information is insufficient, the employer should make further inquiry.

When FMLA Leave is “Requested”

- The employer must give clearly written notice that includes
 - whether the leave is approved or not;
 - any requirement for a medical certification and the consequences of failing to provide certification;
 - that the leave will be counted against their FMLA leave entitlement for that 12-month period;
 - the employee's right to substitute paid leave and whether the employer will require any substitution and any conditions related thereto.

When FMLA Leave is "Requested" (cont'd)

- any requirement to make premium payments to maintain health benefits and the arrangements for payments
- any requirement for a fitness-for-duty certificate
- the employee's status as a "key employee" and its consequences
- the right to restoration to the same or equivalent position
- potential liability for health insurance premiums paid by the employer if the employee fails to return to work

Medical Certification

- An employer may require certification of a serious health condition.
- Notice of certification requirements and the consequences of an employee's failure to provide certification must be given to the employee at the time of the leave request.

Medical Certification (cont'd)

- Certification must be given within the time frame requested by the employer, but the employee must have at least 15 days.
- The certification is provided by a health care provider (includes not only doctors, but podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners and Christian Science practitioners).



Information Required for Certification

- identification of which of the six types of “serious health conditions” apply
- the medical facts which support the certification
- the date the condition began and its probable duration
- whether necessary to take intermittent leave or reduced leave schedule
- if pregnancy or chronic condition, whether presently incapacitated and likely duration and frequency
- a brief statement of regimen of treatment
- whether inpatient hospitalization is required

Information Required for Certification (cont'd)

- the employee's inability to perform his or her essential job functions or work of any kind (as to the employee's own health condition)
- need for third-party care or that employee's presence would be beneficial to the patient (as to the care of a family member)
- a statement of the medical necessity for the intermittent leave or a reduced leave schedule or that the leave is necessary to care for a family member and expected duration and schedule of the leave (as to intermittent leave or reduced schedule leave)
- If the certification is incomplete, the employer must so advise the employee and provide the employee a reasonable opportunity to cure the deficiency.

Recertification

- The employee may be required to provide subsequent recertification, but not more often than every 30 days, unless
 - the employee requests an extension of the leave
 - circumstances described in the original certification have changed significantly
 - the employer receives information that casts doubt on the continuing validity of the original certification

Recertification (cont'd)

- the employee states he/she is unable to return from leave due to a continuation, recurrence, or onset of a serious health condition
- If the certification is complete, the employer may not request additional information from the health care provider. The only option is to obtain a second opinion at the employer's expense.

Benefits

- Group health plan coverage must be maintained on the same conditions as though the employee was not on leave
- Entitled to benefit from changes in benefits that occurred during FMLA
- Upon return from an FMLA leave, an employee cannot be required to re-qualify for any benefits

Fitness for Duty Exam

- An employer can have a uniformly applied practice or policy that requires employees to receive certification from the health care provider that the employee is able to resume work, but only with regard to the particular health condition that caused the FMLA leave.
- Similarly, requirements under the ADA that any return-to-work medical examination be job-related must be complied with.
- The employee must be notified of the fitness-for-duty certification requirement at the time leave is requested or immediately after leave commences.

Job Reinstatement

- Upon expiration of FMLA, an employee must be returned to the same or an equivalent employment position. Pay, benefits, status, responsibility and authority must be equivalent, not just comparable or similar.
- If the employee is no longer qualified the position, a reasonable opportunity to re-qualify must be given.
- The employee must be restored to the same work site or to a geographical proximate work site.
- Any period of FMLA leave will be treated as continued service (no break in service) with respect to pension or other retirement plans.

Job Reinstatement (cont'd)

- Not Required to Return to Work if:
 - Employee is unable to perform the position because of a physical or mental condition, including the continuation of a serious health condition (although there may be obligations under the ADA).
 - Employee's job was subject to a reduction in force.
 - FMLA was induced by fraud.
- An employee is not entitled to accrue any additional benefits or seniority during unpaid FMLA leave.

Key Employee

- An employer may deny restoration to a "key employee" only if necessary to prevent substantial and grievous economic injury to the operations of the employer.
- A "key employee" is salaried and among the highest paid 10% of the employees employed within 75 miles of the work site.
- The employer must notify employees of their status as key employees if there is reason to believe that restoration will not occur.

Intermittent Leave & Reduced Schedule Leave

Intermittent or Reduced Leave

Intermittent leave or reduced schedule leave is available without the employer's consent to care for an immediate family member with a serious health condition or because of a serious health condition of the employee (FMLA), but only when medically necessary.

Intermittent/Reduced Schedule Leave for Birth, Adoption, Foster Care

- Within a year
- Employer must agree
- Do not discriminate



Employer Right to Transfer Employee To Accommodate Intermediate/Reduced Schedule Leave

Employer may require temporary transfer to alternative position.

- employee must be qualified
- position better accommodates recurring absences
- comply with the law
- have equivalent pay and benefits, but not necessarily equivalent duties
- can be part-time job with same hourly rate of pay and benefits
- must return employee to same or equivalent job at end of leave

Tracking Intermittent/ Reduced Schedule Leave Time

- Count only the amount of leave actually taken
- Increments can be as short as the shortest time used by the payroll system
 - ➔ Cannot require > 1 hour

Nondiscrimination or Interference

- An employer may not interfere with employee's rights under the FMLA, discriminate or retaliate against any employee for opposing unlawful practices under the FMLA or for participating in any proceeding related to enforcement of the FMLA.
- FMLA absences may not be counted as occurrences under "no fault" attendance policies.

***Nevada Dept. of
Human Resources v. Hibbs (2003)***

- Application of family leave provisions of FMLA to states is not barred by 11th Amendment.
- 14th Amendment permits application of FMLA to states in order to deter sexual discrimination.
- States relied upon invalid stereotypes in granting leave. (Family-care leave stigmatized as an inordinate drain on the workplace caused by female employees.)
- After FMLA, employers could not evade leave obligations by hiring men.

***Ragsdale v.
Wolverine Worldwide, Inc. (2002)***

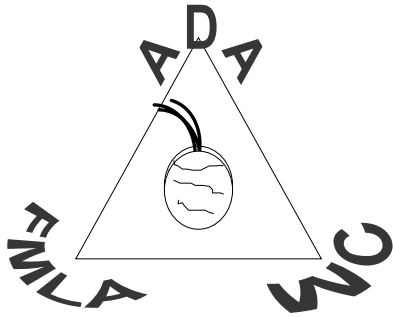
Background

- Medical leave granted for 30 weeks
- Part-time or additional leave denied
- Ragsdale claims FMLA violation
 - 30 weeks were not designated
 - Regs: no designation, no FMLA

Ragsdale Supreme Court Ruling

- Regulation is invalid
- "Impermissible alteration of statutory framework"
- Notice and designation not addressed
- Impact:
 - Must designate and provide notice
 - DOL penalty not valid unless employee harmed

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Disability Laws

- Americans With Disabilities Act (ADA)
- New Jersey Law Against Discrimination (NJLAD)

Americans With Disabilities Act

Discrimination

- Limiting, segregating or classifying
- Participating in a contractual arrangement or relationship
- Using criteria that are not job-related and consistent with business necessity
- Applies to job application procedures, hiring, promotion, compensation, training, all other terms, conditions, and privileges of employment.

Definitional Act

Prohibits discrimination against an otherwise qualified individual with a disability who can perform the essential functions of a job with or without reasonable accommodation. An employer must reasonably accommodate each such person's mental or physical impairments unless that would constitute an undue hardship or the person, if employed, would pose a direct threat to such person or others.

Disability

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual
- A record of such impairment
- Being regarded as having such an impairment

Disorders explicitly excluded from coverage under the ADA include:

- Sexual behavior disorders
- Compulsive gambling
- Pyromania
- Kleptomania
- Substance abuse disorders resulting from current drug or alcohol use or use in the recent past
- Problems with family relationships

Personality traits or behaviors, such as feelings of stress, chronic lateness, or poor judgment, are not mental impairments, but may be shown to be related to a mental impairment under the ADA.

Qualified Individual with A Disability

- Satisfies the requisite skill, experience, education and other job-related requirements
- Can perform the essential functions of the position with or without reasonable accommodations

Major Life Activity

- Ability to care for one's self
- Perform manual tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Reproduction
- Working generally

**Working is to be Considered as a
“Major Life Activity” Only:**

- If no other major life activity is substantially limited, and
- When the employee is “significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes.”

***Toyota Motor Mfg., Kentucky
v. Williams***

- To be substantially limited in performing manual tasks means having an impairment that prevents or severely restricts daily activities that are of central importance to most people’s daily lives on a permanent or long-term basis.

Mitigation

Mitigating measures, such as eyeglasses or medication, must be taken into consideration when determining whether an individual is “substantially limited” for purposes of establishing a disability under the ADA.

What is Meant by “Essential”? – Relevant Inquiries

- Does the job exist to perform this function?
- How many people are available to perform this function?
- Is some special skill or license required for someone to do this function?
- Would the job change significantly if this function was taken away?
- Work experience of past incumbents
- Current work experience of incumbents in similar jobs
- Look to:
 - Job descriptions
 - Collective bargaining agreement

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Reasonable Accommodations Examples

- Modifications to application process
- Modifications to work environment
- Modifications for access to equal benefits and privileges
- May include
 - making facilities accessible/usable
 - job restructuring/schedule modification/reassignment

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Reasonable Accommodations (cont'd)

Considerations

- Size of employer's business
- Type of employer's operations
- Nature and cost of accommodations
- Whether accommodations would require a waiver of an essential job function

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Reasonable Accommodations (cont'd)

Process

- Interactive
- “Reasonable” not mean “best” or as requested
 - “Stress free” job not required
 - No “shadow” employ
 - Maintain performance standards
- Medical documentation

Undue Hardship

An accommodation need not be made if the employer can show that the accommodation would impose “an undue hardship on the operation of its business.”

- Significant difficulty
- Significant expense
- Resources
- Type of operations
- Impact

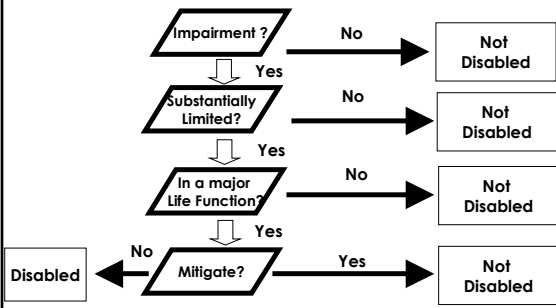
Direct Threat

- Significant risk of substantial harm to other employees or him/herself (*Chevron v. Echazabel*)
- Assessment of present ability
- Reasonable medical judgment

ADA Decision Ladder

- Knowledge of physical or mental impairment
- Impairment substantially limits a major life activity
- Qualifications for the position
- Perform the essential functions of the job
- Reasonable Accommodation
- Undue hardship
- Direct Threat

ADA Decision Ladder



“Disabled” under the ADA is not necessarily the same as:

- “Handicap” under the New Jersey Law Against discrimination (NJLAD)
- “Serious Health Condition” under the Family and Medical Leave Act (FMLA)
- Entitlement to Benefits under ERISA welfare benefits plan (“SDABP”)
- Entitlement to Workers’ Compensation
- Disabled under state laws

New Jersey Law Against Discrimination (NJLAD)

ADA vs. NJLAD

Similarities

- Intent
 - Protect employee who is "disabled" (ADA) or "handicapped" (NJLAD) from discrimination because of medical condition
 - Protect employer: require that essential function of the job be performed.
- Scope
 - Physical and mental
 - Perceived/believed to be
- Similar concepts
 - Exclusions
 - Mitigation
 - Essential functions of job
 - Reasonable accommodations
 - Undue hardships/Direct threat

Handicap

"...suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness...or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions... which prevents the normal exercise of any bodily or mental functions..."

**NEW JERSEY EMPLOYERS
DISABILITY LAWS**



Federal

**AMERICANS WITH
DISABILITIES ACT (ADA)**

“Disability”
Substantially limits
major life function

Significantly:

- NJLAD does not require that the condition substantially limit a major life function.
- New Jersey courts have interpreted the term “handicap” broadly and have explicitly rejected limiting its scope to the severely disabled.



State

**NEW JERSEY LAW
AGAINST DISCRIMINATION (NJLAD)**

“Handicap”
Prevents normal exercise of
bodily or mental function

**NEW JERSEY EMPLOYERS
DISABILITY LAWS**



Federal

**AMERICANS WITH
DISABILITIES ACT (ADA)**

- A. At least 15 employees.
- B. Interstate Commerce.
- C. Employees/Applicants only.
- D. No individual liability.
- E. Cap in compensatory / punitive damages (depending on size of corporation).
- F. Must file with EEOC.



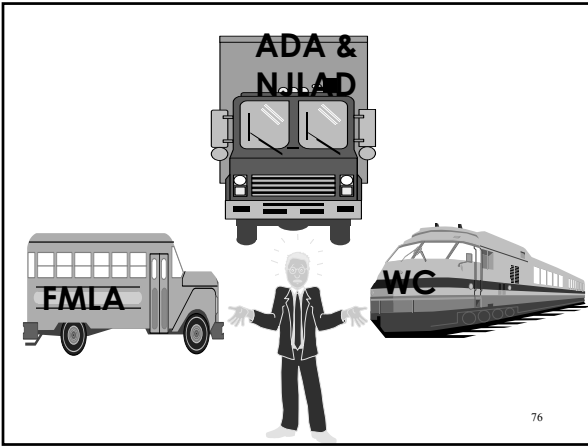
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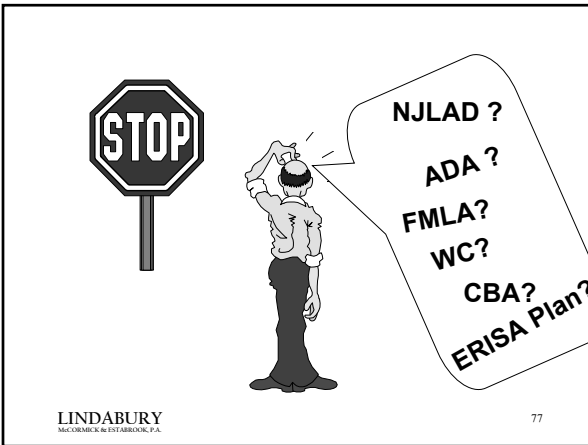
**NEW JERSEY LAW
AGAINST DISCRIMINATION (NJLAD)**

- A. No minimum number of employees. (All private employers.)
- B. No interstate commerce requirement.
- C. Can include independent contractors and others not in employment relationship.
- D. Individual liability possible
- E. Compensatory/punitive damages
- F. Need not file with NJLAD.

Workers' Compensation

Requires medical treatment and certain benefits for an employee who has incurred an injury that arises out of and in the course and scope of the worker's employment





Leave of Absence

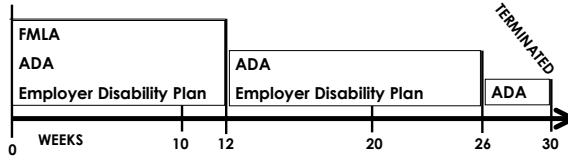
FMLA:

- Employer must allow FMLA eligible employee with serious health condition 12 weeks of unpaid absence.

ADA

- Regular attendance can be (usually is) an essential job function
- If so, denying frequent absences and indefinite leaves may not violate ADA (unless the leave would be a reasonable accommodation).
- Reasonableness could be under 12 weeks or over 12 weeks.

Absence Time Line



- Assume company has 26-week disability plan.
- Assume 30 weeks leave is a reasonable accommodation.

Family Leave

FMLA:
12 weeks to care for spouse child or parent (NJFLA parent-in-law) with Serious Health Condition

ADA
Not required to provide time off as a reasonable accommodation to an employee whose family member requires care.

Employee Notice

ADA
Employee has obligation to request reasonable accommodation

WC
Employee must report work-related injury within 45 days of occurrence

FMLA:

- Need only state a qualifying reason
- If foreseeable, 30-days notice
- If unforeseeable, as soon as practicable
- If paid leave, employer's notification requirements apply

Job Protection

ADA:

No guarantee, but must make reasonable accommodation.

WC:

No guarantee, but cannot retaliate.

FMLA:

Guaranteed reinstatement to same or equivalent position.

Benefits

ADA:

No discrimination because of disability

WC:

No guarantee

FMLA:

- Group benefits - continued coverage
- Non-group benefits - no coverage

Medical Examination

ADA:

- Applicants - only after conditional offer of employment
- Employees
 - Determination of ability to perform essential functions
 - For reasonable accommodation process
 - Required by law
 - Job related/business necessity

WC:

- Absolute right, but at employer's expense (for 2nd or 3rd opinion as well)
- No restrictions on selection of physician or obtaining additional information

Medical Examination (cont'd)

FMLA:

- Can require medical certification
 - Only information approved by DOL
 - Can't request additional information
- 2nd opinion at employer expense
 - Health care provider who is not regularly used
 - Reimbursement for employee expenses
 - Reasonable commuting distance
- 3rd opinion
 - If 2nd opinion differs from 1st
 - Parties agree on who is to conduct examination
 - Reimbursement for employee expenses
 - Reasonable commuting distance

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Fitness for Duty Examination

ADA:

- Need to determine if employee is able to perform essential functions of the job
- Necessary to reasonable accommodation process
- Required by law
- Job related and business necessity

WC:

- Discretionary
- Information sought related to injury/illness

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Fitness for Duty Examination (cont'd)

FMLA:

- Uniformly applied practice to all employees
- If requirement not in handbook/manual, then notice required
- Only as to the health condition related to the leave
- "Clarification" only with employee consent
- Cannot be required for intermittent leaves
- ADA requirements must be met

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Intermittent / Reduced Schedule Leave

ADA:

May be a reasonable accommodation unless it creates an undue hardship.

WC:

No right to such leave.

FMLA:

Absolute right for serious health condition of employee or family member if medically necessary.

Attendance Programs

ADA:

Subject to reasonable accommodation, Absences due to a disability may be counted as occurrences.

WC:

Absences due to a compensable injury may be counted as occurrences.

FMLA:

Qualifying absences may not be counted as occurrences.

Light Duty

ADA:

Return to light duty is not required if it removes an essential job function.

WC:

Not required, but if offered employee must accept or lose temporary total disability benefits.

FMLA:

Not required and employee can refuse.

Case Studies



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