

# Dealing With Complex Issues Under the FMLA and ADA

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# FAMILY AND MEDICAL LEAVE ACT

A quick refresher....

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# Employee Eligibility and Entitlements under the FMLA

- FMLA provides 12 weeks of unpaid leave to an employee for a qualified event, or 26 weeks of unpaid leave for a qualified military event.
- To be eligible under the FMLA, an employee must have:
  - Worked for the employer for at least 12 months over the last seven years;
  - Worked at least 1,250 hours during the year preceding the start of leave, and;
  - Been employed at a worksite where the employer employs at least 50 employees within a 75 mile radius.
- Leave can be taken:
  - All at once.
  - Intermittently.

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## Reasons for FMLA Leave

- Eligible employees may have up to 12 weeks of unpaid leave each year for:
  - Their own serious health condition;
  - To care for a parent, child or spouse with a serious health condition;
  - The birth of a child and to care for the newborn child;
  - The placement of a child with the employee for adoption or foster care and to care for the newly placed child.
- Eligible employees are also entitled to leave for a qualifying military event.

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## Intermittent Leave

- Intermittent/reduced schedule leave may be taken when medically necessary to care for a seriously ill family member, or because of the employee's own serious health condition.
- Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval.
- An employer can request that the intermittent leave or reduced schedule fit the employer's schedule, if it is possible.
- An employer can transfer the employee to another position which better accommodates the leave; but he or she must be returned to the same or equivalent position at the end of the leave.
- An employer cannot require an employee to take more time off than he or she needs.

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# Employer Notice Obligations

- Post Notice of Rights in conspicuous location.
- Distribute FMLA policy to all employees.
- Eligibility Notice: Within five days of employee's notice of need for FMLA, distribute Notice of Eligibility & Rights and, where applicable, Medical Certification – WH-381 and WH-380 E & F;
  - With the Eligibility Notice, the employer is required to provide a written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.
- Designation Notice: Within five days of Employer having knowledge that leave qualifies as FMLA, notify employee of approval of leave – WH – 382.
- Need for Fitness for Duty – WH – 382.

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# Employee Notice Obligations

- Foreseeable leaves: 30 days advance notice unless not practical.
- Unforeseeable leaves: As soon as practical (generally verbal notice within 1-2 business days of learning of need to take FMLA).
- First-Time User/ Occurrence
  - Employee must provide “sufficient notice” for employer to understand that employee needs FMLA leave.
- When an employee is certified for FMLA leave and seeks additional time off for the same reason, the employee must specifically reference to qualifying reason (i.e., health condition) or the FMLA.
- Employees can be required to comply with the employer’s call-in procedures, including calling in to a specific person, unless medically unable to do so.

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# Medical Certification

- Medical Certifications may be used for a serious health condition of the employee or the employee's immediate family member.
  - Employee must complete Medical Certification within 15 days.
- Certification must be complete and sufficient:
  - Employer must notify employee, in writing, when certification is not complete or sufficient.
  - Employee is provided seven days to obtain sufficient and complete certification.
  - Employer may contact HCP for authentication or clarification of need for FMLA or FMLA paperwork.
  - An employee's direct supervisor may not contact HCP directly.
- Medical Certifications are not the same as employee medical records.
  - May not ask for medical records or for information outside of scope.

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# Recertification

- 30 Day Rule: Employers may request recertification no more than every 30 days and only in connection with an employee's absence.
- More than 30 Days: If an employee's FMLA is for more than 30 days, the employer may only require recertification after the minimum duration expires (i.e. if employee leave is certified for 40 days, the employer must wait 40 days to require a recertification).
- Exceptions:
  - Employers may request recertification every 6 months in connection with an absence;
  - The employee requests an extension of leave;
  - Changed circumstances (i.e. employee's certification certified leave for 2x a month and employee begins utilizing FMLA 4x a month);
  - The employer receives information that casts doubt on employee's need for leave.

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# Recertification

- Timing of Recertification: Employees must return Recertification within 15 days of receipt unless it is not practical to do so.
- Content of Recertification: Employers may not ask for any additional information in a Recertification;
  - Employers may provide the HCP with a record of the employee's absence pattern and inquire whether the employee's condition is "consistent with such a pattern."

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# Recertification

- Allowed where employer receives information that “Casts Doubt” on reason for absence.
- Example Regulations:
  - HCP states four weeks of leave needed for knee surgery and recuperation; employee is seen playing softball in company league in 3rd week.

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# FMLA Fraud

- Annual timing:
  - Employee takes FMLA every summer when school gets out.
  - Employee takes FMLA the same week every year.
  - Employee has medical flare-up adjacent to days off, holidays or between Thanksgiving and New Year.
- Unreal circumstances.
- Employee is out of PTO and wants to take a vacation.
- Consistent exhaustion of leave time.
- Employee has exactly 12 weeks of health problems every year.
- In a retaliation case, the relevant question is:
  - Whether the employer had a genuine good faith belief of fraud or poor performance based on particularized facts.

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# Fitness for Duty Certification

- Fitness for Duty Certification may be required if:
  - Employer has uniformly applied policy, or
  - Practice that requires similarly-situated employees to obtain Fitness for Duty Certifications, or
  - Reasonable safety concerns exist.
- Requirements for Fitness for Duty:
  - Employer provides list of essential job functions with Designation Notice .
  - Employer informs employee on Designation Notice that Fitness for Duty will be required.
  - No second or third opinion is permitted on a Fitness for Duty.

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# Failure to Return Certification

- Medical Certification:
  - May deny leave if employee fails to return Medical Certification following the expiration of the 15-day period, unless extenuating circumstances existed.
- Recertification:
  - May deny continuation of leave following the expiration of the 15-day period until Recertification is provided.
- Fitness for Duty:
  - May deny return to work following the expiration of the employee's leave until Fitness for Duty is provided.

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## Expiration of FMLA Leave

- Upon the expiration of his or her FMLA leave, an employee is entitled to be returned to the same position he or she held at the beginning of leave, or to “an equivalent position.”
- The employee has no right to reinstatement if the employer can show that termination/lay-off would have occurred in the absence of the FMLA leave.
- The employee has no right to reinstatement under the FMLA if he or she is unable to perform the essential functions of the position because of his or her condition.
- Where an employee is not capable of returning to a position at the end of his or her FMLA leave, an employer may still have a duty to extend the leave or reinstate the employee in a modified or different position under the ADA.

# AMERICANS WITH DISABILITIES ACT

A quick refresher...

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# Employee Eligibility and Entitlements under the ADA

- To qualify under the ADA , an employee must:
  - Be disabled as defined under the ADAAA ,
  - Be otherwise qualified for the position,
  - Be able to perform the essential functions of the job, with or without reasonable accommodation, and
  - Be employed by an employer that employs 15 or more employees.
- A person is disabled if he or she:
  - Has a physical or mental impairment that substantially limits one or more major life activities,
  - Has a record of such an impairment, or
  - Is regarded as having such an impairment.
- Eligible employees are entitled to a reasonable accommodation under the ADA unless it would be an undue hardship.

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## Leave as a Reasonable Accommodation

- EEOC: “Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability.”
- Under ADA, a hard and fast rule is not recommended. Employer must consider whether continued leave will be an undue hardship. Its policies and practice are important in evaluating this issue.
- A leave of absence may not be reasonable under the ADA if it is indefinite, particularly after a reasonable time.

# CASE STUDIES

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## Case # 1

Frank has a history of abusing the absence and tardiness policy. He has received a number of written warnings. Last month, he was given a final warning for attendance.

Frank has a history of hypertension. In September, he was hospitalized for three weeks because of the condition. This absence was covered by the Company's FMLA policy. His job requires heavy lifting and exertion. Last Friday, Frank's wife spoke with Jim, Frank's supervisor, informing him that Frank's blood pressure was elevated and that Frank would not be in to work. Jim asked no questions. When Frank failed to return to work or call in on Monday, Jim terminated him. Tuesday morning, Frank's doctor sent a fax stating that Frank was hospitalized Friday afternoon for his hypertension which had flared up on Thursday of last week.

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## What Should the Company Do?

1. Discharge Frank because his wife failed to give enough notice of Frank's condition for the supervisor to make a decision that Frank was suffering from a serious health condition.
2. Discharge Frank because his wife failed to tell Jim that Frank was hospitalized.
3. Reinstate Frank because he had a serious health condition and notified the Company.

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## Answer

3. Reinstate Frank because he had a serious health condition and notified the Company.

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## Case # 2

Missy is a biller who works Monday through Friday for an accounting firm.

Missy has intermittent FMLA for migraines. The certification covers a five-month period. In the past three months, Missy had seven FMLA occurrences. Three of her occurrences fell on a Monday. Two coincided with a scheduled day off. The Company suspects Missy is abusing her FMLA. Additionally, her co-workers are becoming increasingly tired of “covering” for Missy when she is out of the office. Missy calls in on the following Monday, stating that she has a migraine and needs to use FMLA leave.

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## What Should the Company Do?

1. Require Missy to complete recertification but do not deny her leave while waiting for the recertification.
2. Require Missy to complete recertification and deny her leave while waiting for the recertification.
3. Missy has a valid FMLA leave. The Company cannot take any action without violating the law.
4. The Company should terminate Missy for fraud.

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## Answer

1. Require Missy to complete recertification but do not deny her leave while waiting for the recertification.

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## Case # 3

Beth has been out for ten weeks on FMLA leave. She is claiming that her supervisor's style has caused her severe depression. The doctor has moved her return to work date back. Beth has been a poor employee since the Company hired her. She complains about everything and claims that her supervisor harasses her. When asked what form the harassment takes, she says he yells at everyone, including a number of male employees. She admits that none of her supervisor's behavior is sexual in nature. The Company just received a slip from her doctor saying that he is putting her on indefinite leave and suggesting we discharge or discipline the supervisor. Her supervisor is fed up with Beth and wants to fire her.

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## What Should the Company Do?

1. If she cannot return to work at the end of her leave, you can automatically terminate her.
2. Seek to accommodate her by transferring her to another position.
3. Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.
4. You cannot discharge her because her complaint of harassment is protected activity under Title VII, and she will have a retaliation claim against the Company.

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## Answer

3. Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.

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## Case # 4

Mindy has been the Office Manager for about a year.

She went out on FMLA maternity leave. While on leave, a retired Office Manager filled in for Mindy. The temporary manager discovered a variety of problems, including bills that were unpaid, unopened mail, overdue reports. The temp also receives a litany of complaints from Mindy's subordinates, describing her as a bully, engaging in favoritism and "harassing" them.

Mindy's boss wants to terminate her when she returns from her leave.

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## What Should the Company Do?

1. Terminate, because any other employee would be terminated for these things.
2. Reinstatement her, but put her on a last chance agreement and get her a job coach.
3. Reinstatement her without discipline because she has the right to be reinstated to her position.

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## Answer

1. Terminate, because any other employee would be terminated for these things.

OR (more conservative approach)

2. Reinststate her, but put her on a last chance agreement and get her a job coach.

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## Case # 5

Sara works a sedentary job as a customer service representative. She can sit or stand while answering questions on a wireless headset set. She has used all of her PTO. Around Labor Day, she presents a physician's note stating that she is totally disabled because of a flare-up of an old back injury that required two prior surgeries. She is granted FMLA leave for eight weeks.

During the fifth week of leave, her coworkers and supervisors see that Sara has posted photos on her Facebook page showing her on a Pub Crawl on Saturday night. The pictures show Sara drinking beer, smoking cigarettes, smiling, bending, and one photo that appears to show her dancing.

HR calls her in and asks her whether she can return to work. Sara says she cannot bear to sit for eight hours. They show her the pictures and ask how she can be out partying and not able to work. She has no answer other than to say she was in pain the whole time.

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## What Should the Company Do?

1. Terminate her for FMLA fraud.
2. Do not terminate because the Company cannot prove FMLA fraud, or that she wasn't in pain.
3. Offer Sara an accommodation of working less than eight hours a day.

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# Answer

1. Terminate her for FMLA fraud. (Assuming the company wishes to do so)

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## Case # 6

Ron has been approved for an intermittent FMLA leave due to fibromyalgia. The Company's absence/call-in rules require that employees call in one hour before the start of their shift if they are going to be absent or tardy. Employees receive disciplinary points for absences and tardiness under the no-fault attendance policy.

Although Ron misses a number of full days due to fibromyalgia, whenever Ron will be late, he begins to call in to excuse his tardiness, claiming FMLA leave due to fibromyalgia. Some of the instances of tardiness for which he claims FMLA leave are as short as 0.10 or 0.20 of an hour. Three times in the last two weeks, Ron called in five minutes prior to the start of his shift to claim he will be late due to FMLA but arrives at work less than 15 minutes after his start time. Because Ron is a shift lead, his tardiness delays the start of the entire shift.

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## What Should the Company Do?

1. Nothing. Ron has been approved for intermittent FMLA leave due to fibromyalgia, so his absences and tardies cannot be held against him unless he runs out of FMLA leave.
2. Terminate Ron. He is obviously falsifying his need for FMLA leave, since FMLA leaves do not last 0.10/hour.
3. Transfer Ron to a different position on the same shift and at the same rate of pay where it is not as critical for an employee to be there at the start of the shift.
4. Seek recertification of Ron's FMLA leave, asking the health care provider whether Ron's condition would support instances of tardiness lasting as little as a few minutes.
5. Question Ron about his whereabouts and reason for tardiness, discipline Ron for failing to follow the call-in rules on three occasions, assess attendance points for the three absences, and seek recertification.

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## Answer

4. Seek recertification of Ron's FMLA leave, asking the health care provider whether Ron's condition would support instances of tardiness lasting as little as a few minutes.

AND/OR

3. Transfer Ron to a different position on the same shift and at the same rate of pay where it is not as critical for an employee to be there at the start of the shift.

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## Case # 7

Kim is pregnant. She has had some complications and is temporarily suffering from gestational diabetes because of her pregnancy. One of the symptoms of gestational diabetes is nausea and vomiting. Kim has been late for work three times because of these symptoms. Kim told her supervisor about her condition, and asked if she could work from home on the days she becomes sick. Kim's supervisor believes Kim is using her pregnancy as an excuse to come in late and get out of work. As a result, he refuses to accommodate her and writes her up every time she is late and uses gestational diabetes as her excuse. When the HR Director reviews Kim's file during her annual review, she is terminated for violating company policy regarding excessive tardiness.

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## Did the Company Violate the FMLA and/or ADA?

1. No. Because the ultimate decision to terminate Kim came from the HR Director, who properly based the decision on information in Kim's personnel file which was unrelated to any disability.
2. Yes. Because the supervisor failed to accommodate Kim and wrote her up for being tardy.
3. No. Because Kim's requested accommodation was unreasonable.
4. Yes. Because the complications from her pregnancy qualify as a serious health condition under the FMLA.
5. Both 2 & 4.

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# Answer

5. Both 2 & 4.

# QUESTIONS?



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# THANK YOU

Note: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.