

# **INTERPLAY OF ADA, FMLA AND WORKERS COMPENSATION: BEST PRACTICES IN ADDRESSING THE INJURY/LEAVE TRIFECTA**

Delaware Valley Labor & Employment Conference

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# FAMILY AND MEDICAL LEAVE ACT (FMLA)

## FMLA Basics

- For private companies, the employer must have at least 50 employees to be subject to the FMLA, and these employees must have worked at least 20 or more workweeks in the current or prior calendar year
- Additionally, there must be at least 50 employees within a 75-mile radius for that location to be covered
- Public (government) agencies and schools are subject to the FMLA regardless of the number of employees
- Bear in mind, an employer with fewer employees than this threshold could still choose to allow unpaid leaves that are in alignment with the FMLA standards, but they would not be required to do so by law

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## FMLA BASICS - EMPLOYEE QUALIFICATION

- The employee must have been employed by the employer (the same employer who is subject to the FMLA leave based on the criteria above) for at least one year. This requirement does not have to be the preceding year calendar year and need not be consecutive. For example, if an employee worked for the employer in the past, that time could count toward this requirement as long as it was fewer than seven years ago (or if the absence of more than seven years was due to military obligations).
- The employee must have worked at least 1,250 hours for the employer in the preceding 12 months. Vacation or PTO time does not count toward this requirement
- The employee must have a qualifying condition. This includes: The employee's own serious health condition. The need to care for an immediate family member with a serious health condition. "Immediate family member" refers to a spouse, child, or parent. Placement or birth of a child. (The right to leave in this instance extends for up to one year after the birth or placement of the child.) Any qualifying exigency related to an immediate family member being in the military on "covered active duty."

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## FMLA BASICS - COVERED EMPLOYER/QUALIFIED EMPLOYEE

If the employer is subject to FMLA leave and the employee qualifies for it:

- The employee has the right to up to 12 workweeks of unpaid leave in a 12-month period, which can be taken in one or more blocks of time. For some conditions, when medically necessary, the leave could also be taken intermittently or on a reduced schedule.
- Job reinstatement upon return from leave, in the same or equivalent role
- Continuation of group health benefits during the leave period. The employee is still obligated to pay his or her insurance premium contributions during that time.
- Up to 26 total weeks of leave (instead of 12) in the case of caring for a covered service-member with a serious injury or illness

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## FMLA BASICS – ADDITIONAL OBLIGATIONS

Covered employers also have an obligation to:

- Post an FMLA notice explaining employee rights under the FMLA program
- Give all new employees information about the FMLA, either in the employee handbook or separately upon hire
- Tell an employee when he or she may have an FMLA-qualifying leave, as soon as the employer reasonably should know that an absence or leave request may qualify
- Give employees an official eligibility notice for FMLA leaves. Explain the employee's rights and responsibilities under the FMLA. For all FMLA leaves, note the FMLA designation and how much of the total leave allotment will be deducted from the employee's leave bank.

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## AMERICANS WITH DISABILITIES ACT (ADA) BASICS

Employers with 15 or more employees are prohibited from discriminating against people with disabilities by Title I of the Americans with Disabilities Act (ADA). In general, the employment provisions of the ADA require:

- Equal opportunity in selecting, testing, and hiring qualified applicants with disabilities
- Job accommodation for applicants and workers with disabilities when such accommodations would not impose "undue hardship"
- Equal opportunity in promotion and benefits

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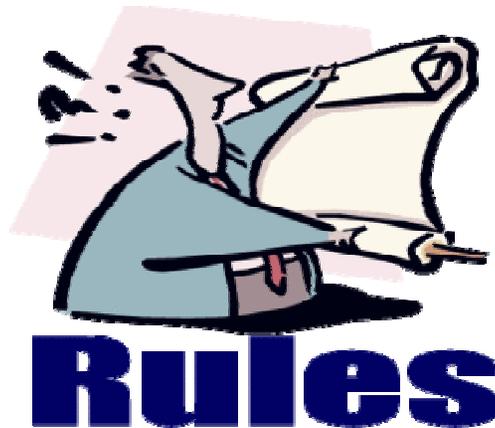
## FMLA AND THE ADA

- TREND – A large percentage of FMLA cases automatically become ADA cases when the employee has exhausted all possible leave and is still unable to return to work
- EEOC has served notice... it is aggressively looking for companies that have automatic termination policies after an employee has missed specific periods of work, contending that such blanket policies violate the ADAAA

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# ADA AMENDMENT ACT AND EEOC REGULATIONS

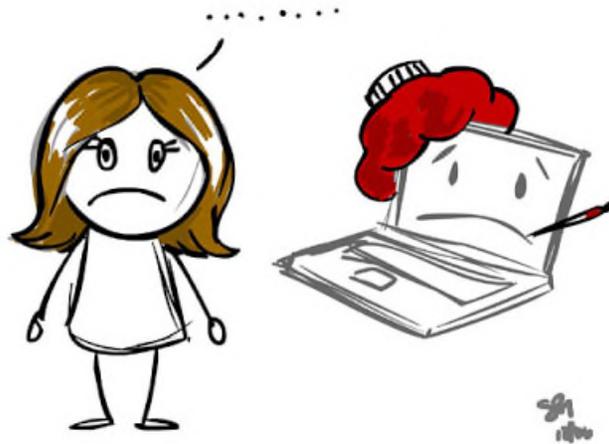
- No per se list of disabilities
- Non-exhaustive list of impairments that will “virtually in all cases” be found to substantially limit a major life activity
- Individualized assessment should be “particularly simple and straight forward”



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## LEAVE POLICIES UNDER ADA

EEOC contends that employers **MUST** “modify attendance leave policies to provide disabled employees with additional leave” **UNLESS** another accommodation would allow the employee to perform the essential functions of the job **OR** if granting additional leave would cause an undue hardship

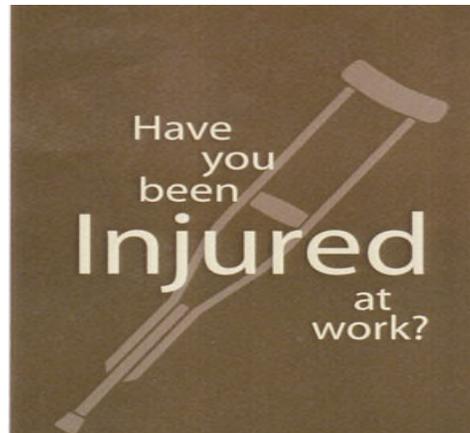


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# BASICS OF PA WORKERS COMPENSATION

## Overview of the Law:

The Pennsylvania Workers' Compensation Act applies to all injuries which arise within the course and scope of employment. It provides for wage replacement and medical expenses.



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## PA WORKERS COMPENSATION LAW

Some of the simple issues which arise under this definition include:

- Who is an employer under the PA Workers Compensation Act?
  - In the broadest sense, it mirrors the other statutes, but there is no minimum requirement for time worked
  - An injury could occur during the first ten minutes of employment and would be covered
  
- Is the Claimant an employee under the PA Workers Compensation Act?
  - In this case, the Pennsylvania Workers Compensation Act may be broader than the ADA or FMLA, as subcontractors may be an employee under the Act, the standard is control over the work environment and whether the direct employer has coverage

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## PA WORKERS COMPENSATION LAW

- Nature of the Injury
  - A physical injury is covered in most circumstances
  - Psychological injuries are covered only if certain criteria are met
- Course and Scope of Employment
  - In general, an injury is in the course and scope of employment if the employee, when injured
    - Was on the employer's premises
    - Was engaged in the furtherance of the employer's business
  - There is a wealth of case law on this issue and it is very fact specific

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## PA WORKERS COMPENSATION LAW

- Whether the injury is related thereto:
  - In this requirement, there are two areas of case law:
    - Whether the employee deviated from his employment enough to be not work related
      - Good example is getting injured on a lunch break, smoke break, or during work but doing something not related to work
    - Whether the injury is related to the employment and/or the initial injury
      - Good examples are heart attacks at home, psychological problems arising from the initial injuries, or where the employee had a prior injury

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# PA WORKERS COMPENSATION LAW

## Disability

- Disability can be total or partial. “Disabled” for purposes of workers compensation may be different than ADA or FMLA
- Simply put, disability is injured and unable to work and earn wages. It could even be unable to do overtime but could work a regular job
- Workers compensation is focused on wage loss and payment for medical treatment



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## INTERPLAY OF QUALIFYING DISABILITIES

Not all “disabilities” under the ADA are “serious health conditions” under the FMLA, and vice versa. Therefore, both acts may not apply to an injured employee. Examples of protection under the FMLA, but not the ADA, would be pregnancy or a mild hernia not substantially limiting a major life activity. Conversely, ADA protection, but not FMLA protection, would apply where there is a *perception* that an employee may have a qualifying disease, even if the employee does not actually have that disease. There, the FMLA does not apply as the ADA is the only applicable statute that protects individuals *suspected* of having a disability or impairment but who do not actually have it.



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## INTERPLAY OF QUALIFYING DISABILITIES

Workers' compensation indemnity benefits are based on a work-related injury that results in actual "disability," defined under the Pennsylvania Workers Compensation Act as the loss of earning power resulting from the work injury. Though all employees receiving such benefits are considered "disabled" in some respect, they may not be eligible for coverage under either the ADA or FMLA. This incongruity is because most workers' compensation injuries are considered temporary in nature.

A work-related injury will often prevent an employee from performing the essential functions of their job, disqualifying them from ADA protection. Finally, a compensable injury may not substantially limit the employee's ability to work and may only entail a specific dysfunction on a particular job.

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## INTERPLAY OF QUALIFYING DISABILITIES

It is important to note that, while an employer may contest an employee's claim for disability in a workers' compensation forum based upon the absence of disability, it cannot take the same position with a request for FMLA leave if the employee has met FMLA's notice and certification requirements and has not previously exhausted their yearly FMLA entitlement.

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## HYPOTHETICAL – FACTUAL BACKGROUND

Sally Smith is a nurse in a large, non-unionized hospital. Sally has been employed with the hospital for 10 years and has never taken any type of leave. For the purposes of this hypothetical, it can be assumed that Sally has worked the requisite hours and that the hospital employs more than 50 people. Sally works four 12 hour shifts in the ICU, the maximum number of shifts permitted by state regulation per workweek. Most of the patients are on ventilators and require around the clock care. Each nurse is assigned up to three patients during his or her scheduled shift. While there is a nurse station on the floor, the job requires nurses to be “on their feet” for most of their shift. They are required to lift and move patients so they don’t get bedsores and to give them sponge baths. The ICU nurses also need to lift and move medical equipment, insert IVs, and have the ability to respond and render emergency treatment whenever necessary. The job description contains a lifting requirement of 80 pounds. Sally is diagnosed with stage two breast cancer and is required to undergo surgery and chemotherapy. It is her hope to continue working as she can during her treatment.

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## HYPOTHETICAL – FMLA LEAVE REQUEST

Sally speaks to Human Resources and obtains the FMLA paperwork on August 15, 2015. The FMLA paperwork contains a medical certification section which seeks information from the treating physician (reason for leave, anticipated duration, the extent to which the condition impacts or prevents Sally from working). Sally turns in the completed FMLA paperwork on September 7, 2015. The medical certification section is partially filled in and signed by her doctor. The doctor notes that the last time he saw Sally in his office was July 15, 2015. He indicates that Sally was diagnosed with breast cancer on August 1, 2015 and that her oncologist, a different physician, created her treatment protocol. It appears that Sally is seeking intermittent leave. The questions concerning dates and/or timing of the requested leave are not filled in.

What, if anything, should HR do with reference to Sally's FMLA request?

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## HYPOTHETICAL – FMLA REQUEST

- A. HR should grant Sally's intermittent leave request. She is a good employee who is going through a terrible time and should be provided with support and understanding
- B. HR should deny Sally's leave request because she returned the form late and it was incomplete
- C. HR should ask for clarification and/or for the form to be filled out completely
- D. HR should deny Sally's leave request because it appears from the Doctor's notations that she can still perform the essential functions of the job while she is undergoing treatment
- E. HR should grant Sally's FMLA intermittent leave request because her Doctor signed the form and indicated that she needs intermittent leave for treatment

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## HYPOTHETICAL – INTERMITTENT LEAVE

Sally provides HR with the requested clarifications promptly and HR grants Sally's intermittent leave. The paperwork provides that Sally's chemotherapy treatments will be administered on a Wednesday morning every two weeks for six months. During the treatment week Sally can work full shifts Sunday through Tuesday. She cannot work on the day of treatment and the three days after treatment, Friday through Saturday. Sally can then work a full schedule, with no limitations or accommodations until her next treatment day. Accordingly, during treatment weeks, Sally can only work three shifts. Sally can work her full schedule during the off weeks. The hospital's workweek runs from Sunday to Saturday.

How does HR track Sally's leave?

- A. Sally will miss five days during each treatment week so HR should count each day she cannot work against her available FMLA
- B. If Sally is scheduled to work full shifts Sunday, Monday and Tuesday during her treatment weeks, only one day should be designated as a leave day
- C. Sally can work all days during non-treatment weeks so she can make up the days she misses during treatment weeks and should not have any days designated as FMLA

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## HYPOTHETICAL – APPROVED LEAVE INSUFFICIENT

After the first four rounds of treatment (approximately two months), Sally finds that she is not bouncing back after treatment as quickly as she had during the first few rounds. She starts to regularly call out sick for scheduled shifts during her non-treatment week and on a few occasions has failed to show up for scheduled shifts without using the call out procedure.

What should HR do?

- A. Count Sally's call out days against her remaining available FMLA leave
- B. Count Sally's call out days as sick days, but HR should not count the days as FMLA leave because the non-treatment week was not considered as part of the intermittent FMLA
- C. Count Sally's call out days against her remaining available FMLA and seek a recertification of Sally's FMLA leave
- D. Discipline Sally for failing to use the call out procedure

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## HYPOTHETICAL - LEAVE ADJUSTED

Sally recertifies as requested and her oncologist states that she cannot work for the remainder of her treatment. HR grants the leave on December 7, 2015. Sally has used a total of two weeks leave thus far.

How much leave does Sally have left?

- A. Sally has 12 weeks of FMLA leave remaining as of December 7, 2015 because she is now not working at all. She must return by March 1, 2016 or she can be terminated.
- B. Sally has 10 weeks of her 12 weeks FMLA leave remaining and thus must return to work on February 16, 2016 or she can be terminated.
- C. Sally has 12 weeks of FMLA leave remaining as of December 7, 2015 because she is now not working at all. Her leave ends February 29, 2016.
- D. Sally has 10 weeks of her 12 weeks FMLA leave remaining as of December 7, 2015.

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## HYPOTHETICAL – RETURN TO WORK

Even though Sally's FMLA leave ended on February 16, 2016, the hospital gives Sally an additional four weeks of leave to Monday March 14, 2016. Sally is asked to keep HR up to date on her treatment and her anticipated return to work date. Sally e-mails once or twice but then ceases to communicate with the hospital. Through the hospital grapevine, HR hears that Sally is in remission and recuperating, but scared to return to work because she can't yet do everything that she could before her diagnosis and treatment.

What should HR do?

- A. Terminate Sally by letter. The hospital gave her additional time and she did not return
- B. Call Sally and terminate her over the phone. After 10 years of service to the hospital she deserves that much
- C. Reach out to Sally to remind her that her extended leave is over. Give her a return date. If she does not report to work on that date, terminate her.
- D. Reach out to Sally to discuss her return. If Sally is ready to return and truly concerned about her job duties, have a discussion about that issue and discuss accommodations if appropriate.

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## HYPOTHETICAL – ACCOMMODATIONS

HR, upon advice of counsel, calls Sally to check in and to see when she thinks she will be able to return to work. Sally explains that she is still very weak, tires easily and has lost a lot of her upper body strength. Sally jokes that she couldn't even hold a small watermelon and that she dropped it on her kitchen floor. Sally and HR laughed about the mess she had to clean up. Nonetheless, Sally, fearful of losing her job if she asked for anything else, agrees to return to work on a modified schedule for the first few weeks and then to full time. Sally does not ask for any other accommodations. The hospital agrees and Sally returns to work on Monday March 21, 2016. Sally has trouble moving the patients into different positions because they are too heavy for her. Sally nonetheless tries and throws out her back. Sally is unable to work as a result of this injury. She has used up her FMLA and does not have any PTO remaining because she used it all when she was treated for breast cancer. The hospital forgets to call counsel and terminates Sally.

Does the Hospital have any liability exposure?

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## HYPOTHETICAL – ACCOMMODATIONS (CONT.)

Which of the following statements is correct:

- I. Sally was injured at work and has a workers' compensation claim.
- II. The hospital did not do anything wrong. Sally did not have any time off remaining.
- III. Sally might have an ADA claim.
- IV. Sally has an FMLA claim because she was not given FMLA paperwork when she hurt her back.
- V. Sally might have an ADA and FMLA retaliation claim.
- VI. Sally might have other claims.

- A. I, IV and VI
- B. II
- C. I, III, V, and VI
- D. III and V

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## HYPOTHETICAL – WORKERS COMPENSATION

Sally's employer accepted her lifting injury as work related and she received workers compensation benefits. During that time, her cancer also recurred. She underwent an additional round of chemotherapy and radiation while she was receiving workers compensation. She was out of work and completely disabled for four months due to her back injury but now has a 20 pound lifting restriction and can return to work, but only 20 hours a week to start. Her employer also reinstated her employment after negotiations between her lawyer and the hospital. Sally has asked to return to work in a limited capacity with the lifting restriction and the reduced hours.

What must the employer do?

- A. Accommodate her and offer her a position that has only a 20 pound lifting position and part time
- B. The hospital doesn't have to accommodate her because she has used her FMLA leave
- C. The hospital doesn't have to accommodate her and can cut off her workers compensation because she can work
- D. The hospital doesn't have to accommodate her because she cannot perform the essential job functions

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## HYPOTHETICAL – WORKERS COMPENSATION

Sally is returned to work in a light duty capacity 20 hours a week with a 20 pound lifting restriction. She attends physical therapy for her back when she is not working. She is also undergoing periodic chemotherapy treatments for her cancer. She works for seven months in this light duty capacity. At one point, she is too weak because of chemo, and when doing upper body exercises during PT, she injures her shoulder. She can't work and undergoes surgery.

Which is true:

- A. Sally has a workers compensation injury and can be paid for her time off through workers compensation, but not entitled to FMLA leave
- B. Sally has a workers compensation injury and can be paid for her time off, and is entitled to FMLA leave
- C. The disability is related to her cancer and she is entitled to FMLA leave, but is not entitled to get paid workers compensation
- D. The disability is related to her cancer, she is not entitled to FMLA leave, nor entitled to workers compensation

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## HYPOTHETICAL – WORKERS COMPENSATION

Sally is out of work and the 12 weeks of FMLA leave is expiring.

What can the employer do?

- A. Advise her that her FMLA leave is expiring and terminate her employment if she doesn't return
- B. Advise her that her FMLA leave is expiring, but they can't terminate her employment because she is on workers compensation
- C. Terminate her because she wasn't entitled to FMLA

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## HYPOTHETICAL – ACCOMMODATION

Sally returns to work at the expiration of the 12 weeks but requests an accommodation for a flexible starting time because effects of the chemo and anesthesia cause her to have sleep issues. She also has to go to physical therapy for her shoulder for one hour twice a week in the hospital.

Does the employer have to accommodate her request for a flexible starting time?

A. Yes

B. No

Does the employer have to accommodate her request to leave work for one hour during her shift?

A. Yes

B. No

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## QUESTIONS?



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# THANK YOU

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