

# **COMPLYING WITH THE FMLA AND ADA WHEN YOUR EMPLOYEE IS DEALING WITH A MENTAL HEALTH CONDITION**

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Scott Cruz

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# The Plan

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- The Big Picture: Mental Conditions & the Workplace
- FMLA and ADA Generally
- Selected FMLA and ADA Issues:
  - “Stress” as Mental Illness or Exacerbating Mental Illness
  - Caring for Family Members with Mental Conditions
  - Employee in Denial or Silent About Mental Condition
  - Employee not Ready to Return to Work
- Wrap-Up and Questions

# The Big Picture: Mental Conditions & the Workplace

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- Stress caused by work
  - Excessive workload
  - Difficult coworkers
  - Juggling work and personal life
  - Lack of job security
- High rates of anxiety and depressive disorders
  - Anxiety, major depression, panic disorder, OCD, PTSD, manic-depression (“bipolar disorder), and seasonal affect disorder (SAD), among others
- Untreated mental conditions costs employers
  - Estimated \$300+ billion annually
  - Accidents, absenteeism, turnover, productivity, medical costs, legal costs, insurance costs, workers’ compensation claims

# The FMLA

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- **Family Medical Leave Act (FMLA)**
  - Purpose is to provide job security/stability for employees dealing with medical issues
  - Applies to private sector employers with 50 or more employees
  - Employees entitled to benefits:
    - Have worked at least 12 months
    - Have worked at least 1,250 hours in past 12 months
    - Works at a location where the employer has at least 50 employees within 75 miles.
  - Up to 12 weeks leave annually to care for own or family member's serious health condition
  - "Serious health condition" = illness, injury, impairment or physical or mental condition that involves in-patient care in hospital, hospice, or residential medical care facility, or continuing treatment by healthcare provider

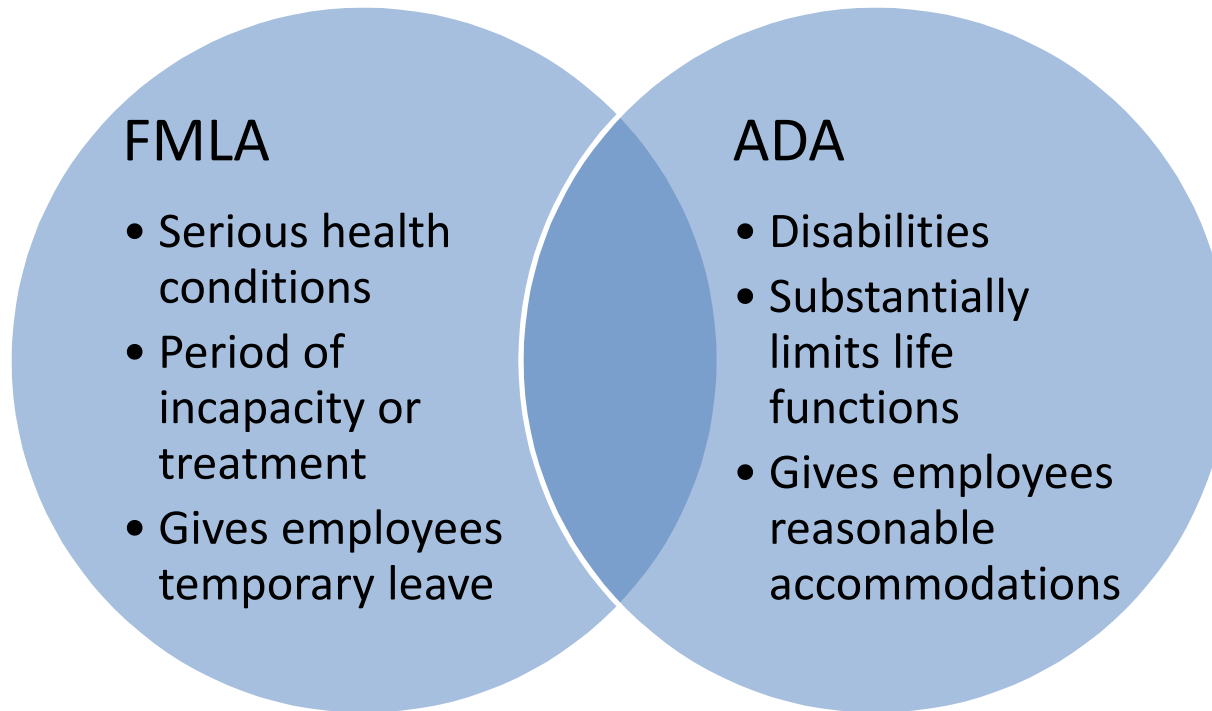
# The ADA

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- **Americans with Disabilities Act (ADA)**
  - Purpose is to prevent workplace discrimination against those with disabilities
  - Applies to all employers with 15 or more employees and all disabilities, including mental health conditions
  - Protects qualified individuals whose mental health conditions, if left untreated, interfere with performance of essential functions of job
  - “Disability” = physical or mental impairment that substantially limits one or more major life functions
    - “Major life functions” = caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, etc.
  - If qualified to perform essential functions of job with or without disability and reasonable accommodation available, must provide reasonable accommodation unless unduly burdensome

# Mental Condition: Serious Health Condition or Disability?

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# “STRESS” AS MENTAL ILLNESS OR EXACERBATING MENTAL ILLNESS

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## “Stress” as Mental Illness

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- Employee had emergency appendectomy and gall bladder surgery, requested FMLA leave
- Employer grants FMLA leave, but terminates before employee returns
- Employee sues for violation of ~~FMLA~~ ...ADA?
  - Employee believed employer thought employee could not handle work stress, and work stress caused appendicitis and gall bladder condition
  - Argued that inability to tolerate work stress was disability (mental impairment), so employer perceived employee had disability, resulting in ADA coverage
- Court dismissed
  - Inability to tolerate work stress, alone, is NOT disability



## “Stress” as Mental Illness

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- Inability to cope with stress is NOT a disability
- Furthermore, ability to work in stressful situations is an essential job function
- No accommodation required

What would you do?

## Stress Exacerbating Disability

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- Employee threatened other employees with violence in violation of Workplace Violence Policy, suspended for 15 days
- Returned to work, but felt uncomfortable/ineffective working with “people who believed him to be mentally disturbed”
- Disclosed bipolar disorder diagnosis, requested transfer away from current coworkers as accommodation
  - Diagnosis and accommodation supported by doctor’s letter
- Employer refused, employee sued for ADA violation

# Stress Exacerbating Disability

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- Moving the employee away from the stressor may or may not be a reasonable accommodation
- Is the alleged stressor
  - ...Coworkers?
  - ...Sound?
  - ...Darkness?



# CARING FOR FAMILY MEMBERS WITH MENTAL CONDITIONS

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## Caring for Family Members with Mental Conditions

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- Employer was hiring for computer programmer
- Best qualified candidate disclosed during interview that he had sole custody of son with severe autism
- Employer selected second-best candidate based on concerns about best-qualified candidate's "ability to prioritize work"
- If best-qualified candidate sues under ADA, what result?

# Caring for Family Members with Mental Conditions

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- Employer violated ADA
  - But employee's son, not employee, had disability?!
- ADA protects not just those with disabilities, but also those who are “associated” with individuals with disabilities
- Particularly relevant for the growing “sandwich generation”

Can you see any other legal issues?

- Sex discrimination

# EMPLOYEE IN DENIAL OR SILENT ABOUT MENTAL CONDITION

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## Employee in Denial or Silent About Mental Condition

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- Ordinarily employee has responsibility to disclose
- But sometimes employer has duty to act to accommodate or suggest leave



## Employee in Denial

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- Employee with numerous medical conditions, including chronic pain and severe depression and anxiety
- Only poor performance reviews over years of employment
- Mentioned chronic pain to supervisor once, and supervisor suggested disability retirement. Employee never followed up, stating her commitment to work.
- Employee continued to perform poorly, but applied for multiple promotions and transfers, even to non-vacancies
- Employee put on performance improvement plan (PIP), and failed; left on FMLA leave before being notified of failure

## Employee in Denial

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- While on FMLA leave employee provided doctor's note stating she could not perform work
- Employee returned to work and stayed (performing poorly), in spite of second doctor's letter saying she could not work
- Employer asked employee which job functions she could perform. Employee did not respond, but continued to report for work.
- Employee terminated based on poor performance and failure of PIP
- Employee sued under ADA

## Employee in Denial

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- No ADA violation
- Employee did not engage in interactive process by showing she could perform essential functions of job or requesting accommodation
- Employee whose performance does not improve despite long and continuous efforts on employer's part, and who does not pursue accommodations or discuss disability may be terminated without violating ADA
  - (when disability or accommodation not obvious)

## Employee Silent About Mental Condition

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- Employee of six years who had endured work environment hostile to her race began crying regularly and uncontrollably at work
- Requested to be assigned to different position and repeatedly complained to supervisor
- Supervisor denied reassignment request and repeatedly told employee she needed to choose between continuing working or resigning
- Employee resigned “for medical reasons,” but wanted position back after a few days. Employer refused.
- (Former) employee hospitalized, diagnosed with depression, anxiety, panic disorder, and insomnia; sued for FMLA violation

## Employee Silent About Mental Condition

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- Employer had responsibility under FMLA to engage in interactive process
- Direct notice of health condition or request for FMLA benefits not necessary for employee to be entitled to FMLA benefits
- “[O]bservable changes in an employee's condition or uncharacteristic or unusual conduct at work may themselves provide an employer with adequate notice of a serious medical condition and obviate the need for an express request for medical leave.”
- Crying spells unusual for employee, so employer should have investigated whether cause of behavior was protected

## Employee Silent About Mental Condition (Take Two)

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- Employee in position that requires good interpersonal relationship management begins acting erratically at work—unproductive, disruptive, aggressive
- Other employees lodge numerous complaints; numerous incidents involving employee “not making sense” and exhibiting “mania”
- Employee eventually disciplined, requests FMLA leave. Employer grants FMLA leave.
- Employee returns, seems improved, but then begins acting out again
- After further discipline, employee terminated for continued misconduct
- Employee sued, alleging disability discrimination and failure to accommodate
  - Surprise! Employee never revealed she had bipolar disorder

## Employee Silent About Mental Condition (Take Two)

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- No ADA violation because employee not qualified for position
- Essential function of job was managing interpersonal relationships; employee could not perform essential functions of job
- But what about accommodation?
- Employee might have been able to perform, but how would employer know accommodation needed?
- Employers not required to guess that employee has disability and needs accommodations when not obvious

Is this consistent with the previous case?

EMPLOYEE NOT READY TO RETURN  
TO WORK

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## Employee not Ready to Return to Work

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- Employee with chronic back pain
- Employer had granted accommodation (stretching every 30 minutes)
- Back pain worsened, exhausted FMLA leave, and then employer leave
- Attendance essential to position
- Doctor's note did not explain
  - Whether employee receiving treatment
  - Likely effectiveness of treatment
  - Medical likelihood that leave would enable return to work
- Employee terminated; sued for ADA violation

## Employee not Ready to Return to Work

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- No ADA violation
- Employee failed to establish that she was qualified for job
  - Position required regular attendance
  - Employee did not offer evidence regarding effectiveness of course of treatment or medical likelihood of recovery
  - Wasn't clear that she would have been able to return if employer had given additional unpaid leave
- Employee was essentially requesting indefinite leave

What would you have done?

## Employee not Ready to Return to Work

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- Specific fitness-for-work certification from doctor or specialist
- Employer must provide written notice to employee
- With notice that FMLA leave granted and essential job functions to be reviewed
- Uniformly applied policy

WRAP-UP: WHAT HAVE WE LEARNED?

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# Lessons

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- Focus on performance and support
- Ask the questions. Do not assume or guess.
- Engage in the interactive process
  - Don't give up too easily if employee doesn't want to talk about it but doesn't improve
- Consult resources if unsure how to proceed



# Resources

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- Society for Human Resources (SHRM)
- Labor and Employment Attorney

# QUESTIONS?



**Scott Cruz**

(312) 985-5910

[scruz@clarkhill.com](mailto:scruz@clarkhill.com)

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# THANK YOU

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