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Brooks Smith & Prophete

ADA & FMLA in the Real World:

Avoiding Common Compliance Traps

Webinar | March 2026

Today's Speakers



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Agenda

I. FMLA

- What is it and when does it apply?
- Defining “Serious Health Condition” under the FMLA
- FMLA Lawsuits: Interference or Retaliation
- Common Compliance Traps

II. ADA

- What is it and when does it apply?
- Defining “Disability” under the ADA
- Determining Concurrent ADA and FMLA Leaves
- Common Compliance Traps



The Family And Medical Leave Act

29 U.S.C. §§ 2601 et. seq.



FMLA Overview

Employer Coverage

Private Sector: employ 50+ employees in 20 or more workweeks in either the current calendar year or previous calendar year.

Employee Eligibility

Work for at least 12 months / 1,250 hours in 12 months immediately preceding the leave/work at a location where the employer has at least 50 employees within 75 miles.

Purpose

Provide leave for eligible employee of a covered employer for certain qualifying family and medical reasons.



FMLA Qualifying Reasons for Leave



Leave For:

- **The birth of a child or placement of a child with the employee for adoption or foster care.**
- **The care for a child, spouse, or parent who has a serious health condition.**
- **A serious health condition that makes the employee unable to work.**
- **Reasons related to a family member's service in the military, including**
 - Qualifying exigency leave - Leave for certain reasons related to a family member's foreign deployment, and
 - Military caregiver leave – leave when a family member is a current servicemember or recent veteran with a serious injury or illness.



Birth of a Child

- Applies equally to male and female employees
- Leave must be completed within 12 months after birth
- Leave must be continuous, not intermittent, unless employee and employer agree to it
- If both parents are employed by the Company, the amount of leave taken may be limited to a combined total of 12 work weeks during a 12-month period
 - If leave is to care for sick child, other spouse, or own serious health condition, each spouse is allowed 12 weeks



Serious Health Condition

- Incapacity and treatment
- Incapacity due to pregnancy and prenatal care
- Chronic serious health condition
- Long-term or permanent incapacity due to a condition for which treatment may not be effective



Serious Health Condition (Cont.)

An illness, injury, impairment, or physical or mental condition that involves

Either

Inpatient Care

Or

Continuing Treatment



Serious Health Condition (Cont.)

- Inpatient care
 - Overnight stay in a hospital, hospice, or residential medical care facility and any period of incapacity
 - Any subsequent treatment in connection with an overnight stay in the type of facility listed



Serious Health Condition (Cont.)

- Continuing treatment by a health care provider
 - Be treated by a health care provider within seven days of the first day of incapacity AND
 - Be prescribed a course of treatment by a health care provider – or
 - Have at least one other visit with a health care provider within 30 days of the first day of incapacity



Serious Health Condition (Cont.)

- Treatment includes:
 - Examinations – to determine if a serious health condition exists and evaluations of the condition
 - Regimen of continuing treatment – includes a course of prescription for medication or therapy requiring special equipment
- Treatment **DOES NOT** Include: routine physicals, eye examinations, or dental examinations
- At home treatment is not by itself sufficient



FMLA Leave

Leave:

- Up to 12 workweeks of leave in a 12-month period for any FMLA leave reason except military caregiver leave.
- Up to 26 workweeks of military caregiver leave during a single 12-month period.
- Employees have the right to take FMLA leave all at once, or, when medically necessary, in separate blocks of time or by reducing the time they work each day or week.
- Intermittent or reduced schedule leave is also available for military family leave reasons. However, employees may use FMLA leave intermittently or on a reduced leave schedule for bonding with a newborn or newly placed child only if they and their employer agree.



FMLA = Protected Job Leave



Leave:

- Job protected but unpaid
- If an employee has health insurance through an employer's group health plan, they can continue their group health insurance coverage during FMLA leave on the same terms as if they had continued to work.
- The FMLA requires that benefits such as life insurance, disability insurance, sick leave, vacation, educational benefits, pensions, retirement or 401(k) benefits, etc., must also be available when the employee returns from FMLA leave. These benefits must be resumed in the same manner and at the same level as when the leave began, unless changes came about that affected the entire workforce. An employee returning from FMLA leave does not have to requalify for any benefits he or she had before the leave began.
- Paid leave can be used at the same time if covered by the employer's paid leave policy.
- Can require that employees use paid leave during FMLA leave.
- Just have to provide enough information so the employer knows the leave might be covered by the FMLA.
- Employees must provide notice to their employer as soon as possible and practical that they need to use FMLA leave.



Scheduling Considerations

- Generally, to take FMLA leave an employee must notify the employer at least 30-days in advance and follow the employer's policy for requesting leave.
- If an advance notice is not possible, such as because of a change in events or a medical emergency, notice must be given as soon as practicable.



FMLA Intermittent and Reduced Schedule Leave

- Must be medically necessary
- Planned and/or anticipated medical treatment of serious health condition
- Recovery from serious health condition
- To care for family member with serious health condition
 - Intermittent episodic condition
 - Intermittent need for caregiver



“Serious Health Condition” Defined

- **Illness, injury, impairment, or physical or mental condition that involves either:**
 - In-patient care in a hospital, hospice, or residential medical care facility; or
 - Continuing treatment by a health care provider



“Continuing Treatment” Defined

➤ **Period of incapacity:**

- Inability to do work, attend school or perform other regular daily activities due to SHC treatment or recovery

➤ **For more than three consecutive calendar days; AND**

➤ **Treatment two or more times by a HCP; OR**

➤ **Treatment by a HCP on at least one occasion which results in a regimen of continued treatment (e.g. prescription drugs such as antibiotics)**

- A regimen of continued treatment does not include resting, drinking fluids, taking aspirin or anything else that can be done without visiting a HCP



FMLA Lawsuits: Interference Claims

Intent is NOT Relevant

Employer motive does not matter for an interference claim.



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Employer motive does not matter for an interference claim.

Employee must show:

Employee gave
notice of need for
leave.



Employee was
entitled to a
benefit under the
FMLA; and



Employee was
denied that
benefit.

FMLA Lawsuits: Retaliation Claims

Intent IS Relevant

Employer motive does matter for a retaliation claim.



FMLA Lawsuits: Retaliation Claims

Intent IS Relevant

Employer motive does matter for a retaliation claim.

Employee must show:

Employee engaged in a statutorily protected activity.



Employee suffered an adverse employment decision; and



The decision was causally related to the protected activity

Pretext for Retaliation.

Fact Scenario

Your employee, Heathcliff, and his wife, Claire, have raised their step granddaughter, Olivia, since she was 3 years old. Olivia's step mother, Denise, (Heathcliff's daughter) had legal custody of Olivia, but only occasionally lived with them too. When Olivia was 21 years old, she became pregnant. Olivia gave birth to a healthy girl, but during the delivery, Olivia had a stroke, remaining hospitalized for months. Heathcliff requests leave to care for both Olivia and the new baby. FMLA?



Fact Scenario

Your employee, Heathcliff, and his wife, Claire, have raised their step granddaughter, Olivia, since she was 3 years old. Olivia's step mother, Denise, (Heathcliff's daughter) had legal custody of Olivia, but only occasionally lived with them too. When Olivia was 21 years old, she became pregnant. Olivia gave birth to a healthy girl, but during the delivery, Olivia had a stroke, remaining hospitalized for months. Heathcliff requests leave to care for both Olivia and the new baby. FMLA?

YES!!



29 C.F.R. §825.122

Son or daughter – biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under the age of 18, or age 18 or older and “incapable of self care because of a mental or physical disability” at the time that FMLA leave is to commence.



In Loco Parentis

- People with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.
- Anyone who stands in a position equivalent to a parent.



Employees Must Inform Employer of in Loco Parentis Status

Martinez Patterson v. AT&T Services

- Employee sought FMLA leave to care for sibling and was informed this was not a basis for seeking FMLA leave because siblings were not covered
- Employee was subsequently terminated
- In challenging termination, employee asserted an FMLA interference claim arguing she stood in “loco parentis” to her sibling
- Because employee never notified employer at the time of the FMLA request, her FMLA interference claim was dismissed



Employee with Pregnant Fiancée

Proctor v. Riley Industries, Inc.

- Employee was engaged to woman who was pregnant with his child
- He sought FMLA leave to attend the prenatal appointments with his fiancée
- His request was denied
- The court held that employee was not a spouse as defined by the FMLA and was not a parent as defined by the FMLA, because the child was not yet born



In-Laws

- FMLA does not protect leave for:
 - Parents-in-law*
 - Siblings
 - Siblings-in-law
 - Sons or Daughters-in-law



FMLA Documentation – Certification Forms

If the employer has reason to doubt the certification, it may require a second opinion

- At the employer's cost
- Employer may select second opinion provider



Recertifications (Cont.)

Generally, no more often than every 30 days AND in connection with an absence

- Unless minimum duration of leave is more than 30 days
- If minimum duration is more than 30 days, employer must wait until the minimum duration expires

An employer may request recertification every 6 months in connection with an employee absence

NO 2nd and 3rd opinions on recertification



Recertifications (Cont.)

Employer may request recertification early if one of the following exists:

- Employee requests an extension of leave
- Circumstances changed significantly (duration/frequency of absences are inconsistent with underlying medical certification on 2 or more occasions, nature/severity of illness has changed significantly); or
- Employer receives information casting doubt on the continuing validity of employee's certification



Recertifications (Cont.)

Employer may provide the health care provider with a record of the employee's absence pattern and ask the HCP if the serious health condition and need for leave is consistent with such a pattern

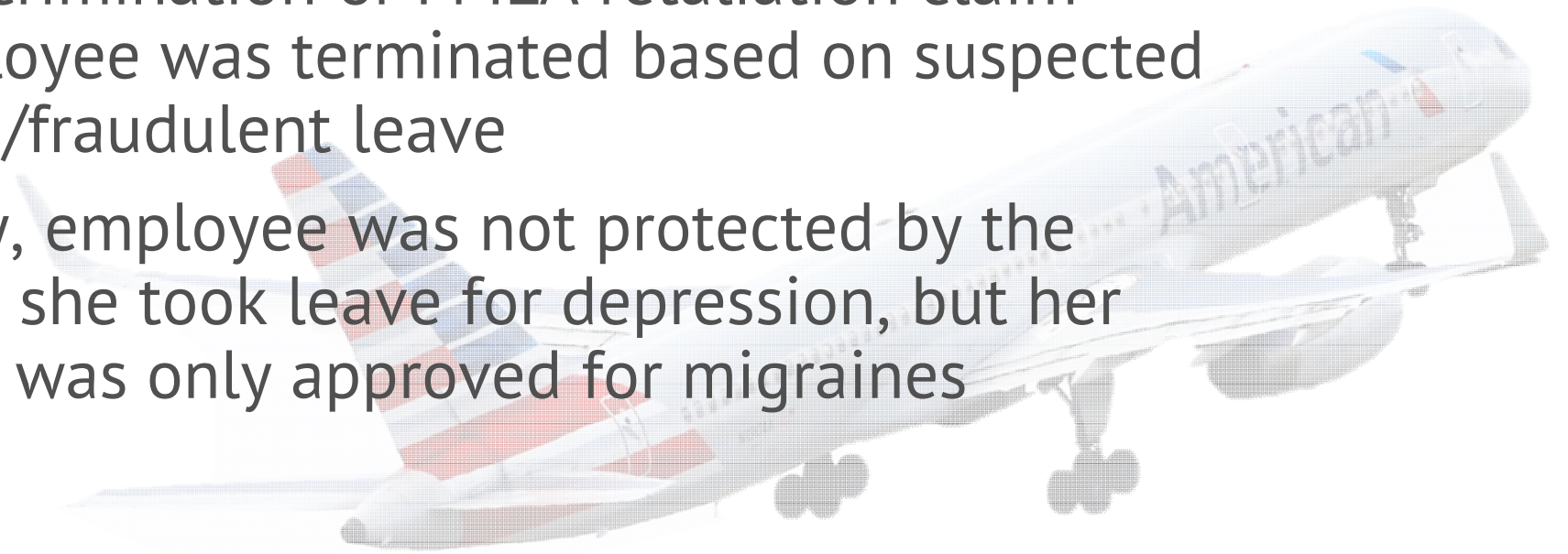
- Failure to comply = basis to deny leave
- Failure of HCP to affirm the pattern is consistent with medical need = basis to deny leave within parameters of inconsistency
 - If recertification requested at a 12-month increment (i.e., at the “annual” medical certification stage) and medical provider affirms suspicious pattern, can get 2nd/3rd opinion



Leave Abuse

Davis-Jackson v. American Airlines

- No ADA discrimination or FMLA retaliation claim where employee was terminated based on suspected leave abuse/fraudulent leave
- Additionally, employee was not protected by the FMLA when she took leave for depression, but her FMLA leave was only approved for migraines



Leave Abuse (Cont.)

LaBelle v. Cleveland Cliffs, Inc.

- Employee was approved for intermittent FMLA for medical appointments and flare ups of a joint condition that impacted his shoulders
- Employer noticed a suspicious pattern of FMLA days and consecutive vacation days
- Employer hired a private investigator who filmed the employee playing golf
- Employee's termination was upheld and no violation found



Leave Abuse (Cont.)

Does vacationing while on FMLA leave constitute leave abuse?

- Not necessarily.

DePrato v. Mass. Water Resource Authority

- Employee was approved for FMLA leave for foot surgery and associated recovery
- Employee tried to return to work early, but could not do so without a doctor's note and could not get one for a few weeks
- He went on a previously scheduled, annual trip to Mexico during the last 1-2 weeks of his leave
- He limited his activities during his trip to be consistent with his medical restrictions
- Employee was terminated for leave abuse and filed suit
- Employee was awarded about \$1.3 million in damages for FMLA retaliation



Leave Abuse (Cont.)

If employees are on leave to care for parents, they must do that.

Scruggs v. Carrier Corp.

- Observed not leaving own house for day on leave to take mother to a doctor's appointment – no right to reinstatement.

Stonum v. U.S. Airways, Inc.

- Full day absence and spent a few minutes a day with mother – employer lawfully terminated employee.



Leave Abuse (Cont.)

Implement a specific call-in policy

- Foreseeable vs. unforeseeable (call “x” hours before shift)
- Advisable to give employee multiple individuals who can be called and notified of need for leave, and make sure managers know to report to HR
- Properly document absences and audit leaves



Leave Abuse (Cont.)

Meet with Employee to set expectations

- Discuss expectations for reporting absences, call-in and sign-off procedures
- Review FMLA policy to discuss use of concurrent paid leave, recertification, moonlighting, etc.
- Discuss planned medical treatment
 - Be familiar with the employer's right to request treatment occur around workday or at a more convenient time



The Dilemma – “I don’t want this to count as FMLA”



Jack’s wife is pregnant and due later this year. He has to undergo knee surgery this month and is expected to be incapacitated and unable to work for two weeks. He asks you not to count these two weeks against his FMLA because he wants to save all 12 weeks for when Jack Junior is born. What do you do?



The Dilemma – “I don’t want this to count as FMLA”



Jack’s wife is pregnant and due later this year. He has to undergo knee surgery this month and is expected to be incapacitated and unable to work for two weeks. He asks you not to count these two weeks against his FMLA because he wants to save all 12 weeks for when Jack Junior is born. What do you do?

You must count the two weeks to undergo knee surgery against his FMLA leave.



Limitations on Right to Reinstatement

Clodfelter v. Miami-Dade Cnty.

- Plaintiff failed to establish an FMLA interference claim where she repeatedly indicated that she did not want to return to the department, indicated that she was going to be looking for another position, and, when the department head indicated it was his understanding that she did not intend to return from FMLA leave, did not challenge or dispute his understanding



Minimizing Liability



Train your managers on the law and the significance of communications

Employer lost with the following commentary:

- You've taken "too many days off."
- "You know...you've missed a lot of work."
- "Not a good time to take leave," and urges her to read the book titled, No More Hysterectomies
- Emails about a "back up plan" and needing to terminate employee
- "Your continued unpaid time away from the workplace compromises the quality of care."



The Americans with Disabilities Act

42 U.S.C. §§ 12101 et. seq.



The Americans With Disabilities Act

Employer Coverage

Employers with 15 or more employees who worked for at least 20 or more calendar weeks.

Employee Eligibility

Qualified applicants or employees.

Leave

Employers must make reasonable accommodations for qualified employees with disabilities, including leave (unless undue hardship).

Purpose

Prohibit disability discrimination and retaliation



Practice Tips for ADA

- Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business.
- Can't refuse to provide an accommodation just because it involves some cost.
- An employer does not have to provide the accommodation the employee or job applicant wants, as long as it provides an effective reasonable accommodation. If more than one accommodation effectively meets the disability-related needs, the employer may choose which one to provide
- Employees with disabilities must be provided with access to leave on the same basis as all other similarly-situated employees.
- Watch out for state laws!



Practice Tips for ADA

- **Unpaid leave may be a reasonable even if:**
 - The employer does not offer leave as a benefit
 - The employee is not eligible for leave under other policies
 - The employee has exhausted leave (FMLA, workers comp, or state law leaves)
- **Engage in the “interactive process”/ talk to the employee**
- **100% Healed Policies (An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship/an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat.")**



“Disability” Defined

- **An individual is “disabled” if he or she has:**
 - A recognized physical or mental impairment that substantially limits a major life activity;
 - A record of such impairment; OR
 - Is regarded as having such an impairment



Comparison: ADA v. FMLA

- **Serious health condition is more broadly defined than disability**
- **Many serious health conditions are not covered disabilities under the ADA**
 - For example, substance abuse $\Rightarrow$ not a disability, but could be a SHC
- **Still not all SHCs are disabilities**
 - Temporary nature of pregnancies, hernias, broken bones
- **Some conditions may be both: continuing treatment for cancer or strokes**



ADA Lawsuits: Failure to Accommodate

Employee must show:

- Employee has a disability (impairment substantially limiting a major life activity)
- Employee is qualified for the job with or without accommodation
- Employer failed to provide a reasonable accommodation



Intent Is NOT Required

- Employer liability may exist even if employer had good intentions
- Failure to engage in the interactive process can create liability



The Interactive Process – Where to Begin



Employers must engage in a good-faith interactive process

- Identify the employee's limitations
- Discuss potential accommodations
- Evaluate effectiveness
- Implement reasonable accommodation



The Interactive Process – Obligations

- **Only need to accommodate essential job functions**
- **Create written job descriptions before advertising or interviewing applicants**
 - Job descriptions can serve as evidence of essential functions
- **Maintain a “good faith” effort**
- **Employee has obligations also...**
 - Does not have to specify specific accommodation, but needs to describe problems solved



What is a “Reasonable Accommodation”?

The Term “Reasonable Accommodation” May Include:

- Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities
- Job restructuring, modified work schedules, reassignment to a vacant position, modification of equipment or devices, adjustment or modification of exams, training materials or policies, the provision of qualified readers, interpreters, or assistants
- Other similar accommodations for individuals with disabilities



Fact Scenario



- Sarah works as a customer service representative
- She provides a doctor's note stating she has multiple sclerosis
- She requests to work from home three days per week
- Company denies request because everyone must work in office

ADA Violation?



Fact Scenario



Maybe



ADA Analysis

- Possible violation if employer refused interactive process
- Blanket policies cannot automatically defeat accommodations
- Employer must evaluate undue hardship



Compliance Trap: 100% Healed Policies

- Policies requiring return with no restrictions may violate ADA
- Employer must evaluate if employee can perform job with accommodation



Compliance Trap: Indefinite Leave

- ADA may require additional leave after FMLA
- Indefinite leave generally not a reasonable accommodation



Compliance Trap: Attendance

- Regular attendance may be an essential job function
- Employers must evaluate accommodations before termination



ADA + FMLA Overlap

**Common mistake:
treating ADA and FMLA
as separate processes**

**After FMLA ends,
employer must still
consider ADA obligations**





→ One law may hand off obligations to the other ←



Fact Scenario

- Maria used 12 weeks of FMLA leave after surgery
- Doctor says she needs 4 more weeks before returning
- Company policy says employees who cannot return after FMLA are terminated
- What should employer do?



ADA + FMLA Compliance Trap

- Automatic termination may violate ADA
- Employer must evaluate additional leave as reasonable accommodation



Key ADA Takeaways

- Most ADA claims arise from failure to engage in interactive process
- Rigid policies often create liability
- Documentation and communication are critical





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Thank You

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