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HR Florida Employment Law Webinar Series

WELCOME

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WORK INJURY CLAIM FORM

1 WORKER'S DETAILS

Title

Family name

Given names

Other known or previous legal names eg. Maiden names

What are your daytime contact phone number/s?

Mobile

Phone

Home

E-mail address

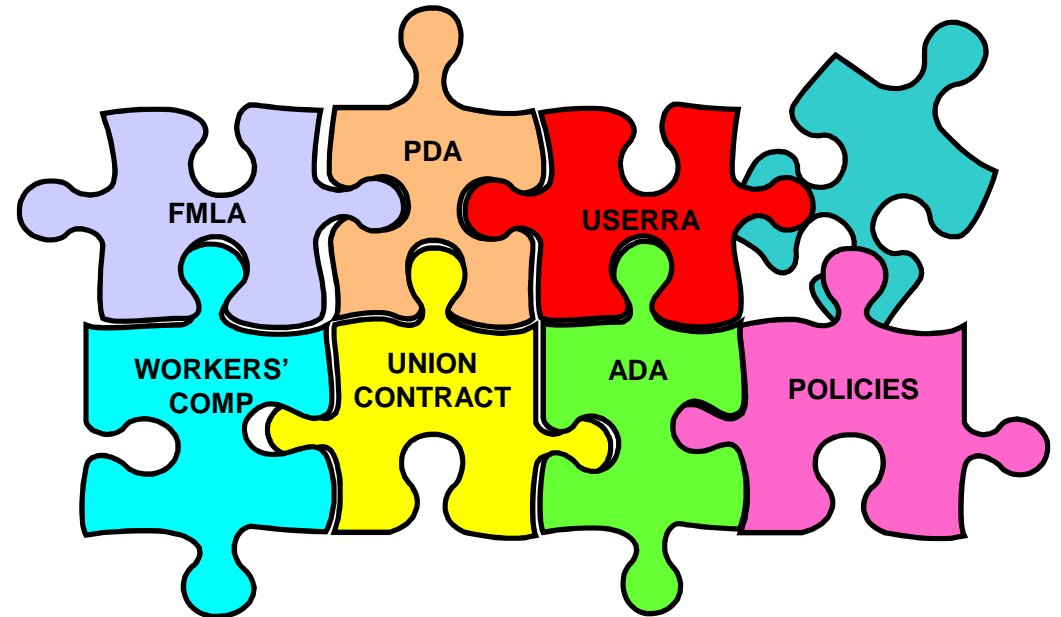
If you need an interpreter, what language do you speak?

Do you have special communication needs because of disability?

The Intersection of ADA, FMLA and Workers' Compensation Leave

Different Laws Involving Leaves of Absence

- Family and Medical Leave Act (FMLA)
- Americans With Disabilities Act (ADA)
- Workers' Compensation
- USERRA
- Pregnancy Discrimination Act



What Is A “Disability”?

An individual with a disability is a person who has:

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

- Pregnancy, however...
 - Pregnancy-related impairments are potentially covered
 - Advanced age, however...
 - Various medical conditions commonly associated with age such as hearing loss, osteoporosis, and arthritis are impairments
 - See recent EEOC Guidance



Temporary or Intermittent Conditions

- A temporary or intermittent condition is an impairment that is *“episodic or in remission is a disability if it would substantially limit a major life activity when active”*
- Examples:
 - Cancer
 - Epilepsy
 - Lupus
 - Asthma

- Don't nit-pick whether the condition is a disability - it probably is
- Keep an open mind in the interactive process
- Focus on accommodations
- Request documentation from qualified medical personnel before making accommodations
- Every employee request and adverse job action based upon a medical condition should be considered as a potential ADA claim

Qualified Individual

“A qualified individual has the skill, experience, education, and other job-related requirements of the job and, with or without reasonable accommodation, can perform the essential functions of the job.”

Essential Functions

- Essential functions are **fundamental job duties**
- Employment decisions must be based on person's:
 - Performance of **essential** job functions
 - Not on their ability to do a **marginal** function
 - Ability at the time
 - Not on speculation about future capability



Reasonable Accommodations

- Ensure equal opportunity in the application process
- Enable workers with disabilities to perform a position's essential functions
- Enable workers with disabilities to enjoy the same benefits and privileges of employment as workers without disabilities

Request For Accommodation

- There must be an individualized inquiry and an interactive process to determine what accommodations are appropriate and needed
- Recognize and handle accommodation requests
 - Do not say accommodation cannot be provided!
 - Refer to HR or other appropriate resource
 - Protect confidentiality
 - Ensure employee who receives an accommodation is not mistreated by co-workers

Reasonable Accommodation Examples

- Making existing facilities accessible to disabled individuals
- Acquiring or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- Reassigning to a vacant position
- Providing qualified readers or interpreters
- Adjusting or modifying examination, training materials, or policies

NOT Reasonable Accommodations

- Creating a new job
- Creating a light-duty position
- Bumping another employee
- Promoting the disabled worker
- Providing personal equipment (wheelchair, hearing aid, etc.)
- Eliminating essential functions
- Lowering production or performance standards
- Excusing misconduct

Making Facilities Accessible

- Installing Braille directional signs and elevator controls
- Assigning disabled parking spaces
- Upgrading to accessible restrooms



Environmental Accommodations

- Lighting
- Noise reduction
- Temperature
- Access to the workspace



- Seating
- Access to files
 - Lazy Susan
- Computer access
 - Heights
 - Monitor
 - Keyboard/mouse
 - Desk
 - Access to computer bay
- Office equipment and tools
 - Automatic staplers, hole punches, scissors
 - Ergonomic writing tools



- Be creative
- Consider past practices
- Consider present effects
 - Cost
 - Impact on other employees and operations



Modified Schedule

- Workday adjustments
- Flexible hours
- Changes to daily schedule. Examples:
 - Allow a diabetic employee to take regular meal breaks during a shift
 - Part-time schedule can be both ADA accommodation and required by FMLA



- Leave can be a reasonable accommodation, allowing a disabled employee to:
 - Obtain medical treatment, rehab, or therapy
 - Recuperate from illness or injury
 - Get repairs to assistive equipment such as wheelchair, prosthesis, accessible van
 - Train a service animal
 - Learn Braille or sign language
 - Avoid temporary work conditions that could harm a disabled worker or aggravate a disability

Leave of Absence

- When is leave is not a reasonable accommodation?
 - Indefinite leave
 - Complete exemption from time and attendance standards
 - Open-ended schedule (e.g., arrive and depart as the employee wishes/feels able)
 - Unlimited sick days
 - Erratic, unscheduled, and unpredictable absences for an indefinite period of time

Telework As An Alternative To Leave Of Absence

- EEOC says telework can be a reasonable accommodation
- Telework can be effective if these issues are considered
 - Safety
 - Workers' Compensation
 - Privacy
 - Need for proper supervision
 - Teamwork and communication



- Allowed only if employee cannot be accommodated in current job
- Employee must be qualified
- Position must be vacant:
 - Bumping not required
- Employer entitled to follow internal policy and bidding procedure to select best candidate:
 - Preferential treatment as reasonable accommodation not required in most states; check with local attorney re current status in your state

- Failure to engage in the interactive process has significant legal consequences
- Some courts have held such failure is a **per se** ADA violation
- Some courts have found employers' failure to engage in the interactive process constitutes evidence of bad faith

Outline Of The Interactive Process

- **Compare** restrictions to essential functions
- **Identify** essential functions that person cannot perform
- **Involve** the employee
- **Follow** confidentiality principles while exploring ways to provide workplace accommodations
- **Consult** in-house and outside experts
- **Select** and provide the accommodation that is most appropriate for the employee and employer

Medical Exams & The Interactive Process

Employer may require medical documentation:

- Specifying the existence of an ADA disability
- Explaining the need for reasonable accommodation





Who needs to know?

Who can you tell?

- Supervisors and managers
 - Regarding necessary restrictions on the work or duties of the employee and necessary accommodations
- First aid and safety personnel
 - IF the disability might require emergency treatment, **or**
 - IF the individual would need assistance in an emergency evacuation

Undue Hardship

Undue hardship refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

Direct Threat Exception

- An exception for employers who refuse to hire or employ persons who pose a “direct threat” to the health and safety of other employees or other persons associated with the business



- Enforced by Department of Labor (DOL)
- “Traditional” FMLA
 - Leave for personal illness
 - Leave for family member serious health condition
 - Leave to bond with new child
- “Military” FMLA
 - Leave to care for injured servicemember or veteran
 - Leave to handle deployment-related exigencies

- Eligible employees can get up to 12 weeks of leave:
 - Unpaid
 - Job-protected
 - Health benefits maintained
- Exception
 - Eligible employees can take up to 26 weeks of leave for military caregiver leave
 - Maximum 26 weeks combined traditional and military caregiver leave

Types of FMLA Leave

- Birth of child
- Adoption of child
- Placement of child for foster care
- Employee's own serious health condition
- Care for parent, spouse, or child with a serious health condition
- Qualifying exigency related to call-up for active duty
- Care for injured servicemember or veteran

What Is A Serious Health Condition?

Inpatient Care:

- Overnight stay in a hospital, hospice, or residential medical care facility
- Any period of incapacity or subsequent treatment in connection with an overnight stay



Foreseeable Leave

- 30 days' notice or as soon as practicable
 - As soon as practicable: Same or next business day of when employee learns of need
- If less than 30 days' notice, employer can request explanation
- If timely notice not given, period of delay counts as non-FMLA absence

Employee Notice Requirements

- No need to mention magic words “FMLA”
- If employee fails to follow usual notice requirements, employer may deny or delay FMLA leave.
- Employee can be required to report periodically on status and intent to return to work
- Discipline for failure to follow employer’s call-in procedure is not FMLA interference or retaliation

- General Notice
 - Poster and on intranet
- Notice of Eligibility and Rights & Responsibilities
 - Provided to an employee within 5 business days of the date
 - An employee requests FMLA
 - Employer becomes aware that an employee's leave may be FMLA-qualifying

Communication With An Employee's Doctor

- After employer has given employee an opportunity to cure any deficiencies in the medical certification, the employer may:
 - Contact the employee's health care provider for clarification and/or authentication
 - **Clarification** - Help in understanding the handwriting on the medical certification or the meaning of a response
 - **Authentication** - Requesting verification that the information was completed and/or authorized by the health care provider

“Equivalent” Position

- Factors that determine equivalency
 - Pay, benefits, and working conditions, including location, privileges, and status
 - Whether the new position involves the same or substantially similar duties and responsibilities
 - Whether the new position entails substantially equivalent skill, effort, responsibility, and authority
- *De minimis* exception
 - Very minor changes in duties, location, etc.

Employees Who Do Not Intend To Return To Work

- If an employee gives “unequivocal notice” of intent not to return to work:
 - Employer may cease health benefits
 - Employer need not guarantee job restoration
 - Best practice: Ask employee for written and signed notice of intent not to return to work
- If employee is not able to return to work but expresses a desire to return, the employer must continue FMLA protections until employee exhausts all FMLA leave

- If employee uses FMLA leave due to their own serious health condition, employer may require a fitness-for-duty medical certification as a condition to restoration
- Best practice: Attach job description
- Similarly-situated employees must be required to provide such documentation
- Policy must be communicated directly to employee before FMLA leave starts

What Constitutes Interference With FMLA Rights?

- Discouraging employees from taking leave
- Refusing to approve leave
- Light-duty assignments
- Be sure you have documented, legitimate reasons for adverse action

Workers' Compensation Basics

- Temporary income replacement and medical care for covered employees who have job-related injuries or illnesses
- Injured employee is limited to statutory caps on compensation for covered medical conditions
- Investigation during early stages of claim is helpful

What Is Workers' Compensation?

- “Exclusive remedy”
 - Injured workers give up most rights to sue employers for injury in exchange for no-fault benefits in case of injury or disability
 - In turn, employers give up the right to reduce the amount of compensation when an injury is a worker's fault
- State-specific statutes
- Weekly payments in place of wages lost

What Is Workers' Compensation?

- Payment for medical care including rehabilitation and job retraining
- Comp for economic loss of injury and for future loss, if total or partial permanent impairment
- Reimbursement and/or payment of medical expenses and benefits payable to the dependents of workers killed during employment
- Damages for pain, suffering, and punitive damages are usually not available

Occupational vs. Non-Occupational

- On company property
- Company sponsored outing
- Under control and/or direction of employer
- Generated out of the course of doing business
- Employer derived some benefit from employee a



What Is Covered?

- Injury occurring “in the course and scope” of employment is compensable under most circumstances
- Coverage even if employee was negligent
 - Exceptions: Horseplay, Intoxication
- Occupational exposure to substances
- Employer not responsible for existing injuries
 - However existing injuries aggravated by the job are covered

Injury & Illness

“Arising Out Of” & “In The Course And Scope Of” Employment

- Damage or harm to the physical structure of the body
 - Medical attention beyond first aid
- Disease or infection resulting from occupational exposure
- Psychological damage, if caused by abnormal work conditions
- Activity performed by employee while engaged in business of employer



Prohibited Actions

- Interfering with an employee's right to file a workers' compensation claim
- Discharging, discriminating, or retaliating against a person who has filed a workers' compensation claim

Getting Injured Employees Back To Work

In determining whether to return an employee to work, consider:

- Modified-duty job
- Working together with treating physicians

Interaction Among ADA, FMLA, & Workers' Comp

- In multiple coverage situations, whatever outcome is best for the employee will prevail
- All coverage requirements for each law must be fulfilled
- Some situations may be covered by all three laws

Interaction Among ADA, FMLA, & Workers' Comp

- Common goal: To allow sick, injured or disabled employees to take time away from work without fear of losing jobs and benefits
- Different purposes:
 - ADA prohibits discrimination and requires reasonable accommodations
 - FMLA sets minimum leave standards
 - Workers' Compensation laws provide for payment of compensation and rehabilitation for workplace injuries

- Only a job-related medical problem affecting the employee can potentially involve all 3 laws
- A family member's medical problem may involve ADA and FMLA, but not workers' compensation
- Some medical problems may only involve one law

Intermittent Or Reduced Schedule Leave

ADA

- No absolute right
- Undue hardship defense
 - May lose defense if intermittent leave taken under FMLA

FMLA

- Absolute right for serious health condition
- Employer discretion for birth, placement, adoption

ADA

- Medical examinations or inquiries regarding an employee's disability **ONLY** if:
 - Job related
 - Limited to determining ability to perform the job and whether an accommodation is needed and would be effective

FMLA

- Medical certification of the need for the leave

Workers' Compensation

- Medical information that pertains to an on-the-job injury

ADA

- Required to be offered if it is a reasonable accommodation that does not create an undue hardship on the employer

FMLA

- Cannot be required

Workers' Compensation

- Ought to be offered if available
 - Refusal may eliminate the employee's entitlement to the wage replacement benefit

ADA

- Permitted, as long as the medical examination and inquiry is job-related and necessary to determine whether the employee can perform the essential functions of the job

FMLA

- Can only be required if employee notified at start of leave; limited to essential functions

Workers' Compensation

- Typically required

ADA

- No specific requirements
- Cannot discriminate and must provide same benefits as those provided to employees on non-ADA leave of absence

FMLA

- Health coverage must be continued at same level as prior to the leave
- Benefits, other than health, are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)

Workers' Compensation

- No specific requirements

ADA

- Required reinstatement to previous job *unless* doing so would create an undue hardship on the employer or create a direct threat

FMLA

- Required reinstatement to the same or an equivalent job
- NO undue hardship exception

Workers' Compensation

- No reinstatement rights under state law
- Beware of retaliatory discharges!

- Coordinate leave of absence procedures
- Ensure leave of absence procedures are in writing and communicated to employees
- Ensure procedures comply with ADA, FMLA and state laws
- Provide written notification of terms of leave of absence when employee begins leave
- Ensure employees are evaluated on an individual, but consistent basis in deciding whether to grant leave, allow their return, or terminate them



Final Questions



THANK YOU
FOR THIS OPPORTUNITY

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