

Administering the FMLA and the ADAAA: How to Avoid Costly Mistakes

Presented By:

Whitney Harmon, Esq.

Baker Donelson Bearman Caldwell & Berkowitz

WHarmon@bakerdonelson.com

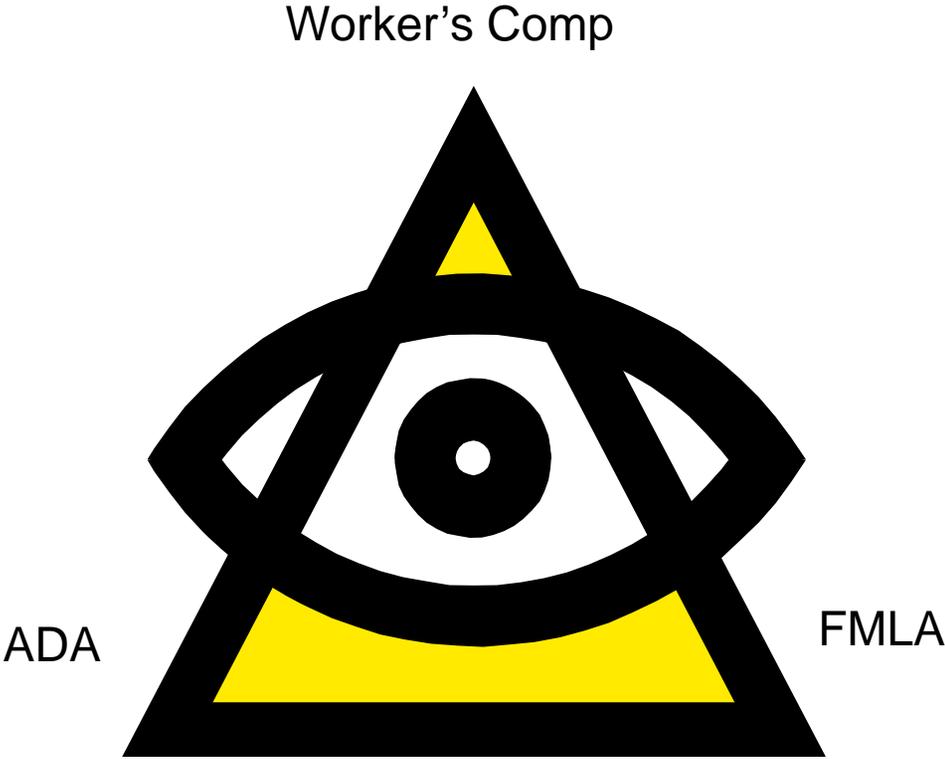
Why Are We Here?

- 3 primary reasons for being here:
 1. **To ensure compliance** with employment laws & regulations related to employees' leave needs.
 2. To make sure you are in a position to effectively **defend your company** in litigation by properly implementing company policies.
 3. To reinforce the responsibility managers and supervisors have to create and support a culture of respect and professionalism, in addition to compliance with the law.

What are we going to discuss today?

- Various Employee Leave Issues
 - Leave under the Family Medical Leave Act
 - The Americans with Disabilities Act Amendments Act and its requirements
 - The interplay between the FMLA and the ADAAA
 - Where Workers' Compensation fits into this analysis.

Avoiding Getting Lost in The Bermuda Triangle



What Is the Family and Medical Leave Act (FMLA)?

- A federal law that:
 1. allows eligible employees,
 2. of a covered employer,
 3. to take job-protected, unpaid leave,
 4. for up to a total of 12 work weeks in any 12 months.



Types of FMLA 12 Week, Job Protected Leave

- leave for the birth of a son or daughter, and to care for the newborn child; or
- leave for placement with the employee of a son or daughter for adoption or foster care; or
- leave to care for the employee's spouse, son, daughter, or parent with a "serious health condition;" or
- leave needed because of a serious health condition that makes the employee unable to perform the functions of his or her job.

Definition of “Serious Health Condition”

- A **“serious health condition”** entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
 - **inpatient care**; or
 - **continuing treatment by a health care provider**, which requires absence for 3 full, consecutive calendar days of incapacity and a regimen of continuing treatment.

Did You Know?

- A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.
- An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.
- **Employees need not expressly request FMLA leave, or even mention the FMLA, but may simply state that leave is needed.**

Job Protection - Reinstatement After FMLA Leave

The FMLA generally requires covered employers to reinstate employees returning from FMLA leave to the same position they held before the leave, or an equivalent position.

Reinstatement is not required if:

- an employee is unable, with reasonable accommodation, to perform the essential functions of his or her job; or
- the employer can prove the employee would no longer be employed at the time of reinstatement due to layoff or other non-retaliatory, legitimate reasons; or
- the employee fails to provide a fitness-for-work certification from a health care provider at the employer's request prior to returning to work.

Effect of FMLA Leave on Employee Benefits

Group health benefits must be continued during FMLA leaves of absence.

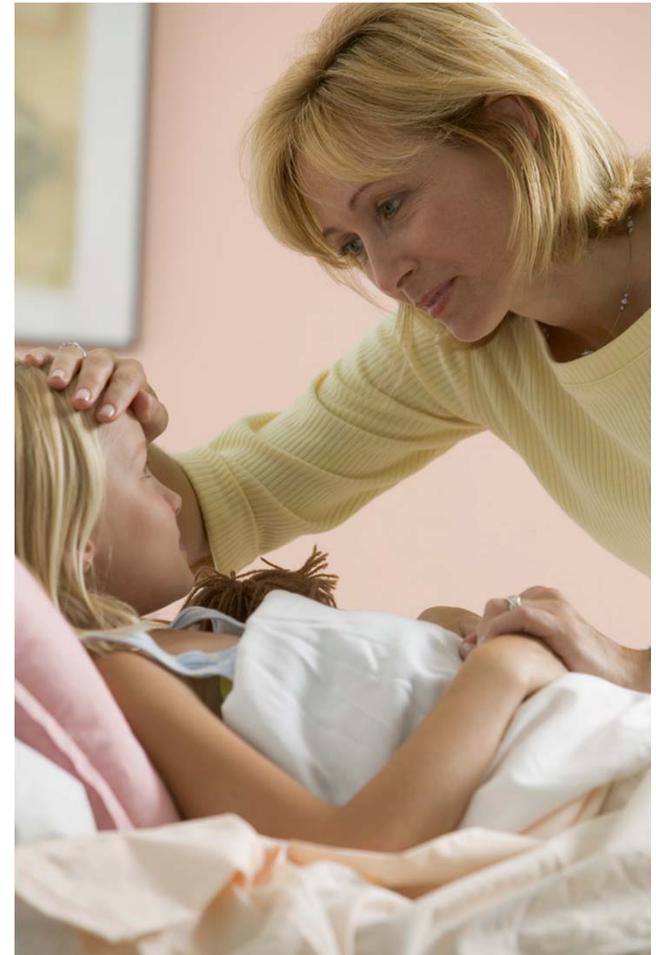


What Is “Intermittent Leave” Under The FMLA?

- Intermittent leave is FMLA leave that does not run concurrently or is for a period of less than an entire workday.
- An employee may take intermittent or reduced schedule leave if he or a family member is incapacitated because of a serious health condition.

Employee Notice Requirements

- Employees who have a need for FMLA leave of absence must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances warranting a departure from this requirement like emergency medical care, unexpected health conditions, etc.



“Constructive Notice” Issues

- Typically, employees give express notice of an FMLA leave election, but such explicit notice is not necessary if the employer has constructive notice (i.e. reason to believe leave may be warranted).
- Under the FMLA, employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to FMLA leave - **even if the employee is unaware that he or she suffers from a specific qualifying serious health condition or that he or she is entitled to leave.**
- Employers have to look for inconsistent behavior that could be attributable to a serious health condition, and when appropriate, have to inquire delicately if this inconsistent behavior is impacting performance.

Timing for Employers to Designate FMLA Leave

- It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give written notice of the designation to the employee.
- Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly **(now within five business days absent extenuating circumstances) notify** the employee that the paid leave is designated and will be counted as FMLA leave.

Retroactive Designation of Leave Is Prohibited

- This is why it is so important for you, the front-line managers/supervisors, to recognize any potential need for leave for your employees and address it promptly.

Exception:

If, despite the employer's best efforts, the employer does not learn that leave is for an FMLA purpose until after the leave has begun, or until after the employee has returned from leave, then **AND ONLY THEN** the leave may be retroactively counted as FMLA leave, provided this is done promptly (generally within two business days).

Medical Certifications

- Certain employer representatives, including human resources professionals, leave administrators, and management officials (but **not an employee's direct supervisor**) now may contact an employee's health care provider directly to clarify or authenticate a medical certification.
- If a medical certification is going to be required, in most cases it must be requested within **five business days** after the employee gives notice of the need for leave or within **five business days** after the leave commences.
- Requests for clarification/supplementation of the medical certification must be requested in writing – after which the employee has **seven days** to respond.

Fitness for Duty Certifications

1. If you elect to impose a fitness for duty certification requirement, federal regulations require that it be applied uniformly to all “similarly situated” employees (meaning, at a minimum, those employees in the same occupation with the same serious health condition).
2. Employers may now require that these certifications specifically address the employee’s ability to perform essential functions of the job, as long as they provide the employee with a list of these functions no later than the date they provide the employee with the notice of FMLA designation.

Fitness for Duty Certifications – Intermittent Leave

- Where reasonable job safety concerns exist, up to once every 30 days, employers may now request a fitness for duty certification before allowing an employee to return to work from intermittent leave



Key FMLA Liability Traps to Avoid

- **Stay on the lookout for constructive leave requests** - remember employees do not have to mention or request FMLA to be eligible for leave.
- Do not fail to provide reasonable accommodations to qualified individuals with a disability as defined by the newly revised **Americans With Disabilities Act Amendments Act ("ADAAA")**.
- Make certain to provide employees with information about their FMLA rights when this information is requested.
- **The FMLA is a complicated law**; supervisors and managers should be appropriately trained, and should interact regularly with HR regarding the administration of FMLA leaves of absence.

The ADAAA

- As of January 1, 2009, the ADA Amendments Act (ADAAA) became effective.
- The purpose of the amendments to the ADA is to expand the definition of “disability” which has been narrowed by recent court decisions.
- Under the ADAAA, the focus has shifted from an employee’s disability to the “interactive process.”
- Managers and supervisors are key to this process because you are the first responders for your company! If an employee does not tell HR, managers and supervisors must recognize when HR should be “interacting” with an employee to discuss accommodation or potential disabilities.

The New Focus

- The question of whether an individual meets the definition of disability should not demand extensive analysis.
- What does this mean?
- The focus for employers and courts will be on engaging in the interactive process and providing reasonable accommodations not on whether the employee has a disability.



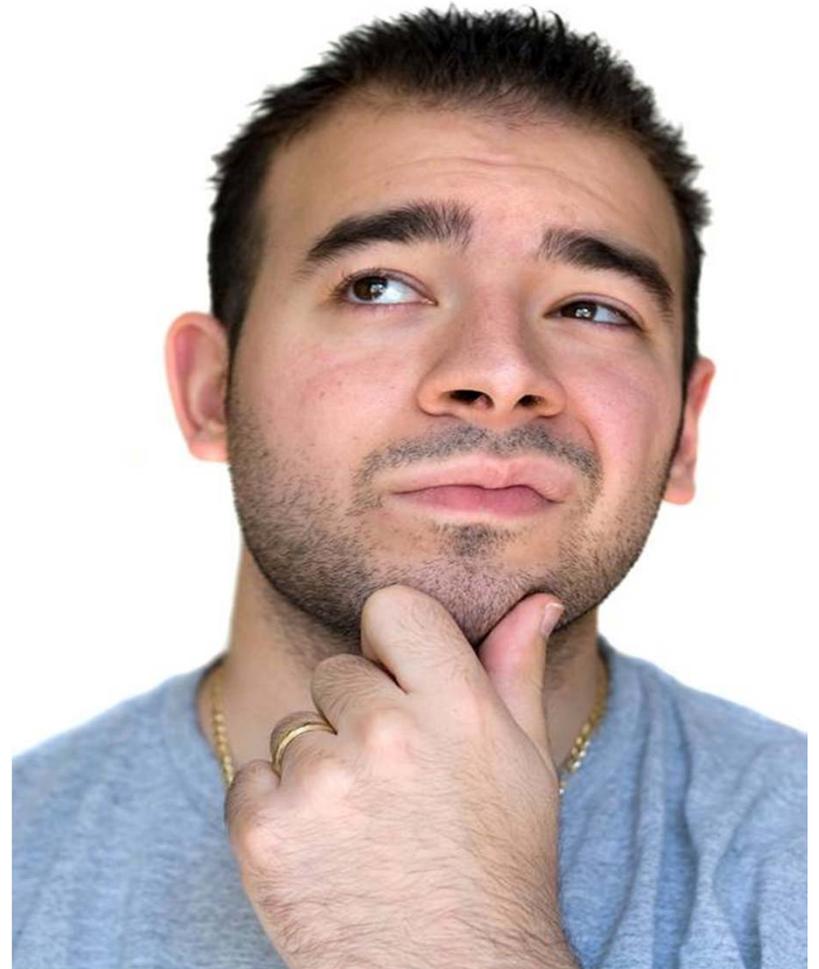
Has the definition of “disability” changed? NO

- Physical or mental impairment that substantially limits one or more of the major life activities of such individual; or
- A record of such an impairment; or
- Being regarded as having such an impairment



So what has changed?

The definitions of “major life activity”
and “substantially limits”



Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- **Sitting**
- **Reaching**
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working

Not finished yet...

- The operation of a major bodily function, including functions of the:
 - Immune system
 - **Special sense organs and skin**
 - Normal cell growth
 - Digestive
 - **Genitourinary**
 - Bowel
 - Bladder
 - Neurological
 - Brain
 - Respiratory
- Circulatory
- **Cardiovascular**
- Endocrine
- **Hemic**
- **Lymphatic**
- **Musculoskeletal**
- Reproductive functions
- Operation of a major bodily function includes the operation of an individual organ within a body system

Other Considerations

- EEOC anticipates that courts will recognize other major life activities
- The term “major” shall not be interpreted strictly to create a demanding standard for disability
- No longer determined by “activities that are of central importance to most people’s daily lives”



Temporary Impairment

- We used to say if it was not permanent (6 months +) it was not a disability. This is no longer the case.
- Factors such as “condition, manner and duration” may be relevant to the determination of whether an impairment substantially limits a major life activity.
- Sliding scale – the more severe, the less lengthy the duration need be, and vice versa.



The ADA

- Constructive notice clues:
 - Changes in production
 - Changes in attitude
 - Requests for assistance
 - Requests for changes in responsibilities
 - Recurring leave requests

It is important to keep records of requests made, accommodations made for employees, and consult with HR on these issues!

What happens when the FMLA and the ADAAA overlap?

- Often an employee will be out on FMLA leave but before he/she is medically cleared to come back to work his/her FMLA runs out.
- Companies are then faced with the question do we fire the employee for failing to return to work, or do we have another responsibility to that employee?
- Under the ADAAA the answer is that you might have another responsibility to the employee.
- You must “interact” with that employee to see if there is a need for an accommodation. This is where the FMLA and ADAAA overlap.



What about Worker's Compensation Claims?

- Workers' compensation laws protect people who are injured on the job. They are designed to ensure that employees who are injured or disabled on the job are provided with fixed monetary awards, eliminating the need for litigation.
- What is covered? As long as the injury is job-related, it's covered. For example, employees are covered if they are injured while traveling on business, doing a work-related errand, or attending a business-related social function.



Questions, Comments, Discussion...

