

ReedSmith

FMLA and ADA: Overlapping Rules and Employer Obligations

presented by James A. Holt

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through partnership

Objectives

Understand the FMLA

Understand the ADA

Understand where the FMLA and the ADA overlap

Learn to issue-spot where these issues may exist

Family and Medical Leave Act

Warning signs that the FMLA may apply

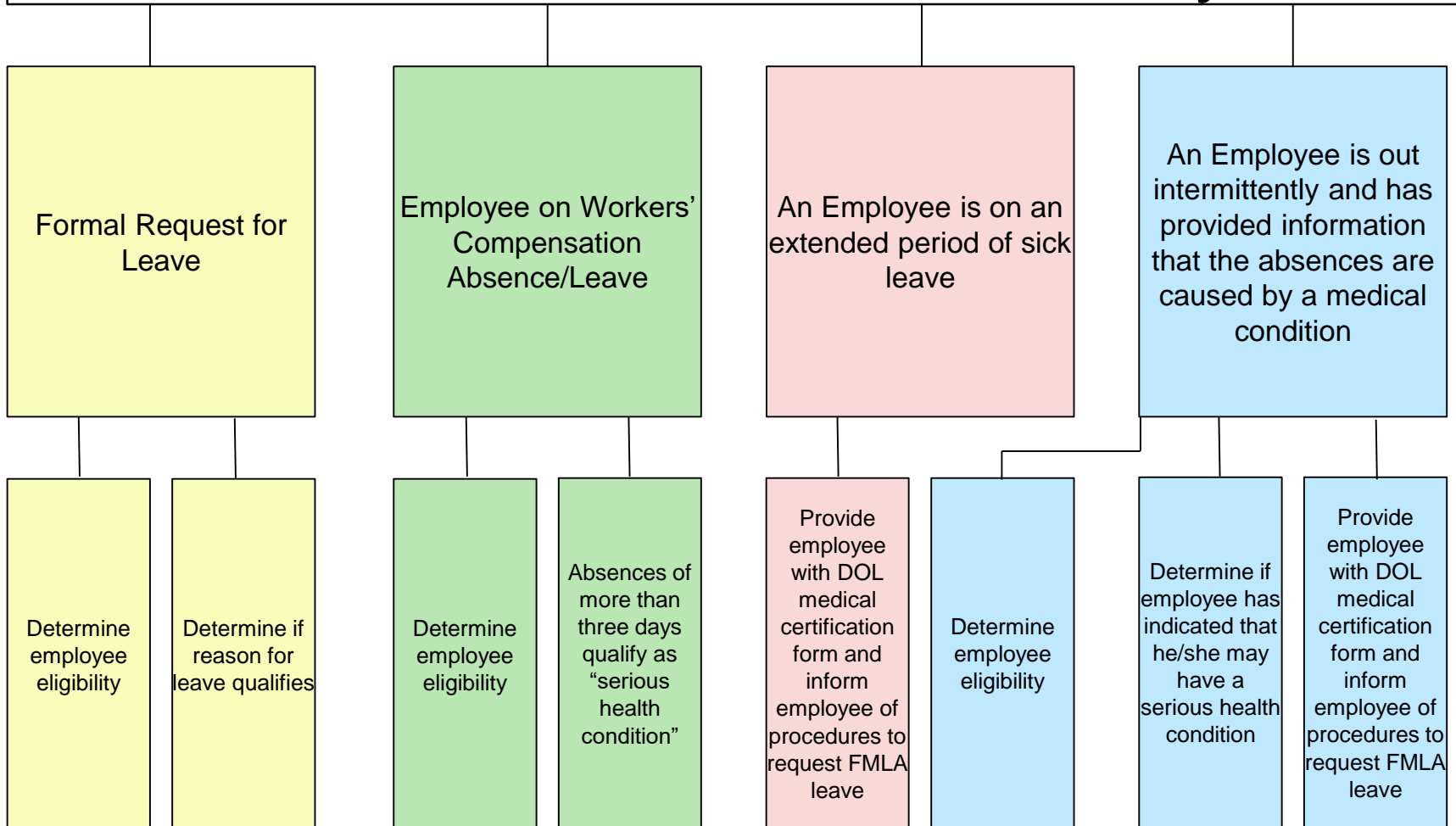
Requests for leave to Human Resources

Extended absences


Poor attendance

Conversations with supervisor (training required)


Initiation of FMLA leave analysis




Determining employee eligibility



Employed for at least 12 months
(need not be 12 concurrent months)



Has worked 1,250 hours in preceding 12 months
(excluding paid, unworked time)



Works at a work site with 50 employees
(within a 75-mile radius)



Has not exhausted his/her annual 12-week entitlement

Determining if reason for leave qualifies

Birth, Adoption,
or Foster care

Within
12 months
of birth or
placement

To care for
immediate family
member or spouse
with serious
health condition

Employee's
own serious
health
condition

For the care of a
covered service
member or
exigency

Determining if a medical condition is a “serious health condition”

Absences due to pregnancy or prenatal care of any duration

Inpatient treatment of any duration

Absences of more than three days involving outpatient treatment which includes:

Chronic medical conditions causing absences of any duration

Two or more visits to a health care provider

One visit to a health care provider followed by a prescription medication or other ongoing treatment (such as physical therapy)

Chronic, long-term illness that causes episode absences
Examples:
migraine
headaches, asthma,
Alzheimer’s
and other
illness without
definite duration

Military family leave

Military caregiver leave

- Eligible employees entitled to 26 workweeks of unpaid leave in a rolling 12-month period to care for a covered service member with a serious injury or illness

Qualifying exigency leave

- Eligible employees entitled to 12 workweeks of unpaid leave during employer's normal 12-month period for qualifying exigencies arising out of the fact that a family member is on active duty or notified of an impending call to active duty

Americans with Disabilities Act

Qualified individual

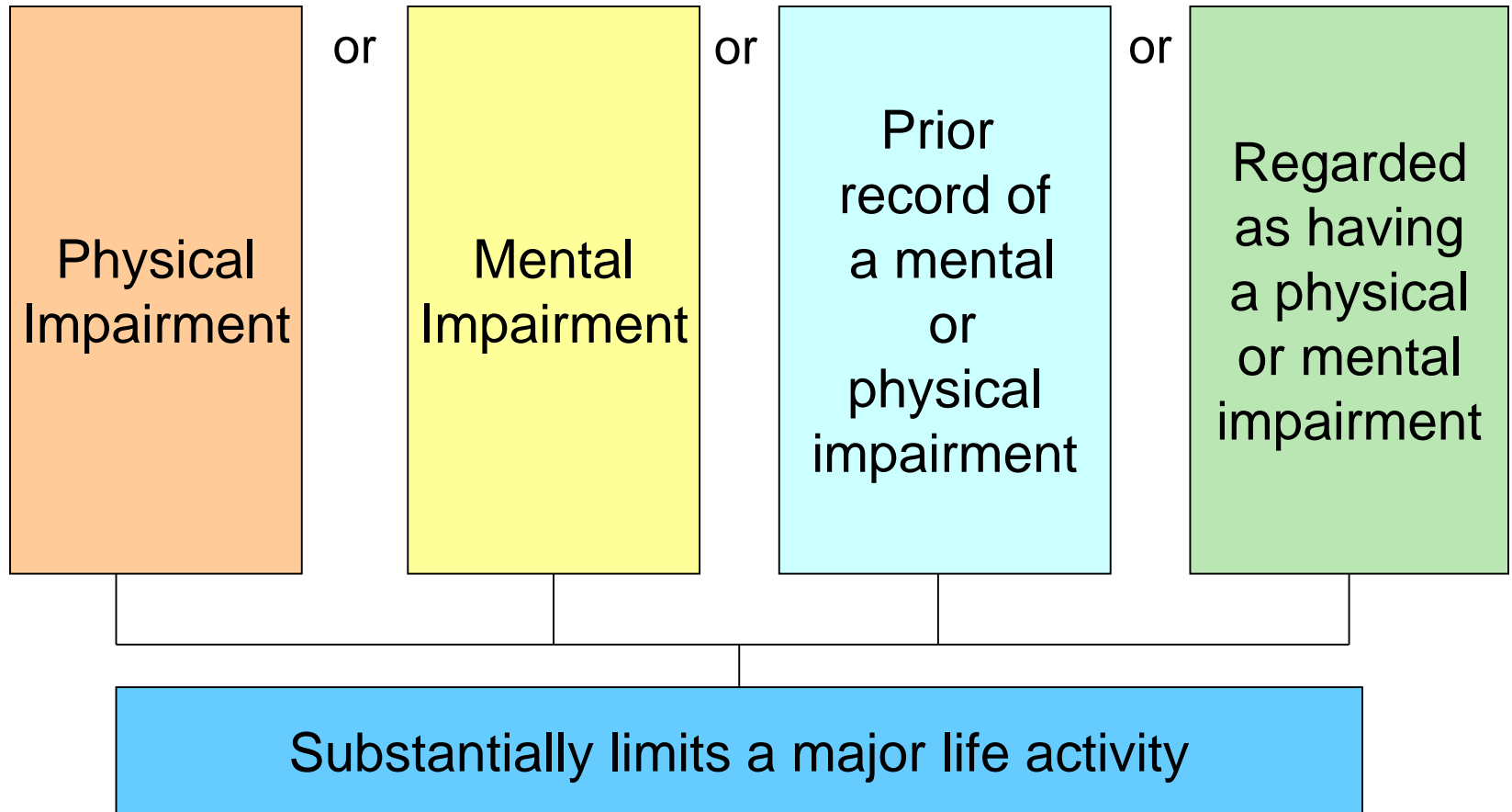
Able to perform essential job functions with or without reasonable accommodation

Excludes marginal job functions

Does not consider long-term or degenerative effects of a disability – but “regarded as” claims

Does not permit cost-based disqualification because of increased health insurance or Workers’ Compensation premiums

Disability defined



“Substantially limited”

“Substantially limits” should be interpreted liberally to provide protection

ADAAA = “Assume Disability, Always Attempt Accommodation”

Under ADAAA, if an impairment that is inactive or in remission would substantially limit someone from engaging in a major life activity if it were active, it is a disability, even if it is not currently imposing any such limits.

“Substantially limited”

Determine whether an impairment substantially limits a major life activity without taking into account the ameliorative effects of mitigating measures, such as:

- Medication, medical supplies, equipment, or appliances, prosthetics, hearing aids, mobility devices, or oxygen therapy (other than normal eyeglasses or contact lenses);
- Assistive technology;
- Reasonable accommodations or auxiliary aids or services; or
- Learned behavioral or adaptive neurological modifications

Disability under ADAAA

When in doubt, it is much safer to assume that a condition is a disability than to rest your defense on the position it is not

Major life activities

Caring for oneself

Manual tasks

Walking

Seeing

Hearing

Speaking

Breathing

Learning

Working

Eating

Sleeping

Standing

Lifting

Bending

Reading

Concentrating

Thinking

Communicating

Using major bodily functions, including functions of the immune systems, normal cell growth, digestive, bladder, bowel, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

Interactive process

The EEOC's guidelines state that...“The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.”

Employer's good-faith effort

Meeting with the employee

Requesting information regarding employee's condition and limitations

Asking what accommodation the employee wants

Showing signs of having considered employee's request

Offering and discussing available alternatives if requested accommodation is too burdensome

Consulting outside resources

Modifying policies as reasonable accommodation

The employer may be required to make an exception to a neutral policy or practice

- An employer may be required to modify or make exceptions to its existing neutral policies regarding leaves of absence, transfers, part-time work, and breaks
- Courts have generally rejected claims that attendance policies must be modified as an accommodation
- Most courts hold that an employer need not lower its quantitative or qualitative standards, including production standards, as a reasonable accommodation

Leaves of absence as reasonable accommodation

Examples of situations in which an employee may be entitled to time away from work as a reasonable accommodation:

- To obtain medical treatment, rehabilitation services, or occupational therapy
- To recuperate from an illness or an episodic manifestation of the disability
- To avoid temporary adverse conditions in the work environment (e.g., a breakdown in air conditioning that will aggravate a respiratory disability)

If the employee has paid leave available, the employer should allow its use before requiring unpaid leave. Otherwise, leave granted as an accommodation need not be paid.

Leaves of absence as reasonable accommodation

Under the ADA most courts don't require indefinite leaves

How long a leave needs to be to be considered a “reasonable” accommodation generally depends on specific circumstances:

- whether the employee has already been given significant time off,
- whether the requested leave is of a substantial duration, and
- how likely it is that the employee will be able to return on the proposed end date

Other types of reasonable accommodation

Job restructuring

Part-time/modified work schedules

Reassignment to vacant positions

Acquisition or modification of equipment

Modification of policies

Job coaches

Readers, interpreters

Unpaid or intermittent leave

Employer considerations for job restructuring

Don't have a blanket policy prohibiting all employees from working unless they have no restrictions (a "full release")

Make an individualized assessment of an employee's restrictions and the job's essential functions to determine whether you need to eliminate an essential job function (which need not be done)

Consider eliminating marginal job functions, shifting non-essential functions among employees, and redesigning job procedures

No obligation to create a new job

Light duty jobs

Employers are not required to create a light duty position.

But if an appropriate light duty position exists and is vacant, assignment to that position may be a reasonable accommodation.

Employers may choose to create light duty jobs only for employees who are injured on the job, and may limit such positions to a specified period of time.

Reassignment to a vacant position

For applicants, no obligation to determine whether he or she is qualified for any position other than the one being sought

Reassignment is an accommodation of last resort.

No duty to create a new position or bump anyone out of a position

Reassignment may be required only if a job is vacant when the employee asks for accommodation or the employer knows that it will become vacant “within a reasonable period of time”.

Reassignment to a vacant position

“Equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time.”

Employer need not promote an employee to accommodate

If employee can no longer perform his or her current job, demotion may be a reasonable accommodation. The employee’s pay may be lowered if the new position pays less (unless the employer “red circles” non-disabled employees who are reassigned to lower positions).

The employee must be qualified for the vacant position.

Undue hardship defense

Significant difficulty and expense

Factors include cost, financial resources, size of employer, size of the facility and impact on business operations

Employer cannot show undue hardship just because:

- Cost of accommodation is high in relation to employee's pay, or
- Providing accommodation would have adverse effect on co-workers' morale, or
- Providing accommodation may lead other employees to request accommodations

Case-by-case analysis required

Confidentiality



Separate files

Under lock and key

Access limited to those with a
“need to know”

Litigation problem

Medical examinations

FMLA

- Employee's Medical Certification
- 2nd Opinion
- 3rd Opinion
- Return to Work Certification

ADA

- No challenge procedure
- IMEs permitted if job-related and consistent with business necessity

Salary and benefit dilemma

FMLA

- FMLA leave *can be unpaid leave*, but employer must provide employee with same level of benefits as if employee was still on the job.

ADA

- ADA permits an employer to reduce the benefits provided to the employee when the employee's reduced work schedule drops the employee's hours below that required for the applicable benefit plan coverage

Return to work issues

The employer cannot refuse to let an individual with a disability return to work because the worker is not fully recovered from an injury unless:

- Worker cannot perform essential functions of the job with or without an accommodation
- Would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation
- Risk of future workers' comp claims not a permissible factor

Case Studies

Chandler Bing is one of your company's best new employees – never misses a day and does great work – although no one can quite explain what he does.

After work one day, Chandler Bing decides to drive to the coffee shop instead of going directly home. Leaving the coffee shop, Chandler is involved in a car accident when his friend Phoebe hits him with her grandmother's old taxi cab.

Chandler calls you the next day and tells you he is supposed to be on bed rest for one week.

*What do you do? Is this covered by the FMLA?
Is this covered by the ADA?*

Chandler calls you a week later to tell you that his injuries from the taxi car accident are more extensive than he had originally thought. He says he needs another week to recuperate.

Is this covered by the FMLA?

Is this covered by the ADA?

After another week, Chandler tells you that he needs an extended leave of absence because of his injuries.

Should you apply the FMLA retroactively?

Another employee – Dwight Schrute – tells you that he is going to the doctor to have his appendix out. After a long, detailed explanation about the process, he tells you that he needs a 6 month medical leave to recuperate.

What do you tell Dwight?

Supervisor Leslie Knope goes out on a medical leave of absence to treat her anxiety.

She is originally going to be out for 1-2 months, but has been continuing to extend the leave.

She has now been out for 7 months.

What do you do?

Leonard Hofstadter provides you with medical documentation supporting his need for a leave of absence. The paperwork does not say anything about how long the leave will be – just instructs Leonard to follow up with the doctor in 4-6 weeks.

What do you do? Should you ask him for re-certification medical documentation? If so, when should you ask him?

Mitchell Pritchett tells you need needs a leave of absence, but does not provide any medical documentation. He doesn't know how long he will be out.

What should you do?



Questions/Wrap up



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