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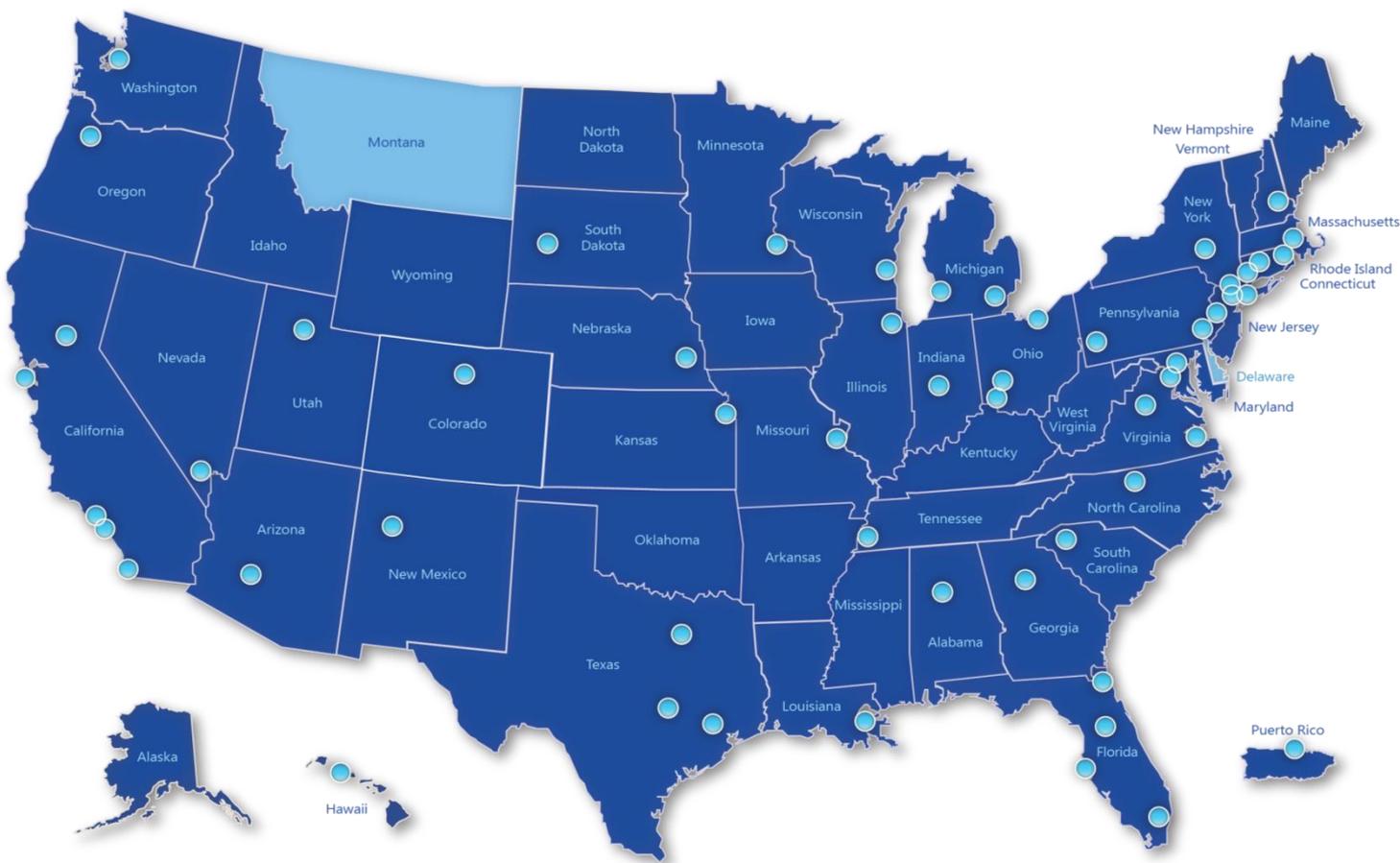
**FMLA & ADA in 2016:
An Employer's Basic Guide to Leave Management**

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Preventive Strategies and
Positive Solutions for the Workplace

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This presentation provides general information regarding its subject and explicitly may not be construed as providing any individualized advice concerning particular circumstances. Persons needing advice concerning particular circumstances must consult counsel concerning those circumstances. Indeed, health care reform law is highly complicated and it supplements and amends an existing expansive and interconnected body of statutory and case law and regulations (e.g., ERISA, IRC, PHS, COBRA, HIPAA, etc.). The solutions to any given business's health care reform compliance and design issues depend on too many varied factors to list, including but not limited to, the size of the employer (which depends on complex business ownership and employee counting rules), whether the employer has a fully-insured or self-funded group health plan, whether its employees work full time or part time, the importance of group health coverage to the employer's recruitment and retention goals, whether the employer has a collectively-bargained workforce, whether the employer has leased employees, the cost of the current group health coverage and extent to which employees must pay that cost, where the employer/employees are located, whether the employer is a religious organization, what the current plan covers and whether that coverage meets minimum requirements, and many other factors.

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- **How do you counsel an employer in dealing with a sick/disabled employee?**
- **One size does not fit all.**
- **Determining strategy for leave management can be challenging because:**
 - **Many federal and state laws must be considered.**
 - **Multiple legal theories can be used under these statutes.**
 - **The law is largely “undeveloped” or “under-developed.”**
 - **Individualized assessment takes time which no one has.**
 - **Systems often do not capture necessary information.**
 - **Leave and paid time off benefits developed when few legal protections existed for absences.**
- **Goals: Provide the leave entitled under the law, reduce systemic exposures, and win individual cases.**

What Are The Trends?

- Systemic risks to administering leaves of absence.
 - Transition between laws and employer administered leave programs.****
- Continued EEOC attacks on fixed leave and no fault attendance policies.**
- Increased scrutiny of light duty policies.**
- Focus on medical qualifications/standards not required by another law.**
- Failure to explore accommodations that may have reduced or eliminated need for leave.**

Is the employee “**entitled**” to be absent with job protection?

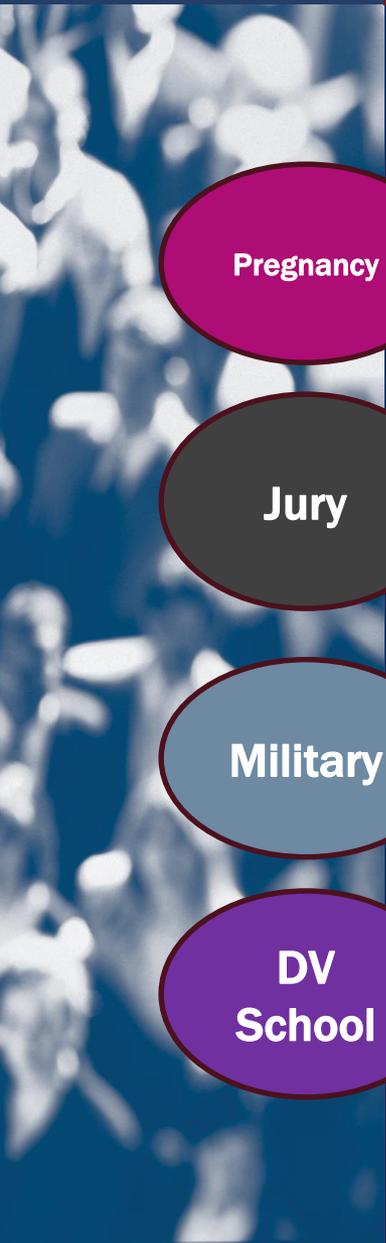
- FMLA, state leave entitlements.

Has company “**committed**” to providing additional job-protected leave?

- Evaluate policies and past practices (always provide what you say you will).

Is additional leave required as a **reasonable accommodation** for employees with disabilities?

- Must consider impact of the ADA Amendments Act.
- Many more people on STD and WC will receive leave as a reasonable accommodation.

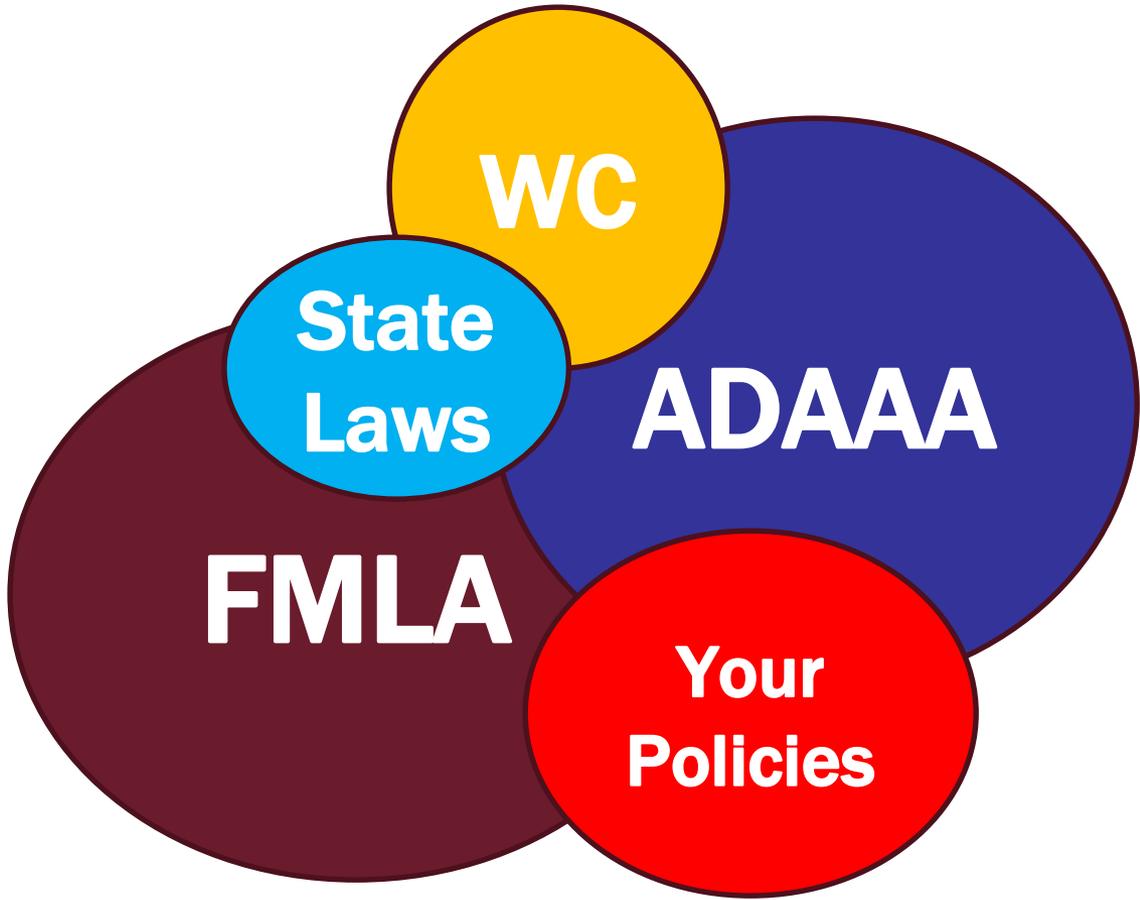


Pregnancy

Jury

Military

DV School



Employee

- **Tell Supervisor Reasons for Absence or Leave**
 - **Employees not required to mention FMLA to be protected**



Supervisor

- **Tells Local HR what Employees says about reason for absence**



HR

- **Sends FMLA forms and medical certifications to Employee (via 3rd party administrator)**
- **Approves or Denies FMLA leave after receiving certifications**
- **Evaluates potential additional leave entitlements beyond FMLA**

Family And Medical Leave Act (“FMLA”) – Entitlements

- Eligible employees are entitled to up to **12** workweeks of unpaid leave during any **12-month** period due to:
 - Birth/adoption (or placement in foster care) of a child (includes prenatal care and care for newborn);
 - The employee’s own serious health condition;
 - To care for the employee’s spouse, parent, or child with a serious health condition; and/or
 - Various military leaves.

- Employee must be returned to same or equivalent job.

- Must maintain group health insurance coverage during leave.

Two Types Of FMLA Claims

- **Interference.**
 - **Employee claims that he/she was denied an FMLA benefit (leave, reinstatement, etc.).**
 - **Merits often will turn on:**
 - ★ **Whether the individual was eligible for and entitled to the FMLA benefits.**
 - ★ **Whether the reinstatement was to an equivalent job.**
 - ★ **Whether the process was followed.**
- **Retaliation.**
 - **Employee claims that he/she suffered an adverse employment action because the employee requested or took leave.**
 - **Merits often will turn on:**
 - ★ **Employer's legitimate reason.**
 - ★ **Evidence that supervisors were frustrated by the leave.**
 - ★ **Time period between leave and adverse action.**

FMLA – Employee Eligibility

- **Worked for 12 months (non-consecutive) for a covered employer.**
- **Worked at least 1,250 hours during 12-month period immediately preceding the leave.**
- **Worked at a worksite in which employer has 50+ employees within a 75-mile radius.**
- **If on non-FMLA leave when reaches 12-month threshold, pre-12 month leave does not count toward FMLA leave.**

FMLA – Serious Health Condition

- **Illness, injury, impairment, or physical or mental condition;**
 - **Requires inpatient care or continuing treatment by a health care provider; and**
 - **Involves more than three days of incapacity.**
- Burden on employer to determine if condition is FMLA-qualifying.***





- **Posting (employees/applicants access).**
- **Individual Notice (handbook/or upon hire).**
- **Eligibility Notice (5 days).**
 - **Informs employee of eligibility or reason why not.**
- **Rights and Responsibility Notice (same time as Eligibility Notice).**
- **Designation Notice (5 days).**
 - **Whether employee's leave will be counted as FMLA leave.**
 - **The amount counted against employee's FMLA entitlement.**
 - **Whether paid leave must be substituted.**
 - **Whether a fitness-for-duty certificate will be required prior to reinstatement.**

- **Fitness-For-Duty Certificate**: If required, employer must include employee's essential functions and specifically state that this certificate is required.
- **Retroactive Notice**: Can retroactively designate leave as FMLA leave (with appropriate notice to employee), as failure to timely designate does not harm the employee.



FMLA – Employee Notice Requirements

- **If foreseeable, 30 days notice.**
- **If not foreseeable or practicable, then as soon as practicable.**
 - **If employer asks, employee must explain why earlier notice was not practicable.**
- **Employees may generally be required to comply with employer’s usual and customary notice requirements to request leave (as long as they are not more strict than FMLA).**

FMLA – Medical Certification

- **Employer is entitled to obtain a medical certification from employee's (or family member's) health care provider.**
- **The certification should be limited to the particular serious health condition for which the employee is seeking leave.**



FMLA – Medical Certification

- **Employer may request authentication and/or clarification from medical provider after employer has given employee an opportunity to fix any deficiencies.**
 - **Cannot be done by employee's direct supervisor.**
- **Authentication: Asking the healthcare provider to verify that the information on the certification form was completed and/or authorized by the healthcare provider.**
 - **No additional medical information may be requested.**
 - **No consent is required for authentication.**



- **Clarification: Contacting the healthcare provider in order to understand the handwriting or to understand the meaning of the responses contained within the certification.**
 - **Employers may not ask healthcare providers for additional information beyond that required by the certification form.**
 - **The employee’s healthcare provider may require the employee’s consent for such clarification, and the employee must provide such consent or FMLA leave may be denied.**
- **Second/Third Opinions.**



FMLA – Recertification

- **30+ Days**

- **Must only ask for recertification based on duration/time provided on original certification.**
- **If certification provides for 3 months of leave; cannot ask prior to that time.**
- **If certification provides for less than 30 days; may ask every 30 days.**

- **Exceptions**

- **If employee asks for extension.**
- **If needs/duration changes.**
- **Employer believes provided questionable e: answer (i.e. says it is FMLA related – not co FMLA certification).**



- **Employees are allowed to take intermittent leave if the leave is to care for themselves or a spouse, parent or child with a serious health condition and intermittent leave is medically necessary.**
 - **Intermittent leave is not required for the birth/adoption of a child unless employer agrees.**



Tracking

- **Track actual time used (cannot make employee take more time off than needed).**
- **Reasonable increments.**
 - **Largest increment – one hour.**
 - **Follow employer policy – if have policy, can use smallest increment in policy.**
- **Workweek basis – figure out how many hours/weeks employee worked (average prior year).**
- **Holidays.**
 - **If counting by workweek – still one week FMLA leave.**
 - **If counting by hour – do not count holiday if employee would have had off.**



Can transfer an employee based on FMLA leave?

☐ Only foreseeable for planned medical treatment.

☐ Equivalent pay and benefits.

☐ Better accommodates the leave.

☐ Can alter an existing job.

☐ Equivalent duties not required.

☐ Reinstatement.

○ Performance Goals and FMLA.

- **Cannot use goals against employee on FMLA (intermittent leave).**
- **Can deny bonus based on performance goals if doing the same for those on non-protected leave.**
- **May need to adjust goals.**

- Intermittent Leave Abuse.**
 - **Review carefully initial medical certifications supporting need for unplanned, episodic intermittent medical leave.**
 - **Insist on complete and sufficient medical certifications.**
 - **Request clarification and authentication if necessary.**
 - **Request second or third opinions if necessary.**
- Send written deficiency notice to employee communicating what employee must do to obtain FMLA protections.**
- Consider denying FMLA leave if medical certifications are not returned and there are insufficient reasons for delay.**

FMLA Management Issues

- **Exercise your right to recertify FMLA leaves.**
- **Do not be afraid to follow-up with employee when leave is unpredictable, chronic, more frequent than expected, etc.**
- **Maintain carefully drafted reporting procedures.**
- **Consider increasing requirements for paid leave.**
- **Be on the lookout for fraud/dishonesty.**



FMLA is the beginning

...

not the end!

Americans With Disabilities Act



EEOC

- FY 2012 disability charges increased from FY 2011
- Highest increase in monetary relief under ADA
- New ADA guidance for returning veterans

Courts

- Expanding disability coverage
- Grappling over requirements for accommodations

- **Prohibits discrimination against qualified individuals with a disability.**
- **Requires covered employers to provide a reasonable accommodation if doing so will allow the individual to perform the essential functions of his/her job (a reasonable accommodation must also be provided to job applicants).**



Two Types Of ADA Claims – Discrimination

○ Typical Scenarios:

- **Adverse employment action because of medical condition or performance related to medical condition.**
- **Retaliation after employer learns of medical condition.**
- **Retaliation after employee requests reasonable accommodation.**
- **Fitness for duty exams.**
- **Adverse action based on fear of behavior associated with condition/medication.**
- **Comments: “crazy,” “psycho,” “gimp,” “crippled.”**

○ Merits often will turn on:

- **Whether the individual was “qualified.” Could he/she perform the essential job functions?**
- **Whether employer had knowledge.**
- **Employer’s legitimate reason.**

Two Types Of ADA Claims – Failure To Accommodate

○ Typical Scenarios:

- Employee’s requested “accommodation” is denied.
- Employee quits (is constructively discharged) because of medical condition.
- Adverse employment action because of performance related to medical condition.

○ Merits often will turn on:

- **Interactive dialogue.**
- Whether employee has actual disability or a record of disability.
- Defenses including undue hardship.

ADA – What Is A Disability?

- (1) Physical or mental impairment that substantially (MHRA: “materially”) limits 1+ major life activities;**
- (2) Record of such an impairment; or**
- (3) Regarded as having such an impairment.**

***An FMLA “serious health condition” is not the same as an ADA “disability.”**





☉aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

☉peration of major bodily functions: immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

ADA – “Regarded As”

- **Employee has to prove that he/she was subjected to a prohibited action because of an actual or perceived impairment – whether or not the impairment limits (or is perceived to limit) a MLA.**
- **Bottom Line: An impairment need not actually be substantially limiting. But employee must prove the employer viewed it as substantially limiting.**
- **Employee not entitled to reasonable accommodation for perceived disability.**

A person with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job.



ADA – Reasonable Accommodation

An employer must make a reasonable accommodation to allow a disabled employee to perform his/her essential job functions unless doing so would result in an undue hardship or pose a direct threat to the health or safety of the individual or others.



ADA – Reasonable Accommodation

- Any change in the work environment that would allow the individual with a disability to perform the essential functions of his/her job.
- Do not need to fundamentally change the position.



- **Change in equipment or tools/assistive device.**
- **Modified work or break schedule.**
- **Work from home.**
- **Reassignment to open position.**
- **Leave of absence.**





Leaves of Absence

Excused

intermittent absences

Light Duty

Work at Home

Change in Supervisor

Excusing performance issues or misconduct

Reallocating marginal job functions

Reassignment

Commuting assistance

Service animals

ADA – Inquiry

- **If the need for accommodation is not obvious, employer can make limited “disability-related inquiries” to determine whether the individual has a covered disability and the need for an accommodation.**
- **But the burden is not on employer to seek out disability.**



ADA – Interactive Process

- **“Reasonable Accommodation” does not mean the best or most expensive accommodation, or accommodation of employee’s choice.**
- **Employers should engage in an interactive process to determine what, if any, accommodation would allow the employee to perform essential job functions.**



ADA – Right To Reinstatement

If a leave of absence was given as an accommodation, an employee has the right to return to the same job unless holding the position open would impose an undue hardship.



- **Create an integrated leave administration program.**
 - **Eliminate SILOs.**
 - **Ensure that outside vendors and internal leave administrators coordinate.**
 - **Train managers and supervisors to report the medical reasons why employees are late or absent.**
 - **Make sure leave policies are integrated and coordinated.**
 - **Create good documentation.**
 - **Ensure timeliness of documentation.**

Biggest Mistakes Under the ADA

- Assuming that compliance with the FMLA is enough
- Not identifying and documenting essential job functions
- Not documenting performance or conduct deficiencies
- Not engaging in an interactive process to identify possible accommodation
- Not considering reassignment or additional unpaid leave with job restoration as a reasonable accommodation



Biggest Mistakes Under the ADA

Making inappropriate written or verbal comments creating ADA
“regarded as” disability status

Providing unrestricted “light duty”

Sharing the specifics of the employee’s physical or mental
impairment with
line supervisors and
managers who are not
“need to know”



**LEAVE MANAGEMENT:
FMLA → ADA
TRANSITION**

The Big Question: How Much Leave is Required?

The Answer: It Depends!!



- **How much more leave is needed?**
 - **Find out by communicating with employee and/or the employee's doctor**
- **Is the additional leave sought for a definite or indefinite duration?**
- **What operational hardship is being experienced due to the employee's current absence?**
- **Will operational hardship change if employee stays on leave?**
- **Will employee be able to return to work performing all of essential job functions?**
 - **What work restrictions will exist?**
 - **Do restrictions impact essential or marginal job functions?**
 - **Can restrictions be accommodated?**

Key Points to Document with Employee

- Date FMLA or other leave entitlements will be exhausted
- Impact of failing to return to work
 - On employment status and benefits
- Willingness to explore reasonable accommodations
 - Help Employees return at or before end of leave entitlement period
- Willingness to consider additional job-protected leave after leave entitlement is exhausted
- Desire to know how much more leave is needed and whether it is for a definite or indefinite period
- Deadline for employee to provide information
 - And obligation of employee to communicate if unable to provide the requested information

Other Return to Work Considerations

- **FMLA and/or ADA rules may restrict the scope of medical information you can receive**
- **First – is FMLA in play. If so, follow FMLA rules**
 - **Generally can only insist on simple statement of the employee's ability to return to work**
 - **May not delay job restoration once the employee provides such medical notes**
 - **Exception if employee notified, at time leave began, of the obligation to provide opinion on employee's ability to perform essential job functions and was provided list of essential job functions**
 - **No second or third opinions**

Recurring Leave-Related Questions

- **Can we contact employee's doctor directly?**
- **Must we provide employee's doctor a medical authorization signed by employee?**
- **How much time must we give Employees to provide requested medical information?**
- **What rights does Canon ITS have if it believes Employees can return to work but Employees are not released by their doctors?**
 - **What if a doctor releases a employee but the employee refuses to return?**
- **Can Canon ITS obtain information employee provided to STD or Workers' Compensation carrier?**

Other Important Items to Remember:

- **Know when to route employees to HR**
 - **Company is “put on notice” when supervisor knew/should have known**
- **Consistency is important – under FMLA and ADA**
 - **Otherwise can lead to other liability: Title VII, ADEA, retaliation, etc.**
- **Canon ITS has a 3rd party administrator that assists with processing leave**
 - **HR will provide employees the number to call**
 - **Supervisors are not to provide forms or other substantive information - route to HR**

Employers have both general notice requirements – satisfied through posting, employee handbooks, and/or given out at the time of hire – and Specific notice requirements – forms that need to be provided to employees who request or require FMLA leave.

Employees also have notice obligations, to alert employers when FMLA leave is needed.

Employers' General Notice Requirements

Covered employers must post a general FMLA notice, even if they have no FMLA-eligible employees.

If an employer has any eligible employees, it must also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hire.

These requirements may be satisfied through electronic posting.

Employee Notice Requirements

Verbal notice is sufficient. Employees must explain the need/reason for leave so as to enable an employer to determine whether the leave qualifies under the Act.

Leave may be denied if employee fails to adequately explain. BUT employees need not say any “magic words,” such as “FMLA.”

Employees can be required to comply with customary notice and procedural requirements for requesting leave, absent unusual circumstances.

Employee Notice Requirements: Timing

Employees must give 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable.

If 30 days notice is not practicable, notice must be given as soon as practicable.

Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party).

Employee Notice Requirements: Timing

Leave may be denied if employee fails to adequately explain.

“Calling in sick” is insufficient to trigger FMLA obligations.

Employees can be required to comply with customary notice and procedural requirements for requesting leave, absent unusual circumstances.

● Eligibility and Rights and Responsibilities Form

- Send within 5 business days of employee request/notice of need for FMLA leave, absent extenuating circumstances**
- There is no longer a need to provide a “preliminary” designation of FMLA leave**

Certification Forms

- **Employees must provide medical information to support FMLA medical leave within fifteen calendar days of an employer's request.**



Certification Forms

The information that can be requested is strictly limited. Use the DOL's standard form.

Managers should have little or no contact with an employee's physician's office. This should be handled by HR or benefits. All communications should be in writing, except in unusual circumstances.

When the information provided is insufficient, the law provides strict protocols for obtaining complete, unambiguous medical information.

Certification of Leave

An employer must advise an employee when the a certification is incomplete or insufficient, and state in writing what additional information is necessary. Employer may deny leave if employee does not cure the problem within 7 calendar days.

If an employee submits a *complete and sufficient* certification, the employer may not request more information from the HCP, but the employer may contact the health care provider for purposes of *clarification and authentication*.

Certification of Leave

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense.

The selected health care provider may not be employed on a regular basis by the employer.

If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense.

This third opinion shall be final and binding.

Medical Recertification

No less than every 30 days and only in connection with an absence, BUT

If the minimum duration is more than 30 days, then employer must wait the minimum duration.

Recertifications are allowed after less than 30 days IF:

- **Employee requests extension;**
- **There are significantly changed circumstances, OR**
- **Information that casts doubt on the stated reason or continued validity of the leave.**

Can always request recertification every 6 months in connection with an absence by the employee

- **DOL Form WH385 (serious illness or injury is not the same as serious health condition).**
- **Some unique certification requirements (e.g., incurred in line of active duty, medically unfit to perform duties of SM office, grade, rank, or rating, etc.)**
- **Similar medical certification as to probable duration of the injury/illness and the frequency and duration of the leave.**

Employers' Specific Notice Obligation: Part II

- Once appropriate medical certification is received, the leave must be “designated” as FMLA leave within five business days.
- Failing to properly designate the leave as FMLA leave can result in the employee taking more leave than he/she is entitled to.

Retroactive Designation

- **In the past, the case law and regulations were unclear.**
- **Now, retroactive designation is ok, as long as no adverse effect on the employee.**
- **Most commonly used in cases involving employee's own health condition.**
- **Adverse effect may be found where employee cares for a family member, then needs own medical leave.**

FMLA: Fitness for Duty Certification

An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees to provide a fitness for duty certificate.

An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave.

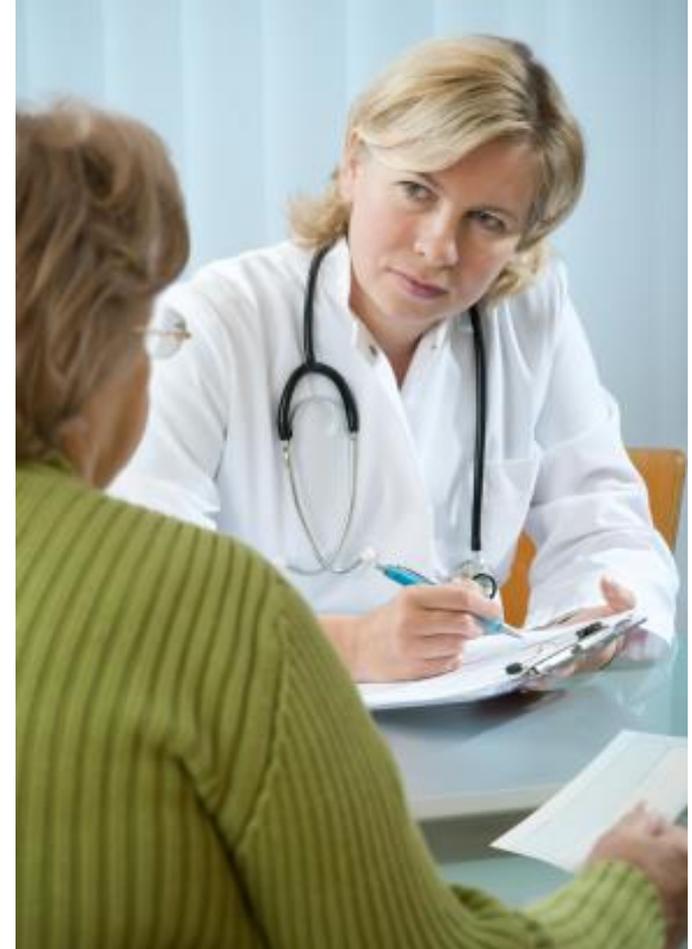
May require that the certification specifically address the employee's ability to perform the essential functions of the employee's job.

FMLA: Fitness for Duty Certification

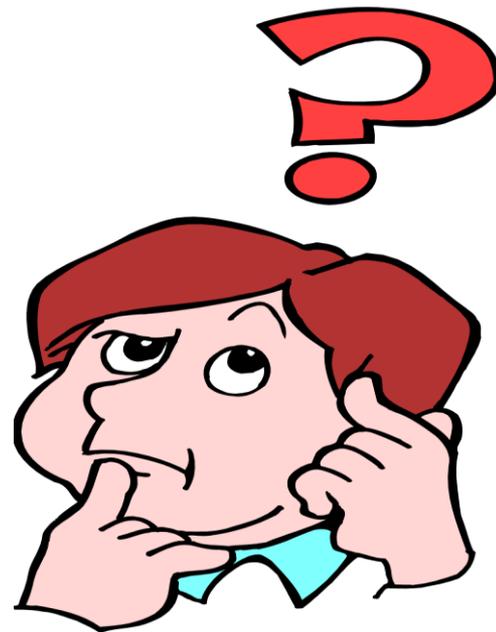
Employers may demand more than a “simple statement” of ability to return to work.

Cannot be requested after each instance of intermittent leave.

Must be included in the Designation Notice!



QUESTIONS



**Thank you for your participation
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If your question was not answered during the webinar or if you have a follow-up question, you can email the presenters today or tomorrow at:

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