

# **Leave After Leave: Handling Employee Requests for Time Off Under the ADA, the FMLA and Workers' Compensation**

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# NFIB Small Business Legal Center

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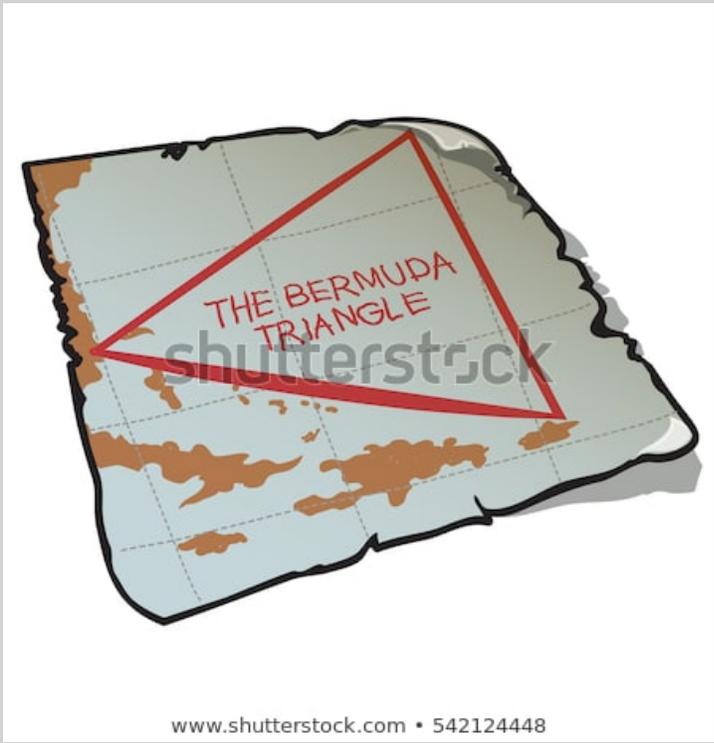


# Agenda



- The legal landscape: ADA, FMLA, and workers' compensation
- Best practices when handling leave requests

# The Bermuda Triangle: FMLA, ADA and Workers' Compensation



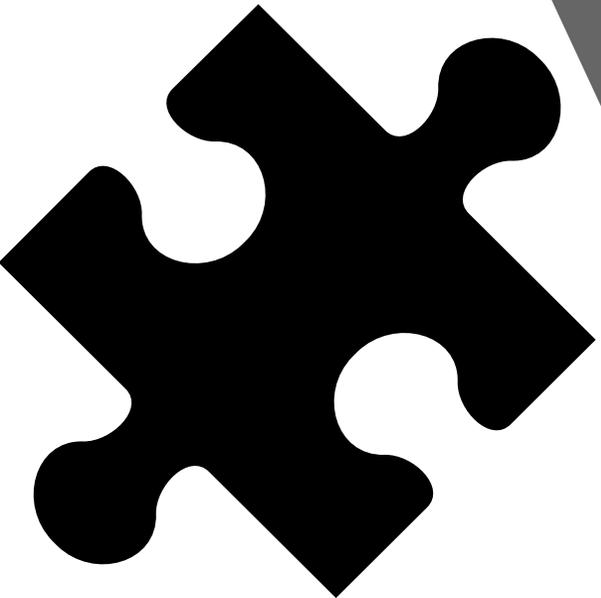
## Common Goal

To allow sick, injured or disabled employees to take time away from work

## Different Approaches

- ADA: provides a right to work
- FMLA: provides a right not to work
- Workers' Compensation: provides compensation to those who cannot work

# Americans with Disabilities Act



# ADA

Covers employers with 15 or more employees

Prohibits discrimination against qualified individuals with a disability

Disability is a **physical or mental impairment that substantially limits a major life activity**

- Present disability
- History of a disability
- Regarded as having a disability
- and/or associates with an individual with a disability

ADA

## **Disability**

“The definition of disability . . . Shall be construed in favor of broad coverage . . . To the maximum extent permitted by the terms of this Act.”

## ADA Coverage

### Physical Impairment

Any physiological disorder or conditions such as: cosmetic disfigurement, anatomical loss, carpal tunnel, severe back pain, vision or speech problems, hearing impairments, cerebral palsy, epilepsy, MS, cancer, heart disease, diabetes, HIV, tuberculosis and issues with cardiovascular, digestive, lymphatic and endocrine systems.

## ADA Coverage

### **Mental Impairment**

Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional illnesses such as anxiety or depression and learning disabilities.

## **Conditions that are NOT impairments under the ADA**

- Physical characteristics
- Personality characteristics
- Compulsive gambling
- Use of illegal drugs
- Gender identity issues
- Sexual conditions such as pedophilia or exhibitionism
- Sexual preference
- Obesity
- Stress

## ADA Coverage Examples

- An individual who is unable to read because he/she was never taught to read would not be an individual with a disability because lack of education is not an impairment under the ADA.
- Individual who is unable to read because of dyslexia (a learning disability) would be an individual with a disability because dyslexia is an impairment.

## Reasonable Accommodation

Employers are required to reasonably accommodate qualified applicants and employees with disabilities unless it imposes an undue hardship on the business

## Steps for Accommodation

- Determine purpose and essential functions of job.
- Engage in the Interactive Process: Consult with the employee and determine job-related limitations.
- Select and implement most appropriate accommodation.



# What is Reasonable Accommodation?

Restructuring a job

Part-time or modified work schedules

Obtaining or modifying equipment or devices

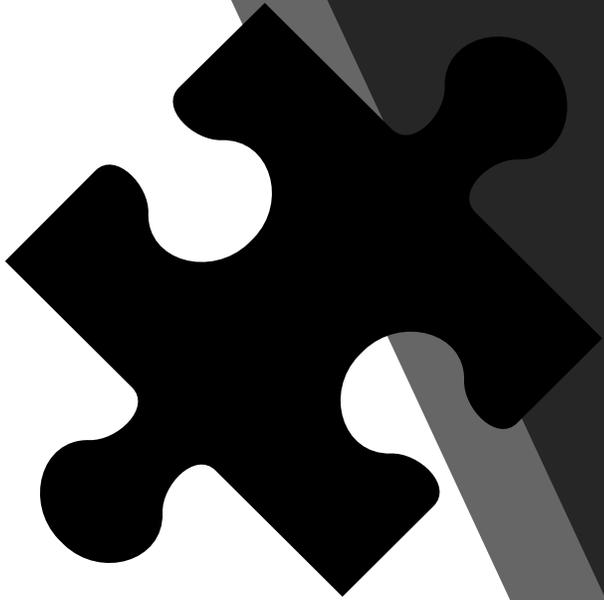
Reassignment to a vacant position

Permitting use of accrued leave

Providing reserved parking

Allowing an employee to provide own equipment

# Family and Medical Leave Act



## FMLA Coverage

- Up to 12 weeks unpaid leave for:
  - Own or family member's serious health condition
  - Birth or adoption of child
- Military exigencies – Up to 26 weeks leave for military caregiver leave – Employer obligation to provide notice w/in 5 days
- Works for Covered Employer (50+ employees)
- Worked for more than 12 months
- Worked at least 1250 Hours in the last 12 months

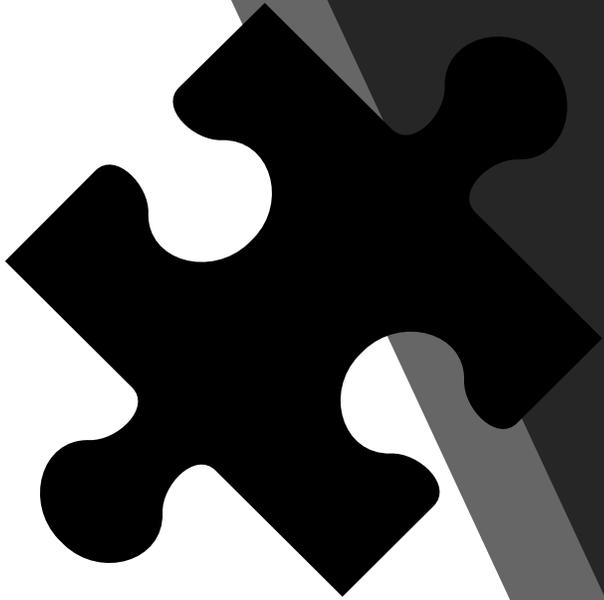
## FMLA Coverage

- Employee has a serious health condition
- Employee needs to care for immediate family member with serious health condition
- Pregnancy, prenatal care and childbirth
- Care for employee's child after birth, or placement for adoption or foster care
- Preliminary matters related to adoption and foster care

## FMLA Coverage Examples

- ✓ Inpatient care
- ✓ Pregnancy and prenatal care
- ✓ Chronic conditions
- ✓ Permanent or long-term conditions
- ✓ Ordinary illnesses that require continuing treatment by a health care provider
- ✓ Leaves related to injuries of military service members or active duty issues

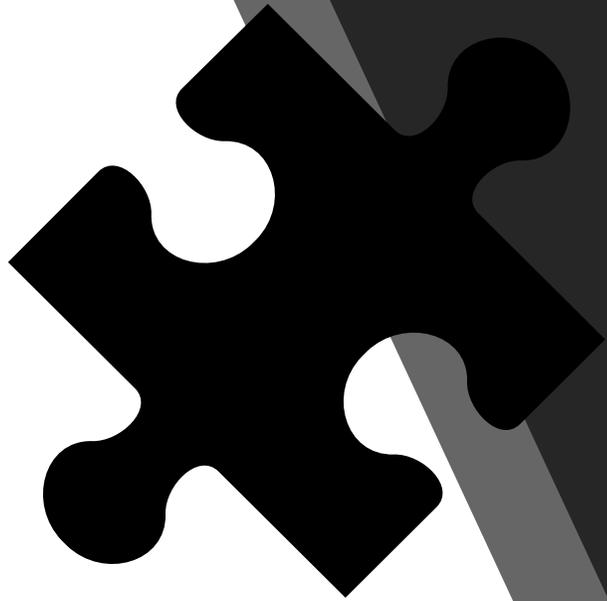
# Workers' Compensation



## **Worker's Compensation Eligibility**

An employee who has an injury arising out of or in the course of employment with state law exceptions possible for willful misconduct or intentional self-inflicted injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs.

To summarize . . .



## Employer Coverage

ADA\* – 15 or more employees

FMLA\* – 50 or more employees within a 75-mile radius for at least 20 weeks during current or preceding calendar year

Workers' Compensation – Applies to most employers

## Employee Coverage

ADA – an employee (or applicant) who is disabled as defined by the ADA, is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation

FMLA\* - an employee who has worked at least 12 months and 1250 hours prior to the start of the leave and who works at a worksite where there are 50 or more employees within a 75-mile radius

Workers' Compensation- an employee who has an injury arising out of or in the course of employment with state law exceptions possible for willful misconduct or intentional self-inflicted injuries, willful disregard of safety rules, or intoxication from alcohol or illegal drugs

## Reinstatement Rights

ADA – Required reinstatement to previous job unless doing so would create an undue hardship on the employer

FMLA – Required reinstatement to the same or an equivalent job; NO undue hardship exception

Workers' Compensation – No reinstatement rights under most state laws, except for retaliatory discharges

# Length of Leave



ADA – No specific limit for leave provided as a reasonable accommodation that does not create an undue hardship on the employer



FMLA – 12 weeks in the 12-month period as defined by the employer



Workers' Compensation – No specific leave limit for injured worker

## Restricted or Light Duty

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 – Not required, but ought to be offered if available as it may eliminate the employee's entitlement to the wage replacement benefit

## Intermittent Leave

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

FMLA – When medically necessary, leave must be granted on a part-time or intermittent basis.

Workers' Compensation – Employee may be released to work with restrictions.

# Retaliation



Avoid taking any adverse action that may be viewed as retaliatory.



Examples: Demotion, moving workstation to a less desirable place, or cutting hours / pay.



Tread carefully before terminating!

# QUIZ TIME

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## Bob's Dilemma

Bob just finished interviewing a great member support manager candidate. On the way out of the interview the candidate, who was limping, says "I have a disability, but I hope that's not a problem." Bob had previously provided the candidate a copy of the PD and asked her if she could perform all the job's functions. The candidate indicated she could.

## Questions:

- Should Bob disregard the statement and make a job offer?
- Should Bob not offer the candidate the position?
- Should Bob send the candidate out for a medical exam to see if she can perform the job?

## Now What?

The candidate has been made a job offer and accepted the position. The candidate faxes Bob a list of things she needs and the name and phone number of an advocacy group. She tells Bob she must have everything on the list before she starts work and that she wants to work from home because of the hour commute.

## Questions:

- What should Bob tell the new employee?

## Bob's Fun Continues:

In June, Tom, a warehouse worker at Bob's company, injured his shoulder when he tried to pull a heavy dolly with one arm. He went out on workers' comp and had surgery over the summer. He was still out on comp through December. The doctor, in January, released Tom to return to work with lifting restrictions, plus he needs to take breaks during the day to do physical therapy exercises. He will also have 3 PT appointments each week. His return-to-work date was January 15. Tom came back for one day but did no substantive work. He then called out sick the next day and had his personal physician fax a letter stating that Tom could not do his job and, thus, could not return to work.

## Questions:

- Can Bob fire Tom?
- Can Bob require Tom to come back on light duty?

### **BONUS POINT QUESTION**

- Does Tom qualify for FMLA?

**Does it never  
end?**

Bob learns that Bonnie, a customer support specialist, is narcoleptic. As an accommodation, Bonnie requests that the company provide her a dark room and a cot in which she can rest every three hours. The support specialist's main job responsibility is to assist external customers with orders and complaints.

## Questions:

- Can Bob fire Bonnie?
- Can Bob deny the accommodation request?

## What if I have less than 15 employees?

Janice is the office manager for a small company with only 12 employees. They do remodeling work. Their only licensed electrician wants to take-off four weeks around the birth of his child. Janice is concerned that the company cannot afford to have their only electrician out for this long.

## Questions:

- Does Janice have to allow him time off?
- Is the employee entitled to paid time off when he is in the hospital for the birth?

## Is this prohibited discrimination?

The Johnson family has employed Ned as a farmhand for decades. But Ned is having back problems and is easily winded these days. Recently Ned has had vision problems, and the Johnsons are concerned about whether he may safely drive the tractor or truck. At this point, Ned is unable to keep up with the physically demanding workload and there really isn't much he can do if he can't safely operate heavy machinery. The company has only 6 employees.

## Questions:

- Can the Johnsons tell Ned its time to retire?
- Is it possible to provide Ned reasonable accommodations that might enable him to continue working?



Questions ?



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