

**“THE TANGLED WEB”**

**THE RELATIONSHIP BETWEEN THE AMERICANS WITH DISABILITIES ACT, FAMILY & MEDICAL LEAVE ACT, AND STATE WORKERS’ COMPENSATION LAWS**

SUBJECT	ADA	FMLA	WORKERS’ COMPENSATION	POINTS TO CONSIDER
Purpose of Statute	<ul style="list-style-type: none"> <li>■ Protect individuals from discrimination on basis of disability.</li> </ul>	<ul style="list-style-type: none"> <li>■ Provide employees with unpaid leave for certain family and medical reasons.</li> </ul>	<ul style="list-style-type: none"> <li>■ Compensate employees for work-related injuries and illnesses.</li> </ul>	<ul style="list-style-type: none"> <li>■ These laws were passed for different and occasionally conflicting purposes.</li> </ul>
Employer Coverage	<ul style="list-style-type: none"> <li>■ 15 or more employees for 20 workweeks in current/preceding year.</li> </ul>	<ul style="list-style-type: none"> <li>■ 50 or more employees for 20 workweeks in current/preceding year.</li> </ul>	<ul style="list-style-type: none"> <li>■ Most employers (some states require 3, 4, or 5 employees).</li> <li>■ Exceptions: Charitable or religious organizations (some states).</li> </ul>	<ul style="list-style-type: none"> <li>■ Conflicting coverage provisions under each law may lead to confusion over various legal obligations.</li> </ul>
Employee Coverage	<ul style="list-style-type: none"> <li>■ A qualified individual with a disability, record of disability, who is perceived as disabled or who associates with a disabled person.</li> <li>■ A disability is an impairment that substantially limits a major life activity.</li> <li>■ Exceptions: Temporary injuries (normally); illegal drug use, sexual deviance.</li> </ul>	<ul style="list-style-type: none"> <li>■ Employee must have worked at least 12 months (need not be consecutive) and at least 1250 hours over previous 12 month period.</li> <li>■ Employee or a child, spouse, or parent with a serious health condition (“SHC”), or for the birth or adoption of a child by the employee.</li> <li>■ SHC includes illness, injury, impairment, or condition that involves:                             <ol style="list-style-type: none"> <li>1) incapacity and inpatient care in a hospital, hospice, or residential facility;</li> <li>or</li> <li>2) outpatient treatment.</li> </ol> </li> <li>■ Exceptions: routine physicals, eye or dental exams, bed-rest, exercise, or other activities which do not require a visit to a health care provider.</li> </ul>	<ul style="list-style-type: none"> <li>■ An injury which arises out of and in the course of an individual’s employment.</li> <li>■ Exceptions: traveling to and from work (usually), or injury from misconduct perpetrated by individual.</li> </ul>	<ul style="list-style-type: none"> <li>■ <b>Use Caution!</b> Statutes create complicated rules and exceptions for who is and who is not covered, the information provided is only general coverage and common exceptions.</li> </ul>
Preemption	<ul style="list-style-type: none"> <li>■ Preempts inconsistent federal or state laws, including workers’ compensation.</li> </ul>	<ul style="list-style-type: none"> <li>■ Requires employers to comply with FMLA or state law, whichever provides the most generous benefit.</li> </ul>	<ul style="list-style-type: none"> <li>■ Not applicable.</li> </ul>	<ul style="list-style-type: none"> <li>■ <b>Use Caution!</b> An employee may recover under both the ADA and FMLA.</li> </ul>

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Statutory Benefits	<ul style="list-style-type: none"> <li>■ No Discrimination.</li> <li>■ Reasonable Accommodation.</li> <li>■ Confidentiality.</li> <li>■ No Retaliation.</li> </ul>	<ul style="list-style-type: none"> <li>■ Up to 12 weeks of unpaid, job-protected leave (plus continuing benefits) over a 12 month period.</li> </ul>	<ul style="list-style-type: none"> <li>■ Wage and medical benefits.</li> <li>■ No retaliation (some states).</li> <li>■ Group health coverage (some states).</li> </ul>	<ul style="list-style-type: none"> <li>■ Worker's compensation leave should be designated as FMLA leave when possible to avoid "stacking" obligations.</li> </ul>
Hiring	<ul style="list-style-type: none"> <li>■ May not deny employment to a qualified individual with a disability.</li> <li>■ Prohibits pre-offer medical exams or inquiries, including Workers' Compensation history.</li> <li>■ Post-offer medical exams/inquiries allowed if given to all employees in same job classification. May not use to discriminate against qualified individual with a disability.</li> </ul>	<ul style="list-style-type: none"> <li>■ May not deny job because of prior FMLA use.</li> </ul>	<ul style="list-style-type: none"> <li>■ Some states allow an employer to inquire about individual's previous Workers' Compensation history for Subsequent Injury Trust Fund.</li> <li>■ Some states allow an employer to inquire and deny/limit benefits based on preexisting injuries or illnesses.</li> <li>■ See ADA section for restrictions.</li> </ul>	<ul style="list-style-type: none"> <li>■ <b>Remember:</b> The ADA preempts any state law rights the employer may have under Workers' Compensation.</li> <li>■ Although an employer may make medical inquiries under Workers' Compensation law, the inquiries must conform with ADA restrictions, i.e. may only ask when a conditional offer has been made but prior to starting work.</li> </ul>
Leave Policies	<ul style="list-style-type: none"> <li>■ Employee must be able to perform essential job functions, with or without reasonable accommodation to be eligible.</li> <li>■ Employer must provide the same leave and benefits to those covered by the ADA that it provides to other employees.</li> <li>■ Leave may be reasonable accommodation, except leave requested for care of a dependent or spouse.</li> </ul>	<ul style="list-style-type: none"> <li>■ Employee must be able to perform essential job functions to be eligible.</li> <li>■ Must provide leave described above, maintain existing medical coverage, and resume all benefits at same levels upon return.</li> </ul>	<ul style="list-style-type: none"> <li>■ No requirements.</li> </ul>	<ul style="list-style-type: none"> <li>■ Leave certification form may seek information relating to the particular SHC, which would be considered "job-related and consistent with business necessity" under the ADA.</li> </ul>
Attendance Policies	<ul style="list-style-type: none"> <li>■ Equal enforcement of leave and absenteeism policies is allowed.</li> <li>■ May provide additional leave as a reasonable accommodation.</li> </ul>	<ul style="list-style-type: none"> <li>■ FMLA-protected leave may not be counted towards discipline or otherwise considered in connection with employment decisions.</li> <li>■ "No-fault" attendance programs are difficult to enforce under FMLA.</li> </ul>	<ul style="list-style-type: none"> <li>■ No requirements.</li> </ul>	<ul style="list-style-type: none"> <li>■ Attendance policies should be coordinated for compliance with ADA and FMLA.</li> </ul>

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Light Duty Assignment	<ul style="list-style-type: none"> <li>■ May have to consider temporary or permanent reassignment to light duty position as a reasonable accommodation.</li> </ul>	<ul style="list-style-type: none"> <li>■ May not require an employee to return to light duty position after taking FMLA leave.</li> </ul>	<ul style="list-style-type: none"> <li>■ Many states disqualify employees from benefits when they reject available light duty work.</li> </ul>	<ul style="list-style-type: none"> <li>■ Avoid the creation of permanent light duty positions and set strict duration limits on temporary light duty work.</li> </ul>
Reinstatement Rights	<ul style="list-style-type: none"> <li>■ Must reinstate if job is open or another job is vacant which the employee may perform.</li> <li>■ Exception: employee is “unqualified” or direct threat to safety or health of self or others.</li> </ul>	<ul style="list-style-type: none"> <li>■ Must restore to same or equivalent job with same pay and benefits.</li> <li>■ Limited exception to reinstatement for “key” employee.</li> </ul>	<ul style="list-style-type: none"> <li>■ See Retaliation.</li> </ul>	<ul style="list-style-type: none"> <li>■ A Workers’ Compensation determination of “permanently” or “totally” disabled does not foreclose the employer’s reinstatement obligations.</li> </ul>
Fitness for Duty Exams (“FFD”)	<ul style="list-style-type: none"> <li>■ Allows employer to require FFD certification so long as job-related and consistent with business necessity.</li> </ul>	<ul style="list-style-type: none"> <li>■ May uniformly require FFD certification with respect to particular SHC, so long as employee had notice of requirement and consequences of failure to pass.</li> </ul>	<ul style="list-style-type: none"> <li>■ Varies by state.</li> </ul>	<ul style="list-style-type: none"> <li>■ Across-the-board FFD requirements may violate ADA when applied to employees who do not demonstrate any basis for fitness concern on return from leave.</li> </ul>
Confidentiality	<ul style="list-style-type: none"> <li>■ Employer must treat an individual’s medical information as a “confidential medical record.”</li> <li>■ Medical information must be kept in a <b>separate</b> file other than the personnel file.</li> <li>■ Access allowed for: <ul style="list-style-type: none"> <li>1) first aid/safety personnel for emergencies;</li> <li>2) supervisors, managers and Union representatives for accommodation;</li> <li>3) Workers’ Compensation compliance;</li> <li>4) insurance companies to provide health/life benefits.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>■ FMLA requires that employer treat an individual’s medical information as a “confidential medical record.”</li> <li>■ Access allowed for: <ul style="list-style-type: none"> <li>1) certification of SHC; and</li> <li>2) supervisors, managers, first aid and safety personnel.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>■ Workers’ Compensation report may be used to check OSHA 200 Log.</li> </ul>	<ul style="list-style-type: none"> <li>■ Keep individuals’ medical information in separate files and limit personnel access to those files.</li> <li>■ FMLA and ADA medical information may be kept in the same file, but must be kept separate from the personnel file.</li> </ul>
Retaliation	<ul style="list-style-type: none"> <li>■ May not discriminate against an individual for opposing an unlawful practice under the ADA or participating in an EEOC investigation.</li> </ul>	<ul style="list-style-type: none"> <li>■ May not discriminate against an individual for opposing an unlawful practice under FMLA or interfere with the exercise of FMLA rights.</li> </ul>	<ul style="list-style-type: none"> <li>■ May not discriminate against an individual for filing a Workers’ Compensation claim (many states).</li> </ul>	<ul style="list-style-type: none"> <li>■ Make sure that performance concerns are documented <b>before</b> leave takes place.</li> </ul>

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Legal Remedies	<ul style="list-style-type: none"> <li>■ Reinstatement, back pay, compensatory damages, punitive damages, other equitable relief, jury trials, and attorney's fees.</li> </ul>	<ul style="list-style-type: none"> <li>■ Reinstatement, back pay, double damages, other equitable relief, jury trials, and attorney's fees.</li> </ul>	<ul style="list-style-type: none"> <li>■ Statutory compensation, medical expenses, and attorney's fees (some states).</li> </ul>	<ul style="list-style-type: none"> <li>■ Plaintiffs and their attorneys will often file "hybrid" claims in an effort to obtain additional relief, which may be added to other common law actions.</li> </ul>