Breakout Session

**Dangerous Intersection:**
Navigating Leave Under the FMLA and ADA

**Immigration Today:**
Winning the Race for Talent When the Course has Changed

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Dangerous Intersection: Navigating Leave under the FMLA and ADA
Dangerous Intersection

When an employee notifies his/her employer of an illness or injury, employers can enter the “dangerous intersection” of the Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA") and its state law equivalents. While each of these laws serves a different purpose, employees may have rights under one or both of them.
Dangerous Intersection

• The interplay of these laws is fraught with potential problems.
• It is essential for employers to know about and understand each law, and the interplay of the laws, to ensure legal compliance and, in cases where more than one law applies to the situation, to provide employees with the benefits and protections each law provides.
• Failure to do so can result in significant penalties and expensive, time consuming law suits.
The Basics
ADA Basics

• ADA
  – Prohibits discrimination against applicants and employees who are qualified individuals with a disability who can perform the essential functions of their job, with or without reasonable accommodation
  – Requires reasonable accommodation, in certain situations
  – Enforced by Equal Employment Opportunity Commission (EEOC)
  – Coverage begins on first day of employment
  – Applies to employers with 15 or more employees (PA state law – 4 employees; NJ state law – 1 employee)
FMLA Basics

• FMLA
  – Sets minimum leave standards for employees for the birth and care of a newborn child; placement of a child for adoption or foster care; care for an immediate family member with a serious health condition; an employee’s serious health condition; a qualifying exigency arising out of foreign deployment of the employee’s immediate family member; and to care for an injured service member.
  – Enforced by Department of Labor (DOL)
  – Applies to employers with 50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year
  – Employee who has worked at least 12 months and 1250 hours and works at worksite with 50 or more employees within 75 mile radius
More ADA Basics – What is a Disability?

• What is a “disability” under the ADA?
  – A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.
More ADA Basics – Who is a Qualified Individual with a Disability?

• Who is “a qualified individual with a disability”?
  – A person who meets the requirements of a position that he or she holds or seeks, and who can perform the “essential functions” of the position with or without reasonable accommodation.
More ADA Basics

Reasonable Accommodation

• What is a reasonable accommodation?
  – A reasonable accommodation is assistance or changes to a position or workplace that will enable an employee to perform his/her job despite having a disability. Under the ADA, employers are required to provide reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship.
  – Reasonable accommodation, in many cases, can include a leave of absence.
More ADA Basics – Interactive Process

• To determine an appropriate reasonable accommodation, the employer and employee/applicant must engage in an interactive process.

• The interactive process is an informal but *legally required* process in which an employee/applicant and employer determine limitations created by the employee/applicant’s disability and how best to respond to the need for accommodation.
More ADA Basics – Interactive Process

• The employer is obligated to:
  – *promptly* engage in the interactive process once the need for accommodation has been recognized (actual or constructive notice); and
  – explore potential accommodations and provide the employee/applicant with an appropriate reasonable accommodation.

• *Both* the employer and the individual seeking accommodation must participate in the interactive process in *good faith.*
More ADA Basics –Interactive Process

• However, an employer is not always required to provide the reasonable accommodation specifically requested by the employee/applicant.

• The employer may choose the one that is easier to provide or is less burdensome.
More ADA Basics – Undue Hardship

• The employer does not need to provide an accommodation if doing so would be an undue hardship.

• Determination of undue hardship under ADA is based on factors that include:
  – the nature and cost of the accommodation needed;
  – the overall financial resources of the facility/employer;
  – the number of persons employed at this facility/employer;
  – the effect on expenses and resources of the facility/employer; and
  – the impact of the accommodation on the operation of the facility.
More ADA Basics – Direct Threat

• Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons if the employer can show that employment of the individual would pose a “direct threat.”
More ADA Basics – Direct Threat

• Direct threat is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment based on a reasonable medical judgment. In determining direct threat, factors to be considered include:
  – The duration of the risk;
  – The nature and severity of the potential harm;
  – The likelihood that the potential harm will occur; and
  – The imminence of the potential harm.
Triggering Events
Triggering Events

• ADA

  – According to EEOC Guidance, an employee “must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.”
  – Request can be made by employee or his/her “representative,” such as a physician or family member
  – The request may be in “plain English” and need not mention the ADA or use the phrase “reasonable accommodation.”
Triggering Events

• FMLA
  – According to the DOL, an employee’s notice of a need for FMLA leave may be oral or written.
  – The first time the employee requests leave for a qualifying reason, he/she is not required to specifically mention the FMLA.
  – However, the employee is required to provide enough information for the employer to know that the leave may be covered by the FMLA.
Constructive Notice under ADA and FMLA

• “Constructive Notice” means the employee did not provide actual notice, but the employer nevertheless should have known that ADA or FMLA rights have been triggered.

• Examples of constructive notice can include:
  – Abrupt changes in employee behavior, such as a model employee sleeping at work or engaging in profane outbursts;
  – Recurring leave requests; or
  – Learning that an employee has been hospitalized.
Documentation Requirements
Documentation Requirements

• ADA

– When the disability and/or the need for accommodation is not obvious, the employer may ask the employee for:
  • documentation describing the impairment;
  • the nature, severity, and duration of the impairment;
  • the activity or activities that the impairment limits; and
  • the extent to which the impairment limits the employee's ability to perform the activity or activities.
Documentation Requirements

• ADA
  – An employer cannot ask for documentation when:
    • both the disability and the need for reasonable accommodation are obvious; and/or
    • the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.
Documentation Requirements

• ADA
  – Disability-related inquiries can be made only if justified by business necessity.
  – A business necessity exists when a medical inquiry is in response to a request for a reasonable accommodation.
  – Examples of disability-related inquiries include asking an employee about: (1) any current or former medication use; (2) family history of illness; (3) past WC claims; or (4) the nature or severity of any disability.
Documentation Requirements

• ADA

  – Important: even if a disability-related inquiry is justified by business necessity, the scope of inquiry must be related to the accommodation requested.
  – For example, if an employee requests an accommodation related to her shoulder, the employer cannot ask for information unrelated to the limitations caused by the shoulder problem.
Documentation Requirements

• FMLA
  – Generally, an employee must give at least 30 days notice of the need to take FMLA leave when he/she knows about the need for the leave in advance and it is possible and practical to do so (such as in cases of pregnancy or planned surgery)
  – Employer provides employee with FMLA Certification paperwork
  – Employee has 15 days to return completed Certification
Documentation Requirements

• FMLA
  – If the certification is “incomplete” or “insufficient,” the employer must give the employee a written notice of that fact and provide the employee with at least 7 calendar days to provide additional information.
  – If the employer has a reason to doubt the validity of the certification, the employer may require the employee to obtain a second opinion at the employer’s expense. If the first and second opinions reach different conclusions, the employer may require a third opinion at the employer’s expense. That opinion is final.
Leave Requirements
Leave Requirements

• FMLA
  – Eligible employees are entitled to:
    • Twelve (12) workweeks of leave in a 12-month period (as defined by the employer) under 5 specified circumstances; and
    • Twenty-six (26) workweeks of leave in a 12-month period for “care of a service member.”
  – Keep in mind that state laws (such as New Jersey Family Leave Act) may also apply
Leave Requirements

• FMLA
  – 12 workweeks of leave under the following 5 circumstances:
    • birth of a child (for bonding purposes) within one year of birth;
    • placement with the employee of a child for adoption or foster care (for bonding purposes) within one year of placement;
    • to care for the employee’s family member (i.e., a spouse, child, or parent) who has a serious health condition;
    • a serious health condition that makes the employee unable to perform the essential functions of his or her job;
    • any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”
Leave Requirements - Interplay of ADA and FMLA

• Keep in mind that, even when FMLA leave expires, an employer’s obligations to continue providing leave probably DO NOT END. In fact, companies are almost always required to provide leave as a reasonable accommodation under ADA.

• If an employee’s FMLA leave expires, but they are still not able to return to work, the employer and employee should promptly engage in the interactive process, provided the serious health condition for which the employee took leave for is an ADA “disability”.
Intermittent Leave – ADA/FMLA

• In addition, under both ADA and FMLA, intermittent/reduced schedule leave may be permitted/required under certain circumstances

• Under FMLA:
  – Intermittent or reduced schedule leave may be taken when medically necessary to care for an ill family member, or because of the employee’s serious health condition.
  – Intermittent/reduced schedule leave may be taken to bond with newborn or newly placed adopted or foster care child only with the employer’s approval.

• Under ADA, reduced schedule or schedule change may be a reasonable accommodation
Benefits During Leave
Benefits During Leave

• ADA
  – No specific requirement
  – However, according to the EEOC, an employer must continue an employee’s health insurance benefits during ADA leave period if it does so for other employees on non-ADA leave of absence.
Benefits During Leave

• FMLA
  – If an employee is provided group health insurance, the employee is entitled to the continuity of the group health insurance coverage during FMLA leave on the same terms as if he/she had continued to work. The employee must continue to make any normal contributions to the cost of the health insurance premiums.
  – An employee’s rights to benefits other than group health insurance while on FMLA leave depend upon the employer’s established policies. Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave.
Communicating with Employees During Leave
Communicating with Employees on Leave

- FMLA/ADA do not establish a clear boundary on this issue.
- A few short phone calls or texts to pass on or request knowledge or updates *probably* do not amount to interference with leave.
Communicating with Employees on Leave

• Do not ask employees to come in to the office.
• Discuss possible promotion or performance review over the phone or wait until employer returns from leave.
• Can the issue wait until the employee returns to the office?
  – Especially for FMLA intermittent leave or ADA reduced schedule.
Communicating with Employees on Leave

• Workplace investigations
  – Employers likely can require employees on protected leave to participate in a workplace investigation as long as the employer can prove that it is following its standard internal investigation procedures and that it would have taken the same steps absent the employee’s leave.

• Consider interview by phone/face time.
• Do not count that time against FMLA leave.
• Be realistic – balance employee’s health issues against need.
Communicating with Employees on Leave

• Communications about returning to work
  – Employer may contact an employee on leave for an update regarding the employee’s situation and the employee’s return date.
  – Limit number of communications and who communicates
  – Document such communications via email and in writing in advance of the employee’s anticipated end of leave
Reinstatement
Reinstatement

• ADA
  – According to EEOC, the ADA requires that the employer return the employee to his/her original position unless the employer can show that:
    • this would cause an undue hardship; or
    • the employee is no longer qualified for his/her original position, with or without reasonable accommodation.
Reinstatement

• FMLA
  – Employee must be reinstated to the same or an equivalent job.
  – No undue hardship exception.
Fitness for Duty Certification
Fitness for Duty Certification

• ADA
  – Permitted when the employer has a reasonable belief that an employee’s ability to perform essential job functions may be impaired by a medical condition or that she/he will pose a direct threat due to a medical condition.
  – Any medical exam or inquiry must be job-related and limited in scope to what is needed to make an assessment of the employee's ability to perform the essential functions of the job.
Fitness for Duty Certification

• FMLA
  – May be required where the employer has a policy or practice that requires employees in similar job positions who take leave for similar health conditions to provide one.
  – The employer may request a fitness-for-duty certification only with regard to the particular health condition that caused the employee’s need for FMLA leave.
  – If the employer will require a fitness-for-duty certification, it must provide notice of that requirement and whether the certification must address the employee’s ability to perform the essential functions of his or her job with the FMLA designation notice.
Beware of Retaliation Claims

• It is unlawful for an employer to discharge, harass, discriminate (in terms of compensation or job opportunities, terms, conditions or privileges), or to retaliate against or threaten to discharge an employee because they have exercised, or attempted to exercise, their rights under most laws, including ADA and FMLA.

• Employers cannot treat employees differently because they have made a request for leave under FMLA or have requested reasonable accommodation under the ADA. Any employer who feels the need to discharge or discipline an employee who has recently requested and/or taken leave should proceed with care.

• FMLA and ADA laws protect an employee even if the request for leave or other accommodation was denied.
FAQs

• **Question:** Is an FMLA “serious health condition” the same as a “disability” under the ADA?

• **Answer:** No. An ADA disability is an impairment that substantially limits one or more major life activities. A SHC under FMLA can be, but is not necessarily, an ADA disability.
FAQs

• **Question:** If an employee requests a leave of absence but there is another accommodation that will allow the employee to keep working, can the employer deny the leave and offer the alternative?

• **Answer:** Yes, as long as the alternative is an effective reasonable accommodation. However, if the individual is eligible for leave under the FMLA, he/she has the right to choose FMLA leave instead of the offered accommodation.
FAQs

• **Question**: Isn’t there a conflict between the FMLA provision allowing for a certification of SHC and ADA restrictions on disability-related inquiries?

• **Answer**: No, the FMLA certification form is limited to requesting information relating only to the SHC for which the employee is seeking leave.
FAQs

• **Question:** What happens when an employee suffers a work related injury that qualifies as a disability under ADA and a SHC under FMLA?

• **Answer:** If a work-related injury causes a condition that qualifies as a disability under ADA, an employer could provide an accommodation, such as light duty, that allows the employee to remain on the job instead of or in addition to leave. If the employee also is eligible under the FMLA, however, the employee can reject the light duty work (a/k/a the accommodation) and take leave under FMLA. (Note: If the employee rejects light duty work that he/she can perform, however, it may impact his/her WC benefits.)
FAQs

• **Question:** Does the FMLA’s limit of 12 workweeks of leave in a 12 month period mean that an employee can be terminated if he/she fails to return to work at the end of the 12 weeks?

• **Answer:** No, if the employee’s SHC is also a disability under ADA. In that case the employee would be entitled to more than 12 weeks of unpaid leave as a reasonable accommodation as long as the additional leave would not impose an undue hardship on the employer’s business.
FAQs

• **Question:** What are an employee’s reinstatement rights following leave under the ADA and FMLA?

• **Answer:** Under the ADA, the employee is entitled to return to the same job unless the employer can show that holding the job open would impose an undue hardship or that the employee can no longer perform the essential functions of the position, with or without reasonable accommodation. In most cases, under FMLA, an employee must be reinstated to the same or an equivalent position.
What questions do you have?

...and THANK YOU!