

*Presenting a live 90-minute webinar with interactive Q&A*

## **Employee Leave Under FMLA, ADA and Workers' Comp: Navigating Overlapping and Conflicting Leave Laws**

Avoiding Pitfalls With Accommodation, Retaliation/Discrimination; Handling Light Duty, Company Policy Violations and Discipline

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WEDNESDAY, MAY 29, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Diane L. Kimberlin, Shareholder, **Little Mendelson**, Los Angeles

Jeffrey S. Kopp, Partner, **Foley & Lardner**, Detroit

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# Employee Leave Under FMLA, ADA and Workers' Comp:

## Navigating Overlapping and Conflicting Leave Laws

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Diane Kimberlin  
Littler Mendelson

[dkimberlin@littler.com](mailto:dkimberlin@littler.com)

310-772-7207

Jeffrey S. Kopp  
Foley & Lardner LLP

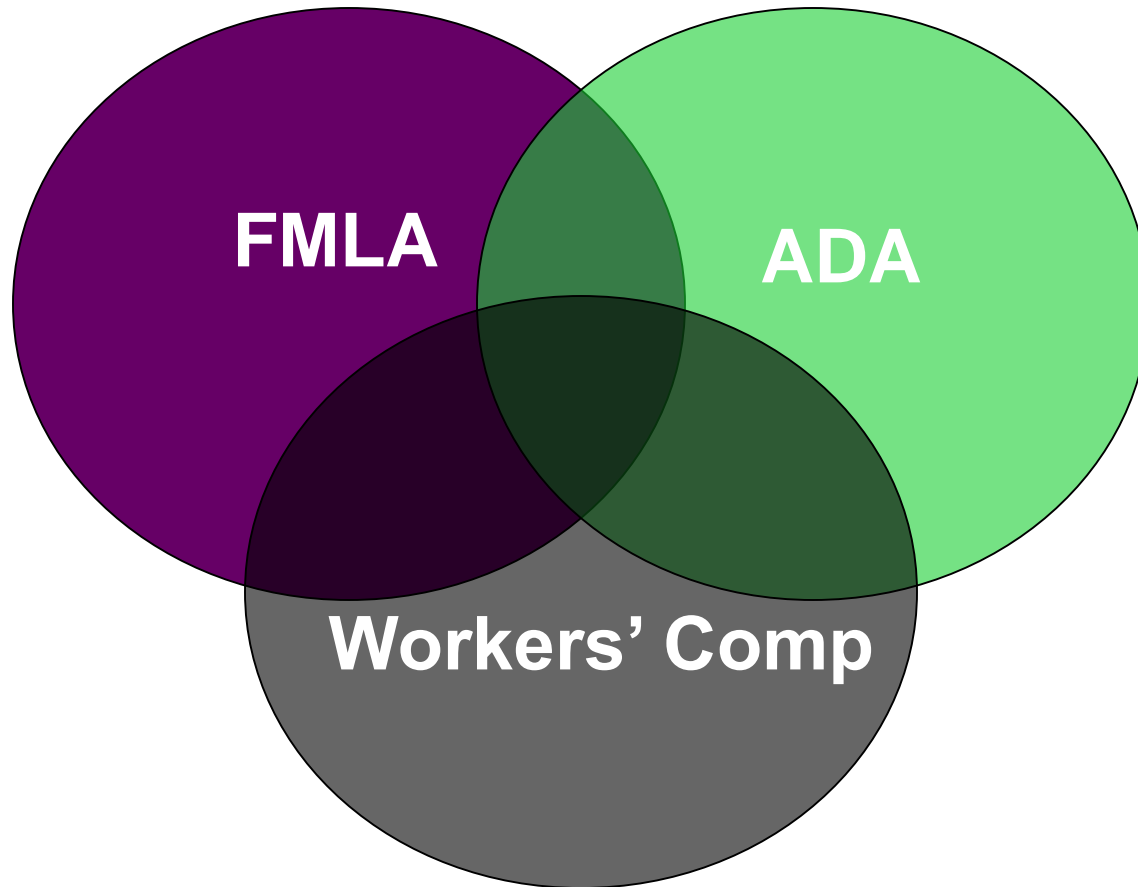
[jkopp@foley.com](mailto:jkopp@foley.com)

313-234-7140

May 29, 2019

# THE ADA, FMLA & WORKERS' COMP OVERLAP

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# Legal Framework

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## **FMLA**

**Unpaid time off with job and benefit protection for specified family and medical leave reasons**

**12 weeks of leave in a 12 month period / 26 weeks in a 12 month period to care for injured service member**

## **ADA**

**Prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform essential functions of the job**

## **WC**

**Reasonable and necessary medical treatment and temporary total or permanent disability benefits for a work related injury or illness**

# Eligibility

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## **FMLA**

**12 months, 1250  
hours in last 12  
months,  
at facility with 50  
employees in 75  
miles**

## **ADA**

**Applicants,  
one second  
employee**

## **WC**

**One second  
employee**



# Critical Definitions

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## **FMLA**

**Serious health condition**

## **ADA**

**Disability (greatly broadened by ADAAA)**

- Physical or mental impairment that substantially limits one or more major life activities
- Record of such impairment
- Regarded as having such impairment

## **WC**

**Arising out of and in course of employment**

# Employer Notice Requirements

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## **FMLA**

**Extensive notice requirements, obligation on employer to designate as FMLA leave**

## **ADA**

**Posting of EEO poster**

## **WC**

**Posting of WC poster**

# Employee Notice Requirements

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## FMLA

30 days if foreseeable;  
as soon as practicable if  
not foreseeable

\*\*\*\*\*

Believe FMLA reason  
or enough to ask more  
questions?

## ADA

Employee's obligation  
to request a  
reasonable  
accommodation

**BUT BEWARE!**

## WC

Employee must report  
injury within certain  
time period; however,  
failure to do so usually  
doesn't disqualify

# Employee Notice Requirements

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- ***Department of Labor Opinion Letter (March 14, 2019)***
- DOL opined that when the leave is clearly FMLA-qualifying, it must be counted and designated as FMLA. According to the opinion letter, “once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee *nor the employer* may decline FMLA protection for that leave. . . . Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.” (emphasis added).
- ***Rejected - Escriba v. Foster Poultry Farms*** (9<sup>th</sup> Cir. 2014)
  - Employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection.
  - Employer cannot force FMLA leave on an unwilling employee. ***Wysong v. Dow Chem Co.*** (6<sup>th</sup> Cir. 2007)

# Employee Notice Requirements

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- ***Coutard v. Municipal Credit Union*** ( 2<sup>nd</sup> Cir. 2017)
  - Employee denied leave to care for seriously ill grandfather.
  - Employee terminated after being absent without leave
  - Employee filed suit under FMLA
  - Court held that employee's mere verbal mention of the grandparent relationship when requesting FMLA was sufficient notice that FMLA might apply due to in loco parentis relationship

# Medical Certification

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## **FMLA**

**Medical certification  
can be required**

**15 days to return**

**Can contact  
employee's HCP to  
authenticate and  
clarify medical  
certification**

**- Update recert every 6  
months**

## **ADA**

**Medical exams  
permitted for current  
employees if job-  
related and consistent  
with business  
necessity (but  
generally request  
information from  
employee's HCP first)**

**- Direct threat?**

## **WC**

**Medical exams  
permitted**

**No restrictions on  
selection of first,  
second or third  
opinions**

# Employee Cooperation

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## **FMLA**

**Duty to cooperate in providing medical certification and other requested medical information (i.e., recertification)**

**\*\*\*\*\***

**Failure to cooperate can lead to delay/denial of leave**

## **ADA**

**Duty to engage in interactive process with employer**

**\*\*\*\*\***

**Failure to cooperate can lead to denial of reasonable accommodation**

## **WC**

**Duty to cooperate**

**\*\*\*\*\***

**Failure to cooperate can lead to denial of benefits**

# Hypo - Angela

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Angela has been a tax accountant for Smith, Jones, & Smith LLC, a private wealth management firm, for the last four years. Angela begins suffering from debilitating migraines and goes to visit her doctor, and learns that she will likely have recurring migraine headaches which may make it impossible for her to work for two to three days at a time. Angela notifies her supervisor, who puts her in touch with HR. HR provides Angela with FMLA paperwork to be completed by her doctor. Angela returns a certification within the 15 day deadline, but the certification is largely illegible and incomplete.



# Hypo - Angela

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1. How does the Firm request that the form be completed and that all relevant information be included?
2. Once the Firm receives the completed FMLA paperwork, it realizes that the certification has been completed by Dr. Green, who has a less-than-reputable practice in the community, and the Firm is wary of his diagnosis. Can the Firm require Angela to get a second opinion?
3. Dr. Green indicates that Angela will need to miss work for approximately three days a month for recovery from her migraines, and possibly follow-up treatment. It is only mid-August, and Angela has already missed five days of work related to her migraines this month. Is there anything the Firm can do?
4. Averaging her time both during and outside of tax season, Angela regularly works 50 hours a week. How much intermittent FMLA leave is she entitled to?
5. What happens if Angela is out of FMLA leave? \*\*\* Key cross-over area

# Hypo - Samantha

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Samantha has asserted that she has a condition that qualifies as a “serious medical condition” for which she will need surgery, but does not want to designate her leave as FMLA leave. She is pregnant and does not want to exhaust her FMLA leave so that she can take her full 12 weeks of FMLA leave when she has her baby. To prevent her employer from forcing her to exhaust her FMLA leave, she simply refuses to turn in her FMLA certification from her medical provider.

- Can the employer force designate this leave as FMLA protected anyway?
- If she refuses to turn in the requested paperwork, can the employer terminate her employment?

# What Is A Reasonable Accommodation?

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- All persons must be able to perform **essential functions** of the job with or without **reasonable accommodation**
  - Essential Functions - Does the individual meet the basic qualifications of the job?
  - Must provide reasonable accommodation absent undue hardship:
    - Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position

# What Is A Reasonable Accommodation?

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Making existing facilities more accessible	Reassignment of non-essential job functions	Part-time or modified work schedules, including unpaid leave
Reassignment to a vacant position	Providing or modifying equipment or devices	Modifications of examinations, training materials or policies
Providing qualified readers or interpreters	Telecommuting	



# Securing The Information You Need For The Interactive Process

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- “Accommodating” both privacy and the need for information.
- Getting enough... but not too much...information
- Medical examinations by employer designated doctor.

# The Role Of Third Party Administrators.

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- Particularly important when FMLA leave issues become ADA accommodations issues.
- What can employers “outsource”?
- Do you understand each other?
- Does the employer get the information needed to make informed accommodation decisions?

# What Is A Reasonable Accommodation?

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- **Williams v. AT&T** (6<sup>th</sup> Cir. 2017)
  - Plaintiff suffered anxiety and depression caused multiple absences
  - Requested later, flexible start time and additional breaks
- Court found that proposed accommodations were not reasonable
  - Regular, in person attendance essential job function
  - Employees with excessive absences were not qualified individuals when they could not regularly attend work

# The Interactive Process

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- Must engage in an **interactive process!**
  - Case by case analysis
- When do you need to engage in the interactive process?
  - ✓ An applicant or employee requests an accommodation (no magic words required); or
  - ✓ An employer:
    - (i) knows that the employee has a disability, and
    - (ii) knows, or has reason to know, that the employee is having difficulty performing job functions because of an impairment
  - The safest approach is to consider any notification that a job modification is needed because of a medical condition as a request for reasonable accommodation



# How Do You Determine Whether There Is An “Undue Hardship?”

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- Individualized assessment showing specific accommodation would cause significant operational difficulty or expense
- Generalized conclusions will not suffice
- Based on several factors:
  - ✓ Nature and cost of the accommodation needed
  - ✓ Overall financial resources; size, number of employees, and type and location of facilities of the employer, the effect on expenses and resources of facility
  - ✓ Type of operation of the employer
  - ✓ Impact of the accommodation on operations
  - ✓ **Generally, cost alone will not be sufficient**

# Examples of Operational Impact

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- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive customer service and increased customer dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust work flow or priorities in light of absent employees
- Increased stress on overburdened co-workers

# Job Protection

## FMLA

Return to same or  
equivalent position for  
12 weeks

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Exception: what would  
have happened to  
employee had he/she  
not gone on leave?

## ADA

Same position unless  
undue hardship to keep  
position open – need not  
keep it open indefinitely

## WC

Not guaranteed

# Hypos - Reinstatement

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- Sara was a fairly new employee when she went on ADA leave. A brand new employee steps in to fill in and does a fabulous job. The department decides that Sara has to go.
- Jason goes on FMLA leave and you discover that his desk drawers are filled with unpaid invoices that he should have paid on behalf of the Company.
- Susan exhausts her FMLA leave and is on a disability leave due to cancer. She is in an entry level position. The Company wants to fill her job.

# Fitness For Duty Certifications

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## **FMLA**

Employee may be required to present a certification from his/her healthcare provider that he/she is able to resume work

## **ADA**

Permitted to determine if employee can perform essential functions with or without accommodation

## **WC**

Permitted

# Hypo - Ben

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Before requesting FMLA leave for medical treatment arising from depression, Ben, a security employee who carries a weapon as part of his duties, had engaged in erratic behavior. After completing a treatment program, Ben's doctor certifies that he is ready to return to full work duties.

- Must the employer accept the treatment provider's certification that the employee is ready to return to work?

# Attendance

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## FMLA

Absence due to a FMLA qualifying reason cannot count as occurrence under any attendance policy

## ADA

Frequent unplanned absences may make an employee “not qualified” BUT accommodate unless undue hardship

## WC

Disciplining/terminating an employee for absences due to a workers’ compensation injury can be risky

# Intermittent Leave Or Reduced Leave Schedule

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**FMLA**

**Absolute right for employee's serious health condition or to care for a family member with a serious health condition, if medically necessary**

**ADA**

**Reasonable accommodation unless employer can establish undue hardship**

**WC**

**Not guaranteed**



# Tips for Managing Intermittent FMLA Leave

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- Insist that employees complete certification forms annually when the leave lasts beyond a single leave year
- Encourage employees to schedule treatments for medical conditions so as not to disrupt employer's operations
- Consider temporary transfers to alternate positions for employees needing **foreseeable** leave → pay/benefits must be the same but duties can differ
  - However, cannot require light duty to avoid permitting employees to take FMLA leave
- Employer does not have to agree to intermittent or reduced work leave for birth of child, adoption or foster care
- Exercise employer's right to authenticate questionable certifications or clarify unclear information on certification
- Get (and pay for) second opinion
- Employees still have to comply with call-in requirements
  - But consider whether the FMLA condition prevents a call-in

# Hypos - Attendance

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- Jane has had absence and tardiness problems for years. She has been on the verge of termination several times. Before you get to termination, she brings in FMLA leave papers and requests intermittent leave.
- Mary reveals she has cancer when put on final warning under your attendance program and states her supervisor knew all along she was off for treatment and she should not have been disciplined.
- Kelly says she has a 40 hour work restriction arising from a serious motorcycle accident. Do we need to honor it?

# Transfer to an Alternative Position

## **FMLA**

If leave is foreseeable based on planned medical treatment or intermittent, can require transfer. Can't require light duty

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Must be similar job and maintain wages and benefits

## **ADA**

Accommodation of last resort if unable to accommodate in current job

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Can change wages/benefits to those of new position

## **WC**

Refusal of light duty position can affect receipt of benefits

# How to Handle Light Duty or Other Work Restrictions

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- Following a work-related injury, there is often a period of convalescence where the injured worker has a medical limitation/work restrictions
- Once the employee returns to work, supervisors must ensure that the work performed complies with medical limitations
- If there are performance problems, avoid references to the WC claim or disability
- If the employee claims he/she cannot do something, seek clarification from doctor
- If no work injury but the employee may be disabled, determine whether he/she can perform the essential functions with or without an accommodation

# Hot Button Issue: Performance

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- What should an employer do if an employee requests leave or an accommodation for the first time in response to counseling?
  - May address the performance issues BUT:
    - ✓ If an accommodation is requested, begin the interactive process
    - ✓ Poor performance does not impact an employee's right to take FMLA leave
  - **NOTE: Don't counsel an employee for performance issues that are caused by the FMLA/ADA absences (e.g., employee isn't getting his/her work done because he took intermittent leave)**

# Avoiding Retaliation Claims

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- The heart of any retaliation or discrimination claim is that the claimant was discharged or treated less favorably than others outside the protected class
- Retaliatory animus must be motivated by:
  - Requesting FMLA leave
  - Having a disability, being regarded as disabled or requesting an accommodation
  - Filing a claim or invoking claims process
- Each state's workers' compensation statute is different  
→ some may not even prohibit retaliation or provide a significant remedy

# Avoiding Retaliation Claims

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- Consistency is key → make sure that the employee continues to be treated like any other employee
- Written policies should be consistently applied
- Carefully review the decision before disciplining or changing job duties
- If job performance is subpar, document counseling and any form of progressive discipline
  - Apply the same standards to all employees!
- Remember that absences covered by the ADA or FMLA cannot be counted against an employee under attendance policies, in performance reviews, or in rankings or layoffs
- Any information regarding a complaint or an employee's exercise of rights under these statutes should only be shared on a "need to know" basis

# Tips for Managing the Interplay Between the ADA, FMLA and WC

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- Analyze each law and situation separately
  - WC injuries often are serious health conditions under the FMLA
  - WC or FMLA conditions often are not disabilities under the ADA
- Avoid regarding an individual as disabled
- Know your leave policies
- Train supervisors to spot issues
- HR manage difficult situations
- Rely on medical documentation
- Encourage communication
- Document everything
- Maintain consistency in decision-making



# QUESTIONS?

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