

ADA and FMLA: Lingering Leave and Accommodation Questions for HR Personnel



**Clark Hill PLC and the Michigan Association of
School Personnel Administrators (MASPA)**

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CLARK HILL

WELCOME PARTICIPANTS FROM MASPA AND CLARK HILL!

Micky Savage
GRPS and MASPA President



TODAY'S PRESENTERS



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WHAT WE'LL COVER TODAY



ADA and FMLA: Q&As from YOU!

- ADA Accommodations and the Vaccine!
- Specific Accommodations for Specific Disabilities
- Snow Days/Holidays and FMLA
- FMLA Abuse?
- Working while on FMLA?
- Designating FMLA
- Forms!
- FMLA done? Don't forget about ADA!



TODAY'S FUNNY

“Of all the laws enforced by the Department of Labor, the FMLA is the easiest for employers to administer.”

Former U.S. Secretary of Labor Alexis Herman



QUESTION #1

- Does an employer still have to make accommodations for employees at high risk of complications due to COVID now with the vaccine available? What if an employee refuses the vaccination?



ANSWER #1

- **IT DEPENDS!** Remember, there are two exemptions recognized for which you must consider accommodations for non-vaccinated employees.
 - EEOC Guidance: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eo-laws>
- **ADA Exemption:** The employee has a disability which prevents them from receiving the COVID vaccination.
- **Title VII/Religious Exemption:** The employee has a seriously held religious belief that prevents them from receiving the COVID vaccination.

ANSWER #1

- Both of these require you to engage in the Interactive Process. During this required process under the ADA with the employee, you request/discuss:
 - Medical documentation
 - Review of essential job functions
 - Alternatives/Accommodations
 - Undue Hardship
 - Significant Difficulty/Expense
 - Impact on co-workers/students
- *Remember*, you can follow up with specific questions to an employee's health care provider under the ADA when considering an accommodation request.



ACCOMMODATION OPTIONS

- Additional PPE
- Remote/Telework
- Transfer/Reassignment
- Modification of Duties
- Leave of Absence



- No one size fits all! Requires case-by-case analysis. Documentation is KEY!
- Ultimate accommodation decision rests with employer as long as other reasonable options available.
- Employer is NOT required to remove or eliminate an essential function of the position in order to accommodate an employee.

ANSWER #1

- What if the employee does not fit into one of these exemptions? Employee just refuses or is fearful of the vaccination?
- No duty to accommodate general “fear” of vaccination or “fear” to return to work.
- Are there other accommodations which allow them to work in-person, but remain safe from COVID?
- Leave of absence under CBA, Board Policies?
- Layoff? Termination? (Consult with legal counsel first!)



HOW LONG IS TELEWORK A REASONABLE ACCOMMODATION?

- Just because an employer temporarily excused an essential function before due to COVID and/or executive orders/authority, does not require it to continue to do so now to accommodate an employee.
- Did not permanently change the essential functions of the position.
- EEOC Q&A #D.15: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- *Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer **does not have to provide telework as an accommodation**. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.*

TELEWORK = REASONABLE ACCOMMODATION?

- To the extent that an employer permitted telework to employees because of COVID-19 and chose to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation **does not have to be granted** if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.
- The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, **does not mean** that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations.
- The employer has **no obligation** under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

QUESTION #2

- Can you explain ADA options for ADD/ADHD disability specific to instructional staff?



ANSWER #2

- JAN is your best friend when considering ADA accommodations!
- Job Accommodation Network!
- Search By:
 - Disability
 - Limitation
 - Work-related function
 - Topic
 - Accommodation
- Interactive Process Questions
- Key Accommodations/Other Ideas/Resources



ANSWER #2

Let's go through an **INTERACTIVE PROCESS!!!**

<https://askjan.org/>



QUESTION #3

- Do you count inclement weather/snow days as part of the FMLA days? If it was a "scheduled leave" would we count that day?



ANSWER #3

- **Although the FMLA rules do not directly address snow days, it does address holidays and so you follow the same concept as in CFR 825.200(h).**
 - If the employee is out on FMLA for the entire week, then you count the snow day against the employee's 12 weeks of FMLA leave.
 - If the employee worked any part of the week, then only the days the employee would actually have been expected to report to work should be counted as FMLA leave.



ANSWER #3

- A teacher is on a full week of FMLA leave. That week, a blizzard forces the school district to call snow days for two consecutive days. Because the teacher was on leave anyway, the full week counts against their allotted amount.
- A teacher has been on leave for several weeks and is due to return on a Thursday. A snow storm forces the school to close on Tuesday that same week. Monday and Wednesday are counted against the teacher's allotted leave, but Tuesday does not.

NOTE

This applies for closures of less than a week. If an employer's operations are shut down for one or more full weeks, any days the employee would not be expected to work should not be counted against the employee's FMLA leave entitlement.

QUESTION #4

- I have an employee on FMLA for back pain. Employee was seen racing motorcycles. Employee says doctor will write a note stating he can ride, but not work. Suggestions?



ANSWER #4

Abuse of FMLA? Not as easy to prove as you may think without a thorough investigation and follow up with the employee and health care provider before taking any adverse action.

- What job functions can't the employee do because of the back pain? What is the cause of the back pain? Do these correlate in any way to riding a motorcycle? Can they work at all? After FMLA, will require ADA accommodation?



REAL CASE EXAMPLE:

Employee who had a bad back and could not stand or sit for long periods. While on FMLA leave, she posted videos of herself on Facebook drinking and dancing at a local bar. The employer fired her, noting that if she could dance, she could work.

ANSWER #4

Question: A slam dunk for the employer?



Answer: **No.** The U.S. District Court refused to dismiss her FMLA claims, finding that the employer should have conducted a closer review of her health condition and that it failed to consult with a medical provider to determine if this conduct was incompatible with FMLA leave.

Rather than getting a second medical opinion that "would have provided the court with helpful evidence," the employer simply relied on its "lay opinion" that she could work if she could dance.

ANSWER #4

So, what do you do if you suspect FMLA abuse?



- FMLA certifications and recertifications are your friend. USE THEM!
- Make sure the original certification is complete and sufficient – if not, follow up!
- Still a reason to doubt? 2nd and 3rd opinions are an option.
- Recertification: An employer can seek recertification if the employee requests an extension of leave, if the circumstances described by the previous certification have changed significantly, or if the employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.



ANSWER #4

- If an employee uses FMLA intermittent leave frequently on Mondays or Fridays, the employer could seek recertification from the health care provider to determine whether this is an expected pattern of absence given the employee's serious health condition.
- The employer also could share the absence pattern with the health care provider and ask if it is consistent with the need for leave.
- The employer should conduct an investigation and interview the person suspected of abusing FMLA leave.
 - Employers should prepare a list of questions to ask employees when FMLA abuse is suspected.
 - Give the employee an opportunity to explain suspicious circumstances, and follow up on co-worker complaints.
- Obtain “particularized facts” and make “reasonably informed and considered decision.”

QUESTION #5

- If an employee is on FMLA for an injury or surgery but requests remote work on specific days, is that ok? Doctor only listed a return date for FMLA leave, but no restrictions.



ANSWER #5

- Key language: “**Employee** requests remote work.”
- Under the FMLA, an employer cannot require an employee to work on FMLA, or condition continued employment on completing work while on FMLA.
- Courts have held, however, that: “giving employees the option to work while on leave does not constitute an interference with FMLA rights so long as working while on leave is not a condition of employment.”



ANSWER #5

- **Things to Consider:**

- Request in writing? Agreement in writing? Voluntary nature? Not required?
- This is actually a request for intermittent/reduced schedule leave.
- Any time the employee works, even if at home, cannot be charged against their FMLA allotment .
- Type of leave? Employee's own serious health condition vs. caring for a family member with a serious health condition.
- Bonding Leave: Employers are not required to allow intermittent FMLA for this type of leave.



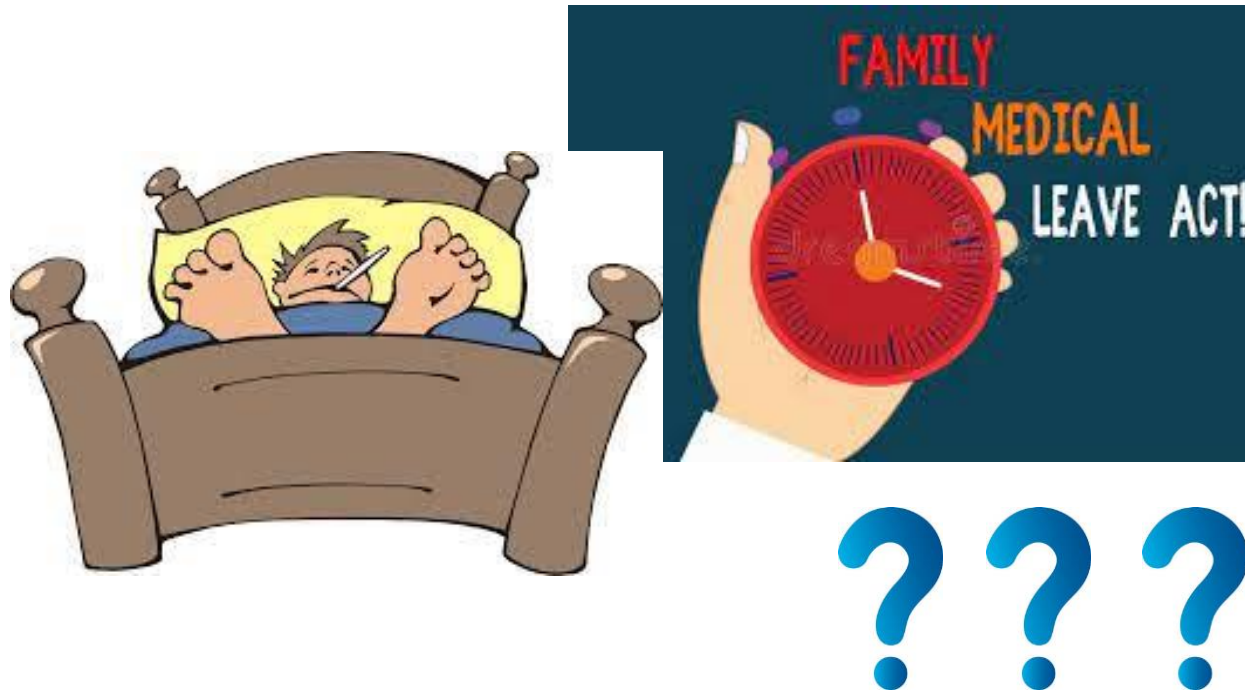
ANSWER #5

- Be careful of wage and hour pitfalls if employee is working on unpaid FMLA.
- Avoid interference claims – best to limit contact with employees on FMLA unless necessary to continue to facilitate FMLA or request regarding job duties is “de minimus.”
 - Should not require employee to travel to office, spend a significant amount of time on request/task, etc.
- “No good deed goes unpunished” - once you open the door to allow this for one employee, you may have to allow for others.



QUESTION #1

- If an employee is off work caring for a spouse and does not ask for FMLA until after the fact do we have to designate it as such?



ANSWER #1

- FMLA requires an employee to let his or her employer know as soon as possible each time FMLA leave is needed and to respond to questions from the employer designed to determine if a particular leave request is FMLA-qualifying.
- When the need for leave is unexpected, the employee must provide notice to the employer as soon as possible and practical.
- When the employee does not give timely notice of unforeseeable leave and does not have a reasonable excuse, the employer may delay or deny the FMLA leave.
- During the time FMLA is delayed or denied, the leave is not protected.

ANSWER #1

- When the need for leave is foreseeable – generally 30 days notice is required.
- If the employee fails to provide the employer with enough information to determine whether the leave is FMLA-qualifying, the leave may not be protected.
- Typically, the employee must also comply with the employer's policies for requesting leave unless unusual circumstances prevent him or her from doing so.
- The first time though – they may not actually say FMLA – that's ok.
- The goal is to get enough information to determine if it is covered and how long the employee expects to be gone.

QUESTION #2

- Our biggest problem is intermittent leave. What can we require the employee to provide when taking intermittent leave?



ANSWER #2 - REASONS FOR INTERMITTENT LEAVE

- **Medical need:**
 - Must be medically necessary, best accommodated through intermittent leave.
 - Also available for psychological comfort for a family/service member.
- **Periodic treatment by a healthcare provider.**
- **Pregnancy:**
 - Prenatal exams, severe morning sickness.
- **Chronic serious health conditions:**
 - Must be incapacitated or unable to perform the essential functions of the position (no treatment required, but individual must be under HCP care).
- **Birth or placement – if employer agrees.**
- **Injured servicemember care.**



ANSWER #2 - LIMITS ON INTERMITTENT LEAVE

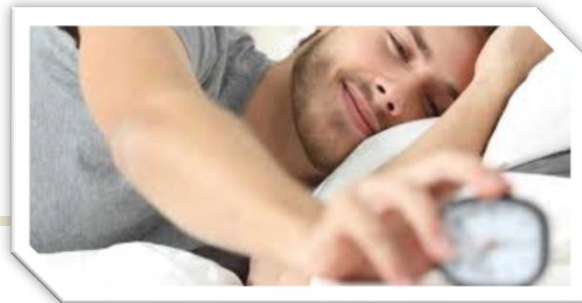
- Employee must use reasonable efforts to schedule treatments to avoid disrupting employer's operations.
- Use increments no greater than the shortest amount of time used to account for other leave (but no greater than one hour).
- Are appointments available after work hours?
- May use varying increments of time (if this is done for other types of leave).
- Leave to care for or bond with a newborn child or for a newly placed adopted or foster child may only be taken intermittently with the employer's approval and must conclude within 12 months after the birth or placement.
- Consider **temporary** transfer (for planned leave) to limit duration.

ANSWER #2 SPECIAL RULES FOR TEACHERS

- Requesting Leave Within the Last Three Weeks of Term
 - More than 5 days of leave
 - Require continuous leave until the end of term
- Requesting Leave within the Last Five Weeks of Term
 - More than two weeks of leave
 - Return is scheduled the last two week of term
 - Require continuous leave
- Requesting Leave More Than Five Weeks Before End of Term
 - More than three weeks of leave
 - Return is scheduled the last three weeks of term
 - May require continuous leave
- Can only charge FMLA for the days required not continuous.
 - If employee was scheduled to return the first day of the last two week period and you impose continuous - the two weeks are not charged against FMLA allotment.

ANSWER #2 - DEALING WITH INTERMITTENT LEAVE ABUSE

- Manage intermittent leave abuse by:
 - Tracking patterns of intermittent leave usage, following up with recertification documentation.
 - Obtaining medical certification of the need for intermittent leave, frequency, and duration.
 - Requiring employee to work with you to schedule **planned** leaves.
- Weighing alternatives to intermittent leave, such as modified schedule or temporary transfer.
- Temporary transfer is only available for **planned** intermittent leave.



QUESTION #3

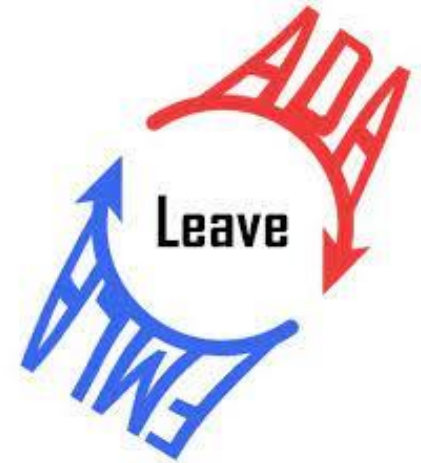
- How do we decide if a leave is an ADA approved leave once FMLA runs out?



ANSWER #3

START BY REMEMBERING THE PURPOSE OF THE TWO LAWS

- **FMLA's** purpose: Allows employees to take leave for their own health or family medical reasons.
- **ADA's** purpose: Helps people become and stay employed by requiring accommodation and forbidding employment discrimination against qualified persons with disabilities.



ANSWER #3 – START THE INTERACTIVE PROCESS

- Does the person have a disability?
- Is additional leave reasonable?
- Will additional leave help them return?
- Will additional leave help them perform the essential functions when they return?
- How much leave is reasonable?
- Are there other accommodations that would accomplish same outcome?



ANSWER #3

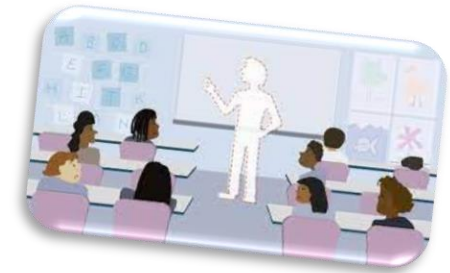
- You can offer other reasonable accommodations
 - Examples: light-duty, flexible work schedule
- If leave is reasonable and not an undue burden, you still need to determine “How Much Leave”
- ADA doesn’t provide guidance on how much leave is “reasonable” if no undue hardship to employer
- Indefinite leave is on its face unreasonable



ANSWER #3

ADDITIONAL LEAVE MAY NOT BE A REASONABLE ACCOMMODATION IF:

- Job is time-sensitive;
- Attendance is an essential function;
- You can't find an adequate substitute within organization for employee seeking additional leave; or
- Absence will adversely affect key areas of organization or require more overtime, extra pay etc. for other employees.
- **REMEMBER**
 - No automatic termination after exhaustion of other leave.
 - Be consistent.



THE BERMUDA TRIANGLE

SUMMARY OF INTERPLAY OF LEAVE PROVISIONS

	FMLA	ADA	WC
Coverage	50 or more EEs w/n 75 mile radius	15 or more EEs	Most employers
Eligibility	EEs who worked at least 1250 hours over 12 months with qualifying serious health condition	EEs who are disabled, qualified, and can perform essential functions of the job with or without reasonable accommodation	EEs w/work-related injury
Length of Leave	Up to 12 weeks of unpaid leave in 12 month period	No limit; based on physician's recommendation and EE's job description	No limit or specified time
Medical Documentation	Certification from provider of need for leave	Not required, but may be requested by employer	Information specific to the work-related injury
Light duty or modified work schedule	Cannot be required	Must be allowed if reasonable and does not create undue hardship	Should be offered to eliminate employer's obligation to pay wage benefits
Return to Work; Fitness-for-Duty	Employer must give notice of the requirement to provide a fitness-for-duty certification with the designation notice	May be requested by employer on reasonable belief that ability to perform job may be impaired by medical condition	Typically required

QUESTION #4

- What recourse do we have for an employee who qualifies for FMLA but fails to follow up on the return of the FMLA forms?



ANSWER #4

- In general, you may require that the employee comply with your normal policies for requesting leave.
- You can take action under your internal rules and procedures if the employee fails to follow your usual and customary rules for requesting leave, as long as it does not discriminate against employees taking FMLA leave.
- Refer back to Question # 1
 - When the employee does not give timely notice of unforeseeable leave and does not have a reasonable excuse, the employer may delay or deny the FMLA leave.
 - If the employee fails to provide the employer **with enough information to determine whether the leave is FMLA-qualifying**, the leave may not be protected.
- You may choose to waive the employee's notice requirements.

QUESTION #5

- When does the official date of FMLA start for an employee? When the doctor deems it FMLA? The day after a night in the hospital?



ANSWER #5

- The date identified on the form is typically the first date.
- Ask for more information if the date is different than your information.

Sick Note

The Medical Center

Excused Absence

Date: February 13

Excused from: work class other

Notes: *Bitten by rabid blood-thirsty raccoon with crazy eyes.*

Signature: *Dr. Yuri Zhivago*



HELPFUL ADA AND FMLA RESOURCES

- FMLA Forms: <https://www.dol.gov/agencies/whd/fmla/forms>
- FMLA Fact Sheets:
<https://www.dol.gov/agencies/whd/fmla/factsheets>
- ADA Q&As: <https://www.eeoc.gov/laws/guidance/ada-questions-and-answers>
- COVID ADA Q&As: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- ADA: Medical Inquires and Exams:
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#4>

QUESTIONS



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THANK YOU TO OUR FRIENDS AT MASPA



THANK YOU TO ALL PARTICIPANTS!



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