

Title I: The Interactive Process & the Intersection Between FMLA, WC, and ADA

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About Me

Marine Corps veteran. Semper Fidelis!

Leadership roles since 1998. In Human Resources or similar roles since 2004.

Worked in both the public and private sectors.

MPS in HR/ER and a dual-major MBA in Business Intelligence and Project Management.

SPHR, SHRM-SCP, and IPMA-SCP certifications. Working on ADAC certification.

Active board member of Fredericksburg SHRM since 2019. Joined Virginia IPMA board this year.

Veteran Ambassador for the SHRM Foundation.

Volunteer with Hire Heroes to assist service members transition to civilian life.

Co-owner of Clowder Consultants and current role is the HR Manager of a regional jail.

Disclaimer

I'm not a lawyer.

This is not legal advice.

Seek appropriate counsel for your own situations.

Check with local and state laws before making any decisions.

This is a broad overview of the basics based on my many years of Human Resources experience with organizational compliance.

3

Objectives

Brief definition of commonly used words in this presentation.

Overview of how the FMLA, WC, and ADA overlap.

What an ADA accommodation is.

Recognizing an accommodation request.

Interactive process and best practices.

Documentation and confidentiality considerations.

Resources for further information.

Open it up to questions.

4

Definitions

Americans with Disabilities Act (1990) and the ADA Amendments Act (2008).

- ADA and ADAAA are federal laws that require employers with 15 or more employees to not discriminate against applicants and individuals with disabilities and, when needed, to provide reasonable accommodations to applicants and employees who are qualified for a job, with or without reasonable accommodations, so that they may perform the essential job duties of the position.

Reasonable accommodation

- A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process.

Qualified individual

- An individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Interactive process

- The employers and employees with disabilities who request accommodations **work together** to come up with accommodations.

5

Overlap of ADA, FMLA, and WC

FMLA and WC are not the focus of this presentation, but there are often overlaps between them.

They can run concurrently.

Each law has a different purpose.

Six points of intersection.

6

Purpose of Each Law

American With Disabilities Act (ADA) – Governed by the EEOC

- **Prohibits discrimination** against employees who are “qualified individual with a disability.”

Family and Medical Leave Act (FMLA) – Governed by the U.S. Department of Labor

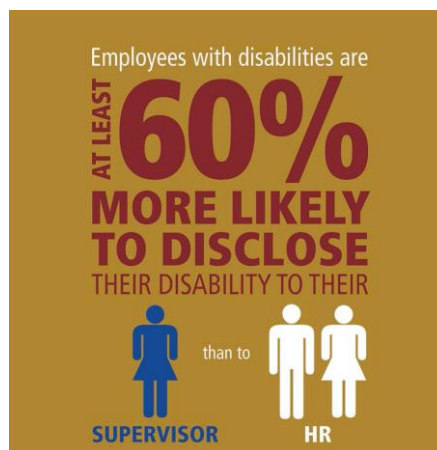
- Provides **unpaid job protected leave** to employees who need time off to care for themselves and their families.

Workers’ Compensation (WC) – Governed by State Workers’ Compensation Commission

- Provides **insurance** coverage that will compensate employees injured on the job for lost wages and medical care.

7

Who Knows?



8

The Interactive Process

9

Six Steps of the Interactive Process

1. Recognize the request for an accommodation.
2. Gather pertinent information.
3. Explore options for reasonable accommodations.
4. Choose an accommodation.
5. Implement the accommodation request.
6. Monitor the accommodation.

DOCUMENT! DOCUMENT! DOCUMENT!

10

Step 1: Recognizing the Request for an accommodation

Employee, or their representative, does not have to mention ADA, disability, or accommodation.

Once confirmed, refer to HR or ADA Coordinator

Which one is not an accommodation request?

- Example A: I need time off for my back surgery.
- Example B: Employee in a wheelchair mentions to their supervisor that the chair does not fit under their desk.
- Example C: Employee asks for a new chair because the current one is uncomfortable.
- Example D: Employee says they are having trouble getting to work in the morning due to a change in medication.

11

Step 2: Gather pertinent Information

Gather only enough information necessary to process the request.

- This could include documentation of the disability or need for accommodation.

Individual may not know the exact cause or possible solution.

- Example: Employee states they are having trouble concentrating or completing tasks.

Engage in a timely manner.

Ensure the individual fully understands the process and purpose.

12

Step 3: Explore Options for Reasonable Accommodations

Employer should be open to new ideas and ways of doing things.

Employee is best place to start for accommodation suggestions.

If employee uncertain, employer can ask employee's medical provider for additional information.

Use resources like Job Accommodation Network (JAN), vocational rehabilitation, and other disability-related organizations.

- Do not forget confidentiality rules when reaching out to external sources.

13

Additional Considerations

Federal / State / Local law considerations:

- COVID-19 regulations, mask mandates, etc.
- State and/or local paid leave programs.
- Company policies for paid leave and insurance coverage.

Focus on limitations that are specifically job-related.

- Job description and analysis.
- Time and frequency of work
- Health and safety risks, including environment factors

Undue hardship or direct threat concern?

14

Step 4: Choose an Accommodation

Once all accommodation options have been explored and identified, employer chooses what accommodation to implement.

If multiple options, consider the employee's preference.

- Employer can still make effective choice, such as low-cost accommodation.

Accommodation choice is not permanent. Can be changed later if ineffective or situation changes.

- If trying an accommodation on a trial period, ensure that everyone understands duration and next steps.

15

Step 5: Implement the Accommodation Request

If equipment is involved, ensure proper installation and employee is trained on its use.

If accommodation requires a policy modification, ensure certain managers or supervisor know of the change so they may implement it.

If reassignment was the solution, allow time for employee to acclimate to new position and/or environment.

If the implementation is temporary, be clear that it is temporary, why and for how long.

16

Step 6: Monitor the Accommodation

This step is often overlooked.

Accommodation could no longer be effective under the following conditions:

- Employee's limitations change.
- Workplace equipment changes.
- Job or workplace itself changes.
- Accommodation becomes an undue hardship for the employer.

Periodic check-ins are recommended.

Employee needs to continue communication if there are changes or problems.

- Ensure employee has a point of contact.

17

Reasons to Deny an Accommodation

The accommodation is not reasonable.

The individual is no longer qualified for the position.

The accommodation would cause an undue hardship.

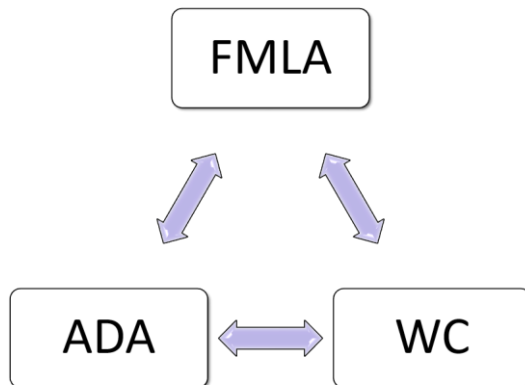
The accommodation or the individual would pose a direct threat to themselves or others.

18

Six Points of Intersection

Three Laws, Six Points of Contact

- Medical documentation
- Light Duty / Temporary Modified Duty
- Leave
- Benefits
- Fitness to Return
- Reinstatement / Return to Work



Medical Documentation

FMLA	WC	ADA
Documentation cannot exceed what is required by DOL medical certification.	Should only relate to employee's occupational injury or illness.	Medical inquiries or examinations must be job related and consistent with business necessity.
Employer can require additional information to clarify. On a case-by-case basis, a 2 nd or 3 rd opinion can be sought at employer's expense.	Typically includes injury report, appointments and progress updates, summary from physician, functional capacity evaluation.	Limited to how the disability limits the employee's ability to perform the essential functions of their role.
Certification is required within 15 business days. Employee's responsibility to return.	Standardized form in most states.	Should only be requested when limitations or impairments are not readily apparent.

21

Light Duty (LD) / Temporary Modified Duty (TMD)

FMLA	WC	ADA
Employee has the right to FMLA.	Should be offered, but accepting may reduce entitlements to wage replacement benefits.	Required to provide if it is a reasonable accommodation – temporary basis only.
Employer cannot require employee to use in lieu of leave.	Employee can reject if FMLA eligible, but may risk losing WC wage benefits.	Should always be considered if non-disabled employees receive same option.
	Clearly outline the duration and what LD/TMD modifications are approved.	Clearly outline the duration and what LD/TMD modifications are approved.

22

Leave

FMLA	WC	ADA
12 weeks of unpaid, job-protected leave within a 12-month period.	Amount of leave will vary based on state laws.	Unpaid leave is unspecified and based on medical professional's opinion and job duties.
Leave can be used in a block period or intermittently.	May be partially paid through wage replacement benefits.	Could be used if employee is not eligible for FMLA or FMLA entitlement has been exhausted.
Considered an absolute right. Employer nor employee can deny.	Employers can have leave policies for WC.	Extended or Intermittent leave in limited circumstances. Handle on a case-by-case basis.

23

Benefits

FMLA	WC	ADA
Health insurance must continue.	Generally not required unless FMLA is run concurrently.	Continuation of benefits should be the same as others on similar leave (non-disability related).
Additional benefits is determined by employer's policies.	Medical coverage will be provided through the claim.	Avoid discriminatory practices.
	Designating FMLA simultaneously will provide greater protection for the employee.	

24

Fitness to Return

FMLA	WC	ADA
Employee needs to be notified of fitness to return requirement (designation notice).	Often required by employer.	Request only if there is reason to believe the ability to perform the essential functions will continue to be limited due to the employee's condition.
Can only relate to the condition in which the employee used leave.	Should only related to the occupational injury or illness.	Case-by-case assessment.
Under the FMLA, the interactive process may be needed.	Be cautious of creating any policy requiring 100% healed. Engage in interactive process as appropriate.	

25

Reinstatement / Return to Work (RTW)

FMLA	WC	ADA
Employee must be restored to same job or "equivalent job."	Can RTW is a temporary role while recovering from occupational injury or illness.	No requirement to return to same role, though reassignment should be final option to consider.
Equivalent job means identical in terms of pay, benefits, shift, location, etc.	Consider ADA accommodations before offering new permanent position.	Conduct interactive process to determine accommodation needs.
Employee entitled to unconditional pay increases.		

26

Summary of Interplay of Leave Provisions

	FMLA	WC	ADA
Coverage	50+ employees within 75-mile radius	Most employers	15 or more employees
Eligibility	Employee worked 12 months with at least 1,250 hours with a qualifying serious health condition	Employee with a work-related injury or illness	Employees who are disabled, qualified, and can perform essential duties with or w/o reasonable accommodation
Length of Leave	Up to 12 weeks unpaid in 12-month period	No limit or specified time	No limit, based on physicians recommendation and job description
Medical Documentation	Certification from provider	Information specific to the work-related injury	Not required, but may be requested by employer
Light Duty / TMD	Cannot be required	Should be offered to eliminate ERs obligation to pay wage benefits	Must be allowed if reasonable and does not create undue hardship
RTW / Fitness for Duty	Must give notice if RTW is needed with designation notice	Typically required	May be requested on reasonable belief that ability to perform job may be impaired by medical condition

27

What happens to WC benefits if an Employee declines LD while on FMLA leave?

Employee has absolute right to decline a light duty job while on FMLA leave. Employee does not have the same right under workers' comp or the ADA.

However, as a result of turning down light duty, the employee risks losing workers' comp benefits. Similarly, a worker that turns down a reasonable accommodation risks job protection under the ADA.

When workers' comp benefits cease, the employer may require use of accrued unpaid leave.

28

Resources

ADA Employment Questions

Equal Employment Opportunity
Commission
P.O. Box 7033
Lawrence, Kansas 66044
(800) 669-4000 (Voice)
(800) 669-6820 (TDD)
[EEOC Website](#)

ADA Public Accommodations

Department of Justice
Office on the Americans with
Disabilities Act
Civil Rights Division
P.O. Box 66118
Washington, DC 20035-6118
(202) 514-0301 (Voice)
(202) 514-0381 (TDD)
(202) 514-0383 (TDD)

Job Accommodation Network (AskJAN)

Job Accommodation Network
PO Box 6080
Morgantown, WV 26506-6080
(800)526-7234 (V) in the United
States
(800)ADA-WORK [(800)232-9675]
(V) in the United States
(877)781-9403 (TTY) in the United
States
(304)216-8189 via Text
janconsultants via Skype
[AskJAN website](#)

29

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30

Questions

