

# **Top Tips For Managing Difficult Leaves and Accommodations**

Steve Gutierrez and Mark Wiletsky

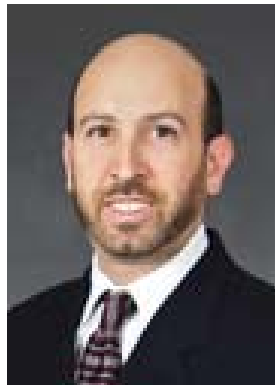
Holland & Hart LLP

Megan Holstein – ReedGroup

# Today's Speakers



**Steve Gutierrez – Holland & Hart**



**Mark Wiletsky – Holland & Hart**



**Megan Holstein – ReedGroup**

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# Agenda

Pregnancy  
Accommodations

Limiting FMLA  
Abuse

Interactive Process  
for Disability  
Accommodations

When FMLA Ends  
and ADA Begins

Medical Marijuana  
Considerations

# Pregnancy - It's all in the perspective!

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**“Your baby is the only person in this office  
who doesn’t annoy me, so I’m awarding  
him Employee Of The Month .”**

# FMLA – Pregnant Employee

- **Leave reasons:**
  - Employee's serious health condition, including pregnancy-related conditions
  - Prenatal check-ups
  - Participate in adoption or foster care placement process
  - Bonding with newborn – must be taken within 12 months of birth or adoption
- **Can be taken as intermittent, reduced schedule, or continuous leave**
  - Except, bonding is only continuous leave unless approved by employer

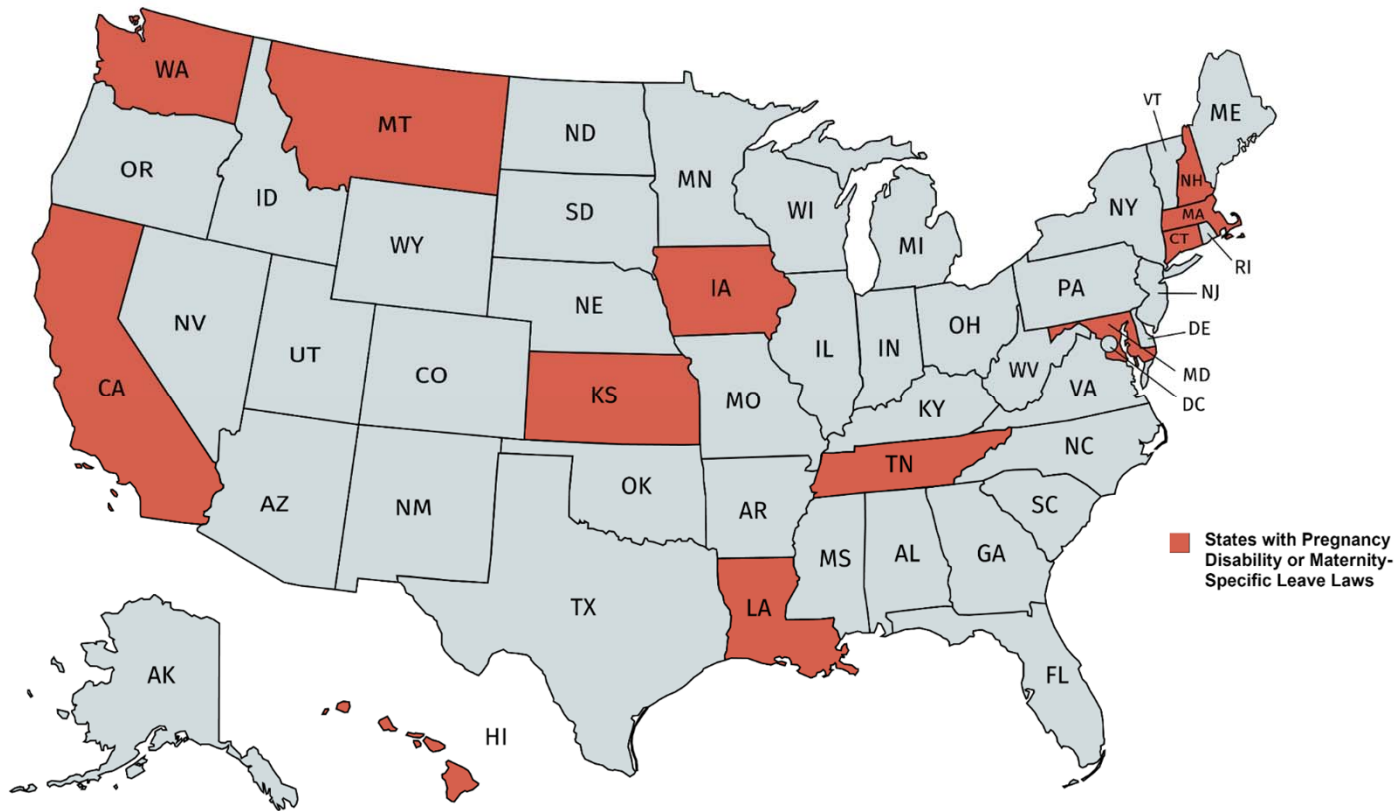
# Pregnancy Accommodations

- Pregnancy, by itself, is not a disability under the ADA
- But, impairments resulting from pregnancy may be a disability (e.g., gestational diabetes)

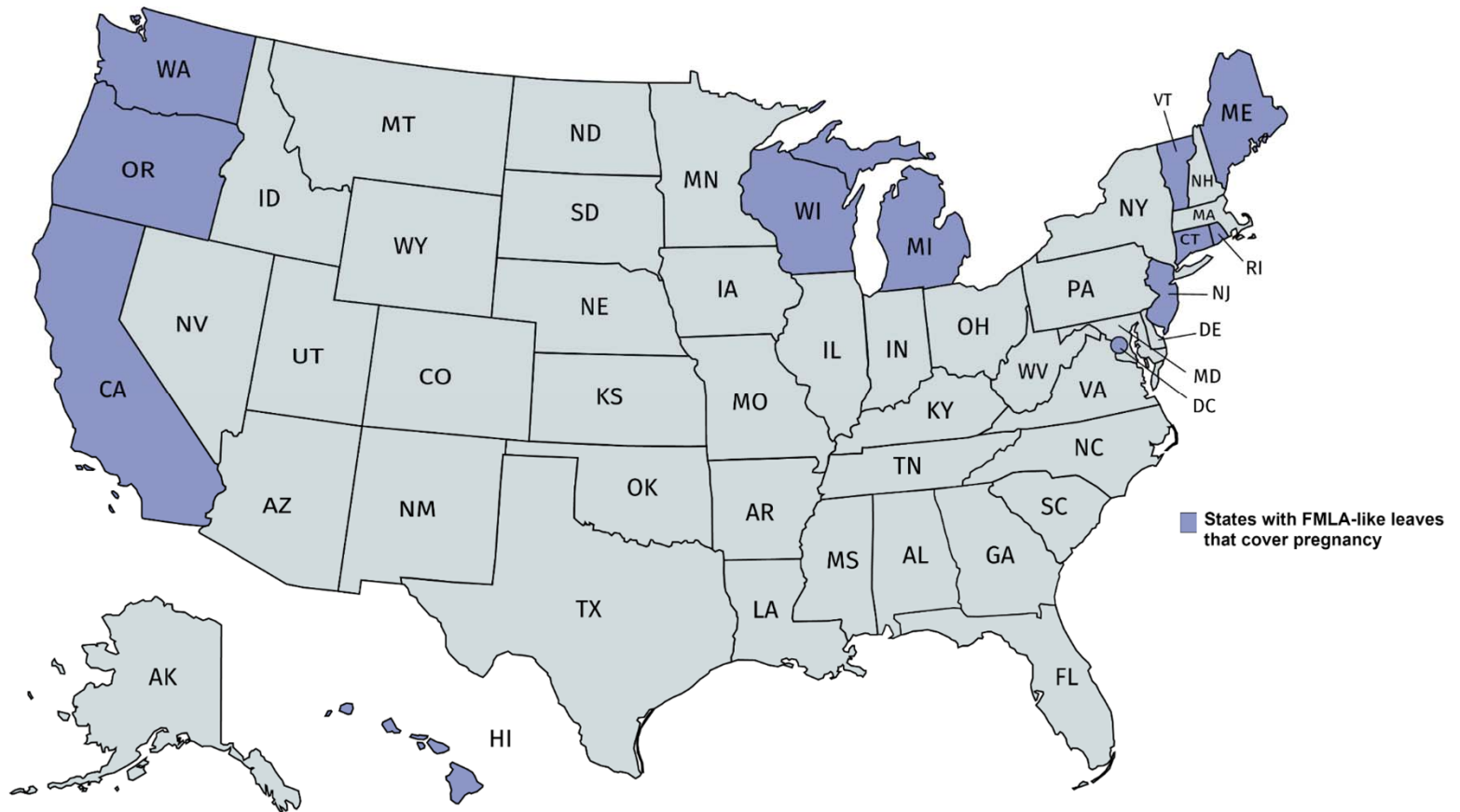


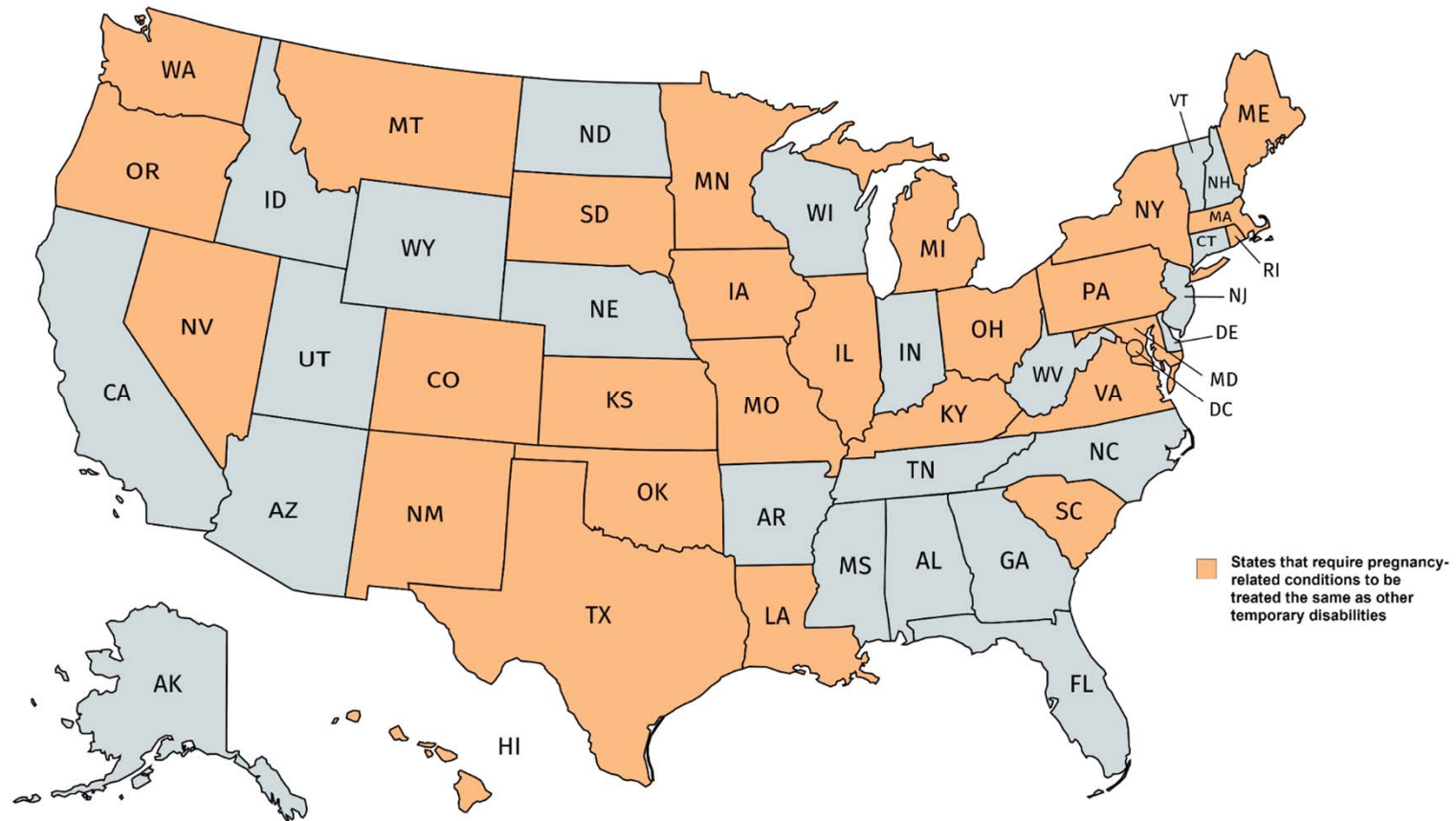












	Accommodation Laws	Disability/Maternity Leave	Anti-Discrimination	Treat same as other temp. disability
Alabama				
Alaska			Alaska Stat. § 18.80.220.	
Arizona			Ariz. Rev. Stat. § 41-1463(B)	
Arkansas			Ark. Code §§ 16-123-102, 107.	
California	Cal. Gov't Code § 12945(3).	Cal. Gov't Code § 12945(1)-(2).	Cal. Gov't Code §§ 12926, 12940.	
Colorado	Colo. Rev. Stat. 24-34-402.3.		Colo. Rev. Stat. § 24-34-402; Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358 (Colo. 1988).	3 Colo. Code Regs. § 708-1:80.
Ct		Conn. Gen. Stat. §§ 46a-60(a)(7)(B)-(G).	Conn. Gen. Stat. Sec. § 46a-60(a)(7)(A).	
Delaware	Del. Code Ann. tit. 19, §§ 710-11.		Del. Code Ann. tit. 19, §§ 710-11.	
DC	D.C. Code § 32-1231.03.		D.C. Code §§ 2-1401.05(a), 1401.11.	D.C. Code § 2-1401.05(b).
Florida			Fla. Stat. § 760.10.	
Georgia				

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Hawaii	Haw. Code R. § 12-46-107.	Haw. Code R. § 12-46-107.	Haw. Rev. Stat. §§ 378-1, 378-2; Haw. Code R. § 12-46-107.	Haw. Rev. Stat. § 378-1.
Idaho			Idaho Code § 67-5909; Stout v. Key Training Corp., 144 Idaho 195, 158 P.3d 971 (2007).	
Illinois	775 Ill. Comp. Stat. 5/2-102(I)-(J); Ill. Adm. Code tit. 56, § 5210.110.		775 Ill. Comp. Stat. 5/2-102(I); Ill. Adm. Code tit. 56, § 5210.110.	775 Ill. Comp. Stat. 5/2-102(I)-(J); Ill. Adm. Code tit. 56, § 5210.110.
Indiana				
Iowa		Iowa Code § 216.6(2).	Iowa Code § 216.6(2).	Iowa Code § 216.6(2).
Kansas		Kan. Admin. Regs. § 21-32-6.	Kan. Stat. Ann. § 44-1009; Kan. Admin. Regs. § 21-32-6.	Kan. Admin. Regs. § 21-32-6.
Kentucky			Ky. Rev. Stat. §§ 344.030, 344.040.	Ky. Rev. Stat. § 344.030.
Louisiana		La. Rev. Stat. §§ 23:341-342.	La. Rev. Stat. § 23:342.	La. Rev. Stat. §§ 23:341-342.
Maine			Me. Rev. Stat. tit. 5, §§ 4572, 4572-A.	Me. Rev. Stat. tit. 5, § 4572-A.
Maryland	Md. Code, State Gov't § 20 — 609.	MD Code Lab & Emp § 3-1202(a).	Md. Code, State Gov't § 20 — 606.	Md. Code, State Gov't § 20 — 609.

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Massachusetts		Mass. Gen. Laws ch. 149, § 105 d.	Mass. Gen. Laws ch. 151B, § 4; Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160 (1978).	Mass. Gen. Laws ch. 151B, § 4; 804 Mass. Code Regs. 8.01; Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 Mass. 160 (1978).
Michigan			Mich. Comp. L. § 37.2202.	Mich. Comp. L. § 37.2202.
Minnesota	Minn. Stat. § 363A.08.		Minn. Stat. § 363A.03(42); Minn. Stat. § 363A.08.	Minn. Stat. § 363A.08.
Mississippi				
Missouri			Mo. Rev. Stat. § 213.055; Mo. Code Regs. Ann. tit. 8, § 60-3.040(16).	Mo. Code Regs. Ann. tit. 8, § 60-3.040(16)(B).
Montana		Mont. Code Ann. § 49-2-311.	Mont. Code Ann. § 49-2-310.	Mont. Admin. R. 24.9.1206.
Nebraska	Neb. Rev. Stat. § 48-1102(11), 1102(18).		Neb. Rev. Stat. §§ 48-1102, 1104, 1107.01-02.	
Nevada			Nev. Rev. Stat. Ann. § 613.335.	Nev. Rev. Stat. § 613.335.
New Hampshire		N.H. Rev. Stat. Ann. § 354-A:7.	N.H. Rev. Stat. Ann. § 354-A:7.	
New Jersey	N.J. Stat. Ann. § 10:5-3.1.	N.J. Stat. Ann. § 34:11B-4.	N.J. Stat. Ann. § 10:5-12.	

	Accommodation Laws	Disability/Maternity Leave	Anti-Discrimination	Treat same as other temp. disability
New Mexico			N.M. Stat. Ann. § 28-1-7; N.M. Code R. § 9.1.1.7(HH)(2).	N.M. Code R. § 9.1.1.7(HH)(2).
New York	Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd., 41 N.Y.2d 84, 359 N.E.2d 393 (1976). N.Y. Executive Law §§ 292(21-e) and (21-f), 296(3).		N.Y. Exec. L. §§ 292, 296; Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 81 N.Y.2d 211 (1993); Mittl v. N.Y. State Div. of Human Rights, 100 N.Y.2d 326 (2003).	Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd., 41 N.Y.2d 84, 359 N.E.2d 393 (1976).
North Carolina				
North Dakota	N.D. Cent. Code Ann. § 14-02.4-03.		N.D. Cent. Code Ann. §§ 14-02.4-02, 14-02.4-03.	
Ohio			Ohio Rev. Code §§ 4112.01, 4112.02.	Ohio Rev. Code §§ 4112.01.
Oklahoma			Okla. Stat. tit. 25, §§ 1301, 1302.	Okla. Stat. tit. 25, § 1301; Okla. Admin. Code § 335:15-3-9. Okla. Admin. Code § 335:15-3-9.
Oregon			Or. Rev. Stat. § 659A.029, 659A.030.	Or. Rev. Stat. § 659A.029.
Pennsylvania			43 Pa. Stat. § 955; 16 Pa. Code § 41.102.	43 Pa. Stat. § 955; 16 Pa. Code § 41.103.
Rhode Island	R.I. Gen. Laws § 28-5-7.4(a)(1) and (a)(3).		R.I. Gen. Laws §§ 28-5-6, 28-5-7.	R.I. Gen. Laws § 28-5-6.
South Carolina			S.C. Code Ann. § 1-13-80; S.C. Code Ann. § 1-13-30.	S.C. Code Ann. § 1-13-30.



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South Dakota				S.D. Admin. R. 20:03:09:12.
Tennessee		Tenn. Code Ann. § 4-21-408.	Tenn. Code Ann. §§ 4-21-101, 4-21-401; see, e.g., Spann v. Abraham, 36 S.W.3d 452 (Tenn. Ct. App. 1999); Castro v. TX Direct, LLC, W2012-01494-COA-R3CV, 2013 WL 684785 (Tenn. Ct. App. Feb. 25, 2013); Pierce v. City of Humboldt, W2012-00217-COA-R3CV, 2013 WL 1190823 (Tenn. Ct. App. Mar. 25, 2013).	
Texas			Tex. Lab. Code Ann. §§ 21.051, 21.106.	Tex. Lab. Code Ann § 21.106.
Utah	Utah Code § 34A-5-106(1)(g).		Utah Code § 34A-5-106.	
Vermont			Vt. Stat. tit. 21, § 495; Lavalley v. E.B. & A.C. Whiting Co., 166 Vt. 205, 692 A.2d 367 (1997).	
Virginia			Va. Code § 2.2-3903.	Vt. Stat. Ann. tit. 21, § 472.
Washington		Wash. Admin. Code § 162-30-020.	Wash. Rev. Code § 49.60.030; Wash. Admin. Code § 162-30-020; Hegwine v. Longview Fibre Co., Inc., 162 Wash. 2d 340, 344, 172 P.3d 688, 691 (2007).	Wash. Admin. Code § 162-30-020.
West Virginia	W. Va. Code § 5-11B-2.		W. Va. Code § 5-11-9; Frank's Shoe Store v. W. Virginia Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986).	
Wisconsin			Wis. Gen. Stat. §§ 111.31, et seq.	
Wyoming			Wyo. Stat. § 27-9-105.	

# CO Pregnancy Accommodation Law

Amends CADA

Effective 8/10/16

Interactive  
process required

Reasonable  
accommodations

Notice  
Requirements

# Colorado's New Law

## Examples of reasonable accommodations:

- More frequent or longer breaks
- Obtaining or modifying equipment or seating
- Temporary transfer to a less strenuous or hazardous position, if available (with return to current position after pregnancy)
- Light duty, if available
- Job restructuring
- Limiting lifting
- Assistance with manual labor
- Modified work schedules

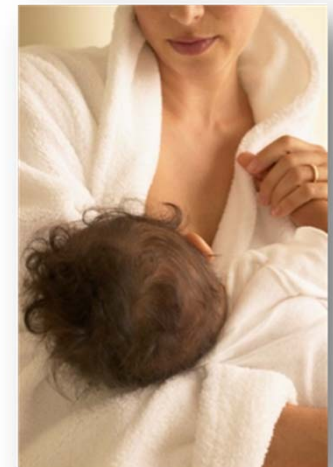
# Tough Accommodation Issues

Difficult pregnancy accommodation decisions may involve:

- **Leave**
  - can't force pregnant employee to take leave that is not requested
  - non-FMLA leave: provide on equal basis as to non-pregnant employees
- **Light duty policy**
  - must offer on equal basis as other non-pregnant employees

# Lactation Laws

- **Federal ACA law**
  - Employers with 50+ employees must provide reasonable, unpaid breaks for up to one year following birth
  - Must provide a place, other than bathroom, that is shielded from view and free from intrusion by others
- **Colorado nursing mothers law**
  - All employers must provide reasonable unpaid breaks (or allow during paid breaks, or both) for up to two years after birth
  - Must make reasonable efforts to provide a private room or location, other than a toilet stall



# Limiting FMLA Abuse



# Using Medical Certifications

- Seek clarification for incomplete or illegible certifications
- Seek second certification from health care provider where:
  - vague info about medical condition
  - relying on another health care provider for condition
  - *Bento v. City of Milford* (D. Conn. Sept. 30, 2016)



# Recent Cases

## Bento v. City of Milford

- OK to ask for medical certification from psychiatrist – primary care doc referenced treating psychiatrist – OK to cure ambiguities.
- OK for employer to set forth specific actions needed to resolve cert.
- OK to delay return to work for specific FFD cert.

Case No. 3:13-CV-01385 (D. Ct. 9/30/16)





# Recertifications

- No more than every 30 days
- If original was for longer than 30 days, must wait until that period expires
- At least every 6 months, regardless of duration
- If employee requests extension of leave
- If you have reason to doubt validity of reason for leave
- If circumstances significantly change

# Recent Cases

## Sharif v. United Airlines, Inc.

- Terminated employee for allegedly misusing medical leave during a vacation in South Africa and Italy and later lying about it



- Employee had one day of work in the middle of a long vacation and couldn't find anyone to cover his shift so called in for one day of FMLA intermittent time, based on an existing certification for anxiety

2016 WL 362251 (4th Cir. No. 15-1747, 10/31/16)

## Recent Cases

### **Richlich v. Spectrum Health Systems Inc. (D.C. Mich. 2016)**

- Employer became aware of medical marijuana use via medical certification for FMLA leave. Took a drug test (negative) and was required to resign or be terminated
- Employee sued medical provider – medical information was unnecessary for FMLA and violated HIPAA – physician's office was negligent in disclosing to employer
- Case filed 10/24/16 – no decision yet

# Interactive Process

Discuss with employee

Evaluate essential job  
functions

Identify  
limitations/restrictions

# Interactive Process continued

Determine range of possible accommodations

Evaluate, considering undue hardship

Tell employee and document

# Written Documentation

**Employer may require documentation needed to establish that a person has an ADA disability and that disability necessitates a reasonable accommodation**

- Should come from an appropriate health care or rehabilitation professional**
- Can't request if disability and need for accommodation are obvious or if individual has provided employer with sufficient information**
- Keep it separate and confidential**

# Undue Hardship

- Not required to provide a reasonable accommodation that will result in an undue hardship to the company
- An “undue hardship” generally means significant difficulty or expense incurred by the employer
- Expense alone, however, not definitive!

# No Direct Threat

- May exclude individuals who pose a direct threat to the health or safety of themselves or others
- Requires a significant risk of substantial harm
- Cannot be based on fear, ignorance, assumptions, etc.
- If threat can be eliminated through a reasonable accommodation, must do so



# Responding to an Accommodation Request

Respond  
promptly

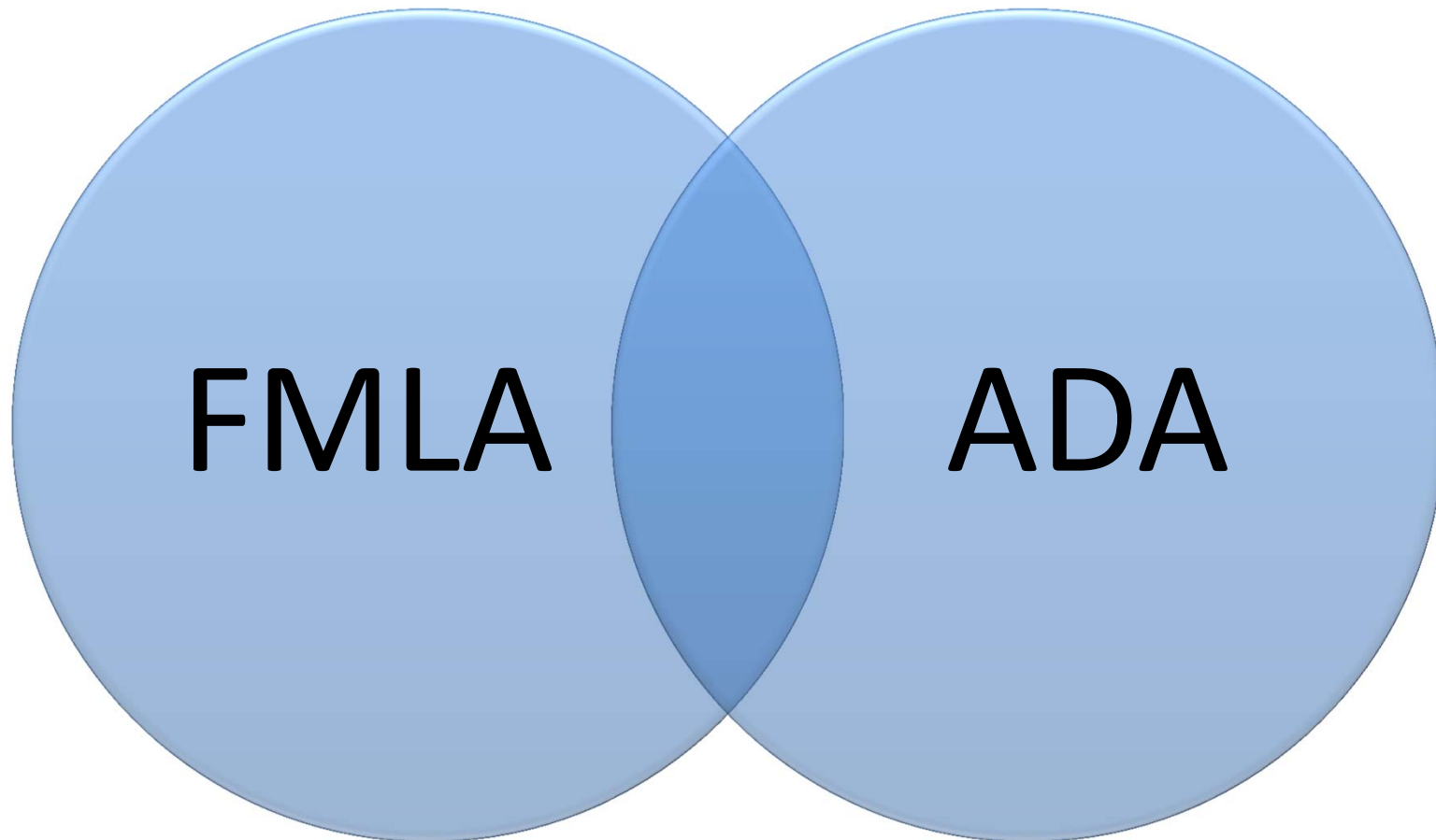
Be interactive  
with  
employee

Keep medical  
information  
confidential

Be patient –  
process can  
take awhile

Document

# Dealing With Both FMLA and ADA



# Overlap

## Reassignment

- FMLA: may reassign employee on intermittent or reduced schedule
- ADA: may reassign if employee unable to perform essential functions with or without reasonable accommodation

## Light Duty

- FMLA: cannot force light duty if employee hasn't exhausted FMLA leave entitlement
- ADA: may be a reasonable accommodation

## Overlap

### Leave

- FMLA: must be provided to eligible employees
- ADA: leave can be a reasonable accommodation

## When FMLA Ends . . .

If employee cannot return after 12 weeks FMLA is exhausted:

- Does employee have a disability?
  - If no disability, no job protections (unless provided by state laws or your own policies)
  - If disabled, employee may be entitled to additional accommodations

# When FMLA Ends For Disabled Worker

- Engage in interactive process after exhaustion of FMLA leave to determine possible reasonable accommodations
- May need to offer additional time off
  - Leave need not be for indefinite time
- Example: employee with cancer uses 12 weeks of FMLA leave for treatment; at conclusion, needs another month to regain strength to return to work; continuing leave is likely a reasonable accommodation, absent undue hardship

# Difficult Decisions

- Return-to-work date continues to be pushed back – how much is enough?
- Employee returns for short periods of time but then needs to take more time off - ongoing problem
- Are you setting a precedent that must be offered to other employees?

# Marijuana – Accommodations?





# Illegal Under Federal Law

- Marijuana remains illegal under Controlled Substances Act
- Considered a Schedule I drug – most dangerous of narcotics

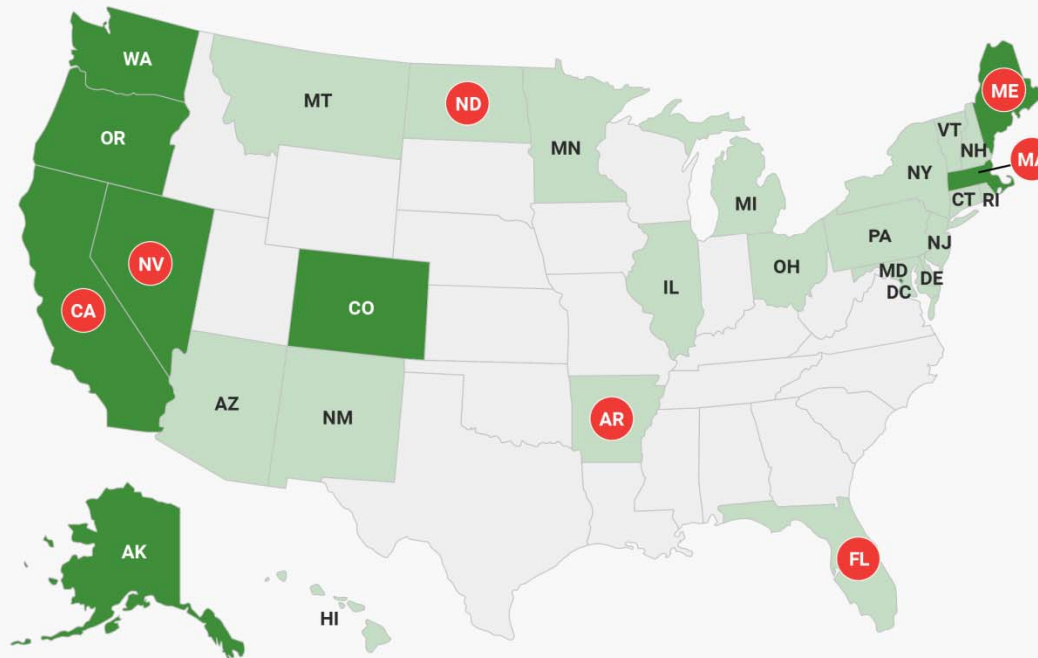


# Legalized Marijuana

BUSINESS INSIDER  
ELECTION ★ 2016

## STATES WHERE MARIJUANA IS LEGALIZED

■ Legalized marijuana   ■ Legalized medical marijuana   ● Legislation passed Nov. 2016



SOURCES: Politico; Reuters

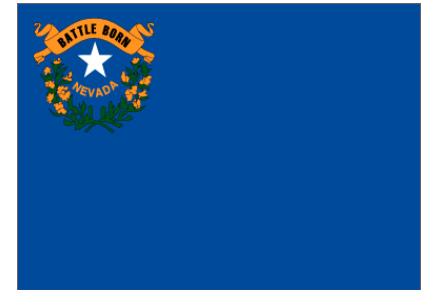
# Anti-Discrimination Provisions

At least eight states include some type of ban on employer discrimination against legal users of medical marijuana:

- Alaska
- Arkansas
- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Minnesota
- Nevada
- New York
- Pennsylvania
- Rhode Island

# Disability Accommodation

- Some states with legalized medical marijuana require an accommodation
  - Nevada: employer must reasonably accommodate the medical needs of an employee who uses medical marijuana, absent undue hardship, direct threat of danger or prohibit employee from fulfilling duties
  - New York: “certified patient” under NY medical marijuana law deemed disabled



## Colorado – Case on Accommodation

- Curry v. MillerCoors, Inc.
- Federal court rejected a terminated employee's claim that his employer discriminated against him on the basis of his disability (hepatitis C and osteoarthritis) when it discharged him for testing positive for marijuana

*Curry v. MillerCoors, Inc.*, No. 12-cv-02471 (D. Colo. Aug. 21, 2013).

# Lawful Activities Laws

- Some states, such as Colorado, prohibit employers from firing employees for off-duty use of a lawful product or engaging in other lawful activities
- But, Colorado Supreme Court upheld the termination of an employee who tested positive for marijuana in random test, ruling his off-duty, off-premises use of medical marijuana was not protected under the CO lawful activities statute as it is still illegal under federal law (*Coats v. Dish Network, LLC*)

# Bottom Line on Marijuana

Generally:

- OK to have drug-free workplace policy
- OK to drug test
- OK to discipline/fire for on-duty or on-premises use, or possession



Check applicable state law regarding possible anti-discrimination and accommodation requirements before acting on positive drug test for off-duty use

# QUESTIONS?

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