


# MANAGING LEAVES UNDER THE ADA, FMLA, AND WORKERS' COMP

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## TODAY'S PRESENTER

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## WE WILL EXPLORE:

- Limiting FMLA Abuse
- Disability Accommodations
- Interactive Process
- Overlap with Workers' Comp
- When FMLA Ends and ADA Leave Begins
- Effect of Medical Marijuana on Leaves and Accommodations



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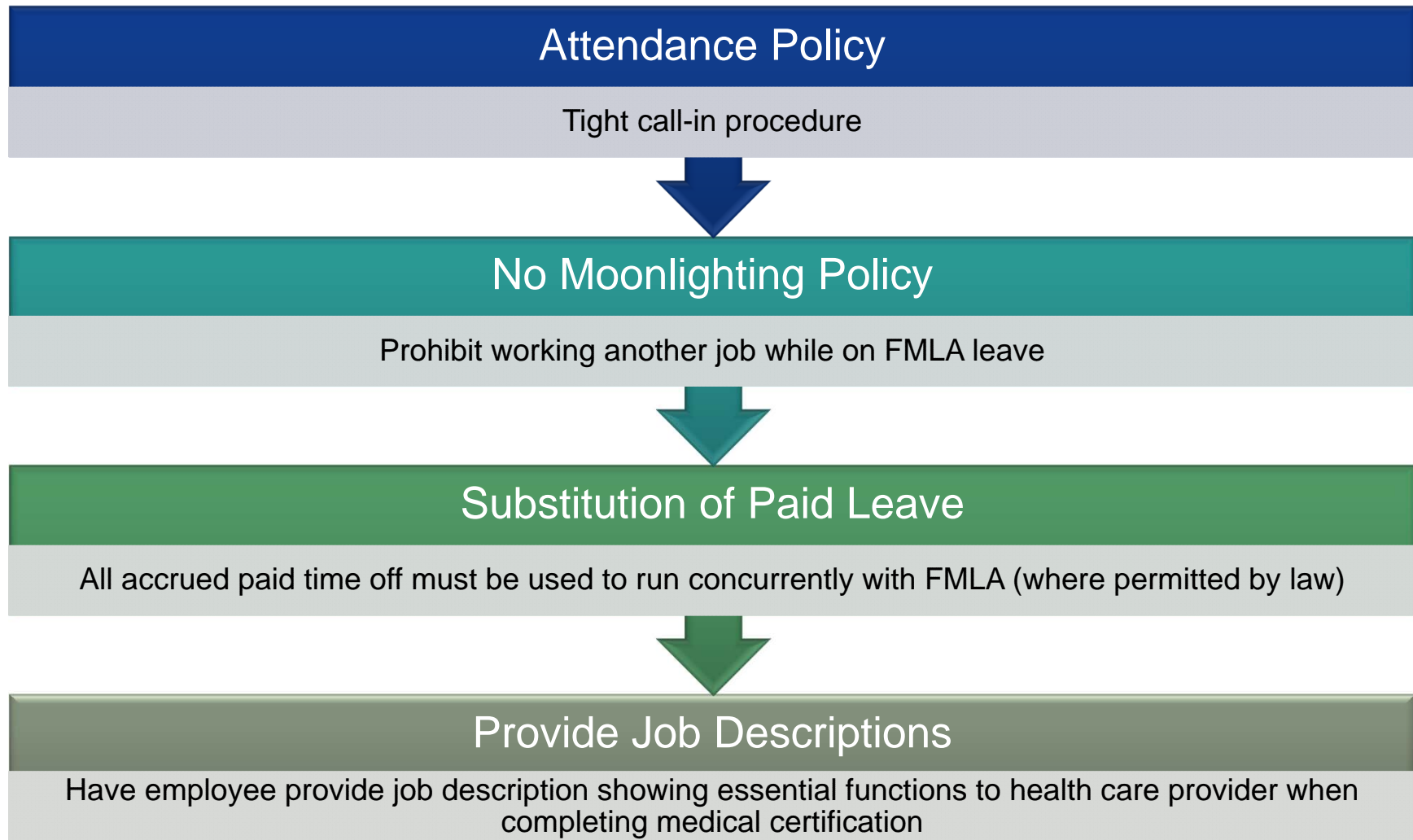
# LIMITING FMLA ABUSE



## RED FLAGS FOR ABUSE

- Use of intermittent leave increases over time
- Use of leave exceeds what was anticipated in certification
- Pattern of use suggests abuse
- New information suggests fraudulent use of leave (e.g., co-worker sees employee skiing while on leave for a bad back)

# TIPS FOR LIMITING ABUSE - POLICIES



## TIPS FOR LIMITING ABUSE

### Use Medical Certifications

Clarify incomplete  
or illegible  
certifications

Seek second  
opinion



## SECOND (AND THIRD) OPINIONS

- Permitted when employer “has reason to doubt the validity of a medical certification”
- Employee is provisionally entitled to FMLA leave while second/third opinion sought
- Employer may select health care provider to furnish second opinion, but cannot be employed by employer
- Third opinion permitted if first two differ – becomes binding
- Second/third opinions at employer’s expense

## TIPS FOR LIMITING ABUSE

### Recertifications:

- 30-day rule: No more often than every 30 days
- If original certification was for longer than 30 days, must wait until that period expires
- At least every 6 months, regardless of duration



## TIPS FOR LIMITING ABUSE

### Recertifications in less than 30 days:

- If employee requests extension of leave
- If circumstances significantly change
  - E.g., medical certification stated that 1-2 days leave needed whenever employee suffers migraine, but employee's absences for migraines last 4-5 days each
- If you have reason to doubt validity of reason for leave
  - E.g., employee on 4 weeks of FMLA leave for knee surgery is seen playing soccer

## ADA REASONABLE ACCOMMODATIONS

- Must accommodate a “known” disability
  - obvious disability (e.g., in a wheelchair, etc.)
  - upon request by applicant or employee – No “magic words” must be used
- Triggers Interactive Process



# INTERACTIVE PROCESS FOR DISABILITIES

Discuss with employee

Evaluate essential job functions

Identify limitations/restrictions

## INTERACTIVE PROCESS CONTINUED

Determine range of possible accommodations

Evaluate, considering undue hardship and direct threat

Tell employee and document

## EXAMPLES OF REASONABLE ACCOMMODATIONS

- Change to job application process
- Leave of absence
- Part-time or modified job schedule
- Job restructuring
- Acquiring or modifying equipment or the workplace
- Changing non-essential policies
- Reassignment to a vacant position



## RESPONDING TO AN ACCOMMODATION REQUEST

Respond promptly

Be interactive with employee

Keep medical information confidential

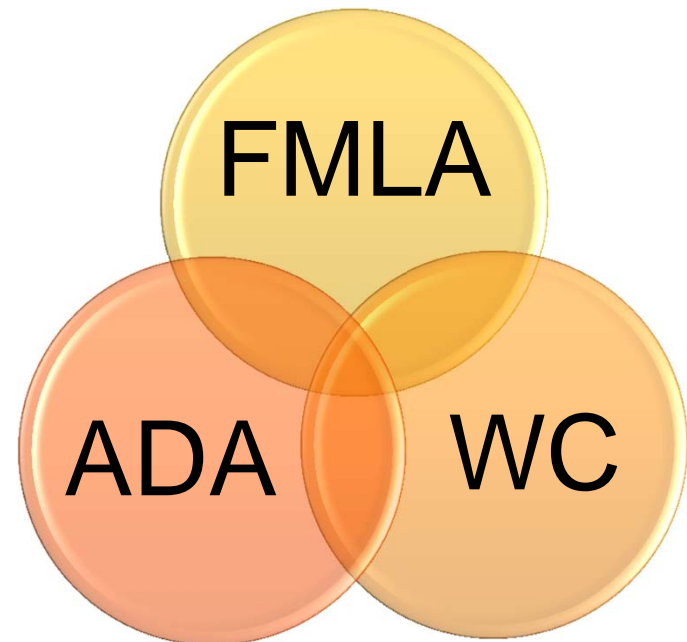
Be patient – process can take awhile

Document



# ADA, FMLA & WORKERS' COMP

- 3 independent laws
- Some overlap of coverage
- Different benefits and protections



## DISTINGUISHING WHEN EACH APPLIES

### ADA

- Employers with 15+ employees
- Disability: Physical or mental impairment
- “Regarded as” disabled
- Record of disability

### FMLA

- Employers with 50+ employees
- Birth/placement of a child
- Employee’s serious health condition
- Family member’s serious health condition
- Qualifying military exigencies
- Service member or veteran care

### Workers’ Comp

- All employers with 1+ employee
- On-the-job injury
- Occupational diseases

# ADA, FMLA AND WC – WHICH APPLIES?

- ▶ **Did Health Condition Arise from an on-the-Job Illness or Injury?** If No, WC Doesn't Apply
- ▶ **Is Employee's Health Condition and Need for Leave FMLA Qualifying?** If No, FMLA Doesn't Apply
- ▶ **Is Employee Substantially Limited from Major Life Activity by Health Condition?** If No, ADA Doesn't Apply
- ▶ **Is Disabled Employee Qualified to Perform Essential Functions of Job with or without Accommodations?** If No, ADA Doesn't Apply

# EEOC – LEAVES AS ACCOMMODATION

## Employer-Provided Leave and the Americans with Disabilities Act<sup>[1]</sup>

(May 9, 2016)

### Introduction

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities.

A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."<sup>[2]</sup> That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.<sup>[3]</sup> As with any other accommodation, the goal of providing leave as an accommodation is to afford employees with disabilities equal employment opportunities.



## WHEN FMLA ENDS . . .

If employee cannot return after 12 weeks of 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 to determine possible reasonable accommodations
- May need to offer additional time off
  - Leave need not be for indefinite time



## PARAMETERS OF LEAVE AS AN ACCOMMODATION

- Multi-month leave is unreasonable (Seventh Circuit)
- Short term or intermittent leave probably reasonable (Seventh, Tenth, and other circuits)
- Six month leave (provided under employer's policy) need not be extended as an accommodation (Tenth circuit)
- EEOC: definite period of leave can be reasonable accommodation if would enable employee to return to work

## 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?



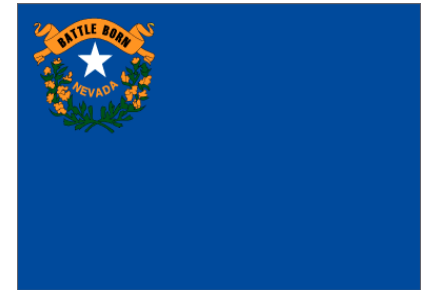
## ANTI-DISCRIMINATION PROVISIONS

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

- Arizona
- Connecticut
- Delaware
- Illinois
- Maine
- Nevada
- New York
- Minnesota

## 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



## MASSACHUSETTS CASE (2017)



- Employee suffered from Crohn's disease
- Permitted to use medical marijuana under Massachusetts law
- Fired under her employer's policy when she tested positive for marijuana
- MA Supreme Court: employee can sue employer for disability discrimination
  - the fact that marijuana use violates federal law does not make off-site use per se unreasonable as a disability accommodation

## COLORADO CASE (2013)



- Employee suffered from hepatitis C, osteoarthritis and pain
- He used medical marijuana off-duty in compliance with CO law
- He was fired after he tested positive which violated employer's written drug policy
- Federal court rejected his claim for disability discrimination under Colorado law
  - “anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct”

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

## WHAT DO YOU THINK?

- Hospital has very detailed attendance policy, including specific call-in procedures
- RN was approved for intermittent FMLA leave for migraines but failed to meet call-in requirement
- Can the hospital discipline or terminate her based on attendance policy for absences that otherwise qualify as FMLA leave?

## ANSWER THOSE EMAILS?

- Physician's assistant broke her foot and can't work while on crutches
- Hospital asks if she can keep up with her emails from home, including requests for Rx refills, responding to patient calls, reviewing lab tests, and sending messages
- PA didn't object
- Interference with FMLA leave?



THANK YOU!

QUESTIONS?

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