



# ADA, FMLA, WC: Understanding The Bermuda Triangle of Employment Law

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Presented with our trusted partner **CATAPULT**



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# Agenda

1. What is FMLA and does it apply to your practice?
2. What to consider when FMLA is not at play (ADA)
3. How to incorporate Workers' Comp and other salary replacement programs
4. When leaves should run concurrently
5. Scenarios to test our knowledge
6. Q & A



# Categories of Leave of Absence

Leaves of absence fall into 2 categories:

- **Job Protection**
  - FMLA
  - ADA (with a twist)
- **Salary Replacement**
  - Workers' Compensation
  - STD/LTD
  - PTO



# Laws

## Family Medical leave Act (FMLA)

- Public Employers, Private Employers with 50+ employees
- Job-protected unpaid leave for eligible reasons set forth in statute

## Americans with Disabilities (ADA)

- 15+ employees
- 2008 ADA AAA
- short term leave may be an accommodation

## Workers' Compensation

- 3+ employees
- Compensatory/medical/death benefits for workplace injury or illness

## Pregnant Workers Fairness Act (PWFA)

- 15+ employees
- New in 2023; requires employers to provide reasonable accommodations for a workers know limitation related to pregnancy, childbirth or related medical conditions up to undue hardship





# Covered Employers FMLA

- **Private-sector employers** who:
  - Employ 50 or more employees in 20 or more workweeks in either the current calendar year or the previous calendar year, within a 75-mile radius
- **Public agencies** (including Federal, State, and local government employers, regardless of the number of employees)
- **Local educational agencies** (including public school boards, public elementary and secondary schools, and private elementary and secondary schools, regardless of the number of employees)

# Covered Employees—FMLA

- Employees are eligible if:
  - they work for a covered employer for at least 12 months,
  - have at least 1,250 hours of service with the employer during the 12 months before their FMLA leave starts, and
  - work at a location where the employer has at least 50 employees within 75 miles
- Can be for self-illness or illness of family member
  - Parent (not in-laws);
  - Child (under age 18 or incapable of self-care)
  - In loco parentis (acting or acted as parent)
  - Spouse



# Reasons for FMLA Leave

- Serious health condition of employee, child, spouse, or parent
- Birth/placement of child for adoption
- Qualifying exigency leave
- Military caregiver leave (26 weeks)



# What Is a Serious Health Condition?

An illness, injury, impairment, or physical or mental condition that involves:

- Inpatient care (overnight stay in a hospital OR subsequent treatment in connection with that stay)
- Incapacity plus treatment
  - Be treated by a health care provider within 7 days of the incapacity AND
  - Be prescribed a course of treatment OR
  - Have at least one other visit with a health care provider within 30 days

# FMLA Requirements

- Posters!
- Notices:
  - Rights and Responsibilities (WH-381)
  - Certifications (WH-380 E, WH-380 F)
  - (WH-384, WH-385 and WH-385 v are military related)
  - Designation (WH-382)-send within 7 days of receipt

## Your Employee Rights Under the Family and Medical Leave Act

### What is FMLA leave?

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees with **job-protected leave** for qualifying family and medical reasons. The U.S. Department of Labor's Wage and Hour Division (WHD) enforces the FMLA for most employees.

Eligible employees can take up to **12 workweeks** of FMLA leave in a 12-month period for:

- The birth, adoption or foster placement of a child with you.
- Your serious mental or physical health condition that makes you unable to work.
- To care for your spouse, child or parent with a serious mental or physical health condition, and
- Certain qualifying reasons related to the foreign deployment of your spouse, child or parent who is a military servicemember.

An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness may take up to **26 workweeks** of FMLA leave in a single 12-month period to care for the servicemember.

You have the right to use FMLA leave in **one block of time**. When it is medically necessary or otherwise permitted, you may take FMLA leave **intermittently in separate blocks of time, or on a reduced schedule** by working less hours each day or week. Read Fact Sheet #286McI for more information.

FMLA leave is **paid leave**, but you may choose, or be required by your employer, to use any employer-provided paid leave if your employer's paid leave policy covers the reason for which you need FMLA leave.

### Am I eligible to take FMLA leave?

You are an **eligible employee** if **all** of the following apply:

- You work for a covered employer.
- You have worked for your employer at least 12 months.
- You have at least 1,250 hours of service for your employer during the 12 months before your leave, and
- Your employer has at least 50 employees within 75 miles of your work location.

Airline flight crew employees have different "hours of service" requirements.

You work for a **covered employer** if **any** of the following applies:

- You work for a private employer that had at least 50 employees during at least 20 workweeks in the current or previous calendar year.
- You work for an elementary or public or private secondary school, or
- You work for a public agency, such as a local, state or federal government agency. Most federal employees are covered by Title II of the FMLA, administered by the Office of Personnel Management.

### How do I request FMLA leave?

Generally, to request FMLA leave you **must**:

- Follow your employer's normal policies for requesting leave.
- Give notice at least 30 days before your need for FMLA leave, or
- If advance notice is not possible, give notice as soon as possible.

You **do not** have to share a medical diagnosis but must provide enough information to your employer so they can determine whether the leave qualifies for FMLA protection. You **must also inform your employer if FMLA leave was previously taken** or approved for the same reason when requesting additional leave.

Your employer **may request certification** from a health care provider to verify medical leave and may request certification of a qualifying exigency.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

State employees may be subject to certain limitations in pursuit of direct lawsuits regarding leave for their own serious health conditions. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress.

### What does my employer need to do?

If you are eligible for FMLA leave, your employer **must**:

- Allow you to take job-protected time off work for a qualifying reason.
- Continue your group health plan coverage while you are on leave on the same basis as if you had not taken leave, and
- Allow you to return to the same job, or a virtually identical job with the same pay, benefits and other working conditions, including shift and location, at the end of your leave.

Your employer **cannot interfere with your FMLA rights** or threaten or punish you for exercising your rights under the law. For example, your employer cannot retaliate against you for requesting FMLA leave or cooperating with a WHD investigation.

After becoming aware that your need for leave is for a reason that may qualify under the FMLA, your employer **must confirm whether you are eligible** or not eligible for FMLA leave. If your employer determines that you are eligible, your employer **must notify you in writing**:

- About your FMLA rights and responsibilities, and
- How much of your requested leave, if any, will be FMLA-protected leave.

### Where can I find more information?

Call 1-866-487-9243 or visit [dot.gov/fmla](http://dot.gov/fmla) to learn more.

If you believe your rights under the FMLA have been violated, you may file a complaint with WHD or file a private lawsuit against your employer in court. **Scan the QR code to learn about our WHD complaint process.**



WH1420 REV 04/23



# ADA

- Prohibits discrimination of a qualified individual with physical or mental impairment that substantially limits major life activity
  - ADAAA of 2008 made establishing a disability much easier
- No specific leave requirement, but does require conversation to consider reasonable accommodation
- Typically will come into play post-FMLA or when FMLA does not apply
- Undue hardship clause



# Pregnancy Workers Fairness Act

- Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions
- Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

## **Similar to ADA but:**

- covers temporary conditions
- May not require an employee to take paid or unpaid leave if another reasonable accommodation is available
- Must accommodate even if unable to perform essential job functions for a temporary period (as long as that function can be performed in near future)

# Salary Continuation

- Workers' Comp
  - Employee suffered workplace injury and is physically or mentally incapable of work
- STD/LTD
- PTO



# No Magic Words!

Employee does not have to bring up FMLA or ADA. Some ways that you may notice the need:

- Time sheet hours look different than usual
- Attendance issues
- Employee tells you about a medical condition and suggests interference with work
- You notice significant behavior changes
- On the job injury



# Medical Certification—FMLA

Company can require medical certification for serious health condition

- Only request what is required on DOL form
- Fitness for return to duty (if consistently required and told upfront)
- Intermittent leave

Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act

U.S. Department of Labor Wage and Hour Division 

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR. RETURN TO THE PATIENT. OMB Control Number: 1235-0033 Expires: 6/30/2026

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee at least 15 calendar days to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found on the [WHD website](http://www.dol.gov/agencies/whd/fmla) at [www.dol.gov/agencies/whd/fmla](http://www.dol.gov/agencies/whd/fmla).

**SECTION I - EMPLOYER**

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308.** Additionally, you may not request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

(1) Employee name: \_\_\_\_\_  
First Middle Last

(2) Employer name: \_\_\_\_\_ Date: \_\_\_\_\_ (mm/dd/yyyy)  
(List date certification requested)

(3) The medical certification must be returned by \_\_\_\_\_ (mm/dd/yyyy)  
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)

(4) Employee's job title: \_\_\_\_\_ Job description  is /  is not attached.

Employee's regular work schedule: \_\_\_\_\_

Statement of the employee's essential job functions: \_\_\_\_\_

(The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.)

**SECTION II - HEALTH CARE PROVIDER**

Please provide your contact information, complete all relevant parts of this Section, and sign the form. Your patient has requested leave under the FMLA. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of the employee. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. For more information about the definitions of a serious health condition under the FMLA, see the chart on page 4.

You also may, but are not required to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment.

Page 1 of 4 Form WH-380-E, Revised June 2020



# Medical Certification—ADA

Employer should request that employee provide doctor's note to substantiate need for leave

- Have employee take job description to Dr.
- Employer cannot ask for unrelated information

**SAMPLE MEDICAL INQUIRY FORM IN RESPONSE TO AN ACCOMMODATION REQUEST**

**Note:** This form should be customized each time it is used. Under the ADA, employers should only ask for necessary medical documentation. Do not ask for information you already have or do not need.

**A. Questions to help determine whether an employee has a disability.**

For reasonable accommodation under the ADA, an employee has a disability if he or she has an impairment that substantially limits one or more major life activities or a record of such an impairment. The following questions may help determine whether an employee has a disability:

Does the employee have a physical or mental impairment?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
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If yes, what is the impairment or the nature of the impairment?  
**Note:** Some state laws may prohibit asking for a diagnosis.

Answer the following question based on what limitations the employee has when his or her condition is in an active state and what limitations the employee would have if no mitigating measures were used. Mitigating measures include things such as medication, medical supplies, equipment, hearing aids, mobility devices, the use of assistive technology, reasonable accommodations or auxiliary aids or services, prosthetics, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy. Mitigating measures do not include ordinary eyeglasses or contact lenses.

Does the impairment substantially limit a major life activity as compared to most people in the general population?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
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**Note:** Does not need to significantly or severely restrict to meet this standard. It may be useful in appropriate cases to consider the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

OR

Describe the employee's limitations when the impairment is active.

If yes, what major life activity(s) (includes major bodily functions) is/are affected?

<input type="checkbox"/> Bending	<input type="checkbox"/> Hearing	<input type="checkbox"/> Reaching	<input type="checkbox"/> Speaking	<input type="checkbox"/> Other: (describe)
<input type="checkbox"/> Breathing	<input type="checkbox"/> Interacting With Others	<input type="checkbox"/> Reading	<input type="checkbox"/> Standing	
<input type="checkbox"/> Caring For Self	<input type="checkbox"/> Learning	<input type="checkbox"/> Seeing	<input type="checkbox"/> Thinking	
<input type="checkbox"/> Concentrating	<input type="checkbox"/> Lifting	<input type="checkbox"/> Sitting	<input type="checkbox"/> Walking	
<input type="checkbox"/> Eating	<input type="checkbox"/> Performing Manual Tasks	<input type="checkbox"/> Sleeping	<input type="checkbox"/> Working	

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Major bodily functions:

<input type="checkbox"/> Bladder	<input type="checkbox"/> Digestive	<input type="checkbox"/> Lymphatic	<input type="checkbox"/> Reproductive
<input type="checkbox"/> Bowel	<input type="checkbox"/> Endocrine	<input type="checkbox"/> Musculoskeletal	<input type="checkbox"/> Respiratory
<input type="checkbox"/> Brain	<input type="checkbox"/> Genitourinary	<input type="checkbox"/> Neurological	<input type="checkbox"/> Special Sense Organs & Skin
<input type="checkbox"/> Cardiovascular	<input type="checkbox"/> Hemic	<input type="checkbox"/> Normal Cell Growth	<input type="checkbox"/> Other: (describe)
<input type="checkbox"/> Circulatory	<input type="checkbox"/> Immune	<input type="checkbox"/> Operation of an Organ	



# Medical Certification—Workers' Comp

- Treating physician must authorize work-related absences
- Documentation from physician relating to workplace injury must be provided to employer

OMB No. 1240-0046  
Expires: 08/31/2026

**Attending Physician's Report**   **U.S. Department of Labor**  
Office of Workers' Compensation Programs 

1. Patient's name (last, first, middle):	2. OWCP File No. (if available):	3. Date of Initial Treatment:	4. Date of this Examination:
5. How did the patient's injury occur?			
6. Objective Findings (include physical examination findings and diagnostic test results). Please also discuss pre-existing condition(s) in the affected body part(s), if any:			
7. Medical Diagnosis(es): Please note that "pain" is not a compensable diagnosis; you may however note pain in box 6 above as a symptom of a specific diagnosis or diagnoses.		8. ICD Code(s):	
9. Do you believe the condition(s) found was caused or aggravated in any way by an employment activity as described in box 5? <b>Please note that there is no apportionment under the FECA. Any contribution from work factors is compensable.</b> However, you must explain how the work activity or workplace incident was sufficient to have caused or aggravated the diagnosed conditions for your response to be accepted.			
10. Please circle the patient's current disability status: <input type="checkbox"/> Totally Disabled <input type="checkbox"/> Partially Disabled <input type="checkbox"/> Not Disabled			
<b>If Totally Disabled.</b> Date disability commenced:		Date of anticipated return to full or modified work:	
<b>If Partially Disabled.</b> Date disability commenced: Also, complete Box 11.		Date of anticipated return to full duty work	
<b>If Not Disabled.</b> Was there any disability in the case? <input type="checkbox"/> If so, indicate dates of disability: From <input type="text"/> to <input type="text"/>			
11. If the patient is partially disabled, indicate the extent of physical limitations and the type of work that could reasonably be performed with these limitations. You may also complete Form OWCP-5c, Work Capacity Evaluation, which can be found at <a href="https://www.dol.gov/sites/dolgov/files/owcp/dfec/regs/compliance/owcp-5c.pdf">https://www.dol.gov/sites/dolgov/files/owcp/dfec/regs/compliance/owcp-5c.pdf</a>			



# Job Protection



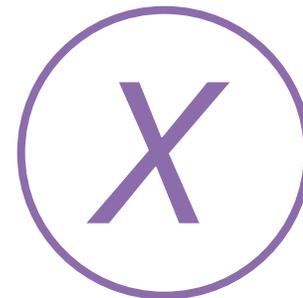
## FMLA

- Yes, same position
- No “undue hardship” exception available



## ADA

- Yes (but not explicitly in statute like FMLA)
- Unless holding job open creates an undue hardship



## WC

- Generally, no, unless reinstatement ordered as a remedy in a REDA lawsuit



# Inflexible Leave Policies

- What is an **Automatic (or “No Fault”)** **Termination Policy**?
  - Neutral policy applicable to all employees
  - Termination after specified period of days on leave
  - Point system

# What If I Don't?

- **FMLA**—Retaliation
- **ADA**—Interference
- **Workers' Comp**—NC Retaliatory  
Employment Discrimination Act (REDA)



# When Can We Terminate?

- FMLA option is exhausted
- ADA interactive process has concluded
- Consider 'bridging' time
- Consider policies
- You have properly identified leave type and run concurrently if needed!



WHEN CAN WE TERMINATE?

# Scenario 1

Employee has 2 weeks of PTO, is eligible May 1 first for FMLA but is having a surgery on April 10. Do we have to allow the time even if there is not enough PTO to cover the absence?



WHEN CAN WE TERMINATE?

## Scenario 2

Employee has no PTO, was hired 4 months ago and has just announced they are expecting a child in June.



WHEN CAN WE TERMINATE?

## Scenario 3

My employee is on intermittent FMLA and seems to be out only on Mondays and Fridays.



WHEN CAN WE TERMINATE?

## Scenario 4

My employee started STD last year and has been out for over 6 months. They won't quit because they are afraid they will lose their STD/LTD benefit. Can I terminate them?



WHEN CAN WE TERMINATE?

## Scenario 5

The employee wanted to take vacation around THANKSGIVING but was out of vacation time. She took the time anyway and submitted FMLA paperwork that showed she was completely incapacitated and needed to be out of work for 2 weeks. During this time, it was brought to your attention that she had posted some vacation photos on social media and your employees are mad! What can you do?



WHEN CAN WE TERMINATE?

## Scenario 6

Employee calls you and tells you they has been diagnosed with anxiety and his Dr. has recommended that he avoid stress including work for 12 weeks. This employee has only been working with you for 6 months and has already had one leave of absence due to a car accident when they first started. Do you have to give the leave?



WHEN CAN WE TERMINATE?

## Scenario 7

Employee tells you they have migraine headaches and gives you a certification that indicates the employee will need to be out when they get a migraine for up to 2 days at a time, up to 2 times a month. Your practice cannot plan around this. What should you do?



# Questions?



# HR On-Call



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[EXPLORE THE PORTAL](#)



# Additional Resources

- Our post-event cheat sheet!
- [FMLA Forms \(DOL\)](#)
- [Sample ADA Form](#)
- [WC Forms](#)




## ADA/FMLA and WC Cheat Sheet

**+** General Purpose

ADA	Prohibits discrimination against qualified individuals
FMLA	Provides protected leave to qualifying individuals for qualifying events (illness, to care for family member, birth/adoption)
WC	Provides compensatory benefits for illnesses or injuries incurred in the course and scope of employment

Eligibility

ADA	Employees and applicants with a qualifying disability
FMLA	Employees who have worked for at least 12 months and at least 1250 hours during the previous 12 months at a location within a 75-mile radius of where at least 50 employees work
WC	Employees who incur an illness or injury in the course and scope of employment

What Conditions are Covered?

ADA	"Disability" that substantially limits one or more major life activities (or a history or perception of having such a disability)
FMLA	"Serious health condition" of employee or certain family members of employee. Birth, adoption, and foster care placement of employee's child. Certain types of military-related leave.
WC	Any job-related injury that is in the course and scope of employment

Reinstatement:

ADA	If leave is required as a reasonable accommodation, the employer generally must keep the employee's position open during the leave
FMLA	Employees must be reinstated to the same or a substantially equivalent position.
WC	There are no statutory reinstatement rights under NC state workers' compensation law. Employers are prohibited from retaliating against an employee for exercising his/her workers' compensation rights.

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# Thank you!

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