



Association of Corporate Counsel,
Dallas-Fort Worth

The Era of Mental Health:
FMLA and ADA Requests

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OBJECTIVES

Objectives

- Review Employer obligations to act
- Understand the difference between ADA and FMLA
- Review the Key Employee exception under FMLA
- Step-by-step guideline of what to do when an employee requests leave and/or accommodations relating to mental health



RECOGNIZING TRIGGERS AND EMPLOYER RESPONSIBILITY

Recognizing Accommodation Triggers

- As employers, we must act even if an employee doesn't use the word 'accommodation,' in the course of sharing a medical situation.
- Note: Requests for help, modified duties, or medical issues may trigger ADA obligations



DEFINITIONS

ADA and FMLA

What is FMLA?

- FMLA (Family and Medical Leave Act)
- Provides up to 12 weeks of unpaid, job-protected leave
- Applies to employers with 50+ employees
- Employee must have worked 1,250 hours in the past 12 months
- Covers serious health conditions, childbirth, caregiving, etc.
- Prohibits discrimination and retaliation.

What is the ADA?

- Americans with Disabilities Act
- Ensures equal opportunity for individuals with disabilities (REGARDLESS OF EMPLOYMENT TIME OR TYPE)
- Applies to employers with 15+ employees
- Focus: Workplace accommodations to perform essential functions; anti-discrimination; anti-retaliation.
- Disability = physical or mental impairment that substantially limits a major life activity

Key Differences

ADA	FMLA
Accommodates disability	Provides job-protected leave
Applies to employers with 15+ employees	Applies to employers with 50+ employees
Qualified with a disability	1,250 hours worked & 12 months employed
Modified duties, schedule, equipment	Unpaid time off
Duration is case-by-case	Up to 12 weeks per year

FMLA for Mental Health Conditions

- A serious mental health condition under the FMLA requires either:
- **(1) Inpatient care** includes –
 - An overnight stay in a hospital or other medical care facility, such as, for example, a treatment center for addiction or eating disorders.
- **(2) Continuing treatment** by a health care provider includes—
 - Conditions that incapacitate an individual for more than 3+ days and require ongoing medical treatment, either multiple appointments with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker;
 - Conditions that requires a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and
 - Chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an individual is incapacitated and require treatment by a health care provider at least twice a year.

FMLA Requests

Requests:

- Employee does not have to specifically request “FMLA leave.”
- BUT employee must give enough medical or other information to determine if FMLA applicable.
- For clarification, employer can ask employee if he/she is requesting FMLA leave.

Company FMLA Obligations

- Provide employee with notice of FMLA eligibility and rights within 5 business days of receiving request (including key employee status, if applicable)
- Evaluate request and any medical documentation
- Within 5 business days of receipt of all information necessary to evaluate, provide written notice approving or denying FMLA leave
- Document everything
- Keep it confidential!



KEY EMPLOYEE EXCEPTION (FMLA)

Key Employee Exception (FMLA)

- A 'key employee' is:
 - Salaried
 - Among the top 10% of earners within 75 miles
 - Job reinstatement may be denied if it causes substantial economic injury to the Company.
 - Still entitled to FMLA leave, but job restoration can be denied if it causes substantial economic injury.
 - The Company must give written notice when FMLA leave is requested of the key employee designation inform the employee of the potential consequences re: reinstatement.

ADA Obligations

- ADA **requires reasonable accommodation** unless it causes undue hardship
- Employers **must engage** in the interactive process **promptly** upon receiving or becoming aware of ADA accommodation request or need.
- Examples: **modified schedule, remote work, job reassignment, office accessibility, additional or unpaid leave, extra breaks, etc.**



INTERACTIVE PROCESS

Important Steps to Follow During the Process

Accommodation Request: Step-by-Step



1. RECEIVE
REQUEST



2. ACKNOWLEDGE
AND DOCUMENT



3. MEDICAL
CERTIFICATION (IF
NEEDED)



4. INTERACTIVE
PROCESS



5. DETERMINE
REASONABLENESS



6. IMPLEMENT
ACCOMMODATION



7. MAINTAIN
RECORDS

Interactive Process

- Must be **timely and in good faith**.
- **Document** all conversations and steps taken.
- **May involve multiple conversations—not a one-time event.**
- **Both the company and the employee are obligated to participate in the interactive process**



KEY REQUIREMENTS

Details Within the Process

Requesting Medical Documentation

- Allowed if needed to verify the disability and limitations (i.e., if the disability and need for accommodation are not obvious, which most mental health related disabilities will not be).
- Must be job-related and consistent with business necessity.
- Helps determine effective accommodation options.
- Keep everything in the employee's confidential medical file

Choosing Among Reasonable Accommodations

- Employee must request accommodations.
- In response, Employer can propose alternate accommodations, not necessarily the team member's preferred one.
- Company must assess effectiveness and impact on the business.
- Company not required to provide accommodation if the employee is unable to do their job with or without accommodation.

Examples of Reasonable Mental Health Accommodations

- Scheduling Changes: Flexible start/end times, part-time schedules, or compressed work weeks.
- Leave and Time Off: Additional paid or unpaid leave for therapy, treatment, or when experiencing symptoms.
- Workplace Environment: Reduced noise/distractions, desk relocations, increased natural light, or permission to use noise-canceling headphones.
- Job Structure/Task Modification: Breaking down large projects, providing written instructions, or reassigning non-essential, marginal tasks.
- Supervision Methods: Weekly check-ins or receiving feedback in writing rather than verbally.
- Other Adjustments: Remote work/telecommuting**, allowing service animals, or providing job coaches.

EEOC Specific Guidance on Leave as a Reasonable Accommodation

Unpaid leave of a short and definite duration is an example of a reasonable accommodation. The ADA requires that employers make exceptions to their policies, including leave policies, when necessary to provide reasonable accommodations to qualified individuals with disabilities.

This is true even when:

- the employer does not offer leave as a team member benefit,
- the employee is not eligible for leave under the employer's policy, or
- the employee has exhausted leave under the employer's policy (including FMLA leave, if applicable).

An employer must consider providing unpaid leave to a team member with a disability as a reasonable accommodation if the employee requires it, unless the employer can show that doing so would cause undue hardship. Unpaid leave as an ADA accommodation must be for a short, definite term.

THIS INCLUDES HIGHLY COMPENSATED (THE TOP 10%) TEAM MEMBERS AS WELL.

Understanding Undue Hardship

- No accommodation is required if it causes significant difficulty or expense to the Company.
- Consider cost, resources, and operational impact.
- The employer must be able to prove undue hardship.

NOTE: EMPLOYERS NEED TO PROVIDE PROOF IT DOES CAUSE A SIGNIFICANT HARDSHIP, WHICH IS RARE.

Oversight

- Any denial of an accommodation should be approved by HR and/or Legal
- Want to ensure proper documentation of undue hardship to support denial



CONFIDENTIALITY REQUIREMENTS

Confidentiality Requirements

- Medical information must be kept separate from personnel files.
- Accommodation requests should only be shared with those involved in the accommodation process, likely including HR and the employee's supervisor.

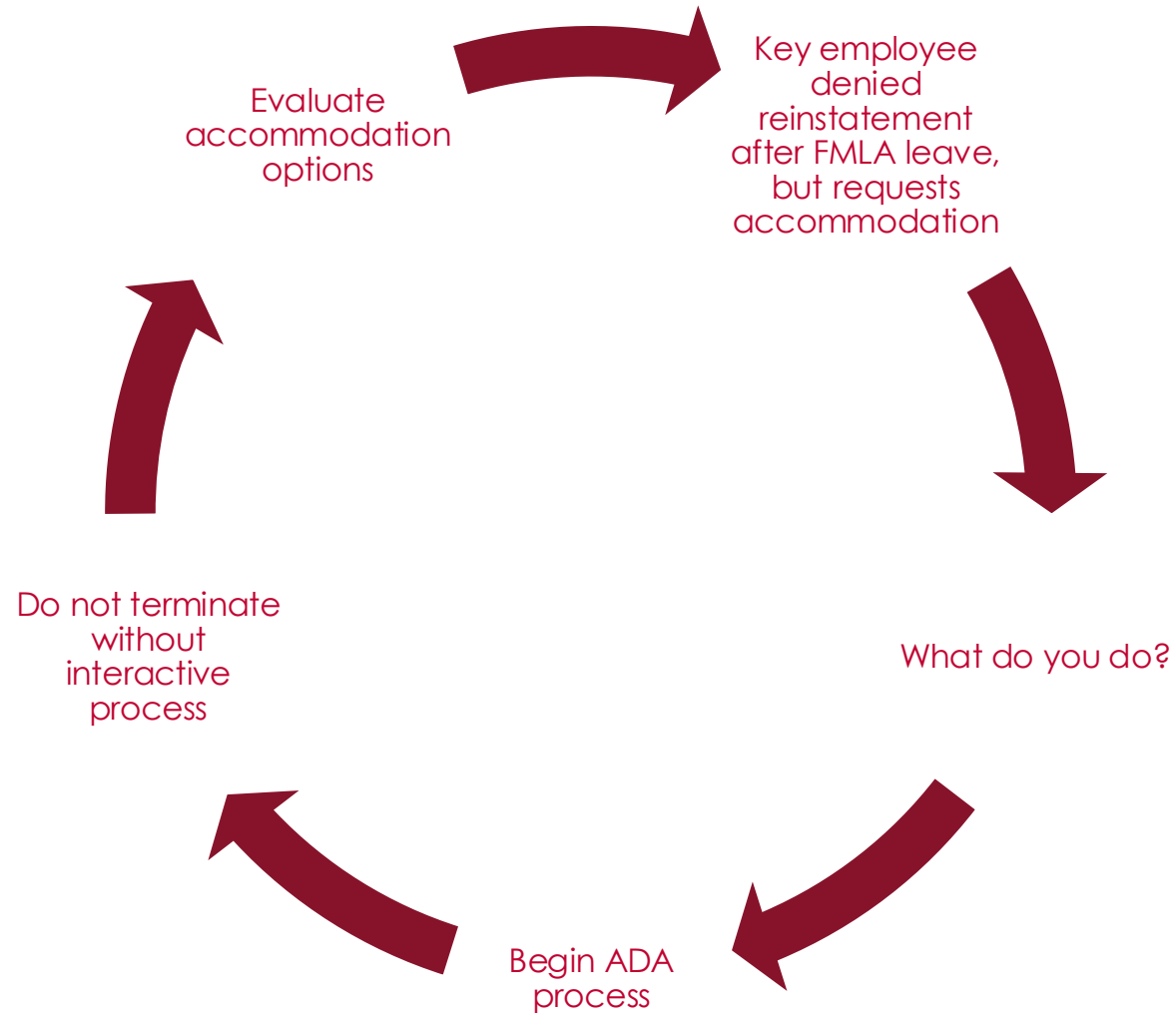
Reassignment as a Last Resort – What the law Requires

- If no accommodation enables performance of current job, consider reassignment.
- Must be to an open, vacant position for which the employee is qualified.

Does an Employer have to hold an Employee's job open while on ADA leave?

- Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.
- If holding the position would cause the employer to incur undue hardship, then the employer must consider whether it has a vacant, equivalent position for which the employee is (1) qualified and (2) the employee can be reassigned while on leave and at the conclusion of the leave can be returned to this new position.

Case Scenario – ADA and FMLA for Key Employee



PROCESS

Receive Request

Acknowledge and Document

Medical Certification (if needed)

Interactive Process

Determine Reasonableness

Implement Accommodation

Maintain Records (Confidential)

Additional Examples – FMLA Leave & Potential ADA considerations

- Employee suffers from severe anxiety and unable to work.
- Employee is seeing a psychologist and regularly attends psychotherapy sessions for anorexia nervosa.
- Employee's daughter who is 25 years old was recently released from several days of inpatient treatment for a mental health condition.
- Employee's spouse is a veteran and is suffering from PTSD since his honorable service discharge last year.

Additional Examples – is it a request triggering a FMLA and/or ADA response?

- Employee asks for time off because he is “depressed and stressed.”
- Employee’s wife calls employee’s employer and says employee is mentally falling apart, the family is having the employee hospitalized, and requests for procedures extending the employee’s leave
- Employee asks to take a few days off to rest after the completion of a major project.

Additional Examples – Reasonable accommodations

- Changing scheduled working hours
- Reduction and/or removal of distractions (e.g., room dividers, soundproofing barriers, allowing employee to wear headphones, private office)
- Service animals
- Remote work
- Increased natural lighting



KEY TAKEAWAYS

Key Takeaways

- Employers must be trained on compliance with ADA and FMLA
- Communication is key
- Document everything
- Keep HR and/or Legal involved during all stages