

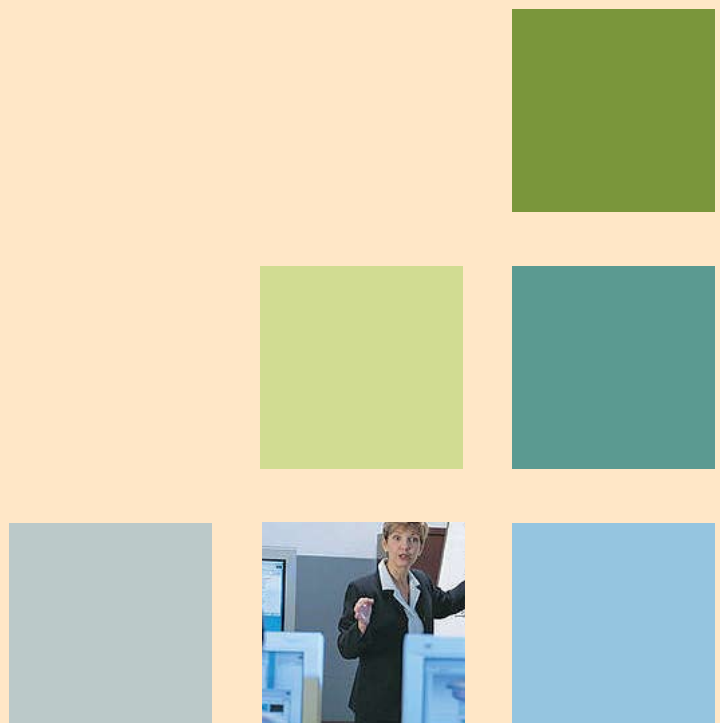
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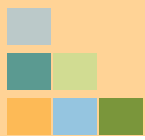
The Case of the Rock Concert Wreck

A Case Study to Accompany the Learning Module
on FMLA and ADA ■ By Angela Hall, J.D., Ph.D.

Instructor's Manual



EMPLOYMENT
LAW



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TEACHING NOTES

I. Purpose

The purpose of the simulation is for students to identify when ADA and FMLA issues occur in the workplace. Students should be able to demonstrate a general understanding of employee rights and responsibilities and employer responsibilities under these acts. The goal of this simulation is for students to understand when the ADA and FMLA provisions do and do not apply.

II. Supplied Materials

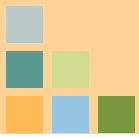
- a. Teaching notes/process narrative (this document)
- b. Role descriptions for students
 - i. General information about the case
 - ii. Line supervisor
 - iii. Human resource manager
 - iv. Pat (employee)
 - v. Chris (employee)
- c. Summary materials: Summary to be provided of basic principles of Americans with Disabilities Act of 1990 (ADA) and Family and Medical Leave Act of 1993 (FMLA)

III. Pre-Case Assignment

- a. Ask students to read their respective roles.
- b. Ask students to read the summary of the basic principles of the ADA and FMLA.
- c. Optional: Ask students to write a one-page paper comparing and contrasting the principles of the ADA and the FMLA.

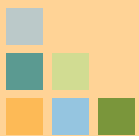
IV. Instructions on How to Conduct the Case Study

- a. Divide students into groups of four.
- b. Assign each student one of four roles:
 - i. Line supervisor
 - ii. HR manager
 - iii. Pat (employee)
 - iv. Chris (employee)
- c. Provide students with the general information sheet and their respective roles ahead of time. Each role includes specific objectives to be completed by the student.
- d. Give students 30 minutes to complete the exercise. The HR manager and line supervisor should use part of that time to gather information from Pat and Chris. Also, the HR manager and the line supervisor should take at least 5 minutes to privately confer with each other.



V. Discussion

- a. A red herring is thrown into the case about possible illegal drug use and/or alcohol abuse. Regardless of whether this is the case, both Pat and Chris are entitled to FMLA leave.
- b. There is no formal procedure that Pat and Chris must follow to request FMLA leave. Because they were injured in an accident, there was no way for them to give advance notice of their leave requests. The employer received sufficient notice of a need for FMLA leave by becoming aware of the accident from Pat's and Chris's families.
- c. The employer can require "recertification" under the FMLA by requesting that the Pat and Chris provide periodic updates from a medical practitioner. (See 29 U.S.C. § 2614.)
- d. There is no specified statutory procedure to request an ADA accommodation. However, Pat and Chris should either verbally or preferably in writing request accommodations to either their supervisor or to someone in the HR department. An employer can require that an employee requesting an ADA accommodation provide documentation from a health care professional (See 29 C.F.R. 1630.14.)
- e. Pat has no right to a workplace accommodation due to the injuries he received from this accident. He is not a qualified individual with a disability as defined under the ADA because he does not have a substantial impairment that significantly limits or restricts a major life activity such as walking, breathing, seeing or hearing. See also *Sutton v. United Airlines*, 527 U.S. 471 (1999).
- f. Chris is entitled to a workplace accommodation for a chair under the ADA, as missing a leg impairs walking and standing, which are major life activities (42 U.S.C. § 12111). Chris is also entitled to transfer to the available position if he/she is qualified and it would not create an undue hardship on the employer. Under these circumstances, Chris would be a prime candidate for the position.
- g. For more information about the FMLA and balancing family (personal) and work issues, please see Perrewé, P.L., Treadway, D.C., & Hall, A.T. (2003). *The work and family interface: Conflict, family-friendly policies, and employee well-being*. In D. A. Hoffman & L. E. Tetrick (Eds.), *Health and safety in organizations: A multilevel perspective* (pp. 285-315) (SIOP Organizational Frontiers Series). San Francisco: Jossey-Bass.



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General Information

Pat and Chris have been best friends since they were kids. They started working right after graduating from high school as distribution clerks in the warehouse of ABC Brewery. Working in the warehouse is hot and noisy, but their co-workers are nice and the supervisor seems to be fair. Pat and Chris enjoy their jobs. They are both good workers and have a positive 12-year history with the employer.

Although Pat and Chris are not required to do any heavy lifting, both are on their feet for the majority of their workdays. There are no chairs in the warehouse. However, like the rest of their co-workers, Pat and Chris sometimes sit on the loading dock when they are not busy.

ABC Brewery is the major employer in the town. ABC employs approximately 200 full-time and 50 part-time workers.

Pat and Chris have been longing to get tickets to the “concert of the century.” The tickets were nearly impossible to get, but Pat’s cousin won two tickets and gave them to Pat as a birthday present. Pat is taking Chris to the concert, which is 200 miles away.

Pat and Chris go to the concert and have a great time. Instead of spending the night, they decide to drive the 200 miles back immediately after the concert because they have to be at work at 9:00 a.m. the following day.

About 20 miles outside of their hometown, Pat falls asleep at the wheel. Pat wakes up in the hospital to find that they have both have sustained massive injuries.

Pat has multiple broken bones, including a broken leg. Chris’s injuries are more severe. Chris has lacerations, broken ribs and a ruptured spleen. Chris’s most serious injury, however, is a leg that was amputated below the knee.

Pat is released from the hospital in one week. Chris is released from the hospital two weeks later, but is transferred to a rehabilitation facility for two months of physical therapy and to be fitted with a prosthetic leg.

Role of Line Supervisor

You are the line supervisor for ABC Brewery. ABC is the largest employer in the area, with approximately 250 employees. The warehouse is one of the largest departments at ABC; 35 employees work in the warehouse during two shifts. You are the supervisor for the day shift (8:00 a.m. to 5:00 p.m.). There is another supervisor for the 5:00 p.m. to 2:00 a.m. shift.

You learn that two longtime employees, Pat and Chris, were involved in a serious car wreck. Pat and Chris are good employees, but you know that Pat and Chris like to party. You suspect that drugs and/or alcohol may have been involved but do not have any evidence of this.

Pat’s and Chris’s families contact you immediately after the accident to advise you that Pat and Chris will be out of work for an indefinite period of time. This will cause scheduling problems for you because the brewery is in the middle of its busy season.

Fortunately, Pat’s injuries are not very severe; Pat is released from the hospital in a week, and ready to return to work only three weeks after the accident. Although Pat’s physician released Pat to return to work without any restrictions, Pat has made some requests regarding his/her return to work. First, Pat wants to work only a five-hour day, although the union contract calls for an eight-hour day. Pat also asks to be transferred from the warehouse because it is “too hot” and relocated to a job in the main building where there is air conditioning.

Chris’s injuries are more serious; part of Chris’s left leg was amputated. Chris is out of work for 10 weeks. When Chris is released to return to work, it is with the condition that Chris sits for 15 minutes every hour and with a recommendation that Chris transfer



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to a position in an air-conditioned building. Chris tells you that s/he is able to perform most of his/her duties in the warehouse, but asks that a chair be provided to sit for 15 minutes every hour and asks that s/he be considered for a transfer to the next available position in the administration building.

Your assignment:

- Based on this information, confer with the HR manager and determine whether Pat and Chris should be advised of their rights for FMLA leave.
- Confer with the HR manager to determine whether the accommodation requests made by Pat should be granted.
- Confer with the HR manager to determine whether the accommodation requests made by Chris should be granted.

Role of Human Resource Manager

You are the human resource manager for ABC Brewery. ABC is the largest employer in the area, with approximately 250 employees. The Human Resource department is quite small and consists of you and two other employees. The other two employees primarily handle the payroll functions for ABC.

You learn that two longtime employees, Pat and Chris, were involved in a serious car wreck. Your town is small and you heard from the local sheriff that drugs or alcohol were not suspected to be a cause in the crash.

Pat's and Chris's families contact you immediately after the accident to advise you that Pat and Chris will be out of work for an indefinite time. You suspect this might cause scheduling problems for the line supervisor because the brewery is in the middle of its busy season.

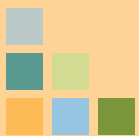
Fortunately, Pat's injuries are not very severe; Pat is released from the hospital in a week, and ready to return to work only three weeks after the accident. Although Pat's physician released Pat to return to work without any restrictions, Pat has made some requests regarding his/her return to work. First, Pat wants to work only a five-hour day, although the union contract calls for an eight-hour day. Pat also asks to be transferred from the warehouse because it is "too hot" and relocated to a job in the main building where there is air conditioning.

Chris's injuries are more serious; part of Chris's left leg was amputated. Chris is out of work for 10 weeks. When Chris is released to return to work, it is with the condition that Chris sits for 15 minutes every hour and with a recommendation that Chris transfer to a position in an air-conditioned building. Chris tells you that s/he is able to perform most of his/her duties in the warehouse, but asks that a chair be provided to sit for 15 minutes every hour and asks that s/he be considered for a transfer to the next available position in the administration building.

You learn that due to an upcoming retirement, an accounting clerk position in the accounting department will be available starting next week. The position is an entry-level desk job. The position requires applicants to have a high school diploma, a basic knowledge of simple math and the ability to use a calculator.

Your assignment:

- Based on this information, confer with Pat's and Chris's supervisor to determine whether they are entitled to FMLA leave.
- If yes, determine if Pat and Chris are entitled to a continuation of health insurance while they are on leave.
- Next, determine if the accommodation request made by Pat should be granted.
- Finally, determine whether the accommodation request made by Chris should be granted.



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Role of Pat

You and your best friend Chris have been longing to get tickets to the “concert of the century.” The tickets were nearly impossible to get, but your cousin won two tickets and gave them to you as a birthday present. You are taking Chris to the concert, which is 200 miles away.

You have a great time at the concert. Instead of spending the night, you decide to drive the 200 miles back home immediately after the concert because you and Chris have to be at work at 9:00 a.m. the following day. You are tired after the concert but decide that because Chris had a couple of beers, you should be the one to drive (you drank only sodas).

About 20 miles outside town, you fall asleep at the wheel and wake up in the hospital to find that both you and Chris have sustained massive injuries.

You have multiple broken bones, including a broken leg. Chris’s injuries are more severe. Chris has lacerations, broken ribs and a ruptured spleen. Chris’s most serious injury, however, is a leg that was amputated below the knee.

You are released from the hospital in one week. You stay at home on bed rest for two weeks. The fracture in your leg is small, so you are wearing an air cast. Although you have been released back to work without any restrictions, you still have a dull ache in your leg, especially when it is muggy outside. Over-the-counter pain medicine, though, gives you relief.

You decide to turn lemons into lemonade! Perhaps this accident is a way to improve your working conditions. You saw something about the ADA on television and decide to ask for a couple of ADA accommodations. Specifically, you ask for a five-hour workday and to be moved into the administration building where there is air conditioning.

Your assignment: Describe the process that you will need to follow (if any) to request leave under the Family and Medical Leave Act (FMLA) and to make a request for an accommodation under the Americans with Disabilities Act (ADA).

Role of Chris

You and Pat have been longing to get tickets to the “concert of the century.” The tickets were nearly impossible to get, but Pat’s cousin won two tickets and gave them to Pat as a birthday present. You and Pat drive to the concert, which is 200 miles away.

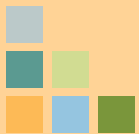
You have a great time at the concert. Instead of spending the night in the city, you decide to drive the 200 miles back home immediately after the concert because you both have to be at work at 9:00 a.m. the following day. You both decide that Pat should be the one to drive; you had a couple of beers, and Pat drank only sodas.

About 20 miles outside of your hometown, Pat falls asleep at the wheel. You wake up in the hospital to find that both of you have sustained massive injuries.

Pat has multiple broken bones, including a broken leg. Your injuries are more severe. You have lacerations, broken ribs and a ruptured spleen. Your most serious injury, however, is a leg that was amputated below the knee. You are extremely depressed about the amputation, but grateful to be alive.

You are released from the hospital two weeks later and transferred to a rehabilitation center, where you spend two months in therapy, learning to use your prosthetic leg. You absolutely hate being cooped up at the rehab facility, but have made great progress and are eager to return home to your life and your work.

You are excited when your physician releases you to return to work. The doctor has placed some restrictions on your return. First, you must sit for 15 minutes out of every hour. Moreover, your doctor recommends that you to ask to be transferred to a “desk job” in an air-conditioned environment. Based on the advice of your physician, you make an ADA request to be provided with

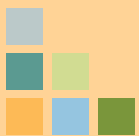


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a chair. Also, you ask for a transfer to a job in the administration building. You heard there will be an opening in the accounting department; you think that you would be a good fit for that position, because you were always good with numbers and did well in accounting class in high school.

Your assignment:

Describe the process you will need to follow (if any) to request leave under the Family and Medical Leave Act (FMLA) and to make a request for an accommodation under the Americans with Disabilities Act (ADA).



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SUMMARY MATERIALS—AMERICANS WITH DISABILITIES ACT OF 1990 (“ADA”)

The following information is from the U.S. Equal Employment Opportunity Commission web site: <http://www.usdoj.gov/crt/ada/q%26aeng02.htm#Anchor-Employment-47857>.

Q. Who is covered under Title I of the ADA and when is the coverage effective?

A. Title I employment provisions apply to private employers, state and local governments, employment agencies and labor unions. Employers with 25 or more employees were covered as of July 26, 1992. Employers with 15 or more employees were covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures; hiring; firing; advancement; compensation; training; and other terms, conditions and privileges of employment. It applies to recruitment; advertising; tenure; layoff; leave; fringe benefits; and all other employment-related activities.

Q. Who is protected from employment discrimination?

A. Employment discrimination is prohibited against “qualified individuals with disabilities.” This includes job applicants and employees. An individual is considered to have a “disability” if s/he has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. Persons having a known association or relationship with an individual with a disability also are protected.

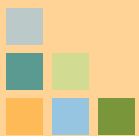
The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protects individuals with a record of a disability and would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the “negative reactions” of customers or co-workers.

Q. Who is a “qualified individual with a disability”?

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of the job that s/he holds or seeks and who can perform the essential functions of the position with or without reasonable accommodation. Requiring the ability to perform “essential” functions assures that an individual with a disability will not be considered unqualified simply because of the inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.



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Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful job performance.

Q. What limitations does the ADA impose on medical examinations and inquiries about disability?

A. An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a “direct threat” in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the indirect threat level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

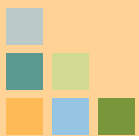
After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem; examinations required by other federal laws; examinations to determine current fitness to perform a particular job; and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record and made available only under limited conditions.

Tests for illegal drug use are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

Q. When can an employer ask an applicant to “self-identify” as having a disability?

A. Federal contractors and subcontractors covered by the affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the Section 503 affirmative action requirements. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.



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A pre-employment inquiry about a disability is allowed if required by another federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

Q. Does the ADA require employers to develop written job descriptions?

A. No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description prepared before advertising or interviewing applicants for a job will be considered evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of the job. A job description is most helpful if it focuses on the results or outcome of a job function, not solely on the way it is customarily performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. What is a “reasonable accommodation”?

A. A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. What are some of the reasonable accommodations applicants and employees may need?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that of effectiveness (i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and enjoy benefits equal to those of an average, similarly situated person without a disability). However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

Q. When is an employer required to make a reasonable accommodation?

A. An employer is required to accommodate only a “known” disability of a qualified applicant or employee. The requirement is generally triggered by a request from an individual with a disability who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual’s known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.



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Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The individual with a disability who requires the accommodation must be otherwise qualified and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employer’s business. “Undue hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature and structure of the employer’s operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Q. Must an employer modify existing facilities to make them accessible?

A. The employer’s obligation under Title I is to provide access for an individual applicant to participate in the job application process and for an individual employee with a disability to perform the essential functions of his/her job, including access to a building, the work site, the needed equipment, and to facilities used by all employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship.

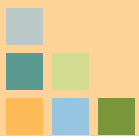
Under Title I, an employer is not required to make existing facilities accessible until a particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual’s work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

Q. Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

A. No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

A. Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.



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Q. Can an employer maintain existing production/performance standards for an employee with a disability?

A. An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing essential functions.

Q. Can an employer establish specific attendance and leave policies?

A. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Q. Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that exclude individuals who pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of an indirect threat by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

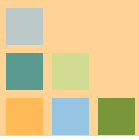
Q. Are applicants or employees who are currently illegally using drugs covered by the ADA?

A. No. Individuals who currently engage in illegal drug use are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Q. Is testing for the illegal use of drugs permissible under the ADA?

A. Yes. A test for illegal drug use is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.



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Q. Are alcoholics covered by the ADA?

A. Yes. While a current illegal drug user is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Q. Does the ADA override federal and state health and safety laws?

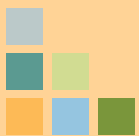
A. The ADA does not override health and safety requirements established under other federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other federal laws, which prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another federal law, then the employer must do so.

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a state or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a “direct threat” to health or safety under the ADA standard. If such a “direct threat” exists, the employer must consider whether it could be eliminated or reduced below the level of a “direct threat” by reasonable accommodation. An employer cannot rely on a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

Q. How does the ADA affect workers’ compensation programs?

A. Only injured workers who meet the ADA’s definition of an “individual with a disability” will be considered disabled under the ADA regardless of whether they satisfy criteria for receiving benefits under workers’ compensation or other disability laws. A worker also must be “qualified” (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to “substantially limit” a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers’ compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant’s workers’ compensation history before making a conditional offer of employment. After making a conditional job offer, an employer may inquire about a person’s workers’ compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers’ compensation costs in the future. However, an employer may refuse to hire or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.



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An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history.

An employer may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

Q. What is discrimination based on "relationship or association" under the ADA?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. How are the employment provisions enforced?

A. The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin and religious discrimination under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated state human rights agencies. Available remedies include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

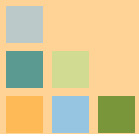
Q. What financial assistance is available to employers to help them make reasonable accommodations and comply with the ADA?

A. A special tax credit is available to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to \$5,000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than \$250 but less than \$10,250.

A full tax deduction, up to \$15,000 per year, also is available to any business for expenses of removing qualified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, restroom facilities, and transportation vehicles. Additional information discussing the tax credits and deductions is contained in the Department of Justice's ADA Tax Incentive Packet for Businesses, available from the ADA Information Line. Information about the tax credit and tax deduction can also be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service.

Q. What are an employer's recordkeeping requirements under the employment provisions of the ADA?

A. An employer must maintain records such as application forms submitted by applicants and other records related to hiring; requests for reasonable accommodation; promotion; demotion; transfer; layoff or termination; rates of pay or other terms of compensation; and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the case.



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Q. Does the ADA require that an employer post a notice explaining its requirements?

A. The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from EEOC summarizing the requirements of the ADA and other federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

Q. What resources does the Equal Employment Opportunity Commission have available to help employers and people with disabilities understand and comply with the employment requirements of the ADA?

A. The Equal Employment Opportunity Commission has developed several resources to help employers and people with disabilities understand and comply with the employment provisions of the ADA. Resources include a technical assistance manual that provides “how-to” guidance on the employment provisions of the ADA; a resource directory to help individuals find specific information; and a variety of brochures, booklets and fact sheets.



SUMMARY MATERIALS—THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (“FMLA”)

The following information was retrieved from the U.S. Department of Labor web site (<http://www.dol.gov/esa/regs/compliance/whd/whdfs28.htm>).

Fact Sheet #28: The Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993

The U.S. Department of Labor’s Employment Standards Administration, Wage and Hour Division, administers and enforces the Family and Medical Leave Act (FMLA) for all private, state and local government employees, and some federal employees. Most federal and certain congressional employees are also covered by the law and are subject to the jurisdiction of the U.S. Office of Personnel Management or the Congress.

FMLA became effective on August 5, 1993 for most employers. If a collective bargaining agreement (CBA) was in effect on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier. FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. The employer may elect to use the calendar year, a fixed 12-month leave or fiscal year or a 12-month period prior to or after the commencement of leave as the 12-month period.

The law contains provisions on employer coverage; employee eligibility for the law’s benefits; entitlement to leave; maintenance of health benefits during leave; job restoration after leave; notice and certification of the need for FMLA leave; and protection for employees who request or take FMLA leave. The law also requires employers to keep certain records.

Employer Coverage

FMLA applies to all:

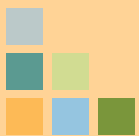
- Public agencies, including state, local and federal employers, local education agencies (schools); and
- Private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce—including joint employers and successors of covered employers.

Employee Eligibility

To be eligible for FMLA benefits, an employee must:

1. Work for a covered employer;
2. Have worked for the employer for a total of 12 months*;
3. Have worked at least 1,250 hours over the previous 12 months*; and
4. Work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

**See special rules for returning reservists under USERRA.*



Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- For the birth and care of the newborn child of the employee;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- To take medical leave when the employee is unable to work because of a serious health condition.

Spouses employed by the same employer are jointly entitled to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care and to care for a parent who has a serious health condition.

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently, which means taking leave in blocks of time or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave.

The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave based on information from the employee.

"Serious health condition" means an illness, injury, impairment or physical or mental condition that involves either:

- Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:
 - (1) A health condition (including treatment or recovery) lasting more than three consecutive days and any subsequent treatment or period of incapacity relating to the same condition, that also includes:
 - Treatment two or more times by or under the supervision of a health care provider; or
 - One treatment by a health care provider with a continuing regimen of treatment; or
 - (2) Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence; or
 - (3) A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence; or



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- (4) A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, cancer).
Only supervision by a health care provider is required, rather than active treatment; or
- (5) Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

“Health care provider” means:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices; or
- Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice and performing within the scope of their practice, under state law; or
- Nurse practitioners, nurse-midwives and clinical social workers authorized to practice and performing within the scope of their practice as defined under state law; or
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; or
- Any health care provider recognized by the employer or the employer's group health plan benefits manager.

Maintenance of Health Benefits

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

Job Restoration

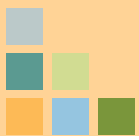
Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment.

In addition, use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a “no fault” attendance policy.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly paid “key” employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- Notify the employee of his/her status as a “key” employee in response to the employee's notice of intent to take FMLA leave;
- Notify the employee as soon as the employer decides it will deny job restoration and explain the reasons for this decision;
- Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
- Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee requests restoration.

A “key” employee is a salaried “eligible” employee who is among the highest paid 10 percent of employees within 75 miles of the work site.



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Notice and Certification

Employees seeking FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable.

Employers may also require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- Second or third medical opinions (at the employer's expense) and periodic recertification; and
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific written information on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

Unlawful Acts

It is unlawful for any employer to interfere with, restrain or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice or because of involvement in any proceeding related to FMLA.

Enforcement

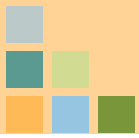
The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

Other Provisions

Special rules apply to employees of local education agencies. Generally, these rules provide for FMLA leave to be taken in blocks of time when intermittent leave is needed or the leave is required near the end of a school term.

Salaried executive, administrative and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.

The FMLA does not affect any other federal or state law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. The FMLA also encourages employers to provide more generous leave rights.



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Further Information

The final rule implementing FMLA is contained in the January 6, 1995 *Federal Register*. For more information, please contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.