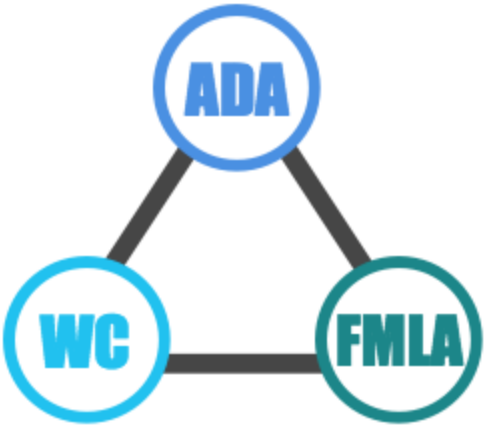
strategix.xyz

Employee Leave Law

FMLA – ADA – WORKERS COMP

How do they work together?



The interaction of the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), and workers' compensation laws is known by employers to be the triangle of employment law.

The best way to handle the interaction of these laws is to know when each law is implicated and exactly what each one requires.

Some leaves may implicate all three laws, like an injury at work that substantially limits a major life activity.

Once an employer understands when each of these laws applies and what they require, it will be simpler to navigate their interaction. For example, some leaves may only implicate one of these laws, like caring for another person (FMLA). Some leaves may implicate two of these laws, like an injury not related to work (FMLA and ADA).

It is crucial that an employer ensure compliance with these laws as a violation can result in damages such as lost wages, back pay, reinstatement, retroactive benefits, compensatory damages, and punitive damages.

It is also important for an employer to understand how these laws interact for the economic efficiency of the employer's business operations. Failure to understand how these laws work together can cost an employer significant money in workdays lost, temporary help costs and overtime pay.

Several states have family and/or medical leave acts that provide more benefits to the employee. In these states, the employee is subject to the plan that provides the highest level of benefits.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age, disability, or genetic information. Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

According to the EEOC, all requests for leave must be treated as a request for a reasonable accommodation. each time an employee requests leave from the job because of a medical condition or special care of a relative, the request must be analyzed through the lens of FMLA and ADA and Workers' Compensation.

The **key** to navigating the confusing waters of ADA, FMLA and workers' compensation is understanding both the fundamentals of each law on its own and how these laws work together.

The Family and Medical Leave Act (FMLA) is the federal law originally enacted in 1993 and amended in 2008 (and again in 2009). The overall purpose of the FMLA is to mandate that certain large employers provide a balance between the demands of the workplace and the needs of families by providing job-protected, unpaid leave to eligible employees.

FMLA provides employees with unpaid time off after the birth or adoption of a child. In addition, the act provides employees with time off if they are seriously ill, or to care for a member of the immediate family who is seriously ill. The employee is assured that when they return, they will have a job with comparable pay and benefits.

According to the U.S. Department of Labor, the FMLA provides a means for employees to balance their work and family responsibilities by taking unpaid leave for certain reasons.

The act is intended to promote the stability and economic security of families as well as the nation's interest in preserving the integrity of families.

The FMLA applies to private employers that have employed at least 50 employees during 20 or more calendar weeks during the current or preceding calendar year. The FMLA also applies to public agencies and to public and private elementary and secondary schools (with some special rules), regardless of the number of employees employed.

Private employers with fewer than 50 employees may be covered by a state family, medical or pregnancy leave law. Supervisors and HR professionals may also be held individually liable under the FMLA. Therefore, the reach of family and medical leave laws is quite broad. All employers should be aware of the federal and state laws that may pertain to them.

The FMLA amendments of 2008 and 2009 extended the FMLA to certain military-related situations. The amendments provide leave for qualifying military exigencies and leave for families of covered military members.

FMLA Poster

It is crucial that employers prominently post an approved FMLA poster in the workplace, even if they have no eligible employees. Employers are required to post a notice for employees outlining the basic provisions of FMLA and are subject to a $100 penalty per offense for willfully failing to post such notice. Employers are prohibited from discriminating against or interfering with employees who take FMLA leave. https://www.dol.gov/agencies/whd/posters/fmla

Qualifying Events

The FMLA provides eligible employees protected, unpaid leave for the following qualifying events:

- ✓ Birth and care of the employee's newborn child
- ✓ Placement of a child with the employee for adoption or foster care.
- ✓ Times when the employee is needed to care for a spouse, child, or parent with a serious health condition.
- ✓ Times when an employee is unable to perform the functions of his or her job because of a serious health condition.
- ✓ Any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered service member on active duty.
- ✓ Caring for a covered service member with a serious injury or illness if the employee is the spouse, child, parent, or next of kin of the service member.

Engaging the employee in the interactive process is essential. Communicate during FMLA leave, and between, and after FMLA leave. In other words, employers must recognize the need for accommodation even in the absence of an employee request.

The employees request can be made verbally or in writing. This notice triggers the employer's obligation to initiate the interactive process.

When considering whether to deny leave or terminate an employee after he or she has asked for the second or third extension of leave (particularly when FMLA has already expired), I advise compiling a detailed report of all communications with the employee regarding issues such as:

- The employee's ability to perform his/her job.
- Whether the employee likely will be able to return to work (and when).
- Whether the requested leave will allow the employee to return to work immediately after the leave ends or very soon thereafter.
- Whether there are other accommodations to help the employee return to work in a timely manner.
- Whether the employer has received any feedback from the employee's physician about the above issues.

The EEOC's decision to initiate litigation against an employer often hinges on whether the employer is to blame for the breakdown in the interactive process. To minimize your exposure to liability, keep communicating with your employees! **The interactive process is essential.**

Employee use of FMLA leave, particularly when the leave taken is intermittent, can be one of the more challenging leave-related situations employers face. It is also incumbent on the employee to engage in the interactive process, they too must respond to communications.

Qualifying Medical Condition

Many employers struggle with the question of whether an employee's request for medical leave is covered by the FMLA.

Under the FMLA, a serious health condition is an illness, injury, impairment or physical or mental condition that involves inpatient care (defined as an overnight stay in a hospital, hospice or residential medical care facility; any overnight admission to such facilities is an automatic trigger for FMLA eligibility) or continuing treatment by a health care provider. Examples include the following:

Continuing treatment by a health care provider that results in an incapacity (inability to work, attend school or participate in other daily activities) of more than three consecutive calendar days with either two or more in-person visits to the health care provider within 30 days of the date of incapacity OR one in-person visit to the health care provider with a regimen of continuing treatment, such as prescription medication, physical therapy, etc. In either situation, the first visit to the health care provider must occur within seven days of the first date of incapacity. Examples include pneumonia, surgery or broken/fractured bones.

Chronic conditions that require periodic visits to a health care provider, continue over an extended period of time and may cause episodic rather than continuing periods of incapacity of more than three days. Examples of chronic conditions include asthma, diabetes, etc.

Incapacity for pregnancy or prenatal care (any such incapacity is FMLA-protected regardless of the period of incapacity). For example, a pregnant employee may be unable to report to work due to severe morning sickness.

Permanent or long-term conditions such as Alzheimer's, severe stroke or terminal disease.

Conditions requiring multiple treatments and recovery from treatments, such as cancer, severe arthritis, and kidney disease.

Treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.

Leave due to the birth, adoption, or placement for foster care of a child does not require medical necessity or any period of incapacity. FMLA leave is for bonding with the child.

Employees may take FMLA leave for themselves or to care for their parent, spouse, child whose medical condition meets the above criteria. The FMLA regulations specifically exclude the following conditions, unless inpatient care or complications develop that would meet the above criteria: cosmetic procedures, colds, flu, ear aches, upset stomach, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease.

If there is any chance that an employee's medical condition might meet the definition of a serious health condition under the FMLA, it is important to issue the notification and certification forms to the employee and **let the health care provider make the determination whether a serious health condition exists.**

Employee Eligibility for Leave

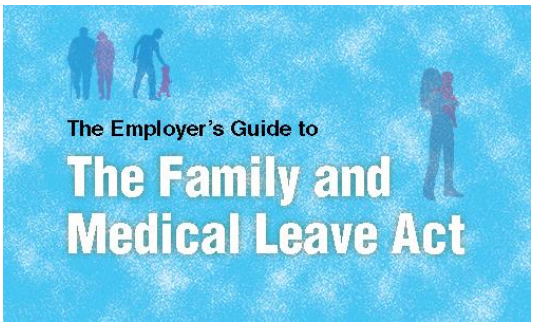
Employees are not immediately eligible on being hired to take FMLA leave. Thus, the next likely transactional issue is whether the particular employee requesting FMLA leave is eligible for such leave. An employee of a covered employer is eligible for leave if the employee has been employed by the employer under all the following conditions:

- ✓ For at least 12 months.
- ✓ For at least 1,250 hours of service during the previous 12-month period.
- ✓ At a worksite where the employer employs at least 50 employees.

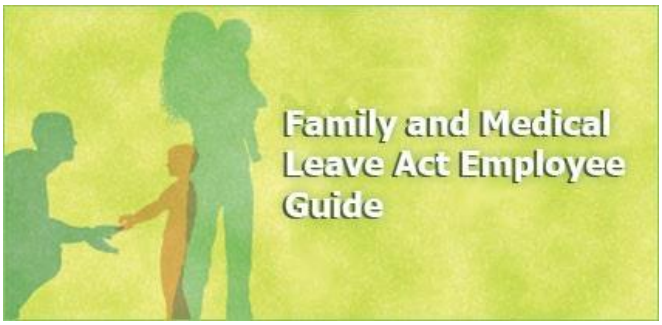
Employees must meet the 12-month and 1,250-hour requirements as of the first day of leave.

If an employee is taking intermittent leave, he or she need only meet these eligibility requirements at the time of the first intermittent absence covered by the same medical certification. Whether the employee works at a worksite with 50 employees within 75 miles is determined at the time the employee gives notice of the need for leave.

For determining whether an employee has been employed by a covered employer for at least 12 months, the 12 months do not need to be consecutive. Thus, in Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006), the First Circuit Court of Appeals held that an employee who worked for an employer for five years, had a five-year break in service and then was reemployed for seven months had met the 12-month requirement. In addition, the 12 months may, in some circumstances, include the time the employee was employed by a predecessor-employer.



https://www.dol.gov/agencies/whd/fmla/employer-guide



https://www.dol.gov/agencies/whd/fmla/employee-guide

The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to SARS 2. The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees.

Generally, the Act provides that employees of covered employers are eligible for:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined by government or doctor's orders, and/or experiencing SARS 2 symptoms and seeking a medical diagnosis.

- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine by government or doctor's orders, or to care for a child (under 18 years of age) whose school or childcare provider is closed.

Most employees of the government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to SARS COV-2.

The leave provisions are created by a time-limited statutory authority and is effective from April 2, 2020 through December 31, 2020.

These guidelines expired last year, but Congress did authorize an extension of tax credits to employers who voluntarily continued to pay workers on leave.

The American Rescue Plan Act of 2021 has extended those credits through Sept. 30, 2021.

The Department of Justice originally published its Americans with Disabilities Act (ADA) regulations on July 26, 1991, including ADA Accessibility Guidelines (1991 Standards).

The final rule was published in the Federal Register on December 2, 2016, and took effect 45 days after publication, on January 17, 2017.

The Americans with Disabilities Act prohibits discrimination against people with disabilities and guarantees that they have equal opportunities in matters of employment.

Employers with 15 or more employees are required to comply with the ADA, although employers of all sizes are also encouraged to comply with ADA rules and regulations as well.

People who are protected by the ADA include people who:

- ✓ Have a physical or mental impairment that substantially limits one or more life activities.
- ✓ Has a history or record of such an impairment.
- ✓ Is perceived by others as having such an impairment or disability.

The ADA requires employers to go through in what is known as the "**interactive process**."

The purpose of the interactive process is to have employers and employees engage in conversation to discuss possible reasonable accommodations that can be made to enable the employee to perform the essential functions of the job.

Employers are required to provide reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship for the company. It is important to note that inconvenience is not the same as an undue hardship under the ADA.

The interactive process is mandatory for all the employers and is triggered when the employee or his or her representative give notice to the management regarding the person's disabilities and the desire for an accommodation. There are a few guidelines that an employer must go through for better implementation of the process.

If an employer refuses to engage in the interactive process and/or fails to make reasonable accommodations, they may be leaving themselves open to claims of ADA noncompliance.

FLWorkComp.com
Protect Your Business

Workers' compensation is a government-mandated system that pays monetary benefits to workers who become injured or disabled in the course of their employment.

Workers' compensation is a type of insurance that offers employees compensation for injuries or disabilities sustained because of their employment.

Workers' compensation is largely regulated on a state-by-state basis, although there are some federal WC regulations that are enforced on the federal level by the Office of Workers' Compensation Programs (OWCP).

Employers conducting work in the State of Florida are required to provide workers' compensation insurance for their employees.

Most workers' compensation laws are similar in that they require employers to provide certain benefits (medical expenses, death benefits, lost wages, vocational rehabilitation, etc.) to employees who suffer a work-related injury or illness, although specific amounts and eligibility requirements may vary across different jurisdictions.

In most states, employers meet their obligation to provide workers' compensation by purchasing workers' compensation coverage from an insurance carrier. A few states, however, require workers' comp coverage be secured through state-operated funds.

By agreeing to receive workers' compensation, workers also agree to give up their right to sue their employer for negligence. This "**compensation bargain**" is intended to protect both workers and employers. Workers typically give up further recourse in exchange for guaranteed compensation, while employers consent to a certain amount of liability while avoiding potentially greater damage of a large-scale negligence lawsuit. All parties (including taxpayers) benefit from avoiding the legal fees needed to process a trial.

https://www.myfloridacfo.com/Division/WC/pdf/WC-System-Guide.pdf

Generally, workers' compensation does not cover routine community-spread illnesses like a cold or the flu because they usually cannot be directly tied to the workplace. However, states are taking action to extend workers' compensation coverage to include first responders and health care workers impacted by COVID-19. A common approach is to amend state policy so that COVID-19 infections in certain workers are presumed to be work-related and covered under workers' compensation. This presumption places the burden on the employer and insurer to prove that the infection was not work-related making it easier for those workers to file claims.

Overlap between FMLA, ADA, and WC

It is easy to see, now, how one employee's leave might be covered under one, two or three of these laws.

Below are a few hypothetical situations to highlight the overlap between these laws:

Workers' compensation + ADA … If an employee is injured in a work-related accident, they may be entitled to benefits provided under workers' compensation. If that employee develops a disability that limits a major life activity as a result of that injury, he or she might also then be protected by the ADA. If this is the case, the employer should make sure to go through the interactive process with the employee to determine what/if any reasonable accommodations might need to be made.

FMLA + ADA … If an employee sustains an injury or develops a serious health condition that is unrelated to work, he or she might be entitled to take up to 12 workweeks of job-protected leave to care for themselves under FMLA. If that condition also limits a major life activity, he or she may also be protected by the ADA.

WC + FMLA + ADA … If an employee sustains a work-related injury that substantially limits one or more major life activities and needs to take leave to care for themselves, he or she might be protected by all three laws.

At a minimum, attendance policies must incorporate a case-by-case assessment of the individual employee's situation and an employer's duty as to reasonable accommodation. I provide more guidance on this below.

According to the EEOC, if an employer receives a request for leave for reasons related to a disability and the leave falls within the employer's existing paid leave policy, it should treat the employee requesting the leave the same as an employee who requests leave for reasons unrelated to a disability.

Where an employee's paid leave has run out, or where the employer maintains no paid leave policy, an employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if: 1) the employee requires it; and 2) it does not create an undue hardship for the employer.

Reassignment to a vacant position. The EEOC uses this resource as a reminder that an employer has an obligation under the ADA to reassign an employee if their disability "prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship." Deemed by the courts as the "accommodation of last resort," reassignment still must be considered if all else fails.

Use "automatic termination" provisions at your own risk. In this resource, the EEOC again strongly counsels against policies that call for termination of employment after the employee has been absent for a certain period of time (e.g., 3 mos., 6 mos., etc.), since these policies do not sufficiently meet the employer's obligation to engage in the ADA's interactive process and to determine whether a reasonable accommodation is necessary.

Undue hardship for the employer

Undue hardship still a nebulous beast to figure out. The EEOC offers guidance and some additional criteria to consider when determining whether a possible accommodation causes an undue hardship (which the employer then does not need to implement), but as we might expect, the resource document does not necessarily provide any enlightenment as to what point requests for intermittent leave or repeated extensions of leave pose an undue hardship.

In determining undue hardship, the employer may consider the following:

> The amount and/or length of leave required (for example, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);
>
> The frequency of the leave (for example, three days per week, three days per month, every Thursday);
>
> Whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
>
> Whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);
>
> The impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and
>
> The impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

As EEOC previously has acknowledged in a separate guidance, a request for indefinite leave—meaning that an employee cannot say whether or when he/she will be able to return to work at all—will always be considered an undue hardship and, as the EEOC puts it, the request "does not have to be provided as a reasonable accommodation."

It is largely the employer's responsibility to understand how these laws may apply and ensure they are acting in compliance with all the applicable laws in any situation.

Ignorance of the law is not an excuse.