



# Navigate Legal Landmines at Your HR Department: Leave Requests

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# Applicable Laws

- Americans with Disabilities Act (ADA)
- Family Medical Leave Act (FMLA)
- Michigan Paid Medical Leave Act (PMLA)
- **AND...Do not forget your CBAs and policies!**

# Who is Protected?

## FMLA

- (1) employed for at least 1 year; AND
- (2) worked at least 1,250 hours in 12 months immediately preceding the leave; AND
- (3) has a qualifying reason for leave.

# What Do Employees Get – FMLA

- Generally, 12 work weeks of unpaid time off in a rolling 12-month period;
- 26 weeks for military caregiver leave;
- Time off can be taken intermittently;
- Maintenance of health benefits during leave;
- Reinstatement to same or substantially equivalent position;
- No discrimination or retaliation.

# Snow Days and Teachers

- Do we count inclement weather/snow days as part of FMLA days?
- If inclement weather falls on a day for an employee's previously "scheduled leave," would we count that day?

# Snow Days and Teachers

- Although the FMLA rules do not directly address snow days, it does address holidays and so you follow the same concept.
- If the employee worked any part of the week, then only the days the employee would have been expected to report to work should be counted as FMLA leave.



# Blizzard and FMLA

A teacher is on a full week of FMLA leave. That week, a blizzard forces the school district to call snow days for two consecutive days. Can you still count the two days against the teacher's FMLA usage?

# Blizzard and FMLA

Because the teacher was on leave anyway, the full week counts against their allotted amount.



# Bad Weather and FMLA

*A teacher has been on leave for several weeks and is due to return on a Thursday. A snowstorm forces the school to close on Tuesday that same week.*

***What should we do about Tuesday?***

# Do Not Count It!

Monday and Wednesday are counted  
against the teacher's allotted leave,  
but Tuesday does not.

## Note: School Closures More Than A Week

This applies for closures of less than a week. If an employer's operations are shut down for one or more full weeks, any days the employee would not be expected to work should not be counted against the employee's FMLA leave entitlement.

# Qualifying Reasons for Leave FMLA

- Employee's serious health condition;
- Serious health condition of parent, spouse or child;
- Birth, adoption, or placement of child w/in 12 months of birth, adoption or placement;
- Serious injury or illness of family servicemember;
- "Qualifying exigency" of family servicemember.





# **Certification of a Serious Health Condition**

**[dol.gov/whd](https://dol.gov/whd)**

# FMLA Form

## Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act Certificación del proveedor de atención médica por una enfermedad grave del empleado en virtud de la Ley de Licencia Médica y Familiar

U.S. Department of Labor  
Wage and Hour Division  
División de Salarios y Horario  
(WHD, Wage and Hour Division) del  
Departamento de Trabajo de los EE. UU.



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.  
NO ENVÍE EL FORMULARIO COMPLETADO AL DEPARTAMENTO DE TRABAJO.  
RETURN TO THE PATIENT / DEVUELVALO AL PACIENTE.

OMB Control Number: 1235-0003 / Número de control de la OMB: 1235-0003  
Expires: 6/30/2026 / Vence: 6/30/2026

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protection because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2612, 2614(a)(3); 29 C.F.R. § 825.305. The employer must give the employee at least 15 calendar days to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found in the DOL website at [www.dol.gov/agencies/eis/whd](http://www.dol.gov/agencies/eis/whd). La Ley de Licencia Médica y Familiar (FMLA, Family and Medical Leave Act) establece que un empleador puede exigir que un empleado que busca protección en virtud de la FMLA debido a la necesidad de una licencia por una enfermedad grave presente una certificación médica emitida por el proveedor de atención médica del empleado. Título 29 del Código de los Estados Unidos, Artículo 2612, 2614(a)(3); Título 29 del Código de Regulaciones Federales, Artículo 825.305. (El empleador debe darle al empleado al menos 15 días calendario para presentar la certificación. Si el empleado no presenta una certificación médica completa y suficiente, su solicitud de licencia en virtud de la FMLA podrá ser rechazada. Título 29 del Código de Regulaciones Federales, Artículo 825.313. Puede encontrar información sobre la FMLA en el sitio web de la DOL en [www.dol.gov/agencies/eis/whd](http://www.dol.gov/agencies/eis/whd)).

### SECTION I - EMPLOYER / SECCIÓN I - EMPLEADOR

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.305. You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.305-825.308. Additionally, you may not request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care. / Tanto el empleado como el empleador pueden completar la Sección I. Si bien el uso de este formulario es opcional, este formulario solicita al proveedor de atención médica la información necesaria para obtener una certificación médica completa y suficiente, que se establece en el Título 29 del Código de Regulaciones Federales, Artículo 825.305. Usted no podrá pedirle al empleado que proporcione más información de la permitida en virtud de las disposiciones de la FMLA, Título 29 del Código de Regulaciones Federales, Artículos 825.305-825.308. Además, no podrá solicitar una certificación por la licencia en virtud de la FMLA para establecer vínculo con un hijo recién nacido sano o un hijo colocado en adopción o cuidado familiar.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees' family members created for FMLA purposes as confidential medical records in separate files/separate from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1630.8, if the Genetic Information Nondiscrimination Act applies. / Por lo general, los empleadores deben mantener registros y documentos relacionados con información médica, certificaciones médicas, recertificaciones o historiales médicos de empleados creados para fines de la FMLA como registros médicos confidenciales en archivos/separados separados de los archivos de personal habituales y de acuerdo con el Título 29 del Código de Regulaciones Federales, Artículo 1630.14(c)(1), si se aplica la Ley de Estadounidenses con Discapacidades, y de acuerdo con el Título 29 del Código de Regulaciones Federales, Artículo 1630.8, si se aplica la Ley de No Discriminación por Información Genética.

(1) Employee name: \_\_\_\_\_  
Nombre del empleado: First / Primero Middle / Segundo Last / Apellido

(2) Employer name: \_\_\_\_\_ Date: / Fecha (mm/dd/yyyy) (mm/dd/yyyy)  
Nombre del empleador: (Indique la fecha en que se solicitó la certificación)

(3) The medical certification must be returned by: \_\_\_\_\_ (mm/dd/yyyy)  
La certificación médica debe devolverse a más tardar el: (mm/dd/yyyy)  
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.) / (Debe esperar al menos 15 días calendario a partir de la fecha de solicitud, a menos que no sea factible a pesar de los esfuerzos diligentes y de buena fe del empleado).

(4) Employee's job title: \_\_\_\_\_ Job description: ☐ is / ☐ is not attached.  
Cargo del empleado: Descripción del trabajo: ☐ está / ☐ no está adjunta.

Employee's regular work schedule: \_\_\_\_\_  
Horario de trabajo regular del empleado:

Statement of the employee's essential job functions: \_\_\_\_\_  
Declaración de las funciones laborales imprescindibles del empleado:

(The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.) / (Las funciones imprescindibles del puesto del empleado se determinan con referencia al puesto que el empleado ocupaba en el momento en que el empleado notificó al empleador sobre la necesidad de la licencia o el inicio de la licencia, lo que ocurra primero).

### SECTION II - HEALTH CARE PROVIDER / SECCIÓN II - PROVEEDOR DE ATENCIÓN MÉDICA

Please provide your contact information, complete at relevant parts of this Section, and sign the form. Your patient has requested leave under the FMLA. The FMLA allows an employer to require that the employee submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to the serious health condition of the employee. For FMLA purposes, a "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. For more information about the definition of a serious health condition under the FMLA, see the chart on page 4. / Proporcione su información de contacto, complete todas las partes relevantes de esta Sección y firme el formulario. Su paciente ha solicitado una licencia en virtud de la FMLA. La FMLA permite que un empleador exija que el empleado presente una certificación médica oportuna, completa y suficiente para respaldar una solicitud de licencia en virtud de la FMLA debido a una enfermedad grave del empleado. A los fines de la FMLA, una "enfermedad grave" es una enfermedad, lesión, discapacidad o enfermedad física o mental que implique el ingreso de un paciente hospitalizado o el tratamiento continuo por parte de un proveedor de atención médica. Para obtener más información sobre las definiciones de "enfermedad grave" en virtud de la FMLA, consulte la tabla en la página 4.

You also may, but are not required to, provide other appropriate medical facts including symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment. Please note that some state or local laws may not allow disclosure of private medical information about the patient's serious health condition, such as providing the diagnosis and/or course of treatment. / También puede proporcionar otros datos médicos adecuados, inclusive síntomas, diagnóstico o cualquier régimen de tratamiento continuo, como el uso de equipo especializado, pero no está obligado a hacerlo. Tenga en cuenta que es posible que algunas leyes estatales o locales no permitan la divulgación de información médica privada sobre la enfermedad grave del paciente, como proporcionar el diagnóstico o el curso del tratamiento.

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MILLER  
CANFIELD

# What to do With Non-cooperative Employee Who Claims FMLA Need?

What recourse do we have for an employee who qualifies for FMLA but fails to follow up on the return of the FMLA forms to HR?



# Uncooperative Employee and FMLA Certification

- In general, you may require that the employee comply with your normal policies for requesting leave.
- You can take action under your internal rules and procedures if the employee fails to follow your usual and customary rules for requesting leave, as long as it does not discriminate against employees taking FMLA leave.
- When the employee does not give timely notice of unforeseeable leave and does not have a reasonable excuse, the employer may delay or deny the FMLA leave.
- If the employee fails to provide the employer with enough information to determine whether the leave is FMLA-qualifying, the leave may not be protected.



# Question...

*If an employee is on FMLA for an injury or surgery but requests remote work on specific days, is that OK?*

Doctor only listed a return date for FMLA leave, but no restrictions

# Considerations...

Key language: “Employee requests remote work.”

- Under the FMLA, an employer cannot require an employee to work on FMLA, or condition continued employment on completing work while on FMLA.
- Courts have held, however, that: “giving employees the option to work while on leave does not constitute an interference with FMLA rights so long as working while on leave is not a condition of employment.”
- BUT...any time the employee works, even if at home, cannot be charged against their FMLA allotment.

# FMLA Covered Conditions

## Serious Health Conditions (SHC's)

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

- (1) “inpatient care”; or
  - overnight stay in a hospital, hospice, or residential care facility and any period of incapacity or subsequent treatment
- (2) “continuing treatment by a health care provider”
  - A period of incapacity of more than 3 consecutive days, and any subsequent incapacity related to same condition, that also involves:
    - (1) In-person treatment 2 or more times w/in 30 days of the first day of incapacity (the first must occur w/in 7 days); or
    - (2) In-person treatment by a health care provider on at least one occasion (first must occur w/in 7 days) resulting in a “regimen of continuing treatment” under supervision of a health care provider.

# FMLA Covered Conditions

**“Regimen” of continuing treatment does NOT include routine physicals, eye exams, dental exams**

- And does NOT generally include simply taking over-the-counter meds, exercise, drinking fluids, or bed rest.
- Usually DOES involve a course of prescription meds or therapy
- NOTE: “health care provider” includes PAs and nurse practitioners



# FMLA Covered Conditions

A SHC also includes:

- Any incapacity due to pregnancy or absences for prenatal care;
- Any incapacity or treatment due to chronic conditions;
- Any period of incapacity due to permanent or long-term conditions for which treatment may not be effective;
- Any period of absence due to receiving multiple treatments or recovery due to restorative surgery or a condition that would likely result in an absence of more than 3 days in the absence of medical treatment;
- Treatment for substance abuse.

# FMLA Covered Conditions

**Ordinarily the following are NOT considered SHC's:**

- treatments for plastic and other cosmetic surgery;
- common cold;
- flu;
- earaches;
- upset stomach;
- minor ulcer;
- headaches (other than migraine);
- routine dental or orthodontia problems, periodontal disease, etc.

**HOWEVER...all conditions could be SHC's if inpatient hospital care is required or unless complications develop**

# FMLA Covered Conditions

## **Any incapacity due to pregnancy or absences for prenatal care**

- Treatment during absence not required and absence need not last more than 3 days
  - Example = incapacity due to severe morning sickness.
- The spouse (not boyfriend) is entitled to FMLA leave if needed to care for pregnant spouse who is incapacitated or if needed to care for her during her prenatal care

# FMLA Covered Conditions

## **Any incapacity or treatment due to chronic conditions which:**

- (1) Require periodic visits (at least twice a year) for treatment
- (2) Continue over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g. , asthma, diabetes, epilepsy, etc.).

**Applies even if the EE is not receiving treatment during the absence or absent for more than 3 days.**



# FMLA Covered Conditions

## Leave for treatment of substance abuse if it requires:

- (a) inpatient care, or
- (b) continuing treatment by a health care provider
  - A period of incapacity of more than 3 days + treatment.

Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

Treatment for substance abuse does not prevent ER from taking action against EE for violating substance abuse policy.

# FMLA Covered Conditions

## Leave for Birth or Adoption of Child

- Both mother and father are entitled to up to 12 weeks.
  - BUT - Spouses working for same employer are limited to 12 weeks total to spend time with healthy baby. Each is still entitled to up to 12 weeks for other covered conditions.
- Must be taken within one year of birth or placement.
- Leave may be taken before adoption, if necessary to make sure adoption will proceed.
  - E.g., to attend counseling, appear in court, consult with attorney or doctor of birth parent, submit to physical examination, or travel to another country.
- NOT required to grant intermittent leave for healthy child.

# FMLA Covered Conditions

## Military Servicemember Leaves

Qualifying exigency” arising out of active duty or call to active duty of EE’s spouse, parent or child;

**OR**

To care for a covered military servicemember who has or is being treated for a serious injury or illness if the EE is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

# FMLA Abuse?

## ***Question: A slam dunk for the employer?***

Employee has a bad back and cannot not stand or sit for long periods. While on FMLA leave, she posted videos of herself on Facebook drinking and dancing at a local bar. The employer fires her, noting that if she could dance, she could work.

# FMLA Abuse?

## ***Answer: No.***

One federal district refused to dismiss the employee's FMLA lawsuit.

- According to the Court, the employer should have conducted a closer review of her health condition and that it failed to consult with a medical provider to determine if this conduct (dancing on Facebook Live while at the bar) was incompatible with FMLA leave. Rather than getting a second medical opinion that "would have provided the court with helpful evidence," the employer simply relied on its "lay opinion" that she could work if she could dance.



# What Should You Do If You Suspect FMLA Abuse?

- Unfortunately, a lot of employees assume that because they were approved for intermittent leave, they can use it whenever they want, wherever they happen to be.
- Managing employees on intermittent leave is one of the most difficult problems facing employers under the FMLA. Employers may know that an employee is abusing FMLA but they do not know how to manage the problem.

# What Should You Do If You Suspect FMLA Abuse?

- FMLA certifications and recertifications are your BEST friend.
- Make sure the original certification is complete and sufficient – if not, follow up!
- Still a reason to doubt? 2nd and 3rd opinions are an option.
- Recertification: An employer can seek recertification if the employee requests an extension of leave, if the circumstances described by the previous certification have changed significantly, or if the employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification

# Ask The Employee Questions...

- Duration of leave anticipated?
- Why can you not perform job?
- When do you expect to return to work?
- Ensure familiarity with company call-in procedure
- Medical documentation

# Most Common Types Of FMLA Abuse

- Having another job.
- Attending to personal business—errands or shopping.
- Engaging in social activities.
- Friday-Monday Leave Absence (FMLA).

# FMLA—Friday & Monday Leave Act

- Let's say that James, after 6 weeks on leave, supplies HR with a note that says that James may not be able to work every day while his recovering from abdominal surgery and may need to call off work depending on how he feels when he gets up.
- Do you have to allow James to work this schedule?
- Now you know why some people call FMLA the “Friday and Monday Leave Act.”





# Handling The Tricky Questions In FMLA Intermittent Leave

# Intermittent FMLA

Let's say you have an employee who uses FMLA intermittent leave frequently on Mondays or Fridays. As an HR officer handling this file, what can you do?

# Intermittent FMLA

Employer could seek recertification from the health care provider to determine whether this is an expected pattern of absence given the employee's serious health condition.

The employer also could share the absence pattern with the health care provider and ask if it is consistent with the need for leave.

# Prudent Considerations for Intermittent FMLA Abuse...

- The employer should conduct an investigation and interview the person suspected of abusing FMLA leave.
- Employers should prepare a list of questions to ask employees when FMLA abuse is suspected. Give the employee an opportunity to explain suspicious circumstances.
- Obtain “particularized facts” and make “reasonably informed and considered decision.”

# FMLA Interference & Retaliation Claims

Andy, a bright IT director, is off on FMLA and recovering from surgery. However, his temporary replacement (Jim) is not as competent as Andy. Jim constantly calls Andy with questions and for troubleshoot assistance at work. OK?



# Avoiding FMLA Interference Claims

- Avoid interference claims – best to limit contact with employees on FMLA unless necessary to continue to facilitate FMLA or request regarding job duties is “de minimis.”
- Should not require employee to travel to office, spend a significant amount of time on request/task, on the phone, and so on.
- “No good deed goes unpunished” - once you open the door to allow this for one employee, you may have to allow for others

reinstatement

FMLA

Medical

right  
employees

employee  
leave  
despite

certification

restriction

light-duty  
job

at  
the

excessively  
costly

return

FMLA leave

regulation  
regard

interference

terminated

federal

court

unstable

family

physical

sufficient  
condition

mental

standing

percent

employee

work

unable

trigger

perform

function

remains

inclusion

process

unstable  
state

close

employment

help

resume

restriction

period

grants

medical

employee

# Scenario

*James, a service mechanic, after undergoing an abdominal aortic aneurysm operation, miraculously heals and is released to return to work in 10 weeks. Unfortunately, in his absence, the dealership hired a superstar “A” tech and does not really need James. Knowing you have a reinstatement obligation under the FMLA, you offer James a lot porter position.*

**Have you satisfied your obligations under the FMLA?**

NO!

Employer must return employee to  
same position or to substantially  
equivalent position!

# Reinstatement

- Return to same or equivalent position;
- Pay, benefits, terms and conditions;
- At conclusion of FMLA leave, FMLA rights disappear;
- Reinstatement rights forfeited *if employee does not return to work*;
- If employee informs employer they are not returning to work, get it in writing;
- No greater right to reinstatement than if leave not taken.



# Consider Leave Beyond FMLA

What if the employee is not eligible for FMLA or has exhausted their FMLA leave?

- Keep in mind that employees may have additional protections under the law, including rights to take leave under school/company policies, even if they are not eligible for FMLA or have exhausted their FMLA leave entitlement.
- Additional areas to review include, but are not limited to:
  - Michigan state law
  - **Americans with Disabilities Act (ADA)**
  - WC

**Tip!** Always consider consulting with legal counsel to determine if additional rights and responsibilities apply in a particular situation. **EVERY SITUATION IS UNIQUE!**

# Who is Protected?



Americans with Disabilities Act

***“qualified individual with a disability”***



# JOB DESCRIPTIONS AND SPECIFICATIONS

HUMAN  
RESOURCE  
MANAGEMENT

# Essential Job Functions Under the ADA

An employee who can not perform the essential job functions, even with a reasonable accommodation, is not considered qualified for the job and is not protected from discrimination.

# Determining Essential Functions

Factors to consider when determining whether a function is essential:

- **Job descriptions—Very Important!!!**
- Employer's judgment.
- Amount of time spent performing the function.
- Consequences of not requiring the person to perform the function.
- Terms of a collective bargaining agreement.
- Work experience of others who have had, or currently hold, the same or similar positions.



# Protected Conditions - ADA

## What conditions are protected?

- impairment that **substantially limits a major life condition.**
- record of having an impairment.
- regarded as having an impairment.

# “Major Life Activities” under the ADA

These include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

# Protected Conditions - ADA

ADA says that:

- **“disability” must be construed broadly.**
- ***Must consider condition without “mitigating measures.”***

# Episodic medical conditions

“Episodic or cyclical impairments, or impairments that go into remission” are disabilities even during remission if they would substantially limit a major life activity when active.

- Examples: depression, bipolar disorder, Post-Traumatic Stress Disorder, other psychiatric conditions, epilepsy, cancer, etc.

# Protected Conditions - ADA

**Still...the person must be otherwise “qualified”**

- Employee meet legitimate skill, experience, education, or other requirements of an employment position and be able to perform the essential functions of the position with or without reasonable accommodation.



# ADHD (Attention-deficit/hyperactivity disorder) and Details!

Mike cites a need to work from home (“reasonable accommodation”) because he claims the work environment is too distracting. He suffers from a diagnosed condition of ADHD. Employer offers noise-cancelling headphones as an alternative accommodation to minimize noise/distractions.

Mike’s productivity slacked, and was placed on a PIP, even after employer tried both the headphones and remote work. Ultimately, Mike claimed his ADHD “caused him to miss details” at work.

Employer terminates Mike.

Legal?

# *King v. McDonough*, 596 F. Supp. 3d 206 (D. Mass. 2022)

- Court upholds the termination decision.
- The record shows that during the time he was employed, his ADHD caused him to “miss details” and “get distracted easily.”
- Under the facts presented here, his condition does not constitute “a substantial limitation on a major life activity.”
- No evidence, says court, indicating that the impairment was long-term or permanent, or that any impact on a major life activity was substantial. Rather, he could perform his job when he elected to do so.

# *Shields v. CreditOne Bank, N.A., 32 F.4th 1218* *(9th Cir. 2022)*

*Following painful bone biopsy surgery, Kim (an HR generalist) could not fully use her shoulder, arm, or hand, and could not type, write, tie shoes, or lift a hairdryer, for a period of two months. At end of 12 week leave, Kim provides doctor note that she is not ready to return to work. Employer eliminates her position.*

Legal?

# *Shields* Court decision

A sufficiently severe impairment need not be “permanent or long-term” and may be “episodic or in remission” if there is a record of a disability or evidence of substantial limitation on a major life activity when active.

# *Shields* Court decision

The ADA and its implementing EEOC regulations make clear that the definition of “disability” of the ADA is not subject to any categorical temporal limitation...



# Substantial Limitation

Impairment that substantially limits a major life activity does not require showing long term effects. EEOC regulations specifically state that a condition lasting less than 3 months can be substantially limiting. While duration of an impairment is a factor, there is no rule excluding short term impairments, “which may be covered if sufficiently severe.”

# Duration of Impairment is But One Consideration...

Temporary impairment that impedes the performance of a major life activity and that “lasts for several months” is “sufficiently severe” to qualify as “substantially limiting” within the meaning of the ADA and the EEOC regulations.

# “Reasonable” Accommodations

- Reasonable = whether the benefits outweigh the costs.
- Some courts look to what other employers are doing in similar circumstances.
- The accommodation must also be effective to be reasonable.

# Duty to Accommodate

Employers must provide “reasonable” accommodations to qualified individuals with disabilities that would enable them to perform the essential functions of their jobs, unless it would cause an “undue hardship”.

# Accommodation Examples

- **Physical modifications to make worksite accessible**
- **Providing aids, devices, readers, interpreters, equipment**
- **Modification of policies/rules**
- **Modification of job**
  - Restructure to part-time or modified schedule
  - DO NOT need to remove essential functions or lower production standards (qualitative or quantitative)
- **Work from home (telecommute)**

## **Reassignment to vacant position**

- DO NOT need to create a new position, allow for bumping (unless otherwise allowed), override seniority rules, or promote
- Person must be qualified

## **Leave of Absence**

- Need not be indefinite, but cannot cut off until unreasonable or undue hardship
- Bright line rules not allowed



# The Interactive Process - Accommodations

What triggers the duty to accommodate:

- **The employee requests an accommodation.**
  - Magic words—no need to mention the ADA or use the words “reasonable accommodation.” Employee needs only to request a change or modification based on a medical condition.
- Employer (1) knows that the employee has a disability, and (2) reasonably believes that the employee may need an accommodation.
- What happens after the duty is triggered?
- **Employer must engage in the “interactive process.”**
- Purpose is to determine whether an accommodation is truly necessary because of a disability.

## *Tafolla v. Heilig*, 80 F.4th 111 (2nd Cir. Aug. 18, 2023)

- Beth was a typist and requested to not be assigned to the task of archiving, which required lifting files from a pile on the floor to the desk.
- The Court found the case should go to trial because archiving was not an essential function of the job.
- Defendant granted a request for no lifting, but Plaintiff still had to bend and lift against restrictions. The supervisor made no effort to find an accommodation, instructing Plaintiff to “get a box, put it on the floor, and sit in your seat and get it done,” which the Court deemed to be an unreasonable end to the interactive process.

# The Interactive Process

1. Analyze essential v. non-essential functions of the position.
2. Talk directly with employee.
  - You can ask: the nature of the condition, its severity, expected duration, life activities it limits, extent of limitations with respect to ability to perform essential functions.
3. Ask what accommodation(s) he/she is seeking.
4. Ask for medical documentation to support the need.
  - Medical must be accepted unless contradicted by second medical opinion
  - Do not overuse the independent medical exam. Remember – the focus is not on whether the condition actually qualifies as a disability anymore.
5. Suggest alternate accommodations that might be reasonable (effective).
  - Remember - The employee's desired accommodation does not have to be provided if another one exists that is better for the employer.

**DOCUMENT, DOCUMENT, DOCUMENT** 

# Sufficient Documentation

## ***What is Sufficient?***

Documentation is sufficient if it:

- (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and,
- (2) substantiates why the requested reasonable accommodation is needed.

# Interactive Process

## ***Owens v. Georgia Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. 2022)***

An employer does not have any duty to engage in the interactive process until the employee makes a specific request for an accommodation. Plaintiff did not trigger the duty to accommodate when she requested telework following childbirth, even though she advised the employer of childbirth-related complications, because she did not say what the disability was or how the accommodation (teleworking) would address the limitations.



*Lashley v. Spartanburg Methodist College, et al.*, 66 F.4th  
168 (4th Cir. Apr. 18, 2023)

Plaintiff failed to engage in the interactive process when she declined to tell the College how her diagnosis of Crohn's Disease limited her ability to work, what accommodation she would need to perform the essential functions of her job, what measures would mitigate the effects of her condition, and also never returned the accommodation form.

# *Dansie v. Union Pacific Railroad Co.*, 42 F.4th 1184 (10th Cir. 2022)

Employee (train conductor) required treatment for AIDS and testicular cancer. Submitted, with doctor note, stating he needed 5 days off work per month but cautioned that the estimate was subject to change based on nature of illness.

# *Dansie v. Union Pacific Railroad Co.*, 42 F.4th 1184 (10th Cir. 2022)

- General Manager testified at deposition that the unpredictability of Plaintiff's request was unacceptable.
- Plaintiff testified that when he told his immediate supervisor that he believed the Company granted his accommodation request, his supervisor just shrugged and walked away.
- His supervisor testified that Plaintiff was on his “shit list” and that he believed Plaintiff was lazy because he failed to follow the attendance policy.



# *Dansie v. Union Pacific Railroad Co.*, 42 F.4th 1184 (10th Cir. 2022)

A reasonable jury could find that Defendant failed to engage in the interactive process when it did not determine exactly what Plaintiff's limitations were and did not explore any accommodations, while Plaintiff suggested several possible accommodations.

# *King v. Steward Trumbull Memorial Hospital, Inc.,* 30 F.4th 551 (6th Cir. 2022)

A leave of absence can be a reasonable accommodation.  
An employer is not required to grant indefinite leave, but a request for 5 weeks is not a request for indefinite leave.  
The employer cannot establish undue hardship where policies explicitly allow for a leave of absence up to 12 weeks.



# *Smithson v. Austin*, 86 F.4th 815 (7th Cir. Nov. 20, 2023)

*Kaitlyn, a science teacher who had serious medical issues, was granted significant accommodations for several years. She ended up suing the school when the new principal allowed her to use sick leave for any absence up to two hours, “barring any undue hardship to the school schedule,” rather than granting her an open flexible duty reporting time of up to two hours and excusing her from those first two hours, as had been done in the past.*

***Was the school principal’s action reasonable?***

# *Smithson v. Austin*, 86 F.4th 815 (7th Cir. Nov. 20, 2023)

The Court held that the School had no duty to always give Plaintiff a schedule where she did not teach in the first period, nor did the School have a duty to excuse Plaintiff from the activities that often occurred at the beginning of the school day, such as training, teacher collaboration, interaction with parents, ad hoc instruction, and other necessary activities.

**In person attendance at a school where students attend in person during fixed hours of the day is an essential function of being a teacher.**

The fact that the school had accommodated such a schedule in the past was not determinative where the amount of time off Plaintiff needed per day and the number of incidents of needing that time off had gradually increased over time.

# *Sarkisian v. Austin Preparatory School, 2022*

## *WL 17683765 (D. Mass. Dec. 6, 2022)*

- Nancy is 70 years old and was employed at a private Catholic school as a 9th grade teacher.
- She underwent hip and knee surgeries.
- Doctor advised school that her hip impairment would last 3-6 months; she could not walk, use stairs, bend, lift, or drive, and that she should be on “total temporary disability” indefinitely.
- HR reviewed accommodation form from doctor and decided to terminate the position because school “had a growing need to fill her position” and “could not provide an extended and continuing leave of absence with no set end date.”

***Was the termination legal? Why or why not?***

*Washington v. Offender Aid & Restoration of Charlottesville-Albemarle, Inc.,*  
No. 3:22-cv-00041, 2023 U.S. Dist. LEXIS 105889 (W.D. Va. June 15, 2023)

- Amy suffered from anxiety and depression associated with PTSD. She gave HR a doctor's note, which only said that Amy needed a "flexible schedule." Employer denied her proposed accommodation in the form of "remote work."
- She sued, claiming Employer acted unreasonable in denying her proposed accommodation (remote work).

***What do you think the Court ruled?***

## *Donnell v. Rockwood Sch. Dist.*, No. 4:22 CV 1267 RWS, 2023 U.S. Dist. LEXIS 71772 (E.D. Mo. Apr. 25, 2023)

- Plaintiff was a blind paraprofessional, requiring the use of a service dog. She received an assignment to begin at a local high school and prior to her start date made a request for accommodation for her service dog. The school district never responded to the request. Plaintiff followed up numerous times without response from the district.
- The Court found Plaintiff properly stated a claim for disability-retaliation. Plaintiff suffered adverse employment action because of her disability when the Defendant did not place her at the high school she was assigned, nor any other school thereafter.
- The Court found Plaintiff engaged in protected activity by telling the district they were not handling her request for accommodation properly and that their animal-service policy did not comply with federal law.





Mike has significant intellectual and physical challenges, a learning disability, borderline autism, Pulmonary Arterial Hypertension, double lung transplant, and osteoporosis from antirejection drugs. Company approved Plaintiff's accommodations of taking breaks to sit down due to the pain from his disability.

A co-worker routinely bullied Plaintiff (cashier at Sonic) based on his disability, despite Plaintiff's numerous complaints to management, telling him to "get [his] lazy ass up," to stop "using [his] disability as an excuse and [his] pain as an excuse," that "[he] needed to start picking up slack," and that he was "a weak little b\*tch."

*Moss v. Saja Rest. Grp., LLC*, Civil Action No. 5:22-cv-00014,  
2023 U.S. Dist. LEXIS 70055 (W.D. Va. Apr. 21, 2023)

On another occasion, Plaintiff believed his co-worker was going to jump him and called his mom to come and pick him up. Plaintiff's brother and mother confronted the bully to no avail. His manager rolled her eyes at the encounter and when Plaintiff attempted to get his tip money from her before leaving, she crumpled it up, threw at him and told him to "get the F out."

***The Court denied summary judgment to Defendant and allowed Plaintiff to proceed on his claims of disability discrimination and disability-based harassment.***



# Modification of “Work” Schedule

## **Modification of work schedule:**

- E.g., allowed to arrive late, leave early, take breaks, flex schedule, part-time schedule, change shifts, etc.

## **Issues:**

- Would the change affect the employee’s ability to perform essential functions?
- Many courts have said that you are not required to create a part-time position where you do not otherwise have any.



# Reassignment

Employer must reassign an individual with a disability who no longer is able to perform a job's essential functions to an appropriate vacant position if one exists.

- Must be qualified and able to do essential functions.
- Could be vacant now or in immediate future.

Not required to:

- Bump another employee.
- Create a new position.
- Promote an employee

# Always Be Mindful of CBA Restrictions on Assignments and Essential Functions



# *Brigham v. Frontier Airlines, Inc.*, 57 F.4th 1194 (10th Cir. Jan. 24, 2023)

Rebecca is a flight attendant. She is a recovering alcoholic who wanted to avoid overnight layovers because they tempted her to drink. To minimize overnight layovers, she requested to be (1) excused from the airline's bidding system for flight schedules or (2) be reassigned to the General Office without any flight schedules.

Employer said NO. Rebecca missed too many assigned flights (8 of them) and then got fired. Rebecca sues Frontier Airlines for disability discrimination.

# *Brigham v. Frontier Airlines, Inc.*, 57 F.4th 1194 (10th Cir. Jan. 24, 2023)

Court cites to important Supreme Court ruling - *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977) (“the duty to accommodate” does not require an employer to “take steps inconsistent with” a collective bargaining agreement)...

- The expansion of Rebecca’s options could have diminished the options available to other flight attendants.
- Though Rebecca was entitled to an accommodation if it was plausibly reasonable, Frontier did not need to violate the collective bargaining agreement by allowing Ms. Brigham to take options away from flight attendants with greater seniority. So, Ms. Brigham's request to bypass the bidding system was not plausibly reasonable.



# “Undue Hardship”

- Undue Hardship = “significant difficulty or expense.”
- Impact on operations is more important than financial cost.
- Must be assessed on a case-by-case basis.





# Undue Hardship

EEOC's list of factors to be considered in determining whether leave would cause an undue hardship:

- amount of leave required.
- frequency of leave.
- whether there is flexibility regarding days on which leave is taken.
- whether leave will be intermittent and unpredictable.
- impact of the leave on coworkers and on whether the specific job duties can be performed timely and appropriately during leave.
- impact on the employer's operations and its ability to serve customers/clients appropriately and timely (considering employer's size).

# *Mueck v. LaGrange Acquisitions, L.P.*, 75 F.4th 469 (5th Cir. Aug. 4, 2023):

Plaintiff could not establish that his termination was a pretext for discrimination against him because...

1. He was an alcoholic, and he was terminated due to a conflict between his court-ordered substance abuse classes and his shift schedule.
2. Company had asked employees to voluntarily switch shifts with Plaintiff, and some had agreed, but not all shifts were covered, which was evidence that the employer was not discriminating against Plaintiff because of his disability.
3. Employee was unable to identify any other employees who could not come to work because of an unplanned and unavoidable absence, such as illness or injury. Other employees who had missed work because of court sanctions unrelated to any disability were treated similarly to Plaintiff.

# “Direct Threat”

- “Direct Threat” = “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- A “significant” risk is a high; not just slightly increased.
- Must be based on an individualized medical assessment of the employee’s ability to safely perform the functions of the job.
- Must be based on objective evidence.

# *Brooks v. Avancez*, 39 F.4th 424 (7th Cir. 2022)

Plaintiff could not establish pretext for disability discrimination when she was terminated after telling Human Resources that she had PTSD “and anything can happen,” which the Company interpreted as a threat.

# *Gross v. Peoples Gas Light & Coke Co.*, 2022 WL 4599369 (N.D. Ill., Sept. 30, 2022)

Plaintiff, who could not perform the essential functions of his job, alleged that he was not given other jobs for which he was qualified, but failed to identify the disability status of people who got the job. The Court granted summary judgment as to those positions where Defendant articulated reasons why others got the positions, but denied summary judgment as to those positions where Defendant simply stated that the successful applicants were “better.”



# Who is Protected?

## PMLA

“Non-exempt” employees in Michigan who are:

- Full time; or
- Part-time, but who work 25+ hrs/wk on average; or
- Temporary, but who work > 25 weeks in a year

County employees covered by an existing CBA as of effective date of PMLA (3/29/19) are not eligible until the CBA expires.

# What Do Employees Get - PMLA

- 40 hours of paid leave per year to use for covered reasons.
- Any form of paid time off can be used to satisfy this requirement as long as employees can use for any PMLA covered reason and family member.

# Reasons for Leave - PMLA

- Employee or “family member’s” illness, injury, or preventative medical care.
- Various reasons if the employee or the employee’s “family member” is a victim of domestic violence or sexual assault.
- If the employee’s workplace is closed due to public health emergency or the employee needs to care for child whose school or place of care is closed due to public health emergency.
- It is determined by a public health official that the employee or a “family member” is a public health risk due to exposure to a communicable disease.

# Who Is Covered Family Member?

## ADA

- No accommodation for care of family member

## PMLA

- Same as FMLA, **plus**:
  - Spouse's parent
  - Grandparent or grandchild
  - Sibling

## FMLA

- Parent (employee's only)
- Spouse
- Child (under 18 unless disabled and incapable of self care, or leave for qualified exigency, serious injury or illness of service member)

# Intermittent & Reduced Schedule Leave

## ADA

Leave for unpredictable / unreliable attendance usually not reasonable and an undue hardship

## FMLA

Must be allowed if medically necessary in maximum of ¼ hour increments because County allows PTO to be used in that increment

Not required in cases of leave to care for healthy newborn or newly adopted child (but employer can choose to provide)

## PMLA

Can be used in ¼ hour increments



# Process For Leave - ADA/FMLA

## ADA

- No advance notice required
- Must engage in interactive process
- Can request documentation, IME, so long as medical inquiry is “job related and consistent with business necessity”

## FMLA

- 30 days’ notice or as much as “reasonably practicable”
- Can enforce customary policies and notice requirements for requesting leave
- Can discipline for failure to follow notice policy
- DOL forms (15 days to return medical certification)
- Can get 2nd/3rd opinion

# Process for Leave - PMLA

- Can enforce customary policies and notice requirements for requesting leave.
- Can discipline for failure to follow notice policy.
- Can require documentation of need for leave.
- Must give minimum of 3 days to produce documentation.
- Cannot require details of domestic violence, sexual assault, or medical condition to be disclosed.

PMLA

ALL

Medical information is confidential

# Coordination of Leaves

**ADA/FMLA**

Can require employee to use up paid leave while on leave (must bargain this for union employees) until STD or work comp benefits kick in, then optional.

All paid leave (vacation, sick, personal, etc.) can count toward PMLA requirement so long as employee can use it for reasons covered by the Act.

Can and should be used for absences covered by ADA/FMLA.

Can also be used for absences for medical reasons that do not reach ADA/FMLA threshold.

**PMLA**

# Coordination of Leaves

A person wearing a white lab coat is holding a document and using a magnifying glass to inspect it. The text "ALWAYS CHECK THE CBA CAREFULLY!" is overlaid on the image.

***ALWAYS CHECK THE  
CBA CAREFULLY!***

# Relationship between FMLA and ADA



*Murphy v. District of Columbia*, 590 F.Supp.3d 175 (D.D.C. 2022), supplemental ruling, 2022 WL 2643554 (D.D.C. Jul. 8, 2022)

- Plaintiff filed a failure to accommodate claim based on the employer's failure to respond to his FMLA request; the employer argued that it did not get the necessary medical information from Plaintiff's physician until after the termination decision had been made. Initially, the Court questioned whether a request for FMLA leave is a request for accommodation, citing cases opining that the FMLA is for an employee who cannot work, and the ADA is for an employee who can work with accommodation.
- Ultimately, the Court ruled that an application for FMLA leave is not a request for accommodation in and of itself, but information could be conveyed in the application or related discussions that would constitute a request for accommodation, even if no "magic words" are used, and a leave of absence can be a reasonable accommodation.

# *Jackson v. Sprint/United Management Co.,* 599 F.Supp.3d 314 (D. Md. 2022)

A request for FMLA leave could be considered a request for accommodation such that evidence of animus toward the employee for requesting leave could support a claim of retaliation in violation of the ADA.

# When Can You Terminate?

1. All FMLA must be exhausted.
2. All PTO must be exhausted (typically).
3. Must determine after careful analysis that continued leave would not be reasonable and/or would cause an undue hardship.
4. Must ensure CBA does not provide greater rights.

# Remedies – ADA & FMLA

## ADA

- 300 days to file EEOC Charge, 90 days to file lawsuit after receiving Right to Sue letter
- Lost wages (past and future)
- Compensatory (e.g., emotional distress) and/or punitive damages (capped at \$300,000)
- Costs, interest, attorney fees

## FMLA

- 2 years to file lawsuit (3 years if willful violation)
- Lost wages (past and future)
- Double damages for willful violation
- Costs, interest, attorney fees

# Remedies - PMLA

- 6 months to file claim with LARA.
- LARA Director to “investigate” and attempt to resolve through “mediation or other means.”
- LARA may “impose penalties and ... payment of all PML improperly withheld.”
- Fines up to \$1,000 for failing to provide PML.
- Fines up to \$100 for posting violation (posters are available).
- No private right of action.



# Case Study # 1

*Jack the Janitor has back problems and cannot lift anything heavy or stand for more than 30 minutes without a break for 6 weeks. His essential functions including heavy lifting.*

# Case Study # 1

1. Does he go on leave? Under what law?
2. At the end of 6 weeks, he needs another 6 weeks. Ok?
3. After 12 weeks, Jack comes back with another doctor's note – needs another 6 weeks. What do you do?
4. How long does the employer have to hold his job open?
5. The employer has a policy that an employee cannot remain on leave more than 26 weeks for any reason. At 25 weeks Jack brings in a note saying he can return without restrictions in 2 weeks. Do you let him?

# Case Study # 2

*Amanda the Accounting Clerk has morning sickness and sometimes needs to start the day 1-2 hours late.*

# Case Study # 2

1. Is this covered by FMLA? ADA?
2. She wants to just use sick time, not FMLA – she is saving FMLA for when she has her baby. Ok?
3. Can the Company tell her that if she is more than an hour late, she must stay out all morning because it has already brought in a temp to cover for her?

# Case Study # 3

*Isaac the IT guy is a part-time employee with a child who has epilepsy. Isaac works on average 20 hours/week.*



# Case Study # 3

1. Is he covered by the ADA? FMLA? Why/Why not?
2. On September 1, 2023, Issac becomes full time and begins experiencing debilitating migraines. When can he start taking time off under the ADA? FMLA?
  - a) What do you need to know to answer that question?

# Case Study # 4

*Lisa meets with her supervisor. She tells the supervisor she is depressed since she was reassigned to a different department.*

*Lisa has been tardy to work lately however. In explaining her tardiness, Lisa stated that “it was all related to [her] current work environment created by [her supervisor,] ... includ[ing] a lack of leadership, direction, a lack of trust within the group, favoritism.”*

# Case Study # 4

Enough to trigger employer obligations under the ADA?

# *Hrdlicka v GM* (6th Cir. March 23, 2023) 2023 WL 2604691

- *Burdett-Foster v. Blue Cross Blue Shield of Michigan*,” 574 F. App'x 672, 680 (6th Cir. 2014) (“Personality conflicts, workplace stress, and being unable to work with a particular person or persons do not rise to the level of a ‘disability’ or inability to work for purposes of the ADA.
- **“In sum, Plaintiff made only a single, unsubstantiated statement that she was depressed without any corroborating medical evidence and without ever having sought medical help, and she consistently presented the issue as a workplace conflict, not a disability.** Although a diagnosis is not necessary for an ADA claim to succeed, Plaintiff failed to present any of the relevant information” that this court has found pertinent to determining if an employer was placed on notice of a disability.”

# Case Study # 5

*Adam applies for FMLA on May 5, 2023 because of a heart condition. He is approved for intermittent FMLA on May 13, 2023; and he receives a letter that he is eligible to take the leave on May 22, 2023. For a period of time between May 26 to June 2 due to pneumonia, Adam was totally incapacitated and could not work. Adam calls the third-party administrator for the reporting absences and the company classified the absences as FMLA leave. **Adam is terminated six days after his last reported absence.***



# Case Study # 5



***Legal?***

# *Maxwell v FCA*, (6th Cir. March 21, 2023) 2023 WL 2636586

Court:

**“There is a genuine dispute as to whether he was engaged in protected activity and whether FCA was aware of it.** And there is no question that Maxwell's termination is an adverse employment action...**Maxwell's termination six days after his last absence is sufficiently close for summary-judgment purposes.** Accordingly, Maxwell showed that there is a genuine dispute as to whether he established a prima facie case of FMLA retaliation.”

# Case Study # 6

*Martin is a perfusionist—an operator who runs the heart/lung machine to keep blood flowing during surgery (e.g., open heart surgery).*

*Martin had a major medical issue in which his kidneys were compromised, and he was heavily sedated. Martin's expected recovery was more than six months, based on medical records.*

*Plaintiff is terminated.*

*Ultimately, Plaintiff was released to return to work without restrictions after four months, but he had already been terminated and was not reinstated.*



# Case Study # 6

***Appropriate?***



*Cline v. Clinical Perfusion Systems, Inc.*, \_\_ F.Supp.3d  
\_\_, 2022 WL 16541186 (N.D. Okla. Oct. 28, 2022)

Court: Plaintiff could not perform the essential functions of his position without an accommodation. A request for leave of “more than 6 months” is not reasonable. The fact that Plaintiff ultimately only needed 4 months is irrelevant – at the time of the termination decision, the leave was indefinite and was expected to last longer.



# Case Study #7

- Andy is in customer service answering questions by phone, email and in person to resolve customer issues at the University.
- He develops lockjaw (tetanus)—takes 6 weeks of FMLA due to speaking problems and then returned to work with reduced schedule to attend to medical appointments/deal with flare ups. Andy requests accommodation of reduced speaking (15 minutes/hour or every other hour)
- Ultimately, University agrees to 15 minutes non-speaking breaks every hour and it would find another position for Andy.
  - Andy is terminated because he could not work a full schedule.

# *Ehlers v. University of Minnesota*, 34 F.4th 655 (8th Cir. 2022)

Court: University acted in good faith, helped to find many jobs, and find him adaptive technology. Some jobs would not work, and the University could not immediately tell Plaintiff about each possible job without any information.

Even if the University did not make good faith efforts, Plaintiff had to show she could have been accommodated but for the lack of good faith. There was no evidence that Plaintiff was qualified for any of the jobs he requested to be assigned to.

# Case Study #8

*Mary, a web-content specialist, has a high-risk pregnancy and was approved for FMLA until her due date. When she exhausted FMLA, Mary was placed on unpaid leave.*

*Mary submits doctor's note: she had a c-section, was "doing well", and should telework until November (the baby was born in July). Supervisor is OK with 6-week arrangement of working from home.*

# Case Study #8

*After 6 weeks, Mary states that because of complications from C-section, she would have to stay home and telework another 8 weeks. She has a doctor's note that said she could telework for 8 weeks but did not mention any complications or specifics.*

*HR sent Plaintiff the paperwork for an accommodation – verify disability, describe how limitations restrict ability to do the job, identify accommodation, and release medical information. Mary forwards paperwork to doctor to complete, but doctor and Mary both drop the ball and do not deliver the information to employer.*

# *Owens v. Georgia, Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. Nov. 9, 2022)*

- Court: the employer does not have any duty to engage in the interactive process until the employee makes a specific demand for accommodation and shows that it is reasonable.
- Plaintiff did say that she wanted to telework due to childbirth complications, but she did not say what the disability was or how the accommodation would address the limitations. The employer does not have to grant the specific accommodation requested, so it needs information about the nature of the disability and the desired accommodation.



# *Owens v. Georgia, Governor's Office of Student Achievement, 52 F.4th 1327 (11th Cir. Nov. 9, 2022)*

- “The link between the disability and the requested accommodation may often be obvious,” e.g., an employee in a wheelchair does not need a doctor’s note to explain why she can’t climb a steep staircase. But childbirth and pregnancy are not disabilities, and “childbirth-related complications” does not say what the condition or restriction is. Saying she had a C-section or blood transfusion 5-6 weeks earlier simply describes a medical procedure, not a condition or limitation. **Because Plaintiff failed to provide information to trigger the interactive process, the employer had no duty to engage further – Plaintiff caused the breakdown.**

# Case Study #9

Jim worked from home because he suffered from a variety of ailments that made travel to work dangerous.

Shortly after he started his job, Employer tells him he has to travel for work (notwithstanding health conditions). Jim refuses and Employer fires him.  
Legal?

# *Germain v. Nielsen Consumer LLC*, 655 F. Supp. 3d 164 (S.D.N.Y. 2023)

Employee had a legitimate claim for fraudulent misrepresentation and disability discrimination against former employer; lawsuit identified with particularity false representations made by employer, namely, that its talent acquisition manager repeatedly reassured employee that his new position would not require travel, that supervisor told him shortly after joining company that “travel [was] expected” for his position, and complaint alleged that employee clearly had told manager that he could not travel during COVID-19 pandemic due to several serious health conditions,

# Case Study #10

# *Lashley v. Spartanburg Methodist College, et al.*, 66 F.4th 168 (4th Cir. Apr. 18, 2023)

Mary told faculty, staff, and students about various health issues (including specifics such as “going to see a pulmonary doctor to have her lungs swabbed due to unhealthy conditions”), usually in the context of missing or rescheduling classes. Dean at College requested a meeting to discuss the effect of Plaintiff’s health on her work, given that she had used her health as a reason for missing or cancelling classes and had complained about unhealthy conditions in the building that housed her office and classes.

***Reasonable?***



# When Can I Ask About a Disability?

***Job-Related and Consistent  
With Business Necessity***

# When Can I Ask About a Disability?

An employer needs to have a reasonable belief, based on objective evidence, that:

- (1) an employee's ability to perform essential job functions will be impaired by a physical or mental medical condition; or
- (2) an employee will pose a direct threat due to a physical or mental medical condition.

# Job-Related and Consistent With Business Necessity

Once an employee is on the job, his/her actual performance is the best measure of ability to do the job. When a need arises to question the ability of an employee to do the essential functions of his/her job or to question whether the employee can do the job without posing a direct threat due to a medical condition, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

# The Law!

Generally, **a disability-related inquiry** or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."

**Back to this:** *Lashley v. Spartanburg Methodist College, et al.*, 66 F.4th 168 (4th Cir. Apr. 18, 2023)

Mary told faculty, staff, and students about various health issues (including specifics such as “going to see a pulmonary doctor to have her lungs swabbed due to unhealthy conditions”), usually in the context of missing or rescheduling classes. Dean at College requested a meeting to discuss the effect of Plaintiff’s health on her work, given that she had used her health as a reason for missing or cancelling classes and had complained about unhealthy conditions in the building that housed her office and classes.

***Reasonable?***



# Lupus and Lethargy

- For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate documentation for claimed deductions. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

***Reasonable Belief & Objective Evidence?***

# “Hey...You Feeling All Right?”

A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

***Reasonable Belief & Objective Evidence?*** MILLER  
CANFIELD

# Lump in Breast

Six months ago, a supervisor heard a secretary tell her coworker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.

***Reasonable Belief & Objective Evidence?***

# HIV

Ashley works in the produce department at Kroger and tells her supervisor that she is HIV-positive. The employer is concerned that the employee poses a direct threat to the health and safety of others because she frequently works with sharp knives and might cut herself while preparing produce for display. The store requires any employee working with sharp knives to wear gloves and frequently observes employees to determine whether they are complying with this policy.

Available scientific evidence shows that the possibility of transmitting HIV from a produce clerk to other employees or the public, assuming the store's policy is observed, is virtually nonexistent.

***Reasonable Belief & Objective Evidence?***

# Richard Can Not Seem to Hear...

Several customers have complained that Richard, a customer service representative for a mail order company, has made numerous errors on their orders. They consistently have complained that Richard seems to have a problem hearing because he always asks them to repeat the item number(s), color(s), size(s), credit card number(s), etc., and frequently asks them to speak louder. They also have complained that he incorrectly reads back their addresses even when they have enunciated clearly and spelled street names.

***Reasonable Belief & Objective Evidence?***



# In Situations Where Reasonable Belief & Objective Evidence, What Can I Ask For?

- An employer may require an employee to provide documentation that is sufficient to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested but cannot ask for unrelated documentation.
- This means that, in most circumstances, an employer cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.



# Questions?



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