

What Managers Should Know about FMLA and the ADA Amendments Act

State of Utah
Division of Risk Management





Caveat

This presentation is provided for informational purposes only and may not be construed as legal advice. Consult your designated legal counsel to address any pertinent issues that may affect you.

FMLA

ADA

Absence



At Work



Triggers: Consider the Implications

- **Prolonged or Frequent Absence**
- **Notes from Health Care Providers**
- **Knowledge of Social Security or other Disability benefits**
- **Workers Compensation Injuries**
- **Use of Mitigating Measures** such as Medication, Medical equipment, Low vision devices, Prosthetics, Hearing aids, Mobility devices, Assistive technology

Why Employers are Sued

- ❑ Lack of **Consistency**
- ❑ Lack of **Training**
- ❑ **Failure to recognize the request** resulting in delay
- ❑ Lack of **Individualized Assessment**
- ❑ **Leave Interference**
- ❑ **Failure to provide approved accommodations**
- ❑ **Regarding an employee as Disabled**
- ❑ **Grant of “unofficial” accommodations for extended periods. (May Remove essential functions)**
- ❑ **Retaliation**

2008 EEOC Statistics

□ Of **95,402 EEOC charges**:

- Race 36%
- Sex (Gender) 29%
- National Origin 11%
- Religion 3.5%
- Age 21%
- **Disability 20%**
- Equal Pay 1%
- Retaliation 30%

2009 EEOC Statistics

- ❑ **93,277 charges (85,000 Pending)**
- ❑ **\$376 Million Awarded**
- ❑ **8,500 Resolutions for \$121 Million**
- ❑ **1 Race, 2 Retaliation, 3 Gender**
- ❑ **Disability 20% of all claims (Up 10%)**
- ❑ **Equal Pay Up (Ledbetter decision)**

- ❑ **EEOC has 155 New Employees**
 - ***www.eeoc.gov/eeoc/plan/upload/2009par.pdf***

Federal Law

Family Medical Leave Act Americans with Disabilities Act

- Enacted 1992.
- Due to a lack of **employment economic security** for employees **needing medical absence**.
- Increase of **single parent families or two parents working**.
- To **develop parental participation** in childrearing and family care.
- To **promote equal opportunity for women and men**, consistent with the Equal Protection Clause of the Fourteenth Amendment.
- Adopted in 1990, effective 1992.
- Amended 2009
- **Civil rights** legislation.
- Imposes **unique proof of protected** status.
- ADA is **not an affirmative Action** Statute.
- Accommodations are to **level the playing field**, not provide an advantage.

Eligibility

FMLA

- Employers with **50** or more employees.
- Employee has worked at least **12** months' total time **in the last 7 years** with Employer.
- Employee has worked at least **1,250** hours during **12-month** period preceding the leave.

ADA

- All Employers in interstate commerce with **15** or more employees are covered.
- Any individual, with a disability, **applying for a job.**
- Employee is **eligible first day of employment** regardless if they are full or part-time.

Qualification

FMLA

ADA

- Employees receive up to **12 weeks unpaid leave** per year for:
 - **Birth or adoption** of child
 - Placement of **foster** child
 - Employee's own **serious medical condition** or
 - Serious health condition of **Parent, Spouse, Child**
 - **Military Caregiver Leave**
 - **Exigent Circumstances** from a call to military duty

No employment discrimination on the basis of:

- A mental or physical **impairment** that **substantially limits a major life activity**;
- A **record** of such an impairment; or
- Being **regarded as** having such an impairment.
- **Accommodations**
- **Leave**

SERIOUS HEALTH CONDITION

FMLA

A **Serious Health Condition** is any illness, injury, impairment, or physical or mental condition that involves either:

- **Inpatient care** (i.e., overnight stay); or **Continuing treatment**.
- Period of **incapacity of more than (3) three consecutive calendar days** and **two visits** to a healthcare provider or one in person visit to a health care provider with a regimen of continuing treatment, such as prescription, or two visits to a health care provider.

DISABILITY

ADA

- Include a **wide variety of disorders** or conditions **affecting any number of body systems**, including; the neurological or musculoskeletal systems, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, or endocrine systems, or the skin.
- Also included are **mental or psychological disorders**, including; mental retardation, organic brain syndrome, emotional or mental illness, and certain learning disorders.



COVERED BY THE FMLA

COVERED BY THE ADA

- **Short term medical conditions:**

- Examples: Appendicitis, Cancer, Gall Bladder removal, pregnancy.

- **Temporary disabilities:**

- Examples: Broken bones or soft tissue injuries that result in **no or minimal impairment.**

- **Chronic / Episodic conditions.**

- **Past illegal drug use.**

- **Past alcohol use.**

- **Chronic** conditions that will **not** resolve following an expected course of treatment and recovery.

- **Broken bones** or soft tissue injuries that result in **permanent impairment.**

- **Past illegal drug use.**

- **Past alcohol use.**

- **A combination of non-qualifying impairments** may, in the aggregate, qualify one for ADA protection

MAY BE COVERED BY THE FMLA

- **A Serious Health Condition that involves the ongoing treatment for:**
 - Sexual behavior disorders, or;
 - Compulsive gambling, or;
 - Psychoactive substance use disorders (from use of illegal drugs).

EXCLUDED BY THE ADA

- Transvestism, Transsexualism
- Pedophilia, Exhibitionism
- Many gender identity disorders
- Sexual behavior disorders
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from ***current illegal drug use.***

NOT SERIOUS HEALTH CONDITIONS

- **Cosmetic Procedures**
 - **Common Cold and Flu**
 - Earaches
 - **Minor Ulcers**, upset stomach
 - **Headaches** other than Migraines
 - **Routine Dental**, Orthodontia or Periodontal
- *Watch for the condition to meet the “Serious” definition**

NOT IMPAIRMENTS

- **Physical characteristics**, i.e., left-handedness or **Common personality traits**, i.e., irresponsibility, irritability
- **Normal deviations** in height, weight, or strength
- Homosexuality / Bisexuality
- Pregnancy
- General **grief or stress**
- **Cultural, environmental, or economic** disadvantages
- Another Disability Rating

Recognizing Leave and Accommodation Requests

- ❑ An employee is **not required to use magic language**, i.e., ADA, accommodation, etc.
- ❑ Requests **don't have to be in writing**, and can come from the employee's **representative**.
- ❑ The employee must simply indicate that s/he wants a **workplace modification** because of a health condition that could be a disability or **use leave for a reason** that may be FMLA qualifying.

Case Study Analysis

FMLA

- Serious Health Condition?**
Yes No
What? _____
- Incapacitated? Yes No**
Why? _____
- Leave Type Appropriate**

- Additional information**

- Next Step**

- ADA Applicable? Yes No**
Why or why not?

ADA

- Impairment? Yes No**
What? _____
- Substantially Limited in Major Life Activity? Yes No**
What? _____
- Reasonable Accommodation Requested?**

- Accommodation Available?**

- Additional information**

- Next Step**



When might both the FMLA and ADA affect an employee's leave?

When the employee's family member has a serious health condition.

- A. When the employee has a serious health condition that requires an overnight stay in the hospital.**
- B. When an employee who has been on FMLA leave for 12 weeks cannot return to work because of a continuing serious health condition.**
- C. When the employee's family member has a serious health condition.**

Recognizing Requests: What should the employer do?

- ❑ **George, a wheelchair-user, tells his supervisor that he needs an accessible parking space. George also mentions that the curb ramp is too steep. The supervisor does not act on George's request and does not forward it to anyone with authority to act.**
- ❑ **Two weeks later, having heard nothing, George reiterates his request to his supervisor.**
- ❑ **Two more months pass, and nothing has been done.**
- ❑ **George requests leave for surgery.**

Recognizing Requests: What should the employer do?

Custodian Bill gives his supervisor a note from his treating physician, indicating that **Bill suffers from diabetes and must test his blood sugar** level several times a day to avoid a hyperglycemic reaction. The **doctor's note explains** that a hyperglycemic reaction can include extreme thirst, **heavy breathing, drowsiness, and flushed skin, and unconsciousness.**

The doctor's note includes a request that **Bill be allowed to take three 10-minute breaks per day to test his blood and take insulin** if needed.

Bill brings a second note requesting **to go home whenever he does not feel well.**

Recognizing Requests: What should the employer do?

- *Freadman v. Metropolitan Property and Casualty Insurance Co.*, 484 F.3d 91 (1st Cir. 2007): employee with **ulcerative colitis** told her supervisor **she needed some time off**, was not feeling well, and was **experiencing a return of symptoms**.
- There was a **triable issue of fact** as to whether employee's request for **time off** was **related to her ulcerative colitis**, because the **employee had taken four months off** for treatment the previous year.

FMLA Presentation Outline



- FMLA Protections
- Employee / Employer Notices
- Medical Certification
- Serious Health Condition
- Intermittent Leave
- Fitness for Duty Certification
- Light Duty
- Military Family Caregiver and Qualifying Exigency Leave

What protections does FMLA provide state employees?

- **Job-Protected** leave
- **Insurance Protection:** Continuation of the state's contribution to insurance benefits (even when the employee takes leave without pay)
 - **Employees** must **pay their portion** of any insurance premiums normally deducted from the employee's paycheck
- **Job Restoration**

FMLA - What Requirements Do Employees Have?

- ❑ To **notify the supervisor 30 days in advance of foreseeable** leave baring **extenuating circumstances**.
- ❑ To **provide notice for unforeseeable** leave to the employer **“as soon as practicable”**.
- ❑ To **provide enough information** to determine FMLA.
- ❑ To **provide medical certification** if required within 15 days and cure deficiencies within **7 calendar days** unless not practicable.
- ❑ To **follow the employer’s call in** protocol.
- ❑ To use sick leave when appropriate.
- ❑ To **update the employer** with date or medical changes.
- ❑ When planning medical treatment, employee must **consult with employer prior to scheduling** treatment.

What Requirements Do Agencies Have?

- ❑ To **protect and notify** employees
- ❑ To **inquire sufficiently** to determine if the employee is requesting FMLA leave or if leave is FMLA-qualifying
- ❑ To **offer an opportunity to cure** deficiencies
- ❑ To **designate leave**
- ❑ To deny leave if deficiencies are **not cured, or certification is not provided**
- ❑ To **track leave** taken
- ❑ To **keep records** on requests and leave taken
- ❑ To provide the state share for **health insurance**
- ❑ **Job Reinstatement**
- ❑ Keep the door open—always

Retroactive Designation

- The employer may retroactively designate leave as FMLA only if:
 - The employee is **notified**; and
 - Retro designation does **not harm or injure the employee**; or
 - Both the **employer and employee agree** to do so.
- Failure to Designate may be **Interference**
 - **If the employer interferes** they may be responsible for
 - **Compensation**;
 - **Benefit loss**; and
 - **Actual monetary loss sustained as direct result of violation.**

Medical Certification

- Employers can require completeness and sufficiency of information.
 - Certification is **incomplete** if one or more of applicable entries not completed.
 - Certification is **insufficient** if the information is **vague, ambiguous** or non-responsive.
- Health care providers must certify that **leave is medically necessary**.

Medical Certification (cont.)

- **Date, duration, treatment, medication,** referral to other health care providers.
- What **job functions** the employee **cannot** perform.
- **Episodic flare-ups:** effects on **ability to work** and **frequency and duration** of incapacity.
 - When **serious health condition** may also be “**disability**” employer may follow **ADA’s procedures** for requesting documentation.

Medical Certification (cont.)

- **Authentication/validation**
 - Employer now permitted to have direct contact with employee's health care provider.
- **Clarification/meaning**
 - With employee's permission, employer's health care practitioner, **HR professional, leave administrator, or management** official may contact employee's health care provider.
- **Direct supervisor contact specifically excluded.**

Second and Third Opinions

- If there is **reason to doubt the validity** of the medical certification, the **employer may require** the employee to obtain a second opinion at the employer's expense. If it differs, the employer and employee must agree on a third opinion provider. The **third opinion is final** and binding.
- **Both must act in good faith** to reach agreement on the third Health Care Provider. If employer does not act in good faith, the employer is bound by first opinion; if employee does not act in good faith, the employee is bound by the second opinion.
- **FMLA leave may be denied if the employee fails to provide necessary information** from their HCP to the physician rendering the second or third opinion.

Recertification

- ❑ Recertification may be required every **30 days only in connection with absence.**
- ❑ However, if minimum duration of **incapacity is specified (i.e. 90 days), employer may not request certification until that time period has expired.**
- ❑ True for pregnancy, chronic or long-term conditions.
- ❑ **Six-month recertification** is permissible in all circumstances.

Pregnancy and Child Birth

❑ **Pregnancy**

- ❑ Any incapacity or prenatal care.
- ❑ Need not be 3 consecutive days and need not receive treatment but must be incapacitated.

Leave:

- **Only the spouse** may use FMLA to care for the mother.
- **Father and Mother may take 12 weeks each** for care of newborn with serious health condition.
- Father and Mother may take **12 weeks each for bonding with healthy** newborn.
 - ❑ may be required to split 12 weeks if same employer
- **Intermittent is only available if agreed upon by employer**

Intermittent Leave

- FMLA leave may be taken “intermittently or on a reduced leave schedule” for qualifying reasons and is **most commonly** used for conditions which are **episodic**, not continuous, and generally don’t require medical attention for every absence.
- Intermittent leave is protected leave **only while** the person is **incapacitated**.

Intermittent Leave (cont.)

- ❑ Employees on intermittent leave **must comply with call-in procedures.**
- ❑ Employers **do not have to accept email or voice mail** notification before or after the shift starting time unless the employee is prohibited from notification.
- ❑ **Document any violations** of call-in procedures.
- ❑ May **impose discipline if no extenuating** circumstances.
- ❑ Employees must **make a “reasonable effort”** to schedule **to avoid disrupting** employer’s operations.
- ❑ **Temporary transfers** are only allowed for employees taking **planned** intermittent leave.

Intermittent Leave (cont.)

- Recertification can be required as often as every 30 days if :
 - there is **reason to question** the use of leave;
 - there is a **substantial change** in the person's; health condition; or
 - if the **leave taken is different** than the original certification.
- A **new certification** can be required **each year** for ongoing illnesses.

Fitness for Duty Certification

- ❑ Must be a **uniformly applied** policy or practice.
- ❑ Employees **must provide certification OR authorization for health care provider** to provide information directly to employer.
- ❑ Must be **job-related and consistent with business necessity**/limited to relevant health condition.
- ❑ Employer may provide list of essential job functions—**this list must be provided contemporaneous with Designation Notice.**
- ❑ **Intermittent Leave: Not entitled to fitness for duty certifications for intermittent or reduced schedule leave, unless reasonable safety concerns exists.** If so, can request **every 30 days.**

Fitness for Duty Certification (cont.)

- ❑ Employer **may contact health care provider** for authentication or clarification of the release to return to work.
- ❑ Employer **may not delay** employee's return to work while contacting health care provider for clarification/authentication.
- ❑ **No second or third** opinions may be required.

Light Duty - New

- Interplay of available **light duty**, workers comp benefits, and FMLA.
- NEW: FMLA leave benefit is **not diminished by time spent in light duty** position, because the employee is working.
- Employers **may impose time limits** on light duty assignments.

Service Member Leave

- **Military Caregiver Leave**: Up to **26 weeks** caregiver leave for eligible employees to care for a **covered military member with a serious injury or illness incurred in the line of duty**. (Includes: treatment, recuperation, therapy).
 - Spouse, son, daughter, parent, or **next of kin**
 - **Period differs** from how a leave year is computed for all other forms of FMLA Leave.
 - ITAs or ITOs mean urgent- allow leave- forms later.
- **Exigency**: Up to **12 weeks** family leave for eligible employees because of any **qualifying exigency** arising out of a covered service member's call to duty.

Qualifying Exigency Leave

- Eligible employees may take FMLA leave for “any qualifying exigency...**arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty** (or has been **notified of an impending call or order** to active duty) in the Armed Forces in support of a contingency operation.”
- Does **not apply** to family members of military members who are in the **regular armed forces or to retired members of a state Reserve or National Guard unit.**
- The employer’s **standard leave year applies** to this type of leave.

Qualifying Exigency Leave (cont.)

A Qualifying Exigency includes:

- ❑ **Short-notice deployment** (7 days notice)
- ❑ Military and **activities** related to call to active duty
- ❑ Childcare and school activities (**related to absent parent**)
- ❑ **Financial and legal** arrangements
- ❑ **Counseling**
- ❑ **Rest and recuperation** (up to 5 days to visit with family)
- ❑ **Post-deployment** activities (w/i 90 days from return)
- ❑ Additional **activities-agreed to by both** employer and employee

Prohibited Actions

- Counting FMLA leave against employees who take it
- **Interfering** with or failing to allow FMLA leave in covered circumstances
- Failing to maintain **benefits**
- Failing to **restore job**
- Failing to provide **greater benefit** under **ADA** or **FMLA**

Prohibited Actions

- **Retaliating** against employees who take FMLA leave, who file FMLA-related complaints, or who assist in FMLA claim actions.
 - ***Burris v. Novartis Animal Health U.S., Inc.*, 2009 WL 175078 (10th Cir. 2009)) No ADA claim but \$148,000 settlement for FMLA interference after supervisor fired employee stating “because of your health, I don’t think you can do this job.”)**



Questions And Answers

ADA Presentation Outline



- ❑ Disability
- ❑ Amendments Act
- ❑ Regarded As
- ❑ Reasonable Accommodation
- ❑ Essential Functions
- ❑ Undue Hardship
- ❑ Direct Threat
- ❑ Performance and Conduct
- ❑ Pre and Post Medical Exams
- ❑ Alcohol, Drugs and Medication
- ❑ Fitness for Duty and
- ❑ Best Management Practices

Disability Defined Today

- An individual with a “disability” is any person who:
 - has a **physical or mental impairment** that **substantially limits** one or more **major life activities**;
 - has a **record of** such impairment; or
 - *Raytheon Co. v. Hernandez*, U.S. Supreme Court (2003)
 - is **regarded as** having such an impairment.



ADA Provisions – Title II

- **Title II: Public Services by State and Local Governments (DOJ Revising)**
- **General Rule: No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.**

ADA-Amendments Act

Effective January 1, 2009

Congressional Findings:

1. **Disability was not interpreted broadly under the ADA.**
2. **EEOC ADA regulations equating “substantially limited” as “significantly restricted” expressed too high of a bar for legal protection.**

Congressional Purposes:

1. To **reject the Supreme Court’s decision in Toyota imposing a demanding standard of “Substantially limits” as the impairment prevents or “severely restricts” the individual from activities essential to most people’s daily lives.**
2. To reject the Supreme Court’s decision in Sutton requiring consideration of **mitigating measures** when determining a substantial limitation.
 - **ADA-AA states determinations shall be made “without regard” to beneficial effects of mitigating measures.**

ADA-AA Definitional Changes: Major Life Activities (cont.)

- **Major Life Activities now include**, but are not limited to; caring for oneself, manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, **concentrating, thinking, communicating**, and working.
- **U.S. House of Representatives Committee on Education and Labor** “interacting with others, **writing, engaging in sexual activities, drinking, chewing, swallowing**, reaching, and applying fine motor coordination.”

Addition: Major Bodily Functions

- MLA's **now include** the operation of a **major bodily functions**, including, but not limited to functions of the; immune system, **normal cell growth**, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Examples of Impairments **Consistently Meeting** the Definition of Disability (cont.)

- Deafness
- Blindness
- Intellectual disability
- Partially/completely missing limbs
- Mobility impairments requiring wheelchair use
- Autism
- Cancer

Examples of Impairments **Consistently Meeting** the Definition of Disability (cont.)

- Cerebral Palsy
- Diabetes
- Epilepsy
- HIV or AIDS
- Multiple Sclerosis
- Major Depression, Bipolar Disorder, PTSD, OCD, or Schizophrenia

Examples of Impairments that Disable Some and Not Others

Depends on the degree to which they affect the individual's major life activities.

- Asthma
- High Blood Pressure
- Hyperthyroidism
- Carpal Tunnel syndrome.
- Learning Disabilities
- Psychiatric Impairments
 - panic disorder, anx-iety disorder, some forms of depression other than major depression

Examples of Episodic Impairments

- “An impairment that is **episodic or in remission is a disability if it would substantially limit an MLA when active.**”
 - **Epilepsy**
 - **Multiple Sclerosis**
 - **Cancer**
 - **Mental Illness**
 - **Hypertension**
 - **Asthma,**
 - **Psychiatric disabilities** such as depression, bipolar disorder, and post-traumatic stress disorder.

Notice of Proposed Rule Making (NPRM) Rules of Construction

- “The **comparison** of an individual’s limitation to the ability of **most people in the general population** often may be made using a common-sense standard, without resorting to scientific or medical evidence.” (2008 Senate Manager’s Statement, at 7.)

<http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>

NPRM – Limited in Working

- **Type of Work**
 - **Includes the job the individual has been performing or for which s/he is applying, and jobs with similar qualifications or job-related requirements.**

NPRM – Working (cont.)

- “An **impairment substantially limits** the major life activity of working if it substantially limits an individual’s ability **to perform, or to meet the qualifications for, the type of work at issue.**”
- “Whether an impairment substantially limits the major life activity of working **must be construed broadly to the maximum extent permitted under the ADA** and should not demand extensive analysis.”

NPRM – Type of Work (cont.)

- May be determined by reference to the **nature of the work** an individual is substantially limited in performing because of an impairment as **compared to most people having comparable training, skills, and abilities.**
- Examples: commercial **truck driving**, **assembly line** jobs, clerical jobs, or law enforcement jobs.

NPRM-Type of Work (cont.)

- May be determined by reference to **job-related requirements** that an individual is substantially limited in meeting because of an impairment as compared to most people performing those jobs.
 - Examples: Jobs requiring **repetitive bending, reaching**, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; **driving**; working under certain conditions, such as in workplaces characterized by **high temperatures, high noise levels**, or **high stress**; or working rotating, irregular, or excessively long shifts.



NPRM – Record of Disability

- An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

NPRM – Record of Disability (Cont.)

■ *Broad Construction*

- Prong 2 coverage is **met if the individual has a history of an impairment that substantially limited** one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.
- Shall be **construed broadly to the maximum extent** permitted by the ADA and should not demand extensive analysis.

Regarded As (Prong 3)

- “Regarded as” claims usually **occur when an employer makes assumptions** regarding an employee’s medical condition which could lead the **employee to believe that decisions were made on the basis of a real or perceived disability**. For example:
 - An employee with controlled **high blood pressure** may be **restricted** by an employer from performing jobs involving **strenuous activity or driving trucks**.
 - An applicant with a **scar** is **not hired** due to a **perception** that the applicant may **frighten** customers.
 - ***Roberts v. Unidynamics Corp.***, 126 F.3d 1088 (8th Cir. 1997) (employer did not regard plaintiff as disabled, because there was insufficient evidence that the employer’s decision-makers had knowledge of rumors that the **plaintiff had HIV or AIDS**).

Regarded As (Prong 3 – cont.)

- An individual is “regarded as” disabled if s/he **“has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment** whether or not the impairment limits or is perceived to limit a major life activity.”
 - *Kelly v. Metallica West* (10th Cir.)
- Excluded are **“impairments that are transitory *and* minor.”** “Transitory” means an **“actual or expected duration of 6 months or less.”**
- An employer is **not required to provide a “reasonable accommodation”** to an individual who is only covered under the “regarded as” prong.

Regarded As (Prong 3 – cont.)

- *Olson v. General Electric Astrospace*, 101 F.3d 947 (3rd Cir. 1996)--Employer's motion for summary judgment motion partially denied because:
 - Employee's **hospitalizations and illnesses were referenced in performance evaluations**
 - Employer "**knew**" employee had missed work because of **illness**
 - Employer had **spent a "significant amount of time" talking to employee** about his health problems and illness-related absences

Regarded As

- ***Roberts v. Unidynamics Corp.*, 126 F.3d 1088 (8th Cir. 1997) (employer did not regard plaintiff as disabled, because there was insufficient evidence that the employer's decision-makers had knowledge of rumors that the plaintiff had HIV or AIDS).**

Reasonable Accommodations

- An Accommodation is a **modification or tool** to changes the work environment or process, (i.e. barrier removal) to:
 - Ensure the enjoyment of *equal benefits and privileges* of employment
 - Assist the employee to perform the essential functions of the job.
- Must be determined on a **case-by-case basis**.
- Accommodations are **not required** if they will create an **undue financial or administrative hardship** or a **direct threat**.
- An accommodation **is usually reasonable if it is not an undue hardship** and does **not pose a direct threat** to self or others.

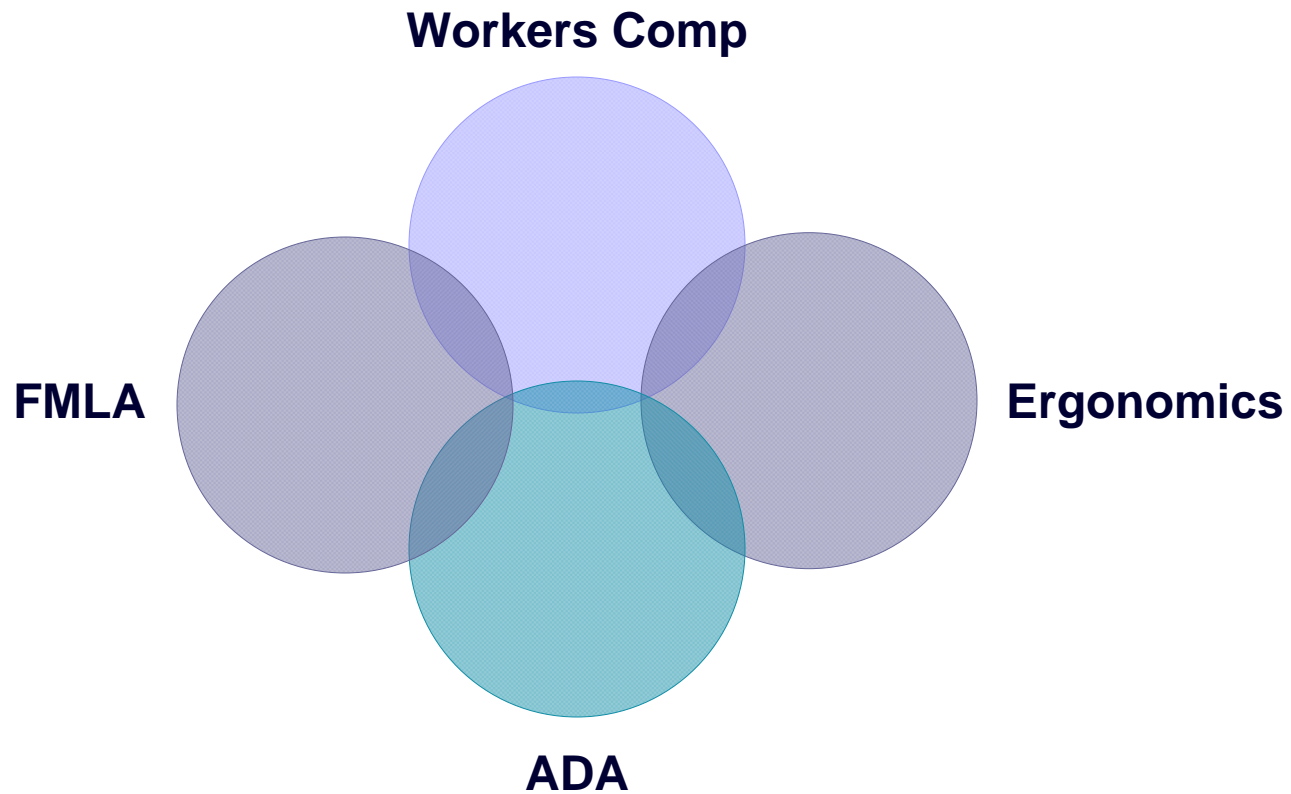
Reasonable Accommodations (cont.)

- ❑ Employers may choose among **effective** accommodations.
- ❑ Accommodations **need not be the ones requested**, as long as they are effective in removing pertinent barriers.
- ❑ Employers do **not have to provide personal use items or assistance** accomplishing **personal care activities**.
- ❑ Employers do **not have to remove essential job functions**.
- ❑ Employers usually do **not have to allow continued unpredictable or unreliable attendance**.
- ❑ Employers do **not have to accommodate** an employee who is not **otherwise qualified**.

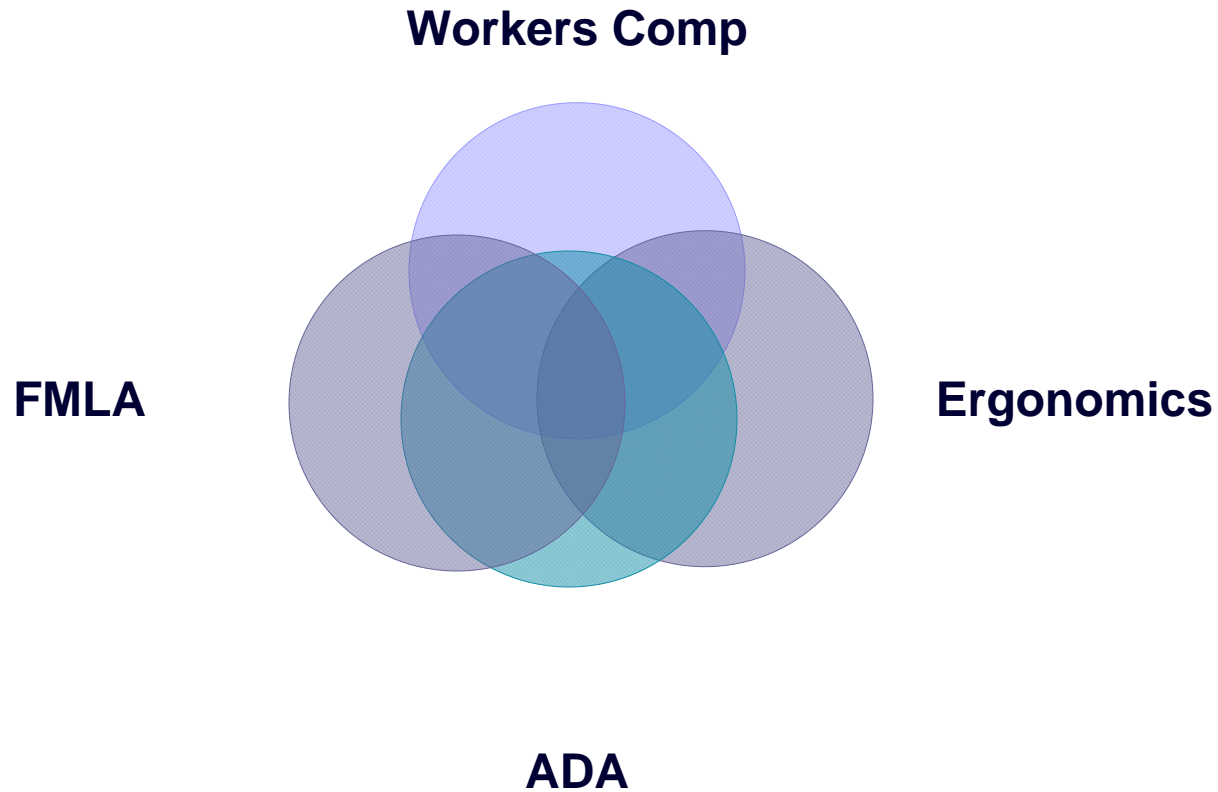
Potential Accommodations

- **Accessibility / Worksite Modifications**
- **Changing** exams, training materials, or policies
- **Job restructuring**, Part-time, Shift or Break Modifications
- **Vision or Hearing** enhancements, qualified readers or interpreters
- **Memory Aids** or Reminders
- **Leave, Telecommuting**
- **Reassignment** to a vacant position:
 - **10th Cir. *Smith Midland Brake*** still controls **priority placement for reassignment** if only effective accommodation.
 - **ADA: *Albert v. Smith's Food & Drug Ctrs, Inc.*, 356 F .3d 1242 (10th Cir. 2004)**. Evidence suggests the **employer failed to continue engaging in an interactive process to find an alternative position** for a reassignment.

Analytical Overlaps – Pre-ADAAA



Analytical Overlaps – Post-ADAAA



New/Unique Accommodation Issues

- Requests to **Telework/Telecommute**
 - *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007):
 - **Employer argued plaintiff couldn't perform essential functions** via telecommuting;
 - Plaintiff's **past and current supervisors had allowed him to telecommute** to accommodate his back condition;
 - **Telecommuting policy permitted telecommuting up to 5 days per week.**

Old Chemical Sensitivity

- Requests for a Scent-Free Environment
 - *Kaufmann v. GMAC Mortgage*, 2007 WL 1933913 (3rd Cir. 2007) (unpublished): **Plaintiff failed to show it would be possible for employer to provide an absolutely odor-free environment.**
 - Employer asked employees not to wear perfumes and instituted policy prohibiting their use;
 - When employee complained, employer reminded employees of the policy;
 - Employer installed air filters/fans and relocated plaintiff twice.

New Chemical Sensitivity

- ***EEOC v. City of Detroit***
 - **Employer asked employees not to wear perfumes and instituted policy prohibiting their use;**
 - **When employee complained, employer reminded employees of the policy;**
- **Not enough: \$100,000 Settlement for Employee**

Failure to Accommodate Claims

- To establish, an employee must show:
 - Employee had a disability
 - Employer had knowledge of the disability
 - Employee requested accommodation
 - Employer failed to assist in good faith
 - Employee could have been accommodated
- ***Armstrong v. Burdette Tomlin Memorial Hospital***, 438 F.3d 240 (3d Cir. 2006).

Pre-Employment Compliance

- An employer **may not**:
 - ask disability-related questions or conduct medical examinations **until *after* it makes a conditional job offer**—even if it intends to look at the answers or results only at the post-offer stage.
 - Veterans with disabilities (TBI, PTSD, etc.)
 - Associational accommodations

Pre-Employment Compliance

- An employer **may**:
 - ask about an applicant's **ability to perform** specific job functions;
 - ask about **non-medical qualifications** and skills, i.e., education, work history, required certifications or licenses;
 - ask applicants **to describe or demonstrate** how they would perform job tasks;
 - **impose medical exams after *bona fide* conditional offer**, provided it is related to **business necessity and applied to all candidates** in that job classification.
 - **Conditional offer is legitimate only after consideration of relevant, reasonably obtainable, non-medical information (*Leonek v. American Airlines*, 400 F.3d 702 (9th Cir. 2005))**

Harrison v. Benchmark Electronics Huntsville, Inc.,
(11th Cir. January 11, 2010).

- **H: “We now explicitly recognize that a plaintiff has a private right of action... irrespective of his disability status.” Non-Disabled Applicants Can Sue under ADA in 11th Cir**
- **Unlawful to use qualification standards, employment tests or other selection criteria that *tend to screen out* individuals with disabilities, on the *basis of disability*, unless the standard, test, or other selection criteria is **job-related for the subject position and consistent with business necessity.****

Essential Job Functions

- A job function may be considered essential if:
 - **The reason the position exists** is to perform that function;
 - There are a **limited number of employees** among whom performance of that function can be distributed;
 - The **function is highly specialized** and the incumbent was hired for expertise or ability to perform it.

Essential Job Functions (cont.)

- Evidence includes, but is not limited to:
 - **Employer's judgment;**
 - **Written job descriptions** prepared prior to advertising or conducting interviews;
 - **Amount of time spent** performing that function;
 - **Consequences of not** performing that function;
 - Terms of a **collective bargaining agreement;**
 - Work experience of **prior incumbents;**
 - **Current work experience** of incumbents **in similar jobs.**

Essential Job Functions (cont.)

- *Holly v. Clairson Industries, L.L.C.*, 492 F.3d 1247 (11th Cir. 2007): genuine issue of material fact whether **strict punctuality** was essential function of mold polisher:
 - For **15 years, employee was given leeway** due to paraplegia, usually only 1 – 2 minutes late;
 - Employee **terminated after employer instituted “no-fault”** attendance policy;
 - **Two supervisors testified employee’s job was not time-sensitive.**

Essential Job Functions (cont.)

- *Hennagir v. Utah Department of Corrections*,
__ F.3d __ WL 2883037 (10th Cir. 2009)
 - Upheld UDOC's implementation of a new essential function (POST Certification) for all clinical and medical staff.
 - A function can be essential, even if infrequently performed, if the consequences of not performing the function would be serious.

Undue Hardship

- "Undue hardship" considers:
 - The particular **employer's resources**
 - If the accommodation will be **unduly extensive** or disruptive
 - If the accommodation will **fundamentally alter the nature** or operation of the business
 - The **Impact** of accommodation **on facility**.
 - The **Impact** of accommodation on **other employees**.
 - The **Impact** on terms of **negotiated agreement**.
- **Nature/net cost**. (considering tax credits, deductions, outside funding)
- **Overall financial resources** of facility.
- **Number of employees** at facility.
- **Nature of operation**. (structure, control, workforce, geographical locations, administrative autonomy, relationship of facility to entity)

Direct Threat

- ❑ An **individual is NOT “qualified”** under the ADA if his or her health conditions present a direct threat to him/herself or to others. *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002); and
- ❑ No reasonable accommodations would **eliminate or substantially limit the threat.**
- ❑ Covered entities generally bear the burden of proving the individual presents a *significant risk of substantial harm*, based upon objective, scientific information.

Direct Threat (cont.)

- Direct threat factors:
 - **Duration** of risk;
 - **Nature/severity** of potential harm;
 - **Likelihood** that potential harm will occur; and
 - **Imminence** of potential harm.
- Courts grant **greater latitude** to entities involved in **public safety**.
 - **10th Cir. *McKenzie-Benton***

Jarvis v. Potter, --- F.3d ----, 2007 WL 2452686 (10th Cir. 2007).

- Jarvis, a **former custodian** for the Postal Service with post-traumatic stress disorder (PTSD).
- Terminated when he **struck two** employees.
- Jarvis himself stated that he could kill someone if he hit the person in the right place, **he could no longer stop the first blow."**

Jarvis v. Potter, --- F.3d ----, 2007 WL 2452686 (10th Cir. 2007). (cont.)

- His **doctor** indicated:
 - symptoms were **not expected to dissipate** in the near future, that individuals with PTSD can exhibit "**aggressive**" and "**violent**" behavior,
 - that the unpredictable **nature of PTSD symptoms can cause disruption,**
 - **Plaintiff had identified the workplace as a stressor** in his life.

Jarvis v. Potter, --- F.3d ----, 2007 WL 2452686 (10th Cir. 2007). (cont.)

- **10th Circuit has recognized that the burden may be on the plaintiff to establish that he can perform a job safely when the essential functions of the job necessarily implicate the safety of others, the court said that this was not such a case; consequently, defendant (employer) bore the burden to establish the existence of a direct threat.**
- The court found that the defendant met its burden.

Performance & Conduct

- An entity **need not lower or change its quality, quantity, or production standards** as an accommodation.
- If the disability **does not cause the misconduct** the individual **may be held to the same conduct standards.**
- If the disability **causes the misconduct**, an entity **may apply discipline provided the rule is applied uniformly and the rule is consistent with business necessity.**

Performance

- ❑ It is generally **inappropriate for employers to focus discussion** about a performance or conduct problems **on an employee's disability**.
- ❑ Focus should be on correcting performance problems and avoiding future misconduct.
- ❑ **Emphasizing the disability risks distracting from the primary focus on workplace problems** and can result in a **“regarded as” claim**.
- ❑ It is generally **preferable for the employee**, rather than the employer **to raise a disability issue**.

Productions Standards

- **Productions Standards** refer to:
 - **Quantitative Standards**
 - **Qualitative Standards**

- **An employee with a disability must meet the same production standards as other employees in the same position**

Practical Guidance: Expectations

- Supervisors should **always give clear guidance to all employees including those with a disability, regarding the**
 - **Quantity; and**
 - **Quality of work** that must be produced; and
 - **the Timetables** for producing it.

Practical Guidance: Providing Accurate Feedback and Evaluations

- ❑ Avoid possible **disparate treatment**.
- ❑ Supervisors should **evaluate the job performance** of an employee with a disability in the **same manner that they would evaluate** any other employee's performance.
- ❑ **Failing to provide an accurate evaluation** may leave the employee at a disadvantage when it comes to:
 - **improving performance** and,
 - if necessary, **request reasonable accommodations**.

Practical Guidance

- Accommodation requests are **prospective**:
Generally, employer **need not rescind discipline.**
- An employer **may have to provide a reasonable accommodation** to an employee with a disability **when providing feedback/performance review/discipline to enable the employee to understand** the nature of the performance or conduct problem and to have a meaningful discussion about it. (interpreters etc)



What Should This Employer Do?

- An employee discloses that **s/he has a disability in response either to receiving a lower performance rating** or to his supervisor raising the issue of a performance problem.

Performance Rating Response

When an employee raises disability in response to a poor performance rating the employer may –

- ❑ **Give lower rating and reiterate that performance problems must be corrected.**
- ❑ **Make clear that the employee earned the lower performance rating.**
- ❑ **May ask why employee believes that disability plays a role in performance problem and whether employee is asking for reasonable accommodation.**



What Should This Employer Do?

- ❑ An employee asks for reasonable accommodation in response to a lower performance rating.

Employer Response: Reasonable Accommodation

- ❑ Employer **cannot ignore or deny a request** for reasonable accommodation **because the employee has performance problems** or has received a lower performance evaluation.
- ❑ Cannot **refuse to provide reasonable accommodation as punishment.**
- ❑ Remember, an **employee can request accommodation at any time**, including after being told about a performance problem or receiving a low evaluation.

Reasonable Accommodation (cont.)

- If an **employee with a known disability has a performance or conduct problem**, an employer may ask whether the employee needs a **reasonable accommodation** if there seems to be a connection between the disability and the problem.
- Alternatively, an employer **may ask what steps can be taken to improve** an employee's performance or conduct **without mentioning the disability** or accommodation.

What Should This Employer Do?

- ❑ An employee who **frequently interacts with the public has Tourette syndrome**, a disability which causes him to **bark, shout, and utter nonsensical phrases, loudly and frequently.**
- ❑ These behaviors **distract co-workers and cause them to make errors** in their work.
- ❑ **Customers also complain** to employee's supervisor.

What Should This Employer Do?

- The same employee but instead the Tourette syndrome causes only **infrequent throat-clearing and eye-blinking**.
- These behaviors are **not disruptive to co-workers, nor are they incompatible** with serving customers.

Conduct

- **Employers may prohibit:**
 - **Violence** or threats of violence
 - **Stealing**
 - **Destruction of property**
 - **Insubordination**
 - Showing **disrespect** to clients, customers, or public
 - **Inappropriate behavior** between coworkers
 - **Alcohol or illegal drug** use
- * **If termination is appropriate for the conduct**, the employer may usually terminate an employee with a disability **without further review of the request for reasonable accommodation after approval** from Risk Management.

Attendance and Leave Issues

- ❑ Employees with disabilities **must be granted the same access** to an employer's **existing leave program** as all other employees.
- ❑ Reasonable accommodation **does not require that employers tolerate chronic, frequent, and unpredictable tardiness or absences.**
- ❑ Such behaviors will likely **demonstrate an inability to perform one or more essential** functions of the job.
- ❑ May enable the employer to **demonstrate that any accommodation would impose an undue hardship.**

10th Circuit Leave

- **Indefinite Leave NOT required.**
- *In Lara v. State Farm Fire and Casualty Co, 121 Fed. Appx. 796 (10th Cir. 2005)*
- **10th Circuit** held that an **employer may not be required to provide additional leave as a reasonable accommodation when the employee fails to provide information on the expected duration of his impairment** and the employer thus lacks the knowledge needed to evaluate the reasonableness of the request.

Indefinite Leave vs. Extended Medical Leave

- ❑ **Indefinite leave** is when an employee (or his/her doctor) can give no date of return, or predict whether an employee will return to work.
- ❑ An **approximate date** of return (e.g.. employee will return at the beginning of October) a not indefinite leave.
- ❑ A **time period for return** (e.g. employee will return between Oct 15 and Oct 30) is not indefinite leave.

Blanket Policy Application

- **EEOC v. Sears**
6.2 Million Dollar Settlement (Largest Ever)

EEOC v. UPS

- **Second Class Action this year is Pending**

Alcoholism and Illegal Use of Drugs

- ❑ The ADA does **not protect** employee who **currently engages** in the **illegal use of drugs and** specifically states that employees who are **alcoholics and/or engage in illegal use of drugs may be held to the same standards of performance and conduct.**
- ❑ The ADA **may protect a recovered drug addict** who no longer engages in illegal drug use and who is qualified.
- ❑ An employer **may prohibit the use of alcohol and/or illegal use of drugs in the workplace, or being under the influence** (42 U.S.C sec 12114(c)(1)).
- ❑ An employer **may discipline and employee who violates such a workplace policy.**

Reasonable Accommodation/Alcoholism

- However, an employee whose **poor performance or conduct is attributable to alcoholism** may be entitled to a **reasonable accommodation**, apart from any disciplinary action the employer chooses to impose (**assuming that appropriate discipline is something less than termination**).
- Reasonable accommodation would not include **measures that enable the employee's alcoholism** (e.g. a modified work schedule for someone who had been drinking the previous night).

Alcoholism (cont.)

- *Moorer v. Baptist Memorial Health Care System*, 398 F.3d 469 (6th Cir. 2005): Affirmed trial court's conclusion **that employer regarded plaintiff as having a disability** when it **linked plaintiff's alleged performance deficiencies to a belief** that he was an alcoholic:
 - Employer demanded that employee undertake a **fitness for duty** examination;
 - **Supervisor told employee** she thought he **was an alcoholic** and required him to seek treatment;
 - While employee was undergoing treatment, **supervisor called employee's wife, told her that alcoholism is an incurable** disease, and indicated her husband would never be cured;
 - When **supervisor fired employee**, she told him that his **work-related problems were caused by his disease of alcoholism.**

Medication and Treatment

- An employer may **not** require the employee to receive or change treatment for the disability.
- Employer comments about disability and its treatment could lead to potential “regarded as” ADA claims.
 - *Kelly v. Mettalics West*

Other Unique Issues (cont.)

- *Moorer v. Baptist Memorial Health Care System*, 398 F.3d 469 (6th Cir. 2005): Affirmed trial court's conclusion **that employer regarded plaintiff as having a disability** when it **linked plaintiff's alleged performance deficiencies to a belief** that he was an alcoholic:
 - Employer demanded that employee undertake a **fitness for duty** examination;
 - **Supervisor told employee** she thought he **was an alcoholic** and required him to seek treatment;
 - While employee was undergoing treatment, **supervisor called employee's wife, told her that alcoholism is an incurable** disease, and indicated her husband would never be cured;
 - When **supervisor fired employee**, she told him that his **work-related problems were caused by his disease of alcoholism.**

What Should This Employer Do?

- A supervisor finds an **employee asleep at his desk.**
- The supervisor **suspects drug abuse** and **wants** to send the employee for an **independent medical** exam.

What Should This Employer Do?

- ❑ There **could be many reasons** the employee may be asleep. (May work 2nd job, have new baby, or personal problems preventing sleep)
- ❑ Complete a **reasonable suspicion** assessment.
- ❑ **This is a performance issue until...?**
- ❑ **Only after the employee discloses sleeping is related to a health** issue would employer have objective information to justify a medical examination.

Fitness for Duty

- Post-Employment Medical Exams/Inquiries
 - *Ward v. Merck & Co., Inc.*, 2007 WL 760391 (3rd Cir. 2007) (unpublished): Plaintiff, who was **terminated after he refused to submit to a fitness-for-duty examination**, claimed the requested examination violated the ADA. The Third Circuit affirmed the trial court's holding that the **examination was job-related and consistent with business necessity due to plaintiff's rapid deterioration in behavior (increased anger) and job performance following diagnoses of and treatment for anxiety disorder, schizophrenia, and panic disorder.**



GINA – Prohibitions

- Employers shall not
 - **fail or refuse to hire, or discharge**, any employee, or otherwise discriminate with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information
 - **Limit, segregate, or classify** employees in a way that would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their status because of genetic information



Obtaining Genetic Information

- ❑ Employers shall **not request, require, or purchase genetic information** with respect to an employee or a family member of the employee.
- ❑ To avoid liability, employers are **advised to direct all evaluating health care providers NOT to disclose family health history** obtained during their evaluations.
- ❑ **Update your forms**

Confidentiality

- Information **may only be disclosed** to:
 - Supervisors, Managers, Professors, who **need to know** about **work restrictions and accommodations**;
 - **First aid and safety personnel** for treatment or evacuation;
 - **Government officials investigating** compliance with federal laws;
 - Relevant information to **state workers' compensation officers** or second injury funds and insurance companies when required to provide life₁₁₉ or health insurance.

ADA Harassment Claim

- *EEOC v. Micron Technoloav. Case No. 2:05-CV-00546-TS (D. Utah, consent decree entered Feb. 2007)*
- Prior to a decision by the court on the merits, the parties reached a **\$60,000 settlement** of an ADA case alleging hostile work environment harassment of a Mexican American employee **based on his hearing impairment and his national origin**
- The alleged **harassment included co-workers making a variety of offensive comments, and some mockingly pretending to sign and "deaf speak," over a two-year period**, notwithstanding the charging party's complaints to management officials at Micron, a Fortune 500 semiconductor manufacturing company
- **Fired after reporting** the harassment to management

Best Management Practices

- ❑ **Recognize Requests for Accommodation**
- ❑ **Don't "Regard" someone "as" disabled**
- ❑ **Promptly Refer all health condition issues to HR**
- ❑ **Maintain Confidentiality**
- ❑ **Review and update Job Descriptions and Physical Demands**
- ❑ **Provide Honest Performance Evaluations**
- ❑ **Consistency, Consistency... throughout the Department, Division, District**

Best Management Practices (cont.)

- ❑ Address **Performance Issues**, not **Health** conditions
- ❑ Protect **Essential Functions**
- ❑ **Keep records of requests made, granted, and denied with detailed analysis for each decision**
- ❑ **Manage “Temporary” Transitional work assignments**
- ❑ **Avoid Retaliation**
- ❑ **Extinguish any form of retaliation**

Quiz: Recognizing FMLA/ADA Requests

Which of the following should be considered a request for FMLA or reasonable accommodation under the ADA?

- A **social worker** tells his supervisor, “I can’t come to work because I am having **knee pain**”.
- The **spouse** of an employee phones the employee’s supervisor in the morning and relates that the employee had a medical emergency due to **Diabetes, needs hospitalization, and requires time off.**
- A **nurse** tells her supervisor that she would like a new chair because her present **chair is uncomfortable.**
- A **janitor** tells her supervisor that she **needs time off for therapy visits.**



Questions and Answers

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