



# ⊕ FMLA & ADA: Avoiding Discrimination Claims

*Denise Macik, PHR, SHRM-CP*

# Before we begin...

---

- ⊕ We are recording this webinar. The on-demand version will be available for viewing on our site by the end of the week.
- ⊕ This webinar has been pre-certified by the HRCI for one hour of HR general recertification credit.
- ⊕ If at any time during the presentation you have a question you'd like us to answer, send it to us using the "Questions" tab in the GoToWebinar menu bar.

# About G&A Partners

---



[www.gnapartners.com](http://www.gnapartners.com)

# Agenda

---

- + What is the Family and Medical Leave Act (FMLA)?
- + What is the Americans with Disability Act (ADA)?
- + How do FMLA and ADA interact?



**Denise Macik, PHR, SHRM-CP**  
Client Advocate  
G&A Partners

# Disclaimer

---

- + I am not an attorney
- + This material is not legal advice
- + This presentation is not a substitute for experienced legal counsel

---

# The Family and Medical Leave Act (FMLA)

# What is FMLA?

---

- FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

# Who is a covered employer?

---

- Private sector employer with 50+ employees working 20+ weeks in the current or preceding year
- Public agency, including a local, state, or federal government agency, regardless of number of employees
- Public or private elementary school or secondary school, regardless of number of employees

Source: DOL Fact Sheet #28



# What makes an employee eligible?

---

- + Works for a covered employer
- + Has worked for the employer for at least 12 months
- + Has worked 1,250 hours in the 12 months immediately prior to leave
- + Works at location with 50+ employees in a 75-mile radius

# What is an employee entitled to?

---

- ⊕ Up to 12 workweeks of leave in a 12-month period
- ⊕ Leave can be continuous or intermittent

# What is a military caregiver entitled to?

---

- + 12 weeks of leave during a 12-month period due to a qualifying exigency arising out of a call to active duty
- + 26 weeks of leave during a 12-month period to care for a family member injured or ill as a result of service in the military

# Types of leave

---

+ Continuous leave

+ Intermittent leave

# Qualifying events for FMLA

---

- + Birth, adoption or foster care
- + Care for a spouse, child or parent who has a serious health condition
- + Employee's own serious health condition
- + Military caregiver conditions/functions

# Serious Health Condition

---

- Illness, injury, impairment or physical or mental condition that involves any period of incapacity
- An absence to receive multiple treatments that likely would result in incapacity of more than three consecutive days if left untreated

# Employee notice requirements

---

- + Give at least 30 days' notice or reasonable notice where leave is foreseeable
- + Give notice under employer's usual and customary notice requirements where leave is not foreseeable
- + Give notice “as soon as possible” if the need for military leave is foreseeable
- + Provide medical certification as required

# Employer notice requirements

---

- ⊕ Eligibility Notice DOL Form WH-381
  - ⊕ Provides clarity on leave eligibility
- ⊕ Designation Notice DOL Form WH-382
  - ⊕ Designates leave for employee



# Medical certification of leave

---

- + Medical Certification WH-380-E, WH-380-F
- + Employee must return within 15 days and is responsible for any costs associated with completion of form
- + Employer representative can authenticate and clarify certification (not direct supervisor!)
- + Employer can request second opinion at employer cost

# Employee reinstatement

---

- Same position, or to an equivalent position with equal pay, benefits and other terms and conditions

# Posting notice

---

- ⊕ Post a general notice explaining rights and responsibilities (WH Publication 1420) in a common area for all workers to see
- ⊕ Provide in other languages when portion of workforce is not fluent in English
- ⊕ Provide information regarding filing a complaint
- ⊕ Employers may be assessed a fine for not posting

# Recordkeeping

---

- + Dates, documents and records of FMLA leave
- + Hours used, if leave is intermittent
- + Keep for no less than three years
- + Maintain medical information in a confidential manner and separate from personnel file

# Most common violations

---

- + Failure to notify of rights
- + Failure to designate leave appropriately
- + Considering FMLA leave in disciplinary actions
- + Failure to reinstate employee appropriately
- + Denying coverage to an eligible employee with a qualifying reason

---

# Americans with Disabilities Act (ADA)

# Background on the ADA

---

- ⊕ The ADA was passed in 1990
- ⊕ The nation's first comprehensive civil rights law that prohibits discrimination based on disability
- ⊕ The law was amended by the ADA Amendments Act (ADAAA) of 2008

Source: Equal Employment Opportunity Commission

# What does the ADA do?

---

- ⊕ Prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities
- ⊕ Prevents discrimination against an applicant or employee, whether disabled or not, because of the individual's relationship or association with an individual with a disability

Source: Equal Employment Opportunity Commission

---



# Who is a covered employer?

---

- ⊕ Employers with 15+ employees, including state and local governments
- ⊕ Also applies to employment agencies and to labor organizations

# Who is covered by the ADA?

---

- ⊕ A “qualified individual with a disability” is considered to have a disability when he/she:
  - ⊕ Has a physical or mental impairment that substantially limits one or more major life activities;
  - ⊕ Has a record of such an impairment; or
  - ⊕ Is regarded as having such an impairment.

Source: Equal Employment Opportunity Commission

# Covered individuals

---

- The ADAAA specifically states certain conditions that can quite easily be determined to be a covered disability under the law

# What is a major life activity?

---

- + Caring for oneself
- + Performing manual tasks
- + Seeing
- + Hearing
- + Eating
- + Sleeping
- + Walking
- + Standing
- + Breathing
- + Lifting
- + Bending
- + Speaking
- + Learning
- + Reading
- + Concentrating
- + Thinking
- + Communicating
- + Working

Source: Equal Employment Opportunity Commission

# What is a major life activity?

---

- + Bodily functions included:
  - + Immune system
  - + Normal cell growth
  - + Digestive, bowel bladder
  - + Neurological
  - + Respiratory
  - + Circulatory
  - + Endocrine
  - + Reproductive functions

Source: Equal Employment Opportunity Commission

# What is a reasonable accommodation?

---

- ➕ A reasonable accommodation can be any modification or adjustment to a job or the work environment that will enable the qualified individual with a disability to participate in the application process or to perform essential job functions.

# What is an undue hardship?

---

- + An action requiring significant difficulty or expense when considered in light of factors such as:
  - + An employer's size;
  - + An employer's financial resources;
  - + The nature and structure of an employer's operation

# Requesting an accommodation

---

- ⊕ A qualified individual with a disability may request a reasonable accommodation during the application process or during the course of employment.



# The ADA interactive process

---

- ⊕ “The interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and...this obligation is triggered by an employee or an employee’s representative giving notice of the employee’s disability and the desire for an accommodation.”

Source: *Barnet v. U.S. Air, Inc.*, 228 F.3d 1105 (9<sup>th</sup> Cir. 2000)

# The ADA interactive process

---

- ⊕ Employers must initiate the interactive process as soon as an employee gives notification of a disability and the need for an accommodation
- ⊕ Employers should understand employee's ideas for specific accommodations

# The ADA interactive process

---

- ⊕ Begin the interactive process when:
  - ⊕ An employee is not eligible for FMLA
  - ⊕ The employee has exhausted FMLA
  - ⊕ An employee is released to work with accommodations

# The ADA interactive process

---

- ⊕ Request additional information that justifies an employee's specific request
- ⊕ Facilitate a negotiation resulting in mutual agreement
- ⊕ Document the interactive process

# Employee reinstatement

---

- The employee is entitled to return to the same job based on final considerations of the accommodation request or
- A different position, based on the considerations of the accommodation request

# Posting notice

---

- ⊕ Requires that employers post a notice describing the provisions of the ADA
- ⊕ Must be made accessible, as needed, to individuals with disabilities

# Recordkeeping

---

- ⊕ Application forms submitted by applicants and other related records
- ⊕ Any records related to an EEOC claim must be kept until the final disposition of the charge
- ⊕ Keep all records 4 years after termination

# Most common violations

---

- + Ignoring the request for accommodation
- + Inquiring about the diagnosis, prognosis, symptoms or manifestation of the medical condition
- + Assuming the employee can perform the essential functions without accommodation
- + Disclosing employee's disability or medical information



---

# Simple Steps to Avoid Discrimination Claims

# Learn the basics

---

- + Headcount:
  - + FMLA applies to employers with 50+ employees
  - + ADA applies to employers with 15+ employees
  
- + Timeframe:
  - + FMLA has a 12 workweek limit
  - + ADA has no limit
  
- + Terminology:
  - + FMLA uses “serious health condition”
  - + ADA uses “disability”

# Learn the basics

---

## + Reinstatement:

- + FMLA requires return to the same or equal position
- + ADA can be same position or different, all based on the hardship considerations to employer

## + Benefits continuation:

- + FMLA requires all benefits to be continued
- + ADA only as required by the position

## + Documentation:

- + Both the FMLA and the ADA require medical documentation

# Access the following

---

- ⊕ Determine which laws apply to employees as a group
- ⊕ Determine which laws cover the particular employee's situation
- ⊕ Determine the employee's benefits and/or entitlements under the relevant laws

# Stay consistent

---

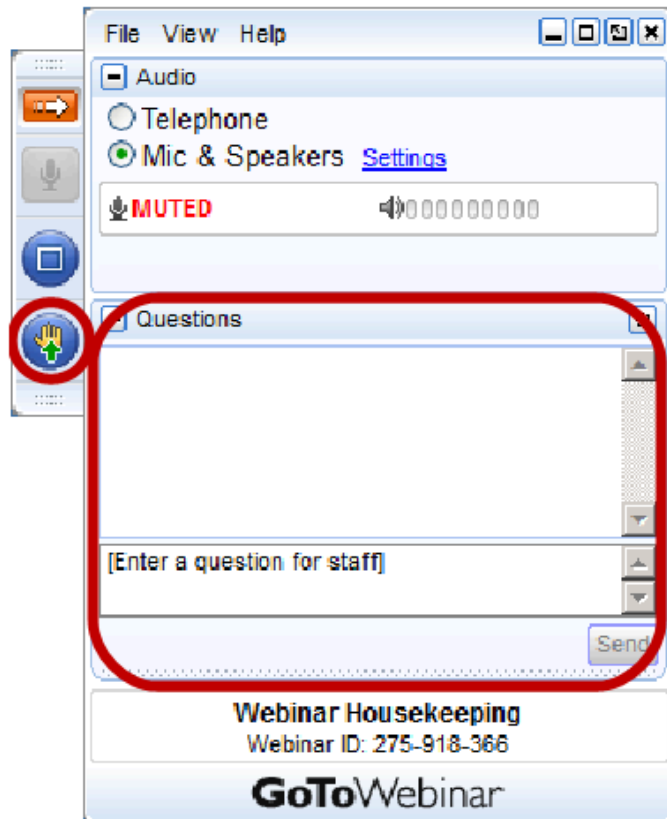
- + Require medical certifications, and when needed confirm certification with HCP
- + Request recertification when circumstances change
- + Keep accurate and updated signed position descriptions
- + Enforce call-in procedures
- + Train supervisors and management

# Closing thoughts

---

- ⊕ Employers cannot interfere with, restrain or deny employees' FMLA and/or ADA rights
- ⊕ It's prohibited to retaliate, discriminate against, discharge or otherwise consider a negative factor against an employee for exercising FMLA and/or ADA rights

# Questions?



\*You can type questions in the Go-to-Webinar menu bar as shown.

# Questions?

---

# Q&A



# #AskMDE

---



If we didn't get to your question during today's presentation, tweet us ([@GAPartners](https://twitter.com/GAPartners)) using [#AskMDE](https://twitter.com/AskMDE), and our experts will reply with an answer shortly!

Or, you can email your questions to [info@gnapartners.com](mailto:info@gnapartners.com).

# Reminders

---

- + The recording of this webinar will be available on the G&A Partners website soon ([www.gnapartners.com](http://www.gnapartners.com)).
- + This webinar has been pre-certified for 1 hour of general recertification credit toward PHR, SPHR and GPHR recertification through the HR Certification Institute.

**We will send out an email to all those who are confirmed as attended with the program ID code to note on your HRCI recertification application form.**



The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit.

# Join us for our next webinar!

Free HRCI Pre-Certified Webinar

## Creating An Exceptional Employee Experience

Thursday, September 21, 2017 @ 11 a.m. CST



[www.gnapartners.com/webinar/creating-exceptional-employee-experience/](http://www.gnapartners.com/webinar/creating-exceptional-employee-experience/)