Family and Medical Leave Act
And
The Americans with Disabilities Act

FLORIDA ASSOCIATION OF SCHOOL PERSONNEL ADMINISTRATORS

Presented by: Douglas G. Griffin, ESQ

FMLA – a reminder of the basics

What is the purpose of The Family and Medical Leave Act?

The FMLA allows "eligible" employees to take job-protected, **unpaid leave**, for up to a total of 12 workweeks in any 12 months because of:

a. the birth of a child and to care for the newborn child,
b. the placement of a child with the employee for adoption or foster care,
c. the employee is needed to care for a family member with a serious health condition,
d. the employee's own serious health condition, or
e. any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty in support of a contingency operation.

In addition, "eligible" employees may up to a total of 26 workweeks in a "single 12-month period" to care for a covered service member with a serious injury or illness

FMLA – eligible employees

Which employees are eligible for FMLA leave?

An "eligible employee" is an employee of a covered employer who:

a. Has been employed by the employer for at least 12 months, and

b. Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

FMLA – eligible employees

Must the 12 months of employment be consecutive?

The 12 months an employee must have been employed by the employer need not be consecutive months, provided employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months

FMLA – eligible employees

What twelve-month period must be used to determine whether the employee has worked at least 1,250 hours in the past 12 months?

The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on "non-FMLA leave" at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be "FMLA leave.

An employer of "full-time teachers ... of an elementary or secondary school system ... who often work outside the classroom or at their homes" must show that such employees "did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave."

FMLA – qualifying events (birth or placement)

Are eligible employees entitled to FMLA after birth of a child?

Yes, both the mother and father are entitled to FMLA leave to be with the healthy newborn child (i.e. , bonding time) during the 12-month period beginning on the date of birth.

A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter.

Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer.

FMLA – qualifying events (birth or placement)

Are eligible employees entitled to intermittent and reduced schedule leave after birth or placement of a healthy child?

No. An eligible employee may use intermittent or reduced schedule leave after the birth or placement for adoption or foster care to be with a healthy newborn child only if the employer agrees.

FMLA – qualifying events (own serious health condition)

What is meant by serious health condition?

For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves **inpatient care** or **continuing treatment** by a health care provider.

Although the FMLA protects leave because of a serious health condition that makes the employee unable to perform the functions of the position of such employee, and one type of "serious health condition" is a "chronic health condition," **the FMLA does not extend its potent protection to any leave that is medically beneficial leave simply because the employee has a chronic health condition.** Rather, the FMLA only protects leave for any *period of incapacity* or *treatment for such incapacity* due to a chronic serious health condition.

FMLA – qualifying events (own serious health condition)

What is meant by "continuing treatment?"

A. Incapacity and treatment. **A period of incapacity of more than three consecutive, full calendar days, and** subsequent treatment.

B. Pregnancy or prenatal care.

C. Chronic conditions. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition.

D. Permanent or long-term conditions. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

E. Conditions requiring multiple treatments. Any period of absence to receive multiple treatments for **restorative surgery** after an accident or other injury; or a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention.

FMLA – qualifying events (family member's serious health condition)

What is meant by needed to care for a family member?

"Family member" is limited to employee's spouse, son, daughter or parent.

The medical certification provision that an employee is "needed to care for" a family member or covered service member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition,

- the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor; or
- providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care; or
- where the employee may be needed to substitute for others who normally care for the family member or covered service member

FMLA – leave entitlement

How is the "12-month period" in which the 12 weeks of leave entitlement occurs determined?

An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

a. The calendar year;

b. Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;

c. The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,

d. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a)

FMLA – leave entitlement

May an employer interrupt the leave by requiring an employee on FMLA to attend an investigatory or pre-disciplinary conference?

Although in certain circumstances required meetings may unlawfully interrupt an employee's leave, requiring an employee to attend a one-time conference which is a legitimate piece of an ongoing investigation does not interfere with leave rights.

FMLA - reinstatement

What is an employee's right to reinstatement after FMLA leave?

On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

FMLA - reinstatement

Does an employer have a duty under the FMLA to make accommodations for an employee to allow the employee to return to the same position?

No. The FMLA does not require an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his medical leave. In order for an employee to demonstrate entitlement to restoration, the employee must have been able to perform the essential functions of the job without accommodation at the time he sought restoration.

FMLA – intermittent or reduced schedule

May FMLA be taken on an intermittent or reduced leave schedule basis?

Yes. FMLA leave may be taken “intermittently or on a reduced leave schedule” under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

FMLA – intermittent or reduced schedule

How are increments of FMLA leave for intermittent or reduced schedule leave determined?

When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided **that it is not greater than one hour**.

FMLA – employee notice requirements

When must an employee provide notice to the employer of the need to take FMLA leave?

a. Foreseeable leave—30 days. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice.

b. Foreseeable leave—less than 30 days. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case.

FMLA – employee notice requirements

What are the consequences if an employee fails to provide compliant notice?

There is a "rigorous notice standard for employees seeking to use FMLA leave for absences." Failure to provide timely and adequate notice can defeat an entitlement or interference claim. Failure to establish timely and adequate notice of intent to take FMLA leave, and that the employee, therefore, qualified for FMLA leave, likewise, defeats a retaliation or discrimination claim.

FMLA – employee notice requirements

May an employee on FMLA be compelled to comply with an employer's customary notice and procedural requirements?

Yes, absent unusual circumstances. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. An employee may be required by an employer's policy to contact a specific individual.

FMLA – employer notice requirements

What type of employer notice is required when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason?

When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave **within five business days, absent extenuating circumstances**.

Employers must also provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice must be provided to the employee each time the eligibility notice is provided.

FMLA – employer notice requirements

What must the designation notice include?

a. That the leave may be designated as FMLA leave entitlement;

b. Any requirements for the employee to furnish certification;

c. The employee's right to substitute paid leave, or whether the employer will require the substitution of paid leave;

d. Any requirement for the employee to make any premium payments to maintain health benefits;

e. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave;

f. The employee's potential liability for payment of health insurance premiums if the employee fails to return; and

g. Any requirement for fit-for-duty certification upon return.

FMLA – employer notice requirements

Is the period of FMLA leave entitlement extended in the event that an employer fails to timely issue the required notice designating leave as FMLA leave?

Generally, not. The employee has the burden of proving that any delay in issuance of the notice caused any real impairment of their rights and resulting prejudice.

Failure to provide the required notice can constitute an interference claim. However, Plaintiff must demonstrate that the employer's failure to follow the applicable regulations rendered her "unable to exercise that right in a meaningful way, thereby causing injury.

FMLA – health care provider certification

What is the general rule for health care provider certification under FMLA leave?

An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member.

FMLA – health care provider certification

What is meant by "health care provider" under the FMLA?

The FMLA defines health care provider as:

a. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
b. Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X–ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
c. Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;
d. Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.
e. Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits

FMLA – health care provider certification

When must the employee provide a required health care provider certification?

The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

FMLA – health care provider certification

What is the required content of medical certification for a period of leave taken because of a serious health condition?

a. The approximate date on which the serious health condition commenced, and its probable duration;

b. A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any continuing treatment;

c. If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability;

d. If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, and an estimate of the frequency and duration of the leave required to care for the family member;

FMLA – health care provider certification

What is the required content of medical certification for intermittent or reduced leave taken because of a serious health condition?

a. Information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

b. If leave is for unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

c. If leave is to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

FMLA – health care provider certification

May an employer require an employee to grant an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member?

No. While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.

FMLA – health care provider certification

How are employers required to respond to perceived deficiencies in a required medical certification?

An employer must advise an employee whenever the employer finds a certification incomplete or insufficient, and must state in writing what additional information is necessary to make the certification complete and sufficient. If the employer determines that a certification is either incomplete or insufficient, it may deny the requested leave on the basis of an inadequate certification. But it may only do so if it has provided the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.

FMLA – health care provider certification

How may an employer authenticate and clarify a medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member?

If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official.

FMLA – health care provider certification

Under what circumstances may an employer require opinions from additional health care providers?

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave must not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies.

FMLA – recertification

What is the process for re-certifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member?

Generally, an employer may generally only request recertification no more often than every 30 days and only in connection with an absence by the employee. If, however, the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification.

FMLA – fit-for-duty upon return

What is the general rule for fitness-for-duty certification as a condition of returning from FMLA leave?

As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e. , same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process.

Americans with Disabilities Act

FLORIDA ASSOCIATION OF SCHOOL PERSONNEL ADMINISTRATORS

Presented by: Douglas G. Griffin, ESQ

ADA – basics

The ADA -

A. Prohibits discrimination on the basis of disability against a qualified individual.

B. Requires employers to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability.

C. Prohibits discrimination based on relationships or associations with an individual with a disability.

D. Prohibits retaliation because an individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.

E. Prohibits coercion, intimidation, threatening, or interfering with any individual in the exercise or enjoyment of rights under the ADA.

F. Severely limits permissible medical examinations and inquiries.

ADA – disability

What is considered a disability in regards to the Americans with Disabilities Act?

In general. *Disability* means, with respect to an individual—

a. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

b. A record of such an impairment; or

c. Being regarded as having such an impairment.

Whether a condition constitutes a disability under the ADA involves three inquiries: (1) whether the condition is a physical or mental impairment; (2) whether the life activities from which he was impaired (e.g., walking) amounted to major life activities; and (3) whether the impairment substantially limited him from performing the identified major life activities.

ADA – disability

What are considered major life activities in regards to the Americans with Disabilities Act?

a. Major life activities —In general. Major life activities include, but are not limited to:

1. 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; and
2. The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

ADA – qualified individual with a disability

What is meant by a "qualified individual with a disability" under the Americans with Disabilities Act?

The term "*qualified,"* with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

ADA – essential functions

What evidence do courts rely upon to determine whether a function is essential?

Evidence of whether a particular function is essential includes, but is not limited to:

a. The employer's judgment as to which functions are essential;
b. Written job descriptions prepared before advertising or interviewing applicants for the job;
c. The amount of time spent on the job performing the function;
d. The consequences of not requiring the incumbent to perform the function;
e. The terms of a collective bargaining agreement;
f. The work experience of past incumbents in the job; and/or
g. The current work experience of incumbents in similar jobs.

ADA – dissrimination prohibited

What type of discrimination is prohibited under the Americans with Disabilities Act?

Discrimination on the basis of disability against a qualified individual in regard to:

A. Recruitment, advertising, and job application procedures;
B. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
C. Rates of pay or any other form of compensation and changes in compensation;
D. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
E. Leaves of absence, sick leave, or any other leave;
F. Fringe benefits available by virtue of employment;
G. Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
H. Activities sponsored by a covered entity, including social and recreational programs; and
I. Any other term, condition, or privilege of employment.

ADA – entrance tests

What "qualification standards tests, and other selection criteria" may an employer require under the Americans with Disabilities Act?

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

Individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Employment tests must be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

ADA – disparate treatment

What is required to state a claim for unlawful disparate treatment under the ADA?

To establish a prima facie case under the ADA, a plaintiff must show "(1) that she has a disability within the meaning of the ADA; (2) that she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) that she suffered an adverse employment action due to a disability."

ADA – disparate treatment

What are examples of actions which constitute adverse employment action?

- Negative job reference.
- Transferring employee to a new location and to work alone, under orders not to speak to others.
- A transfer which did not affect wages or benefits, but resulted in a “less distinguished title” and “significantly diminished material responsibilities,” Involuntary placement on disability leave.
- Constructive discharge.
- Constructive demotion.
- Refusal to rehire.
- Failure to promote.
- Denial of a raise.
- Increased workload that materially **changes an employee's duties** can constitute an adverse employment action.

ADA – harassment

What must an employee prove to establish unlawful harassment by a supervisor under the ADA?

To prevail on a hostile work environment claim under the ADA, the employee must show 1) that he is a member of the class of people protected by the statute, 2) that he was subject to **unwelcome** harassment, 3) that the harassment resulted from his membership in the protected class, and 4) that the harassment was severe enough to affect the terms, conditions, or privileges of his employment.

ADA – reasonable accommodation

What is an employer's obligation to make a "reasonable accommodation" under the Americans with Disabilities Act?

It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

ADA – reasonable accommodation

What are examples of Reasonable Accommodations under the Act?

The term "reasonable accommodation" may include—

A. making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

B. job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

ADA – reasonable accommodation

What communication is generally required of both the employee and employee relating to an employee's need for reasonable accommodation?

Applicable regulations provide that in order "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations."

ADA – job restructuring

To what extent must an employer restructure job duties as a reasonable accommodation?

An employer may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires an individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the individual with a disability can perform are made a part of the position to be filled by the individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position.

An employer is not required to reallocate essential functions.

ADA – reassignment

What are the recognized exceptions to an employer's duty to reassign an employee?

1. It is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job.
2. The ADA does not require the employer to reassign a disabled employee to a position that would constitute a promotion.
3. The ADA does not require an employer to reassign a disabled employee in a manner that would contravene that employer's "important fundamental policies underlying legitimate business interests."
4. The job to which a disabled employee seeks reassignment must be vacant.

ADA – leave

Must an employer grant an employee a leave of absence of reasonable duration as a reasonable accommodation?

Yes. An allowance of time for medical care or treatment may constitute a reasonable accommodation. Leave is not reasonable under the ADA, however, where at the time of termination the employee had no idea when, if ever, he would be able to return. Leave is only a reasonable accommodation where it is finite and will be reasonably likely to enable the employee to return to work.

ADA – medical inquiries

What are considered prohibited medical examinations and inquiries under the Americans with Disabilities Act?

A. **Pre-employment examination or inquiry.** Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

B. **Examination or inquiry of employees.** Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

ADA – pre-employment medical inquiries

Which pre-employment medical examinations and inquiries are specifically permitted under the Americans with Disabilities Act?

A covered entity may require a medical examination (and/or inquiry) **after making an offer of employment to a job applicant and before the applicant begins his or her employment duties**, and may condition an offer of employment on the results of such examination (and/or inquiry), **if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability**. Such medical examinations do not have to be job-related and consistent with business necessity.

ADA – pre-employment medical inquiries

May an employer require candidates to identify any potentially disabling impairments on the job application?

No. An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability.

ADA – pre-employment medical inquiries

May an employer ask how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability?

No. The employer is prohibited from asking how often the individual will require leave for treatment or use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

ADA – pre-employment medical inquiries

May an employer ask an applicant with a known or obvious disability to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions, when other non-disabled applicants are not asked the same questions?

Yes, if the nature of the disability may prevent the performance of job functions. Such a request may be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category.

ADA – medical inquiries of current employees

What medical examinations and inquiries of current employees are permitted under the Americans with Disabilities Act?

A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.

ADA – medical inquiries of current employees

What are examples o medical examinations and inquiries of current employees which are permitted under the Americans with Disabilities Act?

- Inquiries or medical examinations necessary to the reasonable accommodation process.
- Physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, State, or local law.
- If the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.
- Fit-for-duty exams when an employee has made threats or engaged in disturbing behaviors.

THANK YOU

LegalAnswerBooks.com