

## WCASHRM

### Mistakes Managers Make When it Comes to Attendance

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Hot Springs, AR

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## FMLA

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## THE “RULE”

Covered Employers must provide eligible Employees up to 12 weeks unpaid leave per year for the birth or placement for adoption or foster care of a child; or for the serious health condition of the Employee or of the Employee’s parent, spouse or child.

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## THE “RULE”

- Employees Also Entitled to Military Family Leave
- Employees are Entitled to Reinstatement to Own Job or Equivalent Position.
- Must Continue Health Insurance

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## FAMILY AND MEDICAL LEAVE ACT

Eligible Employee § 825.110

Has been employed for at least 12 months within the last 7 years – does not need to be consecutive

Must have worked 1250 hours in the 12 months preceding the commencement of leave (exception for military leave)

Leave counts toward 12 month requirement

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## “SERIOUS HEALTH CONDITION”

An illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

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## Serious Health Condition – Continuing Treatment

[§ 825.115](#)

### Continuing Treatment by a Health Care Provider

- Incapacity (of more than 3 calendar days) Plus Treatment
- Pregnancy
- Chronic Conditions
- Permanent/Long-term Conditions
- Absence to Receive Multiple Treatments

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## FAMILY AND MEDICAL LEAVE ACT

Serious Health Condition § 825.115

1. Doctor visit + RX + >3 days' incapacity =  
Serious Health Condition
- Or
2. Doctor visit + Doctor visit  
= Serious Health Condition\*

(\*Dr. visit must occur w/in 7 days of onset Second visit within 30 days)

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## FAMILY AND MEDICAL LEAVE ACT

### Intermittent Leave § 825.203

- Must be Medically Necessary
- Employee Must Make “Reasonable Effort” to Schedule Treatment to Avoid Employer Disruption Instead of Only “Attempting” to Schedule to Avoid Disruption.

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## FAMILY AND MEDICAL LEAVE ACT

### Employer Notice Obligations

Eligibility Notice/Rights and Responsibilities – 5 Days

From Request

Designation Notice- 5 Days

From Receipt of Information Necessary to Make Determination

General Notice- May Now Be electronic

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## **FAMILY AND MEDICAL LEAVE ACT**

Medical Certification Process § 825.308

If Leave Appears to Exceed Estimate in  
Certification,

Employer May Provide Healthcare Provider

With Record of Absences and

Ask If Consistent With Condition

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## **FAMILY AND MEDICAL LEAVE ACT**

Fitness for Duty § 825.312

May Provide Employee

List of Essential Job Functions

and Require That Fitness for Duty

Address Employee's Ability to Perform

Must Notify Employee at Beginning of Leave

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COMMON MISTAKES  
SUPERVISORS MAKE WHEN  
IT COMES TO FMLA LEAVE

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MISTAKE NO. 1  
THINKING A SERIOUS  
HEALTH CONDITION IS

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## MISTAKE NO. 2

Assuming Employees Will Ask for “FMLA Leave”

- Employees Don’t Ask For “FMLA Leave”
- Calling in “Sick”
- Ask Questions & Follow Up

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## MISTAKE NO. 3

Not Giving Appropriate Response

- Employer Response to Request for Leave WH-381
- When In Doubt - Use the Form and call it FMLA
- Ask Questions and Follow UP

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## **MISTAKE NO. 4**

### **Asking Too Much or Too Little**

- Certification of Healthcare Provider
  - DOL Form WH-380 E & F
- Supervisor Cannot Talk to Doctor About Certification
- May Seek Clarification With Permission

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## **MISTAKE NO. 5**

### **Counting FMLA Leave in a No Fault Attendance Policy**

- It's Not The Last Absence That Gets You
- FMLA Leave is Protected
- No Fault is Not True No Fault

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## MISTAKE NO. 6 FAILING TO TELL HR

- Tell HR When Any Employee Has Been Out More than Three Calendar Days
- Tell HR When Any Employee Misses More than Once for the Same Condition—Asthma, HBP, migraines, depression
- Recognize Potential Leave Request

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## MISTAKE NO. 7 FORGETTING ABOUT THE ADA

- ADA requires “reasonable accommodation”
- Reasonable accommodation includes leave
- Obligation is separate from FMLA

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**Americans with Disabilities Act  
BASIC RULE**

PROHIBITION ON DISCRIMINATION &  
DUTY TO ACCOMMODATE  
IS PREDICATED ON THE EMPLOYEE BEING A:

“QUALIFIED INDIVIDUAL WITH A  
DISABILITY”

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**“DISABILITY”**

PHYSICAL OR MENTAL IMPAIRMENT  
THAT *SUBSTANTIALLY* LIMITS  
*MAJOR* LIFE ACTIVITIES

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## ADA AMENDMENTS ACT OF 2008

- Retains Definition Of Disability -  
Substantially Limited In Major Life Activity
- Overturns Prior Supreme Court Cases & Requires  
Courts To Liberaally Construe “Disability” Toward  
Coverage
- Any Doubt About Whether Disabled Resolved In  
Favor Of Plaintiff

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## ADA AMENDMENTS ACT OF 2008

- EEOC Regulations Implementing ADA
- Substantially Limits – “need not prevent or  
significantly or severely restrict...”
- Ex- 20lb lifting restriction

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## ADA AMENDMENTS ACT OF 2008

Episodic Conditions May Be (Are) Disability

–Epilepsy

–Asthma

–Diabetes

“If It Would Substantially Limit MLA When Active”

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## ADA AMENDMENTS ACT OF 2008

Major Life Activities Now Included in Statute

- Caring For One’s Self
- Performing Manual Tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating

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# **WHAT DOES IT MEAN TO YOU AS A SUPERVISOR?**

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## **REASONABLE ACCOMMODATION PROCESS**

- WHO IS ENTITLED?
- WHAT IS A REASONABLE ACCOMMODATION?
- WHAT IS AN UNDUE HARDSHIP?

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## **“ESSENTIAL FUNCTIONS”**

EMPLOYER NOT REQUIRED TO ELIMINATE  
“ESSENTIAL FUNCTIONS” OF THE JOB  
BUT MAY HAVE TO MODIFY  
HOW AND WHEN  
THOSE ARE PERFORMED

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## **“ESSENTIAL FUNCTIONS”**

EEOC GIVES SOME DEFERENCE TO  
PREVIOUSLY PREPARED  
WRITTEN JOB DESCRIPTIONS IN  
DETERMINING WHAT’S ESSENTIAL

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## **“ESSENTIAL FUNCTIONS”**

- ARE THE FUNDAMENTAL JOB DUTIES
- ARE THE REASON THE POSITION EXISTS

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## **“ESSENTIAL FUNCTIONS”**

- CONSIDER AMOUNT OF TIME SPENT ON FUNCTION
- CONSIDER CONSEQUENCE OF NOT REQUIRING THE FUNCTION
- CONSIDER WORK EXPERIENCE OF THOSE WHO HOLD OR HAVE HELD JOB

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## **“UNDUE HARDSHIP”**

THE ACCOMMODATION IS...

UNDULY COSTLY

OR

EXTENSIVE

OR

SUBSTANTIAL

OR

DISRUPTIVE

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## **“UNDUE HARDSHIP”**

DETERMINING FACTORS...

- NATURE & NET COST OF THE ACCOMMODATION
- FACILITY'S OVERALL FINANCIAL RESOURCES
- OWNER'S OVERALL FINANCIAL RESOURCES
- IMPACT ON OPERATIONS
- IMPACT ON OTHER EMPLOYEES' ABILITY TO PERFORM
- IMPACT ON FACILITY'S ABILITY TO CONDUCT BUSINESS

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## LEAVE AS ACCOMMODATION

- Baseline of Reasonableness
- Finite or Indefinite
- Will Employee Return After
- Duration

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## OVERLAPPING LEAVE ISSUES

### Leave Entitlement

- FMLA - 12 Weeks
- ADA - Reasonable Accommodation
- WC - Work Related Injury – Healing Period

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## OVERLAPPING LEAVE ISSUES

- Workers' Comp Leave = FMLA (maybe ADA) Leave
- ADA Leave Likely Required at Expiration of FMLA Leave
- ADA and FMLA Impact No-Fault Attendance Policies
- ADA and FMLA Impact Leave Policies

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## MISTAKE NO. 8

IMPLYING EMPLOYEE MUST  
BE 100% HEALED

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## **MISTAKE No. 9**

### **FAILING TO ENGAGE IN THE INTERACTIVE PROCESS**

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### **THE INTERACTIVE PROCESS**

EEOC REQUIRES "INTERACTIVE PROCESS" TO  
DETERMINE:

- WHETHER THE EMPLOYEE IS DISABLED
- WHETHER ACCOMMODATION IS REASONABLE
- WHETHER ACCOMMODATION IS FEASIBLE
- WHETHER ACCOMMODATION CREATES UNDUE HARDSHIP

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# Q & A

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## CONTACT US WITH YOUR QUESTIONS OR TO REQUEST TRAINING:

HARASSMENT

DISCRIMINATION

ADA/ADAAA

ADEA

FLSA

FMLA

OSHA

HIPAA

HANDBOOKS

OTHER COMPLIANCE & LITIGATION MATTERS

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