



Leave Laws: Navigating the Complexities of the FMLA, the ADA, State Leave Laws, and Everything in Between

Presented by: **GORDON&REES**
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

General Employer Obligations Under the Americans with Disabilities Act

- Private employers with 15 or more employees, state and local governments, employment agencies and labor organizations are all subject to the ADA.
- The ADA prohibits employers from discriminating against “qualified individuals with a disability” and requires employers to engage in the “interactive process” with disabled employees.

What Qualifies as a Disability Under the ADA?

- A qualified disability is a physical or mental impairment that “substantially limits” one or more “major life activities.”
- Some personality disorders including kleptomania, exhibitionism and compulsive lying disorders are not considered disabilities.
- *Note: gender identity disorders are not disabilities under the ADA, but may be covered under your state specific statute (ex: FEHA in California).*



Red Flag

A workplace injury may also be considered a disability under the ADA. When there is a question about whether a condition is covered, it is best to check with legal counsel for assistance.

The ADA and the Hiring Process

- The ADA precludes prospective employers from inquiring about a candidate's medical conditions or disabilities in either the job application or interview prior to extending a job offer.
- Once an offer has been made, the employer may inquire about medical conditions, provided it does so for all employees, not just those with obvious disabilities.
- If an applicant has an obvious disability that could reasonably inhibit them from performing a job duty, the employer may ask whether the applicant would need an accommodation to perform the task.

COVID-19 has changed the screening process. Employers are permitted to conduct COVID-19 screening in the hiring process.

Common Disabilities Encountered by Employers

- Depression and Stress: May be considered impairments if they result from an actual physiological or mental disorder and substantially limit the employee's ability to perform a major life activity.
- Carpal Tunnel Syndrome: Symptoms vary widely from person to person, an individualized assessment is necessary to determine whether it "substantially limits a major life activity."
- Alcoholism: May be a "disability" if it substantially limits an individual's major life activities. An employer **may not** make adverse employment decisions merely because it knows an individual is an alcoholic.

What is the Interactive Process?

- Under the ADA (and most state statutes), the employer has a duty to engage in a conversation with the employee about any necessary workplace accommodations.
- The employer and employee must have a *dialogue* to determine:
 - Can the employee continue to perform the **essential functions** of the position with or without an accommodation?
 - Does the employee need an accommodation?
 - Does the employee need time off work to recover?

When is the Interactive Process Triggered?

- Do not wait for the employee to come to you!
 - The employer's duty to initiate the interactive process is triggered when it knows the employee is injured, suffering from a disability, or suffering from a serious health condition.

Document, Document, Document!

- Many disability discrimination lawsuits could have been avoided had the employer kept better records.
- It is the best practice to talk to the employee often regarding any accommodations they may request.
- Document all conversations in writing and keep all documentation in a separate file.



BEWARE!

Employees have privacy rights pertaining to their medical conditions or diagnoses. Avoid asking “what” is wrong and simply initiate a conversation about possible workplace accommodations.

What is a Reasonable Accommodation?

- A reasonable accommodation is any change or adjustment to a job or work environment that permits a disabled employee to perform the essential functions of a job.



Reasonable accommodations have changed under COVID-19.

Common Examples of Reasonable Accommodations

- Light duty
- Lifting restrictions
- Modified furniture or special equipment/devices
- Modified work schedule
- More frequent breaks
- Reassignment to a vacant position
- Granting leave

How COVID-19 Has Changed Medical Leave and Sick Pay

Medical Leave and COVID-19

- Employee qualifies for FMLA or California Specific CFRA and can take job protected leave if, due to COVID-19 the employee or employee's spouse, parent or dependent child requires inpatient care or continuing treatment or supervision by a health care provider or COVID-19 leads to some other serious health condition.
- What about documentation?
- Interplay with FFCRA?

FFCRA – Applies to businesses under 500 employees

- 80 hours sick pay at 100% of wages (max \$5,110)
 - Subject to a stay at home order;
 - Advised by a health care provider to self-quarantine
 - Experiencing symptoms and seeking diagnosis
- 80 hours at 2/3 of wages (max \$2,000)
 - Employee is caring for someone subject to a stay at home order or advised to self-quarantine;
 - Caring for a “son or daughter” whose school or child care provider is closed due to COVID-19.
- Tax credit available for 100% of wages paid under FFCRA. Detailed guidance available on IRS website.

Taking Leave for Child Care

- EE can start with sick leave up to 80 hours and then – if employee has been working at least 30 calendar days - transition to up to 10 weeks of paid leave under the Emergency Family and Medical Leave Act (EFMLA).
- \$200 per day and \$10,000 aggregate

Summer Vacation and Re-Opening of Child Care Facilities

School

- No leave if school is closed for summer vacation or any other non COVID-19 related reason.

Place of Care:

- A physical location in which care is provided for an employee's child such as day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

Child care provider:

- Includes nannies, au pairs, and babysitters and grandparents, aunts, uncles, or neighbors.

Fear of Contracting COVID-19

- Generalized fear of the virus, not accompanied by a disability or other medical reason, is not a sufficient reason to refuse to come to work and would not qualify employees for paid leave from work.

Be Flexible!

- Require sick employees to stay home
- Follow uniformly applied policies regarding return to work after CDC recommended home quarantine/isolation
- Be especially mindful of high-risk employees
- Provide telework options or flexible scheduling to minimize contact between at risk individuals and others

Health Screenings at Work

- Protects all employees and customers
- Reduces need for paid leave if infection rate is low
- Important to monitor employees uniformly
- Best practice is to use one form to track all employee health screening

California Specific Sick Leave Laws

- COVID-19 Supplemental Paid Sick Leave (SPSL)
 - Food Sector workers in retail and agriculture
 - Has a required poster to be displayed or distributed to employees
- San Francisco Public Health Emergency Leave (PHEL)
- Oakland Emergency Paid Sick Leave
- City of Los Angeles Supplemental Paid Sick Leave

Don't forget – most COVID-19 orders provide for emergency leave before an employee uses California's paid sick leave (24 hours per year).

Avoiding the Litigation Trap

The best way to avoid lawsuits is to document everything!

- Conduct regular performance evaluations
- Implement and enforce good employment policies
- Keep proper attendance and payroll records
- Provide proper training for managers and supervisors
- Display or distribute posters detailing new COVID-19 laws
- Keep detailed documentation on employee requests for leave
- Keep all medical information confidential
- Err on the side of providing leave, be flexible and generous if possible