



## Navigating the Intersection of the ADA, FMLA, and Workers' Compensation

Employment situations that involve the Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA), and workers' compensation laws are notoriously difficult to navigate. Employment lawyers call the intersection of these laws "the Bermuda triangle" because it is so easy to become lost or confused. This UE Toolbox helps alleviate the confusion by providing a chart that compares the laws and a decision tree to guide you through the legal analysis.

### Rules of Thumb

In analyzing an employment situation where these laws might apply, employers should follow three rules of thumb:

**1. Evaluate the situation under each law separately.**

It does not matter which law is applied first, but each law must be applied separately to determine the outcome under that statute.

**2. The law that provides the most benefit to the employee trumps.**

In some situations, one of the laws may dictate that an employer has no obligation to an employee, while another law may require a significant obligation. As a general rule, the law that is most favorable to the employee must be followed.

**3. Re-evaluate the situation under each law every time the employer receives new information on the employee's condition or a deadline passes under one of the laws.**

This task requires excellent coordination. Supervisors are usually the first to receive new information on an employee's condition, while the office of human resources typically monitors deadlines under laws such as the FMLA. In addition, legal counsel may need to review proposed actions before the supervisor can proceed.

## Comparison of the ADA, FMLA, and Workers' Compensation Laws

Note: This chart is based on one developed by the State of Nevada Department of Personnel.

<b>Workers' Compensation</b>	<b>Family and Medical Leave Act (FMLA)</b>	<b>Americans with Disabilities Act (ADA)</b>
<p><b>Purpose:</b></p> <p>Provides a system for securing prompt and fair settlement of employees' claims against employers for occupational injury and illness</p>	<p><b>Purpose:</b></p> <p>Provides unpaid leave for specific situations and the right to reinstatement to the same job or an equivalent job</p>	<p><b>Purpose:</b></p> <p>Prohibits discrimination against a qualified individual with a disability and requires "reasonable accommodation" of individuals with disabilities</p>
<p><b>Covered Individual:</b></p> <ul style="list-style-type: none"> <li>▪ Begins the first minute of the first day of employment for injuries or illness arising out of employment.</li> </ul>	<p><b>Covered Individual:</b></p> <ul style="list-style-type: none"> <li>▪ Worked for the employer for at least 12 months; <i>and</i></li> <li>▪ Worked for at least 1,250 hours during the preceding 12-month period; <i>and</i></li> <li>▪ Employed at a work site where the institution has at least 50 employees within a 75-mile radius.</li> </ul>	<p><b>Covered Individual:</b></p> <ul style="list-style-type: none"> <li>▪ Has a physical or mental impairment that substantially limits one or more of the major life activities of the individual; <i>or</i></li> <li>▪ Has a record of such an impairment; <i>or</i></li> <li>▪ Is regarded as having such an impairment.</li> </ul>
<p><b>Summary of Benefits:</b></p> <ul style="list-style-type: none"> <li>▪ Income replacement</li> <li>▪ Medical care</li> <li>▪ Vocational rehabilitation</li> <li>▪ Disability payments</li> <li>▪ Light duty (early return to work program)</li> </ul>	<p><b>Summary of Benefits:</b></p> <p>Entitles a qualified employee to a total of 12 weeks of leave in a 12-month period:</p> <ol style="list-style-type: none"> <li>1. For the birth of the employee's child, and to care for the newborn child.</li> <li>2. For the placement with the employee of a child for adoption or foster care.</li> <li>3. For the employee's own serious health condition.</li> <li>4. To care for the employee's spouse, child (typically under 18), or parent with a serious health condition.</li> </ol>	<p><b>Summary of Benefits:</b></p> <p>Requires employers to make reasonable accommodation by:</p> <ol style="list-style-type: none"> <li>1. Creating an application process that allows a qualified person with a disability to be fairly considered for positions.</li> <li>2. Modifying the work environment or the job itself so that a qualified person with a disability is able to perform the essential functions of the job.</li> <li>3. Modifying the work environment so that a person with a disability can enjoy benefits and privileges that employees without disabilities receive.</li> </ol>

<b>Workers' Compensation</b>	<b>Family and Medical Leave Act (FMLA)</b>	<b>Americans with Disabilities Act (ADA)</b>
<p><b>Bells should ring when an employee:</b></p> <ul style="list-style-type: none"> <li>▪ Is injured during the course of employment or contracts an illness caused by his or her job.</li> </ul>	<p><b>Bells should ring when an employee:</b></p> <ul style="list-style-type: none"> <li>▪ Calls in sick for three or more days in a row.</li> <li>▪ Must miss work because he or she has intermittent doctor's appointments for a chronic condition.</li> <li>▪ Needs to care for a spouse, parent, or child (typically under 18) due to a serious health condition.</li> <li>▪ Becomes pregnant or expects a newborn child.</li> <li>▪ Adopts a child or accepts a foster child.</li> </ul>	<p><b>Bells should ring when:</b></p> <ul style="list-style-type: none"> <li>▪ A job candidate requests an adjustment to the application or interview process due to a medical condition.</li> <li>▪ An employee requests an adjustment to job duties due to a medical condition.</li> <li>▪ An employee is performing poorly and indicates that the performance deficiency is due to a medical condition.</li> </ul>

#### **Comparison of ADA to FMLA**

- The FMLA requires a "serious health condition," which is defined more broadly than the term *disability* under the ADA.
- The ADA does not provide any leave time for the birth of a child, for the placement of a child for adoption or foster care, or to care for a family member.
- Neither law requires the employer to pay the employee while on leave unless the employee has paid leave time available such as sick or vacation time.

#### **Comparison of ADA to Workers' Compensation**

- An injury must occur on the job to be covered by workers' compensation, while the ADA may cover conditions or injuries that develop outside the workplace.
- An occupational injury or illness that substantially limits a major life activity would be covered by both laws.
- If the employer "regards" a person as disabled due to an occupational injury or illness and the person is not substantially limited, the ADA may protect the employee.

#### **Comparison of FMLA to Workers' Compensation**

- Both laws provide leave time to seek medical treatment or to recover from a serious health condition, but the condition must arise out of the course of employment to be covered by workers' compensation.
- FMLA leave can run concurrently with workers' compensation for up to 12 weeks in a 12-month period.
- Workers' compensation only provides leave time for injuries and illnesses that are work related.

## ADA, FMLA, and Workers' Compensation Decision Tree

Note: This chart is based on one developed by the State of Nevada Department of Personnel

<b>Section I: Workers' Compensation Laws</b>		
	<b>No</b>	<b>Yes</b>
1. Is this a work-related injury or an occupational disease?	<input type="checkbox"/>	<input type="checkbox"/>
If the answer is "yes," this is a workers' compensation issue, and the workers' compensation laws in your state apply.		
Contact legal counsel or the designated office at your institution for additional information.		

<b>Section II: The Family and Medical Leave Act (FMLA)</b>		
The FMLA entitles a qualified employee to a maximum of 12 workweeks of leave in a 12-month period for a qualifying event. Institutions can calculate the "12-month" period on either a calendar year basis or a rolling basis from the time the employee qualifies.		
<b>Qualified Employee</b>	<b>No</b>	<b>Yes</b>
1. Has the employee worked for the institution for at least 12 months (the 12 months do not need to be continuous)?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has the employee worked at least 1,250 hours during the 12-month period preceding the requested leave?	<input type="checkbox"/>	<input type="checkbox"/>
3. Does the institution have at least 50 employees within a 75-mile radius of the employee's work site?	<input type="checkbox"/>	<input type="checkbox"/>
If you answered "yes" to all three questions, this person is a qualified employee.		
<b>Qualified Event</b>	<b>No</b>	<b>Yes</b>
For the purposes of this analysis, the decision tree looks only at qualifying events that involve the employee's own health.		
1. Does the employee have a serious health condition that requires inpatient care or continuing care from a health-care provider?	<input type="checkbox"/>	<input type="checkbox"/>

Continuing care could include any of the following:

- A period of incapacity requiring absence of more than three calendar days that involves continuing treatment by a health-care provider
- Pregnancy and time needed for prenatal visits
- A chronic health condition, such as asthma or diabetes
- A long-term condition such as Alzheimer's
- Multiple treatments by a health-care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (such as physical therapy for a back injury)

If you answered "yes," continue the FMLA analysis.

If you answered "no," go to Section III.

<b>Starting the FMLA Clock</b>	<b>No</b>	<b>Yes</b>
An employee does not have to specifically ask for FMLA leave. The burden is on the employer to recognize situations where the FMLA may apply and start the FMLA clock.		
1. Did the employer designate the time off as FMLA leave within two business days of receiving an employee's leave request or learning of time off for an FMLA-qualified reason?	<input type="checkbox"/>	<input type="checkbox"/>
If you answered "yes," then the 12-week FMLA clock has started. Note that employees may take intermittent leave in increments of just one hour.		
If you answered "no," contact an employment lawyer to determine whether you can start the FMLA clock retroactively.		
<b>Reinstating the Employee</b>	<b>No</b>	<b>Yes</b>
At the end of FMLA leave, an employer must return the employee to the same or equivalent job unless one of the following circumstances occurs:		
1. Did the employee unequivocally state an intention not to return to work?	<input type="checkbox"/>	<input type="checkbox"/>
2. Was the employee hired for a limited term project that has ended?	<input type="checkbox"/>	<input type="checkbox"/>
3. Was the employee's job eliminated by a layoff or reduction in force?	<input type="checkbox"/>	<input type="checkbox"/>
4. Did you learn that the employee obtained leave fraudulently?	<input type="checkbox"/>	<input type="checkbox"/>
If you answered "yes" to any of the four questions above, then you do not have an obligation to reinstate the employee.		
If you answered "no" to any of the four questions above, go to question 5.		
5. Is the employee able to perform all the essential functions of his or her old job without accommodation?	<input type="checkbox"/>	<input type="checkbox"/>
If you answered "yes," you must reinstate the employee to the same or equivalent job at the end of FMLA leave.		
If you answered "no," proceed to Section III to determine whether you have a duty to accommodate the employee under the ADA.		

### **Section III: The Americans with Disabilities Act (ADA)**

	<b>No</b>	<b>Yes</b>
1. Does the individual have a physical or mental impairment that substantially limits one or more major life activities? To make a determination, analyze the following:	<input type="checkbox"/>	<input type="checkbox"/>
a. What is the nature and severity of the impairment?		
b. What is the expected duration of the impairment?		
c. What will be the long-term impact or expected impact of the impairment on the individual?		
d. In which major life activity is the individual substantially limited (e.g., walking, speaking, thinking, seeing, breathing, hearing)?		
2. Does the individual have a "record of" a disability, regardless of whether the individual is currently disabled, such as medical records, school records, employment records, or false positive test results?	<input type="checkbox"/>	<input type="checkbox"/>

	No	Yes
3. Is the individual “regarded as” having an impairment? The individual may be regarded as having an impairment in any of the following situations:	<input type="checkbox"/>	<input type="checkbox"/>
a. The individual does not have a physical or mental impairment but is treated as if he or she does, such as a person suspected of having AIDS who does not.		
b. The individual has a physical or mental impairment that substantially limits major life activities only because of the attitudes of others, such as a person with asymptomatic HIV who is limited by irrational fears of co-workers.		
c. The individual has physical or mental impairment that does not substantially limit major life activities but is treated as if that impairment substantially limited a major life activity, such as a person whose epilepsy is controlled by medication but is treated by his or her employer as if the medication is not effective.		
If you answered “no,” this person does not have a disability protected by the ADA, and the institution has no obligation under the ADA to provide accommodation.		
If you answered “yes,” this person may have a covered disability under the Americans with Disabilities Act. You will probably need to obtain medical documentation to make a determination. Complete Section IV to determine what accommodation may be necessary.		

#### Section IV: The ADA Accommodation Process

Employers must provide reasonable accommodations to *qualified individuals* with disabilities unless doing so would pose an *undue hardship* for the employer.

	No	Yes
1. Does the employee pose a <i>direct threat</i> to his or her own safety or the safety of others?	<input type="checkbox"/>	<input type="checkbox"/>
If you answered “yes,” then the employee probably does not have the right to accommodation under the ADA. Consult with counsel to ensure that the employee meets the legal definition of a “direct threat.”		
If you answered “no,” then continue the analysis.		
<b>Note: You must determine the essential and marginal functions of the employee’s position before answering the next two questions.</b>		
2. Can this person currently perform all of the <i>essential functions</i> of the job? If not, which <i>essential functions</i> is the employee unable to perform?	<input type="checkbox"/>	<input type="checkbox"/>
3. Can this person currently perform all of the <i>marginal functions</i> of the job? If not, which <i>marginal functions</i> is the employee unable to perform?	<input type="checkbox"/>	<input type="checkbox"/>
If the answers to questions 2 <b>and</b> 3 are “yes,” no accommodation is necessary. If the answer to either question 2 <b>or</b> 3 is “no,” proceed with the analysis.		
4. Could the employee perform the <i>essential functions</i> of the position with a reasonable accommodation such as:		
a. Changes in the physical work environment	<input type="checkbox"/>	<input type="checkbox"/>
b. Job restructuring	<input type="checkbox"/>	<input type="checkbox"/>
c. A modified work schedule	<input type="checkbox"/>	<input type="checkbox"/>
d. Flexible leave policies	<input type="checkbox"/>	<input type="checkbox"/>
e. Other accommodation	<input type="checkbox"/>	<input type="checkbox"/>

If you answered “no” to all five questions above, there are no reasonable accommodations that would allow the employee to perform all essential functions. Consequently, the employee is not “otherwise qualified” and is not entitled to protection under the ADA.

If the answer to any of the questions is “yes,” consult with the employee to identify potential accommodations and to assess the effectiveness of each potential accommodation in enabling the employee to perform the functions of the position. The employer may choose which accommodation to provide if there is more than one that would be effective. The employee is entitled to a reasonable accommodation but not necessarily his or her preferred accommodation.

	No	Yes
5. Could the employee perform the <i>marginal</i> functions of the position with a reasonable accommodation such as:		
a. Changes in the physical work environment	<input type="checkbox"/>	<input type="checkbox"/>
b. Job restructuring	<input type="checkbox"/>	<input type="checkbox"/>
c. A modified work schedule	<input type="checkbox"/>	<input type="checkbox"/>
d. Flexible leave policies	<input type="checkbox"/>	<input type="checkbox"/>
e. Other accommodation	<input type="checkbox"/>	<input type="checkbox"/>
If the answer to any of the questions is “yes,” consult with the employee to identify potential accommodations as described in the paragraph above.		
If the answer to any of the questions is “no,” the employer must reassign the duty because it is a marginal function of the employee’s job.		

## Resources

- **Fisher & Phillips.** “Meet the New ADA: Massive Changes Ahead for Nation’s Employers.” *Legal Alert*, Sept. 18, 2008.  
[www.laborlawyers.com/shownews.aspx?Meet-the-New-ADA:-Massive-Changes-Ahead-for-Nations-Employers&Type=1122&Show=10879](http://www.laborlawyers.com/shownews.aspx?Meet-the-New-ADA:-Massive-Changes-Ahead-for-Nations-Employers&Type=1122&Show=10879)  
 This article provides a detailed analysis of the ADA Amendments Act and how it will affect employers.
- **Fries, Richard.** *Managing Employee Attendance: FMLA, ADA and Workers’ Compensation.* American Bar Association.  
[www.bna.com/bnabooks/ababna/adr/2000/adrfries.pdf](http://www.bna.com/bnabooks/ababna/adr/2000/adrfries.pdf)  
 This article analyzes how the FMLA, ADA, and workers’ compensation laws would apply to situations involving absence without proper notice, absence without good reason, and excessive absenteeism.
- **Levine, Jonathan, and Hobbs, Eric.** *New Law Broadens Americans with Disabilities Act (“ADA”) Protections*, Sept. 25, 2008.  
[www.mbf-law.com/articles.cfm?action=view&publication\\_id=2045](http://www.mbf-law.com/articles.cfm?action=view&publication_id=2045)  
 This article reviews the provisions of new legislation to expand the reach of the ADA.
- **Thompson Hine.** *The Three Headed Monster: ADA, FMLA, and Workers’ Compensation - Helping Employers Ensure Compliance.* Oct. 3, 2005.  
[www.thompsonhine.com/publications/publication149.html](http://www.thompsonhine.com/publications/publication149.html)  
 This article gives an excellent overview that includes a summary of each law, a chart comparing the laws, and a case study that applies the three laws.

- **U.S. Equal Employment Opportunity Commission.** Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964.

[www.eeoc.gov/policy/docs/fmlaada.html](http://www.eeoc.gov/policy/docs/fmlaada.html)

This fact sheet provides answers to frequently asked questions about the differences between these laws and ensuring compliance when multiple laws apply to an employment situation.

## United Educators Publications

*Note: To access the UE resources cited in this document, you will need a password for the Risk Management Library of the UE website. Obtaining a password is easy. Simply go to the website at [www.ue.org](http://www.ue.org) and take a few minutes to register. Passwords are usually activated by the next business day.*

- **Vinik, D. Frank.** "Employees With Disabilities: A Plain English Guide to Rights and Responsibilities in the Education Workplace."

[www.ue.org/membersonly/GetDocument.asp?id=384](http://www.ue.org/membersonly/GetDocument.asp?id=384)

This 50-page monograph provides a detailed explanation of disability laws in easy-to-understand language and is filled with examples. Note that because the monograph was written before Congress passed the ADA Amendments Act in September 2008, its discussion of mitigating measures is no longer valid.

- **Vinik, D. Frank.** "The Family and Medical Leave Act Liability Hotspots." *Risk Research Bulletin*, July 2008.

[www.ue.org/membersonly/GetDocument.asp?id=1028](http://www.ue.org/membersonly/GetDocument.asp?id=1028)

This *Risk Research Bulletin* identifies liability hotspots created by the FMLA and suggests best practices for minimizing risk in those situations.

- **Vinik, D. Frank.** "10 Lessons Learned From Expensive Claims Involving Employees With Disabilities and Serious Medical Conditions." *Risk Research Bulletin*, September 2005.

[www.ue.org/membersonly/GetDocument.asp?id=757](http://www.ue.org/membersonly/GetDocument.asp?id=757)

This *Risk Research Bulletin* analyzed more than 750 claims brought against UE members and derived 10 lessons learned to help educational institutions decrease liability in this area.

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Two Wisconsin Circle, Fourth Floor  
Chevy Chase, MD 20815  
phone/301.907.4908  
fax/301.907.4830  
[www.ue.org](http://www.ue.org)