



**PLUNKETT COONEY**  
ATTORNEYS & COUNSELORS AT LAW

## Tangled

Unknotting Complex Employee Leave and Disability Issues

Presented by  
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### Today's Presenters



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### Introduction & Overview

- When it comes to compliance, the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) are two of the most difficult laws.
- This webinar will dive deeper into both, focusing on accommodations under ADA and Michigan's Persons with Disabilities Civil Rights Act (MPDCRA) and how to prevent and handle FMLA abuse.



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### STD and Workers' Compensation

- Insurance coverage – income replacement (and workers' compensation covers medical treatment)
- STD for non-work related injuries and illnesses
- Workers' Compensation – work related injuries and illnesses
- Neither provides a right to a leave of absence or reinstatement.

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### FMLA – Overview

- Requires covered employers to grant eligible employees up to 12 weeks of job-protected, unpaid leave for:
  - Birth of a child
  - Placement of adopted or foster child with employee
  - Employee's own serious health condition
  - Serious health condition of employee's spouse, parent or child

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### FMLA – Overview

- FMLA amendments require leave also be given for:
  - Exigencies for family members of those in military
  - Extended leave up to 26 weeks if it is to care for seriously wounded or ill military members or veterans who served in last five years



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### FMLA – Covered Employers

- Private employers engaged in commerce with a minimum of 50 employees
- Public employers are covered regardless of number of employees.
- Covered employers only have to grant leave to employees who work at a site with 50 or more employees within a 75 mile radius.



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### FMLA – Eligible Employees

- An employee is eligible for leave after working for 12 months (which do not have to be consecutive) and working 1,250 hours in 12 months immediately preceding start of FMLA leave.



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### FMLA – Benefits

- Employers must:
  - Maintain an employee’s health insurance during FMLA leave
  - Return employee to his/her original job or an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment



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### FMLA – Notice Requirement

- Employees are required to give their employers notice of the need for FMLA leave:
  - If foreseeable, at least 30-days notice
  - If unforeseeable, as soon as practicable – usually same day employee becomes aware of need, or next day; unless its an emergency
  - Notice can be verbal.
  - “Sufficient” is not defined.



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### FMLA – Employee Notices

- Employers can require employees to comply with their usual and customary notice and procedural requirements for requesting leave including:
  - Require notice in writing
  - Require notice be given to specific persons
  - Follow call-in procedures



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### FMLA – Employer Notices

- It is always employer’s obligation and right to designate leave, paid or unpaid, as FMLA leave.
- Regardless of whether employee asks for FMLA
- Even if employee asks that it not be designated as FMLA leave
- Within five business days of request or having knowledge that reason for absence might qualify



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### FMLA – Employer Notice

- Must state whether eligible and, if not, why
- Any requirements for medical certification and consequences of failing to provide
- Any right or requirement to use paid leave
- Requirements regarding paying health insurance premium
- Right to maintain health insurance and return to same or equivalent job
- Key employee status, if applicable



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### Abuse of FMLA Leave

- Employees who use FMLA in a fraudulent manner to avoid working when they otherwise could
- Intermittent leave is particularly susceptible to abuse.



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### Basic Types of FMLA Abuse

- Working a second job on the side in violation of an express written policy prohibiting it
- Working a second job on the side where there is no written policy that specifically prohibits it
- Engaging in manual labor
- Running errands or shopping
- Partying or engaging in other social or recreational activities

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### Basic Types of FMLA Abuse

- Sneaking off on a pleasure trip
- Failing to take care of a family member while on family care related FMLA



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### Signs of FMLA Abuse

- High degree of FMLA usage on Fridays , Mondays and around holidays
- Employees who are unable to take off of work using vacation or personal days solve that problem by taking FMLA leave for those same days.
- Co-workers come forward, directly or anonymously and tell their supervisor or HR that a particular employee is misusing FMLA and provide details regarding those activities.



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### Curbing Abuse of FMLA

- Question the original certification.
- Ask for a second opinion.
- Require employees to follow your paid leave policy.
- Ensure all absences related to the condition are counted.
- Request recertification.
- Follow up on changed or suspicious circumstances.



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### Curbing Abuse of FMLA

- Control employees scheduling of planned treatments
- Consider temporary transfers



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### Managing Intermittent Leave

- Require employee to provide detailed information when requesting FMLA.
- Treat absences as non-FMLA if employee simply calls in and claims to be sick.
- Require employee to call in whenever absent and obtain a status report each time.
- Question employee about his/her activities while off, when they return to work.



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### Managing Intermittent Leave

- Provide detailed job description to health care provider.
- Insist employee provide complete medical certification, and put the burden on the employee.
- If employee does not furnish complete medical certification, don't treat the absences as FMLA.
- Require second and/or third opinions.
- Require written detailed requests for foreseeable leave.



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### FMLA Expansion

- Employees in legal same-sex marriages have the same rights as employees in opposite sex marriages to take FMLA leave.
- FMLA policies should have been updated to reflect this.



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### Introduction – ADA/MPDCRA

- Like other civil rights laws, Americans with Disabilities Act (ADA) and Michigan’s Persons with Disabilities Civil Rights Act (MPDCRA) prohibit discrimination (or harassment) based on protected status, specifically disabilities (actual, perceived or history of disability), or because of association with someone with disabilities.
- Both ADA and MPDCRA require more of employers and require reasonable accommodations.



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### Introduction – Coverage

- MPDCRA - Michigan employers having one or more employees. Personal liability is possible.
- ADA - Employers engaged in industry affecting commerce, having 15 or more employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year. No individual liability.
- Can be subject to both



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## Introduction – Requests for Accommodation

- MPDCRA requires applicant/employee with disability to request accommodation *in writing* within 182 days of day he knew or should have known that accommodation was needed, if employer provides notice of this requirement. (*Tip* - post notice of requirement; place on job application and in handbook).

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## Introduction – Requests for Accommodation

- ADA requests for accommodation do not need to be in writing and may be made any time by employee, or by another person acting on behalf of employee.



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## Introduction – Undue Hardship

- Both ADA and MPDCRA only require accommodations that do not result in undue hardship to employer.
- Types of accommodations under MPDCRA are specified in statute with undue hardship based on cost and size of employer.
- ADA is only limited by concept of undue hardship, which must be proven by employer.



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### MPDCRA – Accommodations

- Burden of proof for failure to accommodate is specified – plaintiff/employee must prove by preponderance of evidence that accommodation would not cause undue hardship on employer. MCL 37.1210(1).
- How much an employer must spend on accommodation is determined by number of employees.

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### MPDCRA – Accommodations

- Statute lists types of accommodations that need to be provided.
- Accommodations that may be required: purchasing devices or equipment, hiring readers or interpreters, restructuring job or altering schedule
- Does not require “leaves of absence”



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### MPDCRA – Undue Hardship

- Example: Equipment or Device not undue hardship to employer with:
  - Less than four employees, and cost is equal to or less than State Average Weekly Wage (SAWW).
  - Four to 14 employees and cost is equal to or less than 1-½ times SAWW.

(Currently, SAWW = \$935.00)

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### MPDCRA – Undue Hardship

- 15 or more employees and cost is equal to or less than 2.5 times SAWW.  
(Currently, SAWW = \$935.00)
- Above amounts do not include cost of reasonable maintenance or repair of equipment or devices. MCL 37.1210(2)-(7)
- Similar formulas for hiring readers/interpreters, etc.

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### MPDCRA – Undue Hardship

- Job restructuring and altering employee's schedule applies to minor or *infrequent* duties of position. MCL 37.1210(15)
- Employer with less than 15 employees is not required to restructure job or alter employee's schedule. MCL 37.1210(14)

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### Americans with Disabilities Act (ADA)

- Employer's obligations under ADA are much broader than under state law.
- Key to determining obligations is first determining "essential functions of job."
- Hint: Ask on job app – Can you perform essential functions of the position you seek with or without a reasonable accommodation? (But, you don't get to know if its with or without an accommodation.)



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### ADA – Essential Functions of Job

- “Essential function” means fundamental job duties, not marginal tasks. May be essential because:
  - It’s the reason the job exists.
  - Limited number of employees who can perform that function
  - Function is highly specialized and incumbent was hired because of that expertise.

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### ADA – Essential Functions of Job

- Factors to consider when determining essential functions:
  - Employer’s judgment
  - Written job description (this is key and should be written before you advertise for job vacancy.)
  - Amount of time function performed
  - Consequence of not performing function
  - CBA
  - Work experience of past and current incumbents



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### ADA – Accommodations

- Kinds of accommodations required under ADA are not limited as under state law.
- Reasonable accommodation may be **any** change in work environment or how work is done that will help disabled person apply for job, perform “essential functions” of their position or enjoy all benefits and privileges of employment.

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### ADA – Accommodation Examples

- Modifying existing work environment to be accessible and usable by disabled employee; modification or purchase of equipment or devices
- Job restructuring; part-time or modified work schedules; reassignment to *vacant* position; modifications of examinations, training materials or policies; providing qualified readers, interpreters or coaches

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### ADA – Accommodation Examples

- Employer need not provide accommodation that is *primarily* for personal benefit of individual (i.e., assists individual with daily activities both on and off job, such as eyeglasses, wheelchair, prosthetic).
- Needs to provide accommodation that assists individual with performing duties of job (i.e., eyeglasses specifically designed to enable person to use office computer monitor).

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### ADA – Accommodation Examples

- Employer does not need to provide accommodation that is amenity or convenience and not job related (i.e., hot plate or refrigerator).
- Employer does not need to restructure job to “fit” abilities of individual who is not otherwise qualified (i.e., skills, experience, education, etc.).

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### ADA – Accommodation Examples

- Employer does not have to provide “best” accommodation or one preferred by employee.
- Employer is required to provide accommodation that is *sufficient* to meet job-related needs of individual.



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### ADA – Accommodations

- Employer is not expected to accommodate a disability about which it is unaware.
- Generally, employee is obligated to inform employer when accommodation is needed.
- May ask whether accommodation is needed if: employer is aware of disability and that employee is struggling, or where employee is mentally challenged and doesn't know to ask ... **otherwise don't ask!**



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### ADA – Process for Determining Accommodation

- EEOC “suggests” the following flexible, “interactive process”/problem solving approach that involves employer and employee.
  - Analyze job, its purpose and essential functions.
  - Consult with employee to ascertain job-related limitations and how they can be overcome with accommodation.

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### ADA – Process for Determining Accommodation

- With employee, identify potential accommodations and assess effectiveness of each.
- Consider employee's preference and select and implement "most appropriate" for both employee and employer.

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### ADA – Process for Determining Accommodation

- If individual provides own accommodation, employer not relieved of obligation in future should they choose to stop.
- Where obvious, just provide accommodation without using step-by-step process above.
- Where additional assistance is needed, contact Job Accommodation Network:

**1-800-ADA-WORK (1-800-232-9675)**

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### ADA – Process for Determining Accommodation

- Employer cannot require employee to accept accommodation where not requested or wanted.
- If accommodation refused and employee cannot perform essential functions, employee is not qualified for job.
- No accommodation is required where employee is "regarded" as disabled, but not.



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### ADA – Medical Inquiries

- What if it is not clear that employee has a disability?
- EEOC Legal Counsel – Opinion Feb. 25, 2014 states that employer may inquire whether employee has disability and needs reasonable accommodation. Use plain English rather than legal standards and/or give examples.
- **Your employment attorney should write this letter for you!**

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### ADA – Medical Inquiries

- Concerning existence of disability, “may” be permissible to ask:
  - Nature of employee’s disability
  - Expected duration
  - Kind of activities affected
  - Use of mitigating measures and extent to which they eliminate or control impact of medical condition

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### ADA – Medical Inquiries

- If asking about “major bodily functions” or “major life activities,” offer examples such as normal cell growth, endocrine, neurological, standing, lifting, concentrating, etc.
- If asking about mitigating measures, use examples such as medication, physical therapy, behavioral modifications, etc.

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### ADA – Medical Inquiries

- Concerning need for reasonable accommodation, it “may” be permissible to ask:
  - How accommodation would assist person in applying for job, performing essential functions or position, or enjoying equal access to benefits and privileges of employment.

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### ADA – Medical Inquiries

- Letter should be tailored to specific circumstances (i.e., when disability is obvious, no need to ask if person has disability).
- Each question should be analyzed for its purpose to determine if it is appropriate.
- Lengthy form letters provide greater chance of violating ADA by making inappropriate inquiry.



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### ADA – Undue Hardship

- It is employer’s burden of proving accommodation is undue hardship.
- In general, it may be undue burden if disruptive to other employees or operations (i.e., turning thermostat up in July so that it becomes unduly hot to employees and customers).

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### ADA – Undue Hardship

- Terms of CBA are relevant (i.e., accommodation would violate seniority rights of other employees).
- However, negative impact on morale of other employees insufficient for undue hardship.
- Employer must not disclose to other employees that it is providing accommodation for a disability!

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### ADA – Undue Hardship

- Analysis: It must be “significant” difficulty or expense when considering:
  - Nature and net cost of accommodation, taking into consideration tax credits and deductions and/or outside funding
  - Overall financial resources of *facility(ies)*, number of persons employed at facility and effect on expenses and resources

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### ADA – Undue Hardship

- Overall financial resources of *employer*, number of employees, and number, type and location of its facilities
- Type of operation(s) of covered employer, including composition, structure and functions of workforce, and geographic separateness and administrative or fiscal relationship of facility(ies) in question to employer

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### ADA – Undue Hardship

- Impact of accommodation on operation of facility, including impact on ability of other employees to perform their duties and impact on facility’s ability to conduct business. 29 CFR 1630.2
- Cost must be undue as compared to employer’s budget (not as compared to salary of disabled worker). If employee willing to cover portion of cost, only employer’s portion is relevant to analysis.

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### ADA – Undue Hardship

- Bottom line, ***the more financial resources and employees the employer has, the less likely employer will succeed in proving an undue hardship.***
- Employers should consult with experienced employment attorney before denying an accommodation.



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### Leaves of Absences

- If employee cannot perform essential functions of job with accommodation, may need to grant leave of absence:
  - Under FMLA (if qualified)
  - Under employer’s leave of absence policies and/or CBA
  - Under the ADA



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### Leaves of Absences

- FMLA and employer's leave policy/CBA rights are the floor and outside of ADA accommodation
- Once FMLA (and other rights to leave) ends, must consider additional leave under ADA
- COBRA notice once FMLA ends



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### Leaves of Absences as Reasonable Accommodation

- Attorney drafted letter to employee asking doctor for information
- When is it an undue hardship?
  - How much leave must be granted?
  - How many times must it be extended?
  - Indefinite leaves of absence
- Bottom line ... consult with an employment attorney!



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### Leaves of Absences as Reasonable Accommodation

Bottom line:

***Consult with an experienced employment attorney!***



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### Questions?



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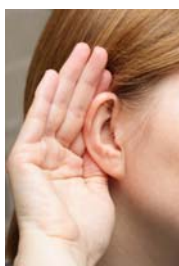
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## Thank You!!

Content of this webinar was intended to provide general information about legal issues and should not be taken as legal advice in any specific instance.

Information presented in this webinar was current at time of original presentation on Nov. 10, 2016.

Information can become outdated or inaccurate as result of subsequent amendments to laws or issuance of new regulations or court decisions interpreting laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.

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