



➤ March 20, 2024

FMLA Compliance: Unraveling FMLA and ADA Employer Requirements



Presentation By:
Joe Aitchison

Before We Begin



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➤ Presenter



Joe Aitchison, SPHR, SHRM-SCP, CHRS

Joe provides Business & HR client advisory services and HR out-source services nationally. He is a Human Resource professional with over twenty five years business management and HR consulting experience. He has worked with multi plant International Tier I Automotive Manufacturing, retail, food processing, health care, legal administration and professional services.

Mr. Aitchison is recognized as a leader in human resources and has obtained a lifetime certification as a senior professional in human resource management, SHRM – Senior Certified Professional and Healthcare Reform Specialist by the Healthcare Reform Center & Policy Institute. Mr. Aitchison serves on several for profit and not for profit boards.

➤ Agenda

- ✓ FMLA – From the DOL’s Perspective
- ✓ FMLA Compliance
- ✓ Top Employer Issues & Mistakes
- ✓ Employer Best Practice Recommendations
- ✓ FMLA & ADAAA - Deal appropriately with leaves of absence and reinstatement
- ✓ ADAA - Define “disability” correctly
- ✓ ADAA - Accommodations – Employer Responsibility
- ✓ ADAAA - Avoid discrimination based on disability
- ✓ Q & A

➤ FMLA – The Basics

The Department of Labor (DOL) Philosophy

- The Family and Medical Leave Act codified a simple and fundamental principle: **Workers should not have to choose between the job they need and the family members they love and who need their care**
- The significance of the FMLA is in its recognition that workers aren't just contributing to the success of a business, but away from their jobs they are contributing to the health and well-being of their families

[Employer's Guide to the Family and Medical Leave Act \(dol.gov\)](https://www.dol.gov/eis/whd/whdmain.html)



➤ What is FMLA?

- Family and Medical Leave Act (FMLA)
 - Enacted into law in 1993
 - Updated in 2009, 2010, and 2013
- Family and Medical Leave
 - Bonding
 - Serious health condition for spouse, child, or parent
 - Own serious health condition
- 12 weeks of protected leave for eligible employee
 - Provides benefit protection
 - Guarantee reinstatement to same or similar position

➤ FMLA – Employee Rights

FMLA Eligibility

1. FMLA – EEs are eligible for up to **12 weeks of job protected leave** (26 weeks to care for injured service member) in a 12-month period

Eligibility Rights & Requirements

1. Employed for 12 months (within past 7 years with ER)
2. Worked 1,250 hours in most recent previous 12 months
3. Employer has 50 employees within 75 miles. Also, if **the Employer controls or directs more the 50 EE even if outside the 75-mile radius**
4. Employee must have a qualifying reason to take FMLA
5. Leave can be taken in a block of time, intermittently, or on a reduced schedule. Leave can be taken in weeks, days, hours, or minutes.
6. Right to reinstatement to the same or equivalent job
7. Right to have health benefits continued during leave as if still working the same regular schedule

➤ Determining FMLA Leave Entitlements

Employees are entitled to a total of 12 work weeks of leave during any 12-month period. **Employers should make certain that the 12-month period is clearly identified in your policies:**

1. The calendar year
2. Any fixed 12-month “leave year” such as a fiscal year, or a year starting on an employee’s “anniversary” date
3. The 12-month period measured forward from the date any employee’s first FMLA leave begins
4. A “rolling” 12-month “look back” period from the date an employee uses any FMLA leave

➤ FMLA Relationships

FMLA

- Self (Employee)
- Children
- Parents
- Spouses
- Next of Kin (Military Service Member)

➤ Child FMLA Relationships

Children – Under 18

- Biological
- Adopted
- Step
- Foster
- Legal Ward/Custody
- In Loco Parentis
- Adult Children



➤ Child FMLA Relationships

Children – In Loco Parentis

A relationship situation in which a person has put himself or herself in the position of a parent by assuming and discharging the obligations of a parent to a child with whom her or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent.

Presume parents must provide either:

- Day-to-day care for the child, or
- Financial support for the child

Minimum Required Documentation:

- A simple statement asserting the relationship (written?)

➤ Adult Child FMLA Relationships

Adult Children – Physical

“Incapable of self care in at least 3 ADLs or IADLs because of a mental or physical disability”

Instrumental activities of daily living (IADLs) are not necessary for fundamental functioning, but they let an individual live independently in a community, including:

- Housework
- Taking medications as prescribed
- Managing money
- Shopping for groceries or clothing
- Use of telephone or other forms of communication
- Using technology (as applicable)
- Transportation within the community

Activities of Daily Living (ADLs) refers to daily self care activities within an individual’s place of residence, outdoor environments or both. Basic ADLs consist of self-care tasks including:

- Bathing and showering
- Bowel and bladder management (recognizing the need to relieve oneself)
- Dressing
- Eating (including chewing and swallowing)
- Functional mobility
- Personal device care
- Personal hygiene and grooming
- Toilet hygiene

➤ Adult Child FMLA Relationships

Adult Children - Psychological

ADAAA Definition of Disability: An impairment that substantially limits a major life activity comparatively to most people

- Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, **emotional or mental illness** and specific learning disabilities.
- **Gender Dysphoria Treatment & Associated Gender Transition Surgery (Most likely covered under the FMLA)**
 - FMLA leave for gender reassignment surgery most likely will be covered under the FMLA when the employee’s **HCP determines that surgery is necessary to alleviate the worker’s / family member’s depression**. Depression is considered a serious health condition and associated treatment is protected under the FMLA..

➤ Spouse Relationships

Spouse

- Traditional Marriage / Same Sex (Certificate of Marriage requirement)
- Common Law/Informal Marriage / Civil Union (according to state law)

➤ DOL: What You Need to Know

- Covered employers must **(1)** post the [FMLA Poster](#) **(2)** Provide “Employee Rights and Responsibilities under the Medical Leave Act” **Within 5 business** days after an employee has informed you of the need for leave, **(3)** the employer must complete and provide the employee with the [Notice of Eligibility and Rights & Responsibilities](#) (WH-381)
- Attach to (provide) the notice one of the following appropriate certification forms:
 - [WH-380-E](#)
 - [WH-380-F](#)
 - Exigency for Military Family Leave: [DOL Form WH-384](#)
 - Serious Injury or Illness of Service member for Military Family Leave: [DOL Form WH-385](#)
- The employer must give the employee at **least 15 calendar** days to return the form; additional time may be allowed in some circumstances (**7 day cure rule**)
- Within **5 business days after** an employee has submitted the appropriate certification form, the employer must complete and provide the employee with the designation notice
 - [DOL Form WH-382 Employer Responsibility to Designate FMLA Leave and Notice to Employee](#)
 - [Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act | U.S. Department of Labor \(dol.gov\)](#)

➤ Serious Health Conditions

Illness, injury, impairment, or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment

- **Incapacity:** “Inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom”
- **Treatment:** RX regimen, PT/OT, chemical therapy, psych. therapy, manual manipulation of the spine, surgeries other than cosmetic, evaluation tests for the mere existence of a SHC

➤ Serious Health Conditions

A Chronic health condition or incapacity requiring treatment

- Lasting **3** consecutive full calendar days (72 hours and 1 minute will suffice)
- Requiring ***2 HCP in person visits** for treatment within 30 days

- 1st in person office visit in 7 days
- 2nd within 30 Days

* What about Telemedicine (Diagnosis & Treatment)?

- If accepted by the employer's Group Health Plan – most likely will be acceptable as an HCP visit

OR

- **One** occasion of treatment resulting in a regimen of treatment under the supervision of a health care provider (RX, therapy, etc.)
- **Note: The 3, 2,1 Rule**

➤ Serious Health Conditions - Types

- In Patient – overnight hospital stay
- Continuing Care
 - Pregnancy or prenatal care
 - Incapacity and treatment
 - Chronic conditions
 - Multiple treatments
 - Long term / permanent
- Substance Abuse Treatment

➤ Serious Health Conditions - Pregnancy

Pregnancy – Any period of incapacity for pregnancy or prenatal care

- Does not have to receive treatments to miss work
- Can be incapacitated for any period of time
- Morning sickness, ultrasound, blood work, etc.

The Feds and many states have Pregnancy Disability Law (PDL) with very low or no threshold for eligibility and some states have partial wage replacement.

➤ Serious Health Conditions

Critical Definitions

- Unable to perform the functions of the position – Employee is unable to work at all “or” is unable to perform any one of the essential functions of the employee’s position.
- An employee who must be absent from work to receive medical treatment for a serious health condition is considered unable to perform the essential functions of the position during the absence.

Outside work activities – While on FMLA “or other leave.” Work at another employer or volunteer services allowed?

Job descriptions – Essential job functions

➤ Types of Leave

1. Continuous Leave

- **One** block of time due to a single qualifying reason

2. Intermittent Leave

- Taken in **separate** blocks of time due to a single qualifying reason

3. Reduced Leave Schedule

- Leave schedule that **reduces** an employee's usual number of working hours per workweek, or hours per workday

➤ Intermittent Leave

- In calculating the amount of leave, the employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour *
- Shortest increment may vary during different times of day or shift
- Required overtime not worked may count against an employee's FMLA entitlement

** Special rules apply for calculating leave for airline flight crew employees*

➤ Calling In “Sick”

- Employees can not simply call in sick for approved FMLA leave. They must present information that links the absence to the approved FMLA leave.

Hidden FMLA Abuse In Multiple Claims

Track by day on calendar

Track days of week for each claim and for all claims.

Use claim numbers or identifiers

➤ Top Employer Mistakes

Employer Responsibility

- Provide notice
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- **Maintain records**



➤ Employer Mistakes

Assumptions

- Failure to grant FMLA based on misunderstanding of what qualifies as a serious health condition
 - Chronic condition
 - Condition requiring inpatient care
 - Condition requiring ongoing treatment
 - **Two minor conditions but directly related**

Terminating

- Terminating an employee during leave or following leave
 - Reinstatement can be denied
 - Have clear reason why you are terminating
 - DO NOT include FMLA in your evaluations
 - Is additional time a reasonable accommodation?

➤ Employer Mistakes

Same or Equivalent Job

- Failure to reinstate employee to the same or equivalent job
 - Changes to work location may be considered retaliation
 - Shift changes
 - Job responsibly changed
 - Make sure good business reason exist for change

Denying Leave for Parents

- Failure of granting leave for physical or psychological comfort for a parent
 - Understand the role of the employee in providing comfort
 - Employee does not have to be only person
 - Understand “*in loco parentis*”

➤ Employer Mistakes

Disciplining Employee

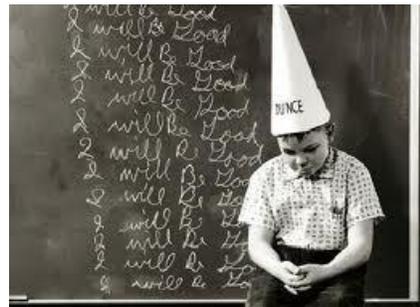
- Taking disciplinary action because employee took FMLA
 - Adjust job performance goals
 - Retaliatory action?

Absentee Policy

- Counting FMLA against a company's absentee policy
 - Not designating FMLA when it should be
 - Employer's responsibility to understand when FMLA applies

FMLA Usage

- Failure to notify employee that time was used toward 12-week entitlement
 - Who is accountable for the balance awareness?
 - Out of time notice
 - If you do not notify employee that 12 weeks has been used and you terminate the employee for not returning to work; you probably will lose a retaliation lawsuit (Young v. Wackenhunt Corporation)



➤ Employer Mistakes

Notification Process

- Failure to notify the employee of rights and responsibility
 - Even if you were right to deny FMLA, the DOL can levy a fine for not following the proper notice procedure
 - Are your policies sufficient or up to date?
 - Are your posters available for viewing?
 - Employee says....“How was I supposed to know?”



➤ Employer/Supervisor/Manager FMLA Mistakes

- Threaten termination or discipline for missed work time
- Leave denial
- Point system/“no fault” policy
- **Failure to recognize sufficient information for designation**
- Failure to provide notice
- Medical certification & recertification issues
- Retaliation and interference

➤ Federal FMLA Forms

- [Certification for Employee's Serious Health Condition, WH-380-E](#)
- [Certification for Family Member's Serious Health Condition, WH-380-F](#)
- [Eligibility & Rights and Responsibilities Notice, Form WH-381](#)
- [Designation Notice, Form WH-382](#)
- [Certification for Qualifying Exigency, WH-384](#)
- [Military Caregiver, Leave of Current Servicemember, WH-385](#)
- [Military Caregiver, Leave of a Veteran, WH-385-V](#)

➤ Notification Process



- Refer and direct employee questions to HR
- FMLA Certification Form 380 E/F given to employee within 5 days of FMLA event by employer
- Rights and Responsibility Notice must be given to employee by employer at time of certification request (WH-381)
- Employee must be allowed at least 15 days to return 380 E/F (*Extenuating circumstances may apply*)
- If additional information needed the employee gets at least 7 days to obtain/complete
- Notification of approval/denial/pending provided to the employee within 5 days (WH-382)
- Employee responsible for any cost

➤ Military FMLA

Exigency Leave

- Up to 12 weeks for spouse and/or dependents for family adjustments, and other

Caregiver Leave

- Up to 26 weeks of FMLA for aggravating an existing injury/illness or developing a injury/illness resulting from active duty
- Calculated on a rolling forward calendar
- Taken intermittently, reduced schedule, or continuously

Exigency Leave Reasons

- Short-notice deployment activities (7 calendar days)
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling activities
- Rest and recuperation activities (15 calendar days)
- Post-deployment activities
- Parental Leave
- Additional activities



➤ Employer Awareness

Prohibited Employer Actions

- **Interfere** with, restrain or deny employees' FMLA rights
- Discriminate or **retaliate** against an employee for having exercised FMLA rights
- Discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- Use the taking of FMLA leave as a negative factor in employment actions

➤ Employee Rights – File a Claim

Employees have a right to:

- File a complaint with Wage and Hour Division
- File a private lawsuit
- Action must be taken within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful

➤ Remedies Available for FMLA Claims

- Reinstatement
- Back pay – lost income prior to court decision or settlement
- Front pay – projected future/ongoing lost income
- Value of lost benefits (e.g., medical expenses)
- Other monetary losses (e.g., hiring a caretaker instead of taking leave to care for a family member)
- Liquidated damages – for willful violations, an amount equal to actual damages plus interest (similar to punitive damages)
- Interest, costs, and attorney's fees

➤ Best Practices

- Review policies and procedures
- Consistency, consistency, and more consistency!
- How do you handle accusations of FMLA abuse?
- **Suggestion** - Have a training program at least every 18 months on FMLA
 - Train Managers & Supervisors



➤ American's with Disability Act Amendments Act of 2008 (ADAAA) - The Act

“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.”

➤ ADAAA & FMLA

Purpose

The ADA (as amended) prohibits discrimination against applicants and employees who are qualified individuals with a physical or mental impairment (disability), have a record of a disability, and those “regarded as” having a disability.

The FMLA sets minimum leave standards for employees for the birth and care of a newborn child, placement of a child for adoption or foster care, care for an immediate family member with a serious health condition, an employee’s serious health condition, and to care for an injured servicemember.

➤ ADA & FMLA

Enforcement

- **ADA:** U.S. Equal Employment Opportunity Commission (EEOC)
- **FMLA:** U.S. Department of Labor (Wage and Hour Division)

Employers Covered

- **ADA:** 15 or more employees for 20 weeks during current or preceding calendar year.
- **FMLA:** 50 or more employees for at least 20 weeks during current or preceding calendar year.

Employee Eligibility

- **ADA:** An employee (or applicant) who is disabled, as defined by the ADA, is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation.
- **FMLA:** An employee who has worked at least 12 months and 1,250 hours before the start of the leave and who works at or reports to a worksite at which 50 or more employees work within a 75-mile radius.

Length of leave:

- **ADA:** No specific limit for the amount of leave that would be provided as a reasonable accommodation that does not create an undue hardship on the employer.
- **FMLA:** 12 weeks in the 12-month period as defined by the employer. 26 weeks of leave is provided for the employee to care for an injured servicemember.

➤ ADAAA & FMLA

Medical documentation

- **ADA:** Only medical examinations or inquiries regarding an employee's disability that are job-related and limited to determining ability to perform the job and whether an accommodation is needed and would be effective.
- **FMLA:** Medical certification of the need for the leave, not to exceed what is requested on the U.S. Department of Labor (DOL) Medical Certification Form.

Restricted or light duty

- **ADA:** Required to be offered if it is a reasonable accommodation that does not create an undue hardship on the employer.
- **FMLA:** Cannot be required.

Fitness-to-return-to-work certification:

- **ADA:** Permitted as long as the medical examination and inquiry are job-related and necessary to determine whether the employee can perform the essential functions of the job.
- **FMLA:** May be required only under a policy or practice that requires employees who have been on a similar type of leave of absence to provide one.

➤ ADAAA & FMLA

Benefits while on leave

- **ADA:** No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on a non-ADA leave of absence.
- **FMLA:** Health coverage must be continued at the same level as before the leave. Benefits other than health benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

Reinstatement:

- **ADA:** Required reinstatement to previous job unless doing so would create an undue hardship on the employer.
- **FMLA:** Required reinstatement to the same or an equivalent job. No undue hardship exception.

➤ Disabled Broadly Defined

- **Temporary and Episodic Illnesses** - included if they substantially limit a major life activity.
- **Major Life Activity** - is broadened to include bending, reading, working, learning, concentrating, thinking and communicating.
- **List** includes bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, **brain**, **respiratory**, circulatory, endocrine, and reproductive functions”).
- **Mitigating Measures** - are not included when evaluating whether someone is disabled (even if the disability is treatable, the Act considers the person’s condition in its untreated form) with the exception of corrective lenses.

➤ Major Life Activities

- 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
 - Immune system, special sense organs, skin
 - Normal cell growth
 - Digestive, neurological, respiratory
 - Circulatory, cardiovascular
 - Endocrine, hemic, lymphatic, musculoskeletal, reproductive
 - Individual organs
- Eating
 - Sleeping,
 - Walking,
 - Standing,
 - Lifting, bending,
 - Reading,
 - Concentrating,
 - Thinking,
 - Communicating”
 - Bodily functions.

➤ In ADAAA Statute

- immune system
- neurological
- normal cell growth
- **Brain**
- Digestive
- **Respiratory**
- bowel
- Circulatory
- bladder
- endocrine
- reproductive functions
- special sense organs & skin
- Genitourinary
- Cardiovascular
- Hemic
- Lymphatic
- Musculoskeletal
- individual organ operation

***Lists are not exhaustive**

➤ Some Impairments Will “Virtually Always” Be Covered

- Blindness
- An intellectual disability
- Autism
- Cancer
- Diabetes
- Epilepsy
- HIV infection
- Post-traumatic stress disorder

➤ Do Not Consider Mitigating Measures

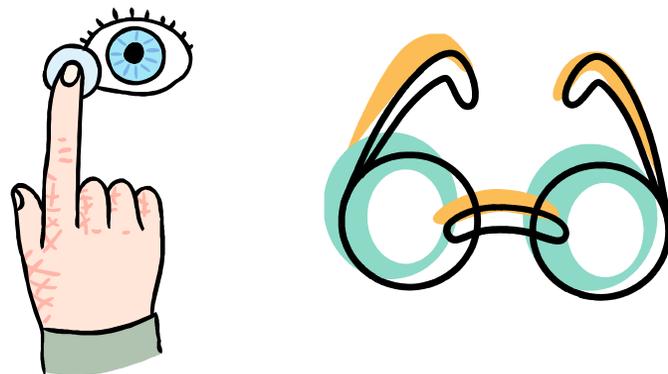
They include:

- Hearing aids
- Medication
- Prosthetic devices, including limbs
- Mobility devices
- Reasonable accommodations
- Learned adaptive behaviors

➤ Limited Role of Mitigating Factors

- ADAAA: Most mitigating measures should not be considered when determining if someone is disabled

Exceptions:





What if the Disability Is Not Apparent?

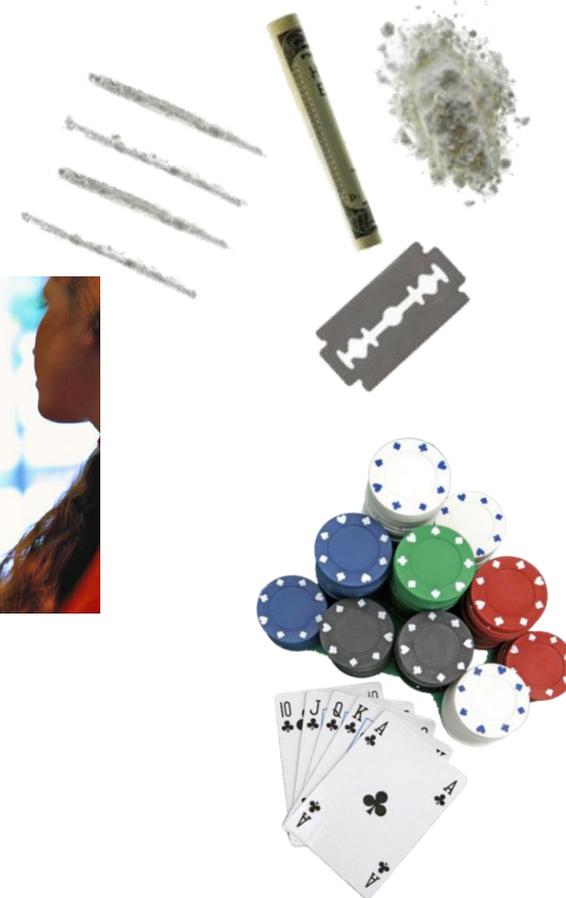
- Mental disorders
- Epilepsy
- Recovering alcoholic
- Learning disabilities

Essential Job Functions

Focus on abilities, not disabilities!

➤ ADA and Addictions

- Alcoholism covered
- Current use of illegal drugs not covered
- Drug tests allowed
- Other addictions (Opioids as example) may be covered





Reasonable Work Accommodation

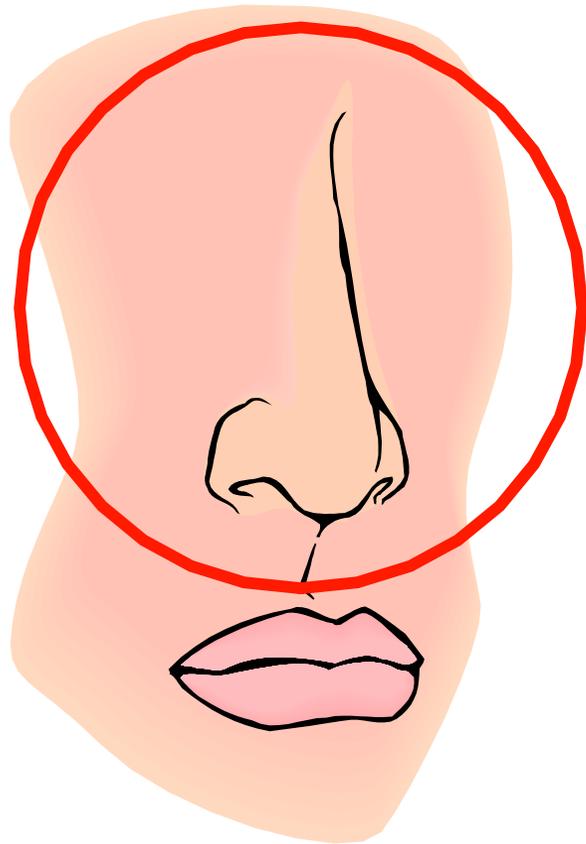
What Does it Mean?

It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- Acquiring or modifying equipment or devices,
- Job restructuring,
- Part-time or modified work schedules,
- Reassignment to a vacant position,
- Adjusting or modifying examinations, training materials or policies,
- Providing readers and interpreters, and
- Making the workplace readily accessible to and usable by people with disabilities.

➤ The “Classic” Fragrance Sensitivity?



➤ What is Fragrance Sensitivity?

The severity of symptoms varies from one individual to another. Symptoms can show up over a wide time range from a few minutes to seven to ten days

Reactions to fragrances may include:

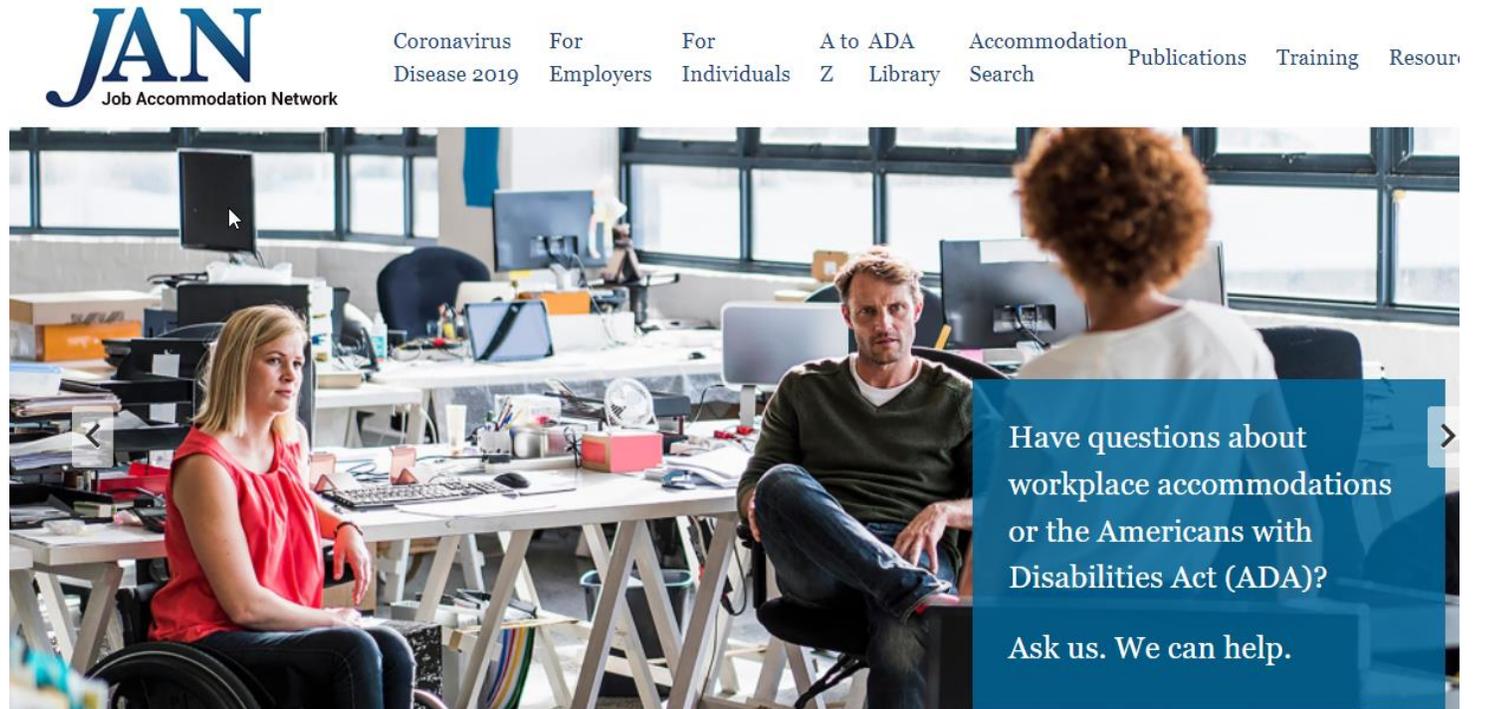
- Difficulty breathing or breathing problems
- Asthma attacks or asthma-like symptoms
- Contact dermatitis (an itchy and inflamed skin rash)
- Hives
- Nausea
- Dizziness
- Headache

➤ Respiratory Impairments & Fragrance Sensitivity

- Persons with respiratory impairments may have heightened sensitivity to ordinary substances and chemicals
- Medical conditions that may result in respiratory impairments include the following:
 - Allergies
 - Asthma
 - Chemical Sensitivity
 - Chronic Obstructive Pulmonary Disease
 - Cystic Fibrosis
 - Environmental Illness (EI)
 - Fragrance Sensitivity
 - Lung Cancer
 - Pulmonary Sarcoidosis
 - Tuberculosis
 - Emphysema
 - Pulmonary Hypertension

JOB ACCOMMODATION NETWORK

Reference – EEOC Job Accommodation Network :
<https://askjan.org/info-by-role.cfm#for-employers>
Funded by DOL/ODEP – West Virginia University



The image shows the top portion of the JAN website. At the top left is the logo for JAN (Job Accommodation Network). To the right of the logo is a navigation menu with the following items: Coronavirus Disease 2019, For Employers, For Individuals, A to Z Library, ADA Accommodation Search, Publications, Training, and Resources. Below the navigation menu is a large banner image of an office setting. In the foreground, a woman with blonde hair is sitting in a wheelchair, wearing a red sleeveless top. She is looking towards a man in a green sweater who is sitting at a desk. Another person with curly hair is seen from behind, also sitting at a desk. A blue semi-transparent box is overlaid on the bottom right of the banner image, containing white text.

JAN
Job Accommodation Network

Coronavirus Disease 2019 For Employers For Individuals A to Z Library ADA Accommodation Search Publications Training Resources

Have questions about workplace accommodations or the Americans with Disabilities Act (ADA)?
Ask us. We can help.

Before Q&A



Slides and
Certificate are
available in the
Handouts
section



Receive an email
tomorrow with
the recording

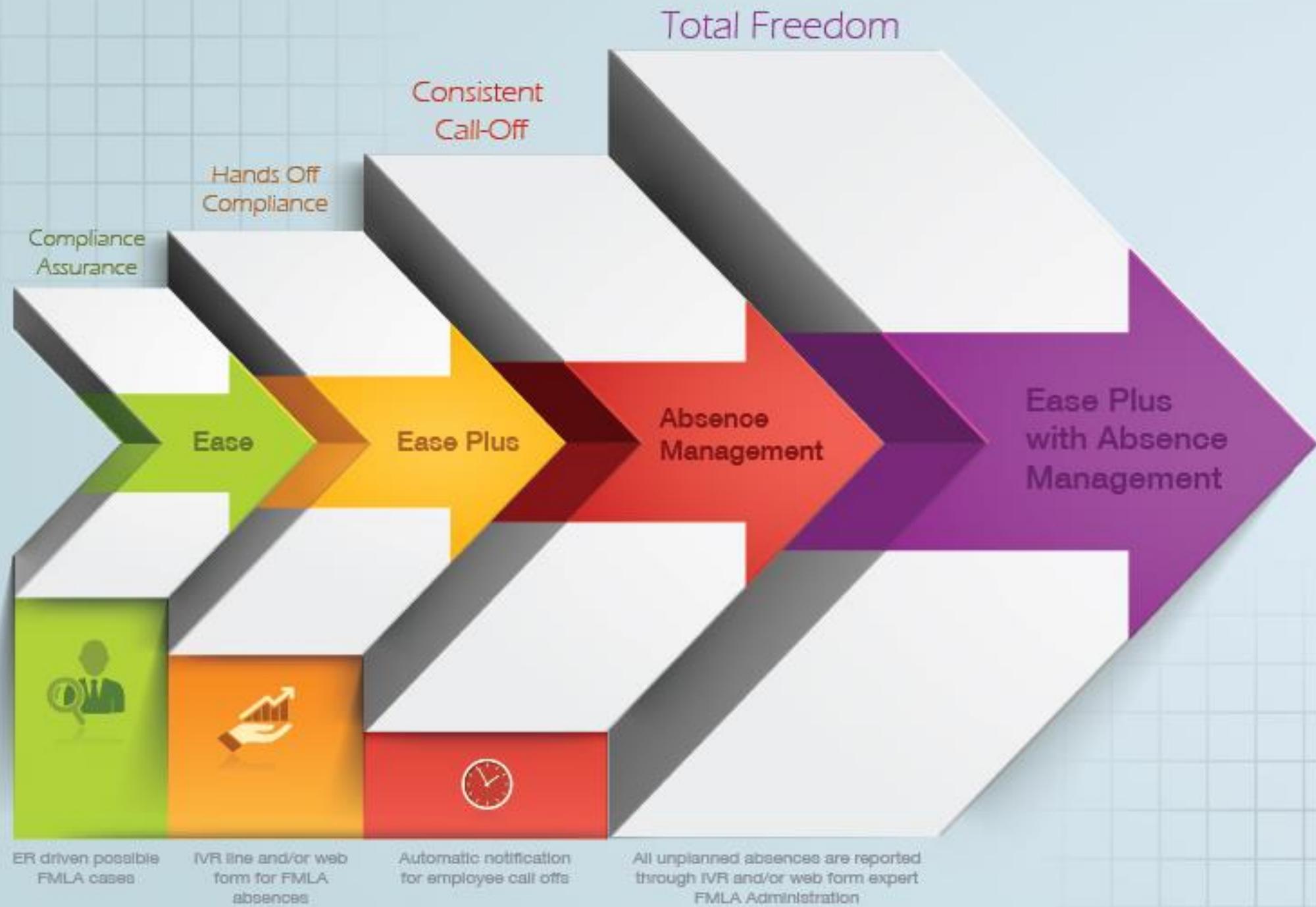


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QUESTIONS



BASIC's FMLA Solutions



➤ BASIC's Solutions: Multiple Levels of Service

- **FMLA Ease**

- Policy Review & Consultation
- All FMLA Notice & Document Distribution
- Eligibility & Entitlement Calculations
- Full Certification Support
- Comprehensive Reporting
- Manager Training
- Authentication and clarification
- Federal and state compliance
- 24/7 access to FMLA Dashboard
- Coordination with STD and Workers Comp
- BASIC's FMLA experts

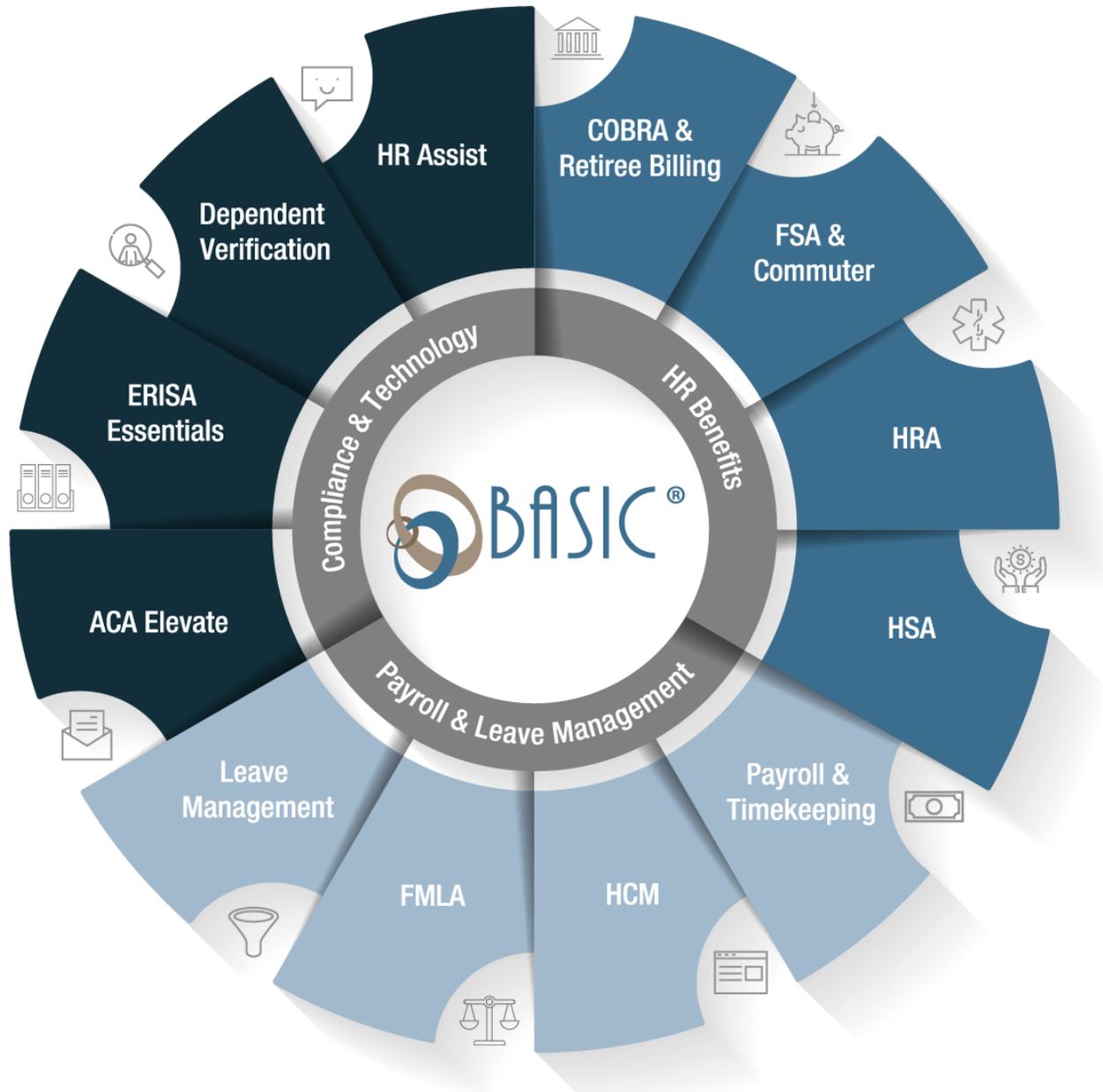
➤ BASIC's Solutions: Multiple Levels of Service

• FMLA Ease Plus

- Interactive Voice Response (IVR) system, giving employees access to an automated 24/7 toll-free number to track their FMLA absences.
- Real time absence communication with immediate notification to supervisors.
- Direct capture of FMLA planned & unplanned absences
- Leave coordination with payroll data

• Option for Absence Management

- IVR system can be used for all planned and unplanned absences.
- Provides consistent, accurate reporting of all absences.
- Real time communication to supervisors.



Request a Proposal

For you or your client at this link:

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