



ZASHIN & RICH

Employment Law Issues Giving Rise to Liability
FMLA & ADA
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- More than thirty years of experience and expertise in representing public and private employers in labor and employment law and human resource management.
- Negotiated over 500 labor contracts.
- Represents employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
- Ohio State Bar Ass'n. Certified Specialist in Labor and Employment Law
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio "Super Lawyer".



OSBA Certified Specialist
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Employment and Labor Law Group

Zashin & Rich's Employment Group has extensive experience representing public sector entities, large and small businesses, and non-profit organizations. Zashin & Rich's Employment Group's expertise extends into many areas including:

- Litigation and EPLI Defense
- Discrimination and Retaliation
- General Employment Counseling
- Labor Law
- Collective Bargaining
- FLSA, Wage and Hour Issues
- Worker's Compensation
- Restrictive Covenants
- Employee Handbooks
- Unemployment Compensation
- Civil Service Law
- Public Records/Sunshine Laws

- Discrimination and Retaliation
Laws Representation
- Title VII
 - ADA
 - ADEA
 - FMLA
 - PDA
 - FLSA
 - others

Ohio PRIMA 10-5-16

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Today's Agenda

Agenda

1. ADA/accommodations
2. Pregnancy and Religion
3. FMLA and Leave



The Americans with Disabilities Act





- Claims
- Interactive Process
- Accommodations
- Advanced Issues





ADA LEGISLATIVE BACKGROUND

- ADA passed in 1990
- Rehabilitation Act passed in 1973
- Covers all state/local governments
- Covers private employers employing "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year"
- ADAA passed in 2008 and became effective January 1, 2009 (not retroactive)



“DISABILITY” CLAIMS



1. Discrimination.
 - Includes “*failure to accommodate*”
2. Harassment.
3. Retaliation.



ADA-FMLA Defenses for Litigation

DISABILITY DEFINITION

- ADA covers a “qualified individual with a disability”
- E.g. = “an **individual with a disability** who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”





ADA-FMLA Defenses for Litigation

“INDIVIDUAL WITH A DISABILITY” DEFINED

1. Physical or mental impairment that substantially limits a major life activity; *OR*
2. A “record of” such impairment; *OR*
3. Being “regarded as” having such an impairment.



***** Only #1 is entitled to a reasonable accommodation**



ADA-FMLA Defenses for Litigation

REASONABLE ACCOMMODATIONS



- Goal is the removal of “workplace barriers”
- **3 general categories:**
 1. Changes to the job application process;
 2. Modifications to the work environment ;
 3. Changes so a disabled employee can enjoy equal benefits and privileges

ADA-FMLA Defenses for Litigation 10

REASONABLE ACCOMMODATIONS



- Employer *never* has to modify the essential functions of a position, but it may need to provide a “reasonable accommodation” to enable the employee to perform the job’s “essential functions”
- **Questions are:**
 - What are the “essential functions” and
 - What are “reasonable accommodations”

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WHAT ARE “ESSENTIAL FUNCTIONS”?


- Those duties that are necessary for the job to be completed (not marginal)—
 - Whether the position exists to perform a particular function
 - Whether only some employees can perform the function
 - Whether expertise or ability to perform the function is reason for hiring

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ESSENTIAL FUNCTIONS


- Consider the following when considering whether a job duty is an “essential function:”
 - Written position description
 - Amount of time spent performing the duty
 - Employer’s judgment
 - Terms of collective bargaining agreement
 - Work experience of others who performed/are performing the job
 - **“Regular and predictable attendance”?**


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ADA-FMLA Defenses for Litigation

WHAT ARE “REASONABLE ACCOMMODATIONS”?


- A reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”
- Look at the **costs** of providing the accommodation weighed against the **benefits** of the accommodation.


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TYPES OF REASONABLE ACCOMMODATIONS



- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment
- Changing exams, training materials, or policies
- Providing qualified readers or interpreters

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UNDUE HARDSHIP

- An employer is not required to provide a reasonable accommodation if doing so would impose an **“undue hardship”**
- Means significant difficulty or expense in providing the accommodation.
- Analysis focuses on the particular employer’s resources— and on whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

PRACTICE POINT: INFORMING OTHER EMPLOYEES


- ADA prohibits employers from disclosing an employee’s “medical” information (with limited exceptions)
- EEOC: Employer may “explain that it is acting for legitimate business reasons or in compliance with federal law”

Case Examples – WHO IS “DISABLED?”

- Sergeant’s subordinates file several complaints about interpersonal conflicts with him. In response, City places Sergeant on paid administrative leave to investigate. While on leave, Sergeant notifies Police Department that he has been diagnosed with ADHD and requests “all reasonable accommodations.”
- City completes investigation and terminates Sergeant for his behavior. Sergeant sues City for discriminating against him for being disabled under the ADA. Sergeant claims his ADHD substantially limited two major life activities: “working” and “interacting with others.”
- Court rejects claim that he is disabled. The evidence showed that he was a technically competent police officer, so ADHD had not limited him in “working.” **Evidence that he was ‘cantankerous’ and didn’t get along with coworkers was not sufficient to prove that he was “substantially limited” in the ability to interact with others.**

– *Weaving v. City of Hillsboro*, 763 F. 3d 1106 (9th Cir. 2014)



FAILURE TO FOLLOW THE INTERACTIVE PROCESS CAN BE FATAL!

- EEOC sued a NC pub for rescinding a job offer to an applicant after learning he was HIV-positive. Employer allegedly made food safety assumptions without considering reasonable accommodations.
- Wisconsin manufacturer settled a claim--required injured employees to meet workers' compensation maximum-medical improvement standards before returning to work, without considering reasonable accommodations that could be made to return the employee to work sooner.



THE INTERACTIVE PROCESS IN 8 STEPS

1. **Employee requests** accommodation
2. Employer **examines** the job and determines essential functions
3. Employer consults with employee to **learn about physical/mental abilities** as they relate to the essential functions
4. Employer makes individualized determination whether employee poses **direct threat**, and if threat can be removed by reasonable accommodation



ADA-FMLA Defenses for Litigation



THE INTERACTIVE PROCESS IN 8 STEPS

5. Employer and employee identify potential accommodations (**interact**)
6. Employer considers whether the accommodation would impose an **undue hardship**, and other alternatives must be considered.
7. If reasonable accommodation is available, employer **provides** it in a timely manner.
8. **Follow-up** after providing accommodation



ADA-FMLA Defenses for Litigation



Case Example – Interactive Process

Parsons v. Auto Club Group, 565 Fed. Appx. 446 (6th Cir. 2014)

Employee told supervisor “that his apnea ‘was coming back again’ and that he would have to pay \$1,200 for the medical device he needed because Blue Cross would not cover it” just to let him know.

“This is not enough to suggest that Parsons requested accommodation from Auto Club.” **FURTHER:**

“When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be ‘too little, too late.’”



Case Examples – Interactive Process

- County prison guard has left arm amputated after a car accident. Guard exhausts his leave under the FMLA, but refuses to provide the County with documentation of his fitness-for-duty or an estimate of when he could return to work. Guard testifies that he assumed his doctor wouldn't release him, so he just didn't ask!
- County holds a hearing to discuss terminating Guard. He asks for a transfer to a Dispatch position in the Sheriff's office. The County denies the transfer and terminates him for failing to return to work. Guard sues the County, alleging that he was denied a “reasonable accommodation” for his disability under the A.D.A.
- Guard's claim fails, because he never provided any documentation about his ability or inability to return to work, despite the County's requests. **A request for reasonable accommodation must give notice to the employer of his disability and the resulting limitations.** Guard never triggered the “interactive process,” so the County was not required to consider reassigning him.

— *Bundy v. Chaves*, 215 Fed. Appx. 759 (10th Cir. 2007)



Case Examples – Interactive Process

- SWAT team officer broke her leg while jogging and required an FMLA leave. When she exhausted her FMLA leave, she requested light or desk duty and stated that she could not return for *at least* a month. Officer's request was denied, and she submitted a doctor's note estimating that *at least* an additional one to three months of physical therapy were needed before she would be fit for duty. The City terminated her employment.
- The court held that the officer did initiate the interactive process by requesting light duty/desk duty because of her broken leg. However, the department was **not required to create a new position** for her, since there was no vacant position available. The department was also **not required to give her “indefinite” leave where she could not provide a realistic estimate of when she would return.**

— *Silva v. Hidalgo Police Department*, 2014 U.S. App. LEXIS 13658 (5th Cir. 2014)



PRACTICAL EXAMPLES: EMPLOYEE'S DUTY TO PARTICIPATE

- *Agee v. Mercedes-Benz*, (11th Cir. March 30, 2016)
 - Employee submitted a doctor's note and stopped participating in interactive process.
 - Is mandatory overtime an essential function of the position?
- Service Dog and the ADA
 - Service Dog for PTSD
 - Refused to supply nature of disability/documents



Case Examples – Reasonable Accommodation

Horn v. Knight Facilities Mgmt., 556 Fed. Appx. 452 (6th Cir. 2014)

Janitor developed sensitivity to cleaning chemicals and was fired after her doctor mandated a restriction of "no exposure to cleaning solutions."

Proposed accommodations were: (1) eliminating bathrooms on her route; (2) use of a respirator

Accommodations were not objectively reasonable since eliminating the bathrooms on her route still would have involved exposure to cleaning chemicals, and respirator would have complied with the doctor's restriction.



CASE EXAMPLES

SLEEP AT THE WHEEL



- George, a 9-1-1 dispatcher, has been falling asleep while at work (management has even had to wake him up). He also uses the "flex time" policy when he can't wake up in time to report to work.
 - Reported by coworker that George fell asleep while driving them home from work on a recent occasion.
 - Letter from a training consultant says George fell asleep during a training class as well.
- You confront George and he reports he is fighting restless leg syndrome and narcolepsy.
- What do you do?



Case Example - Telecommuting

- *EEOC v. Ford Motor Co.*, 782 F.3d 753(6th Cir. April 10, 2015)



- Court applied “common sense” to determine “regular, in-person attendance is an essential function ... of most jobs....”



ALCOHOLISM AND THE ADA



- *Blazek v. City of Lakewood*, 576 Fed. Appx. 512 (6th Cir. 2014)
- An employee is caught drinking during his lunch break. He maintains a commercial driver's license, and his job duties require him to operate vehicles. He tells the employer that he is an alcoholic. The employer terminates the employee.
- Employee did not seek an accommodation for his disability (alcoholism) before he lost his job. Further, he lost his job for violation of the employer's alcohol policy, not for being an alcoholic. If the employee were not violating a conduct rule and had asked for an accommodation, the employer may have had a responsibility to provide it.



DON'T LIE ABOUT MEDICAL LEAVE

- *Mattessich v. Weatherfield Township*, 2016-Ohio-458 (11th Dist. Feb. 8, 2016)
- Depression-suffering police officer terminated for lying about medical leave.
- Fatal to disability discrimination claim.



ADA AND MARIJUANA

- Most courts that have addressed this issue have held that ADA does not protect medical marijuana because it remains illegal under federal law.
- Ohio's Medical Marijuana Law allows it to be prohibited under Drug free workplace policy.



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ADA and Pregnancy

- The EEOC recently updated its guidelines on pregnancy, making clear that while pregnancy itself is not a disability, pregnant employees' impairments related to pregnancy affecting major life activities are covered by the ADA.
 - Complications
 - Bed rest
 - High Blood pressure



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ADA and Pregnancy

- **EEOC guidelines on ADA and pregnancy:**
 - Pregnancy-related impairments do **not** have to be severe or fully prevent a major life activity to be covered
 - A pregnant employee may require early leave
 - Reasonable accommodations may include allowing a pregnant employee to have a water bottle at her station, take more frequent breaks, or sit while working



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Lactation Breaks

- The **Patient Protection and Affordable Care Act** also requires employers to accommodate nursing mothers' need to express breast milk by providing a place to do so as often as needed.
 - Do you have a Lactation Break policy?



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The Family and Medical Leave Act



The
Family
and
Medical
Leave
Act

- ADA/FMLA overlap
- Intermittent Leave
- Leave Abuse



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FMLA: DEFINING WHO IS COVERED

Employer

- Private Sector if employ 50+ employees.
- All public sector regardless of size.

Employees

- At least one year of service credit with the employer;
- 1,250 hours worked within the last year; and
- Employed at a worksite with 50 or more employees within 75 miles of the worksite



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QUALIFYING REASONS FOR FMLA

- Birth or placement of a child for adoption or foster care
- A “serious health condition” of the employee **or** a close family member
- Qualifying exigencies of call to active service of family member
- To care for a military service member who was injured in the line of duty if employee is the “next of kin”



WHAT IS A “SERIOUS HEALTH CONDITION”

Any illness, injury, impairment, or physical or mental condition that also involves:

- Inpatient care;
- Any period of incapacity of more than 3 calendar days and ALSO involves:
 - 2 or more treatment by health care provider OR
 - Treatment by provider on 1 occasion that results in a “regimen of continuing treatment under supervision of a health care provider”
- Any period of incapacity due to pregnancy/prenatal care



WHAT IS A “SERIOUS HEALTH CONDITION”

Any illness, injury, impairment, or physical or mental condition that also involves (*continued*):

- Chronic serious health condition that involves all of the following:
 - Periodic visits for treatment to provider;
 - Continue over extended time period;
 - May be episodic rather than continuing in nature
- Any period of incapacity which is permanent/long term and where treatment may not be effective (terminal stages/Alzheimer’s)
- Absence for restorative surgery after accident/injury OR for a condition that would likely result in absence of more than 3 days at a later date without medical intervention (chemo/dialysis)



WHAT IS A "SERIOUS HEALTH CONDITION"

Are the following "serious health conditions" under FMLA?

- Lasik eye surgery?
- Breast augmentation?
- Weight loss surgery?
- Flu for over 3 days?



WHAT IS A "SERIOUS HEALTH CONDITION"

- A federal court denied an FMLA claim after a police officer was compelled to use her vacation time for a two-day absence caused by a psychological impairment. The officers' condition did not require continuing treatment, and was not a serious health condition within the meaning of the FMLA.
- The FMLA is designed to provide leave when needed for a serious health condition, not brief minor illnesses.
 - Lundy v. Town of Brighton, 521 F. Supp. 2d 259 (W.D. New York 2007)



FMLA ENTITLEMENTS

"Eligible" employees may receive:

- Up to 12 weeks of unpaid leave
 - 26 weeks for military caregiver leave
- Continued health care benefits during the leave
 - Employee must continue to pay their share of premium
- Job protection/restoration
 - Same or similar position



FMLA AVAILABILITY

- 12-month period:
 - Calendar year
 - Any fixed 12-month period
 - 12-month rolling period
- Intermittent/reduced schedule



EMPLOYEE OBLIGATIONS

- Reasonable notice
 - 30 days if “foreseeable”
- Provide reasons for the leave
- Certification of need
 - Use DOL forms
- Periodic reporting
 - Recertification every 30 days unless:
 - Extension requested
 - Changed circumstances




EMPLOYER RIGHTS

- Failure to provide notice for a foreseeable leave?
- 2nd and 3rd opinions on medical certification
- Concurrent counting of paid leave
- Repayment of health care premiums if not return
- Fitness-for-duty before return to work.






EMPLOYER OBLIGATIONS

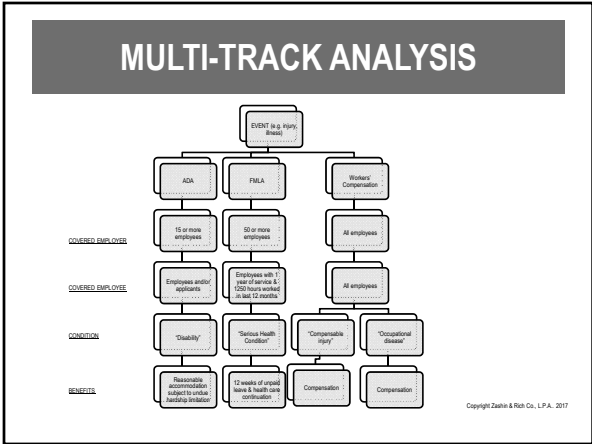
- Posting requirements
 - May 2016 – DOL issued new FMLA poster!
- Designation requirements
 - 5 business days after employee supplies notice of need
 - Retroactive permitted if “does not cause harm or injury to the employee.”
- Handbooks and other notices
 - General notice of rights to all employees in handbook
 - Personal notices to employees requesting FMLA
- Record keeping



ADA/FMLA OVERLAP




- **Matters that arise may implicate both the ADA and FMLA (and even workers compensation).**
- **Employers must analyze each situation under all three laws (e.g. utilize a “multi-track analysis”)**





ADA/FMLA OVERLAP

- **EEOC and DOL position:**
 - “A single request for FMLA leave is enough to put the employer on notice of a potential need for an ADA job accommodation.”
 - Leave of absence may be a “reasonable accommodation” under the ADA
- **So, if I grant 12 weeks of FMLA to a person who may qualify as “disabled” under ADA – am I good?**
 - Extension of leave beyond normal limits must also be *considered* under ADA accommodation precedent



REQUEST FOR LEAVE

- **ADAAA:** unpaid leave **is** a form of reasonable accommodation.
- **FMLA:** unpaid leave or leave with pay can be given to a qualifying employee.

JOB RESTRUCTURING OR TRANSITIONAL DUTIES

- **ADAAA:** employer might have to modify a job to reallocate nonessential job functions.
 - May also transfer to another job as accommodation
- **FMLA:** does not apply to modified duties
 - However, transfer to another job during the FMLA leave period is permitted.

MODIFIED WORK SCHEDULE

- **ADAAA:** may have to modify work schedule, but nexus must exist between disability and schedule.
- **FMLA:** leave must be granted, but no modified work schedule.
 - May ask for reduced schedule leave though (e.g.: moving from F.T. to P.T. status)

Work Schedule						
Mon	Tue	Wed	Thu	Fri	Sat	Sun
OFF	OFF	OFF	OFF	OFF	OFF	OFF
OFF	OFF	OFF	OFF	OFF	OFF	OFF
OFF	OFF	OFF	OFF	OFF	OFF	OFF
OFF	OFF	OFF	OFF	OFF	OFF	OFF



DEALING WITH LEAVE ABUSE



DEALING WITH LEAVE ABUSE

SEEGER v. CINCINNATI BELL (6th Cir. 2012)

- Employee suffered herniated disc. Granted FMLA and paid short term disability.
 - Offered him light duty first but employee declined “too disabled to work.”
- Several days later, he was seen at Oktoberfest.
 - Upon questioning – he admitted to walking over 10 blocks and drinking beer.
 - Employer had “leave fraud” policy = fired him.
- Result?
 - “Reasonable belief” in FMLA abuse enough?
 - “Legitimate business reason” established?



DEALING WITH LEAVE ABUSE

- Just days after being counseled for poor performance, a Sheriff's department investigator was diagnosed with cytomegalovirus and then stayed off work for several weeks.
- Investigator spent two of those weeks entertaining a house guest and visiting Florida tourist attractions. Although the employee submitted several doctors' notes during the leave, none verified that the condition was serious enough to render her unable to perform duties. She was subsequently terminated.
- The court found that the plaintiff's activities were inconsistent with a need for FMLA leave, and she did not provide adequate medical proof of a serious condition.

– *Gunzburger v. Sheriff of Broward County, Fl.*, No. 09-14445 (11th Cir. 2010)



DEALING WITH LEAVE ABUSE

- College public safety dispatcher receives citation from Police Officer for disobeying the officer's command and driving over a curb and grassy area.
- Dispatcher began an unrelated FMLA leave several days later. College investigated the citation incident during her leave, and during investigation it learned that she was working part-time for a different employer during the FMLA leave. College issued a 3-day unpaid suspension.
- Dispatcher filed a lawsuit alleging several counts, including retaliation for having taken FMLA leave.
- Court held that the fact that the investigation took place during the FMLA leave does not make it pretextual. The dispatcher failed to show that college's proffered reasons for investigating and disciplining her were pretextual and were not honestly-held.

– *Pamela Murphy v. Ohio State University*, No. 12-4391 (6th Cir. 2013)



DEALING WITH LEAVE ABUSE

LINEBERRY v. RICHARDS (E.D. Mich, 2013)

- An RN at Medical Center was approved for FMLA due to lower back and leg injury.
 - Dr. certified substantial lifting and mobility restrictions.



- Result?
 - "Reasonable belief" in FMLA abuse enough?
 - "Legitimate business reason" established?



DEALING WITH LEAVE ABUSE

- Don't make it easy to call-off.
 - Entitled to have a reason for the absence supplied to you.
- Ask for second opinions when in doubt
- Develop effective tracking process
- Re-certification process when inconsistent use



DEALING WITH LEAVE ABUSE

- Use social media as an investigation tool
- Utilize private investigators
- Take advantage of Employment Policies
 - Employees must follow customary paid leave call-in policy of employer regardless of FMLA
 - Dishonesty
 - Investigate excessive leave and suspicious patterns
 - Leave Abuse Policy




INTERMITTENT LEAVE ISSUES

- Make sure they qualify.
 - Must be "medically necessary."
 - Can only be taken for :
 - "serious health condition"
 - "serious injury/illness of covered service member"
 - "qualifying exigency"
 - NOT for birth, adoption, placement UNLESS employer agrees/allows under policy



INTERMITTENT LEAVE ISSUES


- Don't take it lying down
 - If used for planned medical treatment – enforce that employee is obligated to schedule outside work hours when possible
 - Can deny if it does not fit within basis for intermittent leave
 - *Lane v. Pontiac Hospital* (2010). Employee granted intermittent FMLA to care for his mother (diabetes, arthritis). However, employee denied leave when he tried to use it for 4 days missed cleaning up flooding in his mother's basement.
 - Court upheld denial since time was not used to care for mother's illness.
 - Recertify every 30 days when no time established by certification.




CASE EXAMPLES

BUILDING A PORCH WHILE ON FMLA

- Officer is injured at work – concussion and muscle strain
 - Dr. certification provided
 - Took 5 weeks FMLA
 - Co-worker reported seeing employee building a porch on his home.
- What do you do?







CASE EXAMPLES

MIGRAINE FLARE-UP

- Officer is transferred to new assignment. He dislikes it and asks for new assignment. Denied.
 - 15 minutes later he says he has to go home due to "migraine". He has done this before.
 - He does have approval for intermittent FMLA for this condition
- What do you do?





CASE EXAMPLES



FRAGRANCE-FREE WORK ENVIRONMENT

- Officer provides dr. statement saying she is deathly allergic to certain fragrances at work. Requests that the workplace become “fragrance-free” or she cannot work there.
- What do you do?
 - Grant the request?
 - Reasonable Accommodations available?
 - FMLA?
 - Other leave?



BUILD YOUR DEFENSE

Establish FMLA Defenses:

- Good faith belief of abuse
- Same-decision anyway
- No prejudice to employee
- Not a “serious health condition” under FMLA



BUILD YOUR DEFENSE

Document :

- FMLA notices, requests, approvals
- Medical Excuses
- Your policies and UPDATE!!
- Training of managers and employees
- Any Investigations



COLLECTIVE BARGAINING ISSUES

ADA:
FMLA:
Other Leave Issues:



THANK YOU!

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Federal Employment Law Basics

KNOWLEDGE OF THE LAW IS PREVENTION OF LAWSUITS

ADA/FMLA/ATTENDANCE ISSUES

March 7, 2019

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About Jonathan J. Downes



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- Negotiated over 500 labor contracts.
- Represents employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio “Super Lawyer”.



About Zashin and Rich

Zashin & Rich Co., L.P.A. (“Z&R”) has over 20 attorneys who specialize in labor and employment law with offices in Columbus and Cleveland, representing both private and public employers. Z&R represents its clients in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in arbitrations, impasse proceedings and litigation.

Attorneys represent private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at the National Labor Relations Board, the State Employment Relations Board, State Personnel Board of Review, and local civil service commissions. Z&R representation includes all federal and state discrimination laws, administrative and court proceedings, employee handbooks and manuals, contract administration, strike situations, and workers’ compensation.

The Firm has an extensive insurance defense practice representing several national insurance companies including Chubb, Travelers, AIG, Pools, PERSO and PEP among others. The firm represents clients before the EEOC, OCRC and in state and federal courts in all parts of Ohio. The Firm’s Labor & Employment Group has received First Tier ranking in Employment Law-Management in the Cleveland Region and Labor Law-Management in both the Cleveland and Columbus Regions by U.S. News Best Lawyers® “Best Law Firms” in 2014 and 2015.

Zashin & Rich’s Employment Group’s expertise extends into many areas including:

Litigation and EPLI Defense	Employment Agreements	Federal Laws
General Employment Counseling	Restrictive Covenants	Title VII
Labor Law	Employee Handbooks	ADA
Collective Bargaining	Unemployment Compensation	ADEA
FLSA, Wage and Hour Issues	Civil Service Law	FMLA
Worker’s Compensation	Public Records/Sunshine Laws	FLSA



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I. ADA – “AMERICANS WITH DISABILITIES ACT”

A. TYPES OF ADA DISABILITY CLAIMS

- Discrimination.
 - Includes “failure to accommodate”
- Harassment
- Retaliation

B. DISABILITY DEFINITION

- ADA covers a “qualified individual with a disability”
- Defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”

C. “INDIVIDUAL WITH A DISABILITY” DEFINED – 3 PARTS

- Physical or mental impairment that substantially limits a major life activity; OR
- A “record of” such impairment; OR
- Being “regarded as” having such an impairment.

D. REASONABLE ACCOMMODATIONS

- Goal is the removal of “workplace barriers”
- 3 general categories:
 - Changes to the job application process;
 - Modifications to the work environment;
 - Changes so a disabled employee can enjoy equal benefits and privileges.
- Employer never has to modify the essential functions of a position, but it may need to provide a “reasonable accommodation” to enable the employee to perform the job’s “essential functions”
- Questions are:
 - What are the “essential functions,” and
 - What are “reasonable accommodations”

E. WHAT ARE “ESSENTIAL FUNCTIONS”?

- Those duties that are necessary for the job to be completed (not marginal)
 - Whether the position exists to perform a particular function
 - Whether only some employees can perform the function
 - Whether expertise or ability to perform the function is reason for hiring

F. ESSENTIAL FUNCTIONS – FACTORS TO CONSIDER

- Consider the following factors when considering whether a job duty is an “essential function:”



- Written position description
- Amount of time spent performing the duty
- Employer’s judgment
- Terms of collective bargaining agreement
- Work experience of others who performed/are performing the job
- “Regular and predictable attendance”
- “Ability to get along with others”

G. WHAT ARE “REASONABLE ACCOMMODATIONS”

- A reasonable accommodation is one that “seems reasonable on its face, i.e., ordinarily or in the run of cases.”
- Look at the costs of providing the accommodation weighed against the benefits of the accommodation.

H. TYPES OF REASONABLE ACCOMMODATIONS

- Job restructuring
- Part-time or modified work schedules
- Consider light duty/transitional work program
- Reassignment to a vacant position with rate of pay for lower classification
- Acquiring or modifying equipment
- Changing exams, training materials, or policies
- Providing qualified readers or interpreters
- Leave of absence

I. UNDUE HARDSHIP ON EMPLOYER

- An employer is not required to provide a reasonable accommodation if doing so would impose an “undue hardship”
- Means significant difficulty or expense in providing the accommodation.
- Analysis focuses on the particular employer’s resources—and on whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.
- Not required to create new position
- Impact on other employees
- Impact on delivery of services
- Safety of employees and public

J. PRACTICE POINT: INFORMING OTHER EMPLOYEES

- ADA prohibits employers from disclosing an employee’s “medical” information (with limited exceptions)
- EEOC: Employer may “explain that it is acting for legitimate business reasons or in compliance with federal law”



K. INTERACTIVE PROCESS - PROACTIVE PROCESS

THE INTERACTIVE PROCESS IN 9 STEPS

- Knowledge or Notice of Disability
- Employee requests accommodation
- Employer examines the job and determines essential functions
- Employer consults with employee to learn about physical/mental abilities as they relate to the essential functions
- Employer makes individualized determination whether employee poses direct threat, and if threat can be removed by reasonable accommodation
- Employer and employee identify potential accommodations (interact)
- Employer considers whether the accommodation would impose an undue hardship, and other alternatives must be considered.
- If reasonable accommodation is available, employer provides it in a timely manner.
- Follow-up after providing accommodation

Consider having a questionnaire for the interactive process interview.

CASE EXAMPLES

Case Example – Who is “Disabled?”

Weaving v. City of Hillsboro, 763 F. 3d 1106 (9th Cir. 2014)

- Sergeant’s subordinates file several complaints about interpersonal conflicts with him. In response, City places Sergeant on paid administrative leave to investigate. While on leave, Sergeant notifies Police Department that he has been diagnosed with ADHD and requests “all reasonable accommodations.”
- City completes investigation and terminates Sergeant for his behavior. Sergeant sues City for discriminating against him for being disabled under the ADA. Sergeant claims his ADHD substantially limited two major life activities: “working” and “interacting with others.”
- Court rejects claim that he is disabled. The evidence showed that he was a technically competent police officer, so ADHD had not limited him in “working.” Evidence that he was ‘cantankerous’ and didn’t get along with coworkers was not sufficient to prove that he was “substantially limited” in the ability to interact with others.



Case Example – Who is “Disabled?”

Felkins v. City of Lakewood, No. 13-1415 (10th Cir. 2014)

- After breaking her leg in an accident at work, an emergency dispatcher tells her supervisor that she has a chronic condition that affects her bone tissue. Dispatcher has surgery, and gives employer a doctor’s note stating that she was receiving care but “had no chronic condition.” Dispatcher is then released with no restrictions.
- Employer allows dispatcher to return, use crutches and a wheelchair while her leg continues to heal, and phase in gradually to her regular 10-hour shift schedule. Dispatcher begins having unplanned absences, and is terminated for failing to report consistently for her shifts and inordinate leave usage. Dispatcher sues the employer for failure to accommodate her disability under the ADA.
- The court rejected dispatchers claim; the burden is on the employee to establish a disability, and she never produced any evidence that she had a chronic bone tissue condition. The notes she had presented to her employer contradicted the existence of a disability, and her employer was entitled to rely on that documentation.

Case Example – Interactive Process

Parsons v. Auto Club Group, 565 Fed. Appx. 446 (6th Cir. 2014)

- Employee told supervisor “that his apnea ‘was coming back again’ and that he would have to pay \$1,200 for the medical device he needed because Blue Cross would not cover it” just to let him know.
- “This is not enough to suggest that Parsons requested accommodation from Auto Club.”
- FURTHER: “When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be ‘too little, too late.’”

Case Example – Interactive Process

Bundy v. Chaves, 215 Fed. Appx. 759 (10th Cir. 2007)

- County prison guard has left arm amputated after a car accident. Guard exhausts his leave under the FMLA, but refuses to provide the County with documentation of his fitness-for-duty or an estimate of when he could return to work. Guard testifies that he assumed his doctor wouldn’t release him, so he just didn’t ask!



- County holds a hearing to discuss terminating Guard. He asks for a transfer to a Dispatch position in the Sheriff's office. The County denies the transfer and terminates him for failing to return to work. Guard sues the County, alleging that he was denied a "reasonable accommodation" for his disability under the A.D.A.
- Guard's claim fails, because he never provided any documentation about his ability or inability to return to work, despite the County's requests. A request for reasonable accommodation must give notice to the employer of his disability and the resulting limitations. Guard never triggered the "interactive process," so the County was not required to consider reassigning him.

Case Example – Interactive Process

Silva v. Hidalgo Police Department, 2014 U.S. App. LEXIS 13658 (5th Cir. 2014)

- SWAT team officer broke her leg while jogging and required an FMLA leave. When she exhausted her FMLA leave, she requested light or desk duty and stated that she could not return for at least a month. Officer's request was denied, and she submitted a doctor's note estimating that at least an additional one to three months of physical therapy were needed before she would be fit for duty. The City terminated her employment.
- The court held that the officer did initiate the interactive process by requesting light duty/desk duty because of her broken leg. However, the department was not required to create a new position for her, since there was no vacant position available. The department was also not required to give her "indefinite" leave where she could not provide a realistic estimate of when she would return.

Case Example – Reasonable Accommodation

Swanson v. Village of Flossmoor, 794 F. 3d 820 (7th Cir. 2015)

- Detective suffered a stroke and was placed on FMLA leave. The department allowed him to return to work part-time by using paid leave. After he began experiencing headaches, he asked to be placed on light duty or to work partial days -his requests were denied.
- Detective sued under the ADA, alleging that the department had failed to make reasonable accommodation.
- The court rejected his claim. The ADA does not entitle an employee to the accommodation of his choice, but to a reasonable accommodation. Here, allowing him to use his paid leave to work part-time was reasonable.



Case Example – Reasonable Accommodation

Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014)

- Firefighter of 9 years has off-duty accident that blinds his right eye. His doctor and city physician clear him to RTW without restrictions.
- Chief called city physician and convinced him to switch his opinion partially due to National Fire Protection Association (NFPA) guidelines making the operation of fire vehicles in an emergency mode with lights and sirens an “essential function.” – not cleared now.
- Firefighter requests to RTW without having to drive or, alternatively, switched to fire inspector duties. City declines both and terminates his employment.
- Were the national guidelines adopted? Employee said “no” – City supplied nothing in writing to verify.
- Is driving an emergency vehicle an essential function for a firefighter? Here, the job description said “may” operate emergency vehicles – not “shall.”
- Is having binocular eyesight an essential function for Firefighters?

Case Example - Did Disability Cause Termination? When is disability known to Employer

Jennings v. County of Monroe, No. 14-2545 (6th Cir. 2015)

- Assistant Director of dispatch center has a history of PTSD unknown to the employer. Director begins having marital problems, drinks a pint of tequila and takes someone else’s Xanax, and contemplates suicide (going so far as to place a gun barrel in his mouth).
- Placed on administrative leave to investigate his off-duty conduct and required to submit to a fitness-for-duty evaluation. The evaluator concludes he is not disabled, and the director’s own psychologist releases him to return to work. Director is terminated because for his off-duty conduct. Director sues, alleging that he was terminated because of his PTSD in violation of the ADA.
- Court rejects director’s claims. There was no evidence County knew of a causal connection between the behavior and his PTSD. Even if there was a connection and the employer knew of it, a disability does not immunize an employee from the consequences of disqualifying conduct that makes him unfit to perform his job.



Case Example - Alcoholism and the ADA

Blazek v. City of Lakewood, 576 Fed. Appx. 512 (6th Cir. 2014)

- An employee is caught drinking during his lunch break. He maintains a commercial driver's license, and his job duties require him to operate vehicles. He tells the employer that he is an alcoholic. The employer terminates the employee.
- Employee did not seek an accommodation for his disability (alcoholism) before he lost his job. Further, he lost his job for violation of the employer's alcohol policy, not for being an alcoholic. If the employee were not violating a conduct rule and had asked for an accommodation, the employer may have had a responsibility to provide it.
- Practice note – consider insurability of employee after OVI conviction

Case Example - Don't Lie About Medical Leave

Mattessich v. Weatherfield Township, 2016-Ohio-458 (11th Dist. Feb. 8, 2016)

- Depression-suffering police officer terminated for lying about medical leave.
- Fatal to disability discrimination claim.

L. ADA AND PREGNANCY

- The EEOC recently updated its guidelines on pregnancy, making clear that while pregnancy itself is not a disability, pregnant employees' impairments related to pregnancy affecting major life activities are covered by the ADA.
 - Complications
 - Bed rest
 - High Blood pressure

Case Example - Pregnancy and Light Duty Policies

Young v. UPS, 135 S. Ct. 1338 (2015):

- The Supreme Court decided that UPS's rule that employees could be assigned to light duty only for on-the-job injuries discriminates against pregnant women. The Court's rationale is the same as the EEOC guidelines.
- The EEOC's 2014 guidelines specify that employers must accommodate pregnant employees with light duty if the same is done for employees similar in their ability or inability to work.



Case Example - Pregnancy and Light Duty

U.S. v. City of Florence, KY, E.D.Ky Case No. 2:16-cv-00190, E.C.F. Doc. #5-1 (October 26, 2016) (Consent Decree):

- Historically, the City of Florence Kentucky police department assigned light duty positions to employees who were temporarily unable to perform their regular job duties, regardless of why the employee needed light duty. In April 2013, the City announced that light duty would be restricted to employees with on-the-job injuries and that employees with non-work-related illnesses, injuries or conditions demonstrate that they had “no restrictions” before they could return to work.
- Two female police officers requested light duty when they were unable to perform their duties as patrol officers due to their pregnancies. The City denied the requests and required each to take leave, but continued to grant light duty to other employees who were similar in their ability or inability to work.
- The officers filed a complaint with the EEOC, followed by a lawsuit challenging the discriminatory light duty policy based on the Supreme Court’s ruling in Young v. United Parcel Service.
- The plaintiffs and city ultimately settled the case in October 2016. Under the settlement, the City must adopt new policies that allow accommodations, including light duty, for pregnant employees and employees with disabilities. In addition, the City must train all supervisors, administrators, officers and employees who participate in making personnel decisions related to light duty and other accommodation requests.
- The City also agreed to pay \$135,000 in compensatory damages and attorney’s fees as well as restore the paid leave that the female officers were forced to use.



M. BUILD YOUR DEFENSE FOR ADA CLAIMS

- Legitimate Business Reason
- Undue Hardship – on department, other employees, public
- Direct Threat – to self or others
- Provided a “Reasonable Accommodation”
- Engaged in Good Faith in the Interactive Process
- Not a “Qualified Person with a Disability”
 - Request employee to identify accommodations
 - Can’t perform job even with accommodation
- Accommodation/interactive process – what was considered
- Review policies
 - Leaves
 - FMLA and ADA
 - Collective bargaining agreement
- Essential Job Functions in Job Descriptions
- Review all similarly situated discipline/leave requests
- Consider alternate positions, light duty, transitional work
- Review data regarding performance: performance evaluations, work reports, statistics, leave use, etc.,
- Training of managers and employees to understand FMLA and ADA
- Investigations
 - Identify facts specific to the current matter and distinguish from prior matters



II. FMLA – FAMILY AND MEDICAL LEAVE ACT

A. QUALIFYING REASONS FOR FMLA

- Birth or placement of a child for adoption or foster care
- A “serious health condition” of the employee or a close family member
- Qualifying exigencies of call to active service of family member
- To care for a military service member who was injured in the line of duty if employee is the “next of kin”

B. WHAT IS A “SERIOUS HEALTH CONDITION”

Any illness, injury, impairment, or physical or mental condition that also involves:

- Inpatient care;
- Any period of incapacity of more than 3 calendar days and ALSO involves:
 - 2 or more treatment by health care provider OR
 - Treatment by provider on 1 occasion that results in a “regimen of continuing treatment under supervision of a health care provider”
- Any period of incapacity due to pregnancy/prenatal care
- Chronic serious health condition that involves all of the following:
 - Periodic visits for treatment to provider;
 - Continue over extended time period;
 - May be episodic rather than continuing in nature
- Any period of incapacity which is permanent/long term and where treatment may not be effective (terminal stages/Alzheimer’s)
- Absence for restorative surgery after accident/injury OR for a condition that would likely result in absence of more than 3 days at a later date without medical intervention (chemo/dialysis)

C. EXAMPLES OF SERIOUS HEALTH CONDITION

SERIOUS HEALTH CONDITION” PROVIDED THAT A CATEGORY (ABOVE) APPLIES:	NOT A SERIOUS HEALTH CONDITION, UNLESS THERE ARE COMPLICATIONS THAT MEET A CATEGORY (ABOVE):
<ul style="list-style-type: none"> • Pregnancy and prenatal care • Miscarriage • Asthma • Diabetes • Epilepsy • Alzheimer’s Disease • Stroke • Terminal stages of a disease • Most Cancers (chemo/radiation) • Severe arthritis • Kidney disease (dialysis) 	<ul style="list-style-type: none"> • Outpatient Cosmetic Treatments (e.g., acne and minor plastic surgery) • Common cold • Influenza • Ear aches • Upset stomach • Minor ulcers • Headaches (other than migraines) • Routine dental problems • Routine orthodontics problems • Gum disease



<ul style="list-style-type: none"> • Heart Attacks • Heart bypass/valve operations • Severe back injuries • Spinal injuries 	<ul style="list-style-type: none"> • Routine annual physical exams • Routine eye exams • Routine dental exams • Learning disability (ADD, ADHD)
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D. EMPLOYER RIGHTS

- Failure to provide notice for a foreseeable leave?
- 2nd and 3rd opinions on medical certification
- Concurrent counting of paid leave
- Repayment of health care premiums if not return
- Fitness-for-duty before return to work.

E. EMPLOYER OBLIGATIONS

- Posting requirements
 - May 2016 – DOL issued new FMLA poster!
- Designation requirements
 - 5 business days after employee supplies notice of need
 - Retroactive permitted if “does not cause harm or injury to the employee.”
- Handbooks and other notices
 - General notice of rights to all employees in handbook
 - Personal notices to employees requesting FMLA
- Record keeping

F. ADA/FMLA OVERLAP

- EEOC and DOL position:
 - “A single request for FMLA leave is enough to put the employer on notice of a potential need for an ADA job accommodation.”
- Leave of absence may be a “reasonable accommodation” under the ADA
- So, if I grant 12 weeks of FMLA to a person who may qualify as “disabled” under ADA – am I good?
 - Extension of leave beyond normal limits must also be considered under ADA accommodation standards

G. INTERPLAY OF OTHER LEAVES

- Sick and Vacation
- Injury Leave
- Workers Compensation
- Leave of Absence Policy
- Short-term/long-term disability
- Disability Separation



H. INVESTIGATING FMLA LEAVE ABUSE

- Use social media as an investigation tool
- Utilize private investigators
- Take advantage of Employment Policies
- Employees must follow customary paid leave call-in policy of employer regardless of FMLA
- Dishonesty
- Investigate excessive leave and suspicious patterns
- Leave Abuse Policy

I. BUILD YOUR DEFENSE

Establish FMLA Defenses:

- Good faith belief of abuse
- Same-decision anyway
- No prejudice to employee
- Not a “serious health condition” under FMLA
- Consider if an ADA accommodation issue exists

J. DOCUMENT

- FMLA notices, requests, approvals
- Medical Excuses
- Policies
- Training of managers and employees
- Any Investigation
- Work performance of employee

CASE EXAMPLES - Dealing With Leave Abuse – and FMLA

Seeger v. Cincinnati Bell (6th Cir. 2012)

- Employee suffered herniated disc. Granted FMLA and paid short term disability. Employer offered him light duty first but employee declined “too disabled to work.”
- Several days later, he was seen at Oktoberfest. Upon questioning – he admitted to walking over 10 blocks and drinking beer.
- Employer had “leave fraud” policy and fired him.
- Result? “Reasonable belief” in FMLA abuse is enough. “Legitimate business reason” established



Gunzburger v. Sheriff of Broward County, Fl., No. 09-14445 (11th Cir. 2010)

- Just days after being counseled for poor performance, a Sheriff's department investigator was diagnosed with cytomegalovirus and then stayed off work for several weeks.
- Investigator spent two of those weeks entertaining a house guest and visiting Florida tourist attractions. Although the employee submitted several doctors' notes during the leave, none verified that the condition was serious enough to render her unable to perform duties. She was subsequently terminated.
- The court found that the plaintiff's activities were inconsistent with a need for FMLA leave, and she did not provide adequate medical proof of a serious condition.

Pamela Murphy v. Ohio State University, No. 12-4391 (6th Cir. 2013)

- College public safety dispatcher receives citation from Police Officer for disobeying the officer's command and driving over a curb and grassy area.
- Dispatcher began an unrelated FMLA leave several days later. College investigated the citation incident during her leave, and during investigation it learned that she was working part-time for a different employer during the FMLA leave. College issued a 3-day unpaid suspension.
- Dispatcher filed a lawsuit alleging several counts, including retaliation for having taken FMLA leave.
- Court held that the fact that the investigation took place during the FMLA leave does not make it pretextual. The dispatcher failed to show that college's proffered reasons for investigating and disciplining her were pretextual and were not honestly-held.

Lineberry v. Richards (E.D. Mich, 2013)

- An RN at Medical Center was approved for FMLA due to lower back and leg injury.
 - Dr. certified substantial lifting and mobility restrictions.
- Result? Termination affirmed
 - "Reasonable belief" in FMLA abuse is enough
 - "Legitimate business reason" established



III. INQUIRIES INTO EMPLOYEE'S ILLNESS OR DISABILITY

Recent court decisions have suggested that seemingly innocuous questions about an employee's reasons for taking sick leave, even well-intentioned questions of concern, may be construed by a court as an improper inquiry into an employee's disability, violating the ADA.

Private employer's policy requiring employees to provide a doctor's note identifying the nature of a health-related absence for such absences to be excused violated the Americans with Disabilities Act. EEOC v. Dillard's, Inc.

However, other courts have found that requiring employees to disclose the "nature of their illness" to be permissible.

Public employer's policy requiring public employees who return to work after three or more days of sick leave to submit a doctor's statement to their immediate supervisor stating the "nature of the illness."

The lower district court found in favor of the employees but on appeal, the Sixth Circuit held that the City's policy of requiring employees to furnish their immediate supervisors with information regarding a general diagnosis following periods of sick leave did not trigger the protection of either the ADA or the Rehabilitation Act. The Sixth Circuit found that the inquiry by the City's policy was not invasive enough to determine whether the employee actually had a disability and/or the nature or severity of that disability.

As such, the City's policy requiring employees to disclose the "nature of their illness" to their supervisors was found to be permissible. *Lee et al. v. City of Columbus, et al.*, Case No. 09-3899 (6th Cir. 2011).

As a result, employers should be cautious about inquiring into the nature of an employee's illness. Even well-intentioned inquiries could violate the ADA, but minimally invasive questions should be permissible. Employers are encouraged to seek legal advice prior to requesting such information from its employees.



MULTI-TRACK ANALYSIS

