

# Navigating the Regulatory Square

## *FMLA, ADA, Workers' Comp & Coronavirus*

Presented by:

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# Roadmap

- Statutory Framework
- Eligibility Overview
- Leave Entitlement
- Medical Certification
- Key Definitions
- Job Protection / Reinstatement
- FAQ – Areas of Overlap
- Issues related to Coronavirus

# Statutory Framework - FMLA

- Family and Medical Leave Act
- Provides unpaid, job-protected leave for **specified family and medical reasons**
- Enforced by the Department of Labor
- Applies to:
  - Private-sector employers with 50+ employees in 20 or more workweeks in the current or preceding calendar year
  - Public agencies (local, state, Federal)
  - Public or private elementary or secondary schools
- Provides up to 12 weeks of leave in a 12-month period for **eligible employees**

# Statutory Framework – ADA & ADAAA

- Americans with Disabilities Act
- Federal civil rights law designed to prevent discrimination and enable individuals with disabilities to participate fully in all aspects of society
- Enforced by EEOC
- Applies to:
  - Employers with 15+ employees for each of 20 or more calendar weeks in current or preceding year
- Employee **eligibility** begins immediately (job applicants)

# Statutory Framework – ARK. WORK COMP.

- Provides coverage for reasonably necessary medical care to employees who get hurt or get sick because of a job-related injury
- Also may provide certain indemnity benefits to employees who are unable to work because of a job-related injury or illness
- Enforced by Arkansas Workers' Compensation Commission
- Applies to: most employers in Arkansas with 3 or more employees are required to have WC insurance
- Employee **eligibility** begins immediately

# Employee Eligibility

## FMLA

Employee who has worked:

- **12 months**  
(nonconsecutive)
- **1250 hours**
- at worksite with **50+ employees** within 75-mile

## ADA

Employee must be person w/ a disability who, with or without **reasonable accommodation**, can perform **essential functions** of the job. Immediate eligibility; applies to job applicants.

## WC

Employees with accidental injuries which arise out of, and in the **course of employment**, resulting in internal or external harm to the body, which are caused by a **specific incident** and are identifiable by time and place of occurrence.

# Leave Entitlement

## FMLA

“Eligible” employee may take up to 12 work weeks of leave during any 12-month period for:

*(see next slide)*

## ADA

No automatic leave rights, but leave may be a reasonable accommodation.

- No limit on amount but generally cannot be for “indefinite period”
- Leave may be limited or denied if it would cause “undue hardship” on employer

## WC

No “right” to leave but inherently is part of injured worker receiving reasonably necessary medical treatment. WC also entitles injured worker to TTD benefits if employee is totally incapacitated from earning wages.

# Leave Entitlement

## FMLA

Twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a **serious health condition** that makes the employee unable to perform the essential functions of his or her job;



# Key Definitions - FMLA

## “Serious Health Condition”

- Illness, injury, impairment, or physical or mental condition, that involves:
  - Incapacity connected with inpatient care;
  - Period of incapacity requiring absence of 3+ calendar days that also involves continuing treatment
  - *Others*

# Employee Eligibility

## FMLA

Employee who has worked:

- **12 months**  
(nonconsecutive)
- **1250 hours**
- at worksite with **50+ employees** within 75-mile

## ADA

Employee must be person w/ a **disability** who, with or without **reasonable accommodation**, can perform essential functions of the job. Immediate eligibility; applies to job applicants.

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Employees with accidental injuries which arise out of, and in the **course of employment**, resulting in internal or external harm to the body, which are caused by a **specific incident** and are identifiable by time and place of occurrence.

# Key Definitions - ADA

## “Disability”

- Physical or mental impairment that materially (substantially) limits 1 or more **major life activities**;
- Has a record of such an impairment; or
- Is regarded as having such an impairment

# Key Definitions - ADA

## “Disability”

### “Major Life Activities” – Examples

- caring for oneself
- performing manual tasks
- walking, seeing, hearing, speaking, breathing
- learning, reading
- working
- sitting, standing, bending, lifting, reaching
- thinking, concentrating, interacting
- sleeping
- eating

# Key Definitions - ADA

## “Reasonable Accommodation”

- Any modification or adjustment to a job or the work environment that will enable a qualified employee with a disability to perform essential job functions
- *UNLESS doing so would result in an **undue hardship** or pose a direct threat to the health or safety of the individual or others*

# Key Definitions - ADA

## “Reasonable Accommodation” – Examples

- Change in equipment or tools/assistive device
- Modified work or break schedule
- Working from home
- Reassignment
- Leave of absence

*\*Not required to fundamentally change position*

*\*Not required to reallocate essential job functions*

# Leave Entitlement

## FMLA

“Eligible” employee may take up to 12 work weeks of leave during any 12-month period for:

*(see next slide)*

## ADA

No automatic leave rights, but leave may be a **reasonable accommodation**.

- No limit on amount but generally cannot be for “indefinite period”
- Leave may be limited or denied if it would cause “**undue hardship**” on employer

## WC

No “right” to leave but inherently is part of injured worker receiving reasonably necessary medical treatment. WC also entitles injured worker to TTD benefits if employee is totally incapacitated from earning wages.

# Key Definitions – ADA

## “Undue Hardship”

- May exist when providing a reasonable accommodation would result in significant difficulty or expense, based on the resources and operation of the employer.
- Individualized assessment (general conclusions not good enough) based on various factors:
  - Nature & cost of accommodation
  - Overall financial resources of employer (size, # employees, etc.)
  - Type of operation of employer
  - Impact of accommodation on operations
  - Usually – high cost not enough



# Key Definitions – ADA

## “Undue Hardship” – Examples

- Loss in productivity due to using less efficient workers (temps, overtime workers, etc.)
- Forced to defer projects
- Significantly increased burden on management to readjust work or schedules in light of absent employee

# Employee Eligibility

## FMLA

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Employee must be person w/ a **disability** who, with or without **reasonable accommodation**, can perform essential functions of the job. Immediate eligibility; applies to job applicants.

## WC

Employees with accidental injuries which arise out of, and in the **course of employment**, resulting in internal or external harm to the body, which are caused by a **specific incident** and are identifiable by time and place of occurrence.

# Key Definitions – ARK. WORK COMP.

## **“Arising out of, and in the course of, employment”**

- Injury “arises out of” employment if employee is carrying out the employer’s purpose or advancing employer’s interests
- Injury occurs “in the course of” employment if it occurs within the time and space boundaries of employment
  - Generally, no recovery for “coming and going”

# Leave Entitlement

## FMLA

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*(see next slide)*

## ADA

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## WC

No “right” to leave but inherently is part of injured worker receiving reasonably necessary medical treatment. WC also entitles injured worker to TTD benefits if employee is totally incapacitated from earning wages.

# Medical Certification

## FMLA

Employee must provide certification to support medical leave within 15 days of employer request

Can contact provider to authenticate and clarify medical condition but protocols for obtaining information are strict

Employer may require "fitness-for-duty" certification to RTW

## ADA

In order to assist with interactive process, a medical exam is permitted but must be job-related and consistent with business necessity.

- Ability to perform essential job functions
- Limitations interfering with job performance
- Recommended accommodations
- Duration of disability or need for accommodation

## WC

Medical exams permitted

AWCC has discretion to order IME under A.C.A. 11-9-511

Injured worker entitled to one-time change of physician

# Job Protection / Reinstatement

## FMLA

Employee must be reinstated to same or **nearly identical** position (with few minor exceptions)

“Nearly identical:”

- Identical pay & benefits
- Substantially similar duties & same general skill
- Same general schedule and geographically proximate worksite

## ADA

Entitled to return to same job, unless:

- **Undue hardship** to hold open
- No longer perform essential job functions (w/ or w/o reasonable accommodation)
- If reassigned as reasonable accommodation, job need not be same pay/benefits

## WC

No specific requirement for employer to hold job open while employee out with WC injury.

But cannot:

- Discharge for filing WC claim
- Refuse to RTW without reasonable cause

# FAQ in the Areas of Overlap

**Q:** Does an employee with a “Serious Health Condition” always have a “disability” under the ADA?

**A:** Not necessarily. A SHC can be, but isn’t always, a disability. Remember the distinction:

- ADA Disability – an impairment that substantially limits one or more major life activities.
- FMLA SHC – an illness, injury, impairment or physical or mental condition that requires either: 1) inpatient care OR 2) continuing treatment by a provider that results in a period of incapacity of more than 3 consecutive days absence from work, plus subsequent treatments

# FAQ in the Areas of Overlap

**Q:** Are disabled employees entitled to FMLA leave as a reasonable accommodation?

**A:** Not necessarily. Eligibility under each statute is different and distinct. An employee who is disabled under the ADA may not have a SHC under FMLA, may not have met the length of service requirements under FMLA, or the employer may not be a covered employer under the FMLA. Employees must separately qualify under both statutes.



# FAQ in the Areas of Overlap

**Q:** If a disabled employee requests leave as a reasonable accommodation, can the employer offer an alternative that allows the employee to continue working?

**A:** Maybe. An employee can be offered an alternative accommodation so long as it is effective at enabling the employee to perform essential job functions. BUT if the employee is eligible for leave under FMLA and has a SHC, the employee is entitled to take FMLA leave even if the alternative accommodation would permit him/her to work.

# FAQ in the Areas of Overlap

**Q:** If an employee gets hurt on the job, how do I handle light duty assignments under each of the three statutes?

**A:** **ADA** – light duty may be provided as a reasonable accommodation if the work injury qualifies as a “disability”

**FMLA** – if employee is FMLA eligible, the employee can reject light duty and take leave instead

**WC** – if an employee’s physician assigned work restrictions that would allow the employee to work light duty and the employee rejects the assignment, entitlement to indemnity benefits could be impacted

# FAQ in the Areas of Overlap

**Q:** How do I handle requests for intermittent leave under the statutes?

**A:** **ADA** – Reduced working hours or permitting an employee to take time off as needed may be a reasonable accommodation under the ADA if it does not result in an undue hardship on the employer

*\*if undue hardship would result, employer must follow process in seeking reassign employee*

**FMLA** – permitted but to better accommodate the need for intermittent leave, an employee may be temporarily transferred to an available position with equivalent pay and benefits

# FAQ in the Areas of Overlap

**Q:** Can an employer run FMLA leave concurrent with time off for a WC injury?

**A:** Yes. In fact, failure to designate leave resulting from a WC injury as FMLA leave can result in an employee getting more leave than they would otherwise be entitled to.

# CORONAVIRUS DISEASE 2019 (COVID-19)

FIVE STEPS AN EMPLOYER CAN TAKE RIGHT NOW TO PREVENT THE SPREAD OF CORONAVIRUS:

- Communicate to all employees the need for washing hands and avoiding touching eyes, nose, mouth
- Take care to regularly disinfect common areas like breakrooms, kitchens, and bathrooms
- Place hand sanitizers with at least 60% alcohol in reception areas and conference rooms
- Check in with employees and take time to notice whether anyone may be displaying signs of illness
- Encourage people to go home if they are sick

# CORONAVIRUS

Common signs of Coronavirus infection include:

- respiratory symptoms,
- fever,
- cough,
- shortness of breath, and
- breathing difficulties.

# CORONAVIRUS

## **PREVENTIVE ACTIONS RECOMMENDED BY CDC:**

- Avoid close contact with people who are sick.
- Avoid touching your eyes, nose, and mouth.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces using a regular household cleaning spray or wipe.

# CORONAVIRUS

## PREVENTIVE ACTIONS RECOMMENDED BY CDC:

- Follow recommendations for using a facemask
  - People who are well do not need to wear a facemask to protect themselves from contracting Coronavirus
  - Facemasks should be used only by people showing symptoms of Coronavirus to prevent the spread of the disease. Facemasks should also be worn by health workers and people caring for with Coronavirus.
- Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing



# CORONAVIRUS – FMLA CONCERNS

- When an employer concludes that an employee may pose a health threat to other employees, the employer can request that the employee stay home for the COVID-19 incubation period, which is currently thought to be fourteen (14) days.
- Employees who refuse to come to work out of fear of catching COVID-19 do not typically qualify for FMLA leave.
- The CDC recommends that employees who appear to have acute respiratory illness symptoms (e.g. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately.
- Employers should not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
- Employers should maintain flexible policies that permit employees to stay home to care for a sick family member.

# CORONAVIRUS – WORKERS' COMP

- If the employees work required them to be exposed to persons infected with Coronavirus, then employers may be responsible for covering the costs of reasonable and necessary medical care, temporary total disability benefits, and permanent disability (if any).
- If an employee incidentally contracts COVID-19 from a co-worker, there likely will be no workers' compensation liability.

# CORONAVIRUS – ADA CONCERNS

- To avoid implicating the ADA, it is best to continue to apply leave policies and other workplace policies in a uniform, equitable, and neutral fashion
- Pursuant to Section 1630.2(r) of the ADA, an employer may require that an employee undergo a medical evaluation if the employee's condition could pose a "direct threat" to the workforce due to the employee's medical condition.
- A "direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
- When an employer is determining whether an individual is a direct threat to the workforce, the employer must make a context-specific inquiry and look to
  1. the duration of the risk;
  2. the nature and severity of the potential harm;
  3. the likelihood that the potential harm will occur; and
  4. the imminence of the potential harm.

# CORONAVIRUS – ADA CONCERNS

## EEOC GUIDANCE IN THE EVENT OF A GLOBAL HEALTH EMERGENCY:

- if the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations.
- if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

# CORONAVIRUS – BE PRO-ACTIVE

- During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.
- Employers should consider performing routine cleaning of all frequently touched surfaces with disinfect cleaning agents.

# CORONAVIRUS – BE PRO-ACTIVE

- An employer could place posters that encourage staying home when sick, cough and sneeze etiquette, and hand washing hygiene.
- Employers can regularly update employees on the relative risk of an outbreak in the employer's area.
- Educating employees on what symptoms to look for and providing links to the World Health Organization and CDC websites may be helpful.

# CORONAVIRUS – BE PRO-ACTIVE

Employers should review their remote work or telecommuting policies in preparation for the possibility of workforce reductions due to illness.

To minimize the impact an outbreak may have, employers may want to ensure seamless transitions to remote working in the event the outbreak leads to voluntary or mandatory periods of quarantine.

# Additional Questions?

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