WHITEPAPER

Understanding the
Americans with Disabilities Act
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Information provided in this guide is not intended to be used as legal guidance. Legal counsel should always be consulted when considering or implementing changes to leave processes and policies.
INTRODUCTION

Complying with the Americans with Disabilities Act (ADA) has long been one of the greatest challenges for employers when addressing illness, injury and disability in the workplace. As a stand-alone piece of legislation, the ADA can be confusing enough – so much so that the U.S. Equal Employment Opportunity Commission frequently releases updated guidelines on its interpretation.

What’s even more confusing, however, is understanding when and how an employee’s case can transition from leave under the Family and Medical Leave Act (FMLA) to accommodation under the ADA – especially since the ADA can also support “leave as a reasonable accommodation.”

In order to help employers make sense of the links between these two important pieces of federal legislation, this whitepaper will:

- Provide an overview of the ADA
- Clarify some important definitions
- Describe how a case can transition between the FMLA and the ADA
- Review some common mistakes that employers make in managing such cases
- Outline how technology can help employers manage the process according to best practice, improve compliance and reduce the risk of litigation

1990
Americans with Disabilities Act (ADA)

1993
Family and Medical Leave Act (FMLA)

2008
Americans with Disabilities Amendments Act (ADAAA)
WHAT IS THE AMERICANS WITH DISABILITIES ACT?

Enacted in 1990, the Americans with Disabilities Act (the ADA) is a federal law that prohibits employment discrimination based on disability and is designed to support disabled employees in continuing or returning to work. Administered by the Equal Employment Opportunity Commission (EEOC), the ADA is intended to prevent employers from discriminating against qualified individuals with disabilities in employment-related activities including hiring, training, firing and advancement.

In 2008, the ADA Amendments Act (ADAAA) clarified and broadened the term “disability,” increasing the number of individuals who are covered under the Act. However, since there is no official list of disabilities, employers often struggle when determining whether an employee might be eligible for an accommodation under the ADA.

WHO DOES IT COVER?

The ADA covers all government agencies and labor unions as well as all private employers with more than 15 employees. Persons with disabilities are employees with physical or cognitive impairments who can perform the essential functions of the job in question, but who may also require a reasonable accommodation.

Let’s take a look at those tricky EEOC definitions, which are crucial to understanding how the EEOC enforces the ADA.

DEFINITIONS

Under the ADA, a disability is an impairment that substantially limits at least one major life activity such as walking, sitting or breathing. A person is also disabled if they have a record of such an impairment, or if they are regarded as having such an impairment.

Did You Know?

- The number of charges alleging disability discrimination grew from 15,000 in 1993 to nearly 26,000 in 2013.

- In fiscal year 2013, the EEOC filed 51 suits alleging ADA violations, up 15% from the previous year.

- The EEOC reports having obtained $109.2 million for victims of disability discrimination in fiscal year 2013.

- Anxiety disorder, depression and diabetes were some of the most common disabilities referenced in ADA lawsuits in 2013.
In order to be covered under the ADA, however, an employee must be able to perform the essential functions of their job with or without reasonable accommodation. This means, for example, that a disabled job candidate must satisfy an employer’s job requirements regarding educational background and skills, and that a disability must not prevent an employee from performing the basic tasks that are essential to the job.

For instance, a person who is legally blind may not be capable of operating a vehicle, and therefore may not be qualified to work as a driver. However, a person with a less severe visual impairment may still be able to drive, but may require a reasonable accommodation (for instance, they may need to avoid nighttime driving). The second employee could still be covered under the ADA in this case, because they can perform the essential function of driving.

A function may be considered essential to a job if one or more of the following is true:

- The job exists to perform that function
- The function is highly specialized
- Few employees are able to perform that function
Being able to assess an employee’s abilities in comparison to the essential functions of their job is key to determining if they are covered by the ADA. If a disabled employee is capable of performing the essential job functions, they can be considered for a reasonable accommodation, which is defined as a change in the typical work environment that enables an individual with a disability to enjoy equal employment opportunities.

Accommodations could include:

- Modified duty (job restructuring)
- Modified schedule
- Modified workplace policies
- Reassignment to a vacant position
- Leave

As an employer, you do not need to provide an employee with a reasonable accommodation unless they have requested one, although you are permitted to ask if they need one. However, if the disability is obvious (for example, the employee is in a wheelchair), you should propose an accommodation without their prompting.

To find the best reasonable accommodation for a particular situation, you must engage in an interactive process with the individuals involved. If multiple accommodation options are available, you can choose the option that is less expensive or easier to provide.

You cannot require an employee to accept an accommodation. However, if the employee cannot perform an essential function of the job without the accommodation, they may no longer be considered qualified for the job.

An employer is not required to provide an accommodation if it would cause undue hardship, which is defined as significant difficulty or expense. Note, however, that in supporting your claim for significant expense, the EEOC will take into consideration not just the individual circumstances, but also the resources available to your organization. In supporting a claim for significant difficulty, you’ll need to justify that the accommodation is unduly extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business.

Six Steps to the Interactive Process:

1. Analyze the job and determine essential functions.
2. Identify job-related restrictions and limitations.
3. Identify possible accommodations.
4. Assess the feasibility of providing these accommodations.
5. Implement the “most appropriate” accommodation.
6. Regularly monitor and follow up with those involved to determine the effectiveness of the accommodation.
It is also crucial to clearly document the interactive process by keeping records of all notes and correspondence between the individuals involved in the case. Consistency is also key here – pre-filled forms and auto-generated correspondence can go a long way in proving that your organization administers the ADA fairly and equitably.

NAVIGATING BETWEEN THE FMLA AND THE ADA

While professionals often speak of the “interaction” between the ADA and the FMLA, the two laws do not technically interact. Instead, it is more useful to think about an employee’s case as transitioning from leave under the FMLA to accommodation under the ADA. There are two principle ways in which this can happen. But before we get to those, let’s take a look at the basic differences between the two laws.

Firstly, there are several key differences between the benefits provided to employees under these laws. While both acts provide leave and job protection, only the ADA covers accommodations other than leave, and only the FMLA provides for the continuation of health benefits.

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<thead>
<tr>
<th></th>
<th>FMLA</th>
<th>ADA</th>
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<tr>
<td>Leave</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Accommodation</td>
<td></td>
<td>✓</td>
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<td>Continuation of health benefits</td>
<td>✓</td>
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<tr>
<td>Job protection</td>
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The most significant difference between the two laws is that FMLA leave is an entitlement, while an accommodation under the ADA is not. If an employee qualifies under the FMLA, they must be provided with up to 12 weeks of unpaid leave, whereas the ADA requires more process to determine eligibility.
With this in mind, it’s important to be aware of their different eligibility requirements:

<table>
<thead>
<tr>
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<th>FMLA</th>
<th>ADA</th>
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<tbody>
<tr>
<td><strong>Number of employees</strong></td>
<td>Covers employers with more than 50 employees within 75 miles, as well as all state and local government employees.</td>
<td>Covers employers with 15 or more employees, as well as all state and local government employees.</td>
</tr>
<tr>
<td><strong>Working requirements</strong></td>
<td>Employee must have worked for 1,250 hours during the 12 months prior to the start of leave, and must have worked for 12 months (cumulatively) for the employer.</td>
<td>No requirements.</td>
</tr>
<tr>
<td><strong>How much leave is an employee entitled to?</strong></td>
<td>12 workweeks within a 12 month period.</td>
<td>No set amount. An employer must provide the amount required to address the employee’s needs (if leave is the agreed upon accommodation).</td>
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Because of their differing eligibility requirements, it is important to determine separately if an employee is eligible for ADA leave and FMLA leave. For example, they may not meet the FMLA requirement for length of service, but still be eligible for leave as an accommodation if they have a qualifying disability under the ADA.

Now back to those two ways your employee might transfer between coverage under the two acts:

1. **Leave of absence as a reasonable accommodation**

   If you cannot find a reasonable accommodation that will allow a disabled employee to remain at work, you need to consider offering leave as a reasonable accommodation. Unlike the FMLA, ADA leave does not have a limit and the employee does not have to return to work until they have fully recovered from the condition that prevents them from working, unless the employer can prove that the employee’s leave is an undue hardship for the organization.

   If an employee is covered by both acts, he or she has the right to protection under whichever law gives them greater rights or benefits. For example, they have the right to take a leave of absence under the FMLA even if they could continue working with an ADA accommodation.
2. **Returning an employee to work after an FMLA leave**

If an employee has exhausted their FMLA leave, but is unable to fully return to work because of a disability, you must consider them for an ADA accommodation, which might include extending their leave. An employee on FMLA leave could also request an accommodation under the ADA to facilitate their return to work before they have used all 12 weeks of FMLA leave.

**Common mistakes**

So where do employers often go wrong? Here are two of the most common mistakes:

1. If an employer determines that an employee is ineligible for FMLA leave, they must reconsider the case to determine eligibility for ADA coverage. For instance, an employer may deny an employee FMLA leave because they do not meet the eligibility hours required under FMLA, without considering that the ADA has no such requirement. It is therefore important for your leave process to include a mechanism ensuring that employees requesting leave are also considered for an accommodation review.

2. An employer cannot penalize an employee with a disability using company-wide policies that disadvantage them due to their accommodation. For example, if a company’s policy is to terminate an employee who misses a certain number of days, they cannot apply this policy to an employee who has missed work because of his or her disability. Similarly, if your company normally terminates sales representatives who do not make quota, you cannot terminate a disabled employee who cannot meet quota due to the number of days they took off under the ADA.
EMPLOYER OBLIGATIONS CHECKLIST

Leave managers should be aware of their obligations under the ADA in order to minimize the risk of non-compliance and potential litigation. Use this checklist to keep track of your responsibilities for each case that involves a potential ADA accommodation. In the next section, we’ll talk about software solutions that help automate tasks and provide updates and reminders, so that you don’t have to manually keep track yourself.

<table>
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<th>Employee support and awareness</th>
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<tr>
<td>Ensure employees with disabilities have equal access to information communicated in the workplace.</td>
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<td>Provide support to employees in accessing their rights under the ADA.</td>
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<td>Provide access to guidance and policies to help front line personnel identify, direct and respond to potential ADA events.</td>
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<th>Accommodation</th>
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<td>Support the modification of usual and customary jobs.</td>
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<tr>
<td>Consider reassignment to a vacant position by comparing an employee’s current limitations to available jobs.</td>
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<tr>
<td>Support job restructuring, by altering when and/or how functions are performed.</td>
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<tr>
<td>Document the interactive process of determining ADA accommodations.</td>
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<tr>
<td>Capture and clearly document modifications to an employee’s work space as a reasonable accommodation.</td>
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<th>Leave as an accommodation</th>
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<td>Recognize the need to consider leave as an accommodation upon exhaustion of leave rights or when employee otherwise has no right to FMLA leave.</td>
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<td>Support a reduced schedule as a reasonable accommodation.</td>
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<th>Other</th>
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<td>Capture and clearly document an employee’s restrictions, the essential functions of their job, and the impact of their restrictions on the essential functions.</td>
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<tr>
<td>Provide a complete and accurate audit trail of the fulfillment of employer responsibilities under the ADA.</td>
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<td>Clearly identify the nature of temporary assignments and ensure regular interactive discussion to prevent these accommodations from becoming permanent.</td>
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HOW CAN TECHNOLOGY HELP WITH THE ADA?

While your responsibilities under the ADA and the FMLA may seem overwhelming, there are many opportunities to take advantage of a compliance-driven software solution that will provide you with decision support and automated workflow.

Technology can help you manage the ADA in several ways, and it’s important to find software that will address your needs and provide the necessary support.

The right software will:

- Assess employees’ abilities and allow you to compare these to the essential functions of their job.
- Trigger a formal ADA review at key points within the leave process, and trigger an accommodation review when medical restrictions are identified.
- Guide you through the process of determining whether an employee is eligible for an accommodation under the ADA and identify the steps you need to take.
- Automatically generate correspondence and notify you as deadlines approach to protect your organization from potential lawsuits.
- Clearly document the interactive process to comply with the ADA.
- Track alternative job placement efforts under the ADA.
- Maintain copies of all notes and correspondence with a full audit trail.

By taking advantage of such tools, you can help ensure that you are managing leave in compliance with both the FMLA and the ADA, enforce consistent and equitable processes, and protect your organization from the risks and costs of litigation.
NEXT STEPS

The number of ADA cases filed with the EEOC shows no sign of decreasing – since 1992, the number of charges alleging disability discrimination have increased by over 73 per cent. And with the recent release of more EEOC documents regarding the ADA, such as the Pregnancy Discrimination Enforcement Guidance, employers can only expect that the agency will continue to expand its efforts to enforce the ADA in the future.

It is therefore critical for employers to be aware of their rights and responsibilities under both the ADA and the FMLA. Protect your organization by speaking to your legal counsel and partners and looking into ways to ensure you are using best practices within your organization. By remaining aware of best practices and leveraging the right technological solutions, your company can find peace of mind in the face of even the most complex legislation.

ABOUT PRESAGIA

Presagia provides Software as a Service (SaaS) absence management solutions to employers and Human Resources Outsourcing (HRO) providers. We monitor and manage more than 450 pieces of federal and state leave legislation in our proprietary Compliance Engine, including the FMLA and the ADA, and update the system on a continuous basis. Our software automates leave processes to increase efficiency, minimize absence, reduce cost and above all improve compliance.

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