

OSC | 11
Ohio Safety Congress & Expo



#521 Recent amendments to the Americans with Disabilities Act and Ohio law

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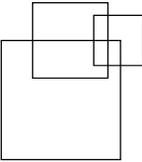
Wednesday, March 30, 2011
8 to 9 a.m.



Continuing Nursing Education Disclosures

- o **Goal:** To educate conference attendees on specific aspects of accident prevention and Ohio's workers' compensation system
- o **Learning objectives for session # 521-**Recent amendments to the Americans With Disabilities Act and Ohio law:
 - Identify key points of the Americans with Disability Act and the Ohio Handicap Statute;
 - Describe accommodation issues faced by occupational nurses in general terms; and
 - Explain activities that help organizations process a request for reasonable accommodation.
- o **Criteria for Successful Completion:** Attend the entire event and complete a session evaluation.
- o **Conflict of Interest:** The planners and faculty have no conflict of interest.
- o **Commercial Support:** There is no commercial support for this event.
- o **Continuing Education:** Awarded 0.1 IACET general CEUs and 1.0 RN* contact hour.

*The Ohio BWC (OH-18801-01-2013) is an approved provider of continuing nursing education by the Ohio Nurses Association (OBNA-001-91), an accredited approver by the American Nurses Credentialing Center's Commission on Accreditation.



Managing the Complexities of the Overlapping Web of FMLA, ADA, Workers' Comp and Antidiscrimination Laws

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Overlapping Laws

V

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Topics

- Briefly address the nuts and bolts of these statutes
- Analyze the interaction between the statutes
- Pointers on dealing with these issues
- Discuss some updates for the FMLA and ADA

V

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Impact on Federal and State Antidiscrimination Laws

29 C.F.R. § 825.702:
"Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act) . . ."

According to the legislative history, "The leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with Federal government, or the Federal government itself." S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993).

V

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FMLA and the ADA

Serious Health Condition and/or a Disability?



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FMLA: What Qualifies as a “Serious Health Condition”

- 29 CFR § 825.113 defines a serious health condition as:
 - An illness, injury, impairment, or physical or mental condition that involves:
 - (1) Inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (which is defined as the ability to work, attend school, or perform other regular daily functions due to the serious health condition, or treatment for or recovery from that condition) or any subsequent treatment in connection with inpatient care;
 - OR
 - (2) Continuing treatment by a health care provider.



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FMLA: What Qualifies as a “Serious Health Condition”

A “serious health condition” involving continuing treatment includes one or more of the following:

- A. A period of incapacity (as defined above) for more than three consecutive days and any subsequent treatment or period of incapacity relating to the same condition that also involves:
 - i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
 - ii. Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
- B. Any period of incapacity due to pregnancy, or for prenatal care;



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FMLA: “Serious Health Condition”

- C. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
 - i. Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
 - ii. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - iii. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.);
- D. A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective (e.g., Alzheimer’s, a severe stroke, terminal stages of disease); or
- E. Any period of absence to receive multiple treatments (including any period of recovery there from) by a health care provider or by a provider of health care services under the orders of or on referral by a health care provider, either for restorative surgery after an accident/injury, or for a condition that will likely result in a period of incapacity of more than three consecutive days in the absence of medical intervention or treatment, such as cancer, severe arthritis, kidney disease.



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FMLA: “Serious Health Condition”

- TREATMENT, including an examination to determine if a “serious health condition” exists, WILL be covered; however, routine physical examinations, eye examinations or dental examinations WILL NOT be covered.



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The ADA

- The ADA provides:
 - “No employer shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”



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ADA: What Constitutes a ADA-Covered Disability

- The ADA defines disability as:
 1. A mental or physical impairment that substantially limits a major life activity;
 2. A record of an impairment; or
 3. Employees who are “regarded” as having an impairment.

42 USC § 12102(A)



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ADA: Substantially Limits

- Three factors to consider when determining if a person is “substantially limited” are:
 1. the nature and severity of the impairment;
 2. the duration or expected duration of the impairment; and
 3. the permanent, or long term impact, of the expected permanent or long term impact of or resulting from the impairment.

29 CFR § 1630.2(j)(2)(i)-(iii)



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ADA: Major Life Activities

- Major Life Activities include, but are not limited to: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”
- “A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”



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ADA: Reinstating the Employee

- Reinstatement employee if the employee can perform the essential functions of the job.
 - This means you can terminate the employee if:
 - The employee cannot perform the essential functions of the job; and
 - There are no reasonable accommodations that would allow him or her to perform the essential functions of their job.



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FMLA Updates

- Incapacity of more than 3 consecutive, full calendar days and subsequent treatment or incapacity that also involves:
 - Visit to HCP 2 or more times within 30 days of first day of incapacity, with first visit to occur within 7 days of first day of incapacity; **OR**
 - Visit to HCP 1 time within 7 days + regimen of continuing treatment (e.g. prescription drugs)
 - Prior regulations provided for an open-ended time frame.



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FMLA Updates

- A serious health condition that is a “chronic” condition requires provider visits of at least twice per year.
 - The previous regulations did not require a certain number of provider visits.
- Health care providers now include physician assistants.
- Employer notice requirements now organized into 3 categories:
 - General Notice (Poster and Policy)
 - Eligibility and Rights and Responsibilities Notice
 - Designation Notice



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FMLA Updates

- Employers must now notify employee of eligibility within **5 business days** (up from 2 days), absent extenuating circumstances.
- Employer has **5 business days** (up from 2 days) to designate leave after receiving sufficient information.
- If foreseeable, employer may now require employee to comply with its usual notice and procedural requirements for requesting non-FMLA leave (i.e., written notice or notice to specific individual)
 - Eliminates the rule that employer cannot impose more stringent notice and procedural requirements



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FMLA Updates

- Employer has **5 business days** (up from 2 days) to request certification after a *foreseeable* leave request or after an *unforeseeable* leave begins.
- Employer may now contact HCP directly, but only to seek authentication and clarification of information provided - no additional information.
- Contact only after employee given opportunity to cure deficiencies.
- Direct supervisor may not contact employee's HCP.



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FMLA Updates

- Must now meet requirements of the employer's paid leave policy to substitute accrued paid leave.
- Examples:
 - Vacation time can only be used in full-day increments (even if employee only needs 2 hours of leave)
 - Completion of sick leave request form
- Must be given notice of additional procedural requirements in the Rights & Responsibilities Notice.
- May now deny Perfect Attendance Awards/ Production Bonuses to FMLA user who does not meet goal – as long as bonus is also denied to employees on non-FMLA leave.



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ADA Amendments Act

- Passed September 17, 2008, by Congress, later signed by the President.
- Took effect January 1, 2009.
- Makes significant revisions to the ADA that are intended to broaden the scope of the ADA.
- Overturns several U. S. Supreme Court decisions that favored employers.



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ADA Amendments Act

1. "Mitigating Measures" no longer relevant (with one exception)
2. "Major Life Activities" defined by a new list which is both specific and broad
3. "Substantially Limited" may be modified?
4. "Regarded as Disabled" definition substantially expanded



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ADA Amendments Act

- "Ameliorative effects of mitigating measures" are not to be examined in determining whether someone is "substantially limited."
 - Impact on employers — More employees will be covered and, in many cases, conditions will be covered disabilities that are not readily apparent to employers.



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ADA Amendments Act

- The new law explicitly rejects the strict standard created by the Supreme Court that to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."
- Term "substantially limits" is retained in the new law but is to be a **less demanding** standard that is to be read "broadly."
- EEOC is to adopt regulations more clearly defining "substantially limits."
- New law expands the definition of "major life activities" by including two non-exhaustive lists:
 - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions")



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ADA Amendments Act

- **Old law:** employee had to prove that he was regarded as being substantially limited in a major life activity because of a qualified impairment.
- **New law:** employee only has to show that the employer believed he or she had a mental or physical **impairment** – neither major life activity nor substantial limitation are now required.



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ADA and FMLA Overlap

- George is an IT (information technology) employee at one of the community hospitals. Due to hospital demands, the IT Department requires IT employees to work mandatory overtime hours on a regular basis. For the first two years of his employment, Elaine, his supervisor, tells you that he was able to work the overtime hours without complaint or problems.
- However, in April, 2009, Elaine tells you that George presented her with a medical slip which restricted his work hours to a maximum of 40 hours per week. George suffers from eczema, a chronic skin condition marked by visible, irritating skin rashes. George's physician has informed the hospital that the eczema flares up if George has to work too many hours and that in his medical opinion George is medically restricted to only 40 hours per week, eight hours per day, on a permanent basis.
- Elaine is coming to you with a problem. She informs you that mandatory overtime is an essential function of the IT position and that many employees in the position complain of the overtime. She believes granting George this restriction will result in problems in her department – George and Jerry always discuss work over coffee and she is certain that Jerry will spread George's non-overtime pass throughout the department.
 - What should you tell Elaine?



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ADA and FMLA Overlap

- Joe works in the Sanitation Department at the main campus. One day his supervisor, Eric arrives in your office. Eric tells you that he just witnessed Joe lifting large buckets of cleaning solution into the air and slamming them on the table for no apparent reason. When Eric approached Joe, Joe raised one of the buckets above his head in a threatening manner.
- Eric sent Joe home pending a review of his behavior. Immediately after leaving work, Joe sees a psychiatrist who writes a prescription of "No work until further notice."
- In the psychiatrist's opinion, Joe is unable to work at the hospital because of his major depressive episode.
 - Eric wants to fire Joe because of his threatening behavior.
 - What can you do?



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Learning

- A serious health condition may or may not be a disability.
 - Is the condition temporary?
 - Does the condition require continuing treatment?



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So what?

- Avoid Tunnel Vision.



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ADA: Reasonable Accommodation

- Employer's Obligation: Engage in the interactive process.



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ADA: Reasonable Accommodation

- WHY?
 - Constitute a denial of request for an accommodation.
 - Support a defenses of good faith – limit punitive damage awards.
- Who?
 - Employer and employee.
 - Third parties not required.



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ADA: Guidance for the Interactive Process

1. Meet with the employee.
2. Obtain as much information as possible about the condition.
3. Discuss available alternatives.
4. Seriously consider accommodations suggested by the Plaintiff.
5. Remember employers should not jump to conclusions regarding "undue hardship."
6. Document the process to avoid misunderstandings.



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Ohio Workers' Compensation Act

- General Rule: "all actions for injuries sustained in the course of employment must be addressed within the framework of Ohio's workers' compensation statutes."

Estep v. Rierter Automotive North America, Inc., 148 Ohio App. 3d 546, 550 (Lucas Cty. 2002).



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Workers Compensation Time And The FMLA

- Time off of work that is paid under the Workers' Compensation system can run simultaneously with time off under FMLA.



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Workers Compensation Overlap

- LeBron is employed as a nurse at a community hospital. LeBron has been employed for ten years. Over the last four years he has held a registered nurse position. Between 2002 and 2003, LeBron sustained three back injuries in the course of his duties. He has filed for and received workers' compensation benefits for each of the injuries.
- Due to the most recent back injury, LeBron has been working in a temporary light duty position. The light duty time period is close to expiring and LeBron has submitted a medical slip which limits LeBron's lifting to only fifteen pounds.
- Mike, his supervisor, has come to you for advice. He says that LeBron loves nursing and LeBron keeps telling him that he would quit before transferring to a non-patient contact position. Mike further informs you that LeBron's position requires him to lift over 50 pounds on a regular basis and that the current medical restriction cannot be accommodated on a permanent basis.
 - What should you do?



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Leaves of Absences

- Temporary or short leaves of absence can be considered a reasonable accommodation.
 - An indefinite or extended leave of absence is not a reasonable accommodation because it does not enable the employee with disabilities to perform the essential functions of the job.
- Payment during leaves of absences
- Termination



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Interaction Among the Three Statutes

Since Seinfeld's conclusion, Kramer obtained subsequent employment as a Driver for Norman Trucking. Kramer has been working full-time in this position for the last three years. Kramer recently injured his back and he requested part-time hours. Kramer presents a doctor's note to you which supports his request.

- Do you have to grant his request?
- Can you request more information?
- What if he submitted an FMLA form?



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Reasonable Accommodations

- Do not need to create new positions under the ADA.



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Interaction Among the Three Statutes

Kramer has been injured at work. He was given a light duty assignment. He has now asked you to make his light duty assignment – stuffing envelopes in the office – permanent. Kramer claims his back restrictions are permanent and he will never be able to return as a Driver.

- Do you have to make his light duty job permanent?
- What should you do?



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Light Duty

- Employer cannot force an employee to accept light duty work.
- Light duty program should state all assignments are temporary and will cease upon maximum medical improvement.



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Summary

- Consider each situation under the ADA, the Ohio Workers' Compensation Act, and the FMLA.
- Consider the possibility that a condition might be a disability, a "serious health condition," or both.
- A reduced work schedule or a leave of absence could be appropriate under FMLA, as a leave, or ADA, as a reasonable accommodation.



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Summary and Advice

- "Light duty" work may "cut off" workers' compensation leave, but an employer may not require an FMLA employee to return to a different job. The employee could then receive health benefits and an unpaid leave period, but not workers' comp benefits.
- Always designate leave as FMLA qualifying so that the leaves will run concurrently. If the employer does not designate FMLA leave in a reasonable time, the employee will not lose his entitlement to 12 weeks (no retroactive designation).



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Some Differences

	FMLA	ADA	OWC
Application	Employers with 50+ employees	Employers with 15+ employees	Most employers, or subject to tort liability
Conditions	"serious health condition" (could be temporary under intermittent leave) generally no alcohol / drug absences	condition that substantially affects one or more "major life activities" (generally permanent or long-term) past alcohol or drug addiction could be a disability	only pertains to injuries that occur "in the scope of employment"
Leave	12 weeks of unpaid leave	"reasonable accommodations" that may include leave or a reduced schedule (no time limit if "reasonable")	as determined by injury and medical recommendations, but could stop leave with a light duty job



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Additional Comparisons

	FMLA	ADA	OWC
Contact with Physician	can contact only to authenticate and clarify information, not to get additional information; direct supervisor may not contact	no restrictions on obtaining additional information from employee's physician	only with consent of employee, unless the physician is in-house
Medical Certifications	may require FMLA certifications that the employee has a "serious health condition" and that she is "fit-for-duty," if give advance notice	certifications may only pertain to the ability to perform the essential functions of a job and must be consistent with business necessity	managed through administrative process
Reinstatement	must reinstate after leave to a substantially equivalent position; may not force employee to accept modified position if entitled to leave	change in position may be part of a "reasonable accommodation"; only reinstate if can perform "essential functions"	could reinstate to a light-duty position or cut off benefits if the employee refuses



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Last Comparisons

	FMLA	ADA	OWC
Attendance Programs	may deny Perfect Attendance Awards/ Production Bonuses to FMLA user who does not meet goal as long as bonus is also denied to employees on non-FMLA leave	permissible to count absences involved in the accommodation	may count absences
Benefits	employer must provide health insurance during leave	only need to provide health insurance if other workers receive health insurance during leave under the same circumstances	workers must pay their share of group health premiums to continue



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