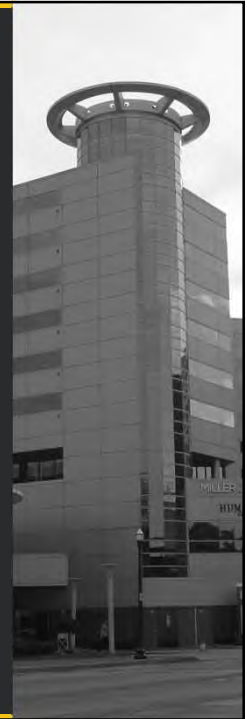


Babies, Boo-Boos, and Breaking Barriers

- *Barbara Moore* ▪ *Jessica Swartz*
- *Matt O'Rourke* ▪ *Adam Walker*



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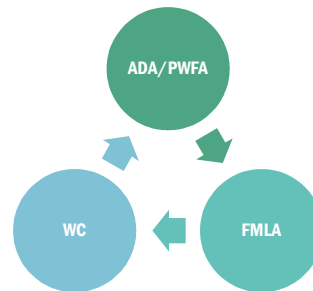
Today's Topics

1. Workers' Compensation
2. Family Medical Leave Act (FMLA)
3. Americans With Disabilities Act (ADA)
4. Pregnant Workers Fairness Act (PWFA)

The Quadfecta

ADA, PWFA, FMLA, and Workers' Compensation

- The ADA, PWFA, FMLA, and Workers' Compensation laws overlap
- But they are all different and serve different purposes
 - ADA: Disability accommodation
 - PWFA: applies ADA framework to accommodations for pregnancy and pregnancy-related limitations
 - FMLA: Leave for family & medical reasons
 - WC: Wage replacement and medical and rehabilitation benefits for workers hurt on the job



Workers' Compensation Refresher

What's Covered

- Wage replacement
 - Percentage of wages, if qualified
- Medical Benefits
 - Employer can choose doctor for first 28 days, then employee can switch
- Vocational Rehabilitation
 - Entitlement to rehabilitation if employee cannot do the same work as before injury or sickness. Ex: job training, education, etc.

Workers' Compensation Refresher (Cont.)

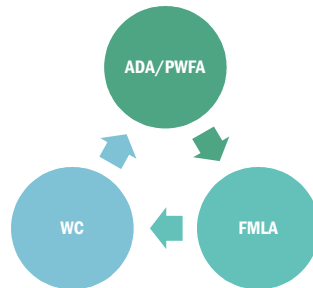
- **Leave?** No, WC does not require leave. Duration of leave is determined by other laws and employer policies – but consider liability risks (e.g., retaliation claim)
- **Duration?** As long as disability lasts (percentages of wage loss and medical expenses come into play)
 - May obtain independent medical examination to verify disability
 - Must furnish IME report to employee within 15 days, if requested

Workers' Compensation Refresher (Cont.)

- **Return to employment?** No obligation to return employee to same job...or any job (but refusal can justify continuing benefits)
- **Light duty?** No obligation to offer light duty necessarily, but if employee unreasonably refuses work, benefits may be suspended. However, note that this area has gotten sticky

Navigating the Quadfecta

- **Key #1:** Look at the facts of your case
- **Key #2:** Apply the requirements of each law separately
- **Key #3:** Stay vigilant. Be aware that overlapping laws with different requirements means you might be compliant under one law but in hot water under another



Family and Medical Leave Act

Leave Entitlement and Reasons for Leave

- If an employee...
 - has worked for the employer a total of 12 months,
 - has worked 1,250 hours in the past 12 months, and
 - Works at a site with at least 50 employees within a 75 mile radius...
- Then the employee can take job-protected leave for...
 - Certain reasons related to military family obligations,
 - The birth or adoption of a child and to bond with the child, or
 - Reasons related to serious medical conditions of the employee or the employee's parents, spouse, or children.

The FMLA in a Nutshell

- Leave is unpaid (but employers can require or employees can request to use available paid time off in most situations)
- Leave can often be taken intermittently
- Health care benefits must be maintained during the leave
- Employers cannot interfere with an employee's rights under the FMLA or discriminate or retaliate against the employee for taking leave that is covered by the FMLA

Documentation

- Notice Requirements
 - FMLA poster
 - WH-381: Eligibility Notice, Rights and Responsibilities Notice
 - WH-382: Designation Notice
- Medical Certification

Americans with Disabilities Act

Overview of the ADA

- Employers cannot discriminate against a qualified individual because the employer regards the person as having a disability (or the person actually has a disability)
- Employers may require limited medical examinations which are job-related and consistent with business necessity
- Employers must keep all medical information confidential

ADA Basics

- What is a “disability” for purposes of the ADA?
 - A disability is a physical or mental condition that makes it more difficult for an individual to do something important, or that impacts one of his or her major bodily functions in comparison to the general populations
- Individual must be “qualified”
 - Able to perform the essential functions of the job, with or without reasonable accommodation
- What are the essential functions?
 - Written position description
 - What the person in the job actually does

Reasonable Accommodations / Interactive Process

- Employers have an affirmative obligation to provide:
 - Reasonable accommodations
 - To qualified disabled individuals
 - If such accommodations are necessary for them to perform
 - The essential functions of the job
- When an employee requests a reasonable accommodation...
 - The employer and the employee must engage in the interactive process
 - **DOCUMENT EVERYTHING**
 - Evaluate if identified accommodation would create an undue hardship

Pregnant Workers Fairness Act

Pregnant Workers Fairness Act (PWFA)

- Same as ADA:
 - Definition of “reasonable accommodation and undue hardship”
 - Interactive process
- New:
 - Definition of “qualified employee”: able to perform essential job functions in the near future


Analysis: Continue to evaluate if qualified employee can, now or in the near future, perform the essential functions of their job and whether the accommodation would cause undue hardship to the employer.

Providing Urgent Maternal Protection for Nursing Mothers Act (PUMP Act)

- Same requirements as 2010 Act
 - Private space (not bathroom)
 - Reasonable breaktime
 - Employers with 50+ employees
 - Exempt employees only
- PUMP Act Additions
 - All employers unless undue burden/significant difficulty or expense
 - Both non-exempt and exempt employees
 - Private right of action


PWFA Game






Poll: (Which Is True?)

Join by Web




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1. A jury in Minnesota awarded a nursing employee \$2M in damages under the PUMP Act. It found that the employee should not only be allowed to pump during a paid break, but also should be compensated at double the usual rate because the employee was entitled to 1) standard break time and 2) paid break time for pumping.
2. An employee at a 15-employee fudge shop on Mackinac Island submitted a complaint to the EEOC stating that she was discriminated against under the PWFA. She was in her third trimester during the summer months, so a doctor told her she should not do manual labor, such as making fudge. The shop dismissed her stating that being down an employee during the summer season on the Island would be an undue hardship. The EEOC agreed with the business owner and dismissed the complaint.
3. A group of pregnant workers at a Virginia power plant alleged discrimination based on sex because, while workers would be paid while out on medical leave, workers out on maternity leave would not be paid. The 5th Circuit upheld the factory's policy because, not all women become pregnant and, therefore, the policy is not based on sex and is not discriminatory.




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Poll: True or False?

An employee would likely need to have supporting medical documentation for a daily, hour-long pumping break to be reasonable.

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Poll: Does a pregnant employee have to provide medical evidence to support a request for accommodation under the PWFA?

- A. Yes
- B. No
- C. It depends



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Poll: Can lowered attendance requirements be an accommodation under the PWFA?

- A. Yes
- B. No
- C. It depends



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Poll: True or False?

An employee must be compensated while on a pumping break if they are working during that break.



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Let the FMLA & ADA Games Begin!



MJ AUTOMOTIVE

Background

- Tier One Automotive Parts Manufacturer
- 600 Employees
- Charles started working for MJA on October 1, 2022. He reports to Andrea, and is one of the best forklift drivers on third shift. He constantly takes extra shifts, and has worked over 2,400 hours since he started.
- On September 10, 2023, Charles was in a car accident. His doctor took him off of work for two weeks. He is due back to work on September 25.

Poll: How much FMLA time does Charles have available when he returns to work?

- A. 0 weeks
- B. 8 weeks
- C. 10 weeks
- D. 12 weeks
- E. Trick question, because we don't know how much FMLA time he took before his car accident



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Charles Returns to Work

- Charles returns to work on September 25.
- A few weeks later, on October 12, Andrea (Charles's supervisor), visits Daniel in HR and complains that Charles "has not been right" since his accident.
- Charles is always complaining about headaches, and he seems confused.
- When Andrea leaves, Daniel looks at Charles's attendance record

Charles's Attendance

Sept. 10	11	12	13	14	15	16
Accident	Off Work →					
17	18	19	20	21	22	23
Off Work →						
24	25	26	27	28	29	30
	Return to work		Called Off: Sick		Called Off: Not feeling well	
31	Oct. 1	2	3	4	5	6
No call/no-show					Called Off: Overslept	
7	8	9	10	11	12	13
			Called Off: Feeling Off		Called Off: Overslept	

Here Comes Charles

- Charles walks into Daniel's office as Daniel reviews his attendance records.
- Charles tells Daniel that he's been suffering from anxiety and has been having headaches since his accident. In fact, most of the time he's called off in the past few weeks has been because of these headaches or because he's too afraid to get out of bed.
- He says that he doesn't know what to do. He thinks he needs to go see his doctor, but he's worried about the situation because he knows Andrea needs him at work and she pressured him to be there to "be a good teammate."



Poll: What Should Daniel Do?

- 1 Go to [PollEv.com](https://www.poll-ev.com)
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- A. Tell Charles to take a few Advil and deal with it.
- B. See if there's another position available, but don't worry about the FMLA because Charles didn't say "FMLA" and didn't ask for a leave of absence.
- C. Tell Charles that there's nothing he can do, because the anxiety is probably causing the headaches and headaches don't count as a serious health condition.
- D. Tell Charles that he may be eligible for FMLA leave, and give him a Notice of Eligibility & Rights and Responsibilities and a certification for his health care provider to complete.

Charles Refuses FMLA

- Daniel gives Charles FMLA paperwork, but Charles says that he doesn't want to take FMLA.
- He says something about wanting to save it for later, and might have mumbled under his breath that his partner is pregnant.



Poll: What Should Daniel Do?

- 1 Go to [PollEv.com](https://www.poll-ev.com)
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- A. Work with Charles to find a solution that does not require him to use his FMLA time.
- B. Make a note that Charles refused the FMLA documentation, require Charles to sign it, put it in Charles's personnel file, and do nothing else.
- C. Tell Charles that he doesn't get FMLA time if his partner gives birth, so he might as well use it now.
- D. Tell Charles that he doesn't have a choice about whether his absences are covered by the FMLA and that the Company will designate his absences as FMLA leave if it believes they are for an FMLA-qualifying reason.

Type of practice / Medical specialty: _____
 Telephone: (____) _____ Fax: (____) _____ E-mail: _____

PART A: Medical Information

Limit your response to the medical condition(s) for which the employee is seeking FMLA leave. Your answers should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. **After completing Part A, complete Part B to provide information about the amount of leave needed.** Note: For FMLA purposes, "incapacity" means the inability to work, attend school, or perform regular daily activities due to the condition, treatment of the condition, or recovery from the condition. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b).

- (1) State the approximate date the condition started or will start: 09/10/23 (mm/dd/yyyy)
- (2) Provide your **best estimate** of how long the condition lasted or will last: Unknown
- (3) Check the boxes for the questions below, as applicable. For all boxes checked, the amount of leave needed must be provided in Part B.

Inpatient Care: The patient (has been / is expected to be) admitted for an overnight stay in a hospital, hospice, or residential medical care facility on the following date(s): _____

Incapacity plus Treatment: (e.g. outpatient surgery, strep throat)
 Due to the condition, the patient (has been / is expected to be) incapacitated for **more than three** consecutive, full calendar days from 09/10/23 (mm/dd/yyyy) to 09/22/23 (mm/dd/yyyy).
 The patient (was / will be) seen on the following date(s): 09/10/23

The condition (has / has not) also resulted in a course of continuing treatment under the supervision of a health care provider (e.g. prescription medication (other than over-the-counter) or therapy requiring special equipment)

Pregnancy: The condition is pregnancy. List the expected delivery date: _____ (mm/dd/yyyy).

Chronic Condition: (e.g. asthma, migraines, headaches) Due to the condition, it is medically necessary for the patient to have treatment visits at least twice per year.

Permanent or Long Term Conditions: (e.g. Alzheimer's, terminal stages of cancer) Due to the condition, incapacity is permanent or long term and requires the continuing supervision of a health care provider (even if active treatment is not being provided).

Conditions requiring Multiple Treatments: (e.g. chemotherapy treatments, reconstructive surgery) Due to the condition, it is medically necessary for the patient to receive multiple treatments.

None of the above: If none of the above condition(s) were checked, (i.e., inpatient care, pregnancy) no additional information is needed. Go to page 4 to sign and date the form.

PART B: Amount of Leave Needed

For the medical condition(s) checked in Part A, complete all that apply. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your **best estimate** based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage.

- (5) Due to the condition, the patient had / will have **planned medical treatment(s)** (scheduled medical visits) (e.g. psychotherapy, prenatal appointments) on the following date(s): Next appointment on November 2
-
- (6) Due to the condition, the patient was / will be **referred to other health care provider(s)** for evaluation or treatment(s).
State the nature of such treatments: (e.g. cardiologist, physical therapy) _____
Provide your **best estimate** of the beginning date _____ (mm/dd/yyyy) and end date _____ (mm/dd/yyyy) for the treatment(s).
Provide your **best estimate** of the duration of the treatment(s), including any period(s) of recovery (e.g. 3 days/week) _____
- (7) Due to the condition, it is medically necessary for the employee to work a **reduced schedule**.
Provide your **best estimate** of the reduced schedule the employee is able to work. From _____ (mm/dd/yyyy) to _____ (mm/dd/yyyy) the employee is able to work: (e.g. 3 hours/day, up to 23 hours a week) _____
- (8) Due to the condition, the patient was / will be **incapacitated for a continuous period of time**, including any time for treatment(s) and/or recovery.
Provide your **best estimate** of the beginning date _____ (mm/dd/yyyy) and end date _____ (mm/dd/yyyy) for the period of incapacity.
- (9) Due to the condition, it was / is / will be medically necessary for the employee to be absent from work on an **intermittent basis** (periodically), including for any episodes of incapacity i.e., episodic flare-ups. Provide your **best estimate** of how often (frequency) and how long (duration) the episodes of incapacity will likely last.
Over the next 6 months, episodes of incapacity are estimated to occur 1-2 _____ times per day / week / month) and are likely to last approximately 1 _____ (hours / days) per episode.

Charles Misses Work

- Things go alright for a while. Charles misses 1-2 days a week, but he's really good about calling in to report his absences.
- There's an all-hands-on-deck work requirement on Sunday, December 17. Charles calls in that day and says he's taking an intermittent FMLA day because of his anxiety.

Charles Misses Work (Cont.)

- Andrea comes to Daniel the next morning. She's livid. She reminds Daniel that Charles called in yesterday for his "anxiety" (yes, she used air quotes), but he posted this on Instagram yesterday.



Poll: What Should MJA Do?

- A. Fire him for looking ridiculous in public.
- B. Fire him because clearly the Lions cause anxiety, not help it.
- C. Fire him because he called off of work but went to the Lions game.
- D. Nothing – let it go. If he took that much time to get ready for the game, he deserves the day off of work.
- E. Call him in and investigate to see what happened and why he couldn't come to work but could go to the Lions game.

Fraudulent Use of FMLA?

- “Honest Belief” Defense
 - If an employer has an “honest belief” that an employee committed FMLA fraud/abuse, the employer may take action against the employee as long as the belief is “reasonably grounded on particularized facts”
 - Independent investigation
 - Activity should be inconsistent with the need for FMLA leave

Charles Exhausts his FMLA Leave

- Let’s say Charles never calls in to work to go to the Lions game. Instead, he eventually gets to the point where he exhausts his FMLA leave.
- He continues to miss work for headaches and anxiety.
- Co-workers have complained to Andrea that Charles seems confused at work and is forgetting things.
- Yesterday Charles twice took an incomplete pallet to the loading dock, which would normally result in discipline.



Poll: Should MJA Discipline Charles?

- A. Yes, he should be held to the same job standards as everyone else.
- B. Yes, but it should also discuss with him whether he needs a reasonable accommodation to meet his job expectations.
- C. No, he has a medical condition.
- D. No, he's a Lions fan.



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Charles Goes Back to the Doctor's

- Realizing that he is on thin ice, Charles decides to go back to his doctor to see if there is anything to be done about his headaches and anxiety
- Charles e-mails Daniel a nearly legible handwritten doctor's note that says that he is required to be on bed rest until further notice
- Recall, Charles has exhausted his FMLA leave



Poll: What Should Daniel Do Next?

- A. Fire Charles immediately. It's clear he is making this up to get extra time off work.
- B. E-mail all of MJA's leadership and ask what they think you should do given Charles' medical conditions and recent attendance issues
- C. Just give Charles the time off as a reasonable accommodation without further conversation since he is already aware of the medical conditions
- D. Engage in the interactive process and document all conversations and decisions made!

Charles' Doctor Refuses to Provide Additional Information

- Assume that you sent Charles' medical provider a letter asking her to provide you with additional details regarding Charles' medical condition, and for a list of all possible accommodations that would allow Charles to perform the essential functions of his position
- In response, Charles' medical provider sent back a short, typed note simply stating that Charles needs time off to rest and recover due to a disability



Poll: What's Daniel's Next Move?

- A. Fire Charles! Charles has failed to provide you with enough information to assess whether the leave can be accommodated
- B. Ask Charles to return to work until the medical provider provides adequate information
- C. Call the doctor yourself and explain that you need more information
- D. Keep Charles on an unpaid leave; send him a written communication explaining that he has an obligation to participate in the interactive process, and that you need the medical provider to give you full responses within 3 days

Charles Is Diagnosed With PTSD

- Assume Charles' doctor provided adequate medical documentation to support a three-week leave of absence and MJA determined it could accommodate a short leave
- On the day before Charles is scheduled to return, Charles provides Daniel with yet another doctor's note
- This note says that his car accident has resulted in a diagnosis of Post-Traumatic Stress Disorder
- Further, Charles can return to work immediately, but he is restricted from driving any vehicle (including a forklift) due to his permanent fear of driving
- Operating a forklift is an essential function of Charles' position



Poll: What Would You Do Next?

- A. Adios, Charles! He cannot perform an essential function of his job (driving the forklift), so you should separate Charles's employment
- B. Send Charles to a specialist for further evaluation at MJA's expense. You doubt this doctor's qualifications and assessment.
- C. Work with Charles to see if another accommodation (such as reassignment) is an option

No Games. Just Business.

(And a Game)

Charlotte

Charlotte has worked for you for 7 months as a Quality Control inspector. She must walk the production line as part of her duties. One day while walking the line, she slipped and fell. She was rushed to the hospital and diagnosed with a torn something or other in her knee.

Charlotte has surgery with 2 months' recuperation time. She comes back to work on light duty with a doctor's restriction and a follow-up in 30 days. After her follow-up, her restriction hasn't changed and she hints the restrictions will be permanent.

Charlize

Charlize is a single parent who has worked for you for 3 years and has a 6-year-old. She often complains about her ex-spouse's failure to pay child support and missing visitation with their child.

In the last 6 months, you've required mandatory overtime every other Saturday. Charlize often complains and calls in "sick." She eventually hands you a doctor's note that says she has chronic stress and depression and can't work more than 40 hours. You shift her work schedule to avoid overtime but still require Saturday work. So she brings another note from the doctor that says her 40 hours can only be Monday through Friday.

Charles

Charles was a day shift production line manager, but he was recently promoted because he's been a great employee for years – never missed a day. He's now in charge of days and nights. But the stress is getting to him. One day, while walking the production line exhausted, he slips and falls, blowing out his knee.

He recovers well and comes back in two weeks on light duty, but a week later has a panic attack that takes him back out, and he's under doctor supervision while working through his stress and depression for months. He uses all of his FMLA.

When his FMLA is exhausted, Charles provides another doctor's note and asks for a reasonable accommodation of leave. The note says Charles is severely depressed and can expect to be back to work in 30 days. 30 days pass and a similar note is produced. Then another, and so on.



Poll: What Would You Do Next?

- A. Keep Charles. He originally was out due to his on-the-job injury and we can't terminate him until he works.
- B. Continue engaging in the interactive process with Charles because of his disability. Extend his leave as long as he keeps producing doctor's notes.
- C. Get rid of Charles. You aren't terminating him because of his injury or because he took FMLA leave, and he isn't entitled to indefinite leave.

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