



**Are You in Leave Jeopardy?**  
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**Agenda**

- Family Medical Leave Act
- Americans with Disabilities Act
- Pregnant Workers Fairness Act
- Military Leave
- Other Leaves
- Game Show

**DMEC**  
 Health Care Compliance  
 Unruffled Calm™

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**The Family Medical Leave Act (FMLA)**

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### FMLA Basics

- Up to 12 weeks of job-protected leave in a 12-month period
- Eligible employees are those who:
  - Have worked for a covered employer for at least 1 year;
  - Have worked at least 1,250 hours in the preceding 12 months; and
  - Work at a site with 50 or more employees within a 75 mile radius
- Available to use in the following circumstances:
  - Birth or placement of child
  - To care for spouse, child, or parent with serious health condition
  - Employee's own serious health condition
  - Military exigency leave
  - Military caregiver (up to 26 weeks of leave)



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### Common FMLA Leave Triggers

- 3+ days of absence for a serious health condition that also involves continuing treatment by (or under the supervision of) a health care provider
- Physical or mental healthcare treatment
- Any absence due to pregnancy or childbirth
- Chronic, episodic conditions
- In-patient hospital admissions
- Leave for treatment of substance abuse



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### What Does the FMLA Require?

- Unpaid leave from work (continuous or intermittent)
- Job restoration upon return to work
- Continuation of medical benefits during leave
- No retaliation/discrimination for taking leave
- No interference with leave



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### Medical Certifications

- Employee must return completed form within 15 calendar days after employer's request (unless unable despite diligent, good faith efforts)
- 2nd opinion allowed if an employer doubts the validity of medical certification
  - At employer's expense and provider may not be employed/contracted by employer on regular basis
- 3rd opinion allowed if first 2 opinions differ
  - At employer's expense, provider is mutually agreed upon and their decision is final and binding



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### Contact with Health Care Provider

- Speak directly to health care provider
  - Contact person: health care provider, HR professional, leave administrator or management official
  - Can never be employee's direct supervisor
- May not ask for information beyond what is required by the certification form
- Must obtain employee's permission to contact health care provider



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### Recertification and Returning to Work

- Recertification can be requested:
  - Change in circumstances
  - Can request every 30 days or minimum duration, whichever is greater, in connection with an absence
  - Can request every 6 months in connection with an absence
- Fitness for Duty Certifications
  - Can require before reinstatement if proper notice is given
  - No second or third opinions
  - Can only require FFD for intermittent leave if there are reasonable safety concerns



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**Reinstatement**

- Return to same or equivalent position
- At conclusion of FMLA leave, FMLA rights disappear (but don't forget the ADA)
- Reinstatement rights forfeited if employee does not return to work
- If employee states they are not returning to work – **Get It in Writing!**
- No greater right to reinstatement than if leave not taken



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**2.9.23 DOL Opinion Letter - Reduced Schedules**

- "If the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely."
- **5 Things To Remember**
  - Be careful not to overlook reduced schedule requests.
  - Be meticulous in tracking FML taker's usage.
  - Make sure to properly calculate FML allotment.
  - Make sure the leave taker is keeping track of progress on work projects.
  - Know the reason for leave usage. (If for planned medical treatments, then you can consider a temporary transfer.)



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**2.9.23 - DOL Field Assist. Bulletin - Remote Work**

- A remote worker's FMLA eligibility is based on the size of the worksite from which "they report to" or "their assignments are made."
- Beyond the FMLA:
  - An employer's obligation to provide employees reasonable break time and a private place to express breast milk extends to employees who are working remotely or working at an off-site location.
  - Regardless of work location, short breaks of 20 minutes or less are generally counted as compensable hours worked. Longer breaks "during which an employee is completely relieved from duty, and which are long enough to enable [the employee] to use the time effectively for [their] own purposes are not hours worked."
  - Be careful of state meal and rest break laws.



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# Disability Accommodations

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### The Americans with Disabilities Act (ADA)

- Prohibits medical examinations and inquiries regarding nature, existence or severity of disability before a conditional job offer is made
- Limits inquiries and medical examinations after employee is hired
- Prohibits discrimination against employees and applicants who can perform the essential functions of the job with or without reasonable accommodation
- Requires employers to provide reasonable accommodations to known disabled individuals unless the accommodation would impose an undue hardship
- Prohibits discrimination based on employee's association with disabled individual
- Prohibits retaliation
- Requires confidentiality of medical information



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### What is a Disability?

- A physical or mental impairment that substantially limits one or more of the major life activities (including major bodily functions) of such individual;
- A record of such an impairment; or
- Being "regarded as" having such an impairment.



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**Examples of Requests for Accommodation**

- Leaves of absence (both block leave and reduced schedule)
- Excused intermittent absences
- Light duty
- Work at home (for periods when employee is required to work at the worksite)
- Modified equipment (computer screen, phone etc.)
- Modified work schedule
- Reallocating marginal job functions
- Reassignment to vacant positions
- Service and comfort animals



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**What is Not a Reasonable Accommodation?**

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Changing an employee's supervisor
- (as compared to changing supervisory techniques)



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**Ask Yourself How Can We Make This Work?**

"If we do it for one, we will have to do it for everyone."

"We have never done that before."

"That's not the way we do things."



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### Undue Hardship

- An employer does not have to provide a reasonable accommodation that would cause an "undue hardship."
- Generalized conclusions will not suffice.
- Requires "significant difficulty or expense."



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### Interactive Process



TALK MEET LISTEN  
OFFER ALTERNATIVES CONSIDER



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# Pregnancy

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### Federal Pregnant Workers Fairness Act

- Requires reasonable accommodations for known limitations due to pregnancy, childbirth, or related medical conditions, unless it would cause an undue hardship
- Prohibits requiring an employee to accept an accommodation other than a reasonable accommodation arrived at through the interactive process
- Prohibits placing an employee on paid or unpaid leave if there is another reasonable accommodation available that doesn't impose an undue hardship
- Incorporates ADA meaning of reasonable accommodation and undue hardship
- Prohibits retaliation



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### Potential Accommodations

- Ability to sit or stand.
- Ability to drink water.
- Closer parking.
- Flexible hours.
- Appropriately sized uniforms and safety apparel.
- Additional break time to use the bathroom, eat, and/or rest.
- Time off to recover from childbirth.
- Be excused from strenuous activities or activities that involve unsafe exposures.



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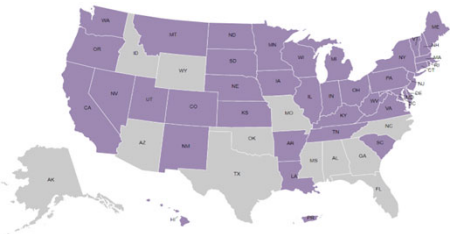

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### State Pregnancy Accommodation Laws

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### Military Leave

- Where an employer provides "benefits," including pay, to employees on a leave of absence, USERRA requires that employers offer the "most favorable treatment accorded to any comparable form of leave when [an employee] performs service in the uniformed services."
- The 3rd, 7th and 9th Circuits have already found that paid leave is one of the rights and benefits protected by USERRA. Whether this employer's military leave is comparable to the other forms of leave is a fact issue to be determined later in the case.



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### SF Military Leave Pay Protection Act

- **Covered Employers:** Private employers with more than 100 employees worldwide.
- **Covered Employees:** An employee who works within the City and County of San Francisco who is a member of the reserve corps of the US Armed Forces, National Guard or other uniformed service organization of the U.S.
- **Requirements:** A Covered Employer must:
  - Pay Supplemental Compensation equal to the difference between gross military pay and gross pay that would have been received if not for the leave, for up to 30 days
  - Pay for all benefits as if the employee had worked their regular work schedule
  - Include a policy in employee handbook.



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**State Leave Laws to Keep in Mind**

- Adoption leave
- Blood donation leave
- Court attendance leave
- COVID-19 leave
- Crime victims leave
- Disaster and emergency services leave
- Domestic or sexual violence victims leave
- Elected official/legislative leave
- Election duty leave
- Jury duty leave
- Lactation leave
- Literacy assistance leave
- Medical donor leave
- Military family leave
- Military National guard leave
- Paid family/medical leave
- Paid sick leave
- Parental leave
- Pregnancy accommodation and leave
- Public health emergency leave
- Rehabilitation leave
- Small necessities (school conferences, medical appts)
- State FMLA
- Voting leave
- Workers compensation



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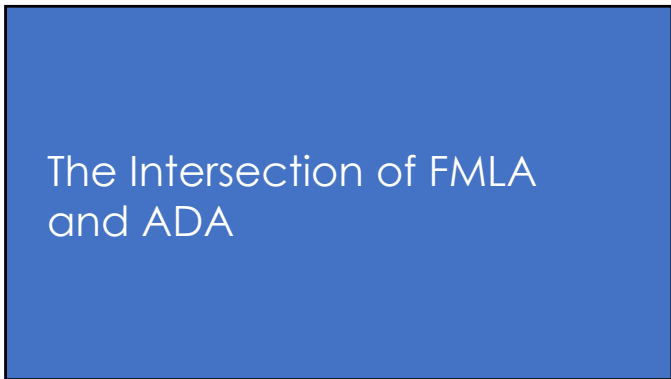
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	FMLA	ADA Accommodation
Number of Employees	50 in 75-mile radius <b>REMOTE EMPLOYEES:</b> Included in office to which they report/assignments are made	15 anywhere
Length of Service for Eligibility	12 months (not necessarily consecutive over the past 7 years) and 1250 hours in previous 12 months	Day 1/Hour 1 (even as applicants)



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REASONS FOR LEAVE	FMLA	ADA Accommodation
For employee's own health condition?	Requires employee suffer from a "serious health condition"	Requires a "disability" (Most serious health conditions will be considered disabilities)
To care for family member with condition?	Yes	No
Pregnancy covered?	Yes	Yes, to the extent pregnant employee suffers pregnancy related disability
For birth or placement of child?	Yes	No, unless doctor indicates unable to work due to recovery from birth of child
Qualified exigencies?	Yes	No
To care for wounded family service members?	Yes, up to 26 weeks	No
Alcoholism covered?	Yes	Yes. Current users held to same standards as others
Drug use covered?	No – but treatment for substance abuse is	No, unless (1) no longer using and (2) participated in or participating in rehab program



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AMOUNT OF LEAVE	FMLA	ADA Accommodation
Length of leave	12 weeks (26 weeks if leave for covered service member)	No bright line limit 6 months? 1 year? 2 years?
Intermittent and reduced schedule?	Yes	Yes, according to EEOC.  However, regular and predictable attendance is arguably an essential function of many jobs. Frequent, sporadic, unplanned absences may result in undue hardship



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RESPONSE TO REQUEST	FMLA	ADA Accommodation
May employer request medical certification?	Beginning of leave Annually each leave year	To establish disability and need for accommodation  If direct threat of harm Must be job related and consistent with business necessity
Can employer offer another accommodation (light duty) instead of leave?	Yes, but can't preclude or dissuade them from taking leave	Yes, if it is effective
Second opinion?	Yes, but only in response to initial certification, and once each FMLA year	Yes



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RESPONSE TO REQUEST	FMLA	ADA Accommodation
Re-certification from health care provider?	Every 30 days, unless the certification is longer, and then only in connection with an absence.  For conditions of indefinite duration: every 6 months  Exceptions to 30 day/6 month rules if: • Request extension • Circumstances described by certification have changed • Reason to doubt validity	Yes, if job related and consistent with business necessity
Can employer move employee to a different shift position?	Only if leave is foreseeable based on planned medical treatments for employee or family member. Temporary transfer only. Equivalent pay and benefits	Yes, if cannot accommodate in original position Employee can be paid consistent with rate for alternate position



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	FMLA	ADA Accommodation
<b>BENEFITS</b>		
Health insurance continued?	Yes	Depends on health plan – possibly COBRA
<b>RETURN TO WORK</b>		
Return to same position?	Yes (or equivalent)	Yes, absent undue hardship
Fitness for duty upon return?	If indicated in designation and uniformly applied policy/practice: certify able to perform essential functions; no second or third opinions; only once every 30 days of intermittent and if reasonable safety measures exist	Must be job related and consistent with business necessity



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## Let's Play!

- The Rules:
  - Break up into teams
  - Pick your score keeper
  - Do not hit the buzzer before we finish reading the question
  - If you do not get a question right, it remains open for another team to answer
  - At the end of two rounds, the top 3 teams move on to the final question
  - There are prizes

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# Starting Question

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Round 1

Getting Interactive	Who Let the Dogs Out?	The Right Timing	Grab Bag
<a href="#">\$100</a>	<a href="#">\$100</a>	<a href="#">\$100</a>	<a href="#">\$100</a>
<a href="#">\$200</a>	<a href="#">\$200</a>	<a href="#">\$200</a>	<a href="#">\$200</a>
<a href="#">\$300</a>	<a href="#">\$300</a>	<a href="#">\$300</a>	<a href="#">\$300</a>
<a href="#">\$400</a>	<a href="#">\$400</a>	<a href="#">\$400</a>	<a href="#">\$400</a>
<a href="#">\$500</a>	<a href="#">\$500</a>	<a href="#">\$500</a>	<a href="#">\$500</a>



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Round 2

To Leave or Not to Leave	Is it Reasonable?	Tell Me More	It's a Baby
\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800
\$1,000	\$1,000	\$1,000	\$1,000



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Final Question

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Topic: FMLA Leave

Identify all of the reasons for which FMLA leave can be taken.



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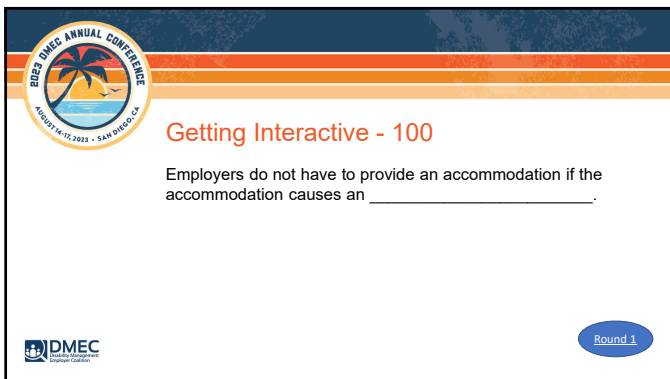
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**Getting Interactive - 200**

Sarah asks to be allowed to work from home full-time. She provides a doctor's note which says she has a medical condition and that it is recommended that she be allowed to work from home. The note does not contain any other information.

Has Sarah provided sufficient information for the employer to evaluate Sarah's request for an accommodation?

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**Getting Interactive - 300**

Doug asks to be excused from working overtime as a reasonable accommodation. During the interactive process, Doug's employer asks Doug to provide confirmation that he has been diagnosed with a disability. The employer provides him with a questionnaire to be completed by his health care provider. Doug refuses to take the form to his provider, alleging that the request violates HIPAA.

Does the employer's request violate HIPAA?

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**Getting Interactive - 400**

Rachel has requested a reasonable accommodation. HR invites Rachel to meet to engage in the interactive process. Rachel agrees but asks to bring her lawyer to the meeting.

Is Roberta entitled to bring her lawyer to the meeting?

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**Getting Interactive - 500**

Erica asserts she is disabled and asks for an accommodation. Erica and the HR Department meet on four different occasions to discuss her functional limitations. In each meeting, Erica is asked to identify any possible reasonable accommodations. Erica does not provide any options that are agreeable to the employer. After the fourth meeting, the employer ent concludes that Erica cannot be accommodated and begins the process of separating her.

Have both parties satisfied their respective duties?

**Round 1**



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**Who Let the Dogs Out - 100**

Ralph has diabetes. After working for his employer for 3 years, Ralph asks if he can bring his diabetic alert dog to work with him.

Does the employer have to accommodate the request?

**Round 1**



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**Who Let the Dogs Out - 200**

Jill's sister recently died. Before her sister died, Jill promised to care for her sister's beagle. Jill begins to bring the beagle to work. When Jill is asked about the dog, she says she promised her dying sister to care for the dog as her sister did and never leave it a home. Does the employer have to allow the dog in the workplace?

**Round 1**



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**Who Let the Dogs Out - 300**

Bob is in a wheelchair. He injures his shoulder and needs assistance navigating his chair. Bob begins to bring his service dog, a Labrador retriever, to work. The dog is trained to pull Bob's wheelchair. Does the employer have to allow the dog in the workplace?

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**Who Let the Dogs Out - 400**

Julie informs you that she suffers from depression and asks to be allowed to bring her emotional support dog to work. Sarah sits next to Julie and is highly allergic to dogs.

Can the employer deny Julie's request on the basis of Sarah's allergy?

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**Who Let the Dogs Out - 500**

Elizabeth's request to bring her emotional support dog to work is approved. During the first week the dog is in the workplace, it constantly barks and whines. Can the employer revoke the accommodation approving the presence of the emotional support animal in the workplace?

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**The Right Timing - 100**

The minimum number of days that must be given to an employee to obtain clarification on the responses provided by an employee's health care provider on a FMLA medical certification form.

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**The Right Timing - 200**

Jennifer requests a reasonable accommodation for a disability. The Company determines that more information is needed to respond to Jennifer's request. The Company asks Jennifer to have her doctor complete a questionnaire that asks specific questions about her functional limitations.

How much time must the Company give Jennifer to return a completed questionnaire?

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**The Right Timing - 300**

The earliest period of time after which an employer may request recertification for an employee's serious health condition under the FMLA.

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**The Right Timing - 400**

The amount of advance notice that an employee can be required to give in order to take FMLA leave for a foreseeable reason.




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**The Right Timing - 500**

The number of days an employer has to respond to a request for FMLA leave.

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**Grab Bag - 100**

Name the federal law that prohibits employment discrimination on the basis of genetic information.

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**Grab Bag - 200**

Becky has 300 hours of paid time off (PTO). She takes 12 weeks of FMLA for her serious health condition. Can Becky be required to use her PTO hours while on leave?

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**Grab Bag - 300**

Joe must undergo regular treatments with his physician due to a serious health condition. He's been approved for intermittent medical leave. When he receives these treatments, he is usually 45 minutes late to work. The employer has been assessing an hour of FMLA leave each time Joe is late due to one of these treatments.

How much time should the employer be assessing?

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**Grab Bag - 400**

Sally receives 3 months of health insurance premiums paid by her employer while she is on FMLA. At the end of her leave, Sally decides that she would like to be a stay-at-home mom and does not return to work.

Can the employer require Sally to repay the health insurance premiums that it paid on her behalf while she was on leave?

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**Grab Bag - 500**

Susie is on a medical leave of absence when her employer undertakes a general reduction in force. Because she is on medical leave Susie cannot be laid off from employment.

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**To Leave or Not to Leave - 200**

Jill tells her employer that she is an alcoholic. She asks for a leave of absence to enter a treatment program because she recently had a relapse.

What laws may entitle Jill to a leave of absence?

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**To Leave or Not to Leave - 400**

An employer has a policy that allows employees a maximum of one year leave. Sam has been on medical leave for 11.5 months and indicates that his doctor says he may need approximately two more months before his able to return to work. The employer informs Sam that if he does not return to work at the end of the one-year period, his employment will be terminated. The employer has consistently applied this practice for years.

Are there any concerns with the employer applying its policy to Sam?

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**To Leave or Not to Leave - 600**

Maria takes an FMLA leave to care for her terminally ill son. After she exhausts her 12 weeks of leave, she is given a discretionary leave for 2 more months. Maria's son passes while she is on the discretionary leave. Maria returns to work in June, and then asks for two weeks off in August because she is getting married. Her supervisor denies the request for time off. Maria produces a doctor's note that states she is suffering from a mental health disability and needs 3 months off for treatment.

Is Maria entitled to three more months of leave?

**DMEC**  
Division of Management  
Employment Relations

Round 2

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**To Leave or Not to Leave - 800**

Charles' 24-year-old daughter was recently released from several days of inpatient treatment for a mental health condition. She is unable to work, and needs help with cooking, cleaning, shopping, and other daily tasks. Assuming Charles is eligible for FMLA leave, can he take FMLA leave to care for his adult daughter?

**DMEC**  
Division of Management  
Employment Relations

Round 2

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**To Leave or Not to Leave - 1000**

Allison requests time off to care for her ill mother. Allison is told that she may be eligible for FMLA leave but needs to provide a doctor's certification. Allison states that she does not want to use FMLA leave and opts to just use two weeks of vacation. Allison does not return to work at the end of the two weeks and is terminated.

Should the employer have designated Allison's absence as FMLA leave against her wishes?

**DMEC**  
Division of Management  
Employment Relations

Round 2

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**Is it Reasonable? - 200**

Ethan works as supervisor where he oversees a team of twelve employees. Ethan's job requires that he physically be at the worksite (in person). Ethan has developed vision problems that prevent him from driving. Ethan has always driven to his job from his home twenty miles away. He requests a modified schedule with a later start time to accommodate his commute to allow him to take public transit instead of driving.

Does the Company have to consider Ethan's commute related accommodation request?

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**Is it Reasonable? - 400**

Dan gives Arnold his annual performance review noting several areas of deficiency. Arnold is placed on a performance improvement plan. A few days later, Arnold provides HR with a doctor's note stating that he is experiencing workplace stress and that he is unable to continue working with Dan because it exacerbates his medical condition. Arnold demands that HR assign him to a new supervisor and says that it is required under the ADA.

Is Arnold entitled to a new supervisor?

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**Is it Reasonable? - 600**

Alan has been diagnosed with ADHD. Alan's doctor states that Alan is able to perform all of the duties of his position if he is provided a quiet place to work. Alan asserts he is unable to work at his desk, which is in a row of desks that are part of an open floor plan. Alan insists that he must be given a private office.

Must the employer provide Alan with a private office?

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**Is it Reasonable? - 800**

Michael's functional limitations prevent him from being able to perform the essential functions of his position, with or without reasonable accommodation. Michael is told that he can apply for other vacant positions at the Company.

Has the employer satisfied its obligations to provide reasonable accommodation under the ADA?

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**Is it Reasonable? - 1000**

Brandon is a new employee. He has a back condition and needs a desk chair with a certain type of lumbar support. His doctor recommends a specific leather chair that costs \$4,000. The employer finds a cloth version of the chair that costs only \$1,000.

Must the employer purchase the more expensive leather chair for Brandon?

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**Tell Me More - 200**

Jim requests leave and states that he is having surgery next Tuesday. You've heard rumors that he will be having rhinoplasty.

Can you ask Jim: "What kind of surgery are you having?"

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**Tell Me More - 400**

Peter complains that he is having to pick up the slack for Josh.

Can you tell Peter: "Well, that's because Josh is receiving a reasonable accommodation?"

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
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**Tell Me More - 600**

Michael tell you that he cannot drive or operate heavy machinery because he is taking medication that makes him drowsy.

Can you ask: "What drugs are you taking?"

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**Tell Me More - 800**

You are interviewing a potential new employee, Jane. During her interview, Jane discloses that she left her prior employment after taking a medical leave of absence.

Can you ask: "Was it due to a workplace injury?"

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**Tell Me More - 1000**

Carrie has applied to be an HRBP. Carrie is hearing impaired and asks that a translator be provided during her interview.

During the interview, can you ask Carrie: "Will you need any accommodations to do the job?"

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
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**It's a Baby - 200**

Sally works in the laboratory and is three months pregnant. Sally becomes sensitive to certain smells and keeps getting sick at work. She provides a note from her doctor stating that she needs a temporary transfer to a different location, that does not have the same smells.

Is the employer required to transfer Sally?

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**It's a Baby - 400**

Jane has just returned from maternity leave. She asks to be provided a stool as an accommodation so that she can sit while performing certain duties. In making this request, Jane explains that since returning from leave, she gets tired from standing more quickly.

Is the employer required to accommodate Jane's request?

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**It's a Baby - 600**

Mary's job requires that she be able to lift up to 50 pounds. Mary is pregnant and suffers from preeclampsia. Mary is restricted from lifting more than 10 pounds.

Does the employer have to modify Mary's job to accommodate her lifting restrictions?

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**It's a Baby - 800**

Melissa is seven months pregnant. Her job requires significant physical activity. Melissa has not requested any accommodations and she has had no performance problems. Nevertheless, her supervisor assigns Melissa to desk work instead of her regular duties. Because of staffing shortages, other employees in the unit have been asked to work overtime to complete work; however, since Melissa has been working in the office, she has not been afforded the opportunity to work overtime.

What concerns does Mary's reassignment present?

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**It's a Baby - 1000**

Carla gives birth to a healthy child. She uses 12 weeks of FMLA leave due to childbirth and to bond with her new child. Carla returns to work at the end of her FMLA leave. Two months later, Carla requests 12 weeks of leave because she has post partum depression.

What laws, if any, require that Carla be given additional time off?

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