




ADA, FMLA & GINA –
The Good, Bad and Ugly

Presented by
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Featured Presenters



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Scenario One
 Sensitivity to
 Fragrances & Chemicals

Scenario One

- **Question:**
Can employer discipline employee for performance issues if employee claims during discipline meeting they are caused by disability?
- **Answer:**
Yes. Performance issues occurring prior to the disclosure are subject to discipline.



Scenario One

- **Question:**
How do you verify employee has “disability?”
- **Answer:**
An attorney should be consulted. This is risky territory!



Scenario One

- **Question:**
What is GINA?
- **Answer:**
Genetic Information
Non-Discrimination Act
of 2008



Scenario One

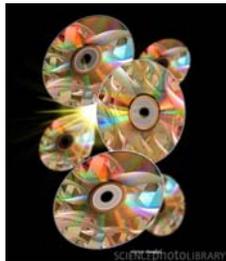
- **Question:**
What is genetic information?
- **Answer:**
In simple terms, it is medical information about employee's family members that may show predisposition to disease/conditions.

Scenario One

- **Question:**
What does GINA prohibit?
- **Answer:**
Obtaining/using genetic information in employment discussions

Scenario One

- **Question:**
What if employer obtains genetic information inadvertently?
- **Answer:**
That is not a violation.



Scenario One

- **Question:**
Is there anything employer can do to prevent receiving genetic information?
- **Answer:**
Use a form with “safe harbor” language (an attorney can prepare the form).



Scenario One

- **Question:**
Under ADA, does employer have to grant accommodation employee desires?
- **Answer:**
No, employer just needs to provide accommodation that works!



Scenario One

- **Question:**
For chemical/scent sensitivities, what can employer do to accommodate employee?
- **Answer:**
 - Change employee work location
 - Go green
 - Air purifier
 - No scent policy
 - Be creative!



Scenario One

- **Question:**
Under ADA, how should interactive process work?
- **Answer:**
It is a discussion between employer/employee where ideas for accommodation are exchanged and discussed in GOOD FAITH.



Scenario One

- **Question:**
Should employer concede employee has disability?
- **Answer:**
Not necessarily, unless it is obvious



Scenario One

- **Question:**
How has the 2008 amendment affected claims under ADA?
- **Answer:**
More conditions rise to level of disability – ADA is more pro employee.



Scenario One

- **Question:**
Are there any accommodations that should be avoided?
- **Answer:**
Avoid any accommodations that will cause employee to be embarrassed, unless employee requests that accommodation.

Scenario One

- **Question:**
Can employer tell employees that changes are being made to accommodate employee's disability?
- **Answer:**
No. Medical conditions should remain confidential.



Scenario One

- **Question:**
Under FMLA, what individuals are counted (in addition to regular active employees) to determine if there are 50 or more employees within 75 miles of employee's worksite?
- **Answer:**
 - Temp agency employees
 - Employees on military leave
 - Sales people who work from home, but report to that location

Scenario One

- **Question:**
Under FMLA, how is the 75 miles measured?
(as the crow flies or surface streets?)
- **Answer:**
Shortest route by
surface streets.



Scenario One

- **Question:**
Under FMLA, how long must employer have
50+ employees to become covered entity?
- **Answer:**
20 or more nonconsecutive
weeks in current or prior
year.



Scenario One

- **Question:**
Where do you get forms for FMLA leave?
- **Answer:**
U.S. Department of Labor
Web site. Employers should
also have current detailed
FMLA policy.



Scenario One

- **Question:**
How long does employee have to return FMLA forms?
- **Answer:**
Documents should be submitted 30 days in advance of foreseeable leaves and within 15 calendar days for unforeseeable leaves.



Scenario One

- **Question:**
How are intermittent leaves tracked?
- **Answer:**
Based on fractions of the employee's workweek.



Scenario One

- **Question:**
How do you determine the employee's workweek when hours fluctuate greatly?
- **Answer:**
By determining average number of hours employee was scheduled to work per week during previous 12 months.



Scenario One

▪ **Question:**
How is abuse controlled?

▪ **Answer:**
By exercising right to obtain second or third opinions. When fraud is suspected, hire a private investigator. Every FMLA policy should prohibit employees from working other jobs during FMLA (and all other) leave of absences.

Scenario One

▪ **Question:**
How does Workers' Disability Compensation Benefits (or STD/LTD) interact with FMLA?

▪ **Answer:**
Neither Workers' Compensation nor STD/LTD provides job security or right to leave of absence, but discharging employee *because* they filed claim would be unlawful.

Continued

Scenario One

– Workers' compensation (like STD/LTD) is income replacement and covers medical expenses for work related illnesses/injuries



Scenario One

- FMLA/ADA issues can become quite complicated. When in doubt, *always* consult an employment attorney before you act!





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Scenario Two

Pregnancy

Scenario Two

- **Question:**
Is an employee who returned to the company six months ago after quitting three years ago, eligible for FMLA leave?
- **Answer:**
Maybe. All weeks of service in the last seven years are counted to determine if the employee meets the 12-month requirement.

Scenario Two

- **Question:**
Do you count the hours worked going back seven years to determine if the employee has worked 1,250 hours?
- **Answer:**
No. The 1,250 hours must have been worked in the 12 months immediately preceding leave.



Scenario Two

- **Question:**
Do you count the hours worked from date employee requests FMLA leave?
- **Answer:**
No. Hours are counted from date leave would actually begin.



Scenario Two

- **Question:**
Can an employer unilaterally transfer a pregnant employee to a light duty job?
- **Answer:**
No. Not unless she requests it and even then consult your attorney to discuss ADA implications.



Scenario Two

- **Question:**
Is reconstructive plastic surgery following a mastectomy a serious health condition under FMLA?
- **Answer:**
Yes, the employee would be entitled to leave under FMLA and ADA.



Scenario Three

- **Question:**
Can an employee who can't return at end of FMLA leave be terminated?
- **Answer:**
Yes, unless the serious health condition is also a disability under ADA.



Scenario Three

- **Question:**
Is a leave of absence a reasonable accommodation under ADA?
- **Answer:**
Yes, it generally is.



Scenario Three

- **Question:**
Is there any limit to the amount of leave allowed under ADA?
- **Answer:**
No.

Scenario Three

- **Question:**
Is ADA leave a paid leave?
- **Answer:**
No.



Scenario Three

- **Question:**
Does an employee have to be returned to their same position following leave?
- **Answer:**
Yes, under the ADA, not under FMLA.

Scenario Four

▪ **Question:**
Can an employee take FMLA leave to take over care of a grandchild when his parent goes on active military duty?

▪ **Answer:**
Yes. They would be entitled to FMLA exigency leave.



Scenario Four

- **Exigency leave is available for:**
- Short notice deployments
 - Military events and related activities
 - Child care and school activities
 - Financial and legal arrangements
 - Counseling

Continued

Scenario Four

- Rest and recuperation
- Post deployment activities
- Any additional activities that employer and employee agree qualifies as exigency

Scenario Four

- **Question:**
Can an employer require certification for exigency leave?
- **Answer:**
Yes.

The image shows a screenshot of a Department of Justice EEOC Form 7150, titled 'Certification of Exigency Leave'. The form is used to certify that an employee's absence is due to a family emergency. It includes sections for 'Employee Information', 'Employer Information', and 'Certification'. The certification section contains a statement: 'I, the undersigned, certify that the absence of the employee named above is due to a family emergency as defined in 29 CFR 825.601(b). I am a member of the family of the employee named above and I am qualified to certify the absence of the employee named above is due to a family emergency as defined in 29 CFR 825.601(b). I am a member of the family of the employee named above and I am qualified to certify the absence of the employee named above is due to a family emergency as defined in 29 CFR 825.601(b).'

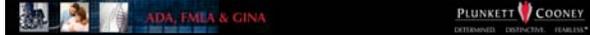
Scenario Four

- **Question:**
Can an employee who already took FMLA leave in past 12 months, take additional leave to care for an injured service member?
- **Answer:**
Yes, they may be eligible for an additional 26 weeks of FMLA leave.

Scenario Four

- **Question:**
Can an employee who already took 26 weeks of FMLA leave, take a second 26-week FMLA leave?
- **Answer:**
Yes, if it's a new 12-month period, for new injury and/or different service member.

Questions & Answers



Informed Employer Webinar Series

- Look for emails regarding Plunkett Cooney's 2012 Informed Employer Webinar Series



Thank You!



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