




PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

Diving Deep


Exploring ADA Accommodations and FMLA Abuse

Presented by
Claudia D. Orr
Laura M. Dinon

Today's Presenters



Claudia D. Orr
(313) 983-4863
corr@plunkettcooney.com



Laura M. Dinon
(231) 348-6417
ldinon@plunkettcooney.com

Diving Deep Into the ADA & FMLA **PLUNKETT COONEY**
DIVERSITY. INTEGRITY. EXCELLENCE.

Introduction & Overview

- When it comes to compliance, Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) are two of the most difficult laws.
- This webinar will dive deeper into both, focusing on accommodations under ADA and Michigan's Persons with Disabilities Civil Rights Act (MPDCRA) and how to prevent and handle FMLA abuse.

Diving Deep Into the ADA & FMLA **PLUNKETT COONEY**
DIVERSITY. INTEGRITY. EXCELLENCE.

Introduction – ADA/MPDCRA

- Like other civil rights laws, ADA and MPDCRA prohibit discrimination (or harassment) based on protected status, specifically disabilities (actual, perceived or history of disability), or because of association with someone with disabilities.
- Both ADA and MPDCRA require more of employers ... they require reasonable accommodations.

Introduction - Coverage

- MPDCRA - Michigan employers having one or more employees. Personal liability is possible.
- ADA - Employers engaged in industry affecting commerce, having 15 or more employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year. No individual liability.

Introduction - Limitations Periods

- MPDCRA claim can be initiated in circuit court within three years of alleged violation. Employers can shorten limitations period by agreement.
- In Michigan, ADA claim must be initiated with charge at Equal Employment Opportunity Commission (EEOC) within 300 days of alleged violation.
- After administrative process, 90 days to initiate lawsuit. Not clear if limitations period can be shortened.

Introduction - Damages

- MPDCRA permits compensatory damages and attorney's fees, but does not allow for award of punitive damages. Wage loss damages are reduced by amount received for workers' compensation benefits.
- ADA allows for compensatory damages and punitive damages (with certain caps based on size of employer) and attorney's fees.

Introduction – Requests for Accommodation

- MPDCRA requires applicant/employee with disability to request accommodation *in writing* within 182 days of day he knew or should have known that accommodation was needed, if employer provides notice of this requirement. (*Tip* - post notice of requirement; place on job application and in handbook).
- ADA - Requests for accommodation do not need to be in writing and may be made any time by employee, or by another person acting on behalf of employee.

Introduction - Undue Hardship

- Both ADA and MPDCRA only require accommodations that do not result in undue hardship to employer.
- Types of accommodations under MPDCRA are specified in statute with undue hardship based on cost and size of employer.
- ADA is only limited by concept of undue hardship, which must be proven by employer.

MPDCRA - Accommodations

- Burden of proof for failure to accommodate is specified - plaintiff/employee must prove by preponderance of evidence that accommodation would not cause undue hardship on employer. MCL 37.1210(1).
- How much an employer must spend on accommodation is determined by number of employees.

Continued

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

MPDCRA - Accommodations

- Statute lists types of accommodations that need to be provided.
- Accommodations that may be required: purchasing devices or equipment, hiring readers or interpreters, restructuring job or altering schedule

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

MPDCRA – Undue Hardship

- **Equipment or Device:** Not undue hardship to employer with:
 - Less than four employees and cost is equal to or less than State Average Weekly Wage (SAWW).
 - Four to 14 employees and cost is equal to or less than 1-½ times SAWW.

(Currently, SAWW = \$910.71)

Continued

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

MPDCRA – Undue Hardship

- 15 or more employees and cost is equal to or less than 2.5 times SAWW.

(Currently, SAWW = \$910.71)

- Above amounts do not include cost of reasonable maintenance or repair of equipment of devices. MCL 37.1210(2)-(7)

Continued

Diving Deep Into the ADA & FMLA



MPDCRA – Undue Hardship

- **Hire/Retain Readers or Interpreters:** Not undue hardship to employer with:
 - Less than four employees and cost is equal to or less than 7x SAWW 1st year and 5x SAWW/year thereafter.
 - Four to 14 employees and cost is equal to or less than 10x SAWW 1st year and 7x SAWW/year thereafter.

(Currently, SAWW = \$910.71)

Continued

Diving Deep Into the ADA & FMLA



MPDCRA – Undue Hardship

- 15 or more employees and cost is equal to or less than 15x SAWW first year and 10x SAWW/year thereafter. MCL 37.1210 (8)-(12)

(Currently, SAWW = \$910.71)

- Above costs for equipment/devices and readers/interpreters are reduced by 50 percent if person with disability is "temporary employee." MCL 37.1210(13)

Continued

Diving Deep Into the ADA & FMLA



MPDCRA – Undue Hardship

- If employee can only be accommodated by purchasing equipment/devices **and** hiring reader/interpreter then, subject to cost limits, employer must do both.
- If employee can be accommodated by either purchasing equipment/devices **or** hiring reader/interpreter, then the employer may choose after consulting with disabled employee. MCL 37.1210(16)

Continued

Diving Deep Into the ADA & FMLA



MPDCRA – Undue Hardship

- Job restructuring and altering employee's schedule applies to minor or *infrequent* duties of position. MCL 37.1210(15)
- Employer with less than 15 employees is not required to restructure job or alter employee's schedule. MCL 37.1210(14)

Continued

Diving Deep Into the ADA & FMLA



MPDCRA – Undue Hardship

- Sections above addressing limitations on accommodations of equipment/devices, readers/interpreters, job restructuring and schedule altering do not apply to public employers and nonprofits. MCL 37.1210(17)
- Accommodation required by MPDCRA is not to be construed as "preferential treatment" or an employee benefit. MCL 37.1214

Diving Deep Into the ADA & FMLA



ADA

- Employer’s obligations under ADA are much broader.
- Key to determining obligations is first determining “essential functions of job.”
- Hint: Ask on job app – Can you perform essential functions of the position you seek with or without a reasonable accommodation? (But, you don’t get to know if its with or without an accommodation.)

ADA – Essential Functions of Job

“Essential function” means fundamental job duties, not marginal tasks. May be essential because:

- It’s reason job exists.
- Limited number of employees who can perform that function
- Function is highly specialized and incumbent was hired because of that expertise.

Continued

ADA – Essential Functions of Job

- Factors to consider when determining essential functions:
 - Employer’s judgment
 - Written job description (this is key and should be written before you advertise for job vacancy.)
 - Amount of time function performed
 - Consequence of not performing function
 - CBA
 - Work experience of past and current incumbents

ADA - Accommodations

- Kinds of accommodations required under ADA are not limited as under state law.
- Reasonable accommodation may be *any* change in work environment or how work is done that will help disabled person apply for job, perform “essential functions” of their position or enjoy all benefits and privileges of employment.

Continued

ADA – Accommodations

Examples:

- Modifying existing work environment to be accessible and usable by disabled employee; modification or purchase of equipment or devices
- Job restructuring; part-time or modified work schedules; reassignment to *vacant* position; modifications of examinations, training materials or policies; providing qualified readers, interpreters or coaches

Continued

ADA – Accommodations

- Employer need not provide accommodation that is *primarily* for personal benefit of individual (i.e., assists individual with daily activities both on and off job, such as eyeglasses, wheelchair, prosthetic).
- Needs to provide accommodation that assists individual with performing duties of job (i.e., eyeglasses specifically designed to enable person to use office computer monitor).

Continued

ADA – Accommodations

- Employer does not need to provide accommodation that is amenity or convenience and not job related (i.e., hot plate or refrigerator).
- Employer does not need to restructure job to “fit” abilities of individual who is not otherwise qualified (i.e., skills, experience, education etc.).

Continued

Diving Deep Into the ADA & FMLA



ADA – Accommodations

- Employer does not have to provide “best” accommodation or one preferred by employee.
- Employer needs to provide accommodation that is *sufficient* to meet job-related needs of individual.

Diving Deep Into the ADA & FMLA



ADA – Accommodations

- Employer is not expected to accommodate a disability about which it is unaware.
- Generally, employee is obligated to inform employer when accommodation is needed.
- May ask whether accommodation is needed if: employer is aware of disability and that employee is struggling, or where employee is mentally challenged and doesn't know to ask.

Diving Deep Into the ADA & FMLA



ADA – Process for Determining Accommodation

- EEOC “suggests” the following flexible, “interactive process”/problem solving approach that involves employer and employee.
 - Analyze job, its purpose and essential functions.
 - Consult with employee to ascertain job-related limitations and how they can be overcome with accommodation.

Continued

Diving Deep Into the ADA & FMLA



ADA – Process for Determining Accommodation

- With employee, identify potential accommodations and assess effectiveness of each
- Consider employee’s preference and select and implement “most appropriate” for both employee and employer.

Continued

Diving Deep Into the ADA & FMLA



ADA – Process for Determining Accommodation

- If individual provides own accommodation, employer not relieved of obligation in future should they choose to stop.
- Where obvious, just provide accommodation without using step-by-step process above.
- Where additional assistance is needed, contact Job Accommodation Network:

1-800-ADA-WORK (1-800-232-9675)

Continued

Diving Deep Into the ADA & FMLA



ADA – Process for Determining Accommodation

- Employer cannot require employee to accept accommodation where not requested or wanted.
- If accommodation refused and employee cannot perform essential functions, employee is not qualified for job.
- No accommodation is required where employee is “regarded” as disabled, but not.

ADA - Medical Inquiries

- What if it is not clear that employee has a disability?
- EEOC Legal Counsel – Opinion Feb. 25, 2014 states that employer may inquire whether employee has disability and needs reasonable accommodation. Use plain English rather than legal standards and/or give examples.

Continued

ADA - Medical Inquiries

- Concerning existence of disability, “may” be permissible to ask:
 - Nature of employee’s disability
 - Expected duration
 - Kind of activities affected
 - Use of mitigating measures and extent to which they eliminate or control impact of medical condition

Continued

ADA - Medical Inquiries

- If asking about “major bodily functions” or “major life activities,” offer examples such as normal cell growth, endocrine, neurological, standing, lifting, concentrating, etc.
- If asking about mitigating measures, use examples such as medication, physical therapy, behavioral modifications, etc.

Continued

ADA - Medical Inquiries

- Concerning need for reasonable accommodation, it “may” be permissible to ask:
 - How accommodation would assist person in applying for job, performing essential functions or position, or enjoying equal access to benefits and privileges of employment.

Continued

ADA - Medical Inquiries

- Letter should be tailored to specific circumstances (i.e., when disability is obvious, no need to ask if person has disability).
- Each question should be analyzed for its purpose to determine if it is appropriate.
- Lengthy form letters provide greater chance of violating ADA by making inappropriate inquiry.

ADA - Undue Hardship

- It is employer's burden of proving accommodation is undue hardship.
- In general, it may be undue burden if disruptive to other employees or operations (i.e., turning thermostat up in July so that it becomes unduly hot to employees and customers).

Continued

Diving Deep Into the ADA & FMLA



ADA – Undue Hardship

- Terms of CBA are relevant (i.e., accommodation would violate seniority rights of other employees).
- However, negative impact on morale of other employees insufficient for undue hardship.
- Employer must not disclose to other employees that it is providing accommodation for a disability!

Continued

Diving Deep Into the ADA & FMLA



ADA – Undue Hardship

- Analysis: It must be “significant” difficulty or expense when considering:
 - Nature and net cost of accommodation, taking into consideration tax credits and deductions and/or outside funding
 - Overall financial resources of *facility(ies)*, number of persons employed at facility and effect on expenses and resources

Continued

Diving Deep Into the ADA & FMLA



ADA – Undue Hardship

- Overall financial resources of *employer*, number of employees, and number, type and location of its facilities
- Type of operation(s) of covered employer, including composition, structure and functions of workforce, and geographic separateness and administrative or fiscal relationship of facility(ies) in question to employer

Continued

Diving Deep Into the ADA & FMLA



ADA – Undue Hardship

- Impact of accommodation on operation of facility, including impact on ability of other employees to perform their duties and impact on facility's ability to conduct business. 29 CFR 1630.2
- Cost must be undue as compared to employer's budget (not as compared to salary of disabled worker). If employee willing to cover portion of cost, only employer's portion is relevant to analysis.

Continued

Diving Deep Into the ADA & FMLA



ADA – Undue Hardship

- Bottom line, the more financial resources and employees the employer has, the less likely employer will succeed in proving an undue hardship.
- Employers should consult with experienced employment attorney before denying an accommodation.

Diving Deep Into the ADA & FMLA



FMLA-Overview

- Requires covered employers to grant eligible employees up to 12 weeks of job-protected, unpaid leave for:
 - Birth of a child
 - Placement of adopted or foster child with employee
 - Employee’s own serious health condition
 - Serious health condition of employee’s spouse, parent or child

Continued

Diving Deep Into the ADA & FMLA



FMLA - Overview

- FMLA amendments require leave also be given for:
 - Exigencies for family members of those in military
 - Extended leave up to 26 weeks if it is to care for seriously wounded or ill military members or veterans who served in last five years

Diving Deep Into the ADA & FMLA



FMLA – Covered Employers

- Private employers engaged in commerce with a minimum of 50 employees
- Public employers are covered regardless of number of employees.
- Covered employers only have to grant leave to employees who work at a site with 50 or more employees within a 75 mile radius.

Diving Deep Into the ADA & FMLA



FMLA – Eligible Employees

- An employee is eligible for leave after working for 12 months (which do not have to be consecutive) and working 1,250 hours in 12 months immediately preceding start of FMLA leave.

FMLA - Benefits

- Employers must:
 - Maintain an employee’s health insurance during FMLA leave
 - Return employee to his/her original job or an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment

FMLA – Notice Requirement

- Employees are required to give their employers notice of the need for FMLA leave.
 - If foreseeable, at least 30 days notice
 - If unforeseeable, as soon as practicable – usually same day employee becomes aware of need, or next day; unless its an emergency
 - Notice can be verbal.
 - “Sufficient” is not defined.

FMLA – Employee Notices

- Employers can require employees to comply with their usual and customary notice and procedural requirements for requesting leave including:
 - Require notice in writing
 - Require notice be given to specific persons
 - Follow call-in procedures

FMLA – Employer Notices

- It is always employer's obligation and right to designate leave, paid or unpaid, as FMLA leave.
- Regardless of whether employee asks for FMLA
- Even if employee asks that it not be designated as FMLA leave
- Within five business days of request

FMLA – Employer Notice

- Must state whether eligible and, if not, why
- Any requirements for medical certification and consequences of failing to provide
- Any right or requirement to use paid leave
- Requirements RE: paying health insurance premium
- Right to maintain health insurance and return to same or equivalent job
- Key employee status, if applicable

Abuse of FMLA Leave

- Employees who use FMLA in a fraudulent manner to avoid working when they otherwise could
- Intermittent leave is particularly susceptible to abuse.

Basic Types of FMLA Abuse

- Working a second job on the side in violation of an express written policy prohibiting it
- Working a second job on the side where there is no written policy that specifically prohibits it
- Engaging in manual labor
- Running errands or shopping
- Partying or engaging in other social or recreational activities

Continued

Basic Types of FMLA Abuse

- Sneaking off on a pleasure trip
- Failing to take care of a family member while on family care related FMLA

Signs of FMLA Abuse

- High degree of FMLA usage on Fridays , Mondays and around holidays
- Employees who are unable to take off of work using vacation or personal days solve that problem by taking FMLA leave for those same days.
- Co-workers come forward, directly or anonymously and tell their supervisor or HR that a particular employee is misusing FMLA and provide details regarding those activities.

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

Curbing Abuse of FMLA

- Question the original certification.
- Ask for a second opinion.
- Require employees to follow your paid leave policy.
- Ensure all absences related to the condition are counted.
- Request recertification.
- Follow up on changed or suspicious circumstances.

Continued

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

Curbing Abuse of FMLA

- Control employees scheduling of planned treatments
- Consider temporary transfers

Diving Deep Into the ADA & FMLA

PLUNKETT COONEY
ATTORNEYS AT LAW

Managing Intermittent Leave

- Require employee to provide detailed information when requesting FMLA.
- Treat absences as non-FMLA if employee simply calls in and says I'm sick.
- Require employee to call in whenever absent and obtain a status report each time.
- Question employee about his/her activities while off, when they return to work.

Managing Intermittent Leave

- Provide detailed job description to health care provider.
- Insist employee provide complete medical certification, and put the burden on the employee.
- If employee does not furnish complete medical certification, don't treat the absences as FMLA.
- Require second and/or third opinions.
- Require written detailed requests for foreseeable leave.

FMLA Expansion

- Effective March 27, employees in legal same-sex marriages will have the same rights as employees in opposite sex marriages to take FMLA leave.
- FMLA policies must be updated to reflect this.

Questions?



Claudia D. Orr
(313) 983-4863
corr@plunkettcooney.com



Laura M. Dinon
(231) 348-6417
ldinon@plunkettcooney.com

Diving Deep Into the ADA & FMLA



Post-Webinar Survey



We want to hear from you!!

Diving Deep Into the ADA & FMLA



May 21 Seminar

PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

Employment Law Seminar
Clueless...
The Cost & Consequence of
Untrained Management

May 21, 2015 • 8:30 to Noon (EDT) • Troy Marriott Hotel

Diving Deep Into the ADA & FMLA



Informed Employer Series

- June 18 Wage & Hour Webinar
- Sept. 17 Technology Issues Webinar
- Nov. 19 Hot Topics Webinar



Diving Deep Into the ADA & FMLA



Audio File of Today's Program

SEMINARS & EVENTS

DIVING DEEP WEBINAR - EXPLORING ADA ACCOMMODATIONS & FMLA LEAVE ABUSE
March 19, 2015

PLUNKETT & COONEY

Diving Deep Into the ADA & FMLA
Exploring Employee Accommodations & Leave Abuse

March 19, 2015 - Noon to 1:15 p.m. (EDT) - Complimentary Webinar

Plunkett & Cooney, Inc. is pleased to present this complimentary webinar.

DIVING DEEP INTO THE ADA & FMLA
EXPLORING ADA ACCOMMODATIONS & LEAVE ABUSE

Thursday, March 19, 2015
Time: Noon to 1:15 p.m. (EDT)
Cost: Complimentary

Webinar Details
• 1 Hour 15 Minutes
• Details (0) (0)

Related Products
• Human Resources Services
• Labor & Employment Law

Diving Deep Into the ADA & FMLA



Labor & Employment Blog

The Informed Employer
Your legal resource for workforce management

EEOC Task Force to Focus on Workplace Harassment in 2015
POSTED BY COURTNEY L. MCKEE
February 26, 2015

EEOC's focus on harassment claims means the time is right for employers to review anti-harassment policies, training and procedures. [Continue Reading](#)

Court Rules Employee Meal Period Interruptions Don't Require Compensation
POSTED BY ANDREW J. BRADSHAW
February 26, 2015

PLUNKETT & COONEY
DETERMINED. DEDICATED. EMPOWERED.

SUBSCRIBE VIA
Email
Phone

PLUNKETT & COONEY
DETERMINED. DEDICATED. EMPOWERED.

TOPICS
Labor & Employment Law

www.plunkettcooney.com/blogs-theinformedemployerblog

Diving Deep Into the ADA & FMLA



Thank You!!

Content of this webinar was intended to provide general information about legal issues and should not be taken as legal advice in any specific instance.

Information presented in this webinar was current at time of original presentation on March 19, 2015.

Information can become outdated or inaccurate as result of subsequent amendments to laws or issuance of new regulations or court decisions interpreting laws differently.

When legal advice is needed, always consult an attorney experienced in the relevant area of law.