INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

LEGAL ISSUES SURROUNDING FIRE FIGHTER MENTAL HEALTH:

HOW TO USE THE ADA AND FMLA TO HELP FIRE FIGHTERS STRUGGLING WITH ANXIETY, DEPRESSION, PTSD, AND DRUG/ALCOHOL ABUSE

March 30, 2026

LEGAL PROTECTIONS FOR FIRE FIGHTERS STRUGGLING WITH MENTAL HEALTH ISSUES AND DRUG/ALCOHOL ABUSE

- The Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) protect fire fighters who are dealing with job-created struggles such as anxiety, depression, PTSD, and drug/alcohol use.
- We will examine:
  - The protections offered by the ADA and FMLA for fire fighters dealing with mental health and drug/alcohol use;
  - The steps fire fighters need to take to invoke these protections; and
  - Tips for assisting members with leave/accommodations

IMPACTS OF FIRE FIGHTING ON MENTAL HEALTH

- Study after study reveals the trauma experienced by fire fighters while performing their jobs.
- In 2018, IAFF partnered with an NBC affiliate in Dallas-Fort Worth and polled nearly 7,000 fire fighters about mental health and trauma
  - 81% thought they would appear weak or unfit for discussing their feelings
  - 71% said they had trouble sleeping
  - 65% had unwanted memories
  - 19% had suicidal thoughts

IMPACTS OF FIRE FIGHTING ON MENTAL HEALTH

- In 2016, a FEMA grant-funded study examined how fire fighters responded to repeated exposure to trauma and found
  - 85% of fire fighters drank alcohol in the prior 30 days
  - Of that 85%, approximately 50% reported binge drinking in the past month
  - On average, fire fighters reported drinking alcohol 10 days per month, or about half of their off-duty days

IMPACTS OF FIRE FIGHTING ON MENTAL HEALTH

- In 2022, researchers at the University of Southern Mississippi and University of Houston did a 2-year study on fire fighters who worked for large, metropolitan fire departments in the southern United States from 2016-2018 and they found
  - Around 50% of fire fighters reported excessive drinking in the past month (*i.e.*, three or more alcoholic drinks in a sitting) and 75% of those fire fighters experienced numerous such episodes
  - Compared to less than 30% of the general population, fire fighters have lifetime rates of alcohol use disorder (AUD) as high as 50%
  - Chronic exposure to potentially traumatic events is associated with psychological distress, depression, and posttraumatic stress disorder (PTSD) symptoms, which in turn, have direct or indirect associations with increased alcohol consumption among first responders

THE AMERICANS WITH DISABILITIES ACT

THE HISTORY OF DISABILITY LAW

- Prior to the Americans with Disabilities Act, the disability protections in the United States were basically a patchwork of federal and state laws and regulations.
- The first disability protections arose out of the 5th and 14th Amendments to the U.S. Constitution.
- These Amendments, in theory, provided all persons Equal Protection under the law.
- However, discrimination was still “permitted” provided the government had a rational basis for doing so.
- These protections only applied to governmental actions.

REHABILITATION ACT OF 1973

- Enacted September 26, 1973, signed by President Richard Nixon
- Basically, an extension of earlier disability protections.
- A key provision was Section 504, which extended Civil Rights type protections to those with disabilities.
- *"No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."*

AMERICANS WITH DISABILITIES ACT

- Signed into law by President George Bush on July 26, 1990.
- A key component was strengthening protections for disabled individuals in all employment, public and private.
- *"No covered entity shall discriminate against a qualified individual on the basis of disability 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."* 42 U.S.C. § 12112

WHAT IS A DISABILITY?

The term "disability" means, with respect to an individual:

- A physical or *mental impairment* that *substantially limits* one or more *major life activities* of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.
  - 42 U.S.C. § 12102(1)

WHAT IS A DISABILITY?

- **§ 12210. Illegal use of drugs**
- **(a) In general.** For purposes of this Act, the term **"individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.**
- **(b) Rules of construction. Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who—**
- **(1)** has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- **(2) is participating in a supervised rehabilitation program and is no longer engaging in such use;** or
- **(3)** is erroneously regarded as engaging in such use, but is not engaging in such use;
- except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

WHAT IS A MENTAL IMPAIRMENT?

- **The ADA implementing regulations define "mental impairment" as:**
  - "Any mental or psychological disorder, such as…emotional or mental illness." 29 C.F.R. § 1630.2
- **The mental impairment must substantially limit a major life activity**
  - Courts to compare the person claiming a disability to "most people in the general population." 29 C.F.R. § 1630.2(j)(1)(ii).
- **Court's have recognized PTSD, Anxiety, Depression, and alcoholism as mental impairments under the ADA**
  - "PTSD is a mental health impairment." *Lowe v. Pettway*, 665 F. Supp. 3d 1313, 1328 (N.D. Ala. 2023)
  - Depression and severe separation anxiety are mental impairments. *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018).
  - "[a]lcoholism is a disability within the protection of the ADA." *Mararri v. WCI Steel, Inc*., 130 F.3d 1180, 1185 (6th Cir. 1997)

WHAT IS A MAJOR LIFE ACTIVITY?

The definition of "major life activity" was expanded in the ADA Amendments Act of 2008:

- 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.
  - 42 U.S.C. § 12102(2)

DISABILITY DISCRIMINATION IN EMPLOYMENT

- The ADA prohibits employers from discriminating based on disability in hiring, termination, wages, training, fringe benefits or other terms, conditions, and aspects of employment.
- Employers also may not limit, segregate, or classify employees and applicants with disabilities in ways that adversely affect their job opportunities or employment status.

REASONABLE ACCOMMODATIONS

DISCRIMINATION IN EMPLOYMENT

Under the ADA, employers cannot discriminate against employees and applicants with disabilities who can perform the essential job functions with or without reasonable accommodations.

- A mental impairment may substantially limit a major life activity, but still allow an employee to perform essential job functions with or without a reasonable accommodation

DISCRIMINATION IN EMPLOYMENT – "EMPLOYER"

An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees…"29 C.F.R. § 1630.2. This includes State and municipal governments.

- Note: the federal government is explicitly excluded from the definition of an employer under the ADA, and disability discrimination claims must be brought under the Rehabilitation Act of 1973.

QUALIFIED INDIVIDUAL

- The term “qualified individual” means an individual who, ***with or without reasonable accommodation***, can perform the essential functions of the employment position that such individual holds or desires.
- Consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

REASONABLE ACCOMMODATION

The term "reasonable accommodation" may include —

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
- Attending a rehab program to address alcohol/drug abuse or PTSD, anxiety or other mental health issues may be considered a reasonable accommodation (based on the considerations discussed below).

UNDUE HARDSHIP

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

- The nature and cost of the accommodation needed under this chapter;
- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

THE REASONABLE ACCOMMODATION PROCESS

- The individual or representative must inform the employer that he or she needs an adjustment or change at work because of a disability.
- Once this occurs, the employer and the individual with a disability should engage in an informal interactive process to clarify what the individual needs and identify an appropriate reasonable accommodation.
- The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.
- The employer may ask an individual for documentation when the disability and/or the need for accommodation is not obvious. The employer may ask the individual for reasonable documentation about his/her disability and functional limitations.

THE REASONABLE ACCOMMODATION PROCESS

- An employer may ask the individual to undergo a medical examination with a doctor of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation.
- Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

THE REASONABLE ACCOMMODATION PROCESS

- An employer is not required to provide the reasonable accommodation that the individual wants if there are more than one accommodations that will allow the employee to perform the essential functions of the job.
- The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.
- If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective. Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide.

FIREFIGHTING AND DISABILITIES

- The demands of firefighting are unique.
- Severe depression and anxiety could be career ending for a fire fighter, while a manageable disability for an attorney.
- Medications which make one drowsy, unable to operate heavy equipment, or struggle with punctuality affect fire fighters' ability to perform their job differently than an attorney's ability to do their job.

FIREFIGHTING AND DISABILITIES

- An attorney on medication for severe depression and anxiety could request reasonable accommodations that include the ability to report to work late, or the ability to work an alternate office schedule.
- A fire fighter on medication for severe depression and anxiety would need to request a very different set of accommodations in order to perform their core job functions. Would it be reasonable to request the ability to show up to a shift late? Or reasonable to request assignments that do not involve the operation of heavy machinery? Alternate shift schedule at the fire house? Or would this be an “undue burden” to the Department?

POSSIBLE ACCOMMODATIONS

- **Upon finding that a fire fighter is suffering from a disability which could adversely impact a fire fighter's duty status, then decisions need to be made about the fire fighter's career.**
- Full duty
- Full duty with a reasonable accommodation (FMLA leave or other leave to attend rehab or other medical treatment)
- Light duty as a reasonable accommodation
- Retirement

LIGHT DUTY – ONE TYPE OF ACCOMMODATION

- The term "light duty" has a number of different meanings in the employment setting.
- Generally, "light duty" refers to temporary or permanent work that is physically or mentally less demanding than normal job duties.
- "Light duty" also may consist of particular positions with duties that are less physically or mentally demanding created specifically for the purpose of providing alternative work for employees who are unable to perform some or all of their normal duties.

LIGHT DUTY

- Light or modified duty may be granted to an injured fire fighter as a reasonable accommodation. However, this granting must not create undue hardship on the employer.
- For example, a larger department with significantly more employees and resources may be able to more easily grant a firefighter light duty as opposed to a smaller department.

FIREFIGHTING AND DISABILITIES

- Individuals need not be “100% healed” before returning to work.
- A 100% healed policy “prevents individual assessment, it necessarily operates to exclude disabled people that are qualified to work, which is a per se violation.”

HARTWELL V. SPENCER, 792 FED. APPX. 687, (11TH CIR. 2019)

- Hartwell was a fire fighter diagnosed with ADHD, Depression, and Generalized Anxiety.
  - Claimed these conditions caused insomnia and his medication caused drowsiness, the combination of which caused him to be chronically late.
  - Sought an accommodation allowing him to be up to one hour late to work without repercussion.
- The 11th Circuit held that "Hartwell "must show either that he can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation."
  - 11th Circuit held that reporting to work on time was an essential function of being a fire fighter
  - Because Hartwell could not report to work on time, even with his requested accommodation, this court ruled he was not "otherwise qualified" for the job of fire fighter.
- 11th Circuit noted that "prior accommodations do not make an accommodation reasonable"
  - "[J]ust because an employer has, in the past, done more than required to accommodate an employee who cannot fulfill all the requirements of his job does not mean that the employer must continue to do so."

CARPENTER V. YORK AREA UNITED FIRE & RESCUE, 2020 WL 1904460 (M.D. PA. APR. 17, 2020)

- Carpenter was a firefighter diagnosed with severe depression, anxiety, and PTSD.
  - Court found that testimony regarding interference with daily life activities combined with doctor's correspondence indicating he was unable to work satisfied ADA disability definition.
- Requested extended medical leave as a reasonable accommodation
  - Court noted that "[I]n certain circumstances, a leave of absence may be a reasonable accommodation under the ADA. However, that leave cannot be indefinite or open-ended; there must be some expectation that the employee could perform his essential job functions in the near future following the requested leave."
- Court held that because he requested indefinite/open ended leave, it was not a reasonable accommodation.

RORRER V. CITY OF STOW, 743 F.3D 1025, 1045 (6TH CIR. 2014)

- Fire fighter Rorrer was severely injured in an off-duty accident, losing all vision in his right eye.
- Rorrer sought a reasonable accommodation to continue as a fire fighter without driving apparatus and a transfer to a fire inspector position.
- The city denied his requests.
- 6th circuit ruled in his favor noting that relieving him from driving duties was not an undue burden, and that the city did not seek in good faith to accommodate Rorrer's request for a transfer.

FITNESS FOR DUTY

FITNESS FOR DUTY

- Under the ADA, fitness-for-duty evaluations must be “job-related,” “consistent with business necessity,” and based on evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.
  - Specifically, the ADA provides that an employer “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”
- In general, discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

FITNESS FOR DUTY

- An employer can require that an employee submit to a medical examination when an employer has a "*reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform essential job functions or that the employee will pose a threat due to a medical condition.*"
- An employee poses a **direct threat** if he or she is creating "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

FITNESS FOR DUTY

- An assessment that an employee poses a direct threat must be based upon “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”
- Factors employers may consider in such an analysis include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.

ALAMO V. BLISS, 864 F.3D 541, 554 (7TH CIR. 2017)

- The Seventh Circuit stated that “fire departments are a special work environment and medical evaluations, including psychiatric evaluations, may be considered job-related and consistent with business necessity.”
  - Fire departments have the “obligation to the public to ensure that its workforce is both mentally and physically capable of performing what is doubtless mentally and physically demanding work.” Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 566 (7th Cir. 2009)

SINTOS V. CITY OF CHI., NO. 21 C 5327, 2025 U.S. DIST. LEXIS 124899, (N.D. ILL. JULY 1, 2025)

- Sinto's conditional offer of approval as a fire fighter was withdrawn after he received an "unacceptable recommendation" on a psychological suitability screening.
- Court found that the examination was not job-related or justified by a business necessity
  - The examination "[c]ompared a candidate's characteristics to those of a pool of public safety individuals who had successfully completed their probationary period…An unacceptable finding on the screening meant that the candidate's results did not look like those of a sample group of individuals who completed the probationary period."
  - Examiner testified "that the suitability screening did not assess whether an individual could perform the essential functions of the position in question."

FINK V. CITY OF N.Y., 129 F. SUPP. 2D 511, 529 (E.D.N.Y. 2001)

- Fire Marshall sued City under ADA after City forced him to submit a hearing examination and subsequently placed him on light duty.
  - City's examination showed a "60% hearing impairment in the right ear and a 74% hearing impairment in the left ear"
- However, Court noted Plaintiff was "employed as a fire marshal, not as a **fire fighter**, and there is nothing in particular about employment as a fire marshal which requires unimpaired hearing."
- Examination not job-related or justified by business necessity

NFPA 1582

- NFPA 1582 lists certain medical conditions that *potentially* interfere with a fire fighter's ability to safely perform essential job tasks.
  - The majority of these are physical conditions such as a skull defect that would preclude proper helmet use, coronary artery disease, or scoliosis.
  - Mental health conditions include a history of psychiatric condition, a substance abuse problem, or medications that increase an individual's risk of heat stress, etc.
- Possession of one or more of the conditions listed in Chapter 9 of NFPA 1582 ***does not indicate a blanket prohibition*** for a fire fighter from continuing to perform the essential job tasks, nor does it require automatic retirement or separation from the fire department. Instead, it solely gives the fire department's physicians guidance for determining a member's ability to medically and physically function with or without reasonable accommodation.

NFPA 1582

- NFPA 1582 was fundamentally developed for, and primarily intended as, guidance for physicians in order to provide them with advice for an association or relationship between essential job functions of a fire fighter as an individual and their medical condition(s).
- Its guidance should be used for the best approach towards an individual's risk assessment and management with respect to their medical issue(s) and particular job, not as a set of medical conditions that prohibit fire fighters from performing their jobs.

WHAT HAPPENS IF AN EMPLOYEE REFUSES TO TAKE A REQUIRED MEDICAL EXAM?

- An employee's refusal to take a medical examination may cause the employee to be subject to termination if the employer is able to establish that the required examination was job-related and consistent with a business necessity. An employee who refuses to comply with a permissible order for an examination also may be found to be insubordinate.

WHAT HAPPENS IF AN EMPLOYEE REFUSES TO TAKE A REQUIRED MEDICAL EXAM?

- Additionally, an employee who refuses to undergo a medical examination may hinder his or her potential claims against the employer resulting from the termination.
  - Without having participated in the examination, the employee would be unlikely to be able to assert that the examination was not actually job-related and was not narrowly tailored in scope.
  - Failure to participate in an examination may also prevent the employee from establishing that he or she has a disability allowing the employee to claim that the discharge was discriminatory in nature.

A WORD ABOUT HIPPA

- The Health Insurance Portability and Accountability Act (HIPAA) restricts the use and disclosure of private health data.
- HIPAA's restrictions are not without exception.
- For instance, an employer may use and disclose information about an employee where the information was obtained by a health care provider who works for the employer—or who provides health care to employees at the employer's request—for the following purposes:
  - To conduct an evaluation relating to medical surveillance of the workplace; or
  - To evaluate whether the [employee] has a work-related illness or injury.
- Protected health data may also be used and disclosed when required by law.
  - The ADA permits an employer to obtain medical information about one of its employees when it can show that a medical examination is job-related and consistent with a business necessity.

A WORD ABOUT HIPPA

- While disclosure and use of medical information will not be prohibited by HIPAA, the ADA imposes its own limitations on how the employer must handle medical information as well as under what circumstances and to whom the information may be disclosed.
- Information about an employee's medical condition or medical history must be collected and maintained on separate forms and in separate medical files set apart from the employee's personnel files.
- The information must be treated as a confidential medical record and may only be disclosed in the following circumstances:
  - (1) to notify a supervisor of an employee's need for restricted work duties or necessary accommodations;
  - (2) to notify safety personnel in the event that the individual's disability may require emergency treatment; and
  - (3) when government officials are investigating compliance with the ADA.

PERIODIC PHYSICAL AGILITY OR FITNESS TESTS

- Under the ADA, physical agility tests are not considered medical examinations, meaning an employer may conduct them at any time, provided that they are "given to all similarly situated applicants or employees regardless of disability." 29 C.F.R. app. § 1630.14(c)
- OSHA has stated that employers shall assure that employees who perform "interior structural fire fighting are physically capable of performing duties which may be assigned to them during emergencies." 29 C.F.R. § 1910.156(b)(2)
- Physical agility tests, though, could be discrimination based on sex or age.

LACROIX V. BOS. POLICE DEP'T, 2022 U.S. DIST. LEXIS 52977, (D. MASS. MAR. 24, 2022)

- Plaintiffs challenged the following City policy under the ADA's medical examination protections:
  - "[O]fficers who have been on leave for three or months must undergo a physical examination by a BPD clinician prior to returning to work….Additionally, officers who have been on leave for six months must also undergo a psychological examination performed by [a] BPD psychiatrist", regardless of whether the reason for leave was related to a mental health issue, before returning to work.
- Court noted that "Plaintiffs [in general] do not need to show they are disabled for the purposes of bringing their claim under [medical examination protections of] the ADA."
- "The Court, agrees with Plaintiffs that [the City] has failed to establish business necessity to justify subjecting all officers to physical examination and/or psychological examination…*when unrelated to an injury that caused the leave from the job.*"
  - Return to duty and periodic examinations must be limited to determining whether the "employee is currently able to perform the essential functions of his or her job."
- Lacroix v. Bos. Police Dep't, Civil Action No. 19-cv-11463-DJC, 2022 U.S. Dist. LEXIS 52977, at *15 (D. Mass. Mar. 24, 2022)

Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J., 283 F. Supp. 3d 72, 77 (S.D.N.Y. 2017)

- The Port Authority Police Benevolent Association, ("PAPBA") sued the Port Authority of New York and New Jersey (the "Port Authority"),challenging Port Authority policies requiring its police officers to submit to annual medical examinations and fitness-for-duty examinations under the ADA.
- The court noted that both kinds of examinations included strenuous physical examinations as well as psychological elements, and were required for all Port Authority officers regardless of rank or job assignment—including largely administrative ranks.
    - Employer “must show that the policy is justified with resepect to the affected class [of employees to which it applies].”
    - “Port Authority has not demonstrated reasonable grounds to require all of its police officers to submit to annual medical examinations, as opposed to a narrowly defined class of police officers for whom annual medical examinations may be necessary.”
- Court concluded general policy examinations violated ADA because the examinations “are—by their own admission—intended to be comprehensive and to reveal a panoply of conditions, including those having no relevance to an officer's ability to perform the job.”

FITNESS-FOR-DUTY EXAMS AFTER RETURN FROM LEAVE

- An employer may require an employee returning from leave to undergo a fit-for-duty examination before returning to work when the employer can demonstrate that it has a reasonable belief that the employee's current condition may prevent him or her from performing an essential job function.
- The fit-for-duty examination that will be used to determine the accuracy of that belief must be limited in scope.
- An examination that sought information in excess of whether or not the employee could perform an essential job function could constitute a violation of the ADA.

FITNESS-FOR-DUTY EXAMS AFTER RETURN FROM FMLA LEAVE

- An employer may require a fit-for-duty examination from an employee returning to work after taking leave under the Family and Medical leave Act (FMLA), provided that the requirement is a uniformly applied practice or policy.
- However, the FMLA contains specific requirements and limitations on the type of information an employer may obtain from the employee prior to permitting him or her from returning to work.

FAMILY MEDICAL LEAVE ACT

FAMILY MEDICAL LEAVE ACT

- Signed into law by President Bill Clinton on February 5, 1993.
- Entitles employees to take reasonable, unpaid leave for
  - Medical reasons
  - Birth or adoption of a child
  - For the care of a child, spouse, or parent who has a serious health condition

FAMILY MEDICAL LEAVE ACT

- Private employers who employ 50 or more employees each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
- Private employers with fewer than 50 employees are not covered by the FMLA, but may be covered by state family and medical leave laws.
- Government agencies (including local, state and federal employers) are covered by the FMLA, regardless of the number of employees.

FAMILY MEDICAL LEAVE ACT

- Eligible employee-
  - An employee who has been employed for at least 12 months by the employer and for at least 1,250 hours of service with such employer during the previous 12-month period.

FAMILY MEDICAL LEAVE ACT

- If you are covered by the FMLA and an eligible employee, you can take up to 12 weeks of unpaid FMLA leave in any 12-month period for a variety of reasons, including:
  - Serious Health Condition
    - Care for your spouse, child or parent who has a serious health condition, or
    - When you are unable to work because of your own serious health condition.
  - Expand Your Family
    - Birth of a child, or
    - Placement of a Child for Adoption or Foster Care.

FAMILY MEDICAL LEAVE ACT

The most common serious health conditions that qualify for FMLA leave are:

- Conditions requiring an overnight stay in a hospital or other medical care facility;
- Conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and require ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
- Chronic conditions that cause occasional periods when you or your family member are incapacitated and require treatment by a health care provider at least twice a year; and
- Pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).

FAMILY MEDICAL LEAVE ACT

- Leave under the Act for expansion for family must be taken within one year of the child's birth or placement and must be taken as a continuous block of leave unless the employer agrees to allow intermittent leave (for example, a part-time schedule).

FAMILY MEDICAL LEAVE ACT

- **Serious Health Condition - Leave for Treatment of Substance/Alcohol Abuse**
- Treatment for substance/alcohol abuse may be a **serious health condition if the conditions for inpatient care and/or continuing treatment are met.**
- FMLA leave may only be taken for substance/alcohol abuse treatment provided by a health care provider or by a provider of health care services on referral by a health care provider. Absence because of the employee's use of the substance, rather than for treatment, *does not qualify for FMLA leave*.

FAMILY MEDICAL LEAVE ACT

- The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for substance/alcohol abuse treatment. However, if the employer has an established policy, applied in a non-discriminatory manner, that has been communicated to all employees, and that provides under certain circumstances an employee may be terminated for substance/alcohol abuse, then pursuant to that policy the employee may be terminated regardless of whether he or she is presently taking FMLA leave.

FAMILY MEDICAL LEAVE ACT

- An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance/alcohol abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance/alcohol abuse.

REQUESTING FAMILY MEDICAL LEAVE ACT

- To take FMLA leave, you must provide your employer with appropriate notice.
- If you know in advance that you will need FMLA leave (for example, if you are planning to have surgery or you are pregnant), you must give your employer at least 30 days advance notice.
- If you learn of your need for leave less than 30 days in advance, you must give your employer notice as soon as you can (generally either the day you learn of the need or the next work day).
- When you need FMLA leave unexpectedly (for example, if a family member is injured in an accident), you MUST inform your employer as soon as you can.

NOTIFICATION OF APPROVAL OF FAMILY MEDICAL LEAVE ACT

- Your employer must notify you if you are eligible for FMLA leave within five business days of your first leave request.
- If the employer says that you are not eligible, it has to state at least one reason why you are not eligible (for example, you have not worked for the employer for a total of 12 months).
- At the same time that your employer gives you an eligibility notice, it must also give you a notice of your rights and responsibilities under the FMLA.

FAMILY MEDICAL LEAVE ACT

- Not all leave requested or taken for medical reasons qualifies for the FMLA's protections.
- For this reason, employers have a legal right to require an employee requesting FMLA leave to obtain certification that attests to the employee's eligibility for such leave from a health care provider.
  - Cash v. Smith, 231 F.3d 1301, 1307 (11th Cir. 2000)

CERTIFICATIONS FOR FAMILY MEDICAL LEAVE ACT LEAVE

- If your employer requests medical certification, you have 15 calendar days to provide it in most circumstances.
- You are responsible for the cost of getting the certification from a health care provider and for making sure that the certification is provided to your employer.
- If you fail to provide the requested medical certification, your FMLA leave may be denied.

CERTIFICATIONS FOR FAMILY MEDICAL LEAVE ACT LEAVE

- The medical certification must include:
  - Contact information for the health care provider;
  - When the serious health condition began;
  - How long the condition is expected to last;
  - Appropriate medical facts about the condition (which may include information on symptoms, hospitalization, doctor's visits, and referrals for treatment);
  - Whether you are unable to work or your family member is in need of care; and
  - Whether you need leave continuously or intermittently.

PAID LEAVE AND FMLA LEAVE

- Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy.
- The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA.
- If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.
- Example:

  Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer's sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer's sick leave policy by taking a full day of sick leave for her doctor's appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.

RETURNING TO WORK FROM FAMILY MEDICAL LEAVE ACT

- An employer may require an employee who has been out on FMLA leave due to a serious health condition to obtain a certification from his or her health care provider stating that the employee is able to resume work.
- In order to require an employee to obtain a certification of fitness to resume work, the employer must have a uniform policy requiring all similarly-situated employees who take FMLA leave due to a serious health condition to provide a certification prior to returning to work.

RETURNING TO WORK FROM FAMILY MEDICAL LEAVE ACT

- When an employee is required to present a fit-for-duty certification prior to returning from FMLA leave, the employee must bear the cost of the certification.
- Additionally, the employee is not entitled to any compensation for the time or travel that is required to obtain the certification.

CONTACTING THE EMPLOYEE'S HEALTH CARE PROVIDER

- With an employee's permission, an employer may contact the employee's health care provider only for the purposes of seeking clarification or authentication of the fit-for-duty certification.
- In seeking clarification, an employer's contact is limited to "understand[ing] the handwriting on the medical certification or to understand the meaning of a response."
- An employer is not permitted to request any additional medical information from the employee's health care provider.

CONTACTING THE EMPLOYEE'S HEALTH CARE PROVIDER

- When the employer contacts the employee's health care provider, it must use "a health care provider, a human resources professional, a leave administrator, or a management official."
- The employer is prohibited from having the employee's direct supervisor contact the employee's health care provider.
- Even when an employer elects to seek clarification or authentication, it may not delay the employee's return to work after it has received a fit-for-duty certification.

REQUESTING 2ND MEDICAL OPINIONS UNDER THE FAMILY MEDICAL LEAVE ACT

- An employer's ability to obtain a second opinion regarding a FMLA certification depends upon the type of certification at issue.
- If the certification at issue is the **initial certification** to request FMLA leave, the employer may obtain a second opinion.
- However, if the certification at issue is a fit-for-duty certification for returning to work, the employer is prohibited from requesting a second opinion.

REQUESTING 2ND MEDICAL OPINIONS UNDER THE FAMILY MEDICAL LEAVE ACT

- On an **initial certification**, an employer may require a second opinion if it has reason to doubt the validity of the initial certification.
- The employer may choose the health care provider that will conduct the second opinion; however, the health care provider may not be an individual who the employer regularly contracts with, unless the area in which the employer is located has an extremely limited number of health care providers.
- Any second opinion will be conducted at the employer's expense.

WHEN A 3RD OPINION MAY BE REQUIRED

- In the event that there is a conflict between the first and second opinions, the employer may require the employee to obtain a certification from a third health care provider.
- The third opinion will once again be conducted at the employer's expense.
- The health care provider will be selected and approved by both parties.
- The third opinion will be the final determination on whether the employee is certified for FMLA leave.

WHITE V. CTY. OF L.A., 225 CAL. APP. 4TH 690, 702, (2014)

- The FMLA requires an employer to rely on the certification provided by an employee's health care provider regarding the employee's ability to return to work.
  - The certification provided need not be more than a simple statement assessing the employee's ability to return to work.
- In the event that an employer questions the certification, it may obtain clarification from the health care provider, but may not put the employee through its own fitness for duty examination prior to reinstating the employee.
- Once an employee is returned to work, FMLA no longer applies and the employee's rights are governed by the ADA.
  - Thus, an employer may require a fitness for duty examination so long as it is paid for by the employer and is job-related/consistent with business necessity.

CHANEY V. PROVIDENCE HEALTH CARE, 165 WASH. APP. 578, 584 (2011)

- Prior to taking FMLA leave, defendant required plaintiff to undergo a fitness for duty examination and the defendant's physician opined that plaintiff was not fit for duty based on his methadone prescription.
- Plaintiff took FMLA leave and worked with his treating physician to adjust his methadone dosage. Plaintiff's treating physician certified that he was fit to return to work.
- Defendant required plaintiff to consult with defendant's physician prior to returning to work. Defendant's physician would not clear plaintiff to return to work, even with adjusted medication and certification from treating physician.
- Defendant terminated plaintiff, based on Defendant's physician's statement.
- Court concluded that defendant violated FMLA by refusing to reinstate plaintiff after receiving certification from treating physician that plaintiff was fit to return to work.

INTERPLAY OF FMLA AND ADA

- Once an employee is certified to return to work after a covered FMLA leave of absence and they return to duty, they can then be asked to take a fitness-for-duty exam under the ADA provided the exam is job related and consistent with business necessity.

TIPS FOR ASSISTING MEMBERS WITH ACCOMMODATION/LEAVE NEEDS

- Be sympathetic and empathetic
- Be flexible and creative as you engage in the interactive process with the Department
  - Remember that both the ADA and FMLA require the employee to put the employer on notice that they require a reasonable accommodation or will be taking leave.
- Understand the essential duties of the job and the needs of the service
- Have a general understanding of the applicable law
- Be a resource for leave, light duty, disability retirement, and accommodations

TIPS FOR REQUESTING ACCOMMODATIONS/LEAVE

- Have your ducks in a row
  - Medical certifications
  - A clearly articulated disability or reason for leave
  - An explanation as to how you can accomplish the essential duties of the job with or without reasonable accommodation
  - Doctors who will advocate for your needs and thoroughly explain what you need
- Understand your rights
- Be resolute but still flexible on accommodations that will allow you to work
- Meet timelines and deadlines

Mark J. Murphy
Attorney
General Counsel's Office
mmurphy@iaff.org

Mark A. Linscott
Attorney
General Counsel's Office
mlinscott@iaff.org

THANK YOU!
ANY QUESTIONS?

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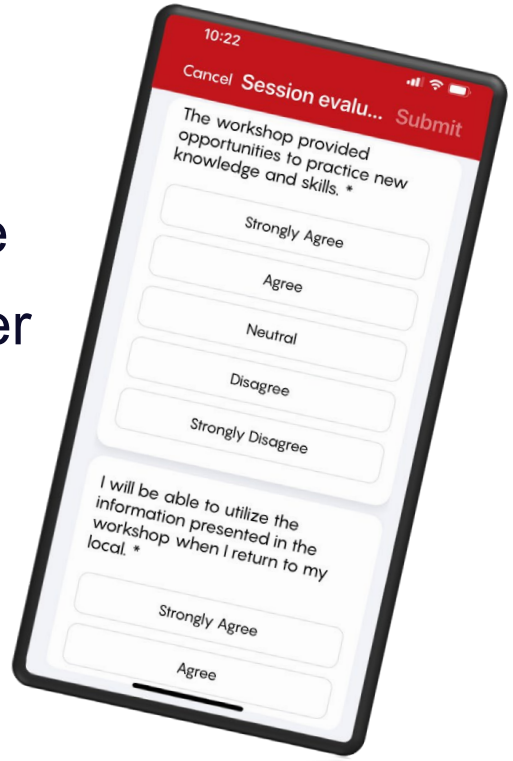

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