



The Americans with Disabilities Act

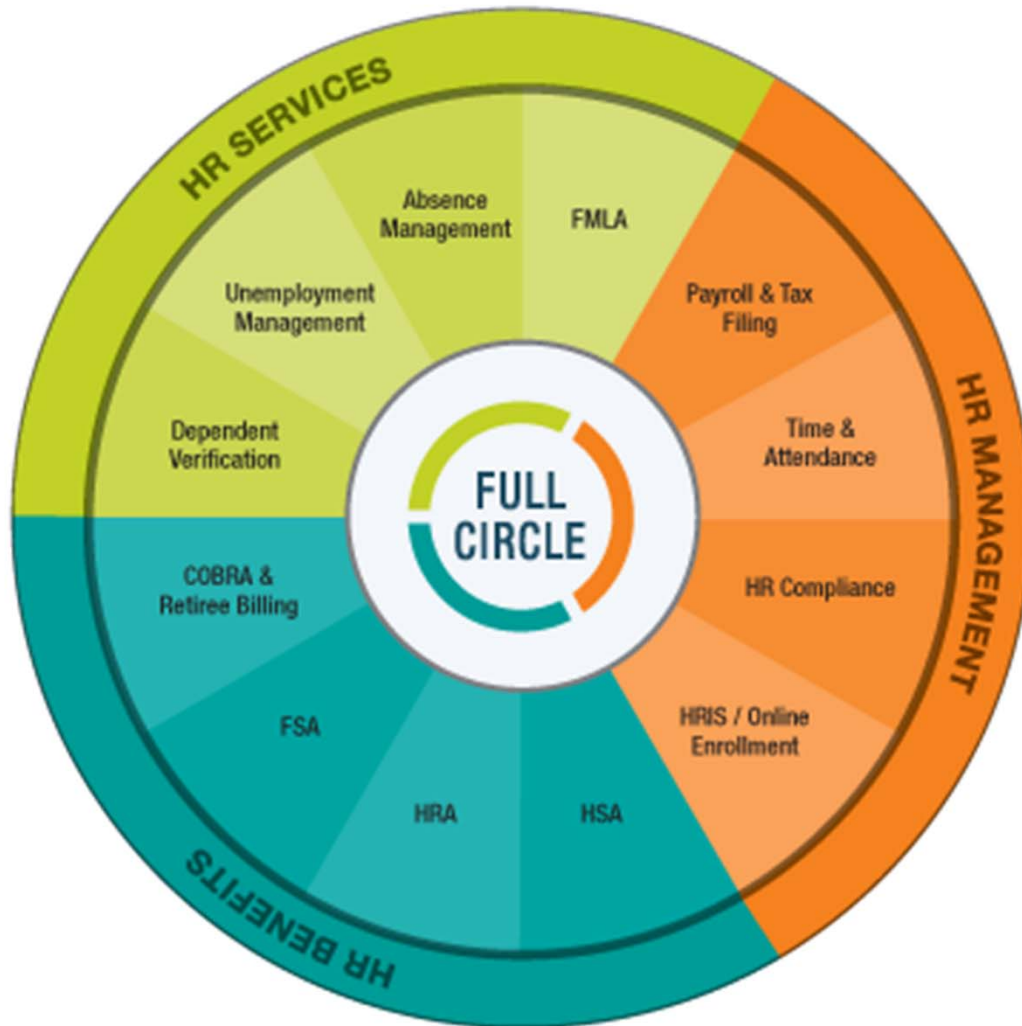
Presented by: Joe Aitchison
Vice President of BASIC



- HR Benefits
- HR Management
- HR Services

We're proud to offer a full-circle solution to your HR needs. BASIC offers collaboration, flexibility, stability, security, quality service and an experienced staff to meet your integrated HR, FMLA and Payroll needs.

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What Employers Need to Know



- ADA & the ACA
- Understand the ADAAA
- Correctly define “disability”
- Accommodations – Employer Responsibility
- Deal appropriately with leaves of absence and reinstatement
- Avoid discrimination based on disability
- Employment Practices





Americans with Disabilities Act Amendments (ADAAA)

- Signed into law on September 25, 2008
- Amendments effective January 1, 2009
- Final Rules issued March 25, 2011



Are you Aware of These ADA Facts?



Just over 1 in 4 of today's 20 year-olds will become disabled before they retire.

Over 37 million Americans are classified as disabled, which is about 12% of the total population.

More than 50% of those disabled Americans are in their working years, from age 18 to 64

8.8 million disabled wage earners, over 5% of U.S. workers, received Social Security Disability (SSDI) benefits at the end of 2012

In December of 2012, there were over 2.5 million disabled workers in their 20s, 30s and 40s receiving SSDI benefits.

** Council for Disability Awareness – July, 2013*

Healthcare Reform & People With Disabilities



The **Affordable Care Act contains** several provisions that will affect people with disabilities. Many of the provisions take effect in 2014.

Accessibility and Nondiscrimination:

- **Pre-existing conditions:** health insurance providers will no longer be allowed to deny coverage, charge higher premiums or exclude benefits based on a pre-existing condition.
- Prohibits discrimination based on disability under any health program or activity that receives federal funding or assistance.
- *Prohibits providers from rescinding coverage* after someone is injured or acquires a new condition.

Affordability:

- **No annual caps** on benefits after 2014.
- **No lifetime caps** on benefits beginning immediately.
- **Places limits** on out of pocket expenses and Deductibles

Healthcare Reform & People With Disabilities



Coverage:

- Certain essential benefits are mandated including:
 - Rehabilitative and habilitative services and devices
 - Chronic disease management
- Mandates coverage of anti-seizure, anti-spasm and smoking cessation medications.

Home and Community Based Services:

- Expands home and community based services for people with disabilities and chronic conditions
 - Allows Individuals with disabilities to live at home and participate in their communities rather than living in nursing homes or institutions.
- Substantially increases funding for community health centers.

Healthcare Reform & People With Disabilities



Medicaid:

- Expands Medicaid coverage to all people under age 64 who have household income less than 133% of the Federal Poverty Line.
- Community First Choice Option:
 - Allows state Medicaid plans to choose home and community based services for people with disabilities who would otherwise require institutional care.
- Extends the Money Follows the Person program until 2016 to cover costs of moving eligible Medicaid recipients from in-patient facilities to community-based settings.



The Act



“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.”



ADA Basics



Do you understand?

- To whom the ADA applies?
- How disability is defined?
- What reasonable accommodations are required?
- What Employer undue hardship means?



1 in 6 Americans have a disability



Final Rules Implementing ADAAA



Primary Purpose:

“To make it easier for an individual seeking protection under the ADA to establish that he/she has a disability within the meaning of the ADA.”

- Focus on *whether individual was/was not reasonably accommodated or otherwise discriminated against – **NOT** whether individual is disabled*

Impact on Employers



- **More requests for accommodations**
- **More internal review**
- **More EEOC charges or lawsuits**
 - Increased Litigation Over Undue Hardship Defense
- **An Increase in:**
 - Impairments Categorized as Disabilities
 - Requests for Leave
 - Demands for Accommodations
- **More retaliation complaints**
- **Fewer dismissals and early conclusions**

ADAAA Did Not Change...



Definitions of/burdens of proof relating to:

- “Qualified”
- “Reasonable accommodation”
- “Undue hardship”
- “Direct threat”

ADA Applies To...



- Covered Employers
- Eligible Employees



Allows applicants and employees who are "regarded as" having a disability because of an actual or perceived impairment to claim discrimination.

Employer Obligations



- Cannot discriminate based on disabilities
- Make reasonable accommodations
- Hire the best qualified applicant

JAN: 1.800.ADA.WORK
<http://askjan.org/>



“Disabled” is defined broadly:

- “The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term disability by rejecting the holdings in several Supreme Court decisions and portions of the EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.”

Disabled Broadly Defined



- Temporary and Episodic Illnesses (included if they substantially limit a major life activity).
- Major Life Activity (ADLs / IADLs)
- Broadened to include bending, reading, working, learning, concentrating, thinking and communicating
- The second list includes bodily functions (e.g. “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions”)
- Mitigating Measures
 - Not included when evaluating whether someone is disabled, even if the disability is treatable, the Act considers the person’s condition in its untreated form with the exception of corrective lenses.



The ADA defines a disability as:

- A physical or mental impairment that substantially limits one or more major life activities
- A record of such an impairment
- Being regarded as having such an impairment

Defining Disability



Disabilities	Physical or mental impairments that substantially limit major life activities
Record of disability	Those who have recovered or were misclassified
Regarded as having an impairment	Being subjected to adverse employment action because the employer thinks the individual has an impairment



Expanded Definition of “Disability”



The ADAAA expands the definition of major life activities, adding:

- Eating
- Sleeping
- Walking
- Standing
- Lifting, bending
- Reading
- Concentrating
- Thinking
- Communicating
- Bodily functions

The ADAAA excludes from the “regarded as” definition those impairments that are **transitory** (actual or expected duration of six months or less) and minor. Also, reasonable accommodations are not required for those who are regarded as disabled, but are not in fact disabled.



Major Life Activities



- Caring for oneself
- Performing manual tasks
- Sleeping, hearing, eating, sleeping
- Walking, standing, sitting, reaching, lifting, bending
- Speaking, breathing, learning, reading
- Concentrating, thinking, communicating
- Interacting with others and working
- Immune system, special sense organs, skin
- Normal cell growth
- Digestive, neurological, respiratory
- Circulatory, cardiovascular
- Endocrine, hemic, lymphatic, musculoskeletal, reproductive
- Individual organs



New Category: Major Bodily Functions



In ADAAA Statute:

- Immune system
- Neurological
- Normal cell growth
- Brain
- Digestive
- Respiratory
- Bowel
- Circulatory
- Bladder
- Endocrine
- Reproductive functions

Added in Regulations:

- Special sense organs & skin
- Genitourinary
- Cardiovascular
- Hemic
- Lymphatic
- Musculoskeletal
- individual organ operation



Impairments Virtually “Always Covered”



- Blindness
- An intellectual disability
- Autism
- Cancer
- Diabetes
- Epilepsy
- HIV infection
- Post-traumatic stress disorder



Possible Application of Major Bodily Functions



- Immune system: HIV/AIDS, auto-immune disorders, lupus
- Normal cell growth: Cancer
- Digestive: Crohn's disease, Celiac disease
- Bowel: Ulcerative Colitis
- Bladder: Didney Disease
- Reproductive functions: Infertility
- Neurological: Multiple Sclerosis, Epilepsy
- Brain: Schizophrenia, Developmental disabilities
- Respiratory: Asthma
- Circulatory: Heart disease, high blood pressure
- Endocrine: Diabetes

Note: *Inclusion of major bodily functions will make it much easier for people with many of these impairments to identify a major life activity.*



Mental health issues and the ADAAA:

- Interacting with others and working
- More mental illnesses will fall under the new definition of “disabled”.
- Due to the stigma given to mental health issues, and the broader definition of “regarded as disabled,” most mental health issues will be covered by the ADA



Do Not Consider Mitigating Measures



Including:

- Hearing aids
- Medication
- Prosthetic devices, including limbs
- Mobility devices
- Reasonable accommodations
- Learned adaptive behaviors



Limited Role of Mitigating Factors



Pre-ADAAA (*old rule*):

whether MLA is “substantially limited” depends on effects of “mitigating measures”

Post-ADAAA (*new rule*):

Most mitigating measures should not be considered when determining if someone is disabled



What if Disability Isn't Apparent?



- Mental disorders
- Epilepsy
- Recovering alcoholic
- Learning disabilities

Focus on abilities, not disabilities!

Essential job functions

ADA & Addictions



- Alcoholism is covered
- Current use of illegal drugs is **not** covered
- Drug tests are allowed
- Other addictions **not** covered



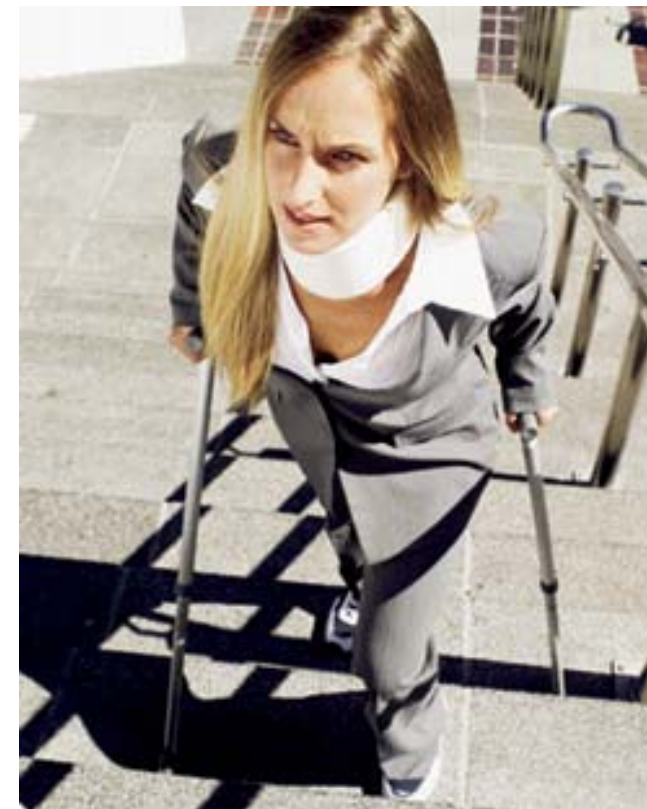


ADAAA Return to Work Requirements



Employees receive:

- Same or equivalent position
- Vacant job at lower level
- No promoting or bumping required
- Termination possible



Reasonable Accommodation



- Reassignment to light-duty position
- **Intermittent leave policy**
- Undue hardship exception



Reasonable Work Accommodation



It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business. Undue hardship means that the accommodation would require significant difficulty or expense.

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- Acquiring or modifying equipment or devices
- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Adjusting or modifying examinations, training materials or policies
- Providing readers and interpreters
- Making the workplace readily accessible to and usable by people with disabilities

Taking Accommodation



Employees are not guaranteed their choice of accommodation:

- Identify non-obvious disabilities
- Discuss accommodations
- Provide necessary medical information
- Avoid making assumptions about a disability and its impact on the job
- Judge individuals only on their *ability* to perform essential job functions
- Make reasonable accommodations to provide equal opportunities to people with disabilities

Individual Assessment – 3X Rule

Alternative Work



- Under the ADA, a qualified individual with a disability may work part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer.
- If (or when) reduced hours create an undue hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule.
- **For example:**
 - An employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his/her current position.

Return to Original Position



- Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship.
- In some instances, an employee may request more leave under the ADA even after the employer has communicated that it cannot hold the employee's job open any longer (i.e., there is undue hardship). In this situation, the ADA-covered employer must see if it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship to continue his/her leave.
- If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued accommodation is not required if a vacant position at a lower level is also unavailable.

Separation of Employment Letter *After medical leave or FMLA - Consider language same or similar to. "Please let us know when you are able to return to work and we will keep in you mind for available potions suitable to your back ground and experience."*

Essential Job Functions



- **Essential functions** are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promoting or firing)
- **Factors to consider in determining if a function is essential include:**
 - A written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions.

Undue Hardship



- Changes that are costly, extensive, substantial, disruptive, or that alter the nature of the business
- Prejudice is not a hardship



Direct Threat



- Employee with disability poses a significant risk of substantial harm in the workplace
- We are not required to accommodate
- We must determine direct threat



Liability Under ADA



- Acts for which we may be liable
- Harassment
- What employees who sue can ask for:
 - Compensation determined by extent of liability and damage to victim
 - Retaliation prohibited
 - Every paycheck is discriminatory if affected by past discrimination

● ● ● Liability Under ADA



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GINA Notice



Employers requesting medical information from an individual or healthcare provider *must* direct the individual or provider *not to provide genetic information.*





What Would YOU Do?



You have an employee in a wheelchair. You have made several reasonable accommodations to allow the employee to complete her job, such as redesigning her work space to fit her wheelchair. The employee complains to you that she still cannot comfortably do her job and she is requesting a piece of equipment that is expensive and would put your department significantly over budget.

What Would YOU Do?

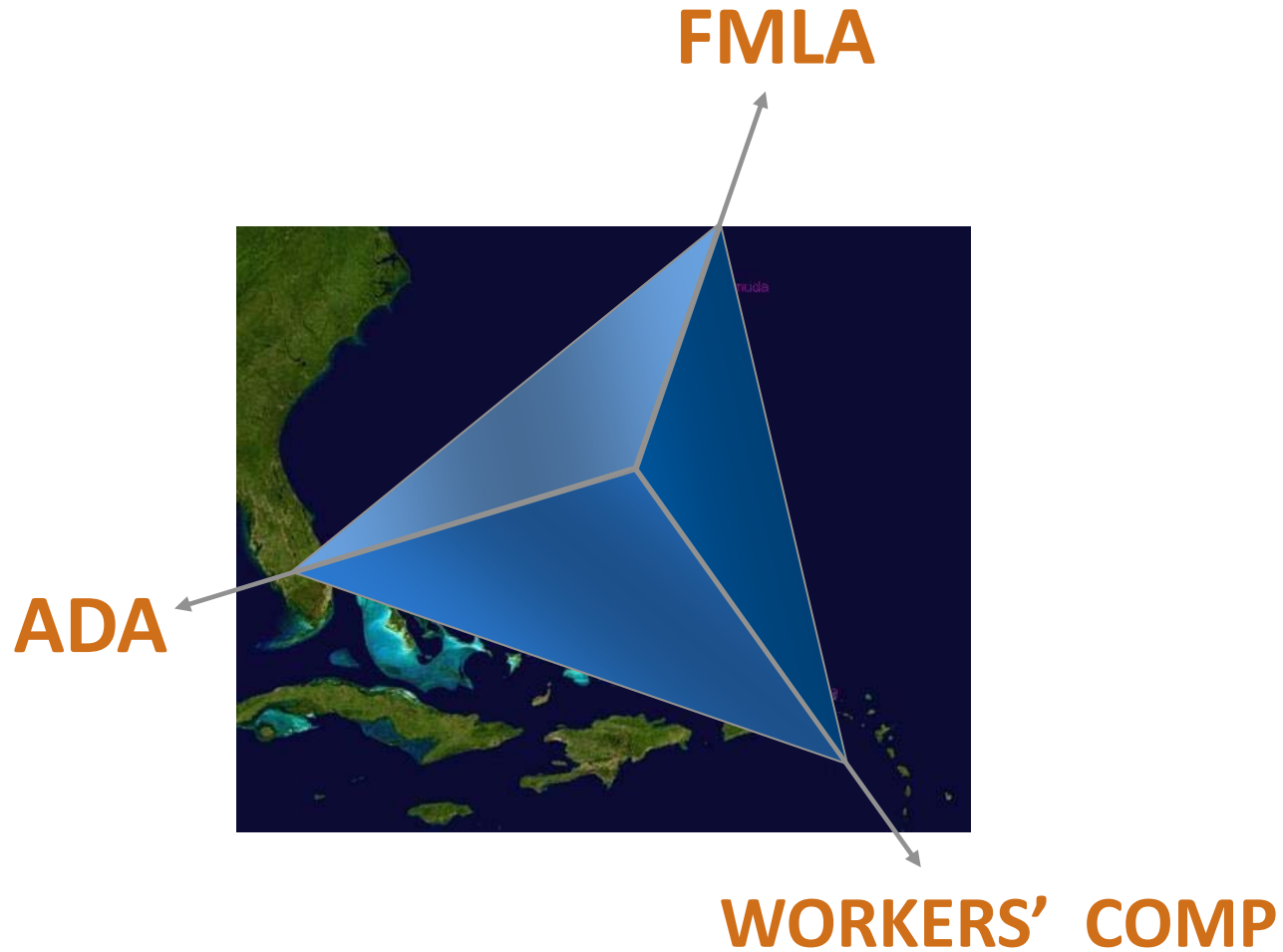


Do you...

- A. Explore less expensive alternatives?*
- B. Deny the claim for the requirement and try to reassign the employee to another job?*
- C. Purchase the equipment for the employee?*
- D. Deny the claim for the equipment and tell the employee she will have to do her job or risk being fired?*



Bermuda Triangle: Managing Employee Illness or Injury



ADA, FMLA & Workers' Compensation Laws



- The ADA prohibits discrimination against applicants and employees who are “qualified individuals with a disability.”
- The FMLA sets minimum leave standards for employees for the birth and newborn care of a child, placement of a child for adoption or foster care, to care for an immediate family member with a serious health condition, and for the employee’s serious health condition.
- Workers’ Compensation laws provide for payment of compensation and rehabilitation for workplace injuries and minimize employer liability.

ADA, FMLA & Workers' Compensation Laws



1. Enforcement

ADA: Equal Employment Opportunity Commission (EEOC)

FMLA : Department of Labor (Wage and Hour Division)

Workers' Compensation Laws: State Workers' Compensation Commissions

2. Employer Coverage

ADA: 15 or more employees for 20 weeks during current or preceding calendar year

FMLA : 50 or more employees within a 75-mile radius for at least 20 weeks during current or preceding calendar year

WC: Applies to most, even small employers

ADA, FMLA & Workers' Compensation Laws



3. Length of Leave

ADA: No specific limit for the amount of leave that would be provided as a reasonable accommodation that does not create an undue hardship on the employer

FMLA : 12 weeks in the 12 month period as defined by the employer

WC: No specific limit for the amount of leave an injured worker may have.

4. Medical Documentation

ADA: Only medical examinations or inquiries regarding an employee's disability that are job-related and limited to determining ability to perform the job

FMLA : Medical certification of the need for the leave not to exceed what is requested in the Department of Labor (DOL) Medical Certification Form.

WC: Medical information that pertains to the employee's on-the-job injury.

ADA, FMLA & Workers' Compensation Laws



5. Restricted or Light Duty

ADA: Required to be offered if it is a reasonable accommodation that does not create an undue hardship on the employer.

FMLA : Cannot be required

WC: Ought to be offered if available as it may eliminate the employee's entitlement to the wage replacement benefit.

6. Medical Documentation

ADA: Only medical examinations or inquiries regarding an employee's disability that are job-related and limited to determining ability to perform the job and whether an accommodation is needed and would be effective.

FMLA : Medical certification of the need for the leave not to exceed what is requested in the Department of Labor (DOL) Medical Certification Form.

WC: Medical information that pertains to the employee's on-the-job injury.

ADA, FMLA & Workers' Compensation Laws



7. Benefits While on Leave

ADA: No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leave of absence.

FMLA: Health coverage must be continued at same level as prior to the leave. Benefits other than health benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

WC: Not required to be continued unless run concurrently with FMLA leave.

8. Reinstatement

ADA: Required reinstatement to previous job unless doing so would create an undue hardship on the employer.

FMLA: Required reinstatement to the same or an equivalent job. NO undue hardship exception.

WC: No reinstatement rights under most state laws, except for retaliatory discharges.



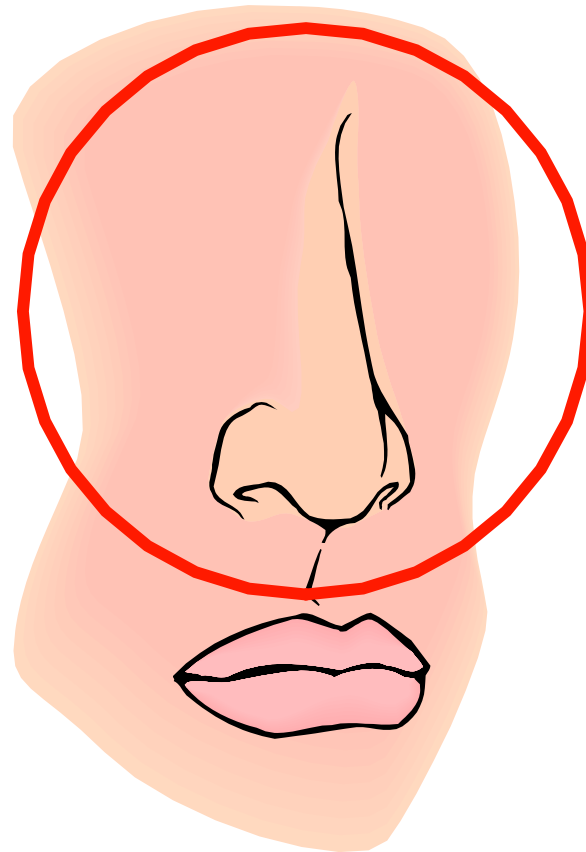
Example

Employee Absence Involving Interaction of ADA, FMLA, and Workers' Compensation:

Joe Jones, an employee, has called in sick for three days citing extreme back pain. He has been with XYZ Credit Union, a large CU with over 200 employees, for three years working full-time with very few absences. Joe calls in sick for the fourth day stating that he was examined by his doctor who took x-rays and stated that he needs complete bed rest and possibly back surgery and will be unable to work for an extended period of time. He states that his doctor thinks the condition is caused by the type of work he has been doing.



The “Classic” Fragrance Sensitivity?



What is Fragrance Sensitivity?



- Fragrances are composed of many different chemicals, and fragrance sensitivity may be an actual allergic reaction or simple irritation to particular chemical or combination of chemicals.
- Fragrances can enter the body through inhalation, ingestion, or absorption.
- Once a person has developed fragrance irritation *it is likely that the sensitivity will grow over time and with repeated exposure.*
- Certain chemicals may be sensitizers at high levels of exposure and can result in sensitivity to the chemical at much lower levels after initial exposure.

What is Fragrance Sensitivity?



The severity of symptoms varies from one individual to another. Symptoms can show up over a wide time range from a few minutes to seven to ten days

Reactions to fragrances may include:

- Difficulty breathing or breathing problems
- Asthma attacks or asthma-like symptoms
- Contact dermatitis (an itchy and inflamed skin rash)
- Hives
- Nausea
- Dizziness
- Headache



Respiratory Impairments & Fragrance Sensitivity



- Persons with respiratory impairments may have heightened sensitivity to ordinary substances and chemicals
- Medical conditions that may result in respiratory impairments include the following:
 - Allergies
 - Asthma
 - Chemical Sensitivity
 - Chronic Obstructive Pulmonary Disease
 - Cystic Fibrosis
 - Environmental Illness (EI)
 - Fragrance Sensitivity
 - Lung Cancer
 - Pulmonary Sarcoidosis
 - Tuberculosis
 - Emphysema
 - Pulmonary Hypertension



Fragrance Sensitivity May Be a Disability Under ADA



- If individual's sensitivity to fragrance would meet definition of "disability" (e.g. it substantially limits one or more major life activities), then individual would be entitled to ADA protections.



Providing Reasonable Accommodation for Fragrance Sensitivity



As fragrance sensitivity may rise to the level of a disability under the ADA, employer should apply the same principles to other disability accommodation requests.

- Ask for certification that shows the sensitivity impairs a major life activity.
- Discuss accommodation options with the employee.
- Determine whether any of the options can be implemented without posing an undue hardship.

Questions to Consider



- What limitations is the employee with fragrance sensitivity experiencing?
- How do these limitations affect the employee and the employee's job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?

Possible Reasonable Accommodations



Maintain good indoor air quality:

- Provide an office or workspace that has working windows
- Maintain the heating, ventilation, and air conditioning (HVAC) system
- Test indoor air quality
- Use air purification systems throughout the building or in personal workstations
- Reduce workplace pollutants
- Provide a mask
- Provide pre-notification of construction and cleaning in the workplace
- Use non-toxic building materials, furnishings, supplies, and flooring
- Use non-toxic solvents, primers, stains, paints, etc.



Possible Reasonable Accommodations



- Discontinue the use of fragranced products (e.g., scented cleaning products, air fresheners, etc.)
- Modify workstation location (e.g., move towards more isolated area, or away from source of offensive scents/fragrances)
- Modify the work schedule
- Consider an alternative work arrangement, such as working from home
- Provide an air purification system
- Modify communication methods, such as telephone, e-mail, or instant messaging
- Modify or create a fragrance-free workplace policy

Summary ADAAA



- Accommodation, Rethink, Refocus
- Change your mentality
 - Focus not on what constitutes undo hardship
 - Focus on reasonable accommodation
 - Employer should try to make the reasonable accommodation
 - To deny accommodation, employers have to show undue costs, or disruption in operations, or safety (harm) risk.

Note: If reasonable attempts to accommodate fail, the outcome could result in an employer undo hardship



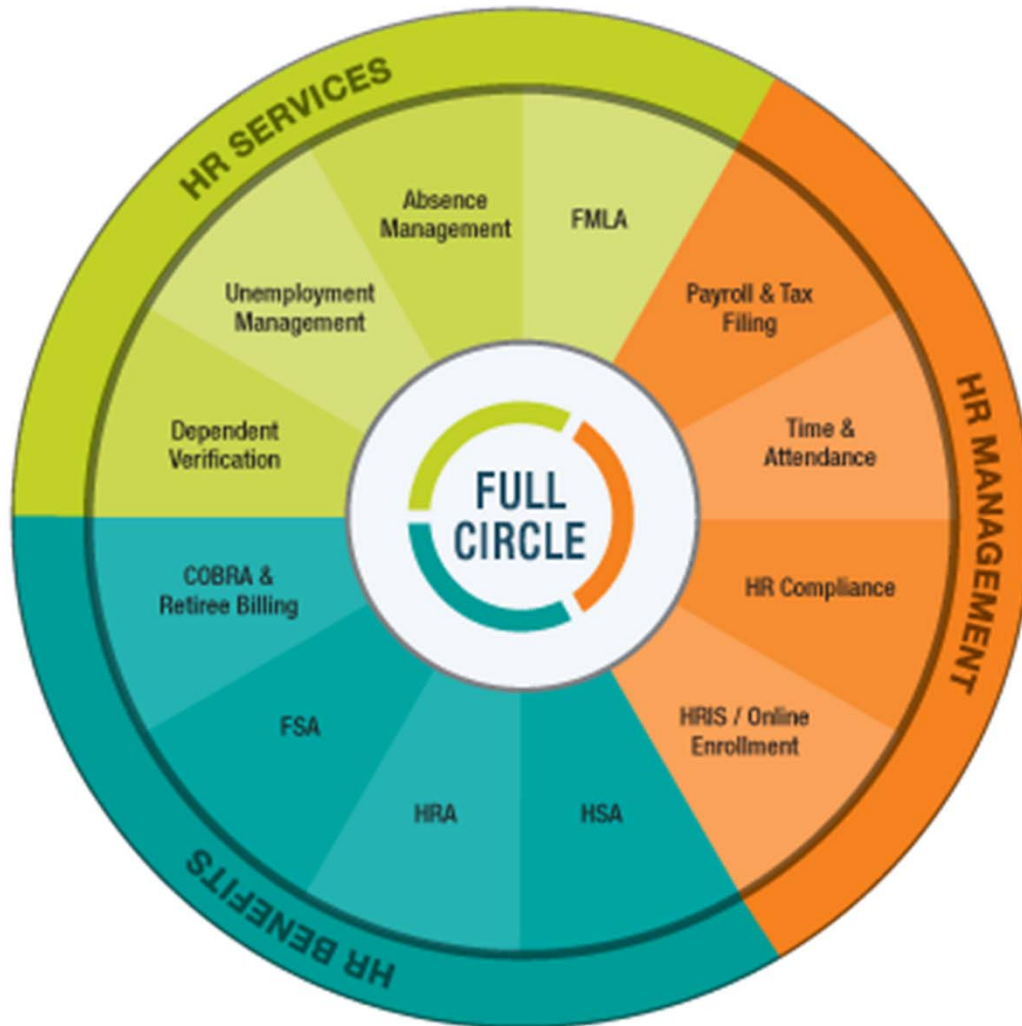
Questions



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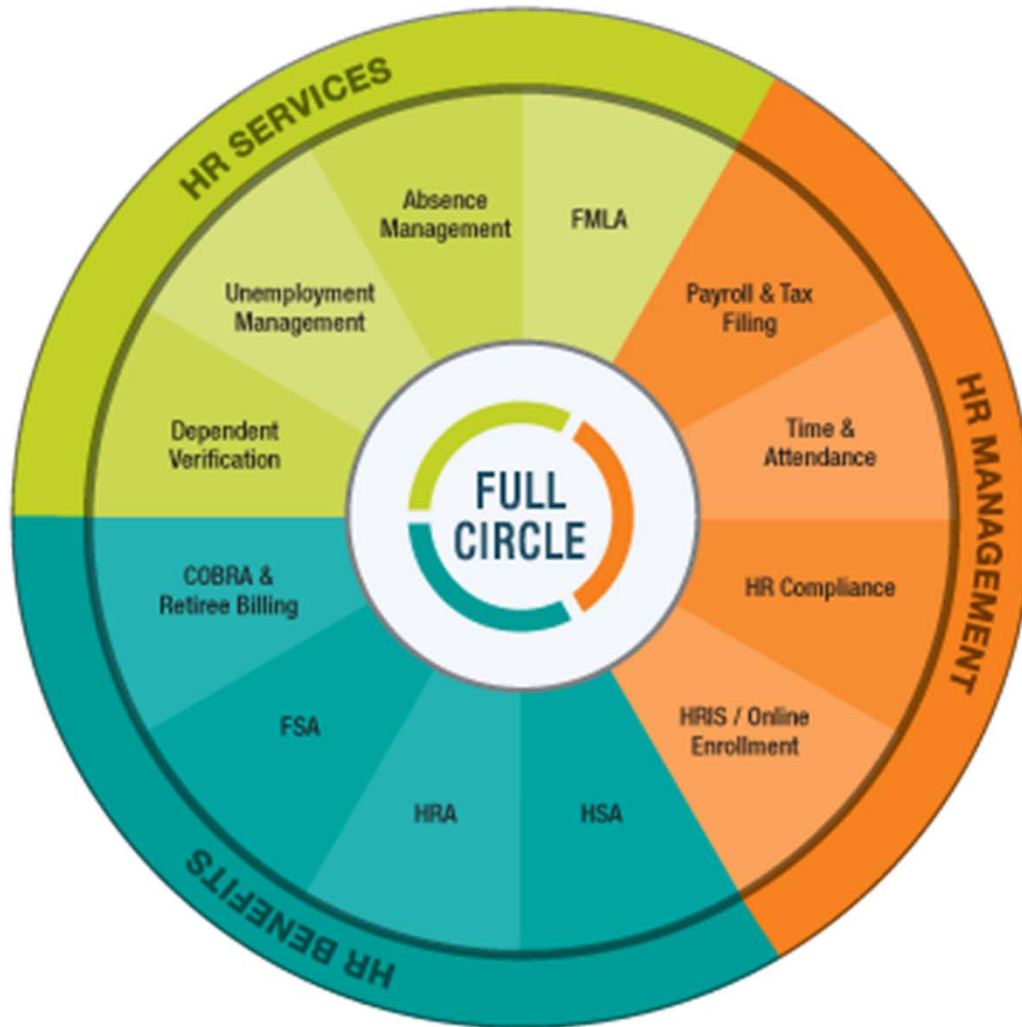
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