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ATTORNEYS & COUNSELORS AT LAW

## HR Health Check

Employee Onboarding, Accommodations & Medical Leaves

Presented by  
**Courtney L. Nichols**  
**Shanel T. Thomas**

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### Today's Presenters



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### Medical Leaves & FMLA

- Family and Medical Leave Act (FMLA) refresher
- Requires covered employers to provide up to 12 weeks of unpaid, job-protected leave per year to eligible employees for:
  - Birth and care of the newborn child of an employee
  - Placement with the employee of a child for adoption or foster care;
  - Serious health condition of an immediate family member;
  - Their own serious health condition

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**Medical Leaves & FMLA**

- Qualifying reason arising out of covered active duty status of military member who is employee’s spouse, son, daughter or parent (qualifying exigency leave)
- To care for covered service member with a serious injury or illness when the employee is the spouse, son, daughter, parent or next of kin of the covered service member (military caregiver leave)

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**Medical Leaves & FMLA**

- Employee eligibility requirements:
  - Must have worked for employer for:
    - At least 12 months
    - At least 1,250 hours over the past 12 months
    - At a location where the company employs 50 or more employees within 75 miles

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**Medical Leaves & FMLA**

- Covered employers:
  - Private-sector employers who employ 50 or more employees in 20 or more workweeks in either the current or previous calendar year
  - Public agencies (Federal, State, local government employers)
  - Local educational agencies (public and private schools, school boards, etc.)

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**Medical Leaves & FMLA**

- Types of Leave:
  - All at once
  - Intermittent or reduced schedule:
    - Employees have the right to take leave when medically necessary, in separate blocks of time or by reducing the time they work each day or week.
    - Exception: employees may use FMLA leave intermittently or on a reduced leave schedule for bonding with a newborn child or newly placed child, only if they and their employer agree.

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**Medical Leaves & FMLA**

- FMLA is job-protected, unpaid leave.
- Employers may require an employee to use their paid leave during FMLA leave.
- Job protection:
  - Employee has the right to go back to work at their same job or to an equivalent job with the same pay, benefits, and other terms and conditions of employment.
  - Violations include changing number of shifts assigned, moving employee to location outside of normal commuting area, denying a bonus for which employee qualified prior to FMLA leave.

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**Legal Update**

**Michigan Paid Medical Leave Act (PMLA)**

- Michigan's PMLA is still being litigated in the state courts.
- On Dec. 7, 2023, the Michigan Supreme Court held oral arguments.
- On Jan. 26, 2023, the Michigan Court of Appeals ruled that amended versions of PMLA and Michigan Improved Workforce Opportunity Wage Act are valid and enforceable (reversing Court of Claims decision which held they were unconstitutional).
- If reversed, the law would revert to original ballot proposal language.
- If affirmed, then the status quo would continue.

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**Michigan PMLA - Legal Update**

- Michigan PMLA specifics:
  - Covered Employers: those with 50 or more individuals that work in the United States, or any territory or possession of the U.S., regardless of full or part-time status or the number of hours they work.
  - Unlike FMLA, PMLA does not apply to U.S. government, other states or political subdivisions of other states.

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**Michigan PMLA Eligible Employees**

- An eligible, nonexempt employee is an individual engaged in service to an employer in the business of the employer and from whom an employer is required to withhold for federal income tax purposes.
- Excluded Employees include:
  - Those exempt from overtime under FLSA
  - Independent contractors
  - Those covered by a Collective Bargaining Agreement
  - US, state, and local government employees

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**Michigan PMLA Eligible Employees**

- Employees whose primary place of work is not in Michigan
- Variable hour employees, seasonal employees ( $\leq 25$  weeks per year), part-time employees who worked less than 25 hours per week the preceding calendar year

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### Michigan PMLA Leave & Accrual

- One hour of paid leave for every 35 hours worked
- Can be capped at one hour per week, 40 hours in a benefit year
- Employers can cap usage and carryover at 40 hours per benefit year.
- Employers can require employees to wait until 90<sup>th</sup> day after start of employment to use leave.
- Employers are not required to restore previously accrued leave to re-hired employees.

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### Michigan PMLA Permitted Uses

- Mental or physical illness, injury, or health condition, medical diagnosis, care or treatment of physical illness, injury or health condition of, or preventive medical care for an employee or employee's family member
- Specified purposes if employee or family member is victim of domestic violence or sexual assault
- Closure of employee's place of business or child's school or place of cause due to a public health emergency or when employee's or employee's family member's presence would jeopardize others' health because of exposure to communicable disease

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### Michigan PMLA Other Provisions

- Advance Notice: Employer can require compliance with customary notice policy, including request for documentation, but must allow three days for employee to provide documentation.
- Payout: Employer is not required to pay the employee for unused leave upon termination.
- Recordkeeping: Employers must keep records for one year.
- Increments: Employees may use leave in one-hour increments, unless employer has a different written policy in an employee handbook.

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### Michigan PMLA - Legal Update

- If Michigan Supreme Court reverses appellate court, the law would revert to ballot proposal language:
  - All employees (FT, PT, temporary, independent contractors) would be entitled to receive and use one hour of paid medical leave for every 30 hours worked, up to 72 hours per year.
  - Small businesses with less than 10 employees would be required to grant 40 hours paid leave, 32 hours unpaid.

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### Michigan PMLA - Legal Update

- PTO time would have to be separated from other PTO banks and would enhance compliance burdens on employees.
- Would allow time to be used in as little as six-minute increments.
- Employers need to be prepared to make changes depending on the case outcome.

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### Medical Leaves & FMLA

- Trends heading into 2024
- Leave to care for an employee's mental health is increasingly gaining momentum in the American workplace.
- In one 2024 survey of HR professionals, "managing mental health" was the most common reason cited for leave from work.
- Others include:
  - Managing mental health-related issues
  - Recovering from illness or injuries

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### Medical Leaves & FMLA

- Caring for a loved one
- Parental leave
- Pregnancy-related issues and conditions
- Bereavement and compassionate leave
- Disability leave (ADA leave of absence)

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### American Disability Act (ADA) - Summary

- Accommodation to perform essential job functions
- Prohibition against discrimination
- In other words:
  - Don't prejudge the abilities of people with disabilities.
  - Individually assess an individual's abilities based on:
    - The essential functions of the particular job held or desired
    - Potential reasonable accommodation that might enable them to overcome job-related barriers

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### ADA Requirements

- Cannot discriminate
- Cannot make medical inquiries, except in limited circumstances:
- Must keep medical information confidential
- Must accommodate



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### Two Types of ADA Cases

- Discrimination cases (wrongful employment action)
  - Typical scenarios for adverse employment action:
    - Because of medical condition
    - Because of performance related to medical condition
  - Negative treatment after employer learns of medical condition
  - Merits often will turn on:
    - Whether the individual was “qualified.” Could he/she perform the essential job functions?
    - Whether employer had knowledge
    - Employer’s legitimate reason

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### Two Types of ADA Cases

- Typical scenarios:
  - Employee’s requested “accommodation” is denied.
  - Employee quits (is constructively discharged) because of medical condition.
  - Failure to provide more leave after FMLA ends

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### Common ADA Mistakes



- Failing to provide accommodation language (handbook; application)
- Failing to provide training to supervisors
- “Losing” employee on leave
- Waiting too long to designate time as covered
- Waiting too long to send specific ADA questionnaire

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**ADA Questionnaire**

- Medical documentation requested for ADA purposes will depend on situation and how much information is already known about:
  - The impairment
  - Functional limitations
  - Need for accommodation

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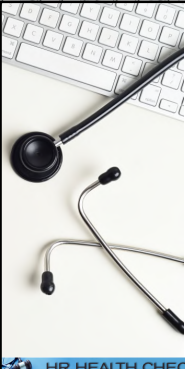
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**ADA Questionnaire**

- May not ask for unrelated information (i.e., complete medical records)
- Documentation is sufficient if it substantiates individual has a disability and needs reasonable accommodation requested.



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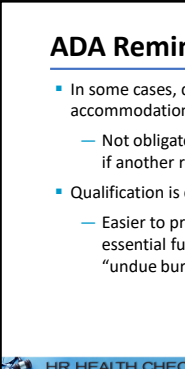
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**ADA Reminders**

- In some cases, difference between required and preferred accommodations:
  - Not obligated to grant reasonable accommodation employee prefers if another reasonable accommodation exists.
- Qualification is critical:
  - Easier to prove not qualified – accommodation eliminates essential functions / otherwise cannot perform than it is to prove “undue burden.”

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### ADA Reminders

- “Slippery Slope” concern is often irrelevant:
  - Each request must be made on a case-by-case basis.
  - Courts often “unmoved” by vague or conclusory “slippery slope” concerns.
    - Mere possibility of an adverse consequence is not enough.

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### ADA: What to Expect in 2024

- Increased scrutiny from the EEOC regarding point-based attendance policies
  - If these policies fail to account for individuals who require accommodations based on qualified disabilities



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### ADA: What to Expect in 2024

- With 70% increase in ADA litigation over the past year, employers can expect heightened scrutiny from the EEOC over the next four years regarding disability policies.

**ADA**  
Americans with Disabilities Act

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### Pre-Employment Drug Testing

- Under the ADA, employers may create drug-free work policies that:
  - Prohibit use of illegal drugs and alcohol at workplace
  - Require that employees are not under influence of drugs or alcohol during working hours
  - Require employees covered by federal contracting laws to comply with drug-free workplace requirements for federal contractors
  - Require employees who use drugs or alcohol to meet same standards of performance and conduct as other employees, even if poor performance is related to drug abuse or alcoholism

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### Pre-Employment Drug Testing

- Circumstances under which employers may test for alcohol differ from those under which employers may test for drugs.
- While the ADA protects recovering alcoholics and drug users, active alcoholics may be regarded as disabled under the ADA while active users of illegal drugs cannot.
- Active alcoholics can be entitled to reasonable accommodations whereas active drug users cannot.

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### Pre-Employment Drug Testing

- Possessing and consuming alcohol is lawful, compared with illegal drugs.
- Tests for alcohol are “medical examinations” under the ADA while drug tests are not:
  - Tests for alcohol must be job related and consistent with business necessity

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### Pre-Employment Drug Testing

- ADA expressly declines to encourage, prohibit or authorize employers to drug test employees.
- Instead, ADA states that because drug tests are not medical examinations, conducting them does not violate ADA.
- A drug is illegal if it is unlawful under Controlled Substances Act or if individual illegally uses prescription drugs.
- Employers are free to conduct tests on employees to detect current use of illegal drugs.

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### Pre-Employment Drug Testing

- Federal law generally does not prevent employers from conducting:
  - Pre-employment drug testing
  - Testing based on reasonable suspicion
  - Periodic or random drug testing, depending on nature of job
  - Post-incident drug testing
- **Note:** ADA prohibits employers from making pre-employment inquiries about applicants' disabilities:
  - This impacts when and how employers can test applicants.

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### Conditional Job Offers

- Before:
  - Because testing for alcohol is a medical examination, employers may not test applicants for alcohol before a conditional job offer.
  - However, employers are free to test applicants for illegal drugs before making a conditional job offer.

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### Conditional Job Offers

- After:
  - Under ADA, once employer has made a job offer, employer may ask health-related questions and require applicant to submit to a medical examination.
  - After a conditional job offer, employer can require drug and alcohol testing.
  - However, employers may only require testing if all entering employees in same job category are subjected to same examination (no individualized assessments).

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### Pre-Employment Drug Testing

- Be aware of confidentiality obligations:
  - Because an alcohol test is a medical examination, test results are considered medical records and subject to strict confidentiality requirements under ADA.
  - Conversely, employers do not need to maintain confidentiality of illegal drug use test results.
    - One caveat: drug test results showing information about lawfully prescribed drug, disability, or other medical condition must be kept confidential just like medical records.
- Key takeaway: treat all test results (drug and alcohol) as confidential.

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### Michigan Pregnant Workers Fairness Act (MPWFA) – Summary

- Michigan adopted its own Act, mirroring PWFA.
- Reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions
- Applies to private employer with at least 15 employees, federal agencies, union and employment agencies



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### Pregnancy Accommodations (Laws Preceding the PWFA)

- In certain circumstances, Title VII and ADA may entitle workers to benefits or accommodations based on pregnancy, childbirth or related medical conditions.
- For example, under the ADA, an individual must have a pregnancy-related disability to be entitled to an accommodation.

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### PWFA Requirements

- This is a new Act takes effect as of June 2023 and will be heavily enforced and scrutinized by the EEOC. Remember, employers cannot take an adverse action, including but not limited to:
  - Deny a reasonable accommodation absent undue hardship.
  - Require that a qualified employee/applicant accept an accommodation other than any reasonable accommodation which is determined during the interactive process.
  - Deny employment opportunities because a reasonable accommodation will be needed.
  - Require a qualified employee/applicant to take leave if another reasonable accommodation can be provided.

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### PWFA – Fact Patterns

- A pregnant cashier asks her supervisor if she can sit while working at register because her pregnancy makes it hard for her to stand for long periods of time. Cashiers usually have to stand.
- A pregnant delivery driver asks for light duty work because she cannot lift heavy boxes because of her pregnancy. The employer has a light duty program for workers with on-the-job injuries that excuses them from lifting heavy packages.
- A new call center employee needs time off to attend therapy appointments for postpartum depression. The employee has not earned enough sick leave yet to cover the time away for the appointments.

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### PWFA – Fact Patterns

- A retail worker needs eight weeks of leave to recover from childbirth. The employee does not qualify for FMLA leave, and the employer does not offer short term disability leave. The worker will be able to do the job after recovering from childbirth.

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### Questions & Answers



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**HR HEALTH CHECK**

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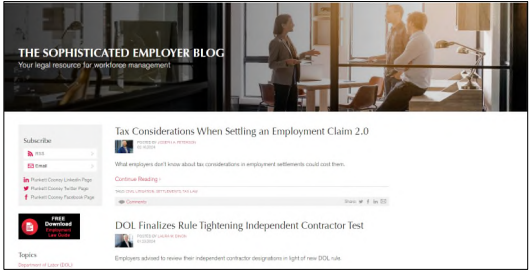
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