



Employment Law Update

Navigating Difficult FMLA, ADA, and Workers' Compensation Issues in the Middle of a Pandemic



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Agenda

- Positive COVID-19 test:
 - FMLA leave required?
 - Automatic accommodation?
- FMLA and ADA implications of underlying health conditions
- FMLA and high-risk family members
- Remote work and reasonable accommodations
- OSHA's General Duty Clause and Worker's Compensation issues



Does the Person Qualify for FMLA Leave?

FMLA: Eligibility Requirements

- 1 year service
- 1250 hours worked in last 12 months
- 50 employees within 75 miles
- Take medical leave to:
 - Care for yourself.
 - Care for a family member who is seriously ill.
 - Bond with a new child.
 - Participate in a qualifying event because of a family member's military deployment to a foreign country.

FMLA Duration

- 12 workweeks, unpaid, job-protected leave (26 military caregiver)
- Leave generally runs concurrently with state leaves
- Intermittent and reduced schedules
- Different methods for counting
12-month period for computing eligibility





Underlying Conditions and FMLA Implications

- Is this request protected by FMLA?
 - Not incapacitated
 - Can an employee take FMLA leave simply because they are worried about becoming incapacitated?
- ***Santiago v. Connecticut Dep't of Transportation*, 50 F. Supp. 3d 136 (D. Conn. 2014)**
 - Cluster headaches; could not work OT during winter months
 - Doctor limited work as prophylactic measure
 - Forced to resign
 - Court: summary judgment denied

Absences ... qualify for FMLA leave even though the employee ... does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report ... because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level

29 CFR 825.115(f)

Santiago v. Connecticut Dep't of Transportation, 50 F. Supp. 3d 136 (D. Conn. 2014)

When to Designate FMLA Leave for Underlying Condition

- Medical condition must be identified
- Employee must make connection b/w medical condition and inability to work
- FMLA notices and certification provided to employee
- Employee returns the certification
 - Leave is medically necessary
 - Handling physician “recommendations”





“I am not able to return to work so long as this pandemic is going on.”

—says employee who has exhausted FMLA leave

Leave to Care for a High-Risk Family Member



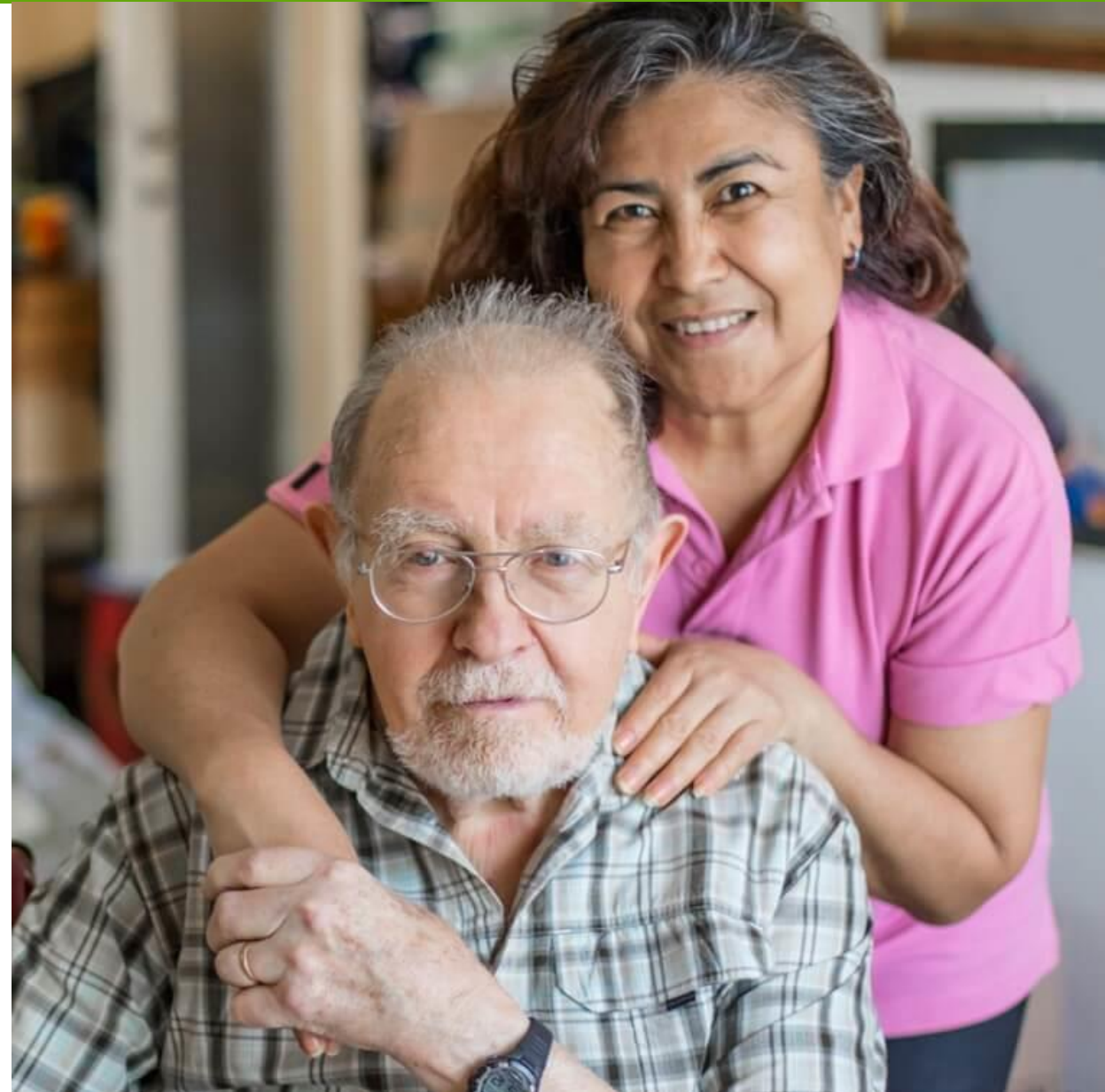


High-Risk Family Members

- Rick works in your processing plant
- Rick: Can't come into work because wife's autoimmune condition puts her at a bad risk of contracting COVID-19
- What are the considerations?

High-Risk Family Members

- ADA?
 - No! The ADA does not require an accommodation of a family member
- FMLA?
 - First: Can the employee telework?
 - Next: Is the family member being “cared for”?
 - Physical care and psychological care: “comfort and reassurance that would be helpful to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.”





High-Risk Family Members

- Employee relations considerations
- Telework (regardless of FMLA)
 - Must the employee be on site?
 - Can you accommodate for a limited period?
- What effect will your decision have on the culture, either way

Positive Covid-19 Test and ADA

- To be entitled to an accommodation, there must be an actual disability.
- Does COVID in and of itself qualify as a disability?
 - Maybe
- What about “long COVID” and how do you know?
 - HHS guidance: “long COVID can be a disability ...”



Questions for the Employee



- Obtain the basic medical facts
- How long do you anticipate being unable to work?
- Are there any changes or modifications we could make that would enable you to perform your job duties?
- How, specifically, would those help?
- Is leave the only thing you believe we could offer?

Questions for Your Manager

- What are the options for remote work?
- If you had to cover the work without the employee, how would you do it? How have you done it in the past? What do you do during FMLA?
- What is the specific impact, if any, if you provide additional leave, potentially for several more months?
- Are there any other adjustments that might make sense, given the employee's job duties?



Factors Establishing Undue Hardship

REMEMBER: Undue Hardship only applies if you are considering accommodating

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities considering absent employees
- Deferred projects
- Lower quality and less accountability for quality
- Less responsive client service and increased client dissatisfaction
- Lost sales
- Increased stress on overburdened co-workers
- Lower morale



What Should You Do?

Give serious consideration to employee's request

- **Interview supervisory staff to determine:**
 - How employee's work has been absorbed and may continue to be performed
 - What are the hardships created by the absence?
- Conduct an Individualized Assessment that you also document
- Make sure you are consistent—if you accommodate one, you should accommodate all

What Should You Do?

- Document the alternatives you have examined and the undue hardship
- Before termination, justify—with documentation—the rationale for the decision
- Any final decision should be a shared decision—involve HR and legal



The Status of Telework During the Pandemic



What Are Reasonable Accommodations in a COVID-19 World?

- What if, instead of asking for leave due to asthma, our employee requests to work from home:
 - Gabe is an assistant manager for one of your community programs; has moderate asthma
 - Has worked remotely for a time, requests that it continue
 - Gabe: “I am requesting to perform my job remotely from home.”
 - Gabe’s doctor: “Gabe needs to work from home for the next four weeks due to asthma. Exposure to COVID-19 will exacerbate condition.”





What Are Reasonable Accommodations in a COVID-19 World?

- Company response:
 - Four weeks of leave is provided
 - At conclusion, Gabe asks to continue telework
 - HR: “We’re not approving work from home for managers since we need managers in the building and supporting operations.”
- Is this a problem?

Work From Home

Peeples v. Clinical Support Options, 3:20-cv-30144-KAR (D. Mass. Sep. 16, 2020)

- Court: Employer has an obligation to engage in a meaningful dialogue with employee
- Employer failed to engage in interactive process
 - PPE insufficient, characterizing them as “workplace safety rules”
 - Employer should have conducted an “individualized assessment to determine whether teleworking should be permitted as a reasonable accommodation” for Gabe’s disability
 - No showing of undue hardship
- Injunction granted in favor of employee returning him to WFH

Work From Home

Peeples Takeaways:

- PPE alone will not cut it
- Interactive process and individualized assessment are critical
- COVID-19 as a trial period?
 - “... telework because of the COVID-19 pandemic could serve as a trial period” to show whether employee could perform all essential function”
 - “Employer should consider any new requests in light of this information”



Considerations for Teleworking

- Before COVID-19:
 - General consensus that physical presence in the office was an essential function of most jobs and remote work was not a reasonable accommodation
- Teleworking during the shutdown:
 - After weeks or months of teleworking, there will be questions about why employees cannot do so as an accommodation



Considerations for Teleworking

Can I go back to not allowing any telework?

- Handling future accommodation requests for remote work:
 - Why is in-person work necessary?
 - What hardships are created by employees working from home?
 - Be prepared to agree or to explain that remote work was allowed during the shutdown, but it was not effective (e.g., problems with technology, decreased productivity, etc.)



Long COVID

Most people who have coronavirus disease (COVID-19) recover completely within a few weeks. But some people—even those who had mild versions of the disease—continue to experience symptoms after their initial recovery.

These people sometimes describe themselves as "long haulers" and the conditions have been called post-COVID-19 syndrome or "long COVID-19." These health issues are sometimes called post-COVID-19 conditions. They're generally considered to be effects of COVID-19 that persist for more than four weeks after one has been diagnosed with the COVID-19 virus.



The Mayo Clinic Identifies These Common Signs and Symptoms That Linger Over Time:

Fatigue	Memory, concentration or sleep problems	Fever
Shortness of breath or difficulty breathing	Muscle pain or headache	Dizziness when you stand
Cough	Fast or pounding heartbeat	Worsened symptoms after physical or mental activities
Joint pain	Loss of smell or taste	
Chest pain	Depression or anxiety	

Long COVID in the News

Lewis Hamilton's long COVID concern after dizziness and fatigue at Hungarian Grand Prix.

- Hamilton appeared to be struggling—he needed help to get to the podium and appeared too weak to hold the celebratory bottle of champagne.
- At a post-race news conference, the 36-year-old said: "I haven't spoken to anyone particularly about long COVID, but I think it is lingering there."



Don't Discriminate— Potential Coverage Under ADA



Biden administration says long Covid can be considered a disability under law

BY MAEVE SHEEHY, REBECCA RAINEY | 07/26/2021 01:35 PM EDT



When Is “Long COVID” a Disability?

- President Issues Executive Order that incorporates guidance from the Department of Justice, that “long COVID” will be considered a disability “if the person’s condition or any of its symptoms is a ‘physical or mental’ impairment that ‘substantially limits’ one or more major life activities.”
- But long COVID is not always considered a disability under the new guidelines. The agency said an “individualized assessment is necessary to determine whether a person’s long COVID condition or any of its symptoms” limits their abilities.

Accommodating Long COVID

- Labor Department clarifies that employers must try to reasonably accommodate workers who have been diagnosed with a disability because of long COVID, like by providing modified equipment or work schedules.
- Equal Employment Opportunity Commission, clarified that an employer doesn't have to provide an accommodation for an employee if it would cause an "undue hardship" or is too expensive.
- If covered by the ADA, then must also participate in the interactive process to determine if an accommodation is possible.

Why Does This Matter To Employers?



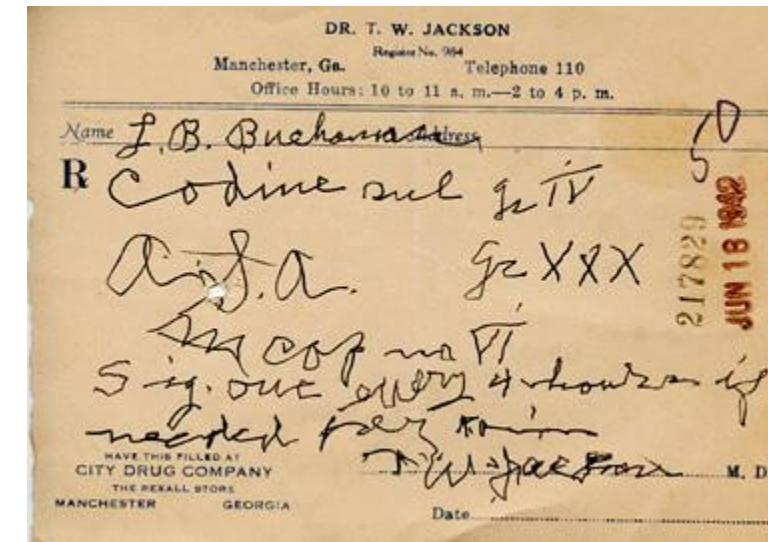
What Do Employers Do?

- Document the condition/ongoing health issues
 - You don't have to just take the employee's word for it.
 - Treat the situation like you would for other health issues and absences
- Keep it confidential, as it is a health issue.



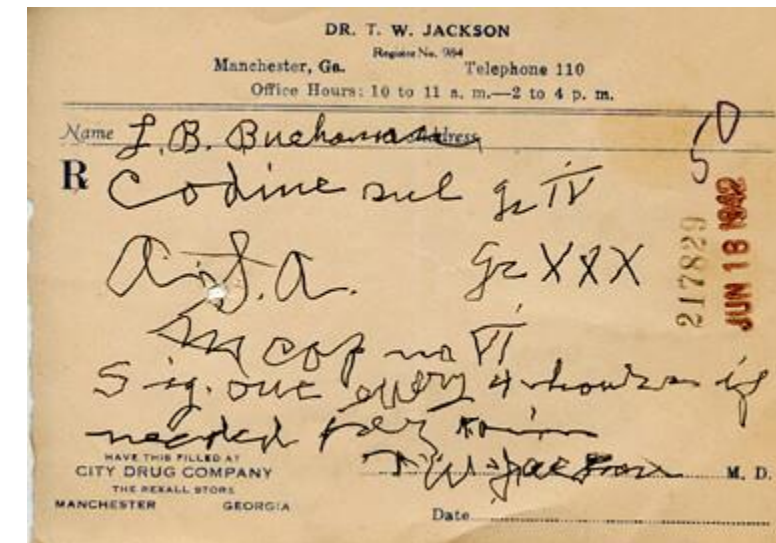
When Can We Ask For a Doctor's Note?

- Employers are permitted to ask for a doctor's note when an employee requests a reasonable accommodation for their disability and the disability is not obvious/visible.
- May request a Dr. Note if an employee requests FMLA leave.
- Employees on worker's compensation also need to provide regular treating provider status reports.



When Can We Ask For a Doctor's Note?

- May require doctor's note if employee has exhausted their sick leave (don't require if it interferes with their three days of guaranteed sick leave).
- May require to the extent employers need to ensure the employee is not contagious and/or cleared to return to work.



Is there Workers' Compensation?



Leave For Work-Related Injury: WC Eligibility

- Applies to all employers, regardless of size
- Applies to all employees—full time, part time, temporary, seasonal, exempt, non-exempt.
- No minimum service requirement—applies immediately upon employment.

Vaccine Mandates

You thought OSHA ETS was dead with the Supreme Court's Stay and OSHA's withdrawal but think again.





OSHA's General Duty Clause requires a safe workspace, so, there could still be a standard OSHA case.

Violate that standard
and workers may have
rights to Workers'
Compensation for
breaching that duty.



Questions?

Thank You



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