

## The Intersection of ADA, FMLA, and Workers' Compensation



**will begin at 2 pm ET**

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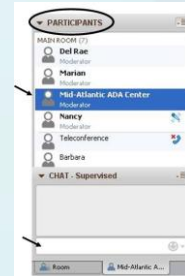


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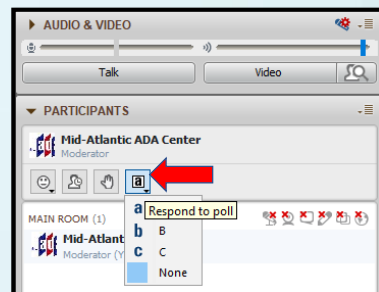


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## Answering Quiz Questions

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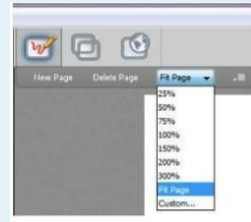
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- **Requests must be received by 5:00 PM ET on Wednesday, January 23, 2019.**

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- **You will need to listen for the continuing education code which will be announced during this session.**

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## About Your Hosts...

- TransCen, Inc.
  - Mission Statement: Improving lives of people with disabilities through meaningful work and community inclusion
- Mid-Atlantic ADA Center, a project of TransCen, Inc.
  - Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



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# The Intersection of ADA, FMLA, and Workers' Compensation



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## Disclaimer

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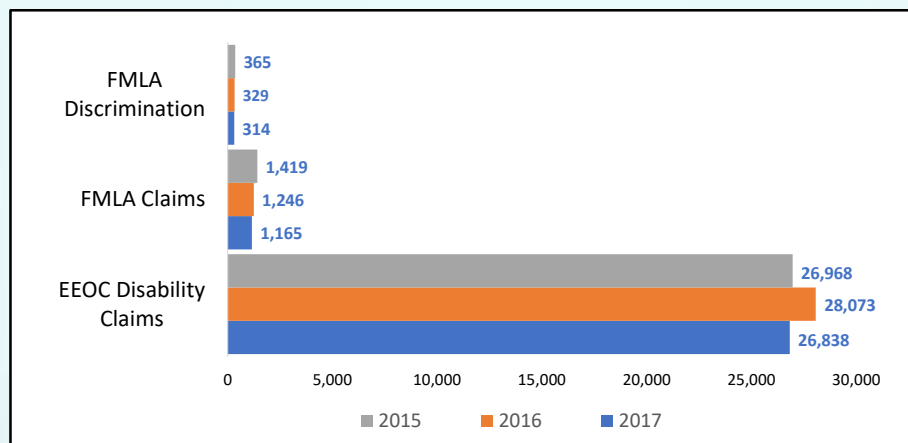
## Agenda

- Brief review of each law
- Comprehensive overview of each intersection
- Group quiz
- Final review
- Questions and Answers

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## Why this Matters



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## Americans with Disabilities Act (ADA)

- Federal law
- Applies to employers who have 15 or more employees
- Title I (Employment) prohibits discrimination against applicants and employees on the basis of a disability
- Three prong definition
  - A physical or mental impairment that substantially limits one or more major life activities
  - Has a record of such impairment
  - Is regarded as having such an impairment

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## Family and Medical Leave Act (FMLA)

- Federal and state law
- Applies to covered entities
  - Employers with 50 or more employees within 75 mile radius
- Leave entitlement for own medical condition or family member's medical condition
  - 12 weeks of unpaid job protection
  - Intermittent leave
  - Block leave
- Eligibility criteria
  - Must have a qualifying condition\*
  - Worked for employer for 12 months and at least 1,250 hours over last 12 months

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## Workers' Compensation (WC)

- Federal and state laws
  - Federal law applies only to federal employees
  - Each state sets its own workers' compensation law
- Applies to
  - Most businesses, even those with few employees
  - Occupational injuries and occupational illnesses (notification of incident varies per state)
- Provides
  - Wage-loss benefits
  - Medical coverage related to injury/illness

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## Additional Considerations

What else should you know?

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## Governed by Separate Entities

- **Americans with Disabilities Act**
  - Equal Employment Opportunity Commission
- **Family and Medical Leave Act**
  - U.S. Department of Labor
- **Workers' Compensation**
  - State Workers' Compensation Commission

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## Protections

- State laws may provide greater protection than federal laws
- Protection under one law does not remove protection under another
  - Common mistake – Failing to run FMLA concurrently with WC
- Termination can occur while on workers' compensation claim
  - Ensure reasons are not retaliatory in nature

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## Policies to Avoid

- Maximum leave policies
  - Requests for additional leave should be evaluated case by case
- 100% healed policies
  - Mandating employees be “restriction free” could be a failure to engage in interactive process

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## Areas of Intersection

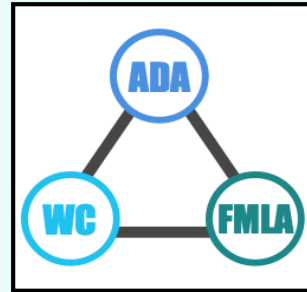
ADA, FMLA, Workers' Compensation

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## Three Laws, Six Intersections

- Medical Documentation
- Temporary Modified Duty
- Leave
- Benefits
- Fitness to Return
- Reinstatement (Return to Work)



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## Medical Documentation

ADA	FMLA	WC
Medical inquiries and exams must be job related and consistent with business necessity	Documentation is not to exceed what is required by DOL to complete Medical Certification	Should only relate to employee's occupational injury or illness
Limited to how the disability limits individual's ability to perform essential functions	Employer can require clarifying information (2 <sup>nd</sup> and 3 <sup>rd</sup> opinions, case by case)	May include injury report, appointment and progress updates, physician's summary, functional capacity evaluation
Should only be requested when impairment and limitations are not readily apparent	Certification to be returned by employee to employer within 15 business days	Most states have standard forms

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## Temporary Modified Duty

ADA	FMLA	WC
Required by employer to provide if it is a reasonable accommodation – temporary basis only	Employee has right to FMLA	Should be offered; may reduce entitlement to wage replacement benefits
Should always be considered if non-disabled employees receive light duty	Employer cannot require TMD in lieu of leave	Employee has right to reject TMD if FMLA eligible, but may risk losing WC wage benefits
Clearly outline the modification and the duration		Clearly outline the modification and duration

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## Leave

ADA	FMLA	WC
Unpaid leave time is unspecified and is usually based on provider's opinion and job duties	12 weeks of unpaid leave within a 12 month period.	Amount of leave injured worker receives will vary per state laws
Could be used if employee is not FMLA eligible or when employee exhausts FMLA	Leave can be used in a block period or used intermittently	May be partially paid through wage replacement benefits
Intermittent leave in limited circumstances	Considered an absolute right; cannot deny	Some employers have leave policies for WC

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## Benefits

ADA	FMLA	WC
General rule; continuation of benefits should be the same as others on similar leave	Health insurance must continue	Generally not required to continue unless FMLA is run concurrently (don't forget employer policies!)
Avoid discriminatory practices	Additional benefit continuation is determined by employer's policies	Medical coverage for injury/illness will be provided through the claim
		Designating FMLA with WC will provide greater protection to employee

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## Fitness To Return (FTR)

ADA	FMLA	WC
Request if there's reason to believe ability to perform essential functions will remain limited due to condition	Employee needs to be notified of FTR requirement (designation notice)	Typically required by the employer
Case by case assessment	Can only relate to the condition for which the employee used leave	Should only relate to the occupational injury/illness
	FTR under FMLA might result in need for interactive process	Be cautious of 100% healed requirements and consider interactive process as appropriate

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## Reinstatement (return to work)

ADA	FMLA	WC
Return to previous position unless doing so causes undue hardship	Required to return employee to same or equivalent position	Varies by state – most don't require job to be held
Consider accommodations that will enable employee to return	Undue hardship analysis does not apply	Consider if ADA applies to engage accommodation process including reassignment
		If terminating, ensure it is because all other options were exhausted and not due to retaliation

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## Review

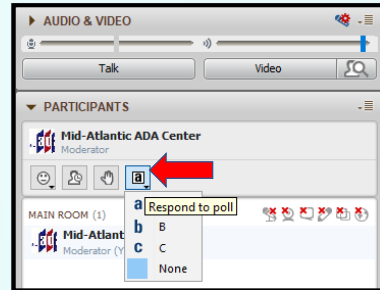
Applying what we have learned

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- **Keyboard shortcuts:**

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## Quiz Question 1

Sarah, who has been with her company for two years, broke her wrist after slipping on ice at work. She is going to require surgery and will be out of work for 4 weeks. What course of action should be taken following Sarah's injury?

- Have Sarah file a workers' compensation claim.
- Tell Sarah that she can remain out of work on FMLA, but there's no need to file a claim because she has health insurance to cover her injury.
- File a workers' compensation claim and follow FMLA guidelines to designate Sarah for block leave under FMLA.

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## Quiz Question 2

When providing temporary modified duty for an occupational injury, it's best to do the following:

- A. Allow the employee to tell you what duties they can do – they know their injury best!
- B. Establish a TMD based on the work restrictions from the WC provider and include a specific duration for the length of time the TMD will be provided.
- C. Don't offer TMD regardless of recommendations – why risk having the employee hurt themselves further?

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## Quiz Question 3

Jason has been out of work under FMLA for cancer treatment. He is nearing leave exhaustion and provides updated medical documentation stating he will need be out for 6 more weeks and can then return to full duty. What steps should be taken?

- A. Thank Jason for the update and terminate employment at the end of his FMLA.
- B. Tell Jason he has to return to work before the end of his FMLA or you cannot guarantee he will have a job.
- C. Engage in the interactive process to assess leave as a reasonable accommodation.

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## Quiz Question 4

Alex, who has been with the company for 4 years, sustained a concussion at work. After taking two weeks to recover, his provider releases him to temporary duty, working 4 hours/day 3 days/week for the next month and will then re-evaluate. You're able to accommodate the TMD but Alex declines, stating he doesn't agree he can work yet.

- A. Inform Alex of his rights to take leave under FMLA and that he can refuse TMD, but that it might impact his WC benefits.
- B. Tell Alex that the WC provider is the one who makes the decisions and he has to take the TMD in order to not be terminated.
- C. Allow Alex take his leave but terminate him once it exhausts for refusing to work.

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## Quiz Question 5

Ashley has been employed with the company for four months. She recently learned she is diabetic and will require several appointments over the next few months to establish an appropriate treatment regiment. As her HR, you should...

- A. Tell Ashley her appointments will have to fall outside of work hours because she isn't covered under FMLA and hasn't accrued enough time to miss work.
- B. Take Ashley at her word; don't request documentation and allow her to miss work whenever needed.
- C. Engage in the interactive process to assess intermittent leave as an accommodation and encourage Ashley to discuss with her provider additional accommodations that may be effective for her.

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## Quiz Question 6

Medical documentation received for ADA accommodations can also be used for assessing and designating FMLA.

- A. Correct. Medical documentation is all the same – there's no need to duplicate paperwork.
- B. Incorrect. Department of Labor has different requirements for determining FMLA eligibility and documentation for accommodations will not be sufficient.

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## Quiz Question 7

Dan is returning to work after being on block FMLA for 8 weeks due to depression. He submits an FTR stating he needs attend weekly appointments for 1 hour/day. How should Dan's FTR be handled?

- A. Engage in the interactive process to determine if there's an alternative to Dan attending his appointments – he's missed a lot of time already.
- B. Dan has 4 weeks remaining of FMLA. He should be transitioned to intermittent FMLA for his appointments. If his FMLA exhausts, engage in the interactive process to assess accommodations including leave.
- C. Mandate Dan's appointments be with the internal EAP so he doesn't have to miss too much time.

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## Quiz Question 8

Rachel is receiving leave as an accommodation for a mental health disorder. Since she hasn't been with the company long enough, she isn't eligible for FMLA. She contacts HR and asks what will happen to her health insurance and other benefits while she is out. HR tells her...

- A. Only employees under FMLA continue to receive benefits.
- B. She will continue to receive benefits but only if she has enough PTO and other accruals to cover lost time.
- C. She continues to receive her benefits while on leave.

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## Quiz Question 9

Jack, an FMLA eligible employee, has a WC injury that results in a permanent condition. The condition qualifies as a disability under ADA. Jack submits an FTR identifying he cannot return to his previous position due to his restrictions. What happens to Jack when it's determined he can't return?

- A. Jack will be terminated because he was unable to return to work.
- B. The interactive process should be engaged to assess reassignment as a reasonable accommodation.
- C. Jack can remain on his TMD as a long-term accommodation.

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## Quiz Question 10

Molly has worked for her company for 11 months and needs leave for 8 weeks. After engaging in the interactive process, she receives leave as an accommodation and is told it will transition to FMLA at one year of employment, as she has already met the hour requirement. Following Molly's leave, what requirement is her employer expected to follow?

- A. Return Molly to any position with a current vacancy.
- B. Return Molly to the same position or an equivalent position.
- C. Return Molly to the same position, absent any undue hardship.

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## Best practices

Ways to ensure compliance

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## Getting it Right

- Successfully applying and complying with each law can:
  - Reduce turnover
  - Increase productivity
  - Improve morale
  - Reduce costs
  - Lessen potential legal claims and fees
- Formal process
  - Enhances consistency across an organization
  - Allows for policy development with concrete steps and timelines

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## Creating Compliance

- Define roles with your stakeholders
  - Establish and communicate responsibilities
  - Outline objectives and expectations
- Develop communication tools
  - Templates for case trigger points
  - Methods to inform employees of rights and resources

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## Training

- Supervisors and front line managers are often first to know of employee's concerns. Train on:
  - What they can and can't ask
  - How to refer and who to refer to
- In person
  - New Hire
  - Annual
- Compliance notices
  - Annual notice on obligations and requirements
  - Clearly identify the overlap and interplay with each law

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## Return to Work Considerations

- Don't wait! Engage employee prior to leave exhaustion
  - Rely on stakeholders
  - Utilize communication templates
- Evaluate and consider all potential accommodations
  - Will vary case by case but could include
    - Modified duty
    - Telework
    - Modified schedule
    - Ergonomics
    - Reassignment

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## Remember to:

- Assess all applicable laws in a case – often more than one
- Begin with the law(s) that provide the greatest level of protection
- Avoid 100% healed policies and consider accommodations that can help employee return
- Maintain accurate job descriptions and provide a copy with request for medical information

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## And Don't Forget –

ADA may not apply first. Although it's always case by case, consider it when:

- Employee is not eligible for FMLA
- Employee exhausts all of their FMLA
- Fitness to return from FMLA or Workers' Compensation includes restrictions
- Reasonable accommodation may enable employer continue working or return to work
- Employee cannot return to prior position with or without accommodations – evaluate reassignment

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# Questions?

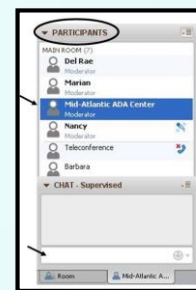


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## Sources

- EEOC Litigation Statistics
- US Department of Labor, Wage and Hour Division

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## Mid-Atlantic ADA Center TransCen, Inc.

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