



2019 NCSHA Annual Conference  
*What's New from the EEOC?*  
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# AGENDA

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- EEOC Developments
- ADA and FMLA Comparison
- Recent FMLA Regulatory Developments
- Recent ADA Caselaw

# What is the EEOC?

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- The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal discrimination laws including the Americans with Disabilities Act (ADA).
- Note that the U.S. Department of Labor enforces the Family and Medical Leave Act (FMLA).

# EEOC FY 2018 Charge Statistics

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**Total Charges: 76,418**

Race: 32.2%

Disability: 32.2%

Retaliation: 51.6%

GINA: 0.3%

LAWS	ADA	FMLA
ENFORCEMENT	EEOC	DOL
SIZE OF EMPLOYER	15 or more employees	50 or more employees within 75-mile radius
ELIGIBILITY	Qualified individual with disability & able to perform essential functions of job with or without reasonable accommodations	Work at least 12 months and 1250 hours & worksite with 50 or more employees within 75-mile radius

# Length and Type of Leave

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## FMLA

- Up to 12 weeks of unpaid leave (in 12-month period).
- Reinstatement rights.

## ADA

- Does not require that employers grant any specific period of leave.
- Only have to grant leave of absence if it's a "reasonable" accommodation.

# Documentation Requirements

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- **ADA:** Employer may request medical certification regarding the nature, severity, and duration of the condition, and request an opinion on whether employee can perform the essential functions of job. Additional correspondence with the physician is allowed for clarification purposes.
- **FMLA:** Employer provides employee with FMLA Certification Paperwork. Employee has 15 days to return paperwork. If further clarification is needed, employee has 7 days to provide requested follow-up documentation. Employer may also request a 2nd medical opinion, or a 3rd medical opinion if the 1st and 2nd opinions differ.

# Comparison of Reinstatement Protocol

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Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship, or that the employee can no longer perform the essential functions of that job, with or without a reasonable accommodation.

Under the FMLA (with a few minor exceptions), an employee must be reinstated to the same position or to an equivalent position.



# Triggering Events

- **ADA:** Employee must let the employer know employee needs an adjustment or change concerning some aspect of employee's job duties for a reason related to a medical condition. The request does not have to include any special words, such as "reasonable accommodation" or "disability." Request can also be made "on behalf of" employee (doctor, family member, etc.).
- **FMLA:** Employee must provide *at least* verbal notice sufficient to make the employer aware of the need for FMLA-qualifying leave and the anticipated timing and duration of the leave. The first time an employee seeks leave for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.

# Determining Employee FMLA Eligibility

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graph TD; A[Determining Employee FMLA Eligibility] --> B[Employed for at least 12 months  
(need not be 12 concurrent months)]; B --> C[Has worked 1,250 hours in preceding 12 months  
(excluding paid, unworked time)]; C --> D[Works at a work site with 50 Employees  
(within a 75-mile radius)]; D --> E[Has not exhausted his/her annual 12-week entitlement];
```

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(need not be 12 concurrent months)**

**Has worked 1,250 hours in preceding 12 months  
(excluding paid, unworked time)**

**Works at a work site with 50 Employees  
(within a 75-mile radius)**

**Has not exhausted his/her annual 12-week entitlement**

# Determining if Reason for FMLA Leave Qualifies

**Birth  
or  
Adoption**

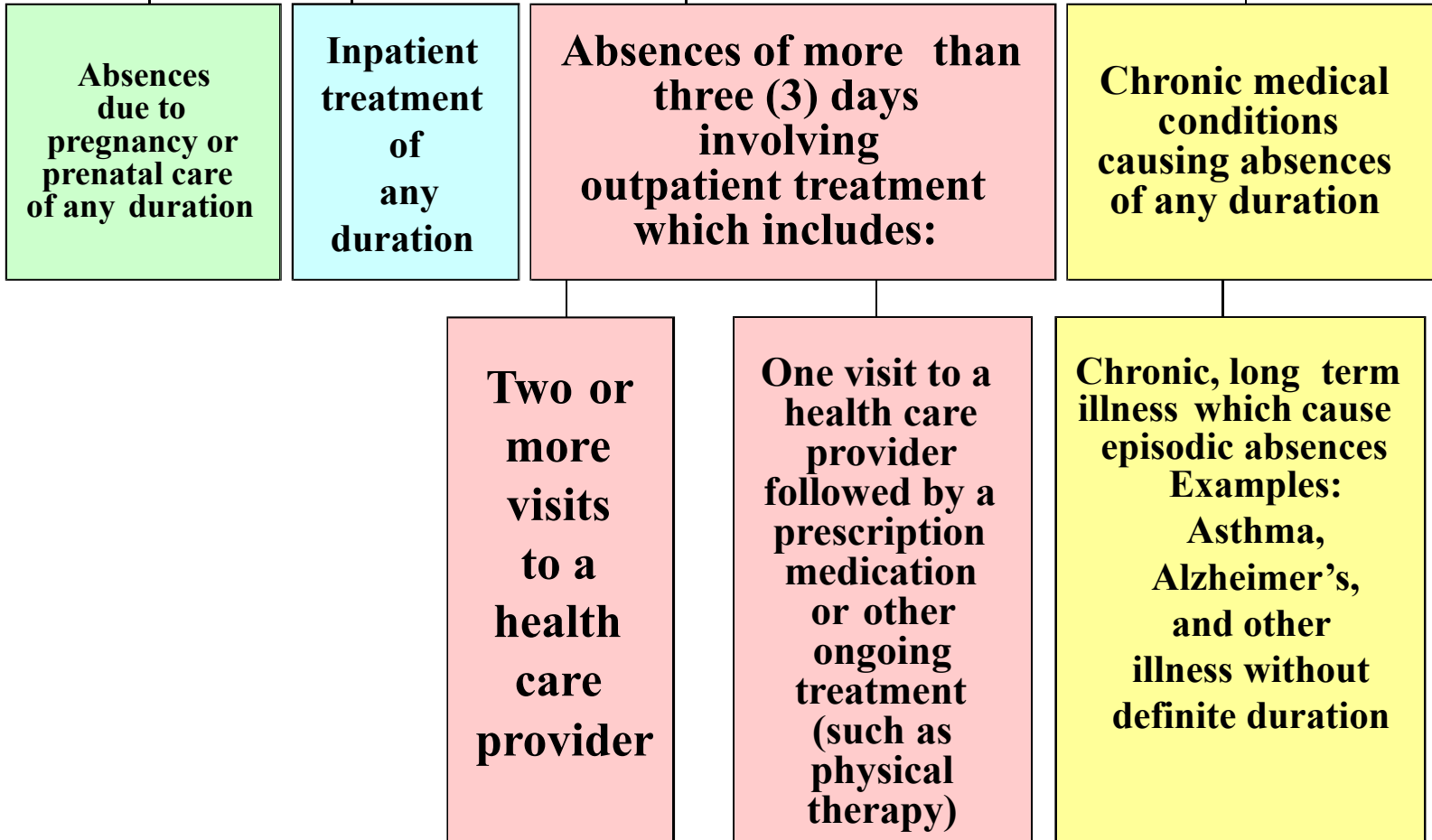
**Within  
12 months  
of birth or  
placement**

**To care for  
immediate family  
member or spouse  
with serious  
health condition**

**Employee's  
own serious  
health  
condition**

**For the care of a  
covered service  
member or  
exigency**

# Determining if a medical condition is a “Serious Health Condition”

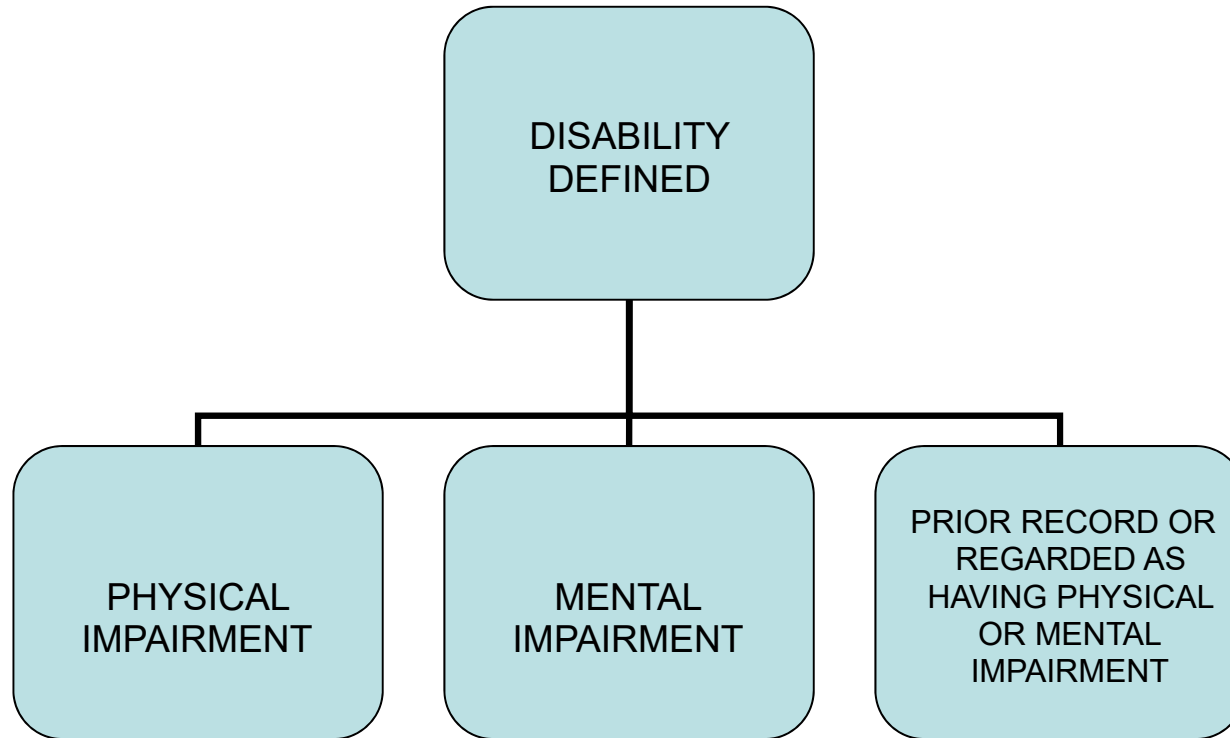


# Military Family Leave

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- Military Caregiver Leave
  - Eligible employees (spouse, son, daughter, parent or next of kin) may take up to 26 workweeks of unpaid leave in a rolling 12-month period to care for a covered servicemember with a serious injury or illness
- Qualifying Exigency Leave
  - Eligible employees may take up to 12 workweeks of unpaid leave during the employer's normal 12-month period for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call to active duty, in support of a contingency operation

# Disability Defined



**SUBSTANTIALLY LIMITS MAJOR LIFE ACTIVITY**

# Major Life Activities

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- Caring for Oneself
- Manual Tasks
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Using major bodily functions, including functions of the immune system, normal cell growth digestive, bladder, bowel, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.



# Interactive Process

- The EEOC’s guidelines state that... “once a qualified individual with a disability has requested a provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.”



# Employer's Good Faith Effort

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- Meeting with the employee
- Requesting information regarding employee's condition and limitations
- Asking what accommodation the employee wants
- Showing signs of having considered employee's request
- Offering and discussing available alternatives if requested accommodation is too burdensome
- Consulting outside resources

# Modifying Policies as Reasonable Accommodation

- The employer may be required to make an exception to a neutral policy or practice.
  - The Supreme Court has held that “the simple fact that an accommodation would provide a ‘preference’ – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, in and of itself, automatically show that the accommodation is not reasonable.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002).
  - An employer thus may be required to modify or make exceptions to its existing neutral policies regarding leaves of absence, transfers, part-time work, and breaks.
  - But courts have generally rejected claims that attendance policies must be modified as an accommodation.
  - And most courts hold that an employer need not lower its quantitative or qualitative standards, including production standards, as a reasonable accommodation.

# Leaves of Absence as Reasonable Accommodation

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- The EEOC has recognized situations in which an employee may be entitled to time away from work as a reasonable accommodation.
- Indefinite leaves or leaves with no proposed end date are generally unreasonable and need not be granted.
- How long a leave needs to be to be considered a “reasonable” accommodation generally depends on specific circumstances, such as whether the employee has already been given significant time off, whether the requested leave is of a substantial duration, and how likely it is that the employee will be able to return on the proposed end date.

# Other Types of Reasonable Accommodation

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- Job restructuring
- Part-time/modified work schedules
- Reassignment to vacant positions
- Acquisition or modification of equipment
- Modification of policies
- Job coaches
- Readers, interpreters

# Undue Hardship Defense

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- Significant difficulty and expense
- Factors include cost, financial resources, size of employer, size of the facility and impact on business operations
- Case-by-case analysis required

# Comparison of ADA and FMLA Limitations on Leave

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**Question:** *Does the FMLA's limit of 12 workweeks of leave in a 12-month period mean that the ADA also limits employees to 12 weeks of leave per year?*

**Answer:** No. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business. The EEOC has said there can be no "bright line" cut off.



# **FMLA Regulatory Developments**

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## **DOL Issued First FMLA Opinion Letters Since 2009**

- FMLA 2018-2-A. Is organ donation surgery a “serious health condition”?



# FMLA Regulatory Developments

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## **DOL Issued First FMLA Opinion Letters Since 2009**

- FMLA 2019-1-A. May employer delay designating leave as FMLA Leave to expand leave period?

# FMLA Regulatory Developments

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## **DOL Issued First FMLA Opinion Letters Since 2009**

- FMLA 2019-3-A. May employer delay designating leave as FMLA Leave to comply with CBA requirements?

# FMLA Regulatory Developments

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## **DOL Issued First FMLA Opinion Letters Since 2009**

- FMLA 2019-2-A. Is attendance at child's school meeting to discuss IEP considered FMLA Leave?



# **ADA Recent Caselaw Developments**

# Extreme Obesity as Disability

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- Richardson v. Chicago Transit Authority (7<sup>th</sup> Cir.)
- Bus driver alleged discrimination under ADA due to obesity.
- Driver failed to present evidence of underlying “physiological disorder” causing obesity.
- Court dismissed driver’s case.

# Working Remotely as Reasonable Accommodation

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- Bilinsky v. American Airlines (7<sup>th</sup> Cir. 2019)
- Employee had multiple sclerosis.
- Employee alleged that AA's failure to allow her to work remotely violated ADA.
- Merger after acquisition of US Air resulted in restructure of employee's department.
- AA contended that new position required physical presence.
- Court ruled in favor of AA.

# ADA “Direct Threat” Defense

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- Nall v. BNSF Railway, (5<sup>th</sup> Cir. 2019)
- Plaintiff diagnosed with Parkinson’s Disease.
- Company refused to reinstate employee based on a failed safety test.
- In response to ADA discrimination claim, company asserted “direct threat” defense.
- Need for an individualized assessment.
- Court found that company “moved the goal posts” in adding new job requirements.

# Job Offer and “Regarded As” Disabled

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- EEOC v. BNSF Railway, (9<sup>th</sup> Cir. 2018)
- Plaintiff received a conditional job offer subject to post-offer medical review.
- Employer revoked offer when plaintiff refused to submit a MRI of his back at his own expense.
- Court found that company “regarded” plaintiff as disabled based on a history of back problems.
- No discrimination if all applicants were required to pay for their medical exams.
- Discrimination in this case because plaintiff was singled out based on a perceived disability.



# Don't Do This!

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- EEOC v. Dolgencorp (6<sup>th</sup> Cir. 2018)
- Plaintiff was a diabetic who worked as a cashier at Dollar General.
- Plaintiff asked to keep orange juice at the register in case of low blood sugar.
- In emergency, plaintiff drank orange juice from cooler and paid for it.
- Plaintiff fired for violation of company policy.
- Plaintiff awarded \$27,500 in backpay, \$? in compensatory damages, \$? in attorneys fees.



# Thank You!