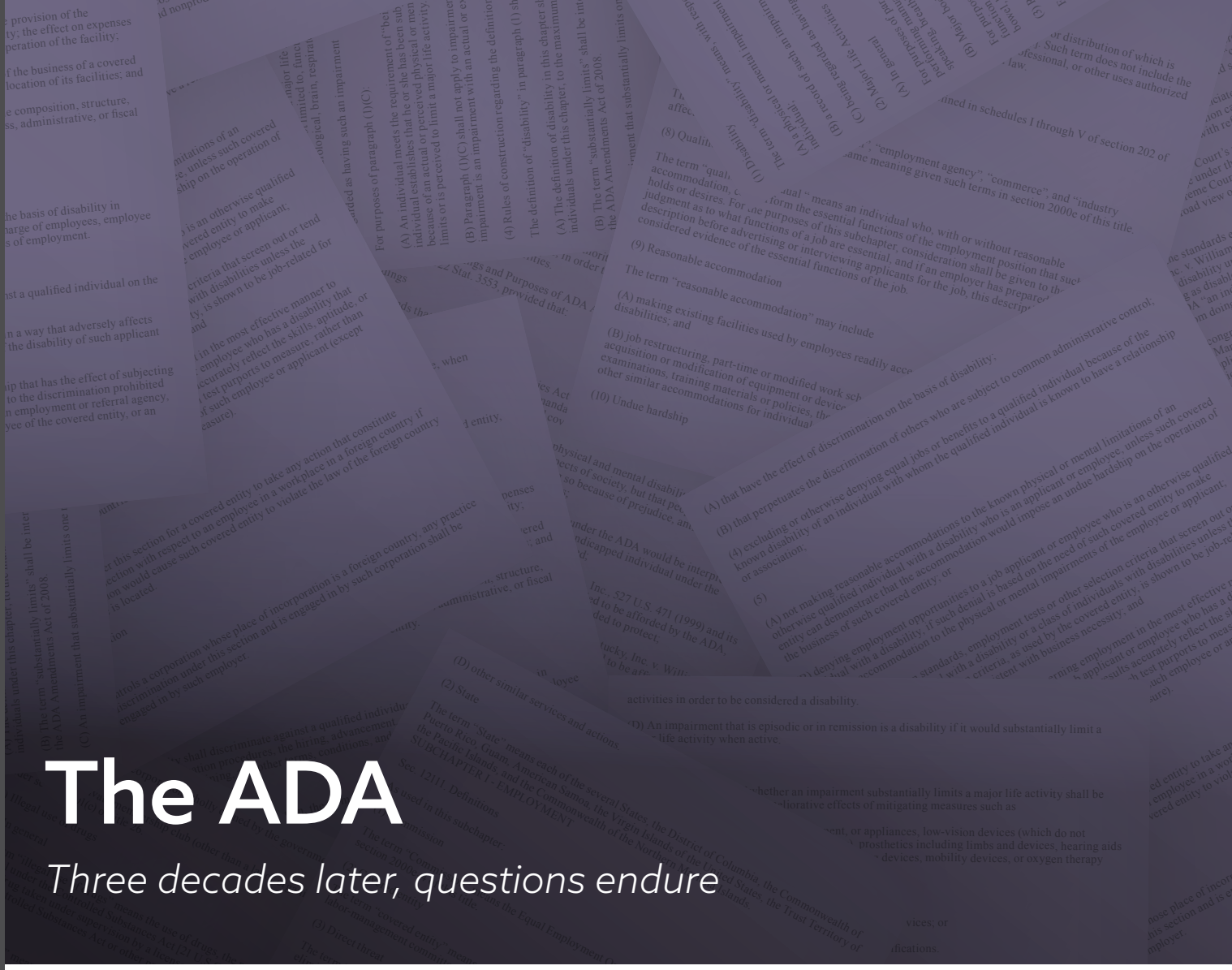

The ADA

Three decades later, questions endure

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Next summer the Americans with Disabilities Act (ADA) turns 30. So why is it still proving to be such a challenge for so many employers?

A BRIEF HISTORY OF THE ADA

Enacted in July of 1990, the ADA is a law that prohibits discrimination based on disability. It defines disability as a physical or mental impairment, a record of physical or mental impairment, or being regarded as having a physical or mental impairment, one that substantially limits one or more major life activities (e.g., caring for oneself, performing manual tasks, communicating, etc.). Under the ADA, employers are required to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would pose an undue hardship on the business.

At its core, ADA prohibits discrimination, retaliation and harassment of disabled persons.

In 2008, Congress stepped in to clarify that the ADA is about accommodating what needs to be done to get an employee back to work, more so than to simply define disability. Thus, the updated ADA Amendments Act (ADAAA), and the Equal Employment Opportunity Commission (EEOC) provided additional guidance that "the determination of disability should not require extensive analysis."

This has allowed employers to spend less time trying to determine whether an employee is disabled, and more time focused on getting them back to health, work and productivity. So why, 30 years later, is the ADA still challenging for so many employers, of all sizes, in all industries? In a word: ambiguity.

TODAY'S CHALLENGES

A quick Google search of ADA will turn up a lot of words and phrases in quotation marks: "Disability." "Major life activity." "Reasonable accommodation." "Undue hardship." Imprecise language around definitions — broadened by the ADAAA to make disability a more inclusive term — can make it difficult for employers to know for certain that they're in compliance with the law. Most employers today aren't spending a lot of time on what now constitutes a disability; when there's litigation, it's more often over what constitutes a reasonable accommodation.

Reasonable accommodations, determined on a case-by-case basis, are defined by the ADA as any change in the work environment, or in the way things are customarily done, that enables an individual with a disability to enjoy equal employment opportunities. Employers are required to provide accommodations to disabled individuals, modifying or adjusting aspects of employment that would enable them to do their job, as long as doing so wouldn't result in significant difficulty or expense — in other words, undue hardship.

Unfortunately, there's no set dollar amount or leave time that's considered "undue." As with most things under the ADA, each case is evaluated individually — what may be considered reasonable for one employee may not for another. A job or function considered critical to a 25-person business will look different in an organization with 25,000 employees. Going without an employee for three weeks at a small company may be too much, where a larger one can adapt. The question, ultimately, is how cumbersome is the burden? There is no magic number of days or dollars — it's the totality of the circumstances. But "it just depends" can be a tricky way to ensure compliance.


Leave of absence
Job reassignment
Categories of reasonable accommodations
Restrictions within the position

That's where the interactive process comes in. It's an information-gathering approach an employer must use to evaluate the employee's request for accommodation. Employers are required to have this discussion, but often they don't even know when the process should start — employees rarely use magic words like "I need an accommodation" or "Let's start the interactive process." And more importantly, they don't have to; it's the employer's responsibility to know when to initiate the interactive process. According to the EEOC, that should happen whenever an employer:

- Knows an employee has a disability.
- Knows or has reason to know that an employee is experiencing workplace problems because of a disability.
- Knows or has reason to know that a disability is preventing an employee from requesting reasonable accommodation.

It's understandable that employers are sometimes uncertain about the questions they're allowed to ask. According to the EEOC, they can ask for information about an employee's requested disability accommodation, the nature of the disability underlying the employee's request and the employee's thoughts on how the disability has caused the need for an accommodation.

ADA AND THE WWW

While many of us can barely remember life before scrolling, the ADA actually predates the internet. Which means it doesn't account for websites and the predominant role they play in our work and daily lives.

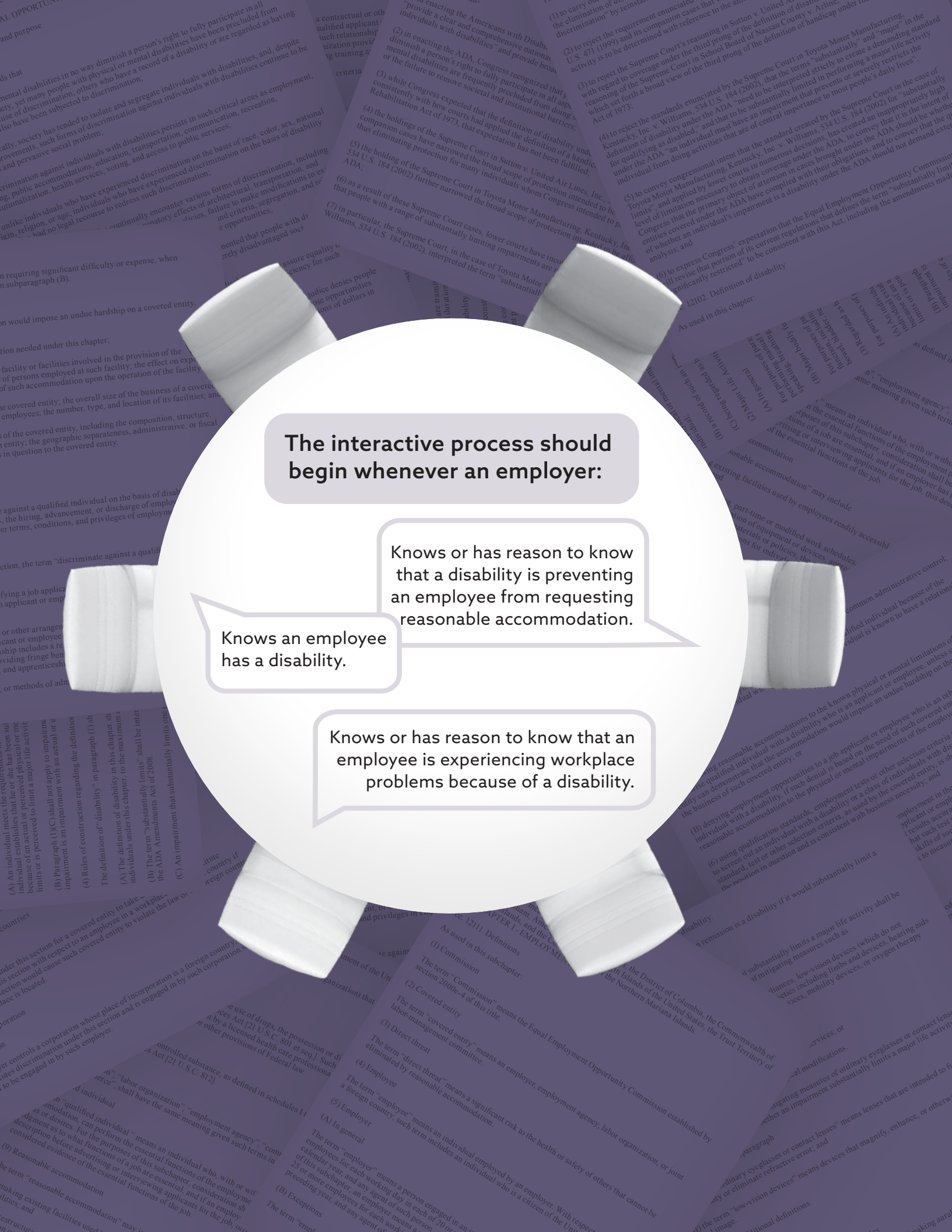
Title III of the ADA prohibits discrimination on the basis of disability in "places of public accommodation," and there is an ongoing debate as to whether a website counts as such a place. Title III also provides standards for businesses' physical locations to accommodate people with disabilities, but there is no guidance for web-based or mobile applications.

Recent lawsuits claim that private company websites do qualify, and that barriers like not having compatible screen-reading software deny the right of equal access. However, the courts disagree on whether websites should be considered public accommodations: The Courts of Appeals within the First, Second and Seventh Circuits have found that a website can be a place of public accommodation, while the Third, Sixth, Ninth and Eleventh Circuits have held that it must be a physical space. Uncertainty remains.

LEAVE AS AN ACCOMMODATION

Another challenge is leave as an accommodation. Title I of the ADA doesn't mention leave specifically as an accommodation, but it does require reasonable accommodations; courts have unanimously recognized that some amount of leave may be a reasonable accommodation. This is the case even when the employer does not offer leave as a benefit, the employee isn't eligible for leave under the employer's policy, or the employee has exhausted the leave provided under other employer programs such as Family and Medical Leave Act (FMLA) benefits.

In Severson v. Heartland Woodcraft, the court ruled on the topic of leave as an accommodation. Raymond Severson, a seven-year employee at Heartland Woodcraft, hurt his back before work in 2013. He subsequently took medical leave; on his final day of FMLA, Severson had surgery and requested an additional two months of continued medical leave to recover. Heartland denied his request and terminated his employment, inviting him to reapply for his position when he was medically cleared to return to work. Severson sued, alleging his employer should have accommodated him with the additional leave.


The interactive process should begin whenever an employer:
Knows or has reason to know that a disability is preventing an employee from requesting reasonable accommodation.
Knows an employee has a disability.
Knows or has reason to know that an employee is experiencing workplace problems because of a disability.

The Seventh Circuit held that a leave of absence spanning multiple months under the ADA is unreasonable. The whole idea behind giving an accommodation is to allow an employee to be able to perform the essential functions of employment, and a multi-month leave of absence doesn't do that.

Severson was a particularly important case because it ruled that, under ADA, an employer is not required to create new position or transfer the employee to light duty when he would have been unable to perform the essential functions of that job.

WHAT'S NEXT?

Employers are becoming more cognizant that they have to be versed on ADA rules and prepared for the interactive process. Some have turned it over to outside partners. Often, though, that conversation falls to a human resources department, a front-line manager or to someone untrained or uneducated in the complexity of employment law. For many organizations, particularly those with 500 or fewer employees, ADA is not top of mind. They may not even realize the impact it can have on their business. So what do organizations who meet the threshold for ADA requirements need to know and remember going forward?

KEY TAKEAWAYS FOR EMPLOYERS

Understanding how the ADA applies to your organization and seeking guidance from outside counsel or qualified administrators can provide valuable insight. Below are some important helpful tips for employers to remember as they strive to remain compliant.

- ADA is an anti-discrimination statute, not a leave-entitlement statute.
  - Just because you grant intermittent leave doesn't mean employees can come and go as they please — make sure your policy is clear and well communicated.
- Create clarity wherever you can.
  - Include language in your policies that employees may be eligible for additional leave as an accommodation under the ADA, if reasonable. Ensure your accommodation review programs consider each request for a leave of absence, along with any other requested accommodations, on a case-by-case basis.
- Maintain a consistent standard.
  - Despite accommodations being evaluated on a case-by-case basis, consistency is still an important thing to remember from a compliance standpoint. If an accommodation can be applied in one instance, it should not be denied in another, similar instance.
- Arm your front line.
  - Do they understand they can't just cut the cord at 12 weeks plus a day? Training is essential. Managers and human resources teams need to understand the ADA process, which should begin at any point during leave when it becomes evident the employee won't be able to return at the end of FMLA.
- Have the discussion — and document it.
  - The number one mistake employers make is not following the interactive process. The second? Not countering with an offer of what can be accommodated. Employers that work in good faith to accommodate employees — and document the process, keeping track of their efforts to support employees' needs — are less likely to run the risk of legal exposure.

RESOURCES

DMEC Tools & Tactics Webinar: "Intermittent Leave and the ADA: What's Reasonable?"
https://event.on24.com/wcc/r/2122032/D3DAB22332FDD864FCDD8646A4825225

Sedgwick connection blog: "Bazinga! Theoretical Big Bang scenarios put the spotlight on intermittent ADA"
https://www.sedgwick.com/blog/2019/05/16/bazinga-theoretical-big-bang-scenarios-put-the-spotlight-on-intermittent-ada

Common misconceptions in integrated disability and absence management. Bryon Bass, SVP, Workforce Absence. Edge 10.
https://edge.sedgwick.com/issue_010/common-misconceptions-in-integrated-disability-and-absence-management/

ADA vs FMLA: back to basics

Many organizations don't understand the differences in disability and family medical leave. They are not the same; rather, they go hand-in-hand.

Let's consider the following scenario. Following an injury, I've taken my 12 allotted weeks of FMLA. I am not yet medically cleared to return to work full-time; I'm requesting to return to my position, but with reduced hours. My employer must now engage in an ADA analysis to determine whether granting my accommodation will result in an undue hardship to the business.

Here's where the ADA is gray: that accommodation may be easy to grant for a couple of weeks, but what if it's for multiple months or longer? What if the request is for intermittent leave, not specifically discussed in the ADA? Employers end up doing the same analysis: can we allow an employee to take off two days a month to seek treatment for anxiety? Or two days a week to receive chemotherapy? It needs to become an interactive discussion. The employer must look at what the doctor is prescribing and work together with the provider and their employee to find the most appropriate solution to meet their needs, as well as the requirements of their position. A conversation should take place: "We can't do that, but we can do this..." A third-party administrator may come in to gather all the related and required information and medical documentation, but ultimately it's on the employer to decide if they can grant the accommodation.

FMLA ELIGIBILITY REQUIREMENTS ARE CLEARLY DEFINED:

- Employees must have been employed with the company for 12 months.
- Employees must have worked at least 1,250 hours during the 12 months prior to the start of FMLA leave.
- Employees may take FMLA leave for themselves or a family member.
- Employees may take up to 12 weeks of leave (and up to 26 weeks for relatives who are service members and require care).
- FMLA allows for intermittent time off, if a doctor determines it's necessary (e.g., for chronic illness like migraines or asthma).
- The employer must employ 50 or more employees within a 75-mile radius of the worksite.

ADA ELIGIBILITY REQUIREMENTS ARE LESS CLEAR:

- Employees are eligible for ADA on their first day of employment.
- Employees may only use ADA leave for themselves, not for relatives.
- The employer must only employ 15 employees for the ADA to apply.
- ADA leave does not have a predetermined timeline. Instead, an employer must do a hardship analysis: Can we reasonably accommodate the request? What's the totality of circumstances?