

The Basics: FMLA and ADA

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Compliance **HR**

Today's Webinar Presenter

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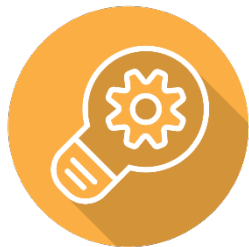
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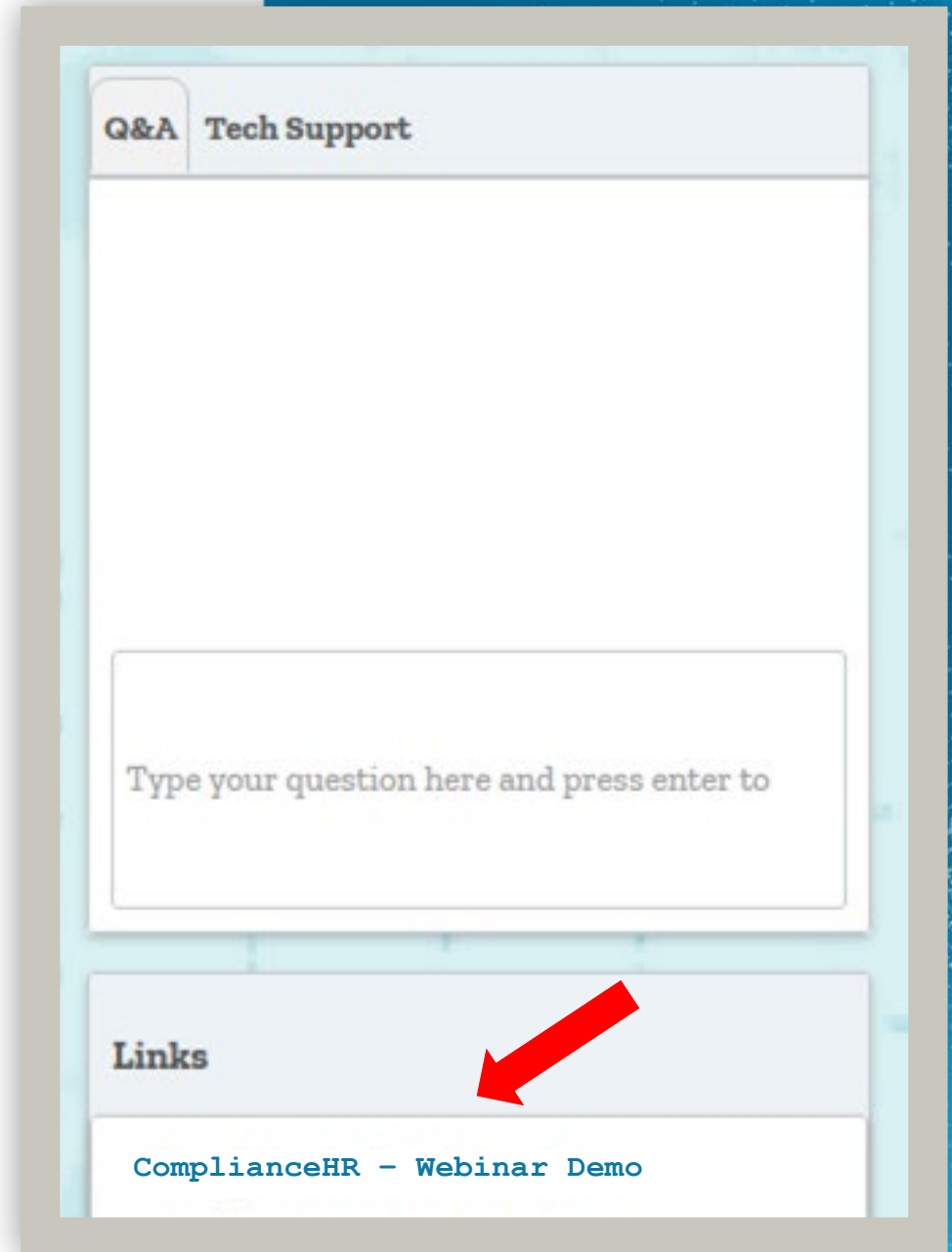
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Agenda

1. FMLA Basics

- Eligibility
- Qualifying Conditions
- Types and Amounts of Leave
- Job Protections

2. ADA Basics

- Notice
- The Interactive Process



What the FMLA Provides

An Introductory Summary

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FMLA Benefits

- Unpaid, job-protected leave
- Benefits continuation
- Job Reinstatement
- 12 or 26 workweeks of leave in a 12-month period
- No interference, no retaliation
- **It doesn't matter how inconvenient this is**





**Recognizing the
Need for a Leave
Conversation
Our Burden, and
No Magic Words**

Ways You May First Learn of the Need for Leave

- You realize that a time sheet or hours worked report looks different than usual;
- An employee has poor attendance that is about to lead to discipline;
- Employee raises an issue about her work schedule as it relates to a medical condition;
- Employee explains during the course of a counseling or disciplinary meeting that he has a medical problem causing the performance deficiencies;



More Ways You May First Learn of the Need for Leave

- Employee provides information—in person, via telephone, from a family member, etc.—about a medical problem that may require time off work, either on occasion, or all at once;
- Manager notices a significant change in an employee's behavior, work patterns or conduct and has reason to believe they may be related to a medical condition; and/or
- Employee has an on-the-job injury which renders him unable to work for a period of time.



Common Myth: “FMLA is Optional”

- Reality: if an employee is taking time off work for a reason that qualifies as FMLA, **the Company has an obligation under the law to designate that time off as FMLA**
- This means neither employees, nor the Company, get to choose to “not use FMLA”
- If the Company requires employees to provide documentation in support of their need for FMLA, and they don’t provide it, the time off work could be unexcused—even if the employee has paid time off available (but check state laws).

More on Requiring the Designation of FMLA

- It is the employer's burden to designate—and if we don't have enough information, to ask for it
- March 2019 and September 2019 DOL Opinion letters reinforce this
 - In other words, if leave is FMLA qualifying, and we fail to designate it as such, we have not complied with the FMLA
 - This includes people who fail to turn in the paperwork—pick up your designation duties as you normally would
 - Complaints by employees that they want to “save their time off” or that their doctor charges \$25 for paperwork do not affect an employer's legal obligations
 - Explain consequences of failure to cooperate with the process
- BUT—cannot force an employee to take more leave than is medically necessary (arises most often in the intermittent leave context)

Who Can Take FMLA

Eligibility and Reasons for Leave

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Eligible Employees Are Those Who...

- Experience a qualifying reason for leave;
- Work for a covered employer (private employer with 50+ employees or a public agency of any size);
- Work at a jobsite with 50+ employees within a 75-mile radius
- Have accumulated **12 months** of service; and
 - Breaks in service may count
 - Time out for a workers' comp injury counts
 - Consider temporary work, work as an intern, and more
 - Non-FMLA leave can transition to FMLA leave
- Have worked **1,250 hours** in last 12 months.



Medical* Reasons for FMLA Leave

**Birth or placement
of a child**



**To care for a spouse,
parent, or child
with a serious
health condition**



**The employee's
own serious
health condition**



Understanding Bonding Leave - “Birth or Placement of a Child”

- Bonding leave is fundamentally different from serious health condition leave
- Intermittent leave is available prior to birth or placement
 - For biological children, pregnancy and prenatal care is a serious health condition for mom and her spouse (marriage required)
 - For adoptive/foster, intermittent leave permitted before placement for legal obligations, home visits, and more
- Once the child is born or placed
 - Not available intermittently once the child arrives
 - Moms and dads both get it
 - Doesn't require medical certification because isn't medically necessary
 - Marriage is not required
 - Spouses who both work for same employer can be required to split the 12 weeks of bonding time (do you do this?)
 - Can be taken any time within 12 months of the birth or placement

What is a “Serious Health Condition?”

An illness, injury, impairment or physical or mental condition that involves:

1. Inpatient Care (overnight stay or subsequent treatment in connection with that stay); or
2. Continuing Treatment
 - A. Incapacity of more than 3 consecutive days and
 - I. Visit 2+ times within 30 days; or
 - II. Visit plus a regimen of treatment (including Rx)
 - B. Pregnancy or prenatal care
 - C. Chronic conditions
 - D. Permanent or long-term conditions
 - E. Condition requiring multiple treatments



Family Members for SHC Leave

- Parent
 - Biological, adoptive, foster, step
 - No in-laws
 - In loco parentis
- Child
 - Biological, adoptive, foster, step
 - In loco parentis
 - Under age 18 (unless mental/physical disability, or qualifying exigency leaves)
 - Grandma wants leave for her grandbaby?
- Spouse
 - As long as “married” under state law
 - Including common law if state recognizes it



Leave to Care for a Family Member

- Available where family member is unable to care for own basic medical, hygienic or nutritional needs (activities of daily living standard)
- Also available for transport to and from medical appointments
- Includes providing psychological comfort
- Employee does not have to be only person available
- But the standard for “providing care” may be decreasing...



Military Leave Under the FMLA

- Qualifying Exigency Leave (up to 12 weeks): for a spouse, child or parent who is a member of the Armed Forces, National Guard or Reserves, on federal active duty/called to duty in a foreign country
- Military Caregiver Leave (up to 26 weeks): for the care of service member undergoing medical treatment for a serious injury or illness



Types and Amounts of FMLA Leave

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Amount and Types of Leave

- Blocks of leave
 - 12/26 workweeks
 - Employee's own workweek is the basis—so a week is a week
- Intermittent/Reduced Schedule Leave
 - In hours or partial workweeks based on employee's regular work schedule
 - Employee's own workweek is still the basis (do they work 30 hours a week, or 60?)—make sure enough hours are being put in their FMLA leave bank
 - Get agreement from exempt employees about their regular work schedule
 - Watch out for requests we may incorrectly consider accommodation issues
 - Employee: "My doctor says I can only work 20 hours a week"
 - Supervisor: "We cannot accommodate that" or "we don't have any part time jobs"
 - **WRONG—this is a form of FMLA if someone is eligible**

More About Intermittent/RSL

- What it's used for
 - Medical necessity and certain Military QE leaves
 - Periodic appointments, prenatal care/morning sickness, treatments, flare-ups of chronic conditions
- Cannot necessarily require medical certification for each absence
- Cannot force more than they need—the physical impossibility rule

Pay and Benefit Issues During FMLA

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Getting Paid on FMLA



- General rule: FMLA leave is an unpaid leave right (*i.e.*, the law does not require pay)
- Wage replacement benefits (like short-term disability, workers' compensation, etc.) are also NOT leave
- Substitution of paid time off under Company policy (vacation, salary continuation, sick time, parental leave)—enables some or all of FMLA to also be paid, but does not extend the leave

Continuation of Health Benefits

- Continue at same level as when the employee was actively working
- Keep them informed (open enrollment, etc.)
- Employee/employer contributions remain unchanged
 - If on paid FMLA, employee-portion of premiums taken from checks, when on unpaid FMLA, employees must pay their portion



Capturing and Documenting FMLA

Notice, Certification, and Recertification

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A High-Level Overview of the Certification Process

- Employees have to provide 30 days' notice if the leave is foreseeable—otherwise as soon as possible
- Once we have notice, we have five (5) business days to begin the process—send FMLA packet (Notice of Eligibility, Rights and Responsibilities Notice and certification form)
- Employee has 15 calendar days to provide certification
- Possible seven (7) day cure period if it is incomplete or insufficient
- Contacting the doctor
 - HR only – for authentication and clarification – and what that really means
 - **Managers and supervisors should never do this**
- Once we receive a complete and sufficient certification, we have five (5) business days to send a Designation Notice



The Details (On Our End) Matter

Recent Cases Make the Company's Job Harder

- Do not use technicalities as a “gotcha” to fire or discipline an employee.
- Tell them the consequences of non-compliance. Then tell them again.
- Send the communications via some traceable method.



Strict Confidentiality of the Information We Receive



- Anything related to an employee's leave, need for accommodation, medical visits, etc. is a confidential medical record
- Stored separately, under "lock and key" (whether virtual or real)
- Share on a need-to-know basis only
- Consider how information is received and transmitted
- **And remember:** we are only entitled to job-related information regarding an employee's need for leave or accommodations (**not the underlying diagnoses, medications, treatment plans and more**)

Returning to Work

6

What Happens to Their Jobs?

- Reinstatement to the “same or equivalent position”
 - “Virtually identical:” same pay, same shift, same benefits, same worksite, same duties, etc.
 - If the employee can perform the essential job functions (with or without an accommodation)
 - **Remember, no such thing as “undue hardship”**
- There is “no greater right” than if they had been at work
 - BUT: incredibly high risk of terminating employees while on leave, or immediately after their return

What If They Can't Come Back After 12 Weeks? (or Never Qualified in the First Place?)

7

Leave Under the ADA

Leave is one form of reasonable accommodation under the ADA (*i.e.*, the Company may have **leave obligations to its employees under the ADA** regardless of FMLA eligibility and/or your policies and practices).



The Americans with Disabilities Act (ADA)

- The ADA prohibits discrimination because of a disability (or a history of a disability, or because someone is perceived as having a disability, or because of someone's association with someone with a disability)
- Employers must also **reasonably accommodate** qualified individuals with disabilities unless it poses an undue hardship
- Requires an interactive process with the employee and possibly his/her healthcare provider
- Highly individualized, fact-specific analysis (the interactive process)
- **Net Result**: the end of FMLA is not the automatic end of job protection for those on leave—we have to go through the interactive process

Expanded Understanding of “Disability”

A physical or mental impairment that *[substantially]* limits one or more major life activities.



“Major Life Activities”

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Speaking
- Eating
- Sleeping
- Breathing
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working



Is There a List of Disabilities? (Yes and No)

These are just the ones the EEOC has identified in the Regulations as *ALWAYS* being disabilities—but any illness or injury *can be* a disability

Autism

Cancer

Cerebral Palsy

Diabetes

Epilepsy

HIV/AIDS

Major Depression

Multiple Sclerosis

Muscular Dystrophy

Bipolar Disorder

PTSD

Obsessive Compulsive Disorder

Schizophrenia

So What are the Rules on Pregnancy?

- The ADA says that pregnancy, by itself, is not a disability, but any illnesses or impairments that come from pregnancy or childbirth may be
- See the EEOC's Enforcement Guidance on pregnancy under the ADA and other laws
 - https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (June 25, 2015)
- Many state laws also now cover regular, healthy pregnancy as a disability for discrimination and accommodation purposes
- Practical result? We need to be treating pregnancy like any other disability

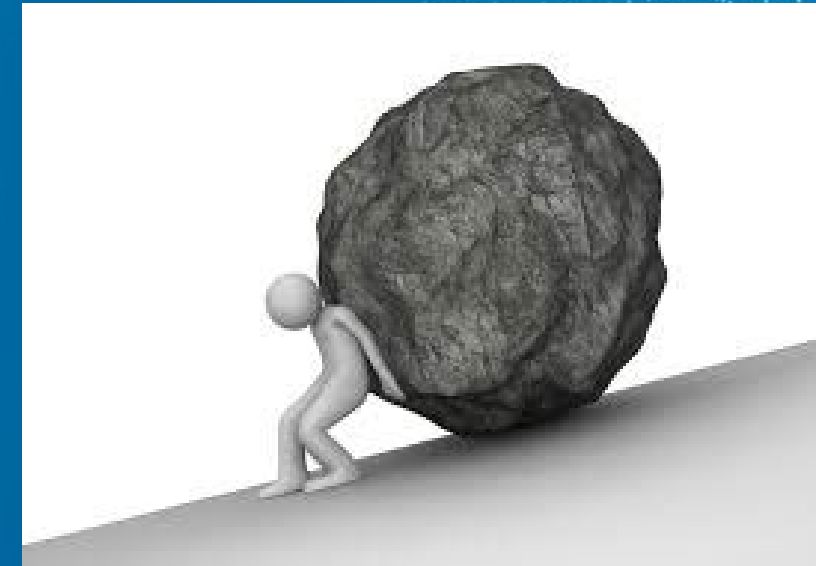


A Few Examples Triggering Your Accommodation Obligations

- Employee raises an issue about her work schedule as it relates to a medical condition;
- Employee explains during the course of a counseling or disciplinary meeting that he has a medical problem causing the performance deficiencies;
- Manager notices a significant change in an employee's behavior, work patterns or conduct and has reason to believe they may be related to a medical condition;
- Employee provides information—in person, via telephone, from a family member, etc.—about a medical problem that may require time off of work, either on occasion, or all at once; and/or
- Employee has on-the-job injury which renders him unable to work for a period of time or that requires some modification to his job or work environment.

Our Responsibility to “Catch” the Need for Accommodation

- Our burden to drive the process
- No magic words required
- Listening for cues
- Managers and supervisors have to know about this (because if an employee tells a supervisor something, “the Company” is deemed to know)
- Shepherd them into the process



The Reasonable Accommodation Obligation

- Reasonable accommodations... [the accommodation has to be something we can actually do]
- For qualified individuals... [they have to be able to perform all of the essential functions of the job if accommodated]
- With known disabilities... [we aren't mind readers—they have to ask for help or let it be known they need help]
- To enable them to perform the essential functions of the job... [functions that the job is created for, are highly specialized or can only be done by a few]
- Unless it poses an undue hardship [this is a high standard—more later!].



A Brief Overview of How the Interactive Process Should Work

- We should initiate the process when:
 - The employee requests it;
 - The employee brings us a doctor's note with restrictions; and/or
 - We otherwise recognize a need.
- We will gather supporting medical documentation that identifies precise limitations
- We will work with the business to identify the essential functions and nonessential functions of the job in question
- We will partner with the employee to identify potential accommodations and discuss
- We will implement and document—get employee's agreement
- We will revisit to ensure appropriate solution reached



Communicating with the Employee

- Critical—but often forgotten in the charges and litigation we see
- Understanding the accommodation request and talking it through with the employee—may need to involve the supervisor, manager, risk, safety, others?
- The information we gather from the health care provider(s) in support of the request—we should screen off from supervisors/managers (more to come on confidentiality)
- Asking the employee about his/her limitations and his/her own understanding of the medical information

The Role of the Doctor

- The ADA permits us to involve the employee's health care provider to substantiate a request or need for accommodation (unless the need and accommodation are obvious; e.g., when an employee is wheelchair bound and asks for a different desk setup)
- It is the employee's responsibility to get us this information
- We should not be picking up the phone and calling the doctor—this should be something we do on paper, to the extent possible
- And watch what we are asking for!
 - **The only “medical” information we are entitled to includes the employee's job-related limitations and necessary accommodations—NOT the underlying diagnosis, medications, details of treatment, etc.**



Summary of the Interactive Process

- Listen for clues that employee requests for time off or other accommodations may be due to an employee's medical condition
- Engage the relevant players
- Your role is to be a fact finder—ask questions and follow up with employees who make requests for accommodations
- Do not make promises or communicate any decisions to employees without the involvement of key stakeholders
- Keep all employee medical and accommodation information confidential and share only on a need-to-know basis
- The business should not be handling these in a vacuum without HR/Legal—even the easy ones!



Accommodation Possibilities

- Some accommodations relate to someone's workspace, equipment, devices or other aspects of where they perform their work
 - Desks, chairs, monitors, amplifying devices, lighting, sound, height or width of spaces, wheelchair access, location relative to restroom or parking lot, service and comfort animals, and more



Accommodation Possibilities

- Other accommodations may relate to how, where, or when a job is performed
 - The order in which tasks are performed, sitting/standing/ walking while working, where tasks are performed, schedule adjustments like part-time work or late starts/early departures for medical reasons, involvement of co-workers in marginal tasks, temporary light duty, remote work, etc.

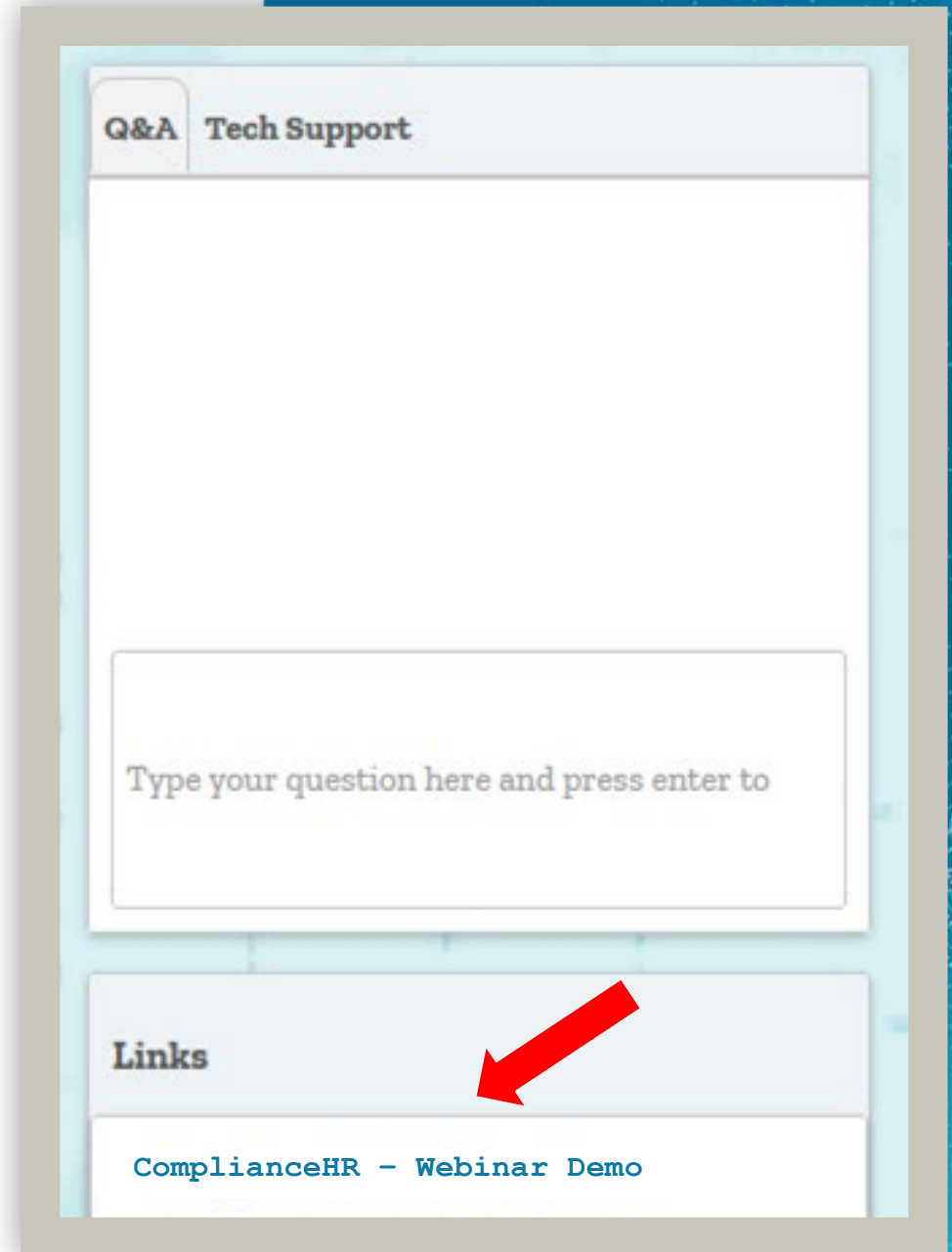
Practical Steps RE: Leave as an Accommodation

- When someone is about to run out of FMLA or PML, or isn't eligible for FMLA in the first place, and has expressed a need for leave, we should be reaching out to determine their status and RTW plans
- We will request new or updated information from an appropriate healthcare provider, which would include job-related limitations, length of the requested leave, and whether, after the leave, the employee will be able to perform all essential job functions, with or without accommodation
- Coordinate with the business (and Legal, when needed) to evaluate on a case-by-case basis—MRB process
- Outline to the employee what you can/cannot do in writing (i.e., length of the leave), with expectations, and get employee agreement
- Don't move to leave as the first choice—this should only be when other accommodation options are exhausted or when leave is explicitly requested

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- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Questions?

Please add any additional questions to the Q&A box

Thank you!

The background is a solid blue color. On the right side, there is a decorative pattern of small white dots. These dots are arranged in a series of curved, overlapping lines that create a sense of depth and movement, resembling a stylized wave or a series of concentric arcs that curve upwards and to the right.