



# Top 10 List of What to Do (or Not Do) When Managing Your Employee's ADA and FMLA Leaves

*Lessons learned from 2015 Developments*

# ADA TOP 5

1. Get rid of blanket, inflexible policies regarding return to work following medical-related absences (disability, workers' compensation, FMLA, company leaves). ADA must be considered, and the interactive process is key!

*EEOC v. Chemical Transportation (9/22/2015)*

*EEOC v. Brookdale Senior Living (8/17/2015)*

2. Remember leave of absence as an ADA accommodation – initially, or as an extension of other leave rights.

*EEOC v. Dialysis Inc. (9/12/2015)*

3. Engage in the interactive process with gusto:
  - Consider alternatives
  - Give requested accommodation a trial
  - Document everything in the process in detail
  - Describe essential functions in the job description in advance

*EEOC v. Ford Motor Company (6<sup>th</sup> Cir. 4/10/2015)*

*Doak v. Johnson (Dept. of Homeland Security) D.C.Cir. 8/18/15*

4. Don't forget the "accommodation of last resort" – reassignment.
  - The employer must proactively search for vacant positions for which the employee is qualified
  - The employee cannot be required to compete for the vacant position if he/she is qualified

*EEOC v. United Airlines (6/11/15)*

5. Even if stress or other condition is a disability:
  - You do not have to change an employee's supervisor as an ADA accommodation.
  - But, supervisor might have to change methods of supervision, directions, feedback, etc.

*Higgins-Williams v. Sutter Medical Foundation (Cal. App. 5/26/15)*

## FMLA TOP 5

6. Conduct a complete audit of your FMLA policy, practices, forms, and documentation.

*St. Mary's Health Care System Inc.* (DOL 11/16/15)  
MARTA (DOL 11/17/15)

7. Train supervisors! Attitude matters and supervisors can be your issue spotters.

*Gordon v. United States Capitol Police*, (D.C. Cir. 2/20/2015)  
*Hefti v. Brunk Industries, Inc.*, Case No. 14-C-729 (E.D. Wisc. 9/23/2015)

8. Scrutinize the initial certification closely. Act before approval or your rights to contest a certification are lost.

*Bonkowski v. Oberg Industries, Inc.* (3<sup>rd</sup> Cir. 5/22/15)  
*Hansler v. Lehigh Valley Hospital Network*, Case No. 14-1772 (3<sup>rd</sup> Cir. 9/19/2015)  
*Fitterer v. State of Washington Employment Security Department* Case No. 14 CV 0404 (E.D. Wash. 7/31/2015)  
*Preddie v. Bartholomew Consolidated School Corp.*, Case No. 14-3125 (7<sup>th</sup> Cir., 9/24/2015)

9. If you choose to allow an employee designate which type of leave he is taking, make sure sufficient information is provided about the FMLA, the employee's rights and the employer's obligations.

BUT, the DOL's position is that in all circumstances the employer has the obligation to designate a leave as FMLA-protected if the employee is eligible and the leave is for an FMLA-qualifying reason. The employee (or the employer) does not get to choose!

*Amstutz v. Liberty Center Board of Education* Case No. 13-CV-2385 (N.D. Ohio, 9/9/2015)

10. Undue hardship and inability to perform essential functions of the job are NOT defenses to FMLA.

*Wages v. Stuart Management Corp.* Case No. 12-2905 (8<sup>th</sup> Cir., 9/11/2015)