

# The Family Medical Leave Act



# Laws Which Can Secure Your Employment

The Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) are two federal laws which can secure you continued employment should you suffer from a disability or disease.

## Family and Medical Leave Act (FMLA):

### Exercising your rights can save your life and may secure your job

The information provided in this guide is to help you understand some of the rights provided to workers through the Family and Medical Leave Act (FMLA) and other disability related laws. The information below contains only small portions of the laws to help you begin your investigation about your rights as an employee if you require medical or family leave time.

The purpose of this guide is not to give legal advice of any kind or to state what your rights may or may not be. The federal government, all states, counties, and cities have separate laws that provide or do not provide for family and medical leave as they pertain to employment. For those states without regulations for employers, the federal FMLA is controlling. Local regulations can be less restrictive, but they cannot be more restrictive than federal law.

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It is advisable to speak with a professional versed in employment law, as well as the HR department in your company and your physician to ensure that you have all the information needed to apply for FMLA.

For the complete FMLA please go to:  
<http://www.dol.gov/compliance/laws/comp-fmla.htm>

It should also be noted that the provisions in the FMLA are for serious health concerns, and not as a way to get time off from work. The ability to take time off to address serious health concerns without the fear of losing your job helps relieve a major cause for personal distress at a time of crisis or celebration such as the birth of a child.

## Addiction Treatment and the FMLA

Addiction and alcoholism are diagnosable and treatable diseases. Getting professional drug addiction treatment can make the difference between succumbing to demoralization and early death, or rebuilding your life. Without quality addiction treatment, the chances of maintaining abstinence for any length of time are greatly reduced. Since alcoholism and substance abuse are considered serious health issues that impede one's ability to perform normal daily tasks, the provisions within the FMLA and ADA may apply.

# Why May People Hesitate to Get Addiction Treatment?

Fear is a significant issue facing those in need of addiction treatment and includes a range of issues such as:

- How will I live without drinking and drugging?
- I have ruined all my family relationships.
- I am not worth anything.
- I will lose my job.
- Fear of being stigmatized.

These fears can all be dealt with in alcohol and drug rehab treatment, but the one we want to focus on in this guide is the fear of losing one's job due to a prolonged absence while seeking treatment for drug and alcohol addiction.

People who call our crisis helpline seeking help for their drug and alcohol addiction express fear of losing their job if treatment is sought. These callers did not understand their legal rights or how to appropriately exercise their rights under FMLA. FMLA provides alcoholics and drug addicts with the employment security they need to make the decision to go into alcohol and drug rehab treatment and reclaim their lives.

Life can send any number of events our way that require all of our attention. These events can be a sick child or parent, an adoption, or an illness that affects our ability to function on a daily basis. Addiction is a recognized disease and it falls within the parameters of an illness that is disabling, serious and progressive. Like diabetes, once a person succumbs to the disease of addiction, treatment and disease management are necessary so that health can be restored.

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Untreated alcohol and drug addiction is a progressive disease that can lead to disability or death. As the disease progresses, a drug addict or alcoholic will suffer from severe mental health issues, such as the likelihood of job loss, serious health problems, family problems, financial insecurity for family members, social isolation and more. The only way to successfully combat addiction and the issues surrounding it is through substance abuse treatment.

The National Institute on Drug Abuse, a division of the government's Department of Substance Abuse and Mental Health Administration, which has issued the following statement:

"Effective treatment programs typically incorporate many components, each directed to a particular aspect of the illness and its consequences. Addiction treatment must help the individual stop using drugs, maintain a drug-free lifestyle, and achieve productive functioning in the family, at work, and in society. Because addiction is typically a chronic disease, people cannot simply stop using drugs for a few days and be cured. Most patients require long-term or repeated episodes of care to achieve the ultimate goal of sustained abstinence and recovery of their lives". (Source: <http://www.drugabuse.gov/infofacts/treatmeth.html>)

# What is FMLA?

Below we have extracted specific provisions from the FMLA to help you understand what the parameters are for medical leave, what you have to provide, and some of the employer's related requirements. You may be able to utilize the FMLA to request time off of work to get treatment for addiction. How much of your addiction you need to disclose will be determined by the health care provider who fills out the FMLA form.

(The contents of this guide are extracted from the different laws and do not reflect every clause within these acts).

"The Family and Medical Leave Act (FMLA) provides an entitlement of up to 12 weeks of job-protected unpaid leave during any 12-month period to eligible, covered employees for the following reasons:

- 1) Birth and care of the eligible employee's child, or placement for adoption or foster care of a child with the employee;
- 2) Care of an immediate family member (spouse, child, parent) who has a serious health condition; or
- 3) Care of the employee's own serious health condition. It also requires that employee's group health benefits be maintained during the leave. "The FMLA is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor". (United States Department of Labor)

Special consideration has been given to men and women in the armed services and the National Guard to further articulate eligibility for FMLA:

"In addition, the 2010 NDAA amends the FMLA's definition of a "serious injury or illness". For a current member of the Armed Forces the definition is amended to include not only a serious injury or illness that was incurred by the member in the line of duty on active duty but also a serious injury or illness that "existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces" that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

For a veteran, a serious injury or illness is defined as "a qualifying injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran." The 2010 NDAA directs the Secretary of Labor to define "qualifying injury or illness" of a veteran".

Based upon the over arching framework for FMLA, an addict seeking treatment may be eligible under the "serious health condition" component.

**The FMLA is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor.**

# Employer Coverage

The Family and Medical Leave Act applies to all public agencies, including state, local and federal employers, local education agencies (schools), and private-sector employers who employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

# Employee Eligibility

To be eligible for FMLA benefits, an employee must:

- Work for a covered employer;
- Have worked for the employer for a total of 12 months (as a minimum);
- Have worked at least 1,250 hours over the previous 12 months; and
- Work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

While the 12 months of employment need not be consecutive, employment periods prior to a break in service of seven years or more need not be counted unless the break is occasioned by the employee's fulfillment of his or her National Guard or Reserve military obligation (as protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), or a written agreement, including While the 12 months of employment need not be consecutive, employment periods prior to a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service.

# Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons:

- For the birth and care of a newborn child of the employee;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for a spouse, son, daughter, or parent with a serious health condition;
- To take medical leave when the employee is unable to work because of a serious health condition; or
- For qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserves in support of a contingency operation.

Under some circumstances the FMLA leave may be taken intermittently or in separate blocks of time for a single qualifying reason. FMLA must uniformly apply to all eligible employees. FMLA makes prejudice against an employee with a drug addiction and/or alcoholism by an employer illegal since it is a recognized disability.

# Is Addiction Considered a Serious Health Condition?

A “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves either:

- Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
- Continuing treatment by a health care provider, which includes:
  - (1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
    - Treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or
    - One treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); or
  - (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
  - (3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
  - (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
  - (5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Since addiction is a progressive disease that affects the brain as well as the body, it is considered a serious chronic illness. Drugs and alcohol severely impact the brain’s ability to communicate with the rest of the body’s cells, tissues, muscles and organs. Every aspect of the body is influenced by drugs and alcohol. Every aspect of a person’s intellect, emotional and psychological functioning is negatively impacted by the addiction to drugs and alcohol. However, in the last few decades scientists have learned a great deal about addiction and treatment and are far more successful at diagnosing the multiple issues that

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generally accompany addiction such as dual diagnosis and other medical problems. According to the National Institute of Drug Abuse, "Addiction need not be a life sentence. Like other chronic diseases, addiction can be managed successfully. Treatment enables people to counteract addiction's powerful disruptive effects on the brain and behavior and regain control of their lives". (Source: <http://www.drugabuse.gov/scienceofaddiction/treatment.html>)

## Certification

Everyone who applies for FMLA leave must fill out specific forms (WH 380F, WH 380E) and have them signed by the treating doctor or health care provider. The specific information required is restricted by law. The employer must comply with the law in requests for additional information and certification. Below is a description of that clause.

"Employers may require that an employee's request for leave due to a serious health condition affecting the employee or a covered family member be supported by a certification from a health care provider. An employer may require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition. An employer may use a health care provider, a human resource professional, a leave administrator, or a management official – but not the employee's direct supervisor – to authenticate or clarify a medical certification of a serious health condition. An employer may have a uniformly-applied policy requiring employees returning from leave for their own serious health condition to submit a certification that they are able to resume work. If reasonable safety concerns exist, an employer may, under certain circumstances, require such a certification for employees returning from intermittent FMLA leave. Employers may use the optional forms WH-380-E and WH-380-F prepared by the U.S. Department of Labor for obtaining medical certifications of serious health conditions".

**Before you apply for FMLA, make sure to understand how your company classifies absences under the FMLA notifications and what you need to do before leaving for treatment to protect your position.**

It is important to understand that the Family and Medical Leave Act is the law and must be abided by the employer. Size of organization, notifications about FMLA rules and requirements and employee work history are the determining factors for eligibility. Employees seeking to exercise their FMLA rights need to have worked at their place of employment full time for at least twelve months.

## Make Sure FMLA Certification Timing is Correct

Before you apply for FMLA, make sure to understand how your company classifies absences under the FMLA notifications and what you need to do before leaving for treatment to protect your position. Also, it is important to note that termination based upon inappropriate or poor onsite behavior prior to treatment is legitimate.

In a 2008 court case, the plaintiff was fired for absenteeism, when he was drinking over a three day period. During that same time, his wife had contacted his doctors and was waiting to get him into treatment. The employee was fired for exceeding the permitted number

of absences with a certain period of time. The employee sued arguing that his alcoholism included the three days missed prior to treatment. While substance abuse is considered a serious health condition under FMLA, the three days of missed work before entering treatment was deemed not part of treatment. The court found that the plaintiff started treatment after the absenteeism from work and that the FMLA coverage began when he entered treatment not while he was drinking and waiting for treatment. The relevant period of incapacity is when the plaintiff was in treatment.

## Job Restoration

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an “equivalent” job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.

In addition, an employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave. In other words, if you were entitled to a bonus before the medical leave, when you return, you are still entitled to that bonus. The bonus cannot be denied because you took a medical leave of absence.

## Other Questions and Answers About FMLA Coverage and Eligibility

### **Q: How much leave am I entitled to under FMLA?**

If you are an “eligible” employee, you are entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period.

### **Q: How is the 12-month period calculated under FMLA?**

Employers may select one of four options for determining the 12-month period:

The calendar year.

- Any fixed 12-month “leave year” such as a fiscal year, a year required by State law, or a year starting on the employee’s “anniversary” date.
- The 12-month period measured forward from the date any employee’s first FMLA leave begins; or
- A “rolling” 12-month period measured backward from the date an employee uses FMLA leave.

### **Q: Does the law guarantee paid time off?**

No. The Family and Medical Leave Act only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.

### **Q: Does workers’ compensation leave count against an employee’s FMLA leave entitlement?**

It can. FMLA leave and workers’ compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.



**Q: If an employer fails to tell employees that the leave is a FMLA leave, can the employer count the time they had already been off against the 12 weeks of FMLA leave?**

In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.

**Q: Who is considered an "immediate family member" for purposes of taking FMLA leave?**

An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent "in-law." The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of a mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans With Disabilities Act (ADA).

**Q: May I take FMLA leave for visits to a therapist, if my doctor prescribes the therapy?**

Yes. The Family and Medical Leave Act permits you to take leave to receive "continuing treatment by a health care provider," which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay, or for treatment of severe arthritis.

**Q: Which employees are eligible to take FMLA leave?**

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.

**Q: Do the 12 months of service with the employer have to be continuous or consecutive?**

No. The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.

**Q: Do the 1,250 hours include paid leave time or other absences from work?**

No. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

**Q: How do I determine if I have worked 1,250 hours in a 12-month period?**

Your individual record of hours worked would be used to determine whether 1,250 hours had been worked in the 12 months prior to the commencement of FMLA leave. As a rule of thumb, the following may be helpful for estimating whether this test for eligibility has been met:

- 24 hours worked in each of the 52 weeks of the year; or
- over 104 hours worked in each of the 12 months of the year; or
- 40 hours worked per week for more than 31 weeks (over seven months) of the year.

**Q: Do I have to give my employer my medical records for leave due to a serious health condition?**

No. You do not have to provide medical records. The employer may request that for any leave taken due to a serious health condition, you provide a medical certification confirming that a serious health condition exists.

**Q: Can my employer require me to return to work before I exhaust my leave?**

Subject to certain limitations, your employer may deny the continuation of FMLA leave due

to a serious health condition if you fail to fulfill any obligations to provide supporting medical certification. The employer may not, however, require you to return to work early by offering you a light duty assignment.

**Q: Are there any restrictions on how I spend my time while on leave?**

Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict your activities. The protections of FMLA will not cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

**Q: Can my employer make inquiries about my leave during my absence?**

Yes, but only to you. Your employer may ask you questions to confirm whether the leave needed or being taken qualifies for FMLA purposes, and may require periodic reports on your status and intent to return to work after leave. Also, if the employer wishes to obtain another opinion, you may be required to obtain additional medical certification at the employer's expense, or recertification during a period of FMLA leave. The employer may have a health care provider representing the employer contact your health care provider, with your permission, to clarify information in the medical certification or to confirm that it was provided by the health care provider. The inquiry may not seek additional information regarding your health condition or that of a family member.

**Q: Can my employer refuse to grant me FMLA leave?**

If you are an “eligible” employee who has met FMLA’s notice and certification requirements (and you have not exhausted your FMLA leave entitlement for the year), you may not be denied FMLA leave.

**Q: Will I lose my job if I take FMLA leave?**

Generally, no. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this law. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under “no fault” attendance policies. Under limited circumstances, an employer may deny reinstatement to work – but not the use of FMLA leave – to certain highly-paid, salaried (“key”) employees.

**Q: Are there other circumstances in which my employer can deny me FMLA leave or reinstatement to my job?**

In addition to denying reinstatement in certain circumstances to “key” employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff.

Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.

Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated “12 month period” no longer have FMLA protections of leave or job restoration.

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Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

**Q: Can my employer fire me for complaining about a violation of FMLA?**

No, nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

**Q: Does an employer have to pay bonuses to employees who have been on FMLA leave?**

The Family and Medical Leave Act requires that employees be restored to the same or an equivalent position. If an employee was eligible for a bonus before taking FMLA leave, the employee would be eligible for the bonus upon returning to work. The FMLA leave may not be counted against the employee.

For example, if an employer offers a perfect attendance bonus and the employee has not missed any time prior to taking FMLA leave, the employee would still be eligible for the bonus upon returning from FMLA leave.

On the other hand, FMLA does not require that employees on FMLA leave be allowed to accrue benefits or seniority. For example, an employee on FMLA leave might not have sufficient sales to qualify for a bonus. The employer is not required to make any special accommodation for this employee because of FMLA. The employer must, of course, treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave (as appropriate) are treated.

For more information, please contact the Wage and Hour Division; or access the FMLA page here on the internet. (Source: <http://www.dol.gov/whd/regs/compliance/1421.htm#2f>)

## Americans With Disabilities Act (ADA)

The information provided below does not cover all sections of the Americans with Disabilities Act, but just specific sections as they pertain to addiction and substance abuse. As with FMLA, you are advised to seek further clarification about the specific sections of the ADA that may apply to your designation as addicted and have a disability.

“The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.

To be protected by the ADA, one must have a disability or have a primary relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as, “A person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person

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who is perceived by others as having such an impairment". The ADA does not specifically name all of the impairments that are covered. ([www.ada.ov/cguide.htm#anchor65610](http://www.ada.ov/cguide.htm#anchor65610))

Leave for serious health issues and disabilities both of which include alcoholism and drug addiction, under FMLA, ADA, or other employment discrimination acts, such as the Rehabilitation Act, are clearly delineated within the contents of each law. The size of the organization and whether the organization receives federal monies contribute to the criteria that allow one to take a medical leave and/or to be designated as disabled.

The FMLA addresses firms with 50 or more employees who have worked for twelve non-consecutive months, and have worked at least 1,250 hours during the 12 month period prior to the leave beginning, were as the ADA addresses firms with 15 or more employees. Employees must be independently eligible for FMLA to be protected under Title VII or the ADA.

The following is a direct provision within ADA that describes drug addiction as an impairment. Should you be an addict or alcoholic and are abstinent, and for some reason require a designation as disabled, the following should help answer some of your questions.

**III-2.3000 Drug addiction as an impairment.** Drug addiction is an impairment under the ADA. A public accommodation generally may base a decision to withhold services or benefits in most cases on the fact that an addict is engaged in the current and illegal use of drugs.

## What is "Illegal Use of Drugs"?

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act. It does not include use of controlled substances pursuant to a valid prescription or other uses that are authorized by the Controlled Substances Act or other Federal law. Alcohol is not a "controlled substance," but alcoholism is a disability.

## What is "Current Use"?

"Current use" is the illegal use of controlled substances that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem. A private entity should review carefully all the facts surrounding its belief that an individual is currently taking illegal drugs to ensure that its belief is a reasonable one.

## Does Title III Protect Drug Addicts Who No Longer Take Controlled Substances?

Yes. Title III prohibits discrimination against drug addicts based solely on the fact that they previously illegally used controlled substances. Protected individuals include persons who have successfully completed a supervised drug rehabilitation program or have otherwise been rehabilitated successfully and who are not engaging in current illegal use of drugs. Additionally, discrimination is prohibited against an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs. Finally, a person who is erroneously regarded as engaging in current illegal use of drugs is protected.

# Is Drug Testing Permitted Under the ADA?

Yes. Public accommodations may utilize reasonable policies or procedures, including but not limited to drug testing which are designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs. (Source: <http://www.ada.gov/taman3.html>)

## Questions Regarding Who Has a “Disability”

**Q: If a person is actively using alcohol, would s/he be protected since alcohol is not illegal?**

A: Maybe. Alcohol use alone does not mean someone has a “disability” under federal anti-discrimination laws; however, if the person has an alcohol addiction that substantially limits one or more major life activities, then yes, that person is protected. Remember that individuals with a disability also must be “qualified” for employment, with or without a reasonable accommodation. If someone is not adequately performing his/her job, then the fact that the person has a disability does not excuse the poor job performance.

**Q: Is an employee who currently abuses alcohol during non-working hours protected against discrimination under the law?**

A: Yes, assuming the employee's alcohol abuse constitutes a “disability” because it substantially limits or once limited one or more major life activities, or the employer regarded it as substantially limiting one or more major life activities and that the person is adequately performing his/her job.

**Q: What if s/he became addicted to a prescription drug while under a doctor's care?**

A: We assume you are asking whether such persons would be excluded from ADA protection because of current “illegal use of drugs.” If someone became addicted to a prescription drug while under a doctor's care, s/he could still be protected by the ADA (and not considered to be currently engaging in the illegal use of drugs) if she were using the drugs as directed. The use of drugs would not be “illegal.” However, if the person were using the prescription medication in any way other than prescribed, this would be considered current illegal use of drugs, and the person would not be protected.

**Q: What is needed to establish that a person who achieved recovery without treatment was, at one time, substantially limited in a major life activity?**

A: There are many ways people can prove that their alcohol/drug addiction once substantially limited one or more major life activities. For example, someone could testify or write an affidavit about how his/her own addiction, at one time, made him unable to care for himself or his family or substantially limited one or more major bodily functions. The person also could provide affidavits or testimony of family members or others. It is not necessary to provide evidence from a treatment program, though that certainly can be helpful.

**Q: If someone is over 20 years in recovery, are they still covered under ADA?**

A: Yes. The ADA considers an individual to have a “disability” even if the individual does not have a current impairment, but only a “record of” an impairment (e.g., alcohol or drug addiction) that substantially limited one or more major life activities. The individual also is protected if the employer “regards” the individual as having such an impairment.

**Q: If a person has been in treatment for a year and is protected by the ADA, then has a relapse and has current usage, is s/he still protected?**

A: Yes, for an alcohol relapse but probably not if the relapse involves the illegal use of drugs. While there is no clear answer on what constitutes “current” illegal drug use, a recent relapse (e.g. within the last few weeks or months), is likely going to be deemed “current,” and therefore the individual would not be protected under the ADA.

**Q: Can a person who has been in recovery, but then relapses and tests positive to a drug test, still be protected?**

A: No, assuming that the negative job action was based on the person’s current illegal use of drugs. See the answer to the previous question.

**Q: Being an “illegal” drug user, past or present, implies a person broke the law at some point. The ADA and the ability to dismiss on this basis are in direct conflict. Couldn’t an employer dismiss a person based on past illegal behavior?**

A: We believe you are asking how to reconcile the ADA’s prohibition on firing someone because of a past drug addiction (including illegal drug use); with the ability of employers to fire people because of the illegal conduct itself. Couldn’t an employer avoid violating the ADA by saying that the reason for the termination is the illegal conduct and not the former drug addiction? The answer is that if the termination is really based on the illegal conduct, and not the disability, then the termination would not violate the ADA. Note, however, that in some states, it is also illegal discrimination to fire someone based on a criminal conviction. Those issues are covered in a different webinar in our series, “Know Your Rights: Legal Rights of People with Criminal Records.”

**Q: Is there case law that examines the “beyond three months as current use” language?**

A: There is some case law examining what constitutes “current” illegal use of drugs. Courts look at a variety of factors, including patterns of relapse and severity and length of addiction.

**Q: Why is the person who relapses with alcohol still protected, while someone with a drug relapse is no longer protected under the ADA?**

A: If you are asking why, in writing these laws, Congress excluded from protection people who currently engage in the illegal use of drugs, the short answer is that Congress historically has been unwilling to enact laws that are seen as supporting and protecting current illegal drug users.

**Q: If an employee tests positive for illegal drugs, completes a return to work agreement and then tests positive a second time, even if they participated in treatment for an addiction, can the employer terminate their employment because s/he is not “fit for duty?”**

A: The ADA does not prohibit an employer for terminating an employee for testing positive for illegal drugs and/or violating the terms of a “second chance” or other agreement governing the terms of the employee’s return to work. But make sure to carefully review the return to work agreement to see what protections, if any, may be in place for the employee.

**Q: If a person was accepted to a training program and has been in the program for three weeks, can the program tell the person that s/he cannot continue because s/he answered “yes” to the question, “Do you have an addiction to any illegal drugs?”**

A: Yes, assuming the “training program” you are referring to is a work-related training program. This is because federal anti-discrimination laws do not protect people from discrimination based on their current illegal use of drugs. It does not matter that the person here answered truthfully or that the employer/training program ignored it at first, even though this understandably seems unfair. (Source:[http://partnersforrecovery.samhsa.gov/docs/QA\\_Employment\\_Discrimination.pdf](http://partnersforrecovery.samhsa.gov/docs/QA_Employment_Discrimination.pdf))

When you are seeking treatment for addiction or alcoholism, it is important to understand that the ADA provides you with certain protections. You can be fired for coming to work drunk or high, or if you test positive on a drug test. But, should you need treatment, and seek help, without any other cause against you at work, you may be protected under both the FMLA and ADA act. You cannot be discriminated against because you have an addiction nor can you be discriminated against because you once went to treatment.

**You cannot be discriminated against because you have an addiction nor can you be discriminated against because you once went to treatment.**

Indeed, direct questions about use are illegal if applying for a position. Once a position has been offered drug testing is legal. Questions about lapses in employment or reasons for termination are reasonable and appropriate for an employer.

You should also keep in mind:

“Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a “qualified individual with a disability” protected by the ADA when the employer takes action on the basis of their drug use”.

“While a current illegal user of drugs is not protected by the ADA if an employer acts on the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol”.

## Pre-Existing Stigma About Substance Abuse in Employment

According to the government's report on disabilities in the Mental Health Parity and Addiction Equity Act, section 7.3 was written to further clarify the issues of discrimination both in hiring new employees with addiction, as well as maintaining those employees who suffer from ongoing alcohol or drug addiction or in some circumstances those who are abstinent but who are on medication maintenance programs.

“The stigma attached to substance abuse can act as a significant barrier to seeking treatment. For example, in a September 2002 Workplace Recovery Benefits Survey of workers with employer-sponsored health insurance, more than half of respondents felt less comfortable asking a supervisor about coverage of substance abuse treatment than about treatment for other diseases such as diabetes. More than one in five respondents believed that seeking health coverage for substance abuse treatment would cause negative consequences at work, such as being fired, losing a license, or failing to get a promotion. More than one in six respondents said they would be reluctant to seek employer-provided health coverage of substance abuse treatment for themselves or a family member”.

The report is very clear about what is considered a disability under the law. There is a clear

distinction between receiving treatment and being diagnosed as an alcoholic and drug addict, thus being designated as disabled and those people who are still using.

The section 7.4 states: "Federal laws barring discrimination on the basis of disability provide similar definitions of the terms "disability," "individual with a disability," and "qualified individual with a disability." Under those laws, a "disability" is a "physical or mental impairment" that "substantially limits" a "major life activity." The list of "physical or mental impairments" explicitly includes alcoholism and drug addiction. The list of "major life activities" includes such examples as caring for one's self, performing manual tasks, and working, among others. Therefore, for alcohol or drug use to be considered a disability under these laws, that use must constitute an addiction and have significant effects on the user's life.

In general terms, these disability non-discrimination laws cover individuals who are in treatment for recovery from substance abuse disorders but exclude from civil rights protections of those who are engaged in current substance abuse. These laws also treat current alcohol use differently from the use of other drugs".

It is important to remember that going off on a binge with either drugs or alcohol, does not relieve you of your employment responsibilities. Indeed, it is highly recommended if you are actively using now, missing work and are looking to enter treatment that you call into work sick. During this same period of time, you should also actively seek medical attention for your addiction. Documentation proving your condition and possible disability are necessary.

If you are using illegal drugs or you are misusing prescription drugs, you are breaking the law. You are not relieved of your responsibilities at work because you are suffering from addiction. Seeking help is a powerful step. In other words, you are not automatically protected by law if you have been irresponsible at work. An employer is not obligated to maintain an employee who misses work, does not call in sick, does not produce, but who decides to seek a leave by using the FMLA or ADA to get treatment and thus maintain his or her job. Poor behavior always has consequences whether intended or not.

**If you are using illegal drugs or you are misusing prescription drugs, you are breaking the law.**

However, should you suffer from an addiction problem, but have shown up for work and meet the eligibility criteria for FMLA and ADA, then you will also want to consider the cost of treatment. Once you take the FMLA leave, you will not be paid by your employer as FMLA is unpaid leave.

## Helping To Off Set the Cost of Treatment: Short term and Long term Disability Insurance

"Under certain conditions, employees or employers may choose to "substitute" (run concurrently) accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy". (FMLA)



Assume you are not eligible for accrued paid leave-time, you may have funded through work or privately disability insurance. Such disability insurance may be applicable when seeking addiction treatment, whether it is federal disability or private insurance disability. Benefit programs such as short and/or long term disability can help provide partial income protection during the time of hospitalization and treatment.

The goal of disability insurance is to help provide financial assistance in the case of unforeseen disability, and while the FMLA helps provide time off for illness etc., it does not provide for salary during the 12 weeks of the leave. We all know that expenses continue to occur during the FMLA time off, mortgages need to be paid, and food needs to be purchased as well as other live sustaining expenditures. To help ease the burden, many people have chosen to pay, through private insurance companies, for long term and short term disability insurance.

As the names indicate, long term and short term insurance are designed for different purposes. When we speak of these policies, we are addressing private insurance, not Medicaid or SSI.

## The Differences in Disability Insurance Coverage

Short term disability will become applicable once the waiting period has been certified. It can be anywhere from 0-14 days. Long term disability waiting periods most commonly are 90 days, but they can also range from 30-720 days.

Short term disability payments can last from 3 months to a year (in some circumstances policies may cover disability for up to 2 years). Long term disability can pay benefits for several years to a life time, again, depending upon the policy's benefits.

**The law requires addiction/mental health and medical benefits be equal to other disability requirements making it illegal to have more severe criteria for addiction or mental health disorder disability claims.**

Not all insurance companies issue disability coverage; however, for those companies that do, according to MetLife.com:

Two features that may be part of disability income policies are important for you to understand: non-cancelable protection and guaranteed renewable protection. An insurer cannot cancel or refuse to renew either type of policy, as long as premiums (i.e., price of insurance protection for a specified period) are paid on time. These features differ, though, in important ways.

- **Non-cancelable.** The policy's premium can never be raised above the amount shown in the policy, and benefits may not be reduced—as long as premiums are paid on time.
- **Guaranteed renewable.** You have the right to renew the policy with the same benefits, but the insurer can increase your premiums—as long as they are increased for all other policyholders in the same class (i.e., having the same characteristics).

There are additional riders that can be purchased from certain insurance companies that will further defray the cost of living during treatment; these riders help increase disability benefits. Not all companies provide the same choice of riders and not riders are the same. You need to check with your insurance carrier to determine whether you have short or long term disability insurance and if there are additional riders attached. A treatment facility should provide help

in filling out the necessary standardized forms for both the FMLA leave and the short term or long term disability insurance.

## Final Parity

The law requires addiction/mental health and medical benefits be equal to other disability requirements making it illegal to have more severe criteria for addiction or mental health disorder disability claims:

- Lifetime or annual dollar limits imposed on mental health/addiction benefits may NOT be more restrictive than those imposed on medical/surgical benefits.
- Plans that provide Out-of-Network coverage under the medical/surgical benefit must provide on par Out-of-Network coverage under the addiction/mental health benefit.
- Financial requirements (e.g., deductibles, co-payments, coinsurance, and out-of-pocket expenses) imposed on mental health/addiction benefits may NOT be more restrictive than those imposed on medical/surgical benefits.
- Treatment limitations (e.g., frequency of treatment, number of visits, number of days, or similar limits on scope or duration of treatment) imposed on addiction/mental health benefits may NOT be more restrictive than those imposed on medical/surgical benefits.
- There can be NO separate cost-sharing requirements or treatment limitations that are applicable only to mental health/addiction benefits.
- Plans are prohibited from using “separate but equal deductibles.” In other words, mental health/substance use disorder and medical/surgical benefits must add up together towards the same, combined deductible.
- Criteria for medical necessity determinations and the reason for any denial must be made available to contracted providers or the plan participant or beneficiary upon request.
- Where there is a state parity law or state mandate, the Federal Parity law serves as the floor and state laws must be enhanced to reach the federal floor.
- State laws that require more than the federal law are NOT preempted.

## Brief Summary of the Regulatory Process

Regulations are the written rules by which agencies implement law. Interim final regulations (IFR) implementing parity were issued February 2, 2010. The regulations give specific instructions for implementing the parity law.

“Interim final regulations” have the effect of binding law when they are issued. Parity regulators have said they will issue additional regulations, but we do not know when or if they will definitely come out. Until additional regulations are released, plans must comply with the existing regulations.

# Deductible Example

If your annual deductible is \$500, you can meet that deductible by paying \$250 for medical/surgical services and \$250 for mental health/substance use disorder services.

A plan CANNOT make you pay \$500 towards a medical/surgical deductible and \$500 for a mental health/substance. (Source: [http://www.facesandvoicesofrecovery.org/pdf/final\\_parity\\_toolkit.pdf](http://www.facesandvoicesofrecovery.org/pdf/final_parity_toolkit.pdf))

## For Further Readings on The Laws or Resource

U.S. Department of Labor  
Job Accommodation Network

800-526-7234 (voice & TTY)

<http://www.dol.gov/compliance/laws/comp-fmla.htm#factsheets>

U.S. Equal Employment Opportunity Commission  
<http://www.eeoc.gov/facts/qanda.html>

National Conference of State Legislature  
<http://www.ncsl.org/default.aspx?tabid=13309>

Florida: my Work Life  
<http://www.myflorida.com/mybenefits/WorkLife/FMLA.htm>

**Every employer who is mandated to participate in FMLA must also have public notifications about the FMLA act and its HR policies.**

**FMLA** THE FAMILY & MEDICAL LEAVE ACT