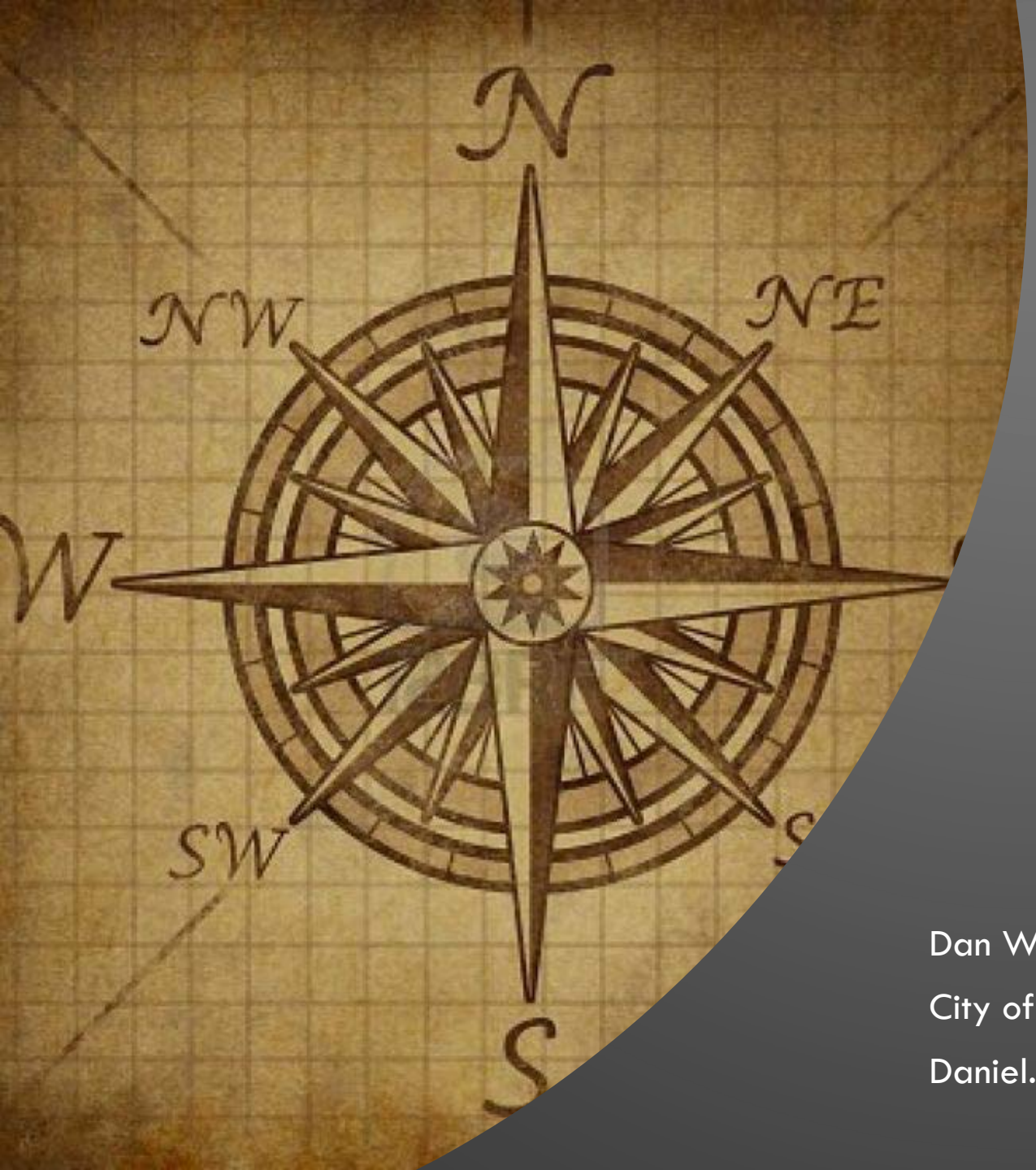


NAVIGATING TOUGH ADA & FMLA ISSUES IN THE PUBLIC SECTOR

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AGENDA
• Brief Overview
• Top FFCRA issues
• Top ADA & FMLA issues
• Medical leave
• Light duty
• Medical exams & inquiries
• Safety risk
• Real-life scenarios
• Practical tips

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Emergency Paid Sick Leave Act (EPSLA) and Expanded Family Medical Emergency Leave Act (EFMELA)
- Eligible Employees
  - Exclusion “health care providers” and “emergency responders”
- Notice
- Enforcement
- Recordkeeping

QUALIFYING REASONS

- Employee CANNOT work or telework due to a need for leave because the employee is:
  - 1- subject to or caring for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  - 2- advised by a health care provider to self-quarantine related to COVID-19;
  - 3- experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  - 4- caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
  - 5- caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
  - 6- experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

FFCRA NUANCES

- When is a person “seeking diagnosis”?
- Who is an “individual”?
- Who is a “son or daughter”?

PAY

- EPSLA
  - Up to 80 hours at regular rate of pay, paid at:
    - 100% for qualifying reasons #1-3, up to $511 daily and $5,110 total;
    - 2/3 for qualifying reasons #4-6, up to $200 daily and $2,000 total
- EFMELA
  - Up to 12 weeks at 2/3 rate of pay up to $200 daily and $12,000 total.
- Part-time employee → # of hours that employee normally scheduled to work over that period.
- Overtime

INTERMITTENT LEAVE

- Only if employer agrees
- Telework
  - Available for any reason for leave
- Working at Usual Place of Work
  - ONLY if caring for child whose school or place of care is closed or care provider is unavailable.

EFMELA: BIG PICTURE

- Caring for a Child
- Place of Care
  - School's Out for Summer, now what?
- Think Outside the Box
- Be reasonable.

INTERPRETATION

- Our City already provides a robust leave package and expanded reasons for leave to those covered by the FFCRA before the FFCRA took effect. Can I offset any leave taken before April 1 against the 80 hours required by EPSLA?
- City community center is closed due to COVID-19 quarantine order and employees working there now cannot work. Are they eligible for EPSLA of EFMLEA leave?
- Can I pay more than what the law requires?

INTERPRETATION CONT

- My employee is ill with COVID-19 symptoms and quarantines himself for 2 weeks, without seeking a medical diagnosis or the advice of a health care provider. Does he get paid for those two weeks under the FFCRA?
- Do you have to give FFCRA to employees on works comp/temporary disability leave, or an approved leave of absence?

THINGS TO WATCH FOR IN HEROES ACT

- Elimination of first-responder and healthcare worker exemption
- New reason for paid leave
- Intermittent leave
- Increased Payment
- Additional FMLA Time
- Change to FMLA Eligibility Requirements



THINGS TO KNOW

#1: You will have to deal with this.

#2: It's complicated!

#3: Think about the big picture.

#4: There are lots of great resources, including JAN.


GUNS N' ROSES
#5: All you need is PATIENCE!
By Dosex

ADA & FMLA: The Basics

ADA

- Provide reasonable accommodation (RA) to qualified employees with a disability
- RA may = leave (but a lot more)
- Disability = almost all medical conditions/injuries
- Qualified = able to do essential functions, with or without RA
- 15+ employees

FMLA

- Provide up to 12 weeks of leave for qualifying event
- Event = includes almost all employee medical conditions/injuries
- Job restoration & continuation of benefits
- 50+ employees
- Eligibility requirements

EFMELA v. FMLA

- Still 12 weeks of leave for qualifying event
- NEW Qualifying Event
- Must pay after first 2 weeks
- Notice
- Job restoration & continuation of benefits

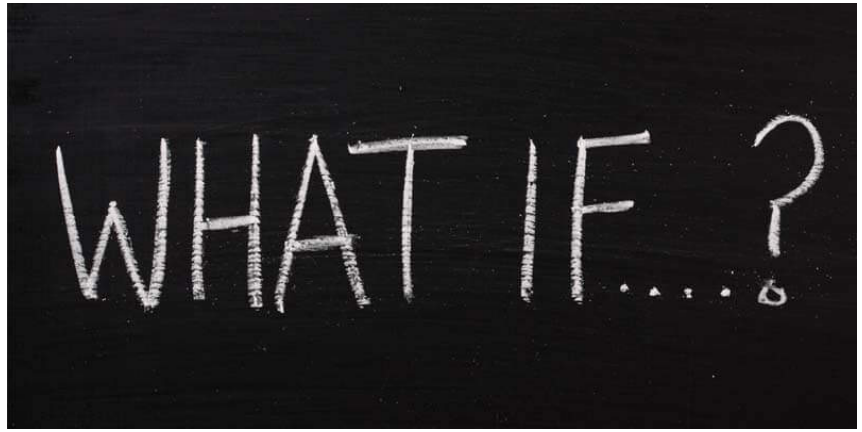
ADA & FMLA: Big Picture

- Assume all medical conditions are protected
  - Past medical conditions & being regarded as having medical condition
  - What about pregnancy?
  - What about temporary conditions?
- Individualized inquiry (different than other employment laws)
- Start analysis with FMLA, then ADA (+ state laws, work comp)
- ADA often requires leave in excess of FMLA requirements
- FMLA: No undue hardship defense (even for intermittent leave)
- Be reasonable.


What about an employee
saying no thanks to FMLA?


ACCOMMODATION


Medical Leave
ACCOMMODATION
Light Duty
Job Transfer



- Utility clerk, 14 years
- Not well-liked by supervisors or co-workers
- Some discipline
- 9/1: 5-7 weeks of FMLA for hysterectomy
- Extension for full 12 weeks because of complications
- 11/15: Doctor says needs leave through 1/1 because of complications (stroke-like symptoms)

Should the public employer grant the request for additional leave?

A. Yes but it should not grant any additional requests after this.

B. Yes unless it is undue burden.

C. Yes -- but it should follow the employer's handbook, which caps leave (regardless of how designated) at six months..

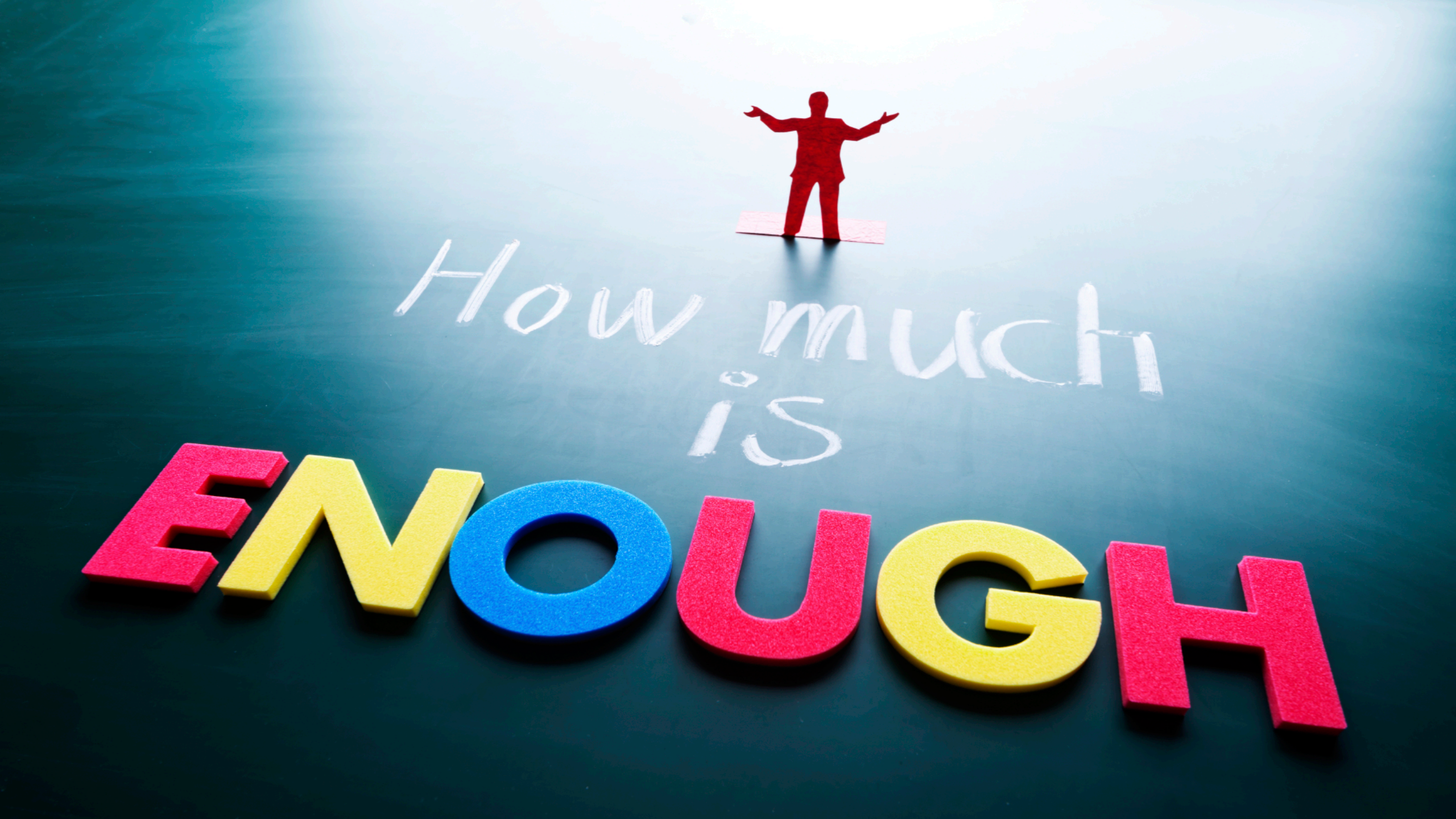
D. No, the employee is only entitled to a little leave above and beyond FMLA.

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- Must consider leave – including unpaid leave -- as accommodation
- No policies: 100% healed, work without restriction, etc.
- No maximum leave policies
- Undue hardship defense available
- https://www.eeoc.gov/eeoc/publications/ada-leave.cfm


Practice Tips
MEDICAL LEAVE
REQUEST
• Review policies re: leave
• Review return-to-work documents from employer, including requests for medical information/exams
• Review accommodation requests from employee


How much
is
ENOUGH


ACCOMMODATION
Light Duty


ACCOMMODATION
Job Transfer

1. Be proactive.
2. Communicate, communicate, communicate.
3. Document, document, document.



4. Analyze employee & medical provider proposals.
5. Brainstorm potential accommodations.
6. Use resources, including Job Accommodation Network (JAN).
7. Rely upon experts (medical providers, vocational experts, etc.).



Rely on employee's provider?

Who?

Medical Exams

When?

Monitoring?



- Firefighter, officer, 9 years
- Well-liked & hard worker
- Seizure on June 1 (first & only)
- Leave through October 1
- Doctor: Can return to work without restrictions
- State law: No driving for 3 months following seizure.

Can employer require fitness-for-duty exam?

A No because he has not taken any medical leave or requested an accommodation.

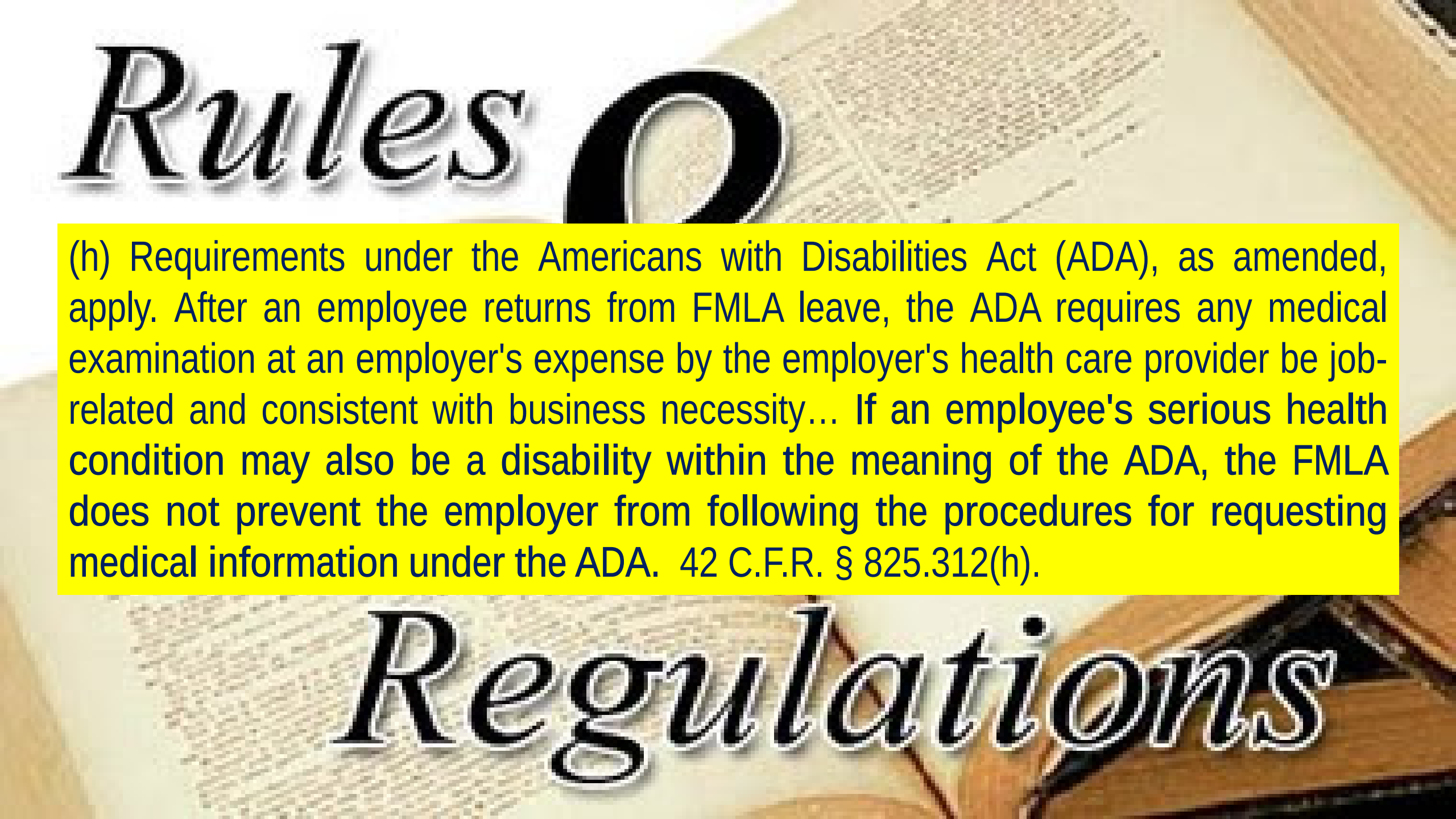
B No because his conduct does not implicate his mental health.

C Yes because an employer can always require an independent medical exam following a misconduct investigation/proceeding.

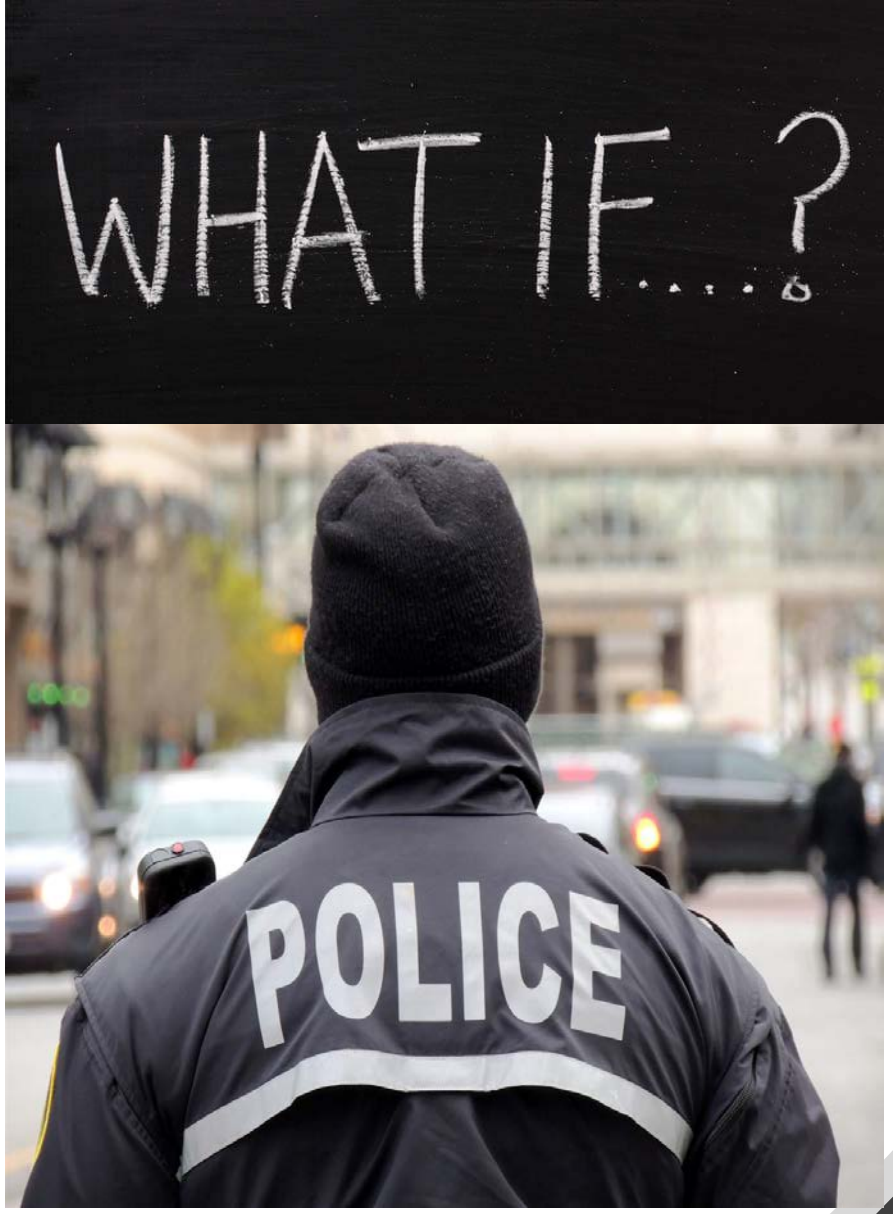
D Yes because the exam is job related and consistent with business necessity. In most if not all situations, an employer will be able to independently verify whether an employee can safety perform job in safety-sensitive position.

None of the above

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(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity… If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. 42 C.F.R. § 825.312(h).



- Officer, 16 years
- Average performance
- Accesses DVS to find address
- Paid administrative leave pending investigation
- Before discipline meeting, puts gun on desk
- Paid administrative leave pending investigation

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B No because his conduct does not implicate his mental health.

C Yes because an employer can always require an independent medical exam following a misconduct investigation/proceeding.

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SAFETY STATUS

RISK LEVEL

“HIGH”

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- Officer for 4 years
- Average/a little above average
- Struggles with difficult calls – i.e. death, abuse of kids, etc.
  - Mentoring, debriefing, training
- 3 months ago: Crying in squad (divorce)
- 2 months ago: Absent
- 1 month ago: Loud argument with coworker (both disciplined)
- 3 days ago: High speed chase (violated city policy).
- Afterward, other officer reports officer at off-duty party said her gun “would solve all her problems”



Does the officer pose a safety risk to herself, her coworkers, or the public?


POLICE
Return to Work



Can employer require ongoing documentation that employee can SAFELY perform job?


IT'S A QUESTION PARTY!
MY FAVORITE!