

**Evaluation of Psychiatric  
Disability**

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**Psychiatric Disability**

- No uniform definition
- Definitions provided by insurance or laws
- Symptoms do not equal Disability

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**Types of Disability**

- Private insurance
- Americans with Disabilities Act (ADA)
- Wisconsin Fair Employment Act
- Family and Medical Leave Act (FMLA)
- Wisconsin Family Medical Leave
- Social Security
- Workers Compensation

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## Americans with Disabilities Act (ADA)

- 1990 law enacted to prevent discrimination against people with disabilities who want to work and are qualified to work
- Regulations are imposed by The U.S. Equal Employment Opportunities Commission (EEOC)

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## ADA

- “qualified individual with a disability”
  - Possesses requisite skills, education, experience
  - With or without accommodation can perform the essential functions of the position

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## ADA - Disability

- Mental Impairment
  - Emotional or mental illness
  - Major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders

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## ADA - Disability

- Disability
  - Impairment must “substantially limit” one or more major life activities of the individual
- Stress alone is not a mental impairment.
- Traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.

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## ADA

- Major Life Activities
  - Learning
  - Thinking
  - Concentrating
  - Interacting with others
  - Caring for self
  - Speaking
  - Manual tasks
  - Sleeping

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## ADA

- Substantial Limitation
  - Severity and length of time it restricts a major life activity.
  - Assessment of limitation may or may not consider therapeutic effects of medication or other mitigating factors.

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## ADA

- EEOC may not require expert opinion.
- You may be regarded as impaired if people perceive that you are disabled (even if you are not truly impaired).

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## ADA

- Substantial Limitation (example from EEOC)
  - Interacting with others
    - Relations with others characterized on a regular basis by severe problems
    - Consistently high levels of hostility, social withdrawal, or failure to communicate when necessary

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## ADA - Accommodations

- Employee may request reasonable accommodation.
  - Time off
  - Flexible work schedule
  - Occasional leave
  - Change in job responsibilities
  - Different job
  - Physical change of work environment
    - Sound-proofing to improve concentration

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### ADA - Accommodations

- Policy changes
- Change in supervisory methods
  - Daily instructions
  - Written vs. oral feedback
  - Temporary job coach

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### ADA - Accommodations

- Employers have no obligation to monitor medications.
- Accommodation needs to be provided unless (or until) such accommodation poses undue hardship.
  - Hardship is based upon employer’s resources

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### ADA – Employee misconduct

- Employees can be disciplined for violating company policies about workplace behavior even if misconduct resulted from disability.
  - Policy is out of business necessity
  - Violence/threats/theft/property destruction
  - Needs to be uniformly applied to others without disabilities

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ADA –  
Employee misconduct

- Employer can be required to provide accommodation so employee does not violate further work rules.
- Inappropriate behaviors preceding request for accommodation do not have to be excused.

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ADA – Direct Threat

- Under the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a “direct threat.”

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ADA – Direct Threat

- “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- Policy needs uniform application to include individuals without disability.

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### ADA – Direct Threat

- Specific behavior must be identified
- High risk, not just increased risk
- History of violence not sufficient - requires appraisal of present abilities and imminent dangerousness

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### Family and Medical Leave Act (FMLA)

- Employee is entitled to their job back with same pay and benefits after time off.
- Employer is required to pay benefits during FMLA leave.

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### FMLA

- Applies to employers:
  - Federal
    - 50 or more employees (including part-time or temporary) for 20 or more weeks of the current or preceding year.
  - Wisconsin
    - 50 “permanent” employees in company with at least one in Wisconsin during preceding year.

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## FMLA

- Applies to employees:
  - Federal
    - 12 months employment
      - need not be consecutive
      - Paid/unpaid leave counts if receiving compensation or benefits from employer
    - 1,250 hours of work in previous 12 months
    - 50 or more employees within 75-mile radius

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## FMLA

- Applies to employees:
  - Wisconsin
    - 52 weeks of continuous employment
      - Need not be preceding 52 weeks
    - 1,000 or more paid hours in most recent 52 weeks.
      - Includes non-worked paid time

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## FMLA

- Qualifying events - Federal
  - Serious health condition of employee
  - Serious health condition of parent, child, or spouse
    - Does not include *in loco parentis*
      - Foster-children
      - Guardianships

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## FMLA

- Qualifying events - Federal
  - Birth, adoption, or foster placement of child
    - No requirement for serious health condition
    - Men and women both eligible

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## FMLA

- Right to leave - Federal
  - 12 weeks (cumulative) in 12 months for any qualifying event or combination
  - Spouses working for the same employer may only take one 12-week period for birth, adoption, or foster-placement

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## FMLA

- Qualifying events – Wisconsin
  - Serious health condition of employee
  - Serious health condition of parent, child, or spouse
    - Includes in-laws
    - Does not include *in loco parentis*
  - Birth or adoption
    - No foster-home placement

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## FMLA

- Right to leave – Wisconsin
  - In a 12-month period
    - 2 weeks for employee’s serious health condition
    - 2 weeks (aggregate) for serious health condition of parents, children, or spouse
    - 6 weeks for birth or adoption
      - Must begin within 16 weeks of birth/adoption

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## FMLA

- Federal and State leave
  - Concurrent leave vs. “Stacked leave”
  - Calendars are different
    - Wisconsin uses “calendar year”
    - Federal – choice by employer
      - Calendar
      - Any fixed 12-month year (fiscal year)
      - Rolling horizon – forwards or backwards
      - Can change with 60-day notice

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## FMLA

- Serious health condition – Federal
  - Inpatient treatment
  - Continuing treatment by health care provider
    - “Treatment” – includes exam to determine whether a serious health condition exists and evaluation of the condition.

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## FMLA

- Serious health condition – Federal (cont.)
  - Continuing treatment by a health care provider includes:
    - Incapacity to work, attend school, or perform other daily activities for more than 3 consecutive calendar days plus:
      - Treatment 2 or more times by health care provider
      - Treatment at least once, which results in ongoing treatment under provider's direction
  - Period of incapacity due to pregnancy

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## FMLA

- Serious health condition – Federal (cont.)
  - Continuing treatment by a health care provider includes:
    - Period of incapacity or treatment (even if less than 3 days) due to chronic serious health condition. Must satisfy all of the following:
      - Requires periodic visits for treatment;
      - Continues over extended period of time (including recurrences); and
      - May cause episodic rather than continuous incapacity

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## FMLA

- Serious health condition – Federal (cont.)
  - Continuing treatment by a health care provider includes:
    - Permanent/long term incapacity due to condition for which treatment may not be effective
      - Requires supervision by health care provider but not treatment
    - Period of incapacity or treatment (even if less than 3 days) for treatment or recovery related to restorative surgery
    - Period of incapacity or treatment (even if less than 3 days) for a condition that would likely result in incapacity of 3 or more calendar days if not treated

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## Wisconsin FMLA

- Serious Health Condition
  - A “disabling” physical or mental illness, impairment, or condition involving:
    - Inpatient care in a hospital, nursing home, or hospice
    - Outpatient care that requires continuing treatment or supervision by a health care provider (no 3-day rule)

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## FMLA

- Intermittent leave
  - Single leave in non-continuous increments
- Reduced schedule
  - Fewer hours each day

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## FMLA – Leave increments

- Federal
  - Smallest increment that employer uses to account for leaves, but not more than one hour.
  - Cannot require employee to take more leave than necessary to address the need for leave.
  - Employer can transfer to different position to accommodate schedule.

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### FMLA – Leave increments

- Wisconsin
  - May take leave in increments less than a day if employer allows any other leave to be taken in increments less than a work day.
  - Does not allow employer to transfer to different position.

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### FMLA – Certification

- Existence of serious health condition
- Date serious health condition commenced and probable duration
- Medical facts regarding the serious health condition
- If leave requested, the extent to which employee is unable to perform employment duties

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### FMLA – Certification

- Recertification and periodic reports required on employee's status and intent to return to work
- Return to work certification
  - Must be consistent with ADA
    - Limited to inquiries that are job-related and consistent with business necessity.

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### FMLA

- State/federal differ regarding what type of leave can be used during FMLA period
  - Vacation
  - sick leave
  - personal days
  - unpaid

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### Social Security

- Provides guaranteed income to individuals with disability found to be incapable of gainful employment

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### Social Security

- “Disability” – unable to engage in “any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”

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## Social Security

- Permits general presumptions about an individual's inability to work
- Doesn't focus on specific job functions
- Whether a person can do work that exists within the national economy
- Does not consider work with accommodation
- Uses its own diagnosis criteria

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## Workers' Compensation Laws

- Provide benefits to individuals who earn less due to work-related injury or illness
- Do not distinguish specific job functions

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## Disability Insurance Policies

- Contractual rather than statutory right to benefits
- Disability definition varies by policy
  - Incapacity to perform one or more duties of the insured's regular occupation
  - General occupation vs. specific occupation (neurosurgeon vs. general practitioner)
- Payment for "partial disability"
  - Lost earnings

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## Assessment of Disability

- Personal Physician
- Independent Medical Examinations (IME's)

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## Assessment – Personal Physician

- Generally accepted as part of care.
- Provide excuse/restriction/limitation due to medical condition.
- Return to work.
- This is accepted as source of medical information in most circumstances.

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## Assessment – Personal Physician

- Roles of treating physician and forensic evaluator are different.
- Objectivity/neutrality may be counterproductive to a therapeutic alliance.
- Bias
- Confidentiality

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## Independent Medical Examinations (IME's)

- Independent opinion from non-treating physician
- Record review and examination
- Psychological testing

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## Conducting IME's

- Referral
  - Clarification of claim for disability
  - Specific questions to be addressed by IME
  - Policy definitions
  - Job requirements

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## Conducting IME's

- Referral
  - Medical records
  - Third-party information
  - Surveillance
  - Report distribution

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**Conducting IME's**

- Referral
  - Scheduling the examination
    - When? Multiple appointments?
    - Cancellation policy
    - Fees
    - Audio/video recording?
    - Labs?

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**Conducting IME's**

- Confidentiality
  - Notice must be given about non-confidential nature of exam.
    - Retaining party
    - Purpose of exam
    - Disclosure of information
    - Subject's ability to receive evaluation results

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**Conducting IME's**

- "I am not your doctor."
- "I will not be providing any treatment."
- "We do not have a doctor/patient relationship."
- "I will not have contact with you after this assessment."
- "This is not confidential."
- "My opinion might be helpful to your claim, harmful to your claim, or have no effect."

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**Conducting IME's**

- Many evaluators have written consent forms documenting purpose of evaluation and disclosures.
- AMA/APA/AAPL differ regarding whether this is the practice of medicine.
- Licensure issues if out of state

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**Conducting IME's**

- Review information ahead of time.
- Perform a thorough assessment.

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**Conducting IME's**

- Don't assume that the subject will appreciate your role or be friendly. Your role often requires that you recommend the exact opposite of what they want.
  - They may lose benefits.
  - They may lose their job.
  - They may be forced to take time off from work.

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**Conducting IME's**

- Consider your physical environment and safety ahead of time.
- Have malpractice insurance specifically designate coverage for IME's.

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**Assessment –  
Areas of Focus**

- Events leading to decision to stop working/seek disability
  - Stresses in and out of work environment
  - Symptom history
- Efforts to return to work
- Typical day
  - Pre & post disability

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**Assessment –  
Areas of Focus**

- Barriers to returning to employment
  - Illness/symptoms
  - Financial
    - It is possible to make more money by being disabled.
    - Other employment
  - Family
    - children at home, sick parents
  - Attitude
    - Sick role
    - Malicious intent
  - Accommodations

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### Assessment – Areas of Focus

- Work history
  - Disciplinary actions
  - Attitudes
  - Termination
  - Income
  - Perception of coworkers/supervisors

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### Assessment – Areas of Focus

- Stresses
  - Job related?
- Personality characteristics
  - Interpersonal skills
  - Coping strategies
  - Frustration tolerance
  - Problem behaviors

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### Assessment – Areas of Focus

- Substance abuse
- Treatment compliance
- Laboratory testing
  - Substance abuse
  - Medication levels

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**Assessment –  
Areas of Focus**

- Self-appraisal of prognosis
- Self-appraisal of treatment
  - Cooperation
  - Barriers to effective treatment

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**Assessment –  
Areas of Focus**

- Desire to return to work
  - Non-psychiatric barriers
  - Secondary gain

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**Report Writing**

- There are guidelines from APA/AAPL
  - Fitness for duty examinations of physicians
- Start the report by indicating the reason for the examination.
- Include a statement about notification of nonconfidentiality.

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## Report Writing

- Answer questions thoroughly.
  - Correlate observed symptoms with functional impairment.
  - Why do/don't the symptoms result in impairment?
  - Are problem behaviors related/unrelated to impairment or symptoms of mental illness?

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## Report Writing

- Focus on objective findings.
- Provide information both for and against your opinion, if present.
- Say what you believe can be clearly supported. Don't make assumptions or speculate.

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## Report Writing

- Don't feel the need to clarify issues that are not clear. Instead, point out areas of ambiguity.
  - This often relates to validity of reported symptoms/truthfulness.
  - Poor documentation by treating physicians frequently limits objective information.

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## Report Writing

- Explain whether subjective reports are consistent with a known illness.
  - Do your observations contradict their report?  
Are their claims unlikely or inconsistent with illness?
  - Are they malingering?
  - Should an illness that is severe enough to be disabling be observable?

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## Report Writing

- Restrictions
- Limitations
- Accommodations
- Monitoring

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## Report Writing

- Treatment Needs
  - Is current treatment appropriate?
    - If not, provide specific recommendations.
  - Prognosis
  - Inappropriate for forensic examiner to subsequently provide treatment

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