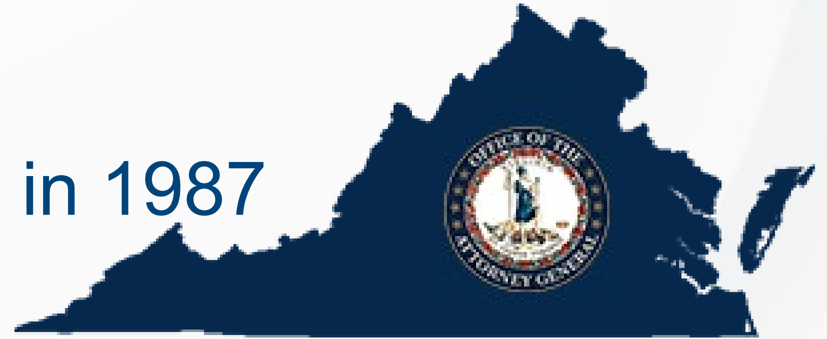
Virginia’s Labor & Employment Law Update & The ADA

The Virginia Human Rights Act
“VHRA” - Recap

The Virginia Human Rights Act (“VHRA”)

- The General Assembly engaged in a massive overhaul of the VHRA - VA Code § 2.2-3900 *et seq.*



- Once a relatively moderate law enacted in 1987

- The old statute only recognized two causes of action:
  - (i) unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation, by employers employing more than five but fewer than 15 persons and;
  - (ii) unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons.

VHRA Now

- Covered employers:
  - “Employer" means a person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.
  - For purposes of unlawful discharge on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation, "employer" means **any employer employing more than five persons** and
  - For unlawful discharge on the basis of age, "employer" means any employer employing more than five but fewer than 20 persons.
  - State and local governments are employers under the statute as well.

VHRA

- Newly Recognized Protected Categories:
  - Racial discrimination includes hairstyle discrimination
  - Sexual orientation and gender identity

VHRA CROWN ACT

As part of the expansion of the VHA – On Wednesday, March 4, 2020 the Commonwealth of Virginia became the fourth state to make hair discrimination illegal.

The CROWN Act legally protects people in workplaces from discrimination based on their natural hair. The law specifically prohibits the enforcement of any grooming or dress code policies that will disproportionately affect people of color and adds natural hair as a protected characteristic associated with race as a protected class; this includes bans on certain styles like Afros, braids, twists, cornrows, and dreadlocks. The consequences of breaking this law, are the same as outlined in the existing Law Against Discrimination:

Equitable relief
Recovery for economic losses
Compensatory damages
Punitive damages, which may be capped
Attorney fees

VHRA – Pregnancy and Mandatory Requirements

- Require a covered employer to provide reasonable accommodation for the known limitations of an employee related to pregnancy, childbirth, or related medical conditions, unless such an accommodation would impose an undue hardship on the employer.

VHRA – Pregnancy and Mandatory Requirements

- The statute provides a non-exhaustive list of reasonable accommodations including:
  - frequent or longer bathroom breaks [and] breaks to express breast milk;
  - access to a private location other than a bathroom for the expression of breast milk;
  - acquisition or modification of equipment or access to or modification of employee seating;
  - a temporary transfer to a less strenuous or hazardous position;
  - assistance with manual labor;
  - job restructuring;
  - a modified work schedule;
  - light duty assignments; and
  - leave to recover from childbirth.

VHRA – Pregnancy and Mandatory Requirements

Beginning October 29, 2020, the law requires that the notice and the employee handbook contain information concerning:

- The prohibition against unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions; and
- An employee's rights to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions.
- This information must also be directly provided to any new employees at the commencement of their employment and to any employee within 10 days of such employee's providing notice to the employer that she is pregnant.

Some Employers are not in compliance with these provisions! Do Not Forget to Update Your Handbook.

VHRA – Procedural Requirements

- Administrative charge must be filed with the Virginia Division of Human Rights.
- After the Division has completed its investigation, it will issue a “reasonable cause” or “no reasonable cause” finding.
- After issuing a reasonable cause finding, the Division will attempt to conciliate the dispute.
- If the Division issues a no reasonable cause finding, it will close the case and provide the employee with a notice of their right to commence civil action without attempting conciliation.

VHRA – State Court Implications

- The demurrer is not as strong as the 12(b)(6) motion in federal court.
- Almost impossible to obtain summary judgment in state court. The litigants cannot use deposition transcripts in support of summary judgment.
- No cap on compensatory damages based on the size of the employer like Title VII or the ADA.
- Relaxed schedule in state court. State court cases can last years. Cases in the “Rocket Docket” set for trial 6-9 months after the Complaint is served.

Marijuana Laws

Virginia Legalized Marijuana: What Does it Mean?

NOT this….at least not at your mine

Marijuana in the workplace

What does the law actually say?

- “No employer shall discharge, discipline, or discriminate against an employee for such employee's lawful use of cannabis oil pursuant to a valid written certification issued by a practitioner for the treatment or to eliminate the symptoms of the employee's diagnosed condition or disease pursuant to Va. Code 54.1-3408.3.”

Marijuana in the workplace

Wait, doesn’t this mean employees can get high whenever they want?

Marijuana in the workplace

Protection for Employers

<u>The law does not prohibit employers from:</u>

- Taking any adverse employment action for on-the-job impairment caused by marijuana or cannabis oil use.
- Prohibiting possession during work hours.

Marijuana in the workplace

Hypothetical:

- Your employee, Cindy, shows up for work one day and smells like marijuana.
- Cindy says: “Well, yeah, … marijuana is legal in Virginia now, so I smoked some last night. What’s the problem??”
- What about two hours ago?

Marijuana in the workplace

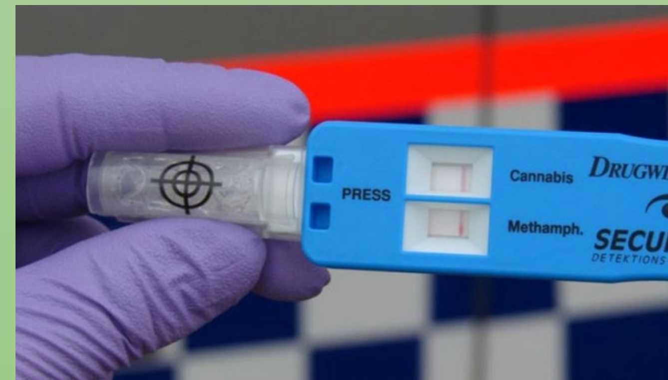
- The law does <u>not</u> protect employees from recreational use.

- Employees are only protected for the lawful use of "**cannabis oil**" →
  - ***"Any formulation of processed Cannabis plant extract***, which may include oil from industrial hemp extract acquired by a pharmaceutical processor pursuant to <u>[the law]</u>, or a dilution of the resin of the Cannabis plant that contains at least five milligrams of cannabidiol (CBD) or tetrahydrocannabinolic acid (THC-A) and no more than 10 milligrams of delta-9-tetrahydrocannabinol per dose. 'Cannabis oil' does not include industrial hemp, as defined [by the law] that is grown, dealt, or processed in compliance with state or federal law, unless it has been acquired and formulated with cannabis plant extract by a pharmaceutical processor."

Marijuana in the workplace

Can we still test employees for marijuana?

- **Yes**,…but many employers are re-examining their testing procedures.
  - Consider testing only for reasonable suspicion or post-accident
- If an employee test positive for marijuana, we cannot discharge, discipline, or discriminate against them for the lawful use of cannabis oil.
- Inquire as to whether the employee has a valid written certification from a practitioner that allows for the use of cannabis oil.



Marijuana in the workplace

Hypothetical:

- Terry shows up for work and has glassy eyes. He is also slurring his speech and cannot walk in a straight line.
- You decide to test Terry based on reasonable suspicion.
- Just before the test, Terry gives you a copy of his written medical certification to use cannabis oil. He states that he is legally allowed to use cannabis oil and refuses to take the test.
- What do you?

Marijuana in the workplace

Hypothetical…continued:

- You ask Terry why he needs a written medical certification for the use of cannabis oil?
- Is this OK to ask?

Marijuana in the workplace

Hypothetical:

- You see Mike in the break room showing other employees a bottle of cannabis oil.
- Mike explains to you that he has a written certification for the cannabis oil and he only uses it at night to sleep better.
- Can you discipline Mike for doing this?

Marijuana in the workplace

Don't Forget Virginia has a "Ban-The Box" Law:

- In 2020, Virginia enacted a law that prohibits employers from requiring job applicants to disclose information regarding an arrest, criminal charge, or conviction for simple possession of marijuana.

Marijuana Decriminalization

- Simple possession of marijuana is now decriminalized in Virginia.

- The law requires that criminal records related to previous prosecutions for simple marijuana possession be sealed with disclosure available only under limited circumstances.

- Additionally, the law prohibits any employer or educational institution from requiring an applicant to disclose information related to any arrest, criminal charge, or conviction for any decriminalized possession of marijuana.

Misclassification

Three New Misclassification Laws:

- Private Cause of Action for employees alleging they were misclassified - VA Code § 40.1-28.7:7
- Whistleblower Protection - VA Code § 40.1-33.1
- Presumption of Employee status if person receives remuneration now embedded and in Virginia law authorizes Department of Taxation to impose fines for violations.

VA Code § 40.1-28.7:7
Private Cause of Action for Misclassification

What It Does:

- An individual who has not been properly classified as an employee can bring a civil action for damages if employer had knowledge of misclassification.
- Creates presumption that whoever is paying the individual for services is that individual's employer, UNLESS it can be shown that the individual is an independent contractor.
- Mandates the use of the IRS's 20 factor test in determining whether or not the individual is properly classified as an independent contractor.

- Allows for array of damages including employment benefits, out-of-pocket expenses and attorneys’ fees.
- Opens the door for class actions.

The IRS Test

- 20 factors aimed at determining if the entity paying for services controls the terms and conditions of employment.

- Key Factors:
  - Are you supervising the individual's work?
  - Giving instructions on how to perform the work?
  - Training?
  - Setting schedule?
  - Have the right to hire and fire?

VA Code §58.1-1900

What It Does:

- Gives Department of Taxation investigative authority into misclassification claims
- Creates Presumption of employee status unless employer can prove independent contractor using IRS test
- Allows for assessment of fines and civil penalties of up to 5k per misclassified individual if employer fails to pay wages, taxes, benefits or other contributions
- Prohibits repeat offenders from being awarded public contracts

What to Do

- Conduct an audit of your workforce to ensure properly classified

- Reclassify where appropriate

Whistleblower Laws

VA Code §40.1-33.1 Whistleblower Protection

What it Does

- Prohibits retaliation against individuals who report or threaten to report misclassification to an appropriate authority
- Grants Commissioner of Labor & Industry authority to institute proceedings against an employer accused of retaliation
- Allows for broad damages and civil penalties

What to Do:

- Have clear no retaliation policies
- Make sure your supervisors are trained on those policies and do not inadvertently take an adverse action against an employee who has raised a misclassification claim

Non-Compete Laws

Virginia’s New Non-Compete Law

- Effective July 1, 2020

- Cannot enter into, enforce, or threaten to enforce a covenant not to compete with “low-wage” employees:
  - Any employee who earns less than $1,137/week ($59,124 annually)
  - Any independent contractor who earns less than $20.30/hour.

Virginia's New Non-Compete Law

- What types of agreements are affected?
  - Traditional non-compete agreements:
    - Employment agreements
    - Standalone agreements
    - Separation agreements
  - Customer non-solicitation agreements?
    - Not clear under the new law

Virginia’s New Non-Compete Law

- Are there any exceptions?

  - Confidentiality and non-disclosure agreements are still allowed.

  - “Low-wage” employees do not include employees paid predominantly by commission or bonus.

  - Agreements signed before 7/1/20 are exempt from the new law.

Virginia's New Non-Compete Law

- Penalties and Posting Requirement:
  - Employees can sue employer and supervisors for:
    - Injunctive relief
    - Liquidated damages
    - Lost compensation
    - Attorneys' fees and costs
  - Civil penalty of $10k per violation
  - Must post a copy of the law
    - $1k penalty for not posting

Minimum Wage Increases

Increase to Minimum Wage

- Currently at the federal minimum of $12.00
- Increasing as follows:
  - May 1, 2021 → $9.50/hour
  - Jan. 1, 2022 → $11.00/hour
  - Jan. 1, 2023 → $12.00/hour
- Potentially increasing further to:
  - Jan. 1, 2025 → $13.50/hour
  - Jan. 1, 2026 → $15.00/hour

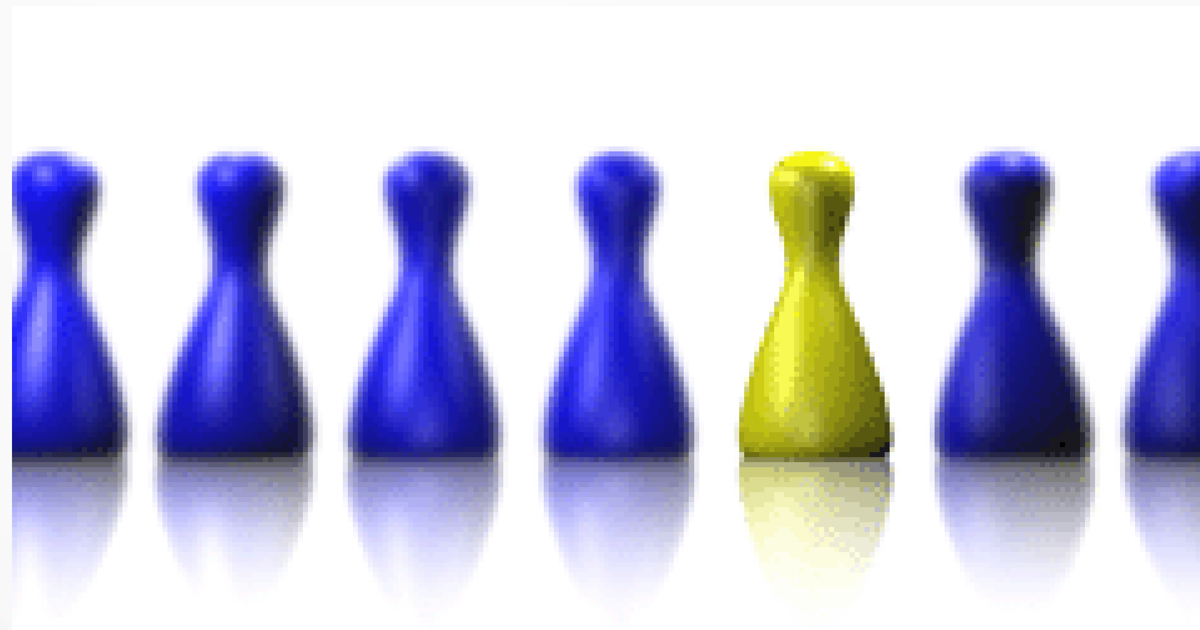
The Americans with Disabilities Act

The ADA was signed by President Bush on July 26, 1990

Ogletree Deakins

Its purpose was to protect "otherwise qualified individuals with disabilities" from discrimination based on their disability.

- It prohibits employers with 15 or more employees from discriminating against individuals on the basis of disability.



The ADA:

- Applies to persons who are disabled, have a history of a disability or who an employer regards as having a disability
- Covers hiring, promotions, job assignments, training, termination, and any other terms, conditions, or privileges of employment

- It prohibits employers from treating employees or applicants less favorably due to disability.

Absent undue hardship, applicants and employees with disabilities are entitled to reasonable accommodation to:

- apply for jobs;
- perform their job duties; and
- enjoy equal benefits and privileges of employment

The ADA Amendments Act of 2008 (ADAAA) revised the definition of “disability” to more broadly encompass impairments that substantially limit a major life activity.

"Disability" defined

A disability is a physical or mental impairment that substantially limits a major life function, OR

- "Having a record of" an impairment OR

- “Being regarded as” having an impairment

"Disability" also includes impairments that are episodic or in remission . . .

. . . if they substantially limit a major life activity when active, such as epilepsy or post traumatic stress disorder.

The ADAAA expanded the list of major life functions to include

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting

- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working

The ADA prohibits employment-related discrimination against a “qualified individual with a disability,” meaning one "who, with or without reasonable accommodation, can perform the essential functions" of the job.

One might think that reporting to work is an essential function of every job; and therefore . . .

. . . That an employee who cannot report to work is not otherwise qualified and not entitled to an accommodation.

One would be wrong.

According to the EEOC:

- Employees with disabilities must be granted the same access to an employer's existing leave programs as all other employees
- If an employer otherwise allows medical or other leave for up to one year, the same has to be granted as a reasonable accommodation unless there is undue hardship.

"Undue hardship" is "action requiring significant difficulty or expense" when considered in light of a number of factors such as:

- the nature and cost of the accommodation
- in relation to the size, resources, nature, and structure of the employer's operation.

- The employer has the burden of proving that a requested accommodation would cause undue hardship

- If a particular accommodation would be an undue hardship, the employer must try to identify an alternative that will not pose such a hardship.

Intermittent, short- and long-term leave as a reasonable accommodation

According to the EEOC:

Absent undue hardship, the ADA requires employers to modify attendance policies as a reasonable accommodation

Modifications may include:

- Allowing an employee to use paid or unpaid leave;
- Adjusting arrival or departure times; and
- Providing periodic breaks

Time for a Break!

However, according to the EEOC:

- Employers are not required to grant indefinite leave as a reasonable accommodation to employees with disabilities, because . . .

- Indefinite leave can impose an undue hardship on an employer’s operations.

Intersection between the ADA and the FMLA

- Start with whether the employee's serious health condition constitutes a disability under the ADAAA

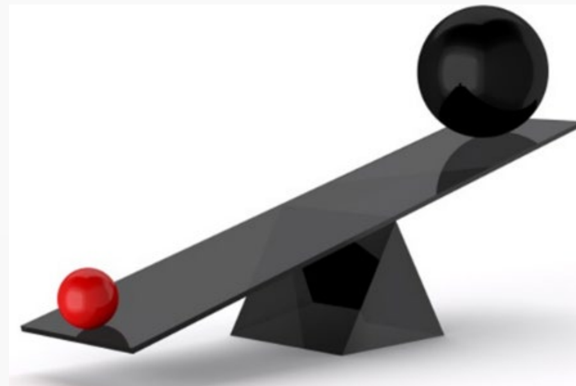
  If so . . .

  - . . . Even if the employee has exhausted all leave available under the FMLA, additional leave may constitute a reasonable accommodation under the ADA

If an employee qualifies for leave under both the ADA and the FMLA, an employer must provide leave under whichever statute provides greater rights.

Here are some examples:

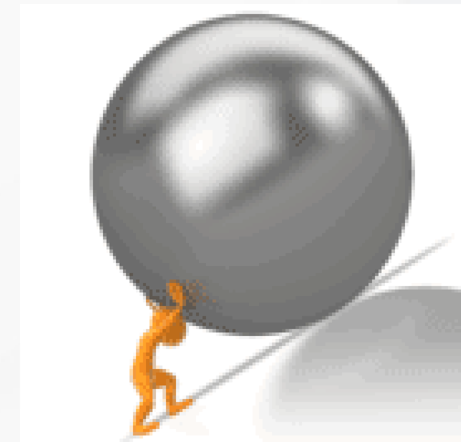
- Reinstatement to an equivalent position (FMLA) vs. reinstatement to the same position (ADA)
- Payment of insurance premiums under the FMLA vs. non-payment under the ADA



- If an employee has already exhausted 12 weeks of FMLA leave, and

- Qualifies for leave under the ADA, then

- The only basis for a denial of leave as a reasonable accommodation is through a showing that it would be an undue hardship to the employer.



- Unlike the FMLA, the ADA places no time limit on leave that may be requested as accommodation
- leave extending beyond the FMLA's 12-week maximum may be required as an ADA accommodation.

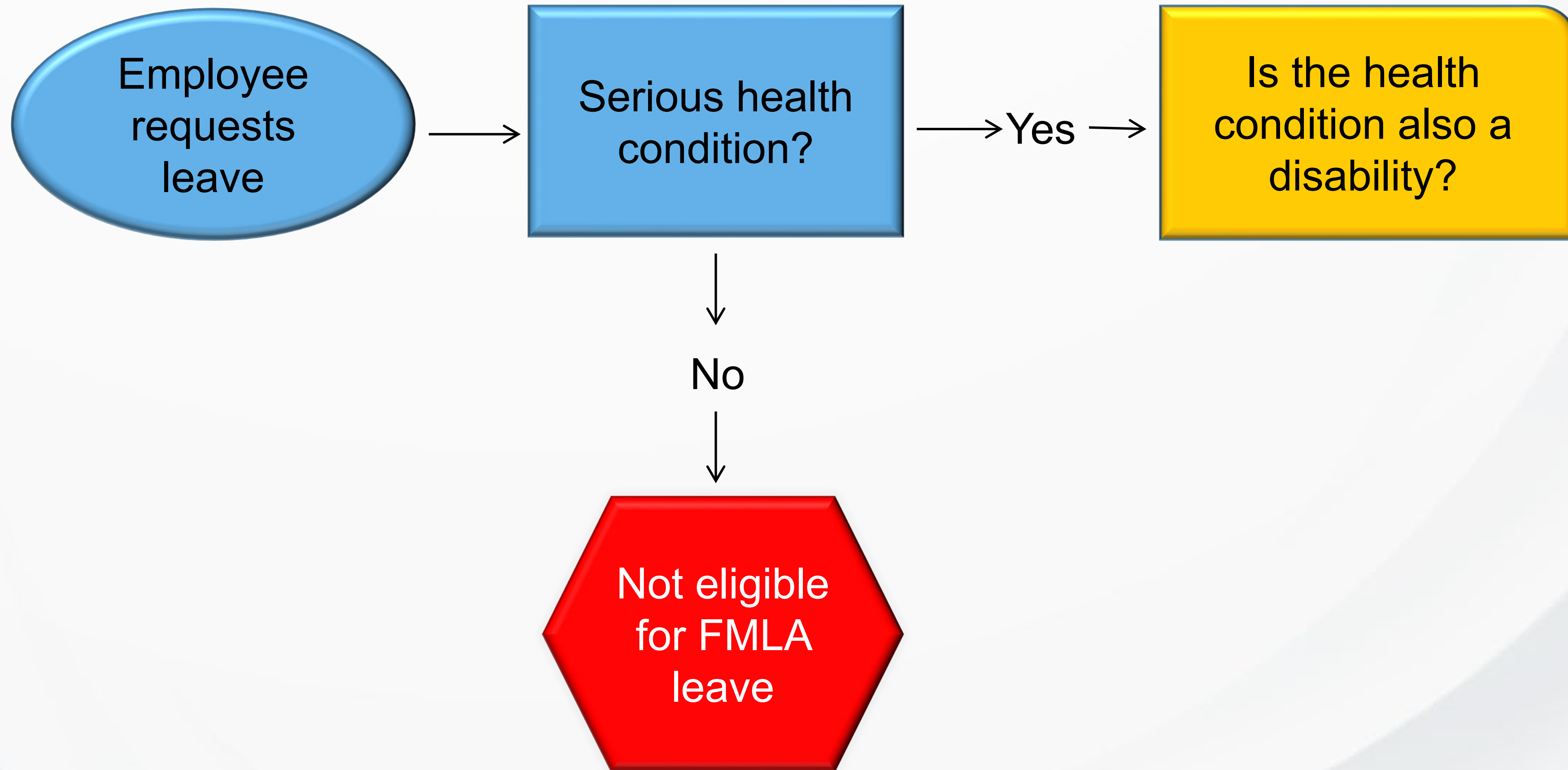
When must leave be granted to a qualified employee?

- When it does NOT impose an undue hardship on the employer's operations
- When leave would be available under any other employer leave program, such as sick leave, leave without pay, or a sabbatical

And sometimes . . .

- Even if leave would not be available under the employer's leave policies, it must be granted unless it is an undue hardship.

- To simplify the decision-making process, we work with employers to create flow charts that combine your policies with legal requirements (*flow chart excerpted below*):



The Bottom Line:

For the employer, the intersection between the FMLA and the ADA can be complicated . . .

. . . So call a lawyer.

Questions?

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