

# Legal Briefings

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## “The Interplay of the ADA and FMLA”

### Introduction

For employees and employers, leave from work due to serious illness or disability is a complicated issue. Important laws on both the state and federal level may apply depending on an individual's particular circumstances. This paper examines two of the applicable federal laws, the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) and their application and interplay in the context of employee leave due to illness or disability.

### General Overview of the Laws

The ADA is a federal statute that addresses the civil rights of people with disabilities in numerous contexts.<sup>1</sup> The stated purpose of the ADA is “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.<sup>2</sup> The FMLA is a federal statute mandating leave for certain employees for the birth or placement of a child or the serious health condition of an employee or immediate family member.<sup>3</sup> An employer, when confronted with the issue of requesting time off for a medical leave, should separately evaluate the employee's rights under the ADA and FMLA. In this evaluation, the employer should consider whether these rights overlap and the appropriate actions to take regarding the requested time for medical leave.<sup>4</sup> Employers should also consider whether state worker's compensation laws would cover the leave request. Since worker's compensation laws vary from state to state, this paper will not address that issue.

### The Americans with Disabilities Act (ADA)

In 1990, Congress passed the ADA and utilized the same definition of *disability* as the Rehabilitation Act of 1973, i.e., a mental or physical impairment that substantially limits a major life activity.<sup>5</sup> This definition concerning who is covered by the ADA has itself been “substantially limited” by the U.S. Supreme Court and lower courts since the passage of the ADA. Supreme Court rulings in three cases known as the *Sutton* trilogy, and a later ruling in *Toyota v. Williams*,<sup>6</sup> limited this definition. As these cases deviated from congressional intent, Congress passed the ADA Amendments Act (ADAAA) of 2008 that went into effect on January 1, 2009.<sup>7</sup> Under the ADAAA, courts will construe the definition of disability much more broadly than in the past.

Title I of the ADA contains the provisions related to employment.<sup>8</sup> One of the central

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provisions of Title I is the requirement that employers provide reasonable accommodations to employees with disabilities that will allow them to perform the essential functions of the job. The employment provisions involve every aspect of employment, including application procedures, medical testing, reasonable accommodations, workplace policies and procedures, benefits, discipline, harassment, and termination. In every situation, the ADA requires that employers make an "individualized assessment."<sup>9</sup> The Equal Employment Opportunity Commission is the government agency charged to provide guidance and enforcement of ADA for employment issues.<sup>10</sup> This paper will not focus on broad ADA or reasonable accommodation issues, but will only examine issues that arise when an employee requests leave from work as a reasonable accommodation.

## **The Family and Medical Leave Act (FMLA)**

The FMLA was passed in 1993 and entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.<sup>12</sup> The purpose of the FMLA is "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."<sup>12</sup> The U.S. Department of Labor (DOL) is the government agency charged to enforce and provide guidance under the FMLA.<sup>13</sup> In 2008, the DOL published the final regulations for the FMLA. The new rules clarify ambiguities in the FMLA as well as providing new military family leave entitlements. The new rules are effective January 16, 2009.<sup>14</sup>

## **Areas of Application and Interaction of the FMLA and ADA**

In analyzing employee leave situations, there are four possible situations with respect to the application of the ADA and the FMLA:

1. Only the ADA applies;
2. Only the FMLA applies;
3. Neither law applies; or
4. Both laws apply.

The situation where both laws apply is the most complex. In these situations, an employer must provide leave under whichever statute provides the greater rights to employees.<sup>15</sup> However, double recovery will not be awarded to the employee for the same loss.<sup>16</sup> The FMLA Regulations and EEOC Guidance attempt to explain the complex relationship between these two laws.<sup>17</sup> In analyzing an employee's leave request, "An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take."<sup>18</sup>

## **General Provisions for Leave Under the ADA and FMLA**

Generally, the ADA and FMLA requirements for leave are:

### **ADA**

1. An employee who needs leave as a reasonable accommodation is entitled to such leave if the leave will not cause undue hardship on the employer.
2. There is no specified limit of time for the leave, but the time must be reasonable.
3. The amount of leave that is reasonable in a particular circumstance is a fact specific situation requiring an individualized assessment.
4. The leave must enable the employee to become qualified to perform the essential job functions with or without a reasonable accommodation at the end of the leave period.
5. An employer may offer an accommodation other than leave if it is reasonable and effective despite an employee's preference to be granted leave to accommodate their disability.
6. ADA leave may taken intermittently absent "undue hardship."
7. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the

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entire period, then the employer should grant unpaid leave<sup>19</sup>.

8. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status.
9. An employee should be reinstated to the same position after leave absent "undue hardship" as long as they are still qualified for the position.<sup>20</sup>

## FMLA

1. An eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period.
2. Leave is also available where "the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition."<sup>21</sup>
3. "FMLA leave may be taken 'intermittently or on a reduced leave schedule' ... when medically necessary for "medical treatment of a related serious health condition, ... for recovery from treatment."<sup>22</sup>
4. An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave.<sup>23</sup>
5. An employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.<sup>24</sup>
6. 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 FMLA leave.<sup>25</sup>
7. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one unless the employee is designated as a "key employee" (discussed in more detail below).<sup>26</sup>
8. Leave may also be taken to provide care or psychological comfort to an

immediate family member with a serious health condition."<sup>27</sup>

9. Eligible employees who are family members of military service members with a serious injury or illness incurred while in the line of duty, may take up to 26 weeks of leave to care for them.<sup>28</sup>
10. Families of active duty members of the Reserve or National Guard may qualify for leave for a "qualifying exigency". This leave allows an employee to handle the affairs of child, spouse, or parent related to a contingency operation. Qualifying exigency leave counts towards the employee's 12 week FMLA leave<sup>29</sup>.

If an employee qualifies for FMLA leave under the statute, then the right to leave is absolute; i.e. the employee must be granted medical leave.<sup>30</sup> Unlike the ADA, the FMLA does not take the "reasonableness" of leave into account. The ADA also permits an employer to offer a reasonable accommodation other than leave if it is effective and eliminates the need for leave despite the employee's preference for leave. This differs from the FMLA, where the employer cannot substitute an alternative accommodation for an employee's valid leave request. When both laws apply, FMLA leave may be extended beyond 12 weeks as a reasonable accommodation under the ADA.<sup>31</sup>

## Covered Employers

### ADA

Title I of ADA defines an employer as "a person engaged in an industry affecting commerce who has 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 person..." State and local government employers of any size are covered by the ADA.<sup>32</sup> In addition, state and local anti-discrimination laws may cover employers of any size.<sup>33</sup>

The question of how employees are counted was discussed by the U.S. Supreme Court in the case of *Clackamas v. Wells*. In *Clackamas*,

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a physicians' group argued that the ADA did not apply to them as an employer because it did not meet the 15-employee requirement unless the 4 physician-partners counted as employees.<sup>34</sup> The U.S. Supreme Court held that the common-law element of control in master-servant relationships was relevant in determining whether the physician-partners would also be counted as employees for purposes of the ADA. The Court referenced EEOC guidelines as providing a framework for deciding the central question of "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."<sup>35</sup> The EEOC guidelines cited by the Court identify the following six factors as being relevant to this determination:

1. "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. "Whether and, if so, to what extent the organization supervises the individual's work;
3. "Whether the individual reports to someone higher in the organization;"
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
6. "Whether the individual shares in the profits, losses, and liabilities of the organization."<sup>36</sup>

## **FMLA**

The FMLA defines an employer as "any person engaged in commerce... who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year..."<sup>37</sup> Public agencies are covered by the FMLA regardless of the number of employees. Public and private elementary school employees are also covered by the FMLA regardless of the number of employees, but there are special rules addressing employees of local educational agencies.<sup>39</sup>

## **Covered Employees**

### **ADA**

The issue of whether an employee is covered pursuant to Title I of the ADA is a complicated issue and has been the most litigated issue under the Act. Typically, it is more efficient and cost effective for the employee and employer to focus on investigating effective accommodations rather than in making the determination of whether the employee is covered pursuant to the ADA. An employee is considered to be an individual with a disability if they:

1. Have a disability;
2. Have a record of a disability; or
3. Are regarded as having a disability.<sup>40</sup>

A disability is defined by the ADA as a "physical or mental impairment that substantially limits one or more of the major life activities."<sup>41</sup> In order to be protected by the Act, an individual must be qualified to perform the core job duties, called the "essential functions" of the job, with or without a reasonable accommodation.<sup>42</sup> Essential functions are determined by focusing on the purpose of the function and the result to be accomplished, rather than simply considering how the function is currently performed or what is written in the job description.<sup>43</sup> These determinations must be made on a case-by-case basis.<sup>44</sup>

### **Reasonable Accommodations**

A "reasonable accommodation" is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to equally enjoy the benefits and privileges of employment. The EEOC and the courts have conclusively stated that leave from work due to a disability is a possible reasonable accommodation under the ADA. The leave can include accrued paid leave or unpaid leave. The leave may be taken intermittently or as a period of continuous time.<sup>45</sup> The EEOC has identified that some of the disability-related reasons for leave include, but are not limited to:

1. Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment,

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- or dialysis), rehabilitation services, or physical or occupational therapy;
2. Recuperating from an illness or an episodic manifestation of the disability;
3. Obtaining repairs on a wheelchair, accessible van, or prosthetic device;
4. Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
5. Training a service animal (e.g., a guide dog); or
6. Receiving training in the use of Braille or to learn sign language<sup>46</sup>

The amount of leave that is required under the ADA is something that depends on the specific situation, and requires an individualized assessment under the factors relevant to a reasonable accommodation and undue hardship analysis. There is no “bright line rule for determining a maximum duration of leave that can constitute a reasonable accommodation.”<sup>47</sup>

If holding a position open is deemed by the employer to be an undue hardship, the employer must consider reassignment to a vacant, equivalent position for which the employee is qualified and to which the employee may return at the conclusion of the leave.<sup>48</sup>

Making reasonable modifications to policies and procedures is also a form of reasonable accommodation. Employers must modify workplace, attendance, and leave policies to grant leave absent an undue hardship.<sup>49</sup> This includes modifying so called “no-fault” policies whereby employees are terminated after being on leave for a certain period of time.<sup>50</sup> Employees cannot be penalized for time missed during leave taken as a reasonable accommodation.<sup>51</sup> An employer may offer the employee an accommodation other than leave, for example reassigning non-essential job functions, if the proposed accommodation is effective and eliminates the need for leave.<sup>52</sup> Note that the employer does not have this option under the FMLA; if an employee qualifies for FMLA leave, then the employer must grant the leave.<sup>53</sup>

The relevant criteria in determining the reasonableness of leave as an accommodation includes the:

1. Length of leave requested;
2. Whether the nature of the job or the financial circumstances of the company makes it an undue hardship to keep the position open or hire temporary workers;
3. Cost of the leave;
4. Financial resources of facility involved;
5. Overall financial resources of covered entity;
6. Type of operation, including composition, structure, and functions of work force;
7. Impact of the leave on operation of facility.<sup>54</sup>

The employee usually has the burden to propose reasonable accommodations and both parties have the duty to engage in the interactive process. The employer, however, has the ultimate obligation to provide an effective reasonable accommodation.<sup>55</sup>

## FMLA

A. An “eligible employee” for FMLA leave is someone who:

1. Has been employed for at least 12 months by a covered employer; and
2. Has performed 1,250 hours of work during those 12 months, which do not have to be consecutive.<sup>56</sup>
3. In measuring the 12 months, separate terms of employment are counted as long as a break in service does not exceed 7 years. Military service cannot be included in the break in service determination.<sup>57</sup>
4. Works where there are at least 50 employees working within 75 miles of the worksite.<sup>58</sup>
  - In *Bellum v. PCE Constructors*, the 5<sup>th</sup> Circuit upheld the DOL interpretation that the 75 miles be measured by surface miles, not linear miles.<sup>59</sup>
5. Is requesting leave due to their own “serious health condition” or the “serious health condition” of an immediate family member (defined as parent, spouse, or child).<sup>60</sup>

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- B. The term “serious health condition” means:
1. An illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or
  2. Continuing treatment by a health care provider.<sup>61</sup>
    - In *Russell v. North Browards Hospital*, the court held that a serious health condition requires three full days of incapacity<sup>62</sup>.
- C. “Continuing treatment” is defined as:
1. A period of incapacity of more than three calendar days that results in two or more treatments by a health care provider within a 30 day period or
  2. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.<sup>63</sup>
  3. Both options for continuing treatment require an in person doctor visit within 7 days of the onset of the leave.
- D. “Continuing treatment” can also include:
1. Any period of incapacity due to pregnancy or for prenatal care, a chronic serious health condition, permanent or long term condition for which treatment is not effective (e.g., stroke, Alzheimer’s disease); or
  2. A period of time to receive multiple treatments (e.g., chemotherapy for cancer or dialysis for kidney disease).<sup>64</sup>

## A Case Illustrating ADA and FMLA Interplay on Employee Coverage

In the case of *Verhoff v. Time Warner Cable, Inc.*, a cable installer claimed that he was entitled to leave under the FMLA and ADA due to his eczema.<sup>65</sup> The employee claimed that his condition limited him in sleeping, caring for himself, thinking, concentrating, and cognitive processes. The court held that sleeping five hours per night was not a substantial limitation under the ADA nor were the distractions to the employee’s mental processes caused by his condition. However, the employee was covered by the FMLA as his

condition did meet the definition of a “serious health condition.”<sup>66</sup>

## A Case Illustrating ADA and FMLA Interplay on Reasonable Accommodations

In the case of *Santacrose v. CSX Transportation, Inc.*, an employer claimed that it reasonably accommodated an employee’s disability by allowing him to use company sick leave and FMLA leave to avoid working mandatory overtime shifts.<sup>67</sup> The employee would have preferred to avoid overtime without being required to use his company sick leave or FMLA leave. The court held that the employer did comply with the ADA even though it did not provide the employee the accommodation that he specifically requested. The court did not address the issue of what would happen once the employee used up all available sick or FMLA time.<sup>68</sup>

## The Employee Request for Leave

### ADA

Generally, under Title I of the ADA, the employee must make the initial request for leave (or any other “reasonable accommodation”).<sup>69</sup> EEOC Guidance provides:

1. The employee “may use ‘plain English’” and need not mention the ADA or the term “reasonable accommodation” as long as the plain meaning of the request reasonably alerts the employer to the need for leave due to a medical condition.<sup>70</sup>
2. There are no formal phrases or words that need be included in the request for leave.
3. There are no specific notice requirements in terms of the amount of advance notice that is required.
4. A friend, family member, service provider, or any other individual can make a request for leave on behalf of the employee.<sup>71</sup>

### FMLA

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The FMLA Regulations state:

1. "An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.
2. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example."<sup>72</sup>
3. In *Aubuchon v. Knauf Fiberglass*, the court held that, the employer can deny the benefits of the leave if the employee does not provide proper notice.<sup>73</sup>
4. The FMLA requires the employee to provide the employer with 30 days notice of the need for leave if the need for leave is foreseeable.<sup>74</sup>
5. If the need for leave is not foreseeable, the employee must give notice "as soon as practicable."<sup>75</sup>
6. If the employee fails to give 30 days notice without any reasonable justification for the delay, the employer is able to delay the leave until 30 days after it received notice.
7. If the employer wishes to delay leave the employee's leave due to lack of proper notice, "it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed."<sup>76</sup>
8. A friend, family member, service provider, or any other individual or "spokesperson" may make the request for the employee, if the employee is unable.<sup>77</sup>

## The Employer Response to the Leave Request/Notice of Rights

### ADA

Once an individual has requested a reasonable accommodation, the employer is obligated to engage in an interactive process with the employee in order to an appropriate and effective accommodation.<sup>78</sup> The employer may ask the individual relevant questions that will

enable it to make an informed decision about the request. If the need or effectiveness of an accommodation is not apparent, the employer in certain circumstance may make a limited medical inquiry for relevant medical information (discussed below in more detail). In addition to medical information, an employer may inquire regarding the type of reasonable accommodation requested.<sup>79</sup> The ADA does not require the employer to provide employees with notice about their rights. However, many employers have information about ADA rights and reasonable accommodation procedures in employee handbooks.

### FMLA

The FMLA requires that employers:

1. Prominently post a notice regarding employee rights under the FMLA;
2. Including an FMLA policy in the employer's handbook or policy manual (if one is available);
3. Provide written FMLA guidance concerning the employee's rights and obligations pursuant to the FMLA if there is no handbook or manual.
4. Provide employees with a standard form when an employee requests leave.<sup>80</sup>

The posted notice must include:

1. The specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations;
2. That the leave will be counted against the employee's annual FMLA leave entitlement;
3. Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;
4. The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
5. Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments and the possible consequences of failure to make such payments on a timely basis;

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6. Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;
7. The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
8. The employee's right to restoration to the same or an equivalent job upon return from leave; and
9. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.<sup>81</sup>

A copy of a notice may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.<sup>82</sup> Employers have 5 business days to provide notice to employees. If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.<sup>83</sup> However, if an employer fails to provide notice that leave already taken counts against FMLA leave, the employee may not be entitled to additional FMLA leave.<sup>84</sup> In these cases, a court will look at the harm suffered by the employee due to the lack of notice to determine the proper remedy.<sup>85</sup>

## A Case Illustrating ADA and FMLA Interplay on Employee Coverage and Notice

The case of *Burnett v. LFW Inc., d/b/a The Habitat Co.*, involves several ADA and FMLA issues.<sup>86</sup> The employee of a property management company, whose job required lifting, had no performance issues. In October 2003, Mr. Burnett first informed Habitat that he was having medical difficulties. Around the same time, he was offered a transfer to a different location, presumably due to conflicts with a co-worker. The employee declined the transfer as he would have reduced restroom access which would be bad due to his "weak

bladder." He also stated that he was going to see a doctor about his medical issues.<sup>87</sup>

In November, the employee received the first verbal warning regarding his work performance in his four years of employment.<sup>88</sup> In a December meeting, he provided the company more information on his medical condition. He said that he "felt sick" even though he didn't look sick. He also stated that he had a fear of prostrate problems as his brother-in-law had prostate cancer. He said that if he had progressive form of prostate cancer, he would feel suicidal. In January, he was told that he was a "loose cannon" and was reprimanded for causing disruptions. Two weeks later, Mr. Burnett told his employer that he was going for a biopsy. He was reprimanded for "substandard work" the same day.<sup>89</sup>

After the biopsy, Mr. Burnett requested light duty and one week of vacation leave (to get the biopsy results) and was denied. He was later told to see his supervisor about the leave request, but stated that he felt sick and needed to leave work. He then left work even though he was denied permission. A few days later, Mr. Burnett was terminated for insubordination. He was experiencing complications from the biopsy and gave the paperwork to the company but Habitat would not reconsider the termination. Soon thereafter, biopsy results indicated cancer. Mr. Burnett filed suit under ADA and FMLA. The court held that Mr. Burnett did give proper notice under the FMLA although it was a "close question." The court noted that no special language is needed to request leave but that saying "I'm sick" is not enough. However, in this case the other statements about prostrate trouble are also relevant. The court held that Mr. Burnett did have an FMLA "serious health condition" even before the cancer diagnosis and the Habitat may have committed FMLA interference and retaliation by terminating him. However, the court also found that there was no ADA disability at the time of termination so the ADA was not applicable.

## Medical Certification

### ADA



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Once an employee has requested a reasonable accommodation, the employer has the right to request reasonable medical documentation only if the disability is not obvious regarding the nature of disability and functional limits.<sup>90</sup> Under the ADA:

1. Reasonable medical documentation is defined as medical information that is related to the need to establish that the individual has a disability for which an accommodation is requested.<sup>91</sup>
2. A reasonable accommodation request from an employee does not give the employer the right to seek a general medical release.<sup>92</sup>
3. The request for documentation must be strictly limited to the accommodation request and an employer may not seek medical information unrelated to the accommodation request.
4. The employer may request that the documentation be provided by an appropriate healthcare or rehabilitation professional.<sup>93</sup>
5. If an individual's disability or need for an accommodation is not obvious to the employer, and the individual refuses to provide the requested reasonable documentation, then the individual is not entitled to a reasonable accommodation.<sup>94</sup>
6. The employer must keep all medical information in a confidential medical file that is separate from the employee's personnel file.
  - In *Cripe v. Mineta*, an employer carelessly left unconcealed on a desk a letter from the employee's attorney indicating the employee had HIV. As a result, other employees discovered the employee had HIV. The Court denied summary judgment for the defendant and found a question of material fact remained as to whether the employer appropriately maintained the confidentiality of the medical records.<sup>95</sup>
7. Staff of the employer should only have access to the information on a "need-to-know" basis.<sup>96</sup>

If the individual supplies insufficient information from a healthcare professional, the

employer can request that the individual visit a healthcare professional of the employer's choice for the purposes of documenting the disability and functional limitations related to the request for a reasonable accommodation. However, the employer should explain why the documentation is insufficient and allow the individual to supply the missing information in a timely manner.<sup>97</sup> Any employee medical examination conducted by the employer's health professional must be related to the job and consistent with business necessity. This means that the examination must be limited to determining the existence of a disability pursuant to the ADA and the functional limitations that require a reasonable accommodation.<sup>98</sup> The employer must pay all costs associated with the visit.

## FMLA

When an employee requests leave due to a serious health condition, the employer may request additional medical information including:

1. Medical certification from the health care provider of the employee (or their immediate family member if their condition gives rise to the need for leave), to support the need for such leave.<sup>99</sup>
  - In *Urban v. DolgenCorp of Texas, Inc.*, the 5<sup>th</sup> Circuit held that leave was properly denied because the employee's physician failed to submit the required certification.<sup>100</sup>
2. Periodic updates from the employee on the status of the leave and the intention to return to work.<sup>101</sup>
3. A second opinion if the employer legitimately questions the validity of the medical certification. The employer is entitled to select the health care provider at the employer's expense, but the selected health care provider may "not be employed on a regular basis by the employer."<sup>102</sup>

If an employer finds a medical certification to be incomplete, the employer must inform the employee in writing of the deficiency and the employee has 7 days to cure. The employer's representative may contact the employee's health care provider for purposes of clarification and

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authenticity of the medical certification.<sup>103</sup> The employer's representative must be a healthcare provider, human resource professional, a leave administrator, or a management official, but cannot be the employee's direct supervisor.

If a health care provider selected by the employer for a second opinion has a different opinion than the employee's health care provider, the employer may request a third opinion. The third opinion is at the employer's expense and the employee and employer must both approve the health care provider for the examination.<sup>104</sup> The opinion of the third healthcare provider shall be considered the final binding opinion.<sup>105</sup> In general, an employer may request re-certification at any reasonable interval, but not more often than every 30 days.<sup>106</sup> For long term conditions, the employer may request recertification every 6 months.<sup>107</sup> In *Killian v. Yorozu Automotive Tennessee*, the 6<sup>th</sup> circuit found that if an employee fails to provide medical certification within the time frame, the employer's remedy is only to delay leave, not terminate it.<sup>108</sup>

When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.<sup>109</sup> DOL has developed an optional form, (Form WH-380), for the employee to use when obtaining medical certification, including second and third opinions, from health care providers that meets FMLA certification requirements.<sup>110</sup> In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.<sup>111</sup>

## Periodic Leave – Leave Taken Intermittently or on a Reduced Leave Schedule

Periodic or intermittent leave is available to employees under both the ADA and the FMLA. Intermittent leave is time taken off from work in separate blocks of time. A reduced leave schedule is leave that reduces the number of hours that an employee works per week.<sup>112</sup>

### ADA

Under the ADA, leave may taken intermittently or on a reduced leave schedule absent "undue hardship."

### FMLA

1. "FMLA leave may be taken 'intermittently or on a reduced leave schedule' ... when medically necessary for "medical treatment of a related serious health condition, ... for recovery from treatment..."<sup>113</sup>
2. The employer may request that the employee provide "the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable."<sup>114</sup>
3. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.<sup>115</sup>
4. If the need for the intermittent leave is foreseeable, the employer may transfer the employee for the duration of the leave "to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position."<sup>116</sup>
  - a. The alternative position must have equivalent pay and benefits but does not need to have equivalent duties.
  - b. An employer may increase the pay and benefits of an "existing alternative position" to meet this requirement, but "may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee."<sup>117</sup>
  - c. When an employee who was transferred under these provisions is able to return to full-time employment, the employee must be placed in the same or equivalent job as the job he/

# The Interplay of the ADA and FMLA

- she left when the leave commenced.
- d. An employee may not be required to take more leave than necessary...<sup>118</sup>

## Job Reinstatement After Leave

While the ADA requires restoration to the same position, the FMLA requires employers to restore eligible employees after leave to their original position or to an equivalent position “that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.”<sup>119</sup>

If an employee is unable to perform an essential function of their job, the FMLA does not require that they be reinstated into another job but the ADA, if it applies, may require that the employer explore reasonable accommodations, including reassignment, before terminating the employee.<sup>120</sup> As mentioned above, when both laws apply, the employee is entitled to reinstatement under the law affording the broadest protection, in this case, the ADA.<sup>121</sup> Under the FMLA, however, an employer may disqualify an employee from any bonus or award that was not achieved based on the leave. FMLA leave and non-FMLA leave must be treated the same for bonus purposes.<sup>122</sup>

### ADA

1. The employer must keep the employee’s job open while the employee is on leave and return the employee to the same position unless the employer can show that doing so causes an undue hardship.<sup>123</sup>
2. If there is an undue hardship in returning the employee to the same position, a transfer to an equivalent position should be examined. If none is available a transfer to a lower position should be examined.<sup>124</sup>

### FMLA

The FMLA guarantees the right of the employee to return to the same position or to an equivalent one unless the employee is

designated as a “key employee.” The following factors are relevant to this determination:

1. A “key employee” is a “salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite.”<sup>126</sup>
2. In order to deny a key employee reinstatement, “an employer must determine that the restoration of the employee to employment will cause ‘substantial and grievous economic injury’ to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.”<sup>127</sup>
3. The “substantial and grievous economic injury” standard is “more stringent” than the “undue hardship” standard under the ADA.<sup>128</sup> In order to meet this standard, reinstatement must be more than a “minor inconvenience” and must threaten the “economic viability of the firm” or cause a “long-term economic injury.”<sup>129</sup>

If an employer wishes to designate an individual as a “key employee,” they must

1. Notify the employee of his/her status as a “key” employee in response to the employee’s notice of intent to take FMLA leave;
2. Notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
3. Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
4. Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.<sup>130</sup>

It is important to note that “key employees” are still entitled to FMLA leave even if they are not able to be reinstated to their positions.<sup>131</sup>

## Cases Illustrating Reinstatement Issues

In *Smith v. Diffie Ford-Lincoln Mercury, Inc.*, an employee was verbally reprimanded for

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not training staff as required.<sup>132</sup> However, training staff was not listed as a job duty. The employee then went on six-week leave due to breast cancer. Two weeks before she was to return from leave, the employee was terminated for failing to train staff. The court held that the employer violated ADA and FMLA by failing to provide leave and by terminating the employee. The court also upheld the DOL regulation that it is the employer's burden to show that an employee who is not reinstated would have been terminated anyway, even if they were not on leave.<sup>133</sup> This case demonstrates the importance for employers of being consistent in administering discipline.

On the other hand, in *Thorneberry v. McGehee Desha County Hospital*, the 8<sup>th</sup> Circuit found that failing to reinstate a nurse from FMLA leave was proper when the employee had performance issues and was disruptive while on leave. The employee had been experiencing mood swings, probably related to her depression and went on leave. While on leave, the employee continued to show up at work and disrupt the workplace. The court found that the employer would have discharged the employee if the employee was not on FMLA leave, and therefore the discharge while on FMLA leave was proper. The court stated that there is no absolute right to restoration.<sup>134</sup>

## Immunity and Suit for Damages

As a result of two United States Supreme Court decisions, state employees have different remedies available under the ADA and FMLA when bringing a suit against the state. This is due to the fact that states' are given immunity from some lawsuits under the Eleventh Amendment to the United States Constitution.

### ADA

The Supreme Court, in *Board of Trustees University of Alabama v. Garrett*, held that, the 11<sup>th</sup> Amendment bars suits for money damages in federal courts under Title I of the ADA by state employees against the state, but suits for injunctive relief (non-monetary relief) by state employees against state officials are permitted under Title I.<sup>135</sup>

The Supreme Court reasoned that there

was insufficient evidence of a history or pattern of irrational employment discrimination by state or local governments against people with disabilities to justify a waiver of the state's sovereign immunity. In response to *Garrett*, some states have passed legislation waiving sovereign immunity for ADA suits for money damages, allowing for suits in state court.

### FMLA

In contrast to *Garrett*, the Supreme Court came to a different conclusion regarding immunity under the FMLA in *Nevada Department of Human Resources v. Hibbs*, holding that money damages are available in federal court in suits by state employees against the state under the FMLA.<sup>136</sup> The Supreme Court, viewing the FMLA as offering gender-based protections, reasoned that unlike the ADA, there was sufficient evidence of a history and pattern of gender-based discrimination in the administration of leave benefits to justify removing the state's immunity. The Court did not mention the disability component of the FMLA in its decision.

## Extension of FMLA Leave Under the ADA

Once employees have used their 12 weeks of FMLA leave, they may be entitled to additional leave under the ADA.<sup>137</sup> In upholding extended leave as a reasonable accommodation, the 9<sup>th</sup> Circuit held in *Nunes v. Walmart*, that extended medical leave may be a reasonable accommodation if it does not pose an undue hardship and if it will permit the employee eventually to perform the essential functions of her position.<sup>138</sup> The amount of leave that is reasonable in a particular situation must be examined on a case-by-case basis utilizing an individualized assessment. In some circumstances, courts have found that one year of leave might not be an undue hardship where the company's own benefits policies allowed for one year of leave and regularly hired seasonal workers to fill vacancies.<sup>139</sup>

In the case of *Gibson v. Lafayette Manor, Inc.*, an employer claimed that an employee who was unable to return to work at the conclusion of their FMLA leave was unqualified to perform their job and therefore not entitled to additional leave under the ADA.<sup>140</sup> Pursuant to its policy, the

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employer terminated the employee at the end of her leave. The court found for the employee citing the well-established principle that terminating employees under blanket policies requiring termination at the conclusion of a specified period of leave may violate the ADA as the ADA requires reasonable modification of policies. The court stated that the employer should have engaged in the interactive process to determine the amount of leave that would be necessary for the employee to return to work.<sup>141</sup>

A request for an extension of leave under the ADA does not need to have a fixed return date under EEOC Guidance, but courts are reluctant to find requests for indefinite leave as reasonable.<sup>142</sup> Courts have held that requests for additional leave that only contain a vague estimate for a return date, or that contain no return date due to a prolonged illness, amount to an unreasonable request for indefinite leave.<sup>143</sup> There is also no need for indefinite leave if the employee cannot show the ability to resume the job or its equivalent.<sup>144</sup> However, there is no per se rule that an indefinite leave is unreasonable, and courts have found that an indefinite leave may be reasonable if the employer has a large, fungible work force with a high turnover rate.<sup>145</sup> At the very least, a request for extended leave triggers a responsibility for the employer to investigate the feasibility of the request.<sup>146</sup>

finding as to whether reasonable cause exists that an ADA violation took place. The employee then has 90 days from the receipt of the letter to file an ADA lawsuit.

## FMLA

The Department of Labor (DOL) is responsible for enforcing the FMLA.<sup>148</sup> If the employee decides to file a private lawsuit, it must be filed within two years after the last action that the employee contends the employer was in violation of the FMLA, or three years if the violation was willful.<sup>149</sup> Unlike the ADA, which requires employees to exhaust administrative remedies, the FMLA allows employees either to file with the DOL or go directly to court. If the individual decides to file a complaint with the DOL, the complaint must be in writing and filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.<sup>150</sup> The complaint must be filed in a reasonable amount of time but not more than two years after the alleged FMLA violation.<sup>151</sup> No particular form of complaint is required, except that it should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.<sup>152</sup> Filing with the DOL does not stop the time limit for filing an FMLA lawsuit.

## Enforcement

### ADA

The Equal Employment Opportunity Commission (EEOC) enforces the ADA.<sup>147</sup> Charges of Discrimination must generally be filed with the EEOC within 180 days of the alleged discrimination. A workshare agreement with a state agency may extend this time period to 300 days. Federal employees are covered under the Rehabilitation Act instead of the ADA. Federal employees must contact their EEO Officer within 45 days of any alleged wrongful conduct in order to preserve their claim. Claims filed beyond any of these time limitations may be barred.

The EEOC process generally involves: an attempt at mediation, an investigation, and a final attempt at conciliation. After the EEOC investigation, the employee receives a "Notice of Right to Sue Letter" where the EEOC makes a

## An ADA/FMLA Case Study

The following fictional case study may be helpful in applying the ADA and FMLA rules and guidelines discussed above.

### **Julia and Scarpas Printing and Copying Services**

For the last three years, Julia has worked for Scarpas Printing and Copying Services as a part-time sales associate working the mid-day shift. Scarpas has 14 stores in a 30-mile radius and a total of 46 full-time and 18 part-time employees.

Typically, Julia worked three days a week from 7:00 A.M.- 4:00 P.M., and was paid for 9 hours per day. During her first three years of employment, Julia was considered a very reliable

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employee and was rarely late or absent from work. She has not used any medical leave time. Julia uses a scooter as a result of having Multiple Sclerosis, affecting her ability to walk. As her worksite is accessible, the only accommodation that she needed was to have a reserved, accessible parking space near the entrance she uses.

Last January, Julia started to arrive late for work at least once a week. She would tell her supervisor, Ben, that she was not feeling well and that she would not be late again. After six of these incidents, Ben scheduled a meeting with Julia to discuss the issue. At that meeting, Ben informed Julia that her lateness was unacceptable because the day shift employees could not leave to take their breaks until Julia arrived for her afternoon shift. Ben informed Julia that she would be written up for being late and would continue to be disciplined for each time that she was late pursuant to company policy. After two more times being late without excuse, she would be terminated.

Immediately after hearing this, Julia told Ben that her lateness was a result of problems she has had due to medication that she takes for depression. The medication makes it difficult for her to fall asleep and to wake up. Her sleep problem have gotten worse since Julia's mother died a couple of months ago. Julia did not state the name(s) of the medication but indicated that her doctor thought that she would need to take six weeks off from work for intensive therapy and to adjust her medication.

## Discussion Questions

1. **Is Julia requesting an accommodation under the ADA?** Yes. There are no formal requirements for the language used for an accommodation request as long as the plain meaning of the request reasonably alerts the employer to the need for leave.
2. **Is Julia requesting leave under the FMLA?** Yes. This statement is sufficient regarding the need for FMLA leave.
3. **Should Scarpia's respond to Julia's disclosure and her need for time off from work? If so, how?** Yes. Under the ADA, Scarpia's must engage in the "interactive

process" to determine whether leave or another accommodation is reasonable or effective. Under the FMLA, Scarpia's is entitled to medical certification but Julia is entitled to the leave as long as she is an "eligible employee." Under both laws, the employer may seek limited medical information regarding the need for leave.

4. **Do the ADA and/or the FMLA cover Julia's depression? What are the relevant considerations for each law?** The ADA covers mental impairments that substantially limit one or more major life activities. Sleeping is a major life activity and the amount of sleep that Julia gets per night would be relevant to that determination. Julia's depression meets the FMLA's definition of a "serious health conditions" due to the need for "continued treatment." A mitigating measure, such as medication, can itself be the basis for a claim of "substantial limitation" of a major life activity.
5. **Is the company covered by the FMLA? What about the ADA? Why or why not? Is there additional information that is necessary?** The company is covered by the ADA and would likely be covered by the FMLA due to the number of employees. Part-time employees can be used when counting the number of employees as long as there are there are fifty (50) employees for twenty (20) or more (nonconsecutive) work-weeks in the current or preceding year.
6. **Is the company entitled to more information about Julia's condition and treatment? Should it ask for more information? If so, what information should be sought? Can the company send Julia to another doctor, perhaps a company doctor, for a second opinion?** The company is entitled to medical information only regarding Julia's depression as this is the disability giving rise to the leave request. It may request limited information regarding Julia's depression and the need for leave. Under the ADA, the employer may send the employee to a healthcare professional of the employer's choice for the purposes of documenting the disability and functional limitations related to the request for a reasonable accommodation if the employee provides insufficient medical information. However, the employer should explain why the documentation is insufficient and allow the

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- individual to supply the missing information in a timely manner. Under the FMLA, the employer may request an additional medical opinion, but the selected health care provider must not be employed on a regular basis by the employer. The Department of Labor has created a sample form for seeking medical certification pursuant to a leave request under the FMLA.
7. **If medical documents are obtained, who should have access to the medical information? Should the records be kept in Julia's personnel file?** Only staff of the employer who need to know the medical information should have access to it. The ADA requires that medical information be kept in a separate medical file, not the employee's personnel file.
  8. **The company is concerned that her depression may exacerbate her Multiple Sclerosis (MS). Can the company request information about Julia's MS?** No. The company may only request information regarding the disability giving rise to the request for leave.
  9. **Must the company grant Julia the leave?** Under the ADA, the company must grant the leave if there is no undue hardship. The company may require that Julia accept a reasonable accommodation other than leave if it would be effective. Under the FMLA, the company must grant Julia the leave.
  10. **If Julia is eligible for leave under the FMLA and ADA, how should the initial leave period be characterized? Why?** The initial leave should be characterized as FMLA leave as that is the law offering the broadest protection to the employee.
  11. **Must the Company rescind the discipline that was mentioned at the meeting prior to Julia mentioning her depression?** The company does not need to rescind discipline for a workplace rules violation because the employee had not given notice to the employer of her depression nor has she given notice of her need for an accommodation.
  12. **May the company monitor her treatment? How?** Under the ADA, an employer may request reasonable medical updates. Under the FMLA, an employer may request re-certification at any reasonable interval, but not more often than every 30 days.
  13. **If there were only 45 full and part-time employees of Scarpas so it was not covered by the FMLA, would the company have to grant leave to Julia under the ADA? Are options other than leave available to the company?** If Julia is a qualified employee with a disability and the leave would not be an undue hardship on the employer, she would be entitled to the leave. However, the company may require that Julia accept a reasonable accommodation other than leave if it will be effective. The company is required to engage in the "interactive process."
  14. **Should Julia's job be held open during this time?** Under the ADA, the job must be kept open and Julia restored to the same position unless there is an undue hardship. If such a hardship exists, then reassignment to a vacant position must be examined. Under the FMLA, Julia must be returned to an equivalent position unless she was designated as a "key employee."
  15. **Must Julia's benefits be maintained while she is on leave?** The ADA requires that Julia's benefits be maintained if they are maintained for other employees in a similar leave situation. The FMLA requires that benefits be maintained in the same manner as if Julia were still working.
  16. **Assume that Julia qualified for, and was granted the 6 weeks of FMLA leave that she requested. At the end of the 6 weeks of leave, Julia tells Ben she needs 6 more weeks and gives him a Doctor's note to that effect. Must Ben give Julia another 6 weeks of FMLA leave?** As Julia is eligible for FMLA leave, she should be granted the additional 6 weeks. If the FMLA did not apply, the ADA requires that the leave be granted if reasonable.
  17. **Can the company have another doctor examine Julia? If so, can it be a doctor of its choosing?** If Julia's doctor does not provide sufficient information to justify the leave, the FMLA allows the employer to have Julia examined by a doctor of its own choosing, at the employer's expense if the doctor is not regularly employed by the employer. The ADA allows the employer to pay to send the employee to any doctor it chooses.
  18. **Assume that Julia received the extra leave time. She is unable to return to work at the**

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end of 12 weeks of FMLA leave and her doctor says that she needs another 4 weeks of leave. Must the company grant the extra leave? Which law(s) would be applicable? What factors must be considered in evaluating the leave request?

The leave time under the FMLA has expired, but Julia may receive additional leave under the ADA as long as it would not be an undue hardship and that Julia would be a qualified employee able to perform the essential job functions at the conclusion of the leave unless the employer can demonstrate an undue hardship.

19. **Assume that the company grants the extra 4 weeks of leave under the ADA. At the end of this period, Julia's doctor says that she needs leave for an indefinite length of time. Must the company grant any additional leave? If so, how much? What factors are relevant?** Although requests for indefinite leave are sometimes frowned upon by the courts, EEOC Guidance is clear that such a request must be viewed as a reasonable accommodation request under the ADA. The company is therefore required to engage in an "interactive process" and grant a reasonable period of leave.
20. **Assume that Julia received all the leave that she requested and is now able to return to work. Is the company entitled to receive a fitness for work evaluation under the ADA? What about the FMLA? Can the company insist that Julia be 100% healed in order to return to work? Must she be returned to her original position under the ADA and/or the FMLA?** Under the ADA, a fitness for work evaluation is permissible if done for all employees returning to that position from leave or if there is a reasonable basis for the employer to believe that Julia may be unable to perform the essential job functions. A fitness for work evaluation is also permissible under the FMLA. The company cannot insist that Julia be 100% healed because that would ignore the ADA's reasonable accommodation requirements. The ADA requires that Julia be returned to the same position absent undue hardship. If undue hardship exists, then a transfer to another position must be examined. The FMLA requires that Julia be returned to an equivalent position.
21. **Assume that Julia has been back at work for 1½ years after her original period of leave. She now produces a doctor's note stating that she needs to leave early 2 hours two days per week for her therapy. What are the company's options? Are there any situations where Julia can be transferred to another position?** Under the FMLA, Julia should be eligible for intermittent or reduced schedule leave up to an aggregate of 12 weeks. The company may assign Julia to another position that better accommodates the leave for the duration of the leave. Under the ADA, the company must grant the leave if it is reasonable or offer an alternative effective accommodation.
22. **If Julia uses up her 12 weeks of FMLA leave and still needs to leave early 2 hours two days per week for her therapy, what are the company's obligations and options?** If Julia is no longer eligible for FMLA leave, she may be entitled to leave under the ADA. The ADA requires that the company grant the leave if it is reasonable or offer an alternative effective accommodation.



# The Interplay of the ADA and FMLA

## Notes:

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1. Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.* (1990). [hereinafter ADA].
2. 42 U.S.C. § 12101(a)(8).
3. Family Medical Leave Act, 29 U.S.C. § 2601 *et. seq.* (1993). [hereinafter FMLA].
4. See EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964. (7/6/2000).
5. 42 U.S.C. § 12102 (2); 28 C.F.R. § 36.104 (1994).
6. The *Sutton* trilogy of cases consists of: *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999). *Toyota Motor manufacturing. v. Williams*, 534 U.S. 184 (2002).
7. For more information on the ADA Amendments Act, please see the DBTAC: Great Lakes ADA Center Brief No. 6, October 2008, on the ADA AAA.
8. 42 U.S.C. § 12111.
9. See, e.g., *Toyota Motor Manufacturing. v. Williams*, 534 U.S. 184, 199 (2002).
10. 42 U.S.C. § 12116.
11. 29 U.S.C. § 2601 *et. seq.* (1993)
12. 29 U.S.C. § 2601 (b)(2); see also 29 C.F.R. § 825.112 (a).
13. 29 U.S.C. § 2617 (b); see also 29 C.F.R. § 825.200 (discussing how to determine the 12 week and month time periods).
14. 29 C.F.R. § 825.100(a).
15. 29 C.F.R. § 825.702; See also EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964. (7/6/2000).
16. 29 C.F.R. § 825.702 (*citing Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)).
17. See EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964 (7/6/2000); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02); 29 C.F.R. § 1630.2 *et seq.*
18. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Question 21.
19. EEOC Advisory letter from Joyce Walker-Jones, *AD/Disparate treatment/reasonable accommodation* (January 24, 2004).
20. *Id.*
21. *Id.* See also 29 CFR § 825.11.
22. 29 U.S.C. § 2612 (b)(1); see also 29 CFR §§ 825.203, 825.204(a),(c).
23. 29 U.S.C. § 2612 (d)(1); see also 29 CFR § 825.207.
24. 29 CFR § 825.209.
25. *Id.*
26. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02); 29 C.F.R. §§ 825.214(a), 825.215 (1997).
27. *Id.* See also 29 CFR § 825.114.
28. 29 C.F.R. 825.127.
29. 29 C.F.R. 825.126.
30. See 29 U.S.C. § 2612 (a)(1).

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## Notes:

31. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Question 20.
32. 20 U.S.C. § 12111(5) (A). *See* 28 C.F.R. 35.140 (Title II of the ADA covers all public employers without regard to the number of employees, and Title I of the ADA applies by the principle of incorporation).
33. 20 U.S.C. § 12111(5) (A).
34. *Clackamas Gastroenterology Associates v. Deborah Wells*, 538 U.S. 440, 2003.
35. *Id.* at 448-449.
36. EEOC Compliance Manual § 605:0009 (2000).
37. 29 U.S.C. § 2611 (4)(A)(i); *see also* 29 C.F.R. § 825.104(a); *see also* 29 C.F.R. 825.105 (discussing how to determine if an employer is covered by the FMLA).
38. 29 U.S.C. § 2611(4)(A)(iii) (stating that the definition of public agency is as defined in § 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(x)). Section 3(x) of the FLSA defines “public agency” as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency). An employee may sue the State for money damages under the FMLA. *Nevada. Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). The 11th Amendment does not bar such suits because the FMLA’s purpose is to rectify past gender discrimination. *Id.*
39. *See* 29 U.S.C. § 2618; 29 C.F.R. § 825.104; *see also* 29 C.F.R. § 825.600-825.604.
40. *See* 42 U.S.C. § 12102(2).
41. 42 U.S.C. § 12102(2)(A).
42. 42 U.S.C. § 12111(8).
43. *See* 29 C.F.R. 1630.2(n); *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02);
44. *See, e.g., Bryant v. Caritas Norwood Hosp.*, 345 F. Supp. 2d 155 (D. Mass. 2004).
45. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Question 22.
46. *Id.* at Question 16; *Cehrs v. Northeast Ohio Alzheimer's Association*, 155 F.3d 775 (6th Cir. 1998); *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001).
47. *Cleveland v. Federal Express Corp.*, 2003 U.S. App. LEXIS 24786 (6th Cir. 2003).
48. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Question 18.
49. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Questions 17 and 24. *See also, U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398-99 (2002).
50. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Question 17.
51. *Id.* at Question 19.
52. *Id.* at Question 20.
53. 29 C.F.R. § 825.702(d)(1) (1997).
54. *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02).
55. *Id.*
56. 29 U.S.C. § 2611(2); *see also* 29 C.F.R § 825.110.
57. 29 C.F.R. § 825.110(b).
58. 29 U.S.C. § 2611(2)(B)(2); *see also* 29 C.F.R § 825.110.
59. *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 738-40 (5<sup>th</sup> Cir. 2005).
60. 29 U.S.C. § 2612(a); *see also* 29 C.F.R § 825.112.
61. 29 U.S.C. § 2611(11); *see also* 29 C.F.R. § 125 (discussing who is qualified to meet the definition of health care provider). Treatment for substance abuse may be considered a serious health condition, if the employee is seeking continuing treatment (See 29 C.F.R. § 825.114(d)).

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## Notes:

62. *Russell v. North Broward*,
63. 29 C.F. R. § 825.115.
64. 29 C.F. R. § 825.114 (2).
65. *Verhoff v. Time Warner Cable, Inc.*, 2008 WL 4691794 (6<sup>th</sup> Cir. 2008)(unpublished).
66. *Id.* at \*6-7.
67. *Santacrose v. CSX Transportation, Inc.*, 2008 WL 2973889 (11<sup>th</sup> Cir. 2008)(unpublished).
68. *Id.* at \*1.
69. See EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities* No. 915.002 (10/22/02) available at <http://eeoc.gov/policy/docs/accommodation.html> (last visited September 29, 2005) (citing 29 C.F.R. § 1630.9); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989)[hereinafter Senate Report].
70. *Id.*
71. See EEOC Guidance, *supra* note 51 (citing *Cf. Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996)); *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994). *But see Miller v. Nat'l Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").
72. 29 CFR 825.302 ©
73. *Aubuchon v. Knauf Fiberglass*, 359 F.3d 950 (7th Cir. 2004).
74. 29 U.S.C. § 2612(e)(1); 29 U.S.C. § 2612(e)(2)(B); see also 29 C.F.R. § 825.302(a).
75. 29 C.F.R. § 825.302(b).
76. 29 C.F.R. § 825.304.
77. 29 C.F.R. 825.303 (b).
78. See EEOC Guidance, *supra* note 51 (citing 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9) (the appendix to the regulations at § 1630.9 provides a detailed discussion of the reasonable accommodation process); see also *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Dalton v. Subaru-Isuzu*, 141 F.3d 667, 677 (7th Cir. 1998).
79. See EEOC Guidance, *supra* note 51 (citing the burden-shifting framework outlined by the Supreme Court in *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation).
80. See 29 U.S.C. § 2619 (a); 29 C.F.R. §825.301 (a).
81. 29 C.F.R. § 825.301(b).
82. 29 C.F.R. § 825.301(a)(2).
83. 29 C.F.R. § 825.301(f).
84. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81(2002) (invalidating a DOL regulation which provided that the clock did not run if an employer did not notify an employee that his leave was counting against his 12-week FMLA allotment).
85. *Id.* at 88-89.
86. *Burnett v. LFW Inc., d/b/a The Habitat Co.*, 472 F.3d 471 (7th Cir. 2006).
87. *Id.* at 474-475.
88. *Id.* at 477.
89. *Id.* at 478-484.
90. See EEOC Guidance, *supra* note 51 (citing 29 C.F.R. § 1630.9); see also EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities] [Although the latter Enforcement

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## Notes:

- Guidance focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.]
91. See EEOC Guidance, *supra* note 51, Question 6.
  92. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 2000).
  93. *Id.*
  94. *Id.* citing *Templeton v. Neodata Servs., Inc.*, No. 98-1106, 1998 WL 852516 (10th Cir. 1998); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996); *McAlpin v. National Semiconductor Corp.*, 921 F. Supp. 1518, 1525 (N.D. Tex. 1996).
  95. *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. 2006).
  96. EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.
  97. See EEOC Guidance, *supra* note 51, Question 7.
  98. *Id.*
  99. 29 U.S.C. § 2613(a).
  100. *Urban v. DolgenCorp of Texas, Inc.*, 393 F.3d 572 (5<sup>th</sup> Cir. 2004).
  101. 29 U.S.C. § 2614 (a)(5); see also 29 C.F.R. § 825.309.
  102. 29 U.S.C. § 2613(c).
  103. 29 C.F.R. § 825.307(a).
  104. 29 U.S.C. § 2613(d)(1).
  105. 29 U.S.C. § 2613(d)(2).
  106. 29 U.S.C. § 2613(e).
  107. 29 C.F.R. § 825.305(e).
  108. *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549, 555 (6<sup>th</sup> Cir. 2006).
  109. 29 C.F.R. § 825.305(b).
  110. 29 C.F.R. § 825.306(a).
  111. 29 C.F.R. § 825.306(b).
  112. EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, (7/6/2000).
  113. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); See also 29 CFR § 825.203, 825.204(a),(c).
  114. 29 C.F.R. § 825.302(f).
  115. *Id.*
  116. 29 CFR § 825.204(a).
  117. 29 CFR § 825.204(c),(d).
  118. 29 CFR § 825.204(e).
  119. 29 CFR § 825.215(a).
  120. 29 CFR § 825.214(a).
  121. See EEOC Fact Sheet: *The Family and Medical Leave Act, the ADA, and Title VII*, (7/6/2000).
  122. 29 C.F.R. § 825.215(c)(2).
  123. See EEOC Guidance, *supra* note 51, Question 18 (citing *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 996-97 (D. Or. 1994); *Corbett v. National Products Co.*, 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).
  124. See EEOC Guidance, *supra* note 51, Question 18; EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, (7/6/2000).
  125. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02); 29 C.F.R. §§ 825.214(a), 825.215 (1997).
  126. 29 CFR § 825.217(a).
  127. 29 CFR § 825.218(a).
  128. 29 CFR § 825.218(d).
  129. 29 CFR § 825.218(c).
  130. 29 CFR § 825.219(a).

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## Notes:

131. 29 CFR § 825.218(d).
132. *Smith v. Diffie Ford-Lincoln Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).
133. *Id.* at 966-968.
134. *Throneberry v. McGehee Desha County Hospital*, 403 F.3d 972 (8<sup>th</sup> Cir. 2005).
135. 531 U.S. 356 (2001).
136. 538 U.S. 721 (2003).
137. See 29 C.F.R. § 1630.2(p); EEOC Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (7/6/2000). See also *Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998); *Wells v. District Lodge 751*, 5 Fed. Appx. 605 (9th Cir. 2001).
138. *Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1247 (9th Cir. 1999). See, e.g., *Cehrs*, *supra* note 151 (additional leave is reasonable if employer cannot show undue hardship); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (extended leave may be appropriate when employee shows leave will be temporary).
139. See *Nunes*, *supra* note 151.
140. *Gibson v. Lafayette Manor, Inc.*, 2007 WL 951473 (W.D. Pa.) (unpublished).
141. *Id.* at \*7-9.
142. See EEOC Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (7/6/2000). See, e.g., *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000) (a request for leave that may extend three years is not reasonable); *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998) (a request for indefinite leave need not be accommodated).
143. *Walsh*, *supra* note 151 (a period of one to three years is vague and not reasonable); *Nowak*, *supra* note 151 (indefinite leave for a prolonged illness is not reasonable).
144. *Watkins v. J&S Oil Co. Inc.*, 164 F.3d 55 (1st Cir. 1998).
145. *Norris v. Allied Sysco Food Services*, 948 F. Supp. 1418 (N.D. Cal. 1996).
146. *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000).
147. See 42 U.S.C. § 12117; 42 U.S.C. § 12111(1).
148. 29 U.S.C. § 2617 (b); 29 U.S.C. § (10).
149. 29 C.F.R. § 825.400(b).
150. 29 C.F.R. § 825.401.
151. *Id.*
152. *Id.*