Tuesday, October 26
9:00am-10:30am

506 - No Really, Attendance is a Requirement of the Job: Case Studies in Leave and Accommodation Issues

Karla Elliott
General Counsel
Eagle Adjusting Services, Inc.

Carolyn Ladd
Counsel
The Boeing Company

Brenda Pence
Senior Counsel
Siemens Corporation

Session 506

Faculty Biographies

Karla Elliott

Karla J. Elliott is the general counsel for Eagle Adjusting Services, Inc., an independent insurance adjusting firm, in Noblesville, Indiana. As the company's sole legal officer, Ms. Elliott is responsible for all of the company's legal affairs, including contract negotiation and management, employee relations, intellectual property, commercial disputes, and corporate governance.

Prior to joining Eagle, Ms. Elliott served as the first general counsel for Product Action International, an automotive and manufacturing quality control company in Indianapolis, IN. Ms. Elliott began her legal career as an employment litigator with the Washington, DC office of Jackson Lewis, LLP, and later worked in the labor and employment practice groups at the Indianapolis firms Bingham McHale, LLP and Barnes & Thornburg, LLP. While in private practice and as an in-house counsel, Ms. Elliott has represented clients in federal court trials involving a variety of employment laws, including the Title VII, the Americans with Disabilities Act and the Family and Medical Leave Act.

Ms. Elliott holds a JD from John Marshall Law School in Chicago where she graduated cum laude and was a member of the Law Review. She has an undergraduate degree from Purdue University.

Carolyn Ladd

Carolyn Ladd is in-house counsel in the labor, employment and benefits group at Boeing in Seattle, Washington. Her practice focuses on compliance with the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and state equal employment opportunity laws. She provides day-to-day advice to human resource professionals, manages employment related litigation, and conducts training.

Prior to joining Boeing, Ms. Ladd was in private practice with Jackson Lewis, a nationwide law firm representing management in labor and employment law matters.

She was elected to the executive committee of the Washington State Bar Association Labor & Employment Law Section.

Ms. Ladd received a BA from the University of Washington. She received a JD from the University of Oregon School of Law. She also has a Master of Laws (Labor Law) from the Georgetown University Law Center where she wrote her thesis on the reasonable accommodation requirement of the Americans with Disabilities Act.

Brenda Pence

Brenda Pence is a senior counsel with Siemens Energy, Inc. in Orlando, Florida. Ms. Pence's responsibilities include providing day-to-day counsel to human resources and managers regarding a variety of labor and employment issues, representation in administrative proceedings and supervision of litigation.

Ms. Pence has years of experience as a labor and employment law attorney. Prior to joining Siemens Energy, Ms. Pence was a senior counsel employed at the United States Senate, where she provided representation, advice and management training in labor and employment matters for the employing offices of the Senate. Before that, Ms. Pence worked for both national and regional law firms in California where she represented both private and public employers in labor and employment matters.

Ms. Pence received her BA from the University of Arizona and her JD from Northwestern University School of Law.

Reasonable Accommodation Obligations Under the ADA

When The Employee Is Unable to Attend Work

It is often said that attendance is an essential function of any job. For most employers, that means the employee must report to work on time at his or her assigned workplace. What are the employer's obligations when the employee is able to report to work, but cannot do so at the assigned time? What about if the employee cannot report at the assigned place? What about if the employee cannot work at all? The answers to these questions often depend on the particular facts of the case, but general guidance on these issues is offered below. This article is intended for those who already possess a basic understanding of the accommodation requirements of the Americans with Disabilities Act ("ADA"), as amended.

1. Employees Who Cannot Work Assigned Hours.

1.1 Modified Schedules.

1.1.1 Whether Punctuality is an Essential Job Function.

Certainly, there are those jobs where an assigned schedule is an essential function and need not be modified. The inquiry into whether a job requirement is essential to one's job "is a factual determination that must be made on a case by case basis [based upon] all relevant evidence." 29 C.F.R. pt. 1630, app. § 1630.2(n). In its "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 22, the EEOC acknowledged that "for certain positions, the time during which an essential function is performed may be critical." The EEOC stated that employers should therefore "carefully assess whether modifying the hours could significantly disrupt their operations -- that is cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs." Guidance at p. 33. The EEOC provides an example that it might be essential that a newspaper printing press operator work during the specific hours when the newspapers are printed. Guidance at p. 34.

Other examples of when specific work hours were found to be an essential function of the job are:

- A green house technician's ability to adhere to a rigid scheduling of tasks (such as spraying plants and ventilating the greenhouse) was essential since the plants would not grow properly unless the tasks were done in a timely manner. *Palotai v. Univ. of Md.*, 38 Fed. Appx. 946 (4th Cir. 2002).

- Military schedules. *Webb v. Donley*, 347 Fed. Appx. 443 (11th Cir. Sep. 14, 2009)(Air Force employee); *Nadler v. Harvey*, 2007 WL 2404705 (11th Cir. Aug. 24, 2007)(Army civilian operation research analyst).

- Store area coordinator needed to prepare store prior to opening for customers. *Earl v. Mervyns, Inc.*, 207 F.3d 1361 (11th Cir.2000) (per curiam).

- An employee's personal opinion as to whether punctuality was an essential function was not enough to override her employer's stated requirements and the provisions of a collective bargaining agreement. *Martinez v. Pacificorp*, 2000 WL 504857, at *2 (10th Cir. Apr. 28, 2000).

- Flexible shift for staff nurse at 24-maternity ward was necessary to meet scheduling demands and provide coverage for generally undesirable night shift. *Laurin v. Providence Hosp.*, 150 F.3d 52 (1st Cir. 1988).

- Business college instructor required to teach the assigned courses on campus during the scheduled class times and spend time with her students. *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213-14 (4th Cir. 1994).

- Shortage of computer equipment for computer aided designer (CAD) and the need to occasionally consult with and supervise the employee as he performed his work weighed in favor of finding punctuality was an essential job function. *Fritz v. Mascotech Auto. Sys. Group, Inc.*, 914 F.Supp. 1481 (E.D.Mich.1996).

Where performing work at a specific time is not an essential function, an employer may need to modify an employee's work schedule if this is needed as a reasonable accommodation. And it would not cause an undue hardship. 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2)(ii). The key is whether the disability is really the cause for the schedule modification. A modified work schedule can include such changes as altering arrival/departure times, providing periodic breaks during the day, or changing when certain functions are done.

Examples of when modification of work hours was found to be appropriate as an accommodation are:

- Allowing a customer service employee an additional 15 minutes to return from lunch break would have been a reasonable accommodation where the employee was unable to comply with the rigid 30-minute breaks due to his mobility impairment and the lack of accessible parking. *EEOC v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790 (8th Cir. 2007).

- Allowing a manager to start one hour later than the scheduled work time, rejecting employer's argument that "setting a good example" by punctuality was necessary for the manager's position. *Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318 (3d Cir. 2003).

1.1.2. Open-Ended Schedules.

The EEOC generally has stated that employers "need not grant open-ended schedules (*e.g.*, the ability to arrive or leave whenever the employee's disability necessitates)." EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with

Disabilities" (2008) at Question 20. However, in this Fact Sheet, the EEOC also noted that if someone needed unpredictable leave (for example, because of seizures) only once every few months, that could be a reasonable accommodation. A review of the cases that have addressed this issue focus on the specific facts of whether the open-ended schedules created an undue hardship. *See Ward v. Mass. Health Research Inst., Inc.*, 209 F.3d 29, 36 n. 6 (1st Cir. 2000).

Examples:

- Data entry assistant/lab assistant could work flexible 7-1/2 hour shift because only requirement was that work be completed before the lab opened the following day. *Id*.

- A flexible start time was an undue hardship for a Coding Clerk for U.S. Attorney's Office due to 4:00 deadline that must be met, clerk's inability to inform Office in advance when she could not attend and need to have others perform her job in her absence. *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994).

- Safety considerations precluded refinery machinist from working after regular hours by himself. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989).

- Employee who suffered from rhinosinusitis and experienced wheezing and other problems when he was exposed to perfumes, nail polish and other irritants was not entitled to leave the workplace whenever he thought he would be exposed to an irritant. *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098 (8th Cir. 1999)

1.1.3. Part-Time Work.

Reducing hours to a part-time schedule may be a reasonable accommodation. 42 U.S.C. § 12111(9)(B). Again, the initial issue to be addressed is whether the number of hours worked is an essential function of the position. For example, the EEOC has written that "a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement." EEOC's Fact Sheet "Reasonable Accommodations for Attorneys with Disabilities," (7/27/06).

Many courts, however, have suggested that creating a part-time position is not necessarily required as an accommodation. Examples:

- Full-time work was an essential function of a full-time directory assistance position. Therefore, "part-time work is not a reasonable accommodation for a full-time job." *Lileikis v. SBC Ameritech, Inc.*, 84 Fed. Appx. 645 (7th Cir. 2003).

- Customer support employees of photo equipment leasing company who were all hired on a full-time basis and who consistently worked full time performing their duties (which included visiting retail stores within their territories, providing

training and sales support, and immediately responding to field emergencies), could not perform job on a part-time basis. Court noted that when "an employer has no part-time jobs available, a request for part-time employment is not a reasonable one." *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49 (4th Cir. 2002).

- Employer not required to create new part-time position as an accommodation where no part-time job previously existed. *Treanor v. MCI Telecom. Corp.,* 200 F.3d 570 (8th Cir. 2000). See also, *Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998)(same).

- Employee's job required her to enter data into a computer for six to nine hours per day. A part-time schedule was not reasonable because the employer would have to reassign portions of her job to other employees. *Soto-Ocasio v. Fed. Express Corp.,* 150 F.3d 14 (1st Cir. 1998).

- Director of Human Resources position required working more than 40 hours per week; employer was not required to reduce hours. *Tardie v. Rehab. Hosp. of R.I.*, 168 F.3d 538 (1st Cir. 1999).

Examples of when part-time work was a reasonable accommodation:

- *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166 (1st Cir. 1998), is consistent with the EEOC's view that part-time work might be appropriate as a reasonable accommodation. Similarly, in both *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000) and *Parnahay v. United Parcel Service, Inc.*, 20 Fed.Appx. 53 (2d Cir. 2001), the courts stated that part-time work might be an accommodation for a full-time employee, as long as the employee "can demonstrate that he could perform the essential functions of his job while working part-time."

- In *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000), the court noted that allowing an employee to work part-time for a temporary period can be an accommodation. In this case, the plaintiff, a used car manager with muscular dystrophy, wanted to return to work initially on a part-time basis. The court noted that "[e]mployees who have experienced serious medical problems often return to work part-time and increase their hours until they are working full time." Since another employee was available to fill in for the hours the plaintiff could not initially work, "gradual return to full-time work would have been a reasonable accommodation" under the ADA.

1.2 Shift Changes as a Reasonable Accommodation.

There is a great deal of controversy over whether an employer has to offer an employee a shift change as a reasonable accommodation. On the one hand, a shift change can be viewed as a schedule modification which must be done unless it causes an undue hardship. The EEOC has been inconsistent on this issue. On the one hand, it sued Union Carbide Chemicals and Plastics Co., Civ. Act. No. 94-103 (E.D. La., Settled:3/96) because it failed to transfer an employee from a rotating shift to a straight shift when the

employee could not perform the rotating shift because of his disability (bi-polar disorder). The EEOC took the position that the "shift" itself was not an essential function of the lab position.

Specifically, the EEOC stated that the "function" of the lab position was to analyze samples, not "to run on a certain schedule." EEOC's Memorandum in Support of Motion for Partial Summary Judgment, at p. 21. Therefore, the shift had to be modified as a reasonable accommodation. On the other hand, it can certainly be argued that, for many jobs, the shift -- or the time that the functions are performed -- is an integral part of the particular job. For example, a midnight security guard simply cannot guard the building during the nighttime if s/he is not at his/her station during the nighttime hours. Therefore, the employer should not be forced to modify the shift as a reasonable accommodation.

In fact, as noted above, in its “EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002" (10/17/02) at Question 22, the EEOC acknowledged that “for certain positions, the time during which an essential function is performed may be critical.” The EEOC stated that employers should therefore “carefully assess whether modifying the hours could significantly disrupt their operations -- that is cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.” Guidance at p. 33 (emphasis in original). Supporting this view, in *Turco v. Hoechst Celanese Chemical Corp.*, 101 F.3d 1090 (5th Cir. 1996), the court held that there was no duty to create a "straight day-shift chemical operator position" for an employee with diabetes who could not work his rotating shift.

Despite the EEOC's position in Union Carbide, the EEOC's Technical Assistance Manual on Title I of the ADA seems to support the view that a shift change may not be required as a reasonable accommodation. In explaining "essential functions," the Manual states that if a company has a "floating" supervisor -- who substitutes for regular supervisors on various shifts -- then "the ability to work at any time of day is an essential function of the job." This is because "[t]he only reason this position exists is to have someone who can work on any of the . . . shifts in place of an absent supervisor." Technical Assistance Manual, Section 2.3(a). This example therefore suggests that the time a function is performed can itself be essential (based on the particular job) and would not have to be changed as a reasonable accommodation.

Even though an employer arguably does not need to modify the shift for certain workers, it might still be required to reassign the individual to another shift if there was a vacant position on the other shift.

2. Employees Who Cannot Report to Assigned Location.

Employees sometimes request that they be assigned to work at a different location or to work at home due to difficulties in commuting to work.

2.1 Reassignment.

The EEOC lists “reassignment to a vacant position” as a reasonable accommodation, 42 U.S.C. § 12111(9)(B); however, employers are not required to create new jobs or reassign disabled employees if no positions are vacant.

Despite the requirement of reassigning to vacant positions, some courts have found that getting to work is not a workplace-created barrier and, therefore, there is no duty to accommodate. See *Parker v. Verizon Penn., Inc.*, 309 Fed. Appx. 551 (3d Cir. 2009)(unpublished)("commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate," and the employer’s “failure to accommodate” the plaintiff by limiting his commute “was not required”); *Wade v. Gen. Motors Corp.*, 1998 WL 639162 (6th Cir. Sep. 10, 1998) (employee with vision impairment should find another means of transportation to and from work; the employer is not responsible for getting an employee to work).

Others courts have rejected this argument in the context of requiring modified work schedules due to transportation difficulties. *See Colwell v. Rite-Aid Corp.*, 602 F.3d 495, 504 (3d Cir. 2010)(finding employer should have considered reassignment to day shift due to employee’s inability to drive safely at night); *Livingston v. Fred Meyer Stores*, 2010 WL 2853172, at *2 (9th Cir. July 21, 2010)(employer denied a reasonable accommodation in refusing to assign employee an earlier shift to avoid driving at night).

Other cases addressing transfer to different location:

- Employer acted reasonably by offering employee who requested unpredictable amount of leave for her disability a transfer to another office that could more easily absorb the extra work caused by her absences even though employee claimed the longer commute would cause her stress. *Corder v. Lucent Tech., Inc.*, 162 F.3d 924 (7th Cir. 1998)

- *Pimentel v. City of New York*, 2001 WL 1579553, at *15 (S.D.N.Y. Dec. 11, 2001) (finding a transfer to accommodate a reduction in commuting time for plaintiff to receive medical treatment was not required).

- *Dicino v. Aetna U.S. Healthcare*, 2003 WL 21501818 at *15, No. Civ. 01-3206 (D.N.J. June 23, 2003) (holding ADA did not obligate accommodation of requests “which essentially constitute commuting problems” when they had “nothing to do with [plaintiff's] ability to perform her job duties once she got where she needed to be”).

- *Bull v. Coyner*, 2000 WL 224807 at *9, No. 98-7583 (N.D.Ill. Feb. 23, 2000) (“Activities that fall outside the scope of the job, like commuting to and from the workplace, are not within the province of an employer's obligations under the ADA .... [Defendant], with full knowledge of [plaintiff's] vision problems, may have been insensitive or even malicious in requiring him to work at nights. But she had no legally-imposed obligation to be thoughtful ...”).

- *Salmon v. Dade County School Bd.*, 4 F.Supp.2d 1157, 1163 (S.D.Fla.1998) ("[P]laintiff also claims that the [defendant] failed to accommodate her disability by transferring her to a school with a shorter commute. But plaintiff's commute to and from work is an activity that is unrelated to and outside of her job.").

2.2 Working From Home.

The EEOC and some courts take the position that where the work is performed is just another policy that may have to be modified for certain jobs. Other courts have found that it will be an "unusual" or "extraordinary" case where attendance at the workplace is not an essential function of the job and work-at-home may be a reasonable accommodation. *Mason v. Avaya Comm., Inc.*, 357 F.3d 1114 (10th Cir. 2004). *See also Rauen v. U.S. Tobacco*, 319 F.3d 891 (7th Cir. 2003).

Like other forms of accommodation, issues regarding whether the essential functions of the job can be performed at home and whether working at home would create an undue burden need to be addressed.

Examples of when working at home might be a reasonable accommodation:

- For a supervisor who supervised a team that was allegedly "self-directed," the agency's handbook anticipated telecommuting for up to five days per week, and the employee had been working at home (for part of each week) for several months. *Woodruff v. Peters*, 482 F.3d 521 (D.C. Cir. 2007)

- For a medical transcriptionist who could not reliably attend work at the employer's worksite because of her obsessive compulsive disorder and where the employer allowed other medical transcriptionists to work from home. *Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

Examples of when working at home might not be a reasonable accommodation:

- Job requiring "on-site inspection and other work on electric lines" could not be performed at home. *Lalla v. Consol. Edison Co. of N.Y., Inc.*, 91 Fed. Appx. 701 (2d Cir. 2002).

- Production jobs. *Waggoner v. Olin Corp.*, 169 F.3d 481 (7th Cir. 1999)

- Food server, cashier, jobs that cannot be adequately supervised if performed at home, jobs to require the use of certain equipment or tools that cannot be replicated at home. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 34.

- Jobs requiring face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers; and jobs requiring the employee to have immediate access to documents or other information located only in the workplace. EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03).

- Where employee's essential functions (including troubleshooting, training, supervising, and "supporting personnel") required actual attendance at the plant. *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006).

- Service-call coordinator who had always been required to be at the workplace due to supervision and team work needs (including covering for other employees as needed). *Mason v. Avaya Comm., Inc.*, 357 F.3d 1114 (10th Cir. 2004).

- Employer's computer system could not be used through remote access. *Heaser v. The Toro Co.*, 247 F.3d 826 (8th Cir. 2001).

- Where part of the job requirements including training and advising other office workers that could not be performed from home. *Kvorjak v. Maine,* 259 F.3d 48 (1st Cir. 2001).

- Evaluator for the General Accounting Office, needed to be in the office because he had to interview people, gather data, attend team meetings, and collaborate with co-workers in performing audits. *Moore v. Walker,* 24 Fed. Appx. 924 (10th Cir. 2001).

- Bank loan review analyst could not perform his job at home because the job required him to review confidential loan documents which could not be taken out of the office, and because he worked as part of a team and "the efficient functioning of the team necessitated the presence of all members." *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998),

- Where "productivity inevitably would be greatly reduced" by working from home. *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997).

- Where the employer can provide other accommodations that are equally effective, *e.g.*, medical leave, paid time off, or a private place to lie down during exacerbations. *Black v. Wayne Ctr.*, 2000 WL 1033026 (6th Cir. Jul. 16, 2000). The EEOC has written that an employer may choose to make an accommodation that would enable the employee to work full-time in the workplace rather than granting a work-at-home request. EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03).

- If the employee fails to meet non-discriminatory prerequisites that the employer has for employees to work from home, e.g., satisfactory performance. *Spielman v. Blue Cross and Blue Shield of Kan.*, 33 Fed.Appx. 439 (10th Cir. 2002). *But see,* EEOC Fact Sheet "Work-At-Home/Telework as a Reasonable Accommodation" (2/3/03)(employer might be required "to waive certain eligibility requirements" for an employee to be able to work at home (such as a seniority requirement) so that an employee can be given such work as a reasonable accommodation.).

- Where the employer had consolidated its marketing operations in one location "to enhance supervision in the department and realize administrative efficiencies."

The court noted that allowing the employee to continue working from home "would deprive Teledyne of the efficiency gains and better quality work product it wanted from consolidation." *Whelan v. Teledyne Metal Working Prod.*, 226 Fed.Appx. 141 (3d Cir. 2007).

3. Employees Who Cannot Work.

3.1. Whether Leave is a Reasonable Accommodation.

Most authority indicates that unpaid leave is a form of reasonable accommodation. Appendix to 29 C.F.R. § 1630.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 16. Unpaid leave may be an appropriate reasonable accommodation when an individual expects to return to work after getting treatment for a disability, recovering from an illness, or taking some other action in connection with his/her disability, such as training a guide dog.

Below are examples of when leave was found to be a reasonable accommodation:

- Allowing an employee to use his sick leave and intermittent FMLA leave to avoid working overtime shifts. *Santacrose v. CSX Transp., Inc.*, 288 Fed. Appx. 655 (11th Cir. 2008).

- Four months leave so that the employee could be treated for his post-traumatic stress disorder, and where company policy allowed for such leaves of absence. *Rascon v. U.S. West Commc'ns, Inc.*, 143 F.3d 1324 (10th Cir. 1998).

- Employer's placement of employee on medical leave rather than restructuring job was a reasonable accommodation. *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001).

- Employer's failure to extend a one-month leave of absence for an additional brief period of time was a failure to accommodate an employee with a mental disability. Employer could not establish undue hardship as it had a 52 week of paid disability leave program. *Criado v. IBM Corp.*, 145 F.3d 437, 444-45 (1st Cir. 1998).

- "Reasonable accommodation for the handicap of alcoholism requires, *inter alia*, that an employee be given time off to participate in a treatment program." *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996). *See also, Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 996-97 (D. Or.1994)("ADA may require an employer to provide a leave of absence to an employee with an alcohol problem, particularly if the employer would provide that accommodation to an employee with cancer or some other illness requiring medical treatment." But "an employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job. Thus an employer would not be required to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery.")

Another question that arises is how much leave an individual must be given as a reasonable accommodation. This is likely to be fact-specific -- depending on whether a particular amount of time imposes an undue hardship on the employer and on whether the individual is still considered "qualified."

- Leave beyond the one-year job reservation period normally provided under employer's policies was "reasonable accommodation" under ADA for employee's breast cancer; employer did not contest reasonableness of requested accommodation except to embrace per se rule that any leave beyond one year was too long, employer provided no evidence of undue hardship, employee did not expect to be paid during leave extension, employer filled her job (secretary) with temporary employees during her absence, and there was no evidence that temporary employees were being paid more or were less effective than she. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000).

- Employer should have granted second leave of absence for 2-4 weeks for employee with lupus where doctor was optimistic that condition could be brought under control. Employer failed to show undue hardship to hold the employee's job open for 2-4 weeks, in light of the evidence that the job had been vacant for a number of months before the employee was hired, it took six months to fill the position after the employee was discharged, and other employees were able to handle the job's duties on an interim basis. *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998),

- Reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization." "As long as a reasonable accommodation available to the employer could have *plausibly* enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation." *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 878-79 (9th Cir.1989)(emphasis added).

Below are examples of when leave was not required as a reasonable accommodation:

- Employer not required to grant a second leave of absence for employee to receive treatment for alcohol abuse where approximately 3 years earlier it had granted him a one-month leave for treatment for cocaine addiction. *Evans v. Federal Express Corp.*, 133 F.3d 137, 140-41 (1st Cir.1998).

- A six-month leave of absence was not a required reasonable accommodation for a policeman with a small municipality which could not reallocate his job duties among its small staff of fifteen to twenty-two police officers. The court noted that "an employer is not required to hire additional people or assign tasks to other employees to reallocate essential functions that an employee must perform." *Epps v. City of Pine Lawn*, 353 F.3d 588 (8th Cir. 2003).

- Employee who worked five days during a three year period who wanted an additional month of leave after returning to work and being unable to perform the job was not a "qualified individual" and, therefore, no accommodation was required. *Hamm v. Exxon Mobil Corp.*, 223 Fed. Appx. 506 (7th Cir. 2007)(unpublished)

- Employer not required to grant leave for repeated short absences where there was no definite endpoint. Employee was found not to be a "qualified individual" when employer terminated her employment because she could not attend work. *Oestringer v. Dillard Store Services*, 92 Fed. Appx. 339 (7th Cir. 2004).

- The EEOC has stated that employers "have no obligation to provide leave of indefinite duration," because "granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations." EEOC Fact Sheet "Applying Performance and Conduct Standards to Employees with Disabilities" (2008) at Question 21.[1] Accord, *Peyton v. Fred's Stores of Ark.*, 561 F.3d 900 (8th Cir. 2009)(fact that employee could return to work after 6 months leave was irrelevant to whether employer failed to reasonably accommodate because, at the time of her termination, employee "had no idea when, if ever, she would be able to return" after her cancer treatment and therefore was not a "qualified individual"); *Krensavage v. Bayer Corp.*, 314 Fed. Appx. 421 (3d Cir. 2008)(the court noted that "open-ended disability leave" is not a reasonable accommodation where there is no "expected duration" for the leave); *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000)(employee's request for an additional one to three years leave after having been on leave for 1.5 years of leave was tantamount to a request for indefinite leave, which was "an objectively unreasonable accommodation").

- An employee's third request for additional leave was not a request for "reasonable accommodation that would permit her to perform the essential function of regular work attendance," where each request "further postponed her return-to-work date." The court noted that although leave is a possible accommodation, an employer is not required to provide "an unlimited absentee policy." *Brannon v. Luco Mop Co.*, 521 F.3d 843 (8th Cir. 2008). See also

[1] But see EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 44 (if an employee cannot "provide a fixed date of return," the employer can deny such leave only if it can show undue hardship because of this uncertainty (for example, "disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position"). Accord, *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998)(court "not sure that there should be a per se rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation'"); *Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000)("some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite.").

Amadio v. Ford Motor Co., 238 F.3d 919 (7th Cir. 2001)(employer not required to grant one week leave of absence where it had previously granted 23 leaves over the prior three years resulting in over 70 weeks of absenteeism and it was unlikely that the additional leave would be effective).

4. Whether Employee's Job Must be Held Open During Leave

Although there is general agreement that unpaid leave is a form of reasonable accommodation, there is disagreement on what this means -- specifically, whether it means that an employee's job must actually be held open. The EEOC takes the position that unpaid leave means holding the employee's job open, unless doing so would cause an undue hardship. See EEOC Fact Sheet: "The FMLA, the ADA, and Title VII of the Civil Rights Act of 1964" at p. 7 (question 14), and EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 18. The EEOC has stated that if holding a position open for the needed leave period would pose an undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position. *Id*.

5. Modifying No-Fault Attendance Policies as a Reasonable Accommodation

Many employers have a "no-fault" attendance policy, where employees get a certain amount of leave (for example, three months or six months) and then they are fired -- regardless of the reason for the absence. This no-fault policy should not itself be considered an ADA violation. It is the EEOC's position that an employer must modify its "no-fault" leave policy to provide additional leave unless another accommodation "would enable the person to perform the essential functions of his/her position" or "additional leave would cause an undue hardship." See also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at Question 17.

Family and Medical Leave Act

Nuances in Attendance Issues

For many employers, the most challenging leave-related compliance issues arise in the context of the Family and Medical Leave Act. In short, for purposes of this discussion, the FMLA provides for specific instances in which the attendance of eligible employees of a covered employer cannot be considered a requirement of the job. Recent modifications to the FMLA regulations provide for expanded protection of employees, creating more instances in which employers must excuse absences of their employees.

As there are volumes of detailed materials relating to the implementation and management of FMLA leave in the workplace, these materials are intended to focus on the newest provisions of the Act which expand employee protections, and to outline noteworthy cases in attendance-related issues.

FMLA Primer

In its most basic essence, the FMLA provides an eligible employee

- an absolute entitlement to a minimum of 12 (up to 26) weeks unpaid leave;
- the right to benefit continuation; and
- the right to reinstatement to the same or an equivalent job upon return from leave

if that employee must take leave due to

- the employees own serious health condition;
- care of a newborn child or newly-placed adoptive or foster child; or
- care of a covered family member with a serious health condition.

In January 2008, the President signed the National Defense Authorization Act for FY 2008 ("NDAA 2008"), expanding the coverage of the FMLA to incorporate leave protection for qualifying exigencies and care of a covered service member. The modifications to the FMLA become final on January 16, 2009. Thereafter, further amendments were introduced under the National Defense Authorization Act for Fiscal Year 2010 ("NDAA 2010"), enacted on October 28, 2009. Thus, the FMLA now additionally covers

- military family leave; and
- military exigency leave.

Among the more difficult provisions for FMLA-qualified employers to manage is the use of intermittent and reduced schedule leave. The FMLA provides that employees may take leave intermittently or on a reduced schedule

- when medically necessary for treatment or recovery from treatment for a serious health condition;
- when incapacitated due to a chronic serious health condition;
- to provide care for a family member with a serious health condition;
- care for a family service member under military family leave; and
- qualifying exigencies related to military service.

FMLA Now Covers Military-Care Leave

The most significant modifications to the FMLA in the two decades of its existence came with the implementation of the NADA last year. Although provisions of USERRA (discussed later in these materials) have provided protection for military servicemembers requiring leave for active and reserve duty since its inception in 1994, the NDAA's changes to the FMLA now provides employment protection for family members affected by the deployment or injury of our nation's servicemembers.

With its newest provisions, the FMLA provides its familiar protections to the spouse, son, daughter, parent, or next of kin of a covered servicemember for up to 26 workweeks during a single 12-month period in order to care for the servicemember. As with familiar FMLA provisions, each term in the new provisions must be defined to understand the true scope of the Act.

Covered Servicemember

A covered servicemember includes

- current members of the Armed Forces;
- current members of the National Guard or Reserves; and
- current members of the Armed Forces, National Guard or Reserves on the temporary disability retired list

who is undergoing medical treatment, recuperation, or therapy, or is otherwise in outpatient status for a serious injury or illness, as well as

- a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy

A covered servicemember does not include members of the Armed Forces, National Guard or Reserves on the permanent disability retired list.

Serious injury or illness

A serious injury or illness is an injury or illness that was incurred by the servicemember in the line of duty on active duty, or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty and that may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating. In the case of a covered veteran, the illness or injury may have manifested itself before or after the member became a veteran.

Family Member – Who Gets the Leave

The Act sets forth the family members eligible for military family leave - a spouse, son or daughter[2], parent, or next of kin. "Next of kin" is given priority in the Regulations in the following order:

- blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions
- brothers and sisters
- grandparents
- aunts and uncles
- first cousins

The servicemember may also choose to designate a particular family member as "next of kin" for purposes of the Act. In such a case, only the designated relative will be considered his/her only next of kin eligible for family military leave. When no designation is made, all individuals within the category of relationship defined as next of kin may take military family leave (consecutively or simultaneously) to care for the servicemember. Employers may request confirmation of the relationship when leave is requested.

Single 12 Month Period

An employee is eligible for up to 26 weeks of leave during a "single 12 month period." Regardless of the method an employer uses to calculate other types of FMLA-qualifying leave, this 12 month period begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date. If the entire 26 weeks is not used within that timeframe, it is forfeited.

Leave entitlement under the family military leave provisions must be assessed on a per-covered-servicemember, per-injury basis. This means that an eligible employee may be granted more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for a subsequent serious injury or illness.

[2] Whether as a covered servicemember or family military leave caregiver, "son or daughter" includes biological, adoptive, foster, stepchild, legal ward, or child for whom the employee stood in loco parentis.

In such cases, more than a total of 26 workweeks may be taken within any single 12-month period.

As with other qualifying leave, a husband and wife employed by the same employer may take a total of 26 weeks. In addition, FMLA leave taken for any other qualifying reason counts toward the 26 week total.

Qualifying Exigencies

The newest provisions of the FMLA also allow for leave to be taken "because of any qualifying exigency … arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces." "Qualifying exigencies" have been specifically categorized in the Regulations as

- Short-notice deployment: leave taken to address any issue that arises when a covered servicemember is notified of an impending call or order to active duty seven or less calendar days prior to the deployment; may be taken beginning on date notified of impending deployment

- Military events and related activities: leave taken to
  - attend any official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty of a covered servicemember; or
  - to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty of a covered servicemember

- Childcare and school activities: leave taken (when the active duty or call to active duty status of a covered servicemember causes the need to arise) to
  - arrange for alternative childcare;
  - provide for urgent, immediate need childcare;
  - enroll or transfer a child to a new school or daycare facility; and
  - attend meetings with staff at a school or daycare facility

- Financial and legal arrangements: leave taken to
  - make or update financial or legal arrangements to address the servicemember's absence, such as preparing and executing powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System, obtaining military identification cards, or preparing or updating a will or living trust; and
  - act as the servicemember's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits (may be taken up to 90 days following termination of active duty status)

- Counseling: leave taken to attend counseling provided by someone other than a health care provider for oneself, the covered servicemember, or child, provided the need for counseling arises from the active duty or call to active duty status of the servicemember

- Rest and recuperation: leave taken to spend time with a covered servicemember who is on short-term, temporary, rest and recuperation leave during deployment (up to five days for each R&R leave period)

- Post-deployment activities: leave taken to
  - attend arrival ceremonies, reintegration briefings and events, or any other official ceremony or program sponsored by the military for up to 90 days following the termination of active duty status; or
  - address issues that arise from the death of a covered servicemember while on active duty status

- Additional activities: leave as agreed to between the employer and employee

As with other types of FMLA qualifying events, employers should request and obtain proper certification from employees seeking family military leave and exigency leave. (Samples of Department of Labor approved forms are included at the end of this section.)

Additional Updates and Guidance

Continuing Treatment

In addition to the substantial changes related to military family and exigency leave, the new FMLA Regulations additionally provide some long-needed guidance on what is considered "continuing treatment" for a "serious health condition" entitling an employee to FMLA leave. A serious health condition involving continuing treatment requires

- an absence of more than three consecutive, full calendar days, and
  - treatment two or more times within 30 days (the first must occur within 7 days) of the first day of incapacity (unless there are extenuating circumstance) by a health care provider, a nurse under the direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by a health care provider; or
  - treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment.

The Regulations additionally defines continuing treatment for a chronic condition to include at least two visits per year to a health care provider.

Perfect Attendance Awards

Under previous Regulations an employer could not deny a perfect attendance award (such as a bonus or additional pay) to an employee who was absent from work for an FMLA-qualifying condition. The new regulations have changed that rule, and now allow an employer to deny a perfect attendance award (or other award based on the achievement of a specific goal) to an employee who does not have perfect attendance (or otherwise does not achieve the goal) due to FMLA-qualified absences, provided that the employer treats employees taking other, non-FMLA, leave in the same manner. For example, if an employee who used paid vacation leave for a non-FMLA qualifying reason could achieve the goal, then an employee who substituted paid vacation leave for an FMLA-qualified absence must also achieve the goal.

Eligibility – How Long Must an Employee Work Before FMLA Leave Applies

Since its initial enactment, the FMLA has defined "eligible employee" (except as noted for flight crews, below) as an employee who has been employed by the employer

- For at least 12 months; and
- For at least 1,250 hours of service with that employer during the previous 12-month period

Except for employees returning from a National Guard or Reserve military obligation (pursuant to USERRA), the hours of service requirement is determined according to the same principles used in the Fair Labor Standards Act ("FLSA"). Thus, vacation, holiday pay, sick leave, and other pay for hours not actually worked do not count towards the 1,250 hours requirement. However, the calculation of hours has been, and continues to be, one of the FMLA's most litigated issues. For example:

- Employee, who had taken FMLA leave during the prior 12-month period, may not toll that 12-month period for the time during that period for which she was on FMLA leave. *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010). "There is no basis for such a contortion of the statutes – no hint in the statute or elsewhere that Congress envisaged and approved such a circumvention of the requirement that an applicant for FMLA leave have *worked* 1,250 hours in the preceding 12 months." *Id.* at 750.

- Employee not entitled to count 44 day suspension period after which her employer voluntarily reinstated toward the 1,250 hour requirement. *Magallanes v. Illinois Bell Telephone Co.*, 2010 WL 2942165 (N. D. Ill. July 22, 2010). "[T]he Seventh Circuit has made clear that the 1,250 hour requirement is a strict one that courts should be hesitant to dilute." *Id.* at *12.

- Employee's "make whole" award from arbitrator for alleged wrongful dismissal could not be considered in hours calculation. *Plumley v. Southern Container, Inc.*, 303 F. 3d 364 (1st Cir. 2002). Other courts have disagreed with *Plumley*, however, stating that, where employees were unlawfully prevented by the employer from working hours they wanted to and otherwise would have worked,

those hours should be included in the 1,250 calculation. *See, e.g., Ricco v. Potter*, 377 F.3d 599 (6th Cir. 2004); *Savage v. Chicago Transit Authority*, 2007 WL 809600 (N.D. Ill. March 7, 2007); *Magruda v. Belle Vernon Area School Dist.*, 2009 WL 440386 (W.D. Pa. Feb. 23, 2009).

Courts have distinguished the holdings in cases such as *Ricco, Savage,* and *Magruda,* noting that, absent a judicial or quasi-judicial finding of unlawful conduct, any agreement for a make-whole award is insufficient to qualify as "hours worked.

- "In *Ricco*, unlike here, there was a final determination by an arbitrator that the company had engaged in unlawful conduct and [the plaintiff] was therefore entitled to a "make-whole" award. Here, there was no such final determination, only a settlement agreement, and courts have been clear that a settlement agreement is not a final judgment and therefore has no issue preclusive effect, absent clear intention by the parties otherwise. *Shaw v. Total Image Specialists, Inc.,* 2009 WL 369817 (S.D. Ohio Feb. 12, 2009)

- "As the district court noted, [the plaintiff] is left with only an unsubstantiated subjective belief that her … suspension was wrongful. … By failing to pursue a formal challenge to her suspension, [the plaintiff] has accepted that she is not entitle to …FMLA credit…" *Pirant v. U.S. Postal Serv.*, 542 F.3d 202, 207-08 (7th Cir. 2008), as modified on denial of reh'g (Dec. 3, 2008), *cert. denied* 130 S. Ct. 361, 175 L. Ed. 2d 21 (U.S. 2009).

Flight Crew Amendments

On December 21, 2009, the President signed the most recent modifications of the FMLA into law, specifically addressing the service requirements for airline flight attendants or flight crew members via the Airline Flight Crew Technical Corrections Act. In short, this Act further modified the FMLA to provide that flight attendants and flight crew members meet the hours of service requirement if, during the previous 12-month period, s/he (1) has worked for been paid for not less than 60& of the applicable total monthly guarantee (or its equivalent), and (2) has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.

Additional Resources:

Sample FMLA policy (contained within materials) – modified to include military care and exigency leave provisions

FMLA forms key (contained within materials)

The Family and Medical Leave Act of 1993, as amended (with notated modifications resulting from the National Defense Authorization Act for FY 2008, the National Defense Authorization Act for Fiscal Year 2010, and the Airline Flight Crew Technical Corrections Action, found at http://www.dol.gov/whd/fmla/fmlaAmended.htm

Francis P. Alvarez and Alexander J. Passantino, "Managing Family and Medical Leaves of Absence: Statutory Entitlement, Employer Commitments, and Reasonable Accommodations," ACC Infopak, *available on ACC Resources website*

SAMPLE

FAMILY AND MEDICAL LEAVE ACT POLICY

Under the Family and Medical Leave Act of 1993, as amended (FMLA), employees may be eligible for a period of job-protected unpaid leave for certain family and medical reasons as described below. This Family Medical Leave Act Policy ("Policy") provides an overview of employees' rights and responsibilities under the FMLA as well as Company's own policies regarding FMLA Leave.

General Eligibility

To be eligible for FMLA Leave under this Policy, an employee must have worked at Company for at least 12 months and must have worked at least 1,250 hours during the 12 month period prior to the commencement date of any leave requested under this Policy. Eligibility will be determined as of the date the leave commences. Employees who work from a location where fewer than 50 employees are employed within a 75 mile radius are not eligible for leave under this policy.

Types and Duration of FMLA Leave

Basic FMLA Leave and Active Duty Leave

An employee may be eligible for up to 12 weeks of unpaid leave during any 12-month period (the 12-month period is measured looking back from date of the leave) for the following reasons:

- The birth of a child and to care for such child, or placement for adoption or foster care of a child with the employee. Such leave must be concluded no later than 12 months after the birth or placement of the child with the employee;
- To care for an immediate family member (spouse, child under 18 years old or 18 and over who is incapable of self-care, or parent) with a serious health condition;
- Because of a serious health condition which renders the employee unable to perform the functions of his/her job; or
- Because of any qualifying exigency arising out of the fact that an employee's spouse, son (of any age), daughter (of any age) or parent, who is a member of any branch of the military, including the National Guard or Reserves, has been deployed or called to active duty in a foreign country ("Active Duty Leave").

Military Caregiver Leave

An employee may be eligible for Military Caregiver Leave to care for a spouse, son (of any age), daughter (of any age), parent or next of kin who is: 1) a current member of the Armed Forces (including the National Guard or Reserves) and who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness which is

incurred in the line of duty (or for a pre-existing injury or illness which is aggravated in the line of duty) and that renders the service member medically unfit to perform the duties of his or her office, grade, rank or rating, or 2) a veteran who was a member of any branch of the military (including the National Guard or Reserves) and who is undergoing medical treatment, recuperation or therapy, for a serious injury or illness that occurred in the line of duty (or for a pre-existing injury or illness that was aggravated by service in the line of duty) at any time within 5 years preceding the treatment, recuperation or therapy.

"Next-of-kin" is defined as the closest blood relative of the injured or recovering service member.

Eligible employees are entitled to a total of 26 weeks of unpaid Military Caregiver Leave during a single 12-month period. This single 12-month period begins on the first day an eligible employee takes Military Caregiver Leave and ends 12 months after that date. Military Caregiver Leave applies on a per-covered service member, per-injury basis, so that an employee may be eligible to take more than one 26 week period of Military Caregiver Leave, but no more than 26 weeks of leave may be taken during any one 12 month period.

Even in circumstances where an employee takes other leave covered by the federal FMLA as described in the Basic FMLA Leave and Active Duty Leave section above, the combined leave shall not exceed 26 weeks during that 12 month period.

Definitions

A "serious health condition" as referred to above means an illness, injury, impairment, or physical or mental condition that involves:

- in-patient care (*i.e.*, an overnight stay) in a hospital or other medical care facility (including any period of incapacity or any subsequent treatment in connection with such in-patient care);
- a period of incapacity of more than three (3) consecutive full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: (i) treatment two (2) or more times by a health care provider or under the supervision of a health care provider within 30 days of the start of the incapacity, or (ii) treatment by a health care provider on at least one (1) occasion within seven (7) days of the start of the incapacity which results in a regimen of continuing treatment under the supervision of a health care provider;
- any period of incapacity due to pregnancy, or for prenatal care;
- any period of incapacity due to a chronic serious health condition requiring periodic visits of at least twice a year for treatment by a health care provider;
- a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, during which the employee (or family member) must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider; or

- any period of absence to receive multiple treatments by a health care provider or under the supervision of a health care provider, either for restorative surgery after an accident or other injury, or for a condition that will likely result in a period of incapacity of more than three (3) consecutive calendar days in the absence of medical intervention or treatment.

A "qualifying exigency" referenced above under "Active Duty Leave" refers to the following circumstances:

- Short-notice deployment: to address issues arising when the notification of a call or order to duty in a foreign country is seven (7) days or less;
- Military events and related activities: to attend official military events or family assistance programs or briefings;
- Childcare and school activities: for qualifying childcare and school related reasons for a child, legal ward or stepchild of a covered military member;
- Financial and legal arrangements: to make or update financial or legal affairs to address the absence of a covered military member;
- Counseling: to attend counseling provided by someone other than a health care provider for oneself, for the covered military member, or child, legal ward, or stepchild of the covered military member;
- Rest and recuperation: to spend up to five (5) days for each period in which a covered military member is on a short-term rest leave during a period of deployment;
- Post-deployment activities: to attend official ceremonies or programs sponsored by the military for up to 90 days after a covered military member's active duty terminates or to address issues arising from the death of a covered military member while on active duty;

When Spouses Work Together

If both a husband and wife are employed by Company and are eligible for leave under this policy, they are eligible for a combined total of 12 weeks of leave when the leave is due to the birth or placement of a child or to care for a parent who has a serious health condition, or a combined total of 26 weeks when the leave is due to the birth or placement of a child or to care for a parent who has a serious health condition or for Military Caregiver Leave. (However, in no event shall the husband and wife take more than a combined total of 12 weeks of leave for the birth or placement of a child or to care for a parent who has a serious health condition).

Notice of Need for FMLA Leave

An employee who wants to take FMLA must notify Human Resources of his/her request for leave. The employee will be required to fill out the prescribed form requesting leave.

If the need for leave is foreseeable, the employee must provide at least thirty (30) days advance notice. When 30 days' advance notice is not possible, the employee must give as much notice as is practicable.

If an employee fails to give the required notice with no reasonable excuse, FMLA coverage may be denied for a period of time.

Employees should make every reasonable effort to schedule medical treatments so as not to disrupt Company's ongoing operations.

Substitution of Paid Leave for Unpaid FMLA Leave

Employees must substitute any workers compensation benefits, accrued vacation or personal time for any otherwise unpaid FMLA medical leave for the employee's own serious health condition. All substituted accrued vacation or personal time, and any days for which an employee receives either short-term disability payments and/or workers compensation payments, will be counted against an eligible employee's FMLA leave entitlement.

For all other types of FMLA leave, employees must substitute accrued vacation or personal leave for any otherwise unpaid part of the leave. All substituted accrued vacation or personal time will be counted against an eligible employee's FMLA entitlement.

Intermittent FMLA Leave

Intermittent or reduced schedule leave may be available if the need for leave is due to an employee's serious health condition or an employee's immediate family member's serious health condition and when the need for intermittent or reduced schedule leave is certified by a health care provider. Intermittent or reduced schedule leave is not available for the birth or placement of a child for adoption or foster care. Military Caregiver Leave may be taken intermittently or on a reduced leave schedule when medically necessary. Active Duty Leave may also be taken on an intermittent or reduced leave schedule.

Employees must attempt to schedule their intermittent or reduced schedule leaves so as not to disrupt the operations of Company and in some instances, Company may require employees taking intermittent or reduced schedule leaves to transfer temporarily to an alternative position for which the employee is qualified and which better accommodates the employee's leave schedule.

Employees taking intermittent leave must follow Company's standard call-in procedures absent unusual circumstances.

Documentation Supporting FMLA Leave

An employee requesting leave for a serious health condition must provide a completed FMLA Certification of Health Care Provider Form supporting the need for the leave. A request for reasonable documentation of family relationship verifying the legitimacy of a request for FMLA Leave may also be required.

The employee will have fifteen (15) days in which to return a completed Certification form following Company's request for the certification. If the employee fails to provide timely certification after being required to do so, the leave may be denied or discontinued. If the Certification form is incomplete or insufficient, an employee will be given written notification of the information needed and will be given a period of seven (7) days to provide the necessary information.

In some circumstances, a second opinion, at Company's expense, related to the health condition may be required. If the original certification and the second opinion differ, a third opinion, at Company's expense, may be required. The opinion of the third health care provider, which Company and the employee jointly select, will be the final and binding decision.

A request for Active Duty Leave must be supported by the Certification of Qualifying Exigency for Military Family Leave form as well as appropriate documentation, including the covered military member's active duty orders.

A request for Military Caregiver Leave must be supported by the Certification for Serious Injury or Illness of Covered Servicemember form as well as any necessary supporting documentation.

Recertification

Under certain circumstances, including (but not limited to) situations in which the need or nature of the approved leave changes, Company may, in its sole discretion, require recertification of the employee's serious health condition. In these situations, the employee will have fifteen (15) days in which to provide a completed Recertification form.

Restoration To Position And Benefits

Employees on an unpaid FMLA leave (for which no paid leave is substituted or after all paid leave has been exhausted) will maintain the benefits they accrued prior to commencement of the leave. Generally, eligible employees returning from FMLA leave within 12 weeks (or 26 weeks, when applicable) will be returned to the job position that they held when they went on leave, or they may be placed in an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. Exceptions to such restoration will include, but not be limited to, changes in the work force such as reductions-in-force or elimination of positions/departments such that there is no position to which the employee would be entitled if the employee had not taken the leave.

For employees taking FMLA leave under this Policy, medical and dental benefit coverage, as well as other benefit coverage, will continue for the duration of the leave on the same terms and conditions as if the employee were at work. Employees will be

required to continue to pay their share of benefit premiums during the FMLA leave, as required for active employees. Employee premium payments for benefits during paid leave when any unused accrued vacation time, personal time or workers compensation leave apply, will continue to be made by payroll deduction or by whatever alternative method is normally utilized for making such premium payments when the employee is not on leave. Employee premium payments for benefits during an unpaid leave when no unused accrued vacation time, personal time or workers compensation leave apply, must be paid to Company at the same time they would have been made had the employee not been on FMLA leave.

If an employee's premium payment is not made within 30 days of the due date, all medical and dental coverage for which the employee is required to contribute may be terminated, provided Company has given the employee 15 days advance written notice of the termination of coverage. If coverage ends due to the employee's failure to make timely payment, the employee will be entitled to immediate restoration of medical and dental coverage upon the employee's return from FMLA leave. Any changes by Company to employee premium payments for medical and dental benefit coverage will apply to employees on FMLA leave.

If an eligible employee fails to pay his or her portion of the required premium payments for benefit coverage, and Company elects to make the premium payment to keep benefit coverage in effect during a period of paid or unpaid FMLA leave for medical and dental benefits, and/or a period of unpaid FMLA leave for other benefits, Company may recover the amount of the premium payment from the employee regardless of whether the employee returns to work. Company may recover its share of the premium paid for maintaining an employee's medical and dental benefit coverage during any period of unpaid FMLA leave if the employee fails to return from leave after entitlement has expired, provided the employee fails to return to work for a reason other than the continuation, recurrence, or onset of a serious health condition that would otherwise entitle the employee to FMLA leave, or other circumstances beyond the employee's control. (Note that in the event of a serious health condition, Company may require medical certification of such condition.) An employee will not be considered to have returned to work unless the employee works for at least 30 calendar days after returning.

Return To Work

Employees on FMLA leave must periodically inform the Human Resources Department of their status and intent to return to work following the expiration of their approved FMLA leave. Employees returning from FMLA leave must be able to assume all of the essential functions of their jobs upon return. As a condition to restoring an employee whose leave was based on the employee's own serious health condition, the employee must provide certification from the employee's health care provider stating that the employee is able to resume work.

Failure To Return From Leave

Unless required otherwise by law an employee granted a leave of absence under these provisions who fails to return to work upon expiration of the leave granted shall be classified as "voluntarily terminated."

Key Employees

An employee who qualifies as a "key employee" may be denied restoration of employment after a period of FMLA leave. A "key employee" is an employee who is salaried and is among the highest paid ten percent of the work force. Upon requesting FMLA leave, an employee will be notified by Company of his/her status as a "key employee" if there is a possibility that Company may deny reinstatement after leave.

Interaction with State Military Leave Laws

Certain states require employers to provide greater or different job-protected leave to family members of persons in the military. When applicable, Company complies with all such military family leave laws. When leave provided under one of these laws is covered under the federal FMLA, it also shall count toward the employee's federal FMLA entitlement and as FMLA Leave under this Policy. These military family leave laws vary by state, and the employee should contact Human Resources with questions.

Family and Medical Leave Act – Forms Key

The following links contain copies of forms approved by the Department of Labor for use in administering Family and Medical Leave. The specific form use is detailed below:

Form WH-380-E - http://www.dol.gov/whd/forms/WH-380-E.pdf - Certification of Health Care Provider for Employee's Serious Health Condition. This form should be given to employees requesting FMLA leave for their own serious health condition (to be filled out by their physician).

Form WH-380-F - http://www.dol.gov/whd/forms/WH-380-F.pdf - Certification of Health Care Provider for Family Member's Serious Health Condition. This form should be given to employees requesting FMLA leave to care for a family member with a serious health condition.

Form WH-381 - http://www.dol.gov/whd/forms/WH-381.pdf - Notice of Eligibility and Rights and Responsibilities. This form should be given to employees who request FMLA leave or when an employer becomes aware that the employee's leave may be for an FMLA-qualifying reason.

Form WH-382 - http://www.dol.gov/whd/forms/WH-382.pdf - Designation Notice. This form should be given to employees once the employer has determined whether the leave will be designated as FMLA leave.

Form WH-384 - http://www.dol.gov/whd/forms/WH-384.pdf - Certification of Qualifying Exigency For Military Family Leave. This form should be given to employees who request FMLA leave due to a qualifying exigency arising from the fact that a family member of the employee has been sent on a tour of duty overseas.

Form WH-385 - http://www.dol.gov/whd/forms/WH-385.pdf - Certification for Serious Injury or Illness or Covered Servicemember. This form should be given to employees who request FMLA leave due to the serious illness or injury of a servicemember.

WHD Publication 1420 - http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf- This is the required FMLA poster and should also be given to all employees to explain their rights under the FMLA. (It used to be sufficient to provide a copy of the employer's policy to all employees, but the new regulations make it clear that the information provided to all employees must "at a minimum" include all the information that is on the poster.)

Leave for Military Service: USERRA

What is USERRA?
The Uniformed Service Employment & Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335, is a federal law intended to encourage noncareer uniformed service, minimize disruption to those performing uniformed service and prohibit discrimination.

What "uniformed services" are covered by USERRA?

- Army
- Navy
- Air Force
- Marine Corps
- Coast Guard
- Reserve components of all of the above
- National Guard
- Commissioned Corps of the Public Health Service
- Anyone else designated by the President during a time of war or national emergency

38 U.S.C. § 4303(16)

What service is covered?
It is surprising to many employers to learn that USERRA protects both voluntary and involuntary uniformed service. Covered service includes:

- Active duty
- Active and inactive duty for training
- National Guard duty under federal statute
- Fitness exams
- Funeral honors duty
- Disaster response upon activation of the National Disaster Medical System

38 U.S.C. § 4303(13).

When is National Guard service covered by USERRA?
The National Guard has a dual status and Guardsmen can perform service under either federal state authority. Only service under federal authority is covered by USERRA. "Service under Federal authority includes active duty performed under Title 10 of the U.S.C. Service under Federal authority also includes duty under Title 32 of the U.S.C., such as active duty for training, inactive duty training, or full-time National Guard duty." 20 C.F.R. § 1002.57.

Are National Guardsmen protected by USERRA when they perform service under state authority?

Guardsmen can be called up by a governor to perform service during a state emergency, such as for forest fires or flooding. That service is not protected by USERRA because it is being performed under state, not federal, authority. Some states have laws that protect employees who perform National Guard duty under state authority. For example, the Washington State Veterans Employment & Reemployment Act, RCW 73.16, protects employees when the National Guard is state activated. An employer cannot discriminate against an employee because of state activated National Guard service. RCW 73.16.032. Benefits must be restored the same as they are to any employee returning from a leave of absence from the employer. RCW 73.16.051. The most significant difference between Washington law and USERRA is the reinstatement position. Washington law requires that the Guardsman be reinstated to the same or a position that is similar in terms of seniority, status and pay. RCW 73.16.033. USERRA, in contrast, requires reinstatement to the escalator position. 20 CFR § 1002.191. Washington law requires health insurance continuation only for state employees in contrast with USERRA. RCW 73.16.053; 38 U.S.C. § 4317.

What employees are covered by USERRA?

All employees are covered by USERRA regardless of how long they have worked for an employer or how many hours they have worked. "The term 'employee' means any person employed by an employer." There is also extraterritorial jurisdiction for U.S. citizens or permanent resident aliens employed in a foreign country by an employer incorporated in the U.S. or controlled by a U.S. corporation. 38 U.S.C. § 4303(3).

Are applicants covered by USERRA?

Yes, according to the U.S. Department of Labor that enforces USERRA. An employer cannot discriminate against an applicant because of the applicant's obligations as a member of the National Guard or Reserves. An employer cannot withdraw a job offer because the applicant is called upon to fulfill an obligation in the uniformed services. 20 C.F.R. § 1002.42.

The plaintiff in *Atteberry v. Avantair, Inc.,* 2009 U.S. Dist. LEXIS 48031 (M.D. Fla. 2009), reapplied for a job as a Flight Dispatcher with his previous employer after hearing they had openings. He was made an offer to begin work on December 27, 2007. But after receiving the offer, the employer then asked him how much longer his military obligations would last and how much time he would miss from work. After learning that he had two more years of military service left, the employer withdrew the job offer. They then proceeded to give differing accounts of why the job offer was withdrawn – lack of available positions, a company policy of not rehiring former employees, and that he had a poor exit interview. The court denied summary judgment finding that the "Defendant's proffered justifications are merely pretext for the discrimination claim brought under USERRA is a natural inference drawn from Plaintiff's recollection of the facts."

What about independent contractors?
USERRA does not provide protection for those workers who are truly independent contractors. (Just having the title of "contractor" or receiving a 1099 instead of a W-2 is not enough.) The regulations provide a multifactor test similar to that used by the Internal Revenue Service to determine when a worker is an independent contractor versus an employee. 29 C.F.R. § 1002.44.

What employers are covered?
All employers are covered by USERRA regardless of size. "[T]he term 'employer' means any person, institution, organization or other entity that pays salary or wages for work performed or that has control over employment opportunities . . . ." 38 U.S.C. § 4303(4)(A). A hiring hall can be an employer subject to the antiretaliation, anti-discrimination and reinstatement requirements of USERRA. 20 C.F.R. § 1002.38.

Can there be joint employers under USERRA?
Yes. An employee can have more than one employer. A security guard who is hired by a security company and is assigned to the work site and reports both to the security company and the site owner has two employers for USERRA purposes: the security company and the work site. 20 C.F.R. § 1002.37.

What discrimination is prohibited by USERRA?
USERRA prohibits discrimination in hiring, reemployment, retention, promotion or any benefit of employment on the basis of membership in the uniformed services, application for membership or performance of service. The standard of proof is whether protected activity was a "motivating factor" in the employer's action. 38 U.S.C. § 4311.

On April 18, 2010, the U.S. Supreme Court granted certiorari in a USERRA case to determine when and how the "cat's paw" theory should be applied in discrimination cases. The Seventh Circuit described the cat's paw as follows:

> One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom in 2009. But that's the situation in this case as we try to make sense out of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever--and rather unscrupulous--monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976).

Vincent Staub worked for Proctor Hospital as an angiography technologist. Staub was in the Army Reserve. A supervisor at Proctor Hospital called his military service "bullshit" and a waste of taxpayer money. She refused to accommodate his need to have one weekend off per month for his Army Reserve drill. He was later terminated by

the Vice President of Human Resources. Staub argued that the HR VP had been used as the cat's paw by Staub who harbored anti-military animus. A jury returned a verdict in favor of Staub that was upheld by the district court. The Seventh Circuit reversed and remanded holding that the trial court should only admit the animus of a nondecision maker where that person had "singular influence" on the decision maker. "[T]he employer is off the hook if the decisionmaker did her own investigation." The case is *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2010). Oral argument is scheduled before The Court on November 2, 2010.

What notice must an employee give an employer before performing uniformed service?
Either the employee or an appropriate officer of the particular uniformed service must notify the employer that the employee intends to leave work to perform uniformed service. The notice can be oral or written and need not follow any particular format. The notice should be provided as far in advance as is "reasonable" under the circumstances. 20 C.F.R. § 1002.85.

Does an Employee have to get Permission from the Employer to do Uniformed Service?
No! Employee *notice* to the employer is required – employer *permission* is not required. 20 C.F.R. § 1002.87.

Can an employee's failure to give advance notice of uniformed service be excused?
Yes, under certain circumstances an employee need not give advance notice of uniformed service. An employee is excused from giving advance notice if it is prevented by military necessity determined by a designated military authority. (This might occur where a mission is classified.) An employee is also excused from giving advance notice if is impossible or unreasonable under the circumstances. (This might occur when the employee must report for uniformed service in an extremely short period of time.) 20 C.F.R. § 1002.86.

How long can an employee perform uniformed service and retain reinstatement rights?
Generally, an employee is entitled to reinstatement if the cumulative period of uniformed service while employed with that employer is less than five years. 38 U.S.C. § 4312(c). However, there are many types of uniformed service that do not count toward the five year cumulative maximum. The following types of service are excluded:

- Periodic National Guard and Reserve training;
- Involuntary active duty in wartime;
- Involuntary active duty during a national emergency;
- Involuntary active duty for an operational mission, involuntary retention on active duty of a critical person during time of crisis or other specific conditions;
- Other exceptions listed in 20 C.F.R. § 1002.103

Notice of Return to Work
After the completion of uniformed service, the employee must report back to work or give employer timely notice of intent to return to work. The amount of time an employee has to report back or give notice of an intent to return depends on the length of uniformed service:

- Service of less than 31 days: must *report* to first shift after safe travel home + 8 hours rest
- 30 to 180 days: must give notice within 14 days after completing service
- More than 180 days: must give notice within 90 days after completing service

The above deadlines are excused if impossible or unreasonable through no fault of employee. 29 C.F.R. § 1002.115. If employee fails to report or provide notice in a timely fashion, he/she is subject to conduct rules, established policy & general practices of the employer pertaining to absence from scheduled work. 29 C.F.R. § 1002.117.

If the employee is injured or ill from an injury or illness that occurred while performing service, the time to give notice of an intent to return is extended for up to 2 years while the employee recovers. 29 C.F.R. § 1002.116.

What Documentation can an Employer Require from a Returning Employee?
If the uniformed service is over 30 days, employer can require documentation establishing the following eligibility criteria for reemployment: (a) reemployment application is timely, (b) the employee has not exceeded the five year limit on the duration of service, and (c) the employee's separation from the military was for a qualifying reason. 29 C.F.R. § 1002.121. An employee is not entitled to reinstatement if the discharge from military service was dishonorable, other than honorable, dismissal as a result of court-martial, AWOL or other reasons listed in the regulation. 29 C.F.R. § 1002.135.

The employer cannot delay reinstatement of the employee while waiting for documentation from the military. 29 C.F.R. § 1002.122. *See, Petty v. Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008) (An employer could not delay reemployment even though it questioned the authenticity of the employee's discharge paperwork).

The Escalator Position
At the heart of USERRA is the requirement that an employee returning from uniformed service be placed in the "escalator" position meaning "the employee is entitled to reemployment in the job position that he or she *would have attained* with reasonable certainty if not for the absence due to uniformed service. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events." The escalator position requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other

job perquisites, that he or she would have attained if not for the period of service. 20 C.F.R. § 1002.191.

The court in *Serricchio v. Wachovia Securities, LLC*, 2010 U.S. Dist. LEXIS 31484 (D. Conn. 2010) held the escalator position for a financial advisor returning from military service required comparable commission opportunities. It was not sufficient that the employer, Wachovia, placed him in a position providing the same draw and commission *structure.* Rather, the employer had to give him the same opportunity for earning potential and advancement that he had prior to his military service. Prior to military service, the plaintiff, Michael Serricchio, serviced 200 accounts, managed $9 million with his partner, and was earning $6,500 per month. Upon return from service in the Air Force Reserve, Wachovia offered Serricchio a position where he would manage only a handful of accounts and earn only a small commission. The total award to Serrichio was in excess of $1.6 million: $

An escalator goes up – but it also goes down. Can an employee returning from uniformed service be laid off?
Yes, the application of the escalator principle can result in adverse consequences to the employee. If an employee's seniority or job classification would have resulted in the employee being laid off during the period of uniformed service, the employee can be laid off upon return. 29 C.F.R. § 1002.194. Employer is not required to reemploy employee if its circumstances have so changed as to make reemployment impossible or unreasonable. 29 C.F.R. § 1002.139.

What if the employee was replaced while on military leave?
The employer cannot refuse to reemploy the employee on the basis that another employee was hired to fill the position during the employee's absence, even if reemployment of the service member might require termination of the replacement. 29 C.F.R. § 1002.139(a).

Is a Service Member Protected from Discharge upon Returning to Work?
Yes, if the uniformed service was more than 30 days a returning service member is protected from discharge for a period of time depending on the length of service. The returning employee can only be discharged for cause for cause:

- For a period of one year after reemployment if the uniformed service was more than 180 days;
- For a period of six months after reemployment if the uniformed service was for more than 30 days but less than 180

28 U.S.C. § 4316(c). 20 C.F.R. § 1002.247. If the discharge is for conduct, it is the employer's burden to prove that the employee had notice of the conduct rule and that it was reasonable for the employer to discharge the employee. If the discharge is a layoff or because the employee's job has been eliminated, the employer bears the burden to prove that the employee's job would have been eliminated or that he/she would have been laid off with out regard to the uniformed service. 20 C.F.R. § 1002.248.

Joseph Duarte worked at Agilent Technologies, a spin off from HP, for 19 years. He worked in the compensation organization designing and evaluating the incentive compensation pay plans used to pay salespeople. Duarte was also a member of the Marine Reserves who was called up to active duty twice after September 11, 2001. When he returned from his second tour which lasted eight months, he was reinstated to a position with the same pay and benefits but his duties had changed because he was no longer the design consultant for one of Agilent's sales groups. Rather he was assigned to a special benchmarking project. Four months after returning from his second tour he was laid off. After a bench trial the judge found that Agilent had violated USERRA and that Duarte's layoff was not a discharge for cause under USERRA. The court wrote,

> I conclude that the timing of this action and the decisionmaking process that preceded Duarte's termination were not reasonable under the circumstances. This conclusion fosters USERRA's stated purpose to encourage service in the armed services by eliminating or minimizing the disadvantages members of the armed services experience in their civilian careers and employment as a result of their military services. 38 U.S.C. § 4301(a)(1). I do not question [the manager's] motives while acting under budgetary stress. But Duarte paid a steep price for his military deployment during his employment with Agilent. Specifically, he was seriously disadvantaged as a result of his military deployment and the corresponding diminished status and responsibilities assigned to him upon his return. This is the harm USERRA was enacted to prevent.

Duarte v. Agilent Technologies, 366 F. Supp. 2d 1039, 1048 (D. Colo. 2005).

Is a Returning Service Member Eligible to take FMLA?

The Family and Medical Leave Act regulations were amended with regard to when a returning service member is an "eligible employee" entitled to FMLA. For the 12 month requirement, "The time served performing the military service must be counted in determining whether the employee has been employed for at least 12 months by the employer." 29 C.F.R. § 825.110(b)(2)(i). In determining whether the employee has worked 1250 hours in the last 12 months, "[A]n employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours of service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service." 29 C.F.R. § 825.110(c)(2). *See* USERRA-FMLA Questions & Answers: http://www.dol.gov/vets/media/fmlaq-a.pdf.

What are the enforcement mechanisms for USERRA?
An individual can complain to the US DOL who will investigate the complaint. The US DOL can also refer cases to the U.S. Department of Justice who can sue on behalf of an individual. 20 C.F.R. §§ 1002.288 – 1002.292. Or an individual can sue an employer directly. Unlike Title VII, there is no exhaustion requirement. 20 C.F.R. § 1002.303.

What remedies are available for a USERRA violation?
A court may award:

- Attorneys' fees
- Reinstatement
- Lost wages or benefits
- Liquidated damages in the amount of the lost wages or benefits for a willful violation

A USERRA violation is "willful" if the employer either knew or showed reckless disregard for whether its conduct was prohibited by USERRA. 20 CFR § 1002.312

Resources

- **USERRA regulations:** **http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm**

- **National Committee for Employer Support of the Guard & Reserve:** **www.esgr.org**

RELIGIOUS ACCOMODATION

I. WHAT IS "RELIGION?"

A. Title VII of the Civil Rights Act of 1964

1. "The term 'religion' includes all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

2. "Religious practices . . . include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . .The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee." 29 C.F.R. § 1605.1.

B. Can an employer question the sincerity of an employee's beliefs?

EEOC v. Red Robin Gourmet Burgers, Inc., 2005 U.S. Dist. LEXIS 36219. Plaintiff worked for Red Robin as a server. He practiced Kemetecism, a religion with roots in ancient Egypt that worships sun god Ra. He had two tattoos encircling his wrists that were less than ¼ inch wide written in Coptic that said, "My Father Ra is Lord. I am the son who exists of this Father; I am the Father who exists of his son." He received the tattoos during a religious ceremony. He believes that intentionally covering them is a sin, except during the month of Mesura when Ra died and was reborn. Red Robin had an appearance policy that stated "tattoos must not be visible." The plaintiff was terminated when he refused to cover the tattoos. The EEOC sued Red Robin for violating Title VII and Red Robin moved for summary judgment. Red Robin questioned whether the plaintiff had a bona fide religious belief. But the court held that he sufficiently explained his faith in his deposition and his willingness to sacrifice his job rather than cover his tattoos was sufficient to demonstrate a bona fide religious belief.

Cloutier v. Costco, 390 F.3d 126 (1st Cir. 2004). Plaintiff worked for Costco in Massachusetts as a cashier. In March 2001 Costco updated its dress code to include all "facial jewelry" aside from earrings. Cloutier was told to remove her facial piercings. She refused (without stating any religious objection) and was sent home. The next day she returned wearing her piercings and for the first time asserted that she was a member of the Church of Body Modification and her eyebrow piercing was a part of her religion. She then filed a charge of religious

discrimination with the EEOC. "Determining whether a belief is religious is more often than not a difficult and delicate task, one to which the courts are ill-suited. Fortunately . . . there is no need for us to delve into this thorny question in the present case." (Internal citations omitted).

EEOC v. Union Independiente de la Autoridad de Acueductos & Alcantarillados de Puerto Rico, 279 F. 3d 49 (1st Cir. 2002). Plaintiff was a Seventh Day Adventist who claimed that the tenets of his religion prohibit him from joining a union. He applied for a job with AAA that had a collective bargaining agreement with a union security clause. He was discharged for failing to join the union. An employee must have a bona fide religious belief in order to state a religious accommodation claim. Title VII does not mandate that an employer or a union accommodate what amounts to a purely personal preference. Credibility issues, such as the sincerity of an employee's religious belief, are quintessential questions of fact. "[T]here is record evidence that [the plaintiff] lied on an employment application; that he is divorced; that he took an oath before a notary upon becoming a public employee; and that he works five days a week (instead of the six required by his faith). Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity." *Id.* at 56-57.

II. TIME OFF AS A REASONABLE ACCOMMODATION FOR RELIGIOUS PRACTICES

A. EEOC Regulations

"After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2 (c)(1).

B. Sabbath Observance Conflicts with Work Schedule

EEOC Regulations
Accommodations Suggested from the EEOC when Work Schedule Conflicts with Religious Practices 29 C.F.R. § 1605.2(d):

a. Voluntary swaps
b. Flexible scheduling
    (1) floating or optional holidays
    (2) flexible work breaks

(3) use of lunch time in exchange for early departure
(4) staggered work hours
(5) permitting an employee to make up time lost due to the observance of religious practice

c. Lateral transfer and change of job assignments

Baker v. The Home Depot, 445 F.3d 541 (2nd Cir. 2006). Plaintiff began working for Home Depot in March 2001 as a full time sales associate. He worked a flexible schedule including working on any day that his services were required. He worked a full time, 40 hour per week schedule. During the summer of 2001, during church pre-marital counseling and while attending church with his fiancée, plaintiff came to understand the importance of the Sabbath and the biblical requirement that all work cease on the Sabbath. He informed the Home Depot store manager of his religious objection to working on Sunday and the store accommodated him. Approximately a year later the store got a new manager who insisted that he work on Sundays. Although he explained his religious beliefs about the Sabbath to her, the new store manager told him that he could come in to work after church on Sunday. Or he could work a part time schedule, but he could not be a full time employee if he could not work Sunday. The plaintiff responded that he needed to be a full time employee because his wife was pregnant and he needed to pick up health insurance. He asked the store manager to not make him choose between his religion and his job. She scheduled him to work on Sunday and he was terminated when he failed to show up. Plaintiff sued Home Depot under Title VII alleging that it failed to accommodate his religious practices. The District Court granted Home Depot's motion for summary judgment finding that Home Depot's offer to schedule him to work in the afternoon or evenings on Sunday was a sufficient accommodation. Baker appealed to the 2nd Circuit *pro se.* First, Home Depot argued that that plaintiff failed to demonstrate a sincere religious belief requiring him to abstain from Sunday employment. They pointed to the fact that at one time he characterized Sunday as a "family day" and that he previously worked Sundays. They also pointed to the affidavit of his pastor who stated that Sunday is "a day of rest" and that his "admonishment to the congregation has been to find employment in which they would have Sunday off." Home Depot claimed that the pastor did not claim that work on Sunday was forbidden. The court rejected this argument stating, "[T]he present record is replete with protestations of Baker's belief that Sunday employment was prohibited absolutely by Scripture." The 2nd Circuit also found that the District court erred when it held that offering the plaintiff to work after church was a reasonable accommodation because it failed to address the plaintiff's principal objection to working on Sunday. "An employer does not fulfill its obligation to reasonably accommodate a religious belief when it is confronted with two religious objections and offers an accommodation which completely ignores one. . . .The shift change offered to [plaintiff] was no accommodation at all because, although it would allow him to attend morning church services, it would not permit him to observe his religious requirement to abstain from work totally on Sundays." Interestingly the court also

stated, "[W]e express here no opinion as to whether Home Depot's offer of part-time employment or its allowance of the exchange of shifts with other employees would constitute reasonable accommodations." Employees are not entitled to hold out for the 'most beneficial accommodation', but an offer of an accommodation might be unreasonable if it causes an employee to suffer an inexplicable diminution in his employee status or benefits.

Vaughn v. Waffle House, Inc., 263 F. Supp. 2d 1075 (N.D. Tx. 2003). Plaintiff worked for the Waffle House restaurant as a district manager. The restaurants are open 7 days per week, 24 hours per day including holidays. Managers work six days in a row and then are off for one or two days. Plaintiff is a member of the Seventh Day Adventist Church and began observing the Sabbath from sundown Friday until sundown Saturday. (He had worked for Waffle House for a year without observing the Sabbath, but then decided to do so.) He asked his manager for an accommodation for Sabbath observance. For seven weeks plaintiff was allowed to take every Sabbath off, but Waffle House determined it could not continue because it required other managers to cover for him. (Friday evening and Saturday morning are the busiest times at the restaurants.) Waffle House then gave plaintiff five options for work assignments that would better accommodate his Sabbath observance. Plaintiff then transferred to a position in human resources that paid $10,000 less than his managerial position. He sued Waffle House alleging that they failed to accommodate his religious practice. The court, granting summary judgment for Waffle House, noted that an employer does not have to provide the employee with his preferred accommodation. "Defendant , reasonably accommodated [plaintiff's] request to be relieved of any work performed on his Sabbath, and the fact that it resulted in reduced compensation does not render the accommodation unreasonable, especially considering that the number of hours which he was required to work were correspondingly reduced as well."

III. UNDUE HARDSHIP

A. EEOC Regulations 19 C.F.R. § 1605.2(e)

1. Cost: "An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require 'more than a de minimis cost.'" Factors considered by the EEOC in determining what constitutes more than a de minimis cost:

    a. Cost in relation to the size and operating cost of the employer
    b. The number of employees who will need a particular accommodation
    c. Regular payment of premium wages of substitutes would constitute an undue hardship

d. *Infrequent* payment of premium wages for a substitute is not an undue hardship
e. Administrative costs of providing accommodation are not an undue hardship

2. Seniority Rights: Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system

B. What if the Requested Accommodation Conflicts with a Seniority System?

Balint v. Carson City, 180 F.3d 1047 (9th Cir. 1999). Plaintiff, a member of the Worldwide Church of God, observed the Sabbath from sundown Friday to sundown Saturday. She was offered a position in the Carson City Sheriff's Department. She informed the Department of her religious practice and asked that her schedule be adjusted so that she work on Sundays instead of Saturdays. The Department refused her request and made no efforts to accommodate her request. The city had a seniority based shift bidding system. Plaintiff sued alleging that the city had failed to accommodate her religious practice. The Ninth Circuit, relying on *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), held that the existence of a seniority system was not a defense if reasonable accommodation can be made without violating the seniority system. "Employers need not transgress upon their seniority systems to make accommodations, but they are required to attempt accommodations that are consistent with their seniority systems and that impose no more than a de minimis cost." *Id.* at 1055.

C. Can an Adverse Impact on Coworkers be an Undue Hardship?

George v. The Home Depot Inc., 2002 U.S. App. LEXIS 21824 (E.D. La. 2002). Plaintiff, a Catholic, worked as a greeter in the kitchen and bath department. Her job was intended to increase sales in the department by answering the phone, answering questions and "qualifying" customers by asking preliminary questions. This allows the designers to spend more of their time designing. Plaintiff was the only greeter in the department. The store was open 24 hours per day, 7 days per week. Sunday is the store's second busiest day of the week. Plaintiff refused to work on Sunday's because of her belief that her religion stated she had to rest her mind and body on Sundays. Her manager offered to schedule her work on Saturday and Sunday so that she could attend mass, but plaintiff responded that she could not work at all on Sundays. Home Depot established that it could not accommodate plaintiff's religious preference without suffering an undue hardship. "Home Depot has established a business need for having plaintiff, the only greeter in the kitchen and bath department, work on Sundays, the second busiest day of the week. There is undisputed record evidence that the lack of a greeter on Sundays would have required the designers to handle the duties otherwise delegated to the greeter, thus decreasing the efficiency of the department."

Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit http://www.acc.com/annualmeetingextras.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at http://www.acc.com/LegalResources.