606:Navigating Employment Law's Bermuda Triangle-Managing Leave & Reasonable Accommodation Issues

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Faculty Biographies

Robert E. Gans

Robert E. Gans is labor/employment counsel for Computer Sciences Corporation in Falls Church, Virginia, a Fortune 500 information technology company with approximately $12 billion revenue and 90,000 employees worldwide. He manages primarily U.S. employment litigation, as well as handles broader corporate policy issues related to HR matters. He handles EEOC charges, Department of Labor complaints, OFCCP compliance reviews, Reduction in Force/WARN Act issues, severance and non-competition agreements, and FMLA/ADA administration and accommodation matters.

Prior to joining Computer Sciences Corporation, Mr. Gans was employment counsel for Nordstrom, managing east coast division employment and general liability matters, training and counseling senior management and human resources personnel, advising on matters of sexual harassment prevention, FMLA/ADA reasonable accommodations, benefits/severance, workplace violence prevention, and contractual issues. Prior to Nordstrom, he was a litigator for the Washington, DC employment law boutique firm of Shaw, Bransford, Veilleux and Roth. Mr. Gans even started out his litigation career as a plaintiff's lawyer.

He is a member of the New York, Connecticut, DC, and Virginia (Corporate Counsel) Bars, and is the current chair of the Labor & Employment Forum for the Washington Metro Area Corporate Counsel Association (WMACCA).

Mr. Gans received his BA from Duke University, in Durham, North Carolina and is a graduate of Washington University Law School, in St. Louis, Missouri.

Eric D. Reicin

Eric D. Reicin is associate general counsel for Sallie Mae. In this position, he serves as the company's chief labor and intellectual property attorney and is based at the company's headquarters in Reston, Virginia. Sallie Mae is one of the largest diversified financial companies in the United States and is publicly traded on the NYSE.

Prior to joining Sallie Mae, Mr. Reicin was a litigator at a large law firm in Washington, DC.

Mr. Reicin frequently appears as a speaker on employment law topics before both local and national organizations. He is the corporate counsel chair for ABA EEO committee and is a founder of the ABA/EEOC joint training partnership. Mr. Reicin also is the current vice president and program chair of the ACC's Washington Metropolitan Area Chapter (WMACCA) and serves as a member of its board of directors. His previous professional affiliations include serving as cochair of the ABA EEO committee regional liaison division as well as chair of the WMACCA Labor and Employment Forum. He also served as coeditor for the chapter on sexual and other forms of harassment in Lindeman and Grossman, *Employment Discrimination Law,* 2000 supplement and coeditor for the chapter on retaliation in forthcoming Lindeman and Grossman, *Employment Discrimination Law,* 4th Ed.

Mr. Reicin is a Mortar Board graduate of the University of Michigan and is a cum laude graduate of the University of Illinois College of Law.

Linda A. Whittaker

Linda A. Whittaker is the senior assistant general counsel of the employment law practices division of Wal-Mart Stores, Inc, located in Bentonville, Arkansas. Ms. Whittaker advises the largest private employer in the United States on policy, procedures, and training for employment issues, including leaves of absence (FMLA, USERRA), privacy, Equal Employment Opportunity compliance, job descriptions, and state law issues, such as workers compensation. She serves as the company's Americans with Disabilities Act (ADA) coordinator, responsible for analyzing and developing policy, procedures, and compliance for all aspects of the ADA and relevant state laws and regulations, consent decrees, and other agreements for both employment and customer service issues. Ms. Whittaker develops and authors job descriptions, policies, procedure manuals, training, and bulletins for the company on a multitude of employment issues.

Before assuming her current role, Ms. Whittaker enjoyed a successful trial practice as both an in-house litigator and in private practice. Prior to joining Wal-Mart, Ms. Whittaker was a partner at Stanley, Lande & Hunter, where her clients included public and private employers in both union and non-union settings. She counseled those clients on employment issues in addition to her trial work. She represented employers at union negotiations, hearings, arbitrations, and agency inquiries.

Ms. Whittaker received a BA and BS from the University of Arizona, Tucson. She graduated with high distinction from the University of Iowa College of Law. While at Iowa, Ms. Whittaker worked on the *Iowa Law Review* and won a position on the Iowa's national mock trial team.

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Managing Leave

- Overview of Laws Protecting Employee Leaves and Reasonable Accommodations
- FMLA
- ADA
- Worker's Compensation
- Military - USERRA
- State Laws

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FAMILY AND MEDICAL LEAVE ACT

- **The Family and Medical Leave Act of 1993**, 29 U.S.C. 2612(a), requires employers of 50 or more workers within 75 miles of the employer's work site to provide eligible employees up to 12 weeks of unpaid job protected leave in a twelve month period for certain family and medical purposes. FMLA leave generally is permitted under the following circumstances: (1) the birth of the son or daughter of an employee and in order to care for the son or daughter; (2) the placement of a son or daughter with an employee for adoption or foster care; (3) to care for the spouse, son or daughter, or a parent of the employee if such spouse, son or daughter, or parent has a serious health condition; or (4) if the employee has a serious health condition which makes the employee unable to perform their job. FMLA also provides that where medically necessary, a person may take leave intermittently or be placed on a reduced leave schedule. In general, FMLA requires that an employee be restored to the same or an equivalent position upon return from leave. FMLA further prohibits discrimination against individuals who exercise their rights under FMLA. Employees must be employed for at least 12 months and performed 1250 hours of service for the employer during the preceding 12-month period to be a covered employee.

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FMLA Issues

- **Serious health condition**
- **What about "common" conditions**
  - (flu, common cold, stress, sleep apnea and migraine headaches)
- **Delay in receipt of medical certification**
- **Multiple "serious health conditions" or ailments**
- **Second opinions; third opinions**
- **Interaction of state and federal FMLA statutes**
- **Intermittent leave** – DOL opinion letter, May 25, 2004
- **Concurrent leaves**
- **Misuse of FMLA**
- **Transfer to different position during intermittent leave period**
- **No-fault attendance policies**
- **RIF decisions**
- **Pending legislation**

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Americans with Disabilities Act

- **Title I of the Americans with Disabilities Act of 1990 (ADA)**, 42 U.S.C. Section 12101, et seq. prohibits discrimination against qualified individuals with disabilities in all employment practices including job application procedures, hiring, firing, advancement, compensation, and training. The ADA also requires that the employer provide a "reasonable accommodation" of an employee's disability unless undue hardship (including direct threat to health and safety) can be shown. The ADA applies to all private employers with 15 or more employees.

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ADA

- **Qualified individual**
- **Disability** – 42 U.S.C. Section 12101(2) – "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."
  - Note: State law definitions of "disability" may be broader
- **"Substantially" limits a major life activity**
- **Essential functions**
- **Reasonable accommodation**
- **Undue Hardship**

State Law definitions vary…

California: CA Fair Employment and Housing Act – Disability defined as:
- "having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss"
- "limits an individual's ability to participate in major life activities." (not "substantially limits")

Connecticut: Prohibits discrimination against any individual who:
- Has a chronic physical handicap, infirmity, or impairment.
- "Exhibits a severe discrepancy between educational performance and measured intellectual ability" and who "exhibits a disorder" in one or more basic psychological processes involved in understanding or using language.
- Has record of or is regarded as having one or more mental disorders, as defined in the American Psychiatric Association's most recent Diagnostics Statistics Manual.

Illinois: Prohibits discrimination against any individual with a determinable physical or mental characteristic, the history of such a characteristic, the perception of such characteristic and is unrelated to the person's ability to perform the duties of a particular job.

New Jersey: Prohibits discrimination against individuals "suffering" from:
- Any physical disability, infirmity or disfigurement; and
- Any mental, psychological, or developmental disability that prevents the normal exercise of any bodily or mental function, or is medically or psychologically demonstrable by accepted techniques (e.g., AIDS or HIV infection).

New Mexico: Prohibits discrimination based on a "serious medical condition."

New York: Prohibits discrimination based on a "physical, mental or medical impairment" which "prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." (e.g., carpal tunnel syndrome is a disability under NY law). This definition may include temporary conditions.

Washington: Prohibits discrimination on the basis of any sensory, mental, or physical qualifying disability, and defines such condition as "an abnormality" that is a "medically cognizable or diagnosable" condition; may include temporary impairments.

Wisconsin: Prohibits discrimination against any individual who has a mental or physical impairment that makes "achievement unusually difficult or limits the capacity to work."

Interactive process

-
- **C**ommunication
- **C**ontemporaneous documentation
- **C**hronology
- **C**onsistency
- **C**aring

- **Job Accommodation Network (JAN)** – 1-800-526-7234; www.ian.wyu.edu

"What a pain in the…"

According to a survey by Integra in 2000 [as noted on JAN's website]:

- 62% of workers surveyed reported work-related neck pain
- 44% of workers surveyed reported eye strain
- 38% of workers complained of hand pain
- 34% of workers complained of sleeping problems related to stress
- 12% of workers admitted calling in sick because of job stress.

Reasonable Accommodations

ADA Reasonable Accommodations may include:

- **Changing policies and procedures (e.g., one year maximum LOA policies)**
- **Leaves of absence**
- Adjustments to the employment application process (e.g., sign language interpreter)
- Job restructuring (changing the arrangement of duties, work pace or method of performing the job tasks on an interim basis or longer)
- Flexible work schedules
- **Use of accrued paid leave or providing additional unpaid leave for necessary treatment**
- Reassignment to a vacant position
- **Part-time schedule in current position**
- **Intermittent leave**
- Use of assisting devices/physical modifications to work-site/workspace

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Reasonable Accommodations

ADA Reasonable Accommodations usually do not include:

- Creating a new position
- Eliminating or changing an essential job function of the current position
  - Note: Wisconsin law does not distinguish essential from non-essential job functions
- Changing the employee's supervisor
- Providing an assistant or job coach to perform the essential functions of the job (with some potential exceptions for interpreters, readers, or other assistants for non-essential functions)
- Rescinding or waiving disciplinary action

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Common ADA Issues

- **Telecommuting**
- **Drugs**
- **Primary and secondary contractors**
- **Indefinite leave requests**
- **"Little" accommodations**
- **Psychiatric disabilities (http://www.jan.wvu.edu/media/Psychiatric.html)**
- **Restoration to job**
- **When does an FMLA medical condition become an ADA disability?**
  - **continuous leave for 12 weeks (plus state law)?**
  - **intermittent leave?**
- **Light duty return to work**
- **Preferential reassignment rights?**
- **Regarded as disabled - Accommodation requirements?**

What do different circuits say about preferential reassignment rights?

Circuits that do not support preferential reassignment rights (6th, 7th and 8th)

- **Hedrick v. Western Reserve Care System, 355 F.3d 444 (6th Cir. 2004)** - a disabled employee does not have preference in hiring over other more qualified candidates for an open position.
- **EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000)** – the ADA is not a mandatory preference act
- **Kellogg v. Union Pacific Railroad Company, 233 F.3d 1083 (8th Cir. 2000)** – employer is not required to make accommodations that would subvert other, more qualified applicants for the job

Circuits that do support preferential reassignment rights (10th, plus EEOC)

- **Smith v. Midland Brake, 180 F.3d 1154 (10th Cir. 1999)(en banc)** – ADA does require an employer to prefer a disabled employee who needs a reassignment over other, better candidates for the vacant position
- Note: EEOC agrees - a disabled employee who can be accommodated by reassignment to a vacant position does not have to be the best qualified person for the job and should not have to compete against other applicants for the position.

What do different circuits say about "regarded as" disabled?

Circuits in which "regarded as" employees are not entitled to reasonable accommodation

- **Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999)**(not deciding the issue, but noting that "it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability") – [**Note**: **"The Taylor defense"** – an employee who is erroneously perceived by an employer as disabled has an obligation to reasonably inform the employer of the mistake.]
- **Newberry v. E. Texas State Univ., 161 F.3d 276, 280 (5th Cir.1998)**
- **Workman v. Frito- Lay, Inc., 165 F.3d 460, 467 (6th Cir.1999)**
- **Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir.1999)**
- **Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003)**

Circuits in which "regarded as" employees are entitled to reasonable accommodation

- **Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir.1996)**
- **Jacques v. DiMarzio, Inc., 200 F.Supp.2d 151, 163 (E.D.N.Y. 2002)**(recognizing that the 2d Cir has not addressed the issue yet) (plaintiff had bipolar disorder, but never claimed that it affected the major life activity of working, so not considered disabled under the ADA)

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Accommodation Request Form (sample language)

Basic initial questions:

- Name, Date, Job Number/Position/Location details
- Describe the limitations that form the basis for your accommodation request
- List the job task(s) that you are unable to perform without accommodation
- List any accommodation(s) that you believe would help you perform the job tasks listed above (including any special equipment or methods, changes in physical workspace, etc.) [Note: The company may have additional ideas/suggestions regarding reasonable accommodations as well.]
- Is the accommodation assignment requested for the short term or long term?
- Estimated full return to work date and/or duration of accommodation
- Date of expected re-evaluation of job modification (as applicable) [For HR only]
- Employee signature and date
- HR Leave Representative signature and date

To be filled out during/after the interactive process:

- Accommodations considered
- Accommodation accepted/selected (if any), and duration
- If accommodation is denied, explanation (*including acceptance of a job modification, but not an accommodation based on ADA-qualifying disability)

Requests for extensions of accommodations:

- For how long are you requesting an extension?
- Any previous extensions?
- Anticipated return to work date or duration of accommodation

(See Also Wal-Mart Sample Worksheets/Checklists in the Additional Written Materials…)

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Workers Compensation

- **General Definition – State mandated/regulated compensation system for employee who are injured on the job in the course of their employment.**

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Workers Compensation

- **Exclusive remedy provisions**
- **Light duty issues**
- **Benefits**
- **Return to work priorities (varies by state)**
- **Workers Compensation retaliation**

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USERRA

- **USERRA** –The Uniformed Services Employment and Reemployment Rights Act provides for up to 5 years (and perhaps longer) leave from employment with re-instatement rights for employees who are absent from employment because of "service in the uniformed services." Upon reemployment, an employee is entitled to all benefits they would have obtained if they had been continuously employed – such as leave under the FMLA.

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USERRA

- Length = up to five years (maybe more)
- Disability = not defined
  - Reasonable accommodation
  - Reassignment
- Reinstatement- the job the person "would have held"
- FMLA eligibility

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Navigating the Triangle

- Numerous and overlapping statutory schemes and regulations
  - Covered employers
    - Contractors
    - Consultants
    - Joint Employers
    - Mergers and Acquisition Issues

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Navigating the Triangle

- Eligible employees
  - Disability
  - Serious health condition
    - **What about "common" conditions** (flu, common cold, stress, sleep apnea and migraine headaches)
  - Occupational injury
  - Military Service
  - Length of employment as condition of eligibility
  - Medical Condition eligibility

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Navigating the Triangle

- Medical inquiries [Best Practice: Get a Release]
  - Documentation for FMLA/ADA/WC
  - Delay in receipt of medical certification
  - 2nd or 3rd opinions under FMLA
  - IME
  - Investigators
- Continuation of Benefits
- Notice Issues
- Paid/Unpaid Leave
- Length of leave
  - Intermittent FMLA leave
  - Indefinite leave requests
  - Concurrent leaves

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Navigating the Triangle

- Accommodations other than Leave
  - Transfers and light duty
  - Transfer to different position during intermittent leave period
  - Telecommuting
  - "Little" accommodations
  - Preferential reassignment rights
  - Adjustments to the employment application process (e.g., sign language interpreter)
  - Job restructuring (changing the arrangement of duties, work pace or method of performing the job tasks on an interim basis or longer)
  - Flexible work schedules
  - Reassignment to a vacant position
  - Part-time schedule in current position
  - Use of assisting devices/physical modifications to work-site/workspace
  - Restoration to job

Navigating the Triangle

- Return to work
  - Light Duty Positions
  - Documentation
  - Reinstatement v. reassignment
- Regarded as disabled-- Accommodation requirements
- FMLA slipping into WC, ADA, and state law issues.
- Undue Hardship defense
- Affect on Benefits – eligibility based on status (full time v. part time)

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Navigating the Triangle

- Terminations
  - RIF
  - No-fault attendance policies
- Employee Claims
- Best practices involving military leave in light of the war on terror
- Misuse of FMLA/ADA
- State law issues
- WC issues
- Outsourcing of leave issues
- Union/CBA issues
- Pending legislation

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FMLA CHECKLIST

1. Has the Associate worked for us for more than 12 months? _____ (Yes or No)
   If "yes," go to #2. If "no," the Associate does not qualify for job protected leave.

2. Has the Associate worked at least 1000 hours in the past year? _____ (Yes or No)
   If "yes," go to #3. If "no," the Associate does not qualify for job protected leave.

3. Is the leave for a serious health condition? _____ (Yes or No)
   Use the serious health condition chart, if necessary.
   If "yes," go to #4. If "no," the Associate does not qualify for job protected leave.

4. Is the request for leave properly certified? _____ (Yes or No)
   If "yes," go to #5. If "no," the Associate does not qualify for job protected leave.

5. Has the Associate previously taken FMLA leave? _____ (Yes or No)
   If "yes," the "anniversary date" for purposes of calculating leave will be the date of the first FMLA LOA. If "no," the effective date of the current request will be the anniversary date for purposes of calculating FMLA leave.

6. What is the anniversary date for this Associate? _____
   The Associate is entitled to 12 weeks FMLA leave annually based on the anniversary date.

7. Is this a continuous, intermittent or reduced hours LOA? _____
   If continuous, grant the leave, track the leave manually at facility level.
   If intermittent or reduced hours, go to #8.

8. For an intermittent or reduced hours LOA, you will need to calculate the number of hours/days the Associate has available for leave. If the Associate works an erratic or changing number of hours each week, multiply the total number of hours worked in the past 12 week and divide by 12 to get the average hours per week. Then multiply that number by 12 for the total number of hours available for leave. I.E. Associate has worked a total of 408 hours in the past 12 weeks. That would be an average of 34 hours per week for a <u>total</u> availability of 408 hours. Leave time must be tracked manually at facility level.

WHEN IS A CONDITION A DISABILITY?

Use these steps to decide whether an Associate has a qualifying disability under the ADA. These steps apply when an Associate either:

1) has an injury or condition that is not job-related; or
2) has an injury which is job related and they have reached maximum medical improvement. That is, they are released to return to work with or with out long term restrictions.

1. Find out exactly what mental or physical impairment is claimed by the Associate.

    a. If the impairment or condition is obvious, proceed to #2.
    b. If the impairment or condition is not obvious, you may need documentation from the Associate health care provider describing:

        i. The diagnosis of the condition
        ii. The prognosis or expected duration of the condition
        iii. The restrictions or limitations caused by the condition
        iv. The expected duration of the limitations

    c. You can provide the Associate with a Medical Information Form which asks for this information. *It is NOT required to use this form, but the Associate and their doctor may find it useful.*

2. What is the expected duration of the impairment?

    a. If more than 180 days, or you are in California, New Jersey, New York or Washington, proceed to #3.
    b. If less than 180 days, and you are NOT in California, New Jersey, New York or Washington, the individual is not disabled. You should:

        i. Review your denial of the requested accommodation with your RPM or the ADA Coordinator.
        ii. Complete the Request for Accommodation Form.
        iii. Inform the Associate of your decision and their ability to appeal.
        iv. Give the Associate a copy of the completed Reasonable Accommodation Form.
        v. Fax the completed Reasonable Accommodation form to the ADA Coordinator.

3. What major life activities are limited or affected by the impairment?

    Remember, major life activities are activities are things such as:

standing	hearing
walking	seeing
talking	working
breathing	taking care of ones self
learning	sleeping

    a. If a major life activity is affected, proceed to #4.
    b. If none of the above are affected, you should:

i. Review your denial of the requested accommodation with your RPM or the ADA Coordinator.
ii. Complete the Request for Accommodation Form.
iii. Inform the Associate of your decision and their ability to appeal.
iv. Give the Associate a copy of the completed Reasonable Accommodation Form.
v. Fax the completed Reasonable Accommodation form to the ADA Coordinator.

4. Is the Associate more restricted than the average person in his or her ability to perform the major life activities listed above? Remember to look at the Associate's limitations as if they utilized devices such as glasses, hearing aids, medication, etc. California only – look at the Associate's limitations without regard to whether they utilize devices.

a. If yes, proceed to #5.
b. If no, you should:

i. Review your denial of the requested accommodation with your RPM or the ADA Coordinator.
ii. Complete the Request for Accommodation Form.
iii. Inform the Associate of your decision and their ability to appeal.
iv. Give the Associate a copy of the completed Reasonable Accommodation Form.
v. Fax the completed Reasonable Accommodation form to the ADA Coordinator.

5. The Associate appears to be a qualified individual with a disability. Consider their request for accommodation and decide if it is reasonable. Use the Reasonable Accommodation Worksheet for guidance.

c. If it is, grant the request. Send a completed copy of the Reasonable Accommodation Form to the ADA Coordinator.
d. If it is not, discuss alternatives with the Associate.

i. If the Associate accepts the alternative, complete the Reasonable Accommodation Form and send a copy to the ADA Coordinator.
ii. If the Associate refuses the alternative, you should:

1. Review your denial of the requested accommodation with your RPM or the ADA Coordinator.
2. Complete the Request for Accommodation Form.
3. Inform the Associate of your decision and their ability to appeal.
4. Give the Associate a copy of the completed Reasonable Accommodation Form.
5. Fax the completed Reasonable Accommodation form to the ADA Coordinator.

REASONABLE ACCOMMODATION WORKSHEET

1. What is the Associate's current job or the job they are seeking? (If this is a request to enable the Associate to enjoy the benefits of employment, go to # 7.)
2. With what essential function(s) of this job does the Associate need accommodation?
3. Are there one or more devices that would allow the Associate to perform the essential functions of the job? ---------- (If no – go to #8.)
    a. What is the cost of the device(s)?
    b. Before a requested accommodation is denied on the basis of cost, the facility manager must partner first with the RPM. If the RPM agrees the device is too costly, they must partner with the ADA Coordinator before a final decision is reached.
4. In order to be reasonable, an accommodation must be effective – that is, it must work to allow the Associate to perform the essential functions of the job.
    a. If there is a choice among alternatives, are they equally effective?
        i. If yes, the choice among effective accommodations is yours – the employer. Consider the Associate's preference – but you make the decision.
    b. While the accommodation must be effective, it doesn't have to be the most effective. For instance, a visually impaired Associate cannot see the CBL screen. One choice might be to purchase talking software that would "read" the CBL to the Associate. Another choice would be for the personnel Associate to read the CBL to the visually impaired Associate.

While the visually impaired Associate prefers the speaking software, the manager chooses to direct the personnel associate to read the CBL.

If the accommodation is effective, go to #5. If there is no effective accommodation, go to #8.

5. It is never reasonable to create a job. Creating a job includes:
    a. Expecting the Associate to perform only some – but not all - of the essential functions of the job.
    b. Paying two people to do one job.
    c. Changing or eliminating production or customer service standards.
    d. Actually creating a job that doesn't otherwise exist.
6. An accommodation is not reasonable if it would change the nature of our business.

    For example, a Deaf cashier requests that customers be required to communicate with him by using a computer.
7. We must also accommodate request for accommodation that would allow the Associate to enjoy the benefits of employment.

    For example, a deaf Associate requests an ASL interpreter for the holiday party. The facility should provide the interpreter.
8. If there is no reasonable accommodation that would allow the Associate to perform the essential functions of the job, consider reassignment to an open, vacant position.
    a. What positions are open, vacant at this time?

i. Can the Associate perform this job without reasonable accommodation?

ii. What reasonable accommodation would allow the Associate to perform this job? (Go through the same analysis, above.)

b. If there is no open, vacant position at this time that the Associate could do either with or without reasonable accommodation, do you anticipate that such a position will become available within the next 30 days? (For California – use 90 days)

i. If no, terminate.

ii. If yes, put Associate on personal LOA for 30 days LOA (California = 90 days LOA).

1. If a position opens during this time, offer the Associate the position. If the Associate refuses the position, terminate.

2. If a position does not become available within the designated time period, terminate at the end of the period.

9. **Whatever happens, complete the Reasonable Accommodation Form and send it to the ADA Coordinator. Facsimile = 479/277-5991.**

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans' Employment and Training Service

July 2004

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive system, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute.

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Employer Obligations

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Homeland Security – Emergency Preparedness and Response Directorate (FEMA), when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, section 300hh-11(e).

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.

- Commissioned Corps of the Public Health Service.

- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The law provides an exemption from employer reemployment obligations if the employee's pre-service position of employment "is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period."

Advance Notice (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or

- the giving of notice is otherwise impossible or unreasonable.

Duration of Service (Section 4312(c))

The cumulative length of service that causes a person's absence from a position of employment with a given employer may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions . Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.

Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The U.S. military involvement in Haiti ("Uphold Democracy") and in Bosnia ("Joint Endeavor") is two examples of such an operational mission.

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

Disqualifying service (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work (Section 4312(e))

Time limits for returning to work depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f))

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation . **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.
Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. **Section 4313(a)(2)**. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) the duties of which the employee is qualified to perform, with full seniority.

"Escalator" position . The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority "escalator" at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation of status and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

<u>Disabilities incurred or aggravated while in Military Service</u> Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons

Seniority rights Section 4316(a)

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the service member is entitled to the most favorable treatment so long as the nonmilitary leave is comparable. For example, a three-day bereavement leave is not comparable to a two-year period of active duty.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. **Section 4316(b)(4)**. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans

Pension plans, **Section 4318,** which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate the liability of the plan for pension benefits accrued by persons who are absent for military service. If no allocation or cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, or the determination of such rate is not reasonably certain, the employee's compensation during the period of service is computed on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, service members cannot be forced to use vacation time for military service.

Health benefits Section 4317

The law provides for health plan continuation for persons who are absent from work to serve in the military and their dependents, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage (in connection with the person's position of employment) would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). Upon reemployment of the service member, a waiting period or exclusion cannot be imposed upon reinstatement of health plan coverage of any person whose coverage was terminated by reason of the military service (unless an exclusion or waiting period would have been imposed absent the military service). However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge

Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than 180 days.

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;

- promotion;

- reemployment;
- termination; and
- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services or to perform service in the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military or as intermittent employees in the National Disaster Medical System are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service.

USERRA clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Reprisals

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.
- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced (Non-Federal employers)

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statute for States, local governments, and private employers. Previously, the Secretary lacked such authority.

Veterans' Employment and Training Service. Reemployment assistance is provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates complaints and, if meritorious, attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions Section 4323(a).

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(d)(1)(C). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(h)(2). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(f). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgments to determine potential claims of employees.

Service Member Checklist

Service Member Obligations	Yes	No	Comments
1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)			
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?			
3. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)			
4. Was the service member discharged under conditions other than disqualifying under section 4304?			
5. Did the service member make application or report back to the pre-service employer in a timely manner?			
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?			
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.			

Employer Obligations

Employer Obligations:	Yes	No	Comments
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)			
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.			
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?			
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.			
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?			
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?			
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?			
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?			

9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?			
10. Did the employer providehealth coverage upon request of a service member? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?			
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute?			
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for service?			

THE BERMUDA TRIANGLE:
THE AMERICANS WITH DISABILITIES ACT,
THE FAMILY AND MEDICAL LEAVE ACT AND
WORKERS' COMPENSATION REGULATIONS

By

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I. INTRODUCTION

The Americans With Disabilities Act (the "ADA"), the Family and Medical Leave Act (the "FMLA"), and state Workers Compensation Acts have created a maze of rules which interact in complex ways. Employers have been hard pressed to manage their obligations under these statutes, which appear to conflict in several key areas, such as medical inquiries and examinations, leave entitlement, light duty assignments, and return to work requirements.

This article reviews the related provisions of these statutes, highlights some of the potentially troublesome areas of intersection, and provides advice on avoiding conflicts that may result in unnecessary liability.

II. THE AMERICANS WITH DISABILITIES ACT, THE FAMILY AND MEDICAL LEAVE ACT AND WORKERS' COMPENSATION LAWS

A. Background on The Americans With Disabilities Act and the Family and Medical Leave Act.

1. Introductory Principles of the ADA.

Title I of the Americans With Disabilities Act (the "ADA") prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[1] The ADA covers private employers with 15 or more employees.[2] The ADA does not preempt any existing federal or state law that is consistent with the ADA.[3] Thus, a single violation may subject a covered employer to actions under the ADA and other federal and state statutes, such as the FMLA, state FMLA statutes, or state workers' compensation acts.[4]

The ADA protects any "qualified individual with a disability," meaning an individual with a disability who, with or without reasonable accommodation, can perform the "essential functions" of the employment position held or desired.[5] The term "essential

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1 2 U.S.C. § 12112(a).

2 42 U.S.C. § 12111(5)(A).

3 42 U.S.C. § 12201(b).

4 Under the ADA, the term "employer" means "a person engaged in an industry affecting commerce" who has the requisite number of employees "for each working day in each of 20 or more calendar weeks in the current or preceding year" and any agent of such person. **Id**.

5 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

functions" refers to fundamental job duties of the employment position that the individual with a disability wants or holds.[6] With respect to an individual, the term "disability" means having a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or having a record of such an impairment; or being regarded as having such an impairment.[7]

Under the ADA, employers are required to make "reasonable accommodations" to the known physical or mental limitations of a qualified individual who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.[8] Reasonable accommodation may include, among other things, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, flexible work schedules, reassignments to vacant positions, and similar accommodations.[9] A reasonable accommodation may be a part-time schedule in a current position or intermittent leave. Reassignment to a vacant position may also be a reasonable accommodation.[10]

2. Leaves of Absence under the ADA and the Family and Medical Leave Act.

1. When is a leave of absence a reasonable accommodation?

The discussion that follows relates to rights and obligations under the ADA. The Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq*. ("FMLA"), and state leave laws have some provisions that conflict. The employee is entitled to the most advantageous provisions of all applicable state laws. A detailed explanation of the FMLA is published in "The Family And Medical Leave Act Of 1993 And Its Final Regulations Issued In January 1995."

a. Must an employer provide a leave of absence as a reasonable accommodation?

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6 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

7 42 U.S.C. § 12102(c).

8 42 U.S.C. § 12112(b)(5)(A). Accommodation is not required when it would result in "undue hardship," meaning an action requiring "significant difficulty or expense." This standard is not defined in the ADA. The EEOC Regulations state that employers must show substantially more difficulty or expense than is necessary to satisfy the "de minimis" standard under Title VII of the Civil Rights Act of 1964. EEOC Interpretative Guidance, § 1630.15(d).

9 EEOC Interpretative Guidance, § 1630.2(o).

10 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

Absent an undue hardship, employers are required to provide unpaid leave as a reasonable accommodation when doing so would be effective. 42 U.S.C. § 12111(9), (10); 29 C.F.R. Pt. 1360, App. § 1630.2(o). "Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5, 15 A.D. Cas. 21 (8th Cir. 2003) (former police officer failed to establish he was qualified to perform essential functions of job, with or without accommodation; "[h]is excessive absenteeism from work rendered him unable to perform the job, and time off of work was not a reasonable accommodation in this instance" because the city could not reallocate plaintiff's job duties among its small staff during plaintiff's requested six-month leave of absence); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247, 8 A.D. Cas. 1813 (9th Cir. 1999) ("If [the plaintiff's] medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified."); *see also Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967, 13 A.D. Cas. 588 (10th Cir. 2002) (summary judgment for employer reversed because court could not conclude that the length of leave requested was unreasonable or unduly burdened employer where plaintiff had requested and taken no more leave than the FMLA already required that she be given); *Rascon v. U.S. W. Communications, Inc.*, 143 F.3d 1324, 1333-34, 8 A.D. Cas. 541 (10th Cir. 1998) (extended leave for veteran who suffered from post-traumatic stress disorder was reasonable under the circumstances, including the employer's leave policies allowing for even greater leave, and the specific information provided by the plaintiff in support of his request, such as the expected duration of his treatment, information on his course of treatment and a positive prognosis from his doctors); *but see Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 380-81, 14 A.D. Cas. 580 (7th Cir. 2003) (denying summary judgment for employer on other grounds; not working for an extended period of time is not a reasonable accommodation under the ADA where plaintiff, suffering from symptoms of depression that prevented him from staying awake, requested indefinite leave; the court noted that by not working, plaintiff was not able to perform the essential functions of his position and thus was not a "qualified individual" under the ADA), *cert. denied*, 124 S. Ct. 327, 157 L. Ed. 2d 147, 14 A.D. Cas. 1568 (2003).

However, "unfettered ability to leave work at any time" is not a reasonable accommodation. *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101, 9 A.D. Cas. 765 (8th Cir. 1999); *see also E.E.O.C. v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 950, 11 A.D. Cas. 1569 (7th Cir. 2001) (request by employee with AIDS for "sick days, if needed, without being penalized" was unreasonable; "businesses are 'not obligated to tolerate erratic, unreliable attendance'"). In *Jackson v. Veterans Admin.*, 22 F.3d 277, 3 A.D. Cas. 483 (11th Cir. 1994), the plaintiff sought accommodations due to limitations caused by his severe arthritis, including allowing him to "swap" off days with other employees, delay his shift start time, or defer more physically demanding and less time-sensitive job duties until the next day in the event of a flare-up. The court affirmed summary judgment for the employer, explaining:

> Such accommodations do not address the heart of the problem: the unpredictable nature of [plaintiff's] absences. There is no way to accommodate this aspect of his absences. Requiring the [employer] to accommodate such absences would place upon the agency the burden of making last-minute provisions for [plaintiff's] work to be done by someone else. Such a requirement would place an undue hardship on the agency. *Id.* at 279.

a. Must an employer provide *paid* leave as a reasonable accommodation?

Only to the extent paid leave is provided to non-disabled employees or is required by the FMLA.[11] An employer is not expected to provide employees with disabilities with any more paid leave time than other similarly situated employees. Employers should allow the employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. EEOC Reas. Acc., at "Leave."

b. May an employer deny a request for leave when the employee cannot provide a fixed date of return?

No, according to the EEOC, unless the employer can prove that granting the indefinite leave would result in an undue hardship.[12] However, "[t]he employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and a possible date of return." EEOC Reas. Acc., at Quest. No. 43. "After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship." *Id.*; *accord* EEOC Dis. Inq., at Section C, Quest. 16 ("If the employee's request for leave did not specify an exact or fairly specific return date . . . or if the employee needs continued leave beyond what was originally granted, the employer may require the employee to provide periodic updates on his/her condition and possible date of return. However, where the employer has granted a fixed period of extended leave and the employee has not requested additional leave, the employer *cannot* require the employee to provide periodic updates. Employers, of course, may call employees on extended leave to check on their progress or to express concern for their health.") (emphasis in original).

Courts, however, typically hold that a request for an indefinite leave is not a "reasonable" accommodation request. *E.g.*, *Wood v. Green*, 323 F.3d 1309, 14 A.D. Cas. 100 (11th Cir.) (employee's request for indefinite leave of absence so that he could work at some uncertain point in future not reasonable accommodation under ADA, and thus employee not qualified individual; "ADA covers people who can perform the essential functions of their jobs presently or in the immediate future"), *cert. denied*, 124 S. Ct. 467, 14 A.D. Cas. 1760 (2003); *Walsh v. United Parcel Serv.*, 201 F.3d 718, 725, 10 A.D. Cas. 161 (6th Cir. 2000) (affirming summary judgment for employer; plaintiff's request for ninety days of leave for additional medical evaluation, following nearly a year and a half of leave he already received, combined with his failure to provide medical documentation indicating a time frame or circumstances under which he could return to work, was unreasonable; "We therefore hold that when, as here, an employer has already provided a substantial

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[11] The FMLA likewise does not require employers to pay employees during an FMLA leave, unless it otherwise provides a paid leave of absence benefit. 29 U.S.C. § 2614(c)(1). Under certain circumstances, an eligible employee may choose, or an employer may require, that earned or accrued paid leave be substituted for all or part of an unpaid FMLA leave. 29 C.F.R. § 825.207(a).

[12] Under the FMLA, eligible employees are entitled to a maximum of 12 workweeks of leave during any 12-month period. 29 U.S.C. § 2612(a)(1). An employee may take FMLA leave intermittently or on a "reduced leave schedule" to care for a sick family member, or for the employee's own illness, if intermittent leave is medically necessary. 29 C.F.R. § 825.203(a).

leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation."); *Watkins v. J & S Oil Co., Inc.*, 164 F.3d 55, 62, 137 Lab. Cas. P. 33 (1st Cir. 1998) (affirming summary judgment in favor of employer; plaintiff's request was unreasonable where he asked the employer to leave his original position open for an indefinite amount of time); *Smith v. Blue Cross Blue Shield, Inc.*, 102 F.3d 1075, 1077, 6 A.D. Cas. 367 (10th Cir. 1996) (open-ended leave requested by plaintiff due to panic attacks and fears of stress was not a reasonable accommodation; "[a]n employer is not required to wait indefinitely for . . . [the disabled employee's] recovery"); *Hudson v. MCI Telecom. Corp.*, 87 F.3d 1167, 1169, 5 A.D. Cas. 1099 (10th Cir. 1996) ("the ADA does not require an employer to grant an employee indefinite leave as an accommodation").

When an employer already has provided substantial leave to an employee, an additional leave period of a significant time with no clear prospects for recovery and return to work is not a reasonable accommodation. *See Walsh v. United Parcel Serv.*, 201 F.3d 718, 726-27, 10 A.D. Cas. 161 (6th Cir. 2000) (employer did not violate ADA when it discharged a pilot who had been on a leave of absence for nearly 18 months due to complications stemming from an automobile accident rather than granting him additional leave; plaintiff failed to provide requested information as to whether or when he was able to return to work, indefinite leave of absence was not a reasonable accommodation; physician did not identify disability or recommend accommodations that would allow plaintiff to return to work in any other position and gave only a vague estimate of date plaintiff could return to work).

c. Must an employer hold open the job of an employee on leave as a reasonable accommodation?

The EEOC takes the position that an employer must allow an employee with a disability who is granted leave as a reasonable accommodation to return to his/her same position, unless the employer can prove that doing so would impose an undue hardship. If an employer is not able to hold the position open without incurring an undue hardship, then it must consider whether it has a vacant, equivalent position for which the employee is qualified. If so, the employer should reassign the employee to that equivalent position when the employee returns from leave. EEOC Reas. Acc., at Quest. No. 18. *But see Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187, 5 A.D. Cas. 1326 (6th Cir. 1996) (plaintiff's claim that the employer "replaced him rather quickly" was interpreted by the court as suggesting that he believed the employer should have left his position open or perhaps filled it temporarily, neither of which is reasonable under the circumstances; "employers are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future").[13]

[13] An employee who takes a qualified FMLA leave is entitled to be restored to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. 29 U.S.C. §§ 2614(a)(1), (2), (3); 29 C.F.R. §§ 825.215(a).

d. May an employer provide an accommodation that allows an employee to remain on the job instead of a requested leave?

Yes, except where the FMLA gives the employee the absolute right to a leave.[14] The employer is required to provide an effective accommodation, not the most effective accommodation, or the accommodation of the individual's choice. Therefore, except where the FMLA otherwise requires, instead of providing a leave, an employer may provide a reasonable accommodation that allows the employee to remain on the job as long as this does not interfere with the employee's ability to address his/her impairment. Once the employee no longer needs the reasonable accommodation, the employer is required to restore the employee's full duties or return the employee to the original position. EEOC Reas. Acc., at Quest. No. 20.

e. May an employer penalize an employee for work missed during a leave taken as a reasonable accommodation?

According to the EEOC, an employer may never penalize an employee for work missed during a leave taken as a reasonable accommodation. To do so would render the accommodation ineffective; thus, the employer would be liable for failing to provide a reasonable accommodation. EEOC Reas. Acc., at Quest. No. 19.[15]

f. May an employer terminate an employee who requires leave beyond a company-wide "no-fault" leave policy?

Again, the EEOC says "no." "No-fault" leave policies permit an employer to terminate employees automatically after they have been on leave for a certain amount of time. However, if an employee with a disability needs unpaid leave beyond the company-wide amount as a form of reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave unless the employer can prove that such additional leave would cause an undue hardship or that another effective accommodation exists. EEOC Reas. Acc., at Quest. No. 17. *But see Price v. S-B Power Tool*, 75 F.3d 362, 365-66, 5 A.D. Cas. 277 (8th Cir. 1996) (employer's policy required that absentee rates not exceed three percent; after plaintiff was discharged for violating this policy, she claimed she was terminated because of her epilepsy and that

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[14] Both male and female employees who meet the length of employment (at least 12 months), hours of service (at least 1,250 hours worked during the last 12 months) and certain worksite requirements are entitled to FMLA leave in all qualifying circumstances. 29 C.F.R. § 825.112(b). Qualifying circumstances include: (1) birth of a child and care of a newborn child; (2) placement of a child for adoption or foster care; (3) care for an employee's spouse, child or parent with a "serious health condition"; and (4) an employee is incapable of performing the functions of his/her job due to the employee's own "serious health condition." 29 C.F.R. §§ 825.112, 825.113, 825.225.

[15] The FMLA prohibits employers from: (1) reducing the benefits of an employee taking unpaid FMLA leave if an employee taking other unpaid leave would be entitled to retain his/her benefits; (2) using FMLA leave as a negative factor in considering an employee for discipline, promotion or other employment actions; or (3) counting FMLA under "no fault" attendance policies. 29 C.F.R. § 825.220(c).

the "no-fault" attendance policy should not have been applied to her; after conducting a fact-specific inquiry, the court concluded that "[plaintiff] has not shown the existence of any facts which would permit a jury to conclude that this reason was pretextual or that intentional discrimination was the true reason for her termination").

g. What are an employee's rights under the ADA as compared to the Family and Medical Leave Act (FMLA)?

An employer must consider the employee's rights separately under each statute. In some cases, actions that are permissible under one statute are prohibited by the other.

PRACTICAL TIP: COMPARISON OF ADA AND FMLA PROVISIONS

- **Right to Leave of Absence**

ADA: Employer must provide leave of absence as a reasonable accommodation unless doing so would create an undue hardship.

FMLA: Employer must provide an eligible employee up to 12 weeks of unpaid leave during a 12-month period.

- **Continuation of Benefits During Leave**

ADA: Leave may be provided with no benefits continuation unless the employer would provide benefits to nondisabled employees under similar circumstances.

FMLA: The employer must maintain the health benefits of an employee on FMLA leave. 29 C.F.R. § 825.209(a), (b).

- **Right to Reinstatement After Leave**

ADA: Employee is entitled to the position s/he held prior to leave unless the position is no longer vacant because it would have been an "undue hardship" to hold it open.

FMLA: Employee is entitled to same or equivalent position s/he held prior to leave. An employer may transfer an employee to an equivalent position (with equivalent benefits, pay, and other terms and conditions of employment) without establishing undue hardship. 29 U.S.C. § 612(a)(1)(B).

- **Light Duty Positions**

ADA: Employer not required to *create* a light duty position, but must reasonably accommodate (*e.g.*, by removing marginal functions or by considering for existing vacant light duty position if disabled employee is qualified and no reasonable accommodation will allow him/her to remain in present position.).

FMLA: Employer may not, in lieu of leave, *require* an employee to take a light duty position. 29 C.F.R. § 825.702(d). However, the employer may *offer* light duty assignments as an alternative.

• **Undue Hardship Defense**
ADA: Available as an affirmative defense to the reasonable accommodation requirement.
FMLA: Not available. However, employees needing intermittent leave or leave on a reduced schedule are required to attempt to schedule their leave so as not to disrupt the employer's operations. 29 C.F.R. § 825.117.

3. EEOC's Guidance on Reasonable Accommodation.

On March 1, 1999, the EEOC issued an enforcement guidance on reasonable accommodations and undue hardship under the ADA.[16] The guidance speaks to numerous issues regarding the application of the ADA, including detailed discussion of leave as a reasonable accommodation. In some significant respects, EEOC's guidance seeks to establish for employees leave rights greater than those allowed in the prevailing case law. The following is a brief summary of the subject matter and guidance offered in EEOC's publication:

- *Paid Leave* - An employer is required to provide paid leave to the same extent as that provided to similarly situated employees. An employer must allow an employee to use their accrued paid leave prior to requiring them to use unpaid leave.

- *"No-Fault" Leave Policies* - Policies that require an employee to be terminated after a certain amount of leave may violate the ADA to the extent that the leave would not cause undue hardship.

- *Holding A Job* - An employer is required to reinstate an employee on ADA leave to the employee's original position unless holding the employee's position open would cause an undue hardship. If holding an employee's position would create an undue hardship, the employer must first consider whether there is an equivalent position that can be made available, or if that effort fails, a lower level position. If no position is available, continued leave is not required.

- *Offering An Accommodation That Eliminates The Need For Leave* - When an employee requests leave, an employer may provide an accommodation that would require the employee to remain on the job while also meeting the employee's accommodation needs. However, when the employee no longer requires a reasonable accommodation, she must be reinstated to her original position.

[16] EEOC Enforcement Guidance: Reasonable Accommodation And Undue Hardship Under The Americans With Disabilities Act, March 1, 1999.

- *Modified Schedules* - A modification of an employees work schedule may be a reasonable accommodation where it would not significantly disrupt the employer's operations. If a modification creates an undue hardship, the employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

- *No Fixed Date of Return* - Allowing an employee leave without a fixed date of return is a reasonable accommodation; however, if such a leave creates an undue hardship, the leave may be denied. Undue hardship can result from the inability to plan for the employee's return and the inability to fill the position.

B. Background on The Family And Medical Leave Act Of 1993.

The Family and Medical Leave Act ("FMLA") entitles qualified employees to up to twelve (12) weeks of unpaid leave per year for the birth or adoption of a child, the care of an immediate family member with a serious health condition, or for recovery from an employee's own serious health conditions. Covered employers are required to maintain an employee's health coverage during a qualified FMLA leave and to reinstate the employee to the same or an equivalent job once the leave is concluded.

A "covered employer" is any entity, individual or agency employing fifty (50) or more employees for each working day in at least twenty (20) calendar workweeks in the current or preceding calendar year.[17] If an employer that has initially met the "50 employees for 20 workweeks" threshold subsequently reduces its workforce to fewer than 50 employees, that employer remains covered by the FMLA until it has not employed at least 50 employees for 20 consecutive or nonconsecutive workweeks in two consecutive calendar years.[18]

1. Employees Eligible for Family and Medical Leave. An employee must meet each of the following three requirements in order to be entitled to an FMLA leave.[19]

   a. An employee must have at least twelve (12) months of service with the covered employer from whom leave is being requested. Thus, a temporary or seasonal employee will qualify once he or she has completed 52 weeks of service.[20]

17 29 U.S.C. § 2611(4); 29 C.F.R. § 825.102(b)

18 29 C.F.R. § 825.105(e).

19 29 U.S.C. § 2611(2)(A), (B)(ii).

20 29 C.F.R. § 825.110(b).

b. An employee must have worked at least 1,250 hours for the covered employer during the preceding twelve (12) month period.[21]

c. An employee must work at a worksite of the covered employer that has at least fifty (50) employees working within a seventy-five (75) mile radius of that worksite.[22]

An employee's eligibility for FMLA leave is determined at the time the employee requests the leave.[23]

2. Qualifying Circumstances.

a. Birth Or Placement Of New Children. Both male and female employees who meet the service, hours and worksite requirements are entitled to FMLA leave for the birth and care of a newborn child, or the placement in their home of adopted or foster children, legal wards, stepchildren and other children for whom the employee requesting leave stands "in loco parentis" (in the place of a parent). Employees must request this type of leave thirty (30) days in advance. However, if the date of the birth or placement prevents that amount of notice, employees must provide as much notice as is "practicable."[24]

b. Care For Family Member With A Serious Health Condition. Both male and female employees who meet the service, hours and worksite requirements are entitled to FMLA leave in order to care for a spouse, child or parent has a "serious health condition." The regulations define a serious health condition as an "illness, injury, impairment, or physical or mental condition" that involves at least one of the following:

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[21] 29 C.F.R. § 825.110(c). It has been held that "an employee only gets credit toward the FMLA 'hours of service' requirement if the employee actually worked the hours in question," and neither paid leave, such as vacation and sick time, nor unpaid leave will be considered "hours or service" under the FMLA. Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 18, 21 (D.D.C. 1995). In addition, according to a recent Sixth Circuit opinion, where an employee claimed that she was subjected to an adverse action in violation of the FMLA, the "hours of service" requirement should be calculated from the date of the commencement of the leave, and not from the date of the adverse action. Butler v. Owens-Brockway Plastic Prods., Inc., 199 F.3d 314 (6th Cir. 1999).

[22] 29 C.F.R. § 825.111(a)(2). One court has pointed out that the 50 employee requirement recognizes the "onerous burden on smaller employers" of granting unpaid leave to necessary employees. Pate v. Baker Tanks Gulf South, Inc., 34 F. Supp. 2d 411 (W.D. La. 1999) (holding under the ADA that the defendant had proven that granting additional leave would be an undue hardship given the minimal staffing at the employees work location).

[23] 29 C.F.R. § 825.111(d).

[24] 29 U.S.C. § 2612(e).

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities of more than three calendar days that also involves continuing treatment by, or the supervision of, a health care provider; or

(3) Continuing treatment by, or the supervision of, a health care provider for a chronic health condition that is so serious that, if not treated, it would likely result in a period of incapacity of more than three calendar days; or for prenatal care.[25]

Prior to granting an employee FMLA leave for the care of a spouse, child or parent with a "serious health condition," the employer may require that the employee produce written certification from a health care provider stating the following:

(a) The date when the serious health condition commenced;

(b) The probable duration of the condition;

(c) The nature of the condition; and

(d) A statement that the employee is needed to care for the immediate family member, including an estimate of the amount of time that such employee will be needed.[26]

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[25] 29 C.F.R. § 825.114(a). "The legislative history makes clear that Congress intended the FMLA to cover serious illnesses that last more than a few days. Minor illnesses, on the other hand, should be addressed through the employer's sick leave policy and not through the FMLA." Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1035 (M.D. Tenn. 1995) (a serious health condition is one where an individual is incapacitated for more than 3 days, seen once by a doctor, and prescribed a course of medication). See also Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 259 (N.D. Miss. 1995) (a minor illness, such as food poisoning, requiring one visit to a physician, "cannot possibly be construed as a serious health condition under the terms of the [FMLA]"), aff'd, 74 F.3d 91 (5th Cir. 1996).

[26] 29 U.S.C. §§ 2613(a), (b). See Pagan v. United States Postal Service, 99-3278, 1999 U.S. App. LEXIS 32557, at *4-*5 (Fed. Cir. Dec. 15, 1999) (Even if an employee has provided prior documentation that the employee will need leave to care for a sick family member on an intermittent basis, an employee may be required to submit medical certification to the employer to support each specific day of absence.).

If the employer has reason to doubt the validity of the certification provided, the employer may require, at the employer's expense, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer. If there is a conflict in the two opinions, a third opinion may be obtained at the employer's expense. However, the third health care provider must be agreed-upon, and his/her opinion is final.

c. Employee's Own Serious Health Condition. Employers are also required to provide FMLA leave to employees who suffer from serious health conditions that render them incapable of performing their job duties.[27] In order to be eligible, the employee must be "unable to perform" his or her job. This standard is satisfied when a health care provider finds that the employee is unable to work at all or is unable to perform any of the "essential functions"[28] of his or her position. As with the other types of FMLA leave, employees are required to give their employer thirty (30) days notice of their intent to take the leave, or as much notice as is "practicable."

The following cases address the circumstances in which an employee's medical problems did not rise to the level of a "serious health condition":[29]

Frazier v. Iowa Beef Processors, Inc., No. 99-1630/1632, 2000 U.S. App. LEXIS 665 (8th Cir. Jan, 19, 2000).

The court affirmed judgment as a matter of law in favor of the employer, holding that the employee was lawfully terminated for excessive absenteeism. The employee failed to establish that he had a "serious health condition." Although the employee suffered from an impingement to his right shoulder, the employee did not establish that his doctors considered the injury to be of such severity as to make him unable to work. The employee also failed to prove that he received "continuing treatment" from a health care provider, as neither of his visits to doctors for purposes of diagnosis resulted in a

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[27] 29 U.S.C. § 2612(a)(1)(D).

[28] The term "essential functions" is intended to be construed as it is construed with respect to the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the regulations promulgated thereunder. See 29 C.F.R. § 825.115.

[29] In addition to the discussions of specific ailments in these cases, courts will also consider the evidentiary support for a plaintiff's claim of incapacitation. In one such case, Boyd v. State Farm Insurance Co., 158 F.3d 326 (5th Cir. 1998), cert. denied, 119 S. Ct. 1357 (1999), the Fifth Circuit affirmed summary judgment for the employer where the plaintiff's only evidence that he was incapacitated was an expert witness's opinion, written two years after the fact, that included "vague" and "conclusory" statements and reflected no opinions formed "contemporaneous[ly]" with the alleged events.

program of treatment, prescribed medication, or a course of physical therapy.

Marchisheck v. San Mateo County, 199 F.3d 1068 (9th Cir.1999).
Plaintiff's son's injuries from being beaten in fight did not constitute a serious health condition because the son was treated only once for the injuries. Furthermore, neither the son's behavioral problems nor a combination of his emotional problems and the effects of the assault was sufficient because there was no evidence that he suffered an inability to perform regular daily activities. Even if the son did have a serious health condition, plaintiff was still not entitled under the FMLA (or CFRA) to take leave to help her son move overseas with relatives for a more stable environment; caring for a child with a serious health condition requires some level of participation in ongoing medical treatment.

Murray v. Red Kap Industries, Inc., 124 F.3d 695 (5th Cir. 1997).
The court affirmed a directed verdict for the employer, holding that the employee was lawfully terminated during the second week of leave taken following a respiratory tract infection, because she had failed to return to work upon her doctor's certification that she was able to do so, and she had no treatment by a health care provider during the second week of leave.

Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997).
The court affirmed the grant of judgment as a matter of law in favor of the employer on FMLA claims, where the district court had held that the employee was lawfully terminated for leaving work early on the basis that she was too ill to perform her duties. The court held that her carpal tunnel syndrome did not rise to the level of a "serious health condition," because her doctor never advised her to refrain from work, nor could her doctor testify that the employee was unable to perform the functions of her job in light of her illness.

Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997).
The court affirmed summary judgment against an employee who suffered from hematochezia, or passage of bloody stools, who was lawfully terminated on the basis of his leave for a flexible sigmoidoscopy because hematochezia is not a "serious health condition." The severity of his condition was unknown at the time of his leave and if it was discovered that he suffered from a severe condition such as cancer, then his absences in the future would be covered by the FMLA.

3. Terms of FMLA Leave.

a. Amount Of Leave. Eligible employees are entitled to a total of twelve (12) workweeks of FMLA leave during any twelve (12) month period.[30]

An employee may take the 12 weeks of FMLA leave intermittently to care for a sick family member or for his/her own illness, if intermittent leave is medically necessary. Employees may not take FMLA leave intermittently for the birth or placement of a new child, unless the employer agrees to such an arrangement.[31]

Employers may require an employee requesting intermittent leave based on planned medical treatment or recovery from a serious health condition, to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.[32] The new position must provide equal pay and benefits, but it need not have equivalent or even similar duties.

b. Substitution of paid leave time.[33] If an employee is taking FMLA leave for either (1) the birth or placement of a new child, or (2) to care for a seriously ill family member, the employee may elect, or the employer may require, substitution of any accrued paid vacation leave, personal leave or family leave for the unpaid leave benefit under the FMLA.

c. Compensation And Benefits During FMLA Leave. The FMLA does not require employers to pay employees during an FMLA leave, unless it otherwise provides a paid leave of absence benefit. Employers must maintain an employee's group health insurance coverage for the duration of a qualified FMLA leave at the level and under the conditions that the coverage would have been provided if

30 29 U.S.C.§ 2612(a)(1).

31 29 C.F.R. § 825.203(a).

32 29 C.F.R. §§ 825.204 (a), (c).

33 29 C.F.R. §§ 2612(d)(2)(A), (B).

the employee were not on leave.[34] An employer may not require the plaintiff to forfeit future benefits in return for FMLA leave.[35]

4. Notice of FMLA Leave.

Employees must provide their employer with notice of their intent to take leave 30 days prior to the requested leave[36] or as far in advance as is "practicable."[37] The FMLA "does not require an employee to invoke the language of the statute" or to reference the statute specifically "to gain its protections when notifying her employer of her need for leave for a serious health condition."[38] While "an employee must tell her employer the reason she is absent from work before she will be entitled to FMLA protection," it is the "employer's duty to make further inquiry to determine if the leave qualified for FMLA protection."[39] No particular format for such notice is required.[40]

Illustrative cases:

Bailey v. Amsted Indus., Inc., 172 F.3d 1041 (8th Cir. 1999).
The court affirmed the district court's entering judgment in favor of the employer. The employee failed to satisfy the FMLA notice requirements where he did not give his employer 30 days notice of his medical appointments, nor did he provide notice of his unforeseen absences "as soon as practicable." The court rejected the employee's argument that he satisfied the notice requirements

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34 29 U.S.C. §§ 2614(c)(1).

35 See Mardis v. Central Nat'l Bank & Trust, No. 98-6056, 1999 U.S. App. LEXIS 7261 (10th Cir. Apr. 15, 1999) (holding that the employer violated the FMLA where the plaintiff was instructed that due to her prior FMLA leave her accrued vacation and sick leave benefits were forfeited; however, an employer may, consistent with the FMLA, require postponement of a scheduled vacation or place temporary restrictions on the employees vacation leave)

36 29 C.F.R. § 825.302(a)

37 29 C.F.R. §§ 825.302(b), 825.303(a). This requirement generally means that an employee must make the employer aware of the employee's need for leave within one or two business days of learning of it. Id.

38 Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995). See also 29 C.F.R. § 825.302(c).

39 See Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1038 (M.D. Tenn. 1995).

40 See Ozolins v. Northwood-Kensett Community Sch. Dist., 40 F. Supp. 2d 1055 (N.D. Iowa 1999) (rejecting the employer's argument that because the plaintiff did not submit the proper leave request form, she did not invoke her rights under the FMLA, where she had apprized her employer of the relevant facts both in writing and orally). See also 29 C.F.R. § 825.302(d).

because the company was aware that he had serious medical conditions, was under medical care and needed to miss work from time to time. "An attempt to satisfy the notice requirements by an indication that [the employee] might have to be absent at some unforeseen time in the future satisfies neither the requirement of notice of 'anticipated timing and duration of the leave,' 29 C.F.R. 825.302(c), nor the requirement of notice 'as soon as practicable if dates . . were initially unknown,' 29 C.F.R. 825.302(a)."

Browning v. Liberty Mut. Insur. Co., 178 F.3d 1043 (8th Cir. 1999), cert. denied, 210 S. Ct. 588 (1999).
The court held that the employee did not give sufficient notice to put the employer on notice that her situation qualified for FMLA leave. The employee was released by her doctor to work under certain restrictions, and had started working under those restrictions. Although her sister subsequently called the employer to notify them that the employee's arm had gone numb and would not be at work, the employer's calls to her doctor confirmed that the employee's restrictions had not changed and she was still released to work.

Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999).
The court held that an employee's statement that he might be suffering from bipolar disorder and needed time off to see a doctor was not sufficient notice of FMLA leave. The court noted that the employee never scheduled a doctor's appointment, nor did he request leave for a specific day or period.

Godwin v. Rheem Mfg. Co., 15 F. Supp. 2d 1197 (M.D. Ala. 1998).
Granting summary judgment for employer on plaintiff's claim that he was denied FMLA leave because his notice, given 14 days after his absence, was inadequate under the statute. The court held that although prior absences had been cleared by the employer, the employee's representations that he had been absent because he had contracted poison ivy, with no mention of a qualifying reason under FMLA, were insufficient to put the employer on notice as required in the FMLA statute and regulations.

Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973, 4 WH Cases 2d 678 (5th Cir.), cert. denied, 525 U.S. 826 (1998).
Reversing a lower court's judgment in the employee's favor because she did not reasonably apprize her employer of her request to take leave for a serious health condition in compliance with FMLA regulations as to unforeseeable leave. Wal-Mart discharged the plaintiff for excessive unexcused absences after the plaintiff's mother informed the employer that the plaintiff was sick and "having a lot of pain in her side," that she would not be able to work on the one

particular day, and that she wanted to make it up. No contact was made again until 12 days later, at which time the plaintiff presented a doctor's note that did not state it was medically necessary for her to have missed the work day 12 days earlier.

Gay v. Gilman Paper Co., 125 F.3d 1432, 4 WH Cases 2d 289 (11th Cir. 1997).
Granting summary judgment for the employer, finding that the plaintiff did not give sufficient notice to her employer of her need for FMLA leave. After plaintiff was admitted to a psychiatric hospital, her husband called her supervisor and told him she was in the hospital "having some tests run." Plaintiff's husband deliberately withheld information concerning the true nature of her condition and instructed his sons to do the same. Plaintiff argued it was the employer's burden to request further information if it so desired. The court held that the information submitted to the employer was not sufficient to put the employer on notice that her absence was potentially FMLA-qualifying, and therefore the burden never shifted to the employer.

Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997).
Holding that the employee did not give his employer adequate notice of need to take FMLA leave for a serious health condition. The employee's wife told his employer that she was sick and he would be out because of family problems. The employee later notified his employer he would be out because he was sick, but offered no further information and stated that he did not know when he would return.

Employers also must provide their employees with notice that they are designating leave as FMLA leave.[41] Employers are able to retroactively designate this leave as FMLA leave in the following circumstances.

If an employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee returned from leave (e.g., employee absent for only a brief period), the employer may, upon the employee's return to work, designate the leave retroactively (so long as the designation occurs within two business days of the employee's return to work). The employer also must give the employee appropriate notice of the designation. 29 C.F.R. § 825.208(e)(1).

[41] 29 C.F.R. § 825.208(b)(1). This notice must be made in writing or orally. However, if the notice is given orally, it must be confirmed in writing no later than the following payday. Id.

> If an employee took leave for an FMLA-qualifying reason but the leave was not designated as FMLA, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA-qualifying reason if the employee wants the leave to be covered by the Act. If the employee does not provide such timely notification, he or she may not later assert FMLA protections for the absence (e.g., the absence may be counted for disciplinary purposes). Id.
>
> If the employer knows the reason for the leave but has been unable to confirm that the leave qualifies under FMLA, or has requested medical certification that has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee at the commencement of leave (or as soon as the reason for the leave becomes known). When the employer receives the confirming information, the preliminary designation becomes final. If the information fails to confirm that leave is FMLA-qualifying, the employer must withdraw the designation and provide written notice to the employee. 29 C.F.R. § 825.208(e)(2).

Until recently, except in the above circumstances, a federal regulation provided that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against the employee's FMLA entitlement."[42] However, in Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002) the United States Supreme Court invalidated that penalty provision of the regulations.

In Ragsdale, plaintiff, who suffered from cancer, received seven months of leave under the employer's policy. Plaintiff requested an extension, but defendant declined to grant additional leave. Defendant terminated plaintiff when she did not return to work. Plaintiff asserted that, because defendant did not designate her leave, it did not count against her 12-week entitlement and the statute guaranteed her 12 more weeks. The Court, however, held that:

> [plaintiff] has not shown that she would have taken less leave or intermittent leave if she had received the required notice. . . . [Plaintiff's] medical condition rendered her unable to work for substantially longer than the FMLA twelve week period. In fact her physician did not clear her to work until . . . long after her 30-week leave period ended. Even if [defendant] had complied with the notice regulations, [plaintiff] still would have taken the entire 30-week absence.

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42 29 C.F.R. § 825.700(a).

Id. at 1162. The Court thus held that the regulation was "invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their right and resulting prejudice." Id. Ragsdale did not, however, invalidate the notice and designation requirements. An employer may count leave time which an employer fails to designate timely as FMLA leave against an employee's 12-week entitlement, however, an employer may be held liable if an employee is able to establish that the employer retrained his or her exercise of FMLA rights by failing to designate timely the leave as FMLA leave – for example, if the employee is able to is able to show that he or she would have taken less leave or intermittent leave if he or she had received the required notice. Thus, Ragsdale requires a fact specific analysis in deciding to designate leave time retroactively.

5. Rights Upon Return from FMLA Leave.

Reinstatement. Any employee who takes a qualified FMLA leave is entitled, upon return from such leave, to be restored to the same or an "equivalent" position with the same seniority rights and benefits the employee had when the leave commenced.[43] The regulations define an "equivalent position" as one that has the same pay, benefits and working conditions (including privileges, perquisites and status) as the position held by the employee prior to taking FMLA leave.[44]

6. Termination of Employment

Employees who are poor performers may be terminated, regardless of their FMLA leave status. If an employee would have been terminated regardless of FMLA leave, then the employee may be terminated before, during or after such leave. In the following cases, poor performance provided a legitimate, non-discriminatory reason to terminate employees who had asserted their rights under the FMLA:

Polderman v. Northwest Airlines, Inc., 40 F. Supp. 2d 456 (N.D. Ohio 1999). The court granted defendant's motion for summary judgment, holding that an employee was properly terminated for excessive

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43 29 U.S.C. §§ 2614(a)(1), (2), (3).

44 29 C.F.R. §§ 825.215(a). However, this FMLA requirement is distinguishable from the ADA requirements as it does not require the employer to reinstate an employee to their prior or equivalent position where he or she is unable to perform an essential function of the job. See Tardie v. Rehabilitation Hosp., 168 F.3d 538 (1th Cir. Cir. 1999); see also Green v. Alcan Aluminum Corp., No. 98-3775, 1999 U.S. App. LEXIS 30158, at *5 (6th Cir. Nov. 16, 1999) (employer not required to restore employee to her position where she remained unable to perform the essential functions of her position at the end of the protected FMLA leave period); Reynolds v. Phillips & Temro Indus., 195 F.3d 411 (8th Cir. 1999) (affirming summary judgment for employer where employee could not perform the essential functions of his job at the end of twelve weeks of leave)

absences soon after she was granted FMLA leave. The court found that the plaintiff had been given warnings under the employer's progressive discipline system for unexcused absences prior to taking FMLA leave and, thus, the employer was justified in terminating her on that basis, regardless of the temporal proximately of her termination and her FMLA leave.

Clay v. City of Chicago Dep't. of Health, 143 F.3d 1092 (7th Cir. 1998).
The court affirmed the grant of summary judgment to the employer, holding that the Director of Human Resources was lawfully terminated following an FMLA leave for a back problem where there were "many observed deficiencies in her performance." The hiring forms prepared by her office were defective, she was unable to get along with the staff of the City Deputy Budget Director, hiring for vacant positions in the Department of Health was delayed, and there were numerous other recorded deficiencies. Although the employee's performance was rated "good" in her last performance review, complaints and negative feedback were received after that review was completed. The court held that the employee was terminated due to her work deficiencies and not due to her FMLA leave.

Richmond v. Oneok, 120 F.3d 205 (10th Cir. 1997).
Affirming summary judgment for the employer, the court held that a secretary was lawfully terminated following FMLA leave where her supervisor had documented 15 instances of poor work performance in the three years prior to her termination. The fact that the employee did not receive any counseling regarding her performance did not demonstrate that she was terminated for any reason besides poor performance.

Mosley v. Hedges, No. 96 C 8349, 1998 U.S. Dist. LEXIS 5316 (N.D. Ill. Apr. 13, 1998).
Holding that an accounts payable clerk was lawfully terminated while she was on FMLA leave, the court granted summary judgment to the employer. The employee had been suspended for five days, without pay, for insubordination and was issued a written warning regarding her tardiness prior to her request for FMLA leave. The employee was also warned, prior to her FMLA leave, that her failure to process registration forms and her poor relations with the public and her colleagues could lead to a dismissal. The employee's performance evaluation, conducted shortly after her request for FMLA leave, was unsatisfactory in eight categories. While the employee was on leave, the employer discovered a large number of unopened invoices and unprocessed invoices at the employee's work station. Shortly thereafter, the employee was discharged as a result of her record of poor performance. This termination was lawful because the employer did not terminate her "for taking FMLA leave."

Hubbard v. Blue Cross Blue Shield Ass'n., 1 F. Supp. 2d 867 (N.D. Ill. 1998).
Granting summary judgment to the employer on the FMLA claim, the court found that the employee was lawfully terminated from her position as Billing Manager because she would have been terminated regardless of whether she took FMLA leave due to depression. The employee turned in late and inaccurate time sheets and was sometimes tardy and absent. Her supervisor reported that she exhibited hostility and resisted work assignments. She failed to meet the goals of a corrective action program designed to improve her performance, so she was terminated upon her return from FMLA leave.

Employees who engage in insubordination, fraud or other prohibited conduct may be discharged regardless of FMLA leave status.[45] Employees were properly discharged in the following cases:

Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997).
The court affirmed the grant of summary judgment for the employer on an FMLA claim, holding that the employee was properly discharged while on leave following knee replacement surgery. The court noted that the employer "honestly believed" that the employee was fraudulently accepting disability benefits because an investigative company videotaped her walking, driving, sitting, bending, and shopping. The employer need not "conclusively prove" that the employee misused her leave, only that it had an "honest suspicion" that she was not using the leave for its intended purpose. The employer need not afford her greater rights than similarly situated employees (suspected of fraud) who were not on FMLA leave.

Moughari v. Publix Super Mkts., Inc., No. 4:97CV212-WAS, 1998 U.S. Dist. LEXIS 8951 (N.D. Fla. Apr. 27, 1998).
The court held that an assistant bakery manager was lawfully terminated during his FMLA leave to care for his wife and new child and granted summary judgment to the employer. The employee admitted that during his leave he worked at starting up a used car business for four to six hours per day. He was fired based upon his employer's belief that he failed to communicate honestly about his leave. The court held that an honest belief that the employee was misusing leave time was a legitimate reason for termination.

Chaffin v. John H. Carter Co., C.A. No. 96-2127, 1998 U.S. Dist. LEXIS 448 (E.D. La. Jan. 16, 1998), aff'd., 179 F.3d 316 (5th Cir. 1999).
Granting summary judgment to the employer, the court held that the employee was lawfully terminated while on FMLA leave for depression after a co-worker reported observing her in a bar with a drink in her hand. The court found that the termination was appropriate when the employee refused

[45] See 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a).

to provide an explanation to the employer. As long as an employer has an honest suspicion that the employee is engaging in fraud by using FMLA leave, the employee can be terminated.

The following cases illustrate circumstances in which employees who had asserted their rights under the FMLA were properly terminated pursuant to a reduction in force:

O'Connor v. PCA Family Health Plan, Inc., Nos. 97-5879, 98-5121, 2000 U.S. App. LEXIS 608 (11th Cir. Jan. 18, 2000). The court affirmed the grant of summary judgment to the employer, concluding that the employer was justified in terminating an employee even while she was on FMLA leave. The court noted that the employee did not challenge the legitimacy of the first phase of the employer's reduction-in-force, pursuant to which she was slated for termination. The fact that the employer removed two other employees who were on FMLA leave from the layoff roster was not evidence that employer was aware of or had any duty to refrain from terminating employees on such leave.

Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).
Affirming the grant of summary judgment to the employer on an FMLA claim, the court held that an employee who had taken FMLA leave for heart and ear problems was lawfully laid off for lack of work where his performance had been ranked seventh among seven members of his rank group for the previous year. The employer's decision-making supervisors testified that the employee was discharged because of his performance and his non-FMLA absences and that their decision ignored his FMLA-protected absences.

Coleman v. Prudential Relocation, 975 F. Supp. 234 (W.D.N.Y. 1997).
The court granted summary judgment to the employer, finding that as a matter of law the employee was lawfully terminated pursuant to a RIF following a leave to care for his parents where he was unable to handle a heavy caseload and had problems with supervisors and others which were unrelated to his leave. Noting that the employee's performance review contained a criticism that he regularly had a need to leave early, the court nevertheless found that the employee was selected for termination because he scored lower than other employees in the ranking process based on quality of customer service, focus on results, ability to complete tasks under pressure and work in a timely fashion, and adherence to core values and company policy.

Leary v. Hobet Mining, Inc., 981 F. Supp. 452 (S.D. W.Va. 1997).
Granting summary judgment to the employer, the court held that the employee was lawfully terminated pursuant to a RIF while on FMLA leave where she was designated for termination by her supervisor who anticipated

future contracts, extrapolated what positions would be needed to fill those contracts, and then filled each position with whomever would best perform that job. Individuals who did not fit into one of those positions were terminated. The employee on FMLA leave was one of those individuals, and so she was lawfully terminated based upon that process.

7. Effect on Other Laws, Employer Policies and Collective Bargaining Agreements.

The FMLA does not supersede any provision of state or local law that provides greater family or medical leave rights than those provided by the FMLA, but it does supersede any such law which provides less generous benefits.[46] The FMLA does not preclude employers from implementing more generous leave policies,[47] but an employer cannot adopt any policy or plan which does not provide the benefits required by the FMLA.

8. Violations of the FMLA.

The FMLA gives employees the right to file a civil action for monetary damages and equitable remedies (e.g., reinstatement of employment) against employers who violate the law.[48] The Supreme Court has recently held that states are not immune from suit under the FMLA.[49] The FMLA also provides for administrative enforcement by the filing of a complaint with the Secretary of Labor.[50]

C. Background on Workers' Compensation Laws.

Workers' Compensation benefits are governed by state law and generally differ from state to state. Workers' Compensation statutes in general afford benefits to employees whose injuries are job-related, for income replacement and medical and rehabilitation expenses, regardless of whether the employer is at fault. Under most

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46 29 C.F.R. § 825.701(a).

47 29 C.F.R. § 825.700.

48 29 U.S.C. §§ 2617(1)(A),(B). FMLA cases commenced in state court are removable to federal court. Ladner v. Alexander & Alexander, Inc., 879 F. Supp. 598, 599 (W.D. La. 1995).

49 Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (holding that Congress acted within its power under § 5 of the Fourteenth Amendment to the Constitution in abrogating the States' Eleventh Amendment immunity to suits under those provisions of the FMLA). See also Tennessee v. Lane, 124 S. Ct. 1978 (2004) (on the ADA, holding that "Title II of the ADA, as it applies to the class of cases implicating the fundamental right of *access to the courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment") (emphasis added).

50 29 U.S.C.§ 2617.

state laws, employees may be entitled to occupational medical disability leave, and employers may be obligated to grant leaves of absence to employees with job-related injuries for the period of disability.[51]

Many state legislatures have enacted workers' compensation statutes to provide financial and medical benefits to injured workers who suffer work-related injuries without regard to fault. Many of these statutes provide that employers shall not be liable in any action for damages on account of personal injury sustained by an employee arising out of and in the course of employment or on account of death resulting from personal injury sustained in the course of employment. Rather, employees may obtain compensation for injuries as provided by workers' compensation act or through employer-maintained insurance. Most workers' compensation statutes provide compensation for, among other expenditures, medical expenses and wage earnings.

While a leave under Workers' Compensation will be unpaid leave, an employee may be entitled to receive medical and other insurance, to accrue sick time, vacation time, and seniority as if not on leave. In addition, an employee may be entitled to workers' compensation payments during the leave, to reinstatement at the end of the leave period, or to light duty assignment in lieu of extended leave. With regard to reinstatement, some state laws expressly provide reinstatement rights to injured employees, while others have been construed to provide an implied right to reinstatement.[52]

III. WHERE THE ADA, FMLA AND WORKERS' COMPENSATION RULES INTERSECT.

A. Coverage Under Both The ADA and The FMLA.

Because the ADA and the FMLA set forth different criteria for protection, an employer will have obligations under both statutes only if an employee has both a "disability" within the meaning of the ADA, and a "serious health condition" within the meaning of the FMLA. For example, if an employer erroneously believes that a qualified individual has AIDS, this individual is protected under the ADA because (s)he is "regarded as" having a covered disability; however, (s)he is not protected by the FMLA because (s)he does not actually have a "serious health condition."

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[51] For example, the Virginia Workers' Compensation Act provides that "the rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee . . ." Va. Code Ann. § 65.2-307. Likewise, Maryland's Workers' Compensation Act provides that the employer's liability under the Act is exclusive. Md. Code Ann., Labor and Employment § 9-509.

[52] See, e.g., Judson Steel Corp. v. Workers' Compensation Appeals Board, 22 Cal. 3d 658 (1978). Neither Maryland nor Virginia expressly provide for reinstatement.

Likewise, an employee who has a hearing impairment that substantially limits a major life activity is covered by the ADA but will not, on the basis of that disability, be covered by the FMLA where (s)he is not treated as an inpatient or not required to be absent at least three calendar days. On the other hand, an employee who has a mild hernia which does not substantially limit his/her major life activities but nonetheless requires surgery, will be protected under the FMLA because surgery will involve inpatient care but will not be protected under the ADA because (s)he does not have a "disability" as defined by the ADA.

The ADA definition of "disability" typically does not include transitory illnesses or temporary, nonchronic impairments of short duration, having little or no long-term or permanent impact. In contrast, under the FMLA, an employee is entitled to up to 12 weeks of unpaid leave for a "serious health condition" if he or she suffers from an illness, injury, impairment, or physical or mental condition that involves either "in-patient care" or "continuing treatment by a health care provider." This leave entitlement applies to an employee who merely stays the night in a hospital (hospice or residential medical care facility) or who is incapacitated and consequently absent from work (or school or other regular daily activities) for more than 3 days and being treated by a health care provider.[53]

B. Medical Inquiries and Records

The ADA prohibits an employer from inquiring, including through medical examinations, whether an employee is an individual with a disability and if so the nature of the disability, unless the inquiry is "job-related and consistent with business necessity" (i.e., required for the assessment of the individual's ability to do the job at issue).[54] Information obtained by the employer must be maintained in separate, confidential, medical files.[55] Access to medical files must be restricted to statutorily designated individuals who have a specific need for such information (e.g., supervisors, first aid personnel). Under the FMLA, an employer may require medical certification that the leave is due to a serious health condition.[56] The employer also may require, as a condition to the restoration of employment, that an employee certify that (s)he is fit to return to work. However, if an employer requires a medical certification, it must comply with the ADA requirement that the examination be job-related and consistent with business necessity.[57] Seeking more information than is necessary (to verify the leave request or fitness to return to work) may violate the ADA. Likewise, to avoid violating the ADA, employers should keep all information obtained in separate, confidential, medical files.

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53 29 C.F.R.§ 825.114.

54 29 C.F.R. § 1630.13, 1630.14.

55 29 C.F.R. § 1630.13, 1630.14.

56 29 C.F.R. § 825.100(d).

57 29 C.F.R. § 825.702(e).

In circumstances where both the ADA and the FMLA apply, a potential conflict exists as to whether a medical examination must be administered by the physician of the employee or that of the employer. Under the ADA, medical examinations may be administered by the employer's physician.[58] In contrast, the express language of the FMLA limits medical certifications, at least those comprising the first opinion regarding entitlement to leave and fitness to return to work, to those supplied by the health care provider of the employee, not that of the employer.[59] If an employer questions an employee's certification, the FMLA allows an employer to require, at its own expense, that the employee obtain a second opinion from a health care provider designated by the employer.[60] If this second opinion differs from the original certification, an employer may require, at its own expense, that the employee obtain a third opinion from a jointly designated or approved health care provider.[61] The third opinion is final and binding.[62] Although these differences may be harmonized, there may be disagreement about whether the FMLA overrides the ADA's preservation of the employer's right to administer a job-related medical examination for purposes of determining entitlement to leave and fitness to return to work.

C. "Undue Hardship" As A Defense Only Under The ADA.

Under the ADA, employers are required to make "reasonable accommodation" to the known physical or mental limitations of a qualified individual who is an applicant or employee, unless the employer demonstrates that the accommodations would impose an undue hardship on the operation of the business.[63] "The term undue hardship' means an action requiring significant difficulty or expense."[64] In contrast, under the FMLA, an employer must provide up to 12 weeks of leave regardless of the magnitude of hardship imposed on the employer. Of particular concern to employers is the FMLA's failure to limit the number of employees who can take leave at one time. Despite the lack of an "undue hardship" defense under the FMLA, the Act does require that employees needing intermittent leave or leave on a reduced leave schedule attempt to schedule their leave so as not to disrupt the employer's operations.[65]

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58 42 U.S.C. § 12112(d)(3), (d)(4).

59 29 U.S.C. 2613(a); 29 C.F.R. § 825.305(a).

60 29 U.S.C. § 2613(c).

61 29 U.S.C. § 2613(d)(1).

62 29 U.S.C.§ 2613(d)(2).

63 42 U.S.C. § 12112(b)(5)(A).

64 42 U.S.C. § 12111(10)(A).

65 29 C.F.R. § 825.117.

D. Differences In Maintenance Of Employee Health Benefits.

The ADA requires employers to reasonably accommodate the known physical or mental impairments of an otherwise qualified individual with a disability. Reasonable accommodation may include additional unpaid leave and "job restructuring [and] part-time or modified work schedules."[66] Thus, an employer may attempt to reasonably accommodate a disabled employee by offering him/her a part-time job or a leave with no benefits.

In contrast, the employer must maintain the health benefits of an employee on FMLA leave on the same terms as if the employee were not on leave.[67] The employer can recover the premium payments paid during the period of leave if the employee does not return to work, unless the failure to return is for reasons beyond the employee's control (e.g., because of the serious health condition).[68]

Consequently, an employee whose "disability" also constitutes a "serious health condition" could work part-time until the expiration of 12 weeks of leave, with health benefits maintained during this period.[69]

E. Reinstatement Rights Under The ADA And The FMLA.

Under the ADA, upon returning from leave, an employee is entitled to the position (s)he held prior to leave unless the position is no longer vacant because it would have been an "undue hardship" to hold it open.[70]

In contrast, under the FMLA, an employer does not have to establish "undue hardship" in order to transfer an employee to an equivalent position (with equivalent benefits, pay, and other terms and conditions of employment) instead of restoring the employee to the position held prior to leave.[71]

Consequently, an employee has greater reinstatement rights under the ADA than under the FMLA where reinstatement to the same job is not an undue hardship. However, the FMLA in some cases affords greater protection because it requires restoration to the same or equivalent job -- even if it would constitute an undue hardship.

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66 42 U.S.C. § 12111(9)(B).

67 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.100(b).

68 29 C.F.R. § 825.100(b).

69 29 C.F.R. § 825.702(c).

70 42 U.S.C. §§ 12111(9)(B), 10(B); 29 C.F.R. §§ 1630.2(o)(2)(ii), (p)(2).

71 29 U.S.C. § 612(a)(1)(B).

F. "Light Duty" Positions Under The ADA And The FMLA.

The ADA does not require an employer to create a "light duty" position, but does require an employer to reasonably accommodate (e.g., by removing marginal functions). If an employer already has a vacant "light duty" position for which a disabled worker is qualified and no reasonable accommodation will allow the employee to remain in his/her regular job, it might be a reasonable accommodation to reassign the worker to that "light duty" position.[72]

If the FMLA entitles an employee to leave, an employer may not, in lieu of medical leave, require an employee to take a "light duty" position.[73] However, the employer certainly may, but FMLA is not required to, offer "light duty" assignments as an alternative.

An employer may reassign an employee requesting FMLA leave intermittently or on a reduced leave schedule to another position better suited to accommodate that type of leave. Although the new position must offer pay and benefits equivalent to the employee's previous position, the new position need not have equivalent duties. An employer may augment the pay and benefits of an existing alternative position (that typically is compensated at a lower rate) to meet the "equivalent pay and benefits" requirement.

The employer's right to reassign an employee to another position that better accommodates FMLA leave is limited by the need to comply with the ADA.[74] For example, the ADA will require an employer to keep the ADA-protected individual in his/her regular position during periods of intermittent leave where such assignment does not pose an undue hardship for the employer.

G. Attendance Policies.

Both the ADA and FMLA may impact an employer's policies on attendance. An employer typically will be required to make an attendance policy accommodation for an employee with a disability in cases where the employer has notice and the accommodation is not likely to cause the employer undue hardship. For example, an extended leave of absence, which the employer normally knows about and by definition can plan around, usually will not cause undue hardship, even if such a leave would be an exception to the employer's normal rules. Thus, as stated above, an employer may have to accommodate the individual requesting such a leave.

Similarly, a series of regular medical appointments, which are set in advance and require only minor schedule modifications, in most cases will not cause undue

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72 EEOC Technical Assistance Manual § 9.4.

73 29 C.F.R. 825.702(d).

74 29 C.F.R. § 825.204(b).

hardship and probably will require accommodation, even where the employee's absences would exceed those allowable under the employer's normal policy.

Under the FMLA, eligible employees are entitled to take up to 12 workweeks of unpaid leave per year, regardless of the employer's attendance policy.[75] In cases involving a serious health condition that befalls an employee or an employee's family member (i.e., employee's spouse, son, daughter, or parent), an employee is allowed to take his/her leave intermittently, in separate blocks of time.[76] This intermittent leave can include leave periods from as short as one hour to several weeks.[77] The FMLA also prohibits an employer from (1) using FMLA leave as a negative factor in considering an employee for discipline, promotion, or other employment actions; or (2) counting FMLA leave under "no fault" attendance policies. In contrast, the FMLA regulations, but not the ADA, interfere with the employer's ability to discipline or discharge an employee for chronic absences or tardiness covered by the FMLA. The ADA does not require an employer to tolerate an employee's excessive absenteeism or unsatisfactory attendance record, provided that it has reasonably accommodated the employee. Generally, unforeseeable intermittent leave has the greatest potential to implicate an employer's established attendance procedures and policies. Because an employee may take intermittent leave in increments of just one hour, such leave can cause serious attendance problems. Although neither the FMLA nor the regulations provide clear guidance in situations involving a chronically absent or tardy employee, an employer's ability or inability to discipline or terminate an employee in two areas is reasonably clear. First, an employee who is consistently late or absent due to an illness or ailing family member whose condition requires unforeseeable treatment may not be terminated or disciplined for FMLA-covered absences.[78] Second, under the FMLA, an employer confronted with an employee who is consistently late or absent due to an illness or ailing family member whose condition is not serious and requires foreseeable treatment may deny the leave or may require the employee to transfer temporarily to an available alternative full-time or part-time position of equal pay and benefits for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Such a transfer must also comply with the ADA and any applicable collective bargaining agreement.[79]

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75 29 U.S.C.§ 2612(a)(1).

76 29 U.S.C. § 2612(b)(2).

77 29 C.F.R. § 825.203(d).

78 Cf. 29 C.F.R. § 825.304(a) (stating that an employer may not require an employee to adhere to the employer' s internal rules and procedures when FMLA leave is involved).

79 See 29 C.F.R. § 825.204.

H. Impact of the FMLA and ADA Upon Workers' Compensation Practices.

B. How Do The ADA And The Workers' Compensation System Interrelate?

The ADA does not preempt any existing state law that is consistent with the ADA. 42 U.S.C. § 12201(b). Thus, a violation of the ADA may subject an employer to liability under state workers' compensation statutes as well.

1. Is an employee who is injured on the job automatically considered disabled under the ADA?

Not necessarily. The definitions of "disability" under the ADA and workers' compensation statutes are different due to the different purposes of the statutes. For instance, the ADA does not cover non-chronic impairments of short duration with no long-term or permanent impact or minor injuries, but does cover disabilities not caused by the job. EEOC Tech. Assist. Man., § 9.2. In contrast, state workers' compensation laws provide no benefits for disabilities not caused by the job, but generally provide benefits to employees not only for permanently disabling job-caused injuries, as well as for temporary ones. Thus, if an employee breaks her leg on the job and cannot work for two months, but the leg heals normally within a few months, the employee would not be an individual with a disability under the ADA, but could receive workers' compensation benefits. *See Jones v. United Parcel Serv.*, 214 F.3d 402, 406, 10 A.D. Cas. 1064 (3d Cir. 2000) (affirming dismissal of case where employee provided no evidence of disability and was collaterally estopped from claiming a disability from a slip-and-fall at work because workers' compensation proceeding adjudicated that he had fully recovered from work-related injuries).

2. What is a "disability-related occupational injury"?

The term "disability-related occupational injury" refers to cases where the ADA and workers' compensation statutes simultaneously apply, such as where the occupational injury and the disability are linked. EEOC Workers' Comp., ¶ 140,185, at n.9.

3. How may an employer address disability-related occupational injuries?

a. May an employer ask an employee disability-related questions or require medical examinations both at the time the employee experiences an occupational injury and upon return to work?

Yes, as long as the disability-related questions or medical exams are "job-related and consistent with business necessity." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 7. An employer can meet this requirement if it "reasonably believes that the occupational injury will impair the employee's ability to perform essential job functions or raises legitimate concerns about direct threat." *Id.* Additionally, questions and examinations are permitted where they are required by another federal law or regulation. EEOC Psych. Guid., ¶ 140,178, at Quest. No. 14.

Questions and exams must be limited to the specific occupational injury and determining "its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat" and "the extent of its

workers' compensation liability." EEOC Workers' Comp., ¶ 140,185, at Quest. Nos. 7-8.) Excessive questioning or medical examination may result in disability-based harassment in violation of the ADA. *Id.*

b. May an employer discharge an employee who is temporarily unable to work because of a disability-related occupational injury?

No, unless it would impose an undue hardship on the employer to provide leave as a reasonable accommodation. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 18.

c. Must an employer provide a reasonable accommodation for an employee with an occupational injury that is not considered a disability under the ADA?

No. The ADA's reasonable accommodation requirement applies only in circumstances where an employee has a work-related limitation caused by a disability, as that term is defined under the ADA. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 17.

d. May an employer ask for documentation if an employee with a disability-related occupational injury requests a reasonable accommodation?

Yes. "If an employee with a disability-related occupational injury requests reasonable accommodation and the need for accommodation is not obvious, the employer may require reasonable documentation of the employee's entitlement to reasonable accommodation." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 9. However, the employer is not entitled to medical records if they are not necessary to the request for reasonable accommodation. *Id.*

e. May an employer refuse to hire or allow an individual to return to work if the individual "sustained a prior occupational injury" or if the employer assumes that the individual poses an "increased risk of occupational injury and increased workers' compensation costs"?

No. Refusing to hire an applicant based on such assumptions constitutes discrimination in violation of the ADA. An employer may refuse to hire an applicant only where it can show that hiring the person poses a "direct threat." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 12. However, an individual's prior occupational injury may be considered in determining whether s/he poses a direct threat. *Id.* In applying direct threat analysis regarding prior occupational injuries, an employer may consider the following factors:

- Whether the prior injury is related to the person's disability (*e.g.*, if employees without disabilities in the person's prior job had similar injuries, this may indicate that the injury is not related to the disability and, thus, is irrelevant to the direct threat inquiry);

- The circumstances surrounding the prior injury (*e.g.*, the actions of others in the workplace or the lack of appropriate safety devices or procedures may have caused or contributed to the injury);

- The similarities and differences between the position in question and the position in which the prior injury occurred (*e.g.*, the prior position may have involved hazards not present in the position under consideration);

- Whether the current condition of the person with a disability is similar to his/her condition at the time of the prior injury (*e.g.*, if the person's condition has improved, the prior injury may have little significance);

- The number and frequency of prior occupational injuries;

- The nature and severity of the prior injury (*e.g.*, if the injury was minor, it may have little or no significance);

- The amount of time the person has worked in the same or a similar position since the prior injury without subsequent injury; and

- Whether the risk of harm can be lowered or eliminated by a reasonable accommodation.

Id.

f. To what degree must an employer reallocate job duties to accommodate an employee with a disability-related occupational injury?

As with non-occupational disabilities, an employer must reallocate job duties that are "marginal functions of the position that the employee cannot perform." An employer does not have to eliminate the "essential functions" of the employee's position. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 20. Should the employer wish to remove an essential job function, it has the option of doing so, as long as it does not negatively affect an individual's employment opportunity or position. *Id.* at n.25.

g. May an employer provide an accommodation that requires an employee to remain on the job instead of allowing leave?

Yes. As long as an employer provides an effective accommodation that meets the employee's job-related needs, an employer need not grant the employee's preferred accommodation. Therefore, an employer may reallocate marginal functions, or even provide temporary reassignment, rather than allow an employee to take leave.[80] However, an employer must return the employee to his or her original position once the employee is able to perform the essential functions of his or her position without a reasonable accommodation. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 24.

[80] An employer may *not* require an employee to remain on the job where the employee qualifies for leave under the FMLA. 29 U.S.C. § 2612(a)(1).

h. Must an employer grant the request of an occupationally injured employee for leave that is *not* related to a reasonable accommodation?

If an employee with a disability-related occupational injury does not request leave as a reasonable accommodation but as leave "routinely granted to other employees," such as "accrued paid leave, or leave without pay," the employer may not prevent the employee from taking leave, unless it follows the same procedure for employees without disabilities who request such leave. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 24.

i. May an employer place an employee with a disability-related occupational injury in a workers' compensation vocational rehabilitation program to satisfy its reasonable accommodation requirement under the ADA?

No. An employee's rights under the ADA are separate from workers' compensation entitlements. An employer therefore must always provide a reasonable accommodation, unless doing so imposes an undue hardship. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 25. However, if both the employer and employee voluntarily agree that they prefer vocational rehabilitation, it may be used as an alternative to accommodation. *Id.* at n.27.

j. If an employer creates a "light duty" position to decrease workers' compensation costs, must it create a similar position for employees with non-job-related disabilities?

No. While an employer may create "light duty" positions to accommodate an employee who has been injured on the job, it does not have to create an equivalent position for employees with non-job-related disabilities. However, an employer does have to provide a reasonable accommodation, subject to undue hardship. While the ADA does not require an employer to *create* a position, it does require *reassignment*. EEOC Workers' Comp., ¶ 140,185, at Quest. Nos. 27-28. Therefore, where there is no alternative means of providing a reasonable accommodation, an employer must reassign an employee with a non-job-related disability to a vacant reserved light-duty position (assuming the employee can perform the essential functions of the job, and barring undue hardship). *Id.* at Quest. No. 28. Note, however, that where an employer policy of creating light jobs adversely affects a class of individuals, "the employer must show that the policy is job-related and consistent with business necessity." *Id.* at n.29.

k. If an employer creates a *temporary* "light-duty" position for an employee with a disability-related occupational injury, must it also provide *permanent* "light-duty" positions?

No. An employer may create or alter the "content, nature, or functions of its positions." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 28. *See Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697, 8 A.D. Cas. 1505 (7th Cir. 1998) ("Although the ADA provides that reassignment to a vacant position may constitute a reasonable accommodation, it does not require that employers convert temporary 'light-duty' jobs into permanent ones.").

4. What are an employer's obligations regarding an employee's return to work?

a. Who decides when an employee with a disability-related occupational injury can return to work?

The employer is ultimately responsible for deciding when an employee should return to work, subject to the requirements imposed by the ADA. "The employer may not refuse to return to work an employee who is able to perform the essential functions of the job, with or without reasonable accommodation, unless it can show that returning the person poses a 'direct threat.'" EEOC Workers' Comp., ¶ 140,185, at Quest. Nos. 14 & 16. While the final decision rests with the employer, it may refer to rehabilitation counselors, physicians, or other specialists. *Id*. at Quest. No. 16. The employer should provide such professionals the following information:

- [T]he essential functions of the employee's position and the nature of the work to be performed;
- [T]he work environment and the employer's operations, including any unavoidable health or safety hazards which may exist; and
- Possible reasonable accommodations.

Id.

b. If an employee is determined to have a "permanent disability" or is "totally disabled" under the workers' compensation system, may an employer refuse to allow the employee to return to work?

No. Workers' compensation laws differ from the ADA in determining whether an individual has a disability or is able to work. "Such a determination is *never dispositive* regarding an individual's ability to return to work, although it may provide relevant evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a direct threat." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 15 (emphasis in original).

c. May an employer preclude a return to work unless the employee is able to return to "full duty"?

"Full duty" refers to "marginal as well as essential job functions or may mean performing job functions without any accommodation." EEOC Workers' Comp., ¶ 140,185, at Quest. No. 13. As long as the employee can perform essential job functions, with or without reasonable accommodation, an employer cannot prevent the return to work. A disability-related occupational injury is not enough to show that the employee is unable to perform the essential job functions of a position. *Id*. at Quest. No. 14.

d. Must an employer attempt to accommodate an employee in the employee's original position prior to requiring reassignment?

Yes. An employer must first determine whether the employee can "perform the essential functions" of the original position, "with or without reasonable accommodation." This includes job restructuring, and modifying equipment or the employee's work schedule. EEOC Workers' Comp., ¶ 140,185, at Quest. No. 21. If the employee cannot perform the essential functions of the original position, or providing reasonable accommodation would impose an undue hardship on the employer, then an employer must reassign the employee to an equivalent position. If no such position exists, the employer must assign the employee to a lower position, unless doing so would impose an undue hardship on the employer. For example, an employer does not have to create a new position or remove another employee from his/her position to reassign an employee. *Id.* at Quest. No. 22.

IV. COMMENTS

Under the ADA an employer may not inquire of an employee whether the employee is an individual with a disability or the nature of any disability, unless the inquiry is job-related and consistent with business necessity. However, the ADA does not prohibit employers from obtaining information about pre-existing injuries after a conditional offer of employment but before the start of work, provided that the inquiry is made of all applicants in the job category. Employers should consider obtaining such information from all employees in certain job categories in order to limit liability for amounts to be paid under workers' compensation if an employee's pre-existing condition is exacerbated by a work-related injury. Such medical information must remain confidential although it can be submitted to second injury fund officials as required. Prior to making a conditional offer of employment, employers should not attempt to obtain from third parties, such as state workers' compensation offices or others, information about an applicant's prior occupational injuries or claims.

The medical certification is one of the most important mechanisms available to employers for curbing employee abuse related to leaves of absence. Employers should insist in every case that an employee requesting leave due to his or her own medical condition provide appropriate medical certification in support of the leave request within fifteen (15) days of the request. The employer should inform the employee that failure to provide the certification will automatically result in a denial of the leave request.

In addition, an employer may require a second certification from a physician of its own choosing. While costly, a second opinion may ensure the legitimacy of the request of an employee seeking a medical leave or a leave to care for a seriously ill family member. Moreover, if an employer's policy of consistently requiring a second opinion is published in an employee handbook or otherwise distributed to the workforce, employees may be reluctant to request such leaves when they are not entitled to them. Employers should also uniformly require follow-up recertification at regular intervals during the leave period, but no more than every thirty (30) days.

In order not to run afoul of the ADA, employers should require that any medical certification of the employee's own condition, including a uniformly required fitness for duty certification at the end of any leave period, be narrowly tailored so as to be job-related and consistent with business necessity. To ensure that the physician performing the examination understands the employee's job duties, the employer should provide a detailed job description. Employers should inform an employee at the time of the leave request, or at least no later than the start of the requested leave, about any requirement of fitness for duty certification upon return from leave.

Employers may ask disability-related questions or require a medical examination of an employee either at the time of an occupational injury or when the employee requests to return to the job following such an injury, provided that questions and examinations are job-related and consistent with business necessity. Moreover, the ADA does not prohibit an employer from asking disability-related questions or requiring medical examinations to ascertain the extent of any workers' compensation liability.

An employer covered by the ADA should maintain and update comprehensive job descriptions that specify the "essential functions" for each position. Those descriptions should include specific attendance standards and requirements as well as qualitative and quantitative performance standards. An employer who has designated attendance as an essential function in a job description may be in a stronger position to assert that an employee who is unable to meet attendance requirements is not qualified or that having to endure excessive absenteeism is not a reasonable accommodation.

Employers should carefully monitor offers of light duty assignment to injured employees. While an offer of light duty may limit an employer's liability for wage replacement under workers' compensation, an FMLA-eligible employee may refuse such an assignment, although that may mean forfeiture of wage replacement benefits during the leave. Employers who make workers' compensation eligibility a prerequisite to entitlement for light duty may potentially violate the ADA by distinguishing between types of disabilities.

Employers should centralize and formalize their decisions respecting disabled employees and decisions respecting leaves of absence in their main human resources office or in some high level policy-making body or committee. They should also maintain a documentation system for handling reasonable accommodation issues. This will allow an employer to monitor more easily and effectively the various, and at times conflicting, requirements of state and federal statutes.

These various statutes may conflict or overlap, and lack of coverage under one statute may not translate into a lack of liability under another. While employees may not fully understand their legal rights in this area, this will not prevent some employees from attempting to exploit the policies of their employers in order to avail themselves of greater benefits than those to which they are truly entitled under those policies or the law.

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