LEAVE: ADA, FMLA, PREGNANCY

Katrina Grider
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Allen Center
500 Dallas Street, Suite 3000
Houston, TX 77002-4709
(713) 655-5763
katrina.grider@ogletree.com

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Katrina Grider

Of Counsel Houston

713-655-5763

katrina.grider@ogletree.com

Katrina Grider is Of Counsel in the Houston office of Ogletree Deakins. Ms. Grider has over thirty years of extensive federal and state court labor and employment law litigation, administrative, counseling, and practice experience from both perspectives: management and enforcement. Ms. Grider represents employers in state and federal courts, as well as in proceedings before the Texas Workforce Commission, the Equal Employment Opportunity Commission and the Department of Labor. Ms. Grider counsels clients on administrative and judicial interpretations of various labor and employment laws, and assists clients in developing best policies and practices for personnel matters.

Prior to joining the firm, Ms. Grider maintained a management side labor and employment boutique solo practice for 20 years. Ms. Grider is Board Certified in Labor and Employment Law – Texas Board of Legal Specialization.

Admitted to Practice

- Texas
- Oklahoma
- U.S. District Court, Southern District of Texas
- U.S. Court of Appeals, Fifth Circuit
- U.S. Supreme Court

Education

- J.D., University of Tulsa College of Law, 1985
- B.S., Oklahoma State University, 1982

Honors and Awards

- Martindale Hubbell AV Preeminent 5.0 out of 5 Rating
- National Black Lawyers Top 100 (2016, 2017)
- Texas *Super Lawyer* (2003-2006, 2011, 2012)
- 2009 Standing Ovation Award: Outstanding Volunteer, TexasBarCLE
- Houston's Best Lawyer for the People 2006

Practice and Industry Groups

- Employment Law

Experience

Ms. Grider conducts customized in-house seminars and training for managers, supervisors and employees concerning all aspects of EEO compliance, including but not limited to training regarding workplace harassment, discrimination, and retaliation, management best practices regarding supervising employees, and best practices regarding personnel issues and documentation.

Ms. Grider also conducts internal investigations involving workplace harassment, discrimination, retaliation, and related personnel matters.

Ms. Grider enjoys longstanding outreach partnerships with the Houston and Dallas EEOC District Offices and the San Antonio and New Orleans field offices by participating as a keynote speaker at the Technical Assistance Program (TAPS) Seminars for employers for 20 years.

Ms. Grider has handled over hundreds of EEOC administrative discrimination charges that have been dismissed by the Commission.

Ms. Grider has also assisted clients in DOL wage and hour audits.

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Today's employers must run their businesses within the competitive environment in which they operate while affording employees an ever-increasing array of leaves. Yet, running a business without a full complement of employees is difficult. A frequently utilized leave is a medical leave needed for an employee's own medical condition. Such a leave requires the coordination of leave rights under company policies, as well as federal, state, and local laws. All too often, an employee commences a medical leave not to be heard from for months or in some case years. Suddenly, the company needs to replace the employee, but the employee may retain the right to return to his/her position, thereby preventing the company from moving forward. This paper provides some practical ways for employers to manage medical leaves to hasten an employee's return to work or separate the employee from employment after the employer has satisfied its legal obligation to the employee.

I. MEDICAL LEAVES UNDER THE FEDERAL FAMILY AND MEDICAL LEAVE ACT AND AMERICANS WITH DISABILITIES ACT

A. An Employee's Medical Leave Rights Under The FMLA

Under the Family and Medical Leave Act of 1993 (FMLA), eligible employees of covered employers are entitled to 12 weeks (or 26 weeks for injuries sustained in active duty) of unpaid leave each year for a serious health condition that makes the employee unable to perform his or her job. Except in the cases of "key employees," when an employee returns from FMLA leave, the employee must be restored to the same or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214(a). An equivalent position must have the same pay, benefits and working conditions, including privileges, perquisites, and status. 29 U.S.C. § 2614(a)(1)(B). The position must involve the same or substantially similar duties and responsibilities, skill, effort, and authority. If the employee is no longer qualified for the position—i.e., because of the employee's inability to attend a necessary course or failure to renew a license—because of the leave, the employee must be given a reasonable opportunity to fulfill those conditions upon return to work.

B. An Employee's Medical Leave Rights Under The ADA

Title I of the Americans with Disabilities Act (ADA) prohibits discrimination based on disability in employment and requires that covered employers (employers with 15 or more employees) provide reasonable accommodations to applicants and employees with disabilities that require such accommodations due to their disabilities. A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. §1630.2(o). That can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees.

The 2008 ADA amendments made it easier for an individual seeking protection under the ADA to establish that he/she has a disability within the meaning or the statute. The Equal Employment Opportunity Commission (EEOC) has construed the definition of disability broadly. Accordingly, in most cases, an employer should assume an employee is entitled to the protections of the ADA and a reasonable accommodation. With respect to leaves as a form of reasonable accommodation, the EEOC issued guidance on employer-provided leave under the ADA in May 2016.

II. GRANTING LEAVE AS A REASONABLE ACCOMMODATION

The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave. Requests for leave related to disability often fall under existing employer policies. In those cases, the employer's obligation is to provide persons with disabilities access to those policies on equal terms as similarly situated individuals. However, that is not the end of an employer's obligation under the ADA. An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. That is the case even when:

- the employer does not offer leave as an employee benefit;
- the employee is not eligible for leave under the employer's policy; or
- the employee has exhausted the leave the employer provides as a benefit (including leave exhausted under a workers' compensation program, or the FMLA or similar state or local laws).

Reasonable accommodation does not require an employer to provide *paid* leave beyond what it provides as part of its paid leave policy. Also, as is the case with all other requests for accommodation, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances.

III. LEAVE AND THE INTERACTIVE PROCESS GENERALLY

As a rule, the individual with a disability - who has the most knowledge about the need for reasonable accommodation - must inform the employer that an accommodation is needed. When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as one for a reasonable accommodation under the ADA. However, if the request for leave can be addressed by an employer's leave program, the FMLA (or a similar state or local law), or the workers' compensation program, the employer may provide leave under those programs. But, if the leave cannot be granted under any other program, then an employer should promptly engage in an "interactive process" with the employee -- a process designed to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship.

The information required by the employer will vary from one employee to another. Sometimes the disability may be obvious; in other situations, the employer may need additional information to confirm that the condition is a disability under the ADA. However, most of the focus will be on the following issues:

- the specific reason(s) the employee needs leave (for example, surgery and recuperation, adjustment to a new medication regimen, training of a new service animal, or doctor visits or physical therapy);
- whether the leave will be a block of time (for example, three weeks or four months), or intermittent (for example, one day per week, six days per month, occasional days throughout the year); and

- when the need for leave will end.

Depending on the information the employee provides, the employer should consider whether the leave would cause an undue hardship.

An employer may obtain information from the employee's health care provider (with the employee's permission) to confirm or to elaborate on information that the employee has provided. Employers may also ask the health care provider to respond to questions designed to enable the employer to understand the need for leave, the amount and type of leave required, and whether reasonable accommodations other than (or in addition to) leave may be effective for the employee (perhaps resulting in the need for less leave). Information from the health care provider may also assist the employer in determining whether the leave would pose an undue hardship. An employee requesting leave as a reasonable accommodation should respond to questions from an employer as part of the interactive process and work with his or her health care provider to obtain requested medical documentation as quickly as possible.

The interactive process may continue even after an initial request for leave has been granted, particularly if the employee's request did not specify an exact or specific return date, or when the employee requires additional leave beyond that which was originally granted.

Example #1:

An employee with a disability is granted three months of leave by an employer. Near the end of the three months leave, the employee requests an additional 30 days of leave. In this situation, the employer can request information from the employee or the employee's health care provider about the need for the 30 additional days and the likelihood that the employee will be able to return to work, with or without reasonable accommodation, if the extension is granted.

However, an employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, although it may reach out to an employee on extended leave to check on the employee's progress.

Example #2:

An employee with a disability is granted three months of leave to recover from a surgery. After one month, the employer phones the employee and asks how the employee is doing and whether there is anything the employee needs from the employer to help the employee recover and return to work. That is an acceptable request for information. Additionally, a week prior to the end of the employee's leave, the employer again reaches out to the employee to ask whether the employee can return to work at the end of leave and if any additional accommodations are required. This is also an acceptable request for information.

The ADA requires that employers make exceptions to their policies, including leave policies, to provide a reasonable accommodation. Although employers can have leave policies that establish the maximum amount of leave an employer will provide or permit, they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability, unless the employer can show that doing so will cause an undue hardship.

Example #3:

An employer covered under the FMLA grants employees a maximum of 12 weeks of leave per year. An employee uses the full 12 weeks of FMLA leave for her disability but still needs five additional weeks of leave. The employer must provide the additional leave as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship. The EEOC takes the position that compliance with the FMLA does not necessarily meet an employer's obligation under the ADA, and the fact that any additional leave exceeds what is permitted under the FMLA, by itself, is not enough to show undue hardship. However, there may be legitimate reasons that establish undue hardship, such as the impact on an employer's operations from the leave already taken and/or from granting additional leave. Also, the employer may consider whether other reasonable accommodations may enable the employee to return to work sooner than the employee anticipates, if those accommodations would be consistent with the employee's medical needs.

Many employers, especially larger ones, and those with generous maximum leave policies, may rely on "form letters" to communicate with employees who are nearing the end of leave provided under an employer's leave program. These letters frequently instruct an employee to return to work by a certain date or face termination or other discipline. Employers who use such form letters may wish to modify them to let employees know that if an employee needs additional unpaid leave as a reasonable accommodation for a disability, the employee should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship. If an employer relies on a third-party provider to handle lengthy leave programs, including short- and long-term disability leave programs, it should ensure that any automatic form letters generated by these providers comply with the employer's obligations under the ADA.

Employers who handle requests under their regular leave policy separately from requests for leave as a reasonable accommodation should ensure that those responsible communicate with one another to avoid mishandling a request for accommodation. For example, an employer may hire a contractor to handle its long-term disability program but have its human resources department handle all requests for leave as a reasonable accommodation. The employer should ensure that the contractor is instructed to forward to the human resources department, in a timely manner, any requests for additional leave beyond the maximum period granted under the long-term disability program, and to refrain from terminating the employee until the human resources department can engage in an interactive process. The human resources department should contact the employee as soon as possible to explain that it will be handling the request for additional leave as a reasonable accommodation, and that all further communication from the employee on this issue should be directed to that department.

An employer and employee should continue to communicate about whether the employee is ready to return to work or whether additional leave is necessary. For example, the employee may contact a supervisor, human resources official, or anyone else designated by the employer to handle the leave to provide updates about the employee's ability to return to work (with or without reasonable accommodation), or about any need for additional leave.

If an employee requests additional leave that will exceed an employer's maximum leave policy (whether the leave is a block of time or intermittent), the employer may engage in an interactive process as described above, including obtaining medical documentation specifying the amount of the additional leave needed, the reasons for the additional leave, and why the initial

estimate of a return date proved inaccurate. An employer may also request relevant information to assist in determining whether the requested extension will result in an undue hardship.

Employees on leave for a disability may request reasonable accommodation to return to work. The request may be made by the employee, or it may be made in a doctor's note releasing the employee to return to work with certain restrictions.

An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – that is, be "100%" healed or recovered – if the employee can perform his/her job with or without reasonable accommodation, unless the employer can show providing the needed accommodations would cause an undue hardship. Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk, but it cannot show that the individual is a "direct threat." Direct threat is the ADA standard for determining whether an employee's disability poses a "significant risk of substantial harm" to self or to others. If an employee's disability poses a direct threat, an employer must consider whether reasonable accommodation will eliminate or diminish the direct threat.

If an employee returns from a leave of absence with restrictions from his or her doctor, the employer may ask why the restrictions are required and how long they may be needed, and it may explore with the employee and his doctor (or other health care professional) possible accommodations that will enable the employee to perform the essential functions of the job consistent with the doctor's recommended limitations. In some situations, there may be more than one way to meet a medical restriction.

Example #4:

An employee with a disability has been out on leave for three months. The employee's doctor releases her to return to work, but imposes a medical restriction requiring her to take a 15-minute break every 90 minutes. Taking a rest break is a form of reasonable accommodation. When the employer asks the purpose of the break, the doctor explains that the employee needs to sit for 15 minutes after standing and walking for 90 minutes. The employer asks if the employee could do seated work during the break; the doctor says yes. To comply with the ADA, the employer rearranges when certain marginal functions are performed so that the employee can perform those job duties when seated and therefore not take the 15-minute break.

If necessary, an employer should initiate the interactive process upon receiving a request for reasonable accommodation from an employee on leave for a disability who wants to return to work (or after receiving a doctor's note outlining work restrictions). Some issues that may need to be explored include:

- the specific accommodation(s) an employee requires;
- the reason an accommodation or work restriction is needed (that is, the limitations that prevent an employee from returning to work without reasonable accommodation);
- the length of time an employee will need the reasonable accommodation;
- possible alternative accommodations that might effectively meet the employee's disability-related needs; and
- whether any of the accommodations would cause an undue hardship.

In some situations, the requested reasonable accommodation will be reassignment to a new job because the disability prevents the employee from performing one or more essential functions of the current job, even with a reasonable accommodation, or because any accommodation in the current job would result in undue hardship. The EEOC takes the position that if reassignment is required, an employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions. Reassignment does not include promotion, and generally an employer does not have to place someone in a vacant position as a reasonable accommodation when another employee is entitled to the position under a uniformly-applied seniority system.

Example #5:

A medical assistant in a hospital required leave as a reasonable accommodation for her disability. Her doctor clears her to return to work but requires that she permanently use a cane when standing and walking. The employee realizes that she cannot perform significant parts of her job while using a cane and requests a reassignment to a vacant position for which she is qualified. The hospital violates the ADA if it fires the employee rather than reassigning her to a vacant position for which she is qualified and in which she could perform the essential functions while using a cane.

IV. UNDUE HARDSHIP

When assessing whether to grant leave as a reasonable accommodation, an employer may consider whether the leave would cause an undue hardship. If it would, the employer does not have to grant the leave. Determination of whether providing leave would result in undue hardship may involve consideration of the following:

- the amount and/or length of leave required (for example, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);

- the frequency of the leave (for example, three days per week, three days per month, every Thursday);

- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);

- whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);

- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and

- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which considers, for example, the size of the employer.

In many instances an employee (or the employee's doctor) can provide a definitive date on which the employee can return to work (for example, October 1). In some instances, only an approximate date (for example, "sometime during the end of September" or "around October 1") or range of dates (for example, between September 1 and September 30) can be provided. Sometimes, a projected return date or even a range of return dates may need to be modified considering changed circumstances, such as where an employee's recovery from surgery takes longer than expected. None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis. However, indefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation.

In assessing undue hardship on an initial request for leave as a reasonable accommodation or a request for leave beyond that which was originally granted, the employer may consider leave already taken – whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.

Example #1:

An employee has exhausted her FMLA leave but requires 15 additional days of leave due to her disability. In determining whether an undue hardship exists, the employer may consider the impact of the 12 weeks of FMLA leave already granted and the additional impact on the employer's operations in granting three more weeks of leave.

Example #2:

An employee has exhausted both his FMLA leave and the additional eight weeks of leave available under the employer's leave program but requires another four weeks of leave due to his disability. In determining whether an undue hardship exists, the employer may consider the impact of the 20 weeks of leave already granted and the additional impact on the employer's operations in granting four more weeks of leave.

Example #3:

An employer not covered by the FMLA initially grants an employee intermittent leave for a disability. After six months, the employer realizes that the employee is using far more leave than expected and asks for medical documentation to explain the additional use of leave and the outlook for the next six months. The documentation reveals that the employee could need as much leave in the coming six months as he already used. Because of the increased number of absences, the employer has had to postpone meetings necessary to complete a project for one of the employer's clients, in turn causing delays in meeting the client's needs. In addition, the employer has had to reallocate some of the employee's job duties, resulting both in increased workloads and changes in work priorities for coworkers that are interfering with meeting the needs of other clients. Based on this information, the employer determines that additional intermittent leave as described in the doctor's letter would be an undue hardship.

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work.

Example #4:

An employer is not covered under the FMLA. An employee with a disability requires 16 weeks of leave as a reasonable accommodation. The employer determines that it can grant the request and hold open the job. However, due to unforeseen circumstances that arise after seven weeks of leave, the employer determines that it would be an undue hardship to continue holding the job open. The job is filled within three weeks by promoting a qualified employee. Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly-vacant position as a reasonable accommodation.

V. CASE STUDIES

A. Case Study 1: Marketing Manager Sally

Sally had been out on FMLA/STD leave since mid-November 2016 with a return to work day of 02/10/17. Her STD expired 01/05/17 and the STD Third-Party Administrator (TPA) reached out to Sally on 01/10/17 and inquired about extending STD, at which point Sally told the STD TPA she was going to extend her STD. The TPA gave Sally 45 days to get her medical paperwork in. Sally's FMLA was set to expire 02/10/17, before the company would have her STD paperwork, rendering her technically AWOL. However, Sally recently told HR that her doctor decided she should remain off work through April 2017. On February 10, 2017, the company asked what its options were.

<u>Step 1: Confirm the past and get more information</u>

The company sent Sally the following email:

> Hi Sally. I hope you are doing well. Thank you for your patience as I worked through your current situation.
>
> I know we have talked about all these pieces of your leave previously, but I wanted to provide you a summary at this point as we decide what is next.
>
> - Your FMLA-covered leave began November 15, 2016 (according to your doctor) and ended on February 10, 2017. You were covered by short-term disability for a portion of this time, ending January 5, 2017, according to TPA. I understand that you responded to their request for updated medical records on January 12, 2017 and that they allow 45 days to gather the records, and then some time to review them. I know you and I have both followed up with TPA to get a status but have not heard back from them yet.

- On February 6, 2017, I e-mailed you regarding what your plans were when the FMLA expired, and that we needed to determine what to do next. You replied to me that your doctor wanted you to remain off work until end of April and that he would provide documentation to support that. You also let me know that you have been diligent about following up on your short-term disability extension. Thank you for your proactivity on both!

I appreciate your offer to get us what is needed from your doctor to move forward. I'm sorry it took me a bit of time to determine what that would look like.

I would like you to request documentation from your doctor that provides the following information:

1. The amount of additional time you need to be off work completely.

2. The likelihood you will be able to return to work on the date given in #1 above. If not 100%, then the likely duration of your leave until your doctor is certain you will be able to return to active employment.

3. Whether we can provide you with anything to enable you to return to work in any capacity before the dates given in #1 above.

Your doctor can provide me with this information in a letter, and I would like this information by February 28th. If you cannot provide me with it by that date, please let me know and I can adjust it based on the circumstances. Once I receive the information, I will be in touch with you on next steps.

If there is anything I can do to help you, as always, please don't hesitate to let me know. Additionally, if you would prefer to discuss this with me instead of communicating in writing, let me know and we can schedule a meeting or telephone call to do so.

Step 2: Review additional information

Sally's doctor responded 02/27/17 with a note that said:

I am writing this letter on behalf of Sally Doe. She has been under my care since Nov 2016. She is unable to return to her current job till May 1, 2017. I have discussed with her return to work time frame during today's visit. She is most likely to return to work on May 1, 2017. Unfortunately, she is unable to return to work in any capacity till then.

Step 3: Evaluate reasonableness of additional time

HR asked the business unit how Sally's leave was impacting marketing deliverables and received the following response:

I want to outline the critical issues we now face to meet our revenue goals with the prolonged vacancy of the marketing manager. We have had to turn to expensive outsourcing, delay the start of crucial business plan projects, and

> reconsider our aggressive revenue goals due directly to the changing and undetermined date of Sally's return.
>
> Understand that this is the only Marketing Manager position I have on our team and I would like to explore further alternatives to filling this gap. This Marketing Manager position is responsible solely for all the execution of our marketing plans.

The email went on to explain in detail four critical projects that had to be outsourced and the delays, excessive costs and problems associated therewith.

Step 4: Render and communicate the decision

The Company determined it was an undue hardship to keep Sally's job open and notified Sally as follows:

> Dear Sally:
>
> Thank you for your prompt attention to my request for information from your doctor regarding your additional leave time and anticipated return to work date. My preference would have been to talk through this with you, but I understand and respect your preference to communicate in writing.
>
> After reviewing this information against the needs of the Company at this time, we have made the decision that it is imperative that we fill the Marketing Manager position. To continue leaving this important position open is causing extreme hardship for the small team, as you can well imagine.
>
> Upon your release to return to work, expected to be May 1, 2017, you will be considered for any open position within the Company for which you are interested and qualified. Until that time, you will remain an employee of the Company on leave (should you so desire) and applicable benefits will remain intact. We will then touch base prior to May 1st to determine your future plans.
>
> I sincerely hope that you are doing well. Please don't hesitate to contact me any time to discuss this further.

Sally emailed the Company the following response:

> I understand the team's decision 100% and realize the need for marketing support is severely needed with the event season coming up and anniversary quickly approaching.
>
> I sincerely appreciate everyone's patience and understanding around my situation, and I want to sincerely thank you for allowing me to get the help and support I need right now.
>
> Thank you again, Sally

B. Case Study 2: Computer Programmer Kate

Kate is a computer programmer who approached the company about modifying the days she worked each week, so she could have 48 hours rest between work days due to her medical condition. The company granted her request but before it could be implemented, Kate began a medical leave of absence (STD, not eligible for FMLA) on June 10, 2016 and was approved through August 16, 2016. Through the company's third-party leaves administrator (TPA), she requested an extension until 09/06/16 but never provided paperwork to support the extension. As a result, further STD was denied. HR learned of this in mid-September and called Kate to discuss her status. Kate informed HR she can't return to work per her doctor's orders and she was appealing the denial of STD. HR sent Kate the following letter on 09/16/16:

> Dear Kate,
>
> Your leave of absence was approved from June 10, 2016 through August 15, 2016. You requested an extension through September 6, 2016, but you failed to submit the paperwork required to support your request. On September 6, 2016, you called in sick and left a message that you were going to be extending your leave of absence. No extension has been approved as of today.
>
> I left a voicemail for you on September 9, 2016 and again on September 12, 2016 to confirm your request for an extension of your leave of absence as we did not hear from you after your call on September 6, 2016, and you did not file the paperwork necessary to request an extension of your leave of absence. You returned my call on September 13, 2016, leaving me a message that you are unable to return to work at this time, per your doctor, and that your claim for short-term disability benefits with the TPA is under appeal.
>
> I would like to discuss your situation with you further and explore whether there is any way the company can assist you in returning to work. You first requested an accommodation for your medical condition several months ago, which the company was prepared to grant when you first went out on a leave of absence in June. I would like to continue our interactive discussion with you. I'd like to discuss when you are planning to return to work, and if there are any accommodations that the company could make to allow you to return to work. I also will need confirmation from your doctor to support any extension of your leave.
>
> Please contact me at [phone number] no later than September 23, 2016 so that we may have this discussion.

Kate never responded so HR sent Kate the following letter on 09/27/16:

> Dear Kate:
>
> As you know, I have made many attempts to engage in a discussion with you about your request for additional time off and whether there was anything the company can do for you to enable you to return to active employment. You have not responded to my efforts, filed any paperwork to support an extension of your leave, or responded to my letter of 09/16/16. Under these circumstances, the

company assumes you have abandoned your job and plans to terminate your employment. If I am mistaken about any of this, please contact me immediately.

Kate responded to this letter and called HR saying she had not abandoned her job but was unable to return to work and was appealing the denial of STD and submitting paperwork relating thereto. Kate confirmed there was nothing the company could do to accommodate her return to work and was simply seeking more time off.

HR kept in contact with the TPA and Kate over the next couple months, but Kate's STD was never granted due to a lack of documentation, despite Kate's insistence that documentation was submitted. HR repeatedly asked Kate for copies of that documentation, but none was ever provided. On January 4, 2017 the company sent Kate the following letter:

Dear Kate:

As you know, on May 31, 2016, Jane Doe HR Business Partner (HRBP), reached out to you to discuss the documentation from your doctor indicating that you needed a full 48 hours of rest at some point during the week due to a medical condition. The Company agreed to provide this accommodation to you but before we could implement the work schedule accommodation, you opted to take a leave of absence. Your leave was originally approved through June 26, 2016 and since then, extended on several occasions.

In July 2016, I took over for Jane as the HRBP supporting your business group. You were to return to work on 09/07/16, per your medical release document. Instead, you called in sick on 09/07/16 and left a message for your supervisor that you were out ill and were working on an extension of your leave with the Leave office. However, the Leave office did not have any record of an extension request for you at that time. I tried to reach you for a status update and left you two messages on 09/09/16 and 09/12/16. You did not return those calls. As such, we moved to terminate your employment and I sent you a letter stating this via UPS on 09/12/16.

You left me a voicemail on 09/13/16 stating that you were unable to return to work at this time, per your doctor, and that you were appealing the denial of your short-term disability benefits. Because you were in contact with the Leave office and pursing your appeal, we did not terminate your employment at that time.

On 09/16/16, I sent you a letter asking you to contact me, so I could continue the interactive process with you and discuss what the Company could do to assist you in returning to work. I requested that you contact me by 09/23/16 to continue the discussion, but you did not do so.

On 09/27/16, I sent you a letter noting that I had attempted to engage in the interactive process with you and you had not responded to my attempt nor filed any paperwork to support an extension of your leave. I told you we were going to move forward with termination of your employment at that time. You called me on 10/03/16 and said the process was confusing and you were working on your extension. You also told me that there was nothing the Company could do

to accommodate you at that time. I instructed you to contact the Leave office right away.

On 10/06/16, I sent you a letter to notify you that you were still on an unapproved Leave of Absence because the Leave office did not have any extension paperwork from you or your doctor. I also advised that your extension through 09/06/16 had been denied because documentation was not submitted by you and your doctor. I left you a voicemail, as well, on 10/06/16 asking you to contact the Leave office regarding your extension.

We spoke again on 12/08/16 because no paperwork had been submitted to support your Leave of Absence and your absence was still unauthorized. I advised you to contact your doctor. You thought it had already been submitted and told me you would contact your doctor right away. You also told me that you were aware your short-term disability pay had been exhausted and that you applied for long-term disability.

I contacted leaves on 12/20/16 for an update on your extension and they told me that your long-term disability had been denied because documentation was not received by the due date.

On 12/22/16, we spoke, and I explained that no additional paperwork had been submitted to the Leave office by your doctor. I asked you to have it faxed to the Leave office and to me, so I could ensure it got to the right team quickly.

As of today, nothing has been submitted to support your extension of leave. The last time you contacted the leaves office was on 12/8/16 to request additional Leave of Absence forms. You have been absent without leave or authorization for months and have told me you are unable to perform your job, that there is no accommodation the Company can provide to enable you to do so or to return you to active employment in any capacity, and that you have no return to work date.

Unfortunately, considering all the foregoing, your employment with the Company is terminated effective immediately. If I am mistaken about any of this, please contact me immediately. Additionally, if at any point in the future you can return to work with or without a reasonable accommodation, you are free to apply for any open position at the Company for which you are qualified. Please contact me if you wish to do so and would like my assistance in applying.

Kate, on behalf of all of us here at the Company and your manager, I wish to thank you for your years of service with the Company and wish you improvement on your road to better health.

The company has not heard from Kate since this letter.

VI. STEP-BY-STEP GUIDE TO PROACTIVELY MANAGE LEAVES

As the above situations reveal, to control leaves and keep them from spiraling out of control, an employer cannot be passive but should commence managing the leave at the start of it. The following steps can be utilized to proactively manage an employee's medical leave throughout the duration of the leave, so a company can satisfy its legal obligations and either successfully return the employee to active employment or terminate the employment relationship if no reasonable accommodation exists.

STEP 1: Know the employee's leave entitlement

- Leave laws – FMLA/ADA/state and local laws – Determine the employee's eligibility for and entitlement to any statutory leave rights and grant that job-protected time off.

- Contractually mandated leaves – *i.e.,* CBA – Determine whether the employee has any leave rights mandated by contract, like rights under a collective bargaining agreement or written employment contract. If so, those rights must be protected.

- Company Policies – Review all company policies and ascertain the employee's leave rights under those policies and ensure the employee receives benefits consistent with the company's administration of those policies.

STEP 2: Actions to take at the beginning of the leave

- Clearly state your expectations for employee communication during the leave and monitor compliance. Employees need to understand that if the company uses a third-party administrator or a leaves group separate from HR, they need to communicate any changes in their situation to HR, in addition to leaves administration. Employees also need to understand that information provided to leaves administration is not typically or automatically shared with HR or the business unit.

- Communicate with the employee's supervisor/manager to understand and/or develop a plan to cover the employee's work duties during the leave.

STEP 3: Actions to take during the leave

- Direct the employee's supervisor to report and document issues related to work coverage while the employee is out on leave and to keep HR apprised of any issues. This will help in determining whether any request for additional leave beyond job protected leave required by the local, state, or federal law, is reasonable or an undue hardship.

- Check in with the leave administration group for any changes in leave status, in the event the employee neglects to or is unable to keep HR apprised of any changes in the leave status.

STEP 4: Actions to take for a leave beyond a mandatory job protected leave

- When leave is required beyond any mandatory job protected leave, the ADA interactive process must be undertaken and documented well. The company should first ensure

that there is no accommodation it can provide that will enable the employee to return to active employment.

- If additional leave is the only option, gather the necessary information to determine whether additional leave is reasonable or an undue hardship. This includes, at a minimum, the length of additional leave, the reason for it, why the initial return to work date proved inaccurate, the likelihood the employee will return at the end of that leave, medical documentation supporting the request, and the effect additional leave will have on the company's business or operations.

- If additional leave in the position the employee holds is not a reasonable accommodation, the leave may be denied and if the employee does not return to work, the company may fill the position. However, the company should evaluate whether there are any job vacancies for which the employee is qualified and whether it is a reasonable accommodation to hold that position open for the duration of the employee's leave.

- Whether a company can/should terminate an employee whose additional leave is determined to be an undue hardship, or who fails to cooperate in the interactive process, is an individualized assessment.

VII. OTHER CONSIDERATIONS: THE AMOUNT OF LEAVE

A. Duration and Amount of Leave: How Much Leave Is Reasonable?

The ADA requires employers to provide reasonable accommodation to disabled employees provided that the accommodation does not cause an undue hardship to the employer.[1] For an accommodation to be deemed "reasonable," it must be "effective." In the context of job performance, this means that the accommodation will enable the individual to perform the essential functions of his or her position. An employer's failure to provide reasonable accommodations to employees with a qualifying disability is a distinct violation of the ADA. In some circumstances, the ADA may require an employer to provide a paid or unpaid leave of absence as a reasonable accommodation.[2]

Generally, a determination of the reasonableness of a leave of absence as an accommodation under the ADA depends upon the duration of the leave and the likelihood that the employee will be able to return to work at the end of the leave. Regardless of the circuit, an accommodation is reasonable if the costs are not clearly disproportionate to the benefits it produces.

Most courts acknowledge medical leave as a reasonable accommodation. Although leave under the ADA is technically unlimited, as the ADA does not specify how much leave is required as a reasonable accommodation, leave for an indefinite period is generally not a reasonable accommodation, especially where the prospects for recovery are uncertain.[3] While each court

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1 *See* 42 U.S.C. § 12112(b)(5)(A).

2 29 C.F.R. Pt. 1630, App. 1630.2(o).

3 *See, e.g., Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000); *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000); *Taylor v. Pepsi-Cola Co.,* 196 F.3d 1106 (10th Cir. 1999). *Compare Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (court affirms award in favor of disabled employee who was terminated when she requested that her employer extend her one-month leave of

stresses that the determination is based on an individualized, case-by-case assessment, the courts appear to be taking similar fundamental considerations into account: (1) the amount of time requested; (2) the degree of certainty of the employee's ability to return to work on the specified date; and (3) the employer's written policies.

For example, the Eighth Circuit held that an employer did not violate the ADA when it terminated an employee who was absent for months to undergo cancer surgery and treatment when the employee could not provide the employer with the expected duration of her leave.[4] Although an employer is not obligated to grant a request for indefinite leave, a leave request is not "indefinite" because the individual can only provide an approximate return date due to the nature of the disability.

When accommodated leave verges on a request for indefinite leave, the once reasonable and required accommodation transforms into an unreasonable demand no longer aiding the employee to perform the essential functions of the job. How much leave an employer will be obligated to afford a disabled employee continues to depend upon a personalized inquiry. However, it is clear under most of the case law that the prevailing considerations in assessing indefiniteness and thus reasonableness are: (1) whether a precise amount of time is requested; (2) whether there exists an effective, "optimistic" prognosis that the requested leave would ameliorate the employee's disability; and (3) the employer's current sick leave policies.

B. Maximum Leave Policies

Even facially neutral maximum leave policies (sometimes called "no fault" leave policies) may create liability under the federal ADA. The ADA, as interpreted by the EEOC and as amended under the Americans with Disabilities Act Amendments Act ("ADAAA"), clarify that at the end of such a maximum leave period, an employer still must engage in the interactive process and consider reasonable accommodations for any disability causing the extended leave, including the modification or extension of the maximum leave policy.

1. EEOC Litigation

In recent years, the EEOC has brought several class action lawsuits alleging systemic disability discrimination based on the enforcement of "maximum leave" policies. Maximum leave policies provide for a maximum amount of leave after which an employee will be terminated, *e.g.*, employees must return to work after 12 weeks of leave or face termination. The EEOC's view is that any policy that provides employees with a pre-determined amount of leave (*e.g*., 12 months) violates the ADA unless the employer proactively considers reasonable accommodations for the employee, which may include a reassignment to another job or additional leave. Put differently, the EEOC holds employers to an obligation to engage in the interactive accommodation process with each employee who is approaching the maximum amount of leave.

The following are recent settlements by the EEOC in class action cases involving maximum leave policies:

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absence by a few more weeks); *with Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998) (two short leaves of absence of two to four weeks each were not unreasonable).

[4] *Peyton v. Fred's Stores of Arkansas, Inc*., 561 F.3d 900 (8th Cir. 2009).

- In *EEOC v. Sears Roebuck,* filed in Chicago in 2004, the parties were embattled in a discovery war until 2009 when the case was resolved with a $6.2 million consent decree covering more than 250 claimants who had been separated under Sears' 12-month leave policy.

- In *EEOC v. Denny's,* filed in Baltimore in 2006, the parties were embroiled in extensive discovery until 2011 when the parties entered a $1.3 million consent decree covering 33 claimants who were separated pursuant to Denny's maximum leave policy.

- In *EEOC v. Supervalu,* filed in Chicago in 2009, the parties engaged in a fast-tracked discovery battle until 2010 when they entered a $3.2 million consent decree covering more than 100 claimants who had been separated under Supervalu's 12-month leave policy.

- In *EEOC v. Verizon,* filed in Baltimore in 2011, the EEOC simultaneously filed a $20 million consent decree providing relief to 800 claimants who were disciplined or terminated under Verizon's no-fault attendance and leave policies.

Notably, the consent decrees in two of these settlements required employers to notify individuals on disability leave(s) as to when their leaves were about to expire and inform those individuals regarding their options to request leave extension(s) and/or the possibility of a transfer to jobs consistent with their medical restrictions.

Bucking the trend against "inflexible leave" policies, the Tenth Circuit recently upheld a university's inflexible six month leave policy, and further held that the university was not required to provide an employee undergoing cancer treatment with more than six months' leave as a reasonable accommodation.[5] This decision, however, stands in contrast to other court and EEOC determinations that "inflexible leave" policies are unlawful because they do not take into account the possibility of providing additional leave as a reasonable disability accommodation, instead looking to whether the amount of leave provided by the policy was reasonable.

2. EEOC Enforcement Guidance

The EEOC's "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act"[6] specifically provides that an employer may not apply a maximum leave policy to an employee who needs leave beyond a set period. The EEOC recommends that if an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its maximum leave policy to provide additional leave, unless the employer can show that: (1) another effective accommodation would enable the person to perform the essential function of his or her position, or (2) granting leave would cause an undue hardship. According to the EEOC, adjusting or modifying workplace policies, including leave policies, is a form of reasonable accommodation.[7] However, the EEOC also opines that "[w]hile undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to an employer's operations if additional leave is granted beyond the period allowed by

[5] *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).

[6] http://eeoc.gov/policy/docs/accommodation.html.

[7] *See* 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997).

the policy. In determining whether an undue hardship exists, the employer should consider how much additional leave is needed (*e.g.*, two weeks, six months, one year?)."[8]

Therefore, the EEOC interprets the ADA to mean that an employer's reasonable accommodation obligation may include extending the employer's medical or personal leave policies, including no-fault, neutral, or maximum leave policies, so long as doing so creates no undue hardship. The EEOC has sued employers with similar universal leave policies and received substantial settlements in each.[9] While the EEOC's guidance and interpretation on the issue is not binding upon courts or on employers, the EEOC's enforcement practices must be considered in the administration of these policies.

As such, employers should conduct an individualized assessment (i.e., a case-by-case evaluation as contemplated under the ADA) to determine whether an extension of leave would be a reasonable accommodation even in a maximum leave policy. If dialogue with the employee suggests that a limited period of additional leave after exhausting the maximum leave provided would allow the employee to return to work and perform the essential functions of the position, this may be a necessary reasonable accommodation.

C. Medical Certification

Under the ADA, an employer may not require an employee to submit to a medical examination or provide a medical certification, unless there is a business necessity and the examination is limited to the employee's ability to perform job-related functions.[10] However, an employee requesting accommodation must provide documentation describing the nature, severity, and duration of the impairment, and substantiating the request for accommodation.

D. Reinstatement to Position

Leave as a reasonable accommodation includes the right to return to the employee's original position. However, if an employer determines that holding open the job will cause an undue hardship, then it must consider whether alternatives permit the employee to complete the leave and return to work. For example, if an employer is not covered under the FMLA and an employee with a disability requires 16 weeks of leave as a reasonable accommodation, the employer may initially grant the request and hold open the job. But unforeseen circumstances may later arise resulting in an undue hardship in continuing to hold the job open. The job is filled within three weeks by promoting a qualified employee. Meanwhile, the employer determines that the employee on leave is qualified for the now-vacant position of the promoted employee and that the

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[8] *See* "*Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*," fn. 50.

[9] In *EEOC v. Sears Roebuck,* filed in Chicago in 2004, the parties resolved the case in 2009 with a $6.2 million consent decree covering more than 250 claimants who had been separated under Sears' 12-month leave policy. In *EEOC v. Denny's,* filed in Baltimore in 2006, the parties entered into a $1.3 million consent decree in 2011 covering 33 claimants separated pursuant to Denny's maximum leave policy. In *EEOC v. Supervalu,* filed in Chicago in 2009, the parties entered into a $3.2 million consent decree covering more than 100 claimants who had been separated under Supervalu's 12-month leave policy. In *EEOC v. Verizon,* filed in Baltimore in 2011, the EEOC simultaneously filed a $20 million consent decree providing relief to 800 claimants who were disciplined or terminated under Verizon's no-fault attendance and leave policies.

[10] 42 U.S.C. § 12112(d)(4).

job can be held open until the employee returns to work in six weeks. The employer explains the situation to the employee with a disability and offers the newly-vacant position as a reasonable accommodation.

E. Reassignment

The reassignment obligation under the ADA is affirmative. An employer cannot displace an employee and simply refer them to the company website for jobs. Requiring an employee to compete and be the most qualified person for a vacant position is not an accommodation, because all persons may apply for and compete for positions. The Supreme Court suggests that absent a seniority system strong enough to almost grant other employees a property interest in a vacant position (so it is not really vacant), or an undue hardship (which is not clearly defined), the employer has an affirmative obligation to place a displaced employee into a vacant position of equal or lesser status.

VIII. THE CONVERGENCE OF LEAVE LAWS: GENERAL CONSIDERATIONS

Determining which leave laws apply to a given situation is like navigating a minefield. As illustrated above, employers must consider numerous laws in determining whether an employee is entitled to leave.

The FMLA, ADA, and state workers' compensation leaves, as well as leaves provided by other state or local laws, all have their own unique eligibility and leave mandates. Employers often fall into the troublesome trap of attempting to manage all the leaves simultaneously and one analysis. Anytime a member of the Human Resources team consults an attorney to determine whether additional leave should be given, each of the laws must be viewed independently and in the aggregate.

A. Statutory Sources of Job Protection

According to the FMLA's regulations, employers must provide leave under whichever statutory provision (*e.g.,* ADA, FMLA, state laws) provides the greater rights to employees.[11] Thus, employers must review each statute independently and assess which law provides the most protection. Of course, a person protected under one statute may or may not also be protected under another statute.

For example, under the ADA, the EEOC is clear that employers receive no credit for FMLA having been granted. The EEOC guidance indicates that you exhaust the FMLA first and then perform an ADA analysis. So, the ADA may grant leave to an employee that is not eligible for FMLA. It may also grant leave to an employee that has exhausted the FMLA. In either case, leave is considered a reasonable accommodation "in the run of cases." Therefore, if leave would be effective in returning the employee to full duty, including regular attendance, then leave must be considered if reasonable and if it will not create an undue hardship.

B. What are the "Triggers"

Perhaps the most underutilized provision of the FMLA in analyzing an employee's return to work rights and obligations for providing additional leave or accommodations is its deference to

[11] *See* 29 C.F.R. § 825.702(a).

the ADA. The FMLA is tough on employers because it is hyper-technical, particularly with what may be asked of an employee or an employee's doctor. Conversely, the rules on information sharing under the ADA are relatively loose. The EEOC claims that an employee who seeks leave citing his or her own impairment is seeking an accommodation. So, the ADA is triggered almost every time an employee seeks leave citing his or her own impairment.

There are several other ways the ADA can help. First, if the ADA is triggered, an employer is not technically limited to the strict questions on the FMLA certification form, or the rigors of the FMLA certification process. An employer may obtain more information. This is especially true when one considers the structure of how the FMLA and the ADA interact with each other. The ADA analysis of whether the employee can be accommodated within his or her job comes first. So, an interactive dialog and fact-finding period should, technically, occur before an employer moves to the FMLA. The FMLA is basically a concession that the employee cannot perform one or more essential functions.

C. Return to Work

Finally, the FMLA return to work process is limited and restrictive on employers. Consequently, most employers violate them repeatedly. Employers who require a doctor's note every time an employee returns from a leave are likely violating the FMLA because that level of frequency is rarely permitted. But, if the ADA is triggered, because an employer has an objective basis to believe the employee may not be able to perform one or more essential functions, then the employer has the right under the ADA to seek medical clearance, regardless of what the FMLA says

D. Intermittent Leave

Another issue that often confounds employers involves unpredictable intermittent leave with little or no notice to the employer. If an employee's explanation is that they are incapable of giving better notice, such as with flare-ups with little or no notice, then employers should consider safety implications when, with little or no notice, the employee cannot perform an essential function. If an essential function the employee suddenly cannot perform impacts health and safety, then perhaps the employee poses a significant threat to health and safety under the ADA and could be temporarily or permanently unqualified for the position.

Below is an explanation of some of the key interrelationships between leave laws that an employer should be aware of when managing leaves of absence.

IX. THE CONVERGENCE OF LEAVE LAWS: KEY DIFFERENCES

A. The Difference Between a "Disability" Under the ADA and a "Serious Health Condition" Under the FMLA

The most important determination when analyzing a potential ADA/FMLA situation is whether an employee's illness or injury is a "serious health condition" under the FMLA or a "disability" under the ADA (or both). Generally, a "serious health condition" is a condition that is, for the most part, temporary and from which an employee likely will recover. In contrast, a "disability" is typically a more permanent impairment.

Many conditions that constitute a disability under the ADA also will constitute a serious health condition under the FMLA. However, not all disabilities are considered serious health conditions,

and all not all serious health conditions are disabilities. For example, an impairment that substantially limits a major life activity but does not require any ongoing medical treatment will be considered a disability under the ADA, but not a serious health condition under the FMLA (*i.e.*, a severe hearing impairment). Conversely, a condition that results in a period of incapacity or requires treatment but does not substantially limit a major life activity would be a serious health condition under the FMLA but would not be a disability under the ADA (i.e., a broken arm).

B. Duration of Leave

FMLA leave is limited to 12 weeks during any 12-month period. The ADA does not impose a fixed limit on the amount of leave to which an employee may be entitled as an accommodation. However, an employer is not obligated to allow an employee to remain out on leave where the employee's absence would impose an "undue hardship" on the employer.
Medical leave granted as a reasonable accommodation under the ADA and leave granted to employees disabled to work-related injuries may run concurrently with FMLA leave.

C. Benefits

The ADA does not require the employer to maintain health and other benefits for employees while on leave unless failure to do so would be discriminatory. The FMLA, however, does require maintenance of group health benefits (and possibly other benefits as well) for employees while on leave.[12]

Therefore, if an employee is on leave as a reasonable accommodation under the ADA, and such leave is counted against the employee's FMLA entitlement, the FMLA requires the employer to continue providing group health benefits to that employee even if the employee would not be entitled to such benefits under the ADA.[13]

D. Light Duty

1. Mechanics

State workers' compensation laws may require an employer to offer employees the opportunity for a restructured light duty assignment. Light duty may also constitute a reasonable accommodation under the ADA. However, if the employee independently qualifies for leave under the FMLA, the employer *may not* require the employee to accept a light duty position. Refusal to accept such an assignment, however, may result in the loss of eligibility for workers compensation benefits.[14]

An employee who has been on FMLA leave and voluntarily accepts a light duty assignment retains his or her rights under the FMLA to be restored to the same or equivalent position for a cumulative period of up to twelve workweeks.[15] For purposes of job restoration, all time spent on FMLA leave plus the time the employee is employed in a light duty assignment is

[12] *See* 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209.

[13] *See* 29 C.F.R. § 825.702(c)(3).

[14] *See* 29 C.F.R. § 825.702(d)(2).

[15] *See* 29 C.F.R. § 825.220(d).

counted.[16] Thus, the employer's obligation to restore the employee to an equivalent position ceases after 12 workweeks of FMLA leave and light duty.

However, the period during which the employee is employed in the light duty assignment does not count against the employee's 12 work-week allotment of the FMLA leave. Thus, if an employee with a work-related serious health condition accepts a light duty job, the employee will only have exhausted the amount of FMLA leave taken prior to acceptance of the light duty position.[17]

Thus, for job restoration purposes, all time is counted—leave and light duty—whereas for leave entitlement calculations, only the time on leave counts.

2. Practical Considerations

Many employers offer light duty to employees with work-related injuries to prevent malingering, work hardening and to mitigate the payment of wage replacement benefits. State workers' compensation laws may require an employer to offer employees the opportunity for a restructured light duty assignment. However, if the employee independently qualifies for leave under the FMLA, the employer *may not* require the employee to accept a light duty position. Refusal to accept such an assignment, however, may cause the loss of eligibility for workers compensation benefits.[18]

Often, too, the light duty offered employees with occupational injuries is not offered to employees hurt outside of work. Employers who offer light duty only to employees with occupational injuries should know of how their light duty programs interact with federal leave laws.

As an initial matter, employers should offer light duty *work* rather than maintaining light duty *positions.* It is important to distinguish between "light duty" and reasonable accommodations required by the ADA. Typically, the distinction is that light duty is work or a position created to address an employee's restrictions and most often overlooks the employee's inability to perform the essential functions of a regular, existing position. Such positions are also called "transitional or work-hardening positions." Reasonable accommodations, on the other hand, are based primarily on the employee's *ability to perform* the essential functions of an existing job, with or without accommodation. Employers are smart to consider light duty on a case-by-case basis rather than establishing regular or permanent "light duty" positions. Establishing regular "light duty" positions would effectively create a position which, if vacant, would have to be considered as a reasonable accommodation for a permanently impaired employee.

Moreover, the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*,[19] which held that the Pregnancy Discrimination Act ("PDA") "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work," impacts the light duty analysis. In *Young,* the plaintiff sued her employer for finding her ineligible for light duty work solely due to her pregnancy-related limitations. Because *Young* opens the door for plaintiffs to sue when an employer's light duty

[16] *See* 29 C.F.R. § 825.220(d).

[17] *See* 29 C.F.R. § 825.702(d)(2).

[18] *See* 29 C.F.R. § 825.702(d)(2).

[19] 135 S. Ct. 1338 (2015).

policies impose a significant burden on pregnant employees, employers should review their policies related to light duty and reasonable accommodation requests to ensure that they are in line with legitimate business needs and not based, instead, on costs and convenience.

Often doctors write employees out of work without considering light duty options. In those cases, employers should inquire about the employee's actual limitations to see if light duty can be provided. Such medical inquiries are generally permissible in this situation, and managers and human resources professionals should be trained on the need for individualized inquiries in granting and/or denying requests for light duty accommodations. Those inquiries, which would not necessarily be permitted under the FMLA, are permissible if made to administer to an employer's light duty program in a workers' compensation scenario. While an employee can reject light duty under the FMLA, that rejection is likely to disqualify the employee for wage replacement benefits under state workers' compensation law, such inquiries are necessary and specifically permitted.

An employee who has been on FMLA leave and voluntarily accepts a light duty assignment retains his or her rights under the FMLA to be restored to the same or equivalent position for a cumulative period of up to twelve workweeks.[20] For job restoration, all time spent on FMLA leave plus the time the employee is employed in a light duty assignment is counted.[21] Thus, the employer's obligation to restore the employee to an equivalent position ceases after 12 workweeks of FMLA leave and light duty.

However, the period during which the employee is employed in the light duty assignment does not count against the employee's twelve-work-week allotment of the FMLA leave. If an employee with a work-related serious health condition accepts a light duty job, the employee will only have exhausted the FMLA leave taken prior to acceptance of the light duty position.[22]

For job restoration purposes, all time is counted—leave and light duty—whereas for leave entitlement calculations, only the time on leave counts.

E. Medical Certification / Fitness for Duty Requirements

Generally, an employer may require fitness-for-duty certifications from employees returning from disability leave under the ADA. Similarly, the FMLA allows the employer to request a certification from the employee's health care provider certifying that the employee can return to work, if FMLA leave was taken due to the employee's *own* serious health condition. However, fitness-for-duty reports can be required only if the requirement is uniformly applied to all employees in similar situations. If an employee fails to provide a fitness-for-duty certification, the employee can be denied reinstatement and be terminated.

One source of conflict between the ADA and the FMLA involves the designation of health care professionals. Under the ADA, an employer may require that the employee go to a health care provider chosen by the employer. However, under the FMLA, the employee generally can obtain a medical certification from the doctor of his or her choice, unless the employer doubts the validity of the initial certification. In that case, the employer may require a second opinion from a health care provider of the employer's own choosing. As the FMLA requires that employers

[20] *See* 29 C.F.R. § 825.220(d).

[21] *See* 29 C.F.R. § 825.220(d).

[22] *See* 29 C.F.R. § 825.702(d)(2).

provide leave under whichever statutory provision (*e.g.,* FMLA, ADA, state law) provides the greater rights to employees, it could be argued that an employee who is on leave that qualifies under the FMLA and the ADA is entitled to select the health care provider to conduct a fitness-for-duty examination.

F. Contact with the Employee's Health Care Provider

Generally, under the provisions of the FMLA, an employee returning to work must give the employer permission to speak with his/her healthcare provider.[23] The employer is not allowed to speak to the employee's health care provider without this permission. However, if an employee is on workers' compensation leave running concurrently with FMLA leave, the employer can have direct contact with the employee's workers' compensation healthcare provider.[24] Under the ADA, an employer is not prohibited from communicating with the employee's physician.

As a practical matter, if the employer has designated the employee's leave as FMLA leave, the employer should request permission to speak to the employee's healthcare provider as required by the FMLA. If, however, the employee's leave does not qualify for FMLA coverage, the employer should feel free to communicate directly with the employee's healthcare provider as allowed under the ADA and the workers' compensation laws.

G. The Employer's Obligation to Reinstate the Employee

The EEOC takes the position that the employee's job must be held open while the employee is on reasonable accommodation leave under the ADA, unless the employer can establish that holding the position open would impose an undue hardship.

Even if the employer can show that keeping open the position for the entire period sought by the employee would constitute an undue hardship, the employer must consider reassignment of the employee to another, vacant position for which the employee is qualified upon conclusion of the leave.

FMLA requires that an employer hold open an employee's job for 12 weeks. An employee who is unable to return to work upon expiration of FMLA leave has no right to reinstatement or to an alternative or modified position under the FMLA.[25]

However, if FMLA leave has expired and the employee remains unable to return to work, the employer must determine whether the individual is a "qualified individual with a disability" under the ADA. If the employee is covered by the ADA, the employer must determine whether the employee is entitled to reasonable accommodation, including continued leave.

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[23] 29 C.F.R. § 825.307(a).

[24] 29 C.F.R. § 825.306(c).

[25] *See* 29 C.F.R. § 825.216(c).

H. Workers' Compensation

1. Paid/Unpaid Leave

Under the FMLA, an employer can generally require an employee to use or exhaust any paid time off during FMLA leave. However, this rule changes in a workers' compensation setting. Where an employee is on FMLA leave due to a workers' compensation injury and is receiving wage replacement benefits through workers' compensation, the employer generally cannot require the use of PTO; it can only supplement the benefits paid by workers' compensation if agreed to by both parties. Employers should be mindful of how they word their PTO policies if they seek to limit the use of PTO to only otherwise "unpaid" leave.

Remember, refusal of appropriate light duty typically stops wage replacement benefits under workers' compensation. Once that stoppage becomes effective, the employee is considered on unpaid leave and the employer is back in position to require the use of accrued PTO as it would be under normal FMLA leave scenarios. Of course, if the employee accepts light duty, the time worked cannot be counted against the employee's FMLA leave.

2. Medical Information and Medical Inquiries

Under the ADA and the FMLA, there are prohibitions and limits on an employer's ability to make medical inquiries during employment. However, such limitations are largely preempted in a workers' compensation claim, at least to the extent state law permits related medical inquiries and the inquiries are reasonably related to the occupational injury.

Under the workers' compensation laws of most states, employers are provided medical records from the authorized treating physician throughout the duration of a workers' compensation claim. Beyond that, most states' workers' compensation laws allow employers and their representatives to make medical inquiries of an injured employee's treating physician to establish work restrictions, return to work status, anticipated date of maximum medical improvement, etc. Accordingly, employers have access to employee medical information they would not normally have. By having such access, when it comes to notice of an "impairment" for purposes of the ADA or for certification of a serious health condition under the FMLA, an employer's knowledge of the employee's medical condition can be established via the normal course of a workers' compensation claim. Employers should know that knowledge may be assigned to them in this way and assure that, as an organization, there is enough communication between those who receive or have access to workers' compensation medical records and those who administer FMLA leave and ADA accommodation requests.

Indeed, there is no requirement that FMLA certification be provided on the employer's form. If the information provided is otherwise complete and accurate, a doctor's note can certify the need for leave. Therefore, in a workers' compensation scenario, employers should not unreasonably insist upon a specific format for the information. If the employer needs additional information, beyond what has been provided via the workers' compensation process, it should provide the employee with a letter specifying what it needs for deciding on the leave. Insisting on a form where the necessary information is already in hand can constitute interference with FMLA rights.

X. TIPS FOR EMPLOYERS

The first step in the process, where in-house counsel and human resources personnel are critical, is recognizing an employee's leave entitlement under applicable law, under any contractual obligation such as a collective bargaining agreement, and under company policies Employers should ensure their own policies and procedures are consistent with federal, state, and sometimes local, requirements for all forms of leave to ensure employees returning from leave are handled appropriately. In considering the reinstatement process, employers should be certain their procedures were appropriate. If not, granting the employee additional leeway in the reinstatement process may be a simple means to avoid a technical statutory violation. Ensuring these processes are appropriate includes employer and employee notification requirements, proper consideration of potential ADA reasonable accommodations in FMLA, workers' compensation situations, in addition to other employer-provided leaves and USERRA leave in which an employee's own health condition or disability is at issue, maintaining employee confidentiality, and follow through on all requests.

To ensure uniformity and appropriate documentation, in-house counsel and human resources personnel should consider procedures and policies that definitively articulate how FMLA, ADA, workers' compensation, and military leave requests, among others, are to be handled, particularly in the context of a reinstatement request. Further, risk should be minimized by ensuring necessary personnel are trained in the employer's processes and a general understanding of the rights and obligations created by the various statutes. Finally, and because it is so often overlooked, which frequently impairs employers' options in the leave and reinstatement process, job descriptions should be accurate and highlight essential functions, if they are used.

When a leave or reinstatement request arises, the employer should plainly state its expectations for employee communication during the leave and monitor compliance or regarding intermittent leave. Employees need to understand that if the company uses a third-party administrator, they need to communicate changes to the administrator and to human resources to ensure the company has necessary information in a timely manner. In addition, communicate with the employee's supervisor/manager is critical. Her or she must understand and/or develop a plan to cover the employee's work duties during the leave or intermittent leave and otherwise in the reinstatement process.

Because of the opportunity for employees to abuse leaves of absence, employers should be particularly watchful. To limit abuse, employers should not grant indefinite leave, but instead, request an anticipated date of return, even if it is not an absolute return date. In addition, if possible, employers may benefit from providing a reasonable accommodation that requires an employee to remain on the job while still addressing their medical needs. But perhaps most important, employers should document all attempts to return the employee to work, document all offers that the employee rejects, and track leave to determine if there is a pattern of abuse surrounding Fridays, Mondays, or holidays.

When employees are out on leave and approaching the conclusion of leave, or regarding requests to extend an existing leave, the ADA interactive process must be undertaken and documented. If there is no accommodation it can provide that will enable the employee to return to active employment, the employer may consider whether additional leave is reasonable or an undue hardship. If not, additional leave may be denied and if the employee does not return to work, the company may fill the position. However, the company should evaluate whether there

are any job vacancies for which the employee is qualified and whether it is a reasonable accommodation to hold that position open during the employee's leave.

Finally, at the end of leave, and additional consideration of the interactive process, the employer should carefully consider whether it has considered all appropriate leave and attendance polices prior to premature termination.