

NAVIGATING ROUGH WATERS: THE CONFLUENCE OF THE ADA, FMLA AND WORKERS' COMPENSATION LAWS

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When an employee faces a significant medical condition, it is obviously a challenging personal issue for the employee, but as practitioners in the employment law and human resources fields are acutely aware, complicated legal issues are also presented. An employer must navigate a myriad of statutes, each with different purposes, coverages, requirements, and rights. This network of statutes may give rise to overlapping, undefined, and contrary obligations.

Apart from determining which law applies, employers must strike an appropriate balance between competing interests -- legal requirements versus business needs, respect for employee confidentiality versus a need to know certain medical information, and a desire to treat the employee fairly versus the negative impact of a possibly prolonged employee absence on business operations. This article explores the intersecting statutes which are implicated when an employee suffers from a medical condition that may require time away from work.

A. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act ("ADA"), enacted in 1990, prohibits covered entities from discriminating against a "qualified individual with a disability" in regard to any term, condition or privilege of employment. 42 U.S.C. § 12101 et seq. A covered entity includes employers with fifteen or more employees. 42 U.S.C. §12111(5)(A). Several critical definitions determine whether the ADA will apply in a given situation.

A "disability" is defined as a physical or mental impairment that substantially limits one or more of an individual's major life activities; a record of such an impairment

or being “regarded as” having such an impairment. 42 U.S.C. § 12102(2).¹ “Major life activities” are those such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or walking. 29 C.F.R. § 1630.2(i). This list is not exhaustive. 29 C.F.R. pt. 1630 app., § 1630.2(i). An individual is “substantially limited” if she or he is unable to perform a major life activity that the average person in the general population can perform or if she or he is significantly restricted as to the condition, manner or duration under which she or he can perform the activity. 29 C.F.R. § 1630.2(j). Temporary, non-chronic conditions of short duration, such as a strain, broken limb, or the flu generally would not be covered. 29 C.F.R. pt. 1630 app., § 1630.2(j). Pregnancy is not considered to be an ADA impairment. 29 C.F.R. pt. 1630 app., § 1630.2(h). Individuals who currently engage in illegal use of drugs also are not considered disabled under the ADA. 29 C.F.R. § 1630.3. The Supreme Court has held that the ADA allows employers to consider corrective or mitigating measures when determining whether an employee is disabled, such as eyeglasses, medication, etc. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

Title I of the ADA requires employers to provide “reasonable accommodation” to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. 42 U.S.C. § 12101 et seq. In general, an accommodation is any change in the work environment or in the way that 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). Reasonable accommodations must be provided to qualified individuals with a disability regardless of whether they work

¹ The ADA also prohibits discrimination against any qualified individual, whether or not that individual has a disability, because that person is known to have an association or relationship with an individual who has a known disability. 29 C.F.R. § 1630.8.

part-time or full-time and regardless of length of service. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html. Generally, the individual with a disability must inform the employer that an accommodation is needed. 29 C.F.R. pt. 1630 app., § 1630.9. To determine the appropriate reasonable accommodation, it may be necessary for the employer to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations. 29 C.F.R. §1630.2(o).

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed, including but not limited to, making existing facilities accessible; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquiring or modifying equipment; changing examinations, training materials or policies; providing qualified readers or interpreters and other similar accommodations. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2). In addition, unpaid medical leave is also a reasonable accommodation and must be provided to an otherwise qualified individual with a disability. 29 C.F.R. pt. 1630 app., § 1630.2(o). No set amount of leave is required as a reasonable accommodation under the ADA.

An accommodation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables

the individual to perform the essential functions of the position. 29 C.F.R. pt. 1630 app., § 1630.9. An employer does not have to eliminate an essential function or lower production standards. 29 C.F.R. pt. 1630 app., § 1630.2(o); 29 C.F.R. pt. 1630 app., § 1630.2(n). A qualified individual with a disability is not required to accept an accommodation which such individual chooses not to accept. If such individual, however, rejects a reasonable accommodation, and cannot as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability. 29 C.F.R. § 1630.9(d). Further, the accommodation does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. 29 C.F.R. pt. 1630 app., § 1630.9.

The only statutory limitation on an employer’s obligation to provide “reasonable accommodation” is that no such change or modification is required if it would cause “undue hardship” to the employer. 42 U.S.C. § 12111(10). The term “undue hardship” means an action requiring significant difficulty or expense. 42 U.S.C. § 12111(10)(A). In determining whether an accommodation would impose an undue hardship on a employer, factors to be considered include (i) the nature and cost of the accommodation; (ii) the overall financial resources of the facility; (iii) the overall financial resources of the covered entity; and (iv) the type of operations of the covered entity. 42 U.S.C. § 12111(10)(B). The concept of undue hardship is not limited to financial difficulty, and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive or that would fundamentally alter the nature or operation of the business. 29 C.F.R. pt. 1630 app., § 1630.2(p). An employer must assess on a case-by-case basis

whether a particular reasonable accommodation would constitute an undue hardship.

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

The ADA's requirements regarding reasonable accommodation and undue hardship supersede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. 29 C.F.R. § 1630.1(c).

B. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act ("FMLA") was enacted in 1993. Under the FMLA, an eligible employee may take up to twelve workweeks of leave during any twelve month period for one or more of the following reasons: (1) the birth of a child and in order to care for the newborn child; (2) the placement of a child with the employee through adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; and (4) because a "serious health condition"² makes the employee unable to perform the functions of his or her job. 29 U.S.C. § 2612(a). In order to be eligible for leave, an employee must work at a worksite with fifty or more employees or for an employer who has fifty or more employees within seventy-five miles of that worksite; have worked for that employer at least twelve months; and have worked at least 1250 hours over the previous 12 month period. 29 U.S.C. § 2611(2)(A).

An eligible employee has a right to an intermittent leave or leave on a reduced schedule for the employee's own serious health condition or to care for a family member with a serious health condition, if medically necessary. 29 U.S.C. § 2612(b)(1). When the leave is foreseeable based on planned medical treatment, an employer may transfer an

² A "serious health condition" means an illness, injury, impairment, or a physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

employee to an alternative position with equivalent pay and benefits that better accommodates the leave schedule. 29 U.S.C. § 2612(b)(2).

An eligible employee who takes leave under the FMLA is entitled to be reinstated to the same position the employee had when leave commenced or to an equivalent position, with equivalent benefits, pay and terms and conditions of employment. 29 C.F.R. § 825.214. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. 29 C.F.R. § 825.214. An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. 29 C.F.R. § 825.216. In addition, an employer may deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(c).

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. 29 C.F.R. § 825.701.

C. WORKERS' COMPENSATION

Each state has its own workers' compensation statute. *See e.g.*, N.J.S.A. 34:15-1 *et seq.* Generally, an employer with one or more employees is a "covered employer." An employee who incurs an injury that arises out of and in the course of employment relationship is protected. An employee who has a pre-existing condition that is aggravated or accelerated by the workplace is also protected. An employee has a right to receive benefits as a result of an injury arising out of and in the course of employment.

Job protection typically is not guaranteed, but it is unlawful for an employer to retaliate against an employee for exercising rights under the workers' compensation statute.

D. CRITICAL ISSUES INVOLVING INTERACTION OF THE STATUTES

- Coverage – As a preliminary matter, only those employers with fifty or more employees are covered concurrently by the FMLA and ADA. See 42 U.S.C. § 12111(5); 29 U.S.C. § 2611(4). Accordingly, employers under fifty employees need not provide FMLA leave, but as discussed below, it is critical to note that unpaid leave may be considered a reasonable accommodation under the ADA and applicable state and local non-discrimination in employment statutes, which typically have lower employee thresholds. In addition, many states have versions of the FMLA that need to be consulted to determine applicability.
- Unpaid Leave: ADA & FMLA – If an employer has fewer than fifty employees or if an otherwise eligible employee has less than one year of service, then the FMLA will not apply. It is possible, however, that an employer must still provide unpaid leave as a reasonable accommodation. Further, even if the employee has taken the full twelve weeks of FMLA leave, then it is possible that a grant of additional leave could be a reasonable accommodation. The EEOC provides the following examples:
 - An employee with an ADA disability needs thirteen weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for twelve weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave

unless it can show undue hardship. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html, question 21.

- An employee with an ADA disability has taken twelve weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he is no longer able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment, but under the ADA, the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html, question 21.
- Notice – Under the FMLA, an employee need not specifically request an “FMLA leave”; the employee need only identify an FMLA leave qualifying reason for a requested leave. 29 C.F.R. § 825.302(c). For leaves that are foreseeable, at least thirty days notice must be given. 29 U.S.C. § 2612(e); 29 C.F.R. § 825.302(a). Under the ADA, an employee generally has the obligation to request a reasonable accommodation. 29 C.F.R. pt. 1630 app., § 1630.9. According to the EEOC, however, an employer should initiate the reasonable accommodation interactive process under limited circumstances, such as when the employer knows that the employee has a disability. 29 C.F.R. pt. 1630 app., § 1630.9; EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html.

- Medical Conditions under ADA & FMLA – The FMLA regulations specifically provide that the ADA’s “disability” and the FMLA’s “serious health condition” are different concepts, and must be analyzed separately. 29 C.F.R. § 825.702. Some FMLA “serious health conditions” may be ADA disabilities, such as most cancers and serious strokes. Equal Employment Opportunity Commission, The Family Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, question 9, last modified on 7/6/00, www.eeoc.gov/policy/docs/fmlaada.html. Other “serious health conditions” may not be ADA disabilities, such as pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., routine broken leg or hernia). Id.
- FMLA & State/Local Family Medical Leave Laws – As set forth in 29 C.F.R. § 825.701(a), nothing in the FMLA supersedes any provision of state or local law that provides greater family or medical leave rights than those provided by FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under state law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under state law, then the leave used counts against the employee's entitlement under both laws.

- Examples of the interaction between FMLA and state laws include: If state law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under state law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year. 29 C.F.R. § 825.701(a)(1).
- Job Protection – Under the FMLA, job protection is guaranteed. 29 U.S.C. § 2614(a)(1). Employees who return from FMLA must be restored to their same or equivalent position with the same or equivalent benefits, absent special circumstances, such as if they would be otherwise terminated or if they are a “key employee” as defined by the statute. 29 U.S.C. § 2614(a)(1); 29 U.S.C. § 2614(b). Under the ADA, an employee who is granted leave as a reasonable accommodation is entitled to return to his or her same position unless the employer demonstrates that holding open the position would impose an undue hardship. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html, question 18. If an employer cannot hold a position open during the entire leave period without incurring undue hardship, then the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position. Id.

- Medical Certification/Examination – Under the FMLA, an employer may require medical certification of a serious health condition by the health care provider. 29 U.S.C. § 2613; 29 C.F.R. § 825.305. The FMLA sets forth what constitutes sufficient certification, which is encompassed in optional form WH-380 published by the Department of Labor. 29 C.F.R. § 825.306. If the employer doubts the validity of the certification, a second and third opinion can be requested at the employer's expense. 29 U.S.C. § 2613; 29 C.F.R. § 825.307. Under the ADA, when a disability or need for accommodation is not obvious, an employer may request reasonable documentation of the individual's disability and functional limitations. 29 C.F.R. pt. 1630 app., § 1630.9. A medical examination may be required when the employee provides insufficient information from his or her own health care professional. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, www.eeoc.gov/policy/docs/accommodation.html, question 7.
- Intermittent Leave/Reduced Schedule Leave – Under the FMLA, an employee has a right to intermittent leave or reduced schedule leave. 29 U.S.C. § 2612(b)(1). Intermittent leave or reduced schedule leave may be considered a reasonable accommodation under the ADA, subject to the undue hardship defense. 42 U.S.C. § 12111(9)(B).
- Continuation of Health Insurance Coverage – Under the ADA, an employer must continue health insurance coverage for an employee taking leave only if the employer provides coverage for other employees in the same leave status.

The coverage must be on the same terms normally provided to those in the same status. Equal Employment Opportunity Commission, The Family Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, question 15, last modified on 7/6/00, www.eeoc.gov/policy/docs/fmlaada.html. Under the FMLA, an employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his or her share of the premiums. 29 C.F.R. § 825.209.

- FMLA/ADA/Workers' Compensation – If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after twelve weeks of FMLA leave the employee is unable to return to work, then the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections. 29 C.F.R. § 825.216. If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently and the workers' compensation health care provider clears the employee to return to work in a "light duty" position during the FMLA leave and the employee rejects the employer's offer such position, the employee may no longer qualify for workers' compensation benefits, but is still entitled to continue on unpaid FMLA leave for the remainder of the twelve weeks and may also be considered protected under the ADA. 29 C.F.R. § 825.702(d)(2).

E. SELECTED CASES

- *Brown v. City of Salem*, 2007 U.S. Dist. LEXIS 14738, 19 Am. Disabilities Cas. (BNA) 29 (D. Or. Feb. 27, 2007) – The plaintiff, a former Emergency Dispatch Operator for the defendant City of Salem, was diagnosed with sleep apnea and restless leg syndrome, as a symptom, he fell asleep involuntarily for brief periods. The plaintiff alleges that during his employment he sought accommodation for this problem and acknowledged that the defendant was at first cooperative in the interactive process and excused the plaintiff from night duty and agreed to provide either a cooling collar or portable fan to cool the workplace temperatures. It was uncontroverted that the plaintiff's employment was terminated, at least in part, for falling asleep on the job. The court denied the defendant's motion for summary judgment, holding that evidence that an employer may have classified a symptom of a disability as misconduct, or may have attempted to "excuse" one improper motive for termination because there are several other proper motives, precluded granting summary judgment to the employer. The plaintiff's claim under the FMLA claim was deemed waived after he failed to address the possible merits of either his retaliation claim or FMLA claim in response to defendant's summary judgment motion.
- *Sheville v. America West Airlines*, 2006 U.S. Dist. LEXIS 88058, 18 Am. Disabilities Cas. (BNA) 1654 (D. Ariz. Dec. 4, 2006) – Summary judgment granted for employer on the plaintiff's causes of action for wrongful termination under the ADA and the FMLA. The plaintiff was diagnosed with

multiple sclerosis. The plaintiff's ADA claim that he was terminated because of his disability was not established where a co-worker who was never diagnosed with multiple sclerosis but who also sent inappropriate e-mails from his company computer was also fired. The plaintiff's claim that he was terminated for exercising his FMLA rights four years prior to his termination failed since he was not able to establish a causal connection between his leave and termination.

- *Erickson v. Baylor Institute for Rehabilitation et al.*, 2006 U.S. Dist. LEXIS 3695 (N.D. Tex. Jan. 26, 2006) – The plaintiff alleged that throughout her employment, she suffered from bi-polar disorder, which constituted both a disability under the ADA and a serious health condition under the FMLA. As to the ADA discrimination, the employee did not respond to a request for admission of the employers, which stated that the employee did not have a physical or mental impairment that substantially limited any major life activity. Considering this deemed admission and the employee's failure to respond to the employer's motion with additional evidence, there was no genuine issue of material fact as to whether the employee had a disability under the ADA. Given the employee's failure to respond to other requests for admission and failure to respond to the motion with additional evidence, there was also no genuine issue of material fact as to whether the employee had a "regarded as" disability or record of disability. Plaintiff's FMLA claim also failed for the same reasons.

- *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002) – The plaintiff suffered from dysthymia, a form of depression, along with phobia and bouts of more intense depression. Over several years, she was absent from work on relatively frequent basis. The employer discharged the plaintiff after continuing absences following two periods of probation for absences from work. She was discharged the day after she had called in that she would be absent because of “depression again.” The court of appeals affirmed the district court’s ruling that the ADA claim failed because she did not show that she was able to perform the essential functions of her position, because of absenteeism, with or without accommodation. The district court awarded summary judgment on the FMLA claim because of insufficiency of the employee’s notice to the employer of her need for FMLA qualifying leave. The court of appeals disagreed, viewing the employee’s uncontroverted statement that it was “depression again” as a potentially valid request for FMLA leave, where the employer knew that (1) the employee suffered from depression, (2) she needed leave in the past for depression, and (3) the employee was suffering from “depression again.”
- *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002) – The plaintiff was diagnosed with breast cancer and required medical leave which was within twelve weeks as required by the FMLA. The employer claimed that during the plaintiff’s absence, it became apparent that the plaintiff had not trained the junior employees as she had been instructed prior to her diagnosis. The employer terminated the plaintiff while she was on

medical leave for treatment of her covered medical condition. It was established that the plaintiff would have returned to work before using her twelve weeks of leave had she not been terminated. The district court granted summary judgment for the employer on the plaintiff's ADA claim. On the FMLA claim, the jury awarded back pay and interest and the judge awarded liquidated damages. The employer appealed the FMLA judgment based on the improper jury instructions. The employee appealed the grant of summary judgment on the ADA claim, denial of FMLA front pay, and refusal to award full costs and attorney's fees. The court affirmed the denial of the employer's motion for judgment as a matter of law on the FMLA claim and affirmed liquidated damages. The plaintiff's denial of FMLA front pay was reversed and remanded, as was summary judgment to the employer on the ADA claim.

F. CONCLUSION

The potential application of federal, state and local laws providing similar yet different disability-related protections and obligations, state workers' compensation statutes, evolving case law and employer policies create an extraordinarily complicated maze when an employer is confronted with an employee with a medical condition. Even well-intentioned employers may find themselves as defendants in expensive lawsuits. When an employee first notifies the employer of a medical condition or if the employer suspects that the employee may have medical condition, the employer should carefully navigate these statutes.