Intersection of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and Workers’ Compensation

Mid-Atlantic ADA Update Conference
Baltimore, MD
9/18/14

Selected EEOC Resources

- Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA
  www.eeoc.gov/policy/docs/accommodation.html
- Enforcement Guidance: Workers’ Compensation & the ADA
  www.eeoc.gov/policy/docs/workcomp.html
- FMLA, ADA, and Title VII
  www.eeoc.gov/policy/docs/fmlaada.html
- Notice of Rights Under the ADA Amendments Act of 2008
  www.eeoc.gov/laws/types/adaa_notice_of_rights.cfm
FMLA is enforced by the U.S. Department of Labor:

- Tel: 1-866-4-USA-DOL (1-866-487-2365)
- TTY: 1-877-889-5627

### FMLA Leave

- Twelve workweeks of leave in a 12-month period for:
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee’s spouse, child, or parent who has a serious health condition;
  - a serious health condition that makes the employee unable to perform his or her job;
  - any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty;” or
- Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember’s spouse, son, daughter, parent, or next of kin (military caregiver leave).
**FMLA Leave**

- **Note:**
  - State or local government employers and elementary and secondary schools are covered by FMLA, regardless of size. However, private employers only covered by FMLA if at least 50 employees.
  - FMLA only applies to employees who have been employed for at least a year.
  - Twelve-week limit on use of FMLA per 12 month period.

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**ADA Leave**

- Leave is a form of reasonable accommodation needed by an individual due to an impairment that substantially limits a major life activity or a “record of” (past history) of a substantially limiting impairment.

- An employer must allow an employee with a disability to use accrued paid leave, and to obtain additional unpaid leave, for reasons related to a disability, unless doing so would result in undue hardship (significant difficulty or expense).

**ADA Leave**

- *Examples*: Leave may be needed as a reasonable accommodation for an employee with a disability to --
  - attend medical appointments or obtain medical treatment
  - recover from an illness or episodic manifestation of a disability
  - receive disability-related training (e.g., on how to use a service animal)
  - make repairs to equipment or devices (e.g., an accessible vehicle or prosthetic limb), or
  - avoid temporary adverse conditions in the workplace.

**FMLA vs. ADA**

- The FMLA regulations require that when an employee is entitled to leave under both the FMLA and the ADA, the employer should provide the leave under whichever statutory provision provides the greatest rights.

- *See Fact Sheet on FMLA, ADA, and Title VII* at Q&A 16 (citing 29 C.F.R. 825.702(a), (b)-(e)).
Many requests for leave from individuals with disabilities can be resolved without addressing ADA, because the leave needed is available anyway under an employer’s voluntarily-adopted regular leave policies (e.g., accrued paid sick leave and annual leave) and/or the FMLA.

Reasonable accommodation issues typically arise when the employee seeks leave not otherwise available. For example, ADA may come into play if an employer would not ordinarily allow the requested leave under its own policy, and the employee is not eligible for FMLA or has already used all FMLA leave.

The ADA may require an employer to provide leave in addition to the 12 weeks available under the FMLA, but the 12 weeks of leave taken under the FMLA may be considered in determining whether granting additional leave as a reasonable accommodation would result in undue hardship.

See Reasonable Accommodation Guidance at Q&A 21, Ex. A.
Unlike the FMLA, the ADA does not require an employer to provide time off as a reasonable accommodation for an employee to care for a family member or other individual with whom the employee has a relationship or association.

However, an employer would have to provide leave to such an employee on the same terms as it normally provides leave to employees who need to care for someone who is ill.

See “Questions and Answers About the Americans with Disabilities Act’s Association Provision,” [www.eeoc.gov/facts/association_ada.html](http://www.eeoc.gov/facts/association_ada.html), at Q&A 4; Fact Sheet on FMLA, ADA, and Title VII at Q&A 19.

FMLA and ADA:

- Employee asks for leave due to a medical condition – need not specify FMLA or ADA.
- Employer then is entitled to seek more specific supporting medical information.
## Leave Requests and Supporting Documentation

- **FMLA:** Employer may require certification (FMLA form) from the employee’s health care provider.

- An employer may also require second or third medical opinions (at the employer’s expense) and periodic recertification of a serious health condition.

- See *Fact Sheet on FMLA, ADA, and Title VII* at Q&A 16.

## Leave Requests and Supporting Documentation

- **ADA:** Employer may require sufficient documentation to show that the employee has a disability under the ADA and needs the accommodation. The amount of documentation requested must be reasonable, and must relate to the specific condition for which leave as an accommodation has been requested. It may not, for example, include the employee's entire medical record or the results of all medical procedures and examinations related to the condition at issue. *Reasonable Accommodation Guidance* at Q&A 6-8.

- An employer may ask for periodic updates on the health of an employee who has been granted leave without a fixed date of return. However, when an employer has granted a fixed period of extended leave and the employee has not requested additional leave, the employer cannot seek periodic updates. Employers may, of course, call employees on extended leave to check on their progress (e.g., ask them how they are doing) or to express concern about their health.

- See *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* (“Employee Guidance”), [www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html) at Q&A 16.
ADA Accommodation: Employer Requests for Supporting Medical Information

- Accommodation request may be oral, and is simply a request for some type of change due to a medical condition.
- Once accommodation request is made, when and how much medical information can the employer ask for in support of the accommodation request?
- ADAAA has not changed the rule: If not obvious or already known, an employer may obtain reasonable documentation that an employee has a disability and needs the accommodation requested.

ADA: Does the individual have an impairment that substantially limits a major life activity?

- When considering if an individual who has requested accommodation has or had an impairment that “substantially limits a major life activity,” remember the changes made by the ADA Amendments Act of 2008 (ADAAA).
- ADAAA: The definition of disability “shall be construed in favor of broad coverage” and “should not demand extensive analysis.”
- Definition is much easier to meet.
When it enacted the ADAAA, Congress made 4 changes to standard for whether impairment “substantially limits” a “major life activity”

--Need not prevent, or significantly or severely restrict, a major life activity
--Major life activities include “major bodily functions”
--Ameliorative effects of mitigating measures not considered
--Impairments that are “episodic” or “in remission” are substantially limiting if they would be when active

Don’t Rely on Pre-ADAAA Case Law on Definition of Disability

Use Resources on new ADAAA standards:

Revised EEOC ADA regulations:
29 C.F.R. Part 1630
Notice of Rights Under the ADAAA:
www.eeoc.gov/laws/types/adaaa_notice_of_rights.cfm
Question and Answer Guide:
www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm
How Have Courts Been Interpreting and Applying the ADAAA?

- For the most part, courts are applying the ADAAA to easily find that individuals with a wide range of conditions previously unprotected now meet the “substantially limited” standard.
- The turn-around in the case law is especially notable with respect to impairments such as cancer, diabetes, HIV, multiple sclerosis, and psychiatric conditions.

Examples: ADAAA Applied

- Diabetes:

Examples: ADAAA Applied

- **Cancer:**
  - *Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173 (E.D. Tex. 2011) (rejecting employer’s attempt to distinguish this “stage 1” cancer case from one in which plaintiff had stage 3 cancer, the court noted that “cancer at any stage ‘substantially limits’ the ‘major life activity’ of ‘normal cell growth’”).

Gogos v. AMS Mechanical Systems, Inc.,
737 F.3d 1170 (7th Cir. 2013)

- Court applied new rules re: major bodily functions, “episodic or in remission,” and mitigating measures
- Chronic high blood pressure, which caused vision loss for several minutes when it spiked, could substantially limit circulatory function or eyesight “when active”
- Moreover, plaintiff’s chronic high blood pressure could be substantially limiting even if, due to the benefits of medication, he had never experienced any substantial limitation.
**Summers v. Altarum Institute, Corp.,** 740 F.3d 325 (4th Cir. 2014)

- Plaintiff fractured his left leg, tore a tendon in his left knee, fractured his right ankle, and ruptured a tendon in his right leg.
- Following two surgeries, his doctors restricted him from putting any weight on his left leg for six weeks, and estimated that he would not be able to walk normally for seven months at the earliest.

**Summers (cont’d)**

- District court: too temporary.
- Fourth Circuit reversed: **under the ADA as amended, even “temporary” impairments may be substantially limiting.** Duration of an impairment is relevant but not dispositive.
- Court cited 29 C.F.R. § 1630.2j)(1)(ix) (“effects of an impairment lasting or expected to last fewer than six months can be substantially limiting”)


Herniated disc and resulting pain -- which had lasted for years and was serious enough to require surgery -- substantially limited plaintiff’s ability to walk, bend, sleep, and lift more than ten pounds.

Relevant facts may include: difficulty, effort, or time required to perform the major life activity; pain experienced while performing it; length of time, or the extent to which, it can be performed; effect on the operation of a major bodily function, etc.

See also Barlow v. Walgreen, 2012 WL 868807 (M.D. Fla. March 14, 2012) (back impairments could be shown to substantially limit musculoskeletal function).


Examples of Impairments Found by Courts Not to Be Substantially Limiting


More Examples – Not Substantially Limiting

- **Brtalik v. South Huntington Union Free School Dist.**, 2012 WL 748748 (E.D.N.Y. Mar. 8, 2012) (two-week light-duty restriction after colonoscopy/polypectomy; “Brtalik's attempt to characterize a routine, diagnostic, out-patient procedure, or any related minor discomfort, as a disability within the meaning of the ADA is simply absurd”).
Can Employer Provide an Alternative to Leave, or Deny the Request as Too Burdensome?

- **FMLA:** No. Employee is entitled to the leave if eligibility and documentation requirements are met.

- **ADA:**
  - Employer is entitled to provide an accommodation other than leave (e.g., a part-time or modified work schedule, or telework), as long as the accommodation would allow the employee to meet his or her needs related to a disability. *Reasonable Accommodation Guidance* at Q&A 20.
  - Employer is entitled to deny leave as an ADA accommodation if it would pose an undue hardship.

ADA Leave

- **“No fault” leave policies:**
  - Some employers have “no fault” leave policies, under which an employee is automatically terminated after using a certain amount of leave. If an employee with a disability needs additional leave as a reasonable accommodation, the employer must make an exception as a reasonable accommodation, absent undue hardship.
  - *Reasonable Accommodation Guidance* at Q&A 17.
Case Illustrations

- **EEOC v. Princeton Healthcare (settled July 2014).** The EEOC sued Princeton HealthCare System (PHCS), alleging that its fixed leave policy failed to consider leave as a reasonable accommodation, in violation of the ADA. According to the EEOC, since PHCS's leave policy merely tracked the requirements of the federal Family Medical Leave Act (FMLA), employees who were not eligible for FMLA leave were fired after being absent for a short time, and many more were fired once they were out more than 12 weeks.
- Under the consent decree settling the suit PHCS will pay $1,350,000, which the EEOC will distribute to employees who were unlawfully terminated under PHCS's former policy. PHCS also is prohibited from having a blanket policy that limits the amount of leave time an employee covered by the ADA may take. PHCS must instead engage in an interactive process with covered employees, including employees with a disability related to pregnancy, when deciding how much leave is needed. In addition, PHCS can no longer require employees returning from disability leave to present a fitness for duty certification stating that they are able to return to work without any restrictions. PHCS also agreed that it will not subject employees to progressive discipline for ADA-related absences, and will provide training on the ADA to its workforce.

Case Illustrations

- Other significant resolutions of EEOC cases involving leave and attendance policies from previous years include:
  - **Interstate Distributor** ($4.85 million nationwide resolution challenging maximum 12-week leave policy)
  - **Supervalu** ($3.2 million resolution challenging termination of approximately 1,000 employees at the end of medical leave)
  - **Sears** ($6.2 million resolution challenging automatic termination policy and failure to accommodate employees injured at work)
  - **Verizon** ($20 million nationwide resolution challenging “no fault” attendance policy).
Policies prohibiting leave for new employees:

Some employers have rules prohibiting any leave until an employee has been employed for a certain length of time. An exception may have to be made to provide leave as a reasonable accommodation for an individual with a disability even if he or she has not been employed long enough under the employer’s rule.

For example, EEOC’s Phoenix District Office reached a settlement in EEOC v. Swift Transportation Co., Inc., No. 06-01898-PHX-NVW (D. Ariz. Jan. 31, 2007), on behalf of a Charging Party who requested one month of unpaid leave for recovery from testicular cancer treatment. The employee had worked for the company for only four months, and the employer required six months of continuous work to qualify for leave.

While acknowledging that attendance is, of course, relevant to job performance and that the time during which a function is performed is integral to some jobs, EEOC does not characterize attendance as an “essential function.” EEOC regulations define essential functions as duties to be performed. Attendance is not a duty to be performed.

Reasonable Accommodation Guidance at Q&A 22, Ex. C & n.65.
The refrain in some court decisions that “attendance is an essential function” can mislead employers. Courts often cite this language when deciding a case in which the leave requested is so unpredictable, frequent, or long-term that it would pose undue hardship.

Since essential functions never have to be removed as an accommodation saying that “attendance is an essential function” may mislead an employer to mistakenly think it does not have to grant leave, a modified or part-time schedule, or telework as reasonable accommodations.

Unless it would pose an undue hardship, these may be reasonable accommodations that have to be provided to an individual with a disability.

If an employee has used all accrued paid leave (e.g., paid sick leave and vacation time), and is receiving additional leave as an ADA accommodation, the leave is **unpaid**.

*Reasonable Accommodation Guidance* at text preceding Q&A 17.

FMLA leave is also unpaid, but the employer may designate it to run concurrent with accrued paid leave.
**ADA Leave**

- An employer **may not penalize** an employee who has taken leave as a reasonable accommodation.

- E.g., terminating an employee who failed to meet an annual sales quota because she took five months of leave as a reasonable accommodation, without taking into account the employee’s productivity during the time she did work, would constitute retaliation for the employee’s use of an accommodation to which she was entitled under the ADA. *See Reasonable Accommodation Guidance at Q&A 19.*

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**Hold Position Open?**

- **FMLA:** Individual must be returned to same or equivalent position.

- **ADA:** *If not an undue hardship,* employer must return employee to his or her original position following a period of leave as a reasonable accommodation.
  - If returning the employee to the original position would result in undue hardship, the employer must determine whether there is another position to which the employee could be reassigned. *Reasonable Accommodation Guidance at Q&A 18.*
**ADA Leave**

- However, an employer may not require an employee with a disability to take leave as a reasonable accommodation when another effective accommodation exists that would enable the employee to continue working.

  - See, *e.g.*, Informal Discussion Letter dated September 27, 2001, [www.eeoc.gov/foia/letters/2001/ada_reas_accomm_5.html](http://www.eeoc.gov/foia/letters/2001/ada_reas_accomm_5.html) (stating that requiring an employee to take a leave of absence and back-filling her job was not an effective accommodation when telework would have enabled the employee to continue working).

**ADA Undue Hardship**

- **FMLA:** Employer has no undue hardship defense. Employee is entitled to leave if requirements are met.

- **ADA:** An employer may deny an accommodation, including leave, if it would pose an undue hardship.
  - Leave may pose an undue hardship if too unpredictable, too frequent, or too lengthy. Courts make this determination based on the facts of the particular workplace, such as the individual’s job and duties, whether a temporary worker or worker from another shift can be hired to cover the absence, the consequences of the absence given the nature of the employer’s business, etc.
In some cases, the employee’s health care provider may only be able to predict an approximate date of return (e.g., the employee can return to work “within eight to twelve weeks”).

In other instances, unforeseen medical circumstances may delay an originally agreed-upon return date.

EEOC has said that such requests for leave without a fixed date of return may be a reasonable accommodation under the ADA. See Reasonable Accommodation Guidance at Q&A 44.

In certain circumstances, undue hardship will result from granting leave without a fixed return date because of disruptions to the operations of the employer’s business that occur when the employer can neither plan for the employee's return nor permanently fill the position. Id. at Ex. A.

Don't confuse requests for leave without a fixed date of return with requests for “indefinite leave“ (employee can provide no indication of when, or if, he will ever be able to return to work).

Courts have requests for “indefinite leave“ to be “unreasonable.” EEOC would apply an “undue hardship” analysis, but ultimately would agree that in cases where an employee can give no indication that he or she will be able to return to work, leave as a reasonable accommodation need not be granted.
**Attendance/Leave Issues and Reasonable Accommodation**

- Violations of attendance/leave policies BEFORE request for accommodation subject to employer’s usual disciplinary action for infraction
- If employee entitled to reasonable accommodation to address attendance/leave problem, employer should provide accommodation to enable employee to meet requirements going forward (assuming infraction did not warrant termination)

**Workers’ Compensation**

- Form of employer insurance providing wage replacement and medical benefits for on-the-job injuries.
- May involve leave or return to work in a “limited duty job” specially tailored to employee’s medical restrictions.
- Compare: ADA never requires an employer to eliminate “essential functions” of a job as a disability accommodation.
What if employee’s workers’ compensation claim is denied (e.g., injury ruled not to be work-related), or employee reaches “maximum medical improvement” and workers’ compensation benefits end?

If employee still has medical restrictions, employer should remember to assess if FMLA or ADA applies.

FMLA: Does employee need more leave to recuperate before returning to work? If so, is employee eligible for FMLA, and does the employee have FMLA leave remaining?

ADA: Does employee have a substantially limiting impairment? If so, may be entitled to:

-- leave if needed as a reasonable accommodation under ADA; or
-- accommodation if needed to perform job to which employee is returning; or
-- if restrictions prevent return to original job, accommodation of reassignment to a vacant position for which qualified (with accommodation if needed to perform the new position).
ADA, FMLA, and Workers’ Compensation

- Even if no substantially limiting impairment, does employee have an impairment that is not “transitory and minor”? If so, not entitled to ADA accommodation but protected from disparate treatment (action taken by employer because of the impairment – ADAAA definition of “regarded as” an individual with a disability).

- If qualified, employee cannot be barred from returning to work or to certain duties because of a concern about safety or re-injury unless ADA standard of direct threat to health or safety of self or others is met.

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