Ballard Spahr LLP

Ballard Briefing

I Won't Be in Today:

The Interplay of Employee Rights under the ADA and FMLA

November 3, 2010

Ballard Spahr, 1735 Market Street, 42nd Floor, Philadelphia

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Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., protects a "qualified individual with a disability" from employment discrimination because of the disability. In addition to prohibiting discrimination, the ADA, unlike most federal civil rights laws, imposes upon employers of 15 or more employees the affirmative obligation to provide reasonable accommodation to employees with disabilities, if such accommodation is necessary for the individual to enjoy the privileges and benefits of employment and the accommodation does not impose an undue hardship.

A 2001 Supreme Court case held that state employees may not bring suit against the state to recover damages under the ADA because of the Eleventh Amendment's sovereign immunity. Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001). However, the ADA is still applicable to local governments, municipalities, and all agencies that are not "arms of the state."

1. The ADA protects a "qualified individual with a disability."

    (a) A "disability" is:

        (i) A physical or mental impairment that substantially limits a major life activity;

        (ii) A record of such impairment; or

        (iii) Being regarded as having such an impairment.

    (b) If an employee or applicant is disabled, to be protected by the ADA he or she must also be "qualified." A qualified individual with a disability is:

        (i) One who meets the employer's stated requirements for the job, such as education, training, employment experience, skills, or licenses; and

        (ii) One who can perform the essential functions of the job - with or without a reasonable accommodation.

2. If an employee or applicant is a qualified individual with a disability, an employer is obligated to:

    (a) Refrain from discriminating against him or her because of the disability; and

        (b) Engage in an interactive process to determine the nature of his or her limitations and what types of reasonable accommodations are available that will enable the individual to perform the essential functions of the job (if she otherwise could not).

3. Reasonable accommodations can take a number of forms.

(a) Examples of reasonable accommodations include:

(i) Changes in work schedules

(ii) Changes in work processes

(iii) Changes in job duties, including removing job duties the employee cannot perform

(iv) Adaptive equipment or other assistance in performing job functions

(v) Leave of absence beyond what is permitted by the employer's policies or required by the FMLA

(vi) Transfer to an alternative position for which the employee meets the minimum qualifications, with or without accommodation

(b) The employer need not remove essential functions of the job as an accommodation.

(c) Transfer to an alternative position is considered the accommodation of last resort. If there is no other reasonable accommodation that will allow the employee to remain in his or her own positions, the employee must be transferred to any available position for which the employee meets the minimum qualification, even if the employee is not the most qualified applicant for the position, unless transferring the employee to the position would violate a bona fide seniority system.

(d) The employer does not have to create a job for the disabled employee.

4. An employer is only obligated to accommodate known disabilities.

5. An employer is not obligated to provide an accommodation if it causes an undue burden on the employer.

6. The ADA's requirements do not apply to an individual who, though perhaps disabled and qualified, poses a direct threat to the health and safety of himself or others where the threat cannot be sufficiently mitigated through accommodation.

ADA AMENDMENTS ACT OF 2008

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008. In the first significant change to the ADA since its passage in 1990, Congress announced that it will restore the broad scope of protection intended under the ADA.

The Amendments introduce:

- An expanded definition of major life activity;
- Protection of episodic and dormant impairments;
- Near elimination of the mitigating measures concept;
- Broader protection under the "regarded as" prong of the definition of disability; and
- Elimination of reverse discrimination liability.

The Amendments took effect on January 1, 2009. Congress directed the EEOC to amend its ADA regulations to reflect the changes made by the Amendments Act. The EEOC published a Notice of Proposed Rulemaking on September 23, 2009 and received comments, but has yet to issue the final regulations.

The Amendments Act does not apply retroactively.

ADA AMENDMENTS ACT – BREAKING IT DOWN

1. The ADA prohibits discrimination against a "qualified individual with a disability."

2. A "disability" is a physical or mental impairment that substantially limits one or more major life activities.

3. Definition of Physical or Mental Impairment: To qualify as disabled, an individual must first prove that he or she has a physical or mental impairment defined as:

   (a) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting major bodily systems.

   (b) Any mental or psychological disorder.

   (c) Such things as visual, hearing, and speech impairments, alcohol dependency, and heart disease can be impairments.

   (d) *Current* use of illegal drugs, compulsive gambling, sexual orientation, and certain psychological disorders (kleptomania, pyromania, pedophilia) are not impairments.

4. Definition of Substantially Limits: The impairment must be substantially limiting.

(a) Prior to the passage of the Amendments Act, the analysis of whether an individual was substantially limited by an impairment focused on his or her ability to perform a major life activity – including condition, manner and duration – as compared to an average person.

(b) Current EEOC regulations define substantially limited as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) *Significantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

(c) The Amendments Act rejects the notion that the term "substantially" needs to be interpreted strictly.

(d) The Amendments Act declares that current EEOC regulations defining "substantially limits" as "significantly restricted" are inconsistent with Congressional intent.

In response to this finding, the EEOC proposed regulations that delete the "significantly restricted" language and provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to "most people in the general population." Under the proposed regulations, the term "substantially limits," including the application of that term to the major life activity of working, is to be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis. Thus, the comparison of an individual's limitation to the ability of most people in the general population may be made using a common-sense standard, without resorting to scientific or medical evidence.

The proposed regulations also provide that an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability. For example, an employee with a 20-pound lifting restriction that is not of short-term duration is substantially limited in lifting, and need not also show that he is unable to perform activities of daily living that require lifting. Moreover, an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. For example, an individual whose normal cell growth is substantially limited due to cancer need not also show that he is substantially

limited in working or any other major life activity.

5. Definition of Major Life Activity: The impairment must substantially limit a major life activity.

(a) The Amendments Act inserts a definition of "major life activities" into the statute, which generally tracks the EEOC's regulatory definition. Examples of major life activities include:

Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. The proposed EEOC regulations also include sitting, reaching and interacting with others.

(b) In addition, the Amendments Act adds that a major life activity includes the *operation of a major bodily function*, such as:

Immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproduction.

The EEOC proposed regulations also include operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions, as a major life activity.

(c) Before the Amendments Act, many federal courts were reluctant to recognize impairments impacting bodily functions as disabilities. For example:

In Furnish v. SVI Sys., Inc., 270 F.3d 445 (7th Cir. 2001), the Seventh Circuit rejected a plaintiff's contention that he was substantially limited in a major life activity because his Hepatitis B affected his liver functioning and impacted his body's ability to eliminate toxins and maintain appropriate glucose levels. According to the Court, "liver function bears little resemblance to the major life activities enunciated in the ADA regulations." Thus, the Court found that the plaintiff was not disabled.

In Gratzl v. Office of the Chief Judges, No. 07-C-0867, 2008 U.S. Dist. LEXIS 60595 (N.D. Ill. July 22, 2008), the Court rejected a plaintiff's contention that she was substantially limited in a major

life activity because her incontinence affected, among other things, her ability to eliminate waste. According to the Court, eliminating waste is a characteristic of the plaintiff's incontinence and not a separate activity itself.

(d) However, as a result of the Amendment Act's expanded definition of major life activity, mental and physical impairments that did not impact traditional major life activities now will be protected as disabilities if they impact a major bodily function.

(e) The Amendments Act also instructs that an impairment that substantially limits one major life activity need not limit other major life activities to be considered a disability.

(i) This instruction addresses court decisions that have required limits on not just a major life activity, but also on the individual's ability to work.

In Chenoweth v. Hillsborough County, 250 F.3d 1328 (11th Cir. 2001), a plaintiff claimed that her epilepsy was a disability because, among other things, it affected her reproductive capacity. The Court disagreed. Although the Court acknowledged that childbearing is a major life activity, the Court held that "the increase in risk" in safe reproduction caused by the plaintiff's epilepsy was not a basis for an ADA claim because it "had no relevance at all to her work."

6. Episodic or Dormant Impairments

(a) Under the Amendments Act, impairments that are episodic or in remission still qualify as disabilities *if the impairment would substantially limit a major life activity when active*.

The proposed EEOC regulations list the following as examples of impairments that are episodic or in remission: epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia and cancer.

In Hoffman v. Carefirst of Fort Wayne, Inc., d/b/a Advanced Healthcare, No. 09-cv-251, 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. Aug. 31, 2010), in what the court called "one of the first cases of its kind to make it to the summary judgment phase, where the new [ADA Amendments Act] standard is applicable," the court addressed whether the plaintiff, who had cancer that was in remission, was disabled under the ADA Amendments Act. The court held that the plaintiff was disabled because he had Stage III Renal Cancer which, when active, limited a major life activity. The court also noted that the proposed EEOC regulations specifically provided that cancer is an example of impairments that are episodic or

in remission and is therefore considered a disability. The court held that the employer's failure to provide a reasonable accommodation of working 40 hours a week to the plaintiff violated the ADA Amendments Act and granted summary judgment for the plaintiff.

(b) Similarly, chronic conditions that are prone to flare ups, which do not impact a major life activity between episodes, now may qualify as protected disabilities.

(c) Chronic conditions that qualify for intermittent leave under the Family and Medical Leave Act as "serious health conditions" now also may be disabilities under the ADA.

(d) This provision addresses court decisions that have held that episodic impairments do not qualify as disabilities. For example:

In E.E.O.C. v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001), a plaintiff had a mild form of epilepsy that occasionally caused mild seizures at work and during her sleep. The company changed her shift, which her doctor claimed would disrupt her delicate sleeping patterns. The plaintiff then resigned, alleging that the company discriminated against her in violation of the ADA. Rejecting her claim, the Court concluded that the plaintiff did not have a disability under the ADA because of the episodic nature of her illness. As the Court explained, "[t]o hold that a person is disabled whenever that individual suffers from an occasional manifestation of an illness would expand the contours of the ADA beyond all bounds."

In Brown v. BKW Drywall Supply, Inc., 305 F. Supp. 2d 814 (S.D. Ohio 2004), the Court rejected a plaintiff's claim that his loin pain hematuria syndrome (LPHS), which caused lower back pain and swelling feet and made it painful for him to stand and walk, rendered him disabled. According to the Court, the only time the plaintiff's ability to walk was substantially limited by his LPHS was during a three week period when he was completely unable to walk. Although the plaintiff asserted that his LPHS was a continuous condition characterized by episodic flare-ups, he failed to establish that his ability to walk was "more than moderately impaired" at any time other than during the pendency of these flare-ups. Because the plaintiff failed to prove that the substantial impairment on his ability to walk was "anything other than temporary," the Court concluded that he was not disabled under the ADA.

Under the Amendments Act, temporary disabilities qualify as disabilities if the temporary impairment substantially limits a major life activity. In Munoz v. Echosphere, LLC, 09-cv-0308, 2020 U.S. Dist. LEXIS 71913, *35 (W.D. Tx. July 15, 2010), the Court held that the employer's argument that the plaintiff was not actually disabled because her disability was merely temporary would fail under

the Amendments Act, but not the pre-amendment ADA, even if it was conceded that the parties knew of the disability's temporary nature all along.

7. Examples of Impairments that Will Consistently Meet the Definition of Disability

(a) The EEOC proposed regulations state that under the Amendments Act, some types of impairments will consistently meet the definition of disability. Because of certain characteristics associated with these impairments, the individualized assessment of limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity.

(b) Examples of such impairments that are listed in the EEOC proposed regulations include: deafness, blindness, intellectual disability, missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder or schizophrenia.

8. Mitigating Measures

(a) The Supreme Court had ruled that whether an individual's impairment is substantially limiting must be assessed in light of reasonably available corrective or palliative measures.

In Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), severely myopic twin sisters applied to be airline pilots, but were rejected. The Court held in favor of the airline because, as the sisters conceded, with the aid of corrective measures their vision was 20/20, and as a result the sisters did not qualify as disabled. In so holding, the Supreme Court established that individuals with impairments that can be corrected, such that the impairment is no longer substantially limiting, are not covered by the ADA.

(b) The Amendments Act, however, *eliminates from the definition of disability consideration of the ameliorative effects of most mitigating measures*, including:

medication, medical equipment, prosthetics, mobility devices, assistive technology, reasonable accommodations already provided by the employer and learned behavioral or adaptive neurological modifications.

(c) Vision and Hearing Corrective Measures - Special Rules:

(i) Ordinary eyeglasses or contact lenses *may* be considered in determining whether an impairment substantially limits a major life activity.

(ii) Hearing aids and cochlear implants *may not* be considered in determining whether an impairment substantially limits a major life activity.

(iii) Employers are prohibited from using qualification standards, employment tests or other selection criteria based on an individual's uncorrected vision unless such criteria are shown to be job-related for the position in question and consistent with business necessity.

(d) The elimination of consideration of most mitigating measures in determining whether an individual is disabled constitutes a marked departure from prevailing precedent.

In <u>Gallagher v. Sunrise Assisted Living of Haverford</u>, 268 F. Supp. 2d 436 (E.D. Pa. 2003), the Court rejected a concierge's claim that her dog allergy rendered her disabled because she took medication that reduced her coughing, watering eyes, and breathing difficulties. The Court held that "the use of an inhaler and injections decreased any limitations [the plaintiff's] allergies place on her breathing," such that she was not disabled under the ADA.

In <u>Johnson v. Rose Tree Media School Dist.</u>, No. 06-3761, 2008 U.S. Dist. LEXIS 76663 (E.D. Pa. Oct. 1, 2008), the Court ruled that plaintiff, an applicant for a school teaching position, was not disabled under the ADA because her use of hearing and sight aids corrected her hearing and vision impairments.

9. <u>Regarded As Disabled</u>

(a) An individual can show that he or she is protected under the ADA in any one or more of three ways:

(i) A physical or mental impairment that substantially limits one or more major life activities;

(ii) A record of such impairment; or

(iii) The individual is *regarded as* having such an impairment.

(b) *Regarded as* having a disability:

(i) Prior to the passage of the Amendments Act, an individual was regarded as disabled if he or she:

(1) Had an impairment that was perceived to rise to the level of a disability, when in fact the impairment did not rise to that level;

(2) Had an impairment that was substantially limiting only because of the attitudes or stereotypes of others; or

(3) Had no impairment, but was perceived to have an impairment that rose to the level of a disability.

(ii) Pursuant to the Amendments Act, an individual is regarded as disabled if he or she:

Is subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, *whether or not the impairment limits or is perceived to limit a major life activity.*

(iii) For the purposes of "regarded as" impairments, however, the impairment must not be transitory or minor, i.e. an actual or expected duration of six months or less.

(iv) Under the reworked "regarded as" standard:

(1) An individual can establish that he or she is regarded as disabled even if the individual's impairment does not substantially limit or is not perceived to substantially limit a major life activity.

(2) This expanded definition reflects a significant departure from federal case law.

In Khalil v. Rohm & Hass Co., No. 05-3396, 2008 U.S. Dist. LEXIS 10169 (E.D. Pa. Feb. 11, 2008), the plaintiff alleged that her employer regarded her as disabled after she suffered a severe respiratory reaction to paint fumes during an office renovation, and her employer moved her into a temporary office away from the renovation. Rejecting this contention, the Court held that the employer's likely awareness of the plaintiff's asthma, and attempt to mitigate her reaction to paint fumes, was insufficient to establish that the employer regarded her as having a substantially limiting impairment.

In Rinehimer v. Cemcolift, Inc., 292 F.3d 375 (3d Cir. 2002), a foreman who had suffered from a serious case of pneumonia

alleged that various statements from managers about their perceptions that he was "sick, wheezing, and had difficulty breathing" established that they regarded him as disabled and that his termination violated the ADA. The Court disagreed, holding that "to be covered under the 'regarded as' prong of the ADA the employer must 'regard the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled.'"

In Tice v. Centre Area Transp. Authority, 247 F.3d 506 (3d Cir. 2001), the plaintiff argued that his employer's request that he submit to a medical examination following back surgery evidenced a belief that the plaintiff was substantially limited in the major life activity of working. Rejecting this argument, the Court concluded that even if the employer believed the plaintiff to be unable to drive a bus, such a belief would still not establish that the employer regarded him as substantially limited in the major life activity of working. To the contrary, the evidence would have to show that the employer regarded the plaintiff as unable to work in a broad class of jobs.

In Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996), a former buyer in the University's purchasing department, fractured his hip, leaving him with a noticeable limp. Following his termination, the plaintiff alleged that he was terminated because he was perceived as disabled due to his "visible and apparent" limp and the fact that his supervisor was aware of his limitations. The Court disagreed, holding that the mere fact that the employer was aware of the plaintiff's visible walking impairment was insufficient to show that the employer regarded him as disabled.

(v) Because knowledge of an impairment is a critical piece of evidence in "regarded as" cases, it will become increasingly helpful to an employer's defense if it has no knowledge of an alleged impairment.

Holodak v. Rullo, 2006 U.S. App. LEXIS 27613 (3d Cir. 2006). The court held that when the decision-maker did not know about the employee's drinking problems, the employer did not regard the employee's alcoholism as a disability.

Webb v. Mercy Hosp., 102 F.3d 958 (8th Cir. 1996). The court rejected the employee's "regarded as" claim because the employee "produced no evidence that her supervisors or hospital management was aware" that she had a mental impairment diagnosis. The court stated that the employer's

belief the employee was difficult and insubordinate, did not establish that she was considered mentally impaired.

(vi) The desire to avoid knowledge of impairments may cause employers to review what medical documentation, if any, they require under absence control programs or even when employees take sick leave and to devote renewed attention to training supervisors on handling information about employee medical conditions.

(c) In addition to expanding the definition of "regarded as," the Amendments Act further clarifies that individuals "regarded as" impaired are not entitled to reasonable accommodation.

10. Reverse Discrimination

(a) The Amendments Act clarifies that an individual without a disability may not bring a claim of discrimination under the ADA based solely on his or her lack of a disability.

(b) Therefore, employees who have been disadvantaged by an accommodation given to a disabled employee cannot make an ADA claim. Of course, this does not prevent that employee from making a claim that other forms of discrimination are at work.

EMPLOYER'S CHECKLIST

ADA/Reasonable Accommodation Policies. Review your ADA and reasonable accommodation policies to ensure that they comport with the new standards established by the ADA Amendments Act.

ADA Medical Questionnaires. Many employers use medical questionnaires for certain situations when an employee seeks a work accommodation, but it is not readily apparent that the individual has an ADA-qualifying disability. These questionnaires should define the key concepts relevant to this medical determination. Questionnaires will have to be reviewed and revised to adapt to the broader definition of disability under the ADA Amendments Act.

Managerial and Supervisory Training. Courts will consider the extent to which employers have trained supervisors and managers on employment discrimination issues, and ADA compliance in particular, in evaluating whether to assess punitive damages and vicarious liability for employers based on the acts of such managerial employees. *See, e.g.,* EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10th Cir. 1999) (upholding punitive damages award and liability of employer, noting "a broad failure on the part of [the employer] to educate its employees, especially its supervisors, on the requirements of the ADA"). Training is perhaps more important than ever under the expanded scope of the ADA.

Training programs should be reviewed and updated to ensure compliance with the ADA Amendments Act.

HR Assessment of Individuals Seeking Reasonable Accommodation. Employers now must take into account the newly expanded definition of disability when evaluating whether to extend reasonable accommodation to an individual with an impairment, including the addition of major bodily functions to the definition of major life activities, as well as coverage of episodic or dormant impairments and the irrelevance of most mitigating measures.

Accommodation Processes and Tools. In anticipation of more requests for accommodation, employers should ensure that they are prepared to address these requests through the interactive dialogue process. For example, are there updated statements of essential functions for key positions so that the accommodation dialogue can focus on whether the employee is capable of performing such functions, with or without reasonable accommodation? Should the employer form an "accommodation committee" of management personnel who are trained in the ADA and prepared to address requests for accommodation in a consistent and uniform fashion? Should the employer review the minimum qualifications for the position to ensure that employees who can meet those minimum qualifications can actually perform the job as desired?

Termination for Medical Inability to Perform the Job. FMLA leave may be exhausted, but the ADA requires that employers consider additional leave, beyond amounts otherwise provided by policy, as a form of reasonable accommodation. Now that many FMLA serious health conditions will rise to the level of disabilities for ADA purposes, remember to do the ADA accommodation analysis before terminating an employee who has exhausted his/her paid and unpaid leave entitlement.

Watch What You Say! Under the dramatically lower bar for protection under the "regarded as" prong of the ADA, it is unclear how the courts will treat the words and action of supervisors and managers involving physically or mentally impaired employees. Will comments or seemingly innocent actions, such as medical examinations or moving an employee's office, give rise to ADA protection for conditions that do not meet the traditional definition of a disability? It is clear under the Amendments Act that it no longer will be necessary for an employee to demonstrate that he/she was perceived as substantially limited in a major life activity. Until we know how low the new bar has been set, training on the do's and don'ts of commenting on physical and mental impairments will be important to avoid claims under what is likely to be a fertile prong of ADA protection.

General Overview of the FMLA

The Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., ("FMLA") mandates that employers provide eligible employees with up to 12 workweeks of leave time (or more in the case of certain leave related to a family member's military service) in each leave year for certain qualifying conditions, which include the serious health condition of the employee or a qualifying family member, the birth, adoption or placement of a new child with the employee, or certain reasons related to military leave of a family member. Leave for a serious health condition and certain leave related to military service of a family member can be taken on a continuous or intermittent basis.

1. During FMLA leave, the employer is required to continue the employee's "group health benefits" as though the employee were actively employed. With limited exceptions, upon the conclusion of an FMLA leave, the employer is required to reinstate the employee to his or her former position or an equivalent position.

2. The FMLA applies to any private employer that employs 50 or more employees within a 75 mile radius of the worksite for each working day during 20 or more calendar workweeks in the current or preceding calendar year. Part-time employees are counted toward the 50-employee minimum. Special rules apply to schools. Public employers are automatically covered by the FMLA, no matter how many employees they have, however those with less than 50 employees will not have any eligible employees.

3. An employee is eligible for FMLA leave if he/she meets the following three criteria, commonly referred to as the "12s" test:

   (i) 12 months of employment with the employer, which need not be continuous;

   (ii) 1250 hours of actual work in the 12-month period preceding the commencement of the leave (excluding any paid or unpaid leave time); and

   (iii) Employment at a worksite where 50 or more employees are employed within 75 miles of the worksite.

   (b) Part-time employees are eligible for FMLA leave if they meet the 1250-hour requirement (approximately 24 hours per week on average). An eligible part-time employee is entitled to 12 workweeks of leave based on his/her normally scheduled hours.

   (c) Time spent on military leave counts as hours worked for purposes of determining eligibility for FMLA leave.

   (d) If no records are kept of an employee's hours, a 12-month employee will be presumed to meet the 1250-hour requirement. 29 C.F.R. § 825.110(c).

4. An eligible employee is entitled to leave for any one of the following events: (1) upon the birth, adoption or placement for foster care of a child; (2) to care for an immediate family member with a serious health condition; (3) when the employee is unable to perform one essential function of the position because of his/her own serious health condition; or (4) certain reasons related to military service of a family member.

   (a) A serious health condition ("SHC") is any injury, illness, impairment or physical or mental condition that involves any one or more of the following:

      (i) Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;

      (ii) A period of incapacity requiring absence of more than 3 calendar days from work, school or other regular daily activities that also involves continuing treatment or supervision by a health care provider;

      In Schaar v. Lehigh Valley Health Services, Inc., 598 F.3d 156 (3d Cir. 2010), the Third Circuit held that a combination of lay and medical evidence can establish a period of incapacity of more than three days that also involves continuing treatment or supervision by a health care provider. The plaintiff, who worked as a medical receptionist, was absent from work on a Wednesday and Thursday due to a urinary tract infection. Her treating physician prescribed her an antibiotic. He also wrote her a note stating that she was unable to work during the two days she was out of work. The employee taped the note to her manager's door but did not call off for the absences. The employee was already scheduled to be out on vacation the following Friday and Monday. She returned to work on Tuesday and told her supervisor that she had been sick all weekend. Six days later, the employee was terminated for failing to call off her absences on Wednesday and Thursday. The Third Circuit reversed the district court's grant of summary judgment for the employer and held that the medical note, plus the employee's own statement that she was incapacitated for at least two additional days was enough evidence to create a genuine issue of fact for the jury that the plaintiff was incapacitated for more than three days. The Third Circuit held that at least some medical evidence is needed to make such a showing and that lay evidence alone is insufficient.

      In Branham v. Gannett Satellite Information Network, Inc., No. 09-cv-6149, 2010 U.S. App. LEXIS 18328, * (6th Cir. Sep. 2, 2010), the Sixth Circuit stated that to satisfy the "continuing treatment" element a plaintiff must show that she was treated by a health care provider twice within her period of incapacity and that such treatment can include treatment by a

nurse practitioner. Moreover, the regulations define “treatment” to include “examinations to determine if a serious health condition exists and evaluations of the condition.” The court held because the nurse practitioner’s certification included several diagnoses and reflected that “some sort of examination took place,” the nurse practitioner had treated the plaintiff.

(iii) Any period of incapacity due to or treatment for a chronic serious health condition (for example, asthma, diabetes, or epilepsy);

(iv) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (for example, Alzheimer’s, stroke, or terminal diseases);

(v) Any absences to receive multiple treatments or a period of recovery therefrom by a health care provider for a condition that likely would result in incapacity of more than 3 consecutive days if left untreated (for example, chemotherapy, physical therapy or dialysis); or

(vi) Any period of incapacity due to pregnancy, or for prenatal care.

5. It is the employee’s responsibility to put the employer on notice that a potential FMLA event has occurred or will occur. Then, it becomes the responsibility of the employer to designate leave as FMLA-qualifying and to give written notice of this fact to the employee.

(a) An employee giving notice is not required to expressly assert his/her rights under the FMLA, or even to mention the FMLA by name.

(b) If the employee offers an explanation that is potentially FMLA-qualifying, the employer is on notice and must issue the written FMLA leave designation. If an employee fails to identify an FMLA reason for using or needing leave time, such as by saying “I’m sick” or offering no reason, the employer is not obligated to treat the absence as FMLA-qualifying, but may need to inquire further.

(c) If the employer does not receive enough information from the employee, it is the employer’s responsibility to inquire further about the reasons for the leave in order to determine if the reasons are FMLA-qualifying.

6. An employer can require that an employee provide the employer with at least 30 days advance notice of the leave when the need for leave is foreseeable. If the need for leave is not foreseeable, the employee must provide the employer with as much notice as is practicable, *i.e.*, within one or two business days of the employee's knowledge of the need for the leave.

   (a) If an employee fails to give the required 30-day notice for a foreseeable leave and there is no reasonable excuse for the delay, the employer may deny FMLA leave until 30 days after the date on which the employee actually provides notice.

7. Under the FMLA, an employer is permitted to seek various types of medical information about an employee's serious health condition.

   (a) When an employee first notifies an employer of the need for FMLA leave, the employer is permitted to inquire further to ensure that the event in question in fact qualifies as an FMLA event. 29 C.F.R.

   (b) An employer also may require the employee to submit a medical certification form completed by the employee's treating health care provider.

   (c) If a medical certification is not complete or is illegible when it is submitted to the employer, the employer may return the certification to the employee and insist that it be completed fully.

   (d) If an employee submits a complete medical certification signed by his or her health care provider, and the employer still needs additional clarification of information contained in the certification, the employer may contact the employee's health care provider for clarification. If, after receiving clarification, the certification does not substantiate the need for leave, the employer may reject the request for leave.

   Hoffman v. Professional Med Team, 270 F.Supp.2d 954 (W.D. Mich. 2003) (employer did not violate FMLA by refusing to approve intermittent leave based on physician certification that stated, on one hand, that employee suffered recurrent migraines causing intermittent short-term disabilities and, on the other, that it was not necessary for employee to work intermittently or a reduced work schedule).

   (e) If the employer has reason to doubt the validity of a medical certification, it may require that the employee obtain a second medical certification from a health care provider selected by the employer at the employer's expense.

      (i) The health care provider selected by the employer may not be employed on a regular basis by the employer and may not be a provider with whom

the employer regularly contracts or whose services the employer regularly uses.

(ii) Pending receipt of the second certification, the employee is provisionally entitled to FMLA leave.

(iii) If the opinions provided by the two certifications differ, the employer may require the employee to obtain a third medical certification, again at the employer's expense. The third provider must be designated or approved jointly by the employer and the employee. Each must act in good faith in attempting to reach agreement, and if either fails to do so, the other party's certification will be final. The third certification shall be final and binding.

(iv) The employer will be responsible for reimbursing the employee for reasonable out-of-pocket travel expenses associated with obtaining the second and third certifications. 29 C.F.R. § 825.307(e).

8. Employers that choose to offer other paid leave benefits must permit an eligible employee to substitute such benefits for FMLA leave, if the employee so chooses. Also, the employer may require eligible employees to substitute paid leave benefits for FMLA leave. In both cases, the employer may offset or count the paid leave against the 12 weeks of unpaid FMLA leave.

9. Intermittent Leave

(a) To qualify for intermittent FMLA leave, an employee seeking leave for his or her own serious health condition must be unable to perform one or more essential functions of his or her position, and "[t]here must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent . . . leave schedule."

(b) Employees can also take intermittent leave to care for a family member with a serious health condition when medically necessary.

(c) Leave as a result of a family's members military service may be taken intermittently in some circumstances as well (see below).

(d) Employers need not allow employees to take intermittent leave to care for a new child

(e) Although there is no restriction on the size of an increment of leave (*i.e.*, an hour, a day, or a week), employers are permitted to limit leave increments to the shortest period of time the payroll system uses to account for absences or use of leave, as long as the interval is one hour or less.

NEW FMLA REGULATIONS

On January 16, 2009 the Department of Labor's new regulations on the FMLA became effective. The Regulations include:

- Overall reorganization of the regulations
- Redefinition of key concepts under FMLA
- New rules for Military Family Leave entitlement

NEW FMLA REGULATIONS – BREAKING IT DOWN

1. Employee Eligibility

    (a) The general rule is that prior service does not count towards the 12 month service requirement if break in service is more than seven years. There are two exceptions to this rule:

        (i) A break in service resulting from an employee's fulfillment of military service requirement

        (ii) A written agreement, including a collective bargaining agreement, concerning an employer's intention to rehire the employee after the break in service

    (b) Military service must be counted as actual service toward the1,250 hour/12 month requirement.

    (c) If an employee on non-FMLA leave meets the eligibility requirements while on non-FMLA leave, the employee must be deemed eligible for FMLA leave.

    (d) Non-FMLA leave cannot be counted towards the employee's FMLA entitlement.

2. Serious Health Condition

    (a) The DOL retained the six categories of serious health condition, including:

        (i) Inpatient care

        (ii) Absence plus treatment

        (iii) Pregnancy

        (iv) Chronic conditions

(v) Permanent or long-term conditions

(vi) Conditions requiring multiple treatments

(b) Treatment (e.g. visit to health care provider) must be sought twice within 30 days of the first day of incapacity, absent extenuating circumstances.

(i) Treatment means an in-person visit.

(ii) The first visit must occur within 7 days of the first day of incapacity and the second appointment must be determined by the health care provider and not the employee.

(c) "Periodic visits for treatment" means that the employee must seek treatment two or more times within a year.

(d) Determination of need for treatment must be made by health care provider.

(e) Common Ailments are defined as a cold, flu, ear ache, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc. The regulations still say that common ailments are not serious health conditions, however these ailments might rise to that level in certain circumstances.

3. Qualifying Family Member

(a) Qualifying family members include:

(i) Husband: Only a husband, not a father (i.e. boyfriend, fiancé) can take leave to care for a pregnant woman.

(ii) Parent: Adoptive parents are covered.

(iii) Son or Daughter

4. Qualifying Reasons for Leave

(a) The employee must be unable to perform "one or more essential functions" of the job.

(i) The employer may provide a statement of job functions to the health care provider and require the health care provider to specify which functions employee cannot perform.

(ii) The employer must determine which functions are essential.

(b) The employee need not be the only family member available to care for the qualifying family member.

(c) The DOL declined to eliminate psychological care and comfort as a type of care that the employee must offer to a family member to qualify for leave.

5. Intermittent Leave

(a) Employees taking leave for scheduled medical treatment must make a "reasonable effort" to schedule the leave cooperatively with the employer to avoid disruption to the employer's operations.

(i) Employees must try to arrange treatment on a schedule that accommodates the employer's need. The scheduling of medical treatment is ultimately a medical determination within the purview of health care provider.

(b) The DOL sought comment on whether the right to transfer employees taking intermittent leave for scheduled medical treatment to alternative position should be extended to unforeseeable or unscheduled leave and concluded that it lacked statutory authority to do so.

6. Counting Leave Time

(a) Employers may use the shortest time period used for other forms of leave to account for intermittent leave, even if that increment is greater than the smallest payroll increment, however the increment can never be greater than one hour.

(b) Mandatory overtime that an employee misses because of an FMLA-qualifying condition may be counted against an employee's FMLA entitlement.

(c) Missed voluntary overtime does not count against the FMLA entitlement.

7. Substitution of Paid Leave

(a) The employee's ability to substitute accrued paid leave for FMLA leave is determined by the terms and conditions of the employer's normal leave policy.

(b) Public employees may substitute compensatory time for unpaid FMLA leave.

8. Perfect Attendance Awards

(a) A bonus based on achievement of a specific goal may be denied to an FMLA user, such as hours worked, products sold, perfect attendance, etc.

(b) If the same bonus is paid to employees on “equivalent leave status,” however, then it must be paid to the FMLA user.

(c) Bonuses not premised on the achievement of a goal, such as a holiday bonus, cannot be denied to FMLA users,

9. Light Duty Programs

(a) The FMLA permits an employee to reject light duty in favor leave time. If light duty is accepted, period of light duty does not count as FMLA time. Job restoration rights continue during the light duty period.

10. New Administrative Processes

(a) An entirely new set of FMLA forms has been developed, including those for responding to employee leave requests and a new medical certification form.

(b) Employers now have a two-step process for responding to leave requests, which must be triggered within five days of the employer’s knowledge of the need for leave.

(c) Copies of all the DOL-approved forms are available on the DOL website at www.dol.gov.

11. Employer Notice Requirements

(a) A 30-days notice by the employee is still required. If the employee fails to give 30-days notice, the employee must explain why such notice was not practicable

(i) Where the employee does not learn of the need for leave until less than 30 days before the start of the leave, the employee must provide notice of the leave as soon as practicable.

(ii) “As soon as practicable” means the same day or the next business day.

(b) The DOL requires “prompt” notice in instances of non-emergent cases of unforeseen leave

(c) The employer may require an employee to comply with the usual and customary notice and procedural requirements for leave.

(i) The regulations eliminated the rule that an employer cannot impose more stringent notice and procedural requirements on an FMLA user.

(ii) Failure to follow such procedures will result in delay or denial of FMLA leave

(iii) "As soon as practicable" remains the standard for notice of emergent leave, however, "it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."

12. Medical Certification

(a) The employee must furnish the medical certification within 15 calendar days of the leave request.

(b) The employer must give employee seven calendar days to the employee to cure any deficiencies. Failure to return the certification is not subject to cure period.

(d) The employer can require new certification each leave year if the need for leave extends beyond a single leave year.

(e) The certification contains series of questions designed to elicit the necessary information.

(c) The employer may contact a health care provider, but only to seek authentication and clarification. Moreover, the employer contact may only occur after employee has been given opportunity to cure any deficiencies.

(d) An employee's direct supervisor may not contact employee's health care provider, but other employees of the employer, such as a human resources professional, may do so.

(e) HIPAA requirements must be satisfied when contacting an employee's health care provider.

(f) The employer must allow 15 days for recertification requests. The employer may request recertification no more often than every 30 days, subject to two exceptions.

13. Fitness for Duty Certification

(a) The employer can require a statement that the employee can resume work.

(b) In fact, the employer may require certification that employee can perform essential functions of job but the employer must inform the employee of this requirement.

(i) The employer must attach a list of essential functions to the employer designation notice.

(c) An employer may seek authentication and clarification of the certification.

(d) An employer can seek fitness for duty certification every 30 days if the employer notifies the employee of this requirement on the employer designation form. However, an employer cannot seek a fitness for duty certification for each instance of intermittent leave.

14. Military Family Leave

(a) An employee may take FMLA leave because of any *qualifying exigency* arising out of the fact that the employee's *spouse, son, daughter, or parent* is a covered military member on *active duty* (or has been notified of an impending call or order to active duty) in support of a *contingency operation*.

(i) Leave Entitlement:

a. An employee is entitled to the same 12 workweeks per leave year as for non-military FMLA leave.

b. Any leave taken for qualifying exigency also counts towards the 12 workweeks of non-military FMLA leave.

c. The same leave year should be applied.

(ii) A qualifying exigency includes short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities.

(iii) The employee must provide copy of orders upon the request of the employer and the employer may contact the Department of Defense to verify such orders.

(iv) The DOL has published an optional certification form available at www.dol.gov.

(b) An employee may also take FMLA leave to care for a *covered* service member with a *serious injury or illness* if the employee is the *spouse, son, daughter, parent or next of kin* of the service member.

(i) Leave Entitlement:

a. 26 workweeks of leave in a single 12 month period.

b. The leave year begins on first day employee takes caregiver leave.

c. Leave is calculated on a per-service member, per-injury basis.

d. Leave not used in the 12 month period is forfeited.

(ii) The employer is responsible for designating leave and notifying employee of such designation. The employer must designate the leave as caregiver leave first. The leave cannot count as both caregiver leave and non-military FMLA leave.

(iii) The health care provider must be either Department of Defense or Veterans Affairs provider or be approved by those agencies

(iv) The DOL has published an optional certification form available at www.dol.gov.

(v) The employer may also seek authentication and clarification.

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"I Won't Be In Today"

The Evolution and Interplay of Employee Rights under the ADA and FMLA

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Agenda

- Americans with Disabilities Act (ADA):
  - ADA Amendments Act
  - New EEOC Regulations
- Family and Medical Leave Act (FMLA):
  - Family Military Leave Amendments
  - New DOL Regulations
- Case Studies

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Americans with Disabilities Act

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ADA Overview

- The ADA prohibits employers from discriminating against **"a qualified individual with a disability"** with respect to hiring, firing and other employment decisions
- An employer is required to make **"reasonable accommodation"** to the known physical or mental "**disabilities"** of an otherwise qualified individual unless to do so would:
  - Impose an **"undue hardship"** upon employer; or
  - Pose a **"direct threat"** to the health or safety of the employee or others in the workplace

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Disability

- **"Disability"** under the ADA means:
  - A physical or mental impairment that substantially limits one or more of the **"major life activities"** of an individual; or
  - Having a **record** of such impairment; or
  - Being "**regarded as"** having such an impairment
- The ADA protects any individual with a disability who, with or without reasonable accommodation, can perform the **"essential functions"** of the employment position held or desired

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Substantially Limited

- Statutory requirement – individual must be **"substantially limited"** by impairment
  - ADA does not define "substantially limited"
- EEOC regulations had added definition -- unable to perform, or **"significantly restricted"** in ability to perform, major life activity -- but ADA Amendments Act said that standard was too high [Amendments Act]
  - EEOC Proposed Regulations (9/23/09): "significantly restricted" means substantially limited as compared to "most people in the general population"

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Major Life Activities [Amendments Act]

- **Major life activities** include the usual activities people do each day, such as walking, thinking, breathing, eating, sleeping, etc.
- The Amendments Act expands MLAs to include **"major bodily functions,"** defined by non-exclusive list:
  - Immune system
  - Normal cell growth
  - Digestive
  - Bowel
  - Bladder
  - Neurological
  - Brain
  - Respiratory
  - Endocrine
  - Reproduction

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Major Life Activities (cont.) [Amendments Act]

- ADA Amendments Act also clarified that impact on **one** major life activity is sufficient
  - "An impairment that substantially limits **one major life activity** need not limit other major life activities in order to be considered a disability."
- Intent of change was to foreclose courts from requiring both impact on working and another major life activity

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Episodic or Dormant Impairments [Amendments Act]

- ADA Amendments Act:
  - "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity **when active**."
- Key words: **"when active"**
  - Extent to which impairment impacts major life activity is assessed when condition is active, not dormant or in remission
- Episodic conditions prone to flare ups that do not impact major life activities between episodes now may qualify
  - FMLA "chronic conditions" that qualify for intermittent leave
  - Examples: asthma, arthritis, migraines

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Mitigating Measures [Amendments Act]

- "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as –
  - Medication
  - Medical supplies, equipment or appliances
  - Prosthetics, including limbs and devices
  - Mobility devices
  - Oxygen therapy equipment and supplies
  - Assistive technology
  - Reasonable accommodations or auxiliary aids or services
  - Learned behavioral or adaptive neurological modifications"
- Exception: ordinary eyeglasses or contact lenses

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Regarded As [Amendments Act]

- ADA Amendments Act:

  "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment **whether or not the impairment limits or is perceived to limit a major life activity**."
- No duty to provide **reasonable accommodation** under "regarded as" prong – must refrain from discrimination:
- The "regarded as" prong does not apply to impairments that are transitory or minor. i.e., one with an actual or expected duration of **six months or less**.

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Regarded As (cont.) [Amendments Act]

Regarded As Impaired + Adverse Consequence + Causal Connection =

DISABILITY DISCRIMINATION

New "regarded as" standard:

- Actual or perceived physical or mental impairment
- Does not matter if perceived impairment (or actual impairment) substantially limits major life activity

- Potential for far-reaching consequences
  - Discrimination can be based on mere perception of impairment
  - Perception of impairment or limitations can be minor or insignificant
  - Very low threshold to meet "Regarded As" element of claim

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Forms of Reasonable Accommodation

- Reasonable accommodation can be any workplace change in usual way work is performed
- Examples:
  - Leave of Absence: beyond amount of leave granted by employer's policies
  - Modifying Policies or Schedules: attendance policy, modified work schedule
  - Modified Work: restructuring job (marginal functions only), assistive devices
  - Modified Space: ramps, wider hallways, handicap bathrooms
  - Transfer to Alternative Position: "accommodation of last resort"
- Limits on reasonable accommodation:
  - Never have to relieve employee of essential functions
  - Do no have to grant employee's preference
  - Accommodation should not impose "undue hardship"

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Undue Hardship

- No accommodation is required where it would result in an "undue hardship" to the employer
- In determining whether an accommodation would impose an undue hardship, the following are considered:
  - The overall size of the employer (including number of employees, number and types of facilities, and the size of its budget);
  - The type of operation maintained by the employer, including the composition and structure of the workforce; and
  - The nature and cost of the accommodation

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Family and Medical Leave Act

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FMLA Leave Incidents

- FMLA grants leave to employees for the following:
  - Employee's own serious health condition
  - Serious health condition of employee's family member
  - Employee leave to care for a new child (birth, adoption, foster care)

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Family Military Leave [NEW]

- Family Military Leave: New leave entitlement for certain circumstances due to employee's family member performing military service
  - Qualifying exigency leave: Employee's family member is called to active duty in foreign country and employee needs leave to deal with "exigencies" occasioned by call to duty, *e.g.*, childcare or school activities, financial or legal arrangements, counseling, R&R
  - Military caregiver leave: Employee is needed to care for family member in service who has suffered serious injury or illness

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FMLA Leave Entitlement

- Basic entitlement: 12 workweeks of leave per leave year
  - FMLA leave taken for any of these reasons, including multiple leaves during the year for different reasons, counts towards basic entitlement
  - Exception: military caregiver leave entitlement is 26 workweeks per injury [NEW]

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Employee Eligibility

- To be eligible for FMLA leave, employees must:
  - Work for the employer for at least 12 months
  - "Actually work" at least 1250 hours in the preceding 12 months
  - Work at a location with at least 50 employees within a 75 mile radius
- Eligibility is measured at start of the employee's leave
- "Actual work" hours must include periods of military service for purposes of 1,250 hour/12 month requirements [NEW]

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Employee Rights

- During FMLA Leave:
  - Leave is unpaid, unless employee also qualifies for use of the employer's paid leave
  - An employer must continue employee's health benefits while on leave on same terms as if employee was at work
  - No interference with FMLA leave rights
- Upon Return from Leave:
  - Employee must be returned to the same or equivalent position with equivalent pay, benefits and responsibilities
- During and After FMLA Leave:
  - No discrimination or retaliation for use of FMLA leave

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Employee Notice

- Employee must request FMLA leave, but need not reference FMLA specifically when requesting leave
- Notice must be given 30 days in advance, if foreseeable, or otherwise "as soon as practicable"
  - "Prompt" notice is expected in non-emergent cases [NEW]
  - "As soon as practicable" means same day or next business day at latest [NEW]
- Notice must be given within time prescribed by the employer's "usual and customary notice requirements applicable to such leave." [NEW]

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What is a Serious Health Condition?

- To qualify, Serious Health Condition (or SHC) must fall into one of six categories:
  1. One or more nights of inpatient care
  2. Incapacity for more than 3 days plus continuing treatment by health care provider
  3. Incapacity due to pregnancy or for prenatal care
  4. Chronic serious health condition (*e.g.*, asthma, diabetes, epilepsy)
  5. Multiple treatments and recovery therefrom (*e.g.*, cancer treatment, arthritis, kidney disease)
  6. Long term conditions causing incapacity (*e.g.*, Alzheimer's, severe stroke, terminal stages of disease)
- Employee must be unable to perform "one or more essential functions" of the job

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SHC: Incapacity of More than 3 Days

- Incapacity for more than 3 days plus continuing treatment by health care provider
  - Treatment 2 or more times by a healthcare provider or
  - Treatment at least 1 time plus a regimen of continuing treatment (e.g., prescription medication or physical therapy) under the supervision of a healthcare provider
  - "Continuing treatment" does not include a regimen of over-the-counter medications, bed rest, etc., that can be started without a visit to a healthcare provider.
- Common cold, flu, upset stomach and routine dental problems generally do not qualify as serious health conditions (absent complications)

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SHC: Incapacity of More than 3 Days

- "Treatment" (e.g. visit to health care provider) must be sought twice within 30 days of first day of incapacity, absent extenuating circumstances [NEW]
- Treatment means in-person visit [NEW]
- First visit must occur within 7 days of the first day of incapacity [NEW]
- Second appointment must be determined by health care provider, not the employee [NEW]

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SHC: Chronic Conditions

- Chronic serious health condition (*e.g.*, asthma, diabetes, epilepsy)
  - "Periodic visits for treatment" means that employee must seek treatment two or more times within a year [NEW]
  - Determination of need for treatment must be made by health care provider [NEW]

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Medical Certification

- How does the employer know if condition actually qualifies as SHC?
- The employer can require employee to have treating physician certify condition as qualifying on DOL approved certification form
- In cases of intermittent leave usage, medical certification specifically asks doctor to state:
  - Whether intermittent leave is medically necessary
  - Probable duration of leave schedule
  - Likely duration and frequency of episodes of intermittent leave [NEW]
  - If applicable, probable number and duration of treatments, actual or estimated dates, and period for recovery [NEW]

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Medical Certification

- Employee must furnish within 15 calendar days of the employer's request (with additional **7 calendar days** to cure any deficiencies [NEW])
- The employer can require new certification **each leave year** if the need for leave extends beyond a single leave year [NEW]
- The employer may contact the health care provider (HCP) who completed the certification to seek **authentication and clarification** (after employee has been given opportunity to cure any deficiencies) [NEW]
- The employer can seek second opinion if reason exists to doubt veracity of certification

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Intermittent Leave

- Leave may be taken continuously (e.g., in full consecutive workweeks) or intermittently
  - Intermittent leave means a day here and a day there, or even fractions of a day, for treatment
  - Also can be used when symptoms flare up, even absent any treatment during episode
  - Leave may be taken on a reduced leave (part-time) schedule
- Intermittent FMLA leave can be used for employee's serious health condition or that of family member

Common Examples of Intermittent Leave

- Typical Chronic Conditions
  - Migraines
  - Asthma
  - Arthritis
  - Severe allergies
  - Anxiety/stress/depression
  - Soft tissue injuries (e.g., back, neck, joints)
- Typical Reasons for Intermittent Leave Usage
  - Periodic treatment – chemotherapy
  - Periodic symptoms – severe morning sickness
  - Periodic flare-ups – severe asthma, migraines
  - Reduced work capacity – part-time schedule while recuperating from surgery

Case Studies

Case Study #1

On at least two occasions, a nurse anesthetist has trouble intubating a patient. Both times, the nurse loses his cool, raises his voice, swears and throws surgical equipment on the floor, acting erratically and unprofessionally. He also is late for surgeries often, does not make proper patient status reviews and fails to review EKG and lab results in a timely manner. The nurse also exhibits a mild hand tremor. Physicians have begun refusing to work with the nurse.

Several physicians and the hospital's chief administrator meet to discuss the situation. At the meeting, one doctor suggests that the nurse might be using illegal drugs. Another doctor, a known recovering drug addict, calls the nurse to offer emotional support.

What should the employer do?

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Case Study #2

An employee works on a non air-conditioned plant floor. The employee brings in a doctor's note saying that the employee has severe asthma that affects his breathing and precludes him from exerting himself whenever the temperature hits 85° or the humidity hits 85%.

The employee wants the right to leave work or not come in when one of those conditions is present. This primarily affects his work in the summer months.

What are the employer's obligations?

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Case Study #3

A social worker begins to experience chest pain, shortness of breath, numbness in her arms and dizziness, and is subsequently diagnosed with left atrial enlargement. She goes out on leave for eight weeks. She informs her employer that she can come back to work, but she cannot work more than forty hours a week – no overtime. The job description for her position states that ability to work overtime is required.

Her employer informs her that it cannot accommodate her request for no overtime, because it is an essential function of her position.

What obligations does the employer have?

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Case Study #4

A patient care coordinator is injured when a client grabs her left wrist, twisting her arm. The employee goes out on leave for two weeks. Her doctor releases her with a five-pound lifting restriction. She works for two weeks, and goes out again on leave for six weeks due to increased pain in the wrist. Her doctor releases her again, this time with a two-pound restriction. Her supervisor refuses to let her return to her old position with those restrictions, so she continues to be out on leave.

The employer claims the employee cannot perform the essential functions of the position, which includes being able to lift. Another employee, however, has been substituting in her position; that employee is on a ***no lifting*** restriction.

Has the employer violated the ADA or FMLA?

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Case Study #4: Chapter II

The employer decides that it cannot accommodate the lifting restriction in the patient care coordinator's current position. However, there is a hotline position available that requires no lifting and has the same basic qualifications as the employee's current position.

The employer already has posted the hotline position and has several excellent candidates, both internal and external, with better experience and skills.

What are the employer's obligations?

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Case Study #5

An employee takes six weeks of leave for back surgery. Following the surgery, the employee returns to work. After working for two weeks, the employee takes another six weeks of leave for complications arising out of the back surgery.

The employee's job requires the employee to stand for long periods of time, with extensive reaching and bending.

What are the employee's rights?

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Case Study #6

An employee suffers from Crohn's disease, a chronic intestinal disorder. The employee needs occasional time off. The employee's physician certifies the leave as "indefinite" and the expected frequency of the leave as "unknown." The physician states that the employee will need leave whenever, and for however long, a flare-up occurs.

The employee also requests to be moved to an open office next to the restroom. All other employees in that job have cubicles, not offices.

What are the employer's obligations?

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Case Study #7

A 911 dispatcher is suspected of drug and/or alcohol abuse. He has slowed speech and droopy eyes. On one occasion his supervisor smells alcohol on his breath. Just as the employer is about to confront him, the employee steps forward and claims he is an alcoholic and addicted to pain medication, but is prepared to enter a rehabilitation program. The employer suspects that someone tipped the employee off about the confrontation.

What should the employer do?

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Case Study #8

An office employee works Monday through Friday. She tells her employer that she is allergic to mold and other allergens in the building's ventilation system. She believes the problem is coming from the HVAC room on her floor. She wants her office moved.

She also wants to work from home on Wednesdays (mid-week) to alleviate her exposure to the mold and allergens.

What are the employer's obligations?

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Case Study #9

A secretary goes out on FMLA leave for mental exhaustion, anxiety and depression. A few days before she is about to exhaust her leave, the employer sends her a letter stating that she must return to work on the date her leave is exhausted or her position will be filled.

Upon receipt of the letter, the employee calls her HR representative three times and submits a note from her doctor that she can return to work two weeks following the expiration of her FMLA leave, but she needs to be transferred away from her current supervisor as he is exacerbating the employee's anxiety condition.

The HR representative does not return the employee's phone calls due to other pressing matters. When HR finally returns the call, the FMLA leave has been exhausted, and the employee has been separated.

Has the employer violated the FMLA or ADA?

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Presenter Profile

Practice Areas

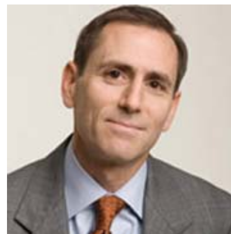
- Litigation
- Labor and Employment
- Corporate and Government Investigations and White Collar Defense
- Health Care
- Higher Education

Education

- George Washington University Law School J.D. 1989
- Lafayette College A.B. 1985

Admitted To Practice

- Pennsylvania 1989
- New Jersey 1989



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David S. Fryman is a partner in the Litigation Department and a member of the Labor and Employment, Corporate and Government Investigations and White Collar Defense, Health Care, and Higher Education Groups. His practice includes representation of employers in all types of labor and employment matters, including labor arbitrations, employment discrimination, and breach of contract cases; National Labor Relations Act representation campaigns and unfair labor practice proceedings; ERISA and employee benefits litigation; restrictive covenant and trade secret cases; and advice and training on a broad range of day-to-day human resource issues. He is Chair of the Philadelphia office Hiring Committee.

Mr. Fryman has represented three prominent research universities in proceedings involving graduate student unionization before the National Labor Relations Board and the Pennsylvania Labor Relations Board. In addition, Mr. Fryman has represented multinational corporations in race, sex, and age discrimination class actions filed by current and former employees, and ERISA class actions filed by plan participants. Mr. Fryman lectures on many employment and labor law topics, including sexual harassment, ADA/FMLA compliance, and union avoidance.

Mr. Fryman is recognized in the 2007 through 2010 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory built primarily on client interviews, as a leader in the field of labor and employment law. Mr. Fryman has received an AV Peer Review Rating from Martindale-Hubbell, an honor that indicates an attorney has reached the height of professional excellence. He has also been honored by *The Legal Intelligencer* and *Pennsylvania Law Weekly* as a "Lawyer on the Fast Track," an award given to select young Pennsylvania lawyers whose achievements have distinguished them among their peers.

Mr. Fryman has made substantial contributions through community service, as a committee member of the United Way of Southeastern Pennsylvania, and as a board member of the Arden Theatre Company and People's Emergency Center (PEC), which provides emergency shelter, transitional housing, and social services to homeless women, teenagers, and children. In 1997, Mr. Fryman was honored by PEC for his work in support of its mission.

Mr. Fyman is a member of the American, Pennsylvania, and New Jersey Bar Associations. He is admitted to the U.S. District Courts for the Eastern, Middle, and Western Districts of Pennsylvania and District of New Jersey; the U.S. Court of Appeals for the Third Circuit; and the U.S. Supreme Court.

Mr. Fryman is a graduate of Lafayette College (A.B. 1985) and George Washington University Law School (J.D., with honors, 1989).

Presenter Profile

Practice Areas

- Labor and Employment
- Litigation
- P3/Infrastructure
- Health Care Reform
- Higher Education

Education

- Georgetown University Law Center J.D. 1988
- Dickinson College B.A. 1985

Admitted To Practice

- Pennsylvania 1988

Brian D. Pedrow
Partner

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Brian D. Pedrow is a partner in the Litigation Department and a member of the Labor and Employment, Higher Education, and P3/Infrastructure Groups, and the Health Care Reform Initiative. His legal practice consists primarily of representing management in employment-related litigation, including discrimination and harassment, labor arbitrations and negotiations, and employment contract, wrongful discharge, and tort claims. Mr. Pedrow advises clients regarding compliance with employment and benefit laws, such as Title VII, ADA, ADEA, OSHA, FMLA, and drug testing.

Mr. Pedrow's practice includes all facets of litigation involving employees and employee benefits. He has litigated before the U.S. Supreme Court and has argued appellate cases in various U.S. appellate courts. He routinely litigates employment discrimination, harassment and tort claims, such as defamation, trade secret/noncompetition disputes, and wrongful discharge and breach of contract suits. Mr. Pedrow also has developed a significant practice representing benefit plans, fiduciaries, and plan sponsors in ERISA litigation arising from benefits eligibility disputes, breach of fiduciary litigation, and interference with benefits claims.

Mr. Pedrow has represented a Pennsylvania Supreme Court justice in First Amendment litigation, as well as the Pennsylvania Chamber of Business & Industry in a constitutional challenge to state workers' compensation statute.

Representative Matters

Public Sector Labor Law

- Has served as labor counsel to Gov. Edward G. Rendell and the Commonwealth of Pennsylvania, conducting labor negotiations and interest arbitrations for most of the Commonwealth's bargaining units

- Served as labor counsel to the City of Philadelphia during the Rendell and Street Administrations

- Has served as counsel to SEPTA in its labor negotiations with the Transport Workers Union, as well as in other labor and employment-related matters

- Serves as counsel to the Pennsylvania League of Cities and Municipalities

Private Sector Labor Law

- Represents a wide variety of Philadelphia-based employers in private sector labor matters, such as labor negotiations, unfair labor practice proceedings, and labor arbitrations; serves as labor counsel to Comcast-Spectacor and Global Spectrum

- Served as labor counsel to Philadelphia 2000, the host committee for the Republican National Convention, and mediated a labor cooperation agreement for the trades unions at the Pennsylvania Convention Center

Employment and Employee Benefits Litigation

- Represented Group Health Association of America in a lawsuit challenging state regulation of employee benefit plans

Advice and Training

- Provides day-to-day advice to clients, ranging from drafting personnel policies to advising on a difficult employee termination to preparing employment agreements; frequently provides training at client sites, including FMLA/ADA training and harassment training

Mr. Pedrow is admitted to practice in Pennsylvania and before the Pennsylvania Supreme Court. He has litigated before federal courts in the Second, Third, Fourth, Sixth, Seventh, and Eighth Circuit Courts of Appeals.

Mr. Pedrow is listed in the 2007 through 2010 editions of *Chambers USA: America's Leading Lawyers for Business*, a directory built primarily on client interviews, as a leader in the field of labor and employment law. He appears in the 2008 through 2011 editions of *The Best Lawyers in America* for labor and employment law. Mr. Pedrow has also received an AV Peer Review Rating from Martindale-Hubbell, an honor indicating an attorney has reached the height of professional excellence.

In addition to membership in the American and Pennsylvania Bar Associations, Mr. Pedrow has served as the Supreme Court and Legislative/Regulatory reporter for the ABA's newsletter, *Employment and Labor Relations Law*. He is a frequent speaker on employment and benefit law issues at public seminars and client-sponsored programs, including such issues as preventing and defending sexual harassment claims, managing attendance and the interaction of the ADA/FMLA, OSHA regulations, and the classification of workers.

Mr. Pedrow currently serves as a board member for Southeastern Pennsylvania Chapter of the Society for Human Resource Management (SEPA SHRM). He participates regularly in the Employment Law Institute sponsored by the Pennsylvania Bar Institute and has served on the PBI's Planning Committee. He has also lectured at Temple University James E. Beasley School of Law and Villanova University School of Law.

Mr. Pedrow was course planner for "The Family and Medical Leave Act, One Year After the Regs," a Pennsylvania Bar Institute program, Philadelphia, December 1, 2009; Mechanicsburg, Pennsylvania, December 14, 2009; Webcast, December 14, 2009; and Pittsburgh, January 21, 2010.

Mr. Pedrow is a graduate of Dickinson College (B.A., *magna cum laude*, 1985). He received his law degree from Georgetown University Law Center (J.D., *cum laude*, 1988), where he was Managing Editor of Georgetown's law journal, *Law & Policy in International Business*, and received honors as a Law Fellow and the Lawyers Cooperative Academic Achievement Award in Constitutional Law.

Presenter Profile

Practice Areas

- Litigation
- Labor and Employment

Education

- New York University School of Law J.D. 2007
- Boston College B.A. 2004

Admitted To Practice

- New York 2007
- Pennsylvania 2009

Rebecca L. Massimini
Associate

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Rebecca L. Massimini is an associate in the Litigation Department and a member of the Labor and Employment Group. Ms. Massimini has represented employers in both state and federal court and before administrative agencies, including the NLRB, EEOC, and such state agencies as the Pennsylvania Human Relations Commission. She orally argued in opposition to motion to dismiss in New York Supreme and Appellate Division courts. She has represented employers in investigations by the New York State Workers' Compensation Board and New York Department of Labor.

Ms. Massimini counsels employers on labor and employment law topics, including Title VII, ADA, ADEA, FMLA, FLSA, WARN, ERISA, state and city anti-discrimination laws, state wage and hour laws, and workers' compensation laws. She also has experience drafting employee releases and settlement agreements and participating in settlement negotiations.

Ms. Massimini is a graduate of Boston College (B.A. 2004) and New York University School of Law (J.D. 2007), where she served as staff editor of the *Environmental Law Journal*.

Labor and Employment Group

Our Labor and Employment Group has experience in counseling and litigating an array of labor, employment, and ERISA matters in the public, private, profit, and nonprofit sectors and in representing a large variety of industries. The types of matters we handle regularly include:

- Representation of employers in collective bargaining negotiations; interest arbitration; private and AAA labor arbitration; NLRA and state labor law compliance issues; the labor implications of mergers, acquisitions, and asset purchases; strike prevention and control; union campaigns; union-free training of management and supervisors; and unfair labor practice proceedings before the NLRB and state labor boards

- Employment discrimination advice and defense of claims on grounds of protected class membership, such as age, race, gender, sexual orientation, disability, religion, national origin, and sexual harassment; and Equal Pay Act claims

- Preparation and defense of affirmative action plans under Executive Order 11246 and other federal and state laws, including advice on implementation of monitoring processes; plan analyses and drafting; and advice, counseling, and litigation over OFCCP audits

- ERISA and other employee benefits advice and litigation, including administrative claims appeals; breach of fiduciary duty claims; litigation of benefit claims and interference with protected rights; ERISA preemption; and plan design counseling for litigation avoidance and defense

- Defense of class action and collective action cases, including claims of wage and hour violations brought against employers

- Defense of at-will employment, wrongful discharge, and employment tort claims

- Design and implementation of corporate-wide HR and labor strategies and initiatives

- Preparation of, and advice and litigation concerning, employment agreements, executive compensation programs, restrictive covenants and trade secret agreements, and employment terminations

- Advice and litigation on behalf of public employers such as cities, states, school districts, authorities, and municipalities in traditional labor and employment matters, as well as under specialized labor laws regarding police, fire, and other personnel (e.g., Heart and Lung Act and civil service laws)

- Training of managers and employees on topics such as sexual harassment, EEO compliance, ADA, FMLA, chronic absenteeism, managing the difficult employee, health and safety compliance, hiring, interviewing, and wage and hour compliance

- Review and legal audit of personnel policies, manuals, and employment forms; formulation of personnel policies, such as FMLA and applicable state leave laws; sexual harassment; drug and alcohol abuse and testing; privacy rights; and ADA compliance

- Advice concerning OSHA and state health and safety laws, including compliance and self-audits; governmental investigations and citations; negotiations with OSHA; and litigation before the OSHRC and the courts

- Wage and hour investigations and FLSA advice

- Reduction in force design, counseling, and litigation, including WARN compliance, early- exit programs, severance pay, and effective use of releases

General Firm Information

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Ballard Spahr LLP is a national firm of more than 475 lawyers in 12 offices across the country. Our attorneys provide counseling and advocacy in more than 40 areas within intellectual property, litigation, business and finance, real estate, and public finance. We represent a diverse cross-section of clients that range from large public companies and privately held corporations to government agencies and nonprofit organizations. Our practices span the life sciences and technology, energy, health care, and other sectors that are driving innovation and growth in today's marketplace.

The firm's mission is straightforward: to provide nothing less than excellence in every legal representation. Our client focus is absolute. We help clients achieve success as they define it. We respect and anticipate their needs, take action to keep them informed, and devise forward-thinking solutions to get the most favorable results. This is Ballard Spahr's pledge.

Practices

- Antitrust
- Bankruptcy, Reorganization and Capital Recovery
- Business and Finance
  - Investment Management
  - Mergers and Acquisitions/Private Equity
  - Securities
  - Transactional Finance
- Consumer Financial Services
- Corporate and Government Investigations and White Collar Defense
- Employee Benefits and Executive Compensation
- Energy and Project Finance
- Environmental
- Family Wealth Management
- Franchise and Distribution
- Government Relations and Regulatory Affairs
- Health Care
- Intellectual Property
  - Patents
  - Trademarks and Copyrights
  - Trade Secrets
  - Entertainment and Media
  - Intellectual Property Litigation
- International
- Labor and Employment

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- Litigation
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  - Appellate
  - Complex Commercial Litigation
  - Construction Dispute Resolution
  - Consumer Class Action Litigation
  - Consumer Financial Services
  - Intellectual Property Litigation
  - Product Liability and Mass Tort
  - Securities Litigation
- P3/Infrastructure
- Public Finance
- Real Estate
  - Construction
  - Eminent Domain
  - Housing
  - Planned Communities and Condominiums
  - Real Estate Development
  - Real Estate Finance
  - Real Estate Leasing
  - Real Estate Tax
  - Resort and Hotel
  - Zoning and Land Use
- Tax
  - Nonprofit Organizations
- Tax Credits
- Water Rights

Industries

- Communications
- Higher Education
- Insurance
- Life Sciences/Technology

Initiatives

- Climate Change and Sustainability
- Distressed Real Estate
- Financial Institutions Reform
- Health Care Reform