

## Ballard Briefing

**I Won't Be in Today:**  
The Interplay of Employee Rights under  
the ADA and FMLA

November 17, 2010

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The Interplay of Employee Rights under the ADA and FMLA

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# General Overview of the ADA and LAD

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).

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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 position, 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.

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## **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.

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- (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 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

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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

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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

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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.

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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

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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 Gallagher v. Sunrise Assisted Living of Haverford, 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 Johnson v. Rose Tree Media School Dist., 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. Regarded As Disabled

- (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:

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- (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

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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 (8<sup>th</sup> 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

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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.

The New Jersey Law Against Discrimination (“LAD”), N.J.S.A. 10:5-1 et seq., prohibits employment discrimination on the basis of an individual’s membership in a protected class, including those that are handicapped. The prohibition applies to “any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment.” N.J.S.A. 10:5-4.1.

1. The LAD provides protection for employees with handicaps, which has historically included a broader range of conditions than the ADA.

(a) Handicapped is defined as “suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically

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or physiologically, by accepted clinical or laboratory diagnostic techniques. Handicapped shall also mean suffering from AIDS or HIV infection.”

- (b) The courts have expanded the definition of handicap to those suffering from obesity, diabetes, alcoholism, and depression.
  - (c) Persons perceived as suffering from a handicap are protected, as are persons that were formerly handicapped in some capacity.
  - (d) Unlike the ADA, the LAD does not analyze whether a handicap substantially limits a major life activity.
2. The LAD regulates “employers,” which includes individuals, partnerships, associations, organizations, and corporations, and includes the State, any political or civil subdivision, and all public officers, agencies, board or bodies.
3. An employer is under a duty to make reasonable accommodations to handicapped individuals which will enable them to perform their jobs. Similar to the ADA, the employee does not have to make a formal request or even use the words “reasonable accommodation.” Once a request is made, the employer and employee must engage in the interactive process to find a reasonable accommodation, unless the employer can demonstrate an undue hardship on the operation of the employer’s business.
- (a) The following factors are considered by the courts in a undue hardship analysis:
    - (i) the overall size of the employer’s business, including the number of employees, size and number of facilities, and overall budget;
    - (ii) the nature of the employer’s business;
    - (iii) the nature and cost of the accommodation needed; and
    - (iv) the extent to which the accommodation would involve the waiver of an essential job requirement.
4. An employee asserting termination due to a disability under the LAD must establish a prima facie case, that:
- (a) he/she is handicapped within the meaning of the law;
  - (b) he/she was performing her job appropriately;
  - (c) he/she was terminated; and
  - (d) the employer sought someone to perform the same work after she was terminated.

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The above framework is generally used in matters involving termination based on a handicap. However, in a handicap discrimination case where the employee is alleging discrimination in the terms and conditions of employment, the *prima facie* case is modified. The third factor of discharge is modified to include adverse employment action, and the fourth factor—that the employer sought other employees to perform the same work—is not required. Rather, plaintiff must show a causal connection between his/her handicap and the adverse employment action.

5. The LAD does not prohibit handicap discrimination if the nature and extent of an individual's handicap reasonably precludes or impedes job performance. Where a handicapped employee is unable to perform the essential functions of the job, despite reasonable accommodations, a claim of handicap discrimination cannot be found. Such a finding must be supported by objective evidence, and cannot be based on the attitudes and preferences of coworkers and customers, the anticipated increase in the cost of insurance, or general assumptions regarding handicapped individuals.
6. The LAD also does not prohibit handicap discrimination where the employer can demonstrate that the employee's handicap poses a serious threat of injury to the health and safety of the employee or others with whom the employee comes into contact. Like the above defense, the safety defense must be proven with objective evidence.

## **EMPLOYER'S CHECKLIST**

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

**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 or an LAD handicap. 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/LAD 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

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the ADA, and 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 LAD 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 and LAD require 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 and FLA

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.

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- (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, \* (6<sup>th</sup> Cir. Sep. 2, 2010), the Sixth

## General Overview of the FMLA and FLA

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.

## General Overview of the FMLA and FLA

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

## General Overview of the FMLA and FLA

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.

# General Overview of the FMLA and FLA

## **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 the 1,250 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

# General Overview of the FMLA and FLA

- (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.

# General Overview of the FMLA and FLA

- (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.

# General Overview of the FMLA and FLA

- (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](http://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.

# General Overview of the FMLA and FLA

- (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.

## General Overview of the FMLA and FLA

- (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](http://www.dol.gov).

## General Overview of the FMLA and FLA

- (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) A husband and wife employed by the Company, who both are eligible for FMLA Military Caregiver Leave as described in this section, are limited to a combined 26-workweek entitlement.
  - (iv) The health care provider must be either Department of Defense or Veterans Affairs provider or be approved by those agencies
  - (v) The DOL has published an optional certification form available at [www.dol.gov](http://www.dol.gov).
  - (vi) The employer may also seek authentication and clarification.

The New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq., (“FLA”) mandates that employers provide eligible employees with up to 12 workweeks of leave time in a 24-month period for certain qualifying conditions, which include the serious health condition of 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. Note that leave is not available under the FLA for an employee’s own serious health condition.

1. The FLA and FMLA have certain key distinctions, including coverage of the acts, employee eligibility, and a broader definition of family members.
  - (a) The FLA applies to any private employer that employs 50 or more employees anywhere worldwide 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. The State of New Jersey, its political

## General Overview of the FMLA and FLA

subdivisions, and public offices, agencies, boards and bodies are included in the Act's coverage.

- (b) In order to be eligible for FLA leave, an employee must meet the following requirements:
    - (i) 12 months of employment with the employer, which need not be continuous, and
    - (ii) 1,000 hours of actual work in the 12-month period preceding the commencement of the leave.
  - (c) The FLA's definition of parents is more broadly defined than the FMLA, including biological parents, adoptive partners, foster parents, step-parents, legal guardians. The Act also extends leave for the serious medical condition of a civil union partner.
  - (d) Another distinction, noted above, is the period within which an employee may take leaves. Under the FLA, an employee is provided 12 weeks leave in a 24-month period, as opposed to the FMLA, which requires an employee take the 12 weeks leave in a 12-month period.
2. The FLA and FMLA also contain many similar provisions, including the employer's duty to continue the employee's "group health benefits" as though the employee were actively employed, the employer's duty to reinstate the employee to his or her former position or an equivalent position (with exceptions), and the employee's duty to provide reasonable notice.
  3. The FLA and FMLA also provide Military Caregiver Leave to care for a Covered Service Member, who is the employee's spouse, son, daughter, parent, or next of kin, and a current member of the Armed Forces, including a member of the National Guard or Reserves, and wounded in the line of active duty such that he or she is medically unfit to perform the duties of his or her office, grade, rank, or rating. See above.
  4. Finally, employees taking leave under the FMLA and/or FLA may be entitled to New Jersey Family Leave Insurance Benefits. These are state-provided benefits which are available to New Jersey employees only and paid for by employee payroll deductions. Qualifying employees are entitled to payments of up to two-thirds of their weekly wage (up to a set maximum) for up to six (6) weeks in any twelve (12) month period. Employees who are receiving temporary disability payments or workers compensation benefits are not eligible for New Jersey Family Leave Insurance Benefits.

## General Overview of the FMLA and FLA

- (a) New Jersey employees may be eligible for New Jersey Family Leave Insurance Benefits:
    - (i) to care for a newborn or newly adopted child, during the first twelve (12) months of the child's birth or adoption; or
    - (ii) to provide care to a family member (defined as the employee's child, spouse, domestic partner, civil union partner, or parent) with a serious health condition.
  - (b) Benefits for leave to provide care to a family member with a serious health condition must be supported by a certification from a healthcare provider.
  - (c) The New Jersey Family Leave Insurance Benefits Program does not provide for leave itself; rather, the Program provides for benefits as outlined above for use during an employee's FMLA and/or FLA leave.
5. FMLA and FLA time runs simultaneously where an employee takes leave for the same purpose. FMLA and FLA may run consecutively, providing an employee up to 24 weeks of leave, where an employee takes 12 weeks medical leave for their own serious condition and then takes an additional 12 weeks to care for a family member or for the birth or adoption of a child.

**"I Won't Be In Today"**

The Evolution and Interplay of Employee Rights  
under the ADA, LAD, FMLA, and FLA

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**Agenda**

- Americans with Disabilities Act (ADA):
  - ADA Amendments Act
  - New EEOC Regulations
- New Jersey's Law Against Discrimination (LAD)
- Family and Medical Leave Act (FMLA):
  - Family Military Leave Amendments
  - New DOL Regulations
- New Jersey Family Leave Act (NJLFA)
- 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 not 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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## New Jersey Law Against Discrimination

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## LAD Overview

- The LAD prohibits employers from discriminating against **employees with a handicap** 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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## Handicapped

- **“Handicapped”** individuals include those suffering from:
  - physical disability, infirmity, malformation, or disfigurement,
  - physical illness or disease,
  - mental, psychological or developmental disability that results from conditions which prevent the normal exercise of any bodily or mental function or which can be shown to exist through accepted clinical or laboratory diagnostic tests. This includes, but is not limited to, people with paralysis, amputation, epilepsy, visual or hearing impairments, speech impediments, AIDS, HIV infection, Sickle cell trait, and other atypical hereditary cellular or blood traits.
- The LAD 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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## Interplay between ADA and LAD

- Distinctions
  - Larger class of persons fall within the definition of **“handicapped”** than **“disabled”**
  - The LAD does not analyze whether a handicap substantially limits a major life activity.
- Similarities
  - Both statutes contain defenses for undue hardship and safety
  - Both provide protection for persons **“perceived as”** having a disability or handicap
  - Both require an employer to make **“reasonable accommodations”**

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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

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## 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

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## New Jersey Family Leave Act

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### Family Leave Incidents

- FLA grants leave to employees for the following:
  - Serious health condition of employee's family member
  - Employee leave to care for a new child (birth, adoption, foster care)
- FLA does not grant leave for an employee to care for their own serious health condition
- FLA entitles an employee to take 12 weeks of leave in a 24-month period (unlike the FMLA, which requires the leave take place in a 12-month period)

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### Employee Eligibility and Rights

- To be eligible for FLA leave, employees must:
  - Work for the employer for at least 12 months
  - "Actually work" at least 1000 hours in the preceding 12 months
- During FLA Leave:
  - An employer must continue employee's health benefits while on leave on same terms as if employee was at work
- Upon Return from Leave:
  - Employee must be returned to the same or equivalent position with equivalent pay, benefits and responsibilities

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## Serious Health Condition of Family Member

- The FLA defines family member more broadly than the FMLA, including:
  - biological parents,
  - adoptive partners,
  - foster parents,
  - step-parents,
  - legal guardians, and
  - civil union partner

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## NJ Family Leave Insurance Benefits

- Employees taking leave may be entitled to New Jersey Family Leave Insurance Benefits.
- Benefits are available to New Jersey employees only and paid for by employee payroll deductions.
- Qualifying employees are entitled to payments of up to two-thirds of their weekly wage (up to a set maximum) for up to six (6) weeks in any twelve (12) month period.
- Employees who are receiving temporary disability payments or workers compensation benefits are not eligible for New Jersey Family Leave Insurance Benefits.

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## NJ Family Leave Insurance Benefits

- New Jersey employees may be eligible for New Jersey Family Leave Insurance Benefits:
  - to care for a newborn or newly adopted child, during the first twelve (12) months of the child's birth or adoption; or
  - to provide care to a family member (defined as the employee's child, spouse, domestic partner, civil union partner, or parent) with a serious health condition.

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## Stacking FMLA and FLA Leave

- FMLA and FLA time runs simultaneously where an employee takes leave for the same purpose.
- FMLA and FLA may run consecutively, providing an employee up to 24 weeks of leave, where an employee takes 12 weeks medical leave for their own serious condition and then takes an additional 12 weeks to care for a family member or for the birth or adoption of a child.

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## Case Studies

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## 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 Profiles

### Practice Areas

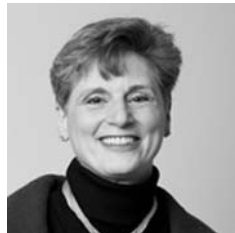
- Labor and Employment
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- Health Care

### Education

- University Of Pennsylvania Law School J.D. 1983
- State University Of New York At Stony Brook B.A. 1980

### Admitted To Practice

- New Jersey 1983
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Denise M. Keyser is a partner in the Litigation Department and a member of the Labor and Employment Group and Health Care Group. For over 20 years, she has represented national and locally based businesses in all types of labor and employment matters, including collective bargaining, arbitrations, OSHA, ERISA, wage and hour, employment-at-will, wrongful discharge, discrimination, management training, and affirmative action.

Ms. Keyser's experience includes serving as chief spokesperson and lead negotiator in collective bargaining negotiations for employers in a wide variety of industries, including health care, education, chemical manufacturing, food production, distribution, and public safety. She has handled numerous labor arbitrations on disciplinary and contract issues. She has experience before the National Labor Relations Board and has litigated cases involving issues such as discrimination, harassment, wrongful discharge, wage and hour issues, breach of contract, and ERISA in both state and federal courts. Finally, Ms. Keyser has worked closely with clients in drafting policies and handbooks, resolving compliance issues, and in day-to-day employment counseling.

Ms. Keyser is a member of the Executive Committee and a coordinator on the Disability Discrimination Subcommittee for the Labor and Employment Law Section of the New Jersey State Bar Association. She is also a former Co-chair of the section's Disability Discrimination Committee and a former Chair of the Alternate Dispute Resolution Committee. She was formerly on the Editorial Board of the *New Jersey Labor and Employment Law Section Quarterly*. She has been a contributing author to the ICLE/New Jersey State Bar Association compendium of New Jersey employment law, entitled *New Jersey Workplace Law*.

Ms. Keyser has been recognized as a Fellow by the College of Labor and Employment Lawyers. *Chambers USA: America's Leading Lawyers for Business* has recognized her as a leader in the field of labor and employment law since the directory's inception in 2003. She is also listed in the 2006 through 2011 editions of *The Best Lawyers in America* for labor and employment. Ms. Keyser has received an AV Peer Review from Martindale-Hubbell, an honor indicating an attorney has reached the height of professional excellence.

## Presenter Profiles

Ms. Keyser is a frequent speaker on developments in labor and employment law before bar, business, and community groups, including the New Jersey Institute for Continuing Legal Education and the Council on Education in Management. She is a member of both the New Jersey State Bar Association and the American Bar Association.

She is admitted to practice in New Jersey (1983) and Pennsylvania (1983).

Ms. Keyser is a graduate of the State University of New York at Stony Brook (B.A., with high honors, 1980) and the University of Pennsylvania Law School (J.D. 1983).

## Presenter Profiles

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- Litigation
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### Education

- Temple University  
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1988
- Ursinus College B.A.  
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### Admitted To Practice

- New Jersey 1988
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Louis L. Chodoff is a partner in the Litigation Department and a member of the Labor and Employment Group. He concentrates his practice in labor and employment law counseling and litigation associated with harassment, discrimination, wage and hour, whistleblower, wrongful discharge, and restrictive covenant disputes.

Mr. Chodoff litigates in state and federal courts as well as in various administrative agencies such as the New Jersey Department of Labor, New Jersey Division on Civil Rights, New Jersey Office of Administrative Law, Pennsylvania Human Relations Commission, and Equal Employment Opportunity Commission. He counsels his clients on employment and labor law implications of corporate acquisitions and advises employers on all aspects of labor and employment law, including discharge and discipline decisions, employee safety and workplace violence issues, drug and alcohol testing issues, training protocols, leave of absence decisions, wage and hour issues, and downsizing.

Mr. Chodoff conducts training for clients throughout the country in areas of harassment prevention and union avoidance. He also conducts labor arbitrations, litigates matters before the NLRB, conducts collective bargaining negotiations, conducts representation election campaigns for management, and obtains state court injunctions in strike matters.

Mr. Chodoff has received an AV Peer Review Rating from Martindale-Hubbell, an honor indicating an attorney has reached the height of professional excellence.

Mr. Chodoff is Co-chair of the Labor and Employment Law Section's Workplace Harassment Committee. He is a frequent lecturer on relating to all aspects of labor and employment law and has spoken before business and professional groups throughout New Jersey, Pennsylvania, and Delaware.

Mr. Chodoff is a graduate of Ursinus College (B.A. 1985) and Temple University James E. Beasley School of Law (J.D., *cum laude*, 1988), where he was Editor of the *Law Review*.

## 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

## Labor and Employment Group

- 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
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Ballard Spahr LLP is a national firm of more than 475 lawyers in 13 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

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- Health Care
- Intellectual Property
  - Patents
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    - 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