

Welcome to the 2009 Legal Issues Webinar Series



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Interplay between the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)

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Seminar Outline

- I. **Overview of the FMLA and ADA**
- II. **Interplay between the ADA and FMLA.**
- III. **ADA / FMLA Case study**
- IV. **Resources for future reference**

Overview of the FMLA and ADA



Goals of The ADA



- Eliminate discrimination and ensure that people with disabilities experience:
 - ❖ Equality of opportunity
 - ❖ Full participation and integration
 - ❖ Independence
 - ❖ Economic self-sufficiency
- Remove barriers to access.
- Provide clear, strong, enforceable standards

42 U.S.C. § 12101(a)(8)

Purpose of The FMLA

- “[I]ntended and expected to benefit employers as well as their employees.
- A direct correlation exists between stability in the family and productivity in the workplace.
- ... encourage the development of high-performance organizations.
- ...[P]owerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships ...

FMLA Leave Standards

Covered employees are entitled to up to 12 weeks of medical leave for any of the following reasons:

- The birth and care of a newborn child;
- Placement with the employee of a son or daughter for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; **or**
- To take medical leave when the employee is unable to work because of a serious health condition.

20 U.S.C. § 2601 (b)(2); 29 C.F.R. § 825.112(a)

FMLA Leave Requirements

FMLA Leave Provides:

- Up to 12 weeks of leave in a 12 month period (The 12 weeks may be taken intermittently).
 - ❖ Service members injured in the line of active service or people caring for them may receive 26 weeks of leave.
- Maintenance of Health Care Coverage
- Job Protection
- FMLA Leave is usually unpaid.

20 U.S.C. § 2612(a)(1); 29 C.F.R. §§ 825.127, 200, 207, 209, 214

FMLA Coverage of Employers and Employees

The Employee must meet all of these conditions to be protected by the FMLA:

- Working at a covered employer;
 - ❖ At least 50 employees within 75 miles.
 - ❖ All public agency employees and public and private schools are covered regardless of the # of employees;
- Worked for the employer for 12 months (not necessarily consecutive) performing 1250 hours of work.
 - ❖ Employees who take leave due to military obligations must be credited for the hours of work they would have performed.

29 U.S.C. §§ 2611(2), (4)(A), 2618; 29 C.F.R § 825.110

ADA Leave Standards

Covered employees are entitled to a reasonable amount of unpaid leave due to a disability.

- Leave is not required if it causes an “undue hardship”;
- The employee must be qualified for the job at the end of the leave;
- Employers may offer a different reasonable accommodation other than leave, e.g., reassignment, as long as the accommodation is “effective.”
- The amount of leave must be “reasonable.”

ADA Coverage of Employers and Employees

- The employee must have an ADA disability to be covered by the ADA.
- The employer must have 15 or more employees.
- All State and local government employees are covered.
- Local laws may cover smaller private employers
 - ❖ For example, The Illinois Human Rights Act and The Cook County and Chicago Human Rights Ordinances cover all employers with one or more employee.

FMLA – Prohibited Acts

Sec. 2615. Prohibited acts –

(a) Interference with rights

(1) Exercise of rights – It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination – It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

FMLA – Prohibited Acts

Sec. 2615. Prohibited acts –

- (b) Interference with proceedings or inquiries – It shall be unlawful for any person to discharge or ... discriminate against any individual because such individual -
- (1) has filed any charge, or ... proceeding;
 - (2) has given, or is about to give, any information in connection with any inquiry or proceeding ...; or
 - (3) has testified, or is about to testify, in any ... proceeding...;
- Retaliation is also prohibited.

ADA Prohibited Acts

- Reasonable Accommodation is a “fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities.”
- Not providing a reasonable accommodation for a known disability may constitute discrimination
- Leave from work in either a block of time or taken intermittently can be a reasonable accommodation.
- Retaliation and Harassment on the basis of disability are also prohibited.

42 U.S.C. § § 12112(b)(5)(A)

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship

Is Leave Paid or Unpaid?

- ADA leave is generally unpaid.
- FMLA leave is generally unpaid leave, however...
 - ❖ An employer may require, or an employee may elect, to substitute accrued vacation, personal medical/ sick or family (paid) leave with certain restrictions and conditions.
 - ❖ Employers are required to allow employees to substitute paid leave for FMLA leave only when the employee is otherwise eligible for paid leave under the employer's policies.

29 U.S.C. § 2612(d); *see also* 29 C.F.R. § 825.207
(discussing the substitution of paid leave for unpaid leave).

Different Definitions For Coverage

- FMLA – Serious Health Condition
- Workers' Compensation – On the Job Injury
- ADA – Qualified Individual with a Disability,...
- Social Security – Inability to Engage in SGA
- Short-term/Long-term disability – various
- State Human Rights Laws – Differing Definitions of Disability

Complications to Consider

- Is it a work-related Injury or off-job Injury?
 - ❖ Work-related injuries may involve Worker's Compensation Laws.
- Is it a temporary or permanent injury?
- Is the employee seeking a temporary or permanent accommodation?
- Is the leave to be used in a block or intermittently?
- Is there light duty involved?
 - ❖ Under new rules, employers can no longer charge light duty assignments against FMLA leave.

Interplay Between the ADA and FMLA



FMLA – ADA Interplay

**As a Reasonable Accommodation
under the ADA, FMLA Leave may be:**

- Extended beyond 12 weeks
- Given to an employee who is otherwise not eligible under the FMLA **and/or**
- Given as paid leave

Under the ADA, what is reasonable in a given situation requires an individualized assessment and a fact-specific determination.

ADA & FMLA Interplay

- **Important Rule:** The law offering the most protections to the employee should be followed. (This is usually the FMLA).
- Different Standards for coverage –
 - ❖ ADA Definition of Disability vs.
 - ❖ FMLA Serious Health Condition
- Intermittent Leave Issues
- Timing & Disclosure Issues
- Documentation

See EEOC Fact Sheet titled, *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, <http://www.eeoc.gov/policy/docs/fmlaada.html>.

ADA & FMLA Interplay – Employer Obligations

- Employers have different rights and obligations under each law.
 - ❖ **ADA:** Employer can chose any “effective” reasonable accommodation. This may be something other than leave.
 - ❖ **FMLA:** Leave must be given if the employee qualifies.

ADA & FMLA Interplay – Case on Employer Obligations

A Case Illustrating ADA and FMLA Interplay

- Employer required employee to use FMLA and sick leave to avoid mandatory overtime due to disability.
- Employee preferred to be exempt from overtime without using sick and FMLA time.
- The court held that the employer complied with the ADA even though it did not provide the employee the requested accommodation.
- **Query:** What if sick or FMLA time was not available?

Santacrose v. CSX Transportation, Inc., 2008 WL 2973889 (11th Cir. 2008)(unpublished).

ADA & FMLA Interplay – Employee Coverage

- Different standards for covered employees under each law:
 - ❖ **ADA:** Employee must have a physical or mental impairment that substantially limits one or more major life activities, or be regarded as having such an impairment, or have a record of an impairment.
 - (Please note that this definition will be interpreted differently under the ADA Amendments Act of 2008).
 - ❖ **FMLA:** Employee must have a serious health condition.

FMLA - “Serious Health Condition”

An illness, injury, impairment or physical or medical condition involving:

- Any period of incapacity or treatment connected with inpatient care in hospital, ... or ... medical care facility.
- Continuing treatment by or under the supervision of a health care provider, including:
 - ❖ Conditions for which treatment is not effective
 - ❖ Conditions which require multiple treatments
 - ❖ A period of incapacity of more than 3 consecutive days
 - ❖ For a chronic serious health condition

29 U.S.C. §§ 2611(2),(8),(11), 2612(a); 29 C.F.R §§ 825.110, 825.112
(g), 825.114, 825.115, 825.118

ADA & FMLA Case On Employee Coverage

- **Case on ADA and FMLA Employee coverage**
 - ❖ A cable installer claimed that he was entitled to leave under the FMLA and ADA due to his eczema.
 - ❖ Claimed limitations in: sleeping, caring for himself, thinking, concentrating, and cognitive processes.
 - ❖ The court held that sleeping five hours per night was not a substantial limitation under the ADA nor were the distractions in thinking caused by his condition.
 - ❖ The condition was an FMLA “serious health condition.”

Verhoff v. Time Warner Cable, Inc., 2008 WL 4691794
(6th Cir. 2008)(unpublished).

ADA & FMLA Interplay – Employee Qualifications

- Different standards for employee qualifications under each law:
 - ❖ **ADA:** Employee must be qualified to do the job, (perform essential functions with or w/o an accommodation & meet attendance requirements), at the end of the leave. Employee must work for an employer with 15 or more employees
 - ❖ **FMLA:** Employee must be unable to perform the essential functions to qualify for leave. Employee must work for a covered employer.

ADA & FMLA Interplay – Notice by Employee

- **Notice by Employee**
 - ❖ **ADA:** Any language that reasonably informs the employer of the existence of an ADA disability. No “magic words” are required.
 - ❖ **FMLA:** Employee must provide 30-day advance notice of the need to take leave, when need is foreseeable or “as soon as practicable.” No “magic words” are required.

ADA & FMLA Case on Coverage and Notice – *Burnett v. “Habitat”*

- Employee of property management co., whose job required lifting, had no performance issues.
- In Oct. 2003, 1st informed co. he had medical difficulties.
- Offered transfer to a different location, presumably due to conflicts with a co-worker.
- Employee declined the transfer as he would have reduced restroom access which would be bad due to his “weak bladder.” Stated that he was going to see a dr.
- In Nov., received 1st verbal warning re: performance.

Burnett v. LFW Inc., d/b/a The Habitat Co., 472 F.3d 471 (7th Cir. 2006).

Burnett Case – Coverage and Notice

- In Dec. meeting, provided more info on medical condition
 - ❖ “Felt sick” even though he didn’t “look sick.”
 - ❖ Fear of prostate problems (Brother-in-law had prostate cancer)
 - ❖ Said if he had progressive form, he would feel suicidal.
- In Jan., he was reprimanded for causing disruptions.
- 2 weeks later, he told co. would have biopsy and was reprimanded for “substandard work” the same day.
- After biopsy, requested light duty and one week of vacation leave (to get biopsy results) and was denied.
- Was told to see supervisor about request, but said he felt sick and needed to leave. He then left w/o permission.

Burnett Case – Coverage and Notice

- He was then terminated for insubordination.
- Had complications from biopsy and gave paperwork to co. showing why he left, but co. would not reconsider. Soon thereafter, biopsy results indicated cancer.
- Filed suit under ADA and FMLA. Court Held:
 - ❖ There was proper notice under FMLA (“close question”). Saying “I’m sick” is not enough but there were other statements.
 - ❖ There was FMLA “serious health condition” even before diagnosis.
 - ❖ Co. may have committed FMLA interference and retaliation.
 - ❖ No ADA disability at time of termination.

ADA & FMLA Interplay – Medical Certification

- **Medical Certification**

- ❖ **ADA:** Restrictions on disability-related inquiries.
- ❖ **FMLA:** Allows employer to ask for certification that an employee has a serious health condition. A specific inquiry is job-related and consistent with business necessity under the ADA. (DOL has a revised form).
 - **New Regulation:** Medical certifications must be complete and sufficient. If not, employer must inform employee the reasons in writing and allow seven days to cure deficiency.
 - **FMLA:** Employer may require additional medical opinions (at employer's expense), periodic reports (not less than every 30 days), and periodic recertification.

ADA & FMLA Interplay – Case on Medical Certification

A Case on Medical Certification

- Employee claimed that the employer sent forms for recertification to the wrong address and refused to resend them.
- Employer claimed employee refused to provide an updated address.
- The court held that it was the employee's responsibility to provide the required medical certification.
- **Note:** Employees should make sure they comply with certification requirements.

Sconfianza v. Verizon Pennsylvania, Inc., 2008 WL 5192375 (3rd Cir. 2008).

ADA & FMLA Interplay – Intermittent Leave

- **Intermittent Leave**

- ❖ **ADA:** Can be a reasonable accommodation if there's no undue hardship. If there is an undue hardship, transfers should be examined.
- ❖ **FMLA:** Can be taken when medically necessary. An employee must make a “reasonable effort” to schedule treatments to avoid disruptions .
 - If the leave is foreseeable, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits his/her reduced hours.

ADA & FMLA Interplay – Health Benefits

- **Health Insurance Coverage During Leave**

- ❖ **ADA:** Employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status.
- ❖ **FMLA:** Employer always must maintain the employee's existing level of coverage under a group health plan provided the employee pays his or her share of the premiums.

An employer must also provide such an employee with the same benefits, (e.g., life or disability insurance), normally provided to an employee in the same leave or part-time status to prevent discrimination.

ADA & FMLA Interplay – Reinstatement

- **Reinstatement After Leave**

- ❖ **ADA:** Employee is entitled to return to the same job absent undue hardship. Otherwise, a transfer to another position should be examined.
- ❖ **FMLA:** An employee is entitled to return to the same position or an equivalent position. FMLA leave cannot result in the loss of any benefit the employee earned or was entitled to before using FMLA leave.

ADA & FMLA Interplay – Exceptions to FMLA Reinstatement

- The employer is not required to reinstate the employee if:
 - ❖ The employee would have been terminated if not on leave.
 - ❖ The employee is a “key employee,” among the highest paid 10% of employees within 75 miles of worksite **and** restoration to employment would cause SUBSTANTIAL and GRIEVOUS injury to the employer.
 - ❖ The employee is unable to perform the job, with or w/o a reasonable accommodation. Unlike the ADA, the FMLA does not require the employer to reinstate the employee into another job.
 - **Query:** Who has the burden of proving the employee would have continued working if not on leave?

29 U.S.C. §§ 2614(a)(1),(b)(2); 29 C.F.R. §§ 825.214(a); 825.115.

ADA & FMLA Interplay – Cases on Reinstatement

A Case Illustrating Reinstatement Issues

- Employee did not train staff as required and was reprimanded. However, this was not listed as a job duty.
- Employee then went on 6 week leave for breast cancer.
- Two weeks before returning from leave, employee was terminated for failing to train staff.
- The court held:
 - ❖ Employer violated ADA (punitive damages) and FMLA (jury).
 - ❖ Employer's burden to show would have terminated employee.
- **Note:** Consistent discipline is important!

Smith v. Duffee Ford-Lincoln Mercury, Inc., 298 F.3d 955 (10th Cir. 2002).

ADA & FMLA Interplay – Cases on Reinstatement

Another Case Illustrating Reinstatement Issues

- In another case, a failure to reinstate was upheld by the court as the employee had performance issues.
- A nurse had been experiencing mood swings, probably related to depression and went on leave.
- While on leave, the employee continued to show up at work and disrupt the workplace.
- The court found that the employer would have discharged the employee if she was not on FMLA leave.

Note: There is no absolute right to restoration.

Throneberry v. McGehee Desha County Hospital, 403 F.3d 972 (8th Cir. 2005).

ADA & FMLA Interplay – Extension of FMLA Leave

- **Extension of FMLA leave under the ADA**

Q: When is it reasonable?

A: When it is not an undue hardship.

- ❖ If the company offers longer term medical leave in general, (e.g. 1 year)
- ❖ Employee must eventually be able to meet attendance and qualifications of job
- ❖ Requests for indefinite leave are not favored by the Courts.

ADA & FMLA Interplay – Case On Extension of FMLA Leave

- Employer claimed that an employee who was unable to return to work at the conclusion of their FMLA leave was unqualified to perform their job and therefore not entitled to additional leave under the ADA.
 - ❖ Pursuant to policy, employee was terminated at end of leave.
- The court found for the employee citing the well-established principle that blanket policies such as this may violate the ADA which requires reasonable modification of policies.
 - ❖ The employer should have engaged in the interactive process to determine the amount of leave that would be necessary to enable the employee to return to work.

Gibson v. Lafayette Manor, Inc., 2007 WL 951473 (W.D. Pa.)(unpublished).

ADA and FMLA Enforcement

1. ADA Cases filed at EEOC. Statute of Limitations (S/L): 180/300 days. (Federal employees – 45 days to report).
2. FMLA Cases, (2 or 3 year S/L), can be filed at:
 - a. U.S. Department of Labor (DOL), Wage and Hour Division, Employment Standards Administration.
 - b. Federal Court (No exhaustion requirement)
3. State Court Right of Action Depends on a State's Human Rights Laws.
 - a. DOL has State Family and Medical Leave Laws info: www.dol.gov/esa/whd/state/fmla/index.htm.

Case Study

ADA & FMLA Interplay



**The Case Study of Julia
and Scarpia's Print Shop**

Julia and Scarpia's Print Shop, In the Beginning

For the last three years, Julia has worked for Scarpia's Printing and Copying Services as a part-time sales associate working the mid-day shift. Scarpia's has 14 stores in a 30-mile radius and a total of 46 full-time and 18 part-time employees.

Typically, Julia has worked three days a week from 7:00 A.M.- 4:00 P.M., and was paid for 9 hours per day. During her first three years of employment, Julia was considered a very reliable employee and was rarely late or absent from work.

Julia and Scarpias Print Shop, the Plot Thickens

Julia uses a scooter as a result of having Multiple Sclerosis, affecting her ability to walk. As her worksite is accessible, the only accommodation that she needed was to have a reserved, accessible parking space near the entrance she uses.

Last January, Julia started to arrive late for work at least once a week. She would tell her supervisor, Ben, that she was not feeling well and that she would not be late again. After six of these incidents, Ben scheduled a meeting with Julia to discuss the issue.

Julia and Scarpias Print Shop, the Ultimatum

At that meeting, Ben informed Julia that her lateness was unacceptable because the day shift employees could not leave to take their breaks until Julia arrived for her afternoon shift. Ben informed Julia that she would be written up for being late and would continue to be disciplined for each time that she was late pursuant to company policy. After two more times being late without excuse, she would be terminated.

Julia and Scarpias Print Shop, the Explanation

Immediately after hearing this, Julia told Ben that her lateness was a result of problems she has had due to medication that she takes for depression. The medication makes it difficult for her to fall asleep and to wake up. Her sleep problems have gotten worse since Julia's mother died a couple of months ago.

Julia did not state the name(s) of the medication but indicated that her doctor thought that she would need to take six weeks off from work for intensive therapy and to adjust her medication. Julia has not used any medical leave time.

Discussion Questions

- A. Is Julia requesting an ADA reasonable accommodation?
 - ❖ Is Julia requesting leave under the FMLA?

- B. Is Scarpia's entitled to more medical information?
 - ❖ If so, what information should be sought?
 - ❖ If Scarpia's is concerned that Julia's depression may affect her MS, can the company request info on Julia's MS?
 - ❖ Can the company send Julia to another doctor for a 2nd opinion?
 - Can Scarpia's use its company doctor, Dr. Zhivago?
 - ❖ Are the legal requirements different under ADA or FMLA?

Discussion Questions

- C. Should Scarpias respond to Julia's disclosure and her need for time off from work? If so, how?
- D. Must the company grant Julia the leave?
- E. If Julia is eligible for leave under the FMLA and ADA, how should the initial leave period be characterized?
- F. Must the Company rescind the discipline that was mentioned prior to Julia disclosing her depression?
- G. May the company monitor her treatment? How?
- H. Should Julia's job be held open during this time?
 - ❖ Must Julia's benefits be maintained while she is on leave?

Discussion Questions

- I. Assume that Julia was granted the 6 weeks of FMLA leave that she requested. At the end of the 6 weeks of leave, Julia tells Ben she needs 12 more weeks and gives him a Doctor's note to that effect.
 - ❖ Is Julia entitled to the 12 weeks of leave?
 - ❖ What is the interplay of FMLA and ADA?
 - ❖ What factors are relevant?
 - ❖ What if Julia needs leave for an indefinite period?
- J. Assume Julia received the leave and is able to RTW. Is the company entitled to have Julia undergo a fitness for work evaluation under the ADA and/or FMLA?

Discussion Questions

- K. Can the company insist that Julia be 100% healed in order to return to work?
- L. Assume that Julia has been back at work for 1½ years. She now produces a doctor's note stating that she needs to leave early 2 hours 2 days per week for her therapy. What are the company's options?
 - ❖ Are there any situations where Julia can be transferred to another position?
 - ❖ What if Julia's FMLA leave is exhausted?

Resources



- **DBTAC: Great Lakes ADA Center:** www.adagreatlakes.org
- **Equip For Equality:** www.equipforequality.org
- **Illinois ADA Project:** www.ADA-IL.org
- **Job Accommodation Network:** www.jan.wvu.edu
- **Copy of the FMLA and its regulations—** www.dol.gov
- **Copy of applicable state laws –** <http://thomas.loc.gov>
- **Wage and Hour Division Opinion letters –** www.bna.com
- **ADA Technical Assistance –** www.adatac.org

The Intersection of the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)

THE END

Presented by:
DBTAC: Great Lakes
ADA Center &
Equip for Equality



Thank you for Participating In Today's Session



Please join us for the next session in this series:

March 3, 2009

Disparate Impact vs. Disparate Treatment

Session Evaluation

Your feedback is important to us. Please fill out the on-line evaluation form at:

http://www.formdesk.com/idealgroupinc/interplay_ada_fmla_011309

