Leaves of Absence and Other Accommodations:

Understanding your obligations under the ADA, FMLA, and W.C. laws

Presented by:

Oyvind Wistrom

Lindner & Marsack, S.C.

411 East Wisconsin Avenue, Suite 1800

Milwaukee, WI 53202

Phone: (414) 273-3910

Fax: (414) 298-9873

www.lindner-marsack.com

I. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*

A. Covered Entities. Title I of the ADA requires employers, employment agents, labor organizations, and joint labor management committees to provide reasonable accommodations to the known physical and mental limitations of otherwise qualified individuals with disabilities who are employees or applicants for employment unless to do so would cause an undue hardship. 42 U.S.C. § 12112.

B. Prohibited Conduct. An employer may not discriminate against a qualified individual with a disability because of the disability. 42 U.S.C. § 12112(a).

C. Who is disabled?

(1) A "qualified individual with a disability" is defined as an "individual who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

(2) The term "disability" means, with respect to an individual,

(a) A physical or mental impairment that *substantially limits* one or more major life activities of such individual;

(b) a record of such impairment; or

(c) being regarded as having such an impairment.

42 U.S.C. § 12102.

(3) Under new 2008 Amendments to the ADA, The definition of disability in favor of broad coverage of individuals under this act to the maximum extent permitted. 42 U.S.C. § 12102(4)(A).

(4) "Substantially limits" was defined as preventing or "severely restricting" or "substantially restricting" a major life activity.

EEOC has been asked to revise definition consistent with the Act so that it does not equate to the "substantially restricts" standard as pronounced by the United States Supreme Court in *Toyota Motor Manufacturing, Kentucky v. Williams*, 153 U.S. 184 (2002). Under the new ADA Amendment, "substantially limits" is to be interpreted according to the findings and purposes of the ADA Amendments. 42 U.S.C. § 12102(4)(B). The findings and purposes of the providing equal opportunity for individuals with disabilities are set forth in 42 U.S.C. § 12101.

(5) Mitigating measures no longer considered. 42 U.S.C. § 12102(E).

(a) Employer may not consider mitigating measures including: medications, artificial aids, assistive technology, reasonable accommodations and learned behavior or adaptive neurological modifications in determining whether individual is disabled.

(b) Eye glasses and corrective lenses can be considered but employers must show business necessity if they apply an uncorrected vision standard.

(6) Under new ADA Amendment, an impairment that is episodic or in remission is a disability if it would limit a major life activity when active. 42 U.S.C. § 12102(4)(D).

(7) "Major life activity." *Major* is not to be strictly interpreted and includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major bodily functions have also been added to include functions of the immune system, normal cell growth, digestive, bowel and bladder functions, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2).

D. What is a Reasonable Accommodation?

(1) Statutory Definition. The ADA, 42 U.S.C. § 12111(9), provides that reasonable accommodation may include:

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.

(2) EEOC Regulations. The EEOC's regulations implementing the ADA, 29 C.F.R. § 1630.2(o)(1), define three categories of reasonable accommodations:

(a) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(b) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(c) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(3) Reasonable accommodation may include:

- Making existing facilities used by employees readily accessible to and useable by individuals with disabilities;
- Job restructuring;

- Part-time or modified work schedules;
- Reassignment to a vacant position (which should typically be considered only when accommodation within the employee's current position would pose an undue hardship);[1]
- Acquiring or modifying tools, equipment, or work stations;
- Adjusting or modifying examinations, training materials/programs, or policies/procedures;
- Providing qualified readers or interpreters;
- Permitting a leave of absence;
- Work at home; and
- Changes in office communications.

42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2).

The fact that an accommodation gives a disabled person preferential treatment does not make the accommodation "unreasonable." *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).

(4) What is <u>not</u> a reasonable accommodation?

The EEOC's Interpretative Guidance includes several modifications or adjustments that are not considered forms of reasonable accommodation:

- Eliminating an essential function of a job;
- Permanent light duty;
- Excusing a violation of a uniformly applied work rule;
- Promoting an employee;
- Lowering uniformly applied production standards; or

[1] If a disabled employee is transferred to a lower-paying position, the employer is not required to pay the employee at the rate of the employee's former, higher-paying position. 29 C.F.R. § 1630 app. 1630.2(o).

- Providing an employee with personal use items such as a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or personal use amenities.

(5) Interactive Process

(a) To determine the appropriate reasonable accommodation, it may be necessary for an employer to initiate an informal interactive process with the employee to determine what accommodation may be available. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(b) If several accommodations are identified that would enable the individual to perform the essential functions, or if the individual would prefer to provide his or her own accommodation, the preference of the individual with the disability should be given primary consideration.

(c) However, the employer has the ultimate discretion in choosing between effective accommodations and may choose a less expensive or easier to provide accommodation. 29 C.F.R. § 1630.2(o)(3); EEOC Interpretative Guidance § 1630.9.

D. What is an undue Hardship?

(1) The ADA requires that employers make reasonable accommodations to facilitate the employment of otherwise qualified individuals with disabilities. The undue hardship exception allows employers to deny accommodations that would be overly expensive or difficult to implement. 42 U.S.C. § 12112(b)(5)(A). The ADA defines undue hardship and "an action requiring significant difficulty or expense," when considered in light of the following factors:

- The nature and net cost of the accommodation;
- The overall financial resources of the facility;
- The effect on expenses and resources;
- The type of operation involved;

- The impact of the accommodation upon the operation and the other employees' ability to perform their duties; and
- The impact on the facility's ability to conduct its business.

29 C.F.R. § 1630.2(p); 42 U.S.C. § 12111(10)(B)..

(2) The ADA contemplates a cost-benefit analysis in which the cost of the necessary accommodation is weighed against the employment opportunities it creates for the disabled employee. 42 U.S.C. § 12111(10)(A).

E. Federal Case Law

(1) General leave requirements.

(a) As a general rule, an employee with a disability must request a reasonable accommodation before an employer can be found liable for failure to provide one. 29 C.F.R. § 1630.9 ("In general…it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."); *see Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001); *Felix v. N.Y. City Transit Auth.*, 154 F. Supp. 2d 640, 656-57, *aff'd*, 324 F.3d 102 (2d Cir. 2003); *Jones v. United Parcel Service*, 214 F.3d 402 (3d Cir. 2000); *Chidebe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 444, 448, *aff'd*, 163 F.3d 598 (4th Cir. 1998); *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 112 (5th Cir. 2005); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998); *Jovanovic v. In-Sink-Erator, Div. of Emerson Electric Co.*, 201 F.3d 894 (7th Cir. 2000); *EEOC v. Convergys Customer Mgmt. Group, Inc.*, 491 F.3d 790, 795 (8th Cir. 2007); *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150 (9th Cir. 1997); *Bartee v. Michelin N. Am.*, 374 F.3d 906, 916 (10th Cir. 2004); *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1364 (11th Cir. 1999); *Office of Senate Sergeant at arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996).

(b) In most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability.

Generally, regular attendance at the job site is a basic requirement of most every job. "It is not absence itself but rather the excessive frequency of an employee's absence in relation to employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of the job." *EEOC v. Yellow Freight Sys., Inc.,* 253 F.3d 943, 948 (7th Cir. 2001) (employee who left early or was absent 39 times in 1991, 16 times in 1992, 133 times in 1993, and 50 times in 1994 was not a qualified individual with a disability); *see Amadio v. Ford Motor Co.,* 238 F.3d 919 (7th Cir. 2001) (employee who worked on an assembly line and took 23 medical leaves during three year period was not a qualified individual with a disability); *Javanovic,* Supra (employee missing twenty four days in twelve months was not qualified); *Waggoner v. Olin Corp.,* 169 F.3d 481 (7th Cir. 1999) (employee missing 5 ½ months of work and showing up later or not at all for forty days in a fourteen month period was not qualified); *see also Mulloy v. Acushnet Co.*, 460 F.3d 141, 148, 152 (1st Cir. 2006); *Lyons v. Legal Aid Socy*, 68 F.3d 1512, 1516 (2d Cir. 1995); *Santiago v. Temple Univ.*, 739 F. Supp. 974, 979 (E.D. Pa. 1990), *aff'd*, 928 F.2d 396 (3d Cir. 1991); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987); *Nesser v. Trans World Airlines, Inc,*, 160 F.3d 442, 445 (8th Cir. 1998); *Dudley v. Cal. Dept. of Transp.*, 213 F.3d 641 (9th Cir. 2000) (unpublished disposition); *Deal v. Candid Color Systems*, 153 F.3d 726 (10th Cir. 1998) (unpublished disposition); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994).

(c) An employer's failure to accommodate reasonable requests for medical leave violates the ADA. *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998) (finding leave request of two to four weeks reasonable). However, a request for medical leave is reasonable only if it is for a short amount of time. *See Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 327 (2003) (two-month leave request not reasonable). Whether a request for leave time is reasonable is a fact dependent

inquiry. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000). Courts look at several factors, including the duration of leave requested, *Cehrs v. Ne. Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998)(requesting leave for a duration certain with a treatment plan looked upon favorably); *Walsh v, Untied Parcel Service*, 201 F.3d 718 (6th Cir. 2000) (requesting indefinite leave as accommodation not favorably looked upon); *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106 (10th Cir. 1999) (accord); whether the employer has a leave policy or practice – and the employee's prior exercise of this policy, *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477 (5th Cir. 2000) (employer not required to retain employee or provide her with indefinite leave after she had exhausted her 12-week FMLA leave, nine months of company leave, and all vacation time); and the employee's work and attendance history, *Nunes v Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).

(d) An employer is not obligated to provide an employee with the accommodation he requests or prefers. An employer need only provide some reasonable accommodation. *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 951 (7th Cir. 2001); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (accord).

(2) Intermittent and indefinite leave.

(a) Time off work may be apt accommodation for intermittent conditions. *See Amadio,* 238 F.3d at 928 (noting that where an employee is unable to regularly attend work, few, if any, reasonable accommodations exist); *Pals v. Schepel Buick & GMC Truck, Inc.,* 220 F.3d 495, 498 (7th Cir. 2000) (part-time work may accommodate a person recovering from a mental condition); *Haschmann v. Time Warner Entm't Co.,* 151 F.3d 591 (7th Cir. 1998). The facts relevant to a determination of whether a medical leave is a reasonable accommodation are the facts available to the decision maker at the time of the employment decision. .

(b) Under the ADA, providing an accommodation does not establish that such an accommodation was necessarily reasonable. *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1994) ("A particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy."); *Amadio,* 238 F.3d at 929; *Vande-Zande v. Wis. Dep't of Admin.,* 44 F.3d 539, 545 (7th Cir. 1995); *Wong v. Regents of University of Cal.*, 192 F.3d 807, 820 (9th Cir. 1999) (holding that an institution's grant of an accommodation does not obligate to continue to grant the same accommodation in the future and that granting an accommodation does not necessarily render the accommodation reasonable as a matter of law); *see also Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) (An employer is not necessarily required to apply its own established business policy as a reasonable accommodation.).

(c) Requests for unlimited sick days, however, is not reasonable as a matter of law. *Waggoner v. Olin Corp.,* 169 F.3d 481 (7th Cir. 1999) (denying request for an accommodation for unlimited time off by a production employee who was absent or tardy forty times in 20 month tenure).

(d) Indefinite leave is also not required. Time off may be apt accommodation for intermittent conditions, but indefinite leave of absence is not required. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) ("Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect."); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (accord); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1187-88 (6th Cir. 1996) (accord); *Byrne v. Avon Prods., Inc*, 328 F.3d 379 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 327 (2003) (holding that indefinite leave "is not what the ADA says…not working is not a means to perform the essential functions," while holding, on the other hand, that employee's rights under FMLA may have been violated); *EEOC v. Yellow Freight Sys., Inc.,*

253 F.3d 943, 948 (7th Cir. 2001) (offer by employer for 90 day leave of absence was reasonable in light of employee's request for unlimited time off); *Nowak v. St. Rita High School,* 142 F.3d 999, 1004 (7th Cir. 1999) (18-month absence not reasonable); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (unpaid, indefinite leave of absence not reasonable under ADA); *Wood v. Green*, 323 F.3d 1309 (11th Cir.), *cert. denied,* 124 S. Ct. 467 (2003) (indefinite leave of absence is not a reasonable accommodation).

(3) Work at Home.

(a) Courts have been reluctant to approve working at home as a reasonable accommodation, especially when working at home would eliminate an essential function of the job. *Kvorjack v. Me.*, 259 F.3d 48, 51 (1st Cir. 2001) (request to work at home was unreasonable for a claims adjuster); *Tyndall v. Nat'l Educ. Ctrs., Inc. of Ca.*, 31 F.3d 209 (4th Cir. 1994); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 726-27 (5th Cir.); *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997); *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship*, 319 F.3d 891 (7th Cir. 2003), *Vande Zande v. State of Wis. Dept. of Admin,* 44 F.3d 538, 544-45 (7th Cir. 1995); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114 (10th Cir. 2004); *cf. Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (triable issue on the reasonableness of working at home where employee could perform essential functions of job from home). In *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship,* 319 F.3d 891 (7th Cir. 2003), the court ruled that working at home was not a reasonable accommodation for a software engineer who needed IV fluids daily and had to use the bathroom up to 14 times a day after undergoing treatments for rectal and breast cancer. The court said a home office is "rarely a reasonable accommodation," and called the issue a "highly fact-specific inquiry." In that case, working at home would not be reasonable for the engineer, whose job required teamwork, interaction, and coordination with co-workers, the court said.

(b) Despite court resistance to finding that working at home can be a reasonable accommodation, EEOC generally supports it. The commission's guidance on reasonable accommodation indicates that it is appropriate in some situations to allow an employee with a disability to work at home or telecommute. According to the EEOC, employers might have to modify their policies on where work is performed "if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship." The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at:*

http://www.eeoc.gov/policy/docs/accommodation.html).

(4) Light Duty

(a) Generally speaking, the employer need not create a new job for the person with the disability, nor must the employer reallocate essential functions to another worker.

(b) An employer may be required to restructure a job by reallocating nonessential, marginal job functions.

(c) It is generally considered an acceptable practice to have light duty program that is available only to employees who have sustained occupational injuries covered by W.C.

(d) On the other hand, reassignment to another vacant position for which the employee is qualified is generally required as a reasonable accommodation.

(5) ADA Amendment Act of 2008: Retroactive Application.

(a) Neither the text nor the legislative history of the ADA Amendment Act of 2008 ("ADAAA") indicates whether the ADAAA should be applied retroactively to cases arising before January 1, 2009. Pub.L. No. 110-325, § 122 Stat. 3553, 3559 (2008); *see Rudolph v. U.S.*

Enrichment Corp., Inc., No. 5:08-CV-00046-TBR, 2009 WL 111737 at *6 (W.D. Ky. Jan. 15, 2009).

(b) The Supreme Court has held that, in the absence of "clear congressional intent favoring [retroactive application of legislation], legislation does not apply retroactively if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transaction already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

(c) Most courts have held that the ADAAA does not apply retroactively. *EEOC v. Argo Distribution, LLC*, --- F.3d. ----, 2009 WL 95259 at *5, n.8 (5th Cir. Jan. 15, 2009); *Rudolph v. U.S. Enrichment Corp., Inc.*, No. 5:08-CV-00046-TBR, 2009 WL 111737 (W.D. Ky. Jan. 15, 2009) (ADAAA does not apply retroactively to the "regarded as" prong in determining whether one has a disability because there is no congressional intent to apply the ADAAA retroactively; the ADAAA broadens the definition of "disability"; and the ADAAA would potentially increase liability); *Schmitz v. Louisiana*, No. 07-891-SCR, 2009 WL 210497 at *3 (M.D. La. Jan. 27, 2009) ("Clearly, the new ADAAA provisions related to the definition of disability create new legal consequences for events completed before its enactment, and broaden the scope of an employer's potential liability under the statute. With no clear evidence of retroactive intent, the fact that Congress passed the amendments to counteract Supreme Court decisions and restore the intended scope of the ADA is not sufficient to overcome the presumption against retroactive application."); *Kirkeberg v. Canadian Pac. Ry.*, No. 07-4621(DSD/JJG).2009 WL 169403 at *5 (D.Minn. Jan. 26, 2009); *but see Menchaca v. Maricopa Community College District*, --- F. Supp. 2d ----, 2009 WL 166923 at *4-6 (D. Ariz. Jan. 26, 2009) (applying the ADAAA retroactively by broadly construing the definition of disability in favor of coverage in a case arising before January 1, 2009 without any discussion of whether the court should apply the ADAAA retroactively).

III. The Family and Medical Leave Act

A. Eligible Employees: Employers who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The worker must have been employed for 12 months and worked at least 1,250 hours. 29 U.S.C. § 2611.

(1) 12 months of service do not have to be consecutive in all cases. 29 C.F.R. § 825.110(b).

(a) Employment prior to a break in service of seven years or more does not have to be counted in determining whether the employee has been employed for at least 12 months, except when the break is taken for National Guard or Reserve military service or under another written agreement such as a collective bargaining agreement. Time for military service is counted toward the 12 month determination. 29 C.F.R. § 825.110(b)(1-2).

(b) Being maintained on the payroll for any part of a week, including any periods of paid or unpaid leave during which other benefits or compensation are provided by the employer count as a week of employment in determining whether the employee has worked for at least 12 months. 29 C.F.R. § 825.110(b)(3).

(2) Eligible employees will have worked at least 1,250 hours in the 12-month period immediately preceding the commencement of the leave.

(3) An employee may become eligible for FMLA leave while on "non-FMLA leave," in which case, any leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement will be considered "FMLA leave." 29 C.F.R. § 825.110(e).

(4) Employer must employee at least 50 employees within a 75 mile radius of the employee's worksite. 29 C.F.R. § 825.111.

(a) Home offices are not considered work sites. 29 C.F.R. § 825.111(a)(2).

(b) A worksite is a site to which an employee reports and from which assignments are made. *Id.*

B. Serious Health Condition:

(1) Under the FMLA revised regulations, much of the definition of "serious health condition" is unchanged.

(2) Federal law: An eligible employee may take up to 12 weeks of leave "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). A serious health condition means an illness, injury, impairment, or physical or mental condition that involves:

(a) inpatient care in a hospital, hospice, or residential medical care facility; or

(b) continuing treatment by a healthcare provider.

29 U.S.C. § 2611(11).

(3) "Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (an inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom), or any subsequent treatment in connection with such inpatient care. 29 C.F.R §§ 825.113(b), 825.114.

(4) Continuing treatment by a health care provider for a serious medical condition may include:

(a) A period of incapacity of more than three calendar days and any subsequent treatment or incapacity, provided that it also involved:

i. Treatment 2 or more times by a health care provider within the first 30 days of incapacity unless extenuating circumstances exist (fact-dependent), by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services

(i.e., physical therapist) under orders of, or on referral, by a health care provider; or

ii. Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider.

iii. Treatment must be an in-person visit and the first (or only) in-person visit occurs within seven days of the first day of incapacity.

29 C.F.R. § 825.115.

iv. Treatment includes (but is not limited to) examinations to determine if a serious condition health condition exists and evaluations of the condition.

v. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

vi. A regime of continuing treatment includes, for example, a course of prescription medication or therapy requiring specific equipment. A regimen of continuing treatment that includes taking over-the-counter medications, bed rest, drinking fluids, exercise, and other similar activities that can be initiated without visiting a health care provider is not, by itself, sufficient to constitute a regime of continuing treatment for purposes of FMLA leave.

vii. Conditions which do not meet the definition of "serious health condition" for FMLA purposes:

- Treatments for which cosmetic treatments are administered are not considered "serious health conditions," unless inpatient hospital care is required or complications develop.

- Common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.

- Mental illness or allergies may be serious health conditions, but only if all of the other criteria are met.

29 C.F.R. § 825.113(d).

(b) Any period of incapacity due to pregnancy or prenatal care, applying to a husband and wife (must be legal spouse). 29 C.F.R. §§ 825.120, 825.121.

(c) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition (i.e., asthma, migraine headaches, chronic back pain, diabetes, epilepsy). A chronic condition requires a periodic in person visit at least twice a year for treatment. A chronic condition continues over an extended period of time and may cause episodic rather than a continuing period of incapacity. 29 C.F.R. § 825.115(c).

(d) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective, i.e., Alzheimer's, severe stroke, or the terminal stages of a disease. 29 C.F.R. § 825.115(d).

(e) Any period of absence to receive multiple treatments by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment, such as cancer, severe arthritis, kidney disease. 29 C.F.R. § 825.115(e).

(f) Husband and wife each entitled to 12 weeks for a child with a serious health condition. 29 C.F.R. § 825.120.

C. Leave Entitlement and Calculation:

(1) It is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1).

(2) An eligible employee is entitled to up to 12 weeks of FMLA leave during a 12-month period. 29 C.F.R. § 825.200.

(a) If a holiday falls within a week of FMLA, then the week counts as a week of FMLA leave. If the holiday falls within a partial week, it is not counted as a full week of FMLA leave (unless the employee is expected to work the holiday). 29 C.F.R. § 825.200(h).

(b) When an employee takes leave intermittently, only the amount of leave actually taken may count toward the employee's leave entitlement. 29 C.F.R. § 825.205(b)(1).

(c) Overtime may be counted toward FMLA leave if the overtime is mandatory; voluntary overtime does not count toward the employee's leave entitlement. 29 C.F.R. § 825.205(c).

(d) An employer may choose to require substitution of accrued paid leave for FMLA leave, meaning that the paid leave and FMLA would run concurrently. Employer must inform the employee of the terms and conditions that must be satisfied for the paid leave. 29 C.F.R. § 825.207.

(3) Employee is generally entitled to reinstatement upon return from leave. 29 U.S.C. § 2614(1); 29 C.F.R. § 825.214; *Kauffman v. Federal Express Corp.,* 426. F.3d 880 (7th Cir. 2005)

(a) An employee is not entitled to "any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and condition of employment than if the employee had been continuously employed during the FMLA leave period."); *Harrell v. United States Postal Service,* 445 F.3d 913, 919 (7th Cir. 2006).

Comment [AAL1]: Fix citation

(b) An employee is not entitled to restoration if he cannot perform the essential functions of the position or an equivalent position. 29 C.F.R. § 825.216(c).

(c) An employer is not prohibited from implementing stricter conditions of reinstatement or return to work

certification requirements than that required under the FMLA where such requirements are part of collective bargaining agreement. *Harrell,* 445 F.3d at 927 ("Postal Service did not violate FMLA when it required Harrell to comply with return to work provisions set forth in [CBA].").

(d) The termination of an employee who is on FMLA leave may be permitted, however, where the employer can show that it "would have discharged the employee even had she not been on FMLA leave." In *O'Connor v. PCA Family Health Plan,* the plaintiff was terminated as part of the implementation of the reduction in force even though she was on an FMLA leave of absence. The court found that the employer's decision to terminate the employee was unrelated to her FMLA leave, and therefore, the termination was permitted. 200 F.3d 1349 (11th Cir. 2000).

(e) Where an employer had an honest suspicion that an employee was abusing an FMLA leave for personal reasons, after first having been denied vacation for the same period of time, forecloses the employee's claim under the FMLA. The employer terminated the employee while on leave after it confirmed that the employee used his disability leave to go on vacation. There was no evidence, the court noted, that the employer's suspicion was not honestly held and therefore the Court found that summary judgment was properly granted for the employer. *Crouch v. Whirlpool, Inc.,* 447 F.3d 984 (7th Cir. 2006).

(f) Employees can reject light duty assignments. If an employee accepts a light duty assignment while still eligible for FMLA, the time does not count against FMLA, and the employee continues to have reinstatement rights to his former job until the end of the 12-month FMLA benefits year. 29 C.F.R. § 825.220(d).

(g) Bonus awards or other payments that are based on achievement of a specific goal can now be denied if the goal is not met, as long as employees on equivalent leave status are treated the same. 29 C.F.R. § 825.215(c)(2).

(h) The employer must reinstate health coverage even if the coverage lapses during the FMLA leave for non-payment. 29 C.F.R. § 825.212(c).

(4) Retaliation

(a) The FMLA also makes it unlawful for any employer to discharge or in any manner discriminate against any individual for opposing any practice made unlawful by the Act or for participating in any proceeding under the Act. 29 U.S.C. §§ 2615(a) and (b).

(b) Employee can pursue both interference, as well as discrimination/retaliation claim under FMLA, the latter requires employee to show that a similarly situated employee who did not take FMLA leave was treated more favorable. *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949 (7th Cir. 2006); *Kauffman v. Federal Express Corp,* 426. F.3d 880 (7th Cir. 2005).

(5) Military Leave 29 CFR §§ 825.309-825.310

(a) Care for a service member who becomes seriously ill or injured during active duty. 29 C.F.R. § 825.127.

i. 26 weeks in a single 12 month period.

ii. Service member must be:
- Undergoing medical treatment; recuperation, or therapy;
- Otherwise in outpatient status; or
- On the temporary disability retirement list

iii. Serious injury or illness is defined as:
- A condition incurred in the line of active duty that may render the Servicemen unfit to perform military duties

iv. Spouse, son, daughter, parent, or next of kin of the covered Servicemen.

v. A person designated as next of kin (nearest blood relative) will be the only person that will qualify for leave. If no person is designated as "next of kin," the next closest blood relative will

be designated as next of kin, other than the relatives specifically identified above. If the Service member has multiple relatives all of the same relationship level, all will be eligible for FMLA leave to care for the Service member.

vi. This new type of leave is available only to family members in the Regular Armed Forces, National Guard, and Reserves, not former members of the Armed Forces, National Guard, Reserves, or those Service members placed on the permanently retired list.

(b) Leave for a "Qualifying Exigency" related to a family member's active duty service in the National Guard or Reserves.

i. To be eligible, an employee must be the spouse, parent, son, or daughter of a "covered military member." 29 C.F.R. § 825.126(b).

ii. "Covered military member" is defined as:
- Members of the National Guard and Reserves on active duty or called to active duty by the federal government in support of a "contingency operation."

iii. Does not pertain to family members of the Regular Armed Forces. 29 C.F.R. § 825.126(b)(2)(i).

iv. A "Qualifying Exigency" includes:
- Short notice of deployment
  i. 7 days to attend to issues arising from notice of deployment within 7 days of the date of deployment.
- Military events and related activities
- Childcare and school activities
- Financial or legal arrangements
- Counseling
- Rest and recuperation (5 days of leave when the covered military member is on leave from deployment)
- Post-deployment activities

29 C.F.R. § 825.126.

v. Employer may require:
- Copy of the covered military member's active duty orders
- Certification of dates of leave, if known
- This, too, is a one time requirement-recertification cannot be required by the employer.

29 C.F.R. § 825.309.

D. Medical Certification and Leave Entitlement

(1) Employer may require a medical certification of a serious health condition from a health care provider. 29 U.S.C. § 2613(a).

(2) The certification is sufficient if it provides the date the serious health condition began, its probable duration, relevant medical facts, and a statement that the employee was unable to work. 29 U.S.C. § 2613(b); 29 C.F.R. § 825.306.

(3) If the certification is incomplete, the employer must provide the employee with seven days to cure any such deficiency. A written list of the deficiencies must be provided to the employee. 29 C.F.R. § 825.305(c).

(4) In the event of an unforeseeable serious health condition, the employee must have at least 15 calendar days in which to submit the certification. 29 C.F.R. § 825.305(b); *Kauffman v. Federal Express Corp.,* 426. F.3d 880 (7th Cir. 2005); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir. 2000).

(5) The FMLA allows employees to take "intermittent leave" (defined as leave taken in separate blocks of time due to a single qualifying reason (29 C.F.R. § 825.202(a)), but this type of leave is generally intended for employees who have a predictable, regularly recurring need for leave. *See* 29 C.F.R. § 825.203 ("If an employee needs leave intermittently…, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations."); *see also* 29 C.F.R. § 825.202(b)(1) ("Examples of intermittent leave would include leave taken on an

occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.")

(6) An employer may, as a condition of restoration of any employee who has taken leave, have a policy that requires all employees to obtain medical certification of their ability to return to work. 29 U.S.C. § 2614(a)(4); 29 CFR §§ 825.305-825.308, 825.313.

(7) Employee has 15 days to provide certification from time requested. 29 C.F.R. § 825.305(b).

(8) If no certification or late certification is supplied, employer may delay or deny FMLA. 29 C.F.R. § 825.305(d).

(9) Certifications, recertifications or fitness for duty may be authenticated by the employer directly with the provider. No longer need to go through health professional. Direct supervisor cannot authenticate. 29 C.F.R. §§ 825.307-825.308.

(10) With the appropriate HIPPA release, after giving the employee a chance to cure the defects, the employer can speak directly with the treatment provider to clarify the certification, recertification, or fitness for duty. The direct supervisor of the employer cannot be the contact. 29 C.F.R. §§ 825.307-825.308.

(11) If the employee refuses to provide the HIPPA release, the employee must assure the additional information needed to evaluate the request is provided. 29 C.F.R. § 825.307(a).

(12) Certification for illness more than one year can be certified every new benefit year. 29 C.F.R. 825.305(e).

(13) Recertification every six months for certifications over 30 days. Recertification no more often than 30 days or if new information casts doubt on the validity of the certification. 29 C.F.R. § 825.308.

(14) 2nd and 3rd opinions only on annual certification, not recertifications. 29 C.F.R. §§ 825.307(b-c), 825.308(f).

E. Employer Notices.

(1) There are four classes of notices: general; eligibility notice; notice of employee's rights and responsibilities; and designation notice.

(2) The employer must translate the notices into other languages if a significant number of employees are not English literate. The employer must provide notice to the sensory impaired employees in a proper format.

(3) General: The employer must post a general notice and place the general notice in the handbook, or deliver by other written or electronic means. The employer must distribute the notice to new employees.

(4) Eligibility notice is simply a written statement to the employee made within five business days of the request notifying the employee that he meets the eligibility requirements under § 825.110 and, if not, why not. Eligibility notice is provided once in a benefit year per qualifying reason unless eligibility changes during the benefit year.

(5) Notice of employee's rights and responsibilities usually accompanies the eligibility notice.

(6) Designation notice given to the employee within five business days of receiving the certification and other sufficient information to designate the leave as FMLA. Statement of need for fitness for duty should accompany the designation and list of essential functions. Retroactive unless actual harm to the employee.

29 C.F.R. §§ 825.300-825.301.

(7) Foreseeable leave – 30 days notice or as soon as practicable, generally within a day or two.

(8) Upon employer request, employee must explain notice of less than 30 days for foreseeable leave.

(9) Unforeseeable leave must be given as soon as practicable under the circumstances and follow the employer customary notice procedure absent unusual circumstances.

(10) Notice can be verbal, but must be sufficient to put the employer on notice of an FMLA qualifying event including timing and duration.

(11) Employee must comply with employer customary notice procedure absent unusual circumstances. FMLA may be delayed or denied if employee does not give proper or timely notice.

(12) For FMLA already approved, employee must specifically reference that qualifying reason for leave as the need arises. Calling in sick is not a trigger for FMLA.

(13) Planned medical treatment must give consideration to employer operations. Medical necessity and not employee convenience controls the scheduling of planned treatment,

29 CFR §§ 825.301-825.304.

IV. Wisconsin Worker's Compensation Act, Ch. 102, Wis. Stats.

A. The Purpose of Worker's Compensation. The purpose of the Wisconsin's Worker's Compensation is to restore injured workers to their fullest economic capacity, through monetary benefits for medical care and rehabilitation.

B. Eligibility requirements: For employees to receive workers' compensation benefits and leave entitlements for a work-related injury, they must show:

(1) At the time of the injury, the employer-employee relationship is such that the provision of the Worker's Compensation Act apply.

(2) The employee sustains an injury.

(3) At the time of the injury, the employee is in the course of employment, which means that the employee is performing services growing out of and incidental to his or her employment.

(4) The injury arises out of his or her employment. Wis. Stat. § 102.03(1).

C. Leave Entitlement:

(1) Injured employee is entitled to temporary total disability (TTD) benefits while in the healing period and unable to work due to work-related injury. TTD compensation is 2/3 of average weekly wage up to statutory maximum based on injury date.

(2) Injured employee who returns to work in light duty capacity, and still suffers a wage loss, is entitled to temporary partial disability (TPD) benefits while in the healing period.

(3) Employee who refuses *bona fide* offer of employment within the employee's physical and mental limitations, is no longer entitled to TTD or TPD benefits.

(4) Once the employee reaches an "end of healing" or "maximum medical improvement," consider whether employee can return to work based on permanent restrictions.

D. Unreasonable Refusal to Rehire Claim

(1) Employee who is terminated as a result of work-related injury or who is refused reinstatement "without reasonable cause" is entitled to pursue an unreasonable refusal to rehire claim under § 102.35, Wis. Stats. Penalty is up to one years wages and is the responsibility of the employer.

(2) An employee who is terminated while off on a worker's compensation leave of absence can be lawfully terminated if it can be shown that employee would have been terminated in the absence of the work-related injury. For example, a legitimate management decision to eliminate a position while an employee is off on work-related injury can constitute reasonable cause for refusing reinstatement. *Ray Hutson Chevrolet, Inc. v. LIRC,* 186 Wis. 2d 118 (Ct. App. 1994).