LEAVE: ADA, FMLA, AND PREGNANCY

91 TIPS, TRICKS AND STRATEGIES FOR ADVANCED LEAVE ISSUES

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28th Annual Labor and Employment Law Institute

August 25-26, 2017: San Antonio

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BOOKS:

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TABLE OF CONTENTS

PART I - DEAL WITH THE PRELIMINARY STUFF

PART II - USE AVAILABLE AND FREE INTERNET RESOURCES FOR INFORMATION

TABLE OF CONTENTS–CON'T.

PART III - RESPECT THE CRITICAL ROLE OF JOB DESCRIPTIONS

PART IV - CONQUER CERTIFICATION CONFLAGRATIONS

TABLE OF CONTENTS–CON'T.

PART V - BECOME AN FMLA MECHANIC

TABLE OF CONTENTS–CON'T.

TABLE OF CONTENTS–CON'T.

PART VII - DEFTLY DEAL WITH INTERMITTENT LEAVE ISSUES

TABLE OF CONTENTS–CON'T.

PART VIII - RESIST RETALIATION RAGE

PART IX - DON'T' FORGET ABOUT ALL THE OTHER GOOD STUFF

TABLE OF CONTENTS–CON'T.

TABLE OF CONTENTS–CON'T.

APPENDICES

84 TIPS, DEVELOPMENTS AND STRATEGIES FOR EMPLOYEE LEAVES OF ABSENCE

Katrina Grider

PART I - DEAL WITH THE PRELIMINARY STUFF

TIP #1: Use the New FMLA Certification Forms from the DOL

In May 2015, the U.S. Department of Labor (DOL) released revised model Family and Medical Leave Act ("FMLA") forms to administer federal FMLA leave. A new notice poster was also released. The updated forms should be used by employers immediately. The new forms expire on May 31, 2018. Copies of the forms are attached in the Appendices to this paper.

TABLE 1: DOL FMLA REVISED FORMS

FORM	DOCUMENT	LINK	APP.
WH-380-E	Certification of Health Care Provider for Employee's Serious Health Condition	http://www.dol.gov/whd/forms/WH-380-E.pdf	1
WH-380-F	Certification of Health Provider for Family Member's Serious Health Condition	http://www.dol.gov/whd/forms/WH-380-F.pdf	2
WH-381	Notice of Eligibility and Rights & Responsibilities	http://www.dol.gov/whd/forms/WH-381.pdf	3
WH-382	Designation Notice	http://www.dol.gov/whd/forms/WH-382.pdf	4
WH-384	Certification of Qualifying Exigency For Military Family Leave	http://www.dol.gov/whd/forms/WH-384.pdf	5
WH-385	Certification for Serious Injury or Illness of Covered Servicemember – For Military Family Leave	http://www.dol.gov/whd/forms/WH-385.pdf	6
WH-385-V	Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave	http://www.dol.gov/whd/forms/wh385V.pdf	7

TIP #2: Note that the DOL added GINA language to the DOL FMLA Forms (WH Forms 380-E, 380-F, 384 and 385-V)

When the DOL published the new FMLA forms in May 2015, it added language on the forms to take into account the impact of the Genetic Information Nondiscrimination Act of 2008 (GINA) on an employer's request for medical certification information. GINA states that employers who request medical certifications from employees must instruct health care providers not to collect or provide any genetic information about the person. The newly revised DOL FMLA forms now include GINA specific language. The following is a discussion of the issues.

a. *GINA Quick Overview*

Title II of GINA prohibits the use of genetic information in making decisions related to any terms, conditions, or privileges of employment (*e.g.*, hiring, firing, and opportunities for advancement). The law restricts employers and other entities covered by Title II from requesting, requiring, or purchasing genetic information, with limited exceptions. GINA does not require specific intent to acquire genetic information to violate the law's provisions.

Title II applies to private employers and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs.

Under GINA, a "request" for genetic information includes ***making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information***. For this reason, employers requiring FMLA or ADA medical certification of an employee's serious health condition or for the serious health condition of an employee's family member should be concerned with GINA.

1) Genetic Test or Not?

The final GINA regulations offer numerous examples covered "genetic tests." For example, tests used to determine whether an individual has a certain genetic variant associated with predisposition to a disease are considered genetic tests (*e.g.*, breast cancer and the BRCA1 or BRCA2 gene, Huntington's disease, cystic fibrosis, or sickle cell anemia). Examples of tests that are not genetic tests include HIV tests, cholesterol tests, and any test for the presence of drugs or alcohol.

"Genetic information" means information about an individual's genetic tests, the genetic tests of family members of the individual, the manifestation of a disease or disorder in family members. It also includes information regarding participation in clinical research that includes genetic services by the individual or a family member of the individual. Also covered is genetic information related to pregnancy (or a family member of a pregnant woman), genetic information about the fetus and an individual using assisted reproductive technology, or genetic information about an embryo.

2) Exceptions

There are six narrowly defined situations in which a covered entity may acquire genetic information:

❶ Where the information is acquired inadvertently (*e.g.*, overheard in an office discussion);

❷ As part of health or genetic services (including a wellness program) that a covered entity provides on a voluntary basis;

❸ In the form of family medical history to comply with the FMLA certification requirements, state or local leave laws, or certain employer leave policies;

❹ From sources that are commercially and publicly available, such as newspapers, books, magazines, and even electronic sources;

❺ As part of genetic monitoring that is either required by law or provided on a voluntary basis; and

❻ By employers who conduct DNA testing for law enforcement purposes as a forensic lab or for human remains identification.

3) GINA and the FMLA

For FMLA exception #3 above, GINA allows an employer to acquire family medical history as part of the FMLA's certification process. This statutory exception is available only when an employee is asking for leave to care for a family member with a serious health condition (not for the employee's own serious health condition). According to EEOC, this narrow exception exists because under the FMLA, family medical history (*i.e.*, information about the manifestation of a disease or disorder in family members of the individual) must be provided as part of the certification process.

4) GINA and the ADA

Employers do not violate GINA if their acquisition of genetic information is inadvertent. As with the FMLA, ***to be covered by this exception, employers requesting medical information from an individual or healthcare provider must direct the individual or provider not to provide genetic information.***

Employers should include the notice on any request for documentation to support an employee's request for reasonable accommodation.

Under both FMLA and ADA, acquisition of genetic information is also considered inadvertent (and not a violation of GINA) if a manager or supervisor learns genetic information about an employee by overhearing a conversation between the employee and others or by receiving it during casual conversation with the employee or others. The "inadvertent" exception does not apply if an employer follows up with probing questions, such as whether other family members have the condition or whether the employee has been tested for the condition.

b. *WH-380-E (revised 2015)*
c. *WH-380-F (revised 2015)*
d. *WH-384 (revised 2015)*
e. *WH-385-V (revised 2015)*

The DOL revised the following forms to include GINA language:

WH-380-E: Certification of Health Care Provider for the Employee's Serious Health Condition.

WH-380-F: Certification of Health Care Provider for Family Member's Serious Health Condition

WH-384: Certification for Serious Injury or Illness of a Current Servicemember - For Military Family Leave

WH-385-V: Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

In Section I of each of these forms, the DOL added the following language:

> "Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, ***and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.*** (emphasis added).

In Sections II amd III of the forms, the DOL added the following language:

> ***Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b).*** (emphasis added).

As with the initial medical certification, GINA also requires that the employer notify the employee and his or her healthcare provider not to provide genetic information as part of the fitness-for-duty certification.

f. *Genetic Information and Confidentiality*

No matter how an employer obtains genetic information, the information must be treated as a confidential medical record and kept separate from personnel files. Access to medical files should be strictly limited. Information may be kept in the same files that an employer uses for confidential medical information under the FMLA or the ADA as long as FMLA's or the ADA's confidentiality requirements are met.

TIP #3: Display the DOL FMLA Poster Everywhere

The DOL notice poster summarizes major provisions of the federal FMLA and tells employees how to file a complaint. All covered employers display the new notice poster in a conspicuous place where employees and applicants for employment can see it. The poster must be displayed at all locations even if there are no employees eligible for FMLA at the location (*e.g.*, there are fewer than 50 employees employed within a 75-mile radius of the worksite). Electronic posting also is permitted to satisfy the posting requirement, as long as it otherwise meets the requirements of the regulations. A copy of the DOL FMLA poster is attached to this article (Appendix 8).

TIP #4: Make Sure Employees Know Their FMLA Rights

HR professionals consistently rate FMLA administration as one of their most difficult tasks. However, many FMLA problems result from a simple, unforced error: Failing to ensure that employees know their FMLA rights.

In one recent case, the Staples office supply chain had to pay more than $250,000 in damages and penalties because it failed to tell an employee he could take FMLA leave to care for his terminally ill wife instead of working from home. When the employee was fired after falling behind in his work, he sued for FMLA interference and won.

Don't let such a basic mistake drag you into court. Here are three simple steps you can take to make sure employees understand their FMLA rights:

Train supervisors. Every manager or supervisor is the potential first contact for an FMLA leave request. For employers, each untrained manager or supervisor represents a potential for costly litigation, bad press and poor workplace morale. Schedule regular FMLA training for supervisors. Address the topic during initial management training; run a refresher course every year or so.

Have central point of contact. Many employers opt to train their HR staff on the FMLA's intricacies and then train managers and supervisors to refer all requests to the appropriate point of contact in HR. This arrangement, however, is no substitute for training supervisors. In fact, it only works if bosses know how to recognize legitimate requests for FMLA leave, and understand how to avoid inadvertently retaliating against a leave-taking employee.

Display workplace posters (see Tip #3 above). One of the simplest forms of compliance is to conspicuously display the government's official FMLA employee rights and

responsibilities poster. Download it for free at www.dol.gov/whd/regs/compliance/posters/fmla.htm.

The DOL takes employers' responsibility to inform employees of their FMLA rights seriously. Employers that fail to provide employees with FMLA information may be fined $110 for each violation. Each day without the poster or proper notification constitutes another violation.

Tip #5: **Update the Company's FMLA Policy and Any Relevant Personnel Policies (And Inform Employees!)**

Many employers still have not updated their FMLA policies after the new regulations or the more recent military leave amendments took effect. Now is the time to review and revise FMLA policies as well as other personnel policies and procedures *(e.g.*, call-in procedures, leave policies) so that leave can be efficiently administered and the company can fully assert its rights in preventing FMLA fraud and misuse. At a minimum, update company policies to adhere to the new GINA regulations. (*see* above discussion).

TIP #6: Update the Company's Employee Handbook to Include the DOL FMLA Poster

The FMLA regulations require all employers who maintain an employee handbook to publish their FMLA policy within the handbook. Easy enough–take the DOL FMLA poster and publish it in the company handbook and distribute over the internet or intranet.

TIP #7: Depending Upon the State, Understand the Definition of a "Spouse"

The DOL announced a Final Rule revising the regulatory definition of "spouse" under the FMLA. Effective March 27, 2015, the FMLA defined a spouse based on the law of the place where the employee's marriage was entered into rather than the law of the state in which the employee resides.

Under the current FMLA regulations, the definition of spouse does not include legally married same-sex spouses if the employee resides in a state that does not recognize the employee's same-sex marriage.

This shift to a "place of celebration" interpretation will require that covered employers permit eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or covered family member regardless of the law in the state where they live. The new definition also includes same-sex spouses that entered into a valid marriage outside the United States. The effect of this change is that covered employers must permit leave for employees to (1) care for their same-sex spouse, stepchild, or stepparent with a serious health condition; (2) take qualifying exigency leave due to their same-sex spouse's covered military service; or (3) take military caregiver leave for their same-sex spouse.

The rule change aligns the regulatory definition of spouse under the FMLA with guidance previously issued by the DOL concerning the definition of spouse under the Employee Retirement Income Security Act (ERISA) and similar guidance issued by the Internal Revenue Service (IRS) in the aftermath of the United States Supreme Court's 2013 decision in *United States v. Windsor*. The *Windsor* decision struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which restricted the definition of "marriage" for purposes of federal law to a union between a man and a woman.

Employers, particularly those with employees in states that do not recognize same-sex marriage, may wish to review and update their FMLA policies and to train supervisors responsible for reviewing family leave requests with respect to the new regulation

PART II - USE AVAILABLE AND FREE INTERNET RESOURCES FOR INFORMATION

TIP #8: **Tell Employers That Their FMLA Dirty Laundry Will Be Aired on the DOL Website**

Companies need to understand that the DOL is serious about investigating FMLA complaints. The DOL recently announced that it intends to do more FMLA investigations at workplaces in an effort to "increase investigators' access to information and save time by reviewing documents and interviewing employees on site."

Accordingly, the Wage and Hour Division is not shy about publishing the findings of its FMLA enforcement investigations on the DOL website. The following cases are some recent DOL press releases.

a. *St. Luke's Regional Medical Center* (04/20/16)[1]

DOL investigators from found systemic violations in St. Luke's Regional Medical Center's administration of the FMLA. As a result of the violations, the employer failed to

[1] *See* http://www.dol.gov/newsroom/releases/whd/whd20160420

ensure that all employees on FMLA-covered leave received all the protections due to them under the law. The violations included failing to maintain employees' benefits while they were absent from their jobs during protected leave, and failing to ensure that employees, upon returning to work, were reinstated to job positions equivalent to those they held before going out on FMLA leave.

St. Luke's cooperated fully during the investigation and immediately remedied the violations. The employer corrected all administrative errors, potentially affecting approximately 13,000 employees throughout the state.

b. *Mercy Health System* (03/31/16)[2]

More than 40,000 hospital workers at Mercy Health System and affiliated locations around the nation are no longer required to have their health care providers answer a litany of unnecessary and illegal questions before requesting leave for their own serious health conditions or to care for a family member.

The resolution comes after a DOL investigation at the Mercy Hospital Fort Smith facility found FMLA violations in the process the organization had for employees requesting leave. The FMLA requires that employees provide enough information so their employer knows that their need for leave is due to an FMLA-qualifying condition before responding to a leave request.

However, Mercy required that their employees' medical certifications for leave include answers to intrusive and personal questions, well beyond the scope of what is allowed by law. For example, the forms provided by the hospital requested health information outside the scope of the illness related to the leave request and the name of the medication prescribed. The requirement to provide more information than is legally necessary or required can prevent workers who need and are qualified for FMLA leave from requesting such leave.

"Employers should take care to request only information needed to designate leave correctly," said Betty Campbell, the DOL division's Southwest regional administrator. "Employees' health conditions and those of their family members are between them and their health care providers. Demanding answers to unnecessary and possibly illegal questions may stop workers from taking much needed medical leave or time to take care of a loved one. The Wage and Hour Division is committed to ensuring workers' access to this important workplace protection."

The division conducted investigations as part of an education and enforcement initiative focused on FMLA compliance in hospitals and clinics. Investigators found that Mercy was not the only large Arkansas medical industry employer in violation of the FMLA. Mercy and two other organizations, Washington Regional Medical Center and HealthSouth Rehabilitation Hospital in Fort Smith, in some instances failed to meet the notification requirements of the FMLA, which require that employers notify employees of their eligibility for protected leave within five business days of the first leave request.

Violations were disclosed at all three organizations in instances where that timeframe was exceeded. At the same time employers provide an eligibility notice, they are also required to provide a written FMLA Notice of Eligibility and Rights and Responsibilities. At HealthSouth this information was provided orally, not in writing.

Investigators found enterprise-wide violations potentially affecting about 40,000 workers at Mercy Health, 2,177 at Washington Regional and 173 at HealthSouth.

c. *MGM Resorts (The Mirage)*(02/16/16)[3]

The DOL found that The Mirage, a Las Vegas hotel and casino resort, wrongfully terminated the employment of a banquet server based on his use of medical leave, which is protected under the FMLA. While the employer reinstated the worker one year after the termination, the Mirage failed to pay him back wages for the time he would have worked, and failed to restore his pension hours and health benefits on a timely basis – all of which the law requires.

The Mirage agreed with the division's finding and paid the employee $74,546 in back wages and fully restored his seniority, pension and health benefits.

Under the FMLA, an employer cannot interfere with, restrain or deny the exercise of – or the attempt to exercise – any FMLA right by the employee. Companies may not discriminate or retaliate against an employee or prospective employee for having exercised or attempted to exercise any FMLA right. Specifically, an employer may not use an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary procedures.

[2] *See* http://www.dol.gov/newsroom/releases/whd/whd20160331

[3] *See* http://www.dol.gov/newsroom/releases/20160216-0

d. *MOBIS North America, L.L.C.* (10/28/15)[4]

The DOL filed suit in federal court seeking reinstatement, back wages and employment benefits of approximately $100,000 and an equal amount in liquidated damages for an automotive plant worker fired by MOBIS North America L.L.C. in Toledo.

A DOL investigation revealed that the company terminated the employment of the production worker in violation of the Family and Medical Leave Act.

The 45-year-old employee had provided MOBIS North America with a completed medical certification that indicated that intermittent time off would be necessary to deal with a medical condition. Despite having the medical information on file, the company terminated the seven-year employee in November 2013 when he exceeded the maximum allowable absences.

MOBIS supplies a wide variety of automotive components to customers including Hyundai, Kia, GM, and Chrysler.

e. *Management Registry Inc., d/b/a Malone Staffing* (09/16/15)[5]

A federal judge ordered Malone Staffing to pay $10,000 in lost wages and liquidated damages after a DOL investigation revealed that the company terminated the employment of an assembly line worker in violation of the FMLA. The employee requested leave for his own serious illness, but was not allowed the 15 days required by the FMLA to provide the employer a completed medical certification.

Additionally, the DOL alleged in its complaint that Malone Staffing failed to have an established FMLA policy, failed to display the required FMLA poster, and failed to provide any of the required notices to the affected worker.

As a result of the investigation and judgment, workers will now receive employee handbooks that include FMLA general notices, notices of written rights and responsibilities and at least 15 days to return a complete medical certification requested in relation to an employee's request for FMLA leave.

Malone Staffing provides temporary employees for many industries including healthcare, professional, information technology and general labor.

f. *Nueces Electrical Co-op* (07/02/14)[6]

An employee of Nueces Electrical Co-op in Corpus Christi has received $46,920 in back wages and damages after a DOL investigation found the company in violation of the Family and Medical Leave Act.

"The FMLA protects eligible workers from having to choose between work and family care or personal medical leave needs," said Cynthia Watson, regional administrator for the DOL Wage and Hour Division for the Southwest. "When employees are unlawfully denied leave and their livelihoods put at risk, the potential for harm is great."

The division's McAllen District Office found that the employer, a company that provides electrical services to Corpus Christi and surrounding areas, wrongfully advised the employee to retire or face termination of employment for needing leave for an FMLA-qualifying health condition. The employer's actions forced the employee, who was entitled to receive FMLA job-protected leave, to cash out a 401(k) savings plan, which incurred significant penalties. The employee suffered wage losses, resulting in loan defaults and an inability to pay essential bills.

In addition to the monetary damages, the company neglected to provide proper FMLA notice to the employee. Under the FMLA, a covered employer must notify eligible employees of their FMLA rights and responsibilities and permit employees to take leave as outlined in the FMLA.

g. *DNA Diagnostics Ctr., Inc.* (02/04/14)[7]

Under terms of a settlement agreement, DNA Diagnostics Center Inc. has agreed to pay $25,000 in lost wages and liquidated damages to an employee of the Fairfield-based company to resolve a lawsuit filed by the DOL for unlawfully denying FMLA leave. The company subsequently fired the employee for exercising her rights under the FMLA to care for her seriously ill 12-year- old niece, for whom the employee was standing "in *loco parentis*," or in the place of a parent.

In June 2010, the department issued an Administrator Interpretation clarifying the definition of son and daughter

[4] *See* http://www.dol.gov/opa/media/press/whd/WHD20152079.htm

[5] *See* http://www.dol.gov/opa/media/press/whd/WHD20151791.htm

[6] *See* https://dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20140702.xml

[7] *See* http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Midwest/20140204.xml

under the FMLA. This interpretation clarified that, under the FMLA, a son or daughter includes not only a biological or adopted child, but also a foster child, a stepchild, a legal ward or a child of a person standing in *loco parentis*. This definition ensures that an employee who assumes the role of caring for a child receives parental rights to family leave, regardless of the legal or biological relationship.

h. *Big Lots* (01/06/14)[8]

A Big Lots Stores paid a former employee $8,787 following a DOL investigation that found the company violated FMLA. The company terminated the worker's employment for absences from work that should have been protected as FMLA leave because the employee was taking the time off to care for a seriously ill child. The investigation found that Big Lots failed to properly provide the employee with the required FMLA eligibility and designation notices. The firm then disciplined the employee by writing her up for tardiness and absences. It ultimately fired her for violating the company's attendance policy, although the time off met the qualifying criteria for the FMLA. Big Lots agreed to maintain future compliance with the FMLA by changing its internal policy to screen leave appropriately that could be eligible under the FMLA.

TIP #9: It's Okay to Use the DOL eLaws FMLA Advisor in a Pinch

Sometimes you just need a quick answer in a pinch without having to resort to flipping through the entire DOL FMLA regulations. The DOL eLaws FMLA Advisor can help. The FMLA Advisor was developed by the DOL to help employees and employers understand their rights and responsibilities under the FMLA. The FMLA Advisor can help identify which employers are covered by the law, which employees are eligible for FMLA leave, what entitlements and benefits are provided under the law, and in what situations FMLA leave may be used. The FMLA Advisor is intended to provide general guidance.

You can access the DOL FMLA elaws Advisor at http://www.dol.gov/elaws/fmla.htm.

TIP #10: Consult the DOL FMLA Field Operations Handbook

The DOL has published its Field Operations Handbook online. Chapter 39 of the Handbook addresses the FMLA. The Handbook is 107 pages and is a great resource because it is a combination of the three critical FMLA pieces: 1) the statute; 2) the regulations; and 3) the DOL FMLA opinions letters and administrator rulings. FMLA Chapter 39 of the Field Operations Handbook can be downloaded in a .pdf file at http://www.dol.gov/whd/FOH/FOH_Ch39.pdf

TIP #11: Don't Forget About the DOL FMLA Opinion Letters–They Are Still Useful

The FMLA provides that a court shall award liquidated damages doubling the amount of lost compensation plus interest for violations of the FMLA. An employer may avoid liquidated damages if it proves to the satisfaction of the court that: (1) it acted in good faith; and (2) the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA. The employer bears the burden of establishing both good faith and reasonable grounds in order to avoid liquidated damages.

In certain cases, an employer's reliance upon a DOL FMLA opinion letter, and review of the statute and DOL FMLA regulations, in light of its prior experience with the FMLA, may be sufficient to establish good faith and reasonable grounds for believing that the employer has not violated the FMLA for purposes of damages.

[8] *See* http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20140106.xml

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-1	06/15/93	Medical Insurance and Maintaining Health Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-1.htm
FMLA-2	08/16/93	No Fault Attendance Policies and Bonuses	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-2.htm
FMLA-3	09/09/93	Return to Equivalent Position	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-3.htm
FMLA-4	09/09/93	Definition of Employer (Condominium Associations in Hawaii)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-4.htm
FMLA-5	09/27/93	Changes in Leave Policies	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-5.htm
FMLA-6	10/01/93	Disability Insurance and Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-6.htm
FMLA-7	10/08/93	Volunteers	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-7.htm
FMLA-8	10/15/93	Joint Employment Relationships	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-8.htm
FMLA-9	10/18/93	Applicability of FMLA to Employees in Foreign Countries	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-9.htm
FMLA-10	10/27/93	Effect of FMLA on State Leave Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-10.htm
FMLA-11	11/02/93	Emergency Leave and Contact with Employee	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-11.htm
FMLA-12	11/02/93	Designation of Leave	http://www.dol.gov/whd/opinion/fmla_prior2002_content.htm
FMLA-13	11/02/93	Deferred Compensation Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-13.htm
FMLA-14	11/03/93	Multi-employer Benefit Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-14.htm
FMLA-15	11/05/93	Furnishing Lodging to Employees	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-15.htm
FMLA-16	11/15/93	Medical Certification for Family Members	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-16.htm
FMLA-17	11/15/93	Light Duty	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-17.htm
FMLA-18	11/15/93	1,250 Hours (Definition of Employee)	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-18.htm
FMLA-19	12/06/93	Cash Supplements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-19.htm
FMLA-20	12/07/93	Holiday Pay	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-20.htm
FMLA-21	12/07/93	Care of Grandparents	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-21.htm
FMLA-22	12/09/93	Employer Coverage (Corporation with Multiple Divisions)	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-22.htm
FMLA-23	12/28/93	Health Care Premiums and Maintenance of Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-23.htm

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-24	01/06/94	Definition of Employer (FMLA Requirements)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-24.htm
FMLA-25	01/10/94	Long Term Disability Insurance/ Preexisting Policies	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-25.htm
FMLA-26	01/14/94	Group Health Plan Premiums (Collective Bargaining Agreements)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-26.htm
FMLA-27	01/31/94	Substance Abuse Policies and Return to Work	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-27.htm
FMLA-28	01/31/94	FMLA Definition of Eligible Employees	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-28.htm
FMLA-29	02/07/94	Intermittent Leave Issues	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-29.htm
FMLA-30	03/18/94	Multi-employer Welfare Trusts	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-30.htm
FMLA-31	03/21/94	Attendance, Safety and Production Bonuses	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-31.htm
FMLA-32	03/24/94	Maternity Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-32.htm
FMLA-33	03/29/94	Vacation and Sick Leave (Substitution of Paid Leave)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-33.htm
FMLA-34	04/12/94	Compensatory Time	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-34.htm
FMLA-35	04/19/94	Reasonable Accommodation	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-35.htm
FMLA-36	05/18/94	Requirements of FMLA and Effect on Other Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-36.htm
FMLA-37	07/07/94	Temporary Employee	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-37.htm
FMLA-38	07/21/94	FECA Benefits and Light Duty	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-38.htm
FMLA-39	07/21/94	Collective Bargaining Agreements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-39.htm
FMLA-40	07/25/94	Exhaustion of FMLA Leave and Workers' Compensation Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-40.htm
FMLA-41	08/08/94	Coverage of Hospital Residents	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-41.htm
FMLA-42	08/23/94	Intermittent Leave and Transfer to Accommodate	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-42.htm
FMLA-43 (Under review)	08/24/94	Serious Health Questions	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-43.htm
FMLA-44	09/13/94	Intermittent Leave Taken in Blocks of Time	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-44.htm
FMLA-45	10/14/94	Multiple Births	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-45.htm
FMLA-46	10/14/94	Hours Worked Eligibility Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-46.htm

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-47	10/17/94	Inability to Perform Job	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-47.htm
FMLA-48	10/19/94	Medical Certification (Second and Third Medical Opinions)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-48.htm
FMLA-49 (Under review)	10/27/94	Leave Substitution and Designation	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-49.htm
FMLA-50	11/23/94	Definition of Key Employee	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-50.htm
FMLA-51	11/28/94	Care of Child	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-51.htm
FMLA-52	12/28/94	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-52.htm
FMLA-53	12/29/94	Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-53.htm
FMLA-54	02/22/95	Continued Service (Effect of Vesting Upon Pension Benefits)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-54.htm
FMLA-55	03/10/95	Light Duty and Interplay Between ADA, FMLA and Workers' Comp.	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-55.htm
FMLA-56	03/28/95	Attendance Bonus Policy	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-56.htm
FMLA-57 Superceded by FMLA-86	04/07/95	Serious Health Condition and Attendance Bonus	
FMLA-58	04/28/95	Return to Work Certification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-58.htm
FMLA-59	04/28/95	Substance Abuse	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-59.htm
FMLA-60	05/02/95	Serious Health Condition	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-60.htm
FMLA-61	05/12/95	Use of Accrued Leave (Substitution of Paid Leave)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-61.htm
FMLA-62	05/17/95	Employer Notice Requirements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-62.htm
FMLA-63	06/19/95	Chiropractor Treatment (Definition of Health Care Provider)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-63.htm
FMLA-64	06/21/95	Maintaining Medical Insurance Coverage	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-64.htm
FMLA-65	07/13/95	Deduction from Wages for Insurance Premium Payments	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-65.htm
FMLA-66	07/19/95	Unmarried Couples	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-66.htm
FMLA-67 Superceded by FMLA2002-5-A	07/21/95	Counting Leave and Reinstatement Rights	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-67.htm
FMLA-68	07/21/95	Unrequested Designation Against Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-68.htm

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-69	07/21/95	Alcohol Abuse & Substance Abuse Treatment	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-69.htm
FMLA-70	08/23/95	Overtime Hours	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-70.htm
FMLA-71	09/14/95	Medical Certification Form	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-71.htm
FMLA-72	09/20/95	Physician Assistant as Health Care Provider	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-72.htm
FMLA-73	10/26/95	Care of Sibling	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-73.htm
FMLA-74	10/30/95	Extending Leave Beyond 12 Weeks	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-74.htm
FMLA-75	11/14/95	Certification and Notice Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-75.htm
FMLA-76	11/30/95	Definition of Employer (Religious Institutions)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-76.htm
FMLA-77	01/30/96	Serious Health Condition (Medical Certification)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-77.htm
FMLA-78	02/14/96	Full-time Teachers and Hours Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-78.htm
FMLA-79	02/23/96	Safety Incentive Program	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-79.htm
FMLA-80	04/24/96	Probationary Teachers	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-81.htm
FMLA-81	06/18/96	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-81.htm
FMLA-82	07/31/96	Effect of FMLA on Other Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-82.htm
FMLA-83	08/07/96	Designation of Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-83.htm
FMLA-84	10/25/96	Foster Care of Children	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-84.htm
FMLA-85	11/18/96	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-85.htm
FMLA-86	12/12/96	Definition of Serious Health Condition	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-86.htm
FMLA-87	12/12/96	Definition of Serious Health Condition/Cold or Flu/Visit to the Doctor/Definition of "Continuing Treatment"	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-87.htm
FMLA-88	12/13/96	Changes in Determining the 12-Month Period	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-88.htm
FMLA-89	07/03/97	Salary Basis Requirements of FLSA	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-89.htm
FMLA-90 Superceded by FMLA2002-5-A	07/03/97	Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-90.htm
FMLA-91	12/09/97	Employer Plans With More Generous Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-91.htm

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-92	12/12/97	Temporary Disability of Workers' Compensation Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-92.htm
FMLA-93	02/06/98	Intermittent Leave/Administrative Leave (Physical Fitness Activities)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-93.htm
FMLA-94	02/27/98	Attendance at Care Conferences Regarding Mother's Health	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-94.htm
FMLA-95	06/03/98	Restoration to Same or Equivalent Position (Compelling Business Interest)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-95.htm
FMLA-96	06/04/98	Parents-In-Law/"Legal Ward"/FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-96.htm
FMLA-97	07/10/98	Job Accommodations of ADA	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-97.htm
FMLA-98	11/18/98	Care for Domestic Partner (Definition of Spouse)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-98.htm
FMLA-99	01/12/99	Siblings Who Work for Same Employer	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-99.htm
FMLA-100	01/12/99	No-Fault Attendance Policies	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-100.htm
FMLA-101 superceded by FMLA2009-1-A	01/15/99	Attendance-Control Policies/Employee Notification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-101.htm
FMLA-102	03/26/99	Counting Leave in Determining Vacation Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-102.htm
FMLA-103 superceded by FMLA2002-5-A	03/26/99	Length of Leave/Employer's More Generous Policy	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-103.htm
FMLA-104	05/21/99	Licensing Board/Employer Coverage	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-104.htm
FMLA-105	06/16/99	Eligibility for Leave Under Employer's New 12-Month Period	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-105.htm
FMLA-106	07/01/99	Work at Second Job During Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-106.htm
FMLA-107	07/19/99	"Usual and Normal Workweek"	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-107.htm
FMLA-108	04/13/00	Employer's Medical Certification Procedures	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-108.htm
FMLA-109	09/08/00	Accrual of Seniority	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-109.htm
FMLA-110	09/11/00	Employer's Bonus Incentive Program	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-110.htm

TABLE 2: DOL FMLA OPINION LETTERS (1993 - 2002)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-111	09/11/00	Professional Employer Organization/Integrated Employer	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-111.htm
FMLA-112	09/11/00	Intermittent Leave and the 1,250 hours test for eligibility	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-112.htm
FMLA-113	09/11/00	Fitness for Duty Test./Employer Certification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-113.htm

NOTE: The numbering system of the FMLA opinion letters was changed in 2002. Prior to 2002, opinion letters were listed simply in chronological order. To facilitate searches, the numbering system used beginning in 2002 includes the year the letter was issued and the appendage "-A" for Administrator-signed letters.

TABLE 3: DOL FMLA OPINION LETTERS (2002 - PRESENT)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA 2002-1	05/09/02	Leave Entitlement for Part-Time Employees	http://www.dol.gov/whd/opinion/FMLA/2002_05_09_1_FMLA.htm
FMLA 2002-2	07/19/02	Unforeseeable Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/2002_07_19_2_FMLA.htm
FMLA 2002-3	07/19/02	Failure to Designate FMLA-Qualifying Leave	http://www.dol.gov/whd/opinion/FMLA/2002_07_19_3_FMLA.htm
FMLA 2002-4	07/23/02	Intermittent Leave After Child's Birth or Adoption	http://www.dol.gov/whd/opinion/FMLA/2002_07_23_4_FMLA.htm
FMLA 2002-5-A	08/06/02	"Deeming Provision" for Otherwise Ineligible Employees	http://www.dol.gov/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm
FMLA 2002-6	12/04/02	Recertification for Intermittent Leave/1,250 Hour Eligibility Test	http://www.dol.gov/whd/opinion/FMLA/2002_12_04_6_FMLA.htm
FMLA 2003-1-A	03/05/03	Arbitration Agreements/Complaint Investigations	http://www.dol.gov/whd/opinion/FMLA/2003_03_05_1A_FMLA.htm
FMLA 2003-2	06/30/03	Eligibility of Guardian of Adult Disabled Sister	http://www.dol.gov/whd/opinion/FMLA/2003_06_30_2_FMLA.htm
FMLA 2003-3-A	07/24/03	Bankrupt Employer	http://www.dol.gov/whd/opinion/FMLA/2003_07_24_3A_FMLA.htm
FMLA 2003-4	07/29/03	No Fault Attendance Policy	http://www.dol.gov/whd/opinion/FMLA/2003_07_29_4_FMLA.htm
FMLA 2003-5	12/17/03	Vacation and Sick Leave/Designation and Notice of FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2003_12_17_5_FMLA.htm
FMLA 2004-1-A	04/05/04	50-Employee Threshold/Day Laborers	http://www.dol.gov/whd/opinion/FMLA/2004_04_05_1A_FMLA.htm
FMLA 2004-2-A	05/25/04	Medical Recertification and 29 C.F.R. § 825.308	http://www.dol.gov/whd/opinion/FMLA/2004_05_25_2A_FMLA.htm

TABLE 3: DOL FMLA OPINION LETTERS (2002 - PRESENT)			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA 2004-3-A	10/04/04	Substitution of Paid Sick or Medical Leave	http://www.dol.gov/whd/opinion/FMLA/2004_10_04_3A_FMLA.htm
FMLA 2004-4	10/25/04	Drug Testing/Fitness-for-Duty Certification	http://www.dol.gov/whd/opinion/FMLA/2004_10_25_4_FMLA.htm
FMLA 2005-1-A	08/26/05	Placement of Child for Foster Care or Adoption	http://www.dol.gov/whd/opinion/FMLA/2005/2005_08_26_1A_FMLA.htm
FMLA 2005-2-A	09/14/05	New Medical Certifications and 2nd or 3rd Opinions	http://www.dol.gov/whd/opinion/FMLA/2005/2005_09_14_2A_FMLA.htm
FMLA 2005-3-A	11/17/05	"Rolling" 12-month leave period and the 1250 hours test for eligibility	http://www.dol.gov/whd/opinion/FMLA/2005/2005_11_17_3A_FMLA.htm
FMLA 2006-1-A	01/17/06	Vacating Employer-provided Lodging While on FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_17_1A_FMLA.htm
FMLA 2006-2	01/20/06	Making Contributions to Multi-employer Group Health Plans for Employees on FMLA leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_20_2_FMLA.htm
FMLA 2006-3-A	01/31/06	Cafeteria Plan Allotments and Maintenance of Group Health Benefits During FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_31_3A_FMLA.htm
FMLA 2006-4-A	02/13/06	Whether FMLA Leave Counts As Hours Worked for Future Health Insurance Eligibility	http://www.dol.gov/whd/opinion/FMLA/2006/2006_02_13_4A_FMLA.htm
FMLA 2006-5-A	05/24/06	SCA Health and Welfare Payments and Maintenance of Group Health Benefits During FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_05_24_5A_FMLA.htm
FMLA 2006-6-A	10/05/06	Dental Insurance as a Group Health Plan and Continuation of Benefits for Instructional Employees During Summer Vacation	http://www.dol.gov/whd/opinion/FMLA/2006/2006_10_05_6A_FMLA.htm
FMLA 2009-1-A	01/06/09	Employee Notice and Call-In Procedures	http://www.dol.gov/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.htm
FMLA 2010-3	06/22/10	Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child.	http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm
FMLA 2013-1	01/14/13	Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability.	http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm

TIP #12: Review the Applicable EEOC Policy Guidances on Accommodation and Pregnancy Issues

The EEOC has issued several policy guidances that discuss reasonable accommodation, pregnancy and other related issues under the ADA, ADAAA and Pregnancy Discrimination Act (PDA). These guidances often provide useful examples of common workplace issues that can be resolved. TABLE 4 lists the guidances that may be most useful in handling complex leave issues.

TABLE 4: RELEVANT EEOC POLICY GUIDANCES

#	POLICY GUIDANCE	DATE	LOCATION
1	Enforcement Guidance: Pregnancy Discrimination and Related Issues	06/25/15	https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
2	Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues	07/14/14	https://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm
3	Fact Sheet for Small Businesses: Pregnancy Discrimination	undated	https://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm
4	Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008	06/17/09	http://www.eeoc.gov/ada/amendments_notice.html
5	Employer Best Practices for Workers with Caregiving Responsibilities	05/22/09	http://www.eeoc.gov/policy/docs/caregiver-best-practies.html
6	Q&A: Background Information for EEOC Notice of Proposed Rulemaking On Title II of the Genetic Information Nondiscrimination Act of 2008	05/12/09	http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html
7	Employment Discrimination and the 2009 H1N1 Flu Virus (Swine Flu)	05/11/09	http://www.eeoc.gov/facts/h1n1.html
8	ADA-Compliant Employer Preparedness For the H1N1 Flu Virus	05/04/09	http://www.eeoc.gov/facts/h1n1_flu.html
9	Q&A: Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)		http://www.eeoc.gov/mediate/ada/ada_mediators.html
10	Q&A: Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)		http://www.eeoc.gov/mediate/ada/ada_parties.html
11	Employer Best Practices for Workers with Caregiving Responsibilities	04/09	http://www.eeoc.gov/policy/docs/caregiver-best-practices.html
12	The ADA: Applying Performance And Conduct Standards To Employees With Disabilities	10/14/08	http://www.eeoc.gov/facts/performance-conduct. html
13	Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce	09/30/08	http://www.eeoc.gov/federal/qanda-employment-with-disabilities. html
14	Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce	09/30/08	http://www.eeoc.gov/policy/guidace.html
15	The ADA: Your Responsibilities as an Employer	08/01/08	http://www.eeoc.gov/facts/ada17.html
16	Veterans with Service-connected Disabilities in the Workplace and the ADA	05/28/08	http://www.eeoc.gov/facts/veterans-disabilities.html

TABLE 4: RELEVANT EEOC POLICY GUIDANCES			
#	POLICY GUIDANCE	DATE	LOCATION
17	Veterans with Service-connected Disabilities and the ADA: a Guide for Employers	02/29/08	http://www.eeoc.gov/facts/veterans-disabilities-employers.html
18	Employment Test and Selection Procedures	12/07	http://www.eeoc.gov/policy/guidace.html
19	Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities	5/23/07	http://www.eeoc.gov/policy/docs/caregiving.html
20	Q&A: EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities	05/23/07	http://www.eeoc.gov/policy/docs/qanda_caregiving.html
21	Q&A: Health Care Workers and the ADA	02/26/07	http://www.eeoc.gov/facts/health_care_workers.html
22	Q&A: Deafness and Hearing Impairments in the Workplace and the ADA	07/26/06	http://www.eeoc.gov/facts/deafness.html
23	Reasonable Accommodation for Attorneys With Disabilities	07/27/06	http://www.eeoc.gov/facts/accommodations-attorneys.html
24	Final Report on Best Practices for the Employment of People with Disabilities in State Government	11/01/05	http://www.eeoc.gov/facts/final_states_best_practices_report.html
25	Work At Home/Telework as a Reasonable Accommodation	10/27/05	http://www.eeoc.gov/facts/telework.html
26	Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures	10/27/05	http://www.eeoc.gov/facts/evacuation.html
27	Q&A: Blindness and Vision Impairments in the Workplace and the ADA	10/24/05	http://www.eeoc.gov/facts/blindness.html
28	Q&A: The Association Provision of the ADA	10/17/05	http://www.eeoc.gov/facts/association_ada.html
29	Cancer in the Workplace and the ADA	08/03/05	http://www.eeoc.gov/facts/cancer.html
30	The ADA: Your Employment Rights as an Individual With a Disability	05/21/05	http://www.eeoc.gov/facts/ada18.html
31	Job Applicants and the ADA	03/21/05	http://www.eeoc.gov/facts/jobapplicant.html
32	Guide: How to Comply with the ADA: A Guide for Restaurants and Other Food Service Employers	10/28/04	http://www.eeoc.gov/facts/restaurant_guide.html
33	Q&A: Persons with Intellectual Disabilities in the Workplace and the ADA	10/20/04	http://www.eeoc.gov/facts/intellectual_disabilities.html
34	Q&A: Epilepsy in the Workplace and the ADA	08/24/04	http://www.eeoc.gov/facts/epilepsy.html
35	The ADA: A Primer for Small Business	02/04/04	http://www.eeoc.gov/ada/adahandbook.html
36	Q&A: Diabetes in the Workplace and the ADA	10/29/03	http://www.eeoc.gov/facts/diabetes.html

TABLE 4: RELEVANT EEOC POLICY GUIDANCES			
#	POLICY GUIDANCE	DATE	LOCATION
37	ADA Technical Assistance Manual Addendum	10/29/02	http://www.eeoc.gov/policy/docs/adamanual_add.html
38	Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA	10/17/02	http://www.eeoc.gov/policy/docs/accommodation.html
39	The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964	07/06/00	http://www.eeoc.gov/policy/docs/fmlaada.html
40	Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA	07/27/00	http://www.eeoc.gov/policy/docs/guidance-inquiries.html
41	Q&A: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA	07/27/00	http://www.eeoc.gov/policy/docs/qanda-inquiries.html
42	Small Employers and Reasonable Accommodation	03/01/99	http://www.eeoc.gov/facts/accommodation.html
43	EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities	03/25/97	http://www.eeoc.gov/policy/docs/psych.html
44	EEOC Enforcement Guidance: Workers' Compensation and the ADA	09/96	http://www.eeoc.gov/policy/docs/workcomp.html
45	ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations	10/10/95	http://www.eeoc.gov/policy/docs/preemp.html
46	Facts About the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964	09/95	http://www.eeoc.gov/policy/guidace.html
47	Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States	10/93	http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html

TIP #13: Check Out the EEOC Informal Discussion Letters

The EEOC Informal Discussion letters are written by staff in the Office of Legal Counsel. These letters do not constitute official EEOC opinions. However, the letters do contain both informal discussion letters that respond to inquiries from members of the public and letters that respond to other federal agencies' and departments' requests for public comment. TABLE 5 is a list of the most recent discussion letters. The website contains letters from 1999 to date.

TABLE 5: RELEVANT EEOC INFORMAL DISCUSSION LETTERS			
#	TOPIC	DATE	LOCATION
1	ADA: Qualification Standards; Federal Vision Standards Applicable to Drivers of Commercial Motor Vehicles	01/13/14	http://www.eeoc.gov/eeoc/foia/letters/2014/ada_vision_standards_drivers_1_13.html

TABLE 5: RELEVANT EEOC INFORMAL DISCUSSION LETTERS			
#	TOPIC	DATE	LOCATION
2	ADA: Sign Language Interpreters	10/28/13	http://www.eeoc.gov/eeoc/foia/letters/2013/ada_sign_language_interpreters.html
3	Title VII and the ADA: Integrity Tests	09/09/13	http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_ada_integrity_tests.html
4	Title VII: Vaccination Policies, Religious Accommodation	07/24/13	http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_vaccination_policies_religious_accommodation_7_24.html
5	ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations	01/18/13	http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html
6	Title VII: Vaccination Policies and Reasonable Accommodation	12/05/12	http://www.eeoc.gov/eeoc/foia/letters/2012/tiitle_vii_vaccination_polices_and_reasonable_accommodation.html
7	ADA & ADEA: Hiring Practices	11/05/12	http://www.eeoc.gov/eeoc/foia/letters/2012/ada_adea_hiring_practices.html
8	Title VII: Vaccination Policies, Covered Entities, Religious Accommodation	11/02/12	http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation_and_vaccination.html
9	Title VII, ADA, GINA & ADEA: Video Interview	11/02/12	Title VII, ADA, GINA & ADEA: Video Interview
10	ADA & Title VII: High School Diploma Requirement and Disparate Impact	06/11/12	http://www.eeoc.gov/eeoc/foia/letters/2012/ada_title_vii_diploma_disparate_impact.html
11	GINA: Forensic Lab Exception to Rules prohibiting Acquisition of Genetic Information	06/06/12	http://www.eeoc.gov/eeoc/foia/letters/2012/gina_forensic_lab_exception.html
12	ADA: Qualification Standards; Disparate Impact	11/17/11	http://www.eeoc.gov/eeoc/foia/letters/2011/ada_qualification_standards.html
13	ADA: Definition of Disability under ADAAA	08/12/11	http://www.eeoc.gov/eeoc/foia/letters/2011/ada_definition_disability.html
14	ADA & GINA: Incentives for Workplace Wellness Programs	06/24/11	http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html
15	ADA & GINA: Confidentiality Requirements	05/31/11	http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_confidentrequre.html

PART III - RESPECT THE CRITICAL ROLE OF JOB DESCRIPTIONS

TIP #14: Make the DOL and the EEOC Happy– Use/Revise/Create Detailed Job Descriptions

Job descriptions are not required by federal law for most employers, ***but they are advisable and strongly recommended for many reasons***. Job descriptions are used directly or indirectly to:

- Assign work and document work assignments.
- Help clarify missions.
- ***Establish performance requirements***.
- Assign occupational codes, titles, and/or pay levels to jobs.
- Recruit for vacancies.
- ***Explore reasonable accommodation***.
- Counsel people on career opportunities and their vocational interests.
- Check for compliance with legal requirements related to equal opportunity, equal pay, overtime eligibility, *etc*.
- Make decisions on job restructuring.

- ***Evaluate requests for accommodation under the ADA***.

- ***Evaluate requests for any type of leave under the FMLA (including return to work qualifications)***

a. *Simple Approach to Job Descriptions*

Here is a simple approach to job descriptions. Make sure that the descriptions tell:

- Who (usually the incumbent or the supervisor).
- Does what work (including review of the work of others).
- Where (the work is done).
- When (or how often).
- Why (the purpose or impact of the work).
- How (it is accomplished).

To the extent practicable, the job description writer should use action verbs with an implied subject (who) and explicit work objects and/or outputs (what).

For example:

— *(Implied subject)* Evaluates *(action verb)* jobs *(what)* by assigning official title, occupational code and grade in accordance with the job evaluation system *(how)*.

— *(Implied subject)* Collects *(action verb)* key job information *(what)* from various sources, *e.g.*, work interviews and direct observation *(where)*.

b. *An "Essential" Task Can Be a Small Part of the Workload*

Typically, the tasks that comprise the bulk of the workload are the "essential functions." But a job that is just a small part of the workload could also be essential, particularly if the jobholder is the only one qualified to do it.

For example, a particular task may require a certified person, whether that task is an accounting filing or boiler inspection. Or, as another example, if only one person is available to answer the phone during the receptionist's lunch period, then answering the phone could be an essential function even though it is only an hour a day.

c. *Making the DOL Happy*

The DOL obviously thinks that job descriptions are important because it has included several places on DOL FORM WH-380-E: CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH CONDITION (FAMILY AND MEDICAL LEAVE ACT) to discuss it.

Specifically, Form 380-E provides for the following information to be completed:

SECTION I: For Completion by the EMPLOYER

Employee's essential job functions

_____

Check if job description is attached:_____

PART A: MEDICAL FACTS

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: __ No __ Yes.

If so, identify the job functions the employee is unable to perform:_____

_____

* * * * *

PART B: AMOUNT OF LEAVE NEEDED

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

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d. *Making the EEOC Happy*

On October 14, 2008, the EEOC published a guidance entitled, *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities*. *See* http://www.eeoc.gov/facts/performanceconduct.html.

This guidance (as well as other EEOC related publications) is premised upon the fundamental concept that an employer can identify and articulate the essential and marginal functions of a particular job. During an investigation, the

EEOC ***always*** requests a copy of the job description. An employer who has no job descriptions in place, or outdated or poorly written decisions faces harsh scrutiny, and the inference may be drawn that the employer's conduct regarding that employee was not based on a legitimate business necessity or other clearly articulated objective criteria.

TIP #15: Remember to Make Job Descriptions ADA/ADAAA Compliant

Writing job descriptions that are compliant with the ADA/ADAAA is tricky. In your efforts to be clear, you can also be exclusionary.

Take, for example, the requirement to be "able to walk" around the office. That language would be unnecessarily exclusionary if the actual requirement is just to be able to move around the office, from a desk to a file cabinet and back. That could easily be accomplished by, for example, an employee in a wheelchair who can't "walk." Here are some tips on managing the wording for most common tasks and demands:

a. *Wording for Time Required*

Here's some suggestions of the following terms for describing the amount of time a task takes:

- Task takes less than one-third of the time — describe as "seldom" to "occasionally"
- Task takes one-third to two-thirds of the time — describe as "occasionally" to "frequently"
- Task takes more than two-thirds of the time — describe as "constantly"

If the amount of time spent on a task or responsibility is "none," then omit that task from the job description.

b. *Wording for Describing Physical Demands*

1) General Descriptions

The general idea here, as mentioned above, is to avoid unnecessary exclusionary words. Also, if a physical demand is not essential in the performance of the job, reference to that demand should be omitted. TABLE 5 below provides some guidelines.

TABLE 5: SUGGESTED WORDING FOR PHYSICAL DEMANDS		
Physical Demand	**ADA/ADAAA Compliant Words**	**Job Description Language Example**
Stand or Sit	Stationary position	Must be able to remain in a stationary position 50% of the time.
Walk	Move, Traverse	The person in this position needs to occasionally move about inside the office to access file cabinets, office machinery, etc.
Use hands/fingers to handle or feel	Operate, Activate, Use, Prepare, Inspect, Place, Detect, Position	Constantly operates a computer and other office productivity machinery, such as a calculator, copy machine, and computer printer.
Climb (stairs/ladders) or balance	Ascend/Descend, Work atop, Traverse	Occasionally ascends/descends a ladder to service the lights and ceiling fans.
Stoop, kneel, crouch, or crawl	Position self (to), Move	Constantly positions self to maintain computers in the lab, including under the desks and in the server closet.
Talk/hear	Communicate, Detect, Converse with, Discern, Convey, Express oneself, Exchange information	The person in this position frequently communicates with students who have inquiries about their tuition bill or financial aid package. Must be able to exchange accurate information in these situations.
See	Detect, Determine, Perceive, Identify, Recognize, Judge, Observe, Inspect, Estimate, Assess	Must be able to detect funnel clouds from long distances.
Taste/Smell	Detect, Distinguish, Determine	Occasionally must be able to distinguish sweet and bitter flavors when creating desserts for Applewood Bakery's customers.
Carry weight, lift	Move, Transport, Position, Put, Install, Remove	Frequently moves Audio/Visual equipment weighing up to 50 pounds across campus for various classrooms and events needs.
Exposure to Work	Exposed, Work around	Constantly works in outdoor weather conditions.

2) Specific Descriptions

TABLE 6: PHYSICAL DEMANDS SPECIFIC DESCRIPTIONS	
EQUIPMENT/DEVICE OPERATION	
List all computers, peripherals, and other hardware **required** to perform this job:	
List all computer software **required** to perform this job:	
List all office machines **required** to perform this job:	
List any other machines (including heavy equipment) **required** to perform this job:	
List all tools involving manipulation that are **required** to perform this job:	
List all vehicles that **must** be operated to perform this job:	

c. *Wording for Describing Mental Demands*

1) General Descriptions

TABLE 7: SUGGESTED WORDING FOR MENTAL DEMANDS	
MENTAL DEMAND	**FUNCTION**
General Intelligence (typical requirement for machine operators, office staff, *etc*.)	Does the employee have the ability to learn and comprehend basic instructions and orientation on the job?
Motor Coordination Skills (typical for a hand assembler, automobile mechanic, watch repair technician)	Is the employee able to coordinate eyes, hand, and fingers rapidly and accurately and handle precise movements?
Coordination of Eyes, Hand and Feet (typical for a tractor trailer driver, foot press operator)	Does the employee have the ability to coordinate the eyes, hand, and feet with each other in response to visual stimuli?
Verbal Intelligence (typical for a sales clerk, production supervisor)	Does the employee have the ability to understand the meanings of words and respond effectively?
Numerical Intelligence (typical for an accounting clerk, a shipping checker)	Does the employee have the ability to perform basic arithmetic accurately and quickly?

2) Specific Descriptions

TABLE 8: MENTAL FUNCTION SPECIFIC DESCRIPTIONS	
MENTAL FUNCTION	**DESCRIPTION**
Comprehension	Ability to understand, remember, and apply oral and/or written instructions or other information
	Ability to understand, remember, and communicate routine, factual information
	Ability to understand complex problems and to collaborate and explore alternative solutions
	Ability to understand opposing points of view on highly complex issues and to negotiate and integrate different viewpoints
Organization	Ability to organize thoughts and ideas into understandable terminology
	Ability to organize and prioritize own work schedule on short-term basis (longer than one month)
	Ability to organize and prioritize work schedules of others on short-term basis
	Ability to organize and prioritize work schedules of others on long-term basis
Reasoning and Decisionmaking	Ability to apply common sense in performing job
	Ability to make decisions which have moderate impact on immediate work unit
	Ability to make decisions which have significant impact on the immediate work unit and monitor impact outside immediate work unit
	Ability to make decisions which have significant impact on the department's credibility, operations, and services
Communication	Ability to understand and follow basic instructions and guidelines
	Ability to complete routine forms, use existing form letters and/or conduct routine oral communication
	Ability to compose letters, outlines, memoranda, and basic reports and/or to orally communicate technical information

TABLE 8: MENTAL FUNCTION SPECIFIC DESCRIPTIONS	
MENTAL FUNCTION	**DESCRIPTION**
	Ability to communicate with individuals utilizing a telephone, computer or other electronic device; requires ability to hear and speak effectively on phone, and to use a computer or other electronic device
	Ability to express or exchange ideas by means of the spoke word, communicating orally with others accurately, loudly, and quickly
	Ability to make informal presentations, inside and/or outside the organization. Speaking before groups
	Ability to compose materials such as detailed reports, work-related manuals, publications of limited scope or impact, etc., and/or to make presentations outside the immediate work area
	Ability to formulate complex and comprehensive materials such as legal documents, authoritative reports, official publications of major scope and impact, etc., and/or to make formal presentations
Mathematics	No/some/extensive mathematical ability is required
	Ability to count accurately
	Ability to add, subtract, multiply, divide and to record, balance, and check results for accuracy
	Ability to compute, analyze, and interpret numerical data for reporting purposes
	Ability to compute, analyze, and interpret complex statistical data and/or to develop forecasts and computer models
Other	Additional comments regarding mental capability requirements:

d. *Wording for Describing Workplace Environmental Conditions*

TABLE 9: SUGGESTED WORDING FOR ENVIRONMENTAL CONDITIONS	
ENVIRONMENTAL CONDITION	**FUNCTION**
Noise Conditions (typical environmental condition for a manufacturing plant worker)	Is the employee exposed during a shift to constant or intermittent sounds at a level sufficient to cause hearing loss or fatigue?
Heat (typical for furnace operator or heat treater)	Is the employee subject to high temperatures that result in significant body discomfort?
Cold (typical for an outdoor worker in cold climates or a freezer operator)	Is the employee exposed to low temperatures that result in significant body discomfort?
Injury Exposure (typical for electricians, forklift truck operators, tractor trailer drivers)	Is the employee exposed to workplace hazards more frequently than normal? To potential injuries?
Atmospheric Exposure (typical for welders, solvent handlers)	Is the employee exposed to dusts, fumes, vapor or mists that could affect the occupational health of the employee?

TIP #16: Differentiate Between Marginal and Essential Functions

Marginal functions are those that are:

>	Passable	>	Extra
>	Peripheral	>	Accessory
>	Minimal	>	Borderline
>	Incidental	>	Nonessential

Essential functions are those that are:

*	Critical	*	Integral
*	Indispensable	*	Necessary
*	Crucial	*	Primary
*	Fundamental	*	Imperative

TIP #17: Beware of the Most Common "Essential Function" Mistakes

a. *Most Common Mistake—Function vs. Method*

One common mistake in identifying essential functions is confusing method with function. "An essential function is what the completed task is, not how that task is completed." Use results-oriented language wherever possible to avoid this problem. For example, do not say employees have "to lift 50-pound boxes" when the actual task is "to relocate 50-pound boxes." And do not say employees have to "walk" from one place to another when the actual requirement is to "move" from one station to another.

The second common mistake is to rely on assumptions about what the employee does in the job. "It is imperative that the employee actually perform the particular function for it to be considered essential." Therefore, do not rely on job titles or traditional roles for jobs. Find out what the person on the job actually does.

A third common mistake is to use percentages to determine essential functions. Generally, that is probably not good practice because the amount of time spent performing a function is not always indicative of whether or not a function is "essential."

b. *Factors to Determine Essential Functions*

So what criteria do you use? Typically, a number of factors are used to determine essential functions. No one factor is necessarily determinative. Here are the main considerations:

1) Employer's Judgment

An employer's judgment as to which functions are essential is important evidence; however, it is not the only evidence or prevailing evidence. Rather, the employer's judgment is a factor to be considered along with other relevant evidence. The employer's judgment can be quickly discounted if, for example, a court finds that the employer doesn't actually require all employees in a particular position to perform an allegedly essential function. Typically, however, the employer will not be second-guessed on production quality or quantity standards that must be met by a person holding the job, nor will the employer be required to set lower standards for the job.

2) Written Job Description

The written description of the job or position, based on job analysis, is also critical information. Note that the job description should be prepared before advertising or interviewing for the job. Job descriptions prepared after hire, or after a suit is filed, will be suspect, at best. A job description must accurately identify and clearly describe the functions that the employee is actually required to perform. An inaccurate or incomplete job description can be detrimental in court. Typically, employers may not claim functions as essential when they are not on a job description.

3) Amount of Time Spent Performing the Function

While the amount of time spent performing a particular function is clearly relevant to determine whether or not it is essential for purposes of the ADA, there are circumstances under which a function must be deemed essential regardless of the fact that it may be performed infrequently or have little time spent on it. For example, a clerical worker may spend only a few minutes a day answering telephones, but this could be an essential function of the position if no one else is available to answer the phones at that time and business calls would otherwise go unanswered.

4) The Consequences of Not Performing the Function

Another factor for determining whether a particular function is essential is the consequences of not requiring the incumbent of the position to perform the function. For example, although an airline pilot may spend only a few minutes of a flight landing an airplane, or a firefighter may only occasionally have to carry a heavy person from a burning building, these are essential functions of their jobs

because of the very serious consequences emanating from the inability of employees to perform them.

5) A Collective Bargaining Agreement's Terms

The terms of a collective bargaining agreement may be relevant to determining the essential functions of a position.

6) On-the-Job Experience

Another factor can be the work experience of people who have performed the job or are performing it. Given that past and current incumbents have actually performed the duties, their opinions should be an important indicator about whether a particular job function is essential.

TIP #18: Expressly State in the Job Description that Attendance is an Essential Job Function

ADA/ADAAA compliance can be challenging, as employers attempt to decipher whether a specific situation falls under the definitions of the law, such as when they must provide accommodations to an employee with a disability; what type of accommodation is ADA-compliant; and what functions of a job are considered "essential." Fortunately, a federal court in Florida recently provided some guidance with respect to whether an employee's regular, reliable attendance is an essential function of the job.

a. *Daniel Mecca v. Florida Health Serv. Ctr., Inc.*, No. 8:12-cv-2561-T-30TBM, 2014 U.S. Dist. LEXIS 13065 (M.D. Fla. Feb. 3, 2014).

Mecca suffered from panic attacks and anxiety. Initially, the Tampa General Hospital (TGH), attempted to work with Mecca by changing his schedule and granting his FMLA requests for these medical conditions. In 2010, Mecca returned from several weeks of FMLA leave with orders from his doctor limiting him to three days of work per week. Mecca acknowledged that this request would essentially allow him to leave whenever he suffered anxiety or panic attacks. Shortly thereafter, Mecca resigned from his position and then sued the hospital for claims including discrimination and retaliation under the ADA in failing to grant him leave to accommodate his disability and for interference and retaliation under the FMLA.

TGH recognized Mecca as a person with a disability, but argued that he was not qualified for ADA protection because he was unable to perform the essential functions of his position, which included regular attendance. Additionally, TGH argued that his requested accommodation for sporadic and indefinite leave was not a reasonable accommodation.

The district court agreed, stating that regular attendance was an essential function of Mecca's job. Additionally, leave had already failed to help Mecca maintain a regular schedule and there was no indication that Mecca's medical conditions would improve in the foreseeable future. The court held that the law does not require employers to carry the burden of such uncertainty, and that the leave was therefore not a reasonable accommodation in this situation. The court also dismissed Mecca's FMLA claim because he had never been denied any requested leave, and he failed to show any discriminatory motive in an adverse employment action.

b. *Practice Points*

- Assessing whether an employee qualifies as disabled, or whether an accommodation is ADA-compliant, is essentially fact specific. Employers should consider — on a case-by-case basis — (1) whether showing up for work on a predictable basis is essential for a particular position; and (2) whether accommodating an employee will ensure his or her regular attendance in the immediate future. Depending on the situation, the ADA may still require employers to be somewhat flexible with their attendance policies.

- If regular, dependable attendance and punctuality are truly essential to a particular position, employers should include it in a written job description. Employers are also advised not to immediately deny accommodation requests, but to engage in an interactive process with employees to determine whether they can make a reasonable accommodation without undue hardship.

- While regular attendance can undoubtedly be an essential function of many jobs, the ADA can present a variety of legal issues when employers are dealing with employee attendance and leave situations. It is also important to understand the interaction between the ADA and FMLA and how they overlap. It is crucial that employers carefully consider every accommodation or leave request made by employees suffering from a disability or serious health condition.

PART IV - CONQUER CERTIFICATION CONFLAGRATIONS

TIP #19: Staple/Attach/Email a Copy of the Job Description to the FMLA Certification Forms

To justify leave, employees must submit documentation from a health care provider certifying that they suffer from a "serious health condition" as defined by the FMLA. When you provide certification and return-to-work forms to be completed by the employee's health care provider, you should attach a job description. So often, employers do not take advantage of this opportunity.

Providing a job description will enable the health care provider to make an educated assessment about the employee's ability to perform essential job functions based on a detailed, accurate description of his responsibilities rather than on his potentially skewed or self-serving description. To be effective for this purpose, job descriptions should be up to date, describe tasks with specificity (including both physical and mental requirements), and distinguish between essential and marginal job functions. *See* discussion above.

TIP #20: Conspicuously Specify Certification Due Dates and Provide Reminders

You may deny leave and/or discipline employees for unauthorized leave when they do not timely submit medical certification justifying their leave. Specifically, employees must submit the certification within 15 calendar days of your request unless it isn't practicable despite a diligent, good-faith effort.

While some employers chase employees for the certification long after the 15 days, others immediately discharge without any contact with the employee. Neither action is necessarily prudent. Rather, you should conspicuously specify the due date on the certification form to notify the employee and/or health care provider of the applicable requirements. This will assist the employee during a difficult time when she may not be as diligent as usual or better enable you to hold an uncooperative employee accountable for failing to fulfill her obligation.

In addition, reminding an employee, either by telephone or letter, of an impending due date will have the same benefits. Not only will these actions help you in the timely receipt of a certification, but they will uncover difficulties the employee is having in obtaining a timely certification sooner rather than later.

TIP #21: Closely Scrutinize Completed FMLA Certification Forms

Invariably, health care providers who complete FMLA certification forms provide inconsistent information. For instance, the form may state that the employee is not incapacitated from working, but then go on to request FMLA leave for 1 or 2 times per month, for up to 2 days per episode. Other times, the doctors' estimates are frankly unbelievable, such as an employee with migraine headaches being limited to working only 50 hours per week. Employers often just confirm that an employee has submitted a certification and place the certification in a file. That is unfortunate since in many circumstances, certifications submitted by employees do not justify their requested leave. Knowing what to look for, however, is key. You should carefully review a certification to determine whether it:

- ✓ was completed by an appropriate health care provider;
- ✓ is completely filled out;
- ✓ actually sets forth a serious health condition;
- ✓ clearly supports a need for leave in sufficient detail, including definite time frames;
- ✓ is internally consistent; and
- ✓ is free of anything that appears suspicious.

Identifying problems early allows you to assess and address them in a timely manner. Alternatively, you may have to address such problems after leave has mistakenly been approved and/or the situation has deteriorated.

TIP #22: Use the Second/Third Opinion Option

The FMLA regulations provide employers with a process that involves referring the employee for a second medical opinion when the employer has reason to doubt the validity of the employee's medical certification. While this must be at the employer's expense, it is sometimes valuable to have an independent health care provider evaluate the employee and his or her request for FMLA leave. When the second opinion differs from the employee's doctor, a third and binding opinion is permitted.

TIP #23: Don't Be Afraid to Seek Recertifications

Proper use of medical certifications is one of the clearest ways to curb FMLA abuse. By requiring that a medical certification be completed by a healthcare provider, the

employer will be able to evaluate not only whether the employee is eligible for FMLA leave, but also whether the leave they take is consistent with what is medically necessary. Get the medical certification forms completed fully and consistently for all employees taking FMLA leave.

Do not accept incomplete, unclear, medical certifications. Make sure that you have all of the information that you need to determine whether it is a proper condition. Employers also have the right to confirm that the medical certification is authentic if there is any doubt. The medical provider can be asked to confirm that the form you received is the same as what they have on file.

Separately, if there is reason to doubt the medical opinion, the employer also has the option to seek a second opinion (and a third if the two do not match).

a. *Timing*

You should allow an employee at least 15 days to return a recertification unless it is impracticable for the employee to do so despite his diligent good faith efforts.

b. *Recertification of Conditions Certified as Lasting less than 30 Days*

If the original medical certification indicates that the minimum duration of the condition will be less than 30 days, you may request recertification of the condition every 30 days in connection with an absence.

c. *Recertification of Conditions Certified as Lasting More than 30 Days*

If the original medical certification indicates that the minimum duration of the condition will be more than 30 days, you generally must wait until the minimum duration expires before requesting recertification in connection with an absence. In all cases, you may request a recertification every six months (even if the original certification indicated the minimum duration is greater than six months) in connection with an employee's absence.

d. *Suspicious or Suspected Fraudulent Circumstances*

The FMLA allows you to request recertification more frequently than every 30 days or inside the "minimum duration" period when:

✓ the employee requests an extension of leave;

✓ circumstances described in the previous certification have changed significantly (*e.g.*, an employee has a pattern of using unscheduled FMLA leave for migraines in conjunction with her scheduled day off); or

✓ you receive information that casts doubt on an employee's stated reason for the absence or the validity of the certification (*e.g.*, an employee who is on FMLA leave for four weeks to recover from knee surgery plays in a company softball league game during her third week of leave).

In seeking recertification for one or more of these reasons, you may request the same information permitted for the original certification. Importantly, you may also give the health care provider a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent the pattern of absences.

e. *Uniform and Consistent Application*

To avoid confusion, develop and follow a consistent procedure to determine when and under what circumstances recertification will be required.

TIP #24: Make a Preliminary Designation of Leave While Awaiting Certification or Second Opinions[9]

If the employer knows the reason for the leave but cannot confirm that the leave is qualifies as FMLA leave (*e.g.*, when a medical certification has been delayed, or second or third medical opinions are being obtained). In this situation, the employer should make a preliminary designation that would become final when the employer learns information that confirms the leave qualifies as FMLA leave. If the information does not confirm that the leave qualifies as FMLA leave, the employer may withdraw the FMLA designation in writing, within two business days.

PART V - BECOME AN FMLA MECHANIC

TIP #25: Determine FMLA Eligibility *Before* Approving Leave

What about situations where a company has several work sites that are geographically spread apart with only one

[9] Steven E. Clark, *The Family and Medical Leave Act*, §25.3(E), TEXAS EMPLOYMENT LAW (Laura Franze ed., 2012).

common HR department? These worksites may have employees who are be eligible for FMLA leave, but some may not be if they work at a location with fewer than 50 employees that's located within 75 miles of the main office.

Managers must use caution when advising one of these employees that he can take FMLA leave without verifying eligibility. Providing such advice may obligate to company to provide all of the associated benefits, even if the employee is not eligible.

a. *Allen v. MidSouth Bank*, C.A. No. H-12-1618, 2013 U.S. Dist. LEXIS 25825 (S.D. Tex. Feb. 25, 2013).

Allen was terminated shortly after taking what she believed was FMLA leave for childbearing. HR notified Allen that her FMLA request was approved, Allen subsequently took 12 weeks off. But it turned out that Allen worked at a location with fewer than 50 employees. The company terminated her, reasoning it did not have to reinstate her.

Allen sued and alleged failure to reinstate. The employer argued that she was not an eligible employee despite the erroneous letter. The district court said the case could proceed, based upon equitable estoppel, which essentially says that if someone relies on a mistake to her detriment, the other party cannot "take back" the mistake.

TIP #26: Change the FMLA Leave Year to a Rolling Year Measured "Backward"

The FMLA allows employers to define the 12-month FMLA year in a number of different ways, such as a calendar year, a look-forward period (from the time the employee first takes leave), or a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

The rolling 12-month period typically is the best choice for employers, since it avoids stacking 12-week FMLA periods back-to-back. Keep in mind, though that employers must provide employees with 60 days' notice of any change to the FMLA 12-month period.

TIP #27: Clearly Communicate, in Writing, the Method Used to Calculate FMLA Leave

An employer may change the method of calculation, but it must promptly and clearly notify its employees of such a change and that change should not result in employees being deprived of accrued FMLA eligibility.

Additionally, employers must make sure they accurately calculate an employee's FMLA eligibility before advising the employee. Finally, as a practical matter, it is advisable to consider business judgment principles when long-term, otherwise satisfactory employees, suddenly face termination based on what judges or juries might likely perceive as a mere "technicality."

a. *Thom v. American Standard, Inc*., 666 F.3d 968 (6th Cir. 2012).

In *Thom*, the Sixth Circuit awarded liquidated damages in a case "arising from confusion as to when an employee should return to work after his leave."

The plaintiff, an employee who had worked for American Standard for 36 years, went on FMLA leave to undergo surgery for a non-work related injury. The company granted his leave request and informed him, in writing, that his leave would extend until June 27. Following his surgery, the plaintiff began recovering faster than expected by his doctor. His doctor provided him with a note releasing him to light duty beginning May 31 and to full duty on June 13. As a result, the plaintiff attempted to return to work on May 31, which was before the expiration of his approved FMLA leave. He was not allowed to return to work at that time because the company did not permit employees with non-work related injuries to perform light duty work temporarily after FMLA leave.

On June 14, the company contacted the plaintiff to ask why he had not returned to work the previous day. The plaintiff explained that he was suffering from increased pain and would return to work on June 27, as originally scheduled. The plaintiff received a doctor's note explaining his condition and delivered it to the company on June 18. When he delivered the doctor's note, he was informed that each day between June 13 and June 17 was as an unexcused absence and, consequently, his employment was terminated.

The FMLA makes it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the FMLA. *See* 29 U.S.C. § 2615(a)(1). The plaintiff's complaint alleged that the company interfered with his FMLA rights by terminating his employment. The company argued that, based upon the method by which it calculated FMLA leave eligibility, the plaintiff actually exhausted his FMLA leave eligibility on June 13.

The FMLA allows an employer to select one of four methods for calculating leave. One such method is the "rolling" method, which calculates an employee's leave

year "backward from the date an employee uses any FMLA leave." The "calendar" method is another way to calculate leave, and provides for 12 work weeks of leave per calendar year. In this case, under the calendar method, the plaintiff's FMLA entitlement would have run through June 27, as the company originally instructed him. However, the company's position was that it used a "rolling" method and, therefore, the plaintiff's FMLA leave was exhausted before his employment was terminated. The district court granted summary judgment for the plaintiff on his FMLA interference claim and awarded him $99,960 in attorney's fees, $2,732 in costs, and $104,354 in back pay.

The company appealed the district court's decision, contending it had the right to decide which method of FMLA calculation would apply to its employees and that notice of the method should be imputed to the plaintiff because the union that represented him was aware of the calculation method. The appellate court found no merit in this argument and, agreeing with the district court that the company never actually informed the plaintiff of this policy, held that "employers should inform their employees in writing of which method they will use to calculate the FMLA leave year." *Thom*, 666 F.3d at 974.

The court went on to say that clear written notice ". . . is consistent with the principles of fairness and general clarity." *Id.* It was not helpful that in this case the company originally informed the plaintiff that his leave would expire on June 27 (under the calendar method) and did not notify the plaintiff of the change in the calculation method to the rolling method until it was defending the lawsuit.

Yet, the appellate court did more than just affirm the district court's ruling – it also granted the plaintiff liquidated damages, finding that the company did not establish that it acted both reasonably and in good faith – two elements that must both be proven to avoid liquidated damages. The court noted that there is "a strong presumption in favor of awarding liquidated damages that are double the amount of any compensatory damages." *Id.* at 976.

TIP #28: Stringently Follow the FMLA Notification Deadlines

The FMLA imposes very specific deadlines on employers for processing requests for FMLA leave. First, within five (5) business days (absent extenuating circumstances) of learning that the employee needs FMLA leave, the employer must provide the employee with the "Notice of Eligibility Rights and Responsibilities Form," or a similar form prepared by the employer. *See* WH-381 (Appendix 3).

Second, if the employer requires the employee to submit a certification form, the employer must provide the employee with at least 15 calendar days (unless this deadline is not practicable under the particular circumstances) to submit the completed certification form.

Third, within five (5) business days after receiving the certification form, the employer must provide the employee with an FMLA designation form, informing the employee whether the leave request has been approved. *See* WH-382 (Appendix 4). However, if the certification form is incomplete or insufficient, then the employer must provide the employee with seven (7) calendar days (unless not practicable under the particular circumstances, despite the employee's diligent good faith efforts) to cure any such deficiency. Employers should advise employees in writing of all applicable deadlines and the consequences for failing to meet the deadlines.

TIP #29: Consider Granting an After-the-Fact Leave Request

Sometimes, simple medical procedures turn out to be not so simple after all. A few days off for outpatient surgery may morph into a lengthy FMLA leave and render the employee disabled. Do not jump the gun and terminate the employee without considering whether he or she is now entitled to FMLA leave and reasonable accommodations. Follow the procedures for obtaining FMLA certification just as you would if the employee had originally applied for leave.

TIP #30: Run PTO, Vacation, Sick Time, STD and Workers Compensation Concurrently with FMLA Leave

Require any form of accrued leave to run concurrently with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA only when the need is legitimate. *See generally* 29 C.F.R. § 825.207 (regulations discussing substitution of paid leave).

Make sure that you notify employees of this policy in writing. The best places to do this are: 1) in the FMLA policy stated in the employee handbook; and 2) on the DOL FMLA DESIGNATION NOTICE form(WH-382)(Appendix 4).

TIP #31: Require Employees to Follow Paid Leave Policies

Employers may require that employees use up paid leave time for their intermittent FMLA absences. In fact, all employers should include such a requirement in their FMLA policies and enforce the practice of using up paid time off during FMLA leave, in order to prevent the situation where an employee can take paid leave after their FMLA leave expires and thereby extend a leave of absence beyond the FMLA entitlement.

The DOL regulations made clear that you may require employees to abide by your paid-time-off policies in order to be paid for FMLA leave time. For example, you may require the employee to call a certain person or a particular telephone number to notify the organization of an FMLA absence.

The FMLA standing alone would not allow you to request a doctor's note for every absence if there is a valid medical certification in place. But if your written paid-time-off policy calls for it, you may require a doctor's note for paid-leave time. (Remember, that if the employee fails to provide the note, FMLA leave cannot be denied. The leave time would simply be unpaid. The prospect of paid leave provides a strong incentive to comply).

TIP #32: Don't Allow Employees to Work from Home While on FMLA Leave

Working from home while on FMLA leave is an oxymoron. Allowing employees to do so creates a myriad of FMLA and FLSA issues. The best advice is to have a written provision in the company's FMLA policy that prohibits such activities. To enforce the policy, consider restricting employees' access to email, text messages and voice mail.

Jason S. Boulette, Tanya DeMent, and Teresa Burlison (Boulette & Golden, L.L.P) have written an excellent analysis of the issues that arise when employees are allowed to work from home while on FMLA leave. The following discussions in TIP #30 are from their CLE paper.[10]

a. *Time Working from Home Cannot be Counted Against FMLA Leave!*

To be eligible for FMLA leave, an employee must work at least 1,250 hours in a twelve month period. *See* 29 C.F.R. §825.110(a)(2).

1) Donnelly v. Greenburgh Ctr. Sch. Dist., 691 F.3d 134 (2d Cir. 2012).

Recently, the Second Circuit examined whether time spent working from home counts towards those required hours. In *Donnelly*, a school teacher alleged he was denied tenure for taking FMLA leave for gallbladder surgery. The school district filed a motion for summary judgment on grounds that the plaintiff was a few hours shy of the 1,250 hours required for FMLA eligibility and thus his leave could not have been FMLA leave and the denial of tenure could not be retaliatory.

The plaintiff responded by claiming that, in addition to his 7.25 hour workday under the collective bargaining agreement between the teachers and the school district, he also worked about 1.5 hours per day from home. The magistrate found that the plaintiff had not produced reliable evidence that he actually spent 1.5 hours performing work integral to his job from home each day and was therefore not eligible for FMLA leave and separately found the plaintiff could not make a prima facie case of retaliation for the denial of tenure for reasons unrelated to his leave.

The district court agreed that the plaintiff could not make a *prima facie* case of retaliation for reasons unrelated to the leave and did not address the magistrate's recommendation that the plaintiff was not eligible for FMLA leave.

The Second Circuit reversed the ground on which the district court had granted summary judgment and then separately held that the plaintiff's evidence regarding his hours worked outside of school hours was sufficient to create a genuine issue of material fact regarding whether he worked enough hours to qualify for FMLA leave, pointing to the DOL's regulation regarding the hours eligibility requirement:

> "In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked ..., the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.800 for definition) of an

[10] Jason S. Boulette, Tanya DeMent, Teresa Burlison, *The Changing Workplace: New Questions Under Old Laws*, U.T. 2013 LABOR AND EMPLOYMENT LAW CONFERENCE (May 16, 2013).

> elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave." *Id*. at 142 (quoting 29 C.F.R. § 825.110(c)(3)).

The Second Circuit also rejected the school's argument that the applicable collective bargaining agreement—which specified the plaintiff worked 7.25 hours per day, producing the almost-there number of 1,247 hours worked when multiplied by the 172 days plaintiff had worked—controlled, pointing once again to the DOL's regulations:

> "The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used." *Id*. (quoting 29 C.F.R. § 825.110(c)(1)).

As the Second Circuit explained its reasoning, it made it clear that the DOL's regulations place the burden on the employer to prove an employee's hours worked when there is a dispute regarding the accuracy of the employer's time records and that all hours worked must be counted, regardless of the terms of any other agreement or contract between the parties.

Obviously, as more and more employees work away from the worksite (whether checking email, answering phone calls, or logging in remotely to work on the employer's network), this ruling advises caution in denying an employee's request for FMLA leave on a strict "in the office" hours count, even when the employee has not logged his or her off-site hours, and emphasizes the potential significance of accurate records regarding hours worked for employees who do not normally record hours worked.

b. *By Definition, Employees Who Are on FMLA Leave Are Unable to Perform Their Jobs–so How Can They "Work" from Home?*

Under the FMLA, an eligible employee is entitled to up to 12 workweeks of leave during any 12-month period "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 is "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care . . . or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

Under the regulations, "continuing treatment" means a period of incapacity of more than three consecutive calendar days that also involves treatment two or more times by a health care provider or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. 29 C.F.R. § 825.114(a)(2)(1).

"Incapacity" means the inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom. 29 C.F.R. § 825.113(b).

As a threshold matter, it should be noted that even if technology enables an employee to perform the functions of his or her position, the employee is still considered "incapacitated" if the employee is unable to perform other regular daily activities. *Id*. Indeed, even with respect to an employee's ability to do his or her job, the FMLA regulations define "unable to perform the functions of the position" to include situations where an employee is unable to work perform at least *one* of the essential functions of the employee's position. 29 C.F.R. § 825.123. Accordingly, an employee's ability to perform *some* work does not necessarily mean that he or she is not entitled to FMLA leave, if he or she remains unable to perform at least one other essential functions of his or her job.

1) Branham v. Gannett, 619 F.3d 563 (6th Cir. 2010).

Branham was a receptionist for *The Dickson Herald* who was fired for excessive absenteeism but claimed entitlement to FMLA leave and sued for interference and retaliation. In support of its motion for summary judgment, *The Dickson Herald* argued that Branham was not eligible for leave under the FMLA as a matter of law, because she could not establish that she was incapacitated for a period of more than three days. Its argument was based, in part, on the fact that Branham did some work from home on "postal reports and subscription issues" while she was absent. *Id*. at 566, 569.

The Sixth Circuit found that, despite Branham's work from home, there was still a genuine issue of material fact regarding her incapacity, because "a person can be incapacitated despite being able to do some of her regular work."

2) Siracuse v. Roman Catholic Diocese of Brooklyn, 2010 WL 627114 (E.D.N.Y. Feb. 23, 2010).

In this case, the employer moved for summary judgment on the employee's interference and retaliation claims under the FMLA, arguing that "because plaintiff has consistently taken the position that she was at all times able to perform the functions of her position and that she performed her counseling duties from home just as effectively as if she had been there in person, she was not subject to the FMLA and cannot make any claims under the Act." *Id*. at *6.

The court disagreed and denied the employer's motion, explaining that although plaintiff was able to perform her job with accommodation working from home, there were days she was unable to work prompting her need for intermittent leave. In short, the court explained, the fact that the plaintiff was able to work at the conclusion of each intermittent leave period did not result in her losing protection with respect to those times when she was unable to work.

c. *Pressuring Employees to Work from Home While on FMLA Is Also Prohibited*

The FMLA prohibits interference with the exercise or attempt to exercise any right provided for under the Act. Under the regulations, "interfering with" the exercise of an employee's rights includes not only refusing to authorize FMLA leave, but also discouraging an employee from using leave. 29 C.F.R. § 825.220(b). The temptation to use technological advances to "encourage" an employee who is otherwise eligible for FMLA leave into working rather than taking time off has opened another front of potential liability for unwary employers.

1) Butler v. Intracare Hosp. North, 2006 WL 2868942, (S.D. Tex. Oct. 4, 2006).

Kathy Butler verbally notified Valinda Allen, her direct supervisor, that she needed to take time off to care for her husband who had been diagnosed with non-Hodgkins Lymphoma and was scheduled to undergo surgery. Instead of giving Butler leave, Intracare provided her a computer to take home and suggested she work remotely following her husband's surgery. Unfortunately, Butler's husband became critically ill following his surgery, and Butler decided not to work from home and instead used her vacation and sick time so she could care for her husband. Butler updated Intracare on her husband's status on a nearly daily basis.

After approximately three weeks, Butler attempted to use the computer Intracare had given her but found it did not function properly. When Butler called Allen to tell her about the issue, Allen asked Butler to come in to the office. When Butler came to the office, she was brought into a meeting with Allen, Deo Shanker (a company officer), and Teisha York (hospital administrator). Shanker informed Butler that she was being terminated, that Intracare was concerned about her emotional health, and that she should come back in three months when she and her husband were doing better, at which point Intracare would find another position for her at the hospital. After her termination meeting, Butler spoke with Shelly DeSilva, another manager, who told her that she and Allen thought Butler needed to take FMLA leave but that Shanker had said that could not happen.

Butler sued Intracare for FMLA interference and retaliation. Intracare moved for summary judgment on various grounds, arguing (among other things) that Butler failed to provide adequate notice of her need for FMLA leave, that Butler was never denied leave, that Butler lost no benefits as the result of an FMLA leave, and that Intracare never failed to reinstate Butler following a leave.

After finding there was at least a fact issue with respect to the adequacy of Butler's notice, the trial court denied the Intracare's motion on the interference claim, because, among other things, a reasonable fact finder could infer that Butler was discouraged from taking FMLA leave when Intracare suggested she work from home rather than take the leave. The court explained its reasoning as follows:

> "The facts viewed favorably to Butler suggest the following: Butler sought to exercise her right to take FMLA leave; rather than grant the leave, Intracare persuaded Butler to work from home. Due to the seriousness of her husband's medical condition, Allen and DeSilva determined that Butler would need to take FMLA leave, not only because of the serious medical condition of her spouse, but because Butler's own emotional state precluded her from working. Allen and DeSilva relayed this conclusion to Shanker. Shanker decided this was not an option and terminated Butler rather than grant the FMLA leave. Under this view, not only did Intracare have notice of Butler's need to take FMLA leave, it was the very

> fact that they concluded she needed FMLA leave that led to Intracare terminating her." *Id*. at *4.

This raises the question of whether an interference claim arises every time an employee who is out on leave performs some work from home, which as any modernized employer or employee can tell you is becoming a more and more frequent occurrence. Unfortunately, as is often the case, the answer is fact-specific and depends on the extent of the work and whether the work was done voluntarily or under pressure. Broadly speaking, several courts have held that fielding occasional calls about one's job—such as passing on institutional knowledge to new staff or providing closure on assignments—while on leave is a professional courtesy that does not give rise to an interference claim.

2) Reilly v. Revlon, Inc., 620 F. Supp. 2d 524 (S.D.N.Y. 2009).

3) Kesler v. Barris, Sott, Denn & Driker, P.L.L.C., 482 F. Supp. 2d 886 (E.D. Mich. 2007).

4) Soehner v. Time Warner Cable, Inc., 2009 WL 3855176 (S.D. Ohio Nov. 16, 2009).

In both the *Reilly* and *Kesler* cases, the plaintiffs complained of co-workers calling them from home to find out where things were located but admitted the calls were short and did not require follow-up work. *Reilly*, 620 F. Supp. 2d at 537; *Kelser*, 483 F. Supp. 2d at 911. The plaintiffs also acknowledged that they did not produce any actual work product or complete any assignments while on leave. Under these circumstances, the courts dismissed the claims of the respective plaintiffs on summary judgment, finding the employers did not violate plaintiffs' rights to leave.

In the *Soehner* case, the plaintiff advanced an interference claim on the theory that he felt pressured to take phone calls and attend to work matters while he was on FMLA leave. The court dismissed plaintiff's claim, because his own deposition testimony indicated he had voluntarily engaged in work activities while on leave and never told anyone not to call him or that he felt pressured to return to work prematurely.

d. *Using Common Sense Approaches*

The net take-away from these cases seems to counsel a common sense approach. First, while technology may make it possible for an employee to perform his or her job in the face of an otherwise incapacitating illness or injury, courts recognize that employees have a right to time off under the FMLA if their conditions (or the conditions of their immediate family members) in fact meet the definition of a serious health condition (or other qualifying event). If an employee wishes to work from home while sick, that is one thing. But pressuring the employee to work from home instead of taking time off is likely to lead to claims of interference and retaliation.

TIP #33: Don't Arbitrarily Reassign an Employee on FMLA Leave

Due to the disruption of operations that may be caused by an employee on FMLA leave, employers often wish to reassign the employee on FMLA leave to a position in which the employee's absence may be more easily accommodated. However, the FMLA limits an employer's ability to require an employee to transfer positions.

First, employers may only reassign employees who need intermittent or reduced schedule leave.

Second, the reassignment is permissible only if: (a) the intermittent or reduced schedule leave is due to planned (*i.e*., foreseeable) medical treatment for the employee, the employee's family member or a covered servicemember; (b) the intermittent or reduced schedule leave is due to a period of recovery from a serious health condition of the employee or the employee's family member, or an injury/illness of a covered servicemember; or (c) when the employer has agreed to permit the employee to take intermittent or reduced schedule leave due to the birth of a child or placement of a child for adoption/foster care.

Third, the reassignment must be limited to the period for which the employee requires the intermittent or reduced schedule leave and to a position for which the employee is qualified and better accommodates the employee's need for leave.

Fourth, the employer must ensure the employee receives equivalent pay and benefits while in the alternative position. Employers may not transfer employees to a position in an effort to discourage the employee from taking FMLA leave. As an example, even if pay and benefits are the same, an employer should not transfer a white collar worker to a janitorial position, as this may be viewed as interfering with the employee's FMLA rights.

Finally, employers may not require a transfer when the employee will need intermittent or reduced schedule leave on an unforeseeable basis.

TIP #34: Make Sure that Fitness-for-Duty Policies Cover All Medically Related Absences (Including FMLA Leave)

Employers need to be careful about fitness for duty certifications when dealing with employees on FMLA leave. An employer may have a policy requiring a medical provider to certify that an employee is well enough to return to work, but the policy cannot apply just to employees who have taken FMLA leave–otherwise it would be considered retaliatory.

If the employer has a policy that all similarly situated employees who take any kind of medical leave must show fitness-for-duty, it is permissible to require that for employees who have taken a block of time of FMLA leave. Remember however, that fitness-for-duty certification cannot be required for employees who take intermittent FMLA leave. *See* 29 C.F.R. § 825.312(f).

TIP #35: Don't Engage in Fishing Expeditions on Fitness-for-Duty Certifications

The DOL regulations specifically state that "an employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave." *See* 29 C.F.R. § 825.312(b). Seeking information beyond the initial qualifying condition not only violates the FMLA, but arguably would constitute an impermissible and overly broad medical inquiry under the ADA (particularly in the absence any request for reasonable accommodation).

The certification from the employee's health care provider must state that he is able to resume work. You may require that the certification specifically address the employee's ability to perform the essential functions of his job. To require such a certification, you must provide the employee with a list of the essential functions of his job and indicate in the designation notice that the certification must address his ability to perform those essential functions. If you satisfy these requirements, the employee's health care provider must certify that he can perform the identified essential functions of his job.

TIP #36: Send the Employee's Health Care Provider a Copy of the Job Description Ahead of Time to Review for the Fitness-for-Duty Certification

An employer requiring a fitness-for-duty certification must inform the employee of the requirement in the initial designation letter. The best way to do this is to complete the requisite section on DOL Form WH-382 (Appendix 4). Second, the employer needs to provide the health care provider with a sufficient description of the essential job functions to make the fitness-for-duty certification meaningful. Send a copy of the job description to the health care provider or attach it to WH-382 and tell the employee to give it to their health care provider. The certification itself need only be a simple statement of an employee's ability to return to work with or without restrictions.

TIP #37: Don't Ask for Second Opinions on the Fitness-for-Duty Certification

You may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. You may not delay the employee's return to work while clarification with the health care provider is being made. ***No second or third opinions on a fitness-for-duty certification may be required***. *See also* 29 C.F.R. § 825.312(b) ("the employer may not delay the employee's return to work while contact with the health care provider is being made).

Once the employee returns to work and issues arise regarding his/her ability to perform the job, the employer's recourse is to simply address the matter as a performance issue rather than an FMLA medical issue.

TIP #38: Don't Send the Employee to the Company Doctor for the Fitness-for-Duty Certification

The FMLA requires employees to submit fitness-for-duty certifications from their own health care providers upon request when they return from FMLA leave. *See* 29 C.F.R. § 825.312(b).

TIP #39: Don't Automatically Terminate an Employee When the Employee is Unable to Return to Work Following the Expiration or Exhaustion of FMLA Leave (*See also* TIP #40)

a. *Rincon v. AFSCME*, No. 13-16845, 2016 U.S. App. Lexis 2969 (9th Cir. Feb. 19, 2016).

Patience has its rewards, especially when dealing with a newly disabled employee who might not be able to return to her job. Offering extended time off before terminating that worker may mean she won't win a disability lawsuit when it becomes apparent to everyone that she will never be able to perform all the essential functions of her position.

Melanie Rincon worked as a union organizer. Rincon received three separate extended leaves of absence of 12 months, six months and 15 months. Her initial problem was a work-related injury; later, she had chronic fatigue syndrome, fibromyalgia, recurrent migraine headaches, insomnia and hypertension.

Rincon continued to be paid during her third leave period due to a leave-share program, but eventually she was terminated.

Rincon sued under the ADA, alleging her employer refused to accommodate her disability. The union explained that her job as a union organizer required her to sometimes work long hours each workday, and sometimes to work seven days per week. It said that while it had been willing to make accommodations in the form of extended leave far in excess of what the FMLA requires, it was not legally required to remove essential functions from her job description or keep her on the payroll indefinitely.

The court agreed. It said the union had already done more than was required under both the ADA and the FMLA when it extended her leave three times. It tossed out Rincon's lawsuit.

TIP #40: For Unpaid Leaves of Absence Beyond the FMLA Leave Period, Use the ADAAA Interactive Process to Determine the Accommodation[11]

The FMLA allows eligible employees to take up to 12 weeks of unpaid medical leave in a 12 month period. At the same time, many employers provide, as a matter of policy, a specified length for unpaid leaves of absence. But what of the employee who has exhausted (or is not yet eligible for) such leave? Does an employer have a legal obligation to grant a request for unpaid leave to an employee who is not eligible for FMLA leave or after it has been exhausted? Where its policies provide for leave in excess of FMLA, may an employer place a limit on the length and terminate an employee who remains unable to work after?

The practical answer is "probably." Under the ADA/ADAAA an employer violates the statute by, among other things:

> "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . ."

In both its regulations and enforcement guidance, the EEOC has made clear its view that an unpaid leave of absence can be a required reasonable accommodation and, for the most part, the court has agreed.

An important first step is understanding the important distinctions between the statutory right under the FMLA and the right as a reasonable accommodation under the ADA.

❶ For the ADA even to apply, the employee must be seeking because of his or her own condition that must rise to the level of a disability under the statute. The ADA does not require an employer accommodate an employee's need or desire to care for another, nor does every "serious medical condition" under the FMLA constitute a "disability" under the ADA.

❷ Unlike the FMLA, an employee is not entitled to a requested leave if the employer offers another reasonable accommodation which would permit the employee to continue working. While the right to leave under the FMLA is absolute, the ADA provides only the right to a reasonable accommodation, not necessarily to the particular accommodation the employee prefers. Conversely, an employer may not insist that a disabled employee take a full-time, unpaid leave if he or she does not wish to do so and there is a less-drastic accommodation. In either case, however, permitting sporadic or unscheduled absences which do not permit the employer to cover the employee's absence will virtually never be seen as reasonable.

❸ A request for leave under the ADA is subject to the same requirement as any other reasonable accommodation request that the employer and employee participate in good faith in the "interactive process" to determine the nature and scope of possible accommodations. This is precisely the opposite of the situation under the FMLA, where even a simple employer request that the employee reconsider some aspect of the request can constitute unlawful interference with the statutory right.

❹ Fourth, the purpose of a leave under the ADA is different than under the FMLA. As with any other

[11] James A. Matthews, III, *Inside: What Are Reasonable Accommodations for Unpaid Leave Under the FMLA*, INSIDE COUNSEL, Dec. 9, 2013, at http://www.insidecounsel.com/2013/12/09/inside-what-are-reasonable-accommodations-for-unpai

reasonable accommodation, the purpose of ADA leave is to ultimately permit the employee to perform the essential functions of his or her job. While the EEOC is often more aggressive on this point, the courts are virtually unanimous that to qualify as a required reasonable accommodation, there must be some evidence that the leave will ultimately permit the employee to return to work.

❺ Again unlike the FMLA, there is no specified, maximum length of a reasonable accommodation leave. For its part, the EEOC takes the position that an employer may not enforce any arbitrary time limitation, but must engage each individual employee in the interactive process and make the reasonableness and undue hardship determinations on a case-by-case basis.

That said, the courts in particular recognize an important distinction between leave in excess of some established length and indefinite leave. Generally speaking, the courts will find the latter to be an undue hardship where there is no more than a generalized hope that he or she may be able to return to work. In the former situation, where the request is for a specified length and there is evidence that the leave will permit the employee to return at its conclusion, the undue hardship analysis considers the amount of leave the employee has already taken, the amount of additional leave being sought and the burden on the employer of keeping the position open and covering the employee's duties for the expected duration of the leave.

Perhaps obviously, the latter inquiry will involve careful consideration of the nature and duties of the position, its importance to the employer's operations, other employees who are capable of covering the position and the ability to obtain and cost of employing a temporary or substitute employee.

The key takeaway from this discussion should be that the EEOC abhors "bright line" rules and policies which lead to adverse consequences for protected class members without any consideration of individual circumstances. While the interactive process and undue hardship analysis can easily be seen as unnecessarily burdensome — particularly in the case of an absent employee who might be viewed as "out of sight and out of mind" — the reality is that it is both little different, but also enormously less expensive, than the process involved in defending the administrative charge or subsequent litigation arising out of the arguably premature termination of an employee requesting additional leave.

TIP #41: Correctly Determine Bonus Eligibility for Employees on FMLA Leave

Many employers' bonus policies require employees to satisfy certain objectives in order to be eligible for a bonus, such as quantity of products sold, number of hours worked, *etc.* A common area of confusion for employers is how to determine an employee's eligibility for such bonuses when the employee has been unable to meet the bonus objectives due to FMLA leave.

Under the FMLA, employers may disqualify an employee who has not met the bonus objectives, even if the failure is due to the employee's use of FMLA, if employees on similar (but non-FMLA) leave are treated the same. Therefore, for purposes of determining an employee's bonus eligibility, an employee who used vacation leave during an FMLA leave must be compared to an employee who used vacation leave during a non-FMLA leave. Similarly, an employee who took an unpaid FMLA leave must be compared to an employee who took an unpaid non-FMLA leave.

TIP #42: Revise Severance Agreements

Employees may now release past FMLA claims. However, many employers are not including the requisite language in severance and settlement agreements. Consider updating the company's model agreements to maximize its protection, and use outside or in-house employment counsel to ensure the language is sufficient.

Under the old FMLA regulations, employees could not waive their rights under the FMLA. Federal appellate courts interpreted this provision to mean that employees could not waive any FMLA claims, including past FMLA claims, without court or DOL approval (adopting a similar approach under the FLSA). This holding effectively prevented employers from settling past FMLA claims without getting a court or the DOL involved.

The new FMLA regulations clarify the DOL's position on this point. Now, any release or settlement of an employee's past FMLA claims (*e.g.*, through a general release contained within a separation agreement) is valid. *See* 29 C.F.R. § 825.220(d). However, an employee still cannot waive any prospective FMLA claim.

PART V - CURTLY CURB FMLA ABUSE

TIP #43: Keep Good Records

Keeping good records is one of the key ways to ensure employees get their full FMLA allowance but cannot abuse

it. The records should include the specific reasons for leave and the amount of leave taken and how much remains during the leave year.

Employers should also remember to use their records to re-evaluate employee eligibility for FMLA leave for each new qualifying reason for leave and at the beginning of each new leave year. The employee must continue to meet the requirements set out by the FMLA.

TIP #44: Judiciously Track and Review FMLA Usage

Optimally, one person should be dedicated to not only tracking, but also reviewing each employee's intermittent FMLA usage on a regular basis. Doing so not only permits accurate calculations of time used, but also ensures that unusual/concerning patterns, such as exclusive use of Fridays and Mondays for leave, will be recognized and addressed.

TIP #45: Do Not Provide FMLA Leave to Employees Who Are Not Entitled to FMLA

This appears to be common sense but it amazing how many employers either do not pay attention to this or do not realize they are doing it. So to avoid this, make sure you understand who is eligible for FMLA. Only employees with 12 months of service who have worked for 1,250 hours in the preceding 12-month period and who work for an employer with 50 or more employees within a 75-mile radius are eligible for FMLA.

Many multi-state employers violate this tip all the time by providing employees at some of their sites that do not meet the 50 employee requirement with FMLA simply because it is easier than having different rules for different company locations. My advice is to provide employees at your locations with less than 50 employees with non-FMLA leave of absence that provides the exact same benefits to the employees but does not guarantee reinstatement to the same position. Be careful to not provide FMLA to non-eligible employees because some courts have held that employers that do this will be later unable to claim the employee was "really ineligible" under the equitable estoppel theory.

TIP #46: Do Not Provide FMLA Leave for Reasons Not Covered by the Act

Employees often seek to take FMLA leave for: (1) an impairment that does not constitute a serious health condition; and (2) for a family member that does not meet the definitions set forth in the FMLA regulations. For example, an employee takes FMLA leave to care for his mother-in-law or his aunt. To help curb FMLA abuse and stop employees from taking FMLA leave for reasons not covered, make sure that you only allow employees to take FMLA leave for their own serious health condition or for the serious health condition of their spouse, child or parent (the definition does not include in-laws or domestic partners but may under some state laws).

Employees may also take FMLA leave for the qualifying exigency of the employee's spouse, child or patent who is on active duty or called to active duty or for the employee's need to care for a spouse, child, parent or next of kin that is a covered service member. Make sure you understand the definitions of these terms and review all FMLA leave requests to ensure that they meet these definitions.

TIP #47: Respond to All Frequent Flier Requests for FMLA Leave[12]

Some employees seem to believe that every minor illness is grounds for FMLA leave. Often, when they are trying to avoid discipline and do not have any other leave available, they will try to invoke the FMLA. They then submit a barrage of FMLA requests every time they have a sniffle or headache and expect time off without penalty.

It can be a hassle to respond to each request with more than a blanket denial. But respond you must. Include a specific reason why you are turning down the request.

If the employee did not include enough medical justification, request more. If it is clear the absence is for an illness not covered by the FMLA, say so. That way, the employee cannot later argue that he was unfairly denied leave when you include the absence in the disciplinary process.

a. *Sanchez v. Donahoe*, C.A. No. 4:12-CV-01328, 2014 U.S. Dist. LEXIS 11268 (S.D. Tex. Jan. 30, 2014).

Sanchez worked for the post office, had a spotty attendance record, and was disciplined several times for excessive absenteeism. Sanchez was eventually discharged for pushing a mail cart into his supervisor. Sanchez had an ongoing conflict with this supervisor and the incident was the final straw.

Sanchez sued and alleged that he had submitted numerous

[12] *Serial FMLA Requests? Respond to Every One*, HRSPECIALIST (Feb. 28, 2014) at http://www.thehrspecialist.com/50851/Serial_FMLA_requests_Respond_to_every_one.hr?cat=employment_law&sub_cat=fmla

FMLA leave requests for what he claimed was a disability. Sanchez alleged that his requests had been wrongly denied because he was disabled.

The district court rejected his argument after reviewing his requests and the employer's response. The court found that each time his FMLA request was turned down, Sanchez was told that it was because he failed to include enough information to allow the post office to decide whether he had a serious health condition. Since Sanchez never provided the additional information, he could not use the denials as proof of discrimination.

TIP #48: Count All FMLA-Qualifying Absences Towards the Employee's 12-week FMLA Entitlement

By doing this, you are ensuring that you are whittling away at the employee's 12-week entitlement rather than letting them take absences and then still have 12 weeks of FMLA leave available. Many employers mistakenly assume that it is the employee that requests FMLA leave and if they have not requested it then the absence is not FMLA leave. This is untrue. The law actually allows the employer to designate all FMLA-qualifying absences as FMLA leave and HR should ensure that it does this and gets the designation letters out to the employee within 5 business days of learning that the absence is FMLA-qualifying. You should also make sure that your policy states that FMLA leave runs concurrently with all other paid time out such as short-term disability or workers' compensation.

Additionally, in larger organizations, front-line supervisors must be the eyes and ears of the organization and must pass along information about FMLA-covered intermittent absences to human resources. This, in turn, requires you to train supervisors to recognize absences that may be covered by the FMLA.

Identifying FMLA absences is not simple, in part because the DOL and the courts have held that the employee does not have to cite to the FMLA in a request. If there is an existing certification, it is enough for the employee to notify the employer that he had a recurrence of the health condition covered by the certification. For first-time health related absences, supervisors should be trained to notify human resources any time an employee is out for more than three days with an illness, particularly if the employee saw a physician during that time.

TIP #49: Require Adequate Medical Certifications to Substantiate That the Employee's Spouse, Child or Parent Has a Serious Health Condition Within the Meaning of the FMLA

You should require that employees timely submit certifications for serious health conditions involving family members. *See* WH-380-F; WH 385, and WH-385-V (Appendices 2, 6, 7). Just like the certification for the employee's own serious health condition, you should also closely examine the certification and follow-up to get clarification or to authenticate the certification if necessary. Remember that the employee's manager is never allowed to contact the employee's or the family's member's health care provider. However, under the amended regulations, designated HR professionals or leave administrators may contact the employee's health care professional to authenticate or clarify the FMLA medical certification.

TIP #50: Know What to Ask For When Employees Call In Sick[13]

Employers are reluctant to ask for medical information for fear of running afoul of the ADA, which restricts employer inquires into employees' medical information that may constitute a disability; HIPAA, which also restricts such inquiries; and GINA, which restricts obtaining and maintaining genetic information of employees and family members.

However, an employer can still make inquiries into the employee's ability to perform the functions of his/her job in order to determine whether the absence is FMLA-qualifying. Thus, questions about whether the employee is unable to perform his/her job because s/he is sick and which job functions cannot be performed are permissible inquiries. Depending on the response, further questions about whether the employee intends to see a doctor and how long they expect to be out may be appropriate in determining whether the absence should be designated as FMLA leave.

TIP #51: Enforce Usual and Customary Call-in Procedures

Under the FMLA regulations, absent an unusual circumstance, employers may deny FMLA leave if the employee fails to follow the employer's call-in procedures. For example, if the call-in policy requires the employee to call in one hour before their shift starts to report an absence, and the employee fails to do so, the employer can deny FMLA leave (and discipline the employee) absent an unusual circumstance.

[13] Steven E. Clark, *The Family and Medical Leave Act*, §25.3(E), TEXAS EMPLOYMENT LAW (Laura Franze ed., 2012).

TIP #52: Don't Allow Employees to Use FMLA Leave as a Discipline Shield

The key point is document, document, and document! Another trend in FMLA abuse concerns employees who request FMLA leave when they fear they are about to be disciplined for legitimate, performance-related problems or misconduct. Employees mistakenly believe that taking FMLA leave will provide them with an added level of job protection. Employees on FMLA leave, however, have no greater right to reinstatement or to other benefits and conditions of employment than other employees who are out on other types of leave or who are continuously working.

Courts have held that an employee who requests FMLA leave will have no greater protection against termination for reasons unrelated to FMLA leave than she did before taking or requesting the leave. This means that if an employer intends to discipline an employee for conduct that took place prior to learning of an employee's need for FMLA leave, the employer may still proceed with the disciplinary action.

Notably, the employer will have the burden to show that it would have disciplined the employee regardless of whether the employee sought FMLA leave. Timely, contemporaneous and thorough documentation of performance issues before and after FMLA leave is critical.

PART VI - MANAGE THE MANAGERS

TIP #53: Restrict FMLA Leave Information to Only Those Who Need to Know

A frequent tactic for employees who have used FMLA leave and who are fired around the same time is to allege that they were terminated for taking FMLA leave. But those claims fall apart if the person making the termination decision did not know anything about the FMLA leave. For that reason, HR should limit access to FMLA leave information to those who need to know.

Generally speaking, managers and supervisors do not need to know much at all about the employee's request for FMLA leave, other than the expected time away and the fact that the leave is job-protected. If the employee has return to work restrictions–especially if they involve safety–this can be addressed with the supervisor so that s/he understands the work restrictions and any necessary accommodations.

a. *Coleman v. FFE Transp. Serv. Inc*., C.A. No. 3:12-CV-1697-B, 2013 U.S. Dist. LEXIS 66124 (N.D. Tex. May 9, 2013).

Willie Coleman was employed s a forklift operator for the company. Coleman's wife was diagnosed with cancer and treated with chemotherapy. Coleman requested and was granted FMLA leave to take his wife to her cancer treatments and related medical appointments. The company subsequently terminated Coleman because he stole a light bulb from the workplace dock. Coleman sued and alleged that his termination was FMLA retaliation.

The district court granted the company's summary judgment motion on the FMLA claim and held that Coleman did not prove that the individuals who made the decision to terminate him knew anything about his taking FMLA leave. For that reason, Coleman could not establish a causal link between his FMLA leave and his termination.

TIP #54: Understand What the DOL Tells Employees–Download the FMLA Employee Guide and Train Your Managers with it

Employees know what their rights are in the age of the internet. For this reason, managers and supervisors must have FMLA training and must understand the basics of the Act. The DOL released an *Employee Guide to the FMLA* (June 20, 2012). The guide is a 16-page plain language booklet designed to answer common FMLA questions and clarify who can take FMLA leave and what protections the FMLA provides. The guide specifically addresses:

- Who can use FMLA? (Coverage and Eligibility)
- When can I use FMLA? (Qualifying reasons to take FMLA)
- What can the FMLA do for me? (FMLA rights and protections)
- How do I request FMLA leave?
- Communication with Employer (Employer and Employee Notices)
- Medical Certification
- Returning to Work (Reinstatement rights)
- How to File a Complaint

This guide is an excellent resource for first-line supervisors and managers. The Guide may be downloaded at

http://www.dol.gov/whd/fmla/employeeguide.htm

TIP #55: Do Even More Training–Train Supervisors to Spot and Respond to Situations Potentially Involving the FMLA

Although it is clear that employees need not explicitly mention the FMLA or use particular magic words to invoke FMLA protections, supervisors still frequently fail to notify their human resources department of potential covered situations. This creates tremendous headaches because the threshold for triggering an employer's legal duty to make further inquiry is very low. In fact, all an employee must do is provide enough information to suggest that FMLA leave may be needed. Supervisors should develop a standard practice of timely reporting such situations to their human resources representative. And, of course, the human resource or a designated employee health representative — not the supervisor — should make further inquiry when warranted.

Supervisors should not question employees about their medical condition or contact the employee's medical provider. They certainly should not discipline or terminate an employee for any absence that may be covered by the FMLA.

To avoid misunderstandings or worse, supervisors should also minimize email communications regarding employee's possible leave. If email communication is necessary, it should be objective and succinct, completely free of conjecture and opinion. Too often, rapidly-composed or speculative communications can be present in a manner that supports a claim of FMLA interference or retaliation (*e.g.*, "John is absent from work again. How long is this going to go on?")

So the focus of supervisor training should actually be on spotting and timely reporting to human resources when a potential FMLA situation arises. Such training can save employers considerable time and money.

TIP #56: Don't Get Scratched by Cat's Paw Management Decisions

The cat's paw[14] theory of liability developed by the Supreme Court in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) is gaining ground in employment discrimination cases–and in FMLA cases. Today, the cat's paw theory of liability refers to one used by another to accomplish his purposes. All HR managers should understand that if they make a decision to fire, discipline or otherwise adversely affect someone based upon the facts provided to them from another manager, if that manager had a discriminatory bias, the employer can be liable for an employment discrimination case even though the HR managers had no such biases. Therefore, if HR managers take those statements at face value without doing their own investigation and as a result take some kind of adverse action against an employee, the employee may have valid employment discrimination claims against the company.

a. *The Key Lessons from Staub*

- The "cat's paw" doctrine can be thought of as an application of the "motivating factor" doctrine; the monkey's malevolent intent is imputed to the employer. So if the employer can't show that the monkey's supervisor, who did the actual firing (or took some other adverse employment action), had a lawful motive uncontaminated by the monkey that would have led the supervisor to fire the employee even without the monkey's interference, the employee is entitled to damages.

- When deciding whether to any kind of adverse action against an employee, HR needs to conduct more than a cursory review of an employee's personnel file and other related documents. HR must thoroughly and impartially review the employee's performance and job history before making an employment decision adverse to the employee.

- The message to employers is that they will need to evaluate carefully the practices they employ in making termination decisions and conducting investigations.

[14] The "cat's paw" theory gets its name from a French fable penned by Jean de LaFontaine (1621-1695) titled "The Monkey and the Cat," in which a clever but unscrupulous monkey persuades a cat to pull chestnuts from a fire for the monkey to eat. The cat burns its paws, while the monkey enjoys the chestnuts. This marriage of French literature and employment law is now used to explain what happens when someone manipulates a decision-maker to commit discrimination, harassment or retaliation.

Employers must be careful to look at the process leading up to each termination including who provided input into the decision and what their motivation might be.

- ***It is critical that decision makers avoid "rubber-stamping" decisions rather than conducting independent investigations into the underlying facts and motivation***. This is especially important in companies with off-site human resource departments where decision makers may be completely unfamiliar with not only the individual employees but also the supervisors evaluating them.

Cat's paw cases put employers in a bind. Courts often let such cases go to trial, trusting a jury to sort out whether the employer should be held liable for retaliation or discrimination. However, employers can win cat's paw cases—if they can prove that the employment decision was based on a thorough and independent evaluation. If they can do that, courts may decide that the decision wasn't tainted by the malicious party's bias. And that means no unlawful discrimination or retaliation took place.

b. *How to Reduce 'Cat's Paw' Liability*

Here's what HR can do to reduce the risk that it will be burned by "cat's paw" liability (in general):

✓ Review employee/supervisor relationships. Be alert for any history of potential adversarial dealings between employees and their bosses.

✓ Avoid relying on recommendations from anyone who may harbor potentially improper motives.

✓ Have somebody who is neutral independently evaluate any reports or recommendations that will be the basis for employment decisions.

✓ Include a review process to ensure that neutral decision-makers aren't simply rubber-stamping improper recommendations.

✓ Completely document neutral decision-makers' independent reviews and the factors they weighed when making their decisions.

c. *Cat's Paw and FMLA Cases*

1) Blount v. Ohio Bell Tel. Co., No. 1:10-CV-01439, 2011 U.S. Dist. LEXIS 24372 (N.D. Ohio Mar. 10, 2011).

In *Blount*, the employer maintained a "performance management system" that disciplined employees for failing to meet certain goals. Managers were given wide discretion to decide whether to issue discipline when an employee did not meet set goals. Two employees who had recently taken FMLA leave sued after they were terminated for failing to meet certain goals under the performance management system. In short, the employees claimed they had been treated differently than other employees who failed to meet the same goals but were not terminated.

In defending the claim, the telephone company claimed that the decision to terminate the employees came from top-level management, not the employee's direct supervisors. Thus, the employer claimed that any alleged biased from the lower-level managers had no bearing on the ultimate termination decision. The court disagreed:

> "Even if the decision to punish and terminate resided higher in the supervisory chain, . . . the animus of the Center Sales Managers can be inferred upwards where it had the effect of coloring the various adverse employment actions in this suit. *See Staub* (discriminatory animus can be inferred upwards where the employee who makes the ultimate decision to punish does so in reliance upon assessments or reports prepared by supervisors who possess such animus)." *Id*. at *17.

As a result, the court allowed the employees' FMLA retaliation claims to be considered by a jury.

The *Blount* decision serves as a reminder to employers that employee allegations of illegal bias by managers should be independently investigated, regardless of when and at what point in the discipline process the allegations are raised. Clearly, a senior-level officer generally can and should rely on the recommendations of lower-level managers when deciding whether to issue discipline or terminate an employee.

However, an employer must tread carefully where there are claims of bias against a manager recommending discipline. Might the result have been different had the telephone company investigated the claims of bias before terminating the employees? In doing so, the telephone company could have tested the accuracy of the claims and determined whether the employees' terminations were independently justified and not tainted by any bias. Such an investigation also would have made for a better record for the company to defend in litigation.

2) Marez v. Saint-Gobain Containers, 688 F.3d 958 (8th Cir. 2012).

Under the FMLA, liquidated damages are a form of "extra" damage a court may award over and above other damages an employee is awarded. The employer can avoid liquidated damages, however, if it proves the FMLA violation was in good faith, that is, the employer reasonably believed its action did not violate the FMLA.

The *Marez* opinion shows that a decision maker's good faith is not enough to avoid liquidated damages if the plaintiff relies upon the "cat's paw" theory to prove liability. Cat's paw in employment discrimination means an employer can be liable for discrimination even if the decision maker was not biased. It applies if there is evidence a non-decision maker acted with a discriminatory motive and caused the adverse employment action. The most common example is when the decision maker relies upon information or advice given by a biased non-decision maker.

Marez worked as a production supervisor at the Saint-Gobain plant that made glass beer bottles. On January 28, 2008, Marez notified her supervisor that she would require FMLA leave for her husband's upcoming surgery; Marez did not know the exact date of the surgery but said it would be "soon." Marez did not notify anyone else at the company about her leave request, nor did her supervisor. Notably, Marez had been on FMLA leave the previous July and August for several weeks, and there was evidence her supervisor was irritated about her lack of availability during that time.

Two days later, on January 30, 2008, Marez was terminated. One of the reasons given for the termination was that Marez had falsified paperwork. Specifically, she had reported on a check sheet that a piece of equipment was functioning when in fact it was "flatlining", or not reporting data. Marez claimed it was an error and not a deliberate omission. Marez's supervisor was the one who discovered the paper work was wrong. The supervisor assembled and presented the information about Plaintiff's paperwork to another member of management. They consulted with the plant manager, and the three of them together made the decision to terminate Plaintiff.

The jury awarded the plaintiff damages of $206,500 for a FMLA violation, and the court added an additional $206,500 as liquidated damages. On appeal, Saint-Gobain claimed that the trial court should not have awarded liquidated damages because two of the decision makers, the plant manager and another member of the management team, did not know about Plaintiff's FMLA request at the time of the termination, and therefore reasonably believed Plaintiff's termination would not violate the FMLA. In other words, even though Marez could rely upon a "cat's paw" theory to establish liability under FMLA, Saint-Gobain argued it should be not used as a basis for awarding liquidated damages. The court rejected that argument:

> "Were we to accept the proposition that the cat's paw theory applies to determining liability and lost wages but not to liquidated damages, that would have the result of treating less favorably for purposes of damages calculations plaintiffs who utilize the cat's paw theory than those who do not. We see no basis in the statute for such a result." *Id*. at 965.

The result in *Marez* is not surprising, given the tendency of courts to extend the cat's paw theory to all of the laws that govern the employment relationship. This case should reinforce the importance of thorough investigations of the facts and circumstances before termination decisions are made. That includes getting the employee's side of the story and whenever possible have a disinterested person investigate the facts.

TIP #57: Lookout for Cat's Paw Liability in FMLA, ADAAA, and USERRA Terminations

a. *The Third Circuit's Road Map*

In a Cat's Paw Scenario, Third Circuit Effectively Puts Burden on Employer to Prove Decisionmaker Was "Independent" of the Biased Supervisor, and that the Decision Was Not Substantially Caused by the Biased Supervisor

In *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d Cir. 2011), *cert. denied*, 2012 U.S. App. LEXIS 1136 (2012), the Third Circuit had its first opportunity to address the cat's paw theory of employer liability for discrimination and/or retaliation under circumstances where an adverse employment action was influenced, but not ultimately made, by an employee with discriminatory or retaliatory animus. The Third Circuit held that, where the plaintiff seeks to hold an employer liable for the improper motives of a non-decisionmaker, the burden shifts from the plaintiff to the employer to prove that the decision was not substantially caused or influenced by the biased non-decisionmaker.

1) Background

Raymond Carnation, a terminated police officer, filed a Title VII claim against the City of Philadelphia, arguing

that his discharge was in retaliation for protesting the discriminatory treatment afforded his African American colleagues. At trial, the plaintiff produced evidence that he had complained to his supervisor about racial tensions within his squad. When his supervisor failed to respond to that issue to his satisfaction, the plaintiff complained to his supervisor's manager that his supervisor was condoning racism by failing to address the issue.

According to the plaintiff, the manager reacted to his protests by assigning him to dangerous and unpleasant duties, and warned that any complaint to the Equal Employment Opportunity Commission would lead him to make the plaintiff's life "a living nightmare." After the plaintiff continued to complain about his supervisor's failure to take action to resolve the issues plaguing his squad, the manager ordered the plaintiff not to call his supervisor to discuss the matter again. Despite the manager's order, the plaintiff called his supervisor the following day and, in fact, resolved many of his concerns.

When the plaintiff informed the manager of his discussion with his supervisor and requested a meeting with his superiors to discuss any remaining issues, the manager responded by filing charges against the plaintiff for insubordination and neglect of duty. The manager submitted the charges to the Police Board of Inquiry ("the PBI"), a three-person panel that receives written and testimonial evidence from both the employee and the party submitting charges. Based on the evidence received, the PBI then recommends an appropriate sanction for the employee to the Commissioner of Police, who would make the ultimate decision as to whether the sanction should be imposed.

After a three-hour hearing, during which the plaintiff was represented by counsel and both the plaintiff and the manager testified, the PBI found the plaintiff guilty of the charges submitted, as well as an additional charge that the PBI added for conduct unbecoming an officer. The PBI recommended the plaintiff's dismissal. Shortly thereafter, the Commissioner gave the plaintiff notice of the City's intent to terminate his employment.

At the trial of the plaintiff's Title VII claim, the jury concluded that the plaintiff's termination was an act of retaliation for his protests at the treatment of African American officers and/or for raising a complaint of discrimination. The City sought judgment notwithstanding the verdict. The City argued that, although the plaintiff was discharged as a result of disciplinary proceedings begun by the manager, the recommendation to terminate was made by the PBI and the ultimate decision to terminate was made by the Commissioner. As such, the City contended that the independent decision-making of the PBI and the Commissioner severed the causal connection between the termination decision and the manager's improper animus. The district court denied the City's motion, concluding that a reasonable jury could find that the manager's retaliatory motive played a substantial role in the decision to terminate the plaintiff's employment.

2) The Third Circuit's Decision

On appeal, the Third Circuit had its first opportunity to apply *Staub*. In *Staub*, the Supreme Court declined to adopt a bright-line rule that a decisionmaker's independent investigation would negate the effect of a non-decisionmaker's discrimination, instead reasoning that liability may not attach where the employer's investigation leads to a termination for reasons unrelated to the supervisor's original, biased action, but that liability may exist where the decision to terminate is based on the original discriminatory report.

The question posed in *McKenna* was this: on which side of the dividing line did the PBI's investigation and recommendation to terminate fall? The Third Circuit began its analysis by defining proximate cause in relation to complaints of discrimination and a subsequent adverse action. Although the plaintiff had the burden to establish that his termination was motivated by retaliatory animus, the Third Circuit effectively imposed an even heavier burden on the City, requiring it to come forward with evidence showing that: (1) the decision to take the adverse action was made by an independent, unbiased decisionmaker; and (2) the adverse action was taken for reasons unrelated to a single actor's retaliatory animus.

In examining the district court's denial of the City's motion for judgment as a matter of law, the Third Circuit observed the lack of factual evidence in the record to support the City's motion. For example, the record at trial failed to show the extent to which the PBI truly employed quasi-judicial features, such as whether the plaintiff could have freely called witnesses on his own behalf or cross-examined the City's witnesses.

Even more importantly, the record at trial did not reflect the basis and weight of the PBI's recommendation to terminate, nor did the record reflect what the ultimate decisionmaker, the Commissioner of Police, saw or relied upon when making the decision to terminate. Rather, the evidence demonstrated only that "[the manager] retaliated against Carnation by referring the [charges] against him, the PBI affirmed those charges, and the Commissioner then terminated Carnation." Under those circumstances, the Third Circuit concluded that the jury was entitled to

conclude that the plaintiff's termination was caused by the manager's decision to retaliate against him.

b. *Practical Implications for Employers*

Although the outcome in *McKenna* was unfavorable to the employer, the Third Circuit has provided employers with a roadmap to insulate themselves against liability in "cat's paw" scenarios. In light of *McKenna*, employers contemplating a termination should bear in mind the following considerations and take the following steps.

- When asserting a lack-of-causation defense, an employer must remember that it has the burden to prove that the ultimate decision was made by an "independent" decisionmaker whose decision was not caused, or unfairly influenced, by a supervisor's retaliatory animus.

  - ☐ To meet that burden, an employer should begin by identifying the independent decisionmaker and clearly defining his or her role in the decision-making process.

- The outcome in *McKenna* may be explained, in part, by the record's lack of clarity as to whether the manager, the PBI, or the Commissioner was the driving force behind the decision to terminate.

- One lesson from *McKenna* is that, in the absence of such clarity, the employer loses.

- The record must also be clear about what that decisionmaker saw, heard, or relied upon in making the decision. To prove that the decisionmaker was, indeed, independent, and based his decision on untainted information, the employer must be able to point to what information informed the decision.

- The record must establish that the employee was not subject to an unfair process. The McKenna panel's focus on procedural protections, or lack thereof, afforded to the plaintiff suggests that employers need to examine their fact-finding methods in conducting investigations into complaints of discrimination and retaliation.

  - ☐ Such methods include taking statements from not only the employee and the allegedly biased supervisor, but also any other witnesses identified by the complainant and supervisor with unbiased knowledge of the facts prior to making any final employment decisions.

- Finally, employers should always have a clear record of the grounds on which any termination or other adverse action is based. Part of what doomed the City's position in *McKenna* was that it was unclear what formed the basis of the ultimate decision to terminate the plaintiff.

- If the record reflected a non-retaliatory rationale independent of the manager's bias, the outcome might have been different. For example, there was some evidence in the record that the plaintiff had been diagnosed as having "homicidal tendencies" toward his superior(s). Had this been appropriately investigated and later documented as a basis for the PBI's recommendation and the Commissioner's decision, this may have severed the causal connection with the manager's bias and justified the decision to terminate the plaintiff's employment.

- Where an employer is considering an adverse action against an employee without a clear record of the legitimate, non-discriminatory and non-retaliatory reasons for the decision, or the decision does not include the involvement of an independent, unbiased decisionmaker, employers should seek legal advice before proceeding with any adverse action.

TIP #58: Provide Managers with Specific Notice and Training That They Can Be Held Individually Liable for FMLA Violations

Too often, managers and supervisors act with impunity regarding FMLA issues by: 1) asking inappropriate questions; 2) discussing confidential medical information; 3) treating employees differently; and 4) other actions that would and could be easily construed as interfering with employees' FMLA rights.

The FMLA regulations clearly state that the FMLA permits individual liability. The regulations defines an "employer" as follows: "[e]mployers . . . include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency." 29 C.F.R. § 825.104(a). The regulations then explicitly provide that "individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA." 29 C.F.R. § 825.104(d). The courts in the Fifth Circuit have upheld individual liability against public sector employers in FMLA cases. *See, e.g.*, *Modica v. Taylor*, 465 F.3d 174, (5th Cir. 2006); *Bellow v. Leblanc*, 537 Fed. Appx. 478, (5th Cir. 2013)(unpublished opinion).

In the private sector, courts have consistently found that individual managers and supervisors acting on behalf of their employer may be individually liable for violating an employee's FMLA rights. The federal circuit courts have split on the issue in the public sector based on highly technical textual and contextual interpretations of the FMLA's definition of "employer." The split in the circuits on the issue will likely be resolved one day by clarification by Congress or a decision by the Supreme Court.

Where it applies, an individual supervisor may be liable even though they are not a very high level official or have final authority over the employee, provided they exercised some control over the employee and was at least partially responsible for the violation. ***To be liable, it is not required that the manager or supervisor intend to violate the employee's FMLA rights. A manager or supervisor may be personally liable for even inadvertent FMLA violations***.

To avoid FMLA lawsuits and retain good managers and supervisors, FMLA-covered employers should provide periodic FMLA training and secure insurance to cover the defense and resolution of FMLA claims filed against individual supervisors.

a. *Graziadio v. Culinary Institute of America*, No. 15-888, 2016 U.S. App. LEXIS 4861 (2nd Cir. Mar. 17, 2016).

Cathleen Graziadio worked as a payroll administrator for the Culinary Institute of America (CIA) in Hyde Park. Graziadio's job was to process student payroll and otherwise help students with pay issues.

Graziadio's 17-year-old son became seriously ill and was hospitalized. Tests revealed he suffered from previously undiagnosed Type I diabetes. Graziadio immediately contacted her supervisor and told her she needed to take time off to care for him. She also asked for FMLA forms. The forms were immediately provided and she completed them, got a medical certification showing her son had a serious health condition. Graziadio returned to work 12 days later.

About a week afterward, Graziadio's other son, a 12-year-old, fractured his leg while playing basketball, requiring surgery. Graziadio again contacted her supervisor and informed her that she anticipated missing work for about 10 days. Plus, she would need part-time hours for a while after that. She asked what paperwork she had to complete before returning to work.

This time, the supervisor referred the leave request to the HR director, named Shaynan.

Over the next few weeks, Graziadio repeatedly emailed Shaynan, asking if there was any information still needed to process her request. At first, she got no response. Then Shaynan sent her several letters and emails asking her to complete "paperwork" without detailing what information she was seeking. Graziadio asked for clarification, but received none. She did send in a doctor's note, but was informed that wasn't sufficient.

Finally, Shaynan told Graziadio that they needed to meet before she would be allowed back to work. Numerous emails then went back and forth in an apparent attempt to schedule a meeting, but Shaynan never agreed to an actual date and time.

Suddenly, Graziadio was terminated for abandoning her position. Graziadio sued, alleging FMLA violations. She added Shaynan as a defendant, arguing that she should be held personally liable for violating the FMLA.

The court agreed. It reasoned that because it was exclusively Shaynan who communicated about Graziadio's FMLA request, made requests of her own, ignored responses and ultimately made the recommendation to terminate Graziadio, she could be considered her "employer" under the FMLA. That meant she could also be liable for making FMLA mistakes.

The court said the case should go to trial. A jury will decide whether Shaynan and the CIA interfered with Graziadio's right to take FMLA leave by essentially stonewalling her leave request and then terminating her when she didn't provide the information allegedly requested.

Practice Note: Do not leave an FMLA request hanging, If you need more information, ask for it and be specific.

TIP #59: Make Sure Medical Leave Requests Funnel Through HR

a. *Rizzio v. Work World Am, Inc.*, No. 2:14-cv-02225-TLN-DAD, 2015 U.S. Dist. LEXIS 127154 (E.D. Cal. Sept. 22, 2015).

Elizabeth Rizzio took intermittent leave after hurting her back in an auto accident. Eventually, Rizzio's boss told her that she would not get a raise for poor attendance. Rizzio had an anxiety attack, landed in the hospital and was terminated upon her return. Rizzio sued. The court sent the case to trial, saying the supervisor could not bypass medical leave rules that required reasonable accommodations and intermittent leave.

Do not let supervisors handle employees' requests for medical leave informally—make sure all such requests come through the HR department. When bosses make up their own rules, inconsistencies will trip you up.

PART VII - DEFTLY DEAL WITH INTERMITTENT LEAVE ISSUES

TIP #60: Do Not Accept Intermittent Leave Requests at Face Value

a. *Certify and Schedule the Leave*

The FMLA allows employers to demand certification from a doctor that an employee needs FMLA leave. An employer can request new medical certification from the employee at the start of each FMLA year. An employer is also entitled to ask for a second or third opinion (at its expense), before granting FMLA leave.

When employees have chronic conditions and certifications that call for intermittent leave, attempt to work out leave schedules as far in advance as possible. It is legal to try to schedule FMLA-related absences, but an employer cannot deny them.

b. *Immediately Nail down the Expected Frequency and Duration of FMLA Intermittent Leave*

Demand a medical provider's estimate of how often the employee will need time off. The company also can wait until the provider gives it that estimate to approve intermittent leave.

c. *Ask about the Specific Condition*

Medical certification must relate only to the serious health condition that is causing the leave. Do not ask about the employee's general health or other conditions.

d. *Allow Time to Respond*

After an FMLA certification request is made, give employees at least 15 calendar days to submit the paperwork. If the employee's medical certification is incomplete or insufficient, specify in writing what information is lacking. Allow seven days to cure the deficiency.

e. *Investigate the Certification If There Is Doubt about the Need for Leave*

Under the updated FMLA regulations, an employer can directly contact the employee's physician to clarify the medical certification. Who can make that call? An HR professional, a leave administrator (including third-party administrators) or a management official, ***but not the employee's direct supervisor***.

f. *Require (And Pay For) a Second Opinion If There Is Still an Issue*

Use an independent doctor that you select, not a doctor who works for the company. If the two opinions conflict, the company can pay for a third and final, binding medical opinion.

TIP #61: Record Intermittent Leave Arrangements

If you and an employee have agreed that she will take intermittent FMLA leave, you should memorialize the agreement. That may include spelling out the employee's new schedule or duties. Remember, you can temporarily transfer an employee to an alternate position to accommodate her need for planned intermittent FMLA leave.

TIP #62: Inquire About Changed Or Suspicious Circumstances

You should always keep tabs on use of FMLA leave, and you may want to pay special attention to patterns of intermittent leave usage. You may seek recertification more frequently than thirty days if: a) the circumstances described by the existing certification have changed; or b) the employer receives information that casts doubt on the employee's stated reason for the absence or on the continuing validity of the certification.

"Changed circumstances" include a different frequency or duration of absences or increased severity or complications from the illness. The regulations allow you to provide information to the health care provider about the employee's absence pattern and ask the provider if the absences are consistent with the health condition.

"Information that casts doubt on the employee's stated reason for the absence" may be information you receive (possibly from other employees) about activities the employee is engaging in while on FMLA leave that are inconsistent with the employee's health condition. The example provided in the regulations is an employee playing in the company softball game while on leave for knee surgery.

A note of caution, however. Employers who receive information from coworkers about an employee's actions while on leave must be certain the information they receive

is credible and that the coworker has no axe to grind against the person on leave. Always attempt to independently verify information received from coworkers before taking action or requesting recertification for suspicious circumstances.

TIP #63: For Intermittent Leave Issues, Follow the Recertification Procedures *Exactly*

a. *Hansen v. Fincantieri Marine Group, L.L.C.*, No. 12-C-032, 2013 U.S. Dist. LEXIS 84168 (E.D. Wis. June 14, 2013).

The *Hansen* case illustrates the necessity of stringently following the FMLA recertification procedures when the employer suspects that the circumstance of the underlying intermittent condition have changed.

Hansen involved an employee who was nearing termination under the employer's attendance policy, The employee submitted a medical certification stating that he suffered from depression. The certification also said the employee would have "episodic flare-ups" that would cause him to be intermittently absent from work – a phrase all employers dread seeing on a FMLA medical certification. The medical certification estimated that the employee would have approximately four episodes of such "flare-ups" every six months, resulting in absences of two to five days each.

The employee experienced many more absences than estimated on the medical certification, including more than four "flare-ups" in the very first month. The employer continued to approve these absences as FMLA-covered for a period of time. However, when the absences continued to occur, the employer faxed a letter to the employee's doctor asking the doctor to reconfirm that the information in the medical certification was correct. The doctor obliged. Based on the updated information from the doctor, the employer terminated the employee on the grounds that the continuing absences were unexcused because they went beyond the estimate in the medical certification. The employee sued and the employer moved for summary judgment. ***The employer lost its summary judgment motion because it did not follow the FMLA's very technical requirements***.

Those FMLA regulations provide that an employer can require an employee to submit a new medical certification, called a recertification, when there is a significant change of circumstances, such as the "duration or frequency" of the employee's absences. In the recertification, the employer can list the employee's actual pattern of absences and ask that the health care provider state whether such pattern is necessitated by the employee's serious health condition.

The court concluded that the fax sent by the employer directly to the health care provider did not correctly follow this "recertification" procedure, in part because the employer contacted the employee's doctor directly, instead of notifying the employee that he needed to provide a new medical certification from his health care provider. The court decided that it was improper for the employer to treat the absences as not covered by FMLA because it did not use the proper "recertification" procedure set forth in the regulations.

TIP #64: Control The Way That Employees Schedule Planned Treatment

Employees may take intermittent leave for treatment, therapy, and doctor visits for serious health conditions. The FMLA regulations specifically require that employees schedule those absences for planned medical treatment in a way that least disrupts your operations. When you receive a request for this type of intermittent leave, communicate with employees about the frequency of the treatment, the office hours of the health care provider and ways that the employee may be able to alter the schedule to cut down on disruptions.

TIP #65: Deal with Monday-Friday Absences on Thursday

Some employees have a habit of scheduling intermittent FMLA absences every Monday or Friday. Employers that suspect employees are using FMLA to get a jump start on the weekend are encouraged to review medical certifications previously submitted by the employee to determine whether the duration or frequency of the leave comports with the information provided by the provider. If the information in the certification departs from the observed absences, the employer may request that the employee submit recertification or speak to the employee's health care provider. Employers can provide the health care provider with a record of the employee's absence pattern and ask if the health condition is consistent with the pattern.

TIP #66: Don't Seek Fitness-for-duty Certification from Employees Returning to Work after Taking Intermittent Leave

The FMLA bars employers from seeking fitness-for-duty certification from employees returning to work after taking intermittent leave. The regulations specifically state that "an employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule." *See* 29 C.F.R. § 825.312(f).

a. *Employer Safety Concerns*

Employers have not responded favorably to this policy because it raises safety concerns about whether employees are actually ready to return to work. In a recent DOL survey several employers stated that particular safety concerns inherent in their workplaces necessitated that they obtain clear information regarding an employee's ability to safely return from leave. The employers suggested that the DOL should delete or revise the regulations so that companies would have the right to seek fitness-for-duty certifications from employees returning to work from intermittent leave.

b. *What is Permissible*

29 C.F.R. § 825.312(f) provides the following guidelines.

- An employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if ***reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave***. (emphasis added).

- If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days.

- Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave.

- The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

- ***Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others***. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. (emphasis added).

TIP #67: Consider Temporary Transfers

If the need for intermittent leave is foreseeable, you may transfer the employee during the period of the intermittent leave to an available alternative position for which the employee is qualified and which better accommodates the recurring periods of leave. The alternate position must have equivalent pay and benefits, but does not have to provide equivalent duties. If the employee asks to use leave in order to work a reduced work schedule, you may also transfer the employee to a part-time role at the same hourly rate as the employee's original position, as long as benefits remain the same.

Alternatively, you may allow the employee to work in the employee's original position, but on a part-time basis. You may not eliminate benefits that would otherwise not be provided to part-time employees, but may proportionately reduce benefits such as vacation leave if it is the employer's normal practice to base the benefits on the number of hours worked.

PART VIII - RESIST RETALIATION RAGE

TIP #68: Do Not Interfere with an Employee's FMLA Rights by Discouraging Him or Her from Taking Intermittent Leave

The FMLA allows an employee to take intermittent leave to care for a spouse with a serious health condition if an intermittent schedule is "medically necessary." Intermittent leave also may be taken to "provide care or psychological comfort to a covered family member with a serious health condition." *See* 29 C.F.R. §825.202(b), 29 C.F.R. §825.220(b) and *Brock-Chapman v. Nat'l Care Network*, L.L.C., 2013 WL 169177 (N.D. Tex. Jan. 16, 2013).

TIP #69: Don't Count FMLA Against Attendance Records

Employers that count FMLA-covered absences against employees are interfering with their FMLA rights. Before you make a final termination decision based on poor attendance, make absolutely sure that you have excluded all possible FMLA leave. Remember, it is the employer's duty to follow up when an employee reports an absence with enough detail to suggest he needs FMLA leave.

a. *Hoopingarner v. Corinthian Colleges*, No. 8:11-CV-397, 2012 U.S. Dist. LEXIS 59688 (M.D. Fla. Apr. 30, 2012).

Edward Hoopingarner worked as a medical-assistant instructor, was frequently absent from work, running home

to unlock the door for his wife when she forgot the key, helping her deal with a broken-down car and even rushing home one day to confront her alleged lover. Hoopingarner also took time off to care for an ailing parent. That time was excluded from his absenteeism record.

The company warned the employee about his poor attendance. Hoopingarner called in sick many times, but seldom gave a specific reason. Those absences were counted against Hoopingarner when he was eventually terminated. However, several absences were related to a specific set of episodes in which Hoopingarner explained he was going to the doctor due to extreme vomiting, diarrhea and other symptoms. He explained that he was going to the ER for blood work and a colonoscopy. The testing revealed he had acute gastritis, which can be a serious health condition under the FMLA.

Hoopingarner sued, alleging interference with his right to FMLA leave. The district court held that Hoopingarner had provided enough information to give his employer notice he needed FMLA leave when he told them about his trip to the ER. Because an email between managers supporting the termination decision mentioned that absence as a factor, Hoopingarner had enough evidence to warrant a trial on whether he was fired for taking protected FMLA leave

TIP #70: Do Not Assume That Suspecting FMLA Abuse Alone Is Enough to Justify Firing an Employee

An employer may terminate an employee and deny reinstatement when the employment otherwise would have ended. However, the employer bears the burden of defending itself against a claim that it interfered with an employee's substantive FMLA rights. *See* 29 C.F.R. §825.312(g).

TIP #71: Don't Constantly Phone/Text/Email Employees Who Are on FMLA Leave

Employees on FMLA leave are entitled to be left alone. Supervisors should not send work home with the employee or call constantly to check up. That could be considered FMLA leave interference.

That does not mean, however, that you can not get in touch with the employee about important and urgent matters or enforce your broader call-in policies if you subject all employees who are off to the same rules. ***Just make sure you note the reason for the call so you can justify it later if challenged.***

TIP #72: Beware Handing out Discipline So Soon after FMLA Request

a. *Flood v. Univ. of Md. Med. Sys. Corp.*, C.A. No. GLR-12-2100, 2014 U.S. Dist. LEXIS 176532 (D. Md. Dec. 23, 2014).

When it comes to the FMLA, courts always pull out their stopwatches and calendars to see how closely the employee's protected activity (requesting or taking FMLA leave) coincides with the adverse action (discipline or firing). As this case shows, the smaller the time, the bigger your risk of liability.

One day at work, Lori Flood, a pharmacist, experienced excessive back pain related to her degenerative disk disease. Flood tried to contact her supervisor by phone and texts but to no avail. Eventually, she went home to get her medication and asked another pharmacist to monitor her station. (Leaving without approval is a violation of the employer's policy.)

When Flood returned to work, her boss noted she had slurred speech and seemed confused. The boss sent her home on administrative leave pending a fitness-for-duty exam.

About seven weeks after that, Flood requested FMLA leave. Two days later, she was fired. The stated reason: She had left her post that day. Flood sued, claiming the firing was actually retaliation for submitting a request for FMLA leave.

While the employer tried to get the case dismissed on summary judgment, the court said "not so fast" and sent it to trial. If Flood's firing was truly because she had put patient care at risk, the court asked, why wasn't she fired right away?

"Given the seven-week gap between the violation and her termination (and) the temporal proximity between establishing her eligibility for FMLA protected leave and her termination," the court said, "the court concludes there is sufficient evidence for a jury to find pretext." *Id*. at 21.

Practice Points:

<u>*Enforce policies promptly*</u>. The longer an employer waits to enforce a policy, the greater the chance the employee will develop legal rights that will compromise the employment action.

Take a chill pill. Once an employee requests FMLA leave, stop all pending employment actions. Courts and juries are extra sensitive to discipline that happens so quickly after employees exercise their FMLA rights.

TIP #73: Beware of Retaliation Lawsuits for Poor Reviews After FMLA Leave Requests

a. *Spaulding v. N.Y. City Dept. of Educ*., No. 12-CIV-3041, 2015 U.S. Dist. LEXIS 127076 (E,D.N,Y. 2015).

Don't think that just because an employee was a poor performer before she requested FMLA leave, a poor review after the request can't be retaliation. If there is other evidence of retaliation (like a direct statement that FMLA leave was a factor), then the previous poor performance won't be much of a defense.

In this case, Spaulding got poor reviews. Then Spaulding asked for FMLA leave. Shortly afterward, she got an even worse review. Spaulding sued, alleging retaliation for asking for FMLA leave.

In court, Spaulding presented evidence of a taped phone conversation with her supervisor in which the supervisor allegedly said her FMLA leave request was considered a negative factor in the review. That was enough for the court to send Spaulding's retaliation claim to trial.

Practice Points:

Remind supervisors that FMLA leave is an absolute right. It can't be used as a negative factor, even if granting leave is inconvenient or downright disruptive. It's up to management to find a way to cope with FMLA absences; they can't blame the employee for work left undone or schedule disruptions.

Supervisors should certainly never voice any objections to FMLA leave or suggest in any way that taking leave is irresponsible, disruptive or unprofessional. In a growing number of retaliation cases, such negative comments lie at the heart of employees' lawsuits.

TIP #74: Implement a Retaliation Prevention Checklist

The following checklist may be useful in determining whether or not a potential FMLA/ADA retaliation issue is brewing.

Another idea is to provide managers with copies of the following fact sheets:

- ✓ DOL FACT SHEET #77B: *Prohibiting Retaliation Under the FMLA* (Appendix 9)
- ✓ EEOC FACTS ABOUT RETALIATION (Appendix 10)

RETALIATION PREVENTION CHECKLIST

1 Are you prepared for a retaliation complaint?

1.1 Do your non-discrimination and harassment policies cover retaliation and include a strong anti-retaliation statement?

1.2 Do you have a complaint process that employees are aware of, understand, and can follow easily?

1.3 Do your employees know to whom and how to submit complaints?

1.4 Do you have a way for complaints to be submitted via an employee hotline?

1.5 Are you training your supervisors on your anti-retaliation policy?

1.6 Do you have an employee relations department or a designated individual to periodically review and implement anti-retaliation policies and procedures, conduct investigations, and provide training?

1.7 Do you consistently and fairly implement disciplinary action?

1.8 Do you keep documentation of all employee performance appraisals and disciplinary actions to document that your practices are fair and not influenced by a complaint of illegal discrimination or other unlawful employment practice?

1.9 Do you keep comprehensive records of all complaints, investigations, and responses?

1.10 Do you discipline and retrain any supervisors who engage in retaliation?

1.11 Do you provide the same information in references for all former employees?

2 Does a potential for retaliation or for a retaliation complaint exist regarding alleged illegal discrimination or other unlawful employer activity exist?

2.1 Is the employee raising informal concerns with a supervisor or manager?

2.2 Is the employee threatening to file a complaint?

2.3 Has the employee filed an internal compliant?

2.4 Has the employee filed a complaint with a state or federal agency?

2.5 Is the employee supporting a co-worker who has filed a complaint?

If the answer is Yes to any of the above,

- Is there any employment action pending on the employee, *i.e.*, promotion, transfer, performance appraisal, demotion, change in job duties, benefits or pay, termination?

  Has the employee asked for a letter of recommendation or reference to be provided to a prospective employer?

- Are any policies or practices being applied differently for this employee?

If the answer is Yes to any of the above, the employers response and action(s), if considered adverse by the employee, may result in retaliation compliant. If a retaliation complaint is received, determine:

- The date of the employment action compared to the date of activity in Section 2 above.

- Documentation of the employees past poor performance or other reason for any adverse employment action.

- If employees in similar situations were treated differently.

- If the person who made the adverse employment action decision was aware of any concern or compliant from the employee alleging illegal discrimination or unlawful employment activity.

PART IX - DON'T' FORGET ABOUT ALL THE OTHER GOOD STUFF

A. Light Duty Issues

TIP #75: Don't Count Time Spent on Light Duty Against FMLA Leave Time

The 2009 DOL regulations make clear that time spent performing light duty work neither counts against an emlpoyee's leave entitlement nor affects the right to restoration. The employee's right to restoration is put on hold during the light duty period, but expires at the end of the 12-month FMLA leave period. 29 C.F.R. § 825.220(d).

TIP #76: Consider Allowing the Employee to Stay on Leave (Paid or Unpaid) Until Fully Healed–But Don't *Require* It

Disabled employees who return to work before fully healed may be eligible for light-duty positions or other modifications as reasonable accommodations. However, employers that allow leave until the employee is fully healed do not have that obligation.

a. *Rocco v. Gordon Food Serv*., C.A. No. 11-585, 2014 U.S. Dist. LEXIS 16103 (W.D. Pa. Feb. 10, 2014).

Herbert Rocco was employed as a delivery driver. This position required demanding physical effort, including lifting up to 100 pounds. Rocco injured his knee while playing recreational tackle football. The company placed Rocco on FMLA leave. At the expiration of 12 weeks (August 2009), Rocco was still unable to return to work. During this time, Rocco was receiving short term disability benefits.

The company's practice was to wait until an employee was cleared by a physician to return to work before deciding whether to terminate the employee, which permitted employees to continue remain on medical leave. In October 2009, Rocco's doctor determined that Rocco was able to return to work. The company scheduled a functional capacity examination to determine whether plaintiff could perform the heavy lifting required by the delivery driver position. The functional capacity examination showed that plaintiff was capable of performing medium-duty work, but not the heavy-duty work required by the delivery driver position. There were no medium-duty jobs available at that time, so Rocco remained on medical leave.

On January 21, 2010, Rocco was cleared to resume heavy-duty work. The company terminated Rocco that same day.

The separation notice prepared by defendant's human resources department indicated the reason for termination was that no delivery driver positions were available. Heather Edwards ("Edwards"), a senior human resource generalist for defendant, scratched out "eligible for rehire" on the separation notice and indicated that plaintiff was ineligible for rehire due to work history and performance. Edwards testified she could not remember why she made the change from eligible to ineligible. Although no delivery drivers were hired in January 2010, the company hired drivers in December 2009 and February 2010.

Rocco sued the company for unlawful termination, failure to accommodate and retaliation under the ADA and state law. The district court dismissed the ADA claim and held that:

> "At the time plaintiff was terminated, he was medically cleared to resume work, including heavy lifting, without restriction. Plaintiff testified he had "a little bit" of pain in January 2010, but he was comfortable to resume his duties had defendant permitted him to return to work. From these facts, no reasonable jury could conclude that plaintiff meets the definition of disabled, even under the less-restrictive interpretation required by the ADAAA. Plaintiff argues that he was substantially limited in the major lift activities of standing, walking, lifting, bending, concentrating, and sleeping. ***These limitations had resolved by the time of the adverse employment decision, as plaintiff admits***. (emphasis added). *Id*. at *13-14.

Essentially, the court found that Rocco could perform the essential function of his old job as of January 2010. Had Rocco been terminated earlier, he might have been able to argue that he was entitled to accommodations.

TIP #77: Review the Prior EEOC and DOL Positions Regarding the Employer's Light Duty Responsibilities

a. *EEOC'S ADA Guidance*

1) EEOC Technical Assistance Manual (TAM)

The EEOC TAM provides some discussion about "light duty" positions.[15] Many employers have established light duty positions to respond to medical restrictions on workers recovering from job-related injuries, in order to reduce workers' compensation liability. Such positions usually place few physical demands on an employee and may include tasks such as answering the telephone and simple administrative work. An employee's placement in such a position is often limited by the employer to a specific period of time.[16]

The TAM expressly states that the ADA does not require an employer to create a "light duty" position unless the "heavy duty" tasks an injured worker can no longer perform are *marginal* job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring.[17] In most cases however, "light duty" positions involve a totally different job from the job that a worker performed before the injury. Creating such positions by job restructuring is not required by the ADA. However, if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

Furthermore, the TAM states that when an employer places an injured worker in a temporary "light duty" position, that worker is "otherwise qualified" for that position for the term of that position. Therefore, a worker's qualifications must be gauged in relation to the position occupied, and not in relation to the job held prior to the injury.[18] It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential functions of that position. The TAM provides the following illustration. A telephone line repair worker broke both legs and fractured her knee joints in a fall. The treating physician states that the worker will not be able to walk, even with crutches, for at least nine months. She therefore has a "disability." Currently using a wheelchair, and unable to do her previous job, she is placed in a "light duty" position to process paperwork associated with line repairs. However, the office to which she is assigned is not wheelchair accessible. It would be a reasonable accommodation to place the employee in an office that is accessible. Or, the office could be made accessible by widening the office door, if this would not be an undue hardship. The employer also might have to modify the employee's work schedule so that she could attend weekly physical therapy sessions.[19]

2) EEOC Policy Guidance on ADA and Workers' Comp.

The EEOC's policy guidance seems somewhat incongruous with the TAM. The guidance defines "light duty" as particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties. In evaluating light duty assignments, the EEOC states that:

- Employers may limit light duty assignments to employees injured on the job.

- Employers are not required to create a light duty position for a non-occupational injured employee with a disability as a reasonable accommodation. However, an employer must provide other forms of reasonable accommodation required by the ADA.

However, in a significant policy statement, the EEOC states that ***if an employer reserves certain positions as "light duty" jobs for employees with occupational injuries, the employer must consider reassigning a disabled employee with a non work-related injury to such a position as a reasonable accommodation***. (emphasis added). Some commentators have argued that this statement in effect fosters the inadvertent creation of "permanent light duty" jobs.

However, the guidance further states that if an employer only provides light duty positions on a temporary basis, it will not be required to provide a permanent light duty position for an employee with a disability related occupational injury. Accordingly, it will be important for

[15] TAM § 9.4.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

employers to monitor light duty assignments so that permanent positions are not created by default.

3) ADA Cases

(a) ***Rucker v. City of Philadelphia***, 4 AMER. DISAB. CAS. (BNA) 1443 (E.D. Pa. 1995).

In *Rucker*, the plaintiff alleged that his employer violated the ADA by not accommodating his disability by placing him on "limited duty." The employee had suffered three on-the-job injuries and was dropped from the payroll when he could not return to work. In granting summary judgment in favor of the employer, the court initially determined that the employee could not perform the essential functions of the job. In reaching this decision, the court noted: "a written description prepared for advertising or interviewing purposes shall be considered evidence of the essential functions of the job." The court then rejected the employee's argument that "reasonable accommodation" required the elimination of an essential function of the job. Finally, the court found that the ADA did not require that an employer create a light duty or new permanent position which did not include essential functions of the job.

(b) ***Johnson v. City of Port Arthur***, 892 F. Supp. 835 (E.D. Tex. 1995).

The plaintiff alleged that the city violated the ADA by not accommodating his disability by placing him on "limited duty." The plaintiff experienced muscle spasms in his back while at work. The plaintiff was hospitalized and diagnosed with a degenerative muscle condition. The plaintiff's doctor released the plaintiff to return to work with certain physical limitations. The city informed the plaintiff that there were no light duty positions available at the time so the employee attempted to return to his former position. Upon return to work, the plaintiff reinjured himself. The plaintiff contended that his laborer position should have been changed to a light duty position.

The court rejected the plaintiff's theory that the city failed to reasonably accommodate his condition. The court recognized that "creating a new job or changing an employee's essential functions, for example, switching him to light duty when he has been a laborer, is not a reasonable accommodation."[20] The court further recognized that changing the plaintiff from a laborer to a light duty worker was not a reasonable accommodation to assist in the performance of his job; rather, it was a completely different job. The reasonable accommodation requested by the plaintiff required a change in the essential functions of the employment.

b. *DOL'S FMLA Guidance*

1) Light Duty (OPINION FMLA-17)

On November 15, 1993, the DOL issued an advisory opinion regarding mandatory light duty assignments. The DOL advised that under the FMLA, employers may not require injured employees to take light duty assignments *in lieu of* FMLA leaves of absence.[21] However, employers can offer alternative work assignments to employees if they are temporarily disabled in work accidents. Furthermore, the opinion states that if the FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require the employee to take a job with a reasonable accommodation.[22] This means that an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request.

Furthermore, the DOL advised that the FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule or position which better suits the employee's personal needs on return from leave. However, the employee cannot be induced by the employer to accept a different position against the employee's wishes.[23]

2) Light Duty (OPINION FMLA-55)

In this opinion, the DOL addressed and employer's concern about the FMLA as it relates to the ADA with respect to light duty accommodation and medical certification. The position taken by the Department that prohibits an employer from *requiring* an employee to accept a "light duty" position in lieu of FMLA leave is the appropriate construction of the statutory language.

The DOL also noted that the leave provisions of FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. While FMLA provides an eligible employee the right to a

[20] *Id.* at 843, citing, *Taylor v. Garrett*, 820 F. Supp. 933, 938 n.6 (E.D. Pa. 1993).

[21] *Family Leave Act Bars Mandatory Light Duty Assignment, DOL Advises*, DAILY LAB. REPT. (BNA) NO. 223, at A-3 (Nov. 22, 1993).

[22] *Id.*

[23] *Id.*; *see also* 29 C.F.R. § 825.215(4).

temporary medical leave of absence for a serious health condition, ADA prohibits employment discrimination against disabled individuals. Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination, and is any change in the work environment or in the way things are usually done that results in equal employment opportunity for an individual with a disability.

An employer under the ADA must make a reasonable accommodation to the *known* physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would cause an undue hardship on the operation of its business. In the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection.

For example, a reasonable accommodation under ADA might be accomplished by providing an individual with a disability with a part-time job which does not ordinarily provide health benefits. Under the FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 work-weeks of leave in any 12-month period with group health plan benefits maintained during this time. Once the FMLA leave had been exhausted in the 12-month period, the employer would have no further obligations under FMLA and would follow the requirements of ADA and any other applicable law.

Beside the ADA, other laws such as state workers' compensation laws may require employers to offer employees the opportunity to take a restructured or light duty job. Under such circumstances, the employer must still afford an employee his or her FMLA rights while at the same time fulfilling the requirements under the respective state law. For example, under a state workers' compensation program, an employer may be required to offer an employee a light duty assignment when the appropriate medical authority has indicated that the person is able to return to work on a limited basis. Such an employee could elect to exercise the remainder of his or her FMLA leave rather than accept the light duty assignment. This does not mean, however, that the employee would be entitled to continue to receive benefits under the workers' compensation program. If that program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer, but is turned down by the employee, the employer's obligations to provide such benefits may cease.

If an employee on FMLA leave voluntarily accepts a light duty assignment, the regulations provide that such an employee retains rights under FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period of up to 12 workweeks. This "cumulative period" would be measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time employed in a light duty assignment. The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave.

TIP #78: Understand That Employers Are Not Required to Offer Light Duty to Employees on FMLA Leave.

Light duty is not right to which employees can insist upon under the FMLA.

a. *James v. Hyatt Regency Chicago*, 707 F.3d 775 (7th Cir. 2013).

Carris James spent his 22-year career with the Hyatt Regency Chicago as a banquet steward. In March 2007, he suffered a non-work-related eye injury and required surgery. The company offered him FMLA leave, which he accepted. Before his medical leave ended (which his collective bargaining agreement had extended beyond the FMLA's required 12 weeks), James faxed a note from one of his physicians, which stated that James could return to work with certain lifting and bending restrictions. Those restrictions would have prevented him from returning to his banquet steward position. When Hyatt refused to offer light duty, James sued.

James argued that Hyatt interfered with his FMLA entitlement when it did not reinstate him to a light duty position. The court disagreed. It relied on the plain language of the FMLA's regulations: "If the employee is unable to perform an essential function of the position because of a physical or mental condition … the employee has no right to restoration to another position under the FMLA." Because light duty is not an "equivalent" position, the FMLA does not mandate restoration to a light duty position. It only protects employees who can return and perform all of the essential functions of their position. Because James's doctor only released him to light duty, the company had no obligation under the FMLA to bring him back to work.

b. *Practice Point*

While the answer to this issue under the FMLA is fairly straight forward, as discussed above, the ADA/ADAAA will dictate a different result. Before denying light duty to an employee returning from FMLA leave, you must consider whether the ADA requires the light duty as a reasonable accommodation. If you have light duty available, and do not have to create a light duty position to accommodate the employee, the ADA will likely require the consideration of temporary light duty as a reasonable accommodation.

TIP #79: Steer Clear of Creating Permanent and Indefinite Light Duty Jobs

In light of the discussion above in TIP #71, if you do not have a permanent light duty position, do not be bullied by a disabled worker into creating one as an accommodation. The ADA does not require it.

Employers often set aside a pool of positions for employees who are recovering from work-related injuries. If a worker reaches a level of recovery that has run its course, permanent assignment to a lesser job is not required if the worker cannot perform one of the company's "regular" jobs, with or without accommodation.

a. *Watson v. Lithonia Lighting and Nat'l Serv. Indus. Inc.*, 304 F.3d 749 (7th Cir. 2002).

After injuring her shoulder, assembly-line worker Tamara Watson wasn't able to do many tasks required for her job. To aid her recovery, the company temporarily limited her to lighter duties that she could handle. But when Watson's doctor said she was permanently unable to work on the line, the company terminated her, saying that no manual jobs were available for someone with her restrictions.

Watson sued under ADA, and argued that the company should have let her hold the "light duty" job on a permanent basis. The district court rejected Watson's argument and the Seventh Circuit affirmed. The Seventh Circuit held forcing the company to turn a temporary light-duty position into a permanent one would require creating an entirely new job, which is not mandated by the ADA. Watson's request also was not reasonable because letting her take a light duty job full time would limit the company's ability to accommodate other recovering employees with temporary light-duty jobs.

TIP #80: Be Consistent and Uniform in the Application of Light Duty Policies

Employers who use light duty programs to cut workers' compensation costs often make one big legal mistake: They apply their policies haphazardly, allowing some employees to take light duty jobs, but not others. That inconsistency is the fastest way to trigger discrimination lawsuits from employees who are turned down for those less strenuous jobs (answering phones, filing, entering orders, etc.).

One key trap: If you allow some employees with non-work-related injuries to return to light duty, you will have to allow pregnant women a crack at those positions, too. That's because the Pregnancy Discrimination Act (PDA) makes it illegal to discriminate on the basis of pregnancy. The following case shows why reserving light-duty jobs for workers' comp cases may be the smartest legal move.

a. *Reeves v. Swift Transp*., 446 F.3d 637 (6th Cir. 2006).

Three months into her job as a truck driver for Swift, Reeves got pregnant. Reeves's doctor restricted her from lifting. Because Reeves's job required heavy lifting, the company sent her home and eventually fired her because it had no work for her. (Reeves did not qualify for FMLA leave.)

Reeves had demanded one of the light-duty jobs reserved for employees on workers' comp, but the company refused. Reeves sued the Swift for pregnancy discrimination. The Sixth Circuit affirmed the dismissal of her case.

The court found that the company's light-duty policy was "indisputably pregnancy-blind" and applied consistently. Only employees on workers' comp could use the policy, and Reeves could not show that any other employee who suffered an off-the-job injury or condition was offered light-duty work. Granting Reeves the light-duty job would, the court said, "afford pregnant women more benefits and better treatment than other employees, instead of the equal benefits and same treatment intended by the Act." *Id*. at 639.

B. <u>Pregnancy Leave Issues</u>

TIP #81: Review the EEOC Guidelines on Pregnancy Discrimination

On July 14, 2014, the EEOC issued enforcement guidance on pregnancy discrimination accompanied by an extensive

and practical Q&A.[24] The new guidance, the first to address pregnancy discrimination since 1983, focuses on how the 2008 amendments to the Americans with Disabilities Act (ADA) may apply to employees with pregnancy-related disabilities.

The guidance sets out the fundamental requirements of the Pregnancy Discrimination Act (PDA) (which amended Title VII in 1978). That is, that an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions and that women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other employees who are similar in their ability or inability to work.

In addition, the new enforcement guidance discusses:

- The fact that the PDA covers not only current pregnancy but also discrimination based on past pregnancy and a woman's potential to become pregnant;
- Lactation as a covered pregnancy-related medical condition;
- The circumstances under which employers may have to provide light duty for pregnant workers;
- Issues related to leave for pregnancy and medical conditions related to pregnancy;
- The PDA's prohibition against requiring pregnant workers who are able to do their jobs to take leave;
- The requirement that parental leave (which is distinct from medical leave associated with childbearing or recovering from childbirth) be provided to similarly situated men and women on the same terms;
- When employers may have to provide reasonable accommodations for workers with pregnancy-related impairments under the ADA and the types of accommodations that may be necessary; and
- Best practices for employers to avoid committing unlawful discrimination against pregnant workers.

The related question-and-answer document offers very practical examples of what the EEOC requires of employers. Here are several of the most interesting entries:

a. *What workplace actions are prohibited under the Pregnancy Discrimination Act (PDA)?*

Under the PDA, an employer cannot fire, refuse to hire, demote, or take any other adverse action against a woman if pregnancy, childbirth, or a related medical condition was a motivating factor in the adverse employment action. The PDA prohibits discrimination with respect to all aspects of employment, including pay, job assignments, promotions, layoffs, training, and fringe benefits (such as leave and health insurance).

b. *Does the PDA protect individuals who are not currently pregnant based on their ability or intention to become pregnant?*

Yes. An employer is prohibited from discriminating against an employee because she has stated that she intends to become pregnant. In addition, the PDA's protection extends to differential treatment based on an employee's fertility or childbearing capacity. Thus, sex-specific policies restricting women from certain jobs based on childbearing capacity, such as those banning fertile women from jobs with exposure to harmful chemicals, are generally prohibited. An employer's concern about risks to a pregnant employee or her fetus will rarely, if ever, justify such restrictions. Sex-specific job restrictions can only be justified if the employer can show that lack of childbearing capacity is a bona fide occupational qualification (BFOQ), that is, reasonably necessary to the normal operation of the business.

c. *Will an employer violate the PDA if it takes an adverse action against a pregnant worker based on concerns about her health and safety?*

Yes. Although an employer may, of course, require that a pregnant worker be able to perform the duties of her job, adverse employment actions, including those related to hiring, assignments, or promotion, that are based on an employer's assumptions or stereotypes about pregnant workers' attendance, schedules, physical ability to work, or commitment to their jobs are unlawful, even when an employer believes it is acting in an employee's best interest (for example, by moving her to a less stressful job).

[24] http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm

d. *May an employer require a pregnant employee who is able to perform her job to take leave at any point in her pregnancy or after childbirth?*

No. An employer may not force an employee to take leave because she is or has been pregnant, as long as she is able to perform her job. Requiring leave violates the PDA even if the employer believes it is acting in the employee's best interest. If an employee has been absent from work as a result of a pregnancy-related condition and then recovers, her employer may not require her to remain on leave until the baby's birth; nor may an employer prohibit an employee from returning to work for a certain length of time after childbirth.

e. *Is an employee or applicant protected from discrimination because of her past pregnancy?*

Yes. An employee or applicant may not be subjected to discrimination because of a past pregnancy, childbirth, or related medical condition. For example, an employer would violate the PDA by terminating an employee shortly after she returns from medically related pregnancy leave following the birth of her child if the employee's pregnancy is the reason for the termination. Close proximity between the employee's return to work and the employer's decision to terminate her, coupled with an explanation for the termination that is not believable (*e.g.*, unsubstantiated performance problems by an employee who has always been a good performer), would constitute evidence of pregnancy discrimination.

f. *May an employer take an adverse action against a pregnant worker because of the views or opinions of coworkers or customers?*

No. Just as an employer cannot refuse to hire or retain a pregnant woman because of its own prejudices against pregnant women, it cannot take an adverse action against a pregnant worker because of the prejudices of coworkers, clients, or customers. For instance, an employer may not place a pregnant worker who can perform her job on leave based on her coworkers' belief that she will place additional burdens on them and interfere with their productivity.

g. *Does the PDA protect employees from harassment based on pregnancy, childbirth, or related medical conditions?*

Yes. Unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance that is motivated by pregnancy, childbirth, or related medical conditions may constitute unlawful harassment.

h. *Are pregnant employees covered under Title I of the ADA?*

In some circumstances, employees with pregnancy-related impairments may be covered by the ADA. Although pregnancy itself is not an impairment within the meaning of the ADA and thus, is not a disability, pregnant workers and job applicants are not excluded from the ADA's protections.

Pregnancy-related impairments are disabilities if they substantially limit one or more major life activities or substantially limited major life activities in the past. Examples of pregnancy-related impairments that may substantially limit major life activities include:

- Pelvic inflammation, which may substantially limit the ability to walk;
- Pregnancy-related carpal tunnel syndrome affecting the ability to lift or to perform manual tasks;
- Pregnancy-related sciatica limiting musculoskeletal functions;
- Gestational diabetes limiting endocrine function; and
- Preeclampsia, which causes high blood pressure, affecting cardiovascular and circulatory functions.

i. *Does the ADA protect the parents of a newborn with a disability?*

Yes. he ADA prohibits discrimination against individuals who have a known "association" with an individual with a disability. Thus, for example, an employer would violate the ADA by refusing to hire the mother or father of a newborn with a disability because it was concerned that the applicant would take a lot of time off to care for the child or that the child's medical condition would impose high healthcare costs.

j. *Update: Young v. United Parcel Service*, 135 S. Ct. 1338 (2015).

Employers may want to revisit their policies and practices on pregnancy accommodations after the Supreme Court's recent decision in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015). Although it did not set a bright-line rule, the high court's interpretation may allow more employees to maintain a lawsuit brought under PDA. Employers may

violate the PDA if they do not offer pregnant employees accommodations that they offer to other employees similar in their ability or inability to work.

In *Young*, a part-time UPS driver requested "light duty" accommodations when her doctor recommended that she lift no more than 10 pounds in the latter stage of her pregnancy. UPS denied Young's request, because the job required her to lift up to 70 pounds, and placed her on unpaid leave. Eventually Young lost her employee medical coverage. Young filed suit, alleging that UPS had discriminated against her in violation of the PDA. Young argued that because UPS had previously accommodated other drivers, such as drivers who suffered from a disability and those who lost their DOT certification, then she too deserved an accommodation.

The Supreme Court held that a pregnant employee may state a *prima facie* case of disparate treatment pregnancy discrimination by showing that: (1) she belongs to the protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work."

The employer may offer a legitimate, nondiscriminatory reason for denying the accommodation; however, the employer cannot argue that it was more expensive or less convenient to accommodate a pregnant employee than it would be to accommodate a non-pregnant employee.

The real crux of the *Young* decision lies in the employee's ability to rebut the employer's reasons as pretext. The Supreme Court held that a pregnant employee may still reach a jury by showing that the "employer's policies impose a significant burden on pregnant workers," and that the employer's "proffered legitimate, nondiscriminatory reasons" are not sufficiently strong to justify that burden.

In light of *Young*, employers should revisit their existing accommodations policies to ensure that company practices and procedures do not impose any adverse impact on pregnant employees, regardless of individual circumstances.

TIP #82: Don't Treat Pregnancy Any Differently that Any Other Medical Condition

The Pregnancy Discrimination Act (PDA), prohibits employers from discriminating against female employees or job applicants based on pregnancy, childbirth, or related medical conditions. If your company has more than 15 employees, the PDA prohibits you from:

- refusing to hire a woman because she is pregnant; and
- firing or forcing a worker to leave because she's pregnant.

A pregnant employee must be allowed to keep her job as long as she is able to perform her duties. Also, you cannot regulate how much time an employee must take off work either before or after childbirth if she is able to do her job. What should you do if an employee's pregnancy prevents her from performing all of her job duties? If your company offers other workers easier duties for a limited time when they cannot do their regular jobs, then you must offer the same accommodation to pregnant workers.

Under the PDA, you are also prohibited from:

- treating a female employee who has recently had a baby differently than employees dealing with other types of medical conditions;
- taking away credit for previous years worked, accrued retirement benefits, or seniority because of maternity leave; and
- firing or refusing to hire a woman because she has had an abortion.

You must treat an employee who has recently given birth at least as well as you treat other workers who cannot do their jobs for a short period of time. For example, if you permit a worker to go on paid or unpaid leave because of a heart attack or a broken leg, you must offer that arrangement to a worker who needs time off for childbirth (or pregnancy). Also, you must hold the new mom's job for her at least as long as you would hold open a position for an employee who is out on sick or disability leave.

TIP #83: Remember that the PDA Doesn't Require Better Treatment Only Equal Treatment

a. *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).

Mirtha Urbano worked for Continental Airlines as a ticketing sales agent. The job required her to lift heavy baggage to check-in customers. When she became pregnant, her doctor ordered her to refrain from lifting heavy baggage. Thus, Urbano requested to work for Continental as a service center agent, so she would not have to lift heavy loads.

Continental denied her request because its policy granted light-duty assignments exclusively to employees suffering

from an occupational injury. This left Urbano unable to find a suitable position within Continental. Therefore, she used up her accrued sick days and then took ninety days of FMLA leave. Urbano ultimately filed suit under Title VII.

The Court employed the *McDonnell Douglas* analysis in assessing Continental's motion for summary judgment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The four prong *McDonnell Douglas* test required Urbano to show: (1) she was a member of a protected class; (2) she was qualified for the position she lost; (3) she suffered an adverse employment action, and (4) other similarly situated employees were treated more favorably.

The court found that Urbano failed to establish the second prong of the test, namely because she could not provide evidence she was qualified for transfer to a light-duty position. In order to show she was qualified for a light-duty position, she would have to satisfy Continental's policy requirement and prove she sustained a work-related injury.

The court further explained that the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women. Rather, it only requires that pregnant women be treated the same as any other worker who suffered an injury off-duty. Here, Continental treated Urbano the same as any other injured employee. Accordingly, the court dismissed Urbano's claims because her demand was for preferential treatment rather than a concern over disparate treatment.

b. *Practice Point*

An employer's evidence and documentation of uniform and consistent applications of its light duty policies can serve as critical evidence in these cases.

TIP #84: Base Light Duty Policies on Business Necessity and Enforce Them Consistently (Even with Pregnancy)

If you have a policy that allows for light-duty positions due to injuries or disability, be sure to apply it to everyone universally. Treating pregnant employees according to established policy may help you avoid liability.

a. *Daugherty v. Genesis Health Ventures of Salisbury Inc.*, 316 F. Supp. 2d 262 (D. Md. 2004).

After nursing assistant Jennifer Daugherty became pregnant, her doctor restricted her to light-duty assignments, including not lifting anything more than 75 pounds. But lifting patients was an essential function of her job at a long-term care facility. The company fired Daugherty, citing its long-standing policy of giving light-duty assignments only to employees who suffer injuries on the job.

Daugherty sued, alleging a PDA violation, but the court sided with the company. Its reasoning: The company's policy was clearly a justified "business necessity." Nursing assistants were responsible for lifting and transporting residents. If all employees injured off the job were offered light-duty assignments, the facility wouldn't be able to properly care for patients.

b. *Practice Points*

✓ The best light-duty policies are flexible, with no time limit on how long a pregnant employee can be assigned to light duty.

✓ Leave the decision as to when to start a light-duty assignment with the pregnant worker and her physician.

✓ Stipulate that employees on light duty will continue to receive normal promotions, pay increases and benefits.

TIP #85: Promptly Respond to Accommodation Requests from Pregnant Employees

The ADAAA made several significant changes to the ADA that affected the definition of disability. In particular, the regulations implementing the ADAAA rejected the notion that an impairment of limited duration doesn't substantially limit a major life activity and, therefore, is not a covered disability under the ADA. This has a significant effect on the assessment of pregnancy-related impairments which are, by their nature, of limited duration. According to the EEOC, impairments resulting from pregnancy such as, gestational diabetes, carpal tunnel syndrome, anemia, and sciatica may be ADA disabilities.

As stated above, the PDA prohibits employment discrimination on the basis of pregnancy, child birth, or related medical conditions. It also requires employers to treat a pregnant worker with a temporary disability in the same way it treats any other employee with a temporary disability.

The following is list of suggestions that employers can follow when pregnant employees ask for workplace modifications, adjustments, or other type of accommodations.

- A woman who has a temporary disability caused by pregnancy may be entitled to light duty or unpaid leave if an employer provides these options to employees with other types of temporary disabilities.

- An employee can use plain language when requesting an accommodation—she does not need to mention the ADA or use the phrase "reasonable accommodation."

- If an employee's condition might be an ADA disability, start the interactive process—have an informal discussion with the employee about how her restrictions affect her ability to do her job.

- Obtain necessary documentation—if the need for accommodation isn't obvious (*e.g.*, carpal tunnel syndrome), ask for documentation from the employee's healthcare provider, but make sure the request is limited to information needed to establish the existence of a disability and the need for reasonable accommodation.

- Document the steps taken in response to the employee's request.

- Provide training for supervisors so they know how to respond to requests from pregnant workers.

C. ADA/ADAAA Related Issues

TIP #86: Don't Forget the Times Where the PDA and ADA/ADAAA Intersect

Be alert to situations where the complications from pregnancy, in and of themselves, constitute a disability under the ADA/ADAAA. This is one of the cases where the PDA and ADA clearly intersect. In the case below, the court held that: 1) postpartum depression can be a covered disability under the ADA; and 2) under the PDA, postpartum depression is protected as a medical condition related to pregnancy.

a. *Reilly v. Revlon*, Inc., 620 F. Supp. 524 (S.D.N.Y. 2009).

Lisa Reilly was employed by Revlon as a member of their medical services department. After giving birth, Reilly began to suffer from postpartum depression, a form of depression that follows the birth of a child. Reilly was hospitalized as a result of her depression and, although she used up the entirety of her Family and Medical Leave Act ("FMLA") leave, she was still unable to return to work due to her illness.

Revlon's employment policies stated that employees do not have an automatic right to reinstatement once their FMLA leave has expired. There was a brief period of discussion between Revlon and Reilly regarding the possibility of gradually assimilating Reilly back to work, however, no plans were ever finalized. Finally, a little more than two months after Reilly's FMLA leave had expired, he was informed that her position had been filled. As a result, Reilly filed a claim that, among other things, she had been discriminated against under the ADA and the PDA.

The district court began by addressing Reilly's ADA claim. Although the court ultimately held that a fact issue existed as to whether Reilly had an actual or perceived ADA disability, it implied that postpartum depression would be covered under the ADA so long as Reilly met the three-step test set out by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

In *Bragdon*, the Supreme Court held that an individual should be classified as disabled for the purposes of the ADA if the following three conditions are met: (1) the court has determined the individual suffers from a physical or mental impairment; (2) the court has identified the life activity upon which the individual has relied and determined that this activity constitutes a major life activity under the ADA; and (3) the court has determined the impairment has substantially limited that major life activity.

The district court then Court addressed Reilly's PDA claim. Although the Court articulated that "[p]ostpartum depression is a condition related to pregnancy and accordingly falls within the PDA's protections," it held that Reilly had simply not provided any evidence of discrimination on those grounds. Consequently, it dismissed her PDA claim.

However, the Court also noted that medical conditions related to pregnancy are protected under the PDA, and thus by articulating that postpartum depression is a medical condition related to pregnancy, the court simultaneously declared that discriminating on these grounds would violate the PDA.

TIP #87: If You Start the ADA/ADAAA Interactive Process–Finish It[25]

a. *Spurling v. C&M Fine Pack, Inc.*, 793 F.3d 1055 (7th Cir. 2014).

In *Spurling*, the Seventh Circuit reversed, in part, a district court's entry of summary judgment in favor of an employer in a FMLA discrimination and ADA failure to accommodate suit.

The plaintiff, Spurling, was a night shift forming inspector/packer employed by C&M. In 2009, Spurling received several disciplinary warnings regarding her falling asleep while on duty. On February 15, 2010, Spurling received a Final Warning/Suspension after she left the worksite to use the restroom and was found by a coworker sleeping in the restroom. Upon her return to work after her suspension, Spurling met with the plant manager and three of her supervisors where she indicated that her sleep issues were caused by medication that her doctor had prescribed and produced a doctor's note to that effect. Spurling continued to experience difficulty remaining conscious at work and on April 12, 2010, Spurling's shift supervisor reported her for being completely asleep while packing parts. On April 15, 2010, Spurling was issued a Final Warning/Suspension note informing her that due to the repeated incidents of sleeping on her shift, she was being suspended until the company decided how best to proceed. The letter indicated that Sterling should provide any information relevant to the company's deliberation prior to April 19.

On April 16th, Spurling met with the HR Manager at C&M to inform him that her performance issues might be related to a medical condition. The HR Manager provided Sterling with a letter regarding the ADA and documentation for Spurling's physician to complete with instructions for the paperwork to be returned no later than April 30. Spurling alleged that she requested time off to determine the extent of her medical issue after she received the paperwork. Spurling returned the ADA paperwork, which stated that she had a mental or physical disability covered under the ADA, to C&M on April 21 and was told that the company would review the material and get back to her. C&M's HR Manager testified that the information provided by Spurling's doctor was insufficient to establish that she suffered from a disability under the ADA; therefore, C&M proceeded with terminating Spurling's employment on April 28, 2010. On May 27, 2010, Spurling received a diagnosis of narcolepsy, which in her case was manageable with proper medication.

In granting summary judgment in favor of the employer, the district court held that an employer could not be held accountable for discrimination under the ADA when both it and the employee are unaware that a qualifying medical condition exists. According to the District Court, Spurling's employment termination took place on April 15, and at that time, no discrimination could have occurred because neither the company nor Spurling had knowledge of her condition. Applying the same reasoning, the District Court held that Spurling's FMLA claim failed because C&M could not be held liable for firing Spurling for a qualifying condition it was unaware she had.

According to the Seventh Circuit, the actual issue in the case was whether the April 15 letter to Spurling sufficed to terminate her employment. Disagreeing with the lower court, the appeals court applied the "unequivocal notice of termination" test in answering the question of employment termination. The court held that April 15 was not the date of employment termination because, at that time, there was not a final decision to terminate Spurling's employment, and C&M had not given her unequivocal notice of its final termination decision. April 28 was the date C&M actually communicated its final termination decision to Spurling; therefore, that was the date of termination for purposes of analyzing the failure to accommodate claim.

Analyzing the accommodation claim, the court determined that C&M began the ADA interactive process with Spurling by asking her to complete the ADA paperwork but failed to follow through. Instead of engaging in the interactive process by seeking further clarification from Spurling or her doctor concerning the medical evaluation, the company disregarded the evaluation altogether and proceeded with her termination. C&M's failure to engage in the interactive process was not alone actionable, held the court. C&M's failure to engage in the interactive process prevented the identification of an appropriate accommodation for a qualified individual, Spurling. That conduct was actionable since it was found that Spurling could have performed the essential functions of her job by taking medication to control her narcolepsy. Ultimately, the court held that C&M properly began the interactive process envisioned by the ADA but failed to carry it through.

With regard to Spurling's FMLA claim, the appeals court held that Spurling's statement to the HR Manager prior to her medical evaluation that she needed time off to figure out why she was falling asleep was not sufficient to put her

[25] Keisha Jackson, *Don't Start the ADA Interactive Process Unless You're Going to Finish It!*, EMPLOYMENT ESSENTIALS, Mar. 13, 2014 at http://www.sjlaboremploymentblog.com/don't-start-the-ada-interactive-process-unless-youre-going-to-finish-it/

employer on notice that she had a "serious health condition" requiring FMLA leave. According to the court, unless an employer already knows the employee has an FMLA authorized ground for leave, the employee must communicate the ground to the employer. The court held that C&M had no way of discerning that Spurling's inability to stay alert was possibly a FMLA issue because employees falling asleep on the third shift was not atypical, and it was something for which Spurling had already been disciplined.

b. *Practice Point*

The take away is that employers must be careful about starting a process that they have no intention of completing. Once C&M provided an opportunity for Spurling to engage in the interactive process, which was accepted by Spurling's completion and return of the ADA paperwork, it no longer had the luxury of proceeding with the termination until the process was complete.

TIP #88: Don't Forget that Probationary Periods Are Not Immune from the ADA/ADAAA[26]

Many employers reserve the right to terminate a new employee at any time during a "probationary period" if they find a new hire is not suited for the job. All too often, this gives employers a false sense of security in the belief they can terminate an employee for any reason during that period. However, a pipe-fitting manufacturer recently discovered this can be a costly mistake after it agreed to a $65,000 settlement with the EEOC.

According to the EEOC's disability discrimination lawsuit, the company's policy offered non-probationary employees up to 26 weeks of leave, but did not offer leave to employees in the probationary period. The employee — a Marine Corps veteran — began suffering from seizures caused by service-related disabilities and requested six weeks of unpaid medical leave to address the seizures. However, since he was only ten weeks into the job, the company denied his request and terminated his employment.

While probationary employees are not entitled to leave under the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA) applies throughout the hiring and employment process. The EEOC has long held the Act covers probationary employees, who are entitled to accommodations under the ADA. Avoiding EEOC scrutiny and ADA liability therefore requires employers to analyze every ADA request — whether from a new hire or a long-term employee — in the same way.

Although this case settled before going to court, it offers several takeaways for employers. The company's primary mistake was not making an exception to its leave policy for this probationary employee and automatically terminating him. Rather, it should have carried out an individualized assessment to determine whether a reasonable accommodation would help the employee perform the essential functions of the job. This includes learning more about how his condition affected his job, why a leave of absence was necessary and whether it would ultimately help him return to work.

This interactive process is crucial for determining whether the employee's absence will affect the company's operations and — if it does — allow it to document it as early as possible. Although here the requested leave was of a specific duration, if no time frame is given, employers should explain to the employee how his absence would impinge on their business. Employers should then request a reasonable estimate of when the employee will be able to resume his essential job functions — with or without an accommodation — to enable them to better assess whether leave can be provided as a reasonable accommodation, or would impose an undue hardship on the employer. Unfortunately, there is no bright line rule outlining the length of leave employers must grant as an ADA accommodation. Instead, the ADA requires this individualized interactive process for each employee requesting leave.

This case also serves as an important example that employers must take care not to view leave requests from an FMLA standpoint alone. Rather, employers should always consider whether an employee is entitled to a leave of absence as a reasonable accommodation under the ADA, either before, or after, the 12 weeks of FMLA leave is exhausted.

[26] Tiffany Roberston, *Settlement Reminds Employers Probationary Periods Are Not Immune to the ADA*, ONLINE COMPLIANCE TRAINING SOLUTIONS, Mar. 11, 2015 at http: http://www.wecomply.com/blog/post/2582603-Settlement-Reminds-Employers-Probationary-Periods-Are%20Not-Immune-to-the-ADA?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=ethicsandcompliancetrainingblog-wecomply

TIP #89: Intermittent FMLA Leave May Be an ADA Accommodation

a. *Asher v. United Recovery Sys. L.P.*, C.A. No. H14-0661, 2015 U.S. Dist. LEXIS 157703 (S.D. Tex. Nov. 23, 2015.

Here's something to remember when an employee claims she has a disability that interferes with her ability to work overtime or even a full day. You can offer intermittent FMLA leave as a reasonable accommodation rather than restructuring the job or transferring the employee to another open position.

Remember, the employer, not the employee, gets to pick the ADA accommodation. As long as it is a reasonable accommodation and is designed to let the employee perform his job's essential functions, you have met your ADA obligations.

Vincent Asher worked as a debt collector, calling individuals who owed money and trying to get them to make payments on their debts. Asher worked eight or nine hours per day and could work more if he chose. When Asher was involved in an auto accident, he received time off under the FMLA to heal.

Asher came back to work and soon reinjured his back while helping his son move. Doctors forbade Vincent from working overtime after a supervisor asked him to make up missed time with several 12-hour shifts. He then was offered intermittent leave to adjust his schedule for the days he claimed to be in pain. Eventually, Asher was fired for poor performance.

That's when Asher sued, alleging that he had been terminated because he was disabled and had been denied a reasonable accommodation of a transfer to a less stressful position. The court dismissed Asher's Vincent's lawsuit.

It reasoned that by letting Ahser take intermittent FMLA leave, the employer had, in fact, accommodated his back pain, including his need to avoid working overtime. It didn't need to transfer him to another job or change his schedule permanently.

D. <u>Miscellaneous Tips</u>

TIP #90: There Is No Harm in Granting Leave More Generous Than the FMLA

a. *Bernard v. Bishop Noland Episcopal Day Sch.*, 630 Fed. Appx. 239, (5th Cir., 2015) (unpublished opinion).

Employers are supposed to let employees who need FMLA leave know about their eligibility and what's involved in taking leave. But what if you offer a leave plan that goes above and beyond what the FMLA requires? Courts won't hold that against you—even if you flub the FMLA's notice requirements.

Heather Bernard, a teacher, asked about delaying the start of her school year so she could be treated for anorexia. Bernard's school had a generous program that allowed up to three full months off. The first month was fully paid, the second paid at half-time and the third at one-third regular salary.

Bernard took the paid time off and returned to work when it expired. No one from the school had told her about FMLA leave, nor did the employee handbook mention it.

After her return, Bernard was required to show she was recovering and following her medical team's treatment advice. It soon became apparent that she wasn't. She began to lose weight again, couldn't remember her students' names or follow lesson plans. Then Bernard stopped treatment altogether and started missing work without calling in. Bernard was terminated for poor performance.

Bernard sued, alleging that no one ever told her about FMLA leave. She said if she had known about it, she would have taken FMLA leave. But the court said that even though Bernard hadn't received the required FMLA eligibility notice, she suffered no harm. She had already taken a more generous paid leave, which would have run concurrently with FMLA leave anyway. Her case was dismissed.

TIP #91: Enforce Neutral Leave Policies[27]

a. *Kings Aire v. Melendez*, 477 S.W.3d 309 (Tex. 2015).

The Texas Supreme Court has vacated a jury verdict in favor of a former employee who had alleged workers' compensation retaliation, rendering judgment in favor of the employer.

The Supreme Court found that the employee had not presented evidence that his termination had resulted from anything other than the uniform enforcement of a neutral absence control policy.

The court found that plaintiff Jorge Melendez had failed to present any evidence to support his allegations that the absence policy of his former employer, Kings Aire, had not been uniformly enforced, that his discharge had not been required by such uniform enforcement, or that Kings Aire's stated reason for discharging Melendez was false.

Injury, FMLA and workers' comp

Melendez suffered an on-the-job injury on July 2, 2009. Kings Aire placed Melendez on FMLA leave the next day. Melendez's 12 weeks of FMLA leave expired on Sept. 24, 2009, but as of that date, he had not been released to return to work.

Kings Aire notified Melendez on Sept. 28, 2009, that he had exhausted his FMLA leave and that he had been terminated on Sept. 25, pursuant to the following policy:

"A leave of absence may be granted for any reason acceptable to Kings Aire or required by law…. Except as discussed below or required by law, a leave generally may not exceed three months, and an employee who fails to return to work within three months of the leave of absence will be terminated."

Melendez filed a lawsuit, alleging he had been terminated in retaliation for filing a workers' compensation claim.

Dueling arguments

Kings Aire presented evidence that it discharged four other employees pursuant to this policy, two of whom, like Melendez, had been out due to workers' compensation injuries, and two of whom had been on leave due to personal illnesses unrelated to on-the-job injuries. Kings Aire also presented evidence that several employees suffered work-related injuries, filed workers' compensation claims, and returned to work without incident because they were able to return in 12 weeks or sooner.

In response, Melendez cited Kings Aire's FMLA policy, which provided that an employee would be discharged if he or she failed to provide a medical certification of fitness within 15 days after the conclusion of the leave.

Melendez was not afforded this grace period, he said, and so his discharge the day after his leave expired was inconsistent with Kings Aire's own policy.

Kings Aire disputed this interpretation, arguing that the FMLA policy had to be read in conjunction with the company's absence control policy, under which employees received the 15-day grace period only if they had not yet exhausted 12 weeks of leave.

"[E]ven assuming reasonable people could disagree about the policy's meaning," the court wrote, "the plaintiff made no showing that it was applied inconsistently and thus provided no evidence that the stated reason for termination was false."

Thus, the court reasoned, "Barring unusual circumstances, when an employer terminates an employee consistent with the employer's uniform enforcement of its leave policy, even when an alternative interpretation of the policy would not require termination, that uniform enforcement is no evidence that an employee's termination 'would not have occurred when it did but for the employee's assertion of a compensation claim or other conduct protected by section 451.001.'"

What it means for employers

The lesson for Texas employers is that their policies must clearly state the outer limit on leaves, and they must be vigilant to enforce that limit in all cases.

Any evidence of exceptions being made to a leave policy will destroy the effectiveness of the defense and may even provide factual support to the plaintiff's claim of retaliation.

As the Texas Supreme Court noted in Melendez, had Kings Aire allowed Melendez the 15-day grace period, it would have been a departure from Kings Aire's uniform enforcement of its absence control policy.

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[27] Tiffany L. Cox, *Texas Supreme Court says neutral leave policy OK*, HR SPECIALIST, Jan. 4, 2016 at http://www.thehrspecialist.com/63372/Texas_Supreme_Court_says_neutral_leave_policy_OK.hr?cat=employment_law&sub_cat=fmla

To be sure, there is a tension in the law that can prove challenging for employers that must also be mindful of their duty to provide reasonable accommodation under the ADA. The EEOC has taken the position that inflexible leave-of-absence policies may violate the ADA, as the granting of leave may, in some instances, constitute a reasonable accommodation.

Consequently, any absence control policy should include language to the effect of:

"If the employee is unable to return to work at the end of the maximum leave period, his or her employment will be terminated if it is determined that the employee cannot perform the essential functions of his or her job with or without reasonable accommodation."

This determination should be made only after engaging in the interactive process to satisfy the EEOC's interpretation of the ADA's accommodation obligation.

APPENDIX 1

DOL FMLA FORM WH-380-E

Certification of Health Care Provider for Employee's Serious Health Condition

APPENDIX 2

DOL FMLA FORM WH-380-F

Certification of Health Care Provider for Family Member's Serious Health Condition

APPENDIX 3

DOL FMLA FORM WH-381

Notice of Eligibility and Right & Responsibilities

APPENDIX 4

DOL FMLA FORM WH-382

Designation Notice

APPENDIX 5

DOL FMLA FORM WH-384

Certification of Qualifying Exigency for Military Family Leave

APPENDIX 6

DOL FMLA FORM WH-385

Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave

APPENDIX 7

DOL FMLA FORM WH-385-V

Certification for Serious Injury or Illness of a Veteran for Military Family Leave

APPENDIX 8

DOL FMLA Poster

APPENDIX 9

DOL Fact Sheet #77B:
Prohibiting Retaliation Under the FMLA

APPENDIX 10

EEOC Facts About Retaliation