

LEGAL BRIEFINGS



Employee Leave for Medical Reasons:

The Applications and Interactions of the ADA and FMLA

Introduction

For employees and employers, leave from work due to serious illness or disability is a complicated issue. Important laws on both the state and federal level, including workers compensation laws, may apply depending on an individual's particular circumstances. This paper examines two of the applicable federal laws, the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) and their application and interplay in the context of employee leave due to illness or disability.

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General Overview of the Laws

The ADA is a federal statute that addresses the civil rights of people with disabilities in numerous contexts.¹ The stated purpose of the ADA is “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.² The FMLA is a federal statute mandating leave for certain employees for the birth or placement of a child or the serious health condition of an employee or immediate family member.³ An employer, when confronted with the issue of requesting time off for a medical leave, should separately evaluate the employee’s rights under the ADA and FMLA. In this evaluation, the employer should consider whether these rights overlap and the appropriate actions to take regarding the requested time for medical leave.⁴

The Americans with Disabilities Act (ADA)

In 1990, Congress passed the ADA and utilized the same definition of disability as the Rehabilitation Act of 1973, i.e., a mental or physical impairment that substantially limits a major life activity.⁵ However, this definition concerning who is covered by the ADA has itself been “substantially limited” by the U.S. Supreme Court and lower courts during the past fifteen years.

Title I of the ADA contains the provisions related to employment.⁶ The employment provisions involve every aspect of employment, including ap-

plication procedures, medical testing, reasonable accommodations, workplace policies and procedures, benefits, discipline, harassment, and termination. In every situation, the ADA requires that employers make an “individualized assessment.”⁷ The Equal Employment Opportunity Commission is the government agency charged to provide guidance and enforcement of ADA for employment issues.⁸ One of the central provisions of Title I is the requirement that employers provide reasonable accommodations to employees with disabilities that will allow them to perform the essential functions of the job. This paper will not focus on broad ADA or reasonable accommodation issues, but will only examine issues that arise when an employee requests leave from work as a reasonable accommodation.



The Family and Medical Leave Act (FMLA)

The FMLA was passed in 1993 and entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.⁹ The purpose of the FMLA is “to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse,



or parent who has a serious health condition.”¹⁰ The U.S. Department of Labor (DOL) is the government agency charged to enforce and provide guidance under the FMLA.¹¹

Areas of Application and Interaction of the FMLA and ADA

In analyzing employee leave situations, there are four possible situations with respect to the application of the ADA and the FMLA:

1. Only the ADA applies;
2. Only the FMLA applies;
3. Neither law applies; or
4. Both laws apply.

The situation where both laws apply is the most complex. In these situations, an employer must provide leave under whichever statute provides the greater rights to employees.¹² However, double recovery will not be awarded to the employee for the same loss.¹³ The FMLA Regulations and EEOC Guidance attempt to explain the complex relationship between these two laws.¹⁴ In analyzing an employee’s leave request, “An employer should determine an employee’s rights under each statute

separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.”¹⁵

General Provisions for Leave Under the ADA and FMLA

Generally, the ADA and FMLA requirements for leave are:

ADA

- An employee who needs leave as a reasonable accommodation is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship on the employer.
- The amount of leave that is reasonable in a particular circumstance is a fact specific situation requiring an individualized assessment.
- There is no specified limit of time for the leave.
- The leave must enable the employee to become qualified to perform the essential job functions with or without a reasonable accommodation at the end of the leave period.
- An employer may offer an accommodation other than leave if it is reasonable and effective despite an employee’s preference to be granted leave to accommodate their disability.

- ADA leave may be taken intermittently absent “undue hardship.”
- An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave.
- An employer must continue an employee’s health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status.
- An employee should be reinstated to the same position after leave absent “undue hardship” as long as they are still qualified for the position.¹⁶

FMLA

- An eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period.
- Leave is also available where the employee is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.
- Leave may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.¹⁷
- FMLA leave may be taken “intermittently or on a reduced leave schedule” ... when medically necessary for “medical treatment



of a related serious health condition, ... for recovery from treatment.”¹⁸

- An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave.¹⁹
- An employer must continue the employee’s health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.²⁰
- An employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a ‘no fault’ attendance policy.²¹
- The FMLA guarantees the right of the employee to return to the same position or to an equivalent one unless the employee is designated as a “key employee” (discussed in more detail below).²²

If an employee qualifies for FMLA leave, then the right to leave is absolute the employee must be granted medical leave.²³ Unlike the ADA, the FMLA does not take the “reasonableness” of leave into account. The ADA also permits an employer to offer a reasonable accommodation other than leave if it is effective and eliminates the need for leave despite the employee’s preference for leave. Conversely, under the FMLA, the employer cannot substitute an alternative for an employee’s valid leave request. When both laws apply, FMLA leave may be extended beyond 12 weeks as a reasonable accommodation under the ADA.²⁴

Covered Employers

ADA

Title I of ADA defines an employer as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.”²⁵ State and local government employers of any size are covered by the ADA.²⁶ In addition, state and local anti-discrimination laws may cover employers of any size.

FMLA

The FMLA defines an employer as “any person engaged in commerce... who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year...”²⁷ Public agencies are covered by the FMLA regardless of the number of employees.²⁸ Public and

private elementary school employees are also covered by the FMLA regardless of the number of employees, but there are special rules addressing employees of local educational agencies.²⁹

Covered Employees

ADA

Whether an employee is covered pursuant to Title I of the ADA is a complicated issue and has been the most litigated issue under the Act. Typically, it is more efficient and cost effective for the employee and employer to focus on investigating effective accommodations rather than in making the determination of whether the employee is covered pursuant to the ADA. An employee is considered to be an individual with a disability if they:

1. Have a disability;
2. Have a record of a disability; or
3. Are regarded as having a disability.³⁰

A disability is defined by the ADA as a “physical or mental impairment that substantially limits one or more of the major life activities.”³¹ In order to be protected by the Act, an individual must be qualified to perform the core job duties, called the “essential functions” of the job, with or without a reasonable accommodation.³² Essential functions are determined by focusing on the purpose of the function and the result to be accomplished, rather than simply considering how the function is currently performed or what is written in the job description.³³ These determinations must be made on a case-by-case basis.³⁴

Reasonable Accommodations

A “reasonable accommodation” is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to equally enjoy the benefits and privileges of employment. The EEOC and the courts have conclusively stated that leave from work due to a disability is a possible reasonable accommodation under the ADA. The leave can include accrued paid leave or unpaid leave. The leave may be taken intermittently or as a period of continuous time.³⁵ The EEOC has identified that some of the disability-related reasons for leave include, but are not limited to:

- Obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis), rehabilitation services, or physical or occupational therapy;
- Recuperating from an illness or an episodic manifestation of the disability;
- Obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);

- Training a service animal (e.g., a guide dog); or
- Receiving training in the use of braille or to learn sign language.³⁶
- The amount of leave that is required under the ADA is something that depends on the specific situation, and requires an individualized assessment under the factors relevant to a reasonable accommodation and undue hardship analysis. There is no “bright line rule for determining a maximum duration of leave that can constitute a reasonable accommodation.”³⁷

Making reasonable modifications to policies and procedures is also a form of reasonable accommodation. Employers must modify workplace, attendance, and leave policies to grant leave absent an undue hardship.³⁸ This includes modifying so called “no-fault” policies whereby employees are terminated after being on leave for a certain period of time.³⁹ Employees cannot be penalized for time missed during leave taken as a reasonable accommodation.⁴⁰ An employer may offer the employee an accommodation other than leave, for example reassigning non-essential job functions, if the proposed accommodation is effective and eliminates the need for leave.⁴¹ If holding a position open is deemed by the employer to be an undue hardship, the employer must consider reassignment to a vacant, equivalent position for which the employee is qualified and to which the employee may return at the conclusion of the leave.⁴² Note that the employer does not have this option under the FMLA; if an employee qualifies

for FMLA leave, then the employer must grant the leave.⁴³

The relevant criteria in determining the reasonableness of leave as an accommodation includes the:

- Length of leave requested;
- Whether the nature of the job or the financial circumstances of the company makes it an undue hardship to keep the position open or hire temporary workers;
- Cost of the leave;
- Financial resources of facility involved;
- Overall financial resources of covered entity;
- Type of operation, including composition, structure, and functions of work force;
- Impact of the leave on operation of facility.⁴⁴

The employee usually has the burden to propose reasonable accommodations, but the employer has the duty to engage in the interactive process and provide an effective reasonable accommodation.⁴⁵

FMLA

An “eligible employee” for FMLA leave is someone who:

- Has been employed for at least 12 months by a covered employer; and

- Has performed 1,250 hours of work during those 12 months, which do not have to be consecutive.⁴⁶
- Works where there are at least 50 employees working within 75 miles of the worksite.⁴⁷
- Is requesting leave due to his/her own “serious health condition” or the “serious health condition” of an immediate family member (defined as parent, spouse, or child).⁴⁸

The term “serious health condition” means:

- An illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or
- Continuing treatment by a health care provider.⁴⁹



“Continuing treatment” can include:

- A period of incapacity of more than three calendar days that results in two or more treatments by a health care provider;
- 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;⁵⁰
- Any period of incapacity due to pregnancy or for prenatal care, a chronic serious health condition, permanent or long term condition for which treatment is not effective (e.g., stroke, Alzheimer’s disease);
- A period of time to receive multiple treatments (e.g., chemotherapy for cancer or dialysis for kidney disease).⁵¹

The Employee Request for Leave

ADA

Generally, under Title I of the ADA, the employee must make the initial request for leave (or any other “reasonable accommodation”).⁵² EEOC Guidance provides:

- The employee may use “plain English” and need not mention the ADA or the term “reasonable accommodation” as long as the plain meaning of the request

reasonably alerts the employer to the need for leave due to a medical condition.⁵³

- There are no specific notice requirements in terms of the amount of advance notice that is required.
- A friend, family member, service provider, or any other individual can make a request for leave on behalf of the employee.⁵⁴

FMLA

The FMLA Regulations state:

- “An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.
- The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.”⁵⁵
- The FMLA requires the employee to provide the employer with 30 days notice of the need for leave if the need for leave is foreseeable.⁵⁶
- If the need for leave is not foreseeable, the employee must give notice “as soon as practicable” (generally one or two business days after the need for leave becomes known).⁵⁷
- If the employee fails to give 30 days notice without any reasonable justification for the delay,

the employer is able to delay the leave until 30 days after it received notice.

- If the employer wishes to delay leave the employee's leave due to lack of proper notice, "it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed."⁵⁸
- A friend, family member, service provider, or any other individual or "spokesperson" may make the request for the employee, if the employee is unable.⁵⁹

The Employer Response to the Leave Request/ Notice of Rights

ADA

Once an individual has requested a reasonable accommodation, the employer is obligated to engage in an interactive process with the employee in order to an appropriate and effective accommodation.⁶⁰ The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. If the need or effectiveness of an accommodation is not apparent, the employer in certain circumstance may make a limited medical inquiry for relevant medical information (discussed below in more detail). In

addition to medical information, an employer may inquire regarding the type of reasonable accommodation requested.⁶¹ The ADA does not require the employer to provide employees with notice about their rights. However, many employers provide information about ADA rights and reasonable accommodation procedures in employee handbooks.

FMLA

The FMLA requires that employers:

1. Prominently post a notice regarding employee rights under the FMLA;
2. Include an FMLA policy in the employer's handbook or policy manual (if one is available);
3. Provide written FMLA guidance concerning the employee's rights and obligations pursuant to the FMLA if there is no handbook or manual.
4. Provide employees with a standard form when an employee requests leave.⁶²

The posted notice must include:

- The specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations;
- That the leave will be counted against the employee's annual FMLA leave entitlement;
- Any requirements for the employee to furnish medical certification of a serious health



condition and the consequences of failing to do so;

- The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
- Any requirement for the employee to make premium payments to maintain health benefits and the arrangements for making such payments and the possible consequences of failure to make payments on a timely basis;
- Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;
- The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
- The employee's right to restoration to the same or an equivalent job upon return from leave; and

- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.⁶³

A copy of a notice may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.⁶⁴ If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.⁶⁵ However, if an employer fails to provide notice that leave already taken counts against FMLA leave, the employee may not be entitled to additional FMLA leave.⁶⁶ In these cases, a court will look at the harm suffered by the employee due to the lack of notice to determine the proper remedy.⁶⁷

Medical Certification

ADA

Once an employee has requested a reasonable accommodation, the employer has the right to request reasonable medical documentation only if the disability is not obvious regarding the nature of disability and functional limits.⁶⁸ Under the ADA:

- Reasonable medical documentation is defined as medical information that is related to the need to establish that the individual has

a disability for which an accommodation is requested.⁶⁹

- A reasonable accommodation request from an employee does not give the employer the right to seek a general medical release.⁷⁰
- The request for documentation must be strictly limited to the accommodation request and an employer may not seek medical information unrelated to the accommodation request.
- The employer may request that the documentation be provided by an appropriate healthcare or rehabilitation professional.⁷¹
- If an individual's disability or need for an accommodation is not obvious to the employer, and the individual refuses to provide the requested reasonable documentation, then the individual is not entitled to a reasonable accommodation.⁷²
- The employer must keep all medical information in a confidential medical file that is separate from the employee's personnel file.
- Staff of the employer should only have access to the information on a "need-to-know" basis.⁷³

If the individual supplies insufficient information from a healthcare professional, the employer can request that the individual visit a healthcare professional of the employer's choice for the purposes of documenting the disability and functional limitations related to the request for a reasonable accommodation.

However, the employer should explain why the documentation is insufficient and allow the individual to supply the missing information in a timely manner.⁷⁴ Any employee medical examination conducted by the employer's health professional must be related to the job and consistent with business necessity. This means that the examination must be limited to determining the existence of a disability pursuant to the ADA and the functional limitations that require a reasonable accommodation.⁷⁵ The employer must pay all costs associated with the visit.

FMLA

When an employee requests leave due to a serious health condition, the employer may request additional medical information including:

- Medical certification from the health care provider of the employee (or their immediate family member if their condition gives rise to the need for leave), to support the need for such leave.⁷⁶
- Periodic updates from the employee on the status of the leave and the intention to return to work.⁷⁷
- A second opinion if the employer legitimately questions the validity of the medical certification. The employer is entitled to select the health care provider at the employer's expense, but the selected health care provider may "not be employed on a regular basis by the employer."⁷⁸

If an employee submits a complete certification signed by the health care pro-

vider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.⁷⁹

If a health care provider selected by the employer for a second opinion has a different opinion that the employee's health care provider, the employer may request a third opinion. The third opinion is at the employer's expense and the employee and employer must both approve the health care provider for the examination.⁸⁰ The opinion of the third healthcare provider shall be considered the final binding opinion.⁸¹ In general, an employer may request re-certification at any reasonable interval, but not more often than every 30 days.⁸²

When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.⁸³ DOL has developed an optional form, (Form WH-380), for the employee to use when obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements.⁸⁴ In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.⁸⁵

Periodic Leave – Leave Taken Intermittently or on a Reduced Leave Schedule

Periodic or intermittent leave is available to employees under both the ADA and the FMLA. Intermittent leave is time taken off from work in separate blocks of time. A reduced leave schedule is leave that reduces the number of hours that an employee works per week.⁸⁶

ADA

- ADA leave may be taken intermittently or on a reduced leave schedule absent "undue hardship."

FMLA

- "FMLA leave may be taken 'intermittently or on a reduced leave schedule' ... when medically necessary for "medical treatment of a related serious health condition, . . . for recovery from treatment."⁸⁷
- The employer may request that the employee provide "the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable."⁸⁸
- The employee and employer shall attempt to work out a schedule that meets the employee's needs without unduly disrupting the employer's operations, subject to

the approval of the health care provider.⁸⁹

- If the need for the intermittent leave is foreseeable, the employer may transfer the employee for the duration of the leave “to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee’s regular position.”⁹⁰
 - The alternative position must have equivalent pay and benefits but does not need to have equivalent duties.
 - An employer may increase the pay and benefits of an “existing alternative position” to meet this requirement, but “may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee.”⁹¹
 - When an employee who was transferred under these provisions is able to return to full-time employment, the



employee must be placed in the same or equivalent job as the job he/she left when the leave commenced.

- An employee may not be required to take more leave than necessary.”⁹²

Job Reinstatement After Leave

While the ADA requires restoration to the same position, the FMLA requires employers to restore eligible employees after leave to their original position *or* to an equivalent position “that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.”⁹³ If an employee is unable to perform an essential function of their job, the FMLA does not require that they be reinstated into another job but the ADA, if it applies, may require that the employer explore reasonable accommodations, including reassignment, before terminating the employee.⁹⁴ As mentioned above, when both laws apply, the employee is entitled to reinstatement under the law affording the broadest protection, in this case, the ADA.⁹⁵

ADA

- The employer must keep the employee’s job open while the employee is on leave and return the employee to the same position unless the employer can

show that doing so causes an undue hardship.⁹⁶

- If there is an undue hardship in returning the employee to the same position, a transfer to an equivalent position should be examined. If none is available a transfer to a lower position should be examined.⁹⁷

FMLA

- The FMLA guarantees the right of the employee to return to the same position or to an equivalent one unless the employee is designated as a “key employee.”⁹⁸
 - A “key employee” is a “salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite.”⁹⁹
 - In order to deny a key employee reinstatement, “an employer must determine that the restoration of the employee to employment will cause ‘substantial and grievous economic injury’ to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.”¹⁰⁰
 - The “substantial and grievous economic injury” standard is “more stringent” than the “undue hardship” standard under the ADA.¹⁰¹ In order to meet this standard, reinstatement must be more than a “minor in-

convenience” and must threaten the “economic viability of the firm” or cause a “long-term economic injury.”¹⁰²

If an employer wishes to designate an individual as a “key employee,” they must

- Notify the employee of his/her status as a “key” employee in response to the employee’s notice of intent to take FMLA leave;
- Notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
- Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.¹⁰³

It is important to note that “key employees” are still entitled to FMLA leave even if they are not entitled to be reinstated to their positions.¹⁰⁴

Immunity and Suits for Damages

As a result of two United States Supreme Court decisions, state employees have different remedies available under the ADA and FMLA when bringing a suit against the state. This is due to the fact that states’ are given immunity from some

lawsuits under the Eleventh Amendment to the United States Constitution.

ADA

The Supreme Court, in *Board of Trustees University of Alabama v. Garrett*, held that:

- The 11th Amendment bars suits for money damages in federal courts under Title I of the ADA by state employees against the state;
- Suits for injunctive relief (non-monetary relief) by state employees against state officials are permitted under Title I.¹⁰⁵

The Supreme Court reasoned that there was insufficient evidence of a history or pattern of irrational employment discrimination by state or local governments against people with disabilities to justify a waiver of the state's sovereign immunity. In response to *Garrett*, some states have passed legislation waiving sovereign immunity for ADA suits for money damages, allowing for suits in state court.

FMLA

In contrast to *Garrett*, the Supreme Court came to a different conclusion regarding immunity under the FMLA in *Nevada Department of Human Resources v. Hibbs* holding that:

- Money damages are available in federal court in suits by state employees against the state under the FMLA.¹⁰⁶

The Supreme Court, viewing the FMLA as offering gender-based protections, reasoned that unlike the ADA, there

was sufficient evidence of a history and pattern of gender-based discrimination in the administration of leave benefits to justify removing the state's immunity. The Court did not mention the disability component of the FMLA in its decision.

Extension of FMLA Leave Under the ADA

Once employees have used their 12 weeks of FMLA leave, they may be entitled to additional leave under the ADA.¹⁰⁷ In upholding extended leave as a reasonable accommodation, courts have held that extended medical leave may be a reasonable accommodation if it does not pose an undue hardship and if it will permit the employee eventually to perform the essential functions of her position.¹⁰⁸ The amount of leave that is reasonable in a particular situation must be examined on a case-by-case basis utilizing an individualized assessment. In some circumstances, courts have found that one year of leave might not be an undue hardship where the company's own benefits policies allowed for one year of leave and regularly hired seasonal workers to fill vacancies.¹⁰⁹

A request for an extension of leave under the ADA does not need to have a fixed return date under EEOC Guidance, but courts are reluctant to find requests for indefinite leave as reasonable.¹¹⁰ Courts have held that requests for additional leave that only contain a vague estimate for a return date, or that contain no return date due to a prolonged illness, amount to an unreasonable request for indefinite leave.¹¹¹ There is also no need

for indefinite leave if the employee cannot show the ability to resume the job or its equivalent.¹¹² However, there is no per se rule that an indefinite leave is unreasonable, and courts have found that an indefinite leave may be reasonable if the employer has a large, fungible work force with a high turnover rate.¹¹³ At the very least, a request for extended leave triggers a responsibility for the employer to investigate the feasibility of the request.¹¹⁴

Enforcement

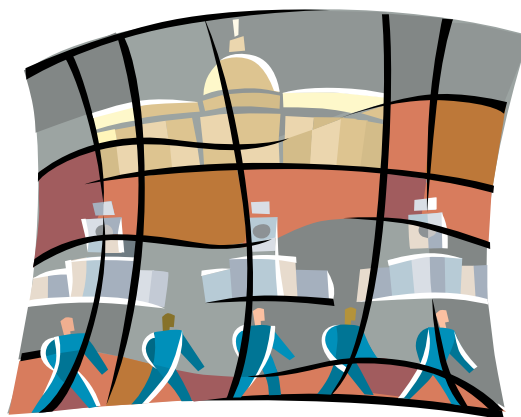
ADA

The Equal Employment Opportunity Commission (EEOC) enforces the ADA.¹¹⁵ Charges of Discrimination must generally be filed with the EEOC within 180 days of the alleged discrimination. A workshare agreement with a state agency may extend this time period to 300 days. Federal employees are covered under the Rehabilitation Act instead of the ADA. Federal employees must contact their EEO Officer within 45 days of any alleged wrongful conduct in order to preserve their claim. Claims filed beyond any of these time limitations may be barred.

The EEOC process generally involves: an attempt at mediation, an investigation, and a final attempt at conciliation. After the EEOC investigation, the employee receives a “Notice of Right to Sue Letter” where the EEOC makes a finding as to whether reasonable cause exists that an ADA violation took place. The employee then has 90 days from the receipt of the letter to file an ADA lawsuit.

FMLA

The Department of Labor (DOL) is responsible for enforcing the FMLA.¹¹⁶ If the employee decides to file a private lawsuit, it must be filed within two years after the last action that the employee contends the employer was in violation of the FMLA, or three years if the violation was willful.¹¹⁷ Unlike the ADA, which requires employees to exhaust administrative remedies, the FMLA allows employees either to file with the DOL or go directly to court. If the individual decides to file a complaint with the DOL, the complaint must be in writing and filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.¹¹⁸ The complaint must be filed in a reasonable amount of time, but not more than two years after the alleged FMLA violation.¹¹⁹ No particular form of complaint is required, except that it should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.¹²⁰ Filing with the DOL does not stop the time limit for filing an FMLA lawsuit.



ENDNOTES

- ¹ Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.* (1990). [hereinafter ADA].
- ² 42 U.S.C. § 12101(a)(8).
- ³ Family Medical Leave Act, 29 U.S.C. § 2601 *et. seq.* (1993). [hereinafter FMLA].
- ⁴ See EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964. (7/6/2000).
- ⁵ 42 U.S.C. § 12102 (2); 28 C.F.R. § 36.104 (1994).
- ⁶ 42 U.S.C. § 12111.
- ⁷ See, e.g., *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 199 (2002)
- ⁸ 42 U.S.C. § 12116.
- ⁹ 29 U.S.C. § 2601 *et. seq.* (1993)
- ¹⁰ 20 U.S.C. § 2601 (b)(2); see also 29 C.F.R. § 825.112 (a).
- ¹¹ 20 U.S.C. § 2617 (b); see also 29 C.F.R. § 825.200 (discussing how to determine the 12 week and month time periods).
- ¹² 29 C.F.R. § 825.702; see also EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964. (7/6/2000).
- ¹³ 29 C.F.R. § 825.702 (citing *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)).
- ¹⁴ See EEOC Fact Sheet: The Family Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964 (7/6/2000); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02); 29 C.F.R. §1630.2 *et. seq.*
- ¹⁵ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Question 21.
- ¹⁶ *Id.*
- ¹⁷ *Id.* See also 29 CFR § 825.200.
- ¹⁸ 29 CFR §§ 825.203, 825.204(a),(c).
- ¹⁹ 29 CFR § 825.207.
- ²⁰ 29 CFR § 825.209.
- ²¹ *Id.*
- ²² *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02); 29 C.F.R. §§ 825.214(a), 825.215 (1997).
- ²³ See 29 U.S.C. § 2612 (a)(1).
- ²⁴ *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02) at Question 20.
- ²⁵ 20 U.S.C. § 12111(5) (A).
- ²⁶ See 28 C.F.R. 35.140 (Title II of the ADA covers all public employers without regard to the number of employees, and Title I of the ADA applies by the principle of incorporation).
- ²⁷ 29 U.S.C. § 2611 (4)(A)(i); see also 29 C.F.R. § 825.104(a); see also 29 C.F.R. § 825.105 (discussing how to determine if an employer is covered by the FMLA).
- ²⁸ 29 U.S.C. § 2611(4)(A)(iii) (stating that the definition of public agency is as defined in § 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(x)). Section 3(x) of the FLSA defines “public agency” as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency). An employee may sue the State for money damages under the FMLA. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). The 11th Amendment does not bar such suits because the FMLA’s purpose is to rectify past gender discrimination. *Id.*
- ²⁹ See 29 U.S.C. § 2618; 29 C.F.R. § 825.104; see also 29 C.F.R. § 825.600-825.604.
- ³⁰ See 42 U.S.C. § 12102(2).
- ³¹ 42 U.S.C. § 12102(2)(A).
- ³² 42 U.S.C. § 12111(8).
- ³³ See 29 C.F.R. 1630.2(n); *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02);
- ³⁴ See, e.g., *Bryant v. Caritas Norwood Hosp.*, 345 F. Supp. 2d 155 (D. Mass. 2004).

- ³⁵ See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Question 22.
- ³⁶ *Id.* at Question 16; *Cehrs v. Northeast Ohio Alzheimer's Association*, 155 F.3d 775 (6th Cir. 1998); *Basith v. Cook County*, 241 F.3d 919 (7th Cir. 2001).
- ³⁷ *Cleveland v. Federal Express Corp.*, 2003 U.S. App. LEXIS 24786 (6th Cir. 2003).
- ³⁸ 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Questions 17 and 24. See also, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398-99 (2002).
- ³⁹ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Question 17.
- ⁴⁰ *Id.* at Question 19.
- ⁴¹ *Id.* at Question 20.
- ⁴² EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02) at Question 18.
- ⁴³ 29 C.F.R. § 825.702(d)(1) (1997).
- ⁴⁴ EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/22/02).
- ⁴⁵ *Id.*
- ⁴⁶ 29 U.S.C. § 2611(2); see also 29 C.F.R. § 825.110.
- ⁴⁷ 29 U.S.C. § 2611(2)(B)(2); see also 29 C.F.R. § 825.110.
- ⁴⁸ 29 U.S.C. § 2612(a); see also 29 C.F.R. § 825.112.
- ⁴⁹ 29 U.S.C. § 2611(11); see also 29 C.F.R. § 118 (discussing who is qualified to meet the definition of health care provider). Treatment for substance abuse may be considered a serious health condition, if the employee is seeking continuing treatment (See 29 C.F.R. § 825.114(d)).
- ⁵⁰ 29 C.F.R. § 825.114 (2)(i); see also 29 C.F.R. § 825.112 (g).
- ⁵¹ 29 C.F.R. § 825.114 (2).
- ⁵² See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities No. 915.002 (10/22/02) available at <http://eeoc.gov/policy/docs/accommodation.html> (last visited September 29, 2005) (citing 29 C.F.R. § 1630.9); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989)[hereinafter Senate Report].
- ⁵³ *Id.*
- ⁵⁴ See EEOC Guidance, *supra* note 51 (citing *Cf. Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996)); *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994). But see *Miller v. Nat'l Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").
- ⁵⁵ 29 CFR 825.302 (c)
- ⁵⁶ 29 U.S.C. § 2612(e)(1); 29 U.S.C. § 2612(e)(2)(B); see also 29 C.F.R. § 825.302.
- ⁵⁷ *Id.* See also 29 C.F.R. § 825.302(b); 29 C.F.R. § 825.303.
- ⁵⁸ 29 C.F.R. § 825.304.
- ⁵⁹ 29 C.F.R. 825.303 (b).
- ⁶⁰ See EEOC Guidance, *supra* note 51 (citing 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9) (the appendix to the regulations at § 1630.9 provides a detailed discussion of the reasonable accommodation process); see also *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Dalton v. Subaru-Isuzu*, 141 F.3d 667, 677 (7th Cir. 1998).
- ⁶¹ See EEOC Guidance, *supra* note 51 (citing the burden-shifting framework outlined by the Supreme Court in *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation).

- ⁶² See 29 U.S.C. § 2619 (a); 29 C.F.R. §825.301 (a).
- ⁶³ 29 C.F.R. § 825.301(b).
- ⁶⁴ 29 C.F.R. § 825.301(a)(2).
- ⁶⁵ 29 C.F.R. § 825.301(f).
- ⁶⁶ *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81(2002) (invalidating a DOL regulation which provided that the clock did not run if an employer did not notify an employee that his leave was counting against his 12-week FMLA allotment).
- ⁶⁷ *Id.* at 88-89.
- ⁶⁸ See EEOC Guidance, *supra* note 51 (citing 29 C.F.R. § 1630.9); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [*hereinafter* Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [*hereinafter* ADA and Psychiatric Disabilities] [Although the latter Enforcement Guidance focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.]
- ⁶⁹ See EEOC Guidance, *supra* note 51, Question 6.
- ⁷⁰ *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 2000).
- ⁷¹ *Id.*
- ⁷² *Id.* (citing *Templeton v. Neodata Servs., Inc.*, No. 98-1106, 1998 WL 852516 (10th Cir. 1998)); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996); *McAlpin v. National Semiconductor Corp.*, 921 F. Supp. 1518, 1525 (N.D. Tex. 1996).
- ⁷³ *EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.*
- ⁷⁴ See EEOC Guidance, *supra* note 51, Question 7.
- ⁷⁵ *Id.*
- ⁷⁶ 29 U.S.C. § 2613(a).
- ⁷⁷ 29 U.S.C. § 2614 (a)(5); *see also* 29 C.F.R. § 825.309.
- ⁷⁸ 29 U.S.C. § 2613(c).
- ⁷⁹ 29 C.F.R. § 825.307(a).
- ⁸⁰ 29 U.S.C. § 2613(d)(1).
- ⁸¹ 29 U.S.C. § 2613(d)(2).
- ⁸² 29 U.S.C. § 2613(e).
- ⁸³ 29 C.F.R. § 825.305(b).
- ⁸⁴ 29 C.F.R. § 825.306(a).
- ⁸⁵ 29 C.F.R. § 825.306(b).
- ⁸⁶ EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, (7/6/2000).
- ⁸⁷ 29 CFR §§ 825.203, 825.204(a),(c).
- ⁸⁸ 29 C.F.R. § 825.302(f).
- ⁸⁹ *Id.*
- ⁹⁰ 29 CFR § 825.204(a).
- ⁹¹ 29 CFR § 825.204(c),(d).
- ⁹² 29 CFR § 825.204(e).
- ⁹³ 29 CFR § 825.215(a).
- ⁹⁴ 29 CFR § 825.214(a).
- ⁹⁵ See EEOC Fact Sheet: *The Family and Medical Leave Act, the ADA, and Title VII*, (7/6/2000).
- ⁹⁶ See EEOC Guidance, *supra* note 51, Question 18 (citing *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 996-97 (D. Or. 1994); *Corbett v. National Products Co.*, 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).
- ⁹⁷ See EEOC Guidance, *supra* note 51, Question 18; EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, (7/6/2000).
- ⁹⁸ *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 (10/22/02); 29 C.F.R. §§ 825.214(a), 825.215 (1997).
- ⁹⁹ 29 CFR § 825.217(a).
- ¹⁰⁰ 29 CFR § 825.218(a).
- ¹⁰¹ 29 CFR § 825.218(d).
- ¹⁰² 29 CFR § 825.218(c).
- ¹⁰³ 29 CFR § 825.219(a).

- ¹⁰⁴ 29 CFR § 825.218(d).
- ¹⁰⁵ 531 U.S. 356 (2001).
- ¹⁰⁶ 538 U.S. 721 (2003).
- ¹⁰⁷ See 29 C.F.R. § 1630.2(p); EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964* (7/6/2000). See also *Nunes v. Wal-Mart Stores*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998); *Wells v. District Lodge 751*, 5 Fed. Appx. 605 (9th Cir. 2001).
- ¹⁰⁸ See, e.g., *Cehrs*, *supra* note 151 (additional leave is reasonable if employer cannot show undue hardship); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998) (extended leave may be appropriate when employee shows leave will be temporary).
- ¹⁰⁹ See *Nunes*, *supra* note 151.
- ¹¹⁰ See EEOC Fact Sheet: *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964* (7/6/2000). See, e.g., *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000) (a request for leave that may extend three years is not reasonable); *Nowak v. St. Rita High School*, 142 F.3d 999 (7th Cir. 1998) (a request for indefinite leave need not be accommodated).
- ¹¹¹ *Walsh*, *supra* note 151 (a period of one to three years is vague and not reasonable); *Nowak*, *supra* note 151 (indefinite leave for a prolonged illness is not reasonable).
- ¹¹² *Watkins v. J&S Oil Co. Inc.*, 164 F.3d 55 (1st Cir. 1998).
- ¹¹³ *Norris v. Allied Sysco Food Services*, 948 F. Supp. 1418 (N.D. Cal. 1996).
- ¹¹⁴ *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000).
- ¹¹⁵ See 42 U.S.C. § 12117; 42 U.S.C. § 12111(1).
- ¹¹⁶ 29 U.S.C. § 2617 (b); 29 U.S.C. § (10).
- ¹¹⁷ 29 C.F.R. § 825.400(b).
- ¹¹⁸ 29 C.F.R. § 825.401.
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.*