Tiptoeing Through the Minefield of the FMLA and the ADA

R. Anthony Prather

- Agenda
  - Family & Medical Leave Act (“FMLA”)
  - Americans With Disabilities Act (“ADA”)
  - Americans With Disabilities Act Amendments Of 2008 (“ADAAA”)
  - EEOC Enforcement Activities
  - Q & A
• Family & Medical Leave Act
  – Protected unpaid leave of up to 12 weeks in a 12 month period for qualifying absences (26 weeks for care of covered service member)
  – Reinstatement to the same or substantially similar position at the conclusion of leave
  – Continuation of group health benefits during leave
  – Anti-discrimination, anti-retaliation provisions
  – Interference claims

• Key Threshold Coverage Issues
  – Is the employer covered?
  – Is the employee covered?
  – Is the condition or leave request covered?

• Employer Coverage
  – 50 or more employees for at least 20 weeks during the current or preceding calendar year
• Employee Coverage
  – Has the employee actually worked 1,250 hours during the preceding 12 months
    • Measured as of the date leave is to commence, not the date it is requested
  – Has the employee been employed for at least 12 months?
    • Need not be consecutive
    • Payroll test only – unlike the 1,250 hour test, time not actually worked does count
    • Measured as of the date leave is to commence, not the date the leave is requested

• Condition Coverage
  – New Child Care
    • Birth or placement of adopted/foster child within last 12 months
    • Spouse of requesting employee also employed? (If so, combined child care leave equals total of 12 weeks)
    • 30 days advance notice typically required
    • No intermittent leave or reduced leave unless the Company consents
    • Note state law issues
  – Medical Leave
    • Does the employee have a serious health condition?
    • Is the individual treating the employee a “health care provider” within the meaning of the FMLA
– Family Leave
  • Appropriate family member (spouse, child, parent)
    – Excludes grandparents, in-laws, former spouses, and children over 18 years of age (unless incapable of self care due to disability)
  • Includes “in loco parentis” relationships
  – Does the family member have a serious health condition?

• Is FMLA Leave Paid Or Unpaid
  – Generally, FMLA leave is unpaid
  – However, employee or employer may designate paid leave as FMLA leave
    • Employee Medical Leave: Paid vacation, personal leave, and/or sick leave
    • Family Leave: Paid vacation, personal leave, sick leave, and/or family leave
    • New Child Leave: Paid vacation, personal leave, and/or family leave
• Must An Employee Be Reinstated Upon Returning From FMLA Leave?
  – Yes. An employee returning from FMLA leave must be placed in the same or equivalent position – equivalent in terms of pay, benefits, and all other terms and conditions (including same or substantially similar duties)

• When Can Leave Or Reinstatement Be Delayed/Denied?
  – Failure by employee to give timely notice of leave (absent exceptional circumstances)
  – Failure to timely provide requested medical certification
  – Failure to provide requested return-to-work certificate
  – When employee otherwise would not have kept job (reduction-in-force, caught working another job if the employer’s policies prohibit same)
• Benefits
  – Employer must continue group health insurance for employees on FMLA leave the same as if not on leave
• Basic Principles
  – Forfeiture vs. accrual of benefits while on leave
    • Must be treated as favorably as others on other forms of similar leaves
  – The FMLA provides the floor, not the ceiling for employee rights

• Leave can be taken in a solid block of time
  • Reduced leave schedule (working 30 hours per week)
• Leave can be taken intermittently
  • Take off periodically for same condition as need arises
• Intermittent/Reduced Leaves
  • Only required for employee medical leave, family, leave, military leave – not new child leave
  • If intermittent leave sought repeatedly for a chronic or recurring condition, no need for a note each time (e.g. child’s asthma, morning sickness)
  • If employee requests intermittent or reduced schedule leave for planned and necessary medical treatment, temporary transfer is permitted so long as employee receives same pay
It is the employer’s responsibility to determine FMLA coverage and leave eligibility

- Once employer has reason to know
- Employee has 1st step (must request, but need not mention FMLA)

Employer must also give notice of determination

- Ordinarily within 5 business days
- As soon as practicable after learning of reason(s) for leave and operative facts

Notice

- 30 days if planned/foreseeable (birth/new child leave, surgery)
- As soon as practicable if unforeseeable

Medical Certifications

- Employer must allow 15 days to complete

Recertification

- General Rule – frequency depends upon the expected duration of the health condition
• FMLA Leave Strategy
  – Run the leave
  – Require the exhaustion and concurrent leaves
  – When taking FMLA, employees may also be required to use and contemporaneously exhaust any accumulated sick, vacation time, or person time to the extent available during the leave period
  – Whenever an employee is eligible for leave pursuant to the FMLA and is also eligible for another type of leave under different policies (such as workers’ compensation), the leaves will run concurrently.

• The Americans With Disabilities Act
  – Provides two types of rights to individuals covered by the statute:
    • If the individual has a legal disability, provides the right to a reasonable accommodation to remove barriers and allow the individual to perform the essential functions of the job
    • Prohibits discrimination/retaliation against covered individuals
    • Also protects the confidentiality of medical information
The term “disability” means, with respect to an individual (a) a physical or mental impairment that substantially limits one or more of the major life activities; (b) a record of such an impairment; or (c) being regarded as having such an impairment.

What is not a disability?

- Physical characteristics or common personality traits (e.g. irresponsibility and showing poor judgment)
- Conditions such as homosexuality, bisexuality, and normal deviations in height, weight, or strength
- Temporary impairments

Qualified individual with a disability

- An individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Essential functions of the job

- Position exists to perform the function
- There are a limited # of other employees available to perform the function, or among whom the function can be distributed
- The function is highly specialize, and the person in the position is hired for special expertise or ability to perform it
– Other factors
  • The employer’s judgment
  • A written job description prepared before advertising or interviewing applicants for a job
  • The amount of time spent performing the function
  • Consequences of not requiring a person in the job to perform a function

• Americans With Disabilities Act Amendments Of 2008
  – Became effective January 1, 2009

– Primary objective of the ADAA
  • “Restore the intent and protections” of the original statute, enacted in 1990 by:
    – Revising the definition of disability
    – Broadening the scope of individuals covered under the ADA by overturning certain decisions of the U.S. Supreme Court

– What changed?
  • Significant expansion of the definition of disability
    – Major life activities expanded and includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working [list is not exhaustive]
    – Major life activities also include the operation of bodily functions (e.g. immune system, normal cell growth, digestive, bowel, bladder, neurological, endocrine, and reproductive functions)
What other conditions could be covered:

- Hypertension – 73 million Americans over the age of 20 yrs old have it (American Heart Assn.)
- Diabetes – 24 million Americans have it (50 million pre-diabetic) (Dept. of Health and Human Services)
- Migraines – 28 million Americans (WebMD)
- Fibromyalgia – 6 million (Healthlink)
- Epilepsy – 2.7 million (Epilepsy Foundation)
- Irritable bowel syndrome, colitis
- Asthma
- Immune system disorders or patients on drugs that suppress immune system

- The term “substantially limited” is interpreted more broadly
  - New regulations fail to define the term with particularity, and simply indicate that it is a lower threshold that “prevents” or “severely or significantly restricts”
- It must be interpreted without regard to the ameliorative effects of mitigating measures.
  - Exception – contact lens and glasses
• Determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as:
  – Medication, medical supplies, equipment, prosthetics, hearing aids and cochlear implants
  – Use of assistive technology
  – Reasonable accommodations or auxiliary aids or services
  – Learned behavioral or adaptive neurological modifications

• An impairment that is episodic or in remission still qualifies if it would be a disability when flaring up

• There is no reverse discrimination claim for nondisabled individuals

-- ADAAA does not change
  • Definition of impairment
  • Reasonable accommodation – although more covered persons expands employer’s obligations
  • Interactive process
  • Undue hardship

-- Reasonable accommodations may include:
  • Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
  • Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities; and

  • **Additional finite period of leave with job protection**
Reasonable accommodations do not include:

- Reassignment to a job that is not vacant
- Creating a new job
- Eliminating essential functions of a job
- Providing assistive devices needed outside of the workplace (e.g. eyeglasses or hearing aids)
  - Note: State laws may be broader and require more with regard to reasonable accommodations

Handling reasonable accommodation requests

- Only required to accommodate known disabilities
- Employer has the right to choose between effective accommodations
- It must be an effective accommodation
- Applies only to accommodations that reduce barriers to employment that arise due to a person’s disability
- It does not have to be the best accommodation, as long as it is effective
- If it can be achieved, it probably is a reasonable accommodation
— Indefinite leaves
  • Generally not considered a reasonable accommodation
  • Finite periods of leave may be a reasonable accommodation
  • Need to look at the individual facts/circumstances

— Interactive process
  • No hard and fast rule will suffice. According to the Courts, neither the employer nor the employee should be allowed to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.
  • Courts will look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are needed. Courts will attempt to isolate the cause of the breakdown and then assign responsibility.

• ADA Leave Strategy
  — Determine whether the individual is covered under the ADA
  — Be prepared to deal with the reasonable accommodation issue early (as the FMLA leave is ending)
  — Be prepared to address indefinite leave issues
• EEOC Enforcement Activities
  – Automatic Termination Policies
    • Automatic application of attendance policies
  – Alcohol Testing Policies
    • Random testing
    • Violation of confidentiality (therapeutic drug use)
  – Reasonable Accommodations

– No Fault Attendance
  • EEOC v. Verizon Wireless
    – Verizon recently paid $20 million to resolve a nationwide class
      disability lawsuit filed by the EEOC. The EEOC alleged that the
      company unlawfully denied reasonable accommodations to
      hundreds of employees and disciplined and/or fired them
      pursuant to Verizon’s “no fault” attendance plans.

    – More specifically, the Agency asserted that Verizon failed to
      provide reasonable accommodations for people with
      disabilities, such as making an exception to its attendance
      plans for individuals whose “chargeable absences” were
      caused by their disabilities.
- Random Alcohol Testing
  - EEOC v. U.S. Steel
    - The Equal Employment Opportunity Commission (EEOC) recently filed suit against U.S. Steel Corporation alleging the Company’s random alcohol testing policy—authorized by a collective bargaining agreement—violates the Americans with Disabilities Act (ADA).
    - When the employee tested positive for alcohol, she advised the nurse that she had not ingested any alcohol in the past month, and that her medical condition might have contributed to the positive test result. That same day, her personal physician performed a blood alcohol test and obtained a negative result. Although the results were made available to U.S. Steel, the company refused to accept them. She was ultimately terminated for violating the company’s alcohol policy.

- Reasonable Accommodation
  - EEOC v. United Airlines (7th Cir. Sept. 7, 2012)
    - The EEOC brought a lawsuit against United Airlines for its policy concerning assignment to vacant positions
    - United Airlines had a policy which provided disabled employees preference in that they could apply for an unlimited number of positions, and would be interviewed, but the transfer process was competitive.
    - Since 2000, the 7th Circuit had held that the ADA did not require placing the disabled employee in the job unless she was the most qualified candidate if the employer had such a policy.
    - Earlier in 2012, the 7th Circuit upheld that position. However, on September 7, it reversed this precedent.
– Now, there is a two-step process:
  » The plaintiff must first show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases
  » If the plaintiff does so, the burden shifts to the employer to show special circumstances that demonstrate undue hardship in the particular circumstances.
– Practical effect: The employer in ordinary circumstances will be required to place an employee in a vacant position for which he/she is minimally qualified, even if he/she is not the strongest candidate.