



"YOU WANT MORE TIME OFF?"

DEALING WITH MEDICAL LEAVE

REQUESTS UNDER THE FMLA AND ADA

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PARKER HUDSON RAINER & DOBBS, LLP



Why are we here?

Determine if your client
is covered by FMLA?

How should a
12-month
rolling period
be calculated?

Learn
elements
of ADA
claim?

Thought
I could
get CLE!

Find out how
much leave
my clients
have to offer?

I always
support
Meritas
webinars?

Hear about
recent
EEOC
trends?

Identify what is
a "reasonable
accommodation"
for leave?

Figure out
how FMLA
and ADA leave
intersect?

Complain
about the
ever-
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Complain about the ever-expanding definition of "disability"?

Figure out how FMLA and ADA leave intersect?

Why are we here?

Clients are struggling to strike a balance between fairness and practical considerations when it comes to employee leave.

They are confused about how much is too much and how much is not enough.

They are looking to counsel for policy guidance in connection with a target that the EEOC keeps moving.

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FAMILY AND MEDICAL LEAVE ACT

FMLA BASICS

- Applies to employers with over 50 employees within 75 miles
- Applies to employees with at least 1,250 hours of service in last 12 months
- Permits up to 12 weeks of total leave (job or equivalent remains open) in rolling 12-month period for:
 - Birth or adoption of child
 - Serious medical condition
 - Immediate family member's serious medical condition

FMLA BASICS

- If employee requests FMLA leave, employer may require certification, including:
 - Description of the serious health condition;
 - Date condition began;
 - Expected duration of the condition or treatment; and
 - Enough information to show inability to perform essential functions of job.
- For intermittent leave or reduced schedule, must provide enough information to establish medical necessity and estimated frequency and duration.

FMLA BASICS

- Employer may require second (or third) medical opinion at employer's its cost.
- If employer requests FMLA-leave certification and employee does not provide it, *absence is not protected*.
 - ❖ Employer may terminate based on absence (unless other law or agreement applies).
- Employer may require "fitness for duty" certification from health care provider to show ability to return to work.



AMERICANS WITH DISABILITIES ACT AND 2008 AMENDMENTS ACT

ADA BASICS

- Applies to employers with at least 15 employees
- Prohibits discrimination and ensures equal opportunity for persons with disabilities
- Requires employer to provide a reasonable accommodation to qualified employees with a disability

ADA BASICS

- **Disability**
 - **Physical or mental impairment**
 - ✧ No disability-related inquiries unless job-related and business necessity
 - **Substantially limits**
 - ✧ As compared to most people
 - ✧ Individualized assessment
 - ✧ Not necessarily permanent
 - **One or more major life activities**
 - ✧ Walking, breathing, seeing
 - ✧ Learning, thinking, interacting
- **Interpreted more broadly than one can imagine**

ADA BASICS

- Reasonable accommodation required
 - Same position or equivalent
 - Interactive process
 - Undue hardship
- Cannot have automatic termination rule

PRACTICAL IMPLICATIONS

- ❑ Process all employee leave requests through both FMLA and ADA
- ❑ EEOC is looking for lapses and exemplars
- ❑ Scenarios

Client Little Dox, LLC

- Little (medical practice) calls asking for urgent advice
- Emily, a surgical assistant, reported unspecified back injury from car accident; can't stand more than 10 minutes
- FMLA leave expires Oct. 6th
- Back surgery scheduled Oct. 10th

SCENARIO #1

Requesting Leave

SCENARIO #1: QUESTIONS

- ✓ Did Little even *have* to give Emily FMLA leave?
- ✓ Can Little fire Emily today?
- ✓ Can Little fire Emily on Oct. 7th?

SCENARIO #1: ANSWERS

- ✓ Did Little *have* to give Emily leave?
 - More than 50 employees
 - Emily worked 1,250 hours in last year

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- ✓ Did Little *have* to give Emily leave?
 - More than 50 employees
 - Emily worked 1,250 hours in last year
- ✓ Can Little fire Emily today?
 - I wouldn't; FMLA not expired

SCENARIO #1: ANSWERS

- ✓ Did Little *have* to give Emily leave?
 - More than 50 employees
 - Emily worked 1,250 hours in last year
- ✓ Can Little fire Emily today?
 - I wouldn't; FMLA not expired
- ✓ Can Little fire Emily on Oct. 7th?
 - Careful with automatic termination without ADA evaluation to see if reasonable accommodation available

Client NYC Styles Co.

- Retail clothing company
- Emmett had wrist pain; now claims carpal tunnel, unable to work, surgery req'd
- NYC's HR director required certification from doctor
- Emmett has repeatedly lost the form, not returned calls or emails from HR, and never returned paperwork
- NYC says it doesn't believe injury is even real and about to fire this cheating employee

SCENARIO #2

Requesting Information

SCENARIO #2: QUESTIONS

- Does NYC have a green light to terminate?
- Does NYC have to use the DOL documentation form?
- What kind of information can NYC request?
- How long does NYC have to wait before it can terminate salesperson for not supplying certification?

SCENARIO #2: ANSWERS

- ✓ Green Light?

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 - More information needed
 - Most employers flexible about 15-day deadline

SCENARIO #2: ANSWERS

- ✓ Green Light?
 - More information needed
 - Most employers flexible about 15-day deadline
- ✓ Form WH-380 not required, but easy to use
 1. Healthcare provider contact information
 2. Start and end date for serious medical condition
 3. Medical facts about the condition
 4. Information about whether employee can perform essential functions of job

Emmett v. NYC Cont'd

- HR director received faxed note from Emmett's doctor on the 15th day
- Explanation of "serious health condition" not clear and not clear why Emmett can't work

SCENARIO #3

Requesting More Information

SCENARIO #3

ISSUES

- If certification complete, no further information to request
- NYC can ask for clarification
- NYC can require second opinion

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- If certification complete, no further information to request
- NYC can ask for clarification
- NYC can require second opinion
- Watch out for FMLA interference, retaliation!

ConstructCo.

- After back surgery, Ernie was cleared to return to work as a construction foreman but had to attend physical therapy 2x/week and took Vicodin 1x/day or "as needed" for pain.
- ConstructCo. doesn't want Ernie climbing construction beams and operating heavy machinery if taking Vicodin, plus difficult to have him off-site during PT.
- ConstructCo. feels its only option is to refuse to let him return, unless he can come back full-time and without Vicodin.

SCENARIO #4

RETURNING TO WORK

SCENARIO #4: QUESTIONS

- ✓ **Can ConstructCo. fire Ernie without liability?**
- ✓ **Does Ernie have to be 100% and full-time to return to work?**
- ✓ **Does ADA grant Ernie any additional rights?**

SCENARIO #4:

ANSWERS

- ✓ **Can ConstructCo. fire Ernie without liability?**
 - ✓ Depends on how litigious Ernie is
 - ✓ ConstructCo can seek clarification or a fitness-for-duty certification from Ernie's medical provider

SCENARIO #4:

ANSWERS

- ✓ **Can ConstructCo. fire Ernie without liability?**
 - ✓ Depends on how litigious Ernie is
 - ✓ ConstructCo can seek clarification or a fitness-for-duty certification from Ernie's medical provider
- ✓ **Does ADA grant Ernie any additional rights?**
 - ✓ ConstructCo. cannot demand that Ernie be 100% – only that he can complete the essential functions of his job

SCENARIO #4:

ANSWERS

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- ✓ **Does ADA grant Ernie any additional rights?**
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- ✓ **Get the clarification** on any work limits, including use of Vicodin during work hours; get clarification on duration of PT and drug use

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ANSWERS

- ✓ **Can ConstructCo. fire Ernie without liability?**
 - ✓ Depends on how litigious Ernie is
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- ✓ **Does ADA grant Ernie any additional rights?**
 - ✓ ConstructCo. cannot demand that Ernie be 100% – only that he can complete the essential functions of his job
- ✓ **Get the clarification** on any work limits, including use of Vicodin during work hours; get clarification on duration of PT and drug use
- ✓ **PT leave unlikely to be an undue burden**

PregoSauces, LLC

- Elle is a warehouse supervisor at PregoSauces ("Prego").
- At 4-months pregnant, she told Prego that she'd use FMLA for leave after the baby's born.
- At month 6, Elle began suffering pregnancy-related issues, including preeclampsia, sciatica, and depression.
- Her doctor suggested reducing her work hours from 8-10/day, to 6-7.
- She also could not lift heavy objects, which was a regular and essential part of her job in the warehouse.

SCENARIO #5

PREGNANCY

SCENARIO #5: ISSUES

- If Elle can't do her job, why can't Prego fire her?
- Can Prego move Elle to an office to avoid liability if she gets hurt in warehouse?
- If she exhausts FMLA pre-birth, she doesn't still get more time after the birth, right?

SCENARIO #5: ISSUES

- If Elle can't do her job, why can't Prego fire her?
 - Possible ADA violation
 - Is it an undue hardship to give her extra leave?

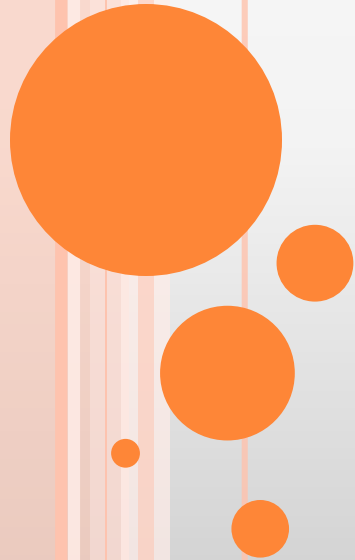
SCENARIO #5: ISSUES

- Can Prego move Elle to an office to avoid liability if she gets hurt in warehouse?
 - Only if she requests light-duty. ADA violation to presume.

SCENARIO #5: ISSUES

- If she exhausts FMLA pre-birth, she doesn't still get more time after the birth, right?
 - It depends.
 - Post-birth disability?
 - Normal process to give additional time after FMLA leave expires?
 - State-law protections?

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3. **Be proactive about determining whether the ADA applies after FMLA exhaustion.**

IF YOU REMEMBER NOTHING ELSE . . .

1. **Treat all medical leave requests as covered by BOTH the ADA and FMLA until you have facts suggesting otherwise**
2. **Some leave is almost always a reasonable accommodation under the ADA**
3. **Be proactive about determining whether the ADA applies after FMLA exhaustion**
4. **The EEOC believes ALL automatic leave policies are per se violations of the ADA.**

IF YOU REMEMBER NOTHING ELSE . . .

1. Treat all medical leave requests as covered by BOTH the ADA and FMLA until you have facts suggesting otherwise
2. Some leave is almost always a reasonable accommodation under the ADA
3. Be proactive about determining whether the ADA applies after FMLA exhaustion
4. The EEOC believes ALL automatic leave policies are per se violations of the ADA
5. Beware of hidden potential for violating Title VII or other acts prohibiting discrimination/disparate impact



QUESTIONS?

ABOUT THE SPEAKERS



Trish Treadwell is a partner with Parker Hudson Rainer & Dobbs, LLP's Litigation and Employment practice group. She represents clients in state and federal courts in a variety of commercial litigation contexts, with an emphasis on employment and franchise issues, but also including UCC and other banking litigation and general complex commercial litigation and arbitration.

As part of her employment law practice, Trish provides counseling and general employment advice. She has represented clients before the Equal Employment Opportunity Commission, the Georgia Department of Labor, and FINRA, as well as in state and federal courts. Representative engagements include claims for discrimination and retaliation; breach of employment agreements; alleged violations of federal and state wage-and-hour and leave laws; and advice regarding employment handbooks, policies, trade secrets, non-competes and other restrictive covenants, and executive and employee agreements.

Trish also represents franchisors in actions to enforce franchise agreements against franchisees or in actions by third parties against the franchise system. Trish provides counseling for franchisors with respect to their disclosure documents, franchise agreements, terminations, and other issues.

She has spoken at state and national conferences and webinars regarding both employment and franchise issues, including the recent ABA webinar regarding the NLRB's recent decision to press joint employer claims against McDonald's.

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Tiffany Johnson is an associate with Parker Hudson Rainer & Dobbs, LLP's Litigation and Employment practice group. She represents clients in state and federal courts in a variety of commercial litigation contexts, primarily focusing on employment, franchise, and intellectual property disputes, as well as other complex commercial litigation matters.

Tiffany is a graduate of Wake Forest Law School, where she served as Editor-in-Chief of the Journal of Business and Intellectual Property Law and contributed regularly to the journal's intellectual property blog. She graduated magna cum laude from Princeton University, where she served as Artistic Director for a student dance company. She is a volunteer for the Atlanta Volunteer Lawyers Foundation and devotes significant time to pro bono work.

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RESOURCES

Materials Included:

- ADAAA Federal Register Regulations
- EEOC Enforcement Guidance on Pregnancy Discrimination
- EEOC Fact Sheet on Final Regulations Implementing ADAAA
- EEOC Notice Concerning the ADAAA
- EEOC Pregnancy Discrimination Act Fact Sheet
- Q&A on Final Rule Implementing ADAAA

Forms Included:

- DOL FMLA Certification of Health Care Provider for Employee
- DOL FMLA Certification of Health Care Provider for Family
- DOL FMLA Designation Notice
- DOL FMLA Notice of Eligibility

RESOURCES

The following is a list of recent cases on this topic—many of which have fact patterns or legal issues similar to those presented in the scenarios. Accordingly, they are grouped by scenario.

Scenario #1

Henry v. United Bank, 686 F.3d 50, 59-61 (1st Cir. 2012) (analyzing failure to accommodate after exhaustion of FMLA leave under both federal and state law) (affirming judgment for employer where employee’s doctor note provided no estimate of expected recovery time or the possibility of returning to work).

Morse v. JetBlue Airways Corp., 941 F. Supp. 2d 274, 305-06 (E.D.N.Y. 2013) (denying employer’s motion for summary judgment where employee exhausted leave and was automatically terminated under an inflexible 52-week maximum leave policy) (noting also that under New York state laws, failure to engage in the interactive process is itself a violation of the law).

Spurling v. C&M Fine Pack, Inc., 739 F.3d 1055, 1059 n. 1 (7th Cir. 2014) (failure to engage in the interactive process without a showing that such failure resulted in a failure to identify an appropriate accommodation for a qualified individual is not an independent basis for liability under the ADA).

Summers v. Altarum Institute, Corp., 740 F.3d 325 (4th Cir. 2014) (fractured left leg and ruptured quad tendon on right leg leaving plaintiff unable to walk normally for at least 7 months was a disability); *Johnson v. Baltimore City Police Dept.*, No. ELH-12-2519, 2014 WL 1281602 (D. Md. Mar. 27, 2014) (series of back injuries and a hysterectomy were disabilities under new regulations); *Barrilleaux v. Mendocino Cty.*, No. 14-cv-01373-TEH, 2014 WL 3726371 (N.D. Cal. June 25, 2014) (fractured and weakened knee requiring crutches was an ADA disability).

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Scenario # 2

Alexander v. Boeing Co., No. C13-1369RAJ, 2014 WL 3734291, at *6 (W.D. Wash. July 28, 2014) (holding that an employer must notify an employee of its FMLA policies regarding timeliness of requests for leave before denying an employee leave, and posting a link to those policies is not necessarily sufficient).

Darst v. Interstate Brands Corp., 512 F.3d 903, 910 (7th Cir. 2008) (employer’s failure to allow its employee to cure a deficient FMLA certification, and subsequent immediate termination of the employee, was not a violation of FMLA because the employee could not show that he was actually entitled to FMLA leave).

Kinds v. Ohio Bell Telephone Co., 724 F.3d 648, 652-54 (6th Cir. 2013) (holding that employer may deny FMLA leave where a certification is not provided within 15 days, and there is no requirement that the employer request the certification within a specific period of time).

Urban v. Dolgencorp of Texas, Inc., 393 F.3d 572, 577 (5th Cir. 2004) (an employee who does not submit any certification within the required time period is not entitled to a cure period).

RESOURCES

The following is a list of recent cases on this topic—many of which have fact patterns or legal issues similar to those presented in the scenarios. Accordingly, they are grouped by scenario.

Scenario # 3

Hyldahl v. Michigan Bell Telephone Co., 503 F. App'x 432, 435-40 (6th Cir. 2012) (employer denial of FMLA leave was improper where it concluded that certification by doctors who did not conduct a contemporaneous medical exam was invalid and chose not to get a second opinion).

Sisk v. Picture People, Inc., 669 F.3d 896, 900-01 (8th Cir. 2012) (temporal proximity between FMLA leave and termination of an employee “must be very close” to create an issue of fact on retaliation; and two months was not close enough) (citing *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1088 (8th Cir. 2010) (one month not close enough); *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002) (14 days was “barely” sufficient to establish causation)).

Word v. AT&T, No. 13-12164, 2014 WL 3928951, at *5-6 (11th Cir. Aug. 13, 2014) (affirming summary judgment for employer where employee alleged disparate treatment under Title VII, in part, because employer counted her FMLA leave differently than white and lighter-skinned African American employees); *Berry v. Marker's Mark Distillery, Inc.*, No. 3:12CV-185-JHM, 2014 WL 1761922, at *20 (W.D. Ky Apr. 30, 2014) (plaintiffs alleged disparate treatment where employer treated member of church for favorably in terms of her use of sick time and personal leave); *Morgan v. Orange County, Fla.*, 477 F. App'x 625, 627 (11th Cir. 2012) (employee failed a state a claim for disparate treatment because he could not identify similarly situated employees who were not terminated for violating employer's call in procedures for reporting FMLA leave).

Wysong v. Dow Chemical Co., 503 F.3d 441, 449-50 (6th Cir. 2007) (discussing involuntary leave theory of FMLA interference); *see also Grace v. Adtran, Inc.*, 470 F. App'x 812, 816 (2012) (declining to address involuntary leave theory and noting that the 6th Circuit is the only circuit to adopt such theory).

RESOURCES

The following is a list of recent cases on this topic—many of which have fact patterns or legal issues similar to those presented in the scenarios. Accordingly, they are grouped by scenario.

Scenario # 4

Budhun v. Reading Hosp. and Medical Center, No. 11-4625, 2014 WL 4211116, at *5-6 (3d Cir. Aug. 27, 2014) (employer was required to allow employee to return to work where employer failed to provide a list of essential job functions, and as a result, employee was cleared to return to work).

EEOC v. United Parcel Service, Inc., 2014 WL 538577 (N.D. Ill. Feb. 11, 2014) (EEOC stated plausible claim for relief where UPS had 12 month automatic termination policy which, it argued, operated like a 100% healed requirement).

Holmes v. Board of County Com'rs, No. CIV-11-0397-HE, 2013 WL 2368394, at *4 (W.D. Okla. May 28, 2013) (genuine issues of fact remained regarding whether allowing employee to return to work while using narcotic medications is a reasonable accommodation, where doctor stated that medication would not affect her cognitive ability); *Lively v. PSI Energy, Inc.*, No. 1:06-cv-1377-SEB/JMS, 2007 WL 4438872, at*8 (same).

Hunts-Watts v. Nassau Health Care Corp., No. 12-CV-1815 (PKC), 2014 WL 4185149, at *10-11 (E.D.N.Y. Aug. 21, 2014) (employer job description that clearly stated that certain functions were “ADA ESSENTIAL FUNCTIONS,” along with employer testimony corroborating the job description, was sufficient to establish essential functions of the employee’s job).

Scenario #5

See EEOC Enforcement Guidance on Pregnancy Discrimination.