Surviving The NEW FMLA & ADA

by

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I. WHO IS COVERED?

A. FMLA

1. The FMLA applies to any employer who employs 50 or more employees for at least 20 weeks in either the current or previous calendar year.

2. Employees are protected by the FMLA if they work for a covered employer *and* they:

a) Work within 75 miles of 50 or more other employees of the employer,

b) They have worked for their employer for at least 12 months within the last seven (7) years, and

c) They have *actually* worked at least 1,250 hours in the preceding 12-month period prior to beginning their leave.

3. Covered employees may receive up to 12 weeks of unpaid leave per any 12-month period due to:

a) The birth, adoption or receipt of a child into foster care,

b) A serious health condition that makes the employee unable to perform the essential functions of his/her position, or

c) A serious health condition wherein the employee is needed to care for a spouse, child or parent.

4. **Counting Holidays Toward FMLA Leave**

Under the final regulations, where an employee takes a full week of FMLA leave, the fact that a holiday may occur within the week does not affect how much of an employee's 12-week FMLA allowance has been used – the week is still counted as a full week of FMLA leave.

However, if an employee is using FMLA leave in increments of less than one week, the intervening holiday **will not count against the employee's 12-week entitlement** unless the employee was otherwise scheduled and expected to work during the holiday. 29 CFR § 825.200(h).

5. Counting Military Leave Towards FMLA Eligibility

In keeping with USERRA, if an employee would have met the 1,250 hours to qualify for FMLA coverage but for any intervening military service, he or she remains eligible for FMLA. 29 CFR § 825.110(c)(2).

The final regulations retain the proposed change clarifying that employees who become eligible for FMLA protection while in the middle of non-FMLA leave may automatically acquire FMLA protection. Leave that begins before FMLA eligibility may start out as "non-FMLA" qualifying leave, but if an employee becomes eligible for FMLA leave in the midst of the absence, FMLA protections are triggered from that point forward. 29 CFR § 825.110(d).

6. Joint Employer Definition

The final regulations contain new language clarifying that a joint employer relationship generally does not arise from "Professional Employer Organizations" in instances where the PEO "merely performs … administrative functions." However, in circumstances where a PEO or vendor actually has the right to hire, fire, and assign work, a joint employer relationship is still likely to exist, "based on all the facts and circumstances." 29 CFR § 825.106(b)(2).

7. Who Is A "Child"?

Section 2611 of the FMLA defines a "child" as being any biological, adopted, foster child, stepchild, a legal ward or a child of a person standing in loco parentis ("in place of the parent") who is either **under the age of 18 or is 18 years of age or older and is "incapable of self-care because of a mental or physical disability**."

8. Definition Of "Incapable Of Self-Care"

The term "**incapable of self-care**" basically means that the individual needs active assistance or supervision in order to care for himself and engage in **at least three** of the "activities of daily living." Examples of the "activities of daily living" include

grooming oneself, dressing, eating, cooking, cleaning, shopping, paying bills, maintaining a residence, using the telephone, using public transportation, etc.

9. Adopted Children

FMLA leave is available for the placement of adopted children. The final regulations retain the proposed clarification that FMLA leave may include time to **"travel to another country to complete an adoption."** FMLA eligibility is not affected by the **"source of the adopted child."** 29 CFR § 825.121(a)(1).

10. Who Is A "Parent" and "In Loco Parentis"?

"Parent" means a biological, adoptive, step or foster father or mother, ***or any other individual who stood in loco parentis to the employee when the employee was a son or daughter***. This term does not include parents "in law."

On June 22, 2010, the U.S. Department of Labor ("DOL") issued Administrator's Interpretation No. 2010-3 clarifying the circumstances under which a person stands "in loco parentis" to a child for purposes of taking leave under the Family and Medical Leave Act ("FMLA") (29 U.S.C. § 2601 et. seq.).

The FMLA entitles employees with up to 12 weeks of job-protected leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, and to care for a son or daughter with a serious health condition. "Son or daughter" is defined to include biological, adopted, or foster child, stepchild, legal ward, and a child of a person standing "in loco parentis."

Persons who are in loco parentis to a child include those with day-to-day responsibilities to care for and/or financially support a child.

Thus, employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. The Interpretation is a step forward for gay and lesbian caregivers, and opens the door for caregivers in other nontraditional family structures. In light of the DOL's interpretation, employers may need to adjust their FMLA policies to reflect the broader definition of "in loco parentis."

The interpretation provides that "employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave." The DOL added that the fact that a child has both a mother and father would

not prevent a finding that a child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child.

"Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA," the DOL wrote. "For example, where a child's biological parents divorce, and each parent remarries, the child will be the 'son or daughter' of both the biological parents and the stepparents, and all four adults would have equal rights to take FMLA leave to care for the child."

The DOL added that when an employer has questions about whether an employee's relationship to a child is covered by the FMLA, the employer may require an employee to provide reasonable documentation or statement of the family relationship. "A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship."

As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same-sex partner will be able to exercise the right to FMLA leave to bond with that child.

Further …

In June 2012, the DOL clarified its position on the "in loco parentis" language as it relates to not just who constitutes a "child" under the FMLA, but also who constitutes a "parent." Specifically, the DOL said:

> "Parent" means a biological, adoptive, step or foster father or mother, ***or any other individual who stood in loco parentis to the employee when the employee was a son or daughter***. This term does not include parents "in law."

Therefore, a parent also includes anyone who at anytime stood in the place of a child's parent. As a result, after that child grows up and starts working for you, that child, or employee, can get time off from work under the FMLA to care for that "parent."

11. The FMLA defines a "serious health condition" as being whenever a covered individual:

a) Undergoes treatment or experiences a period of incapacity that requires inpatient care in a hospital, hospice or residential medical care facility, or any subsequent treatments stemming from this inpatient care, or

b) Requires continuing treatment under the care of a health care provider which results in the person being incapacitated for more than three consecutive calendar days, as well as any subsequent treatments or periods of incapacity that relate to the same condition which also involves:

(1) At least **two treatments** under the direct supervision of a health care provider, nurse or physician's assistant, or by a provider of health care services (i.e., physical therapist) under the direction of a health care provider within a **30-day period** and within **seven days of the onset of the leave**, or

(2) A single treatment by a health care provider that results in a continuing regimen of treatment under the supervision of a health care provider, or

c) Any period of incapacity due to pregnancy or prenatal care, or

d) Any period of treatment or incapacity due to a chronic serious health condition which:

(1) Requires periodic visits of at least **two times each year** for treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider (29 CFR § 825.115(c)(1)),

(2) Continues over an extended period of time, and

(3) May cause episodic rather than a continuing period of incapacity (i.e., asthma, diabetes, epilepsy, etc.).

e) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, as in the case of a stroke, Alzheimer's, or the terminal stages of a disease. The person must still be under the continuing supervision by a health care provider, but she need not be receiving active treatment, or

f) Any period of absence to receive multiple treatments under the care or referral by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in an absence of more than three consecutive calendar days if such treatment was not provided, as in the case of chemotherapy for cancer, physical therapy for severe arthritis and dialysis for kidney disease.

12. FMLA Military Leave

On January 28, 2008, President Bush signed into law an amendment to the Family and Medical Leave Act (FMLA) that expands its coverage to the families of U.S. service men and women.

Under this amendment, covered businesses are now required to offer up to 26 weeks of unpaid leave to employees who need to provide care to wounded U.S. military personnel.

The new law also requires employers to provide 12 weeks of FMLA leave to immediate family members (spouses, children or parents) of soldiers, reservists and members of the National Guard who have a "qualifying exigency."

The final regulations also extend FMLA protection to employees who are needed to care for family members in the military with a serious injury or illness incurred in the line of duty. Likewise, the amendment allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave in order to manage activities associated with their service, known as "qualifying exigencies."

The final regulation defines "qualifying exigencies" as: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to which the employer consents. 29 CFR § 825.126(a).

Employees eligible for leave under both of these new initiatives are permitted to take up to 26 weeks of leave in a 12-month period. This leave may be taken separately from more conventional FMLA (i.e., for serious health conditions), so long as conventional FMLA leave does not exceed 12 weeks and the total leave does not exceed **26 weeks** in the 12-month period. The final regulations include definitions for employee coverage and for certification of qualifying events giving rise to the leave.

13. FMLA Covers Time Off For "Psychological Comfort"

In Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union, No. 00-55722 (9th Cir. 2002), Scamihorn was an employee of General Truck Drivers when he took a leave of absence to care for his father. Scamihorn took a leave under the FMLA, but his employer later terminated Scamihorn, claiming that he was not really needed "to care for" his father. Scamihorn claimed that his termination was illegal under the FMLA.

Scamihorn's father suffered from and took medication for depression, which was brought about by the murder of his daughter. As a result, Scamihorn's father functioned at about 65% of his normal capacity. He generally continued working, stating that "work was part of my salvation," but took some time off and was assisted at other times by his wife. Scamihorn spent several hours each day talking with his father about his sister's death, and sometimes drove his father to therapy when his father was too emotionally distraught to drive. He also performed various chores on an intermittent basis as needed.

The FMLA does not define what it means to "care for" a family member. The regulations, however, state that "[i]t includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a seriously ill child or parent receiving inpatient care." 29 CFR Section 825.116(a) (1993).

The final regulations clarify that "care" includes the provision of psychological comfort to those "receiving impatient or home care." 29 CFR Section 825.116(a) (1995). Noting that "[t]he legislative history of the FMLA underscores the significance of this type of care [S. Rep. No. 103-3 at 24 (1993)]," the court concluded that "the regulations specifically contemplate situations that encompass both physical and psychological care for a family member." The court therefore concluded that Scamihorn was in fact needed to "care for" his father within the meaning of the FMLA.

14. FMLA Covers Time Off From Work To Make Life Support Decisions

In Romans v. Michigan Department of Human Services, 668 F.3d. 826 (6th Cir. 2012), Jerry Romans had worked for the Michigan Department of Human Services (MDHS) as a fire and safety officer at a state juvenile detention center since 2000. Given the nature of his security job, he couldn't leave his post unless there was someone to relieve him.

Romans was working on April 4, 2006, when he received a call from his sister, who informed him that their terminally ill mother likely wouldn't survive the night and they needed to decide whether to keep her on life support. Romans had previously submitted paperwork to his employer certifying that he was a caregiver for his mother and held power of attorney for her. He intended to go to the hospital right after his shift, which was scheduled to end at 11:00 p.m., but the employee who was supposed to work the next shift called in sick at 10:30 p.m., and the MDHS informed Romans that he would have to work a double shift.

Although he found a volunteer to cover for him, Romans' supervisor told him he wasn't allowed to leave. Romans refused to stay and left to help his sister make care-related decisions for their mother even after his supervisor threatened, "I'll have you fired if you leave." As soon as he got to the hospital, however, he "became worried that he would lose his job" and turned around and went back to work. Upon his return, another supervisor let him leave during the extra shift.

In response to the incident, the MDHS suspended Romans for one day without pay. He was subsequently terminated for reasons unrelated to the leave necessitated by his mother's hospitalization. The FMLA recognizes two types of claims: (1) interference claims, in which employers burden (by making it hard for employees to use FMLA leave) or deny employees their FMLA rights, and (2) retaliation claims, in which employers take adverse employment actions such as discipline or termination against employees because they exercise rights under the FMLA. Romans filed both types of claims against his former employer.

Sixth Circuit's Decision

In making an interference claim, Romans alleged that he was denied FMLA benefits to which he was entitled. The claim hinged on whether he was entitled to FMLA leave to care for his mother. The lower court threw out the interference claim after determining that

because his sister was available to make care decisions for their mother, Romans' presence as a caregiver wasn't required. The Sixth Circuit disagreed, however, and held that he was entitled to FMLA caregiver leave under the circumstances.

Specifically, the FMLA regulations provide that to be entitled to FMLA leave, an employee must be "needed to care for" a family member, which encompasses both psychological comfort and physical care. The Sixth Circuit clarified that the "needed to care for" language, which was recently amended, now expressly includes "situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for change in care, such as transfer to a nursing home," and thus applies to the situation at hand. The court found life- support decisions are analogous to nursing home decisions and further noted: "To be sure, this is the kind of decision, like transfer to a nursing home, that few people would relish making without the help of other family members, and the regulations do not force them to do so." The court made it clear that the decision "to make arrangements for change in care" includes "a decision regarding whether an ill mother should stay on life support."

With respect to his retaliation claim, Romans argued that his one-day suspension was in retaliation for his FMLA leave and that it wrongfully factored into his employer's later decision to terminate him under its just cause/progressive discipline policy. The court held that he could have a point and sent both his interference and retaliation claims back to the lower court to be decided at trial.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case clarifies two main points about the FMLA:

1. To qualify for caregiver leave, an employee doesn't have to be the *only* caregiver or family member available to provide care or make decisions for the seriously injured or ill relative.

2. The "to make arrangements for change in care" language in the FMLA includes family consultations or individual decisions regarding life support.

It's important to realize that as more employees face medical care issues involving aging parents, situations that necessitate an employee being off work to make alternative care or life-support decisions qualify as protected FMLA leave. You must act accordingly to ensure employees' FMLA rights are protected.

15. Self-Inflicted Wounds Are Covered By The FMLA

In Chandler v. Specialty Tires of America, Nos. 00-5395, 00-5593 (6th Cir. 2002), Heather Chandler was employed as an administrative assistant by Specialty Tires of America in Tennessee. On May 17, 1998, she attempted suicide by taking an overdose of pills. That evening, Chandler's parents found her and rushed her to the hospital. On May 18, she was transferred to another hospital so that she could be treated by psychiatrists.

During the week she was hospitalized, Chandler kept in close contact with the plant manager, Joe McNeer. She told him about her suicide attempt and that she needed time off for medical treatment. He agreed to place her on paid leave. By the end of the week, she felt better and was planning to return to work the following week.

Robert Beck, Specialty Tire's personnel manager and Chandler's immediate supervisor, learned of her suicide attempt on May 19. Believing that her behavior demonstrated a lack of responsibility, he concluded that he could no longer trust her to handle her duties as his administrative assistant. Following an eight-minute conversation with McNeer, Beck decided to fire Chandler without making any inquiries into her request for leave. He admitted that he had no experience with the FMLA when he fired her. He claimed, however, that he based his decision entirely on what he characterized as her irresponsible act of taking an overdose of pills.

Chandler sued Specialty Tires claiming that she was wrongfully fired in violation of the FMLA. The court found for Chandler and awarded her $36,652.00 in damages and $47,320.00 in attorneys' fees and costs. Specialty Tires appealed to the Sixth U.S. Circuit Court of Appeals, which covers Ohio and Tennessee.

The Sixth Circuit FMLA held that hospitalization after a suicide attempt qualifies as a serious medical condition. The court also held that Chandler's notification of her condition was adequate to preserve her FMLA rights.

The court reasoned that an employee need not mention the FMLA when taking leave. All he must do is notify his employer that leave is needed. It is the employer's responsibility to identify the leave as qualifying for FMLA protection. The employer is then required to restore the employee to his previous position or an equivalent position when he returns from FMLA leave. The Act also prohibits employers from interfering with, restraining, or denying the exercise

or attempted exercise of any FMLA right. That prohibition includes retaliatory discharge for taking FMLA leave.

Specialty Tire argued that Chandler wasn't fired for exercising her FMLA rights. It argued that Beck never considered the cause of her suicide attempt or the fact that it might result in her absence from work. The company claimed that the supervisor considered "only the *act* of overdosing, itself," which isn't protected activity under the FMLA.

The Sixth Circuit acknowledged that the FMLA protects an employee from termination as a result of taking leave for a serious medical condition **but doesn't protect an employee from a termination motivated by the underlying medical condition.** (Beware of the Americans with Disabilities Act!!!) The court concluded, however, that there was evidence that supported the jury's verdict that Beck fired Chandler for taking FMLA leave rather than for taking an overdose of drugs or being diagnosed with severe depression.

The court relied on the following undisputed facts:

- Beck knew that **Chandler** was on medical leave;
- He knew that she had been hospitalized for a suicide attempt;
- He decided to fire her shortly after an eight-minute conversation during which he learned that she was hospitalized;
- The timing of her termination coincided with the end of her period of leave; and
- Beck didn't realize that she was qualified for leave under the FMLA.

16. Terminating Employees BEFORE They Can Use Their FMLA May Be Illegal

In Pereda v. Brookdale Senior Living Communities, Inc., 2012 WL 43271 (11th Cir. Jan. 10, 2012), Kathryn Pereda began working for Brookdale's Pompano Beach facility on October 5, 2008. In June 2009, Pereda advised her employer that she was pregnant and would request FMLA leave after the birth of her child on or about November 30, 2009. In September 2009, approximately 11 months after her hire, Pereda's employment was terminated.

Pereda sued her employer, claiming that the decision to terminate her employment following her request for FMLA leave constituted both interference and retaliation under the FMLA. The trial court granted the employer's motion to dismiss, stating that the employer could not have interfered with Pereda's FMLA rights because she was not entitled to FMLA leave at the time she requested it. The trial court further held that since Pereda was not eligible for FMLA leave, she could not have engaged in protected activity, and, accordingly, her employer could not have retaliated against her.

Pereda appealed the decision to the Eleventh Circuit.

In reviewing this case, the 11th Circuit reasoned that employees may assert two types of claims under the FMLA: "interference," where an employer allegedly denies or interferes with the employee's substantive rights under the FMLA; and "retaliation," where an employer allegedly discriminates against the employee for engaging in activity protected by the FMLA.

In order to be protected by the FMLA, an employee must be eligible (that is, have worked for the employer for at least 12 months and have worked at least 1,250 hours during the previous 12 months) and must experience a "triggering event," such as the birth of a child. In this case, the parties agreed that at the time Pereda requested leave, she was not eligible for FMLA protection, as she had not worked sufficient hours or experienced a triggering event. The parties also agreed that Pereda would have been eligible by the time she gave birth and began her requested leave. Consequently, the Eleventh Circuit concluded that allowing the district court's ruling to stand would create a loophole "whereby an employer has total freedom to terminate an employee before she can ever become eligible" and that "[s]uch a situation is contrary to the basic concept of the FMLA."

The Eleventh Circuit held that with regard to Pereda's interference claim, "because the FMLA requires notice in advance of future leave, employees are protected from interference prior to the occurrence of a triggering event, such as the birth of a child." The court noted that the notice period described in 29 U.S.C. § 2612(e)(1), which requires that an employee provide an employer with 30 days notice of foreseeable leave, was "meant as protection for employers to provide them with sufficient notice of extended absences." The court stated that failing to provide a remedy for an employee who "in goodwill exceed[s] the [30-day] notice

requirement," would create a "trap for newer employees" and extend to employers a "significant exemption from liability."

The court stated that its holding does not expand FMLA coverage to a new class of employees; rather, it means that an employee who is not yet eligible for FMLA leave may bring a lawsuit if an employer terminates the employee "in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible." A determination of whether that happened here will be made on remand of the case to the trial court.

With regard to Pereda's retaliation claim, the Eleventh Circuit held that in light of its conclusion that the FMLA protects a pre-eligibility request for post-eligibility maternity leave, Pereda also could state a cause of action for FMLA retaliation. The court reasoned that a pre-eligibility request for post-eligibility leave is protected activity "because the FMLA aims to support both employees in the process of exercising their FMLA rights and employers in planning for the absence of employees on FMLA leave."

As Pereda appealed from the trial court's ruling on her employer's motion to dismiss, the Eleventh Circuit noted that "the question remains for the district court as to whether there is colorable evidence" that the employer retaliated against Pereda.

Finally, the employer in this case argued that the Eleventh Circuit's ruling could lead to a slippery slope where an employee might announce on the first day of work his or her anticipated need for FMLA leave 364 days later and be protected. In response, the Eleventh Circuit reiterated the well-settled principle that employees such as Pereda, regardless of their FMLA status, may be terminated for legitimate reasons "such as poor performance or dishonesty."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers should be aware that an employee who announces a future need for FMLA leave prior to becoming eligible for such leave may be protected by the FMLA if it appears likely the employee would be eligible by the time the leave were to commence.

B. ADA

1. The ADA applies to private sector employers who employ 15 or more employees for at least 20 calendar weeks in either the current of preceding year.

2. Before a person is protected by the ADA, that individual must first be "disabled" under the meaning of the Act, which means the person must be **substantially limited** in performing a major life activity, which is defined as caring for oneself, performing manual tasks, walking, seeing, hearing speaking, breathing, learning and working. The employer must also be reasonably aware of this disability and the impairment cannot be temporary.

3. Next, the person must be qualified for the position for which she is applying. (i.e., education, skills, abilities, etc.) If so, then the person will be classified as being a "qualified individual with a disability." If the individual can then perform the essential functions of the job either with or without reasonable accommodation, then she will be protected under the ADA from discrimination based on her disability. Unlike the FMLA, it does not matter how long the employee has worked for the employer or even if the person works for the employer, since job applicants are covered by the ADA.

4. The ADA also protects those who associate with disabled persons, although an employer need not accommodate such individuals, those who may not actually be disabled under the Act but are **regarded** as being so, and those persons who have a previous **record** of being disabled.

5. Unless it would present an **undue hardship**, when considering the burden placed upon the employer financially or upon its operations, employers are required to reasonably accommodate a covered individual's disability.

6. It is also a defense to a charge of disability discrimination if the person presents a **direct threat** of substantial harm to herself or others that cannot be eliminated by reasonable accommodation.

Who Is Protected Under The ADA?

- **Qualified Individual**

  with a

- **Physical or Mental Impairment**

  or a

- **Record of a Disability**

  or is

- **Regarded as having a Disability**

  that

- **Substantially Limits ????????????**
  Remember the new list of conditions "Virtually Always" covered under the ADA

- **A Major Life Activity**

  or

- **The Individual Associates With A Person or Persons Who Meet This Definition**

  who with or without

- **Reasonable Accommodation**

  that does not place an

- **Undue Burden**

  on the employer and the individual can successfully perform the

- **Essential Functions of the Job**

  without posing a

- **Direct Threat to Him/Herself or Others**

7. The ADA protects disabled persons from discrimination in all aspects of their employment, which includes hiring, promotions, transfers, use of facilities, etc. Employers are also prohibited from segregating disabled employees from others.

8. ADA Is To Be "Broadly Construed"

The new 2011 regulations provide that:

> "[t]he definition of disability ... shall be construed broadly, to the maximum extent permitted by the terms of the ADA."

In other words, employers are on notice that the ADA will be greatly construed in favor of the individual claiming to be disabled under the ADA.

9. Categorical Disabilities

In the proposed ADAAA regulations, the EEOC stated that certain impairments would qualify individuals for coverage just by virtue of contracting the condition. Those impairments had been referred to as "categorical" or "per se" disabilities, which include:

> Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; **diabetes** substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and **major depressive disorder**, bipolar disorder, **post-traumatic stress disorder, obsessive compulsive disorder,** and schizophrenia substantially limit brain function.

The types of impairments described in this section may substantially limit additional major life activities not explicitly listed.

In other words, if an individual contracted such conditions, that person would "automatically" be covered by the ADA, thus killing the "substantially limits a major life activity test" for those conditions.

The final 2011 regulations no longer state that certain impairments will be categorically classified as disabilities under the ADA. However, under the 2011 final regulations, the EEOC states that all of these conditions will "virtually always" qualify as being disabilities under the ADA. The final regulations explain that given the inherent nature of these conditions, these impairments will:

1. Virtually always impose a substantial limitation on a major life activity and

2. Require an individualized assessment that is "particularly simple and straightforward."

Therefore, by characterizing these listed conditions as being "virtually always" covered by the ADA, the EEOC has in effect labeled tens of millions of Americans disabled by virtually eliminating the prior case-by-case approach analysis for these conditions.

So, employers should beware of all of these conditions when they arise under their ADA analysis.

10. Mitigating Measures Ignored

The ADAAA and the 2011 regulations clearly state that determining whether an impairment "substantially limits a major life activity," thus indicating that it rises to the level of a disability, must be made ***without*** considering the effects of any corrective or mitigating measures.

Examples of mitigating measures include, but are not limited to:

1. Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other

implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

2. Use of assistive technology;

3. Reasonable accommodations or "auxiliary aids or services"

4. Learned behavioral or adaptive neurological modifications; or

5. Psychotherapy, behavioral therapy, or physical therapy.

Employers are still allowed to consider eyeglasses and contact lenses in determining whether or not someone is disabled under the ADA.

11. Temporary Impairments Are Protected

Rejecting the views of business organizations and employment attorneys, the EEOC has made it very clear that **any** impairment – no matter how brief in duration – can be a covered disability. This is a major change from the previous ADA analysis.

The 2011 regulations section 1630.2(j)(1)(ix) rejects any minimum duration that an impairment would "disable" an individual and explicitly provides that:

> "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

This directly contradicts Congress's original intent in passing the ADAAA because Congress said nothing about short-term impairments being substantially limiting. This particular regulation seems ripe for challenge in the federal courts, especially as applied to persons whose impairments may only last a few months. It remains to be seen whether courts will afford deference to a regulation rooted more in the agency's aggressive enforcement mentality than in legislative intent.

The regulations provide no guidance on what is to be considered a "minor" condition other than to state that it is an objective inquiry. They do, however, provide the following guidelines:

- The transitory and minor standard is a defense that must be proven by the employer.

- The defense applies only if the impairment **actually was** transitory and minor, regardless of whether the employer believed it was transitory and minor.

- The transitory nature of an impairment is not relevant to whether someone suffers from an actual disability. A person may be considered actually disabled even if the impairment lasts less than six months.

12. Episodic Impairments

The ADAAA extended coverage to individuals with episodic impairments or conditions in remission, if the impairment would substantially limit a major life activity in its active state. Likewise, the 2011 regulations in section 1630.2(j)(1)(vii) addresses episodic impairments, while new rule 1630.2(j)(3)(iii) provides a non-exhaustive list of examples, including **epilepsy, multiple sclerosis, cancer, and psychiatric disabilities such as major depressive disorder, bipolar disorder, and post-traumatic stress disorder**.

In the Appendix "Interpretive Guidance," other examples of episodic impairments are provided, such as hypertension and asthma, with remarks that:

> "[t]he fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity."

13. "Substantially Limits" and Reasonable Accommodation

In the past, the federal courts have consistently accepted employer arguments that the Plaintiff was not "substantially limited" in a major life activity, and was therefore not protected by the ADA. Employer motions for summary judgment were routinely granted on the ground that the Plaintiff was not disabled, thereby eliminating any questions of whether or not a "reasonable accommodation" would have enabled the Plaintiff to perform all "essential job functions" of the job.

However, armed with statistics about employer successes and after heavy lobbying by disability rights advocates, Congress responded by enacting the ADAAA. Therefore, under the ADAAA and the 2011 regulations, the definition of "substantially limited" has changed drastically.

The 2011 regulations in sections 1630.1(c)(4) and 1630.2(j)(1)(iii) describe the ADAAA as shifting the focus of an ADA case from whether or not an individual meets the definition of being disabled to the question of whether the employer could have "reasonably accommodated" the individual under the ADA.

Consistent with ADAAA, the 2011 regulations state in section 1630.2(j)(1)(iii) that the question of whether an individual is "substantially limited" in a major life activity "**should not demand extensive analysis**."

Additionally, section 1630.2(j)(1)(v) of the 2011 regulations state that comparing an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population "usually will not require scientific, medical or statistical analysis."

In drafting the 2011 regulations, the EEOC refused to define the term "substantially limits." The EEOC claimed that providing a new definition would lead to a greater focus on the threshold for coverage, which is whether or not the person is actually disabled under the ADA, than was intended by Congress.

Prior to the ADAAA, the term "substantially limits" had been interpreted as "significantly restricts," which resulted in many ADA claims being dismissed because the plaintiffs were simply unable to show that they were disabled under the ADA. This is no longer the case under the 2011 regulations. Asking whether or not an impairment "significantly restricts" an individual in a major life activity is no longer a pertinent consideration.

Instead, the EEOC provided the following rules of construction that must be applied in determining whether an impairment substantially limits a major life activity.

1. **Broad construction**. The term "substantially limits" is to be construed **broadly in favor of expansive coverage**, to the maximum extent permitted by the terms of the ADA. Therefore, whether or not someone is "substantially limited" under the ADA it is not meant to be a demanding standard.

2. **Comparison to general population**. An impairment is a disability within the meaning of the ADA if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.

3. **Primary issue is compliance, *not* substantial limitation.** The primary object of attention should be whether covered employers have complied with their obligations and whether discrimination occurred, which refers to whether or not the employer had tried to "reasonable accommodate" the individual and not whether an individual's impairment substantially limits a major life activity.

4. **Individualized assessment**. Determining whether an impairment substantially limits a major life activity requires an individualized assessment.

5. **No consideration of mitigating measures**. The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures (except ordinary eyeglasses and contact lenses), and without regard to whether measures exist and the individual refuses to use them. The EEOC's final regulations also add psychotherapy, behavioral therapy, and physical therapy to the non-exhaustive list of mitigating measures that should not be considered in evaluating whether the individual has an impairment.

6. **Episodic impairments or conditions in remission**. An impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active.

Admittedly, the regulations clearly state that the principles set forth in its various sections are intended to provide for **more generous coverage and a wider application of the ADA.**

The 2011 regulations do provide some very helpful rules of construction on this issue. In determining whether an individual is substantially limited in a major life activity, employers may compare them to "most people in the general population" in the following respects:

- The condition under which they perform the major life activity;

- The manner in which they perform the major life activity;

- How long it takes them to perform the major life activity (and how long they are able to perform it);

- The difficulty, effort, or time required to perform a major life activity;

- Any pain experienced when performing a major life activity; and
- Any adverse effects of mitigating measures (such as side effects of medication).

On the other hand, employers are instructed to focus on the extent to which an impairment limits a major life activity and not on what outcomes an individual can achieve. For example, the fact that someone achieves a high level of academic success doesn't necessarily negate a determination that he suffers from an intellectual disability.

14. Major Life Activities

Further consistent with ADAAA, the 2011 regulations added several new activities to the non-exhaustive list of major life activities covered by the ADA, including "sleeping, ... concentrating, thinking, communicating, sitting, reaching and interacting with others – plus the "major bodily functions" of the special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal systems as "further illustrative examples."

The more comprehensive list of major life activities now includes:

> "Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
>
> The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system."

Additionally, section 1630.2(i)(2) of the 2011 regulations state that

> "In determining other examples of major life activities, the term "major" **shall not** be interpreted strictly to create a demanding standard for disability. **Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life**."

Therefore, the definition of what constitutes a “major life activity” under the ADA has become much more expansive.

15. Eating Held To Be A “Major Life Activity”

In Fraser v. Goodale, No. 01-36018 (9th Cir. 2003), Rebecca Ann Fraser was employed as a senior account specialist for United States Bancorp in Oregon. Fraser suffered from type I insulin-dependent diabetes. Her condition was considered severe and life-threatening. As a result, Fraser had to repeatedly check her blood sugar level, take multiple injections of insulin, and carefully monitor her diet and activities.

In November 1998, Fraser's supervisor told her that she could no longer eat at her desk. When she later experienced an extreme drop in her blood sugar and became disoriented, she sought permission from her supervisor to eat at her desk. He allegedly told her to "come back when she had an intelligent question."

On one occasion, Fraser purchased candy from a vending machine, but her sugar levels were so low that the candy did not help. Fraser again sought permission from her supervisor to remedy the problem, but to no avail. Fraser eventually passed out in the lobby and required assistance from her husband and a co-worker to get home.

Later that month, Fraser complained to upper management about her supervisor's actions. The matter was investigated, but the supervisor wasn't disciplined. On March 12, 1999, the bank terminated Fraser's employment.

Fraser sued Bancorp for failing to accommodate her disability in violation of the ADA. The trial judge dismissed the suit, finding that she was not disabled under the Act. Fraser appealed to the Ninth Circuit.

The Ninth Circuit found for Fraser.

The Ninth Circuit reasoned that the ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." The Ninth Circuit held that diabetes clearly is a "physical impairment" under the ADA.

The Ninth Circuit then decided whether or not eating is a "major life activity."

The EEOC has defined major life activities to include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The Ninth Circuit noted that many other circuit

courts have held that eating is a major life activity because it's "integral to [our] daily existence."

The Ninth Circuit cautioned, however, that "eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity."

The Ninth Circuit further held that eating is a major life activity for Fraser because "[n]ot only must she not eat certain foods, but she must carefully assess her blood sugar before putting anything into her mouth." The court found that Fraser had in fact established that her diabetes "substantially limits" her major life activity of eating.

The Ninth Circuit then held:

Unlike a person with ordinary dietary restrictions, Fraser must monitor much more than what and how much she eats. Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much at a meal or forgets his medication for a few hours, Fraser does not enjoy this luxury.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Do not “blindly” enforce policies. Employees with disabilities are entitled to “better” treatment under the ADA than those employees who are not disabled. In other words, an employer’s policies **DO NOT TRUMP THE ADA**! Examine the person’s situation **INDIVIDUALLY** and base decisions upon that … not strictly upon policy.

(Also, a little communication training for the supervisor in this case would have helped **A LOT**!)

16. What Is A “Reasonable Accommodation”?

Since the ADAAA and the 2011 regulations have clearly shifted the focus of ADA cases from determining whether or not someone is disabled under the law to whether or not the employer attempted to reasonably accommodate the person’s disability, it is critical that employers understand what is meant by the term “reasonable accommodation.”

First, employers are required to make “reasonable accommodations” to all aspects of employment, including the job application process, employer-provided services, employer programs, employer-provided restrooms, employer-provided cafeterias, the company’s lounges, recreation facilities, and so on.

The ADA's regulations define the term "reasonable accommodation" to include:

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

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

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

The ADA and its regulations also cite to some specific examples of types of reasonable accommodations that employers are expected to provide to employees that are not seen as imposing an undue hardship (42 U.S.C.§ 101(9)). These types of reasonable accommodations include:

- Providing readily available access to the work area and usability of its various facilities (i.e., restrooms, water fountains, etc.),

- Restructuring of job duties, modifying work schedules, or permitting part-time work,

- Reassigning an employee with a disability to a vacant position for which the employee is qualified and able to perform. (The employee's salary can be adjusted if the employer would routinely also do so for nondisabled individual.),

- Modification of equipment or devices required to perform the essential duties of the position in order to enjoy the equal benefits and privileges of employment, as well as any necessary modifications to the job application process,

- Adjustment of examinations, training materials, or policies,

- Providing qualified readers or interpreters and other similar accommodations or

- Other similar accommodations for individuals with disabilities, but not to the point where the person providing the assistance is actually the one performing the job.

17. Employer Defense: Undue Hardship

An accommodation will not be required if doing so would place an undue hardship on the employer, which is defined as being any accommodation that is significantly difficult or unreasonably expensive to implement and/or maintain, or one that would fundamentally alter the nature or operation of the employer's business. In making such a determination, the regulations cite several factors that may be considered, such as:

- The overall size and financial resources of the employer, the number of employees and its facilities involved in the reasonable accommodation,
- The type of operation involved,
- The impact of the accommodation on the employer, and
- The nature and cost of the accommodation.

"Reasonable Accommodation" And The Interactive Process

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, **interactive process** with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

It has become an affirmative duty on the part of employers to sit down with employees covered by the Americans With Disabilities Act and engage in the "Interactive Process" in order to determine which, if any, reasonable accommodations may be necessary.

The following is a checklist that can be used to help ensure that an organization is complying with the ADA by engaging in this Interactive Process.

Failure To Participate in "Interactive Process" Costs Employee Her Case

In Davis v. The Guardian Life Ins. Co. of Am., No. 98-5209 (E.D. Pa. 2000), Denise Davis worked for Guardian Life Insurance Company as an underwriter. When she contracted Crohn's Disease in 1989, she began missing a great deal of work. In 1994, in cooperation with her supervisor, she began working part-time. She was to work at home three days a week and in the office two days a week. Guardian then set Davis up with all of the equipment she would need to work from home, such as a fax machine, computer, telephone line, etc. Davis was allowed to

"switch" the days she was in the office and at home depending on her condition and medical appointments.

By April 1997, Davis' condition worsened. She then asked to work exclusively at home. Guardian sent a letter to Davis denying this request. Guardian claimed that Davis needed to be in the office two days a week, although these two days could vary from week to week. If she could not be in the office two days a week, her sick time account would be charged. Guardian then informed Davis that it needed to have a response to its letter and that she needed to designate which two days she would be in the office for the following week.

Davis never responded to Guardian's letter, nor did she ever attempt to return to work after her request was denied. Instead, she filed an ADA claim against Guardian.

The jury awarded Davis **1.5 million dollars**. However, the court overturned the jury's verdict and the award.

The court reasoned that **both the employer and the employee equally** bear the responsibility of determining what reasonable accommodations are appropriate. The court held that in this case, Davis refused to engage in this "**interactive process**" after she received Guardian's letter. Since Davis failed to engage in this interactive process, she was not entitled to prevail.

In 2001, this same reasoning was used in the Sixth Circuit in Brown v. Chase Brass & Copper Co., Inc., 2001 WL 814931 (6th Cir. 2001) in an unpublished opinion.

THE INTERACTIVE PROCESS

- ♣ Identify the essential functions of the job. Include a review of any applicable job descriptions or memorandums indicating or describing the duties and responsibilities. In order to fully understand the scope of the job, be sure to make note of any marginal or "nonessential" job functions.

- ♣ Obtain from the employee's health care provider a listing of the employee's work-related limitations. Identify each restriction or limitation of the employee that may affect his/her ability to perform the essential functions of this job in question.

- ♣ Meet with the employee. Review and confirm the limitations stated by the health care provider in relation to the job's essential functions. Assess and discuss with the employee his/her limitations and discuss and identify reasonable accommodations, if any, that would allow him/her to perform all of the essential job functions. This discussion with the employee should, of course, be documented.

- ♣ If the employee doesn't agree with the limitations, he/she needs to obtain clarification from his/her physician. If your company wants a second opinion, follow the applicable provisions of the ADA.

- ♣ Review each accommodation proposed by either side for feasibility and effectiveness. Document the entire conversation by listing each proposed accommodation and indicating its viability. Both parties should be involved in this "problem-solving" exchange.

- ♣ If an accommodation is not feasible due to the undue hardship it will place on your company, you need to fully document why the accommodation will not work.

- ♣ Consider the employee's preference, and select and implement the accommodation most appropriate for your company and the employee.

- ♣ Conclude the interactive process by documenting a plan for implementing the selected accommodation. Confirm with the employee in writing that the agreed-on plan adequately addresses his/her limitations and details the accommodations that will be implemented.

- ♣ Monitor the plan going forward. Are the accommodations working? Are adjustments necessary?

18. The Accommodation Need Only Be "Reasonable"… It Need Not Be The ***BEST***

Like the "reasonable accommodation" requirement of religious discrimination, the ADA does not require employers to use the "best" accommodation available. Rather, the accommodation need only be sufficient to meet the job-related needs of the individual.

19. Employee Who Declines A Reasonable Accommodation Loses ADA Coverage

The regulations also state that if an employer offers a reasonable accommodation to a disabled employee, and the employee declines the accommodation, the employee will lose his protections under the ADA. The employer may then treat the employee as a nondisabled individual (29 C.F.R. § 1630.8(d)).

In Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), where a disabled employee refused a reasonable accommodation offered to her by her employer, the Sixth Circuit held that the employee could no longer claim to be classified as a qualified individual with a disability.

20. ADA Does Not Require Employers To Adjust Work Schedule To Accommodate Employee's Commute

In Regan v. Faurecia Auto. Seating, Inc., No. 11-1356 (6th Cir. May 10, 2012), Alisha Regan worked as a prototype seat builder for Faurecia Automotive Seating in Troy, Michigan. From the time she was hired in 2006 until September 2009, her normal work hours were 6:00 a.m. to 3:00 p.m. In 2009, Faurecia determined that it needed to change the work hours for employees in Regan's department to 7:00 a.m. to 4:00 p.m. Because the materials the workers needed to perform their job duties didn't arrive from other departments until after 6:00 a.m., the company felt the change was necessary to improve productivity and efficiency.

Regan took issue with the schedule change because of her 74-mile commute to the Faurecia facility and associated issues with her narcolepsy. She stated that the different work hours meant she would have to drive during times of the day when there would be more traffic, which would aggravate her narcolepsy and require her to stop and rest during the drive, resulting in a commute lasting as long as four hours. She proposed to Faurecia that she be allowed to maintain her old schedule or, in the alternative, that she be able to work 7:00 a.m. to 3:00 p.m. without a lunch break. When Faurecia refused both options and offered her Family and Medical Leave Act (FMLA) paperwork, she quit.

Regan filed suit against Faurecia in federal court in Michigan, alleging (1) failure to reasonably accommodate under the ADA and Michigan disability law based on her employer's refusal to exempt her from the new work schedule and (2) gender discrimination based on constructive discharge under Michigan and federal law.

The federal district court dismissed both of Regan's claims, finding that she failed to present sufficient evidence to show that she was disabled or that Faurecia was obligated to provide her a reasonable accommodation. The court similarly dismissed her gender discrimination claim, finding that (1) her resignation didn't constitute a constructive discharge sufficient to support a gender discrimination claim and (2) she was unable to show that the company treated male employees more favorably.

Regan appealed to the 6th Circuit, which affirmed the dismissal of her disability and gender discrimination claims. With respect to her disability discrimination claim, the court noted that the ADA "does not require an employer to accommodate an employee's commute" and cited several federal court decisions from around the country supporting that view. Therefore, Faurecia wasn't obligated to modify Regan's schedule to make her commute shorter or more convenient despite the effect the new work hours would have on her medical condition. The 6th Circuit didn't address the district court's holding that she failed to show she was disabled under the law because the employer had no obligation to accommodate her commute.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers should be cautioned not to apply this decision too broadly because of the specific facts involved. Nevertheless, the court's decision is a helpful one for employers struggling with how to deal with employees who ask for accommodations specifically related to their daily commutes. In some circumstances, an employee might seek an accommodation such as working from home or from an alternative worksite rather than specifically seeking help with her commute. When that happens, it may be necessary under the ADA to provide the accommodation provided it is reasonable to do so based on business operations, the employee's job duties, and the medical issue involved.

21. EEOC Comments On Telecommuting

The Equal Employment Opportunity Commission (EEOC) has released a fact sheet for employers examining the use in deciding if "telecommuting" is a reasonable accommodation under the ADA for their workplaces. According to EEOC Chair Cari M. Dominguez:

"Advances in technology are making telecommuting an increasingly important option for employers who want to attract and retain a productive workforce. For some people with disabilities, telecommuting may actually be the difference between having the opportunity to be among an employer's best and brightest workers and not working at all."

In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, the EEOC concluded that allowing an individual with a disability to work at home may be a form of reasonable accommodation. The new fact sheet notes that employers can use existing telecommuting programs to meet that obligation, though the employer may have to waive certain eligibility requirements or otherwise modify the program for someone with a disability. Employers that do not have telecommuting programs may still need to allow a disabled employee to telecommute as a reasonable accommodation, the EEOC states, unless doing so would create an undue hardship for the employer.

The fact sheet reminds us that after an employee requests the right to telecommute, the employer and employee should discuss why the employee needs to telecommute and whether all or some of the job tasks can be performed from home. (That is referred to as the "Interactive Process.")

There are several difficult issues that must be considered for a telecommuting program, which the fact sheet acknowledges. Some of those include:

- Supervising an employee who works at home;
- Replacing face-to-face interaction with telephone, fax, and e-mail communications; and
- Providing immediate access to documents or other information generally located only in the workplace.

To review the EEOC's report on telecommuting, go to the EEOC's website at www.eeoc.gov.

Another useful resource for employers exploring their reasonable accommodation obligation is the Job Accommodation Network (JAN). JAN is a free service that offers ideas and suggestions on providing effective accommodations. The program's counselors perform individualized searches for workplace accommodations based on a job's requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at (800) 526-7234 or www.jan.wvu.edu/soar.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Do not automatically dismiss the possibility of allowing an employee to telecommute in order to "reasonably accommodate" an employee with a disability. This option should be reviewed as part of the Interactive Process. If there are reasons why telecommuting would not work as a viable option, it should be noted in the Interactive Process.

The EEOC considers this to be a viable option for discussion…which means so should you. Recent case law supports the EEOC's position on this matter.

22. Continuing Duty To Accommodate

In Humphrey v. Memorial Hospitals Assoc., No. 98-15404 (9th Cir. 2001), Carolyn Humphrey was a medical transcriptionist for Memorial Hospitals Association, or MHA, when she was diagnosed with obsessive-compulsive disorder. To accommodate her condition, MHA allowed Humphrey to work a flexible work schedule.

However, Humphrey continued to miss work due to her condition. She then asked MHA if she could work from home, since other medical transcriptionists were allowed to "telecommute." MHA refused, claiming that it had already accommodated Humphrey's condition. MHA also claimed that its policy did not allow employees who had attendance problems to work from home. However, MHA reasoned that if Humphrey's attendance improved, then she would be allowed to work from home under its current policy.

Still, Humphrey's attendance worsened and she was terminated. Humphrey sued MHA for disability discrimination under the ADA.

The court found for Humphrey. Specifically, the court held that even though MHA had already made one accommodation for Humphrey, it was "abundantly clear" that the flexible schedule was insufficient in this situation. Since MHA had already demonstrated that allowing medical transcriptionists work from their homes was not an undue hardship, since it had employees currently working from their homes in these roles, such an accommodation should have been made for Ms. Humphrey. Humphrey should have been allowed to work from her home not under the requirements of the current policy, but as a reasonable accommodation under the ADA.

23. Leave Of Absence ***IS*** A Reasonable Accommodation

The courts have also tended to hold that granting a leave of absence to a disabled employee may be a reasonable accommodation under the ADA. In Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), the Sixth Circuit specifically held that making a leave of absence available to an employee was a reasonable accommodation under the ADA.

24. Length Of Leave Of Absence

Of course, the next question to ask is how long of a leave of absence is "reasonable?" In Dockery v. North Shore Medical Center, 909 F. Supp. 1550 (S.D Fla. 1995), the district court held that an employer's policy which terminated an individual's employment after being on leave for one year would not violate the ADA.

Similarly, in Gantt v. Wilson Sporting Goods Company, 143 F.3d 1042 (6th Cir. 1998), on January 10, 1992, Una Aline Gantt, who became disabled due to a shoulder injury, began a leave of absence from work. Wilson Sporting Goods, Gantt's employer, had a policy that allowed employees to take a maximum of one-year leave of absence. At the end of this leave, if the employee had not yet returned, the employee would be terminated.

In January of 1993, the company contacted Gantt and asked her when she would be returning to work. Gantt replied that she had no idea. Pursuant to Wilson's policy, Gantt was terminated. Gantt filed suit against the company, alleging that her rights under the ADA had been violated.

The court then looked to the ADA's regulations, which state that "Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." 29 C.F.R. pt. 1630, App. § 1630.5. The Sixth Circuit therefore held that since the company's policy did not distinguish between disabled and non-disabled individuals and it was applied in a uniform manner, that the policy did not violate the ADA.

It is important to note that the Sixth Circuit in Gantt did not establish a "bright-line" rule regarding how long of a leave of absence must be given in order to reasonably accommodate disabled employees. Instead, the court left this determination as to the duration of a "reasonable" leave up to the facts and circumstances of each case, which includes considering what policies the employer has in place, if

they are uniformly applied and if the application of the policy appears to be reasonable. In this case, the court was satisfied that leave of absence for one year was reasonable.

25. Indefinite Leave of Absence Not A Reasonable Accommodation

In Boykin v. ATC/Vancom of Colorado, No. 00-1318 (10th Cir. 2001), Fred Boykin was a bus driver for the company when he suffered a mini-stroke. As a result, his CDL license was revoked. Boykin asked to be reassigned to another position, but none were available that did not conflict with his school schedule. Boykin therefore refused the position. The company therefore terminated Boykin.

Six months later, a job became available that Boykin was qualified to perform. Vancom invited Boykin to apply for the job, which he did. However, Vancom decided to hire someone else for the job.

Boykin then sued Vancom for disability discrimination under the ADA. Specifically, Boykin contended that he should have been given an indefinite leave of absence in order to reasonably accommodate his disability. As a result, he should not have had to reapply for the position that came available.

The court disagreed. The court held that it is not reasonable to require an employer to place an employee on an indefinite leave of absence. Each situation must turn on its own circumstances, so determining what becomes an undue hardship may vary from one instance to the next. However, it is simply not reasonable to require indefinite leaves.

Also … in Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996), the Sixth Circuit also held that an employer is not required to maintain the employee's leave of absence indefinitely. Further, in Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), the Fourth Circuit held that an employer need not "wait indefinitely for an employee's disability to be corrected."

26. Anger Issues And The ADA

In Calef v. Gillette Co., No. 02-1444 (1st Cir. 2003), Fred Calef worked as a production mechanic for Gillette. Calef had several physical or verbal confrontations with co-workers that led his supervisors to issue written warnings to Calef. In one incident, Calef threatened a 60-year-old female employee who asked him for help with a machine she was using. He allegedly pointed his finger in her face, raised his hand, made a fist, and stated, "Stop calling me or I'll punch you in the face."

Following that incident, Gillette issued Calef a final warning that "any single infraction of [company] policy in the future will result in termination." He was also referred to Gillette's employee assistance program, although he chose instead to receive treatment from an outside therapist.

Shortly thereafter, Calef was diagnosed with attention deficit hyperactivity disorder (ADHD) and was prescribed Ritalin. According to his doctor, the ADHD did not cause him to become angry. Instead, his condition caused him to deal with anger more impulsively. As a result, Calef may not respond as well as others when faced with highly stressful situations.

Calef continued to work at Gillette for a year without any further incidents. Following a disagreement with a supervisor, he began acting "irrational and increasingly erratic." The supervisor feared for his safety. Within days, the company fired Calef.

Calef sued Gillette, claiming that he was fired in violation of the ADA. The trial judge dismissed the suit. Calef appealed the decision to the First Circuit.

The First Circuit held that Calef's history of physical altercations with co-workers was enough to lose the protection of the ADA. The court said, "Put simply, the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability," the court wrote.

In Koshko v. General Electric Co., No. 01-C-5069, (N.D. Ill. 2003), Gary Koshko was employed by General Electric Company (GE) in Bridgeview, Illinois. Beginning in 1998, he began to experience severe mood swings, which he admitted were "grossly out of proportion to any provocation or precipitating factors."

In September 1999, following an angry outburst on the job, Koshko agreed to take a short- term disability medical leave. One month later, he was diagnosed with intermittent explosive disorder -- which is characterized by a failure to resist aggressive impulses that result in serious violent acts or destruction of property. Koshko’s condition was treated with a combination of drugs and therapy. He was released to return to work, except for overtime, in December 1999.

Several months later, Koshko was called into a meeting with General Electric management. According to Koshko, Bob Watson, the company's national lighting manager, confronted him in a disdainful and insulting manner, criticized his work product, and stated that he should be working overtime. After the meeting, Koshko allegedly returned to his work area, began cursing, and threatened to kill Watson. His co-workers reported his conduct to management, and shortly thereafter, he was fired for violating the company's "rules of conduct."

Koshko sued GE under the ADA for failing to accommodate his disability. The court found for General Electric.

The court first held that Koshko must show that he has a physical impairment that substantially limits one or more major life activities. While his doctor stated that he has "serious emotional problems which impacted such major life activities as sleep and rest, thinking, eating, [and] social interaction with others," the judge found that the doctor didn't state that those life activities were "substantially limited" by his condition.

Even if Koshko was disabled, the court reasoned, he was not a qualified individual under the ADA because he poses a direct threat to the health and safety of others.

27. Prior Drug Use As A Bar To Employment

In Raytheon Co. v. Hernandez, 2003 WL 396696, No. 02-749 (2003), Joel Hernandez, a 25 year employee of Hughes Missile Defense, a subsidiary of the Raytheon Company, tested positive for cocaine use. As a result, he was forced to resign for violating the company's work rules.

Hernandez then went through a drug treatment program. Two years later, he then re-applied for a job with Raytheon.

Hernandez stated on his application that Raytheon had previously employed him. He attached letters from both his pastor about his active church participation and from an Alcoholics Anonymous counselor about his regular attendance at meetings and his recovery. The employee at Raytheon who reviewed and rejected Hernandez's application testified that Raytheon has a policy against rehiring employees who are terminated for workplace misconduct. The Raytheon employee further testified that she did not know Hernandez was a former drug addict when she rejected his application.

Hernandez filed a lawsuit claiming that he had been discriminated against in violation of the Americans with Disabilities Act of 1990 (ADA). Hernandez claimed that Raytheon rejected his application because of his record of drug addition and/or because he was regarded as being a drug addict.

Hernandez also argued that even if Raytheon applied a neutral no-rehire policy in this case, it still violated the ADA because of that policy's disparate impact against former drug users. (This claim was dismissed for not being filed in a timely manner.)

The U.S. Supreme Court first held that Raytheon rejected his application because he had been terminated previously for violating company rules. **The Court rejected Hernandez' contention that his record of drug addition played any role in Raytheon's decision not to rehire him.** The Court also rejected the contention that Raytheon regarded Hernandez as being disabled. The Court therefore rejected Hernandez' disparate treatment claim.

Instead, the Court held that Raytheon had provided a **legitimate, nondiscriminatory reason** for refusing to rehire Hernandez. In short, it had a policy in place of not rehiring employees who violate workplace rules.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Make certain that employees who test positive for drug and/or alcohol use are terminated for violating company policy and not using drugs or alcohol. Human Resources should also make sure that supervisors are trained in taking notes regarding why certain applicants are hired over others.

28. Last Chance Agreements While In Rehab

In DePalma v. Lima, 155 Ohio App.3d 81 (2003), for more than two decades, Anthony DePalma was employed by the Lima Fire Department. During his career, DePalma received very high scores on his exams and received numerous awards for valor and dutiful service. In 2000, DePalma was promoted to assistant chief. In December of 2000, DePalma developed kidney stones and was prescribed various narcotic pain medications. DePalma then became addicted to these medications.

When the medications were no longer available from his treating physicians, DePalma began to purchase them illegally and eventually began taking heroin. Realizing he had a drug addiction, DePalma voluntarily checked himself into Shepherd Hill, a nationally known addiction-treatment center at the beginning of October, 2001. On

October 5, 2001, DePalma was visited by the fire chief, who informed DePalma that he had to sign a last-chance agreement ("LCA") or his employment would be terminated. The agreement required DePalma to (1) complete treatment at Shepherd Hill, (2) abide by all recommendations or he would be terminated, (3) submit to quarterly performance appraisals, and (4) submit to random drug and alcohol testing.

The purpose of the LCA, according to the testimony, was to treat DePalma like Robinson. The first indication the department had of DePalma's drug addiction was his seeking treatment. No incidents had previously occurred to indicate DePalma's drug use.

On March 17, 2002, DePalma was taken to the hospital to be treated for a kidney stone. At the hospital, DePalma was given a full 30-day prescription for Vicodin. When the pain progressed, DePalma returned to the hospital and was scheduled for surgery. DePalma was given Demerol while awaiting surgery. The hospital was aware that DePalma was an addict, but no follow-up was arranged to prevent further addiction to the pain killers, which DePalma received for approximately two weeks. DePalma was off work until March 30, 2002, because of treatment for the kidney stones.

On April 1, 2002, DePalma returned to work and was required to submit to a drug test. The test revealed the presence of pain killers in DePalma's system, and his employment was terminated pursuant to the LCA. DePalma appealed the termination to the board. The board found that the termination had not been appropriate and reversed the termination.

The board then reinstated DePalma and suspended him without pay for 14 days. On July 26, 2002, the city of Lima appealed the board's decision to the Court of Common Pleas of Allen County. On January 17, 2003, the trial court, after reviewing the record of the board's proceedings, reversed the decision of the board and affirmed the termination. The trial court made the following findings:

> "At the time Mr. DePalma was presented with the [LCA] at Shephard [sic] Hill, in light of the content of the [LCA] and the fact that he had admitted himself to Shephard [sic] Hill for treatment for drug addiction, it would have been obvious to him what the allegations were against him. Thus, the notice requirement was fulfilled."

> "The very fact that Mr. DePalma was at Shephard [sic] Hill for treatment for drug addiction was a substantial portion of the City's evidence which surely would have needed no further explanation."

DePalma appealed the court's decision. The Third District Court of Appeals ordered DePalma's reinstatement.

The court reasoned that the city should not have been permitted to use his voluntary act of seeking treatment as the basis for changing the terms of his employment. An employer is prohibited from changing the terms of employment for a person with a disability just because of that disability. Section 12112(a), Title 42, U.S. Code. A qualified individual with a disability does not include an employee currently engaging in the illegal use of drugs. Section 12114(a), Title 42, U.S. Code.

However, an individual is considered to be a qualified individual with a disability if he or she "is participating in a supervised rehabilitation program and is no longer engaging in such use." Section 12114(b)(2), Title 42, U.S. Code. The purpose behind these statutes is to encourage drug addicts to seek treatment without worrying that doing so will cost them their jobs.

The mayor and the fire chief both testified that prior to DePalma's entering the treatment program at Shepherd Hill, there was nothing to indicate that DePalma had violated any rules of work. His performance and behavior at work were excellent. However, once DePalma voluntarily entered the treatment program, the city became aware of his drug addiction and immediately changed the terms of DePalma's employment by having him sign the LCA.

The city argues that this was a permissible action because the LCA was not discipline. The city claims that the LCA is not discipline because it did not adversely affect DePalma at the time he signed it.

However, a written reprimand is discipline if it is placed in an employee's file and the implications of the writing continue beyond the placement in the file. The court did not see any difference between the LCA and a written warning that is placed in one's file. Neither action adversely affects the subject at the time made. However, both actions can provide the basis for further action at a later time, including termination. Thus, the LCA is a form of discipline.

The LCA was signed while DePalma was actively seeking treatment at a rehabilitation center and was no longer using the substance to which

he is addicted. Thus, DePalma was a disabled individual under federal law when he was presented with the LCA.

The fire chief, the union representative, and a substance abuse counselor arrived and told DePalma to either sign the document or be terminated. This, in effect, was a disciplinary action for being a drug addict in recovery.

(It is also important to note that DePalma's Loudermill rights were also violated.)

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employees who voluntarily check themselves into Drug/Alcohol Rehabilitation Programs are protected under the ADA. If no performance issue lead to the testing, and the employees takes the imitative on his/her own, then a Last Chance Agreement should not be used.

29. Reasonable Accommodations and Essential Functions

Under the ADAAA and the 2011 regulations, employers will be defending themselves based upon whether they "reasonably accommodated" an individual with a disability … not whether the person qualifies as being disabled under the ADA. However, in deciding which accommodations are reasonable, if any, employers are not required to restructure, reassign or adjust any of the essential functions of the job.

Basically, "essential job functions" under the ADA have been defined as being those duties that are fundamental to the performance of the position and are not of only marginal importance. A job function may be considered essential for any of several reasons, including but not limited to the following:

- The position exists to perform these functions,
- There are a limited number of employees available and able to perform those functions, so they cannot be distributed to others,
- The function is so highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Evidence of whether a particular function is essential includes, but is not limited to:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.

30. Timely Attendance May *Not* Be An Essential Function

In McMillan v. City of New York, No. 11-3932 (2nd Cir 03/04/2013), Rodney McMillan worked for ten years as a case manager for New York City's Human Resources Administration ('HRA'). In 1997, he assumed the role of a case manager for the HRA Community Alternative Systems Agency ('CASA'). McMillan's new duties included conducting annual home visits, processing social assessments, recertifying clients' Medicaid eligibility, making referrals to other social service agencies, and addressing client concerns. He also met with clients daily in the office.

McMillan also suffered from schizophrenia. However, he suffered drowsiness as a result of his anti-psychotic medication, which made it difficult for him to arrive at the office daily by 10 a.m. (or the 10:15 a.m. grace time allowed by agency rules.) While his agency tolerated McMillan's arrivals as late as 11 a.m. for a decade, this changed in 2008 when his supervisor Loshun Thornton, at her supervisor Jeanne Belthrop's direction, refused to approve any more of McMillan's late arrivals. Thornton explained that she 'wouldn't be doing [her] job if [she] continued to approve a lateness every single day.'

McMillan verified with two treating physicians that his medication schedule could not be altered, and twice requested as an accommodation that his work schedule be altered to allow him to work from 11 a.m. to 7 p.m., a request that was denied. "These requests were forwarded to Donald Lemons, the Deputy Director of HRA's Equal Employment

Opportunity Office, for evaluation. After speaking with Thornton and others, but not with McMillan, Lemons determined that McMillan's request for a later flex start time could not be accommodated because there was no supervisor at the office after 6:00 p.m."

McMillan was allowed to continue working, but was placed on a 30-day suspension without pay for tardiness. He brought an action for discrimination and denial of reasonable accommodations under the ADA and the New York State Human Rights Law, and the New York City Human Rights Law.

The district court found for the employer on all claims, holding (among other things) that timely arrival at work was an "essential function" of McMillan's job.

However, McMillan appealed to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals found for McMillan.

The Second Circuit Court of Appeals held that the employee's long, successful history with this accommodation of arriving late presented a genuine issue of material fact about whether timely attendance at work was an "essential function":

> "For many years prior to 2008, McMillan's late arrivals were explicitly or implicitly approved. Similarly, the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential. Interpreting these facts in McMillan's favor, along with his long work history, whether McMillan's late and varied arrival times substantially interfered with his ability to fulfill his responsibilities is a subject of reasonable dispute."

While other cases that had previously held that timeliness was an essential function, the Second Circuit Court of Appeals held that those cases involved situations that "***absolutely*** required plaintiffs' presence during specific business hours," such as when the employee was a supervisor, or the company had to meet timely deadlines, and so on. The Second Circuit Court of Appeals also noted that there was an important distinction between tardiness and absenteeism:

> "an absent employee does not complete his work, while a late employee who makes up time does."

While the agency objected that an 11 a.m. start time might mean that the plaintiff would be without supervision for up to an hour a day, which would be after 6 p.m., the Second Circuit noted that even unsupervised hours might be a reasonable accommodation:

> "McMillan's request to work unsupervised after 6:00 p.m. is not unlike a request to work from home. Both accommodations are potentially problematic because they are unsupervised. We have implied, however, that unsupervised work might, in some cases, constitute a reasonable accommodation. The majority of cases on this issue, however, find that requests to work without supervision are unreasonable. The question of whether McMillan can reasonably perform portions of his job without supervision, as he apparently has been permitted to do previously, should be considered on remand."

The Second Circuit remanded the issue of whether such a work arrangement might amount to an "**undue burden**" under the ADA, a defense upon which the employer bears the burden of proof, back to the district court.

Also … Punctuality Is Not Necessarily an Essential Job Function

In Ward v. Massachusetts Health Research Institute, Inc., No. 99-1651 (1st Cir. 2000), employees were allowed to arrive at work anytime between 7 a.m. and 9 a.m. However, Michael Ward, a data entry worker, would usually arrive to work between 9:10 a.m. and 9:35 a.m. Sometimes, he would not arrive until noon. However, Ward always worked a full shift and completed his entries.

When Ward continued to be late for work, he was given a written warning. However, Ward told his supervisor that he had arthritis, and this condition caused him to be very stiff and sore in the morning. As a result, it took Ward a while to "loosen" up his joints and get into work. Ward then provided a note from his physician verifying his condition.

Ward then asked to modify his schedule further, but the Human Resource Director denied this request.

When Ward's tardiness continued, he was fired. Ward filed suit under the ADA. The court found for Ward.

The court first stated that an employer is not expected to hire anyone who cannot perform the essential functions of the job. The court also recognized that most courts have found that timely attendance is an essential function of most jobs. However, the court did not believe that timely attendance was an essential function in this case.

First, the court reasoned that Ward arose every morning at 5:00 a.m. In order to get out of bed, Ward would use a blow dryer for 45 minutes just to heat up his legs. Only then could he begin to move around enough to get ready to come to work.

Employers are expected to reasonably accommodate their disabled employees. In Ward's position, it did not matter if he completed his data entry assignments by 5:00 p.m. or by 11:00 p.m. All that really mattered was that they were completed by the start of business the next day. Therefore, allowing Ward to come to work as late as even 12:00 p.m. caused no real hardship for the employer…aside from altering its policy for Ward.

Therefore, since the employer could not show that timely attendance was an essential job function, and since employers are required to reasonably accommodate their disabled employees, Ward prevailed in this case.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

These cases are great examples of the fact that employers cannot just classify some job duty or requirement as an "essential function" and leave it at that. There must be reasons and documentation to support such a classification.

31. "Regarded As" Disabled Now a Broader Category of Employees

Under the 2011 regulations, an individual is "regarded" as having an impairment under the ADA if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, regardless of whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

Therefore, an individual is regarded as having such an impairment under the **ADA any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment**.

However, establishing that an individual is regarded as having an impairment under the ADA does not, by itself, establish liability. Liability is established under the ADA only when individuals prove that a covered entity discriminated against them on the basis of their disability.

This means, for example, that a minor lifting restriction which might not rise to the level of an actual disability (under the major life activity of working or otherwise) could nonetheless be the basis of a "regarded as" claim. In a cryptic passage, the new regulations take this a step further by stating that an employer "regards" someone as disabled by taking action based on any real or perceived impairment, "even if the entity asserts, or may or does ultimately establish, a defense to such action."

Under the 2011 regulation 1630.2(l), proof that an individual was denied employment because of an impairment suffices to establish coverage under the ADA, **"whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity."**

Under the old interpretation, an employee had to prove that an employer ***regarded*** the employee as being substantially limited in a major life activity ***because of a q*ualified disability**.

Under the new law, the employee only has to show that the ***employer believed*** he or she had a mental or physical impairment.

As a result, it will be critical for employers to establish policies and procedures for supervisors in handling situations that might be related to a disability. Training managers in this area will be critical.

However, there is actually some good news in this area for employers. "Regarded as disabled" ***does not*** include employees with a "minor" impairment, or a "transitory" impairment defined as lasting 6 months or less. In addition, an employee who says he or she is being regarded as disabled is not entitled to a reasonable accommodation.

The EEOC also clarified that individuals who claim that an employer is regarding them as being disabled under the ADA must **still** establish the other elements of a claim, which includes:

- The employee is qualified for the position in question and that
- The employee was subjected to a prohibited action because the employer regarded him or her as being disabled.

Likewise, the employer may still raise any defenses to a claim that it regarded an individual as being disabled, such as that the employee posed a direct threat to himself or others.

32. "Regarding" An Employee As Being Disabled: Requiring <u>TREATMENT</u> … NOT <u>ASSESSMENT</u>

In <u>Miners v. Cargill Communications Inc</u>., 113 F.3d 820 (8th Cir. 1997), the promotions director of a radio station was suspected of drinking and driving while on the job, which violated the company's policy of prohibiting the consumption of alcohol while on company time. Further, the promotions director routinely drove the company van as part of her job.

In order to either confirm or disprove these rumors, the company president hired a private investigator to see if the promotions director was in fact engaging in this activity. The investigator confirmed that the rumors were true and that she was in fact drinking and driving on the job.

The president then called the promotions director to his office and gave her the choice of either entering a chemical dependency rehabilitation program or being terminated.

The employee chose instead to sue her employer for violating the ADA and regarding her as being a disabled person. The court agreed with the employee.

Specifically, the court reasoned that the employer's actions indicated that the president did in fact regard the employee as an alcoholic who was eligible to enter a rehabilitation program, which is a disability protected by the ADA.

Then, instead of exploring avenues of a reasonable accommodation with the employee, the employer simply ordered her into rehabilitation. The court did not consider rehabilitation as being a reasonable accommodation in this instance.

And finally, when the employee refused rehabilitation, she was terminated for being an alcoholic, or so the employer thought.

Consequently, the employer regarded the promotion director as being a disabled person, which entitles her to the protections of the ADA, then offered her an unreasonable accommodation. When the employee

rejected this unreasonable accommodation, she was terminated in violation of the ADA.

In retrospect, what the employer should have done was discuss the situation with the employee and determine employee's true problem. She may have been drinking on the job, but that does not automatically make her an alcoholic. The president simply jumped to that conclusion without the benefit of any medical support.

What the president could have done was require the employee to go for assessment to diagnose her problems. Alcoholism is only one of many different issues that arise in employee's lives.

This case illustrates a common problem among managers…they attempt to diagnose their employee's conditions. Unless these managers have a Ph.D. in psychology or are licensed by the state as a physician, they should NEVER diagnose their employees.

To presume to have such expertise without the benefit of a state license is a recipe for disaster.

Recently, some employers have been found to violate the ADA when their managers refer employees whom they suspect of having alcohol or substance abuse problems to rehabilitation. By referring the employee to rehabilitation, the employer may be seen as regarding the employee as being disabled when no such problem may exist at all. Unless the manager has the medical or Ph.D. credentials to back up such a claim, a violation of the ADA could easily erupt.

Instead of referring an employee to rehabilitation, such employees should be referred for assessment, such as through the company's Employee Assistance Program, or EAP. This way, no such unqualified allegations are made regarding the employee.

ALSO … In Sullivan v. River Valley School District, No. 97-00054 (6th Cir. Nov. 29, 1999), Sullivan was a school teacher in the River Valley School District when he suddenly began demonstrating disruptive and abusive outbursts. Sullivan threatened school board members and he disclosed confidential information relating to a student's grades.

The school district's superintendent had a psychologist informally review Sullivan's behavior. The psychologist reviewed grievances filed against Sullivan, letters written about him and other selected materials. The psychologist concluded that while Sullivan was not dangerous, he did feel that Sullivan might have a psychiatric disorder that would require more formal assessment.

On April 27, 1995, the superintendent suspended Sullivan with pay until the school board could vote on the superintendent's recommendation that Sullivan obtain a mental and physical fit-for-duty examination.

The school board accepted the superintendent's recommendation. Sullivan refused to comply with this directive. Sullivan also refused to turn over his grade book and lesson plan book, as directed.

Sullivan's employment was then terminated. Sullivan sued the school district, claiming it regarded him as being disabled.

The Sixth Circuit ruled that requiring Sullivan to undergo an examination was not enough to show that he was regarded as being disabled. The court reasoned that requiring an employee to undergo a medical or psychological examination is legal under the ADA.

However, an examination cannot be required just because an employee is annoying. Such examinations can be ordered when there is a "genuine reason to doubt whether that employee can perform job-related functions."

The court then concluded that the school district had reason to doubt Sullivan's ability to perform the essential functions of his job. Sullivan's disruptive behavior certainly interfered with his ability to do his job.

Further, as a practical matter, it is important to note that the superintendent did not act as an expert in medicine or psychology. Before he made his recommendation to the board, he obtained the opinion of a trained professional before proceeding. Such action on the part of the superintendent showed great prudence…unlike the president in the Miners, supra, case.

Additionally, in the Miners case, no evidence existed that the promotions director was not performing her job in a satisfactory manner…unlike Sullivan's situation as a school teacher.

The court also reasoned that Sullivan was not terminated because he was regarded as being disabled and unable to perform his job. Instead, he was terminated for his misconduct and for insubordination (refusing to comply with the school boards requirements, which included the examinations and surrendering his grade book and lesson plans.)

Therefore, the court held for the school district.

33. "Psychological Counseling" Is A "MEDICAL EXAMINATION" Under The ADA

In Kroll v. White Lake Ambulance Authority, No. 10-2348 (6th Cir. Aug. 22, 2012), Emily Kroll was an emergency medical technician (EMT). She was generally considered a good employee, until she had an affair with a married coworker and began to exhibit on-the-job stress that was manifested in outbursts at work. One outburst was especially notable because it occurred in front of a patient. Afterward, her supervisor became concerned that she couldn't perform her job safely and "requested" that she "**receive psychological counseling**" to continue working. The EMT refused solely because she would have to pay for the counseling herself.

The employee didn't return to work. Instead, she sued her former employer, claiming the supervisor's requirement that she receive counseling violated the ADA prohibition that provides:

> A covered entity **shall not require a medical examination** and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job- related and consistent with business necessity.

In response, the employer argued that the former employee lacked standing (i.e., couldn't file a claim) because she suffered no harm since she never underwent counseling and only opposed it because she was going to have to pay for it herself. In an important holding, the 6th Circuit stated on appeal that an employee need not actually submit to the employer's demand for counseling to have standing to challenge it.

Court's Decision

The 6th Circuit was faced with the fact that the ADA doesn't provide a definition of "medical examination." In determining what constitutes such an exam under the ADA, the court applied the seven-factor test articulated in the Equal Employment Opportunity Commission's (EEOC) guidance "Equal Employment Opportunity Commission on Disability-Related Inquiries and Medical Examination of Employees," which asks the following questions:

- Is the medical exam administered by a healthcare professional?
- Is it interpreted by a healthcare professional?
- Is it designed to reveal an impairment of physical or mental health?
- Is it invasive?
- Does it measure an employee's performance of a task or her physiological responses to performing the task?
- Is the test normally given in a medical setting?
- Is medical equipment used to administer the test?

The court found that all seven factors do not have to be met. In certain cases, even one factor may be sufficient to "determine that a test or procedure is medical" under the ADA.

The 6th Circuit concluded that the first three factors (the third of which was the most critical) weighed in favor of concluding that the psychological testing **the EMT was required to attend was a medical exam under the ADA.** The court sent the case back to the district court because **a jury could determine that the demand for counseling was a "medical examination**."

Specifically, because the employer intended for the EMT to explore her possible mental health impairment, the court found that "[t]his uncovering of mental-health defects at the employer's direction is the precise harm that [the ADA] is designed to prevent absent a demonstrated job-related business necessity." It's also helpful that the court noted the types of psychological testing that don't constitute prohibited medical exams, including tests that "measure personality traits" such as "honest preference and habits." In sending the case back to the district court, the 6th Circuit recognized that the employer could win only if it was determined that the requested counseling was "job-related" and consistent with "business necessity."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

First, the employer made a mistake in that it required the employee "**receive psychological counseling."** This was a mistake.

Instead, the employee should have been referred for an "assessment" by a qualified professional to see if counseling was needed. If so, then the employee could be required to continue with the professional recommendation.

Also, this case serves as an important reminder that the ADA protects employees from questions about their mental health as well as their physical health. It further cautions that although you may employ various methods to ensure that you hire the best applicants and stay apprised of whether current employees can perform their job functions, some of those methods may qualify as "medical examinations" under the ADA and open your company to liability. Going forward, review the methods and tools you use to perform personality testing, mental agility examinations, or psychological counseling, and ask, "Is this tool or exam related to the employee's job, and is it consistent with business necessity?" If the answer to either question is no, consider whether the test or tool is worth the potential liability under the ADA.

34. Harassment Of Co-Workers "Regarded" As Being Disabled

In Lanni v. NJDEP, No. 96-3116 (AET) (1999), Carl Bosch was a radio dispatcher for Ames Armored Car Services who suffered from dyslexia and dysgraphia, two learning disabilities. As a result, many of the armored car drivers would frequently make fun of him.

These drivers would consistently call Bosch **"dummy," "stupid,"** and **"ignorant"** and they would often refer to him directly as **"the dummy."**

On one occasion, six of the armored car drivers drew their guns and pointed them at Bosch saying that he was so dumb, they should just go ahead and shoot him.

On another occasion, Bosch's co-workers chased him down the hallway and sprayed him with pepper spray.

Bosch's co-workers later freely admitted that they "picked on" him because "it was so easy."

Bosch complained about this abuse to his supervisor. However, his supervisor only told Bosch that he should stand up to his harassers since that was the only way they would respect him.

Bosch then retained counsel and sued the company for violating the ADA.

In defending itself, the company argued that Bosch was not covered by the ADA since he was not really "substantially limited in a major life activity." The company also argued that this harassment was not unwelcome since Bosch also participated in these activities, that some of these actions were just "jokes" and not harassment and that any harassment Bosch did receive was because he was different, not because he was disabled.

The court rejected all of these defenses.

The court first held that considered in their totality, even simple jokes can contribute to a hostile environment when accompanied by such vicious behavior. Bosch's co-workers knew of his impairment and ridiculed him because of his condition.

The court then reasoned that not only could Bosch show that he was disabled under the ADA, but that he was also the victim of negative stereotyping ("regarding" Bosch as being disabled.). Both of these classifications entitled Bosch to the protections of the ADA. And finally, the court completely rejected the company's contention that Bosch welcomed such behavior, especially since he complained about it.

The court then awarded Bosch $70,930.00 in back pay and $156,100.00 in noneconomic damages.

35. "Regarding" Employees As Being Disabled: 100% Return To Work Policy

In Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001), Dana Henderson was a welder for Ardco when she injured her back. A few months later, Henderson's physician released her to return to work, but gave her a lifting restriction: Henderson was not permitted to lift more than 25 pounds. When she presented her work restrictions to the plant manager, Ed Bauman, she was told that the company did not allow employees to return to work on light duty assignments. In short, either employees returned to work at 100% capacity or not at all. Ardco's "100% Healed Rule" had been consistently applied for years.

Henderson therefore lost her job at Ardco. Henderson then sued Ardco for disability discrimination under the ADA, claiming that the company "regarded" her as being disabled and discriminated against her on that basis.

The 6th Circuit sided with Henderson. In short, the court found that adopting a 100% Healed Rule in effect disqualifies workers from performing a broad classification of jobs. When an employer views

an employee as being unable to perform a wide range of jobs, that employer is regarding that employee as being substantially limited in the major life activity or working, which entitles them to protection under the ADA. At that point, employers are required to attempt to "reasonably accommodate" these employees.

Ardco failed to enter into any interactive process with Henderson in order to examine what other jobs may be available, what accommodations could be made to her position as a welder, and so on.

II. EMPLOYER NOTICE REQUIREMENTS

A. FMLA

1. **Generally** … covered employers are required to notify qualified employees within **FIVE** business days of when it is reasonably suspected that their absences qualify as FMLA leave and of their rights and obligations under the Act. Otherwise, the employee cannot count the leave taken by the employee towards fulfilling the employee's twelve weeks of FMLA leave per year. Employers must also notify the employee at that time whether the leave will be paid, if the employee will be required to report back to the employer periodically on a reasonable basis, and whether the employee will be required to supply a fit for duty certificate upon returning to work. This notice must also inform the employee if a medical certification of the illness is required.

2. This notice must also inform the employee of her right to continue her health care coverage while on FMLA leave just as if she was still at work. This notice must inform the employee of the cost, where to send the payments, when these payments are due each month, and the consequences of not paying. If the employee defaults, then the employer must notify the employee in writing **15 days** before canceling her coverage.

3. Four FMLA Notices Required

- The final regulations now provide for four separate types of FMLA notice that must be provided by employers to employees: (1) "general notice" of employee FMLA rights, (2) "eligibility notice" to employees requesting FMLA leave, (3) "rights and responsibilities notice" to employees, and (4) "designation notice" indicating whether a given absence qualifies for FMLA leave.

- **"General notice"** includes the conspicuous placement of the familiar poster listing employees' FMLA rights, but the final regulations also include a requirement that new employees be separately apprised of their FMLA rights in writing, in an employee handbook or otherwise **"upon hiring."** 29 CFR § 825.300(a).

- **"Eligibility notice"** is largely a new concept in the final regulations. When an employee requests (or the employer identifies) a potential FMLA-qualifying leave for the first time during the applicable 12-month period, the employer must notify the employee of their FMLA eligibility status within **5 business days.** If the employee is not eligible for FMLA leave, the notice must state **"at least one reason"** why the employee is ineligible. If the employee's eligibility does not change by the next time FMLA leave is requested, no new eligibility notice needs to be provided. 29 CFR § 825.300(b). While eligibility notice may be provided by the employer orally or in writing, an approved form for this eligibility notice is provided by the DOL in an appendix to the final regulations.

- **"Rights and responsibilities notice"** must be provided to employees in writing, detailing the employer's expectations and any consequences of the employee's failure to meet these expectations under the FMLA. Such notice must be provided with the "eligibility notice" described above and must include: (1) an explanation that if FMLA leave is granted it will be deducted from the employee's 12-week allowance, (2) requirements for employees to submit medical certifications and the consequences for failing to do so, (3) any employer requirements regarding the substitution of paid leave such as sick time or vacation, (4) requirements for employee to maintain health benefits during FMLA leave, including payment of premiums, (5) key employee status, if applicable, (6) employee rights to maintain benefits and to job restoration following leave, and (7) the employee's potential liability for unpaid health insurance premiums if the employee fails to return to work following leave. 29 CFR § 825.300(c). An approved prototype "rights and responsibilities notice" is provided by the DOL in an appendix.

- **"Designation notice"** must be provided by employers in writing within **five days** (the analogous requirement in the 1995 regulations had required such notice within two days) after obtaining sufficient information to know whether a given absence is FMLA-qualifying or not. If leave is granted, the designation notice must include any "fitness-for-duty" certification that may be required by the employer before returning the employee to work. It also must specifically inform the employee of the amount of leave, "hours, days or weeks," that will be deducted from the 12-week FMLA allowance. If this breakdown is unknown at the time the leave is granted (e.g., where the amount of leave is unforeseeable or sporadic), the employer must provide such information upon an employee's

request, but the employer need not provide such breakdowns more often than every 30 days. 29 CFR § 825.300(d). An approved prototype “designation notice” is provided by the DOL in an appendix.

4. Employers are also required to display a poster on premises that explains the rights employees have under the FMLA. Covered employers must also include in their handbooks or distribute to their employees an FMLA policy that explains the employees' rights and obligations under the Act.

5. If an employer has identified an employee as being a "key" employee, which is defined as being those employees who are compensated in the top 10% of all the employer's employees within a 75 mile radius of the employee's worksite, then the employer need not restore these key employees to their former positions if proper notice is given. However, if the employee is already on leave when notified, the key employee must be given a reasonable period of time to return to work.

6. Employee Who Conceals Serious Health Condition

In Carter v. Ford Motor Co., No. 96-3668, CA 8, 1997, an employee had his wife call him off from work by telling his employer that he had family problems. Two days later, he was diagnosed with anxiety and depression. The employee called his employer back six days later and reported that he was still sick. A few days later, he called off again saying he was still sick.

The company then sent the employee a letter telling him to either report to work or provide a reason for his absence. The employee’s wife called the company about a week later and said she was coming in with her husband’s medical papers. However, the company said to not bother since her husband had been terminated.

The employee claimed he was terminated in violation of the FMLA. The court disagreed.

The court reasoned that the FMLA specifically requires employees to give their employers notice of their leave “as soon as practicable,” which the court reasoned should be within two days. Since the employee never gave the employer adequate notice of his leave, the termination was legal.

7. Mistakenly Assigning FMLA Eligibility Can Create FMLA Coverage

In Dombrowski v. Jay Dee Contractors, No. 08-1806 (6th Cir. July 8, 2009) Daniel Dobrowski, a mechanical engineer, was terminated by Jay Dee upon returning to work from an approved leave of absence for an elective surgical procedure he underwent to treat his epilepsy.

Dobrowski had been diagnosed with epilepsy since he was a child. Even though he took regular medication and underwent various treatments to control his condition, Dobrowski continued to have seizures as an adult. About six months prior to his October 2004 surgery, Dobrowski, in consultation with his physician, decided to explore additional treatment options, ultimately settling on a surgical option. In mid-July, his doctor cleared him for the surgery and scheduled it for October 15.

In September 2004, Dobrowski discussed his upcoming surgery with his supervisor and requested time off from work. Dobrowski was given a form entitled, "Application for Leave of Absence under the FMLA," which he completed and returned to Jay Dee. In October, the employer informed Dombrowski that his request for leave was approved for 12 weeks, from October 18, and that his position would be held open during the leave period.

Dombrowski underwent surgery and informed his employer that he wanted to return to work in early December, weeks before his leave period was to have concluded. When Dombrowski returned to work on December 13, 2004, he was informed that his position was being eliminated and no other position was available.

Dombrowski sued the employer, among other things, for FMLA violations. The employer moved for summary judgment, arguing that Dombrowski was not eligible for FMLA leave because the employer employed fewer than 50 employees within a 75 mile radius of Dombrowski's worksite.

Dombrowski argued that, having provided him with FMLA leave, the doctrine of equitable estoppel precluded the employer from denying his eligibility. Rejecting the plaintiff's argument, the district court granted the employer's motion. Dombrowski appealed.

The appellate court noted that it previously recognized the doctrine of equitable estoppel in FMLA cases to prevent employers from raising non-eligibility as a defense, but it had not adopted a standard for applying the doctrine. After a review of case law, the court held that a plaintiff must show that:

> (1) a definite misrepresentation as to a material fact was made to the employee,
>
> (2) the employee had a reasonable reliance on the misrepresentation, and
>
> (3) the employee was harmed by relying on this misrepresentation."

The court previously had required that the party asserting the estoppel also be unaware of the "true facts," and that the adverse party intended the complaining party to rely on the statement or conduct.

However, the court found that Dombrowski failed to show that he detrimentally relied on the misrepresentation of eligibility. He presented no evidence establishing that he "change[d] his position" in reliance on the belief that his leave would be FMLA-protected. The court said that, if Dombrowski had relied on the erroneous representation, he should have pointed to "some action or statement that indicated that his decision to have the surgery was contingent on his understanding of his FMLA status."

On the contrary, the evidence demonstrated that Dombrowski already had decided to undergo surgery before he was informed of his eligibility. Accordingly, the court found the plaintiff failed to establish his estoppel claim, and the employer was entitled to judgment as a matter of law.

This case reminds employers of the importance of determining FMLA coverage before offering employees FMLA leave.

8. Sometimes … Requesting FMLA Documentation Late Is Permissible

In Kinds v. Ohio Bell Telephone Company, No. 12–4048 (6th Cir 07/29/2013), Debra Kinds, a decade-long employee of Ohio Bell, was involved in a mentally and physically abusive relationship with her live-in boyfriend that culminated in death threats and an assault. She took a nine-week period of leave and applied for short-term disability benefits with Ohio Bell's insurance administrator, Sedgwick Claims Management Services.

The FMLA Operations Department sent a letter to Kinds on **October 21, 2009** that acknowledged her FMLA leave request and stated that her period of absence "will result in a claim for Short Term Disability Benefits." In addition, the letter explained that if Kinds' claim for disability benefits is approved, then FMLA leave would run concurrently. And even if the claim were denied, the letter stated that Kinds would still "have the right to request FMLA consideration," but would in such event need to have her healthcare provider submit an "FMLA4" form to document "the medical facts to support the denied absence period."

The letter further stressed that "[t]he FMLA4 is only required if your request for disability benefits has been denied."

Kinds first sought mental health treatment from Paula Reshotko, a licensed independent social worker, on November 3, 2009. This counseling session was the first medical treatment that Kinds received during her October to December 2009 absence from work. Reshotko diagnosed Kinds as having a "severe depression episode" and recommended further counseling. Kinds saw Reshotko for counseling again on November 10th and 19th and saw her family physician, Dr. Suzana Sarac–Leonard, also on November 10th.

On November 24, 2009, Sedgwick sent Kinds a letter explaining that her claim for short-term disability benefits was approved "for the period of **November 10, 2009 through December 14, 2009.**" However, her claim for disability benefits had been **denied** for **"the period of October 20, 2009 through November 9, 2009**."

Sedgwick therefore determined that Kinds did not have disability status until November 10th.

Sedgwick's approval of disability benefits for a portion of Kinds' absence prompted two actions by Ohio Bell:

(1) it approved the first week of Kinds's absence (October 13th to October 20th) and the period for which she was determined to be disabled (November 10th to December 14th) for FMLA leave, and

(2) it asked Kinds to submit an FMLA medical certification for the period that was ***not approved*** for disability benefits (**October 20th to November 9th**).

When Kinds failed to provide this FMLA paperwork, she was terminated.

Kinds filed suit against Ohio Bell claiming it interfered with her right to take FMLA leave. Kinds claimed that Ohio Bell failed to make a request for this medical certification in a timely manner, or within five days, as required by FMLA.

The 6th Circuit denied her claim, because Ohio Bell "was not required [by the FMLA] to promptly exercise its right to request a medical certification when Kinds first gave notice of her need for leave."

The court further reasoned that Ohio Bell had "reason to question the appropriateness of her leave after Sedgwick denied short-term disability benefits for the full period requested by Kinds."

Moreover, the court determined that "there is nothing [in FMLA] indicating that the discovery of employee fraud is the only acceptable reason for an employer to request a medical certification after the five-business-day period following an employee's notification of leave."

The court went as far to compliment Ohio Bell by saying that "the company's policy of deferring such requests is actually beneficial to employees because only those employees taking extended leaves for medical issues who have been denied short-term disability benefits are required to provide medical certifications."

Interestingly, even though Kinds' medical doctor sent a letter to Sedgwick certifying that she was providing Kinds "medical assistance" from the dates in question, the court said it was not persuaded, presumably because the letter **did not indicate what condition constituted Kinds' alleged disability.**

However, Sedgwick did not forward a copy of the letter to Ohio Bell, due to the restrictions on the sharing of private health information imposed by the Health Insurance Portability and Accountability Act of 1996.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

FMLA permits an employer to request medical certification even after the requisite five-business day period following an employee's notification of leave because of a serious health condition ***if*** it suspects that the reason for an employee's leave or its duration may not be appropriate.

The circuit court's decision can be viewed as a victory for employers in FMLA compliance matters because it affirms that an employer may defer making a request for medical certification pending claims for short-term disability benefits during the same period.

However, if you make a request for Medical Certification more than five days after becoming reasonably aware of the need for FMLA leave, then you must be prepared to provide a justifiable reason, as the employer did in this case.

B. ADA

Covered employers must display a poster that explains what rights individuals have under the ADA.

III. NOTICE REQUIREMENTS PLACED UPON EMPLOYEES

A. FMLA

It is the employer's obligation to designate an employee's qualifying leave as being FMLA leave. Employees are only required to inform their employers as to why the leave is necessary. On the other hand, if an employee's leave is foreseeable, then the employee must give the employer a 30 day notice of the impending leave, or as much as is practicable.

In a new development, the final regulations note the general rule that an employee need not mention the FMLA by name, but limit this freedom to circumstances "[w]hen an employee seeks leave for the first time for an FMLA qualifying reason." However, once FMLA leave has been granted for an employee's health condition, the employee must thereafter **"specifically reference either the qualifying reason or the need for FMLA leave."** 29 CFR § 825.303(b).

The final regulations expressly clarify that an employee cannot merely call in "sick" and thereby trigger an affirmative duty for the employer to inquire further about whether the absence might be FMLA-qualifying. 29 CFR § 825.303(b).

The final regulations specify that even for unforeseeable leaves, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

1. **Employer's Usual and Customary Procedures**

Under the original FMLA regulations, employees were expected to report their need for FMLA leave "as soon as practicable" if they couldn't provide notice 30 days before they needed to miss work. The old regulations included interpretive examples and suggested that employees had ***up to two days*** to call in if they were out for FMLA protected reasons.

However, the new final regulations first say that "[w]hen an employee seeks leave for the ***first time*** for an FMLA qualifying reason," the employee need not mention the FMLA by name. However, once FMLA leave has been granted for an employee's health condition, the employee must thereafter **"specifically reference either the qualifying reason or the need for FMLA leave."** 29 CFR § 825.303(b).

The final regulations expressly state that an employee cannot merely call in "sick" and thereby trigger an affirmative duty for the employer to inquire further about whether the absence might be FMLA-qualifying. 29 CFR § 825.303(b).

Additionally, the final regulations specify that even when a leave is unforeseeable, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

Also under the final regulations, when the need for leave is not foreseeable, an employee must comply with the employer's ***usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.***

Specifically, the new regulations generally permit employers to require employees to follow established call-in procedures (except ones that impose more stringent timing requirements than the regulations provide), and they provide that failure to properly notify employers of absences may cause a delay or denial of FMLA protections. 29 CFR § 825.302(d).

Employers may require employees seeking FMLA leave to call a "**designated number or a specific individual to request leave."** 29 CFR § 825.303(c). Under the previous 1995 regulations, an employer could not delay or deny FMLA leave if an employee failed to follow such procedures.

After these new regulations were adopted, many employers rejoiced, assuming they could safely discharge employees who didn't show up and didn't call in.

However, in Randolph v. Grange Mutual Casualty Company, No. 09-AP-519, 10th District Court of Appeals of Ohio (Franklin County 12/22/09), James Randolph worked for Grange Mutual Casualty and had an absenteeism problem. He was placed on probation and warned that if he had one more unauthorized absence, he would face termination.

The company had a call-in rule that required employees who needed to miss a scheduled workday to call off within 30 minutes of their scheduled work time.

Randolph suffered from a form of depression and was allowed to take intermittent FMLA leave for such things as medication checks and treatment.

Randolph claimed that one evening before a scheduled workday, he went into a dark depression and "blacked out" until he awoke the next day at 3:00 p.m., having missed his workday. He then headed for his doctor's office and decided to check his voice mail before calling his supervisor.

The supervisor had already fired Randolph after not hearing from him by the 30-minute deadline. That termination was by voice mail, which Randolph retrieved on his way to the doctor. Randolph said the news worsened his condition so much that he drove straight to his mother's house, crying. He never made it to the doctor.

His mother then called in for him about 11:00 p.m., explaining that her son was having a "nervous breakdown."

Randolph phoned the supervisor at 7:15 a.m. the next morning. However, Grange would not reconsider Randolph's termination.

Randolph sued, alleging that he had called in as "soon as practical."

The company argued that the new regulations allowed it to insist that Randolph follow the company's call-off rules.

But the court said that Randolph's suit deserved a trial. It concluded Randolph had no way of knowing that he would black out, was shocked when he learned he had been terminated and then tried to notify his employer via his mother. That, said the court, could be seen as prompt notice under both the old and the new regulations.

2. FMLA: Failure To Provide Medical Certification In A Timely Manner

In Brumbalough v. Camelot Care Centers, Inc., No. 04-5543 (6th Cir. 11/02/2005), Linda K. Brumbalough was employed as the State Clinical Director by Camelot Care Centers, Inc. ("Camelot") when she was terminated from her employment after taking a leave under the Family and Medical Leave Act ("**FMLA"**).

On June 11, 2001, Brumbalough sent an email to Julie Tesore, her supervisor and the Program Director of the Brentwood Office, informing her that she was having some health problems and she needed to cut back on her hours down to 40-45 per week. Following her appointment with her doctor, Ted Stallings, Brumbalough told Camelot that her doctor ordered her to take the rest of the week off. On June 17, 2001, Brumbalough informed Camelot of her intent to have her doctor sign the **FMLA** certification forms, since she was having more health problems and would need to take more time off.

Gretchen Jolly, Director of Human Resources, sent an **FMLA** Medical Certification form to Brumbalough. The Certification from Dr. Stallings provided that Brumbalough was presently incapacitated and that she would need **about** two to three months to recover. Brumbalough's **FMLA** leave was approved as of June 11, 2001. The twelve-week period of **FMLA** leave, if taken in full, was to expire on September 11, 2001.

Camelot then sent to Brumbalough an "Employer Response Form for **FMLA** Leave" which informed Brumbalough that she was to inform Camelot of her status every thirty days, that Brumbalough was required to present a fitness-for duty certification prior to being restored to employment and that she would need recertification from her physician after two months in order to get approval for further **FMLA** leave.

On July 27, 2001, Brumbalough sent an email to Camelot informing them that she felt ready to come back to work in "the next week or so." Ms. Jolly sent Brumbalough a letter on July 31, 2001, acknowledging Brumbalough's request to return to work and requesting that she

provide a fitness-for-duty certification no later than August 7, 2001. The letter said,

> **"We required that you provide us with a date certain for your return. We also require a certification letter from your physician that you are indeed fit for duty to return to your old job. I have enclosed a letter for your doctor to review and sign so that we can adequately assess your planned return to full-time employment."**

The letter also included a copy of Brumbalough's job description and procedures. Dr. Stallings was asked to read the statement contained in the letter, put a date that Brumbalough could return to work, sign it and send it back to Camelot. Brumbalough received the letter on August 4, 2001.

On August 3, 2001, Brumbalough had an appointment with Dr. Stallings and he provided her with a handwritten note on a prescription pad stating, "She may return to work on 8/13/01. She should only work a 40-45 hour week and limit her out-of-town travel to 1 day per week."

Brumbalough claims that she faxed this note to Camelot; Camelot denies receiving it.

On August 8, 2001, Ms. Jolly mailed another letter stating that Camelot had not received a response to its request for a fitness-for-duty release for Brumbalough to return to work. The letter set a new deadline of August 10, 2001, and stated that if Camelot did not get the certification by August 10, 2001, it would consider Brumbalough's employment with Camelot terminated and would proceed to fill her position. This letter was delivered on August 9, 2001.

Brumbalough sought an extension of time for submitting the paperwork from Dr. Stallings. Ms. Jolly extended the deadline for Brumbalough to August 15, 2001. On August 10, 2001, Brumbalough received another overnight letter from Ms. Jolly, which confirmed the extended deadline of August 15, 2001 and stated if Brumbalough was unable to report for duty on or before Wednesday, August 15, 2001 with the fitness-for-duty certification, Camelot would consider her employment terminated. Brumbalough failed to submit the certification by this new deadline and was terminated by way of letter on August 17, 2001.

On August 18, 2001, Dr. Stallings prepared a letter which stated that Brumbalough may now return to work with certain modifications such

as limiting her out-of-town travel to once a week and not working more than 45 hours a week. The letter indicated that the restrictions were expected to last for the next two months, at which time she would be reevaluated. Brumbalough was provided with this letter on August 22, 2001 to Camelot. Ms. Jolly testified that Camelot never received it and Brumbalough testified that she could not say for sure if anyone sent the letter to Camelot.

On April 11, 2003, Brumbalough filed suit against Camelot, alleging that Camelot violated her rights under the **FMLA** by terminating her while she was on **FMLA** leave and refusing to reinstate her.

In reviewing the case, the court first looked to the wording of the FMLA, which requires covered employers to provide their employees with up to twelve weeks of unpaid leave in the event that the employee has a serious medical condition. However, this entitlement is not without restrictions. The employer may require the employee to submit a **medical certification** of the employee's condition prior to the leave, or as soon as possible, if the leave was taken suddenly. 29 U.S.C. § 2613; 29 C.F.R. § 825.305(b).

As long as the employee is on **FMLA** leave, the employer may require the employee to submit a "recertification" of the medical condition as often as every thirty days. 29 C.F.R. § 825.308.

Furthermore, upon proper notification, the employer may require the employee to submit a "fitness-for-duty" certification by her health care provider as a condition of returning to work. 29 C.F.R. § 825.310. If the employee has not submitted a required "fitness-for-duty" certification by the time the employee's **FMLA** leave has ended, then the employee may be terminated. 29 C.F.R. § 825.311(c).

The **FMLA** also does not require the employer to reinstate an employee after her leave has ceased if the employee is unable to fulfill the essential functions of her job. 29 C.F.R. § 825.214(b).

Ms. Brumbalough argued that it was illegal to terminate her while she was still on FMLA leave. According to Brumbalough, Camelot improperly required her to submit a fitness-for-duty certification under the threat of termination because the **FMLA** only permits such an ultimatum to be made when the employee's **FMLA** leave has concluded. 29 C.F.R. § 825.311(c)

However, Brumbalough ended her rights under the FMLA to continue her leave when she notified Camelot of her intent to return to work on July 27, 2001. While the **FMLA** grants up to twelve weeks of leave,

the **FMLA** also permits the employer to require certain documentation before the leave may be covered under the Act.

As previously mentioned, employers may require an employee to submit a recertification every thirty days in order to continue taking **FMLA** leave. 29 C.F.R. § 825.308(c). The employer must give the employee at least fifteen days to submit such recertification. See 29 C.F.R. § 825.308(d). If the employee fails to provide the recertification and continues to take leave, her leave is no longer covered under the **FMLA**. 29 C.F.R. § 825.311(b).

In this case, when Brumbalough started her leave, Camelot requested that she return to them a completed Medical Recertification Form within the next two months. Brumbalough's leave began on June 11, 2001, and Camelot indicated to her that her leave would continue until "on or about 8/11 - 9/11/01." Camelot therefore, providing proper notification, required that Brumbalough submit a recertification by August 11, 2001 … two months into her leave. Brumbalough failed to do so.

Accordingly, by August 11, 2001, Brumbalough was no longer covered under the **FMLA**.

B. ADA

If an employer is truly unaware of the fact that an individual is disabled, then the individual is not protected by the ADA. Therefore, an obligation appears to exist on the part of the employee to inform the employer of her disability if it is not reasonably apparent. Technically, employees are also required to request a reasonable accommodation, if one is needed. Still, the circumstances may call for the employer to inquire into the matter. On the other hand, if an individual declines a reasonable accommodation offered by the employer, then the regulations state that the employee loses her protections under the ADA.

1. Employee Has Burden Of Raising The Issue of Reasonable Accommodation

In Jakubowski v. The Christ Hospital, Inc., No. 09-4097 (6th Cir., Dec. 8, 2010), Martin Jakubowski was a resident family physician at Christ Hospital. The hospital had noted many performance deficiencies in his ability to communication with patients and hospital staff. His communication skills were so poor that he once gave unclear orders for medication that, if followed literally, would have killed the patient. After the hospital referred him for evaluation, Jakubowski was diagnosed with Asperger's syndrome,

which affects his ability to communicate his thoughts to others and understand what others are communicating to him.

Jakubowski's attorney contacted Christ Hospital and proposed that it accommodate Jakubowski's disability with "**knowledge and understanding**." He specifically requested that the hospital make employees aware of the condition, including its symptoms and triggers, and that Jakubowski be allowed to work on his patient communication skills on his own.

Christ Hospital rejected the proposal but offered to assist Jakubowski in finding a residency in the pathology field, which requires little or no patient interaction. Ultimately, the parties were unable to agree on a reasonable accommodation, and Jakubowski was terminated. Soon after, he filed a lawsuit against the hospital.

During the pretrial exchange of evidence, Jakubowski and his attorneys (through expert testimony) identified numerous accommodations that were neither proposed nor considered by Jakubowski or the hospital before his termination. Most involved supervision and remediation efforts. The hospital presented expert testimony that Jakubowski's inability to effectively communicate with patients and other hospital personnel endangered patient safety.

The U.S. District Court for the Southern District of Ohio dismissed the case in the hospital's favor before trial, finding that Jakubowski wasn't a "qualified individual" under the ADA or comparable Ohio law. The ADA and Ohio law define a "qualified individual" as an individual who, "with or without reasonable accommodation, can perform the essential functions of the employment position." "Essential functions" are elements that are fundamental to the job. The court held that the ability to communicate with patients and hospital staff was an essential function of Jakubowski's job as a family practice resident.

The ADA imposes on employers a duty to engage in the interactive process with an individual to determine if a reasonable accommodation exists that would allow him to perform the essential functions of the position. Under the law, it was Jakubowski who had the initial burden to propose a reasonable accommodation. The court held that the accommodation he proposed — notifying his coworkers of his condition — didn't allow him to perform the essential function of communicating with patients.

The district court held that in rejecting Jakubowski's recommended accommodation and offering an alternative — assisting with a transfer to pathology — the hospital met the requirements of the

interactive process. The Sixth Circuit agreed, reasoning that the employer acted in good faith by **considering his proposal, informing him why it was unreasonable, offering assistance in finding another position, and not hindering the interactive process.** Thus, the appellate court affirmed the lower court's dismissal of the case.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This decision should give employers some degree of comfort in engaging in the interactive process. The burden is on the employee to suggest what accommodation might work best for him in his position. The Equal Employment Opportunity Commission (EEOC), however, disagrees with that view. In its enforcement guidance, it states:

> While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. . . . Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.

It remains to be seen how the EEOC and other courts will respond to this case.

So long as an employer engages in the process in good faith — keeping an open mind toward the employee's suggestions and considering all obvious accommodations — it should have an effective good- faith defense if the employee later files a disability discrimination lawsuit.

IV. EMPLOYEE JOB PROTECTION

A. FMLA

Aside from those key employees who have received proper notification, employees returning from FMLA leave must be restored to their same or an equivalent position, absent special circumstances. However, if the employer can show that the employee did not receive her job back due to some reason that is independent of her FMLA leave, such as a layoff or shut down, then no violation will exist. Employees on FMLA leave have no greater rights than those not on FMLA leave.

1. Job Restoration Must Be IMMEDIATE

In Hoge v. Honda of Am. Mfg., Inc., Nos. 03-3452/3477 (6th Cir. Sep. 16, 2004), Lori Hoge was a production associate at Honda of America. In November 1995, she broke her back in a nonwork-related car accident. Hoge then took an extended leave of absence until March 1996. When she returned to work, Honda accommodated her physical restrictions by reassigning her to another position. Hoge remained in this position until April 2000.

In April 2000, Hoge requested and received another FMLA leave from May 11 until June 12, 2000, for abdominal surgery, which was unrelated to her previous back injury. Around June 12, she telephoned Honda to request an extension of her FMLA leave because she needed additional time to recover from surgery. She claims that she requested an extension until June 26 and didn't request an extension beyond that. Honda claims that she requested an extension until July 12 and then December 31.

On June 27, 2000, Hoge came to work with a medical release from her doctor, expecting to return to her door-line position. Honda told her that no positions were available for her. On July 31, 2000, one month after her request to return to work, Honda placed Hoge in a job on the engine line. Honda said the delay in returning her to work was reasonable and was caused by several factors, including her unexpected return and the time required to find an equivalent position to accommodate her physical restrictions in light of the substantial changes made to its production processes during her leave.

Hoge sued Honda in the U.S. District Court for the Southern District of Ohio, claiming that its delay in returning her to work violated the FMLA. Honda did not dispute that Hoge was entitled to be restored to her former position or an equivalent position. It argued that it didn't violate the FMLA because it restored her to an equivalent position within a **reasonable period of time**.

The district court rejected Honda's argument that employers have a **reasonable period of time** to restore employees to their jobs following FMLA leave. The court found that Honda violated the FMLA by failing to reinstate Hoge to her door-line position or an equivalent position by June 28, 2000.

Honda appealed to the Sixth Circuit. The Sixth Circuit held for Ms. Hoge.

The court cited the FMLA, which says that "on return from [FMLA] leave," an employee has the right "to be restored by the employer to the position of employment held by the employee when the leave commenced" or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." The Sixth Circuit held that the FMLA requires job restoration when the employee is capable of performing the essential functions of that job. The court reasoned that the FMLA's requirement of job restoration upon return from leave is "unambiguous" and that "[i]f Congress had intended to permit employers to restore employees within a reasonable time after their need for FMLA leave had ended, it would have so stated."

The Court also noted that an employer violates the FMLA by requiring employees to take more medical leave than is necessary. If an employee needs to use less FMLA leave than originally anticipated, "the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstance where foreseeable." Once the employee provides two business days' notice, the employer is required to restore the employee to his/her previous position or an equivalent one.

The court concluded that Honda was required to restore Hoge to her previous position or an equivalent one starting at least on **June 29, 2000** (two business days after receiving unambiguous notice of her return). The court sent the case back to the district court to determine whether Honda knew that Hoge would be returning to work on June 27, 2000, as she claims and which Honda denies. If Honda had notice that her FMLA leave was to end on June 27, she was entitled to restoration on that date.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When an employee takes FMLA leave, human resources should immediately begin thinking about job restoration. Employers must make sure the employee's former job or an equivalent job will be available at any time upon **two business days notice**.

B. ADA

No restoration rights exist under the ADA at all. Instead, employers are required to reasonably accommodate their otherwise qualified disabled employees.

V. EMPLOYEE BENEFITS

A. FMLA

Covered employers are required to continue to provide health insurance coverage to employees on FMLA leave as if these employees were still at work. The difficult part arises in that employees are entitled to have their health insurance reinstated at the end of their FMLA without any limitations whatsoever. (i.e., no pre-existing conditions, waiting periods, etc.). Therefore, if the employee defaults on her payments while on FMLA leave, the regulations allow employers to continue paying these health premiums on behalf of the employee and then recoup this sum from the employee at a later date in a reasonable manner.

- **Attendance Bonus**

The 1995 regulations specifically required that employee bonuses based solely on attendance not be denied employees based solely on their absences related to FMLA leave. The final regulations now state that bonus awards can be properly based on the **"achievement of a specified goal such as hours worked, products sold or perfect attendance"** and therefore can be denied employees who have taken FMLA leave.

However, FMLA leave and similar non-FMLA leaves must be treated the same for purposes of such bonuses. 29 CFR § 825.215(c)(2).

B. ADA

The ADA prohibits employers from discriminating against qualified individuals with a disability regarding their benefit coverage. Disabled employees are therefore entitled to receive the same benefits as non-disabled employees.

VI. MEDICAL EXAMINATIONS

A. FMLA

1. If employees are properly notified, they may be required to provide their employers with a medical certification from a qualified health care provider in order to substantiate the serious health condition of either themselves or of the covered family member. Employers may only request information relating to the serious medical condition in question. However, if the employee has complied and supplied the employer with such a form, the employer cannot request additional information from the health care provider. The employer, on the other hand, may require

a second opinion, at its own expense. If the two disagree, a third opinion may be obtained.

2. The 1995 regulations prohibited direct contact between employers and health care providers in most instances. However, the new final regulations carve out an exception, allowing employers to contact physicians directly **"[i]f an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act,"** so long as the more liberal restrictions of the ADA are observed. 29 CFR § 825.306(d). (Under the old and new regulations, employers may also contact employees in accordance with state workers' compensation laws.)

3. The final regulations also permit an employer to make direct contact with the employee's physician to seek **"clarification and authentication"** of medical certifications. Previously, only another physician hired by the employer could make such inquiries. However, in a change from the proposed amendments, the final regulations require that employers **initiate** such contacts only through **"a health care provider, a human resources professional, a leave administrator, or a management official."** Importantly, **"[u]nder no circumstances … may the employee's direct supervisor contact the employee's health care provider."** 29 CFR § 825.307(a).

   While the employee is not required to permit his or her doctor to communicate with the employer, the employer may deny the designation of FMLA leave for failure to consent. 29 CFR § 825.307(a).

4. On the other hand, if the employee's accident was work-related so that the employee is also on Workers' Compensation leave, Ohio's Workers' Compensation statute would take precedent and the employer would be permitted to contact the employee's health care provider.

5. As for an employer requiring a second or third medical opinion, the FMLA states that this second opinion cannot be obtained from a health care provider with whom the employer regularly contracts with or uses. Further, the employer must not only pay for the examination itself, but it must also reimburse the employee or family member for any out-of-pocket expenses reasonably incurred. And finally, the employee or family member cannot be required to travel more than a reasonable commuting distance in order to obtain either of these opinions.

6. Medical Certifications

As a condition of granting a leave of absence under the FMLA, § 2613 permits employers to require a medical certification from the employee's attending health care provider in order to verify the need

for the requested time off. A proper medical certification under the Act will include such information as:

1. The date the condition began,

2. The approximate and estimated duration of the condition,

3. The medical circumstances of the condition,

4. Whether the employee is able to perform the essential functions of his job or

5. Whether the employee is truly needed to care for the covered loved one, and

6. What type of leave is medically necessary (i.e., Intermittent leave? Reduced schedule? Continuous?).

The Act also allows employers to require those employees using FMLA leave to have their serious health conditions recertified by their health care providers periodically, but under no circumstances more frequently than every 31 days. However, such recertifications may still only be requested by employers on a reasonable basis. Therefore, even though the regulations allow for the recertification of an employee's or covered loved one's serious health condition, which either the case may be, every 31 days, such requirements by the employer must still be imposed only on a reasonable basis.

The final regulations change and clarify an employer's right to obtain recertification for a serious health condition. As with the 1995 regulations, an employer may require recertification no more than every **30 days**, unless the circumstances of the leave change or the employer receives information that casts doubt on the legitimacy of the original certification. Under the final regulations, if the medical certification indicates that the underlying condition will last more than **30 days, the employer may not request recertification until that minimum duration has passed**. In all cases, however, even where a medical certification indicates that the underlying condition is a **"lifetime condition,"** employers may always require recertification **every 6 months** in connection with an absence. 29 CFR § 825.308. These changes significantly clarify the old rule.

The final regulations include new approved medical certification forms, including separate forms for the serious health conditions of employees and those of family members. To streamline the processing of certifications, the final regulations allow health care providers to include medical facts about diagnoses, symptoms,

hospitalization, doctors' visits, prescription medication, referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

7. Requiring Employees To Report On Their Status To Employer Periodically

Employers may require their employees on FMLA leave to report back into them periodically in order to keep the employer apprised as to their progress and the employee's continued desire to return to work at the end of the leave. This may be accomplished by simply requiring the employee to telephone the employer every so often.

Such reporting back to the employer must be on a "reasonable" basis. Of course, what is found to be "reasonable" will vary from situation to situation depending upon the circumstances of each case.

For instance, requiring an employee who misses work intermittently due to migraine headaches to telephone the employer every day to report on his status may be a reasonable requirement. On the other hand, requiring an employee who is off from work for six weeks of maternity leave to telephone the employer everyday is most likely not a reasonable requirement and will probably be viewed as a type of harassment or retaliation for using FMLA leave.

8. "HONEST SUSPICION OF FMLA MISUSE" As A Reason For Termination

In Seeger v. Cincinnati Bell Telephone Co., No. 10-6148 (6th Cir. May 8, 2012), Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Company (CBT). In August 2007, Seeger began experiencing pain and numbness in his left leg. On September 5, 2007, a physician confirmed that Seeger had a herniated lumbar disc, and Seeger started an approved FMLA leave of absence the same day.

On September 19, Seeger was examined by Dr. Michael Grainger, his primary care physician. Dr. Grainger observed that it was difficult for Seeger to change positions, get in and out of a chair, and walk. The following day, Dr. Grainger's office left a message for CBT that Seeger was unable to perform any restricted work.

On September 23, Seeger attended an Oktoberfest festival in Cincinnati for approximately 90 minutes, during which time he admittedly walked a total of 10 blocks. While at the festival, Seeger encountered several co-workers. One co-worker observed that Seeger was able to walk, seemingly unimpaired, for approximately

50 to 75 feet through the crowd, and the co-worker reported his observations to CBT's HR Manager. On October 15, 2007, Seeger reported to Dr. Grainger that he had been asymptomatic for two days, and Dr. Grainger authorized his return to work. Seeger resumed his full-time position on October 16, 2007.

Meanwhile, CBT investigated the matter by obtaining sworn statements from Seeger's co-workers and by reviewing his medical records, disability file and employment history. Based on the inconsistency between Seeger's reported medical condition and his behavior at Oktoberfest, CBT decided to suspend Seeger's employment and scheduled a suspension meeting with him. At the meeting, Seeger defended his actions and denied committing disability fraud. CBT invited Seeger to submit any relevant information, and Seeger provided a letter from Dr. Grainger. The letter stated, in part, that "[w]alking for one and a half hours at one's own pace doesn't equal working for an eight hour day nor is it reasonable to assume that he could perform even limited duties for an eight hour day."

Ultimately, CBT concluded that Seeger had "over reported" his symptoms and terminated his employment. Seeger filed a lawsuit alleging that he was fired in retaliation for taking protected leave. The trial judge dismissed the suit and Seeger appealed.

While the Sixth Circuit determined that Seeger established a *prima facie* case of retaliatory discharge due to the short amount of time between his return from FMLA leave and his termination, it also concluded that CBT articulated a legitimate, nondiscriminatory reason for discharging Seeger. In the court's words, "Fraud and dishonesty constitute lawful, non-retaliatory bases for termination."

The court then considered whether Seeger produced adequate evidence demonstrating that CBT's professed reason was a pretext for discrimination. Essentially, Seeger attempted to show that there was no factual basis for CBT's proffered reason for discharging him because CBT had ignored medical evidence in its possession that Seeger was responding to treatment, and his pain had improved before Oktoberfest.

Under the "honest belief rule," the inference of pretext is not warranted where the employer can show an honest belief in the proffered reason. The court explained that an employer's professed reason is deemed honestly held where the employer can show that it made a reasonably informed and considered decision before taking the adverse action. The court cautioned that an employer's invocation of the honest belief rule does not automatically shield it

from liability because the employee must be given a chance to produce evidence to the contrary.

The Sixth Circuit held that CBT demonstrated that it reasonably relied on specific facts in determining that Seeger had committed disability fraud, and Seeger failed to refute CBT's honest belief. The court emphasized that Seeger's argument and presentation of competing medical evidence were misdirected. "The determinative question [was] not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." Accordingly, the Sixth Circuit upheld the judgment in favor of CBT.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The significance of this decision is that employers can protect themselves from employees who are exaggerating or misrepresenting a medical condition to get off work. To substantiate a 'reasonably informed and considered' belief of FMLA fraud, employers should conduct a thorough investigation, including whether the off-work activity is actually inconsistent with the medical restrictions, and give the employee an opportunity to defend his or her actions. An employer cannot 'jump the gun' and act precipitously on a suspicion no matter how well founded. Here the quality of the employer's investigation, and affording the employee an opportunity to explain his actions, were instrumental in upholding the discharge decision."

ALSO … in Scruggs v. Carrier Corp., No. 11-3420 (7th Cir. 2012), Daryl Scruggs was approved for intermittent FMLA leave to take his mother, who was living in a nursing home, to and from medical appointments. The employer, Carrier, believed the intermittent leave was being abused and therefore hired an investigator to conduct surveillance on the employee on three different occasions. The first two occasions were unremarkable. However, on the third occasion the investigator never observed the employee's car leave his property. The investigator presented this evidence to Carrier.

Carrier later interviewed the employee and allowed the employee an opportunity to explain. The employee indicated he did not remember specifics of the day in question, but he was certain that he was assisting his mother with a doctor's appointment. The employer documented the interview and also followed up its investigation with the nursing home where the employee's mother resided. The documentation reflected that the employee's mother was not actually seen by the doctor on the date in question. Carrier, in reviewing the doctor's notes, came across other inconsistencies regarding the employee's prior FMLA absences – the times of the absences did not match up with the times of the doctor's appointments.

After considering all the evidence, Carrier terminated the employee for FMLA leave abuse. The employee filed suit and the court granted summary judgment to defendant Carrier, holding it was undisputed the employer had an "honest suspicion" the employee misused his FMLA leave, and that this "honest suspicion" was enough to defeat any claims of FMLA interference and retaliation.

Scruggs appealed to the Seventh Circuit. The Seventh Circuit affirmed the trial court decision.

The court claimed that when Carrier questioned Scruggs, he could not recall what he did on that day, but stated that he did not misuse his FMLA leave. Although Scruggs later provided documentation from his mother's nursing home and doctor's office, this paperwork only raised further questions for Carrier. The documents Scruggs produced were facially inconsistent and conflicted with Carrier's internal paperwork. Taken together, this was enough for Carrier to have an "honest suspicion" that Scruggs misused his FMLA leave on July 24, 2007. Although Carrier could have conducted a more thorough investigation, as Scruggs fervently argued, it was not required to do so. Accordingly, Carrier did not violate Scruggs's FMLA rights because it honestly believed Scruggs was not using his leave for its intended purpose.

It is important to note what Carrier did before it terminated the employee. It investigated, documented, interviewed, and carefully checked the appointment records. The employer's "honest belief" must be based on a "reasonably informed and considered decision."

ALSO … in Warwas v. City of Plainfield, No. 11-1736 (3rd Cir. 2012) Jadwiga Warwas, a licensed physician, was hired in 2003 by the City of Plainfield, New Jersey, as the City's Health Officer. In 2006, Warwas requested sick leave under the FMLA for several health issues. In order to determine Warwas's eligibility for leave, Plainfield required Warwas's treating doctor to complete a medical provider certification form. The doctor completed the form, indicating that Warwas "was restricted to home and could not work/attend school. Based on that information, Plainfield granted the leave request.

In spite of the treating physician's assertion that Warwas was unable to work, Warwas continued to work at home on a part-time basis for the City of Paterson, New Jersey. When Plainfield learned about that work, it terminated Warwas's employment on September 30, 2006. Warwas appealed that termination to the Merit Systems Board, which ultimately reinstated her employment. However, during the month of April 2008, Warwas was expected to return to work, and

was told that further absences would result in her termination. When she failed to return, her employment was again terminated.

Warwas brought an action against Plainfield for interference with FMLA leave. At the close of discovery, Plainfield's motion for summary judgment was granted, and Warwas appealed. The Third Circuit upheld the district court's decision after finding that Plainfield terminated Warwas for reasons "entirely unrelated to the exercise of her rights under the FMLA."

Plainfield believed that Warwas had failed to use her FMLA leave for the intended purpose when, in spite of her doctor's assertion that she was unable to work, Warwas continued to work for Paterson while on leave. According to the Third Circuit, "Warwas is not entitled to a greater degree of protection for violating Plainfield's Municipal Code merely because she was on FMLA leave when caught and terminated." The Court found that Warwas was terminated not for her use of FMLA leave, but for the perceived misuse of the leave and her subsequent failure to return to work.

B. ADA

1. Employers may only require job applicants to undergo a medical examination after an offer of employment has been made, although the offer may be conditioned on the results of this examination. However, every employee entering this particular job classification must be required to undergo this medical examination. Applicants can only be disqualified from a job based upon such an examination for reasons of job-relatedness consistent with business necessity.

2. Medical examinations may be required of current employees when such examinations are needed in order to determine if the employee is still able to perform the essential functions of the job, in order to determine what reasonable accommodation may be required and whenever it is required under the applicable federal, state or local law. Still, such examinations must be job-related and consistent with business necessity. (A drug test is not a medical examination.)

3. Unlike the FMLA, no restrictions exist regarding the selection or location of a physician or regarding what additional information may be asked of the employee's physician. Still, any medical information sought should be related to the individual's disability.

4. The ADA requires employers to keep their employees' medical records confidential and separate from their personnel files. Only those who are on a need-to-know basis may be permitted access to these records. (i.e., the employee's supervisors, first aid personnel, etc.)

VII. FIT FOR DUTY CERTIFICATES

A. FMLA

1. The FMLA permits employers to require their employees to supply them with a fit for duty certificate before being allowed to return to work as long as the employer has such a policy in place requiring such certificates from every employee returning from leave, although employers are not permitted to require a fit for duty certificate when the employee is on an intermittent leave. This requirement must also be stated in the employee's original FMLA notice.

2. Just as with the medical certifications, employers are only permitted to obtain information regarding the particular health condition relating to the FMLA leave and employers can only obtain a clarification through their own health care provider, but only with the employee's consent. Unlike the medical certification, no second or third opinion may be obtained.

3. The employer may provide the employee with a list of the employee's essential job duties together with the designation notice, described above, in which the employer originally advises the employee of the necessity for a fitness-for-duty certification. If the employer provides such a list of essential functions, it may require the employee's health care provider to certify that the employee can perform them. When completing a fitness-for-duty certification, the health care provider therefore must assess the employee's ability to return to work against the identified essential functions. 29 CFR § 825.312(b).

4. While the general restriction on obtaining a new fitness-for-duty certification following each intermittent leave event remains intact, the final regulations carve out an exception: an employer is entitled to a certification of fitness to return to duty for **intermittent absences** up to once every 30 days if "reasonable safety concerns" exist regarding the employee's ability to perform his or her duties. 29 CFR § 825.312(f).

B. ADA

Fit for duty certificates may be required by the employer before allowing a disabled individual to return to work under the same conditions outlined for other medical examinations under the Act, as described above.

VIII. INTERMITTENT AND REDUCED SCHEDULE LEAVES

A. FMLA

1. Intermittent Leave Schedule

An **"intermittent leave schedule"** occurs when an employee takes FMLA leave in certain blocks or intervals of time, such as when the employee takes a week off from work every so often, or a day, or a few hours, or so on. However, such leaves occur on an "irregular" or intermittent basis as the employee needs this time off from work.

The final regulations clarify that an employee **"must make a reasonable effort"** to schedule treatments so as not to **"disrupt unduly"** the employer's operations. 29 CFR § 825.203.

2. Reduced Schedule Leave

A **"reduced schedule leave"** occurs when an employee basically works a shortened daily or weekly work schedule, such as by only working five hours a day, three days a week, etc. A reduced schedule leave may also require an employee to take a few hours off from work each week or each day on a regular basis.

3. Intermittent Leave Schedule and Reduced Schedule Leave must be medically required.

Employees may opt to take either an intermittent leave or they may opt to work on a reduced schedule whenever such a leave is medically required. Therefore, covered employees do not need their employer's permission regarding which type of leave they will be taking when such a leave is necessitated for medical reasons.

However, if an employee does not have a medical condition that requires him to take an intermittent or reduced schedule leave, then the employer will not be required to allow the employee to take such time off. Still, the employee may obtain either an intermittent or reduced schedule leave if the employer consents, such as in the case of the birth, adoption or the taking of a child into foster care.

4. FMLA time off must be tracked in the smallest increments the employer's policies allow.

Employers must provide covered employees with such leaves and then track this time off in the smallest increments their policies allow.

For instance, if an employer tracks sick time in one hour increments, then the employer must track both intermittent and reduced schedule leaves in one hour increments in order to determine when the employee has exhausted his twelve weeks of FMLA leave.

5. Temporary transfer is allowed.

If the employee needs to take this time off from work on an intermittent or reduced schedule basis, then the FMLA allows the employer to temporarily transfer the employee to another position of equal pay and benefits for as long as the employee's intermittent or reduced schedule continues.

6. Employee's treatments must be after hours, if possible.

Also, in order to accommodate the scheduling of the employee's work, the Act permits employers to require the employee to schedule his medical appointments or treatments before or after work hours in order to avoid a conflict with the company's work demands, if the health care provider agrees.

Employees are required to cooperate with their employer and make a reasonable effort to schedule their medical treatments so as not to unduly disrupt the employer's operations, subject to the approval of the health care provider.

For instance, if an employee requests every Tuesday afternoon off from work to go to an appointment with a health care provider, but these appointments may just as easily be scheduled after the employee's workday ends, then the appointment which does not conflict with the employee's work schedule must be taken.

B. ADA

If it is a reasonable accommodation to allow an employee to take an intermittent or reduced schedule leave, then the ADA would require such a leave. However, if such a leave would be found to place an undue hardship on the employer, then no such requirement would exist under the ADA.

IX. LIGHT DUTY ASSIGNMENTS

A. FMLA

Employers may request that employees accept a light duty assignment in lieu of taking FMLA leave, but qualifying employees are not required to accept such an assignment. Employers are not obligated to make such an offer. 29 CFR § 825.207(e).

B. ADA

If an employer offers a disabled employee a light duty assignment and the employee refuses, she may lose her protections under the ADA. Employers are obligated to make such an offer only if it would be a reasonable accommodation to do so.

X. RETALIATION

A. FMLA

1. Burlington Northern's Definition Of "Materially Adverse Employment Action" Applies To FMLA Retaliation Cases

In Millea v. Metro-North RR Co., (2nd Cir 08/08/2011), Christopher Millea suffered from severe post-traumatic stress disorder as a result of combat as a Marine during the First Gulf War. In 2001, Millea began working for Metro–North, a tri-state area commuter railroad. In 2005, he applied for special leave under the FMLA. Metro–North approved his application and granted him 60 days of intermittent FMLA leave for 2006.

In the summer of 2006, Millea was working in a Stamford storeroom under supervisor Earl Vaughn, with whom Millea had developed a contentious relationship. A phone conversation with Vaughn on September 18, 2006 developed into a heated disagreement that triggered one of Millea's panic attacks. Millea immediately left work to see his doctor. Because the encounter with Vaughn led to the attack, Millea did not inform Vaughn about his unforeseen FMLA leave. Instead, he advised Garrett Sullivan, the Lead Clerk, and asked Sullivan to advise Vaughn, which Sullivan did. The next day, Millea called Sullivan at 5:45 am to report that he was taking another FMLA day. Sullivan again relayed the information to Vaughn. In both instances, Vaughn received timely, although indirect, notice of Millea's use of FMLA leave.

Metro–North's internal leave policy states:

> **"[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible."**

Because Millea did not notify Vaughn of his two absences directly, Vaughn told Metro–North's payroll department to log Millea's absences as non-FMLA leave. Metro-North then opened an official investigation of Millea, which resulted in a formal "Notice of Discipline" being placed in his employment file for one year. The Notice was expunged after a year, Millea having had no further disciplinary incidents. After the investigation, Millea voluntarily transferred to a custodian janitorial job, which paid slightly less but was not supervised by Vaughn.

Millea then filed suit against Metro-North. Millea claimed that he never violated Metro-North's internal leave policy because he notified Vaughn indirectly of his absences, or, in the alternative, that the aspect of Metro-North's policy he violated was void because it conflicted with the regulations implementing the FMLA.

Millea alleged the following claims:

- Interference with Millea's ability to take FMLA leave. See 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.").

- Retaliation against Millea for taking FMLA leave by: (i) placing a notice of discipline in his employment file for a year; (ii) requiring him to update his FMLA certification; (iii) creating a work environment that motivated him to transfer to a lower paying job; (iv) delaying approval of his bid for the lead custodian position in 2009; and (v) subjecting him to heightened managerial surveillance. See 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.").

On the interference claim, the Second Circuit Court of Appeals found for Millea. The court reasoned that there is no dispute that a company may discipline an employee for violating its internal leave policy as long as that policy is consistent with the law; however, we conclude that, on these facts, Metro-North's internal leave policy is inconsistent with the FMLA.

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). **However, this requirement is relaxed in "unusual circumstances" or where the company policy conflicts with the law**. Id.

The regulations implementing the FMLA provide that when an employee's need for FMLA leave is unforeseeable (as Millea's was), "[n]otice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." Id. § 825.303(a). Because this regulation expressly condones indirect notification when the employee is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option.

Whether Millea's situation on September 2006 constituted an "unusual circumstance" in which he was "unable" to personally notify Vaughn is a question of fact, not of law. The jury found that Millea gave proper notice, meaning his notice complied with the FMLA and all legally valid aspects of Metro-North's internal leave policy.

As for Millea's retaliation charge, Millea sought to define "retaliation" under the FMLA using the definition of "materially adverse employment action" articulated by the Supreme Court in the Title VII lawsuit, Burlington Northern & Santa Fe Railroad Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In particular, Millea proposed that an adverse employment action occurs when "a reasonable employee in the plaintiff's position would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially adverse" **when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."**

Burlington Northern expanded the definition of "materially adverse employment action" for purposes of Title VII retaliation claims. Today, a Title VII plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court rejected the proposition that an act of retaliation must relate to the specific terms and conditions of the employee's employment.

The Second Circuit reasoned that this same rationale applies to the anti-retaliation provision of the FMLA. The FMLA's anti-retaliation provision has the same underlying purpose as Title VII-and is almost identical wording.

Therefore, the court held that under the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights.

Consequently, a "material adverse action" is restricted solely to changes in the employee's terms and conditions of employment, the district court committed legal error.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

In short, the standard for employees to meet into order to prove FMLA retaliation just got a lot lower. Rather than having to prove that the employer took some action against some tangible aspect of their job, all employees have to prove today is that the employer has created a working environment that is:

"… likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

Unfortunately for employers, this is a question of fact to be determined by a jury.

Therefore, again, HR professionals must make sure that their managers and supervisors are able to document why they are taking the actions they are against employees as well as being aware of what type of environment they are creating in the workplace. This area of "retaliation law" is just another example of where good old HR practices will do much to prevent lawsuits.

B. ADA

- **<u>Burlington Northern's</u> Definition Of "Materially Adverse Employment Action" Applies To ADA Retaliation Cases As Well.**

XI. MOONLIGHTING

A. UNAUTHORIZED WORK WHILE ON LEAVE

In Pharakhone v. Nissan North America, Inc., 324 F.3d 405 (6th Cir. 2003) Nissan had a policy that prohibited employees from engaging in unauthorized work while on leave. Viengsamon Pharakhone, an employee at Nissan, requested time off from work due to the birth of a child. Pharakhone also informed Nissan that he intended to work at the restaurant he and his wife had just purchased while he was on this FMLA leave. Pharakhone was told that under Nissan's policy prohibiting unauthorized work while on leave that he would not be permitted to work at the restaurant while on FMLA leave.

Pharakhone was terminated for violating company policy when he worked at the restaurant while on FMLA leave, in spite of the company's policy. Pharakhone then sued the company for violating his rights under the FMLA. However, the Sixth Circuit Court of Appeals held for the employer.

First, the court found that it was undisputed that Nissan had a uniform policy prohibiting "unauthorized work for personal gain while on leave" – and that Pharakhone did in fact violate this policy.

The court looked to the wording of the FMLA. The court reasoned that the right to reinstatement under the FMLA is not absolute. An employer need not reinstate an employee who would have lost his job even if he had not taken FMLA leave. (29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216) Therefore, an employer need not reinstate an employee if application of "a uniformly-applied policy governing outside or supplemental employment" – which would include a rule against working while on leave - results in the employee's discharge.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers should examine their Leave Policies AND their FMLA Leave Policy. What is required? When is it required? The courts have allowed a little lee-way here for Human Resources to manage its workforce leave issues IF the company is consistent.

What do your policies say?

XII. WAIVER OF RIGHTS

A. FMLA

The 1995 regulations indicated that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Some courts had construed this language as prohibiting settlement agreements and other retroactive waivers without DOL or court approval. The final regulations insert the word "**prospective**" before the word "**rights**," and include an express provision permitting **"the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court."** 29 CFR § 825.220(d).

B. ADA

Employees can waive their right to sue an employer for any past acts.

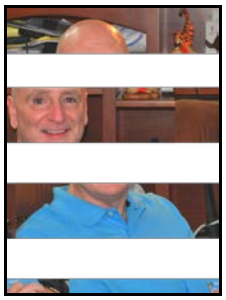
Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.



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