

## VII. Interplay Between the Family and Medical Leave Act and the Americans with Disabilities Act

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The Department's Request for Information noted that several organizations had reported the FMLA's "interaction with other laws," including Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) ("ADA"), was a "potential source of confusion."<sup>15</sup> In seeking comments on section 825.307 of the FMLA implementing regulations, which permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider and only with the employee's permission, the Department specifically asked how this provision "[should] be reconciled with the [ADA], which governs employee medical inquiries and contains no such limitation on employer contact?" Although not directly mentioning the ADA, the Department also asked for information relating to the "implications of permitting an employer to modify an employee's existing job duties to meet any limitations caused by the employee's serious health condition as specified by a health care provider, while maintaining the employee's same job, pay, and benefits."

The ADA, which is enforced by the United States Equal Employment Opportunity Commission ("EEOC"), the Department's Office of Federal Contract Compliance Programs, and the Department of Justice, prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating in employment against qualified individuals with disabilities. See 42 U.S.C. §§ 12101-12117, 12201-12213. The statute includes an affirmative obligation to provide reasonable accommodation to the known disability of a qualified applicant or employee, unless doing so would pose

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<sup>15</sup> Several commentators have called the intersection of the ADA, the FMLA, and workers' compensation laws the "Bermuda triangle of employment laws" because, while all three address employers' obligations towards employees with certain medical conditions, the responsibilities imposed by each are overlapping but distinctively different. Lawrence P. Postol, "Sailing the Employment Law Bermuda Triangle," *The Labor Lawyer*, Vol. 18, No. 2 (Fall 2002); Peter A. Susser, *Family and Medical Leave Handbook*, Vol. 6, No. 4, p. 7 (July 1998).

an "undue hardship." See 42 U.S.C. § 12112 (b)(5)(A). Under the ADA, an employee who needs medical leave related to his or her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause an "undue hardship" on the employer's business operations. See EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (hereafter, "EEOC Reasonable Accommodation Guidance"), at Question 21. The FMLA, enforced by the Department's Wage and Hour Division, entitles "eligible" employees of covered employers up to 12 weeks of unpaid, job-protected leave each year—with continuation of group health insurance coverage under the same conditions as prior to leave—for specified family and medical reasons, including the employee's own serious health condition. See 29 U.S.C. §§ 2612, 2614(c). The FMLA does not include a provision for "reasonable accommodation," nor does it limit the availability of leave to situations where the employee's absence would not cause an "undue hardship" for the employer. Nonetheless, one of the stated purposes of the FMLA is to allow an employee to take reasonable leave for medical reasons "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b).

While both statutes provide employees with job-protected medical leave, as the FMLA's legislative history makes clear, "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). Indeed, the two Acts have distinctively different purposes: the ADA is intended to ensure that qualified individuals with disabilities are provided with equal opportunity to work, while the FMLA's purpose is to provide reasonable leave from work for eligible employees. Compare 42 U.S.C. § 12101 and 29 C.F.R. § 1630.1 (Title I of the ADA requires equal employment opportunity for qualified individuals with disabilities) with 29

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U.S.C. § 2601(b) (one of the purposes of the FMLA is “to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition”). Recognizing this fact, section 825.702(a) of the FMLA implementing regulations provides that “[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees.” *See also* EEOC, Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (hereafter, “EEOC FMLA and ADA Fact Sheet”), at Question 17.

Moreover, an FMLA “serious health condition” is not necessarily an ADA “disability.” An ADA disability is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. *See* 42 U.S.C. § 12102(2). While some conditions that qualify as serious health conditions under the FMLA may be ADA disabilities (*e.g.*, most cancers and serious strokes), other qualifying serious health conditions under the FMLA may not be ADA disabilities. For example, periods of incapacity due to a routine broken leg or hernia could qualify as an FMLA serious health condition, but not be a qualifying disability under the ADA because the impairment is not substantially limiting. Similarly, incapacity due to pregnancy (*e.g.*, severe morning sickness) qualifies as a serious health condition under the FMLA, but may not be a disability under the ADA because the condition is not long-term or permanent. *See* EEOC FMLA and ADA Fact Sheet, at Question 9.

Despite the different purposes and scope of the two statutes, the FMLA and its implementing regulations borrow several important concepts from the ADA. For example, the Department relied on ADA concepts when defining one of the qualifying reasons for medical leave under the FMLA—because of an employee’s own serious health condition. The statutory provision governing this issue provides

that leave is available “because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). The implementing regulations provide that leave entitlement accrues under this provision “where a health care provider finds that the employee is unable to work at all or is unable to perform any *one* of the essential functions of the employee’s position,” as provided for under the ADA and the EEOC’s regulations. 29 C.F.R. § 825.115 (emphasis added). Under the ADA, a qualified individual with a disability is defined as an individual who, with or without reasonable accommodation, can perform all of the “essential functions” of the position in question. *See* 42 U.S.C. § 12111(8). The ADA implementing regulations define essential functions as the “fundamental job duties” of the employment position. 29 C.F.R. § 1630.2(n).

The intersection of the ADA and the FMLA, and its implications for employees and employers, was the subject of much discussion by respondents to the Department’s RFI. The comments focused on five broad areas of interplay between the two statutes, discussed in greater detail below: (1) the interaction between the FMLA employee notice provisions and the ADA prohibitions on medical inquiries; (2) obtaining medical information under the FMLA and the ADA; (3) confirming that an employee is fit to return to work after medical leave under the FMLA and the ADA; (4) offering light duty, modified work or transfers/reassignments under the FMLA and the ADA; and (5) permitting “reasonable leave for medical reasons” under the FMLA and the ADA.

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### **A. The Interaction of the FMLA Employee Notice Provisions and the ADA Medical Inquiry Prohibitions**

Under section 825.302 of the FMLA implementing regulations, an employee must provide notice “sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the

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anticipated timing and duration of the leave.” The request may be verbal and the employee need not specifically mention the FMLA. *See* 29 C.F.R. § 825.302(c). The regulations permit an employer to “inquire further” about an employee’s medical condition where insufficient information is initially provided. *Id.* The ADA, however, strictly proscribes the circumstances under which employers may make medical inquiries of employees, including those without ADA disabilities, providing that:

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 and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.*

42 U.S.C. § 12112(d)(4)(A) (emphasis added); *see also* 29 C.F.R. § 1630.14(c).<sup>16</sup> The ADA also prohibits discrimination in employment against individuals who are “regarded as” having an impairment by their employer. 42 U.S.C. §§ 12102(2)(c) and 12112(a).

The Department received comments from employers and their representatives suggesting that employees need to be further educated about their obligations under the FMLA to provide appropriate information about why leave is needed so that employers can fulfill their obligations under the Act if the leave is potentially FMLA-covered without violating the ADA’s restrictions on medical inquiries or running the risk that they will be deemed to have “regarded” someone as disabled. More than one commenter noted that an employee’s failure to provide adequate FMLA notice can place employers in an unreasonable situation. For example, the

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<sup>16</sup> EEOC Enforcement Guidance expressly provides that the ADA’s restrictions on inquiries and examinations apply to all employees, not just those with disabilities, such that “[a]ny employee . . . has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity.” EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at General Principles Section.

National Coalition to Protect Family Leave stated that employers often have been required to “‘read between the lines’ by grasping unspoken behavioral clues that an employee may need [FMLA] leave,” which places “employers – and their front-line managers – in the impossible position of having to navigate between compliance with the FMLA . . . and compliance with the [ADA] which restricts medical inquiries of employees and prohibits employers from ‘regarding’ individuals as disabled.” Doc. 10172A, at 31-32. A law firm representing employers echoed similar concerns. Schwartz Hannum PC, Doc. 10243A, at 7 (cases reasoning that “unusual behavior” may itself constitute notice to employer of need for FMLA leave “impose an unreasonable expectation upon managers and human resources personnel. . . . such employer representatives must be able to intuit when an employee’s body language or behavior suggests that an FMLA leave may be appropriate.”).

Still another commenter noted that “[e]mployers are wary of asking too many questions for fear of violating complicated limitations of the ADA.” Employers Association of New Jersey, Doc. 10119A, at 7. This commenter stated that “employers err on the side of caution and grant many questionable FMLA requests to ensure the employee’s rights are not violated.” *Id.* at 8; *see also* National Public Employer Labor Relations Association, Doc. R358A, at 10 (suggestion in section 825.302 that employers may “inquire further” about an employee’s medical condition when insufficient information is provided “flies in the face of what human resources managers have trained supervisors not to do under other federal laws,” such as the ADA).

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## **B. Obtaining Medical Information under the FMLA and the ADA**

While an employer’s obligation to provide medical leave under both the FMLA and the ADA are triggered by similar employee notice provisions, the approach an employer must follow to obtain

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appropriate medical information to support the need for leave varies depending on whether the employee's request is covered by the FMLA or the ADA. The statutory provisions of the ADA outline the factors to be considered when determining whether a reasonable accommodation must be granted (42 U.S.C. § 12111(10)) and the types of medical inquiries and examinations that may be made (42 U.S.C. § 12112(d)), but do not specify a particular process for considering an employee's request for reasonable accommodation. The EEOC's implementing regulations and interpretative guidance suggest that an employee and employer engage in an "interactive process" designed to confirm that the employee has an ADA-covered disability and to identify an effective accommodation for the employee's specific limitations. *See generally* 29 C.F.R. Part 1630 and Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act ("This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with a disability."). As part of this process, the employer may request reasonable documentation about the nature, severity, and duration of the employee's impairment, and the extent to which the impairment limits the employee's ability to perform daily activities when the disability or the need for accommodation is not known or obvious. *See* EEOC Reasonable Accommodation Guidance, at Question 6; EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (hereafter, "EEOC Disability-Related Inquiries Guidance"), at Question 7. If the initial information provided is insufficient, the EEOC encourages the employer to "consider consulting with the employee's doctor (with the employee's consent)." EEOC Disability-Related Inquiries Guidance, at Question 11.

The FMLA, after appropriate notifications, allows the employer to require that the employee submit

a certification from his/her health care provider to support the need for FMLA leave. If the employer questions the validity of the employee's certification, the employer may require second and/or third medical opinions to resolve the situation. *See* 29 U.S.C. § 2613. The FMLA medical certification process prohibits an employer from contacting an employee's health care provider directly and restricts the scope and timing of information requests. *See* 29 C.F.R. §§ 825.303-.311; (See also Chapter V for a discussion of employee notification rights and responsibilities and Chapter VI for a full discussion of the FMLA medical certification and verification process.).

Commenters routinely noted these differences between the ADA and the FMLA, and the difficulties caused when leave requests triggered obligations under both statutes. *See* International Foodservice Distributors Association, Doc. 10180A, at 2 ("The severe limitations on inquiries of healthcare providers certifying the presence of serious health conditions – more extreme than under the ADA or state workers' compensation laws – should be revisited."). Several of these commenters stated that the "FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee." Temple University, Doc. 10084A, at 10; United States Postal Service, Doc. 10276A, at 9-10 ("When an FMLA-qualifying 'serious health condition' is also a potential 'disability' under the ADA, [section 825.306's] restriction on medical information is in conflict with the ADA interactive process, which allows – and arguably requires – an employer to gather far more medical information regarding an employee so that it can make an informed decision regarding possible accommodations."). Another commenter argued that the FMLA process "places artificial restrictions on access to necessary information regarding an

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employee's serious health condition. The limitations imposed by the FMLA regulations go far beyond those imposed in such acts as the [ADA] and clearly fail to balance both employer and employee rights under the FMLA." MGM Mirage, Doc. 10130A, at 7; *see also* U.S. Chamber of Commerce, Doc. 10142A, at 7 ("Employers found that the burdens to obtaining medical information under the FMLA are significantly greater" than inquiries under the ADA).

Several commenters contrasted employees' obligations under the FMLA medical certification process with employees' obligations under the ADA interactive process. *See, e.g.,* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 23 ("employees should have a duty to cooperate with the employer, as they do under the ADA"). A law firm reported that its employer clients feel that their hands are tied when employees fail to complete and return FMLA medical certification forms. Proskauer Rose, Doc. 10182A, at 2. This commenter, stated that, "[w]ith the frequent overlap between FMLA and employer-provided leave, and the interplay with disability discrimination and workers compensation laws, many employers are reluctant to risk disciplining an employee for the administrative failure to timely comply with the provision of information needed to make an FMLA eligibility determination." *Id.*

Commenters also noted that the two statutes allow employers to obtain different information regarding an employee's medical condition, with the ADA generally permitting a broader exchange of information. *See, e.g.,* South Central Human Resource Management Association, Doc. 10136A, at 11 ("The ADA allows an employer to obtain all relevant medical information in determining whether a 'disability' exists. The same approach should be used under the FMLA."); *see also* MedStar Health, Inc., Doc. 10144A, at 17 (allow "employers' health care providers to obtain information regarding the actual diagnosis of an employee's serious health condition," as is currently permitted under the ADA). Still other commenters suggested that the

Department "allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions." U.S. Chamber of Commerce, Doc. 10142A, at 8; *see also* United States Postal Service, Doc. 10184A, at 14 (form should "include a statement that the provider has been informed of the employee's essential job functions").

Information received in response to the Department's RFI suggests that one particularly problematic area for many employers is that the FMLA prohibits direct employer contact with the employee's health care provider, while the ADA does not. *Compare* 29 U.S.C. § 2613 with EEOC Disability-Related Inquiries Guidance, at Question 11. Several commenters noted that the FMLA "limitations associated with the clarification process were created solely by the regulations. Such limitations contradict what was expressly addressed and permitted by Congress when enacting the ADA just three years before the FMLA." The National Coalition to Protect Family Leave, Doc. 10172A, at 46; *see also* Temple University, Doc. 10084A, at 10 (The FMLA restrictions on direct doctor contact are "purely a product of the regulation."). One commenter summed up the difficult position it believes this places employers in:

If an employee requests reasonable accommodation under the ADA in connection with or before an FMLA request, therefore, the Company lawfully may have direct contact with the employee's health care provider. In those cases, the rule that an employer may contact . . . the provider directly for one purpose but not for the other confuses employees and their providers. As well, whenever the Company contacts a provider for ADA purposes during the certification process, there is an inherent risk that the contact could be challenged as unlawful under the FMLA.

Progressive, Doc. FL2, at 4.

A number of retailers reported that this

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limitation “poses one of the biggest obstacles to preventing FMLA misuse and abuse. It also creates a conundrum for compliance-minded employers who are concerned about violating the FMLA when fulfilling their obligations under the ADA.” National Retail Federation, Doc. 10186A, at 17. Furthermore, some commenters felt that the prohibition against contact with the health care provider is unnecessary. One public employer asserted:

Comparison with the [ADA] demonstrates that these additional barriers are not necessary. The ADA, like the FMLA, requires employers to review an employee’s medical information and make determinations about the employee’s ability to work based on that medical information. The type of medical information reviewed under both statutory schemes is similar. Additionally, the employer’s staff members reviewing FMLA requests may also be responsible for making determinations regarding employee ADA accommodation requests.

City of New York, Doc. 10103A, at 8; *see also* Edison Electric Institute, Doc. 10128A, at 9 (“Our experience has shown no negative consequences of direct contact between employers and their employees’ health care providers in the ADA context.”); Clark Hill PLC, Doc. 10151A, at 3-4 (Because the ADA “clearly allows employers to make such job related inquiries to a health care provider on their own. . . . [t]he added burden of hiring a health care provider is not necessary”). Comments from the National Retail Federation also reflect this view:

Employers know based on the conversations they have with health care providers during the ADA process that the clarification and additional information they need usually does NOT require the involvement of another health care professional. The need to follow-up with the health care provider presents an exception and is borne out of legitimate needs, such as to gain a better understanding of an employee’s

condition, to determine if the employee qualifies, and if so, what should the employer reasonably expect with respect to intermittent absences and to curb abuse.

National Retail Federation, Doc. 10186A, at 17.

These commenters, and numerous others, suggested that the Department “allow employers to contact the health care provider to confirm that appointments or treatments are being scheduled when least disruptive to operations . . . and for the purposes of clarification and to verify authenticity of the certification.” Commonwealth of Pennsylvania, Doc. 10042A, at 4; *see also* City of Philadelphia Personnel Department, Doc. 10058A, at 2 (arguing that Department should permit Human Resource department to contact employee’s doctor “when medical certification is vague and needs clarification” in same way practice is “currently permitted under the ADA”); Frost, Brown, Todd, LLC, Doc. 10137A, at 2 (eliminate barrier on direct doctor contact as “unnecessary and unjustified” given that such contact is permitted under ADA and most state workers’ compensation laws); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 4 (allow employers to communicate directly with health care providers, as is permitted under ADA).

Other commenters suggested that employers be permitted to require that an employee provide a *limited* release allowing the disclosure of sufficient medical information to confirm the need for leave, as is permitted by the ADA. Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 (suggesting that employers be allowed to require that employees seeking FMLA leave sign release authorizing employer to submit list of questions to employee’s health care provider as is permitted by ADA); *see also* United States Postal Service, Doc. 10184A, at 16-17 (noting that such an approach would be consistent with the ADA where

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it is “well settled law that an employee who refuses to provide an employer with sufficient medical information under the ADA can be denied the accommodation the employee seeks”). For a fuller discussion of comments relating to medical releases and medical certification forms generally, see Chapter VI.

More generally, many of the commenters stated that the FMLA certification process could be improved if a more interactive process, similar to that provided for under the ADA, was adopted. *See, e.g.,* Fairfax County Public Schools, Doc. 10134A, at 4-5 (ADA interactive process is “much better model” and FMLA “regulations should encourage free communication in order for the parties to have a common understanding of medical limits and leave requirements”); Manufacturer’s Alliance/MAPI, Doc. 10063A, at 7 (suggesting that “the ADA informal interactive process used to gather information on an employee’s medical condition should be adopted under the FMLA”); Society for Human Resource Management, Doc. 10154A, at 17 (“By reconciling the processes permitted by the ADA with the FMLA, needless time and expense associated with the FMLA approval process will be eliminated.”); National Association of Manufacturers, Doc. 10229A, at 9 (“The ADA model should be adopted for the FMLA[.]”). A human resource management association stated that an interactive process would work better than the “exchange of paper” process currently in place under the FMLA:

While we understand the goals reflected by the FMLA, perhaps it would be less burdensome if employers were allowed to be involved in the back-and-forth discussion between the employee and physician as opposed to stressing the exchange of paper similar to the “interactive process” line of cases that has developed under the ADA. . . . When family and medical leave is properly certified, it is our experience that the leave is typically *granted*; however, when the circumstances surrounding the leave are less than clear or the doctor’s

certification is less than straightforward, the employer is in a no-win situation.

Krukowski & Costello, S.C. (on behalf of Legislative Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 4 (emphasis in original).

Commenters suggested a number of potential benefits that might flow from implementing similar processes for obtaining medical information under the ADA and FMLA. The City of New York stated that more consistent procedures would allow employers “to make informed decisions in a timely manner” and reduce administrative compliance burdens by allowing “staff members who review both FMLA- and ADA-related requests . . . to apply a similar inquiry procedure to both types of situations.” Doc. 10103A, at 9. Another commenter stated that adopting similar processes would eliminate confusion between the FMLA and ADA guidelines for medical inquiries and interactive discussion. Northern Kentucky Chamber of Commerce, Doc. 10048A, at 7. The Ohio Department of Administrative Services believed such a change would “diminish the requirement that the doctor correct vague or incomplete paperwork.” Doc. 10205A, at 4-5. Another commenter suggested that the need for a second opinion examination would be reduced by incorporating ADA concepts into the FMLA certification process. *See* Pilchak Cohen & Tice, P.C., Doc. 10155A, at 22. A health care provider argued that coordinated procedures for obtaining medical information under the FMLA and the ADA would reduce employer costs of providing FMLA leave. MedStar Health, Inc., Doc. 10144A, at 17 (current rule creates an “unnecessary cost for employers, even for those with in-house employee health offices that are staffed by nurses but do not have a nurse practitioner or other FMLA health care provider”).

The AFL-CIO, however, argued that the clear distinctions between the “reasonable accommodation” provisions of the ADA and the “leave provisions” of the FMLA made the different

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procedures under each statute for obtaining medical information appropriate:

Since only “*known* physical or mental limitations” trigger an employer’s obligation to make reasonable accommodation under the ADA (§ 12112(b)(5)(A)), it is reasonable for employers to have direct contact with employees’ health care providers in certain limited situations. An ADA employer may require detailed medical knowledge of an employee’s disability in order to accommodate that disability in the workplace. Furthermore, it is advantageous for employees with disabilities if their employers understand their limitations.

The same concerns are not present with respect to FMLA medical determinations – employers are not required by the FMLA to make changes in the workplace to accommodate the serious health conditions of employees, and they therefore need less information than employers under the ADA in order to fulfill their statutory obligations. In the FMLA context, an employer does not need access to information beyond a doctor’s certification of the factors establishing the presence of a serious health condition under the statute and a doctor’s estimate of likely absences or duration of treatment.

American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42-43 (emphasis in original). The National Partnership for Women & Families also opined that the FMLA and the ADA raise different privacy concerns and thus that a different approach to protecting medical privacy is appropriate under the FMLA. See Doc. 10204A, at 21 (“The privacy concerns regarding employers’ access to medical information are heightened in the context of the FMLA because the FMLA governs the employer’s access not only to the medical information of employees, but also to the medical information of employees’ family members.

This provides justification for additional caution in insuring the privacy of medical information under the FMLA.”).

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### **C. Confirming an Employee Is Fit To Return to Work After Medical Leave under the FMLA and the ADA**

Under the ADA, an employer may require an employee returning from medical leave to provide a doctor’s note, as long as it has a policy or practice of requiring all employees to do so, and may require an employee to submit to a fitness for duty examination when the “employer has a reasonable belief that an employee’s present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat.” EEOC Disability-Related Inquiries Guidance, at Questions 15 and 17. The FMLA regulations, on the other hand, prohibit an employer from obtaining (except when governed by a collective bargaining agreement or State or local law) a fitness for duty examination when an employee returns from an intermittent leave absence, even if the request would be permitted under the ADA. See 29 C.F.R. § 825.310(g). The same section allows employers to require a fitness for duty certification pursuant to a uniformly applied policy, but limits that certification to a “simple statement” of an employee’s ability to return to work and places limitations on an employer’s communications with the employee’s health care provider regarding the employee’s ability to return to work that are not present under the ADA. 29 C.F.R. § 825.310(c).

As noted in Chapter VI, numerous commenters questioned the FMLA restrictions on fitness for duty certifications, with many arguing that the current process compromises legitimate safety concerns. Several of these commenters stated that the FMLA fitness for duty provision “conflicts with that permitted under the ADA,” with the latter allowing both more substantive information and physical examinations. National Coalition to Protect Family Leave, Doc. 10172A, at 50; see also Fisher & Phillips

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LLP, Doc. 10262A, at 17-18 (“Employers must be permitted to verify FMLA leave and fitness for duty in the same way they currently verify other absences due to illness.”). An employer’s association that commented on the different standards under the ADA and the FMLA stated that, “an employer is more aware of the inherent duties of a job than the employee’s health care provider. Yet [under the FMLA], the employer may not delay the employee’s return to work while contact with the health care provider is being made.” Employers Association of New Jersey, Doc. 10119A, at 8-9. This commenter suggested that the Department adopt the reasonable belief standard used under the ADA so that employers could seek fitness for duty certifications for FMLA leave in all instances, and using the same processes, permitted by the ADA. *Id.*

Several commenters representing employees cautioned that altering the fitness for duty certification procedures under the FMLA would place an “unwarranted burden” on employees. *See, e.g.*, National Partnership for Women & Families, Doc. 10204A, at 23. For a fuller discussion of employee comments relating to this issue, see Chapter VI.

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#### **D. Offering Light Duty, Modified Work, or Transfers/Reassignments Under the FMLA and the ADA**

One of the qualifying reasons for medical leave under the FMLA is for an employee’s own serious health condition. The FMLA implementing regulations provide that an employee is entitled to leave under this provision “where a health care provider finds that the employee is unable to work at all or is unable to perform any *one* of

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<sup>17</sup> As discussed later in this chapter, the Department received comments suggesting that the Department’s regulation is inconsistent with the ADA. Under the ADA, an employee is entitled to reasonable accommodation only if he or she has a covered disability and is qualified to perform (with or without an accommodation) *all* of the essential functions of his or her position. Only those physical or mental impairments that “substantially limit” one or more major life activities are covered disabilities under the ADA.

the essential functions of the employee’s position within the meaning of” the ADA and the EEOC’s regulations. 29 C.F.R. § 825.115 (emphasis added).<sup>17</sup> The regulations prohibit employers from modifying an employee’s job functions to preclude the taking of FMLA leave. 29 C.F.R. §§ 825.220(b)(2), *see also* 825.702(d)(1). The FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave “that is foreseeable based on planned medical treatment” under certain circumstances. *See* 29 U.S.C. § 2612(b)(2).

Under the ADA, an employer must provide reasonable accommodation, including job restructuring, to qualified individuals with disabilities. *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o). Under EEOC Enforcement Guidance, an employer is not required to eliminate an “essential function” of a position, but may do so if it wishes. “This is because an individual who is unable to perform the essential functions, with or without reasonable accommodation, is not a ‘qualified’ individual with a disability within the meaning of the ADA.” *See* EEOC Reasonable Accommodation Guidance, General Principles Section. Moreover, the employer has the “ultimate discretion” to choose among reasonable accommodations as long as the chosen accommodation is effective. EEOC Reasonable Accommodation Guidance, at Question 9. In certain situations, employers must offer light duty or reassignment to qualified individuals with disabilities as a reasonable accommodation. *See, e.g.*, EEOC, Enforcement Guidance: Workers’ Compensation and the ADA (hereafter, “EEOC Workers’ Compensation Guidance”), at Questions 27 and 28 (discussing employer’s obligation to provide light duty work); EEOC FMLA and ADA Fact Sheet, at Question 13 (discussing employer’s obligation to reassign employee to vacant position).

A number of commenters discussed the different treatment afforded modified work, light duty, and transfers/reassignments under the FMLA and the ADA. While commenters sometimes used these

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terms interchangeably, this Chapter treats each issue separately. This is because each may impose different obligations and restrictions on employers under the ADA and the FMLA. Thus, for the Department's purposes, the discussion of modified job duties generally refers to situations where an employer wishes to modify an employee's job duties in his or her *existing* job, and particularly to the suggestion by commenters that employers should be permitted to remove one or more essential job functions in lieu of providing FMLA leave. The discussion of the treatment afforded "light duty" under the FMLA and ADA refers to particular positions created specifically for the purpose of providing work for employees who are unable to perform some or all of their normal duties. It is important to note, however, that the term "light duty" also is used by some employers to refer to situations whereby employees are excused from performing certain job functions of their normal job or are assigned to any less demanding position. The discussion below concerning transfers or reassignments is intended to cover those situations whereby an employer reassigns an employee to an alternative position, which need not be, and often is not, part of the employer's "light duty" program.

### 1. Modifying Job Duties

The FMLA regulations prohibit employers from "changing the essential functions of [the employee's] job in order to preclude the taking of leave." 29 C.F.R. § 825.220(b)(2). Many employers expressed support for changing the regulations to allow "an employer to modify an employee's job duties in his/her *existing* job—including removal of essential job functions—in lieu of FMLA leave." National Coalition to Protect Family Leave, Doc. 10172A, at 36 (emphasis in original); *see also* College and University Professional Association for Human Resources, Doc. 10238A, at 9 (allowing modification of job duties in employee's existing job allows for "greater flexibility to meet staffing needs"); National Retail Federation, Doc. 10186A, at 14-15 ("return[ing] an associate with a non-occupation illness or injury to work in

a manner that is consistent with restrictions is not unfriendly to the employee and is consistent with the statutory intent of FMLA"); DST Systems Inc. Doc. 10222A, at 3 ("Modifications enable an employee to continue work and avoid the need for FMLA leave, thus eliminating the burden on fellow employees and the employer, and loss of active employment for the employee"). These commenters suggested that "an employee who can perform an essential function with an accommodation, or by virtue of the elimination of that task for the period he or she is unable to perform it, should not be permitted to reject the accommodation and pursue FMLA leave. This result is contrary to the legislative intent of FMLA, which was passed to protect employees who *had* to miss work rather than employees who merely *chose* to miss work because they prefer to avoid it." National Association of Convenience Stores, Doc. 10256A, at 2-3 (emphasis in original); *see also* Fisher & Phillips LLP, Doc. 10262A, at 6 (same).

Commenters supporting this view argued that "[a]llowing this would benefit both employers and employees. The more options employees have to remain at work, the less likely they are to exhaust their leave rights and, more importantly, their rights to reinstatement." National Coalition to Protect Family Leave, Doc. 10172A, at 36-37. A number of employers felt that requiring modified work would be particularly helpful in situations where the "employee has requested intermittent leave to be taken on an unplanned, unscheduled basis." Bendix, Doc. 10079A, at 8; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3-4 (same); Detroit Medical Center, Doc. 10152A, at 3 (same). A university employer stated that allowing an employer to modify essential functions of an employee's job may be a better alternative than placing the employee on leave, as it allows the employer "greater flexibility to meet staffing needs, while also providing the employee with protections. It also would better rationalize the FMLA with accommodation provisions of the [ADA] and the

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light duty provisions of workers' compensation laws." Temple University, Doc. 10084A, at 8-9; College and University Professional Association for Human Resources, Doc. 10238A, at 9 (same). As one law firm noted, "[a]n employee at work performing his or her job is certainly preferable to their not being at work at all. This option would also benefit employees to the extent that they would now have the opportunity to continue receiving pay." Fisher & Phillips LLP, Doc. 10262A, at 11.

A group representing 5,000 physicians and other health care professionals specializing in the field of occupational and environmental medicine stated that employers should be "encouraged in the FMLA to assist the employee to consider alternatives for a better health solution than taking time off from work." The American College of Occupational and Environmental Medicine, Doc. 10109A, at 2. Another commenter noted it could not see any "negative effect" to allowing an employer to alter the essential functions of an employee's job but thought it was unlikely that "most employers would ever take this opportunity, as most are loathe to concede that essential functions may not really be essential." Kennedy Reeve & Knoll, Doc. 4763A, at 12.

A number of employee organizations expressed concern about any change to the FMLA scheme that would require employees to accept an employer's offer of modified work in lieu of leave. As the National Partnership for Women and Families stated:

One bedrock principle of the FMLA is the right of an eligible employee to take a specified amount of leave for family or medical reasons and then return to the same or equivalent job. To the extent the RFI is considering a change in the regulations to *require* an employee to accept an employer's offer to make modifications to the employee's existing job to accommodate a serious health condition, we believe such a change would be inconsistent with the express language and intent of the FMLA. We also would oppose any effort to penalize an employee who declined to accept

such a position, except as currently permitted by law. The law entitles eligible employees to take up to twelve weeks of family or medical leave, and nothing in the statute, regulations, or legislative history suggests that an employee should lose the right to determine whether or not to take leave if an employer modifies the employee's job duties.

National Partnership for Women & Families, Doc. 10204A, at 16 (emphasis in original); Families USA, Doc. 10327A, at 5; *see also* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 35 ("[N]either the statute nor the regulations provides a basis for treating a modified position as the equivalent of FMLA leave. An employee who accepts a modified job does not forfeit his or her entitlement to a full 12 weeks of leave if the employee remains unable to perform the essential functions of the *unmodified* job.") (emphasis in original).

Some employers also expressed concern about the implications of eliminating essential job functions. A state employer, who opposed any *requirement* that employers modify essential job functions under the FMLA, expressed concern that such a proposal would not be cost effective, require significantly more documentation, and cause "further confusion" between the FMLA and the ADA. The Commonwealth of Pennsylvania, Doc. 10042A, at 2; *see also* The Pennsylvania Turnpike Commission, Doc. 10092A, at 5 (permitting employers to modify existing job duties would "add to the existing confusion of FMLA and [ADA] regulations"). Another state employer thought that it would be "unduly burdensome to *require* employers to also modify job duties for employees with serious health conditions" because employers already were legally obligated to provide modified work under workers' compensation laws and the ADA. City of Portland, Office of Management and Finance, Doc. 10161A, at 5 (emphasis in original). A business organization in Northern Kentucky did not believe that permitting

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an employer to change the essential functions of a job would be of “significant value.” Northern Kentucky Chamber of Commerce, Doc. 10048A, at 4-5. This organization felt that permitting such a practice would likely add increased administrative burdens, cause further conflict between the ADA and the FMLA, and require increased communications with supervisors to ensure that all assigned work met the employee’s restrictions, among other issues. *See id.* at 4-5; *see also* National Business Group on Health, Doc. 10268A, at 5 (“implications of modifying an employee’s job duties include higher budgeted costs, peer dissatisfaction, and the administrative difficulty of moving an employee to a temporary position”); Elaine G. Howell, H.R. Specialist, International Auto Processing, Inc., Doc. 4752, at 3 (modifying an employee’s existing job duties would allow employees to collect the same pay and benefits while no longer doing an equivalent job and cause employees to provide their physicians “with reasons why they could not do the most disliked portion of their jobs”).

A health system consisting of multiple hospitals in the Washington, D.C., metropolitan area expressed concern that modifying one or more essential job functions in lieu of providing leave under FMLA might mean that an employer would be required to modify those same functions as a reasonable accommodation under the ADA, when it otherwise would not be required to do so.

In keeping with the approach under the [ADA] that essential job functions need not be modified in order to accommodate an employee’s disability, such modifications should not occur to accommodate an employee’s serious health condition under the FMLA. Both laws serve an important purpose in accommodating employees for the ultimate objective of having them perform the essential job functions. Thus, nothing should detract from determinations made regarding the essential job functions as necessary and central to a job position. Additionally,

it is important to note that if employers modify essential job functions for FMLA purposes, they have potentially obligated themselves to doing so under the ADA.

MedStar Health, Inc., Doc. 10144A, at 14-15. As another employer noted, removing essential job functions for FMLA purposes “could lead to an argument that these functions are not that essential, and that the employer should be required to remove them from the position’s job duties altogether as an accommodation” under the ADA. Washington Metropolitan Area Transit Authority, Doc. 10147A, at 4; *see also* Madison Gas and Electric Company, Doc. 10288A, at 3 (“An employer may be hesitant to modify an employee’s existing job duties due to the implications of the [ADA].”). The health care employer felt that “[t]his would be an undesirable result for employers seeking to reasonably facilitate and manage ADA-related job accommodations.” MedStar Health, Inc., Doc. 10144A, at 14-15. Another company, Zimbrick, Inc. stated the following:

Because FMLA and ADA overlap, modifying existing job duties essentially creates a temporary accommodation which could become permanent. From a business perspective, why would we want to pay an employee performing only part of the essential functions the same as someone who performs all of them?

Doc. FL125, at 1.

The EEOC also stated that “such an alteration to the FMLA rule could raise new ADA issues related to essential functions and reasonable accommodation.” United States Equal Employment Opportunity Commission, Doc. 10234A, at 3. In its comments, the EEOC acknowledged that the ADA permits, but does not require, an employer to modify or remove essential job functions. The Commission noted, however, that it has not yet provided guidance on “whether an employer’s reasonable accommodation duty [under the ADA] could be

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satisfied by reallocating essential functions with the express purpose of precluding leave as a reasonable accommodation.” *Id.*

## 2. Offering Light Duty Work

A number of organizations also commented on the differences between the FMLA’s and ADA’s treatment of light duty work. Section 825.220(d) of the FMLA regulations provides that an employee may voluntarily accept a “light duty” assignment while recovering from a serious health condition, but cannot be coerced to do so. When an employee accepts a light duty assignment, the time spent working in the light duty position does not count against his or her FMLA leave entitlement. Under the FMLA, the employee’s right to be restored to the same (or equivalent) position held prior to the start of the leave, however, expires after a cumulative period of 12 weeks of leave and light duty work. 29 C.F.R. § 825.220(d); *see also* Wage and Hour Opinion Letter FMLA-55 (March 10, 1995). By contrast, under the ADA, an employer does not have to create a light duty position for an individual with a disability but, if a vacant, light duty position already exists, the employer must reassign the individual with a disability to the position if there is no other effective accommodation available and the reassignment would not pose an undue hardship. *See* EEOC, *Workers’ Compensation Guidance*, at Questions 27 and 28. In addition, if the only effective accommodation available is similar or equivalent to a light duty position, an employer must provide that accommodation, absent undue hardship. *See* EEOC, *Workers’ Compensation Guidance*, at Question 27.

Nearly all respondents to a survey conducted by a human resource association in Ohio “believed employees requesting leave for their own serious health conditions should be required to accept light duty work consistent with their medical restrictions, if offered.” Miami Valley Human Resource Association, Doc. 10156A, at 6-7. The National Association of Convenience Stores, the U.S. Chamber of Commerce, the Society for Human

Resource Management, the College and University Professional Association for Human Resources, and others agreed. *See* National Association of Convenience Stores, Doc. 10256A, at 2-3; U.S. Chamber of Commerce, Doc. 10142A, at 11; Society for Human Resource Management, Doc. 10154A, at 9; College and University Professional Association for Human Resources, Doc. 10238A, at 9; American Bakers Association, Doc. R354A, at 4; American Hotel & Lodging Association, Doc. R366A, at 3; National Public Employer Labor Relations Association, Doc. R358A, at 8. Employers who supported this proposal believed that “[i]n many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs. Such a change also would better rationalize the FMLA with the accommodation provisions of the [ADA] and the light duty provisions of many workers’ compensation laws.” College and University Professional Association for Human Resources, Doc. 10238A, at 9. Other commenters stated that it “is unnecessary, and often ill-advised, to allow an employee to refuse light duty . . . . Experience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities.” Society for Human Resource Management, Doc. 10154A, at 9; *see also* The Retail Industry Leaders Association, Doc. 10259A, at 3-4 (same).

Several employers supporting mandatory light duty work thought that such work should count against an employee’s 12-week FMLA entitlement. *See* National Association of Convenience Stores, Doc. 10256A, at 2-3; Fisher & Phillips LLP, Doc. 10262A, at 6; American Bakers Association, Doc. R354A, at 4 (Department should clarify that “time spent in light duty work away from the employee’s usual job counts against the 12 weeks of FMLA entitlement for all purposes”). As one employer noted, “light duty should count against an employee’s FMLA leave entitlement and reinstatement rights. Otherwise,

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the employer ends up essentially making reasonable accommodations for FMLA even if the condition is not an ADA-qualifying disability.” Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 4.

On the other hand, some employers thought light duty should not count against the employee’s FMLA leave entitlement. A survey conducted by a national law firm revealed that 66% of the almost 150 individuals who responded on behalf of their companies did not believe that light duty work should be counted against an employee’s FMLA leave entitlement. “The vast majority of respondents felt that light duty is generally the result of a work injury or occupational injury and is better dealt with through the ADA or workers’ compensation. Most respondents stated that with light duty, an employee is usually working and therefore not on leave.” Hinshaw & Culbertson LLP, Doc. 10075A, at 4; *see also* MedStar Health, Inc., Doc. 10144A, at 14 (“When an employee works, even in an alternate light duty capacity, he/she is not absent under the meaning of the FMLA.”).

A number of organizations representing employees also opposed permitting an employer to modify an employee’s existing job in lieu of providing leave. *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 34 (“treating light duty work as the equivalent of FMLA leave falls squarely” within statutory prohibition making it unlawful to interfere with, restrain, or deny exercise of right to take FMLA leave and conflicts with regulatory provision concerning waiver of FMLA rights). Several of these commenters thought that counting light duty as FMLA leave would be unfair to employees because “[i]f an individual is at work, even if the duties have been modified to address the employee’s illness or care giving responsibilities, he or she is still engaging in productive activity for the employer.” University of Michigan Center for the Education of Women, Doc. 10194A, at 2; *see also* Families USA, Doc. 10327A, at 4-5 (“opposes any reduction in FMLA leave for

time spent working in a ‘light duty’ position.”); Coalition of Labor Union Women, Doc. R352A, at 4-5 (“counting ‘light duty’ work as FMLA leave is not appropriate and runs counter to the intent of the statute”) (emphasis in original).

### **3. Standards for Transferring/Reassigning Employees**

The Department also received comments regarding the differing standards under the FMLA and the ADA for transferring or reassigning employees to alternative positions. The FMLA provisions regarding transfers to an alternative position, discussed more fully in Chapter VIII, generally permit the employer to temporarily transfer an employee who needs foreseeable intermittent or reduced schedule leave for planned medical treatment to an alternative position with equivalent pay and benefits. The position must be one for which the employee is qualified and which better accommodates recurring periods of leave. *See* 29 U.S.C. 2612(b)(2). (See also Chapter IV discussing unscheduled intermittent leave.). Under the ADA, part-time work or occasional time-off may be a reasonable accommodation. As a general matter, transfer is the accommodation of last resort under the ADA. However, if, or when, an employee’s need for part-time work or reduced hours in his or her current position creates an undue hardship for an employer, the employer must transfer the employee to a vacant, equivalent position for which the employee is qualified, unless doing so would present an undue hardship for the employer. If an equivalent position is not available, the employer must look for an equivalent position at a lower level. Further accommodation is not required if a lower level position is also unavailable. *See* EEOC FMLA and ADA Fact Sheet, at Question 13. Employers who place employees in lower level positions are not required to maintain the employee’s salary at the level of the higher grade, unless the employer does so for other employees. *See* EEOC Technical Assistance Manual § 3.10.5.

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As discussed more fully in Chapter VIII, a number of commenters suggested that the FMLA regulations should be amended so that employers may transfer employees who request unscheduled or unforeseeable intermittent leave. Some commenters supporting reassignment argued that employers should be permitted to *temporarily* transfer an employee to an alternative position in “all cases involving intermittent leave or reduced leave schedules.” United Parcel Service, Doc. 10276A, at 5. Still other commenters suggested that employers should be allowed, in certain circumstances, to *permanently* reassign employees needing unforeseeable intermittent leave due to a chronic condition. See Betsy Sawyers, Director, Human Resources Department, Pierce County, Washington, Doc. FL97, at 4. Many employers that supported reassignment urged that a process similar to that provided under the ADA be adopted, whereby reassignment “could be conditioned on the employer’s determination that unscheduled leave could not be continued without jeopardizing the essential functions of the job. After making such a determination, the employer could reassign the employee to a position that better accommodated intermittent attendance.” Fairfax County Public Schools, Doc. 10134A, at 3; *see also* National Council of Chain Restaurants, Doc. 10157A, at 10-11 (FMLA should “accommodate employers in a manner similar to the ADA,” by permitting the employer to transfer a manager needing unscheduled intermittent FMLA leave “to a lesser management or a non-management position that better accommodates the employer’s needs”). As one employer stated, this approach “would provide employers with more flexibility in accommodating the employee’s need for leave while enabling the employer to better manage the

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<sup>18</sup> While the FMLA permits the temporary reassignment of employees needing intermittent or reduced schedule leave “that is foreseeable based on planned medical treatment” under certain circumstances, the statute expressly requires that the alternative position have equivalent pay and benefits. 29 U.S.C. § 2612(b)(2).

workforce.” Exelon, Doc. 10146A, at 8.

A law firm suggested that employers also be permitted to reduce the employee’s pay and benefits upon transfer, as is permitted for reassignments under the ADA. See Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.<sup>18</sup> Another commenter also recommended that the employer “be allowed to adjust the employee’s compensation and benefits so that they are commensurate with the position into which the employee is being moved.” National Council of Chain Restaurants, Doc. 10157A, at 10-11. The law firm supporting this approach explained that, otherwise, the provisions for transferring employees under the FMLA are “inherently unrealistic” because the “employee would always prefer to be transferred to a position with less responsibilities and less duties, but with equal pay and benefits.” Pilchak Cohen & Tice, P.C., Doc. 10155A, at 12.

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## **E. Permitting “Reasonable Leave for Medical Reasons” under the FMLA and the ADA**

An employee is entitled to reasonable accommodation, including medical leave, under the ADA only if he or she has a covered disability and is qualified to perform (with or without an accommodation) the essential functions of the position. 42 U.S.C. § 12112(b)(5)(A); *see generally* EEOC Reasonable Accommodation Guidance. Only those physical or mental impairments that “substantially limit” one or more major life activities are covered disabilities under the ADA. See 42 U.S.C. § 12102(2)(A). Moreover, an employer is not required to provide any accommodation that would pose an “undue hardship” on the operation of the employer’s business. See 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9. “Undue hardship” means significant difficulty or expense and refers not only to financial difficulty, but also to requested accommodations that

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are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. See 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p). An employer also is not required to eliminate an essential function of an employee's position when providing accommodation under the ADA. See generally EEOC Reasonable Accommodation Guidance.<sup>19</sup>

One of the stated purposes of the FMLA is to permit employees to take reasonable leave for medical reasons "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). The statute entitles employees to FMLA leave for (among other qualifying reasons) a serious health condition that makes them unable to perform the functions of their position. See 29 U.S.C. § 2612(a)(1)(D). The FMLA implementing regulations adopt the ADA "essential function"

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<sup>19</sup> The EEOC has stated that "in some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation." EEOC Reasonable Accommodation Guidance, at Question 24. Numerous court decisions have held that the ADA does not protect individuals who have "erratic, unplanned absences." *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001) ("our court, and every circuit that has addressed this issue has held that "in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.") (citations omitted); accord *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir. 2004); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998); *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994); cf. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (noting "that although excessive or unscheduled absences may prevent an employee from performing the essential functions of his job and thereby render him not otherwise qualified for purposes of the ADA, regular and predictable attendance is not per se an essential function of all jobs"); *Ward v. Mass. Health Research Inst.*, 290 F.3d 29 (1st Cir. 2000) (while "regular and reliable schedule may be an essential element of most jobs, resolution of the issue in each case requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question"); see also *David v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000) (holding that overtime, like job presence, can be an essential function of a job).

concept in explaining when an eligible employee is entitled to leave for his or her own serious health condition. Under section 825.115, leave may accrue to an eligible employee "where a health care provider finds that the employee is unable to work at all or is unable to perform any *one* of the essential functions of the employee's position." 29 C.F.R. § 825.115 (emphasis added). Other provisions of the FMLA allow an employee to take leave intermittently or on a reduced schedule. See 29 U.S.C. 2612(b); 29 C.F.R. §§ 825.203-.205. Unlike the ADA, however, neither the FMLA regulations nor the statute limits the availability of such leave to situations where the employee's absence does not impose an "undue hardship" on the employer.

A number of commenters believed that the FMLA regulations should be revised to incorporate the ADA concept of "substantially limited" in working. As a group of human resource professionals stated:

The Act seems to suggest that an employee is only entitled to FMLA leave for a serious health condition when the condition makes the employee totally unable to work. The Regulations have gone one step further and state that an employee is entitled to FMLA leave if he/she is unable to perform just one essential job function . . . Employees should only be able to take FMLA leave if they are substantially limited in their ability to perform essential job functions.

South Central Human Resource Management Association, Doc. 10136A, at 18; see also Baldor Electric Company, Doc. 10320A, at 2 (leave should only be allowed when a person cannot perform the majority of the essential functions). According to another employer, "the current regulatory framework allows for leave when an employee is unable to perform only one essential function of his or her job, even if there are ten other essential functions of the job that the employee is able to perform. This

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conflicts with the provisions of the [ADA].” Verizon, Doc. 10181A, at 7.<sup>20</sup>

Commenters also routinely contrasted an employer’s ability to manage absenteeism under the FMLA and the ADA, particularly in situations where an individual takes unscheduled intermittent leave. A law firm representing employers summarized the inconsistencies between the two statutes:

The [FMLA] Regulations clearly state that the ADA definition of “essential job functions” is to be used under the FMLA. 29 C.F.R. § 825.115. Although attendance is an essential job function under well-established ADA case law, the Regulations ignore the case law and permit employees to maintain unacceptable attendance records on a permanent basis. In fact, the FMLA Regulations permit employees with permanent chronic conditions to be absent with impunity for approximately 25% of a work year. . . . The ADA, on the other hand, does not protect an employee with a disability who cannot maintain an acceptable attendance record.

The courts have consistently and uniformly held that attendance is an essential job function and that a continuous or reduced schedule leave of a reasonable duration are reasonable accommodations under the ADA. . . . [T]he FMLA was intended to cover a temporary emergency or critical need for medical leave, not a permanent non-emergency or non-critical need for medical leave.

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<sup>20</sup> In the process of finalizing the FMLA implementing regulations, the Department received comments questioning whether section 825.115 was intended to mean that an eligible “employee must be found unable to perform each and every essential function (i.e. all), or only any single one, or some of several of the essential functions” in order to take FMLA leave due to his or her own serious health condition. The Department made clear in the preamble to its Final Rule that “[t]his section was intended to reflect that an employee would be considered ‘unable to perform the functions of the position’ . . . if the employee could not perform any *one* (or more) of the essential functions.” 60 Fed. Reg. 2179, 2196 (Jan. 6, 1995) (emphasis in original).

Spencer Fane Britt & Browne LLP, Doc. 10133C, at 9; see also South Central Human Resource Management Association, Doc. 10136A, at 13 (noting inconsistency between ADA and FMLA treatment of attendance and stating that FMLA regulations “permit chronic absenteeism problems whereas the ADA does not”); United States Postal Service, Doc. 10184A, at 24 (“Pursuant to the ADA, an employer is not required to accommodate chronic absenteeism or allow employees to work on a part-time schedule while encumbering a full-time position. Yet the FMLA requires an employer to do just that.”) (emphasis in original); Association of Corporate Counsel, Doc. FL31, at 2-3 (suggesting, when discussing employer’s ability to control absenteeism under FMLA, that “current regulations protect employee behavior that the Federal Courts and the EEOC have concluded is not only unreasonable but also inconsistent with the essential needs and expectations of employers”). For a full discussion of comments regarding the impact of unscheduled intermittent leave on attendance, see Chapter IV.

To address these concerns, a significant number of employers and organizations representing employers suggested that intermittent or reduced schedule medical leave should not be required under the FMLA when it presents an “undue hardship” or means that the employee cannot perform the essential functions of the position, as would be the case under the ADA.

[P]rovisions could be added to the FMLA and its regulations to take into account the impact of intermittent leave on the employer. The ADA utilizes reasonableness and undue hardship standards when assessing employee requests for accommodations. Under the ADA, an employer is not required to fundamentally alter the nature of a position in order to accommodate an employee’s disability. The FMLA and its regulations should include similar considerations. An employer should not be required to grant a request for intermittent leave if the request

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fundamentally alters the nature of the employee's position (i.e., effectively changes the start or end time for the position, allows the employee to excuse himself/herself from work without notice, excuses the employee from performing essential duties, excuses the employee from the requirement to work overtime, etc.). An employer should not be required to grant a request for intermittent leave if there is no reasonable way to cover the employee's work duties (e.g., because of the nature of the position; because the employee cannot provide reasonable advance notice of the leaves; because the leaves are frequent).

University of Minnesota, Doc. 4777A, at 3; *see also* National Retail Federation, Doc. 10186A, at 11 ("One suggestion is that intermittent leave should not be required where the unpredictable or short-term nature of the absences impose undue hardship or mean that the employee cannot perform the essential functions of the job."); National Council of Chain Restaurants, Doc. 10157A, at 10 ("same defenses available under the ADA [*e.g.*, undue hardship ] should be available" when employee is unable to perform essential functions); Texas Parks and Wildlife Department, Doc. 10253A, at 1 (allow employers to consider business necessity when intermittent leave extends beyond one year or 480 hours of leave); International Public Management Association for Human Resources and International Municipal Lawyers Association, Doc. R350A, at 3 (summarizing survey of local, state, and federal government employers, including respondent's suggestion that "an ADA-type exception be made if the need for intermittent leave will pose an undue hardship on the employer"). One commenter suggested that amending the FMLA to include "undue hardship" and "direct threat" defenses would import the "important balance between employee and employer rights found in the ADA" to the FMLA and make the two laws better integrated. Pilchak Cohen & Tice, P.C., Doc. 10155A, at 18.

While not specifically addressing the inclusion of an "undue hardship" defense under FMLA, several commenters representing employees indicated that they "strongly oppose any reconsideration of the FMLA that would serve to limit FMLA's scope or coverage." American Federation of State, County and Municipal Employees, Doc. 10220A, at 1. A membership organization affiliated with the AFL-CIO expressed concern about the impact "scaling back" FMLA protections would have. They noted that, at each FMLA workshop they conducted, "attendees repeatedly told us that, without the protections offered by the FMLA, many would have been out of work and without crucial healthcare benefits, due to their employers' very strict absence policies." Coalition of Labor Union Women, Doc. R352A, at 2. The National Partnership for Women & Families, while acknowledging that "situations involving unscheduled leave may present unique challenges for both employees and employers," argued that limiting the availability of unscheduled leave "would be inconsistent with the very purpose of the FMLA" which provides for unscheduled leave because "it is impossible to plan or script every situation where family or medical leave is needed." Doc. 10204A, at 12.