The ADAAA, Title VII and the FMLA for New Lawyers

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The Americans with Disabilities Act Amendments Act or "ADA" of 2008

- Signed into law on September 25, 2008.
- Made significant changes to the definition of "disability" under the old ADA.
  - These significant changes vastly expanded the definition disability and made it easier for employees to qualify as "disabled."

O.R.C. 4112

- Ohio's statute prohibiting discrimination based on disability and/or perceived disability.
- 6th Circuit case law allows the ADA and R.C. 4112 to be argued using the same standard.
  - Single legal analysis for disability discrimination under both ADA and 4112.

The ADA applies to…

- Private employers with 15 or more employees.
- State and local government.
- Employment agencies.
- Labor unions.
- Agents of the employer and joint management labor committees.

What type of conduct is prohibited?

- The ADA prohibits discrimination in all employment practices, including:
  - job application procedures,
  - hiring, firing, advancement,
  - compensation,
  - training,
  - and other terms, conditions, and privileges of employment.
- It also applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Who is protected?

- An individual is considered to have a "disability" if
  - 1) s/he has a physical or mental impairment that substantially limits a major life activity; or
  - 2) has a record of such an impairment; or
  - 3) is regarded as having such an impairment.
- Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.
  - Ex. An employer is interviewing applicants for a position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to offer him the position because Arnold disclosed during the interview that he has a child with a disability. The employer violates the ADA if it refuses to hire Arnold based on its belief that his need to care for his child will have a negative impact on his work attendance or performance.

Disability Defined

- The first part of the definition makes clear that the ADA applies to persons who have impairments, and that these must substantially limit major life activities.
- There are two non-exhaustive lists of examples of major life activities:
  - 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.

Disability Defined

- Major life activities also include the operation of major bodily functions, including:
- 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.
- This definition is very broad. Chances are, if your client has a medical condition, you can argue he or she is disabled.

Examples of Conditions that Qualify as Disabilities

- Examples of specific impairments that should easily be concluded to be disabilities include:
  - deafness,
  - blindness,
  - intellectual disability,
  - partially or completely missing limbs, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, schizophrenia, alcoholism, etc.

“Record of” Disability

- What does it mean if a person is discriminated against because he or she has a “record of” being disabled?
  - Those having a “record of” being disabled are the second type of individuals protected by the ADA.
  - Example: A person suffers from cancer but is now in remission. A person has bi-polar disorder with manic episodes but is now on medication that controls symptoms very well.

“Regarded As” Disabled or Perceived Disability

- This is the third type of individual covered under the ADA- someone who is perceived by the employer, for a variety of reasons, to have a disability.
- Under the third part of the definition, a covered entity has regarded an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual’s impairment or on an impairment the covered entity believes the individual has, unless the impairment is transitory (lasting or expected to last for six months or less) and minor.

Other Examples of Disability

- Alcoholism
  - Alcoholism is a recognized disability under the ADA. If the person is "qualified to perform the essential functions of the job."
- Obesity
  - Some, like the EEOC, argue that the ADA should be expanded to include those with obesity if obesity limits a major life function.
  - Currently, the 6th Circuit does not recognize obesity as a disability, unless it is caused by an underlying physiological disorder or condition.

Disability Discrimination Claim Prima Facie Case

- Elements of a disability discrimination claim are as follows:
- 1) He/she is disabled
- 2) He/she is otherwise "qualified" for the position, with or without a reasonable accommodation
- 3) He/she suffered and adverse employment action
- 4) The circumstances give rise to an inference of unlawful discrimination, or a nexus exists between the adverse job action and plaintiff's disability. *Macy v. Hopkins Cnty. Sch. Bd. Of Educ.*, 484 F.3d 357, 365 (6th Cir. 2007)

Burden Shifting Framework

- After Plaintiff has met his burden of proof, the burden shifts to the Defendant to show a “legitimate, non-discriminatory reason for the termination.”
- If the Defendant can satisfy its burden, the burden shifts back to the Plaintiff and he must show, by a preponderance of the evidence, that Defendant’s proffered reason for termination was pretext for discrimination.

Element 1: He/She is Disabled

- Look to the definition of disability. Use any evidence obtained through discovery to prove the person suffers from a condition widely recognized as a disability. Argue that a major life function is limited and explain how your client's symptoms limit major life functions.
- This is typically not the most difficult part of your burden of proof, especially since the definition of disability has been expanded with the ADA.

Element 2: Person is “Otherwise Qualified” for the Position

- The ADA defines qualified to mean a person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodation.
- Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions.

Otherwise Qualified With Reasonable Accommodation

- If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation.
- If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Element 3: Plaintiff Suffered an Adverse Employment Action

- What counts as an adverse employment action?
- An adverse action typically involves a material change in the terms, conditions, and privileges of employment (termination, demotion, lower pay, failure to hire, etc.).
- Typically does not include written discipline to employee, if it does not result in one of the actions listed above.
- *Interesting Example: Deleon v. Kalamazoo County Rd. Comm'n*, 739 F.3d 914, 2014 U.S. App. LEXIS 681, 2014 FED App. 0012P (6th Cir. Mich. 2014)

Adverse Job Action Example

- ISSUE: Whether a former employer was properly granted summary judgment as to a former employee's claims where he was involuntarily transferred to a position for which he had applied.
- HOLDINGS: The evidence presented a sufficient disagreement as to whether the transfer was materially adverse to a reasonable person because, regarding intolerability, the employee provided evidence that he was exposed to toxic and hazardous diesel fumes on a daily basis in the new position;
- The employee's request of a transfer did not bar a finding of an adverse employment action, because, inter alia, the record reflected that he applied for the position with the intention of commanding a substantial raise.

Element 4: A causal nexus exists between the adverse job action and plaintiff's disability.

- This is where you likely have the most difficulty because everything turns on causation.
- This element requires you to use information obtained in discovery or any information you possess, to argue that the person's disability and termination are directly related.
- Example: Person asks for reasonable accommodation. Person has no prior disciplinary history but all of a sudden, begins to receive discipline for minor issues and/or things other employees are doing. Person is terminated shortly after.
- Example: Comments that are adverse to disability and/or comments expressing irritation person has medical leave or an accommodation.

Legitimate, Non-Discriminatory Reason for Termination

- Employer will come up with some reason the plaintiff was terminated. Throughout discovery, you will want to ask for everything the employer has to prove its alleged reason.
- The Defendant will come up with documentation, witness statements, and other evidence to prove the decision to terminate Plaintiff had nothing to do with that person's disability.
- Burden then shifts back to Plaintiff to show the reason offered by Defendant is not true or would not have warranted termination.

Proving Pretext

- How does a Plaintiff prove the Defendant's proffered reason for termination was pretext for discrimination?
  - Prove the LND reason is untrue
  - Prove the LND reason is so minor, would not have actually motivated the adverse employment action
    - Show others had committed the same offense and were not terminated or disciplined
  - Show Defendant's disciplinary protocol was not followed with regard to your client (when there is a progressive disciplinary policy)
  - Get creative!
  - Lankford v. Reladyne

Reasonable Accommodations

- What are they and who can request one?
- Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application process or to perform essential job functions.
- Reasonable accommodation also includes adjustments to assure that an individual with a disability has rights and privileges in employment equal to those of employees without disabilities.
- Anyone with a disability can and should request a reasonable accommodation.

Examples of Reasonable Accommodations

- making existing facilities used by employees readily accessible to and usable by an individual with a disability;
- restructuring a job;
- modifying work schedules;
- acquiring or modifying equipment;
- reassignment;
- providing qualified readers or interpreters; or
- appropriately modifying examinations, training, or other programs.

- However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or production standards as an accommodation; nor are they obligated to provide personal use items such as wheelchairs, glasses or hearing aids.

When Must the Employer Make a Reasonable Accommodation?

- An employer is only required to accommodate a "known" disability of a qualified applicant or employee.
- Triggered by a request from individual with a disability.
- Accommodations must be made on an individual basis, because nature and extent of disability varies.
- If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer.
- If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one.

Limits on Employer Providing An Accommodation

- An employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business.
  - "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered a number of factors.
  - These factors include the nature and cost of the accommodation in relation to the size, resources, availability, and structure of the employer's operation.
  - Undue hardship is determined on a case-by-case basis.

Temporary or Transient Disabilities

- Discussed a bit earlier so I'll expound on the definition.
- Generally, impairments under 6 months are not covered by the ADA.
- However, a case out of the 4th Circuit says they are, ONLY if they substantially limit a major life activity. So far, the 6th Circuit has not followed suit on this.
- Case: *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 2014 U.S. App. LEXIS 1252, 29 Am. Disabilities Cas. (BNA) 1, 2014 WL 243425 (4th Cir. Va. 2014)

Sexual Harassment/Hostile Work Environment- Title VII and R.C. 4112

- The Ohio Civil Rights Act, codified at R.C. 4112, prohibits employers from discriminating against individuals on the basis of race, color, religion, national origin, disability, age, ancestry, military status and/or sex, which encompasses pregnancy.
- Federal case law construing Title VII of the Civil Rights Act of 1963 is generally applicable to cases involving alleged violations of the Ohio Civil Rights Act. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 421 N.E.2d 128, (1981).

Differences between Title VII & R.C. 4112

- The major difference between the two is the definition of a covered "employer." Under Title VII, an employer is defined as any person employing 15 or more individuals while under R.C. 4112, an employer is any entity employing four or more persons within Ohio.
- So even if you can't meet the threshold for Title VII claims, don't give up- you may still be able to file under 4112.

Types of Harassment in Ohio

- Ohio law recognizes two types of sexual harassment under the Act:
  - 1) quid pro quo (harassment directly linked to the grant or denial of a tangible economic benefit) and
  - 2) hostile work environment harassment (harassment that does not affect an economic benefit but that creates a hostile or abusive work environment). *Hampel v. Food Ingredients Specialties, Inc*. 89 Ohio St. 3d 169, 729 N.E.2d 726 (2000).

Quid Pro Quo Sexual Harassment

- Prima facie case requires Plaintiff to prove the following elements:
  - 1) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
  - 2) the harassment was based on sex;
  - 3) the employee's submission to the unwelcome advances was an express or implied condition of receiving job benefits or the employee's refusal to sexual demands resulted in a tangible job detriment. *Doe v. Marker*, 2003 Ohio App. LEXIS 5584 (Trumbull Cty. 2003).

Hostile Work Environment

- A bit of a misnomer. There is not a hostile work environment if your boss is a jerk and belittles you. There is not a hostile work environment if you don't get along with a co-worker and it makes work stressful.
- A hostile work environment MUST be based on harassment based on a protected class, like race, age, pregnancy, sex (including sexual harassment). *Courie v. Alcoa*, 162 Ohio App.3d 133, 832 N.E.2d 1230 (Cuyahoga Cty. 2005).

Prima Facie Elements for Hostile Work Environment Harassment

- 1) The harassment was unwelcome
- 2) The harassment was based on a protected class
- 3) the harassing conduct was sufficient severe or pervasive to effect the conditions, terms, or privileges of employment, or any matter directly or indirectly related to employment and
- 4) the harassment was either committed by a supervisor, or the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Strict Liability for Supervisor Harassment Cases

- Ohio courts have construed sexual harassment claims consistent with the Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
- Therefore, where the sexual harassment is perpetrated by a supervisor and results in a tangible job detriment (termination, demotion, pay decrease), the employer will be held strictly liable and there is no affirmative defense available.

Affirmative Defense Available in Supervisor Harassment Cases

- If the supervisor's conduct does not culminate in a tangible job detriment, the employer can raise an affirmative defense.
- The employer can escape liability if it proves that it
  - 1) exercised reasonable care to promptly prevent and correct the harassing behavior;
  - 2) the employee unreasonably failed to take advantage of preventative or corrective opportunities and otherwise avoid the harm.

Co-Worker Hostile Work Environment Sexual Harassment cases

- Prima facie elements are still the same as previous slide, as is the affirmative defense.
- No strict liability here. An employer can only be held liable for its own negligence- so it must have known or "should have known" that the harassment was occurring and failed to prevent or stop it. *Payton v. Receivables Outsourcing Inc.*, 2005 Ohio App. LEXIS 4515 (Cuyahoga Cty. 2005).

Same Sex Harassment

- Viable claims for this under Title VII and R.C. 4112.
- Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*, in 1998- this was the first case to recognize same-sex sexual harassment. Joseph Oncale was a male oil rig worker, who claimed he was repeatedly sexually harassed by his male co-workers.
- This was the first case to hold that Title VII's provision prohibiting workplace discrimination "because of sex" applied to harassment in the workplace between members of the same sex.

More on *Oncale v. Sundowner*

- This case set the precedent for same-sex sexual harassment cases and also stands for the premise that sexual harassment can occur without motivation of "sexual desire", stating that any discrimination based on sex is actionable, as long as it places the victim in an objectively disadvantageous working condition, regardless of the gender of either the victim or the harasser.
- Facts: Joseph is employed as part of an 8-man crew on an oil rig. On several occasions, he was subjected to sex-related, humiliating actions against him by his coworkers, in the presence of the rest of the crew. He was also sodomized with a bar of soap and threatened with rape. He obviously complained to his supervisors and no remedial action was taken. Instead, the employer's Safety Compliance Clerk called him a homophobic slur. He eventually quit, citing sexual harassment and verbal abuse.

Oncale v. Sundowner- Procedural History

- Complaint was filed in federal court, in the Eastern District of Louisiana. District Court granted summary judgment to the Defendant, holding, "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers."
- Oncale appealed to the Fifth Circuit. Fifth Circuit agreed with the district Court. Oncale didn't give up and filed a petition for writ of certiorari and the SC decided to hear his case. Supreme Court did so and reversed the decision and same sex-sexual harassment claims were born.
- This is why we do what we do! We met Joseph Oncale at the NELA seminar in Boston in 2014 and hearing him speak was one of the coolest moments of my career so far. He has paved the way for so many others.

Transgendered and Homosexual Individuals- Title VII Protection?

- Important issue right now, especially in the wake of the Supreme Court's decision on gay marriage.
- In the 1970's and 1980's, courts had a pretty narrow view of who is protected under Title VII. For example, in 1979, the Ninth Circuit rejected an argument that discrimination against a homosexual was sex discrimination under Title VII. The Fifth Circuit came to a similar conclusion when it held that termination because of homosexuality was not protected by Title VII. As time moved forward, courts began taking a closer look at Title VII and began interpreting "sex" more broadly.

History of Title VII and protection of transgendered individuals

- In 1984, the Seventh Circuit heard a case involving a transgender plaintiff, *Ulane v. Eastern Airlines*. Kenneth Ulane was hired by Eastern Airlines as a pilot and eventually took leave to have gender reassignment surgery. When Kenneth returned to work as Karen, she was terminated. The Court found that Karen was not discriminated against because she was female and rejected her Title VII claim, holding that Title VII does not protect transgendered individuals.
- Courts, such as the Sixth Circuit, continued to hold that homosexuals were not protected by Title VII. For example, an employee sued his employer, the United States Postal Service, after he was teased and physically assaulted because his co-workers thought he was gay. The Court said too bad- although these comments are cruel, they are not unlawful.

Expansion of Definition of "Sex" under Title VII

- A few years later, the Supreme Court expanded the definition of "sex" when it decided *Price Waterhouse v. Hopkins*. Hopkins was a female manager who was denied a partnership interest because she exhibited masculine traits. Price Waterhouse informed her that she could only increase her changes for a partnership interest by walking and talking more femininely, wearing makeup and taking a course at charm school, among others.
- **The Court held that Hopkins was discriminated against because of sex and the theory of "sex or gender stereotyping" emerged**. The Court said, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse* was the first case to define the word "sex" as both biological sex and gender, which includes "socially acceptable" roles and behaviors that define a woman as a woman and a man as a man. If the employer takes any of these roles and behaviors into consideration, they have taken gender into account.

Gender Stereotyping Theory under Title VII

- After the *Price Waterhouse* decision, other courts began to recognize the gender stereotyping theory as it relates to discrimination claims under Title VII. For example, the Ninth Circuit found that the unrelenting barrage of same sex verbal abuse by male co-workers against the plaintiff constituted sex discrimination under Title VII. The Seventh Circuit came to a similar holding in *Doe v. Belleville,* where the plaintiff endured harassment from male co-workers based on his gender.
- Next, the *Supreme Court decided Oncale v. Sundowner Offshore Services, Inc*.

Title VII Protection Extended to Transgendered Plaintiffs

in 2004, the Sixth Circuit, in a case from Ohio, was the first federal court to apply the gender stereotyping theory to transgendered plaintiffs in *Smith v. City of Salem*.

Plaintiff Smith worked for the City of Salem Fire Department. When he began exhibiting a more feminine appearance, he spoke with his supervisor about his gender identity disorder. The supervisor promised he'd keep the conversation confidential but he did not and the city began to hatch a plan to terminate his employment, based on his gender identity disorder.

The Sixth Circuit held that Smith had a valid claim under Title VII "because of sex" as a result of his non-conforming gender behavior. Specifically, the Court said, "discrimination against a plaintiff who is a transsexual- and therefore fails to act and/or identify with his or her gender- is no different from the discrimination directed against Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman."

Do These Protections Extend to Homosexuals?

- The Sixth Circuit in *Smith* specially said no. It also said no in *Vickers v. Fairfield Medical Center*, when the Court held Title VII does not extend to protect sexual orientation. This is where the analysis gets very murky because gender stereotyping cases usually involve ideas about how a man or woman should act and if he or she does not act that way, the discussion almost always turns to homosexuality and society's views on gender behavior. The Court has commented that "gender stereotyping claims should not be used to bootstrap protection for sexual orientation into Title VII." If the conduct directed toward the employee is based on his or her gender non-conformity, is it usually because that person is perceived as or is homosexual, bisexual or transgender so an argument can and should be made that Title VII protects homosexuals as well. The Court draws a tenuous line between homosexuality and gender non-confortmity when in the eyes of society, the two usually go hand in hand. If gender stereotyping is protected, homosexuality should be as well.

Where Are We Headed?

- It looks like we are moving toward homosexuality being protected under Title VII because the EEOC issued a decision, *Macy v. Holder*, that is binding on all federal agencies that says, "discrimination based on gender identity, change of sex and/or transgender identity" is discrimination because of "sex" under Title VII. The EEOC is now also accepting Charges of Discrimination for sex discrimination claims brought by lesbian, gay and bisexual individuals.
- There have been some courts recently that have actually recognized Title VII claims based on sexual orientation. (Find *Terveer v. Billington* here, from Gender Identity Watch- http://genderidentitywatch.com/2014/04/03/terveer-v-billington-usa/ and *Hall v. BNSF Railway* http://www.clearinghouse.net/detail.php?id=13501).

Protection for Homosexual Plaintiffs in the 6th Circuit

- Lastly, the Seventh Circuit initially dismissed the plaintiff's Title VII claims for sex discrimination based on sexual orientation in *Muhammad v. Caterpillar, Inc*. (full text of opinion here- http://law.justia.com/cases/federal/appellate-courts/ca7/12-1723/12-1723-2014-09-09.html). However, the EEOC filed an amicus brief seeking rehearing on the issue. The Seventh Circuit panel denied the petition for rehearing but issued an amended opinion removing the original holding that Title VII does not cover sexual orientation discrimination.
- Is homosexuality officially protected under Title VII? The answer right now in the Sixth Circuit is no. However, it appears other Courts and the EEOC are recognizing sexual orientation as a protected class under Title VII so hopefully it is only a matter of time before a decision such as this is issued by the Sixth Circut and is binding on Ohio federal courts.

The Family and Medical Leave Act (FMLA)

- What is the FMLA generally?
- The FMLA was enacted in 1993 and is a federal law requiring covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Covered Employers- Who is Required to Provide FMLA Leave?

- **FMLA** applies to all: public agencies, including State, local and Federal **employers**, and local education agencies (schools); and, private sector **employers** who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year - including joint **employers** and successors of **covered employers**.

Eligible Employees- who is eligible to take FMLA leave?

- Only eligible employees are entitled to take FMLA leave. An **eligible employee** is one who:
  - Works for a covered employer;
  - Has worked for the employer for at least 12 months;
  - Has at least 1,250 hours of service for the employer during the 12 month period immediately preceding the leave*; and
  - Works at a location where the employer has at least 50 employees within 75 miles.

12 months of employment- defined

- The 12 months of employment do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement. If the employee has a break in service that lasted seven years or more, the time worked prior to the break will not count unless the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA), or there is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in service. See "FMLA Special Rules for Returning Reservists". (Taken from Department of Labor website)

What Type of Leave is Available?

- 12 workweeks of leave in a 12-month period for one of the following reasons:
- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status

Protections of FMLA

- Entitlement to leave;
- Maintenance of health benefits during leave;
- Job restoration after leave – same position or an equivalent;
- sets requirements for notice and certification of the need for FMLA leave;
- and protects employees who request or take FMLA leave from retaliation

What is a “Serious Health Condition” as defined by FMLA?

- The Department of Labor says, "serious health condition" under the FMLA means an illness, injury, impairment, or physical or mental condition that involves:
- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or

What is a “Serious Health Condition” as defined by the FMLA?

- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

Conditions Explicitly Excluded

- Certain conditions do not qualify for FMLA leave.
- Examples:
- cosmetic treatments
- common colds, flu and ear aches
- upset stomach, minor ulcers, headaches other than migraine,
- routine dental or orthodontia problems, and periodontal disease

Different Length of Leave Available for care of Service Members

- An eligible employee may also take up to **26 workweeks** of leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. The "single 12-month period" for military caregiver leave is different from the 12-month period used for other FMLA leave reasons. See Fact Sheets 28F: Qualifying Reasons under the FMLA and 28M: The Military Family Leave Provisions under the FMLA. (taken from Dept. of Labor website)

Types of Leave- Continuous v. Intermittent and Reduced Schedule

- Three types of leave available under the FMLA- continuous leave, intermittent leave and “reduced scheduled” leave.

Continuous Leave

- Continuous FMLA leave is FMLA leave that is taken and not broken up by periods of work. Continuous FMLA leave is typically when an employee is absent for three consecutive business days or longer and has been treated by a doctor.
- For example, a new mother can take 8 weeks off from work to care for her newborn baby. This 8 week period is considered continuous FMLA leave. Leave to care for a sick family member or leave to receive treatment for your own serious illness may be continuous as well.

Intermittent Leave

- Intermittent leave is an option for employees who want to use FMLA leave in a more flexible manner. Intermittent leave involves the use of days or hours, broken down into increments, to care for a family member with a serious illness or to receive treatment for your own serious illness. An example of intermittent leave is an employee who suffers from a condition that causes "flare-ups" or periods of time where the employee is in pain and cannot attend work. Another example is an employee who is being treated for cancer and must attend chemotherapy or radiation appointments. You may use intermittent FMLA leave to attend these appointments.

Intermittent Leave

- FMLA leave is available to you during these flare-up periods and allows you to receive treatment for your serious medical condition without having to take continuous, unnecessary FMLA leave. Intermittent FMLA leave may be taken in very small increments. Only intermittent leave that is actually taken by the employee is counted against the 12-week time period allotted to you. If you do not use interrmittent FMLA leave, it is not counted against that 12-week period.

Reduced Schedule Leave

- it is also possible to use reduced schedule FMLA leave to care for a family member, reduce stress or for your own serious medical condition, under certain circumstances. Reduced schedule leave allows you to reduce the amount of hours you work per day or per week. The amount of hours or days will then count toward the 12-week allowance allotted to you under the FMLA.
- If at all possible, it is important to work with your employer and notify them of the need for leave as soon as you become aware of it. For scheduled procedures, like chemptherapy or surgery, this is relatively easy to do. In a scenario where you suffer from flare-ups, this may not be feasbile so it is important to inform the employer as soon as you become aware of the need for leave.

What if an Employee Exhausts FMLA leave?

- Since the employer must restore the employee to his or her position (or an equivalent position) upon return from FMLA leave, that person can always choose to go back to work once FMLA has been exhausted. If a person is not yet ready or able to return to work because of medical reasons, there are a few options.
- 1) If you have an otherwise qualified individual with a disability that needs more time off, he or she can request it from the employer as a "reasonable accommodation." If the additional leave would not impose an undue hardship on the employer, the employer may grant the request. If the person requests additional leave, employer may require them to obtain more information from their medical provider, detailing the reasons for the additional leave.

What if an Employee Exhausts FMLA leave?

- If the person can return to work but needs a reasonable accommodation such as a flexible schedule, more breaks or the ability to administer treatments while at work, they can request an accommodation from your employer.
- The request for an accommodation should be clearly communicated to the employer, preferably in writing. If the employer can grant the accommodation without an undue hardship, he or she should be able to return to work with the reasonable accommodation in place.

What if an Employee Exhausts FMLA leave?

- If employee cannot return to work at all yet, with or without an accommodation, another option is to apply for short term disability. This may be a good option for someone who cannot return to work at the end of the 12 week period but expects to be able to return to work in a few weeks or months. If the employer has a short term disability policy, employee should request information on that program to see if they qualify.
- These are just a few options- there are many more. Communication with the employer is key.

QUESTIONS?