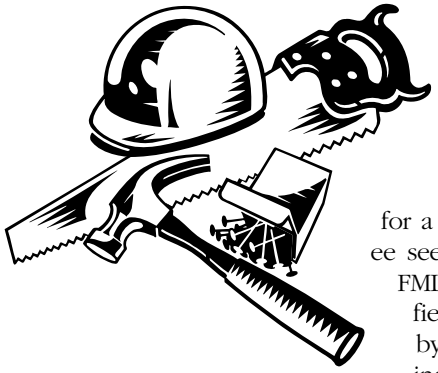
MICHAEL NEWMAN AND FAITH ISENHATH

The Interplay Between the Americans with Disabilities Act and the Family and Medical Leave Act Regarding Workplace Leave

Two of the most familiar statutes that govern employees' medical situations in the workplace and make leave from the workplace available are the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).[1] The ADA prohibits covered employers from discriminating or retaliating against a qualified individual with a disability and permits these employees to seek a reasonable accommodation for their disability.[2] The FMLA guarantees an eligible employee up to 12 weeks of unpaid leave to care for their own serious health condition or that of a relative.[3] Although, at first glance, these two statutes do not appear to have much in common, employers must analyze the implications of both laws when faced with questions and requests from employees regarding their medical situations.

Determining Who is Eligible for FMLA Leave or an ADA Accommodation

When an employee presents an employer with information about a medical condition, the employer should initially determine whether the employee is eligible for either an ADA accommodation or FMLA leave. First, to be an eligible employee under the ADA or FMLA, the employee must work for an employer who is covered by the ADA or FMLA. The ADA applies to all employers who employ 15 or more employees as well as state and local governments.[4] In contrast, the FMLA applies to all public employers and private employers who employ 50 or more employees.[5]



Second, in addition to working for a covered employer, the employee seeking coverage under either the FMLA or ADA must also be qualified for the coverage, as defined by these statutes and accompanying regulations. The FMLA applies only to eligible employees who have been employed by the employer for a combined total of at least 12 months in the previous seven years.[6] In addition, the employee must have worked at least 1,250 hours for the employer sometime during the 12 months immediately preceding their request for leave.[7] Conversely, the ADA has no requirement for the amount of time the employee has worked; rather, under the ADA, the employee must be "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[8]

Third, in addition to being an eligible employee working for a covered employer, the employee must be requesting proper relief that is available under either the ADA or the FMLA. The ADA applies only to a qualified individual with a disability, which is defined as a person with "a physical or mental impairment that substantially limits one or more major life activit[ies]" or a person with a "record of" or "being regarded as" having such an impairment.[9] Furthermore, although an individual may have a disability, the employee must still be able to perform the essential functions of his or her job, with or without a reasonable accommodation.[10] This means that, under the ADA, an employee is entitled to request that the employer accommodate his or her disability in some way, but the employee must be able to perform his or her job once the employer provides this accommodation. Accordingly, the ADA does not cover employees who are still unable to perform their jobs, even with an accommodation.

The FMLA, on the other hand, does not guarantee any accommodations but does allow an employee to take unpaid leave[11] to attend to either his or her own serious health condition or the serious health condition of a child, spouse, or parent.[12] Under the FMLA, a "serious health condition" is defined as an "illness, injury, or impairment, or physical or mental condition that involves: (A) inpatient care in a hospital, hospice, or residential medical care facility, or (B) continuing treatment by a health care provider."[13] Thus, to be eligible for FMLA leave, the person's health condition must qualify as a "serious health condition" as defined by the FMLA.[14]

Interaction Between the FMLA and ADA

Once an employee properly qualifies under either the FMLA or the ADA, the employer must determine what precise relief the employee is entitled to receive. Under the FMLA, the employee is entitled to 12 weeks of unpaid leave that can be taken all at once or intermittently.[15] Conversely, under the ADA, an employee is not entitled to any specific period of leave for his or her disability. However, an employee with a disability

may be entitled to a period of leave as a reasonable accommodation for his or her disability.[16] Significantly, the employee may be entitled to this leave even if it exceeds the 12 weeks provided by the FMLA.[17] However, an employee is typically not permitted to request an extremely long-term leave; nor is indefinite leave a reasonable accommodation.[18] Thus, it is important for an employer to remember that, if an employee has taken the 12 weeks of leave to which he or she is entitled under the FMLA, the employer should not think the legal responsibilities have ended. Rather, the employer must appropriately analyze the situation to determine whether the employee is entitled to further leave or to some other reasonable accommodation under the ADA.

When analyzing the employee's situation, it is important for the employer to distinguish between which leave an employee is taking, because the employee is entitled to different benefits depending on whether he or she is on FMLA leave or on a leave that is granted as an accommodation under the ADA. During an FMLA leave, employees are entitled to have their health care benefits retained.[19] The FMLA does not require the employer to maintain other benefits, such as life insurance or disability insurance, but employees must have their benefits restored upon returning from FMLA leave without subjecting the employee to re-eligibility requirements.[20] There is no such requirement to continue health care coverage under the ADA. However, continuation of health care coverage may be considered a reasonable accommodation under the ADA, if retaining these benefits would permit the employee to maintain his or her position.[21]

After the employee is given the requested leave and seeks to return to work, the medical documentation an employer may require upon the employee's return will depend on the type of leave the employee has taken. Under the FMLA, an employer must accept a return-to-work opinion from the employee's treating physician.[22] However, an employer whose employee is returning from ADA leave has much broader access to the employee's medical information. In this case, to be sure that the employee is fit to return to his or her position, the employer may require a job-related, fitness-for-duty medical exam before permitting an employee to come back to work.[23]

Finally, when an employee returns from a leave, the employer has different obligations under the FMLA and ADA. First, when an employee returns from FMLA leave, the employer must reinstate the employee to his or her previous position or an equivalent position.[24] If an employee is reinstated to an equivalent position, this position must have the same benefits, pay, duties, and responsibilities.[25] Under the ADA, on the other hand, there is no explicit directive that an employee's position be retained during a leave of absence that was granted as a reasonable accommodation. However, the Equal Employment Opportunity Commission has stated that the employer must keep an employee's position open during this leave, if doing so will not unduly burden the employer.[26] If the employer does fill the position, because leaving it open is unduly burdensome, the employer must then consider reassigning the employee when he or she returns from an ADA-accommodated leave.[27] However, unlike the requirement upon return from an FMLA leave, this reassignment does not need to be to an equivalent position.[28]

Conclusion

Because the FMLA and the ADA can easily create confusion for both employers and employees, employers must remember to evaluate employees' medical situations carefully. Employers need to properly classify their employees' leave requests and ensure that the employee using an FMLA leave is doing so for a "serious health condition," while an employee requesting an ADA accommodation is a "qualified individual" with a "disability." Employers must recognize that, under some circumstances, a "serious health condition" under the FMLA may also constitute a "disability" that merits an accommodation analysis under the ADA. Proper review and documentation of the employee's medical situation will ensure easier application of the Americans with Disabilities Act, the Family and Medical Leave Act, and any interactions that may occur between the two statutes. **TFL**

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Endnotes

[1]The ADA was amended effective Jan. 1, 2009, and new FMLA regulations became effective Jan. 16, 2009. For a more detailed discussion of these changes, *see generally* Michael Newman and Faith Isenhath, *The Americans with Disabilities Amendments Act of 2008*, 55 FED. LAW. 12 (Nov./Dec. 2008); Michael Newman and Faith Isenhath, *New Regulations Under the Family and Medical Leave Act for the Military*, 56 FED. LAW. 20 (May 2008).

[2]42 U.S.C. §§ 12101 *et seq.*

[3]29 U.S.C. §§ 2601 *et seq.*

[4]28 C.F.R. § 35.140.

[5]29 C.F.R. § 825.104.

[6]29 C.F.R. § 825.110.

[7]*Id.*

[8]29 C.F.R. § 1630.2(m). The ADA applies to both employees and job applicants. 42 U.S.C. § 12112(a).

[9]28 C.F.R. § 35.104.

[10]42 U.S.C. § 12111(8).

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when Sen. Leahy presented a list of potential candidates, which was published in the *National Journal*.[5] The list consisted of nine names—half of them attorneys, administrators, staffers, and executives who have either lobbied for or have direct ties to the music and entertainment industry. The following list provides a brief description of five of those candidates:

- Michele Ballantyne—senior vice president for federal government and industry relations at the Recording Industry Association of America; former general counsel for Sen. Tom Daschle (D-S.D.); former special assistant to President Clinton, and special counselor John Podesta, White House chief of staff, from 1999 to 2001;
- Alec French—vice president for government relations at NBC Universal; former minority counsel for the House Subcommittee on Courts, the Internet, and Intellectual Property, serving under Rep. Howard Berman (D-Calif.); and former legislative counsel and director of congressional relations for the Interactive Digital Software Association from 1997 to 2000;
- Neil MacBride—associate deputy attorney general; former vice president of antipiracy and general counsel to the Business Software Alliance; and former aide to Vice President Joe Biden;
- Hal Ponder—director of government relations for the American Federation of Musicians; and
- Shira Perlmutter—executive vice president for global legal policy at the International Federation of the Phonographic Industry[6] and former vice president and associate general counsel for intellectual property policy at Time Warner.

Many of the names on this short list are active Washington lobbyists, which does not bode well for the public interest and consumers' rights organizations interested in new business models or the advent of technology and innovation. Although there may be an issue as to whether the list of candidates for the IP czar position can withstand the White House ethics and lobbyist stress test, at an event sponsored by the Motion Picture Association of America, Vice President Joe Biden explained to a group of entertainment executives that the Obama administration understands the needs of the film industry and promised to appoint "the right person" to serve as IP czar.[7] To be continued. **TFL**

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Endnotes

[1]The White House, Office of the Press Secretary, Fact Sheet: Protecting American Innovation (Oct. 13, 2008), available at www.whitehouse.gov/news/releases/2008/10/20081013-7.html.

[2]Title III: Prioritizing Resources and Organization for Intellectual Property Act (Pub. L. 110-403).

[3]Open Congress, available at www.opencongress.org/bill/110-s3325/show.

[4]Brian Hiatt and Evan Serpick, *The Record Industry's Decline: Record sales are tanking, and there's no hope in sight: How it all went wrong*, Rolling Stone (June 28, 2007), available at www.rollingstone.com/news/story/15137581/the_record_industrys_decline.

[5]Andrew Noyes, *The Short List: Leahy Will Float Names for IP Czar*, National Journal Online (Nov. 14, 2008), available at lostintransition.nationaljournal.com/2008/11/leahy-will-float-names-for-ip.php.

[6]The International Federation of Phonographic Industry is the international equivalent of the Recording Industry Association of America.

[7]Richard Koman, *Biden to MPAA: You'll Love Our IP Czar*, ZDNET.com (April 24, 2009), available at government.zdnet.com/?p=4696.

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[11]In addition to leave for a "serious health condition," employees may also be entitled to leave for the placement of a child with the employee for adoption or foster care, *see* 29 C.F.R. § 825.100, or leave to spend time with a relative engaged in certain military service, *see* 29 C.F.R. § 825.310.

[12]29 C.F.R. § 825.100.

[13]29 C.F.R. § 825.113.

[14]29 C.F.R. § 825.100.

[15]*Id.*

[16]*Windsor v. Parkway Sch. Dist.*, No. 4:06-cv-1310, 2008 U.S. Dist. LEXIS 3176, at *20 (E.D. Mo. Jan. 15, 2008).

[17] *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043 (8th Cir. 1999).

[18]*Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000).

[19]29 C.F.R. § 825.209.

[20]29 C.F.R. § 825.212.

[21]*See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002).

[22]29 C.F.R. § 825.312.

[23]*Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999).

[24]29 C.F.R. § 825.214.

[25]*Id.*

[26]*See* EEOC Enforcement Guidance, *supra* note 21.

[27]*Id.*

[28]*Id.*