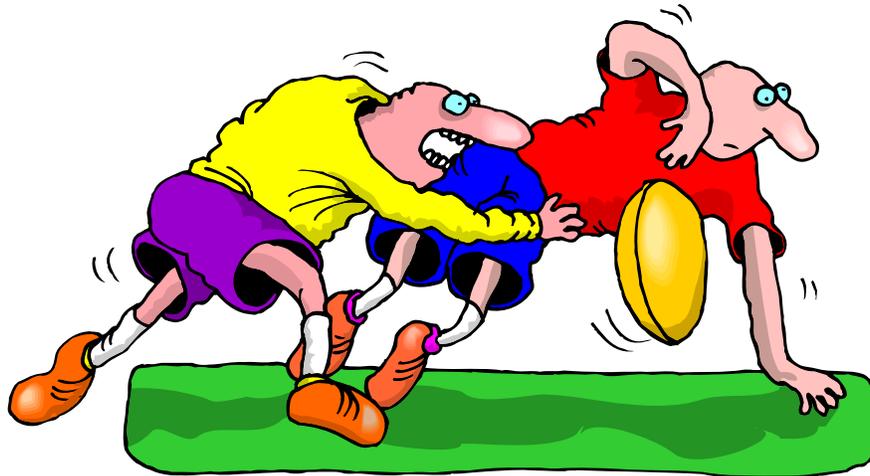


# Tackle FMLA Issues

(and some other stuff)



**Denise K. Drake**  
**Spencer Fane Britt & Browne LLP**

**Kansas City, MO**  
**St. Louis, MO**  
**Overland Park, KS**  
**Omaha, NE**  
**816-292-8210**  
**913-327-5110**  
**816-550-7557 (mobile)**  
**[www.spencerfane.com](http://www.spencerfane.com)**  
**[ddrake@spencerfane.com](mailto:ddrake@spencerfane.com)**

# **FAMILY AND MEDICAL LEAVE ACT**

## **(“FMLA”)**

## **FMLA BASIC REQUIREMENTS**

### **1. Amount of Leave**

Employer must provide 12 weeks of leave during any 12-month period to eligible employees. Employer is required to designate the 12-month period in its policy.

### **2. Reasons for Leave**

- a. Serious health condition of the employee;
- b. Serious health condition of employee's spouse, parent or dependent child; or
- c. Care of a newborn, adopted child or foster child.

### **3. Eligibility Requirements**

Leave is available to eligible employees: (a) have 1 year of service that does not need to be continuous; and (b) have worked 1,250 hours in year immediately preceding the start of the leave; and (c) works at a site where there are 50 employees within a 75-mile area.

### **4. Employee's Notice Requirements**

- a. Leave must be requested by the employee (but employee just has to give employer sufficient information for employer to know if it is for an FMLA purpose; employee does not have to mention FMLA; if in doubt, employer should make further inquiries).
- b. Leave must be requested at least 30 days in advance (or if an emergency situation, as soon as reasonably possible; and at least within 1-2 business days after the need for leave is known).

### **5. Employer's Notice Requirements**

- a. Poster;
- b. General statement of employee's rights and obligations in employee handbook or separate distribution of employer's FMLA policy; and
- c. Specific notice that employer has designated the leave as "FMLA" leave and specifying the employee's rights and obligations.

**6. Types of Leave**

Leave may be taken “continuously,” “intermittently,” or on a “reduced schedule.” An employer can not force an employee to take more time off than is necessary, so if the employee only needs one hour, the employer can not force the employee to take a half-day or a whole day, etc.

**7. Medical Certification Option**

Employer may (but is not required) to obtain medical documentation of the need for leave. If employer requires medical certification, employer must give employee 15 days to return it and must advise the employee of the consequences of not returning the form on time (leave will be delayed or denied, and intervening absences will be counted under the employer’s attendance policy and/or the leave will be considered as unauthorized). If employee does not return the form within 15 days and the employee has made a diligent effort to have it completed, the employer must extend the 15-day period for a reasonable period of time.

**8. Use of Paid Time Off**

While on leave, an employer can force the employee to use and exhaust any paid time off (such as vacation, personal days, sick days) that he/she has.

**9. Effect on Attendance Policies**

FMLA absences can not be used against the employee in applying the employer’s attendance policy, except as stated above.

**10. Employee’s Right to Refuse Light Duty**

If employee is released to work with restrictions, employer may be obligated to reasonably accommodate (if ADA applies), but employee can refuse the accommodation under FMLA and remain on leave instead until the 12 week allowance is exhausted.

**11. Health Coverage Protection**

While on leave, employee can maintain health insurance coverage at same rate employee was paying prior to leave.

**12. Reinstatement Rights**

Until the 12 week allowance has been exhausted, employee has guaranteed job reinstatement rights to same or equivalent job.

## **DEFINITION OF “SERIOUS HEALTH CONDITION”**

### **1. Non-Chronic and Non-Permanent Conditions (Other Than Pregnancy)**

#### **a. Inpatient Care:**

- (1) Overnight stay
- (2) In a hospital, hospice or residential medical care facility

#### **b. A Period of Incapacity or Subsequent Treatment Following Inpatient Care**

(incapacity meaning inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor or recovery therefrom)

#### **c. Continuing Treatment for a Serious Health Condition**

*(More Than 3 Days/2 Treatments by Health Care Provider)*

- (1) Involving a period of incapacity (inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor or recovery therefrom)
- (2) Of more than 3 consecutive calendar days
- (3) With treatment 2 or more times by a health care provider

#### **d. Regimen of Continuing Treatment for a Serious Health Condition**

*(More Than 3 Days/1 Treatment by Health Care Provider)*

- (1) Involving a period of incapacity (inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor or recovery therefrom)
- (2) Of more than 3 consecutive calendar days
- (3) With treatment at least 1 time by a health care provider
- (4) Which results in a regimen of continuing treatment under the supervision of the health care provider (including a course of prescription medication, therapy, etc., but excluding the taking of over-the-counter medications, bed rest, drinking fluids, exercise and other similar activities that can be initiated without a visit to a health care provider)

### **2. Incapacity Due to Pregnancy or for Pre-Natal Care**

(includes regular pre-natal doctor's appointments and episodes of severe morning sickness)

### **3. Incapacity or Treatment Due to Chronic Conditions**

- (1) Which requires periodic visits for treatment by a health care provider
- (2) Continues over an extended period of time
- (3) May cause episodic rather than a continuing period of incapacity (such as asthma, diabetes, epilepsy, etc.)

4. **Incapacity That Is Due to Permanent or Long-Term Conditions**
  - (1) Of condition for which treatment may not be effective
  - (2) For which individual is under continuing supervision of health care provider (although the individual may not be receiving active treatment, such as for Alzheimer's, severe stroke, or terminal stages of a disease)
  
5. **Multiple Treatments and Recovery from Restorative Surgery After an Accident or Other Injury**
  
6. **Multiple Treatments and Recovery from a Condition That Would Likely Result in a Period of Incapacity of More Than 3 Consecutive Calendar Days in the Absence of Medical Intervention or Treatment**  
(such as cancer where chemotherapy or radiation is involved, severe arthritis where physical therapy is involved, kidney disease where dialysis is involved, etc.)

## **THE MOST PROBLEMATIC FMLA LEAVES**

### **A. Continuous Leaves of Short Duration for Non-Chronic Serious Health Conditions**

1. Did the condition last more than three consecutive calendar days?
2. Was the individual unable to perform normal daily activities during that time (including inability to work)?
3. Did the individual do *either one* of the following:
  - a. Visit a doctor at least once plus receive a prescription for medication or physical therapy?
  - b. Visit a doctor at least twice?

### **B. Intermittent Leaves for Chronic Serious Health Conditions**

These types of leaves are the most prone to abuse, because the condition is almost always permanent (meaning the employee will have absences for the rest of his/her work life) and because the employee (not a doctor) gets to decide if and when he/she is unable to work.

**KEY TERMS AND CONCEPTS**  
**RELATED TO INTERMITTENT LEAVES**  
**FOR CHRONIC SERIOUS HEALTH CONDITIONS**

**A. Key Requirements to Qualify as a “Chronic Serious Health Condition”:**

*All* of the following requirements must be met:

1. Must be an “illness, impairment, or physical or mental condition.”  
[Section 825.114(a)]
2. Must involve a period of incapacity (inability to work or perform other regular daily activities) or treatment for such incapacity.  
[Section 825.114(a)(2)(iii)]
3. Must require periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider.  
[Section 825.114(a)(2)(iii)A]
4. Must continue over an extended period of time (including recurring episodes of a single underlying condition).  
[Section 825.114(a)(2)(iii)(B)]
5. Must cause either a continuing period of incapacity or episodes of incapacity.  
[Section 825.114(a)(2)(iii)(C)]

**B. Key Requirements to Qualify as an “Intermittent Leave”:**

*Both* of the following requirements must be met:

1. Intermittent leave must be “medically necessary.”  
[Sections 825.117 and 825.203(c)]
2. The medical need for leave can be *best* accommodated with an intermittent leave.  
[Section 825.117]

**C. Key Notice Obligations of Employee:**

1. Must provide employer with oral notice as soon as practicable of the need for FMLA leave (as soon as both possible and practical, taking into account all of the facts and circumstances):
  - a. Of the general need for intermittent leave.  
[Section 825.302(a)]
  - b. Of each intermittent absence if the dates of same were initially unknown.  
[Section 825.302(a)]

Note: The employee only has to provide notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. The employee does not need to mention the FMLA.  
[Section 825.302(c)]

2. Must provide, upon request, such information as the employer needs to determine if the leave or any absence during an intermittent leave is FMLA-qualifying.  
[Section 825.302(c)]

Such information may include (but is not necessarily limited to):

- a. Medical reason for the leave or absence.  
[Section 825.302(d)]
- b. Anticipated timing and date of the leave or absence.  
[Sections 825.302(c) and (d)]
- c. Duration of the leave or absence.  
[Sections 825.302(c) and (d)]
- d. Why the leave or absence is medically necessary.  
[Section 825.302(f)]
- e. The schedule for treatment of the condition.  
[Section 825.302(f)]

Note: The FMLA regulations do not prohibit the employer from asking the employee directly for the necessary details of the leave or an absence, as it is the employer's obligation to determine if the leave or absence is FMLA-qualifying.  
[Sections 825.208(a) and 825.302(c)]

3. Must comply with the employer's "usual and customary notice and procedural requirements for requesting leave" (such as requesting leave in writing or following call-in procedures).  
[Section 825.302(d)]

Note: An employee's failure to comply with the employer's extra notice and procedural requirements does not justify delaying or denying the leave. However, the employer is permitted to impose disciplinary action for the employee's failure to follow such notice and procedural requirements.  
[Section 825.302(d); Preamble to Section 825.302]

4. Must (if the absence is eligible for payment under the employer's sick day, short-term disability, worker's compensation, or other disability plan) provide such additional information and proof (such as a doctor's note for a particular absence) as required by the plan (or as allowed by law in the case of worker's compensation absences).  
[Section 825.207(d)(1)]

Note: An employee's failure to furnish such additional information does not justify treating the absence as a non-FMLA absence. However, the employer is permitted to deny payment for the absence.  
[Section 825.207(d)(1)]

Note: If the absence is eligible for payment under a policy that provides paid vacation, paid personal days, or paid personal holidays, the employee may not be required to furnish additional information or proof in order to be eligible for payment, even if the policy requires such information or proof. The employer may force the employee to use the paid day, but may impose no other limitations (such as requiring a doctor's note or requiring advance approval or scheduling of the absence).  
[Section 825.207(e)]

5. Must, while on leave and if requested, report periodically on his/her status and intention to return to work.  
[Section 825.312(e)]

Note: If the employee will be able to return to work earlier than anticipated, the employee must provide two business days' advance notice if feasible.  
[Section 825.312(e)]

**D. Key Requirements for “Medical Certification”:**

1. Must be provided, if requested by the employer, to verify the existence of a serious health condition and the medical necessity for an intermittent leave.  
[Section 825.305(a)]
2. Must be “complete.”  
[Sections 825.305(d) and 825.307(a); Preamble to Section 825.305]

**E. Key Elements of a “Complete” Medical Certification**

The employer may use DOL’s prototype medical certification form, but is not required to do so. [Sections 825.306(a) and (b)]. An employer may use its own form, as long as it asks for no more information than is outlined below. [Section 825.306(b)]. For example, an employer may not ask for medical information not related to the serious health condition in question. [Section 825.306(b)]. Also, the employer may not ask for diagnosis. [Preamble to Section 825.306].

The employer may require all of the following information in a medical certification. [Section 825.306(b)]. A medical certification is not complete unless it contains all of the following information.

Information that the employer may require (20 questions you can ask!):

1. Whether the condition meets the definition of “chronic serious health condition.”  
[Section 825.306(b)(1)]
2. The medical facts that support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.  
[Section 825.306(b)(1)]
3. The approximate date the serious health condition commenced.  
[Section 825.306(b)(2)(i)]
4. The probable duration of the serious health condition.  
[Section 825.306(b)(2)(i)]
5. Whether the patient is presently incapacitated.  
[Section 825.306(b)(2)(iii)]
6. The probable duration of the patient’s present incapacity and the period required for recovery from the incapacity if any.  
[Section 825.306(b)(2)(i) and Section 825.306(b)(3)(i)(B)]

7. Whether it is necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis.  
[Section 825.306(b)(2)(ii)]
8. Whether the employee is unable to perform work of any kind.  
[Section 825.306(b)(4)]
9. If the employee can work, whether the employee is unable to perform any one or more essential job functions of the employee's job, and a statement of those essential functions that the employee cannot perform.  
[Section 825.306(b)(4)]

Note: The health care provider's statement regarding essential functions the employee cannot perform must be based on information provided by the employer as to what the essential functions are, and in the absence of such information from the employer, the health care provider's statement can be based on what the employee says the essential functions are.

[Section 825.306(b)(4)]

10. The probable duration of the intermittent or reduced leave schedule.  
[Section 825.306(b)(2)(ii)]
11. The likely duration of episodes of incapacity.  
[Section 825.306(b)(2)(iii)]
12. The likely frequency of episodes of incapacity.  
[Section 825.306(b)(2)(iii)]
13. Whether additional treatment will be required for the condition.  
[Section 825.306(b)(3)(i)(A)]
14. An estimate of the probable number of such treatments.  
[Sections 825.306(b)(3)(i)(A) and (B)]
15. An estimate of the probable interval between such treatments.  
[Section 825.306(b)(3)(i)(B)]
16. Actual or projected dates of such treatment if known.  
[Section 825.306(b)(3)(i)(B)]
17. Whether the employee must be absent from work for such treatment.  
[Section 825.306(b)(4)]
18. If any treatments will be provided by another health care provider, and if so, the nature of the treatments.  
[Section 825.306(b)(3)(ii)]

19. The medical necessity for the leave.

Note: While the above is technically not on the DOL's list of permitted certification questions, it is probably a permissible inquiry since intermittent leave is only allowed if "medically necessary."  
[Sections 825.117 and 825.203(c)]

20. Whether and why intermittent leave is the best way to accommodate the employee's medical need.

Note: While the above is technically not on the DOL's list of permitted certification questions, it is probably a permissible inquiry since intermittent leave is only allowed if "medically necessary."  
[Section 825.117]

## **TOOLS FOR MANAGING ABUSES OF FMLA INTERMITTENT LEAVES FOR CHRONIC SERIOUS HEALTH CONDITIONS**

### **1. Obtain As Much Information As Possible Directly From The Employee**

Nothing in the FMLA regulations prohibits an employer from obtaining as much information as possible about an FMLA leave or absence directly from the employee. It is the employer's obligation to determine if each absence qualifies as an FMLA absence. [Sections 825.208(a) and 825.302(c)]. An employer is entitled to know the medical reason for the leave, anticipated timing and dates of leave, duration of leave, why the leave is medically necessary, and the schedule of treatment. [Section 825.302].

Employers have several opportunities to obtain helpful information:

- a. At the time the employee requests intermittent leave of absence. Ask the employee to complete a request for leave form. Make sure it includes questions about all of the information that you need.
- b. When an employee calls in absent for an FMLA reason. For any individual absence, the employee still needs to provide sufficient notice for an employer to determine if the absence is FMLA-qualifying. Prepare a standard checklist of the questions you want to ask to gather the information you need whenever an employee calls in. As general rule, the case law suggests that an employee has not provided sufficient information to an employer if he/she merely says he/she is "sick," "ill," or "not feeling well."
- c. When the employee returns to work. The FMLA regulations do not prohibit an employer from asking an employee, upon return to work, how the employee is feeling, what the employee did on his/her day off, whether the employee talked to or saw his/her doctor, etc.
- d. When the employer receives information that casts doubt upon the employee's stated reason for the absence. An employer can always talk to an employee about suspicious absences, especially when the employer has received information that the employee's absence might not be a legitimate use of FMLA (such as information from other employees who heard the employee brag about what he/she did on the day off, statements by the employee to others that he/she pulled a fast one, a prior request by the employee to the employer to take the day as a day of vacation, etc.).
- e. When the employer detects a suspicious pattern of absences. If the employee's absences are more frequent or longer in duration than indicated on the certification form or if there are suspicious patterns, the employer has the right to discuss these discrepancies with the employee.

## **2. Provide the Employee's Health Care Provider With A List of Essential Functions**

In connection with chronic serious health conditions, the employee's health care provider is required to identify which essential job duties the employee will be unable to perform whenever the employee will have an absence due to the chronic serious health condition. [Section 825.306(a)(4)(ii)]. The health care provider is required to rely on information provided by the employer regarding essential duties. In the absence of the employer furnishing the information, the health care provider is entitled to rely on whatever the employee says. [Section 825.306(a)(4)(ii)].

Don't allow the employee to control this information. Attach a copy of the job description or a list of essential duties to the medical certification form. It is quite possible that the health care provider will take the matter more seriously if you provide the information, and it may have a bearing on whether the employee needs intermittent leave or how often the doctor believes the employee may need to be absent.

## **3. Insist on "Complete" Medical Certifications**

The DOL medical certification form is not user-friendly and is difficult to understand, especially as it applies to intermittent leaves and leaves for chronic serious health conditions. It is common for an employer to receive the form with incomplete information.

There are several steps an employer may take (and in some cases is required to take) to increase its chance of obtaining a fully completed medical certification:

- a. Use a customized version of the form that is designed solely for use in connection with intermittent leaves for chronic serious health conditions. An employer is not required to use the DOL's medical certification form. [Sections 825.306(a) and (b)]. Although an employer cannot require any more information than is included on the DOL prototype form [Section 825.306(b)], most of the questions can be re-worded with better and easier to understand language.
- b. Advise the employee of the consequences for not providing an adequate and complete medical certification. An employer may delay or deny leave if an adequate and complete medical certification is not provided at all or not provided on a timely basis. [Section 825.311]. The employee must be notified of these consequences at the time the certification is requested. [Section 825.305(d)].
- c. Always insist on "complete" information and give the employee a chance to cure any deficiency. The employee has the responsibility for ensuring that his/her health care provider furnishes all of the information an employer is entitled to receive; it is not the employer's responsibility. It is the employee's responsibility to find a health care provider who will provide complete information. [Preamble to Section 825.305].

If the medical certification is incomplete, an employer is required to notify the employee that the certification is incomplete and allow the employee a reasonable opportunity to cure any deficiency. [Section 825.305(d)].

The information provided by the health care provider must include: (1) the “likely duration” and “likely frequency” of “episodes of incapacity” [Section 825.306(b)(2)(iii)]; and (2) an “estimate of the probable number of and interval between treatments” [Section 825.306(b)(3)(i)]. In other words, the health care provider is to provide information about how often the employee will be absent, how long each absence will be, and how often the employee will be required to see the doctor. Any health care provider who states that such information is “unknown” is not furnishing complete information. At a minimum, the health care provider is required to provide estimates. Once an employer has that information, it is much easier to monitor attendance patterns to determine if the employee’s absences are consistent with what the doctor said, and if not, to obtain recertification.

Whenever a medical certification is incomplete, it is helpful to prepare a list of the questions that have not been completely answered, give the list to the employee, and require the employee to contact his/her health care provider to provide the missing information. The employee should also be advised of a reasonable deadline for furnishing the information.

#### **4. Require Recertifications As Often As Permissible**

The recertification rules are somewhat confusing. There are rules related to recertification of the serious health condition and the need for intermittent leave in general. There are also rules related to recertification of particular absences while the employee is already on an intermittent leave that was previously approved and supported by a medical certification. Each of these sets of rules is discussed below.

a. Recertification of the Serious Health Condition and Intermittent Leave. Recertification of the serious health condition and the need for intermittent leave in general is allowed in the following circumstances:

(1) The period specified on the initial certification as the duration of the overall intermittent leave itself (if less than one year) has expired.  
[Section 825.308(b)(2)]

(2) One year after the date of the initial certification has expired (if the initial certification is for a period of one year or greater or indicates that the duration of the condition is permanent or unknown). A medical certification is only good for a maximum period of one year, since FMLA operates on a 12-month basis.  
[Case Law]

(3) The circumstances described in the initial certification have changed significantly (e.g., the duration of the condition, the nature of the condition, complications).

[Section 825.308(b) and (c)]

(4) The employer receives information that casts doubt upon the continuing validity of the initial certification.

[Section 825.308(b) and (c)]

b. Recertification (Medical Proof) That a Particular Absence is Truly an FMLA Absence. With respect to individual absences while an employee is already on an approved intermittent FMLA leave for a chronic serious health condition, the employer is permitted to require medical proof of a particular absence (basically, that it was medically necessary and for the stated FMLA purpose) in the following circumstances:

(1) The employer receives information that casts doubt upon the employee's stated reason for the absence.

[Section 825.308(a)(2)]

(2) The circumstances described in the initial certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications).

[Section 825.308(a)(1)]

(3) The employer requests it in connection with any particular absence, provided that the employer may not make such a request more often than every 30 days.

[Section 825.308(a)]

## **5. Use An Employer-Designated Health Care Provider**

Designate a health care provider with whom you can consult on questionable cases, especially when the information you have received is vague, subject to interpretation, inconsistent, or suspicious. The physician you use in connection with worker's compensation cases may be a good choice, because he/she is already familiar with your jobs. In appropriate cases, utilize that doctor to initiate contact with the employee's health care provider.

If it is a not a worker's compensation case, the employee's consent is required in order for your health care provider to communicate with the employee's health care provider. [Section 825.307(a)]. Ask the employee for written consent. An employee who is legitimately using FMLA leave is unlikely to deny your request. If an employee refuses to provide consent, the employee may have something to hide and it may be an indicator of possible fraud.

## **6. Analyze Absences and Other Employee Conduct For Fraud**

Monitor unscheduled absences for patterns (a disproportionate number of Fridays off, Mondays off, same of week off, increases in number of absences, increase in frequency of absences, increase in duration of absences, etc.).

In addition, employers should keep their ears and eyes open for information about what the employee may have communicated to other employees (both before and after the absence) regarding his/her plans for the day of absence. Some employees feel compelled to brag about their activities or how they pulled a fast one on the employer.

Another possible indicator of fraud is an FMLA absence (employee calls in absent before his/her shift for an FMLA reason) and, not so coincidentally, it happens to be the same day the employee had previously asked to take as vacation but was denied.

## **7. Modify Sick Day Plans To Require Medical Proof**

The FMLA regulations permit an employer to deny sick pay or other disability pay to an employee, if the employee fails to comply with the terms of the employer's sick day or disability pay policy/plan. [Section 825.207(d)(1)]. Many of these plans only require medical documentation if the employee is absent for three or more consecutive days for illness. Consequently, an absence of one or two days will be eligible for pay, even in the absence of medical documentation.

To help curb FMLA abuse, an employer could modify its sick pay policy/plan to require medical proof for each day of a health-related absence. Alternatively, the employer could start requiring medical proof after the employee has been absent due to illness for more than a designated number of days within a designated period (e.g., require medical proof after the employee has been absent for more than six days within any 12-month period).

## **8. Utilize Second And Third Opinions In Selected Cases**

Use second and third opinions if you suspect that the employee does not really have a "serious health condition," or you believe that it may not be "medically necessary" for an employee to be absent due to the health condition involved, or you believe the employee's own health care provider is too "pro-employee." [Section 825.307]. If an employee refuses to submit to an evaluation for a second or third opinion, the "alternative is for the employee to forego FMLA leave," that is, lose his/her protection under the FMLA. [Preamble to Section 835.307].

It is important to act promptly if you want a second or third opinion. They are only available in connection with the initial request for intermittent leave (and any subsequent, renewed request for intermittent leave after the initial certification has expired). Second and third opinions are not allowed in connection with recertifications. [Section 825.308(e)].

## **9. Use Surveillance When Fraud Is Suspected**

Conduct surveillance if you suspect fraud or abuse of FMLA leave. If the employee is not following his/her own doctor's recommendations regarding FMLA leave or is engaging in normal daily activities while the employee is supposed to be on FMLA leave, the employer may be able to discharge the employee for fraud if it obtains reliable evidence.

The employer's proof does not necessarily have to be ironclad, but must be strong enough to support a good faith belief of fraud. According to at least two cases, if an employer honestly believes or has an honest suspicion that an employee is misusing FMLA leave, the employer will not be liable under the FMLA if it discharges the employee, even if it turns out that the employer was mistaken in its belief. *Kariotis v. Navistar Intl. Transportation Corp.*, 131 F.3d 672 (7<sup>th</sup> Cir. 1997); *Mosley v. Hedges*, 1998 WL 182479 (N.D.Ill).

## **10. Document Your Actions**

As with most human resource issues, documentation is very important. It is particularly important that an employer document oral conversations with employees about FMLA absences and leave, transcribe voicemail messages from employees when they call in absent, and keep accurate attendance records (with notations as to which absences are FMLA and which are not).

# **AMERICANS WITH DISABILITIES ACT**

## **(“ADA”)**

## **WHO IS PROTECTED?**

- Any **qualified** individual with a **disability**
- Any **qualified** individual **who has a relationship with an individual with a disability**

## **WHAT IS A “DISABILITY”?**

- **Physical or mental impairment** which **substantially limits** a **major life activity** (**if** the employer has notice/knowledge of the impairment)
- A **record/history** of such impairment
- A **perception** by the employer that the individual has such an impairment **even if**:
  - The individual does **not** have an impairment at all; **or**
  - The individual’s impairment does **not** substantially limit a major life activity.

## **WHAT IS A “PHYSICAL OR MENTAL IMPAIRMENT”?**

- **Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems:**
  - **Neurological**
  - **Musculoskeletal**
  - **Special sense organs**
  - **Respiratory**
  - **Cardiovascular**
  - **Reproductive**
  - **Digestive**
  - **Genito-urinary**
  - **Hemic and lymphatic**
  - **Skin**
  - **Endocrine**
- **Any mental or psychological disorder.**

### **INCLUDED:**

- **Physical Impairments:**
  - **Orthopedic**
  - **Visual**
  - **Speech**
  - **Hearing**
  - **Cerebral palsy**
  - **Muscular dystrophy**
  - **Multiple sclerosis**
  - **Diabetes**
  - **Other contagious or non-contagious diseases/infections**
  - **Tuberculosis**
  - **Traumatic brain injury**
  - **Past drug addiction**
  - **Alcohol addiction**
  - **Epilepsy**
  - **Cancer**
  - **Heart disease**
  - **HIV disease or AIDS**
- **Mental/Psychological Impairments (which are more than mild and last more than a few months), which might include:**
  - **Mental retardation**
  - **Organic brain syndrome**
  - **Emotional illness**
  - **Mental illness**
  - **Specific learning disabilities**
  - **Major depression**
  - **Bi-polar disorder**
  - **Anxiety disorders**
  - **Panic disorder**
  - **Obsessive compulsive disorder**
  - **Post-traumatic stress disorder**
  - **Schizophrenia**
  - **Personality disorders**
  - **Most DSM-IV mental disorders**

**EXCLUDED:**

■ **Drugs:**

- **Current use of unlawful drugs**
- **Current illegal use of prescription drugs**

(“Current” = use occurring recently enough to indicate the individual is actively engaged in such conduct or that continuing use is a real and ongoing problem; not necessarily limited to a certain day or within a matter of days or weeks before the employment action in question)

■ **Sex-Related Conditions:**

- **Sexual preference (homosexuality and bisexuality)**
- **Sexual behavior disorders (transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments)**
- **Pregnancy (but pregnancy is treated as a disability under the Pregnancy Discrimination Act and must be treated no differently than other disabilities, such as “disabilities” under the ADA)**

■ **Miscellaneous**

- **Criminal behavior disorders (kleptomania, pyromania)**
- **Some compulsive behaviors (compulsive gambling)**
- **Physical characteristics (eye color, hair color, left-handedness, normal range of height, normal range of weight, normal range of muscle tone)**
- **Common personality traits not symptoms of a mental/psychological disorder**
- **Environmental, cultural or economic disadvantage (poverty, lack of education, prison record)**
- **Characteristic predisposition to illness or disease**
- **Age**

## **WHAT IS A “MAJOR LIFE ACTIVITY”?**

- **Basic activities that the average person in the general population can perform with little or no difficulty**

### **INCLUDED:**

- **Caring for oneself**
- **Performing manual tasks**
- **Walking**
- **Seeing**
- **Hearing**
- **Speaking**
- **Breathing**
- **Learning**
- **Sitting**
- **Standing**
- **Lifting**
- **Reaching**
- **Working**
- **Reproduction**
- **Thinking/Concentrating ?**
- **Interacting with Others ?**
- **Sleeping ?**

## **WHAT DOES “SUBSTANTIALLY LIMITS” MEAN?**

- **Unable to perform a major life activity (even with the use of mitigating measures such as medicine, assistive devices or prosthetic devices)**
- **Significantly restricted as to the condition, manner or duration of performing a major life activity (even with the use of mitigating measures such as medicine, assistive devices or prosthetic devices) compared to the average person**

**(NOTE: Temporary, non-chronic impairments of short duration with little or no long term or permanent impact are usually not disabilities. Examples include broken limbs, sprained joints, concussions, appendicitis, flu, obesity, etc.)**

## **NOW THAT WE KNOW WHAT A “DISABILITY” IS AND IS NOT, WHAT IS PROHIBITED AND REQUIRED UNDER THE ADA?**

### **WHAT IS REQUIRED?**

- **Providing equally effective employment opportunities for individuals with disabilities (allowing those with disabilities the opportunity to achieve the same end results as other employees in the same job, even though different methods might be used)**
- **Making reasonable accommodation of an individual’s disability (to the extent that a reasonable accommodation is available and to the extent that the accommodation would not pose an undue hardship)**
- **Engaging in an interactive process with an individual who has a disability to determine if a reasonable accommodation exists**
- **Preserving the confidentiality of information about an individual’s disabilities, need or request for accommodation, actual accommodations made, and related medical information**

### **WHAT IS PROHIBITED?**

- **Making inquiries about disabilities unless they are permitted inquires under the ADA**
- **Discriminating or taking adverse employment action against an individual because of his/her current disability, past disability, or what you perceive is or might be a disability (even if it turns out not to be a protected disability at all)**
- **Failing to honor a request for accommodation of a disability (unless there is no reasonable accommodation available or unless undue hardship would result)**
- **Forcing an employee to accept an accommodation when the employee has neither requested one, doesn’t want one, or doesn’t need one.**
- **Failing to preserve the confidentiality of information about an individual’s disability**
- **Retaliating against any individual for asserting or supporting an ADA claim**

## **PERMISSIBLE AND IMPERMISSIBLE COMMENTS, INQUIRIES, AND CONSIDERATIONS**

Impermissible comments, inquiries, and considerations normally arise either:

1. Because of stereotypes, assumptions, and perceptions; or
2. Through ignorance of the law.

### **AVOID STEREOTYPES, ASSUMPTIONS, AND PERCEPTIONS**

**Examples of Stereotypes, Assumptions, and Perceptions That Could Get You Into Trouble:**

1. People with disabilities can't do the job and are slower. We shouldn't hire them.
2. Employees with disabilities need to be coddled. We need to treat them with kid gloves and expect less of them.
3. An employee who has had a past injury or disease isn't as capable of performing the job.
4. An employee who has had a past injury might hurt himself/herself again the future. Therefore, we should remove certain duties from the job, impose our own work restrictions, or require an accommodation.
5. If an employee requests a leave of absence due to a medical condition, it means he or she is not reliable or will have a bad attendance record once he/she returns to work.
6. Anyone who has had a worker's compensation injury can't be trusted; they are malingerers and we should get rid of them.
7. An employee who is given medical restrictions by his/her doctor is just trying to get out of doing the whole job.
8. If an employee has alcohol on the breath or tests positive on a drug test, he/she is an addict. If we don't fire him/her, we should at least require treatment for the addiction.
9. Pregnant women can't do work that involves exertion or physical effort.
10. Pregnant women won't return to work after the baby is born.

## **INQUIRIES ABOUT DISABILITIES**

### ■ **Pre-Offer - Applicants**

**NO inquiries can be made about disabilities before an offer is made.**

**This includes on the on the employment application, during interview, in checking references, through background reports, or in any communications.**

**It is illegal before making an offer to give a physical or psychological exam, have the applicant complete a health questionnaire, obtain the applicant's worker's compensation history, ask the applicant how many days he/she missed at other jobs due to illness, or solicit other information that is likely to elicit information about a disability.**

**BUT can:**

- 1. Ask about ability to perform job-related functions;**
- 2. Ask the applicant to describe or demonstrate how he/she would perform job-related functions if:**
  - a. The disability is readily observable and you believe in good faith that it might interfere with job performance;**
  - b. The applicant volunteers that he/she has a disability which might interfere with job performance;**
  - c. All applicants for that job are asked to describe or demonstrate how they would perform the job-related functions.**
- 3. Ask what type of accommodation the applicant may need if the applicant volunteers that he/she will need an accommodation (you can ask about the type of accommodation, but not about the disability that makes an accommodation necessary).**
- 4. Can require physical agility tests (to determine strength and endurance) and pre-employment drug tests, since they are not considered medical inquiries and are permitted.**

### ■ **Post-Offer (After a Conditional Offer is Made) – Job Offerees**

**Can generally ask about disabilities after an offer is made as long as all job offerees for that job are asked the same questions and only job-related information is used afterwards**

■ **Employees**

After an employee has started employment, it is only permissible to make inquiries about disabilities, health, and medical conditions ***if it is job-related and consistent with business necessity.***

**Situations In Which Inquiries About Disabilities Can Be Made:**

The following situations generally allow an employer to make inquiries about the employee's medical situation:

1. If it is in response to a request for accommodation; or
2. If it is in response to a request for a leave of absence due to disability, pregnancy, or a serious health condition; or
3. There is a legitimate question about the employee's current fitness for duty; or
4. There is a legitimate question about the employee's ability to safely perform a job or there is a question about whether the employee poses a "direct threat" (poses a significant risk of substantial harm to the safety/health of himself/herself or others).

**Permissible Types of Inquiry:**

1. Nature of the disability
2. Diagnosis and prognosis
3. How the disability impairs the employee's ability to perform the job
4. Whether the employee needs an accommodation
5. What type of accommodation the employee thinks will work
6. Details about any medical evaluation and treatment that has been done in connection with the disability (by whom, when, what, where, etc.)
7. Whether the employee has medical restrictions and details about the restrictions (nature of the restrictions, how long they will last, etc.)

## WHAT INQUIRIES CAN BE MADE ABOUT DISABILITIES?

<u>Type</u>	<u>External Applicants (Pre-Offer Stage)</u>	<u>External Applicants (Post-Conditional Offer Stage)</u>	<u>Employees</u>
- Affirmative Action Data (Self-ID & Requests)	Yes	Yes	Yes
- Physical exam	No	Yes (C, D)	Yes (B, E)
- Psychological exam	No	Yes (C, D)	Yes (B, E)
- Health questionnaire	No	Yes (C, D)	Yes (B, E)
- Work, comp. history	No	Yes (C, D)	Yes (B, E)
- Physical agility test	Yes (A, C)	Yes (A, C)	Yes (A, C)
- Drug test	Yes	Yes	Yes
- Alcohol test	No	Yes (B, D)	Yes (B, E)
- <u>Specific questions</u> (oral and written):			
- About existence of a disability, its nature of severity, medical condition, physical or mental limitations	No	Yes (A, C)	Yes (B, E)
- About ability to perform job-related functions (essential and non-essential)	Yes	Yes	Yes
- About smoking	No (Missouri)	Yes	Yes
- About history of illegal drug use	No	Yes (B, D)	Yes (B, E)
- <u>Specific requests:</u>			
- Describe how you would perform job-related functions (essential and non-essential) with or without reasonable accommodation	Yes (D, F)	Yes (C, D)	Yes (B, E)
- Provide evidence of not currently using drugs	Yes	Yes	Yes
<p>A If given to all similarly-situated applicants/employees</p> <p>B If job-related and consistent with business necessity</p> <p>C If only job-related criteria consistent with business necessity are used afterwards to screen out/exclude the applicant, at which point reasonable accommodation must be considered</p> <p>D If all entering employees in same job category are subjected to it and subjected to same qualification standard</p> <p>E But only for following purposes:</p> <ul style="list-style-type: none"> <li>- To determine fitness for duty (still qualified or still able to perform essential functions)</li> <li>- To determine reasonable accommodation</li> <li>- To meet requirements imposed by federal, state or local law (DOT, OSHA, EPA, etc.)</li> <li>- To determine direct threat</li> </ul> <p>F Can be requested of a particular individual if the disability is known and may interfere with or prevent performance of a job-related function</p>			

## **COMMON ILLEGAL INTERVIEWING QUESTIONS**

1. **Improper:** *How many times were you absent during your last job due to illness?*

**Because:** An employer may not ask any question that is likely to elicit information about any disability that the employee may have or has had..

**Proper:** How many times were you absent during your last job?
2. **Improper:** *Have you ever filed a worker's compensation claim?*

**Because:** An employer may not ask any question that is likely to elicit information about an applicant's past or present disability.

**Proper:** Have you ever been counseled or disciplined for violating a safety rule? What kind of safety record did you have at past jobs?
3. **Improper:** *Have you ever been injured on the job?*

**Because:** An employer may not ask any question that is likely to elicit information about any disability that the employee may have or has had.

**Proper:** Have you ever been counseled or disciplined for violating a safety rule?
4. **Improper:** *How often do you drink alcohol and approximately how much?*

**Because:** An employer may not ask any question that is likely to elicit information about a disability. Since alcoholism can be a disability, and since it is related to how much and how often an individual drinks, the above question would potentially allow the employer to determine if the applicant has an alcohol abuse problem.

**Proper:** Do you drink alcoholic beverages? (Permissible, but about all an employer can lawfully ask. Since the answer is unlikely to elicit any useful job-related information, employers should stay away from alcohol-related questions all together.)
5. **Improper:** *Are you pregnant or do you plan to have children in the future?*

**Because:** It generally is a violation of the Pregnancy Discrimination Act to ask such a question.

**Proper:** As a general rule, it is legally risky to ask any questions related to pregnancy or plans to have children. Don't go there!

6. **Improper:** *Do you have a physical impairment that would affect your ability to do the job?*

**Because:** An employer may not ask any question that is likely to elicit information about an applicant's disabilities.

**Proper:** Can you perform the essential duties of the job?  
Can you perform the essential duties of the job with or without an accommodation?

7. **Improper:** *Will you need any kind of accommodation in order to perform the job?*

**Because:** An employer may not ask any question that is likely to elicit information about an applicant's disabilities. Asking if the applicant needs an accommodation is the same as asking if the applicant has a disability.

**Proper:** (1) Can you perform the essential job duties with or without an accommodation?  
(2) Please demonstrate or describe for me how you would perform the essential duties of the job.

8. **Improper:** *Have you ever filed a disability discrimination charge against any prior employer?*

**Because:** It would be considered retaliation to reject an applicant if one of the reasons is because he/she had filed a discrimination charge or lawsuit against a previous employer.

**Proper:** [Try to find out if the applicant has a "victim" or "entitlement" mentality by asking job-related questions.]  
(1) What 3 things do you expect of any employer, and what 3 things are you willing to give in return?  
(2) Tell me about your work ethic.  
(3) What does the term "loyalty" mean to you in today's workplace?  
(4) Tell me about situations at work where you believe you were treated unfairly.

**INFORMATION COMMONLY VOLUNTEERED**  
**BY APPLICANTS AND INTERVIEWEES**

1. **Be prepared to make proper responses to the following information if it is volunteered by an applicant on the application or during the interview.**
2. **As a general rule, the best (and usually the only proper) response is to say:**  
  
*“We don’t consider that issue as relevant during the hiring process as to whether or not you are qualified for the job. Let’s try and stay focused on your qualifications and why you believe you are qualified for the job.”*
3. **Information about possible disabilities that applicants sometimes disclose either intentionally (trying to set the employer up for a claim), because the applicant believes it is important for the employer to know, or because the applicant doesn’t know any better:**
  - a. **A physical or mental disability or medically-related work restrictions**
  - b. **The need for a reasonable accommodation under the ADA if hired**
  - c. **Previous workers’ compensation claims/workplace injuries**
  - d. **The need for a medical leave to have planned surgery or treatment sometime down the road**
  - e. **Use of prescription drugs**
  - f. **Pregnancy or upcoming need for pregnancy leave**

## **SAMPLE RESPONSES TO SENSITIVE INFORMATION VOLUNTEERED BY AN APPLICANTS AND INTERVIEWEES**

1. **Applicant:** I have had cancer in the past, and it's very important for me to know if your health insurance will cover any re-occurrence.

**Interviewer:** At this point, we are just in the interviewing process. The purpose of the interview is to determine if you are qualified for the job. Whether or not you have had cancer is not relevant right now. If an offer is made to you, we will cover information about benefits at that time.

2. **Applicant:** I have a history of back problems. I don't have a problem right now, but my doctor told me to avoid heavy lifting.

**Interviewer:** Are you saying that you are unable to perform the essential duties of the job? Will you be able to perform the essential duties of the job? Will you need an accommodation?

3. **Applicant:** I will need an accommodation to perform this job because of diabetes and my need to take medication at prescribed intervals.

**Interviewer:** What type of reasonable accommodation will you need? (But the employer may not ask about the disability itself.)

4. **Applicant:** (The applicant has a clearly obvious and noticeable impairment such as a severe visual impairment. The applicant does not say anything about it, but the interviewer notices and wonders whether the applicant will be able to perform the job since the job involves a substantial amount of computer work.)

**Interviewer:** You seem to have a visual impairment that might affect your ability to perform the job. Will you need any type of accommodation in order to perform essential job duties? (If applicant says "yes," the interviewer may ask about the type of accommodation that the applicant will need. If applicant says "no," the interviewer may ask the applicant to describe or demonstrate how he/she would perform the essential job duties.)

5. **Applicant:** At my last job, I was involved in an accident at work and hurt my back. I filed a worker's comp claim, and it still hasn't been settled.

**Interviewer:** Right now we're just trying to determine if you are qualified for the job. The fact that you hurt yourself on your last job and the fact that you have a pending worker's compensation claim are not relevant. The main thing that is important is whether you can perform the essential duties of this job. Do you think you can perform the essential duties of the job with or without an accommodation?

6. **Applicant:** I am scheduled to have prostate surgery next month. I really need this job so that I have health insurance coverage before the surgery. I will also need six weeks off for the surgery.

**Interviewer:** Aside from the fact that you have surgery coming up, will you be able to perform the essential functions of the job? Are you telling me that you will need a leave of absence as an accommodation?

7. **Applicant:** I'm taking some prescription drugs right now that sometimes makes me drowsy. Just thought you ought to know.

**Interviewer:** Thank you for telling us, but at this point, it's not really relevant to whether or not you are qualified for the job. If you are offered a job, you should remind us at that time about the prescription and whether you will need some type of accommodation. In the meantime, let's focus again on your qualifications.

8. **Applicant:** I'm pregnant, although you probably can't tell because I'm only four months along. I'm going to need a pregnancy leave when the baby is born. Okay?

**Interviewer:** Whether or not you would be eligible for a pregnancy leave is covered by our leave of absence policies. If you are offered a job, you will not be eligible for FMLA leave at the time of the birth. I don't know if you would be eligible for a pregnancy leave. I would have to ask HR. In the meantime, let's talk some more about your job history and qualifications for this job.

## **DEFINITION OF REASONABLE ACCOMMODATION**

### **Generally:**

- A means by which any type of barrier to the equal employment opportunities of an individual with a disability is removed or alleviated

### **Specifically:**

- Any appropriate and reasonable (effective, but not necessarily the best, most expensive or least readily available),
- Change (modification or adjustment) in the work environment or in the way/manner things are customarily done,
- That enables a qualified individual with a,
- To perform the essential duties of the job, and
- Does not pose an undue hardship on the employer.

## **THE ACCOMMODATION PROCESS**

### **A. Step 1 – Initiating or Raising the Subject of Accommodation**

1. **An employee requests an accommodation (which is the employee's obligation, especially if the disability is not-observable). No magic language is required, and the ADA does not need to be mentioned. In some situations, an employee uses his/her disability, health, or medical condition as an excuse for poor performance or behavior (and when that happens, you should consider it a request for accommodation).**

**Requests for accommodation may be raised in many ways, including the following:**

- a. **I need an accommodation.**
  - b. **My medical condition is making it difficult for me to perform my job or all parts of my job.**
  - c. **I need to work fewer hours because of my injury.**
  - d. **I need a leave of absence due to a health problem.**
  - e. **I was absent or late because my medication made me sick/drowsy.**
  - f. **My doctor gave me medical restrictions. He/she says I can't do.....**
  - g. **The reason my performance has been bad is because I've been really sick.**
  - h. **The reason my attendance is bad is because of my illness.**
2. **The following factors are present, which gives the employer the right to ask if an employee needs an accommodation:**
    - a. **The disability is observable or the employer otherwise has knowledge of it;**
    - b. **The employee is having difficulty performing the job or is behaving in an inappropriate way;**
    - c. **The employer has a good faith belief that the disability may be causing the performance or behavior problems; and**
    - d. **The employee then indicates that he/she may need an accommodation when asked by the employer if one is needed.**

**B. Step 2 – The Interactive Accommodation Process**

**Once the accommodation process has been initiated, both the employer and the employee have an obligation to engage in interactive discussions regarding the matter. If the employer fails to engage in interactive discussions, it is a violation of the ADA and the employer is subject to punitive damages. If the employee refuses to engage in the interactive process (including a refusal to provide consent for the employer to communicate with the employee's health care provider and obtain verification of the disability), the employee loses his/her protection under the ADA.**

**The purpose of the interactive process is:**

- 1. To identify what parts of the job the employee cannot perform due to the disability;**
- 2. To obtain medical verification of the disability and the need for accommodation (which the employer has the right to require, and which the employee is obligated to provide);**
- 3. To identify possible accommodations that might exist and would be effective (the identification of options is done by the employee, the employer, and sometimes the employee's and/or employer's health care providers);**
- 4. To solicit the employee's input and preferences (if more than one accommodation is available);**
- 5. To select the accommodation (which is the employer's right); and**
- 6. To implement the accommodation.**

## **EXAMPLES OF REASONABLE ACCOMMODATIONS**

### **INCLUDED:**

1. Making facilities (including work areas related to the performance of essential job functions and non-work areas such as restrooms, break rooms, training rooms, cafeterias, lounges, gyms, and auditoriums which the employer provides to its employees) readily accessible to and usable by the disabled (can be approached, entered and used easily and conveniently)
2. Providing reserved parking spaces
3. Providing new or modified equipment
4. Providing qualified readers or interpreters
5. Adjusting or modifying tests, training materials or policies
6. Providing personal assistants to help with specified duties related to the job (but not to actually perform essential functions)
7. Providing job coaches to train or on the job or providing additional supervision
8. Allowing an employee to use paid time off (such as vacation) to use in connection with disability-related needs or granting a leave of absence.
9. Restructuring jobs (reallocating or redistributing non-essential job functions or changing when or how an essential function is performed)
10. Allowing a disabled individual to provide and use his/her own equipment, aids or services at his/her own cost or by sharing the cost if the employer is not required under ADA to provide them (because of undue hardship or other legal reason) or if the individual voluntarily wishes to do so
11. Reassigning a disabled employee (not applicants) to an equivalent (in terms of pay, status, etc.) and vacant (either currently vacant or which will become vacant within a reasonable amount of time) job for which he/she is qualified (but only if reasonable accommodation can not be made in his/her current job)
12. Reassigning a disabled employee (not applicants) to a lower-graded and vacant (either currently vacant or which will become vacant within a reasonable amount of time) but only if reasonable accommodation in his/her current job or an equivalent job is not possible)
13. Modifying work schedules or hours (including allowing part-time schedules)

14. **Permitting use of paid time off for necessary treatment or permitting use of unpaid time off for necessary treatment (potentially including more unpaid time off than the employer's leave of absence policies allow)**
15. **Providing sound-proofed rooms, room dividers, partitions, visual barriers between workspaces, reducing or adjusting noise levels, allowing an employee to wear headphones**
16. **Allowing employees to tape record training sessions or meetings**
17. **Allowing employees to work at home (maybe...and only then in extraordinary circumstances)**
18. **Allowing employees to drink beverages at their work stations**

### **EXCLUDED**

1. **Lowering performance or behavior standards or tolerating an excessive attendance problem (disability is not an excuse)**
2. **Eliminating essential duties, customizing the job to fit employee's restrictions, or creating light duty**
3. **Creating jobs**
4. **Promoting an employee to a vacant job**
5. **Bumping an employee from his/her job**
6. **Maintaining the salary of an employee reassigned from a higher-paying job to a lower-paying one if the employer does not maintain salaries of non-disabled employees who are demoted**
7. **Placing a disabled applicant (external or internal) in a job other than the vacant one for which he/she specifically applied)**
8. **Restructuring essential functions of the job to fit the skills of a disabled individual who is not otherwise qualified for the job**
9. **Providing items, adjustments or modifications that are primarily for the personal use or benefit of the individual (may be job-related but also assist the individual throughout his/her daily activities on and off the job, such as wheelchairs, eyeglasses, hearing aids, private hot plates or hot pots, private refrigerators)**

## **THE ORDER OF ACCOMMODATIONS**

**There is a preferred order in which accommodations must normally be considered:**

- 1. First, accommodate the employee in his/her current job by modifying job methods (not end results), if possible. The employee must still be able to perform all essential job duties.**
- 2. Second, if the employee's only need is for a temporary part-time schedule (restricted work hours), determine if the employer's needs can still be met if the employee works a temporary part-time work schedule.**
- 3. Third, if there is an opening at the same job grade level for which the employee is qualified and which can accommodate the disability, place the employee there.**
- 4. Fourth, if there is an opening at a lower job grade level for which the employee is qualified and which can accommodate the disability, place the employee there.**
- 5. Fifth, if the employee cannot work at all, place the employee on leave of absence for a specified period of time. If the employee is eligible for FMLA leave, an FMLA leave would be a required accommodation. If the employee is not eligible for FMLA leave or has exhausted it, determine if a leave would be reasonable, and if so, grant the leave for 30-day increments at a time, with the employer to determine if any further extension will be reasonable at the end of each 30-day period. In determining whether a leave or extension is reasonable (assuming that the employee is not eligible for FMLA leave), the employer can and should consider whether it can hold the employee's job open during the leave. The employer is required to hold the job open as a reasonable accommodation, but whether it is reasonable to do so depends on the type of job, how critical the job is, whether other employees can fill in, whether a temporary can fill in, how long the employee will on leave of absence, how long it would take to hire a permanent replacement, and other factors.**
- 6. Sixth, once an employee has permanent restrictions that cannot be accommodated in the employee's current job or any other open job for which the employee is qualified, the only option is to terminate the employee.**

## **ADA ANALYSIS**

### **Step 1**

Is the individual **qualified** for the job regardless of the disability?

Does the individual meet the employer's job-related qualification/eligibility standards for the job? Does the individual meet the job's prerequisites in terms of education, experience, skill, licenses, safety, physical and other job-related requirements?

### **Step 2**

Is the individual currently performing the essential functions of the job at the same level of performance, production and conduct to which other employees are held under uniformly applied standards or criteria?

### **Step 3**

Has the individual requested an accommodation? Has the employee indicated that he/she can't do certain job tasks because of a medical condition? Has the employee requested a leave because of a health problem?

### **Step 4**

Does the individual really have a disability?

Does the individual have: 1) a physical or mental impairment which is not temporary in nature; 2) which substantially limits; 3) a major life activity?

### **Step 5**

Can the disability be *reasonably* accommodated? Is a reasonable accommodation available?

### **Step 6**

Does the individual pose a "direct threat"?

Does the individual pose a significant risk of substantial harm to his/her own safety or health or to the safety or health of others which cannot be eliminated or reduced with reasonable accommodation? (There must be a high probability of risk based on an individualized assessment of the individual's present ability to safely perform the essential job functions using reasonable medical judgment and best objective evidence, taking into account the duration of the risk, the nature of the potential harm, severity of the potential harm, likelihood that the potential harm will occur, and imminence of the potential harm.)

## CONFIDENTIALITY

- 1. All information about an employee's disability or medical condition (past, present, or projected) *is considered confidential*. Under the ADA, the information *must be collected and maintained in separate medical files* and treated as confidential medical records.**
  
- 2. The ADA (Americans with Disabilities Act) has *special rules restricting disclosure of information about an offeree's or employee's medical condition*. More specifically, information related to disability (included medical condition, need or request for accommodation, and any accommodations provided) may *not* be shared by management or supervisory employees (including with each other) except on a strict and limited "need to know" basis, as follows:**
  - a. Supervisors and managers (in the employee's direct chain of command, or who have supervisory authority over the employee) may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.**
  
  - b. If there is an HR department or other department charged with handling disability issues, accommodation requests, or processing leaves of absence, authorized personnel in that department may have access to information about disabilities in order to perform their jobs and to handle the foregoing matters.**
  
  - c. Medical, first aid, and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.**
  
  - d. Government officials investigating compliance with the ADA must be provided relevant information upon request.**
  
- 3. If any employee asks any management or supervisory personnel about the disability of another employee, why an employee may be on a leave of absence, or why it appears that the employee has been given special treatment, the manager or supervisor is to: (a) explain that it is a confidential matter and that you believe it would be inappropriate to discuss the matter; and (b) say "if it were you, would you want us discussing your personal situation with anyone else?"**

**SAMPLE Cover Sheet for Those Who Request or Come to Pick up the FMLA Packet for Pregnancy, Birth or Placement of a Child for Foster Care or Adoption**

**Family and Medical Leave Packet**  
Pregnancy, the Birth of a Child, or the Placement of a Child for  
Adoption or Foster Care

Congratulations on your happy news. As you probably know, certain absences associated with your pregnancy, the birth of your baby, or the placement of your child will qualify for coverage under the Family and Medical Leave Act. We want to make sure your absences are designated properly as FMLA-qualifying or non-FMLA-qualifying. Accordingly, we need your help.

The documents enclosed in this packet are:

1. A Request for Family and Medical Leave Form (green).
2. Two copies of an Employee Acknowledgment of FMLA Leave Policy (yellow).
3. A copy of our Leave of Absence Policy.
4. A Labor Department Fact Sheet Summarizing the Family and Medical Leave Act Requirements.
5. An Important FMLA Reminder Sheet.

We need you to complete the Request for Family and Medical Leave Form (green), identifying the date when your baby or child is expected (delivery or arrival for placement). This will help the members of your department plan coverage for your absence.

We also need you to carefully read and complete the Employee Acknowledgment of FMLA Leave Policy (yellow). Please sign one copy and return it to us as soon as possible. You should keep the other copy and consult it regarding your rights and duties when taking FMLA leave. We ask that you also please carefully review the XYZ Leave of Absence Policy and Labor Department Fact Sheet.

**Pregnancy-Related Issues**

If you are pregnant, there may be times when you will be absent from work due to your pregnancy (either illness-related or for a routine doctor's visit). It is imperative that you communicate clearly with your supervisor at all times regarding these absences. We want to make certain the absences are categorized accurately as "FMLA," schedules are set properly, and your work is covered when you are not available. We ask that you schedule your appointments on your days off or in a manner that will not interfere with the operations of your department. It is almost impossible for us to categorize absences accurately and schedule the work appropriately without your help.

If you have missed work at anytime leading up to this point and your absence was related to your pregnancy, please let us know immediately what days and times were pregnancy-related. We will make sure those dates are designated as FMLA-covered. If we do not receive this information, we will consider the absences as non-FMLA-qualifying and subject to our normal attendance policies.

At this time we do not anticipate that we need a Certification of Health Care Provider Form from your doctor. There are many reasons why that may change so please do not be surprised or irritated if we request one in the future. The form will simply help us accurately administer our policies.

### **Mailing or Returning Information to the Human Resources Department**

You may personally return these documents to our office, send the documents interoffice mail to the attention of \_\_\_\_\_, or mail the documents to:

**<FILL IN NAME AND ADDRESS FOR MAILING>**

We sincerely wish you the best with your pregnancy, the birth of your baby, and the care of your new child. If you have any questions about the FMLA or any of the enclosed documents, please contact the Human Resources department at [FILL IN NUMBER].

## IMPORTANT FMLA REMINDER SHEET SAMPLE

- Read all FMLA materials in packet very carefully.
- Complete and return one copy of Employee Acknowledgment of FMLA Leave Policy Form (yellow). ALL employees must complete and return this form.
- Complete and return Request for FMLA Leave Form (green), if included in your packet.
- Have your Health Care Provider complete the Certification of Health Care Provider Form (blue), if included in your packet and applicable to your leave.

\_\_\_\_\_ Return the form to us within FIFTEEN DAYS of receiving this packet. The form must be complete, legible, and understandable.

\_\_\_\_\_ Send us a NEW completed Certification of Health Care Provider Form every THIRTY DAYS, at least.

**(Rule of Thumb: If you cannot read and understand what your health care provider wrote on the form, we probably will not be able to read or understand it either. Please help save everyone time; ask your provider to be complete and write legibly.)**

- Contact your immediate supervisor the FIRST DAY of each month. Tell your supervisor your status and when you plan to return to work, if you know.

Write to your immediate supervisor **THREE DAYS** in advance (at least) to request that you be allowed to return to work.

Provide your supervisor with a Fitness for Duty Report **BEFORE** you return to work. The Fitness for Duty Report must refer to our statement of essential functions.

**(Schedule all appointments and scheduled leaves in the least disruptive manner for your department. To the extent possible, you must follow all scheduling requirements for your department, including submitting written requests for time off in a timely manner consistent with your department practices.)**

Communicate openly and honestly with your supervisors and Human Resources to make sure:

\_\_\_ All of your absences are designated properly as FMLA-qualifying or non-FMLA. Tell your supervisor every time an absence should be categorized as an FMLA-qualifying absence.

\_\_\_ Your absence or absences result in as little negative impact on your department and co-workers as possible.

Send your payments for your health care benefits **BEFORE** they are due to make sure they are received in a timely manner.

Call the Human Resources Department (ext. \_\_\_) if you have any questions or concerns about your leave.

## SAMPLE LETTER

NAME  
ADDRESS

Dear NAME,

I was sorry to hear about your situation and hope you have a speedy recovery. Please let me know if I can be of any help.

Based on our conversation, I have enclosed a copy of our FMLA and Certification of Health Care Provider forms. Please have your physician complete the Health Care Provider form and return it to me as soon as possible.

I want to make sure we are protecting each of your qualifying FMLA days properly. I have outlined below the absences that have been counted as protected Family and Medical Leave Act time:

<u>Week Ending</u>	<u>Dates Missed</u>
01/28/01	01/24, 01/25, 01/26
02/04/01	01/29, 01/30, 01/31, 02/1, 02/02
02/11/01	02/05, 02/06, 02/07, 02/08, 02/09
02/18/01	02/12, 02/13, 02/14, 02/15, 02/16
06/03/01	05/30, 05/31, 06/01
06/10/01	06/04, 06/05, 06/06, 06/07, 06/08
06/17/01	06/11, 06/12, 06/13, 06/14, 06/15

You are entitled to twelve weeks of FMLA-protected time away from work. This calculates to be approximately sixty working days. As of June 15, 2001, 31 days have been protected and designated as FMLA-qualifying; thus, you appear to have 29 days left for FMLA-protection.

This can be a little confusing. If I have missed designating any days as qualifying for protection, please let me know. Likewise, if I have incorrectly designated a day as FMLA-protected, please let me know. Finally, please let me know if you have any questions at all about these designations, the FMLA, or your leave of absence.

I have enclosed several copies of my business card, I have highlighted my direct line and fax number. Please do not hesitate to contact me if I may be of any assistance in any way. Again, we are hope you are feeling better soon.

Sincerely,

NAME  
Employee Benefits Supervisor