

# **Taking Attendance - Best Practices for Controlling and Addressing Attendance Issues Under the Shadow of the ADA and FMLA\***

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\*Nothing in this outline is to be construed as legal advice

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## I. INTRODUCTION

In a perfect world, employees would have perfect attendance. But as employers know all too well, employees do not have perfect attendance. Employee attendance is a tricky issue that every employer must regularly deal with, and in many circumstances, becomes further complicated when the Family and Medical Leave Act (“FMLA”) and/or the Americans with Disabilities Act (“ADA”) plays a role in an employee’s absence.

This outline discusses the basic leave and attendance requirements under both the FMLA and ADA, including when an employee’s absence is and is not protected under these laws. Additionally, this outline discusses various areas in which the FMLA and ADA have overlapping requirements and the resulting issues common endured by employers.

## II. EMPLOYEE ATTENDANCE UNDER THE FMLA

Two of the most common questions that employers have when it comes to FMLA leave are (1) when must an employer grant an employee FMLA leave, and (2) when can an employer deny an employee FMLA leave? In other words, under what circumstances can an employer control an employee’s attendance under the FMLA?

### A. Covered Employers Need Only Provide FMLA Leave to Eligible Employees.

The FMLA requires *covered employers* to provide twelve (and in some circumstances, twenty-six) weeks of unpaid leave during any twelve-month period to *eligible employees* for qualifying family and medical reasons. See 29 U.S.C. § 2612(a). Stated differently, an employer need only grant an employee’s request for a FMLA leave of absence if (1) the *employer is covered* by the FMLA, *and* (2) the *employee is eligible* to take a leave of absence.

An employer is covered by the FMLA if the employer is “engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.” 29 U.S.C. § 2611(4)(A)(i). An employee is eligible to take a qualifying leave under the FMLA from a covered employer if the employee has been employed for at least twelve months by the employer, for at least 1,250 hours of service during the previous twelve-month period, and at a worksite at which the employer employs fifty or more employees within seventy-five miles of that worksite at the time of the leave request. Id. § 2611(2)(A), (B).

### B. Covered Employers Need Only Grant Eligible Employees FMLA Leave When Taken for a Qualifying Reason.

A covered employer must permit a covered employee to be absent from work for up to twelve weeks in any twelve-month period under the FMLA for any *qualifying family or medical reason*. See 29 U.S.C. § 2612(a). However, when an employee requests FMLA leave for a reason that does not qualify for FMLA leave, an employer may deny such a request. See, e.g., Goss v. Umicore USA, No. 15-555-JJM-PAS, 2017 U.S. Dist. LEXIS 146006 (D.R.I. Sept. 8, 2017) (finding an employee’s absence for bronchitis did not implicate the FMLA because the

employee's illness did not constitute a serious health condition); Boyd v. Univ. of Detroit Mercy, No. 16-14375, 2017 U.S. Dist. LEXIS 211755 (E.D. Mich. Dec. 27, 2017) (finding an employee who was terminated for issues related to his attendance, tardiness, and performance "was not entitled to FMLA leave because his shoulder injury did not constitute a 'serious health condition'").

In relevant part, an employee or family member's "serious health condition" is perhaps the most common qualifying reason that employees request an FMLA leave of absence.<sup>1</sup> 29 U.S.C. § 2612(a)(1)(B), (C). It is also a qualifying reason that can be commonly abused by employees. A "serious health condition" under the FMLA is an illness, injury, impairment, or physical or mental condition that involves either inpatient care (including time for recovery and subsequent treatment in connection with the inpatient care) or continuing treatment by a health care provider. Id. § 2612(a)(1); 29 C.F.R. § 825.113(a).

**C. Covered Employers Need Only Grant Eligible Employees FMLA Leave if the Employee's Request is Timely and Provides Sufficient Notice.**

Although an eligible employee has a statutory right to take a leave of absence under the FMLA, the employee must give sufficient notice of their intention to take leave in order to be entitled to it. See 29 U.S.C. § 2612(e)(1). Ideally, an employee's request for FMLA leave would be unambiguous and provided to the employer well in advance of such leave. In practice, however, such leave requests are usually the exception, and not the norm. An employee's leave request that does not comply with the FMLA's requirements, however, may provide an employer with sufficient grounds to deny such a request for leave.

**1. An Employee Must Provide the Employer with Sufficient Notice of a Request for FMLA Leave.**

When requesting FMLA leave, an employee must "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave."<sup>2</sup> 29 C.F.R. at § 825.302(c). More specifically, "[a]n employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act." Id. § 825.301(b).

Thus, where an employee insufficiently indicates their reason for requesting FMLA leave, an employer may deny such a request. See, e.g., Jansson v. Stamford Health, Inc., Civil Action No. 3:16-cv-260 (CSH), 2017 U.S. Dist. LEXIS 51767, at \*73 (D. Conn. Apr. 5, 2017)

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<sup>1</sup> Other qualifying FMLA leaves that an employer must grant to an eligible employee include: (1) parenting leave, 29 U.S.C. § 2612(a)(1)(A), (B); (2) military exigency leave, 29 U.S.C. § 2612(a)(1)(E); and (3) leave to care for a military member, 29 U.S.C. § 2612(a)(3). This outline does not address the parameters of such qualifying leaves.

<sup>2</sup> Note, however, that the FMLA, in some circumstances, permits a third-party to put an employer on notice that an employee requires a FMLA leave of absence. See 29 CFR § 825.301(a) ("e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave").

(finding an employee's leave request that did not mention a need for FMLA leave, specify a leave period, or give sufficient factual information about her daughter's illness was insufficient for an employer to infer that the FMLA may apply to such a request for leave); Davidson v. Evergreen Park Cmty. High Sch. Dist. 231, No. 15 C 0039, 2017 U.S. Dist. LEXIS 77724, at \*18 (N.D. Ill. May 23, 2017) (finding employee failed to establish his employer illegally denied him FMLA leave because the employee provided insufficient notice of his need for FMLA leave to take care of his wife that was suffering from a serious medical condition). For example, an employer need not grant an employee's request for FMLA leave where the employee simply calls in "sick" without providing additional information. See, e.g., Germanowski v. Harris, 854 F.3d 68, 72 (1st Cir. 2017); see also 29 C.F.R. at § 825.301(b).

## **2. An Employee's Request for FMLA Leave to the Employer Must be Timely.**

If an employee's need for FMLA leave is foreseeable, then the "employee must provide the employer at least 30 days advance notice before FMLA leave is to begin." 29 C.F.R. § 825.302(a). If an employee's knew of their need for FMLA leave more than thirty days in advance, their failure to timely provide notice permits an employer to delay and/or deny the employee's request for such leave. Id. § 825.304(a); see, e.g., Acker v. GM, L.L.C., 853 F.3d 784, 786 (5th Cir. 2017) (finding an employee failed to demonstrate his employer interfered with his FMLA rights by imposing unpaid suspensions on the employee for taking leave that the employee failed to provide sufficient notice); Devoss v. Sw. Airlines Co., No. 3:16-CV-2277-D, 2017 U.S. Dist. LEXIS 186709, at \*12 (N.D. Tex. Nov. 13, 2017) (finding employee's FMLA interference claim failed because she did not demonstrated that she gave her employer proper notice of her intent to take FMLA leave).

When an employee's need for FMLA was unforeseeable or known less than thirty days in advance, "the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case." 29 C.F.R. § 825.304(c), (d).

## **D. The FMLA Provides Various Mechanisms that Assist Employers in Controlling Employee Absences.**

Although the FMLA requires employers to permit employees to be absent under certain circumstances, the statute and its regulations also provide employers with various tools that employers can use to help manage and control employee absences. A brief discussion regarding a number of such tools follows (*this list is not exhaustive*).

### **1. Medical Certifications.**

When an employee requests FMLA leave on the basis of a serious health condition, "an employer may require that an employee's leave . . . be supported by a certification issued by the health care provider of the employee or the employee's family member" – *i.e.*, a medical certification. 29 C.F.R. § 825.305(a); 29 U.S.C. § 2613. The use of medical certifications provides employers with a number of ways in which it can control an employee's attendance:

- An employee’s failure to **timely return a medical certification** within the time periods specified by the FMLA (fifteen days, unless not practical under the circumstances) is grounds for denial of an employee’s FMLA leave request.<sup>3</sup> See 29 C.F.R. § 825.305(d), 825.313(a)–(b); see also Robey v. Weaver Popcorn Co., No. 1:16-CV-281-TLS, 2017 U.S. Dist. LEXIS 167831, at \*10 (N.D. Ind. Oct. 11, 2017) (“[T]he failure to timely return the medical certification is evidence that undermines any claim that the Plaintiff was entitled to benefits.”).
- “In all instances in which [medical] certification is requested, it is the employee's responsibility to provide the employer with [a] **complete and sufficient certification** and failure to do so may result in the denial of FMLA leave.”<sup>4</sup> Id. §§ 825.306(e), 825.305(c); see also Keogh v. Concentra Corp., No. 16-CV-11460, 2017 U.S. Dist. LEXIS 170535 (E.D. Mich. Oct. 16, 2017) (finding the plaintiff did not establish a prima facie case of FMLA interference where the plaintiff only sought information from his employer regarding how intermittent FMLA leave worked, and never directly requested FMLA leave or provided a medical certification of a need for FMLA leave).
- Where an employer requests an employee cure an incomplete/deficient medical certification, and an **employee fails to cure such deficiencies or resubmit the certification** (within seven days), the employer may deny the employee’s request for FMLA leave. 29 C.F.R. § 825.305(c), (d); see also Alejandro v. N.Y. City Dep’t of Educ., No. 15-CV-3346 (AJN), 2017 U.S. Dist. LEXIS 49555 (S.D.N.Y. Mar. 31, 2017) (granting summary judgment to the employer on an employee’s FMLA interference claim because the employee failed to correct and supplement the medical certification as requested by the employer).

## 2. Second and Third Medical Opinions.

Where an employer has “reason to doubt” the validity of an employee’s medical certification documenting their serious health condition, “the employer can require the employee to obtain a **second opinion** at the employer's expense.” 29 C.F.R. § 825.307(b)(1) (emphasis added). Until an employer obtains such second medical opinion, the employee is “provisionally entitled” to the benefits of the FMLA. Id. § 825.307(b)(1). If the second medical opinion conflicts with the first, then an employer may require an employee to obtain a third opinion, which is final and binding.” 29 C.F.R. § 825.307(c).

Where the second and third medical opinion ultimately establishes that an employee was not entitled to FMLA leave, then an employer may treat such leave “as paid or unpaid leave under the employer's established leave policies.” Id. Moreover, an employee’s refuses to obtain

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<sup>3</sup> If such leave was foreseeable, “then an employer may deny FMLA coverage until the required certification is provided.” Id. § 825.313(a). If such leave was unforeseeable “the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.” Id. § 825.313(b).

<sup>4</sup> Note that “the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification.” Id. § 825.305(d).

a requested second medical may also be grounds for denying a request for FMLA leave. See, e.g., Curtis v. Nucor Corp., No. 3:16-cv-00009, 2017 U.S. Dist. LEXIS 19789, at \*4 (E.D. Ark. Feb. 13, 2017) (finding plaintiff's FMLA claim failed where the employer denied the employee's request for FMLA leave after requesting a second medical opinion which the employee refused to go to).

### 3. Medical Recertification.

The FMLA also provides employers with multiple opportunities to seek recertification of the serious health condition of an employee or a family member for which an employee has taken FMLA leave. See 29 C.F.R. § 825.308. At a minimum, an employer may request medical recertification every thirty days in connection with such an absence by the employee. Id. § 825.308(a). Where an employer requests recertification and the “employee *fails to provide a recertification within a reasonable time* under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.” Id. § 825.313(c) (emphasis added); see also Basham v. Select Specialty Hosp., No. 2:15-15432, 2017 U.S. Dist. LEXIS 83673, at \*24 (S.D. W. Va. June 1, 2017); Harris v. Chi. Transit Auth., No. 14 C 9106, 2017 U.S. Dist. LEXIS 154969, at \*21 (N.D. Ill. Sep. 22, 2017) (granting summary judgment to the employer on a plaintiff's FMLA interference claim where the employee failed to submit the requested certification and recertification).

Additionally, *a recertification that is incomplete* may also be grounds for denying FMLA leave. See, e.g., Hobbs v. Sloan Valve Co., No. 1:14-CV-03482, 2015 U.S. Dist. LEXIS 89629, at \*9 (N.D. Ill. July 10, 2015) (granting summary judgment to an employer that denied recertification of an employee's FMLA leave based upon an incomplete recertification form).

### 4. Fitness-for-duty Certifications.

After an employee takes FMLA leave for their own serious health condition, “an employer may [employ] a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.” 29 C.F.R. § 825.312(a).

If such a policy is utilized, an employer may delay restoring an employee to their position until the fitness-for-duty certification is provided. Id. § 825.313(d). Additionally, where an employee *fails to provide “a fitness-for-duty certification or a new medical certification for a serious health condition* at the time FMLA leave is concluded, the employee may be terminated.” Id. (emphasis added); see also Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1270 (11th Cir. 2017) (finding the employee did not demonstrate he was denied FMLA benefits where he failed to submit a fitness-for-duty certification by the end of his FMLA leave); Grant v. Hosp. Auth., No. 1:15-CV-201 (LJA), 2017 U.S. Dist. LEXIS 130113, at \*21 (M.D. Ga. Aug. 16, 2017) (finding plaintiff failed to show the employer interfered with its FMLA rights where the plaintiff never submitted a fitness-for-duty certificate as the employer required).

## 5. Employer Call-in Policies and Procedures.

Many employers maintain internal call-in policies that require employees to call into work a specific period in advance of that start of their shift should they need to be absent. Such policies are an effective tool to control employee absences. Under the FMLA, “[a]n employer may require an employee to comply with the employer’s usual and customary . . . procedural requirements for requesting leave, absent unusual circumstances.”<sup>5</sup> *Id.* § 825.302. Indeed, “even when an employee’s need for leave is unforeseeable, the regulations make clear the employee’s duty to comply with the employer’s policy.” *Acker v. GM, L.L.C.*, 853 F.3d 784, 789 (5th Cir. 2017).

Provided no unusual circumstances exist, where an employee *fails to follow the employer’s call-in policy and procedures*, “he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer’s rules provide.” *DOL FMLA Frequently Asked Questions*<sup>6</sup>; 29 C.F.R. § 825.302(d); *Acker*, 853 F.3d at 789 (finding no fact-issue on plaintiff’s FMLA interference claim where the employee failed to follow the employer’s call-in procedures on five occasions and received a disciplinary layoff as a result); *Alcegaire v. JBS USA, LLC*, No. 3:15-cv-266-DJH-CHL, 2017 WL 4288882 (W.D. Ky. Sept. 27, 2017) (finding the employee’s “failure to comply with [the employer’s] call-in requirements is fatal to her FMLA interference claim.”); *Stein v. Atlas Indus.*, No. 17-3737, 2018 U.S. App. LEXIS 8874, at \*4 (6th Cir. Apr. 9, 2018) (“[B]ecause [the employee] failed to comply with [the employer’s] notice requirements and the unusual-circumstances exception does not apply, his interference claim fails.”); *McKenzie v. Seneca Foods Corp.*, No. 16-cv-49-jdp, 2017 U.S. Dist. LEXIS 44104, at \*14 (W.D. Wis. Mar. 27, 2017) (“[A]n employer can deny FMLA leave to an employee who did not follow the employer’s internal procedural requirements for requesting FMLA leave.”).

## 6. Honest Belief Defense.

The honest belief defense only comes into play in the course of litigation. In practice, this defense allows an employer to discipline or terminate an employee *when the employer possesses an honest belief that an employee is abusing FMLA leave*. See, e.g., *Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 152 (3d Cir. 2017) (“Where an employer provides evidence that the reason for the adverse employment action taken by the employer was an honest belief that the employee was misusing FMLA leave, that is a legitimate, nondiscriminatory justification for the discharge.”); *Balding v. Sunbelt Steel Tex., Inc.*, No. 16-4095, 2018 U.S. App. LEXIS 6186, at \*9 (10th Cir. Mar. 13, 2018) (denying an employee’s FMLA claim based on his discharge shortly after he had a panic attack because the employer honestly believed that the employee lied to a client about an order and lied when confronted about the incident).

In fact, the honest belief defense defeats FMLA interference and retaliation claims, even if such belief ultimately proves to be mistaken. See *Capps*, 847 F.3d at 154 (“[A]n employer’s

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<sup>5</sup> Remember, an employer’s call-in policies must be consistently and uniformly applied and enforced for all employee absences, whether due to FMLA leave or for other reasons.

<sup>6</sup> Available at <https://www.dol.gov/whd/fmla/fmla-faqs.htm> (last visited Apr. 11, 2018).

honest, albeit possibly mistaken, belief that an employee had committed fraud, defeats an employee's FMLA retaliation claim.”) (citing Medley v. Polk Co., 260 F.3d 1202, 1207–08 (10th Cir. 2001)); Jackson v. BNSF Ry. Co., 2017 U.S. Dist. LEXIS 121636 (N.D. Tex. Aug 1, 2017) (“Defendant's honest suspicion of abuse is sufficient to defeat plaintiff's substantive FMLA rights.”). To employ this defense, an employer must show that it reasonably relied on the particular facts at issue. Marshall v. Rawlings Co. LLC, 854 F.3d 368, 380 (6th Cir. 2017) (“The honest-belief rule applies where the employer reasonably relied on the particularized facts that were before it at the time the decision was made.”) (internal quotations and citation omitted). Additionally, an employer must conduct a complete investigation into the surrounding facts and circumstances, and afford an employee an opportunity to explain their conduct, even where an employer has caught an employee in a “clear” case of FMLA fraud/abuse/misconduct.

**E. Common Employer Issues With Employee Leaves of Absence Under the FMLA.**

**1. Employee Exceeds the Allowed Number on Their Medical Certification.**

One issue employers commonly face is whether to discipline an employee that has exceeded the number of absences permitted by their FMLA medical certification. The first step in such an inquiry should be to determine whether an employer must seek recertification for his condition. See Hansen v. Fincantieri Marine Grp., LLC, 763 F.3d 832, 842 (7th Cir. 2014) (“[The employer] should have sought recertification when the frequency of [the employee’s] absences exceeded what was estimated in his certification, rather than simply denying him leave.”). An employer can seek recertification no more than every thirty days unless “circumstances described by the previous certification have changed significantly.” 29 C.F.R. § 825.308(c)(2). Thus, if circumstances have “changed significantly,” then the employer should obtain recertification before taking any further action. More often than not, however, circumstances will not have changed significantly. For instance, a single absence beyond that provided by the medical certification is unlikely to constitute a “significant change” that would allow an employer to obtain recertification. In such a case, an employer should wait until there have been multiple absences beyond the allowed number on the medical certification to seek recertification. Remember, the number of absences stated on a medical certification is merely an estimate. See Hansen, 763 F.3d at 843.

Of course, the ultimate question remains, when can an employer impose discipline or terminate an employee for such behavior? Unfortunately, definitive guidance on this issue is lacking. As a general rule of thumb, an employer can probably impose discipline after obtaining recertification, and allowing a number of additional absences beyond that new certification. However, imposing discipline in these circumstances still has risk. See, e.g., Hansen, 763 F.3d at 843 (finding the employer’s denial of the plaintiff's FMLA leave because his absences exceeded his doctor's estimates in the medical certification was improper). Such a decision should be made on an individual basis and the employer should ensure any discipline that is imposed is done in a consistent and uniform manner.

## 2. Employee's Abusive Pattern Using FMLA Leave.

Another common issue that employers face is when an employee repeatedly takes intermittent FMLA leave for their serious health condition in (what appears to be) an abusive pattern – *e.g.*, on Monday/Friday or before holidays. Such an issue can be difficult to control. Similar to the situation in which an employee exceeds the number of absences on their medical certification, an employer's best course of action here again is to obtain recertification of the employee's medical condition if it notices a suspicion pattern of FMLA leave use. In fact, the FMLA regulations addressing recertification provide employers with a tool to help control such abusive patterns: “[a]s part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.” 29 C.F.R. § 825.308.

If a physician confirms such a pattern is consistent with the employee's condition, the employer should continue to designate such leave as FMLA. However, if a physician states that such a pattern of leave is inconsistent with the employee's condition, then an employer may consider imposing discipline should this pattern continue. But see *Compliment v. Sanofi-Aventis US, Inc.*, No. 1:16-cv-3477, 2017 U.S. Dist. LEXIS 149006, at \*13 (S.D. Ind. Sep. 14, 2017) (finding an employee's complaint stated a cognizable FMLA retaliation claim where the employer took away her flex-time and would no longer allow her to take Fridays off after taking FMLA leave). Alternatively, as discussed above, any employer could also conduct an investigation to determine whether or not the employee is lying about the reasons they are requesting or taking FMLA leave. Remember, however, the employer must provide the employee with an opportunity to explain should the employee be found misusing their leave.

### III. EMPLOYEE ATTENDANCE UNDER THE ADA

Unlike the FMLA, the ADA does not guarantee statutorily-protected leave to qualified employees. Rather, the ADA is intended to provide equal opportunity to work to qualified individuals with disabilities. See 29 CFR § 1630.1(a). Nevertheless, in certain circumstances, an employee may still be entitled to a leave of absence under the ADA.

#### A. Only Qualified Individuals with a Disability Are (Potentially) Entitled to a Leave of Absence Under the ADA.

In the employment context, the ADA prohibits employers from “discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112. In effect, where an employee that is not a “qualified individual with a disability” requests a leave of absence under the ADA, an employer need not grant the request because such an employee is not entitled to the ADA's protections.

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such

individual holds or desires. *Id.* § 12111(8). A qualified individual is disabled within the meaning of the ADA if such individual suffers from “a physical or mental impairment that substantially limits one or more major life activities.”<sup>7</sup> *Id.* § 12102(1). Generally speaking, the definition of disability in the ADA is “construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” *Id.* § 12102(4)(A).

**B. Employers Need Only Provide Leaves of Absence that Constitute a Reasonable Accommodation Under the ADA.**

Broadly, the ADA requires employers to provide reasonable accommodation for the known physical or mental limitations of an employee or applicant, who with or without reasonable accommodation, can perform the essential functions of the job, unless the employer can demonstrate that the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5). Although the ADA’s definition of a reasonable accommodation does not mention “leave,” absent undue hardship, an employer may be required to provide leave to an employee as a reasonable accommodation. *See* 29 C.F.R. Part 1630 App., § 1630.2(o) (“permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment”).

Indeed, many courts have found granting an employee leave may be a reasonable accommodation under the ADA. *See, e.g., Moss v. Harris Cnty. Constable Precinct One*, 2017 U.S. App. LEXIS 4601, \*9 (5th Cir. Mar. 15, 2017) (“[L]eave that is limited in duration may be a reasonable accommodation to enable an employee to perform the essential functions of the job upon return.”); *Taylor v. FedEx Ground Package Sys.*, 2018 U.S. Dist. LEXIS 41411, at \*17 (D. Conn. Feb. 26, 2018) (“[M]ost other circuits and the EEOC have concluded that, under certain circumstance[s], a finite term of medical leave may constitute a reasonable accommodation.”); *Hall v. Summit Fire Dist.*, No. CV-15-08189, 2018 U.S. Dist. LEXIS 55231, at \*12 (D. Ariz. Mar. 30, 2018) (“In some cases, placing an employee on medical leave may be a reasonable accommodation.”). The EEOC also takes the position that granting leave may also be a reasonable accommodation in some circumstances. *See EEOC Enforcement Guidance: Employer-Provided Leave and the Americans with Disability Act*, (May 9, 2016) (“2016 EEOC Guidance”).<sup>8</sup> However, whether a leave of absence is required by the ADA must be determined on a case-by-case basis, and not all requests for a leave of absence will constitute a reasonable accommodation.

**1. Leave May Not Constitute a Reasonable Accommodation Where the Requested Leave is Unreasonably Lengthy.**

Some courts have indicated that an employer is not required to grant an unreasonably lengthy request for leave under the ADA. For instance, the Seventh Circuit recently found that a

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<sup>7</sup> Major life activities “include, but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(A). A major life activity “also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.* § 12102(2)(B).

<sup>8</sup> Available at <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm> (last visited Apr. 11, 2018).

multi-month leave of absence was not a reasonable accommodation under the ADA. Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), cert. denied \_\_ U.S. \_\_ (Apr. 2, 2018). After taking twelve weeks of FMLA leave, the plaintiff required and requested an additional two or three months of leave. The employer subsequently terminated the employee. The court found that such a leave of absence was unreasonable because “a medical leave spanning multiple months does not permit the employee to perform the essential functions of his job.” Indeed, the court further opined that the “[i]nability to work for a multi-month period removes a person from the class protected by the ADA.” See also, e.g., Hwang v. Kan. State Univ., 753 F.3d 1159 (10th Cir. 2014) (suggesting granting leave for more than six months is not a reasonable accommodation under the ADA); but see, e.g., Dark v. Curry Cty., 451 F.3d 1078, 1090 (9th Cir. 2006) (suggesting a three-month leave may constitute a reasonable accommodation under the ADA).

## **2. Leave Does Not Constitute a Reasonable Accommodation Where the Request Leave is for an Indefinite Period.**

Courts are in wide agreement that employers need to grant a request for an indefinite leave of absence under the ADA because such a request does not constitute a reasonable accommodation. See, e.g., Ruiz v. Paradigmworks Grp., Inc., No. 16-CV-2993-CAB-BGS, 2018 U.S. Dist. LEXIS 28878, at \*11 (S.D. Cal. Feb. 22, 2018); Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016); Menoken v. Lipnic, 2018 U.S. Dist. LEXIS 36070, at \*22-23 (D.D.C. Mar. 6, 2018); Delegado Echevarria v. AstraZeneca Pharm. LP, 856 F.3d 119, 127 (1st Cir. 2017); but see Hall v. Summit Fire Dist., No. CV-15-08189-PCT-JJT, 2018 U.S. Dist. LEXIS 55231, at \*12 (D. Ariz. Mar. 30, 2018) (“Although leave ‘of unspecified duration may not be a reasonable accommodation . . . where the employee will not be able to return to his former position and cannot state when and under what conditions he could return to work at all,’ an employer is required to at least ‘consider this option.’”) (citing Dark v. Curry Cty., 451 F.3d 1078, 1090 (9th Cir. 2006)).

The EEOC also takes the position that a request for indefinite leave does not constitute a reasonable accommodation because it imposes an undue hardship on the employer. 2016 EEOC Guidance (“[I]ndefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation.”).

## **3. Leave May Not Constitute a Reasonable Accommodation Where Attendance is an Essential Function.**

Where attendance is found to be an essential function of the job,<sup>9</sup> it is less likely that an employee’s request for a leave of absence will constitute a reasonable accommodation under the ADA. See Credeur v. Louisiana, 860 F.3d 785, 795 (5th Cir. 2017) (“The ADA does not require an employer to ‘reallocate essential functions’ to accommodate an employee with a disability.”);

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<sup>9</sup> “The term ‘essential functions’ means the fundamental job duties of the employment position the individual with a disability holds or desires.” 29 C.F.R. § 1630.2(n)(1). To a certain extent, the ADA gives consideration “to the employer’s judgment as to what functions of a job are essential . . . .” Id. § 12111(8).

Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) (“An employee who cannot meet the attendance requirements of the job at issue cannot be considered a ‘qualified’ individual protected by the ADA”). Indeed, as one court has recently explained, “because regular attendance is an essential function of a job, a plaintiff who is excessively tardy and absent from work is not qualified to perform her job and therefore cannot prevail on an ADA claim.” Wolf v. Lowe's Cos., No. 4:16-CV-01560, 2018 U.S. Dist. LEXIS 41135, at \*5 (S.D. Tex. Mar. 13, 2018) (citing Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998)); see also Watson v. Fairfax Cty., No. 1:17-cv-694, 2018 U.S. Dist. LEXIS 33257, at \*15 (E.D. Va. Feb. 28, 2018) (finding plaintiff was not a “qualified individual” under the ADA because “plaintiff was unable to perform the essential functions of her job as a mental health therapist because she was not meeting the job's attendance requirements.”); Winston v. Ross, No. 17-8041, 2018 U.S. App. LEXIS 4788 (10th Cir. 2018) (finding an employee’s request to continue to use leave donated by other employees was not required under the ADA because such a request would not enable her to fulfill the essential function of physical attendance).

Various courts have recognized attendance to be an essential function of employment. See, e.g., Credeur, 860 F.3d at 793 (“[T]here is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs.”); Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013); Wisbey v. City of Lincoln, 612 F.3d 667 (8th Cir. 2010); Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238 (9th Cir. 2012). In contrast, the EEOC has taken the position that attendance cannot be as essential function of a job under the ADA. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (Oct. 17, 2002) at Question 16, n.65 (“2002 EEOC Guidance”).<sup>10</sup>

Depending on the job and the employer’s specific operations, attendance as an essential function may include:

- Presence at the employer’s work site. See, e.g., Credeur v. Louisiana, 860 F.3d 785, 793 (5th Cir. 2017) (“[T]here is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs.”)
- Reporting for work regularly and predictably. See, e.g., Higgins v. Union Pac. R.R. Co., No. 8:16-cv-539, 2018 U.S. Dist. LEXIS 51771 (D. Neb. Mar. 28, 2018) (essential function of working full-time).
- Punctuality. See, e.g., Guzman v. Brown Cty., No. 2018 U.S. App. LEXIS 5722 (7th Cir. March 7, 2018) (finding plaintiff failed to demonstrate her termination was the result of her disability as opposed to her repeated tardiness).

#### **4. Leave May Not Constitute a Reasonable Accommodation Where Intermittent Leave is Requested**

No bright-line rules exists as to whether intermittent leave constitute a reasonable accommodation under the ADA. As a result, whether an employer must provide intermittent leave to an employee under the ADA depends on the circumstances of each case. Some courts have found intermittent leave to constitute a reasonable accommodation. See, e.g., Kazmierski

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<sup>10</sup> Available at <https://www.eeoc.gov/policy/docs/accommodation.html> (last visited Apr. 11, 2018).

v. Bonafide Safe & Lock, Inc., 2016 U.S. Dist. LEXIS 170725 (E.D. Wis. Dec. 9, 2016) (stating in dicta that an employer’s policy of permitting its vice president “to work a flexible schedule to accommodate her multiple sclerosis” was reasonable because she did administrative work). In contrast, other courts have rejected intermittent leave to be a reasonable accommodation. See, e.g., Higgins v. Union Pac. R.R. Co., 2018 U.S. Dist. LEXIS 51771, at \*24-25 (D. Neb. Mar. 28, 2018) (finding an employee’s request to decline a shift whenever he experienced “discomfort” as a result of his disability to be unreasonable).

Notwithstanding the above cases, the 2011 \$20 million settlement and Consent Decree in EEOC v. Verizon Communications, provide employers with a number of questions they can utilize in determining whether intermittent leave constitutes a reasonable accommodation under the ADA:

- Does the employee have a mental or physical impairment that substantially limits one or more major life activities as defined by the ADA, and for the period on and after January 1, 2009, as amended through the ADA Amendments Act of 2008?
- Was the absence caused by the disability?
- Did the employee (or someone else on the employee’s behalf) request through the Company’s designated process, a period of time off from work due to a disability?
- Have the employee’s absences been unreasonably unpredictable, repeated, frequent or chronic?
- Are the absences expected to be unreasonably unpredictable, repeated, frequent or chronic?
- Is the employer able to determine, from the request by or on behalf of the employee, or through the interactive reasonable accommodation process, a definite or reasonably certain period of time off that the employee would need because of a disability? and
- Does the employee’s need for time off from work as a reasonable accommodation pose a significant difficulty or expense for the employer’s business?

If all factors are met, the absence(s) must be considered “non-chargeable” and the employee cannot be disciplined or terminated based on the absence. See EEOC Press Release, Verizon to Pay \$20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011). However, this guidance also demonstrates that employers may be able to avoid liability for denying a request for intermittent leave under the ADA by showing that the employee’s attendance was and is expected to be unreasonably unpredictable, repeated, frequent, or chronic.

## **5. Leave Does Not Constitute a Reasonable Accommodation Where it Imposes an Undue Hardship on the Employer.**

As mentioned above, an employer need only provide a leave of absence as a reasonable accommodation where such accommodation does not impose an “undue hardship” on the employer. “The term ‘undue hardship’ means an action requiring significant difficulty or expense.” 42 U.S.C. § 12111(10)(A). In effect, the ADA does not required an employer to grant a leave of absence to an employee with a disability where doing so would impose significant difficulty or expense. Notably, the “undue hardship” analysis must be determined on a case-by-

case basis, taking the various factors of each situation into account. See 42 U.S.C. §12111(10)(A).

The ADA provides several factors that should be considered when determining whether a reasonable accommodation imposes an undue hardship on an employer. See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2). The EEOC has also offered additional factors to consider when determining whether granting leave to an employee constitutes an undue hardship including:

- the amount/and or length of the leave;
- the frequency of the leave;
- whether there is any flexibility with respect to the days on which leave is taken;
- whether the need for intermittent leave on specific dates is predictable or unpredictable (e.g., the specific day that an employee needs leave because of a seizure is unpredictable whereas intermittent leave to obtain chemotherapy is predictable);
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner; and

#### 2016 EEOC Guidance.

### **C. Employers May Have to Modify their Attendance Policies as a Reasonable Accommodation Under the ADA.**

The ADA's express definition of a reasonable accommodation includes "part-time or modified work schedules . . . and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). As the EEOC has explained, "[i]f requested, employers may have to modify attendance policies as a reasonable accommodation, [absent undue hardship]." EEOC The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities (December 20, 2017) ("2017 EEOC Guidance").<sup>11</sup> Examples of potential modifications as a reasonable accommodation include "allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times, . . . and providing periodic breaks." Id.

#### **1. A Part-Time/Reduced Schedule May Constitute a Reasonable Accommodation.**

As noted above, in some instances, a part-time and/or reduced schedule will constitute a reasonable accommodation under the ADA; however, such an accommodation may also constitute an undue hardship in some cases. See, e.g., Green v. BakeMark USA, LLC, 683 F. App'x 486, 491–92 (6th Cir. 2017) (finding a four-hour part-time schedule to not constitute a reasonable accommodation because "while a part-time work schedule may be a reasonable accommodation in some cases . . . it is unreasonable in situations where the essential functions of the job require full-time attendance."); Hostettler v. Coll. of Wooster, No. 5:15-cv-1601, 2017 U.S. Dist. LEXIS 46742, at \*14 (N.D. Ohio Mar. 29, 2017) (finding the employer "was not required to accommodate [the employee under the ADA] by turning a full-time position into a

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<sup>11</sup> Available at <https://www.eeoc.gov/facts/performance-conduct.html> (last visited Apr. 11, 2018).

part-time job by redistributing the duties to other workers . . . .”); Snead v. Fla. Agric. & Mech. Univ. Bd. of Trs., No. 17-10338, 2018 U.S. App. LEXIS 4350, at \*1 (11th Cir. Feb. 21, 2018) (finding enough evidence for a jury to conclude that a requested accommodation of eight hour shifts rather than twelve hours shifts to be a reasonable accommodation under the ADA).

The EEOC has provided the following example of where a part-time or reduced schedule will constitute a reasonable accommodation: “An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request [as a reasonable accommodation] absent undue hardship.” 2002 EEOC Guidance, at Question 22.

## **2. Modifying an Employer’s No-Fault Attendance Policy May Constitute a Reasonable Accommodation.**

Some employers employ “no-fault” attendance policies in which employees are given a certain number of absences within a designated timeframe, and then disciplined for any additional absences beyond the number allotted regardless of the reason for missing work. Unless an employer can demonstrate undue hardship, however, an employer may be required to modify such a policy as a reasonable accommodation under the ADA. Indeed, the EEOC’s position is that an employer’s inflexible application of a no-fault attendance policy will violate the ADA. 2002 EEOC Guidance (“If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its “no-fault” leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship.”); see also EEOC v. Sensient Natural Ingredients LLC (alleging disability discrimination where the employer discharged employees for surpassing the company’s restrictive leave policy).<sup>12</sup>

## **3. Telecommuting May Constitute a Reasonable Accommodation.**

There is no bright-line rule when it comes to granting telecommuting as a reasonable accommodation under the ADA. Some recent cases have suggested that such an accommodation will not be reasonable under some circumstances. See, e.g., Credeur v. Louisiana, 860 F.3d 785, 795 (5th Cir. 2017) (“Construing the ADA to require employers to offer the option of unlimited telecommuting to a disabled employee would have a chilling effect.”); Brunckhorst v. City of Oak Park Heights, No. 16-455 (DWF/TNL), 2017 U.S. Dist. LEXIS 159600, at \*21 (D. Minn. Sep. 28, 2017) (“Plaintiff has failed to establish that the option of working from home was a reasonable accommodation that the City was obligated to offer Plaintiff.”). However, other recent cases have suggested that such an accommodation may be reasonable. See, e.g., Mosby-Mechem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 602 (6th Cir. 2018) (affirming the jury’s finding that the employee could have effectively performed all the essential functions of her job with her requested 10-week teleworking accommodation).

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<sup>12</sup> Available at <https://www1.eeoc.gov/eeoc/newsroom/release/6-30-17.cfm?renderforprint=1> (last visited Apr. 11, 2018).

**D. Employers May Discipline an Employee for Attendance Problems that Occurred Prior to a Request for a Reasonable Accommodation.**

Notwithstanding the foregoing, an employer may impose discipline on an employee (if consistent with its policies and applied uniformly) for attendance problems that occurred prior to a request for a leave of absence as a reasonable accommodation. See, e.g., Davies v. Lackawanna Cty., No. 3:15-cv-1183, 2018 U.S. Dist. LEXIS 24382 (M.D. Pa. Feb. 14, 2018) (finding employer did not violate the ADA when it fired a diabetic deputy sheriff only a few days after he requested a reasonable accommodation because he was fired for a disciplinary hearing that had been scheduled prior to the request for accommodation); 2017 EEOC Guidance at Question 22 (“An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation.”).

**E. Common Employer Issues With Employee Attendance Under the ADA**

**1. Job Abandonment.**

One of the most difficult areas for employers to balance is its need for employee attendance versus the need of an employee to take a leave of absence due to a qualifying disability. This issue is further complicated when an employee fails to provide notice of such an absence or takes such a leave unexpectedly. In such a situation, an employer must carefully consider the facts and circumstances of the case. See 42 U.S.C. §12111(10)(A).

It is well-established that an individual with a disability must inform the employer that an accommodation is needed. See 2016 EEOC Guidance (“As a general rule, the individual with a disability – who has the most knowledge about the need for reasonable accommodation – must inform the employer that an accommodation is needed.”); Lenzen v. Workers Compensation Reinsurance Association, 705 F.3d 816 (8th Cir. 2013); 29 C.F.R. App. § 1630.9 (stating an employer is not “expected to accommodate disabilities of which it is unaware.”). However, even if an employee fails to request such accommodation, an employer’s accommodation obligation may be triggered if the employer knows of ***both the disability and the employee’s need for accommodation***. See Cannon v. Jacobs Field Servs. N. Am., 813 F.3d 586, 594-95 (5th Cir. 2016).

In effect, an employer should still determine whether or not such leave (albeit unexpected) would constitute a reasonable accommodation. An employer must then determine whether or not the employee’s unexpected absence imposes an undue hardship. Where an employer has knowledge of the employee’s disability and that disability causes the employee to be unable to request an accommodation, it may more difficult to prove the employee’s absence constituted an undue hardship on the employer. In any case, whether and to what extent discipline and/or termination is appropriate when an employee abandons their job will depend on the specific circumstances of the case (e.g., first instance of such misbehavior; employer attendance policies, etc.).

While it may be appropriate to impose discipline and/or terminate an employee in some instances when such unexpected absences occur, this will likely not be the case in every situation. See, e.g., Bethscheider v. Westar Energy, No. 16-4006-CM, 2017 U.S. Dist. LEXIS 5527, at \*4 (D. Kan. Jan. 13, 2017) (finding an employee stated a plausible claim for disability discrimination after being terminated due to her frequent and sometimes unexpected absenteeism, which on a number of occasions was due to migraines); Ewing v. DoubleTree DTWC, LLC, 673 F. App'x 808, 814 (10th Cir. 2016) (acknowledging that “there may be ‘certain instances’ where an employer ‘will know of the individual's need for an accommodation because it is obvious’”) (citation omitted).

#### **IV. INTERSECTION OF LEAVE UNDER THE FMLA AND ADA**

Employers commonly face issues navigating the overlap between the requirements of the FMLA and the ADA. For example, an employee takes their twelve weeks of FMLA leave for a qualifying medical condition, and then requests two weeks of additional leave. Does an employer have to provide the additional leave under the ADA? This issue, as well as other common issues concerning the overlapping requirements of the FMLA and ADA, is discussed in further detail below.

##### **A. Distinctions Between the ADA and FMLA**

###### **1. Purpose**

Congress enacted the ADA in order to, among other reasons, “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2). More specifically, in the employment context, the ADA provides equal access to jobs and job opportunities to qualified individuals with a disability. In contrast, the FMLA was enacted “to allow employees to balance their work and family life by taking reasonable unpaid leave” for certain family or medical conditions. 29 C.F.R. § 825.101(a).

###### **2. Employer Coverage**

The ADA applies to employers “engaged in an industry affecting commerce that has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 12111(5)(A). In contrast, the FMLA applies to employers “engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees” within a 75 mile radius. 29 U.S.C. § 2611(4)(A)(i). Thus, while an employer may be subject to FMLA or the ADA, it does not necessarily follow that an employer will always be subject to both laws.

###### **3. Employee Eligibility**

As discussed above, the ADA applies to employees and job applicants that are qualified individuals with a disability that can perform the essential functions of their current job “with or without reasonable accommodation.” 42 U.S.C. §§ 12111(8), 12112(a). In contrast, an employee is eligible for leave under the FMLA if they have worked at least twelve months for

the employer and worked at least 1,250 hours in the twelve months preceding leave. 29 U.S.C. § 2611(2)(A); 29 C.F.R. § 825.110. The FMLA also only applies to employees. In effect, the differing employee eligibility requirements of the FMLA and ADA could mean, for example, that a new employee could be covered for their qualifying disability under the ADA, but not (yet) eligible for FMLA leave due to this medical condition.

#### **4. Disability vs. Serious Health Condition**

One of the most important differences between the ADA and the FMLA relates to the conditions that each covers – *i.e.*, “disabilities” under the ADA and “serious health conditions” under the FMLA. It is extremely important for employers to remember that these are different concepts and must be analyzed separately. 29 C.F.R. § 825.702(b). In fact, the FMLA’s regulations expressly provide that “the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation of employers covered under the [ADA] . . . . An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees.” 29 C.F.R. § 825.702(a).

In effect, a particular health condition may qualify as a “serious health condition” for purposes of the FMLA, but not a “disability” for purposes of the ADA. For example, a pregnancy or routine broken bone generally will qualify as a serious health condition under the FMLA, but not as a disability under the ADA because such conditions most likely do not substantially limit a major life activity.

#### **5. Entitlement to Leave**

Another very important difference between the FMLA and the ADA is the type and amount of leave available to qualifying employees. As discussed above, under the FMLA, an employee is entitled to twelve weeks of job-protected leave in twelve-month period. See 29 U.S.C. § 2612(a). In contrast, leave under the ADA is not statutorily guaranteed, but may be required where it constitutes a “reasonable accommodation.” See, e.g., Moss v. Harris Cnty. Constable Precinct One, 2017 U.S. App. LEXIS 4601, \*9 (5th Cir. Mar. 15, 2017). Additionally, the ADA may also require other types of leave-related reasonable accommodations including part-time schedules, intermittent leave, or modification of attendance policies. See generally Section III, *supra*.

#### **B. Common Employer Issues**

##### **1. Requesting Additional Leave under the ADA as a Reasonable Accommodation After Using Up FMLA Leave**

Where an employee has used up their FMLA leave and subsequently requests additional leave as a reasonable accommodation for a serious medical condition, an employer must first determine whether such a condition also constitutes a disability under the ADA. If the medical condition for which the accommodation is requested does not meet the ADA’s definition of a disability, the employer does not have to provide additional leave. On the other hand, if such a

condition does constitute a disability, the question becomes whether such leave is reasonable or if it imposes an undue hardship on the employer.

Unlike the FMLA, the ADA does not contain any per se rule as to the length of leave (in general or in addition to other leave) that constitutes a reasonable accommodation. In effect, as with all accommodations, the amount of leave that will be reasonable (versus constituting an undue hardship) must be determined on a case-by-case basis. In determining whether additional leave constitutes an undue hardship, “the employer may take into account leave already taken – whether pursuant to a workers' compensation program, the FMLA (or similar state or local leave law), an employer's leave program, or leave provided as a reasonable accommodation.” EEOC 2016 Guidance. Thus, for example, if an employee requests an additional four weeks of leave beyond the twelve weeks of FMLA leave and the eight weeks of employer-provided leave that the employee has already used, the employer may consider the impact of the prior twenty weeks of leave when determining whether an additional four weeks constitutes an undue hardship. See id.

For example, the 7th Circuit recently determined that a request for an additional two months of leave for back surgery, beyond the twelve weeks of FMLA already provided did not constitute a reasonable accommodation under the ADA. See Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 481 (7th Cir. 2017) (“[T]he ‘inability to work for a multi-month period removes a person from the class protected by the ADA.’”) (citation omitted); see also Gardenhire v. Manville, No. 17-3048, 2018 U.S. App. LEXIS 2933, at \*6 (10th Cir. Feb. 7, 2018) (finding a request for additional leave beyond the twelve weeks of FMLA and twelve weeks of additional leave under the ADA already provided to the employee to not constitute a reasonable accommodation).

Of course, this issue can be more complicated when the employee requests additional intermittent leave. While there may be a stronger argument that such a request constitutes an undue burden on the employer, ultimately, the same analysis discussed above should be followed. Moreover, the Verizon settlement factors discussed above in Section III.B.4. should also be used to help analyze such a situation. The following EEOC example demonstrates one scenario in which an employer may be terminate an employee requesting additional intermittent leave under the ADA:

An employee works as an event coordinator. She has exhausted her FMLA leave due to a disability and now requests additional intermittent leave as a reasonable accommodation. The employee can never predict when the leave will be needed or exactly how much leave she will need on each occasion, but she always needs from one to three days of leave at a time. The employer initially agrees to her request and the employee takes 14 days of leave over the next two months. Documentation from the employee's doctor shows that the employee will continue to need similar amounts of intermittent leave for at least the next six months. Event planning requires staff to meet strict deadlines and the employee's sudden absences create significant problems. Given the employee's prognosis of requiring unpredictable intermittent leave, the employer cannot plan work around these absences. The employer has already had to move coworkers around to cover

the employee's absences and delay certain work. The on-going, frequent, and unpredictable nature of the absences makes additional leave an undue hardship, and thus the employer is not required to provide it as a reasonable accommodation. If the employer cannot reassign the employee to a vacant position that can accommodate her need for intermittent leave, it is not required to retain her.

2017 EEOC Guidance, at Example 35.

## **2. Requesting Leave as a Reasonable Accommodation Under the ADA Where the Employee is Ineligible for FMLA Leave.**

Where an employee who is ineligible for FMLA leave requests additional leave as a reasonable accommodation under the ADA, the same basic analysis under the ADA must be followed: *i.e.*, (1) whether the serious health condition also constitutes a disability under the ADA; and if so, (2) whether the requested leave constitutes a reasonable accommodation or an undue burden on the employer. See generally Section III, *supra*; see also Capps v. Mondelez Glob., LLC, 847 F.3d 144, 156-57 (3d Cir. 2017) (“[A] request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA.”) Where an employer has not granted leave previously in such a situation, an employer may have a more difficult time demonstrating that an employee's request for additional leave under the ADA constitutes an undue burden. Again, however, whether such requests constitutes a hardship is determined on a case by case basis. See, e.g., Thomson v. Dep't of Soc. Servs., 169 A.3d 256, 260 (2017) (finding an employee's requested leave to not constitute a reasonable accommodation where the employee was ineligible for FMLA leave); Oliver v. Williams Cos., No. 12-CV-0585-, 2014 U.S. Dist. LEXIS 46734, at \*33 (N.D. Okla. Apr. 4, 2014) (explaining ADA leave was not a reasonable accommodation for an employee that appeared to be “taking unlimited medical leave . . . [where] plaintiff was not eligible for such leave under the FMLA.”).

The EEOC has provided the following example of ADA leave as a reasonable accommodation where an employee is ineligible for FMLA leave:

An employee with asthma who is ineligible for FMLA leave works on an assembly line shift that begins at 7 a.m. Recently, his illness has worsened and his doctor has been unable to control the employee's increasing breathing difficulties. As a result of these difficulties, the employee has taken 12 days of leave during the past two months, usually in one- or two-day increments. The severe symptoms generally occur at night, thus requiring the employee to call in sick early the next morning. The lack of notice puts a strain on the employer because the assembly line cannot function well without all line employees present and there is no time to plan for a replacement. The employer seeks medical documentation from the employee's doctor about his absences and the doctor's assessment of whether the employee will continue to have a frequent need for intermittent leave. The doctor responds that various treatments have not controlled the asthmatic symptoms, there is no way to predict when the more serious symptoms will suddenly flare up, and he does not expect any change in this situation for the foreseeable future.

Given the employee’s job and the consequences of being unable to plan for his absences, the employer determines that he cannot keep the employee on this shift. Assuming no position is available for reassignment, the employer does not have to retain the employee.

2017 EEOC Guidance, at Example 33.

**3. An Employee Returning to Work from FMLA Leave with Restrictions that Must be Reasonably Accommodated under the ADA.**

An employee with an ADA disability has taken twelve weeks of FMLA leave. The employee then notifies his employer that he is ready to return to work, but is no longer able to perform the essential functions of their position or an equivalent position. What are the employer’s obligations under the FMLA and ADA? As stated by the EEOC:

Under the FMLA, the employer could terminate his employment, but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (*e.g.*, additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

2002 EEOC Guidance, at Question 21. Note, however, if an employee coming off of FMLA leave does not have a disability under the ADA, then the employer has no obligations and may terminate the employee under the FMLA. See id. Again, the type of accommodation an employer must provide in such a situation (if any) will depend on the circumstances of each particular case.

Importantly, an employer will violate the ADA where it fails to consider a reasonable accommodation that would allow the employee coming off leave to perform the essential functions of the job. See 2016 EEOC Guidance. Indeed, absent undue hardship, an “employer may not prohibit [an] employee from returning to work solely because she needs reasonable accommodations . . . .” Id.; cf. Holton v. First Coast Serv. Options, Inc., 703 F. App’x 917, 918 (11th Cir. 2017) (finding, where an employee failed to show they were disabled under the ADA, that the employer did not interfere with the employee’s FMLA rights where she sought to return to her job on a modified basis because this is not a right protected by the FMLA).

**4. Transferring an Employee Coming off Leave to a Different Position Under the ADA and FMLA.**

An employee with an ADA disability has taken ten weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Is this permissible under the FMLA and ADA? Under the FMLA the employer could place the employee in a different, but equivalent position; however, “the ADA requires that the employer return the employee to her original position[,] [u]nless the employer can show

that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation) . . . .” 2002 EEOC Guidance, at Question 21; 29 C.F.R. § 825.214. In effect, absent undue hardship, an employer must keep the employee’s position open when the ADA applies. See 29 C.F.R. § 825.702(c)(1) (“[T]he ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship.”).

But what happens if an employee is unable to return to his or her original job but is able to perform another job? In such a situation, an employer should work with the employee to determine whether a vacant position exists for which the employee is qualified either with or without an accommodation. See 42 U.S.C. § 12111 (listing reassignment to a vacant position as a reasonable accommodation); Minnihan v. Mediacom Communs. Corp., 779 F.3d 803, 814 (8th Cir. 2015) (“[R]eassignment to a vacant position can be a reasonable accommodation, where the employee can perform the essential functions of the new position.”).