Illness and Job Discrimination

Two major laws exist to make sure that anyone with a disability or anyone dealing with a health crisis is not discriminated against. They are the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). Listed below are the things you must know in order to understand and be able to deal with job discrimination. The policies don't change every day, or even every month, but laws and regulations do change. Visit the U.S. Equal Employment Opportunity Commission (EEOC) website , the U.S. Department of Labor website, or both for up-to-date information. Talking with a lawyer who knows disability law can help to make sure your suspected discrimination concern is valid.

Have a good understanding of what qualifies as discrimination or ADA violations and other terms and conditions of employment.

Americans with Disabilities Act

- **Disability.** Under the Definitions section 12102 (section 3) of the ADA, disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

The ADA presents many challenges for both an employee and employers.

It's important to understand before bringing a claim under the ADA and other disability discrimination statutes that employees often may have to give up rights and benefits under other laws. The reason is because these other laws, such as Social Security Disability, require that an employee must be totally disabled. You can't be totally disabled in order to qualify as a disabled person under the Americans with Disabilities Act.

Disability has different meanings for other organizations, such as the Social Security Administration and other health insurance companies. Please see the plan documentation for your insurance company for its definition of disability. The Social Security Administration has its own criteria for determining disability, so please contact your local Social Security office or visit the Social Security website for more information.

Discrimination

Under Title VII of the Civil Rights Act of 1964, the ADA, and the Age Discrimination in Employment Act of 1967, it is illegal to discriminate in any aspect of employment, including:

- Hiring and firing
- Compensation, assignment, or classification of employees
- Transfer, promotion, layoff, or recall
- Job advertisements
- Recruitment
- Testing
- Use of company facilities
- Training and apprenticeship programs
- Fringe benefits

Practices under these laws

Practices addressed include:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age
- Taking revenge against a person for filing a charge of discrimination, taking part in an investigation, or opposing discriminatory practices
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of people of a certain sex, race, age, religion, or ethnic group, or people with disabilities; or denying employment opportunities to a person because of marriage to, or association with, a person of a particular race, religion, national origin, or a person with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.
- Employers must post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. These notices must be accessible, as needed, to people with visual or other disabilities that affect reading. Title VII and the ADA cover all private employers, state and local governments, and educational institutions that employ 15 or more people. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees that control apprenticeship and training.

The ADEA covers all private employers with 20 or more employees, state and local governments (including school districts), employment agencies, and labor organizations.

What are my benefits under the Family Medical Leave Act (FMLA)?

An overview of the FMLA can be found at the FMLA website.

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of these reasons:

- For the birth and care of the newborn child of the employee
- For placement with the employee of a son or daughter for adoption or foster care
- To care for an immediate family member (spouse, child, or parent) with a serious health condition
- To take medical leave when the employee is unable to work because of a serious health condition

The Family and Medical Leave Act, unlike the Americans for Disabilities Act, addresses permanent illness or injuries and temporary illnesses or injuries suffered not just by employees but also the employee's family members.

Spouses employed by the same employer jointly have a right to a combined total of 12 workweeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

Leave for birth and care or placement for adoption or foster care must end within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently—which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule:

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave.

The employer is responsible for choosing if an employee's use of paid leave counts as FMLA leave, based on information from the employee.

What happens to my health benefits?

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever the insurance was provided before the leave was taken. Also, it must be on the same terms as if the employee had never left work. If necessary, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave. If the health benefits expire while you are out on FMLA, it is the responsibility of the employer to notify you of COBRA benefits and, if it applies, a letter of creditable coverage (see HIPAA):

- **Consolidated Omnibus Budget Reconciliation Act (COBRA).** This law was passed by Congress in 1986 to make sure that employers provide continuation of group health coverage that otherwise would have ended when the employee left or was fired. This law covers employers with 20 or more employees and applies to the private sector, and state and local governments. Once you are unemployed, the employer must notify you of benefits and then you would have 60 days to choose COBRA or lose all rights to the benefits. The usual length of coverage is 18 months unless there are other circumstances that would cause the employer to extend the benefits to the maximum of 36 months of coverage. Any coverage provided while you are out on FMLA is not to be considered as COBRA coverage. The premium you must pay may vary but cannot be more than 102% of the normal coverage rate for an employee in a similar situation.

- **The Health Insurance Portability and Accountability Act of 1996 (HIPAA).** This law includes important new protections for working Americans and their families who have pre-existing medical conditions or who might suffer discrimination in health coverage. HIPAA also limits exclusions for pre-existing conditions, prohibits discrimination against employees and dependents based on their health status, and guarantees availability of health coverage and the ability to renew health coverage.

What happens to my job?

On return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or had a right to before using FMLA leave, nor be counted against the employee under a no-fault attendance policy. Under limited circumstances where returning to employment will cause substantial and economic injury to its operations, an employer may refuse to reinstate highly paid key employees after using FMLA leave during which health coverage was maintained. In order to do this, the employer must:

- Notify the employee of their status as a key employee in response to the employee's notice of intent to take FMLA leave;

- Notify the employee as soon as the employer decides it will deny restoring the employee to the same job, and explain the reasons for this decision;

- Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and

- Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests being restored to the same job.

A key employee is a salaried eligible employee who is among the highest paid 10% of employees within 75 miles of the work site.

What the ADA means by reasonable accommodations

The Americans with Disabilities Act requires an employer with 15 or more employees to provide reasonable accommodation for individuals with disabilities, unless it would cause undue hardship. A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodations:

- Changes to the job application process

- Changes to the work environment or the way a job is usually completed

- Changes that enable an employee with a disability to enjoy equal benefits and privileges of employment

Undue hardship would be changes to the work environment that would include significant difficulty and/or expense. Undue hardship also refers to accommodations that would be disruptive or that would change the nature of the business. Each case of reasonable accommodation or employers' charge of undue hardship would be handled on a case-by-case basis.

Employers can make more than one reasonable accommodation. Reasonable accommodations include these examples:

- Shifting minor job responsibilities to other employees
- Unpaid leave time that does not present undue hardship
- Modified or part-time scheduling
- Reassignment to a new position that you are qualified for
- Making the workplace accessible and usable for people with disabilities

Key things to consider when requesting a reasonable accommodation:

- Qualification for a new position or ability to still perform in the previous position.
- The employer is not required to eliminate primary job responsibilities.
- The employer is not required to provide personal use items like wheelchairs or prosthetic devices.
- The employer is not required to modify a work schedule if it interferes with the productivity of other employees and if it causes undue hardship.
- The employer can deny a leave request when no approximate return date is given so that they may either plan for your return or get a replacement, which would involve undue hardship.

When leave is necessary and if you qualify, you should use the Family Medical Leave Act.

Family and Medical Leave Act of 1993

This law contains provisions on employer coverage; employee eligibility for the law's benefits; leave entitlement, maintaining health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protection for employees who request or take FMLA leave. The law also requires employers to keep records. Unlike the ADA, you may file a complaint and get an attorney without a right to sue letter.

Employer coverage

FMLA applies to all public agencies, including state, local, and federal employers, local education agencies (schools), and private sector employers who employed 50 or more employees in 20 or more workweeks in the current or previous calendar year and who are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers.

Am I eligible?

In order to be eligible to take leave under the FMLA, an employee must:

- Have worked for the employer for at least 1,250 hours for 12 months. The 12 months of employment don't have to be consecutive; and
- Work at a location in the U.S. or in any territory or possession of the U.S. where the employer within 75 miles employs at least 50 employees.

When do I have to give notice to use my benefits?

Employees seeking to use FMLA leave must provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is attainable. Employers may also require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member (A serious health condition is one that requires the employee to miss 3 days of work due to illness or injury.);
- Second or third medical opinions (at the employer's expense) and periodic recertification. If an employee submits proper documentation from their treating healthcare provider that demonstrates a serious health condition, the employer has the right to have the employee seen for second opinions. However, the healthcare provider selected by the employer must not work for the employer or have a contract with the employer to provide medical services unless there are 2 or less healthcare providers in the vicinity to provide the type of medical services for the healthcare provider; and
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation. Covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific written information on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

Signing documents

When signing forms for leave that are not regulated under the FMLA or ADA, be aware of the benefits that you have accumulated over a period of time. Make sure that you are not using valuable vacation and sick leave time when you should be using FMLA or ADA. Some employers offer sick leave and vacation time as pay when an employee is out. The employee should always fully understand what they are signing; otherwise, the law will assume the employee did understand and consented to the contents of that document. This can be a complex process, but it is important not to be intimidated. Ask questions until you understand the information. An attorney experienced in this area could be a valuable asset.

When taking internal action with your employer

Here are the steps to take:

- If you are the person filing a complaint with human resources, you must sign the official complaint, but always ask to know the consequences of signing any document that is given. Carefully review each document for content.
- Check with the local EEOC office if it is something that is not easily understood or contact Patient Advocate Foundation (PAF) for case manager or attorney advice. This information can be found at the PAF website .
- With recent changes in the ADA and the very definition of disability being basically reconsidered on a daily basis, the FMLA is a patient's best friend. It is the only law that protects your job and clearly defines exactly what benefits an employee has.
- An employer must, within 2 business days of being notified that an employee has a potential serious health condition, designate the leave as Family and Medical Leave Act leave. Therefore, it is essential to notify an employer as soon as possible about serious health conditions suffered.
- If an employer fails to re-credit leave, the employee may bring an action to enforce rights under the FMLA.

These issues are complex and can feel overwhelming when you or a family member has a serious medical issue. Consider having a trusted friend or family member sit in on meetings and help you with the process. Seek support and guidance from your company's human resources department. And, if issues become complex or hostile, consider seeking legal assistance. An employee generally has 2 years to report violations of any of these FMLA provisions to the U.S. Department of Labor.