

## Take Two Aspirin And Call Me In 12 Weeks or 12 Months: The Intersection of FMLA, the ADA, and Other Leave Protections

David W. Garland, Sills Cummis & Gross, P.C.  
Patricia L. Kasschau, Toyota Motor Sales, U.S.A., Inc.  
Michael C. Subit, Frank Freed Subit & Thomas LLP  
Darlene A. Vorachek, Abrahamson, Vorachek & Levinson  
Moderator: Raymond E. Morales

## Coverage Issues

- ADA applies to employers with 15 or more employees
- FMLA applies to employers with 50 or more employees. Employee at worksite with 50 or more employees within 75 mile radius. Employee has worked for total of 12 months and has worked 1,250 hours of service

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## Coverage Issues: ADA

- Covers qualified individuals with a “disability” (an impairment that substantially limits major life activity)
- Despite disability employee can perform essential job functions if provided reasonable accommodation

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## Coverage Issues: FMLA

- Provides employee leave for:
  - (1) care for newborn child;
  - (2) placement of child through adoption or foster care;
  - (3) care for employee’s spouse, son, daughter or parent with serious health condition; and
  - (4) “serious health condition” makes employee unable to perform essential job functions

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## Coverage Issues: Notice

- ADA: employee must provide notice and request a reasonable accommodation
- FMLA: if foreseeable, then 30 days; otherwise “as practicable”
- FMLA: employee need not request “FMLA leave” only identify an FMLA leave qualifying reason for leave request

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## Coverage Issues: Preemption

- ADA: requirements re: reasonable accommodation and undue hardship supersede any state or local disability antidiscrimination laws to the extent they offer less protection. 29 C.F.R. § 1630.1(c)
- FMLA: preempts lesser protection but does not supersede any provision of state or local law that provides greater family or medical leave rights. 29 C.F.R. § 825.701

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## Intersection of Laws

- Is a “disability” under ADA a “serious health condition” under FMLA?
- ADA – a “qualified” individual must be able to perform essential job functions
- FMLA – a “serious health condition” requires an inability to perform job functions
- Yet, EEOC says leave of absence is a reasonable accommodation; thus, most cancers and serious strokes may dual qualify
- Pregnancy, broken leg, or hernia are serious health conditions but not usually disabilities

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## Intersection of Laws

- Length of Leave:
- FMLA: 12 weeks per year
- ADA: No set time, not indefinite, depends upon when “undue hardship” arises

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## Intersection of Laws

- Can an employer turn down a request?
- ADA: yes, if the request for a reasonable accommodation would pose an undue hardship on the employer
- FMLA: no, not if notice and certification requirements are met

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## Intersection of Laws

- Is the employee's job protected?
- ADA: Yes, unless undue hardship. If so, then must consider vacant, equivalent position for which employee qualified
- FMLA: Yes, guaranteed. Employee must be returned to same or equivalent position with same or equivalent benefits, unless key employee

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## Intersection of Laws

- Is intermittent leave allowed?
- ADA: yes, if reasonable accommodation and no undue hardship
- FMLA: Yes, if medically necessary for serious health condition. No, where birth of child/adoption

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## Intersection of Laws

- Can employer require medical certification or examination?
- ADA: Yes, only when the employee is unable to provide sufficient information from his/her own health care professional
- FMLA: Yes, medical certification required. 2<sup>nd</sup>/3<sup>rd</sup> opinion where doubt

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## Remedies: Enforcement

- ADA: Employee files a charge of discrimination with EEOC
- Time: Within 180 days of last act of discrimination. 42 U.S.C. § 12117(a)
- If right to sue notice then may file in state or federal court
- FMLA: (1) complaint with Secretary of Labor; if Department of Labor files suit then privilege to private right lost; or,
- (2) private suit may be filed in state or federal court
- Time: 2 year status of limitations (3 yrs if “willful” violation 29 U.S.C. § 2611(2))

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## Remedies: ADA

- Compensatory and punitive damages. Cap based on number of employees
- No damages where entity makes good faith effort in consultation with employee to provide reasonable accommodation
- Attorneys’ fees are recoverable

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## Remedies: FMLA

- (1) lost wages, benefits or other compensation denied/lost by reason of violation; or, (2) where no tangible loss any actual monetary loss
- Liquidated damages unless good faith and reasonable grounds for belief no violation
- No punitive damages or pain and suffering
- Attorneys' fees and costs are recoverable

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## Hypo #1 – Frederick Taylor

- Edsel Auto/UAW member
- Trans. Line crew – overtime
- CBA – no-fault attendance
  - FMLA absences not counted
- Absenteeism and tardiness
  - If absent: 4 wk. suspension
  - If late: 1 wk. suspension
- MS - tires easily, trouble managing stress
  - employer knows
- Message to call-in line Friday: absent because “feeling sick”
- 65 minutes late on Monday
  - Still not feeling well
- Meeting w/ LR Rep to advise of 5 wk suspension (4+1)
- FMLA medical certificate and attorney letter:
  - Needs periodic absences due to MS complications
  - Medication disrupts sleep and causes disorientation, thus he is late for work
  - Dizziness caused his tardiness
  - All but one absences and most tardiness during past year due to MS symptoms
  - Request for “light duty” – 40 hrs./wk.
- Light duty only for on-the-job injuries.

## Hypo #2 – Didi Brown

- DLR's Payroll Supervisor
- Fibromyalgia – chronic fatigue and pain, lifelong condition.
- Approved for intermittent FMLA leave since 2002 (averaging 3 days/month)
- Jan-June 2007: absent 55 days due to condition.
- May – 8 late arrivals
- Told manager she sometimes does not feel well in the mornings, but stays late to make up lost work time.
- June – several absences and 7 late arrivals (makes up missed work time).
- Manager:
  - not meeting expectations by not being present to supervise staff during significant work periods.
  - Blames payroll errors on her lack of supervision during absences.

## Hypo #3 – Laura Wright

- 20 yrs. Clerical employee Hoover Financial Services (HFSC)
- Bipolar disorder since teenage years
- Several episodes, last one 10 years ago – HR and some supervisors advised of condition and treatment (unpaid leave to receive treatment)
- Oct '06:
  - stops taking new medication due to adverse side effects
  - unable to sleep, agitated and manic at work
  - Current HR and supervisors not aware of her condition
  - Counseling, job reassignments, EAP referral and threats of discipline
- Mar 1 – 1 hour episode
  - screamed obscenities
  - threw objects
  - HR called Police, but she left before they arrived telling supervisor she was sick
  - HFSC suspended her and issued CBA disciplinary charges seeking termination
  - Filed grievance challenging termination, union went to arbitration
  - Admitted she had stopped taking medication, claimed behavior was justified due to job-related stress
  - Request for reasonable accommodation – transfer
  - Request for FMLA leave
- HR agrees to meet/discuss requests

# QUESTIONS

