



# Leave Rights under the FMLA and the ADA: The Intersection of Two Laws Impacting Employee Leave

## Introduction

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The following discussion will provide a basic overview of employee and employer rights involving leave under both the Family and Medical Leave Act of 1993 (FMLA) and Title I of the Americans with Disabilities Act of 1990 (ADA). The discussion will then focus on the areas where the two laws intersect, providing both overlapping and distinctive protections and obligations.

## Overview of ADA Leave Protections

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Title I of the ADA, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), protects qualified individuals with disabilities from discrimination on the basis of disability.<sup>1</sup> Under the ADA, employers are required to provide necessary reasonable accommodations unless doing so would impose an undue hardship on the employer. A “reasonable accommodation” is a change in the workplace that enables an employee to perform the essential functions of his/her job.

Leave is one form of reasonable accommodation in that it enables an employee to take time off from work, take care of whatever required the leave, and return to work and to the performance of the job’s essential functions. In some cases, leave on a short term, long term, or even hourly basis, will be the only effective accommodation.<sup>2</sup> In other situations, leave may be an effective accommodation,

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<sup>1</sup> The EEOC’s ADA regulations are set forth at 29 C.F.R. Part 1630.

<sup>2</sup> A modification or adjustment satisfies the reasonable accommodation obligation if it is “effective.” Leave may be the only effective accommodation where the employee needs time off to obtain medical treatment, recuperate from an illness or an episodic manifestation of a disability, repair a wheelchair or other device, and so forth.

but there may also be other effective accommodations that will allow the person to stay on the job. Under the ADA, the employer, preferably in conjunction with the individual requesting the accommodation, makes the final decision regarding which effective reasonable accommodation it will provide.

## **Overview of FMLA Requirements**

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In general terms, the FMLA provides leave to certain employees who are experiencing serious health issues or who need to care for a family member. The purpose of the FMLA therefore differs from that of the ADA. While the FMLA provides eligible employees with a benefit that they may exercise when circumstances dictate, the ADA instead seeks to provide equal employment opportunities to employees with disabilities.

### Coverage and Eligibility

The FMLA allows employees to balance their work and family life by taking, in most cases, up to 12 weeks of unpaid, job-protected leave for certain family and medical reasons. The FMLA applies to all:

- state, local and federal employers, and local education agencies (schools), and
- private sector employers who employ 50 or more employees for at least 20 work-weeks in the current or preceding calendar year, including joint employers and successor employers.

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, enforces the FMLA for private, state and local government and some federal employees.<sup>3</sup> Most federal and congressional employees are subject to the jurisdiction of the Office of Personnel Management or Congress.

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<sup>3</sup> The Department of Labor's FMLA regulations are set forth at 29 C.F.R. Part 825.

To be eligible for FMLA leave, an employee must work for a covered employer and:

1. have worked for that employer for at least 12 months; and
2. have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and,
3. work at a location where at least 50 employees are employed at the location, or within 75 miles thereof.

All time worked counts toward the required 12 months of employment. The 1,250 hours requirement can be satisfied in different ways, including regular fulltime work, working 104 hours per month for 12 months, or working 24 hours per week for 52 weeks.

### Leave Entitlement

A covered employer must grant an eligible employee up to a total of 12 work-weeks of unpaid leave in a 12-month period for any one or more of the following reasons:

- the birth of a son or daughter, and the care of that newborn child;
- the placement of a child with the employee through adoption or foster care, and the care of that child;
- the care of an immediate family member (spouse, child, or parent—but not a parent “in-law”) with a serious health condition;
- one's own care, therapy or recuperation when unable to work because of a serious health condition; and
- the exigencies that arise when a family member who is a member of the regular or reserve components of the Armed Forces is deployed to any foreign country.

In addition, the FMLA allows 26 weeks of unpaid leave for family members who are veterans and need medical treatment, recuperation or therapy for a serious injury or illness in-

curred in or aggravated by active duty service. Leave to care for a newborn child or newly-placed child must conclude within 12 months after birth or placement. Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child and its related care, and to care for an employee's parent who has a serious health condition.

#### Definition of Serious Health Condition

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;
- a period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider;
- any period of incapacity due to pregnancy, or for prenatal care;
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.);
- a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or,
- any absences to receive multiple treatments (including related recovery periods) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

#### Intermittent/Reduced Schedule Leave

The FMLA permits employees to take leave on an intermittent basis (i.e., from time-to-time) or to work a reduced schedule (e.g., a four-day week or a six-hour day) under certain circumstances, including to care for a seriously ill family member, or because of the employee's serious health condition. Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed child only with the employer's approval.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider. If the intermittent or reduced schedule leave would unduly disrupt the employer's operations, the employer may instead transfer the employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave.

#### Use of Paid Leave

Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued paid vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave.

#### Notification and Certification

Employees may be required to give 30 days notice of the need to take FMLA leave when the need is foreseeable. In circumstances in which the need for leave was not foreseeable, the employee should provide notice to the employer as soon as is practicable (generally within one to two days of learning of the need

to take leave). An employer may require that a leave request for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. There is an approved Department of Labor form for this purpose.<sup>4</sup> The employer may not make a broad request for medical records.

### Return to Work

Upon return from FMLA leave, an employee must be restored to his\her original job, or to an "equivalent" job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions. In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave. Under limited circumstances, however, an employer may refuse to reinstate certain highly-paid, salaried "key" employees where doing so would cause "substantial and grievous economic injury" to its operations.

### **When is There Overlapping Coverage Between the ADA and the FMLA?**

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Private employers with 50 or more employees are covered by both the FMLA and the ADA. State and local government employers are also covered by both the FMLA and the ADA, regardless of the number of employees. Qualified individuals with disabilities covered under the ADA must also meet the FMLA qualification requirements of at least 12 months of total employment and at least 1,250 hours worked in the prior 12 months to be eligible for FMLA leave.

### **Is an FMLA "Serious Health Condition" the same as an ADA "Disability?"**

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Not necessarily. An ADA disability is an impairment that substantially limits one or more major life activities, a record of such

<sup>4</sup> This form is available at <http://www.dol.gov/asp/archive/reports/fmla/APPENDIXF.htm>

an impairment, or being regarded as having such an impairment. Some FMLA serious health conditions, such as most cancers, heart disease, and serious strokes, likely would also be ADA disabilities. Other conditions, such as pregnancy, an appendectomy, or a routine broken leg, may be serious health conditions, but generally would not meet the ADA definition of disability.

Similarly, a record of a serious health condition may or may not qualify as a record of disability. Likewise, just because the employer knows that someone has a serious health condition does not mean that the employer necessarily regards him/her as having an ADA disability.

### **Are FMLA Certification Inquiries Permissible Under the ADA?**

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Yes. When an employee requests leave under the FMLA for a serious health condition, employers will not violate the ADA by asking for information specified in the FMLA certification form. An employer has a right to know why an employee, who would otherwise be at work, is requesting time off under the FMLA. This type of narrow inquiry would also be job-related and consistent with business necessity under the ADA.

An employer may keep a single medical file that contains both FMLA and ADA information. Such file must be kept separate from the regular personnel file and meet ADA confidentiality standards.

### **General Comparison of ADA and FMLA Leave**

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The FMLA allows for a maximum of 12 workweeks of unpaid leave in a 12-month period, except in the case of the 26 workweeks of unpaid leave available to care for veterans. A qualified individual with a disability could be entitled to more than the number of weeks of

unpaid leave available under the FMLA as a reasonable accommodation under the ADA, provided that such leave would not impose an undue hardship on the employer's business.

The FMLA allows leave to be taken intermittently or in the form of a reduced work schedule (for example, a three-day week instead of a five-day week until the leave is exhausted). The FMLA also allows the employer to require the employee to transfer to an alternative job with equivalent pay and benefits while the leave is being utilized, if necessary.

Under the ADA, an individual with a disability may work part-time or take occasional time off so long as it does not impose an undue hardship on the employer. If, or when, it does impose an undue hardship, the employer must attempt to reassign the employee to a vacant equivalent position or, as a last resort, to a vacant lower position so that the leave or reduced schedule could be continued. Of course, the employer and employee are always free to agree on a voluntary transfer to a different position if both parties deem this preferable to accommodating the person in his/her current position.

Keep in mind that an individual with a disability who is using FMLA leave to work reduced hours may also need a reasonable accommodation (e.g., special equipment) under the ADA to perform an essential function of the job.

### **When the Employer Wants to Keep the Employee On the Job**

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Under the ADA, an employer may offer an employee a reasonable accommodation other than the leave that has been requested, as long as it is effective. For example, an employer may offer special equipment, an opportunity to work reduced hours in the employee's cur-

rent job, or a temporary assignment to another job in lieu of leave, if these are effective accommodations.

However, if the individual is eligible for FMLA leave and has a serious health condition that prevents him/her from performing an essential job function, s/he has the right to take that leave, even if s/he could continue working with a reasonable accommodation. While the FMLA does not prevent an employee from accepting an alternative to leave, the acceptance must be voluntary and uncoerced.

### **Return to Work**

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Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship. In this situation, reassignment to another position would have to be considered as discussed above. Reassignment would also need to be attempted if the person upon returning to work is no longer able to perform the essential functions of his/her original position even with reasonable accommodations.

Under the FMLA, the individual may be returned to the same or an equivalent position, which means a position that is virtually identical in terms of pay, benefits, and other employment terms and conditions. If an employee cannot perform the essential functions of this job or the equivalent position, the FMLA does not require reassignment to another job.

### **Insurance Coverage**

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Under the ADA, the employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status. Under the FMLA, an employer always must maintain the employee's existing level

of coverage under a group health plan during the FMLA leave, provided the employee pays his/her share of the premiums. Other benefits, such as life or disability insurance, must also be provided to the person taking FMLA leave if the benefits are provided to others in the same leave or part-time status.

## **Complying with both the FMLA and the ADA**

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If an employee requests time off for a reason related or possibly related to disability (for example, a request for six weeks off to get treatment for a back problem), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. However, if the employee makes it clear that they only want FMLA leave, the employer should not make additional inquiries related to ADA coverage.

When both the ADA and the FMLA apply to an employee's medical leave, the FMLA rule provides that an employer must provide the employee with the greatest rights available under either statute.

Example: A qualified individual with a disability who is also an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation. The employer should reinstate the employee into the same job upon his or her return to work because this right, available under the ADA, is greater than that promised under the FMLA. At the same time,

the FMLA requires the employer to maintain group health plan coverage during the leave, and that requirement is the greater right available to the employee.

## **Family Leave**

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The FMLA requires an employer to grant leave for the employee to care for his/her spouse, child, or parent with a serious health condition. By contrast, the ADA's reasonable accommodation requirement does not extend to granting time off to care for a family member with a disability. Of course, when an employer opts to offer family leave as an employee benefit, the employer must provide the leave in a non-discriminatory manner.

## **FMLA Information or Complaints**

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For additional information about the FMLA or to file an FMLA complaint, individuals should contact the nearest office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The Wage and Hour Division is listed in most telephone directories under U.S. Government, U.S. Department of Labor. For on-line information go to:

<http://www.dol.gov/esa.fmla.htm>

## **Resources**

National ADA Center Hotline  
800.949.4232 (voice/TTY)

Job Accommodation Network  
PO Box 6080, Morgantown, WV 26506-6080,  
(800) ADA-WORK (voice), 877.781-9403 (TTY)

## Disclaimer

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The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Commission or the publisher. EEOC interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance.

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The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at:  
<http://www.eeoc.gov>

## About this Brochure

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, Director, Employment and Disability Institute, Cornell University ILR School.

This publication was written by Sheila D. Duston, an attorney/mediator practicing in the Washington, D.C. metropolitan area, in September, 2001, and updated in 2010 by Beth Reiter, an independent legal consultant, Ithaca, N.Y., with assistance from Sara Ferguson, a Cornell University Employment and Disability Institute ILR student research assistant.

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The full text of this brochure, and others in this series, can be found at [www.hrTips.org](http://www.hrTips.org).

More information on accessibility and accommodation is available from the ADA National Network at 800.949.4232 (voice/ TTY), [www.adata.org](http://www.adata.org).

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