Administering the FMLA and the Americans with Disabilities Act

Some employers might assume that if they give an employee 12 weeks of leave to comply with the FMLA, their obligation to this employee is finished. However, if the employee also is disabled, the employer's duty under the ADA may be just beginning. Ask a group of HR professionals to list the toughest aspects of applying the Family and Medical Leave Act (FMLA) requirements, and many may agree that coordinating the law with the Americans with Disabilities Act (ADA) is one of their top challenges.

To help navigate the sometimes overlapping obligations and dual application of the FMLA and ADA statutes, here are answers to some of the most frequently asked questions about these laws. Also, keep in mind that many complicated issues arise concerning the interaction of state workers' compensation laws and FMLA leave, as well.

1. WHEN WILL BOTH THE FMLA AND ADA AFFECT A LEAVE?

The ADA applies to employers with 15 or more employees, and the FMLA applies to private employers with 50 or more employees and to all public agencies and schools. Therefore, if it is covered by the FMLA, the employer generally also will be covered by the ADA and must comply with both laws. These laws have different purposes, but both can affect an employee's need for leave. The FMLA requires covered employers to provide eligible employees with up to 12 weeks of job-protected leave every year for various family and medical reasons. In particular, an eligible employee can take a leave if he is unable to work because of a serious health condition. On the other hand, the ADA prohibits discrimination against qualified disabled individuals and requires employers to provide accommodations that allow these individuals to perform the essential functions of their jobs. According to the EEOC and several courts, a leave of absence may be a reasonable accommodation if taking the leave would allow the disabled employee to return to work and perform the essential functions of the job. As a practical matter, these laws will overlap when an employee takes a leave of absence for a FMLA serious health condition that also qualifies as a disability under the ADA. For example, if an employee who has been on FMLA leave for 12 weeks cannot return to work because of a continuing serious health condition, the condition also may be a disability. Therefore, the employer may have to accommodate him by granting additional leave beyond the 12 weeks of FMLA

entitlement.

2. IS A “SERIOUS HEALTH CONDITION” THE SAME THING AS A “DISABILITY”?

No. The FMLA and its implementing regulations define “serious health condition” broadly to include any illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care (i.e., an overnight stay), including any period of incapacity or any subsequent treatment in connection with the inpatient care; or (2) “continuing treatment” by a health care provider. Thus, the FMLA may cover temporary conditions such as a broken leg, as well as a chronic condition like diabetes. The ADA, in contrast, generally is not intended to cover temporary medical conditions. Accordingly, a person is disabled under the ADA only if (1) he has a physical or mental impairment; and (2) that impairment substantially limits a major life activity, such as walking, seeing, hearing, speaking, and breathing. Generally, most disabilities will qualify as serious health conditions under the FMLA. For example, cancer can be both a serious health condition under the FMLA and a disability under the ADA. However, not all serious health conditions will also be disabilities.

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments Act” or “Act”). The ADA Amendments Act is effective as of January 1, 2009. The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The Act retains the ADA’s basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

- directs EEOC to revise that portion of its regulations defining the term “substantially limits”;
- expands the definition of “major life activities” by including two non-exhaustive lists: the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating); the second list includes major bodily functions (e.g., “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions);
- states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability”;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the “regarded as” definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of “disability” should be interpreted broadly.

3. IS A DISABLED EMPLOYEE ALWAYS ELIGIBLE FOR FMLA LEAVE?

No. The employee must meet the FMLA's eligibility requirements. An employee is eligible for FMLA leave if: (1) he has been employed for at least 12 months (not necessarily consecutively); (2) he has worked at least 1,250 hours in the previous consecutive 12-month period; and (3) he works at a work site that is within 75 miles of 50 or more employees. Thus, for instance, an employee who becomes disabled and has worked for only four months will not be eligible for FMLA leave. However, he may be entitled to take leave as an accommodation under the ADA.

4. CAN YOU REQUIRE MEDICAL CERTIFICATION TO DETERMINE COVERAGE UNDER THE ADA AND FMLA?

Yes. Both the ADA and the FMLA allow employers to make limited medical inquiries. Under the ADA, you may make medical inquiries or require medical examinations only if the inquiry or examination is job-related and consistent with business necessity. Thus, if the employee requests leave as an accommodation, you may ask for medical documentation of the existence of the disability and the need for the leave. The FMLA also limits the medical information an employer may require. It allows you to require medical certification of the serious health condition and the need for leave. However, the certification may relate only to the serious health condition that is causing the need for leave. Therefore, you may not require the employee to answer questions about conditions unrelated to the stated reason for the leave. Thus, if you comply with the FMLA medical certification requirements, you also generally will comply with the ADA's limits on medical information.

5. HOW MUCH TOTAL LEAVE DO YOU HAVE TO GIVE?

The FMLA requires employers to give up to a total of 12 weeks of leave in any 12-month period. However, you may have a continuing obligation under the ADA to provide further leave if the employee also is disabled and the leave is considered a reasonable accommodation. The ADA does not place any specific time limit on the amount of leave a disabled employee may take as a reasonable accommodation. As a general rule, however, these leaves cannot be indefinite.

6. DO YOU HAVE TO CONTINUE TO PAY FOR HEALTH INSURANCE DURING A DISABILITY LEAVE?

If the disabled employee's leave qualifies as an FMLA leave, the employer must comply with the

FMLA's requirements. Under the FMLA, employers must provide the same health benefits during an FMLA leave that it would have provided if the employee worked throughout the leave. Thus, if the employer pays for health insurance normally, it must continue doing so during the FMLA leave. If the employee is not covered by the FMLA, the employer does not have to continue to pay for the health insurance. The ADA only requires the employer to give a disabled employee on leave the same benefits it gives any nondisabled employee on leave.

7. ARE THE REINSTATEMENT REQUIREMENTS DIFFERENT FOR THE ADA AND

FMLA?

In some cases, yes. Arguably, the ADA gives employees greater reinstatement rights in circumstances where there is no undue hardship to the employer. Further, if reinstatement to the same position is an undue hardship for the employer, it may have to reinstate the employee to any available vacant position the employee is qualified to perform. In contrast, the FMLA only requires reinstatement to an equivalent job. However, the term "equivalent" has been interpreted to mean nearly identical to the employee's original position in terms of compensation, benefits, and other terms and conditions such as work schedule and geographical location.

8. WHAT PRECAUTIONS SHOULD YOU TAKE TO MONITOR LEAVES?

HR professionals can take control of compliance by implementing a system to identify employees who may be covered by both the ADA and the FMLA. To this end, you should: (1) require medical certification for all health-related leaves to determine whether the ADA, FMLA, or both should apply; (2) at the end of a FMLA leave, determine if the employee is disabled under the ADA and entitled to further leave as an accommodation; and (3) evaluate your reinstatement policy to be sure it allows for return to the same job, not just an equivalent job, for employees who have been covered simultaneously by both the ADA and FMLA.

FMLA-eligible employees who are the spouse, child, parent, or next of kin to a service member who has been seriously injured (including illness) while on active duty can take up to 26 weeks of unpaid leave in a 12-month period to care for the service member. Important: Where appropriate, all existing provisions of the FMLA apply, including the intermittent leave, the substitution of paid leave, and the notice provisions.

Caregiver Leave – Amended and Effective 10/28/09 H.R. 2647 expands the caregiver leave provision to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment.

Active Duty Leave – Amended and Effective 10/28/09 H.R. 2647 expands the exigency leave benefits to include family members of active duty service members.

Note: On June 22, 2010, the U.S. Department of Labor clarified the terms "son and daughter" for Family and Medical Leaves. The Wage and Hour Division of the U.S. Department of Labor also provided an administrator's interpretation of the terms. The WHD concluded that that either day-today care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts.