UNTANGLING THE ADA
AND FMLA FOR YOUR CLIENTS

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Introduction

The Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., which was enacted on July 26, 1990, prohibits discrimination on the basis of disability in employment (Title I); services provided by public entities (Title II); public accommodations (Title III); and telecommunications (Title IV). Miscellaneous matters are set forth in Title V.¹

The ADA prohibits employers from discriminating against individuals protected by the Act. Such discrimination can include limiting, segregating, or classifying candidates on the basis of disability, utilizing discriminatory tests, standards, or selection criteria, improperly conducting medical examinations or inquiries, entering into discriminatory contracts, and utilizing discriminatory benefit plans. 42 U.S.C. §12112(b). In addition, the ADA requires employers to accommodate applicants and employees with disabilities under certain circumstances. 42 U.S.C. §§12111(9) & 12112(b)(5). Because this duty to accommodate often overlaps with FMLA requirements, it is discussed at length in this paper.

The Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §2611 et seq., generally became effective August 5, 1993. The FMLA provides eligible employees of covered employers the right to take up to 12 work weeks of unpaid leave in a 12 month period for the birth of a child, for the placement of a child for adoption or foster care, to care for a close family member (spouse, parent, son or daughter) with a serious health condition, or when the employee's own serious health condition makes the employee unable to perform his or her job. FMLA benefits must be provided to an individual in addition to and separately from any other rights or benefits that the individual may have under federal and state anti-discrimination laws, including the ADA.

¹ This discussion will focus on Title I and the miscellaneous provisions in Title V which affect employment practices.
A. Covered Employers Under the ADA and FMLA

The ADA covers all public employers, as well as private employers with 15 or more employees. 42 U.S.C. §12111(5). Unlike many other employment statutes, employment agencies, labor organizations and joint labor-management committees are also covered. 42 U.S.C. §12111(7). Specifically excluded from the coverage of the employment provisions of the ADA are the United States, corporations owned by the United States, Indian tribes, and private membership clubs (except labor unions) which are exempt under §501(c)(3) of the Internal Revenue Code. 42 U.S.C. §12111(5).

A covered employer is defined by the FMLA as a private employer with 50 or more employees during 20 or more weeks in the current or previous calendar year, and any public employer, regardless of the number of persons employed. 29 CFR §825.104. In determining whether the 50 employee threshold has been met, leased, temporary, and part-time employees are all to be counted. 29 CFR §825.106.

B. Protected Individuals Under the ADA and FMLA

1. ADA

In order to qualify for the protection offered by Title I of the ADA, an employee of a covered employer must meet three separate tests. First, the individual must be “disabled” as that term is defined under the ADA. Second, the individual must be otherwise qualified for the position. Finally, the individual must be able to perform the essential functions of the job, with or without accommodation. 42 U.S.C. §12111(8).

Individuals can be considered “disabled” in one of three ways. An applicant or employee is protected under the ADA if he or she has a physical or mental impairment that substantially limits his or her major life activities. An individual can also be considered “disabled” if he or she has a record of such an impairment or is regarding as having such an impairment. 42 U.S.C. §12102(2).
An impairment is defined as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder. 29 CFR §1630.2(H)(1) & (2). Physical characteristics such as height, eye color, and left-handedness which are in the “normal” range, and thus are not the result of a physiological disorder, are not impairments. 29 CFR §1630.2. Even if an individual has an impairment, he or she is not “disabled” under the act unless that impairment substantially affects one or more major life activities. Temporary, non-chronic impairments of short duration, with little or no longer term or permanent impact, such as broken bones, the flu, or appendicitis, are usually not disabilities. 29 CFR §1630.2(J) App. In determining whether a major life activity is substantially limited, mitigating measures such as medication or corrective devices are to be considered. Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Service, 119 S.Ct. 2133 (1999); Albertson’s, Inc. v. Kirkingburg, 119 S.Ct. ___ (1999).

Even if an individual is “disabled” as defined by the Act, he or she is entitled to protection under the Act only if the individual is otherwise qualified for the position. For example, the individual must have the education, experience, or expertise required for the job.

Finally the individual must be able to perform the essential functions of the job that the employee holds or is seeking, with or without accommodation. 42 U.S.C. §12111(8). The fact that an individual has filed for social security disability benefits will not necessarily preclude that individual from making this showing. Cleveland v. Policy Management Systems Corp., 119 S.Ct. 1597 (1999).

2. FMLA

To be an “eligible employee” under the FMLA, an individual must meet all three of the following qualifications: she must 1) have worked for the employer for at least 12 months; 2) have worked at least 1,250 hours during the year preceding the start of the
leave; and 3) be employed at a worksite where the employer employs at least 50 employees within a 75 mile radius. 29 CFR §825.110. While not eligible to take FMLA leave, “eligible employees” for purposes of determining discrimination or retaliation in violation of the Act include prospective and past employees. Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1 (1st Cir. 1998).

For purposes of the 12 month employment duration requirement, if an employee is maintained on the payroll for any part of a week, then the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as “at least 12 months,” 52 weeks is deemed to be equal to 12 months.

Whether an employee has worked the minimum 1,250 hours of service is to be determined according to the principles established under the Fair Labor Standards Act for determining compensable hours of work. In other words, only actual hours of work will count toward this requirement. Paid time off for vacations, holidays, and sickness will not be counted. 29 CFR §825.110. Employees who are exempt from the Fair Labor Standards Act, and for whom no time records are kept and who have worked for the employer for 12 months will be presumed to have worked at least 1,250 hours in the previous 12 months unless the employer can clearly demonstrate that they did not meet this eligibility requirement. 29 CFR §825.110.

The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. (The 12 weeks/12 months benefits period, however, need not necessarily be measured by reference to the date leave commences, as discussed below.) Under certain circumstances, employers are permitted to project the number of hours expected to be worked through the commencement of leave. The 50 employee/75 mile component of
the eligibility test, however, is to be determined at the point in time the employee requests the leave. If there are not 50 employees within 75 miles of the worksite at that time, the employee may renew the request at a later date. 29 CFR §825.111.

The requirement that the employee be employed at a worksite where the employer employs at least 50 employees within a 75 mile “radius” is a bit confused. The Department of Labor rejected the method of measuring this radius “as the crow flies”, in favor of a more difficult system of measuring this distance based on surface miles on public roads. 29 CFR §825.111.

An eligible employee is entitled to leave for (1) his or her own serious health condition, (2) the serious health condition of a parent, spouse, or child, or (3) birth or adoption of a child. A serious health condition is any illness, injury, impairment, or physical or mental condition that involves (1) any period of incapacity involving inpatient care, (2) any period of incapacity involving an inability to attend work, school, or other regular daily activities for more than three consecutive calendar days if continuing treatment by a health care provider is also required, (3) continuing treatment for a chronic or long-term health condition that would result in incapacity for more than three days if left untreated, and (4) continuing treatment by a health care provider for prenatal care. 29 CFR §825.114. Diagnosis and examination constitute continuing treatment, Stubl v. T.A. Systems, Inc., 984 F. Supp. 1075 (E.D. Mich. 1997), as do examinations and tests to determine the existence of a serious health condition even if there is no precise diagnosis. Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).

C. Medical Inquiries and Medical Examinations

Under the ADA, unlawful discrimination includes certain historically common practices regarding medical inquires and medical examinations. Whether or not medical inquiries or examinations will be allowed depends in part upon when the inquiry or examination takes place.
An employer can never subject an applicant to a pre-employment physical, ask whether the applicant has a disability, or inquire regarding the nature or severity of a disability before making an offer of employment. In addition, an employer cannot make pre-offer inquiries regarding an applicant’s worker’s disability compensation history. An employer may make pre-employment inquiries regarding the ability of an applicant to perform job-related functions. 42 U.S.C. §12112(2). If an applicant has a known disability which might interfere with job performance, an employer can ask the applicant how he or she would perform a job function, with or without accommodation, and can ask the applicant to demonstrate.

After an offer of employment is made, but prior to the commencement of employment, an employer may require the prospective employee to take a physical examination, and may make the offer of employment conditional upon the results of that examination, if (1) all entering employees in the same job category are subjected to such an examination, (2) the examination is job-related and consistent with business necessity, (3) information obtained from the examination is kept in separate medical files and is treated as confidential, and (4) the results of the examination are used in accordance with the act (i.e., only those employees who cannot perform the essential functions of the job with or without accommodation are rejected on the basis of the medical examination). 42 U.S.C. §12112(3).

An employer may conduct voluntary medical examinations which are part of an employee health program. In addition, an employer may conduct periodic physicals to determine fitness for duty or other medical monitoring as required by law, so long as the examinations are job-related and consistent with business necessity. 42 U.S.C. §12112(4)(B). The information obtained in these examinations is to be kept separately and treated confidentially. 42 U.S.C. §12112(3)(B).
Tests for illegal drug use are not considered medical examinations under the Act. 42 U.S.C. §12114(d). Therefore, an employer’s ability to do drug testing is not affected by the Act. However, to the extent that a drug test reveals the use of legal drug use, such as an antihistamine which might be evidence of asthma, the drug test may be considered a medical examination. Therefore, employers should instruct the agencies performing their drug testing to only report the existence of illegal drugs.

Physical agility tests are not medical examinations. Therefore, they can be required at any stage of the application or employment process. However, because such tests often have an adverse impact in individuals with certain types of disabilities, the employer needs to be able to show that the test is job-related and consistent with business necessity.

D. Triggering the Duty to Accommodate Under the ADA

The employer’s duty to accommodate generally is triggered by a request from the applicant or employee. See, e.g., Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998); Summers v. A. Teichert & Son, Inc., 127 F.3d 1150 (9th Cir. 1997); Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 104 F.3d 1004 (7th Cir. 1997). However, the ADA does not require an employee to specifically mention the Act or the term “accommodation.” Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998).

If the employee fails to identify an accommodation when asked, that employee will have a more difficult time contending that the employer failed in its accommodation obligation. Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997); Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997); Shiring v. Runyon, 90 F.3d 827 (3rd Cir. 1996); Taylor v. The Principal Financial Group, Inc., 93 F.3d 155 (5th Cir. 1996), cert. den., 117 S.Ct. 586 (1996). Similarly, if the employee repeatedly refuses a reasonable accommodation, the employer may be relieved of its accommodation obligation.
Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998); Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997); Gile v. Unites Airlines, Inc., 95 F.3d 492 (7th Cir. 1996); Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996).

E. Reasonable Accommodation Under the ADA

Accommodation is an interactive process between employer and employee. Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996). After receiving the employee’s request for accommodation, the employer should consult with the disabled individual. Failure to do so may expose the employer to punitive damages. Katz v. City Metal Co., Inc., 87 F.3d 26 (1st Cir. 1996).

Under the ADA, the choice of what type of accommodation to make is the employer’s, so long as the accommodation accomplishes the goals of enabling the employee to perform the essential functions of the job and providing the employee with the same perquisites of employment as are granted to other employees. Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997); Weiler v. Household Financial Corp., 101 F.3d 519 (7th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996). An accommodation is not reasonable if, even with the accommodation, the employee would not be able to perform the essential functions of the job. Evans v. Federal Express Corp., 133 F.3d 137 (1st Cir. 1998); Mustafa v. Clark County School District, 157 F.3d 1169 (9th Cir. 1998); Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996), cert. den., 117 S.Ct. 964 (1997).

It is generally believed that the duty to accommodate pertains only to enabling the employee to perform the essential functions of the job or to enjoy the benefits of employment. However, two cases have held otherwise. In Lyons v. The Legal Aid Society, 68 F.3d 1512 (2nd Cir. 1995), the Court held that an employer might have a duty to provide paid parking close to the building, even though parking was not provided for
other employees, because this accommodation would assist the employee in getting to work. Similarly, in *Smallwood v. Witco Corp.*, 1995 U.S. Dist. Lexis 18106 (S.D. N.Y. 1995), The court held that a morbidly obese employee might be entitled to transportation to the employer’s facility: “it is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time and that Congress envisioned that employer assistance with transportation to get employee to and from the job might be covered.”

Courts generally will not require employers to be bound by its past actions regarding accommodations. For example, if an employer once created a light duty position for one employee, it is not bound to create one for another, or even to allow the same employee the position again. *See*, e.g., *Laurin v. The Providence Hospital*, 150 F.3d 52 (1st Cir. 1998); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997); *Shiring v. Runyon*, 90 F.3d 827 (3rd Cir. 1996). In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), a bus driver argued he was entitled to alternative employment or time to remedy his disability as three drivers with disabilities had in the past. The court rejected the argument holding: “if an employer undertook extraordinary treatment in one case, the same level of accommodation would be legally required of it in all subsequent cases; in other words, a good deed would effectively ratchet up liability, and thus not go unpunished.”

**F. Triggering the Duty to Grant Leave Under the FMLA**

An employee must give 30 days’ advance notice to the employer of the need to take FMLA leave when the need for the leave is foreseeable for the birth or placement of a child for adoption or foster care, or for planned medical treatment for a serious health condition of the employee or a close family member. 29 CFR §825.302. When it is not practicable to provide such advance notice, or when the need for the leave is not foreseeable, notice must be given “as soon as practicable,” ordinarily within one or two business days of when the employee learns of the need for the leave. 29 CFR §§825.302
and 825.303; Hopson v. Quitman County Hospital and Nursing Home, Inc., 126 F.3d 635 (5th Cir. 1997).

Verbal notice is sufficient to inform the employer that the employee will be needing leave. While an employee is supposed to request FMLA leave, an employer may be held liable for FMLA violations if the employer had sufficient notice of a protected condition and thus should have made a determination that the employee’s absences would qualify for FMLA protection. Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997); Brohm v. JH Properties, 149 F.3d 517 (6th Cir. 1998). However, an employee must initially provide sufficient information to put the employer on notice that the FMLA may be implicated. In Gay v. Gilman Paper Co., 125 F.3d 1432 (11th Cir. 1997), the Court held that where an employee’s spouse provided little information about the employee’s illness, the employer was not required to inquire to determine whether the absences would be protected by the FMLA. In Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973 (5th Cir. 1998), the Court held that where an employee was absence without excuse three times in the preceding three weeks, informing her employer that she would not be at work because she was “sick” was not sufficient notice for the employer to inquire whether the leave qualified as FMLA leave. Whether an employee gave notice that was proper and timely will generally be a question of fact to be decided by a jury. Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998).

An employer may require an employee to comply with its usual rules when requesting leave, but may not disallow FMLA leave on this basis. No specific penalty is prescribed for failure to give notice other than possible delayed availability of FMLA leave. See 29 CFR § 825.304.

G. Medical Certification

An employer may require medical documentation of any need for an accommodation under the ADA. If an employee fails to provide required medical
support for an accommodation on request, the request for accommodation may be denied. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617 (10th Cir. 1998); *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998).

An employer is not allowed to require a medical certification to be provided for birth, adoption, or foster care under FMLA. In other situations, an employer may require the employee to provide a medical certification within a period set by the employer (which may be as short as 15 calendar days after the employer’s request for certification). An employee must be advised of the duty to provide a medical certification and the time frame for providing it. 29 CFR §825.305.

The Department of Labor has developed an optional form for an employee’s use in obtaining a medical certification from a health care provider. An employer may develop its own form, but no additional information may be required. 29 CFR §825.306. Whether an employer uses the government’s form or its own, the only information which may be sought from the health care provider is as follows:

1) the date the serious health condition commenced, and the health care provider’s best judgment of the probable duration of the condition;

2) the diagnosis;

3) a brief statement of the prescribed regimen of treatment; and

4) whether inpatient hospitalization is required.

29 CFR §825.306(A). Unless an employer wishes to rely on the employee’s identification of the essential functions of the employee’s own job for purposes of the health care provider’s certification, the employer will be required to provide the health care provider with a description of the employee’s essential job functions.

An employee who fails to provide the necessary certification is not considered to be on an FMLA leave and does not have the protections of the Act. 29 CFR §825.311; *Harrington v. Boysville of Michigan, Inc.*, 145 F.3d 1331 (6th Cir. 1998). If an employer
questions the adequacy of a medical certification provided under the FMLA, it may not request additional information from that health care provider. It may, however, require the employee to obtain a second medical opinion at the employer’s expense, from a health care provider designated by the employer, provided that he or she is not employed on a regular basis by the employer. 29 CFR §825.307(a); Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997). If there is a disagreement between the two health care providers, a third opinion, from a health care provider agreed upon by the employer and the employee, will be final and binding, and must be paid for by the employer. 29 CFR §825.307(c). An employer may also request recertification for the need for the continuation of the leave at reasonable intervals (no more often than every 30 days). 29 CFR §825.308. The 30 day limitation does not apply under certain circumstances, such as where the original certification anticipates an absence of more than 30 days. 29 CFR §825.308(b).

An employer may have a uniformly applied policy requiring all employees who take a leave under the FMLA to present medical evidence that they are able to return to work relative to the condition for which the employee took the leave. 29 CFR §825.310. A broader medical clearance is not permitted.

H. Continuation of Benefits

Although an employer may be required to provide part-time employment as an accommodation under the ADA, this duty does not require the employer to extend benefits to the employee where benefits normally are not provided for part time workers. Willett v. Kansas, 942 F. Supp. 1387 (D. Kan. 1996), aff’d, 120 F.3d 272 (10th Cir. 1997). However, pursuant to 29 CFR §825.209, an employer must maintain the employee’s coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed while an employee is on FMLA leave. This obligation ends, subject to COBRA, when (1) the employee informs
the employer of his intent not to return to work at the conclusion of the leave; (2) the employee fails to return from the leave; or (3) the employee exhausts his or her FMLA leave.

In the case of paid FMLA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, such as payroll deduction. If FMLA leave is unpaid, the employer may require that payment be made to the employer or to the insurance carrier in one of several different ways set forth in 29 CFR §825.210.

Other benefits, such as accrual of vacation, seniority, and pension rights, do not need to continue while an employee is on FMLA leave. However, an employee cannot lose those benefits already earned as of the result of taking an FMLA leave. 29 CFR §825.215(D)(4).

I. Specific Situations With ADA and FMLA Implications

1. Modification of Job Duties

Requests to modify job duties do not implicate the FMLA.

Job restructuring to remove marginal functions is a possible accommodation under the ADA. Merry v. A. Sulka & Co., Ltd., 953 F. Supp. 922 (N.D. Ill. 1997); Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997). However, an accommodation is not reasonable if it requires the elimination or reallocation of an essential function of the job. Miller v. Illinois Department of Corrections, 107 F.3d 483 (7th Cir. 1997); Barber v. Nabors Drilling USA, Inc., 130 F.3d 702 (3rd Cir. 1997); Smith v. Blue Cross/Blue Shield, 102 F.3d 1075 (10th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995); Benson v. Northwest Airlines, Inc., 62 F.2d 1108 (8th Cir. 1995); Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995); Milton v. Scrvnrr, Inc., 53 F.3d 1118 (10th Cir. 1995); White v. York International Corp., 45 F.3d 357 (10th Cir. 1995). Reasonable accommodation does not require an employer to lower its production standards. Milton v. Scrvnrr, Inc., 53 F.3d 1118 (10th Cir. 1995).
Under the ADA, it is unlawful to discriminate against someone who is perceived as being disabled. However, the mere fact that an employer has placed an employee on restricted duty until it is satisfied that the employee is qualified to return to regular duty does not mean that the individual is perceived or regarded as having a disability. Thompson v. City of Arlington, 838 F. Supp. 1137 (ND Tex 1993).

2. Modified Work Schedules

Requests for modified work schedules implicate both the ADA and the FMLA, and different results are reached depending on which analysis is used. Because employers must comply with both statutes, a modified work schedule may be required under one even though the courts have specifically rejected it as a requirement under the other.

An employer may be required to restructure a job by providing modified work schedules or providing part-time employment as an ADA accommodation. Ralph v. Lucent Technologies, Inc., 135 F.3d 166 (1st Cir. 1998). However, courts interpreting the ADA have held that an employer is not required to turn a full-time position into a part-time position where the position requires continuity and supervisory duties which must be performed in person. Magel v. Federal Reserve Bank, 776 F. Supp. 200 (E.D. Penn. 1991), aff'd, 5 F.3d 1490 (3rd Cir. 1993). Generally, an employer will not be required to restructure a job to allow an employee to work at home, Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998); Smith v. Ameritech, Inc., 129 F.3d 857 (6th Cir. 1997), but in certain circumstances this accommodation may be appropriate. Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997); Spath v. Berry Plastics Corp., 900 F. Supp. 893 (N.D. Ohio 1995).

In Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994), the Court held that the U.S. Attorney's office did not discriminate against a clerical employee in violation of the ADA when it rejected her request for a flexible schedule that would have allowed her to
set her own hours. The employee suffered from Meniere’s disease and was subject to periodic attacks of dizziness and nausea. In affirming summary judgment, the court held, “[t]o require an employer to accept an open-ended ‘work when able’ schedule for a time-sensitive job would stretch ‘reasonable accommodation’ to absurd proportions and imperil the effectiveness of the employer’s public enterprise.” See also, Jackson v. Veterans Administration, 22 F.3d 277 (11th Cir. 1994); Tyndall v. National Education Centers, 31 F.3d 209 (4th Cir. 1994).

While working part-time or requiring sporadic absences may not be a required accommodation under the ADA, it may be required under the FMLA. Where FMLA leave is requested for the purpose of caring for a sick family member or for the employee’s own serious medical condition, leave may be taken intermittently or on a reduced leave schedule “when medically necessary”. 29 CFR §825.203. This may not be done where leave is taken for the birth or placement of a child for adoption.

An employer must afford a qualified individual with a disability, within the meaning of the ADA, the employee’s FMLA rights at the same time that the employer makes any reasonable accommodations and takes other steps in accordance with the ADA. For example, if an employee became disabled, a reasonable accommodation under the ADA might be accomplished by providing the employee with a part-time job with no health benefits. However, the Act would permit an employee to work a reduced leave schedule until 12 weeks of leave were used, with health benefits maintained during this period. At the end of the FMLA leave entitlement, an employer is required to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when the leave commenced. The employer’s FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the equivalent position because of a disability, and the employee had exhausted his or her FMLA entitlement, the ADA may
permit or require the employer to make a reasonable accommodation at that time by placing the employee in a part-time job, with only those benefits provided to part-time employees. 29 CFR §825.702.

If the FMLA entitles an employee to a leave, an employer may not, in lieu of FMLA leave entitlement, require the employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer the employee the opportunity to take such a position.

If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week. 29 CFR §825.205.

3. Provision of An Assistant

In certain situations an employer can be required to provide an employer with a helper as an accommodation. For example, in Borkowski v. Valley Central School District, 63 F.3d 131 (2d Cir. 1995), the Court held that the employer might be required to provide help to teacher who was unable to control her students, and in EEOC v. AIC Security Investigators, 820 F. Supp. 1060 (N.D. Ill. 1993), the Court held that the plaintiff’s inability to drive could be accommodated by hiring a driver.

4. Reassignment to New Positions

The ADA states an employer must reassign an individual with a disability who no longer is able to perform a job’s essential functions to an appropriate vacant position if one exists. Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998); DePaoli v. Abbott Laboratories, 140 F.3d 668 (7th Cir. 1998); Woodman v. Runyon, 132 F.3d 1330
(10th Cir. 1997); Mustafa v. Clark County School District, 157 F.3d 1169 (9th Cir. 1998); Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1998); Aldrich v. The Boeing Co., 146 F.3d 1265 (10th Cir. 1998), cert. den., 119 S.Ct. 2019 (1999). The employee must be able to perform the essential functions of the position to which he or she is being transferred. DePaoli v. Abbott Laboratories, 140 F.3d 668 (7th Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 5667 (7th Cir. 1998); Still v. Freeport-McMoran, Inc., 120 F.3d 50 (5th Cir. 1997); Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996).

Some courts have stated that employers “are not required to find another job for an employee who is not qualified for the job he is doing.” Smith v. Blue Cross Blue Shield, 894 F. Supp. 1463 (D. Kan. 1995), aff’d, 102 F.3d 1075 (10th Cir. 1996). For example, in Daugherty v. The City of El Paso, 56 F.3d 695 (5th Cir. 1995), the court ruled, “we do not read the ADA as requiring affirmative action in favor of individuals with disabilities in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.” Courts so holding generally rule that reassignment is required only if the employer has a practice or policy of reassigning non-disabled employers. Schmidt v. Methodist Hosp. of Indiana, 89 F.3d 342 (7th Cir. 1996).

Courts have uniformly held an employer is not required to create a new position for a disabled employee. McCrea v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997); Still v. Freeport-McMoran, Inc., 120 F.3d 50 (5th Cir. 1997); Siebers v. Wal-Mart Stores, Inc., 125 F.3d 1019 (7th Cir. 1997); Weiler v. Household Financial Corp., 101 F.3d 519 (7th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996); Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994).

An employer is not required to create a light duty position as an accommodation. Turco v. Hoechst Celanese Corp., 101 F.3d 1090 (5th Cir. 1996). However, if an appropriate light duty job is open, assignment to it may be a reasonable accommodation. Stone v. City of Mt. Vernon, 118 F.3d 92 (2nd Cir. 1997). An employer may choose to
create light duty positions only for employees injured on the job and may limit those positions for a certain period of time. *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998).

An employer need not promote any employee as an accommodation. *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998); *Shiring v. Runyon*, 90 F.3d 827 (3rd Cir. 1996); *White v. York International Corp.*, 45 F.3d 357 (10th Cir. 1995).

5. **Leaves of Absence**

Generally, the ADA protects only those individuals who can perform the essential functions of their jobs. Therefore, a number of courts have ruled that the ADA does not require employers to provide disabled employees with indefinite leave. See, e.g., *Watkins v. J&S Oil Co., Inc.*, 164 F.3d 55 (1st Cir. 1998); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 (5th Cir. 1996); *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996). However, in certain situations time off may be a reasonable accommodation. For example, in *Williams v. Widmall*, 70 F.3d 1003 (10th Cir. 1996), the Court held that reasonable accommodation requires that an alcoholic be given time off to participate in a treatment program.

The FMLA clearly requires an employer to grant a leave of absence of up to 12 weeks. Therefore, while the employee may not be entitled to such a leave as an accommodation under the ADA, he or she may be entitled under the FMLA. Pursuant to 29 CFR §825.200, employers are permitted to utilize any one of the following methods for determining the “12-month period” in which the 12 weeks of leave entitlement may occur, provided that the chosen method is uniformly applied:

1. the calendar year;
2. any fixed 12-month leave year, such as a fiscal year, a year required by state law, or a year starting on an employee’s anniversary date;
(3) the 12-month period measured forward from the date of an employee’s first FMLA leave begins; or
(4) a rolling 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

FMLA leave is generally unpaid. However, accrued paid vacation or paid personal leave may be substituted for any FMLA-qualifying purpose. If permitted by the employer’s plan, accrued paid family leave may be substituted for birth or adoption leave, or to care for a seriously ill close family member. For example, if the employer’s plan allows use of paid family leave to care for a child but not a parent, the employer is not required to permit accrued paid family leave to be substituted for unpaid FMLA leave used to care for a parent. Accrued paid medical or sick leave may be substituted to care for a seriously ill close family member, but only where the employer would normally allow such paid leave to be used for another’s serious health condition. For example, an employee does not have the right to use paid sick days to care for a seriously ill spouse if the employer’s leave plan does not allow paid sick leave to be used for that purpose. 29 CFR §825.208. Ultimately, it is the employer’s responsibility to designate whether the time off will be applied to the FMLA leave. Similarly, leave earned under plans allowing “paid time off” may be substituted for any FMLA leave.

J. Threats to Safety and Health

Employers are not required to employ individuals who pose a direct threat to the safety or health of themselves or others in the workplace, nor are employers required to provide accommodations creating such safety or health problems. Whether or not an employee poses a safety or health risk will be determined on a case by case basis. See, e.g., Kapche v. City of Antonio, 176 F.3d 840 (5th Cir. 1999) (no per se rule as to whether drivers with insulin dependent diabetes pose a direct threat); Rizzo v. Children’s World
Learning Centers, Inc., 173 F.3d 254 (5th Cir. 1999); Hamlin v. Charter Township of Flint, 165 F.3d 426 (6th Cir. 1999).

K. Return to Work Rights

Upon return from a FMLA leave, an employee is entitled to be returned to the same position she held at the beginning of the leave, or to "an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." 29 CFR §825.214. An equivalent position must have the same pay, benefits and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. 29 CFR §825.215.

An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted if it is the employer's practice or policy to do so with respect to other employees on "leave without pay." An employer is not required to grant additional paid vacation, sick, or personal days to an employee on FMLA leave.

An employee must be reinstated to the same or geographically proximate worksite where the employee had been previously employed. She is ordinarily entitled to return to the same shift or the same or an equivalent work schedule. The same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and nondiscretionary payments must exist in the new position.

If an employer can prove that the employee would have been laid off during the FMLA leave period, then that employee is not entitled to reinstatement. If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. 29 CFR
§825.216. An employee who fails to return at the end of the twelve week period or is incapable of returning to his or her job at that time has no return to work rights. Cehrs v. Northeast Ohio Alzheimer’s Research Center, 155 F.3d 775 (6th Cir. 1998).

Benefits must be resumed upon the employee’s return to work at the same level as they were provided when leave began, without any new qualification period or physical exam. Some employers may find it necessary to modify life insurance or other benefit programs in order to be able to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee following return from leave. 29 CFR §825.215(D)(1).

A “key employee” is defined as “a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee’s worksite.” 29 CFR §825.217. An employer may deny reinstatement rights to a key employee only when the key employee’s restoration will cause “substantial and grievous economic injury” to the operations of the employer. 29 CFR §825.218. This section must be closely read, as it specifies that the pertinent question is whether such an injury will result not from the key employee’s absence, but from “the restoration of the employee to employment”. In order to deny a key employee restoration rights, the employer must meet a number of notice requirements described at 29 CFR §825.219.

L. Posting and Notice Requirements

An employer should post all non-discrimination posters provided by the Equal Employment Opportunity Commission.

The posting requirements under FMLA are set forth at 29 CFR §825.300. Every employer subject to the Act is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the act’s
provisions and providing information concerning the procedures for filing complaints of violations of the act with the department of labor. When an employer’s work force is comprised of a significant portion of workers who are not literate in English, the employer may be required to provide a translated notice.

If an employer has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, then information concerning FMLA entitlements and employee obligations under the act must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer’s policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on the act. 29 CFR §825.301. If the employer does not have any written policies, manuals, or handbooks describing employee benefits and leave provisions, then the employer must provide written guidance to employees when they request leave. Employers may duplicate and provide the employee a copy of a FMLA fact sheet to be available from the DOL’s wage and hour division.

In addition, when an employee provides notice of the need for leave, an employer must provide the employee with a notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The regulations include detailed language on the information that should be included in this notice (e.g., any requirement to provide medical certification of a serious health condition, whether the employer will require substitution of paid leave, any requirement for the employee to make health plan payments). A prototype notice is also expected to be produced by the Department of Labor for optional use by employers. 20 CFR §825.301.
M. Enforcement

Title I of the ADA will be enforced by the same remedies and procedures provided for in Title VII of the Civil Rights Act of 1964. Therefore, an employee desiring to bring an action under the ADA must first file a charge with the Equal Employment Opportunity Commission. A plaintiff alleging violation of the ADA’s Title I may receive not only back pay but compensatory and punitive damages up to $300,000. Punitive damages will not be allowed in a case involving an alleged failure to accommodate where the employer has acted in good faith in attempting to find a reasonable accommodation which does not pose an undue hardship.

Rights granted by the FMLA may be enforced by employees in court, individually or as a class action, or by the United States Department of Labor. Available remedies include actual damages, interest, double damages, attorneys’ fees, and reinstatement.