

EMPLOYMENT LAW ISSUES

INTRODUCTION

Approximately forty percent of the more than one million Americans diagnosed with some form of cancer each year are working-age adults. Nearly ten million Americans have a history of cancer. These statistics highlight the importance of understanding the legal rights and protections that exist in the workplace for cancer patients and survivors.

EMPLOYMENT LAWS PROTECTING CANCER PATIENTS

The two federal employment statutes that most affect those diagnosed with cancer (or those with a history of cancer) are the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA).⁽⁸⁾ While this section of the Guide focuses only on these two federal statutes, it is important to note that there are also a number of state statutes that may provide additional rights and protections in the employment context.⁽⁹⁾ Information regarding individual state law information can often be found on the Internet, including links on the websites referenced at the end of this section.

THE FAMILY AND MEDICAL LEAVE ACT

What is the purpose and scope of the FMLA?

The purpose of the FMLA is to provide eligible employees with the right to take family and medical leave under certain circumstances. The Wage and Hour Division of the U.S. Department of Labor (DOL) is the federal agency responsible for enforcing the FMLA and for establishing regulations regarding the protections offered by the Act.

The FMLA applies to private employers with fifty or more employees for twenty calendar work weeks in the current or preceding calendar year. A covered employer must provide eligible employees with up to twelve work weeks of unpaid, job-protected leave in certain family and medical situations.

- (8) The FMLA and ADA are two of the most complex statutes in employment discrimination jurisprudence and continue to be the subject of litigation throughout the United States. Thus, the Committee recommends that you contact an attorney and/or the U.S. Equal Employment Opportunity Commission, the U.S. Department of Labor, or an appropriate advocacy group regarding the most up-to-date information on these statutes, including their applicability under specific circumstances and the meaning of any terms used in these statutes.
- (9) This section deals only with the scope of protection for employees of private employers. Public employees, however, are also entitled to certain protections for family and medical leave and disability-related discrimination. Information regarding protections for public employees, including useful links, can be found on the Internet, including the U.S. Department of Labor and the U.S. Equal Employment Opportunity Commission websites.

Who is an eligible employee?

To be “eligible” for leave under the FMLA, an employee must have been employed: (1) for at least twelve months by the employer with respect to whom the leave is sought; (2) for at least 1,250 hours in the twelve-month period immediately preceding the leave request; and (3) at a work site where the employer employs at least fifty or more employees within a seventy-five mile radius.⁽¹⁰⁾ The twelve-month employment period need not be consecutive. Moreover, only hours actually worked will count toward the 1,250 hour eligibility requirement.

Under what circumstances can I request leave under the FMLA?

An employee may request FMLA leave under the following circumstances: (1) for the birth and care of a child, or for the placement of a child for adoption or foster care; (2) for a serious health condition of the employee’s spouse, parent, or child that requires the employee to miss work and care for the family member; or (3) for a serious health condition of the employee that prevents the employee from performing one or more of the essential functions⁽¹¹⁾ of his or her position.

How does the FMLA define a “serious health condition”?

A “serious health condition” under the FMLA is defined as an illness, injury, impairment, or physical or mental condition involving: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuous treatment by a health care provider. Any periods of incapacity or follow-up treatment related to inpatient care are also protected under the FMLA.

Does the FMLA allow me to take leave in smaller blocks of time or reduce my hours?

Yes. Where medically necessary, an employee may be able to take leave intermittently (e.g., for a day or limited number of hours) or request a reduced leave schedule (e.g., reducing the number of hours or days worked). A reduced leave schedule may be used in a variety of situations, including where an employee is recovering from a serious health condition and needs to reduce his or her work schedule or working hours. Intermittent leave is taken in separate blocks of time for a single qualifying

- (10) Notably, state law, collective bargaining agreements, and an employer’s own family and medical leave policy (often located in an employee handbook or a policy manual) may offer benefits more generous than those provided by the FMLA. Thus, it is important to confirm whether such additional benefits exist and, if so, how they may apply to your specific need for family and medical leave.
- (11) The DOL incorporates the ADA definition of an “essential function” into the FMLA regulations. The ADA definition of an essential function is discussed in greater detail under the ADA section.

reason and may be taken due to a serious health condition that requires periodic medical treatments, such as chemotherapy.

During such intermittent or reduced leave schedule, the employer may, in some cases, temporarily transfer the employee to an alternate position with equivalent pay and benefits to accommodate periods of leave or limited capacity. The equivalent pay and benefit requirement applies even if the new position reduces the number of hours to a level where the employee would not otherwise be entitled to such pay and benefits. The employer may not, however, transfer an employee into a position to discourage the employee from taking leave or to otherwise retaliate against the employee for seeking leave. Once the intermittent or reduced leave is no longer needed, the employer must return non-key employees to the same or substantially similar position (discussed below).

What notice do I need to provide my employer and when?

Where the need for leave is foreseeable, the employee should give the employer at least thirty-days advance notice of the need for leave, including its duration. Further, the employee should attempt to schedule the leave, if possible, so that it is not unduly disruptive to the operations of the employer. In those situations where the need for leave is not foreseeable, an employee must give notice as soon as practicable after discovering the need for leave. While federal law does not require an employee to specifically mention the FMLA when requesting leave, the employee must give sufficient information to put the employer on notice that the requested leave may qualify as FMLA leave. The employer can then inquire further, if necessary, regarding the specific circumstances of the requested leave.

Once notice has been given, it is the employer's responsibility to inform the employee that the requested leave will be counted as FMLA leave within two business days of the request, absent special circumstances. The employer must also provide notice to the employee detailing the employee's obligations under the FMLA and the consequences for failing to meet them.⁽¹²⁾ Many employers will use a form provided by the DOL (known as Form 381) to provide such notification. A copy of the form can be found on the DOL website.

(12) Such notice includes whether the employee will be required to provide a medical certification and consequences for failing to do so, the employee's right to use paid leave during the FMLA period and/or whether the employer will require the employee to substitute such paid leave, whether the employee will be required to pay group health insurance premiums and consequences for failing to do so, whether a fitness-for-duty certificate will be required upon returning to work, whether the employee will be classified as a key employee, and the employee's right to job restoration.

May an employer seek medical certifications or examinations in response to an FMLA request?

Yes. An employer may require a medical certification from the employee's health care provider attesting to the serious health condition of the employee or relevant family member. The employer may not, however, seek more information than is contained in the optional DOL FMLA certification form (known as Form 380). The DOL form focuses on information concerning the specific health condition at issue, including the date the condition began, probable duration of the condition, whether the condition meets the definition of a "serious health condition" and the medical facts that support such conclusion. The form also addresses whether intermittent leave will be necessary and the scope of such intermittent leave, whether the employee will be unable to perform the essential functions of his or her position, and, if the leave involves the serious health condition of a family member, information regarding the need to care for the family member. Many employers opt to use the DOL form in connection with such certifications. A copy of the form can be found on the DOL website.

Where the need for leave is foreseeable and the employee has provided the thirty-days advance notice, then the certification should be provided before the leave begins. Where the thirty-days notice is not possible, the employer must allow the employee at least fifteen calendar days to provide the certification. The employee must provide the certification within this timeframe or as soon as practicable under the circumstances. An employer may not contact the employee's health care provider directly regarding any medical certification. However, the employer's health care provider may contact the employee's health care provider, with the employee's permission, for clarification and confirmation of authenticity of any information provided.

What if my employer disagrees with my doctor?

Where the employer has reason to question the validity of the initial certification, the employer may request a second opinion from a different health care provider, at the employer's expense, as long as it is not by a health care provider that is employed or used by the employer on any regular basis. Should the second certification conflict with the initial certification, the employer can request a third certification, at its own expense. The employer and employee must jointly agree upon the third health care provider, whose opinion will be final and binding on the certification. The employer can also request a recertification from the employee, usually every thirty days after the estimated duration has expired, and a fitness-for-duty certification when an employee is ready to return to work (as long as the employer has a uniformly-applied practice of requiring such fitness-for-duty certifications when an employee returns from a medically-related leave).

Will I lose my benefit coverage while on FMLA leave?

Generally, no. During an FMLA leave, an employer must continue employer-provided group health insurance during the term of the leave, as if the employee had not taken leave. Thus, any changes to the group health plan that take place during an employee's FMLA leave must be applied or offered to the employee.

Under some special circumstances, an employer's obligation to continue group health benefits during the FMLA leave will end, including where: (1) the employer-employee relationship would have terminated if the employee had not taken leave; (2) the employee fails to return to work at the expiration of the leave (absent special circumstances); (3) the employee elects not to retain group health care coverage; and (4) the employee's premium payment is more than thirty-days over due, despite sufficient notice (usually at least fifteen days) from the employer.

Who pays for benefits during FMLA leave?

The employer can require the employee to pay his or her share of the insurance premiums paid by the employer during the leave period, which can be done in a variety of ways, including having the employee make the premium payment: (1) at the same time it would have been paid via a payroll deduction; (2) on the same schedule as payments are made under COBRA; or (3) pursuant to a reasonable payment agreement between the employer and employee. The employer must give reasonable notice of the employee's payment option(s) and the employee will generally have the choice to discontinue benefit coverage during the FMLA-leave period.

Do I have to use up my vacation time/PTO during FMLA leave?

An eligible employee may also elect, or the employer may require, that the employee use any accrued, but unused paid leave during the FMLA leave period. Any employer requiring such leave substitution should notify the employee in advance in writing. Such notification is most often contained in an FMLA policy in an employee handbook. Where leave substitution results in a paid FMLA leave, the employee's share of the group health plan insurance premiums should be paid by the method that is normally used by the employer during any paid leave (which is often done as a payroll deduction).

Do I get my same job back when I return from FMLA leave?

Yes, in most cases. In general, federal law requires employers to place non-key employees returning from FMLA leave (or who no longer need intermittent or reduced schedule leave) in the same or a substantially equivalent position. An employee is normally entitled to such restoration even where he or she has been

replaced or his or her position has been restructured to accommodate the employee's absence as a result of the leave. The position must have equivalent pay (including unconditional pay increases), benefits, and other terms and conditions of employment (such as promotion opportunities, skill, hours, location, responsibility, etc.).

The restoration obligation is not absolute, however. For example, an employee is not entitled to restoration where he or she would not have remained continuously employed during the leave period (such as where the employee would have been laid off, terminated for discipline based on conduct prior to the leave, or resigned his or her position prior to the leave). Nor is an employee entitled to job restoration where he or she is unwilling or unable to return to work after the expiration of the leave period (although there may be a requirement under the ADA to provide a reasonable accommodation, as discussed below).

Further, "key employees" are not entitled to job restoration if it would cause "substantial and grievous economic injury" to the employer's business operations. A key employee is defined as a salaried employee who is among the highest paid ten percent of all employees within a seventy-five mile radius of the worksite. A "substantial and grievous economic injury" is considered to exist where the restoration would result in substantial, long-term economic injury or otherwise threaten the financial stability of the employer's operations – which is a more stringent standard than an "undue hardship" under the ADA (discussed below).

THE AMERICANS WITH DISABILITIES ACT

What is the purpose and scope of the ADA?

The purpose of the ADA is to dispense with misconceptions and stereotypes regarding individuals with disabilities and to prevent disability discrimination in employment. The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing the ADA and for establishing the regulations regarding the scope of protections offered by the Act.

The ADA (Title I) applies to private employers that employ fifteen or more employees for twenty or more calendar weeks in the current or preceding calendar year. The Act prohibits discrimination against a qualified individual with a disability and offers protection for both employees and job applicants.

What is a disability under the ADA?

An individual is "disabled" under the ADA if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. Cancer may be considered a disability under the ADA when it, or its side-effects

(including treatment such as chemotherapy or even depression), substantially limit one or more of the individual's major life activities.

What is a “major life activity”?

Major life activities are those activities that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, interacting with others, speaking, hearing, learning, sleeping, walking, breathing, eating, and reproduction. In some instances, “working” can be considered a major life activity, but only where the individual is significantly restricted in a class of jobs or broad range of jobs in various classes – as compared to the average person having comparable training, skills, and abilities.

What does it mean to be “substantially limited” under the ADA?

Determining whether an individual is “substantially limited” in a major life activity requires a case-by-case assessment of the individual's condition, including: (1) the nature and severity of the impairment; (2) its duration or expected duration; and (3) its permanent or expected permanent or long-term impact. This determination is made by comparing the individual to the average person in the general population. Therefore, occasional or intermittent occurrences of an impairment are often not severe and permanent enough to be considered substantially limiting under the ADA.

How are “mitigating measures” considered?

In determining whether an individual is substantially limited in a major life activity, courts will look at the individual's condition at the time of the alleged discrimination, including any corrective or “mitigating” measures utilized by the individual. For example, where an individual takes medication that corrects the limiting effects of an impairment, the individual may no longer meet the substantially-limited requirement and, thus, may not be “disabled” under the ADA.

Is a disability under the ADA the same as a serious health condition under the FMLA?

No, not necessarily, although there may be some overlap.⁽¹³⁾ A serious health condition under the FMLA, by definition, requires inpatient care or “continuing treatment.” A disability under the ADA, on the other hand, is a mental or physical impairment that substantially limits one or more major life activities, and requires

(13) The DOL Regulations expressly state that a “serious health condition” under the FMLA must be analyzed separately from a “disability” under the ADA, because they represent different concepts.

more than temporary conditions like sprains or routine surgery. For example, if an employee has a routine appendectomy, the FMLA would be implicated (assuming the employee is eligible for leave under the FMLA and employed by a covered employer), but not necessarily the ADA, unless complications occur that qualify as a disability.

Who is entitled to a reasonable accommodation under the ADA?

Under the ADA, a covered employer is required to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

Who is a “qualified individual with a disability”?

An individual is a “qualified individual with a disability” where that individual can perform, with or without a reasonable accommodation, the essential functions of the position held or desired. Essential functions are those functions that are fundamental to the position, not marginal. A function may be essential if: (1) the reason the position exists is to perform that function; (2) there are a limited number of employees available to perform the function; and/or (3) the incumbent in the position is hired based on specialized expertise relating to such function.

In determining whether a function is essential, courts will look to several factors, including: (1) the employer’s judgment as to what functions are essential; (2) written job descriptions for the position; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring an employee to perform the function; (5) the terms of any collective bargaining agreement with a union (where applicable); and (6) the past and current work experience of employees in the same position. This determination must be made on a case-by-case basis.

How do I request a reasonable accommodation?

There are no magic words necessary to request a reasonable accommodation. Rather, the employee need only provide sufficient information to put the employer on notice that he or she needs an accommodation based upon a covered disability. Once the employee has requested an accommodation, the “interactive process” between the employer and employee begins. This process is an interactive and on-going discussion between the employer and employee to determine whether the employee needs an accommodation and, if so, what accommodation is reasonable and appropriate under the circumstances. Throughout this process, the employee and, where applicable, the employee’s doctor, will inform the employer of the nature

and limitations of the employee's disability and suggest possible accommodations to enable the employee to perform the essential functions of the position.

What are some examples of reasonable accommodations?

Reasonable accommodations must be tailored to the specific individual in need of an accommodation. Indeed, there may be as many possible accommodations as there are individuals requesting them. Examples of such accommodations include: (1) job restructuring; (2) providing time off of work or a modified schedule (for treatment or other medical needs); (3) simple physical changes to the workplace; (4) modifying a workplace policy; (5) reassigning non-essential functions to others; and (6) reassigning the employee to a different (vacant) position. Importantly, the accommodation selected by the employer need not be the one the employee selects or prefers, as long as it effectively accommodates the employee. But an employer is not required to provide an accommodation that results in an undue hardship (discussed below).

May an employer request medical certifications and other documentation in response to an accommodation request?

Yes. An employer may request reasonable medical documentation, including, but not limited to, documents substantiating that the employee: (1) has a covered disability under the ADA; and (2) needs a reasonable accommodation. The employer may not, however, seek the employee's entire medical file or any documents that do not otherwise relate to the employee's reasonable accommodation request.

Documentation will generally be considered sufficient if: (1) it is offered by a health care professional with the necessary expertise; (2) it describes the nature, severity, and duration of the impairment; (3) it describes the activities limited by the impairment; (4) it explains the extent to which the impairment limits the employee's functional ability; and (5) it substantiates why the requested accommodation is needed. An employer may not use such requests as a means of retaliating against an employee who has requested an accommodation under the ADA.

Where the employee fails to provide sufficient documentation, the employer can request the missing information. The employer, however, should explain why the previous documentation was insufficient and give a reasonable period of time for the employee to provide the additional information needed. The employer can also ask the employee for permission to consult directly with the employee's physician (with a release from the employee) or even request an examination by an employer-selected doctor, as long as the examination is limited to determining whether the employee is disabled under the ADA, the scope of any functional limitations, and any possible

accommodations needed by the employee. All costs related to an employer-requested medical examination must be paid by the employer.

What is an “undue hardship”?

An “undue hardship” is an action that requires “significant difficulty or expense.” Factors considered by the courts in determining whether an accommodation constitutes an undue hardship include, but are not limited to: (1) the nature and cost of the accommodation at issue; (2) the overall financial resources of the employer’s facility, number of persons employed at the facility, the effect on the expenses and resources of the facility, or the impact otherwise of such accommodation on the operation of the facility; (3) the overall financial resources and overall size of the business of the employer; and (4) the type of operation engaged in by the employer, including the composition, structure, and functions of the workforce.

Are there any limitations on pre-employment medical examinations or inquiries?

Yes. An employer cannot inquire into whether an applicant has a disability before the potential employer has made a conditional offer of employment. For example, an employer cannot inquire as to whether the applicant has or had cancer. But the employer may inquire as to whether the applicant can perform job-related functions. Once a conditional offer of employment has been made, an employer may conduct medical exams, but only if: (1) all applicants for the same job category are required to take such examinations; and (2) any examination criteria that screens out individuals is based on medical standards that are job-related and consistent with business necessity (and a reasonable accommodation will not allow the individual to perform the essential functions of the job).

Are there any limitations on medical examinations or inquiries of employees?

Yes. An employer cannot conduct medical examinations or inquire as to whether an existing employee has a disability, unless the examination and/or inquiry is job-related and consistent with business necessity. This does not prohibit an employer from seeking medical examinations or making inquiries with respect to whether an employee can perform the essential functions of the position.

What does it mean to be “regarded as” disabled, or have a “record of” a disability?

The ADA also offers protection to those “regarded as” having or with a “record of” a disability. Thus, an employer may not treat an individual differently based on

the individual's "history" or "record of" an impairment that substantially limits one or more major life activities. Further, an individual may come within the "regarded as" protection of the ADA if an employer either: (1) mistakenly believes an individual has an impairment that substantially limits one or more major life activities; or (2) believes that an actual, non-limiting impairment substantially limits one or more major life activities.

Is extended leave a reasonable accommodation under ADA?

The law is still developing with respect to the extent to which a leave of absence can serve as a reasonable accommodation under the ADA. The EEOC takes the position that flexible leave policies should be considered as a possible reasonable accommodation where appropriate and that, while any additional leave need not be a paid leave, employers should consider allowing the use of accrued leave or leave without pay, where it will not cause an undue hardship.

Unlike the FMLA, there is no annual limit for leave (as a reasonable accommodation) under the ADA. Still, some courts have held that lengthy, indefinite periods of time may constitute an undue hardship on the employer. Thus, while additional leave may be available as a reasonable accommodation, the requested time period must be reasonable under the circumstances.

HOW TO AVOID JOB DISCRIMINATION

Are lawsuits the best answer to a possible employment discrimination claim?

No, not necessarily. In many cases, lawsuits can be costly and time-consuming endeavors that may not result in addressing the alleged discrimination in the best way possible. It is, therefore, advisable to take steps that reduce an employee's exposure to potential discrimination. If the employee nevertheless experiences discrimination, he or she should attempt to resolve the matter internally with the employer. If these steps fail, then the employee may consider pursuing legal action.

What steps can I take to reduce or remove the chance of discrimination in employment?

There are several steps that you can take to reduce or remove the possibility of discrimination in the workplace. These steps include: (1) not volunteering that you have or had cancer, unless necessary, such as when it directly impacts your ability to perform the job (and even then, only to those who have a need to know); (2) focusing on your ability to perform the essential functions of the position, rather than any limitations that you may have; (3) always being aware of your employment rights and the scope of permissible medical examinations and inquiries (ask for clarification

if it appears that the employer has requested more than is permissible by law); and (4) applying for positions and promotions that you are qualified to perform.

What initial steps can I take in response to possible workplace discrimination?

At the outset of any employment relationship, you should familiarize yourself with the employer's FMLA and equal employment opportunity policies, including any complaint-reporting procedure (usually contained in the employee handbook). If you believe you have been discriminated against and/or the subject of retaliation for asserting your rights under the FMLA, ADA, or otherwise, you should promptly follow the employer's internal procedure and report the conduct. The complaint-reporting procedure may require reporting the conduct to a supervisor, member of management, or a member of the human resources department.

Once reported, you should give the employer a reasonable amount of time to investigate and address the matter. Using this procedure may resolve the matter promptly and allow you to stay focused on your job, rather than focusing on potential litigation and dealing with a likely adversarial relationship with your employer. In some instances, failure to report the conduct internally can also adversely impact any future lawsuit. For example, under a number of state and federal employment laws, an employer can argue that it is not liable for the allegedly discriminatory conduct of its employees where a complaining employee failed to put the employer on notice of the conduct via the complaint-reporting procedure and, thereby, prevented the employer from investigating – and possibly resolving – the matter.

ENFORCING YOUR LEGAL RIGHTS

How are legal rights enforced under the ADA and FMLA?

ADA: In Texas, an individual will generally have 300 days from the alleged discriminatory incident or "violation" to file a Charge of Discrimination with the EEOC, which is a mandatory prerequisite to bringing a private civil action under the ADA. Failure to satisfy this administrative remedy can bar any further legal action by the person claiming discrimination. Once filed, the EEOC will process the Charge and conduct an investigation. Thereafter, the EEOC will issue its determination and articulate whether it believes that there is "cause" or "no cause" to believe that discrimination took place. The EEOC will then issue a Notice of Right to Sue letter, which will allow the individual (or "charging party") to commence litigation. The individual can also request a Notice of Right to Sue before completion of the administrative process (without waiting on a determination). In any event, an individual will have 90 days from receipt of the Notice of Right to Sue to file a lawsuit.

FMLA: Unlike the ADA, the FMLA does not have an administrative-exhaustion requirement. Rather, the employee can immediately proceed with a private civil action. An individual seeking relief under the FMLA must file his or her civil action within two years of the alleged violation. This period is extended to three years in cases where the employer engaged in a “willful” violation of the FMLA. An individual may also notify the DOL of any potential FMLA violations, in which case the Secretary of Labor may investigate and thereafter bring a legal action against the employer directly. Thus, an employee can file suit, file a complaint with the DOL, or both. However, where the Secretary of Labor files a civil action against the employer (based on the conduct complained of by the employee), the employee’s individual right to bring a private action ends. Thus, an employee should consult with an attorney and carefully select the option that is best suited to the employee’s specific case.

USEFUL RESOURCES

U.S. Department of Labor (FMLA information)
www.dol.gov or 1-(866)-4-USA-DOL

U.S. Equal Employment Opportunity Commission (ADA information)
www.eeoc.gov or 1-(800)-669-4000

Advocacy, Incorporated (disability rights advocacy)
www.advocacyinc.org or 1-(800)-252-9108

Lance Armstrong Foundation/LIVESTRONG™ SurvivorCare (cancer survivor resources and information) www.livestrong.org or 1-(866)-235-7205

State Bar of Texas (general representation information)
www.texasbar.com or 1-(800)-252-9690

Find Law (general representation information)
www.findlaw.com