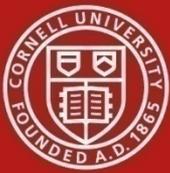




# THE INTERPLAY BETWEEN ADA AND FMLA

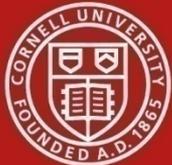
**Susan W. Brecher, Esq.**  
**Human Capital Development**  
**Cornell University ILR School**

**Judy Young**  
**Employment and Disability Institute**  
**Cornell University ILR School**



# Overall Goals

- Present multiple perspectives on FMLA leaves and ADA disability accommodations by analyzing the interplay and implications
- Examine the roles of HR and managers and provide tools and best practices for effective communication and leave management



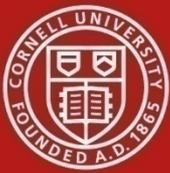
# Guiding Questions for Analysis and Implications

- What is the overlap between FMLA and ADA?
- What type of documentation may be requested?
- What are the communication essentials for HR, managers, and employees?
- What is the impact of intermittent leave on performance standards?
- Would ADA apply when FMLA leave ends?



# Part 1: Case Study

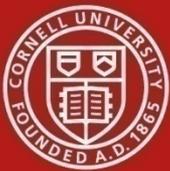
In December 2011 Carla, a phone customer service representative (CSR), told her manager that she has irritable bowel syndrome (IBS) and asked for time off for surgery and treatments.



# Participant Poll

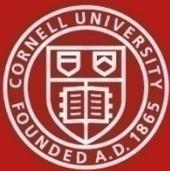
Is Carla's request covered by:

- A- FMLA
- B- ADA
- C- Both



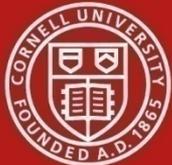
# FMLA

- **FMLA is an employee entitlement**
  - Must be eligible
  - Leave limited to 12 work-weeks within 12 months
  - Includes intermittent leave which can be taken in short intervals
  - Allows leave for family members, including military
  - Restores employee to same or equivalent job



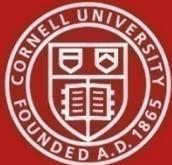
# ADA

- ADA is an employee right
- Disability is:
  - Mental or physical impairment that substantially limits a major life activity
  - Person has a record of the disability
  - Person is regarded as having a disability



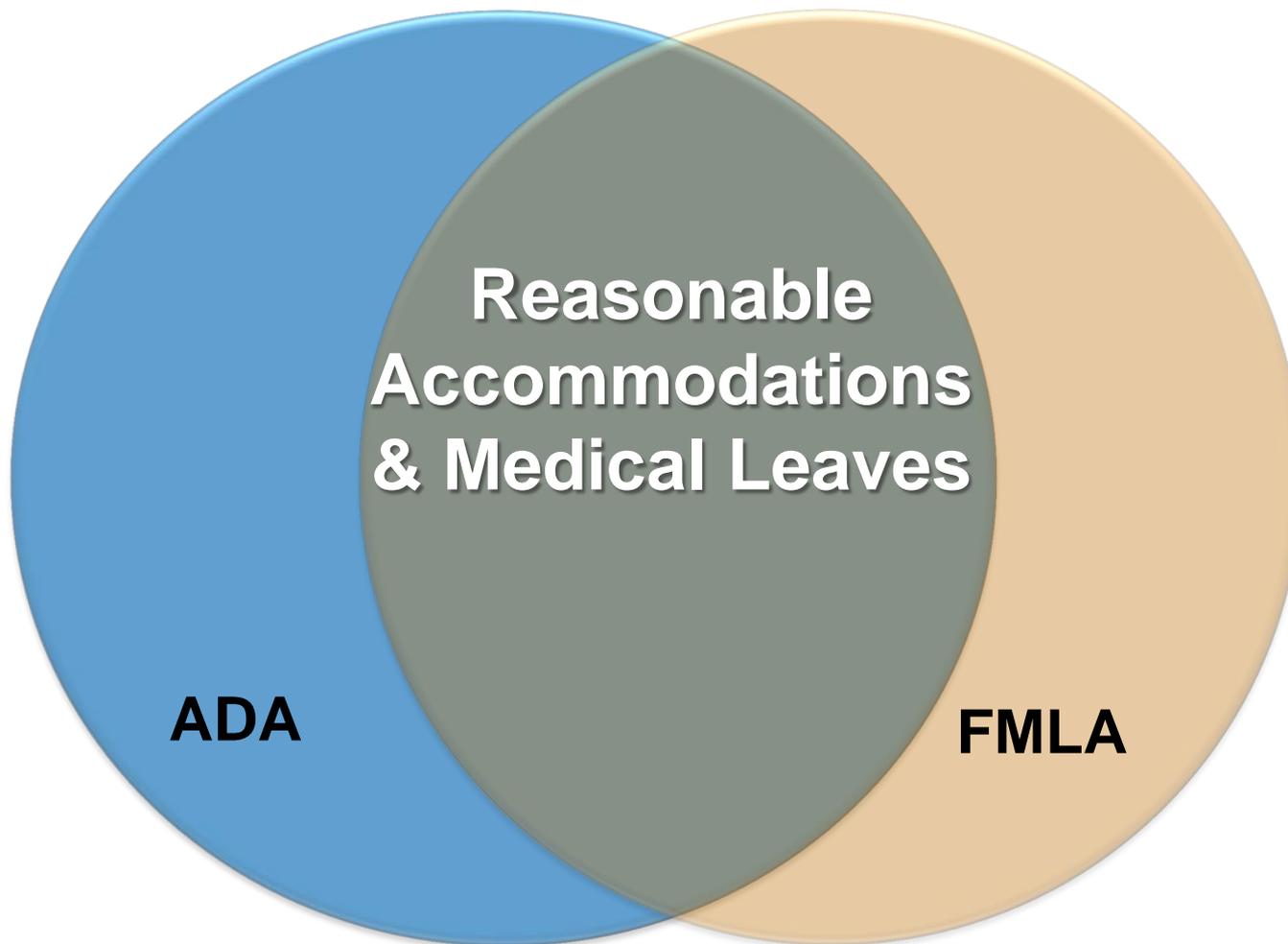
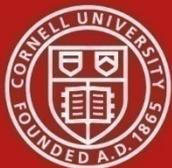
# ADAAA

- Interprets definitions of disability more broadly
- Includes bodily functions as major life activities
- Shifts focus to nondiscrimination and reasonable accommodations



# Reasonable Accommodations

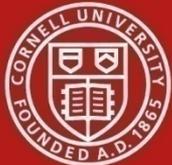
- Request is made by employee
- Requires an interactive process
- Medical documentation can be requested
- Considerations should be made based on individualized assessment
- Accommodation requests and interactive process should be documented





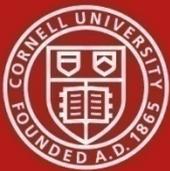
# The Interplay: FMLA and ADA

- Consider medical leave requests with an FMLA/ADA lens
- Medical condition may rise to the level of disability
- Evaluate employee's rights separately under FMLA and ADA
- When overlap exists, consider the one that provides the greater rights
- Review leave policies and their implications for ADA and FMLA



# What Type of Documentation May Be Requested?

- Information needed for:
  - FMLA leave
  - ADA accommodations
- What is the impact of GINA?
- When can an employer request an IME?



# Medical Documentation

## FMLA

- Certification from health care provider (HCP)
- Information to determine the existence of a serious medical condition
- May use DOL form or other form which provides sufficient information
- Certification should be presented 15 calendar days post request



# Medical Documentation

## ADA

- Medical information requested should be limited to functional limitations in relation to essential functions of the job
- Provision of job description is recommended so HCP understands job requirements
- If information is insufficient employee should be allowed to go back to HCP before employer makes contact directly



# Medical Documentation

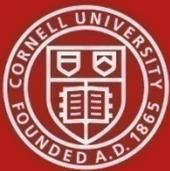
## ADA and FMLA

- Provide HCP with GINA safe harbor language to avoid getting unwanted medical information
- Follow protocols when information is insufficient
  - Request more from employee
  - Contact HCP
  - Conduct IMEs, when appropriate
- Keep information separate and confidential



# Communication Essentials

- Employees must request leave or RA
- Employees do not need to use legal terminology to request leave or reasonable accommodation
- Managers should receive only “need to know” medical information
- Identify an organizational “go-to” person(s) for all disability and leave-related questions and requests



# Communication Essentials

- Communicate to employees their specific FMLA leave entitlements and ADA rights
- Inform supervisors about the parameters of employees' medical leaves, including intermittent time off
- Advise managers to use appropriate language (good business reasons) when discussing leaves with co-workers



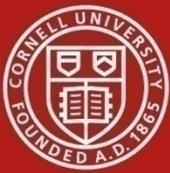
# Communication Essentials

- Ensure that managers understand how timing of employment decisions may be viewed in the context of medical leave and accommodation requests
- Tell managers about their responsibility not to interfere, discriminate or retaliate against employees entitled to medical leave



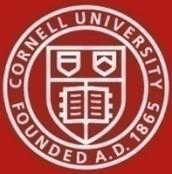
## Part 2: Case Study

- In March 2012, Carla told her manager she would need bathroom breaks during the day because of her medical condition
- Based on company policy, the performance standards require the CSRs to be available to take calls 88% of their work day



# Impact of Intermittent Leave on Performance Standards

- Requests for intermittent leave under FMLA and RA under ADA require a review of the essential functions of the job
- If predictable, employee should try to schedule so as not to unduly disrupt operations
- Under FMLA performance standards may be modified



# Impact of Intermittent Leave on Performance Standards

- Under ADA the standard is whether it “poses an undue hardship on the operation”
- ADA: while there is no requirement to lower standards, reasonable accommodations must be considered through an interactive process



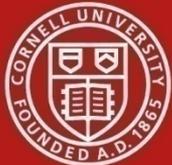
## Part 3: Case Study

- In July, HR advised Carla that she exhausted her FMLA leave based upon the number of consecutive medical days taken and the accumulated intermittent leave time on the days she worked
- Carla told HR she would still need the bathroom breaks and might need time off for an operation



# Would ADA Apply When FMLA Leave Ends?

- Under ADA leave may be a reasonable accommodation and should be considered when FMLA leave is not available
- An interactive process is required
- Employee is not entitled to accommodation of choice
  - May not be granted leave if another solution is more feasible and effective
- Beware of inflexible leave policies



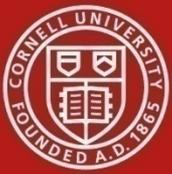
# Examples of Reasonable Accommodations

- Part time or modified work schedules
- Telecommuting and/or work at home options
- Job restructuring
- Light duty assignments
- Transfer to vacant position
- Modifying workplace policies

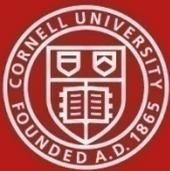


# Reasonable Accommodations as a Continuum

- Determine on a case-by-case basis
- Consider on a temporary or permanent basis
- Revisit effectiveness periodically
- Needs may change (for example, promotions, working conditions, progressive and additional disabilities)
- Re-enter into the interactive process



# Resources



# Resources

- **Fact Sheet on the EEOC's Final Regulations Implementing the ADA**

[http://www.eeoc.gov/laws/regulations/adaaa\\_fact\\_sheet.cfm](http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm)

- **ADA, FMLA and Title VII**

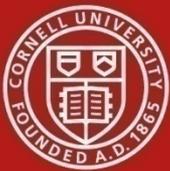
<http://www.eeoc.gov/policy/docs/fmlaada.html>

- **Requests for Medical Information in Procedures for Providing Reasonable Accommodation for Individuals with Disabilities in Section D**

[http://www.eeoc.gov/eeoc/internal/reasonable\\_accommodation.cfm#D](http://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm#D)

- **Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA**

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>



## Resources (cont.)

- **Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA**

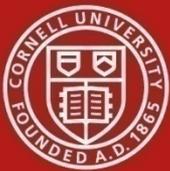
<http://www.eeoc.gov/policy/docs/accommodation.html>

- **Small Employers and Reasonable Accommodation**

<http://www.eeoc.gov/facts/accommodation.html>

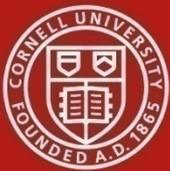
- **The ADA: Applying Performance and Conduct Standards to Employees with Disabilities**

<http://www.eeoc.gov/facts/performance-conduct.html>



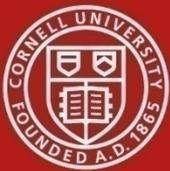
## Resources (cont.)

- **EEOC Testimony from June 8<sup>th</sup>, 2011 Hearings: Use of Leave as Reasonable Accommodation**  
<http://www.eeoc.gov/eeoc/newsroom/release/6-8-11b.cfm>  
<http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm>
- **Department of Labor, Wage and Hour Division: FMLA Homepage** <http://www.dol.gov/whd/fmla/index.htm>



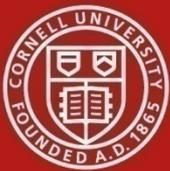
## Resources (cont.)

- **Department of Labor Wage and Hour Division: Protection for Individuals under the FMLA**  
<http://www.dol.gov/whd/regs/compliance/whdfs77b.htm>
- **Department of Labor, Wage and Hour Division: FMLA Employee Guide**  
<http://www.dol.gov/whd/fmla/employeeguide.pdf>
- **Department of Labor, Wage and Hour Division: FMLA Fact Sheet 28: The Family and Medical Leave Act of 1993**  
<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>



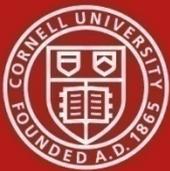
## Resources (cont.)

- **Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008 (with special attention to question #17)**  
[http://www.eeoc.gov/laws/regulations/gina\\_qanda\\_smallbus.cfm](http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm)
- **Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008**  
<http://eeoc.gov/laws/regulations/gina-background.cfm>



## Resources (cont.)

- **National Employee Technical Assistance Center**  
<http://www.askearn.com>
- **Job Accommodation Network (JAN)**  
<http://www.askjan.org>  
Fact Sheet: The Interactive Process  
<http://askjan.org/topics/interactive.htm>
- **Office of Disability and Employment Policy (ODEP):**  
Employment Laws: Medical and Disability-Related Leave  
<http://www.dol.gov/odep/pubs/fact/employ.htm>



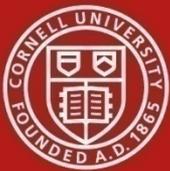
# Resources (cont.)

## Cornell University Employment and Disability Institute:

- Research – <http://www.ilr.cornell.edu/edi/m-research.cfm>
- Publications – <http://www.ilr.cornell.edu/edi/m-pubs.cfm>
- Resources – <http://www.ilr.cornell.edu/edi/m-resources.cfm>

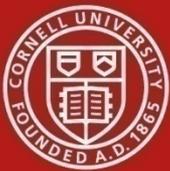
## EEOC Settlements:

- Verizon Communication (2011): Settled out of court for \$20m
- Supervalu Supermarket Chain (2011): Settled out of court for \$3.2m
- Sears & Roebuck Co. (2010): Settled out of court for \$6.2m



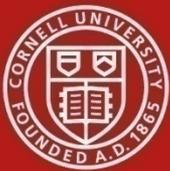
# Court Cases

- EEOC v. Ford Motor Co., Case No. 11-13742, (E.D. MI Sept.10, 2012)
- Pagel v. TIN Inc., 2012 U.S. App. LEXIS 16548 (7th Cir. Aug. 9, 2012)
- Stodulski v. Medline Industries Inc. No. 10-2870 (U.S. Dist. 2012)
- Antone v. Nobel Learning Communities LEXIS 6922 (U.S. Dist. 2012)
- EEOC v. United Airlines No. 11-1774 (7<sup>th</sup> Cir. 2012)
- Valdez v. McGill (10<sup>th</sup> Cir. 2012)
- Myles v. University of Pennsylvania Health System No. 10-4118 (U.S. Dist. 2011)
- Beem v. Providence Health & Services 25 Am. Disabilities Cas. (BNA) (U.S. Dist. 2011)
- Picarazzi v. John Crane Inc. LEXIS 11432 (U.S. Dist. 2011)
- Feldman v. Law Enforcement Associates Corporation, 779 F. Supp. 2<sup>nd</sup> 472 (U.S. Dist. 2011)



## Court Cases (cont.)

- Hamed v. Macy's West Stores LEXIS 119562 (U.S. Dist. 2011)
- Lundquist v. University S.D. Sanford School of Medicine (2011)
- Anderson v. JP Morgan LEXIS 5885 (11<sup>th</sup> Cir. 2011)
- Miller v. Illinois Dept. of Transportation No. 09-3143 (7<sup>th</sup> Cir. 2011)
- Brown v. Kastle Systems of Texas LLC LEXIS 87641 (U.S. Dist. 2010)
- Carmona v. Southwest Airlines Co. 604 F.3d 848. (5<sup>th</sup> Cir. 2010)
- Incorvati v. Best Buy Co. Civil No. 10-1939 (U.S. Dist. 2010)
- Fisher v. Vizioncore Inc. LEXIS 125855 (U.S. Dist. 2010)
- Livingston v. Fred Meyer Stores Inc. 388 Fed. Appx. 738 (9<sup>th</sup> Cir. 2010)
- Peyton v. Fred's Stores of Arkansas 561 F.3d 900 (8<sup>th</sup> Cir. 2009)
- Rauen v. US Tobacco Mfg . 319 F.3d 891 (7<sup>th</sup> Cir. 2003)



# Thank You

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