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
Reasonable Accommodations & Medical Leaves

ADA

FMLA
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
• 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 ADAAA
  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

• 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 8th, 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
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

- Department of Labor, Wage and Hour Division: FMLA Fact Sheet 28: The Family and Medical Leave Act of 1993
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

• 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
- Supervalue 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 (7th Cir. 2012)
• Valdez v. McGill (10th 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)
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 (11th Cir. 2011)
- Miller v. Illinois Dept. of Transportation No. 09-3143 (7th Cir. 2011)
- Carmona v. Southwest Airlines Co. 604 F.3d 848. (5th Cir. 2010)
- Fisher v. Vizioncore Inc. LEXIS 125855 (U.S. Dist. 2010)
- Livingston v. Fred Meyer Stores Inc. 388 Fed. Appx. 738 (9th Cir. 2010)
- Peyton v. Fred’s Stores of Arkansas 561 F.3d 900 (8th Circ. 2009)
- Rauen v. US Tobacco Mfg. 319 F.3d 891 (7th Cir. 2003)
Thank You

Susan W. Brecher, Esq.
Employment and Disability Institute
Cornell University, ILR School
swb6@cornell.edu

Judy Young, M.A.
Human Capital Development
Cornell University, ILR School
jy335@cornell.edu