THE FAMILY AND MEDICAL LEAVE ACT, THE AMERICANS WITH DISABILITIES ACT, AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

This fact sheet was prepared by the Equal Employment Opportunity Commission's (EEOC) Office of Legal Counsel. It is intended to provide technical assistance on some common questions that have arisen about the Americans with Disabilities Act of 1990 (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) when the Family and Medical Leave Act of 1993 (FMLA) also applies.

Introduction

Background

1. Q: What is the relationship between requirements of the FMLA,[1] the ADA,[2] and Title VII[3]?

[1] References to the FMLA are to Titles I and IV of the Family and Medical Leave Act of 1993.

[2] References to the ADA are to Title I of the Americans with Disabilities Act of 1990, as amended.

[3] References to Title VII are to Title VII of the Civil Rights Act of 1964, as amended.

A: The FMLA and the ADA both require a covered employer to grant medical leave to an employee in certain circumstances.[4] The FMLA and Title VII both have requirements governing leave for pregnancy and pregnancy-related conditions.

In addition, under Title VII, employers must not discriminate on the basis of race, color, religion, sex, or national origin when they provide family or medical leave.

2. Q: Who enforces the FMLA?

A: The Department of Labor enforces the FMLA. The EEOC has no enforcement responsibility for the FMLA.

3. Q: When did the FMLA go into effect?

A: The FMLA went into effect on August 5, 1993.[5] The FMLA final rule became effective on April 6, 1995.[6]

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[4] Under the ADA, unpaid medical leave is a reasonable accommodation and must be provided to an otherwise qualified individual with a disability unless (or until) it imposes an undue hardship on the operation of the employer's business. See 29 CFR Part 1630 app. §1630.2(o). No set amount of leave is required as a reasonable accommodation under the ADA.

[5] If a collective bargaining agreement was in effect on August 5, 1993, the FMLA did not become effective for employees covered by the agreement until February 5, 1994, or the date the agreement expired, whichever was earlier. 29 CFR §825.102(a).

[6] 29 CFR Part 825, published at 60 FR 2180 (January 6, 1995), as amended at 60 FR 6658 (February 3, 1995) and 60 FR 16382 (March 30, 1995).

While the text of this document stands on its own, FMLA regulatory citations are provided in footnotes for those readers who need to obtain a more detailed understanding of certain FMLA provisions.

Basic FMLA Requirements

4. Q: What leave is an employee entitled to under the FMLA?

   A: Under the FMLA, an "eligible"[7] employee may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

   (1) The birth of a child, and to care for the newborn child;

   (2) The placement of a child with the employee through adoption or foster care, and to care for the child;[8]

   (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

   (4) Because a serious health condition makes the employee unable to perform one or more of the essential functions of his or her job.[9]

5. Q: What other rights do "eligible" employees have in conjunction with FMLA leave?

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[7] See footnote 17 below for the FMLA definition of "eligible" employee.

[8] Leave for (1) and (2) above must be concluded within 12 months of the birth or placement, unless state law or the employer allows a longer leave period. 29 CFR §825.201.

[9] 29 CFR §825.200(a). For purposes of this provision, the FMLA rule incorporates by reference the ADA definition of "essential functions". Id. at §825.115. See question 8 for a discussion of "serious health condition."

A: During FMLA leave, an employer must maintain the employee's existing level of coverage under a group health plan.[10] At the end of FMLA leave, an employer must take an employee back into the same or an equivalent job.[11]

When FMLA, ADA and Title VII Coverage Overlap

6. Q: What employers are covered by the FMLA, the ADA and Title VII?

A: The FMLA covers private employers with 50 or more employees.[12] The ADA and Title VII cover private employers with 15 or more employees.[13] Thus, only those private employers with 50 or more employees are covered concurrently by the FMLA, the ADA and Title VII.[14]

[10] Id. at §825.209.

[11] Id. at §825.214.

[12] Id. at §825.104.

[13] 42 U.S.C. §12111(5)(A)(ADA); 42 U.S.C. §2000e(b)(Title VII).

[14] Note that the FMLA has special requirements for public and private elementary and secondary schools, due to the unique nature of education. For purposes of coverage, public and private elementary and secondary schools are covered by the FMLA regardless of the number of employees. 29 CFR §§825.104(a), 825.600. Thus, any elementary or secondary school covered by the ADA and Title VII is also covered by the FMLA.

State and local government employers are covered by the ADA and the FMLA, regardless of the number of employees.[15] State and local government employers are covered by Title VII, however, only if they have 15 or more employees.[16]

7. Q: Are all employees who are protected by Title VII or the ADA also entitled to leave under the FMLA?

A: No. Employees protected by Title VII or the ADA must be independently "eligible" for FMLA leave. "Eligibility" for FMLA leave depends on several factors, for example, length of service.[17] In addition, an individual must be employed by an FMLA-covered employer with 50 or more employees to obtain FMLA leave. See Question 6.

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[15] 29 CFR §§825.104(a), 825.108 (FMLA); 28 CFR §35.140 (ADA Title II covers all public employers without regard to the number of employees, and ADA Title I standards apply by incorporation); 29 CFR §1630.2(e)(ADA Title I applies to all employers with 15 or more employees, including state and local governments).

[16] 42 U.S.C. §2000e(b)(definition of "employer").

[17] Employees are "eligible" for FMLA leave if they: (1) have been employed by a "covered" employer for at least 12 months, which need not be consecutive; (2) had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) are employed at a worksite where the employer employs 50 or more employees within 75 miles. 29 CFR §825.110.

An "eligible" employee must meet additional FMLA requirements in order to take medical leave because of his/her own "serious health condition." A health care provider must find that the employee is unable to work at all, or is unable to perform any one of the essential functions of his/her job, due to the "serious health condition". 29 CFR §§825.115, 825.200(a)(4). The FMLA rule incorporates the ADA definition of "essential functions" here. Id. at §825.115.

The ADA and the FMLA

FMLA "serious health condition" and ADA "disability"

8. Q: What is a "serious health condition" under the FMLA?

   A: An FMLA "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves . . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider".[18]

9. Q: Is an FMLA "serious health condition" the same as an ADA "disability"?

   A: No. An FMLA "serious health condition" is not necessarily an ADA "disability". An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

[18] 29 CFR §§825.114(a)(1),(2). The FMLA regulations explain that "inpatient care" means at least an overnight stay at a health care facility, and includes any related period of incapacity or subsequent treatment relating back to the inpatient care. Id. at §825.114(a)(1). "Continuing treatment by a health care provider" covers five situations: (1) incapacity of more than three consecutive calendar days that involves either (a) treatment two or more times by a health care provider (or under the direction or orders of a health care provider), or (b) treatment by a health care provider on at least one occasion resulting in a regimen of continuing treatment under the supervision of the health care provider; (2) any period of incapacity due to pregnancy, or for prenatal care; (3) any period of incapacity or treatment due to a chronic serious health condition requiring periodic visits for treatment, including episodic conditions such as asthma, diabetes, and epilepsy; (4) a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, although the individual is under the continuing supervision of a health care provider (e.g., Alzheimer's, severe stroke, or the terminal stages of a disease); and (5) any period of absence to receive multiple treatments from a health care provider (or on orders or referral from a health care provider) for restorative surgery or for a condition that would likely result in an absence of more than three consecutive calendar days without treatment (e.g., cancer (chemotherapy, radiation), severe arthritis (physical therapy), kidney disease (dialysis)). Id. at §825.114 (a)(2).

Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes. Other "serious health conditions" may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting (e.g., a routine broken leg or hernia).

In addition, the fact that an individual has a record of a "serious health condition" does not necessarily mean that s/he has a record of an ADA disability. Under the ADA, an individual must have a record of a substantially limiting impairment in order to be covered.

Finally, just because someone has a "serious health condition" also does not mean that the employer regards him/her as having an ADA disability. To satisfy this prong of the ADA definition of "disability", the employer must treat the individual as having an impairment that substantially limits one or more major life activities.[19]

To determine if an individual has an ADA disability, all pertinent evidence, including any information about whether the individual has or had a "serious health condition", should be considered. Under the FMLA regulations, employers must allow EEOC investigators to review pertinent FMLA medical certifications and recertifications, and other relevant materials, upon request.[20]

[19] For a detailed discussion of the ADA definition of disability, see Compliance Manual Section 902, Definition of the Term "Disability".

[20] See 29 CFR §825.500(g)(3).

Medical Certifications, Inquiries and Confidentiality

10. Q: Is there a conflict between the FMLA provision allowing employers to ask for certification that an employee has a serious health condition and ADA restrictions on disability-related inquiries of employees?

    A: No. When an employee requests leave under the FMLA for a serious health condition, employers will not violate the ADA by asking for the information specified in the FMLA certification form. The FMLA form only requests information relating to the Particular serious health condition, as defined in the FMLA, for which the employee is seeking leave. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off under the FMLA. If the inquiries are strictly limited in this fashion, they would be "job-related and consistent with business necessity" under the ADA.[21]

11. Q: May an employer keep a single confidential medical file for each employee, separate from the usual personnel file, for medical documentation under both the ADA and the FMLA?

[21] See 29 CFR §1630.14(c)(ADA).

A: Yes. An employer may keep a single confidential medical file, separate from the usual personnel file, containing both FMLA and ADA medical information if the employer follows the ADA confidentiality standards. This includes following the ADA interpretations of those confidentiality exceptions that are set forth in both the ADA and the FMLA regulations.[22] For example, employers may not give supervisors and managers unlimited access to the medical files. However, employers may give supervisors and managers information concerning necessary work restrictions and accommodations.[23]

Comparison of ADA and FMLA Leave

12. Q: Does the FMLA's limit of 12 workweeks of leave in a 12- month period mean that the ADA also limits employees to 12 weeks of leave per year?

A: No. The FMLA does not mean that more than 12 weeks of unpaid leave automatically imposes an undue hardship for purposes of the ADA. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business. To evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA. See 29 CFR §1630.2(p).

[22] There is also an exception to the applicable confidentiality requirements for government officials investigating compliance with the FMLA, pursuant to §825.500(g)(3) of the FMLA regulations.

[23] 29 CFR §1630.14(c)(1) (ADA); 29 CFR §825.500(g) (FMLA). See generally "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" at 21-23 (discussion of confidentiality)(October 10, 1995).

13. Q: How do the ADA and the FMLA requirements compare regarding intermittent or occasional leave?

A: Under the ADA, a qualified individual with a disability may work Part-time in his/her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an undue hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Continued accommodation is not required if a vacant position at a lower level is also unavailable.[24]

The ADA does not prohibit an employer and an employee from agreeing on another mutually acceptable accommodation. For example, an employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his/her current position.

[24] 42 U.S.C. §12111(9)(B)(reassignment to a vacant position is a reasonable accommodation); 29 CFR §1630.2(o)(2)(ii)(same); "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act", at III-24 to III-25 (discussing reassignment to a vacant position).

Under the FMLA, an "eligible" employee may take leave intermittently or on a part-time basis[25] for his or her own "serious health condition" when medically necessary for treatment or recovery, until s/he has used up the equivalent of 12 workweeks in a 12-month period.[26] When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits his/her reduced hours.[27]

14. Q: What are employees' reinstatement rights under the ADA and the FMLA?

A: Under the ADA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship.

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[25] "Intermittent leave" is FMLA leave taken in separate blocks of time due to a single reason, for example pregnancy, when leave may be used intermittently for prenatal care examinations or episodes of severe morning sickness. FMLA leave also may be used to change an employee's schedule for a period of time, normally from full-time to part-time. 29 CFR §825.203.

[26] 29 CFR §825.203(c).

[27] Id. at §825.204(a); See also special rules governing intermittent leave for instructional employees at §§825.601, 825.602 (accounting for factors such as the importance of teacher continuity and summer vacations).

Note that a qualified individual with a disability who is using FMLA leave to work reduced hours, and/or has been temporarily transferred into another job under the FMLA, may also need a reasonable accommodation (e.g., special equipment) to perform an essential function of the job. See 29 CFR §825.204(b).

In some instances, an employee may request more leave under the ADA even after the employer has communicated that it cannot hold the employee's job open any longer (i.e., there is undue hardship). In this situation, the ADA-covered employer must see if it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship to continue his/her leave. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued accommodation is not required if a vacant position at a lower level is also unavailable.[28]

In other instances, an employer may hold the original position open, and the employee may want to return to work, but may be unable to perform an essential function of the original position even with reasonable accommodation. Under the ADA, the employer must then consider reassignment, first to a vacant equivalent position for which the individual is qualified and, if one is unavailable, to a vacant position at a lower level. Further accommodation is not required if a vacant position at a lower level is also unavailable.

[28] See supra note 24 (reassignment as a reasonable accommodation).

Under the FMLA, an employee is entitled to return to the same position or to an equivalent position.[29] However, if an employee is unable to perform an essential function of the same or equivalent position because of a physical or mental condition, the FMLA does not require the employer to reinstate the employee into another job.[30]

15. Q: Do the ADA and the FMLA require an employer to continue an employee's health insurance coverage during medical leave?

A: Under the ADA, an employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status. The coverage must be on the same terms normally provided to those in the same leave or part-time status.

Under the FMLA, an employer always must maintain the employee's existing level of coverage (including family or dependent coverage) under a group health plan during the period of FMLA leave, provided the employee pays his or her share of the premiums.[31] An employer may not discriminate against an employee using FMLA leave, and therefore must also provide such an employee with the same benefits

[29] 29 CFR §825.214. As an exception to the FMLA's general guarantee of reinstatement, an employer may deny reinstatement (but may not deny leave) to a "key" employee if restoration would cause "substantial and grievous economic injury," provided certain conditions are met. 29 CFR §825.216(c). A "key" employee is "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." Id. at §825.217. The FMLA's "substantial and grievous economic injury" standard is different from and more stringent than the "undue hardship" test under the ADA. Id. at §825.218(d).

[30] 29 CFR §825.214(b).

[31] Id. at §§825.209, 825.210.

(e.g., life or disability insurance) normally provided to an employee in the same leave or part-time status.[32]

ADA Compliance When the FMLA Also Applies

16. Q: If an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and ADA reasonable accommodation?

    A: If an employee requests time off for a reason related or possibly related to a disability (e.g., "I need six weeks off to get treatment for a back problem"), the employer should consider this a request for ADA reasonable accommodation as well as FMLA leave. The employer may require FMLA certification[33] and may make additional disability-related inquiries if necessary to decide whether the employee is entitled to reasonable accommodation because s/he also has a covered disability. However, if the employee states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage.

17. Q: When both the ADA and the FMLA apply, how should the employer determine which terms and conditions govern the employee's initial 12 weeks of medical leave?

    A: Under the FMLA rule, an employer must provide leave under whichever statutory provision provides the greater rights to employees.[34] For examples of how this principle is applied, see the FMLA rule at §§825.702(b)-(e).

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[32] 29 CFR §825.220(c).

[33] For a discussion of when an employee must provide medical certification to support FMLA leave, see 29 CFR §825.305.

[34] 29 CFR §825.702(a).

18. Q: As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?

A: An employer may offer an employee a reasonable accommodation other than the leave s/he requested under the ADA, as long as it is effective.[35] For example, an employer may offer an assistive device, an opportunity to work reduced hours in the employee's current job, or a temporary assignment to another job, if these are effective accommodations.

However, if the individual is "eligible" for leave under the FMLA and has a serious health condition that prevents him/her from performing an essential job function, s/he has the right to take a leave of absence of up to 12 workweeks in 12 months, even if s/he could continue working with an effective reasonable accommodation.[36] While the FMLA does not prevent an employee from accepting an alternative to leave, the acceptance must be voluntary and uncoerced.[37]

The ADA and Family Leave

19. Q: Does the ADA require an employer to give an employee time off to care for a spouse, son, daughter, parent or other individual with a disability?

A: The ADA's reasonable accommodation obligation does not require a covered employer to give an employee time off to care for a spouse, son, daughter, parent or other individual with a disability with whom

[35] 29 CFR pt. 1630 app. §1630.9.

[36] 29 CFR §825.702(d)(1).

[37] 29 CFR §825.220(d).

the employee has a relationship.[38] However, an employer would be required to provide leave on the same terms as it normally provides leave to employees who need to care for someone who is ill.[39]

Title VII and the FMLA

Leave for Pregnancy, Childbirth and Related Conditions

20. Q: Under Title VII, what rights do women have to take leave for pregnancy, childbirth and related conditions?

    A: If an employer offers temporary or short-term disability leave, Title VII requires the employer to treat pregnancy and related conditions the same as non-pregnancy conditions.[40]

    For example, if an employer provides up to 8 weeks paid leave for temporary medical conditions, the employer must provide up to 8 weeks paid leave for pregnancy or related conditions.

21. Q: Can a leave policy that complies with the FMLA violate Title VII?

    A: Yes. An employee is protected by anti-discrimination laws such as Title VII regardless of how long s/he has been on the job, but an employee is not eligible for FMLA leave until s/he has been employed

[38] The FMLA, in contrast, requires an employer to grant leave to an eligible employee to care for the employee's spouse, son, daughter, or parent with a serious health condition. 29 CFR §825.112(a)(3). The FMLA rule defines "spouse", "son", "daughter", and "parent" at 29 CFR §825.113.

[39] 29 CFR §1630.8 (relationship or association with an individual with a disability).

[40] See 29 CFR §1604.10(b). See generally 29 CFR pt. 1604 app. (Questions and Answers on the Pregnancy Discrimination Act).

for 12 months. Thus, an employer policy that denies pregnancy leave during the first year of employment, but provides leave for other medical conditions, would discriminate against pregnant women in violation of Title VII. Additionally, a neutral policy that prohibits any employee from taking sick leave or short-term disability leave during the first year of employment could have a disparate impact on women and thus violate Title VII.

Title VII and Family Leave

22. Q: Does Title VII require covered employers to give employees leave to care for an ill child or family member?

A: Title VII in itself does not require employers to give employees leave to care for an ill child or family member. However, Title VII prohibits covered employers from discriminating on the basis of race, color, religion, sex, or national origin when they administer family leave.

For example, if an employer allowed a woman but not a man to take 12 weeks of leave to care for a newly-adopted or placed child, the man would have a Title VII cause of action because the employer administered family leave in a discriminatory way based on gender.

As another example, if an employer allowed a woman to take 3 weeks of childcare leave in addition to leave necessary to recuperate from childbirth, but declined to permit a man to take 3 weeks of childcare leave, the man would have a Title VII cause of action because the employer administered family leave in a discriminatory way based on gender.

Referral of Individuals with FMLA Questions or Complaints

23. Q: Who should be contacted for information about the FMLA or to file FMLA complaints?

A: For additional information about the FMLA, or to file an FMLA complaint, individuals should contact the nearest office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The Wage and Hour Division is listed in most telephone directories under U.S. Government, Department of Labor.

For further information, contact the Office of Legal Counsel's Attorney of the Day at 202-663-4691 (Voice), 202-663-7026 (TTY).

This fact sheet is available upon request in alternative formats. Write or call EEOC's Office of Communications and Legislative Affairs, 1801 L Street, N.W., Washington, D.C. 20507, (202) 663-4900 (Voice), (202) 663-4494 (TTY).

The purpose of this fact sheet is to provide technical assistance to individuals interested in the relationship between the ADA, Title VII, and the FMLA. It is not a formal Commission policy document.