AMERICANS WITH DISABILITIES ACT ("ADA")

I. OVERVIEW

A. EMPLOYERS COVERED BY THE ADA

Employers who employ **15 or more** employees in 20 or more calendar weeks in the current or preceding calendar years are covered by the Americans with Disabilities Act ("ADA"), 42 USC 12101, et seq. When calculating this number, part-time employees should be counted. The ADA applies to governmental employers of all sizes, regardless of the number of employees.

The ADA generally requires employers to provide employment opportunities to employees and applicants with disabilities, provided that they can perform the essential job functions with or without a reasonable accommodation. 42 USC §12102(2).

It is important to remember that even if a business is not covered by the ADA, it is likely covered by the Michigan Handicappers Civil Rights Act ("MHCRA") MCLA 37.1101 et seq. which also prohibits discrimination against those with disabilities. The MHCRA covers employers who employ 1 or more employees and closely parallels the provisions of the ADA and its predecessor, the Rehabilitation Act of 1973. Accordingly, the concepts discussed in this outline may well apply to smaller businesses.

B. INDIVIDUALS PROTECTED BY THE ADA

The protections afforded by the ADA extend to three classes of individuals and extend to job applicants as well as employees.

1. Individuals with Disabilities

The ADA protects individuals with a "disability." The ADA defines a person with a disability as someone with a "physical or mental impairment that substantially limits a major life activity."

2. Individuals with a Record of Disability or Regarded as Disabled

The ADA also protects someone with a record of a physical or mental impairment that substantially limits a major life activity, or is regarded as having such an impairment. For example, an individual that had been a cancer patient eight years ago is likely protected under the ADA, even though the cancer has been in remission for six years because such a person has a record of an impairment.

An employee that is falsely rumored to have AIDS is protected under the ADA, even though the employee may be perfectly healthy. This worker is "regarded as" or perceived as having a covered disability.

3. Individuals with a Relationship with a Disabled Person

A person may be protected by the ADA because s/he is a person with a known association or relationship with a disabled person. A worker with a disabled spouse or other family member is protected by

the ADA. For example, it is unlawful to refuse to hire an individual whose spouse will require expensive medical treatment, decline to offer health care benefits to that individual, or try to make arrangements for employee-only health care coverage.

Employers should also be aware that "partners" in a homosexual relationship are likely in a relationship that qualifies for protection under the ADA. Employers should recognize that the ADA reaches farther than the Family and Medical Leave Act (FMLA) in this respect; The FMLA does not entitle an individual to FMLA leave for "partners" or "roommates."

An employer does not have an obligation to accommodate a person with a known association or relationship with a disabled person. However, the employer may not deny employment or employment benefits to such a person because of the association or relationship. An employer may also be obligated to provide this person with leave.

C. QUALIFIED INDIVIDUALS WITH DISABILITIES

Only "qualified" individuals with disabilities (or with a record of disability or regarded as disabled) are protected by the ADA. A "qualified individual with a disability" is a person who "satisfies the requisite skill, experience and educational requirements of the employment position such individual holds or desires, and who is able to perform the essential functions of their job with or without a reasonable accommodation."

1. Satisfying Qualification Prerequisites

Where a disabled individual does not possess the requisite skills, experience and/or educational requirements for the position, s/he is not a "qualified individual with a disability."

A "qualified individual with a disability" who is able to perform the essential functions of the job with or without accommodation, must be provided reasonable accommodation unless the accommodation would pose an undue hardship to the employer or employment would pose a direct threat to the health and safety of the employee, other employees or the public.

In addition, a qualified individual with a disability who is able to perform the essential functions of the job with or without reasonable accommodation may not be discharged or subject to discrimination in the terms or conditions of employment.

Finally, the ADA imposes restrictions upon an employer's ability to make medical inquiries, request medical examinations and make decisions based upon an individual's medical condition in the hiring process and throughout employment. The Act also specifies conditions under which medical records may be kept by employers.

a. Examples of situations where individual may be "unqualified":

(1) A person has lost some license or certification necessary for the job. (Eg: a driver whose operator's license has been revoked, or a CPA that fails to complete the necessary continuing education mandated by the SEC.)

- A paranoid deputy marshall was not qualified for the position because his condition precluded carrying a firearm, which was an essential function of the position. Lassiter v. Reno, 86 F3d 1151 5 AD Cases 1343 (4th Cir 1995) cert denied 117 S.Ct. 766 (1997).

(2) The individual may have been identified as so grossly lacking the basic skills or training for a position that s/he is not qualified.

- A registered clinical nurse with such severe hearing difficulties that he could not hear medical equipment alarms and could not respond appropriately to a patient's distress symptoms was not qualified for a hemodialysis position when he declined a hospital's offer of accommodation in the form of increased training. Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F3d 342 (7th Cir 1996).

- An applicant that had lost the ability to power grasp a steering wheel (as required by D.O.T. regulations) due to a prior work related injury was not qualified for a driver's position. Campbell v. Federal Express Corp., 918 FSupp 912 (DC MD 1996).

However, employers must be careful in asserting a lack of qualifications for a present employee requesting accommodation (such as medical leave), because the prior period of employment will likely be a prima facie showing that the person was qualified for the job. Before an employer asserts that a present employee is not qualified for the position due to performance issues, the lack of skills should be well documented before any adverse employment action is taken.

(3) Some courts have been inclined to rule that employees that are unable to meet reasonable attendance requirements (allowing for some reasonable accommodation) are not qualified for the positions claimed.

- Depressed employee who was unable to attend work on a regular basis is not a "qualified individual with a disability" Corder v. Lucent Techs, Inc, 1998 U.S.App. LEXIS 31047 (7th Cir 1998).

- Employee who suffered from depression for several years, was not a qualified individual with a disability because she could not get to work on time. Kotlowski v. Eastman Kodak Co., 922 FSupp 790 (DC NY 1996).

- Where an employee's disability (depression) prevented her from reporting to work and remaining on duty for the entire shift, she was not "otherwise qualified" to perform her job. Matzo v. Post Master General, 685 FSupp 260 (DC DC 1987).

- A sales employee with chronic fatigue syndrome who was unable to work regular hours was not a "qualified individual with a disability." Kennedy v. Applause, Inc, 1994 US Dist LEXIS 192116, 3 AD Cases 1734 (DC Calif 1994), aff'd in part, dismissed in part 90 F3d 1477 (9th Cir 1996).

- An employee with Spina Bifida, unable to provide reasonable attendance and dependability was not qualified for a telephone operator position. Gore v. GTE South Inc., 917 FSupp 1564

(MD AL 1996). See also: Teahan v. Metro-North Commuter RR Co., 951 F2d 511 (2nd Cir 1991) cert denied 113 S.Ct. 54 (1992) (relapsed alcoholic and substance abuser with pattern of excessive absenteeism).

(4) Occasionally, employers can successfully argue that the nature of the disability renders the employee unqualified for the position. That even if the requested accommodations were implemented, the employee would not be able to perform the essential functions of the job.

- A rotary die cutter that was blind in one eye and suffered from multiple sclerosis was not qualified for the position where his physician concluded that his balance and vision problems, numbness and decreased sensation prevented him from working safely around machinery with or without accommodation. Riley v. Weyerhauser, 898 FSupp 324 (DC NC 1995) aff'd 8 AD Cases 1536 (4th Cir 1996);

- A secretarial employee with carpal tunnel symptoms that successfully petitioned for and obtained Social Security benefits and obtained a ruling from an Administrative Law Judge that she was "totally disabled," was no longer qualified for a position. Cline v. Western Horseman, Inc., 922 FSupp 442 (DC CO 1996). See also: Miller v. U.S. Bancorp, 926 FSupp 994 (DC OR 1996) Aff'd 139 F3d 906 (9th Cir 1998) (memory loss; claim for SSA benefits). Note: there are cases that hold that social security determinations of disabled and unable to work do not automatically preclude an ADA claim.)

- An employee that suffered "meltdown" every time a restaurant got crowded was not qualified for the position. Johnston v. Morrison, Inc., 849 FSupp 777, 3 AD Cases 259 (ND AL 1994).

- Individual that could only type 44 words per minute was not qualified for a job that required 45 words per minute. Lucero v. Hart, 915 F2d 1367, 1 AD Cases 1697 (9th Cir 1990).

- An employee who made death threats to his fellow employees was found not to be a qualified individual with disability under the ADA, even though the employee claimed the threats were the result of mental illness. Jones v. New York Housing Authority, 1993 US Dist LEXIS 18374, 5 AD Cases 1868 (DC SNY 1996).

- Previously injured employees that were unable to keep up with increased production standards were no longer qualified for their positions because the faster production schedule was implemented to improve the employer's competitiveness in the market. Milton v. Scrivner, Inc., 53 F3d 1118 (10th Cir 1995).

This issue becomes so intertwined with the question of accommodation, that employers should carefully consult with counsel whenever taking the position that an employee's disability renders them unqualified. It is important to remember that the employee's attorney will later seek to identify accommodation methods that would permit the employee to perform the essential functions. When communicating with an employee about employment decisions, the concept of the employee's lack of qualifications should be addressed in the context of available reasonable accommodations.

2. Essential Job Functions

The ADA only protects a disabled employee if that employee can perform the essential functions of the job with or without reasonable accommodation. The essential job functions are defined as the fundamental, basic, necessary or vital functions of the job. A key question that may be asked when engaging in an examination of the essential functions is: Does the job exist to perform that function.

An employer is not required to reassign (or hire an assistant to perform) any of the essential functions of the job to co-workers.

If a job duty is not an essential job function, it is a marginal job duty. Marginal duties must be reassigned to co-workers as a reasonable accommodation, if that would not constitute an undue hardship to the employer.

Evidence of essential functions include:

a. Job descriptions (written before the employer advertises for the job), testimony by supervisors, and other evidence of the employer's judgment as to what is essential is given consideration.

   (1) The EEOC has clarified that employers are not required to have job descriptions, but they are recommended because they can provide evidence of the essential functions. (But note: a bad job description will be used against an employer).

b. The consequences of not requiring the employee to perform the job, e.g. if a fireman is unable to carry a victim out of a burning building, the consequences would be severe.

c. The terms and conditions of a collective bargaining agreement.

d. Past experience of employees holding the job.

e. Experience of employees currently holding the job.

f. The number of employees available to perform the function. (As indicated in the Technical Assistance Manual, it may be an essential function for a file clerk to answer a telephone if there are only a few employees in a busy office and each employee has to perform many different tasks.) A function may have become essential because other employees have been accommodated and only a limited number remain available to perform a task.

g. The degree of expertise or skill required to perform the function.

h. The amount of time spent performing a function.

While the employer's judgment as to what is an essential job function is relevant, the EEOC has declined to make the employer's judgment a "rebuttable presumption" (very strong evidence) despite many employers' requests and comments. 42 USC §12111(8). Yet, the interpretive comments indicate that the Act is not intended to second guess an employer's business judgment concerning qualitative and productive standards.

For example, if a auto center requires that mechanics achieve an hourly productivity level of $1700 per hour, the government will not question the employer's choice of that production quota, assuming the employer can demonstrate the quota is actually imposed upon the employee. See Milton v. Scrivner, Inc. 53 F3d 1118 (10th Cir 1995) (injured employees unable to keep up with new, faster production schedule.)

However, other language in the interpretive guidelines, technical assistance manual and the statute itself suggest that the courts may question quality and productivity standards if they result in hiring, discharge or other adverse employment action toward a disabled individual. The Technical Assistance Manual specifically states that if a disabled person is found not qualified because s/he is unable to meet the standard, the employer must demonstrate that other employees are actually required to meet the standard and it was not established for discriminatory reasons. The Technical Assistance Manual also states that employers are not required to lower quality or quantity standards as an accommodation.

a. Regular, Predictable Attendance as an Essential Function

Attendance is one area where ADA concepts clash. Regular, predictable attendance is an essential job function. However, attendance policies must be relaxed and time off granted as an accommodation.

Regular attendance is an essential function of almost every job. However, the question is one of degree. Excessive, sporadic and unpredictable absenteeism is not subject to reasonable accommodation. Gore v. GTE South, Inc., 917 FSupp 1564 (MD AL 1996) (regular and reliable attendance on the job held to be an essential function of the employee's position as telephone operator: "common sense dictates that it is not possible to take a customer's incoming call if the operator is not physically present.") See also: Jackson v. Administrator of Veterans Affairs, 3 AD Cases 620 (ND AL 1993); aff'd, 22 F3d 277 (11th Cir 1994); Kennedy v. Applause, Inc.,1994 US Dist LEXIS 19216; 3 AD Cases 1734 (DC CA 1994) aff'd in part dismissed in part, 90 F3d 1477 (9th Cir 1996); Carr v. Reno, 23 F3d 525 (DC Cir 1994) (an employee's ability to appear for work and complete assigned tasks within a reasonable period is an essential function of any government job. See also Tyndall v. National Education Centers of California, 31 F3d 209 (4th Cir 1994).

b. Other Examples of Essential Functions

Case examples where courts have found a plaintiff to be unable to perform the essential functions of a job:

- A construction inspector that could not climb safely because of Parkinson's disease was unable to perform the essential functions of the job. Chiari v. League City, 920 F2d 311 (5th Cir 1991).

- An individual that was unable to perform if there was a hint of criticism was unable to perform the essential functions of the job. Pesterfield v. Tenn. Valley Authority, 941 F2d 437 (6th Cir 1991).

- An individual that could only type 44 words per minute was unable to perform the essential functions of a job that required 45 words per minute. Lucero v. Hart, 915 F2d 1367 (9th Cir 1990).

- Firefighters that were required to wear beards because of pseudofolliculitis barbae skin condition were not able to perform the essential function of obtaining an adequate seal on face respirators. Fitzpatrick v. City of Atlanta, 2 F3d 1112 (11th Cir 1993).

- A Police Chief that could not shoot a gun was unable to perform an essential function. Ethridge v. Alabama, 860 FSupp 808 (MD AL 1994).

- An attorney with depressive disorder and personality disturbance which impairs ability to perform independent legal analysis, research and writing is not qualified because no accommodation will permit him to perform the essential functions of the job. Bolstein v. Reich,1995 US Dist LEXIS 731, 3 AD Cases 1761 (DC DC 1995); See also: Hill v. State of Florida, 2 AD Cases 177 (MD FL 1992)(depressive public assistant unable to keep up with interviewing full load of clients or processing paperwork)

D. COVERED DISABILITIES

Not all injuries, illnesses, medical conditions or ailments are covered disabilities under the ADA. The Act defines a covered disability as "any physical or mental impairment which substantially limits one or more major life activities."

Just because an employee has a "compensable injury" under the Workers' Compensation Act does not automatically mean s/he has a covered disability under the ADA. The employee must still meet the definitions of disability under the ADA.

Also, the mere fact that an employee's medical condition bears upon his or her ability to perform one particular job does not automatically mean that the person is disabled for purposes of the ADA.

To be a "disability" under the ADA, the condition must "substantially" limit a major life activity. This qualification, which has its origins in the Rehabilitation Act of 1973, was placed into the law to screen out minor ailments, injuries, and conditions.

1. Substantially Limits a Major Life Activity

The determination of whether an impairment is substantially limiting is made on a case by case basis and is concerned with "whether the particular impairment constitutes, for the particular person, a significant barrier to employment." Forrisi v. Bowen, 794 F2d 931 (4th Cir 1986).

Most cases hold that a condition that keeps an individual out of a particular career or a particular job with a particular employer, but which does not preclude employment in a general or a wide class of jobs does not substantially limit the person in the major life activity of "working." Bolton v. Scrivner, Inc., 36 F3d 939 (10th Cir 1994); Gupton v. Commonwealth of Virginia, 14 F3d 203 (4th Cir 1994) cert denied, 115 S Ct 59 (1994). See also: Weiler v. Household Finance Corp., 101 F3d 519 (7th Cir 1996) (inability to get along with boss is not a substantial impairment of an employee's ability to work). Accord: Lamboy-LaSalle v. P.R. Telephone Co., 8 AD Cases 392 (DC PR 1998).

The employee does not have to be totally unable to work in order to be substantially limited in the major life activity of working. If the ability to perform work in a wide range of jobs is significantly restricted, the ability to work is substantially limited.

Carpal Tunnel Syndrome has been found not to be a disability when it does not substantially limit the employees in their daily life and the employee could still perform other kinds of jobs. McKay v. Toyota, 878 FSupp 1012 (ED KY 1995). However, other courts have found that Carpal Tunnel Syndrome may be a covered disability. Felibrity v. Kemper Corp., 98 F3d 274, 4 AD Cases 1729 (7th Cir 1996).

Bad backs have been found not to be disabilities when the employees's ability to lift has not been substantially limited. The Fourth and Eighth Circuits have both ruled that a 25 pound lifting restriction was not substantial enough. Williams v. Channel Master Satellite Systems, Inc., 101 F3d 346 (4th Cir 1996) cert denied 520 US 1240 (1997); Aucutt v. Six Flags Over Mid-America, 85 F3d 1311 (8th Cir 1996).

The Technical Assistance Manual offers the following criteria to determine if the individual is "substantially" limited:

- **!** The type of job from which the worker is disqualified;
- **!** The geographical area in which the person may reasonably expect to find a job; and
- **!** The number and types of jobs using similar knowledge, skill or abilities from which the individual is also disqualified because of the impairment.

2. Major Life Activity

Examples of major life activities include:

Seeing	Breathing	Performing manual tasks
Hearing	Learning	Working
Speaking	Sitting	Caring for one's self
Walking	Standing	Lifting
		Reading

There have been some rulings that certain activities are not major life activities. Krauel v. Iowa Methodist Medical Center, 95 F3d 674 (8th Cir 1996) (reproduction); Soleau v. Guilford of Maine, Inc., 105 F3d 12, 6 AD Cases 437 (1st Cir 1996)(getting along with others).

3. Specific Conditions Excluded as Disabilities

The EEOC Technical Assistance Manual and the EEOC Compliance Manual for EEOC investigators list a number of conditions that are **not** covered disabilities:

- **!** Environmental, cultural or economic disadvantages;
- **!** Homosexuality/bisexuality;

- **!** Transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, and other sexual behavior disorders;
- **!** Pregnancy (but complications of pregnancy may be disabilities);
- **!** Physical characteristics, such as eye or hair color, left or right-handedness;
- **!** Common personality traits such as a quick temper, poor judgment or irresponsible behavior;
- **!** Normal deviations in height, weight or strength;
- **!** Gamblers, pyromaniacs and kleptomaniacs;
- **!** Infertility.

4. Temporary Disabilities

Temporary disabilities may or may not be covered under the ADA. The determination must be made on a case by case basis and will be based upon:

- **!** The nature and severity of the impairment;
- **!** The duration or expected duration of the impairment; and
- **!** The permanent or long lasting impact of the disability.

The Technical Assistance Manual indicates that "broken limbs, sprains, concussions, appendicitis, common colds or influenza" generally are not disabilities. A broken leg that heals normally is specifically cited as the type of injury that does not qualify. However, if the leg did not heal properly and the individual's ability to walk was restricted, s/he may be considered to be disabled. Likewise, if the break resulted in the individual walking with a limp, s/he may be protected by the ADA if s/he is "regarded as" disabled.

The case law arising under the ADA has illuminated a number of conditions that have not sufficed as "disabilities" within the meaning of the Act. However, the reader is cautioned that many of these cases are fact-specific and cannot be read as excluding the condition as a disability carte-blanche. Nevertheless, the following conditions have, on occasion, been ruled to be not covered disabilities:

- **!** A back injury that was not long-lasting, and not a substantial barrier to employment. Rakestraw v. Carpenter Co., 898 FSupp 386 (DC MS 1995). See Also: Graaf v. North Shore University Hospital, 8 AD Cases 436 (SD NY 1998).
- **!** Shift-related sleep disorder. Williams v. City of Charlotte, 899 FSupp 1484 (WD NC 1995).
- **!** Hernia as a temporary, non-chronic condition. Gonzalez v. Perfect Carton, 1996 US Dist LEXIS 2257, 6 AD Cases 151 (ND IL 1996).

- Carpal Tunnel Syndrome where the individual did not claim that she was excluded from a wide variety of jobs. (To be read with caution; other cases have held that carpal tunnel syndrome is a covered disability.) Lamury v. Boeing Co., 1995 US Dist LEXIS 16262, 5 AD Cases 39 (DC KS 1995).

- Repetitive strain injury resulting in 23% loss of motion where no evidence that the plaintiff was restricted from a broad class of jobs. Taylor v. Albertson's, 74 F3d 1250 (10th Cir 1996).

- Post Traumatic Stress which subsides within a short time is only a temporary condition and not covered by the ADA. Hamilton v. Southwestern Bell Telephone Co., 136 F3d 1047 (5th Cir 1998).

5. Drug or alcohol addiction or dependency as a disability

a. Drug use

Current drug users are not protected under the ADA. However, reformed or former drug users are protected. Employers may not discriminate with regard to employment decisions and have an obligation to accommodate, for example, by providing time off for treatment for former drug users. The Technical Assistance Manual states that an employee who violated a company substance abuse policy by testing positive for drugs could claim s/he was a former user. However, one court has indicated that remaining off drugs for seven weeks is not long enough to escape the status of a "current" drug user. Baustian v. State of Louisiana, 871 FSupp 1079 (DC LA 1995). See also: McDaniel v. Mississippi Medical Center, 877 FSupp 321 (DC MS 1995)(six weeks off drugs is insufficient). Furthermore, if the employee failed a drug test, s/he likely engaged in the current use of drugs.

It is not a violation of the ADA for an employer to refuse to hire an applicant who admitted past "casual" use of illegal drugs. Casual use is not a disability under the ADA because the ADA requires "some indicia of dependency sufficient to substantially limit a major life activity." Hartman v. Petaluma, 841 FSupp 946 (DC CA 1994).

b. Alcohol Addiction

The exclusion of current drug users is in contrast to the ADA's treatment of employees currently addicted to alcohol. Both current and former alcoholics are covered under the ADA. This presents challenging scenarios when attendance disabilities occur because the individual is too hung over to come to work. Employers must remember that the ADA imposes the obligation to treat alcohol addicted workers the same as employees with other disabilities with regard to attendance and discipline. See Eg: Schmidt v. Safeway, Inc., 864 FSupp 991 (DC OR 1994).

6. Special Problems with Mental Disabilities

The ADA protects individuals with physical or mental impairments. Individuals with mental disabilities may, however, as part of their illness, be prone to engage in disruptive, threatening and even violent behavior. Thus, a delicate balance must be maintained between accommodating employees with mental

disabilities and the rest of the workers, customers, and visitors. But it is also important to bear in mind that the ADA prohibits making generalizations about individuals with disabilities. Therefore, just because an individual has a mental impairment, the employer cannot assume the individual is disruptive, violent, or potentially violent.

a. "Mental impairments" are defined as '[a]ny mental or psychological disorder, such as . . . emotional or mental distress." 29 CFR §1630.2(h)(2).

b. Examples of "emotional or mental illness" include: Hunt-Golliday v. Metropolitan Water Reclamation, 104 F3d 1004 (7th Cir 1997)(depression, anxiety, panic attacks); Palmer v. Circuit City of Cook County, 117 F3d 351 (7th Cir 1997) cert denied 1998 US LEXIS 3384 (1998) (depression, paranoid disorder); Lassiter v. Reno, 86 F3d 1151 (4th Cir 1995) aff'g 885 FSupp 869 (paranoia); Gaul v. AT&T, Inc., 955 FSupp 346 (DC NJ 1997) Aff'd Sub Nom 134 F3d 576 (1998)(stress and depression); Schwartz v. COMEX, 1997 US Dist LEXIS 4658 (DC NY 1997)(paranoid disorder); Lewis v. Aetna Life Ins. Co., 1997 US Dist LEXIS 16851 (DC VA 1997)(depression); Kotlowski v. Eastman Kodak Co., 922 FSupp 790 (DC NY 1996)(depression); Johnston v. Morrison, 849 FSupp 777 (DC AL 1994)(employee who suffered "meltdown" every time restaurant got crowded); Matzo v. Post Master General, 685 FSupp 260 (DC DC 1987) Aff'd 861 F2d 1290 (DC Cir 1988) (depression); Brundage v. Los Angeles Office of the Assessor, 57 CA App 4th 228 (Cal Ct App 2nd Dist 1997)(manic depressive, bi-polar disorder).

Claims of mental disabilities are on the rise. Between July 26, 1992 and September 30, 1996 approximately 12.7% of ADA charges filed with the EEOC were based on emotional or psychiatric impairment. (EEOC Enforcement Guidance ADA and Disabilities)

7. Mitigating Measures

To qualify as a protected disability under the ADA, a physical or mental impairment must substantially limit one or more of the major life activities of the individual. Whether mitigating measures such as medicines should be part of the "substantial limitation" inquiry has become a debated issue. According to the EEOC, the "substantial limitation" question should be made without regard to mitigating measures such as medications, or assistive or prosthetic devices. EEOC Enforcement Guidance of the ADA and Psychiatric Disabilities, p. 6.

At present the courts are divided on the issue. The majority of courts have followed the EEOC's interpretation that mitigating measures should not be considered in the disability determination: Doane v. City of Omaha, 115 F3d 624 (8th Cir 1997) cert denied 118 S.Ct. 693 (1998); Holihan v. Lucky Stores, Inc., 87 F3d 362 (9th Cir 1996) cert denied, motion granted 520 US 1162 (1997); Harris v. H & W Contracting Co., 102 F3d 516 (11th Cir 1996); Roth v. Lutheran Gen. Hops., 57 F3d 1446 (7th Cir 1995); Fallacaro v. Richardson, 965 FSupp 87 (DC DC 1997); Hendler v. Intelcom USA, Inc., 963 FSupp 200 (DC NY 1997); Wilson v. Pennsylvania State Police Dep't., 964 FSupp 898 (DC PA 1997); Shiflett v. G.E.Fanue Automation Corp., 960 FSupp 1022 (DC VA 1997) Aff'd 151 F3d 1030 (4th Cir 1998); Sicard v. City of Sioux City, 950 FSupp 1420 (DC IA 1996); Thomas v. Davidson Academy, 846 FSupp 611 (DC TN 1994).

However, the following courts have rejected the EEOC interpretation and have found that mitigating measures should be considered in determining whether an employee is substantially limited: Ellison v. Software Spectrum, 85 F3d 187 (5th Cir 1996); Schluter v. Industrial Coils, Inc., 928 FSupp 1437 (DC WI 1996); Coghlan v. H.J. Heinz, Co., 851 FSupp 808 (DC TX 1994). Michigan has adopted this approach in cases filed under the Michigan Handicappers Civil Rights Act. Chmielewski v. Xermac Inc., 457 Mich 593 (1998).

The United States Supreme Court will review two cases this term and determine whether mitigating measures should be considered or not. The two cases are: Sutton v. United Air Lines, Inc., 130 F3d 893 (10th Cir 1997), cert. granted 1999 US LEXIS 2 (1/8/99); Murphy v. United Parcel Service, Inc., 141 F3d 1185____ (10th Cir 1998), cert. granted 1999 US LEXIS 3 (1/8/99).

E. REASONABLE ACCOMMODATION

An employer is required to provide a qualified individual with a disability, a reasonable accommodations that will permit the employee to perform the essential function of the job. An employer is not required to eliminate essential job duties as an accommodation. Bolstein v. Reich,1995 US Dist LEXIS 731, 3 AD Cases 1761 (DC DC 1995).

An employer is only required to provide a reasonable accommodation. An employer is not obligated to provide the specific accommodation requested by the employee if another reasonable accommodation will permit the employee to perform the job. Wernick v. Federal Reserve Bank of New York, 91 F3d 379 (2nd Cir 1996).

For example, an employee that turns in a physician's slip indicating that the employee may only work 40 hours a week may prefer to have Saturday off, although the shop generally works Saturday. The employer would meet its duty of reasonable accommodation by giving the employee Wednesday off (or any other day) and requiring Saturday work.

The employer is also not required to provide the best possible accommodation, as long as the accommodation provided is effective for the purpose. If an employee rejects a reasonable accommodation offered by the employer, which would have accommodated the disability, the employee loses any claim under the ADA. Dyer v. Jefferson County School District, 905 FSupp 864 (DC CO 1995).

An employer may question the accommodation sought by an employee or the employee's physician if the employer can show that it had reason to believe that the physician's information is not valid, or that the employee could work without the accommodation requested. An employer may also seek additional information regarding the employee's ability to return to work without the requested accommodation. Stolmeier v. Yellow Freight System, 1994 US Dist LEXIS 2207, 3 AD Cases 65 (DC OR 1994).

1. Examples of Reasonable Accommodations:

a. Making existing facilities available to employees, e.g., breaking curbs, lowering desks, rearranging display racks.

b. Participating in an ongoing treatment regimen.

c. Permitting a leave of absence.

d. Altering pace of work.

e. Isolating the individuals from others.

f. Acquisition of special equipment and adaptive devices may be required for essential job function.

However, if adaptive devises will not permit the disabled employee to perform "marginal" job functions, those marginal tasks must be assigned to other employees as an accommodation. This accommodation is called job restructuring (e.g. electronic visual aids.) It is not necessary to provide personal devices such as hearing aids.

g. Employers are not required to hire someone to do the disabled employee's job for her, e.g., a security guard whose job function is to check identification would not be able to argue that s/he needs an assistant to read the identification badges for her.

h. Adjusting or modifying exams and training materials, e.g. a deaf interpreter may be required to assist with a computer proficiency test.

i. Providing qualified readers, interpreters and personal assistants during employment may be required.

j. Modifying work schedules and allowing flex time to attend rehabilitation clinics may be required. The morale of the other employees who may be adversely effected by having an employee unavailable at certain hours is completely irrelevant, e.g., requiring one or two managers to lock up five nights a week because the other manager needs flex time to attend a clinic.

k. Part-time work may also be required if it will not create an undue hardship.

l. Holding the employee's job open during a temporary disability.

(As indicated above, the ADA may or may not cover temporary disabilities and arguably does not require this type of accommodation. However, where a temporary condition is covered or a covered disability results in a temporary absence, the employer may have a duty to hold a position open, if there is no undue hardship.)

m. Michigan has held that an employer is obligated to grant "reasonable healing time" under the state disability statute to permit a disabled employee to return to work. Rymar v. Michigan Bell, 190 Mich App 504 (1991), appeal denied 483 NW3d 402.

n. An employer is not required to change an employee's supervisor as an accommodation. Wernick v. Federal Reserve Bank of New York, supra. However the EEOC's Guidance on Psychiatric Disabilities suggest that modifying supervisory styles may be a reasonable accommodation.

o. Reassignment to a different position should be the "final" accommodation possibility.

2. Transfer To Vacant Position As An Accommodation

The ADA requires that a qualified individual with a disability be reassigned to a vacant position as an accommodation, if the employer has a regular practice or policy of reassigning employees without disabilities who have suffered occupational injuries, or other temporary medical conditions. But see: Rourk v. Oakwood Hospital Corporation, 458 Mich 25, 27 (1998)(Under Michigan Handicapper Civil Rights Act, an employer has no duty to transfer an employee to a different job or position).

Case law indicates an employer must search the entire geographic or metropolitan area for equivalent job vacancies. File v. United Airlines, Inc., ___ F2d ___ (7th Cir 1992).

Transferring a disabled employee into a vacant position may be offered as accommodation only after all other accommodation options have been considered and rejected for lawful reasons.

When extended leave from one position would be an undue hardship for the company, transferring the employee into another position that can more easily go vacant or be covered by other employees may be the answer. However, there is no obligation to bump an employee out of his/her job to give it to a disabled employee as an accommodation.

An employee who is transferred as an accommodation may suffer a reduction in compensation if warranted by the new position, and if consistent with the treatment accorded non-disabled employees in similar situations.

There is no requirement that employers create a new job for the employee as an accommodation. In other words, if the employee is unable to perform the essential functions of the position, the employer is under no obligation to design a job that s/he can perform. An employer also does not have to combine two existing part-time positions into a full time position as an accommodation. Fedro v. Reno, 21 F3d 1391 (CA 7 1994).

In the union setting, a big issue is whether collectively bargained provisions and seniority rules must be disregarded to accommodate a disabled employee. Case law is clear that there is no obligation to bump an employee out of his/her job to give it to a disabled employee as an accommodation. The Technical Assistance Manual suggests that if a collective bargaining agreement has specific seniority lists and work requirements, it "might" be an undue hardship to assign a disabled employee to a position if others had seniority for the job. See e.g. Eckeles v. Consolidated Rail Corp., 94 F3d 1041, (7th Cir 1996) cert denied 520 US 1146 (1997). See also: Daigre v. Jefferson Parish School Board,1997 US Dist LEXIS 494 (ED LA 1997), aff'd 119 F3d 2 (5th Cir 1997). Accord: Willis v. Pacific Maritime Asn., 1998 US App LEXIS 31060; (request for accommodation is per se unreasonable if it conflicts with a labor agreement between the employer and a union).

Under the ADA, employers can avoid liability if an employee refuses a favored work or light duty assignment (assuming s/he could not be accommodated in her former position).

3. Light-duty Positions

The term "light duty" means different things to different people in the employment setting, ranging from simply assigning an employee to a job that is more sedentary, to actually excusing an employee from demanding job functions.

Generally, "light duty" issues arise when trying to bring injured employees back from workers' compensation leave. When used below, the term "light duty" refers to positions with less demanding duties that are created specifically for the purpose of providing alternate work for employees that are unable to perform some or all of their normal duties. This definition, (which does not necessarily distinguish between essential or marginal duties) is the definition used by the EEOC's Enforcement Guidance: Workers' Compensation and the Americans with Disabilities Act, published in 1996.

The ADA does not require the creation of permanent light-duty positions. Miller v. Illinois Dept. of Corrections, 107 F3d 483 (7th Cir 1997). Likewise, an employer has no obligation to reassign essential job functions, and has no obligation to hire an assistant to perform duties that are essential job functions (see supra.) However, the required accommodation of reassigning marginal duties to other employees can make the remaining job resemble a light duty position.

Any policy of creating a light duty position must be applied in a non-discriminatory manner. If an employer "reserves" light duty positions, an employee with a non-occupational disability may be entitled to accommodation in the form of a transfer to a "vacant" light duty position if other accommodations do not permit her to perform the essential functions of her regular job.

There is no duty to create any position under the ADA, whether "light duty" or not. An employer may lawfully refuse to create a light duty position for an individual injured off duty where there is no light duty position available even where it creates light duty positions for occupationally injured employees provided however that a reasonable accommodation analysis is conducted. 1996 Enforcement Guidance Memorandum. However, if an employer has a vacant "light duty" or other position, it may be claimed by an employee seeking accommodation under the ADA. The EEOC Guidance Memorandum on the ADA and Workers Compensation issued September 3, 1996, draws a distinction between "creating" light duty positions for those employees with occupational injuries, and "reserving" light duty positions only for those with compensable injuries, which is forbidden.

Employers often create light duty positions for their employees who have suffered job-related injuries as part of their workers' compensation strategy. Employers have a financial incentive to create these "light duty" positions for those employees receiving workers compensation payments because it eliminates a future workers compensation claim. The issue arises whether an employee with a non-work related disability could insist upon a transfer to an open light duty position as an accommodation.

The answer is found in the EEOC Technical Assistance Manual released in 1992 and the EEOC Enforcement Guidance: Workers' Disability Compensation and the Americans with Disabilities Act released in September, 1996. The Technical Assistance Manual does not clearly state that a light duty position cannot

be claimed by an employee under the ADA as a reasonable accommodation, but it does suggest a strategy to avoid such claims. The Technical Assistance Manual indicates "If [the light duty position] was created as a temporary job, a reassignment to that position need only be for a temporary period." Thus, under the 1992 interpretation of the EEOC, at best an employee could only claim a temporary light duty position for its temporary duration. The obvious implication is that a light duty position could be claimed under the ADA on a long term basis.

Thus, an employer should only create a light duty position on an ad hoc basis to bring an employee back from workers' compensation leave. The light duty position should be documented as a temporary position. If the employee is not ready to return to regular duties at the contemplated end of the temporary light duty position, the employer has the opportunity to establish a second temporary term of the light duty position. If the employee is ready to assume regular duties earlier than anticipated, there is a risk that other employees with disabilities that did not arise at work may claim the now-vacant temporary job as an accommodation, but only for the temporary term of the job.

If a disabled employee is on workers' compensation leave, and can perform the duties of her original position with accommodation, the employer can require the employee to return to work without violating the ADA. However, if the leave qualifies as FMLA leave, the employee must be provided leave up to 12 weeks in duration, and cannot be compelled to take a light duty or a different job during the 12 week period. (Theoretically, under the FMLA, an employee is only entitled to medical leave if s/he is unable to perform the essential functions of the job, but the recertification and second/third opinion procedures of the FMLA make it unlikely that an employer will succeed in returning an employee in less than 12 weeks against the employee's will.)

4. Leaves of Absence as Accommodation

Although an employee may not mandate the type of accommodation to be provided, and an employer's only obligation is to provide a reasonable accommodation, in reality, leave is often the only accommodation that will permit recuperation. Granting unpaid leave and relaxing attendance and leave policies are two types of accommodation that are contemplated by the ADA.

In rare instances, an employee will request leave when it is not really a reasonable accommodation. For example, an employee that learns he is HIV positive may need several days off to deal with the emotional turmoil and to arrange medical care, but while he is asymptomatic, there may be no real need for leave consisting of several weeks. Whenever a decision is made to oppose a request for such leave, the employer should receive medical advice and must consider the individual circumstances of the employee. It is a mistake to proceed upon a layman's preconceptions about a particular physical or mental condition.

An employer may not decline to grant leave as an accommodation because the employee has used up all available leave time under a company policy, including a no-fault attendance policy. No-fault attendance policies are defended by companies on the basis that they do not discriminate against the disabled because they treat all persons the same. However, the ADA requires more than non-discriminatory treatment, it requires an affirmative duty of accommodation. The ADA specifically lists "adjusting or modifying policies" as one of the accommodations that may be required. Therefore, an employer may have to allow the disabled employee more leave time as a reasonable accommodation.

The ADA does not require an employer to provide a disabled employee paid leave as an accommodation. Companies may still set forth well-defined policies capping paid leave time. However, paid leave time available to other employees may not be denied to those with ADA covered disabilities.

An employer is not required to provide **unlimited** unpaid leave as an accommodation, nor does the ADA require an employer to hold a job open **indefinitely** until an employee's health problems are corrected. Monette v. Electronic Data Systems Corp., 90 F3d 1173 (6th Cir 1996); Hudson v. MCI Telecommunications, 87 F3d 1167 (10th Cir 1996); Myers v. Hose, 50 F3d 278 (4th Cir 1995). However, if the employment handbook provides for six months medical leave upon substantiation of a medical condition (for example maternity leave policies or recovery time for open heart surgery), the employer would likely face ADA liability for denying the same six months leave to a disabled employee as an accommodation. Likewise, an employer that grants personal leaves of absence to similarly situated employees for other nonmedical reasons (to finish a novel or obtain a PhD) would again likely face ADA liability for denying the same leave time to an employee with a covered disability.

Unpaid leave as an accommodation is not unlimited. At some point, the employee is no longer qualified to perform the position and extension of further leave becomes an undue hardship. Unfortunately, the ADA requires this decision to be made on a case by case basis. However, an employer cannot automatically terminate employment once the prescribed leave period runs out. An extension or relaxation of a company's leave policy would likely be required as a reasonable accommodation. Some state courts, including Michigan, have defined a "reasonable healing time" doctrine that requires employers to keep a position open if the employee's return to work is imminent. Federal courts may likely require the same as a reasonable accommodation. In addition, employers must consider whether they have extended the leave time granted to other non-disabled employees, because disabled employees may claim disparate treatment under the ADA.

5. An Employer Does not Have to Excuse Workplace Misconduct

A disabled employee is not immunized from consequences of his/her misconduct under the ADA. An employer may hold all employees (those with and without disabilities) to the same conduct standards. Nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who violates a job-related conduct standard (such as stealing or destroying property). EEOC Enforcement Guidance on the Americans with Disabilities and Psychiatric Disabilities p. 26; Maddox v. University of Tennessee, 62 F3d 843 (6th Cir 1995).

An employer may hold a disabled employee, including an alcoholic, to the same standards as other employees. Courts have also held that the ADA does not require a retroactive "fresh start" accommodation. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F3d 1102 (Fed Cir 1996); Palmer v. Circuit Court of Cook County Social Services Dept., 117 F3d 351 (7th Cir 1997) cert denied 1998 US LEXIS 3384 (discharge of employee suffering from major depression and a paranoid delusional disorder for making a series of phone calls alleging harassment and threatening her supervisor). See also: Hamilton v. Southwestern Bell Telephone Co., 136 F3d 1047 (5th Cir 1998). EEOC v. Amego, Inc., 110 F3d 125 (1st Cir 1997); Williams v. Widnall, 79 F3d 1003 (10th Cir 1996); Crawford v. Runyan, 79 F3d 743 (8th Cir 1996); Martinson v. Kinney Shoe Corp., 104 F3d 683 (4th Cir 1997); Newland v. Dalton, 81 F3d 904 (9th Cir 1996); Little v. FBI, 1 F3d 255 (4th Cir 1993); Williams v. Anheuser Busch, 957 FSupp 1246, (DC FL 1997); McKey v. Occidental Chem. Corp., 956 FSupp 1313 (DC TX 1997); Brundage v. Los Angeles Office of Assessor, 57 Cal App 4th 228 (Cal Ct App 2nd Dist 1997).

Unfortunately, some courts hold that misconduct caused by a disability cannot be cited as grounds for termination without running afoul of the law. Teahan v. Metro-North Commuter Railroad Co, 951 F2d 511 (2nd Cir 1991) cert den 506 US 815 (1992) (absences caused by substance abuse may not form the basis for discharge.)

F. EMPLOYER'S DEFENSES TO ACCOMMODATION

Even where an individual has a covered disability and is a "qualified individual with a disability," there are several circumstances which an employer can rely upon to defeat a claim that accommodation is required:

1. Unknown Disability

If the employer has not been notified of the disability and the symptoms of the disability are not obvious, there is no duty to accommodate. Miller v. National Casualty, 61 F3d 627 (8th Cir 1995); Bacon v. Great Plans Mfg., 958 FSupp 523 (DC KS 1997).

The employee has the initial duty to inform the employer of the disability and request accommodation. Taylor v. Principal Financial Group, Inc., 91 F3d 155 (5th Cir 1996)(employee with bipolar disorder seeking less stressful work environment failed to apprise management of any limitations relating to the impairment); Simpkins v. Specialty Envelope, Inc., 1996 US App LEXIS 22327 (6th Cir 1996)(the employee's duty to give notice required more than a telephone call from her spouse indicating that the employee was in the hospital and unable to work for a few days.) Accord: Willis v. Conopco, Inc., 6 AD Cases 806 (11th Cir 1997).

2. Employee Cooperation

Once sufficient notice has been provided by the employee, the employer and the employee must then engage in an interactive process to determine a reasonable accommodation. Beck v. University of Wisconsin, 75 F3d 1130 (7th Cir 1996); Bultemeyer v. Fort Wayne Community Schools, 100 F3d 1281, 6 AD Cases 67 (7th Cir 1996).

An employer is not responsible for providing an accommodation if the employee fails to specify the specific accommodation(s) needed to perform the job.

Recent case law has also held that if an employer offers alternative reasonable accommodations to a disabled employee, a refusal of the accommodations by the employee renders him/her unqualified under the law. Schmidt v. Methodist Hosp. of Indiana, 89 F3d 342 (7th Cir 1996). Where an employee fails to authorize the release of medical information to her employer, she has failed to cooperate and her ADA claim fails. See e.g. Templeton v. Neodata Services, Inc., 1998 US App LEXIS 31010 (10th Cir 1998).

3. Undue Hardship

Sometimes the accommodation requested by the employee presents an undue hardship for the employer. Employers are not required to make a reasonable accommodation if it would impose an "undue hardship" upon the business. EEOC ADA Technical Assistance Manual, §3.9. If one accommodation involves an undue hardship, others must be considered. Other times, all accommodations seem to present an undue hardship.

Taking the position that any accommodation presents an undue hardship must be done carefully, however, because it is likely that such position will be challenged by the EEOC or an attorney litigating on behalf of the employee.

The analysis of undue hardship involves an examination of the following factors:

a. The size of the business;

b. The type of operation. (For example, a lounge with low lighting would not be required to install bright lighting to accommodate a visually impaired worker);

c. The nature and cost of accommodation;

d. The financial resources of the local unit and the parent corporation; and

e. The practical realities. (For example, a fire fighter must be able to carry victims out of a burning building.)

The Technical Assistance Manual makes it clear that the undue hardship is not limited to financial hardship. The concept includes any action that is "disruptive" or would fundamentally alter the nature or operation of the business." §3.9

Hardships may be created by the assignment of duties to other employees. Mears v. Gulfstream Aviation, 905 FSupp 1075 (DC GA 1995) aff'd 87 F3d 1331 (1996)(accommodation that adversely affects other employees' ability to do their job is an undue burden on the employer and thus unreasonable.); Jones v. Alabama Power Co., 1995 US Dist LEXIS 20971 (DC AL 1995) aff'd 77 F3d 498 (11th Cir 1996)(reassignment of over 40% of employee's tasks to other employees is undue hardship); Carr v. Barr, 1992 US Dist LEXIS 9022 (DC DC 1992)(unpredictable absences made scheduling of other employees impossible); Helgerson v. Gridon Cordage, Inc., 518 NW2d 869 (MN Ct App 1994) cert denied 1994 Minn LEXIS 661 (1994)(restructuring of rotation schedule for all employees so disabled employee only had to perform certain jobs was an undue burden where rotation developed for efficiency and safety reasons). Although creating a heavier workload for other employees may create an undue hardship, the possibility that assignment of marginal tasks to others could create a morale problem is irrelevant.

The EEOC guidelines interpreting the ADA indicate that an employer could demonstrate undue hardship by showing that the other employees cannot handle the reassignment of marginal tasks because of the limited number of available employees. For example, the employer may have certain work which can only be done by a mechanic and may only have one mechanic on duty at certain times. The fact that parts employees and tire installers are on duty is irrelevant if they cannot do the marginal functions that the disabled mechanic is incapable of doing.

The fact that an expensive accommodation is required for only one person or for a low-paying job is irrelevant. For example, a $21.00 per hour reader may be required for a position that itself pays only $16.00 per hour.

The employer must make a reasonable accommodation notwithstanding an undue hardship if a third

party, e.g., state vocational rehabilitation agency, or the employee will assume the expense. Increased insurance costs and workers' compensation costs are also not considered unreasonable hardships and cannot justify a refusal to provide a reasonable accommodation.

The employer should also consider consulting the Job Accommodation Network at 1-800-526-7234 to discuss accommodation options. This federally funded program at West Virginia University has provided good ideas that have put people back to work and has at times confirmed the employer's belief that no accommodation was possible.

The Michigan Handicapper Civil Rights Act:

Unlike the ADA, the MHCRA sets forth specific statutory requirements as to what accommodations constitute an "undue hardship." These statutory requirements are based on the number of employees and the state average weekly wage. For 1998 the state average weekly wage is $614.10.

a. Employers with fewer than 4 employees are not required to purchase any equipment or device as an accommodation if the total purchase cost exceeds the state average weekly wage. Any equipment or device which costs less than the average weekly wage is not an undue hardship.

b. An employer with 4 or more, but less than 15 employees is not required to purchase any equipment or device as an accommodation if the total purchase cost exceeds 1.5 times the state average weekly wage, as an undue hardship.

c. An employer with 15 or more, but less than 25 employees is not required to purchase any equipment or device as an accommodation if the total purchase cost exceeds 2.5 times the state average weekly wage, as an undue hardship.

d. An employer with 25 or more employees must accommodate an employee by purchasing any equipment or device where the total purchase price is equal to or less than 2.5 time the state average weekly wage. However, there is no per se statutory rule that if the total purchase price exceeds 2.5 time the average weekly wage it is an automatic undue hardship.

4. Direct Threat

An accommodation does not have to be made where the employer can demonstrate that an individual with dangerous propensities causes a significant risk to the health and safety of the individual or others that cannot be reduced or eliminated by reasonable accommodation. 42 USC §12111(3).

Whether an individual poses a "direct threat" requires a case by case assessment of the individual's present ability to safely perform the job. In making this assessment, employers should rely on reasonable medical judgment and the best available objective evidence. Employers should consider the following factors: (1) duration of the risk; (2) nature and severity of the potential harm; (3) likelihood that the potential harm will occur; and (4) imminence of the potential harm. 29 CFR §1630.2 (r).

An individual does not pose a "direct threat" simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability. EEOC Enforcement Guidance of ADA and Psychiatric

Disabilities p. 33. An employer's subjective fear of danger will not establish a direct threat. Lussier v. Runyon, 1994 US Dist LEXIS 4668 (DC ME 1994)(employer discriminated against plaintiff because it's actions were motivated solely by the fact that it feared plaintiff's mental condition made him likely to cause a Royal Oak, Michigan type incident.) EEOC v. Texas Bus Lines, 923 FSupp 965 (DC TX 1996)(doctor's recommendation that 5'7 inch, 345 pound female applicant for bus driver position could not move swiftly enough in emergency after watching her "waddle" from the waiting room violation of ADA.) This case sets up the argument that an employer may have to "second guess" its doctors.

However, courts have frequently supported the direct threat defense. Adams v. Alderson, 723 FSupp 1531 (DC DC 1989), aff'd, 1990 US App LEXIS 25878 (DC Cir 1990)(an employee with a maladaptive reaction to stress attacked his supervisor found a danger the health and safety of himself and others and not entitled to an accommodation); EEOC v. Amego, Inc., 110 F3d 135 (1st Cir 1997); Palmer v. Circuit Court of Cook County, 117 F3d 351 (7th Cir 1997) cert denied 1998 US LEXIS 3384 (1998); Den Hartog v. Wasatch Academy, 909 FSupp 1393 (DC UT 1995), aff'd 1997 US App LEXIS 29792 (10th Cir 1997); Johnson v. The New York Hospital, 96 F3d 33 (2nd Cir 1996); Williams v. Widnall, 79 F3d 1003 (10th Cir 1996); Breiland v. Advance Circuits, Inc., 1997 US Dist LEXIS 14424 (DC MN 1997); Judice v. Hospital Service, 919 FSupp 978 (DC LA 1996); Jones v. New York Housing Authority, 1995 US Dist LEXIS 18374, 5 AD Cases 1868 (DC NY 1996) subsequent appeal 1996 US App LEXIS 24943 (2nd Cir 1996) (complaint dismissed); Gosvener v. Coastal Corp., 51 Cal App 4th 805 (Cal Ct App 1996).

But, of course, a few courts have rejected the direct threat defense:

In Hindman v. GTE Data Services, Inc., 1994 US Dist LEXIS 9522 (DC FL 1994), (judgement entered 4 AD Cases 182), an employee fired for bringing gun to work, claimed chemical imbalance caused him to do it. The court concluded that "whether Hindman posed a direct threat, or to what degree he posed a direct threat is a genuine issue of material fact here." However, on reconsideration by the second judge to preside over the case, Hindeman's ADA claim was dismissed because his alleged mental disability did not amount to an "extraordinary circumstance" warranting the relaxation of GTE's weapons policy.

In Collins v. Blue Cross Blue Shield of Michigan, 916 FSupp 638 (DC MI 1995), vacated 96 F3d 1448 (6th Cir 1996) plaintiff was on medical leave of absence under treatment with a psychiatrist for stress. The employer received report from psychiatrist that plaintiff was suffering from major depression/adjustment disorder and was unable to work. The psychiatrist also reported that during the course of treatment plaintiff made threatening statements about her supervisor. When plaintiff's psychiatrist cleared her to return to work, defendant terminated plaintiff based on the threatening statements. The district court held plaintiff was wrongfully discharged based upon the testimony of plaintiff's treating and defendant's examining psychiatrist, that they did not believe plaintiff would act on her threats. The Sixth Circuit vacated this decision and remanded the case to state court ruling that the case had been improperly removed and that district court did not have jurisdiction to hear the case. 96 F3d 1448 (6th Cir 1996).

In G.B. Goldman Paper Co. v. United Paperworkers Integration Union, Local 286, 957 FSupp 607 (DC PA 1997), plaintiff deliberately attempted to hit his co-worker with a dump truck. Plaintiff was suspended and ultimately discharged for "harassing, intimidating and threatening bodily harm to fellow employees." Plaintiff grieved his suspension and discharge. Even though plaintiff had a history of making threats, and had tried to hit other workers with his dump truck, the arbitrator found that while discipline was appropriate, discharge was too severe. On appeal, the district court affirmed the arbitrator's decision and held that under

the company's own work rules, "harassing, threatening and intimidating," was only a Group B offense which did not prescribe discharge.

5. Judicial Estoppel

The EEOC Technical Assistance Manual provides that representations made in a compensation claim do not automatically preclude an ADA claim. However, some recent court decisions have ruled that where an individual has made a claim of permanent disability in a workers compensation petition or Social Security Disability petition, s/he may be "judicially estopped" from claiming a violation of the ADA. In these cases, an employee is claiming that s/he is unable to perform the essential functions of the job in the compensation/SSI claims and is taking an inconsistent legal and factual position in the ADA claim. ADA cases have been dismissed on this theory. Tranker v. Figgie International, 221 Mich App 7 (1997) on remand 231 Mich App 115 (1998), Kennedy v. Applause, 90 F3d 1477 (9th Cir 1996), McNemar v. Disney, 91 F3d 610 (3rd Cir 1996) cert denied 117 S Ct 958 (1997); Reigel v. Kaiser, 859 FSupp 963 (ED NC 1994), Rissetto v. Plumbers Local 343, (9th Cir 1996); August v. Offices Unlimited, 981 F2d 576 (1st Cir 1992), Beauford v. Father Flanaghan's Boys Home, 831 F2d 768 (8th Cir 1987) cert denied 485 US 938 (1998).

Some jurisdictions where estoppel has not been applied: Mohammed v. Marriott International, 1996 US Dist LEXIS 2788, 5AD Cases 940 (DC SNY 1996); Garcia-Paz v. Swift 873 FSupp 547 (DC KS 1996), Dockery v. North Shore Med. Center, 909 FSupp 1550 (SD FL 1995). The EEOC's most recent position is that judicial estoppel does not defeat an ADA claim. EEOC Enforcement Guidance released February 12, 1997.

The United States Supreme Court has recently accepted in the case of Cleveland v. Policy Management Systems Corp, ___ F3d ____ (5th Cir 1997) cert. granted in part 119 S.Ct. 39 (19980.

6. Fitness for Duty Examinations

Employers often face the problem of what to do when an employee who has suffered an on-the-job injury or who has taken a medical leave of absence announces that he is able to return to work. Employers often are concerned whether the employee is actually fit to return to duty. This is an especially important issue when the employee has exhibited violent tendencies, aggression or other inappropriate behavior, has taken a leave of absence to undergo treatment and now states he is able to return to work.

Employers must remember that the ADA prohibits employment decisions based on stereotypes or generalizations about an individual with a disability. Individualized case by case determinations must be made. To that end, employers are permitted to make medical inquiries and require medical examinations which are job-related and justified by business necessity.

When an employee has been injured or has taken a medical leave of absence, an employer may require a fitness for duty examination if it appears that the employee's ability to perform essential job functions is affected. EEOC ADA Technical Assistance Manual, §9.4. See also: Porter v. U.S. Alumnoweld, 125 F3d 243 (4th Cir 1997); Grenier v. Cyanimid Plastics, 70 F3d 667 (1st Cir 1995); Hogan v. Bangor and Aroostook RR Co., 61 F3d 1034 (1st Cir 1995); Pesterfield v. Tennessee Valley Authority, 941 F2d 437 (6th Cir 1991); Judice v. Hospital Service, 919 FSupp 978 (DC LA 1996); Stolmeier v. Yellow Freight System, 1994 US Dist LEXIS 2207 (DC OR 1994).

Additionally, if an employee returns to work with a generalized return to work authorization from his doctor, the employer may require additional information on the employee's fitness to return based on the employee's specific job requirements. Porter v. Alumnoweld, supra. (discharge for failing to undergo fitness for duty exam upheld, the court also held that it was proper to require that the employee pay for the medical evaluation himself.)

Caveat: Unlike the ADA, The Family and Medical Leave Act restricts an employer's ability to challenge a returning employee's medical certification.

II. MEDICAL INQUIRES

A. Pre-offer Applicant Inquires

An employer cannot ask a pre-offer job applicant questions about the employee's past or current medical history or the existence, nature or severity of a disability, including prior workers' compensation claims or occupational injuries. In fact, the employer may not make such inquiries, even if the method is designed to shield the employer from the answers until after a conditional offer of employment is made.

Nor may the interviewer ask questions that are reasonably expected to elicit a response that would likely indicate whether the applicant has a disability. A question: "How well do you handle stress?" is not likely to elicit information on a disability and is permissible. But questions such as: "Have you ever sought treatment for stress?" or "Have you ever been unable to cope with stress?" are likely to elicit whether the person has previously treated for a psychological disability and are prohibited.

Sometimes an applicant may volunteer information about a disability. When that occurs, the employer is prohibited from making follow-up inquiries about the condition.

Where an applicant has a visible or known disability, the interviewer may not inquire about the nature, severity, or prognosis of the disability or whether the individual will need special treatment or leave because of the disability. In the unreported decision, EEOC v. Community Coffee Co., 1995 US Dist. LEXIS 22003, (DC TX 1995), the court found that the employer violated the ADA when an applicant was questioned about the nature of a facial disfigurement, even though it did not discriminate in hiring.

An employer may ask the applicant questions to determine whether s/he can perform the specific job functions. Questions should focus on the applicant's ability to perform the job, and not on a disability. The interviewer may describe or demonstrate the specific functions and tasks of the job and ask the applicant whether he can perform these job functions with or without a reasonable accommodation. The interviewer may ask questions about the ability to perform all job functions, not merely those essential to the job.

The EEOC Enforcement Guidance on Pre-employment Inquiries, published in 1994, indicate that an employer may inquire about an applicant's ability to achieve above-average performance in a major life activity. By way of example, an applicant may lawfully be asked if s/he could walk twenty miles without discomfort.

If an applicant's known disability appears to interfere with or prevent the performance of a job-related function, the applicant may be asked to describe or demonstrate how s/he would perform the specific job function. Likewise, the employer may ask an applicant with a known or obvious disability that may interfere

with performance to demonstrate the ability to perform the job. (However, no demonstration may be requested of an applicant whose disability will obviously not interfere, unless all applicants are requested to perform demonstrations.) When a demonstration is requested, the employer may have to provide accommodation (for example, adaptive devices) that would permit the applicant to perform the duties.

Applicants may be informed of hiring selection procedures (tests, examinations, demonstrations, etc) and invited to inform the employer of needed accommodations to participate in the procedures. This is not a prohibited inquiry about disability. However, at the pre-offer stage of the hiring process, the employer may not ask if the employee would require accommodation to do the job. In fact, if the applicant volunteers information that accommodation would be needed, the employer may not follow-up with inquiries on the type of accommodation that would be required.

An employer may not request information about a job applicant from a previous employer, family member, or other source that it could not properly request from the job applicant herself. Therefore, behind the scenes inquiries on prohibited subjects are prohibited.

B. Post-Offer Medical Examinations in the Hiring Process

A medical examination cannot be administered before an offer of employment is made. An employer may require a medical examination only after an offer of employment has been made, and only if an examination is required of all individuals entering the same job category. The employer's offer should be made conditional upon the applicant passing the examination.

Even if a lawful inquiry has disclosed a medical condition, the employer may not require a medical examination unless such is required for all other employees entering that job. However, there is no requirement that all medical examinations be identical, and if an exam is permissible, the physician may be directed to gather relevant information. An employer may require follow-up examinations where an initial examination reveals that further information is needed. Moreover, an employer may obtain information from other sources, such as therapists, psychologists, and others that are knowledgeable about the individual and the disability. EEOC Technical Assistance Manual at VI-7 (1992).

The post-offer physical examination is not restricted to an examination of job-related conditions, consistent with business necessity. In fact, the exam may be wide ranging. However, the job offer may only be withdrawn for reasons that are job related and consistent with business necessity. If a physical administered to a proposed insurance executive reveals a congenital back problem, the employer would be hard pressed to deny employment. However, if the proposed position would require the applicant to be on the job every day for the next three months, and the exam reveals a condition that will require treatment that renders the applicant unable to work for a portion of that time, the offer may be withdrawn. 29 CFR 1630.14(b) (Appendix) (1991).

After making a conditional offer of employment, an employer may ask about a person's workers compensation history in a medical inquiry or examination that is required of all applicants in the same job category. Employers may also contact third parties, including former employers, to access information about the applicant's workers compensation history during the post offer period. The employer may use the data obtained from the inquiry to screen out applicants with a history of fraudulent workers compensation claims. Unfortunately, fraudulent claims are conceptualized by the EEOC as those where the fraud was discovered before the award. Hence unsuccessful claims are fraudulent and successful claims are thought to be legitimate.

Inferentially, the employer may retract the conditional offer of employment because of the fraudulent claims. Employers that learn of a history of many successful workers compensation claims will need to seek legal counsel before deciding that the conditional offer of employment will be retracted, because of the possibility of litigation.

Where a conditional job offer is withdrawn because a post-offer medical examination reveals that the applicant is not qualified for the position, the employer is still obligated to explore whether the individual can be accommodated. For example, if an employer learns that an applicant for a general labor position in a plant is deaf and was actually lip reading during the interview, the employer may have to place flashing lights on its hi-los rather than rely upon the loud noises projected when the hi-lo is in reverse.

C. Employer Inquiries During Employment

The EEOC Technical Assistance Manual explains what inquiries an employer is permitted to make during employment regarding disabilities. An employer may make job related medical inquiries if consistent with business necessity. An employer may also make medical inquiries in order to determine if the individual meets the definition of an individual with a disability and to identify effective accommodations.

Accordingly, an employer may request sufficient medical information at the time of a request for accommodation to assure itself that an ADA obligation exists. However, employers are cautioned that where the FMLA applies, the certification procedure and second opinion medical examinations are the mandated method for gathering medical information at the time leave is requested.

Employers should understand that most case law on the subject indicates that an employer has no obligation to accommodate an unknown disability. Hedberg v Indiana Bell Tel. Co., 47 F3d 928 (7th Cir 1995); Stola v. Joint Industry Board, 889 FSupp 133 (SD NY 1995). Accordingly, while an employer should not turn a blind eye to facts that indicate that the employee suffers from a covered disability, at times it may be the wiser strategy to make no inquiry. Generally, the employer will wish to make the inquiry at the time of the leave request when the employer believes that no ADA or FMLA obligation exists and wishes to deny the request for leave, or when the employer wishes to explore alternatives to the accommodation requested by the employee.

D. Employer Required Medical Examinations During Employment

Once an employee commences employment, any inquiry or medical examination must be job-related and justified by business necessity (excepting voluntary examinations conducted as part of employee health programs and examinations required by other federal laws, such as DOT regulations).

It is important to understand that the scope of employee medical examinations is narrower than post-offer medical examinations of job applicants. The EEOC Technical Assistance Manual indicates that examinations may lawfully be triggered by the following circumstances:

- Evidence of problems related to job performance or safety;
- To determine whether persons in physically demanding jobs continue to be fit for duty;
- To determine whether the worker has a physical or mental condition that constitutes a

"disability" that must be accommodated. (For example, an employee in a noisy work environment may complain of headaches. The employer may request an examination to determine whether any physical or mental condition is causing the condition, so as to require accommodation.)

- **!** To identify an effective accommodation;

- **!** To determine whether the employee poses a direct threat to herself or co-workers.

An employer can require a frequently absent employee to submit to a medical exam if the absences have a deleterious effect on the employee's productivity and overall job performance. Yin v. California, 95 F3d 864 (9th Cir 1996) cert denied 519 US 1114 (1997)(medical exam was supported by business necessity because the company was attempting to determine whether the employee was capable of doing her job.)

E. Medical Inquiries in a Return to Work Situation

When an employee indicates s/he is ready to return to work, the employer may ask questions about the employee's ability to perform essential job-related tasks if the questions are consistent with business necessity. The employer may also ask questions to identify whether accommodation will be required and if so, the type of accommodation.

Examples of permissible questions are:

- **!** Can you work an 8 hour shift?

- **!** Can you stoop, bend and lift?

- **!** Can you return to work?

- **!** Will you be subject to fainting spells because of your condition?

The employer may not ask questions that are not job related. Nor may the employer ask questions that are not relevant to the safe and efficient operation of the business, such as:

- **!** What is your prognosis for recovery?

- **!** Is the illness in remission?

- **!** Will you eventually be able to walk without a limp?

- **!** What kind of treatment will you require?

III. TERMINATION OF A DISABLED EMPLOYEE'S EMPLOYMENT DURING LEAVE

Whether an employer may terminate the employment status of a disabled individual who is on a leave of absence without incurring ADA liability involves an analysis of several areas:

A. Would accommodation (or further accommodation) be an undue hardship?

B. Has the individual's condition progressed to the point that it can be said that s/he cannot perform the essential functions of the job, even with accommodation?

C. Has the employee provided an imminent return to work date to the company? If so, the imminent return to work can make the assertion of undue hardship or inability to perform the essential functions of the job look pretextual.

D. Has the employee exhausted paid or unpaid leave time under the company policy? If an employee has not exhausted available leave time under company policies, termination is almost never recommended.

E. How has the company treated other employees on leave in the past? To avoid disparate treatment claims, ask:

- **!** Has the company ever granted a longer period of medical leave to any employee? If so, what circumstances can be advanced as the "legitimate business reason" for the difference in treatment?
- **!** Has the company granted longer periods of non-medical leave to other employees?
- **!** Has the company re-hired anybody terminated under the leave policy? That may permit the employee to argue that the person was effectively granted unpaid leave.

F. Has the twelve week period of the FMLA expired? While an employer is not automatically exempt from ADA liability merely because the FMLA obligation has passed, courts and the EEOC will likely view termination before the expiration of twelve weeks with a great deal of suspicion. The FMLA period sets the benchmark by which leave is to be measured; it is almost as if the FMLA is a legislative determination that twelve weeks leave is not an undue burden for companies with 50 or more employees.

G. Has the employer provided accommodations to the employee?

THE FAMILY AND MEDICAL LEAVE ACT ("FMLA")

I. OVERVIEW

The Family and Medical Leave Act of 1993 ("FMLA") provides eligible employees with up to 12 weeks of **unpaid**, job protected leave in a 12 month period for the employee's own serious health condition, for the birth, adoption or foster care placement of a child with the employee, and to care for a child, spouse or parent who has a serious health condition 29 USC § 2612(a); 29 CFR §825.200.

A. EMPLOYERS COVERED BY FMLA

An "employer" is defined as any private employer who employs 50 or more employees (within a 75-

mile radius of an eligible employer worksite) for each working day during each of 20 or more calendar work weeks in the current or preceding year. See 29 USC §2611(2)(B) and (4)(A). An employer may not terminate leave if the number of employees drops below 50 during the leave. An "employer" also includes all public employers, state, local and some federal employers and local education agencies (schools) regardless of size. 29 USC §2611(4)(A)(iii).

1. Joint Employment

Where one corporation has an ownership interest in another corporation, it is considered a separate employer unless it meets the "joint employment" test. "Joint employers" may be separate distinct entities with separate owners, managers and facilities.

A joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between employers to share an employee's services or to interchange employees; (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employees employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Joint employer status is determined by a review of the "totality of the circumstances" and not a single criterion. Joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

In joint employment relationships, only the primary employer is responsible for giving required notices to its employee and providing FMLA leave. Typically, the primary employer would be the entity with authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits.

Employees jointly employed by 2 employers must be counted by both employers, whether or not maintained on one of the employer payroll, in determining employer coverage and employee eligibility. For example, where a company jointly employs 25 temporary employees from a leasing company and has 35 of its own regular employees, the company would have 60 employees for determining whether or not it is covered by FMLA.

2. Integrated Employer Test

Separate entities may be deemed a single employer for purposes of FMLA if they meet the "integrated employer" test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility.

Like the "joint employment" test, a review of the totality of circumstances is required rather than a single criterion. Factors considered in determining whether 2 or more entities are an integrated employer include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control.

3. Employer Agents

The definition of "employer" includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The FMLA adopts the standard set forth in the Fair Labor Standards Act, 29 USC 203(d) and an individual such as corporate officer "acting in the interest of employer" is individually liable for any violations of the requirements of FMLA.

B. CALCULATING THE NUMBER OF EMPLOYEES

For purposes of calculating the number of employees for coverage under FMLA, the definition of "employee" under the FLSA, §3(g), has been adopted. Individuals who are counted for coverage purposes include:

1. Any employee whose name appears on the employer's payroll, whether compensation is received or not;

2. Employees on paid or unpaid leave, including FMLA leaves, disciplinary suspensions, etc. as long as there is a reasonable expectation the employee will later return to active employment;

3. Individuals who "follow the usual path of an employee" and are dependent on the business which s/he serves as opposed to independent contractors who are engaged in a business of his/her own. It appears as though the "economic reality" test is appropriate to determine whether an individual is an employee or independent contractor for purposes of coverage under FMLA.

When a company is close to, but below, the threshold of 50 employees, it should be vigilant in removing employees from the payroll after extended absences. Frequently, individuals on medical leave are mistakenly carried indefinitely, especially those employees that are collecting workers' compensation benefits.

C. ELIGIBLE EMPLOYEES

"Eligible employee" means an employee who has been employed for at least 12 months for a covered employer and has at least 1250 hours of service with the same covered employer during the 12 month period as of the date leave commences. 29 USC §2611(2)(A). The 12 months of employment need not be consecutive. This includes part-time employees.

Some courts have held that an employee must allege that 1250 hours were worked in the prior year in order to establish that the plaintiff is eligible for protection under the FMLA. Blindy v. Examination Management Services, 1996 US Dist LEXIS 14539, 3 WH Cases 2d 989 (ND IL 1996). However, a number of individuals have brought FMLA claims even though they did not meet the one year/ 1250 hours requirement. 29 CFR § 825.110 (d) provides that if an employee notifies the employer of the need for leave before the eligibility requirement is met, the employer must respond by confirming eligibility, by projecting the date the employee would be eligible or by advising the employee when the eligibility requirement is met. If the employer fails to advise the employee wither the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. Schlett v. Avco Fin. Servs., Inc., 950 FSupp 823 (ND OH 1996); Robbins v. Bureau of National Affairs, 896 FSupp 18 (DC DC 1995). But see: Wolke v. Dreadnought Marine,

Inc., 1997 US Dist LEXIS 1752 (DC VA 1997), where the District Court held that Section 825.110 was an unconstitutional and improper extension of the FMLA that directly contradicts Congress' intent regarding the eligibility of employees.

D. EMPLOYERS' NOTICE OBLIGATIONS

1. Posting Requirements

Every employer covered by the FMLA must post in a place conspicuous to employees and applicants, a notice explaining the FMLA's provisions and providing information concerning procedures for filing complaints with the wage and hour division, even if the employer presently has no eligible employees. (Posting in a foreign language may be required, if a significant portion of the workers are not literate in English.)

Employers should post the U.S. Department of Labor poster "Your Rights Under the Family and Medical Leave Act of 1993" with the many other postings that are required under state and federal law. Failure to post as required excuses the employee from providing advance notice of the need to take FMLA leave and if willful, exposes the employer to a $100.00 fine for each offense.

2. Publishing Requirements

If a covered employer has any written guidance to employees concerning employee benefits or leave rights, the employer must include, in addition to the posting requirements, information concerning FMLA entitlement, FMLA rights and responsibilities and the employer's policies regarding the FMLA.

One court has held that an employer that provides up to sixteen weeks leave for the birth of a child violated the FMLA when it did not explain in its handbook that only leave of twelve weeks or less would preserve reinstatement rights. Fry v. First Fidelity Bank Corp., 1996 US Dist LEXIS 875, 3 WH Cases 2d 115 (DC PA 1996).

Employers are advised to prepare and publish a detailed FMLA policy in the employee handbook or other benefit/leave guidance distributed to employees, because 29 CFR §825.300(f) states that an employer may not take action against an employee for failing to comply with any provision that is required to be set forth in the notice. The policy should include any implications that the company's unique policies and practices have upon FMLA rights. See Fry, supra.

3. Designating Method of Calculating Leave

The employer must choose the method of calculating the 12 month period in which FMLA leave is measured, unless state law dictates the method. Currently, Michigan law does not dictate a method. The designation should be done in writing and distributed to all employees.

The employer has several options:

(i) calendar year;
(ii) fixed 12 month (ex: a fiscal year);

(iii) 12 months measured forward from the first day of leave; and
(iv) rolling 12-month period.

The method must be applied to the entire workforce. Employers should post the method of calculating the 12 month period with a dated document.

If the company has an Employee Handbook or other written guidance to employees concerning benefits or leave, it must publish the method of calculating the 12 month period in those materials. The method may be changed upon 60-days notice to employees.

If the employer fails to designate a method of calculating the 12-month period, the method most favorable to the employee shall be applied. McKiernan v Smith-Edwards-Dunlap, 1995 US Dist LEXIS 6822, 3 WH Cases 2d 272 (DC PA 1995)(a company's failure to designate a method, resulted in an employee being able to "stack" 12 weeks of leave on either side of his company anniversary date.)

In choosing which method to apply, employers should consider:

1. The calendar year and fixed 12 month period methods are more easily calculated and administered, but both permit the employee to "stack" 12 weeks leave at the end of one year and another 12 weeks at the beginning of the next; McKiernan, supra.

2. Calculating leave entitlement by measuring the 12 month period forward from the first date of leave is slightly more difficult to administer, but eliminates "stacking" that may result in 24 weeks of continuous leave. However, at the anniversary of the first leave, another full 12 weeks of leave become available;

3. The "rolling" 12 month method is the most difficult to calculate and administer, but ensures that an employer only suffers 12 weeks of leave in any 12 month period.

E. CONDITIONS JUSTIFYING LEAVE

An eligible employee is entitled to a total of 12 work weeks of unpaid, job protected leave during the designated 12 month period for one or more of the following:

1. "The birth of son or daughter of the employee and in order to care for such son or daughter;

   (a) FMLA leave may begin before the actual date of birth of a child. An expectant mother may take FMLA earlier for prenatal care, if she develops a serious health condition which prevents her from working.

2. The placement of a son or daughter with the employee for adoption, foster care placement or foster care;

3. In order to care for a spouse, son, daughter or parent (not a parent-in-law) of the employee if such spouse, son, daughter or parent has a serious health condition;

(a) Son or daughter means a biological, adopted or foster child, a stepchild, a legal ward or a child who is cared for financially and on a day-to-day basis and who is under 18 or over 18 and "incapable of self-care because of a mental or physical disability." 29 USC §2611(12).

(b) An employee on FMLA leave relinquished his reinstatement rights when he failed to return to work until almost a month after his father died. His efforts to deal with his father's estate were not "caring" for his father; The serious health condition ended with the father's death. Brown v J.C. Penny, 924 FSupp 1158 (DC FL 1996).

4. Because of a serious health condition that makes the employee "unable to perform the essential functions of the position of the employee." 29 USC §2612.

If spouses are employed by the same employer, the combined total amount of leave for the husband and wife may be limited to 12 work weeks during the designated 12 month period in the case of birth, adoption or to care for a sick parent. 29 USC §2612(f).

F. SERIOUS HEALTH CONDITION

"Serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves:

1. *Inpatient care (i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity; **or***

2. *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

   a. A period of *incapacity (i.e.*, inability to perform essential job functions, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of **more than three consecutive calendar days**, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

   b. Treatment 2 or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral, by a health care provider; or

   c. Treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment under the supervision of the health care provider;

3. Any period of incapacity due to pregnancy, or for prenatal care;

4. Any period of incapacity or treatment for such incapacity due to a **chronic serious** health condition.

a. A chronic serious health condition is one which requires periodic visits for treatment by a health care provider, continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodic rather than continuing incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc*.).
Chronic conditions include, but are not limited to, asthma, migraine headaches, chronic back pain, diabetes, epilepsy, chronic fatigue syndrome, and periods of incapacity due to pregnancy. See: Victorelli v. Shadyside Hospital, 128 F3d 184 (3rd Cir 1997).

5. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee (or family member) must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Ex: Alzheimer's, severe stroke, or the terminal stages of a disease.

6. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc*.), severe arthritis (physical therapy), kidney disease (dialysis).

FMLA leave is available for substance abuse treatment, as long as the other conditions are met.

The final regulations have, however, made it clear that the common cold, flu, earaches, upset stomach, minor ulcers, headaches (except migraines) and dental work are not "serious health conditions." The regulations also state that routine physicals, eye exams and dental exams are not "treatment" for purposes of determining "continuing treatment."

Employees may have to provide medical testimony that the condition prohibited them from performing the essential functions of the job.

7. An employee's claim of serious health condition may be rebutted by doctor testimony or records:

- Gudenkauf v Stauffer Communications, 922 FSupp 465 (DC KS 1996) Aff'd 158 F3d 1074 (10th Cir 1998)(court rejected employee's claim that symptoms associated with her pregnancy were covered under FMLA because medical records and obstetrician testimony indicated that pregnancy was normal and her symptoms were not severe.)

- Brannon v Oshkosh B'Gosh, 897 FSupp 1028 (DC TN 1995)(where flu-like symptoms of nausea, vomiting and diarrhea were not a serious health condition, despite physician's treatment, where the plaintiff could not prove that she was incapacitated or "unable to perform the functions of her job.")

- Bauer v. Varsity Dayton-Walther Corp., 118 F3d 1109 (6th Cir 1997)(court held that employee's attendance records with his new employer and his failure to seek treatment following his discharge may be considered in determining whether his rectal bleeding was a serious health condition.)

- But see: Murphy v Cadillac Rubber & Plastics 946 FSupp 1108, (WD NY 1996)(court held that a miscarriage involving hospitalization and follow-up care was a serious health condition without requiring a showing that she was unable to perform the functions of her position.)

At least one court has held that while an employee's individual medical conditions alone do not constitute a serious health condition, when combined they do create a serious health condition protected by FMLA. See e.g.: Price v. City of Fort Wayne, 117 F3d 1022 (7th Cir 1997), where an employee's high blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, coughing, stress, and depression was within the protection of the FMLA.

G. HEALTH CARE PROVIDER

A "health care provider" is defined under the FMLA as any doctor of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, chiropractors (but limited to treatment consisting of manual manipulation of the spine to correct subluxation as demonstrated by an x-ray to exist), nurse practitioners, nurse-midwives, clinical social workers, Christian Science practitioners, and any health care provider that the employer's group health plan will accept.

H. INTERMITTENT OR REDUCED LEAVE

The FMLA provides that leave for birth or adoption may not be taken on a reduced schedule (e.g. 6 hour day) or intermittently (in block of time) unless the employer and employee agree otherwise. 29 USC §2612(b)(1).

However, for leave taken to care for a spouse, son or daughter or because of medical conditions, leave may be taken intermittently or on a reduced leave schedule without agreement by the employer when medically necessary. 29 USC §2612(b)(1).

If an employee requests reduced or intermittent leave, the employer may require the employee to transfer to an available alternative position that has equivalent pay and benefits and better accommodates recurring periods of leave than the regular employment. 29 USC §2612(b)(2).

II. EMPLOYERS' AND EMPLOYEES' OBLIGATIONS WHEN LEAVE IS REQUESTED

A. EMPLOYEE NOTICE REQUIREMENTS

1. Foreseeable Leave:

Employees are required to provide the employer with not less than 30 days notice of the date of FMLA leave if the leave is foreseeable. 29 USC §2612(e)(1).

If 30 days notice is not possible, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must by given as soon as practicable. 29 USC §2612(e)(1); 29 CFR §825.302(a)(b). See also: Hopson v. Quitman County Hospital, 119 F3d 363 (5th Cir 1997) corrected on remand 126 F3d 635 (5th Cir 1997). Except in "extraordinary circumstances" when not feasible, "soon as practicable" has been interpreted to mean an employee is expected to give notice within one or two working days of learning of the need for FMLA leave. 29 CFR §825.303(a).

The notice may be provided in person, by telephone or electronic means, or by an employee's spokesperson if the employee is unable to do so personally. 29 CFR §825.303(b).

The employee must provide sufficient detail to make it evident that the requested leave is protected as FMLA leave. Reich v Midwest Plastic Engineering, Inc., 1995 US Dist LEXIS 12130, 2 WH Cases 2d 1409 (WD MI, 1995); Aff'd 113 F3d 1235 (6th Cir 1997) Carter v. Ford Motor Co., 121 F3d 1146 (8th Cir 1997).

However, the employee need not assert rights under, or even mention, the FMLA. Manuel v. Westlake Polymers Corp., 66 F3d 758 (5th Cir 1995). But, the employer should not have to speculate about the nature of the employee's condition. See e.g. Midwest Plastic, where the court explained via hypothetical, an employee who calls an employer Monday to say that s/he would not be in to work because of a car accident suffered on Sunday has not provided sufficient detail to make it evident that the leave was FMLA qualifying, whether the employee had indeed been seriously injured or simply took the day off to go fishing. The employee should say s/he was hospitalized because of the accident.

In Carter, supra., the court held that the employee failed to provide timely or adequate notice of the need for leave when his wife called in to say both she and her husband would be "out" because of family problems, and then called back 6 days later only stating he was "sick." After receiving a letter from the employer telling the husband to return to work or provide a reason for his absence, his wife waited almost a week and then called to say she would be bringing her husband's medical papers.

But see: McGinnis v Wonder Chemical Co., 1995 US Dist LEXIS 18909, 3 WH Cases 2d 71 (ED PA 1995), a statement that an employee's back pain had increased so that he could no longer work was a sufficient notification of a serious medical condition to permit the FMLA claim go to a jury.
(Note: Whereas the Midwest Plastic court appears to require notification of both a medical condition and treatment by a health care professional, the McGinnis court did not.)

If an employee **fails to give requisite notice** for foreseeable leave, the employer may delay the taking of leave until 30 days after notice is provided.

To delay leave, the employer must show that the employee had actual knowledge of the requirement to provide advance notice. This showing may be satisfied by the posting of the required notice in the workplace. 29 CFR §825.304.

Employees also have a duty to make a reasonable effort to schedule foreseeable, planned medical treatment (of themselves, their parent, spouse or child) so it will not unduly disrupt the operations of the employer and shall attempt to give 30 days notice before the medical leave is to begin or such notice as is practicable. 29 USC § 2612 (e)(2).

2. Unforeseeable Leave:

The regulations do not specifically indicate the effect of an employee's failure to give the requisite notice of an unforeseeable leave. However, in Midwest Plastic, supra., the employer treated an employee's absence as unexcused for lack of notification and proceeded to terminate the employee for attendance difficulties which was upheld by the Court. See also: Satterfield v. Wal-Mart Stores, 140 F3d 1040 (5th Cir 1998) Carter v. Ford Motor Co, supra.; Johnson v. Primerica, 1996 US Dist LEXIS 869 (DC NY 1996). Gay v. Gilman Paper Co., 125 F3d 1432 (11th Cir 1997)(where the employee deliberately withheld notice of a serious health condition and provided false information termination is warranted.)

Employers contemplating the termination of an employee for failure to provide sufficient notice in the case of an unforeseeable leave must be able to show the existence of an absenteeism policy and uniform enforcement of it.

Employers are advised to adopt a policy that requires all absences to be reported to a designated person, except those that have been arranged in advance. If reporting absences to one person is not practical, the policy should provide that the employee remain available for phone contact during morning hours, except for needed visits to health care professionals, so that information may be obtained.

The employer may require an employee on FMLA leave to report periodically on his or her status and intent to return to work. 29 CRF §825.309. Even when an employee has initially provided sufficient notification, failure to give updates provides grounds for termination. Midwest Plastic, supra.

B. EMPLOYER OBLIGATIONS

It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying. The employer must notify the employee that the leave is designated and will be counted as FMLA leave within **2 business days** (absent extenuating circumstances) after the employer has acquired knowledge that the leave is being taken for an FMLA required reason. 29 CFR §825.208 (b)(1). The employer's notice that the leave has been designated as FMLA leave may be oral but must be followed by written confirmation no later than the next payday. 29 CFR §825.208(b)(2).

If the employer is going to require that paid leave is to be substituted or that leave is to be counted as FMLA leave the employee must be given notice within 2 business days of the time the employee gives notice of the need for leave, or, if the employer does not have sufficient information as to the reasons for the leave, when the employer determines the leave qualifies as FMLA leave. Notice should be given before the leave begins unless the employer has insufficient knowledge. 29 CFR §825.208(c)

The employer's designation as FMLA leave may be preliminary pending confirmation of the FMLA-qualifying event and certification and made final upon confirmation or withdrawn if confirmation is not forthcoming. 29 CFR §825.208(e)(2)

The final regulations specifically provide that an employer may make inquiries at the time of the leave request to determine if the leave is FMLA qualifying. An employee giving notice of the need for unpaid leave "must explain the reasons ... so as to allow the employer to determine" whether the leave is FMLA qualifying. 29 CFR §825.208, §825.303. See: Reich v Midwest Plastic Engineering, Inc., 1995 US Dist LEXIS 12130, 2 WH Cases 2d 1409 (DC MI 1995).

The discussions and the decision on whether a leave request qualifies for FMLA leave must be documented. 29 CFR §825.208.

C. DESIGNATING FMLA LEAVE AFTER-THE-FACT

The employer may not designate leave as FMLA leave after the leave began or the employee has returned to work except:

1. if the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return; or

2. if the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under the FMLA.

If an employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave the employer may not designate the leave as FMLA leave retroactively. The employer may designate the leave prospectively as of the date of notification to the employee of the designation. However, the employee is entitled to protection under the Act for the entire period, both before and after the designation. See: Viereck v. City of Gloucester City, 961 FSupp 703 (DC NJ 1997).

D. MEDICAL CERTIFICATION

Employers may require and employees must provide a certification by a health care provider. 29 USC §2613(a); 29 CFR §825.305; Murphy v. Cadillac Rubber & Plastics, 946 FSupp 1108 (WD NY 1996).

Notice of the need for certification should be provided in writing at the same time the employer provides notice of FMLA rights to the employee. The notice must be given within **2 business days** after the employee gives notice of the need for leave or after unforseen leave commences. Employees must be given at least **15 days** to submit medical certification.

If the employee does not provide the requested medical certification in a timely fashion, the leave is not protected by the Act. See: Midwest Plastic, supra.,(employer can terminate employee for the absence if she fails to provide requested medical certification and the employer has been consistent in the enforcement of its attendance policy.) Moreover, an employer may rely upon the information contained in the medical certification until the employee provides a contradictory one. Stoops v. One Call Communications, 141 F3d

309 (7th Cir 1998) (Employee absences following receipt of medical certification, which indicates employee does not need to miss work, warrants termination.)

The Department of Labor has adopted optional Form WH-380 which sets forth certification data. The requirements for sufficient certification include statements concerning health and estimations as to the time needed for care including:

1. The date the onset of the condition occurred. See, §103(b)(1).

2. The probable duration of the condition. See, §102(b)(2).

3. The probable duration of the patients incapacity (if different).

4. A statement of the medical condition. See, §102(b)(3).

5. Whether additional treatment will be required and if so, the estimated probable number. Information beyond that set forth in Form WH-380 may not be required.

In order for an employer to use the defense of failure to provide notice of the need for FMLA leave or failure to provide medical certification, the employer must post a notice regarding the employee's rights and obligations under FMLA. Failure to provide such a notice may prevent the employer from asserting these defenses.

If the leave is requested due to the employees' own health condition, the employer can require a statement that the employee is unable to perform his job functions. See, 29 USC §2613(b)(4)(B); 29 CFR §825.306(b).

Employer representatives should scrutinize the certification provided by the employee for missing entries, which should be returned to the employee for completion, or for vague or imprecise responses, which may justify the need for a second opinion examination.

E. SECOND OPINION MEDICAL CERTIFICATION

If an employer has reason to doubt the validity of the employee's certification, it may require (at its own expense) that the employee obtain an opinion of a second health care provider approved by the employer as long as that provider is not employed, contracted or utilized on a regular basis by the employer.

Only the employer's health practitioner is permitted to contact the employee's health care provider in order to obtain clarification of a certification and to determine its authenticity and only if the employee authorizes the contact. 29 CFR §825.307 (a). Employers cannot contact the employee's doctor themselves.

Employers should furnish second opinion health practitioners with relevant information on the essential functions of the job, information about the individual's circumstances and the employer's reason to doubt the validity of the certification provided, remembering that such materials will be subject to discovery later.

In the event there are conflicting opinions, a third health care provider (again, paid for by the employer), approved jointly by the employee, shall have a final determination which will be binding on both. 29 USC §2613(c); 29 CFR §825.307.

If the employer does not act in good faith in selecting the third health care provider, the employee's medical certification is controlling. If the employee does not act in good faith in selecting the third health care provider, the employer's medical certification is controlling. 29 USC §2613(d).

F. RECERTIFICATION

Employers may also require subsequent recertification of the condition during FMLA leave, as well as periodic reports of the employee's intent to return to work. 29 USC §2613(e). The employer may require recertification whenever circumstances described by the previous certification have changed significantly (for example, the duration is extended), or the employer receives information that casts doubt upon the stated reason for the absence. 29 CFR §825.308.

Recertification may not be required more than every 30 days. If the minimum duration of the period of incapacity stated in a certification furnished by a health care provider is more than 30 days, the employer can only request recertification sooner if the employee requests an extension of leave, circumstances in the certification have changed significantly, or the employer receives information that casts doubt on the validity of the certification. 29 CFR §825.308.

G. FAILURE TO PROVIDE CERTIFICATION

An employee's failure to provide certification before foreseeable leave authorizes the employer to delay the commencement of leave until certification is provided. 29 CFR §825.311(a).

When leave is not foreseeable, an employee's failure to provide timely certification (generally within 15 days, unless there is a "medical emergency," and then "within a reasonable time") permits an employer to "delay continuation of FMLA leave." Presumably, this means that thereafter leave is unauthorized and unexcused. If the employee never provides certification, the leave is not FMLA leave.

H. FITNESS FOR DUTY EXAMINATIONS

An employer may request certification from a health care provider that the employee is able to resume work, i.e. a fitness for duty certification as long as that policy is applied uniformly. 29 USC §2614(a)(4); Porter v. U.S. Alumoweld Co., 125 F3d 243 (4th Cir 1997). However, the employer may not challenge the return-to-work certificate unless post-leave behavior justifies it. Albert v. Runyon 6 FSupp 2d 57, (DC Mass 1998).

In McGinnis v Wonder Chemical Co., 1995 US Dist LEXIS 18909, 3 WH Cases 2d 71 (ED PA 1995), the employer argued that a return to work certification imposing restrictions against twisting, bending and lifting was not really a certification that the employee could do the job. However, the employee's testimony, disputed by the employer, that job modifications had once been made that would permit the employee to do the job, created a question of fact, necessitating a jury trial on the issues.

I. EXHAUSTION OF PAID LEAVE

Under 29 USC §2612(d)(2)(A), an employee may elect or an employer may require that the employee first use accrued paid vacation leave, personal leave or family leave before any unpaid leave time is provided. In other words, the employee would have to exhaust all paid leave first including vacation and paid sick leave. The employer may provide a total of 12 weeks leave by allowing unpaid leave for the balance of the time. However, it is at the employer's discretion to do so. An employer cannot be required to provide paid leave. 29 USC §2612(d)(2)(B).

If the employer wishes to require that an employee exhaust available paid leave for all or part of the 12 week FMLA period, the decision that paid leave will be substituted for unpaid leave or that paid leave will be counted as FMLA leave must be made within 2 business days of the time that the employee provides notice of the need for leave or when the employer receives notification that the leave qualifies as FMLA leave, if this happens later.

See, for example: Haggard v Farmers Ins., 1996 US Dist LEXIS 4078, 3 WH Cases 2d 339 (DC OR 1996), where the Court rejected a claim that the employer violated the FMLA by providing 6 weeks paid leave and 8 weeks unpaid leave, and charging 4 weeks of the paid leave against the employee's available vacation time.

J. MAINTAINING BENEFITS DURING LEAVE

1. Group Health Plans

During FMLA leave, employers must maintain coverage for the employee under its group health plan for the duration of the leave, but may recover the premium paid for the group health plan if the employee fails to return to work for reasons other than continuation or recurrence of the health condition or other circumstances beyond the control of the employee. The employer may require certification of such condition. 29 USC §2614(c).

Where there is a co-pay, an employer may require the employee on FMLA leave to remit his/her share of the premium on a timely basis. Failure by the employee to remit timely payment can result in the termination of group health care benefits.

2. Non-health Care Benefits

With respect to non-health care benefits, treatment of the employee on FMLA leave must be consistent with non-FMLA leave policies. For example, if life insurance is provided to employees on other leaves, it must be provided on FMLA leave. 29 CFR §825.220(c).

Employers can provide that employees on leave do not accrue certain benefits such as seniority or other rights during the leave period. 29 USC §2614(a)(3). But, the leave cannot be counted as a "break in service" for purposes of vesting, eligibility or participation in benefit programs.

K. DISCRIMINATION PROHIBITED

An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave, and cannot use the taking of FMLA leave as a negative factor in employment actions, including hiring, promotions or discipline. 29 CFR §825.220 (c). Accordingly, counting absences for a serious health condition for an FMLA protected employee under the company's no-fault policy violates the Act. George v Associated Stationers, 932 FSupp 1012 (ND OH 1996).

L. REINSTATEMENT TO FORMER POSITION

Employers must "restore" the employee on FMLA leave to the position held when the leave commenced or "restore" them to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

The taking of leave under the Act also cannot result in the employee losing benefits held prior to the leave. 29 USC §2614(a)(2). For example:

- A secretarial position that involves more demanding typing than the former job is not an equivalent position. Peterson v Slidell Mem. Hosp., 1996 US Dist LEXIS 18944, 3 WH Cases 2d 1131 (DC LA 1996).

- Where FMLA leave was requested for stress experienced after an employee was informed that his performance as an account manager was unsatisfactory and that he would have to search the company for another available position. Returning the employee to the temporary position that he held while searching for a new position at the same rate of salary was a restoration to an equivalent position under the FMLA. The employe was not entitled to the account manager position. Patterson v AllTel Info. Services, 919 FSupp 500 (DC ME 1996).

- An employee who was unable to return to the same position she held prior to taking 12 weeks of FMLA leave was not entitled to reinstatement to another position. Beckendorf v. Schwegmann, 1997 US Dist LEXIS 5693, 4 WH Cases 2d 315 (DC LA 1997) Aff'd 134 F3d 369 (5th Cir 1997)

An employee may not insist upon assurances that the job to be assumed upon return from leave have some permanence or job security beyond that associated with the position held before the leave. Lempres v CBS, Inc., 916 FSupp 15, 3 WH Cases 2d 697 (DC DC 1996)

1. Highly Compensated Employee Exception

An employer may not have to provide restoration of job for certain highly compensated employees (key employees) where the employer can demonstrate that the denial of restoration of position is necessary to prevent SUBSTANTIAL AND GRIEVOUS ECONOMIC INJURY TO THE OPERATIONS OF THE EMPLOYER. 29 USC §2614(b). Only salaried employees who are the highest paid 10% of employees within 75 miles of the facility can be designated for this exemption. 29 USC §2614(b)(2).

The employer must notify the employee of their status as a "key employee" and the employer's intent

to deny restoration at the time the employer determines such injury would occur. 29 USC §2614(b)(1)(B). The employer can elect to deny restoration if the employee decides not to return to work after receiving notice of intent not to restore. 29 USC §2614(b)(1)(C). The employer must also explain the reasons for the decision and give the employee a reasonable opportunity to return to work after receiving such notice.

III. MISCELLANEOUS ISSUES

A. Record keeping

Employers also have a duty to keep and preserve records pertaining to compliance with FMLA under 29 USC §2616(b) and may be required to submit such records once during a 12 month period, but no more than that. 29 USC §2616(c).

B. State's Right to Enact Own Leave Statutes

29 USC §2651(b) of the Act provides that it does not supersede any provision of state or local law that provides greater family or medical leave rights than the right established under the Act. This is similar to ADA's requirement allowing states to provide greater benefits and avoiding the preemption-type arguments raised under ERISA.

C. Collective Bargaining Agreements

Nothing in the FMLA may be construed to diminish the obligation of an employer to comply with collective bargaining agreements or employee benefit programs that provide greater family or medical leave rights. Norris v. North American Publishing Co., 1997 US Dist LEXIS 2352, 3 WH Cases 2d 1479 (DC IL 1997)(employee must arbitrate his claim of discrimination under FMLA pursuant to Collective Bargaining Agreement).

D. Individual Liability

The FMLA itself does not specify whether individuals can be liable under the Act. The definition of employer in the statute includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employee's of such employer." 29 USC 2611 (4)(A)(ii)(I).

Recent decisions have held that individuals can be held liable under certain circumstances. Some courts have applied the FLSA interpretation of employer because FMLA definition of employer tracks the definition of employer in the FLSA. These courts have held individuals liable where they "controlled in whole or in part the plaintiff's ability to take leaves of absence and return to their positions." Johnson v. A.P. Prod. Ltd., 934 FSupp 625 (SD NY 1996); Holt v. Welch Allyn Inc., 1997 US Dist LEXIS 5896, 3 WH Cases 2d 1622 (ND NY 1997); Norris v. American Publishing, 1997 US Dist LEXIS 2352 (DC PA 1997).

E. Parties Who May Bring FMLA Claims

Employees have a right to sue on their behalf and on behalf of similarly situated employees. 29 USC §2617(a)(2). Actions may also be filed by the Secretary of Labor. 29 USC §2617(b)(2). The Secretary of Labor has the right to seek injunctions. 29 USC §2617(d).

F. The Statute of Limitations

The Statute of Limitations for actions filed under the FMLA is **2** years, except in the case of willful violations, where the statute of limitations is **3** years. 29 USC §2617(c); Wenzlaff v. Nations Bank, 940 FSupp 889 (DC MD 1996).

G. Right to Jury Trial

While the FMLA is silent on the issue of whether a plaintiff has the right to a jury trial, at least one court, Helmly v. Stone Container Corp., 957 FSupp 1274 (DC GA 1997), held that a claimant has the right to a jury trial.

IV. PROVISIONS FOR EDUCATIONAL INSTITUTIONS

The Act does have special provisions for employees of local educational agencies. 29 USC §2618.

Essentially, leave must be taken in blocks of time when leave is needed intermittently or when leave is required near the end of the school term. More specifically, eligible employees who are employed principally in an instructional capacity by a school (an educational agency) and who request foreseeable leave for planned medical treatment where the leave will take more than 20% of the working days in a given 12 month period may be required to take the leave in a particular duration (e.g. the amount of time needed for medical treatment) or may be required to transfer to an alternative position. The alternative position must have equivalent pay and benefits; and better accommodate the need for recurring periods of leave. 29 USC §2618(e).

There are special rules for employees who want to take leave near the conclusion of an academic term:

a. If the employee wants to take a leave more than 5 weeks prior to the end of a term, the school may require that the employee continue to take leave until the end of the term if:

- The requested leave is at least three weeks in duration, and
- The return to employment is during the three week period prior to the end of the term. 29 USC §2618(d)(1).

b. If the requested leave is less than 5 weeks prior to the end of the term, the school may require that the employee take leave until the end of the term if:

- The leave is greater than two weeks; and
- The anticipated return to employment would occur during the two weeks before the end of the term. 29 USC §2618(d)(2).

c. If the leave is less than 3 weeks prior to the end of the term and the duration of the leave is more than 5 working days, the school may require that employee to take leave until the end of the term. 29 USC §2618(d)(3).

The determination of whether to restore the employee to the position held prior to the leave will be made based on school board policies and practices and the terms of the Collective Bargaining Agreement. 29 USC §2618(e).

There is also a special provision whereby a school can reduce the amount of liability for violating the Act if it can establish that it had reasonable grounds for believing that its conduct was not in violation of the Act. 29 USC §2618(f).

Title II concerns civil service employees and is very similar to Title I. However, the Title II provision suggests that an employee may elect to substitute accumulated annual or sick leave, but does not contain provisions that the employer may require such substitution (same as private employers).

V. SIGNIFICANT CONFLICTS BETWEEN THE FMLA, ADA AND WORKERS COMPENSATION

State Workers Compensation laws, the federal Americans with Disabilities Act ("ADA") (with equivalent state acts, such as Michigan's Handicappers Civil Rights Act) and the Family and Medical leave Act of 1993 ("FMLA") have combined to create a "Bermuda Triangle" of interrelated and sometimes contradictory legal obligations whenever medical leave is contemplated. The three statutory schemes were passed at separate times and with no conscious effort to integrate their provisions. However, with practice, human resource professionals and claim administrators can become proficient at navigating through legal obligations that may, at first, be bewildering and intimidating. You can return an injured worker with an occupational injury to work, but you must be consistent and careful.

A. CONFLICTS BETWEEN THE FMLA AND THE ADA:

1. Serious health condition

A serious health condition under the FMLA does not necessarily equate with a "disability" within the meaning of the ADA. Although it will often occur that an employee's injury or illness qualifies as a serious health condition under the FMLA and a disability under the ADA, this is not always going to be the case. By definition, a serious health condition under the FMLA is one that requires "continuing treatment" or inpatient care. In contrast, the ADA defines a disability as a physical or mental impairment that substantially limits one or more of an individual's major life activities. Thus, ADA disabilities must be more than temporary conditions like sprains or routine surgery. If an employee has a routine appendectomy, the FMLA would be implicated but not the ADA except perhaps if complications occur. There may also be occasions where the ADA but not the FMLA would apply like in cases where an employee is regarded as disabled.

2. Relationships with other disabled individuals

The FMLA has specific provisions which permit employees to take leave time to care for their spouse, son, daughter or parent who has a serious health condition. No similar provision exists under the ADA. Although the ADA prohibits employers from discriminating against qualified individuals because they have a relationship with someone who is disabled, the ADA does not obligate an employer to provide leave time as an accommodation to care for another.

3. Interaction with doctor

An employer may not contact the employee's doctor directly under the FMLA and may only have a doctor whom it does not regularly use contact the employee's doctor to seek clarification and/or validation. The ADA, however, allows and actually encourages employers to interact with the employee's doctor to determine an effective and reasonable accommodation and to see whether the employee poses a direct threat to herself or other employees.

4. Return-to-work certifications

An employer may not challenge an employee's return-to-work certification but must consider it at face value under the FMLA. An employer may, however, challenge an employee's return-to-work certification under the ADA, and may actually insist upon a return-to-work or second opinion medical examination if job related and consistent with business necessity.

5. The direct threat defense

There is no direct threat defense available to employers under the FMLA so whether the employee is a threat to the safety of co-workers is irrelevant. However, whether the employee is a direct threat is highly significant to an ADA analysis and where the employee is a direct threat, an employer does not have to provide an accommodation if no accommodation will reduce the threat to an acceptable level.

6. Amount of leave time

Where an employee is unable to return to her position within 12 weeks, she loses her protection under the FMLA and can be terminated. If, however, the ADA applies as well because the employee has a disability within the meaning of the ADA, the employer would have to consider whether the employee needs an accommodation in the form of additional time off.

7. Is leave necessary

Unlike the FMLA, the ADA does not create an entitlement to time off simply because one has a disability. Thus, where the FMLA is not triggered, an employer may deny a request for a leave of absence as long as a reasonable and effective accommodation is offered as an alternative. Employers do not have this option under the FMLA if the employee has a serious health condition.

8. Light Duty

Under the FMLA, the employee has the right to up to 12 weeks leave and the right to be restored to the same position of employment held at the time the FMLA leave commenced or to a position with equivalent benefits, pay and other terms and conditions of employment. Therefore, the employer may not require an employee to return to work in a "light duty" position before the 12-week leave allotment expires. An employer may do so under the ADA.

At the end of 12 weeks of FMLA leave, if the employee is unable to return to his/her prior position, the employer may have an obligation to return the employee to work on a modified schedule or restructured position under the ADA.

B. WORKERS COMPENSATION CONFLICTS:

1. Filing a workers compensation claim

The EEOC Technical Assistance Manual correctly observes that a compensation claim does not automatically preclude an ADA claim. However, recent court decisions have ruled that where an individual has made a claim of permanent disability in a workers compensation petition or Social Security Disability petition, s/he may be "judicially estopped" from claiming a violation of the ADA. In these cases, an employee is claiming that s/he is unable to perform the essential functions of the job in the compensation/SSI claims and is taking an inconsistent legal and factual position in the ADA claim. ADA cases have been dismissed on this theory. Additionally, the fact that an employee has a workers' compensation claim does not automatically mean the individual is disabled under the ADA or has a serious health condition under the FMLA.

2. Light duty position

As discussed previously, employers have a financial incentive to create "light duty" positions for those receiving workers compensation payments. However, an employer likely violates the ADA by reserving these positions only for occupationally injured employees. But, an employer does not have to create a light duty position as an accommodation under the ADA. Accordingly, the lesson appears to be: create light duty positions on an ad hoc, as-needed basis for those with compensable injuries. The positions should be created as temporary positions. If an employer were to create light duty positions which were then held open, they would likely be claimed by individuals with non-compensable injuries as an accommodation under the ADA.

An employer may also require an employee to return to a light duty position from workers compensation leave without violating the workers compensation statute or the ADA. Under the ADA, an employer is only obligated to provide a reasonable accommodation, not the accommodation preferred by the employee. If the employee can perform the original position with accommodation, the employer can require the employee to return to work under the ADA, even if s/he is on workers compensation leave. If no possible accommodation would permit a return to the original job, the employee may be required to return to a "restructured" or light duty job, unless the employee's collective bargaining agreement provides otherwise.

If the occupational injury qualifies under FMLA, the employer cannot require the employee to return to work to a light duty position during the 12 week period.

3. May an employer refuse a return to work by an employee receiving workers compensation payments?

The Michigan's Handicapper's Civil Rights Act, MCL 37.1211, states that an employer may refuse to allow an individual receiving workers compensation payments from returning to work in a restructured (light duty) job. However, this is not likely a viable option under the ADA. No similar exclusion is included in the ADA, and prohibiting the individual from returning to an open position would likely be viewed as a failure to accommodate.

4. May an employer inquire about prior worker's compensation claims in the employment interview?

Under the ADA, an employer may ask an applicant whether s/he can perform the essential job functions with or without accommodation. However, under the ADA, an employer may not inquire into an applicant's worker's compensation history before making a conditional offer of employment. After making a conditional offer of employment, an employer may ask about a person's workers compensation history in a medical inquiry or examination that is required of all applicants in the same job category. EEOC Technical Assistance Manual p. 36.

The employer may use the data obtained from the inquiry to screen out applicants with a history of fraudulent workers compensation claims. Unfortunately, fraudulent claims are conceptualized by the EEOC as those where the fraud was discovered before the award. Hence unsuccessful claims are fraudulent and successful claims are thought to be legitimate. Inferentially, the employer may retract the conditional offer of employment because of the fraudulent claims. Employers that learn of a history of many successful workers compensation claims will need to seek legal counsel before deciding that the conditional offer of employment will be retracted, because of the possibility of litigation. The Technical Assistance Manual specifically provides that where false information is provided in response to such inquiries, the employer may maintain any state law defenses to a compensation claim. Id. at 37.

Whenever any employer makes an employment decision in consideration of past workers' compensation claims, the possibility of workers compensation retaliation litigation must be considered. However, recent case law has confined this theory to discharges, and in the absence of special consideration, retraction of a job offer is not a discharge.

