

## EMPLOYMENT LAW UPDATE: MANAGING THE WORKFORCE IN CHALLENGING TIMES

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## LEAVE LAWS – UPDATE ON NEW LAWS & RULES

- ADAA
- FMLA
- COBRA

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## Why Amend the ADA?

- Court decisions narrowed the definition of “disability,” contrary to Congressional intent
  - The “Sutton Trilogy” – courts must consider “mitigating measures” when determining whether an individual is “disabled.”
  - Toyota Motor Mfg. v. Williams – “substantial limitations” must be in activities “of central importance to everyday life.”

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## ADAA: Major Life Activities

- A Non-exhaustive list:
  - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- Major Bodily Functions:
  - Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

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## ADAA: Major Life Activities cont'd

- Lists illustrative, not exhaustive
- Purpose: Courts are to broadly interpret definition
- Excludes transitory impairments  $\leq$  6 months

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## ADAA: “Substantially Limits”

- Determination made without regard to mitigating measures

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## ADAA – What Has Not Changed?

- Employers must still provide reasonable accommodations to qualified employees
- Employers are not required to provide a reasonable accommodation if it would cause an undue hardship
- Employers must still engage in the interactive process with employees who request a reasonable accommodation

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## ADAA – What Should I Do Differently?

- Be more careful:
  - Document employee requests for accommodations
  - Document the interactive process
  - Take a more expansive view of “disability”

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## FMLA: Final Rule

- November 17, 2008
- Incorporate Military Family Leave Entitlements
- Improve communications
- Provide clarity
- Effective date: January 16, 2009

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## Section by Section Analysis

- 825.100(a) – Qualifying reasons
  - qualifying exigency
  - care for service members for up to 26 weeks in a “single 12-month period”
- 825.100 (b) – Precludes recovery of insurance premiums when employee does not return to work from caring for an injured service member

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## 825.106 Joint Employer Coverage

- 825.106(2) – Professional Employer Organization (PEO)
  - Administrative functions ≠ joint employer
  - Economic Realities Test
    - Hire
    - Fire
    - Assign
    - Direct and control
    - Direct benefit to PEO
    - Other facts and circumstances

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## 825.110 Eligible Employee

- 12 months of employment
  - Periods of employment prior to a break in service of 7 years need not be counted
- Unless
  - Military service
  - CBA or written agreement

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### 825.110 Eligible Employee

- 825.110(d) – when determination of eligibility is made
  - Hours + 12 months
    - at time leave is to start
    - if on non-FMLA leave & meet requirements, FMLA begins
- 825.110(e) – 50 employees + 75 miles
  - When employee gives notice

### 825.115 Continuing Treatment

- 825.115(a) – Incapacity and Treatment
  - Incapacity ≥ 3 continuous full calendar days
  - Treatment:
    - First “in person” visit must be within 7 days of the first day of incapacity
    - Second visit must be within 30 days
    - “Necessity” to be made by health care provider
- 825.111(c) – Chronic conditions
  - Requires at least 2 visits annually to a health care provider

### 825.122(d) Next of kin of a covered service member

- Nearest blood relative other than spouse, parent, son or daughter in the following order unless specifically designated by the service member:
  1. Blood relatives with legal custody
  2. Brothers/sisters
  3. Grandparents
  4. Aunts/Uncles
  5. First cousins
- If no specific designation is made, all family members within the same level of relationship are next of kin

### 825.123 Unable to perform the functions of the position

#### 825.123(b) – Statement of Functions

- Employer option to provide a statement of essential job functions
- Certification must then specify what functions the employee is unable to perform in the job held at the time notice is given or leave commenced, whichever is first.
- Practice Tip: Always provide this information because in order to get a HCP to provide this information in a “fitness-for-duty” release at the end of leave, you must provide it at the beginning of leave.

### 825.126 Leave because of Qualifying Exigency

- Eligible employees may take up to 12 weeks of leave while the employee’s spouse, son, daughter, or parent is on active duty or call to active duty status for one or more of the following exigencies.
  - Not regular armed forces

### 825.126 Qualifying Exigency

- Short notice deployment less than 7 calendar day notice

825.126(2)  
Qualifying Exigency

- Military events and related activities

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825.126(3)  
Qualifying Exigency

- Childcare and school activities

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825.126(4)  
Qualifying Exigency

- Financial and legal arrangements
  - To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status

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825.126(5)  
Qualifying Exigency

- Counseling

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825.126(6)  
Qualifying Exigency

- Rest and recuperation
  - To spend up to 5 days with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment

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825.126(7)  
Qualifying Exigency

- Post-deployment activities

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## 825.126(8) Qualifying Exigency

- Additional activities
  - Any other event arising out of active duty or call to active duty to which the employer and employee agree.

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## Military Caregiver Leave

- 825.127 – Leave to care for a covered service member with a serious injury or illness

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## 825.127(c) Military Caregiver Leave

- Leave up to 26 weeks during a "single 12-month period"
- Single 12-month period begins first day of leave
- Combined total of 26 weeks but leave for other FMLA reasons limited to 12 weeks
- When leave qualifies under both military caregiver leave and caring for a seriously ill family member, the leave is designated as military caregiver leave and not leaves running concurrently

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## 825.200 Leave Year

- 825.200(b)(3)
  - The 12-month period measured forward from the date any employee's first FMLA leave begins.
  - The next 12-month period begins the first time FMLA leave is taken after completion of any previous 12-month period.

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## 825.200 (e) Failure to designate leave year

- Option most beneficial to employee will be used

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## 825.200(f) Holiday

- Employee absent all week = no effect
- Increments less than 1 week, holiday does not count against entitlement unless the employee was scheduled to work
- Employer closings do not count

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### 825.203 Scheduling Intermittent Leave

- Employee must make a reasonable effort to schedule treatment so as not to disrupt unduly the employer's operations

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### Increments of FMLA Leave for Intermittent or Reduced Schedule Leave

#### 825.205(a)(2)

- Physical impossibility to commence or end work mid-way through shift
  - Examples:
    - Flight attendant
    - Railroad conductor
    - Laboratory employee
- Entire time is FMLA

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### 825.205(b)(3) & (c) Calculation of Leave

- Varied schedule
  - Weekly average of scheduled hours over previous 12 months
- Overtime scheduling
  - If employee would normally be required to work overtime and employee is restricted, the hours may be counted against entitlement
    - Ex: 48 hour week  
8/48 = 1/6 work week

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### 825.207 Substitution of Paid Leave

- Leave that is compensated
  - Disability payments
  - Time loss
- Employer may not require but can agree to the use of accrued paid leave

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### 825.207 Substitution of Paid Leave

- Employee must comply with policies unless employer agrees otherwise

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### 825.215(c)(1) Equivalent Pay

- If a bonus is based on achieving a specified goal and the employee does not meet the goal, payment may be denied.
  - Examples:
    1. # of hours worked
    2. Products sold
    3. Perfect attendance
- Exception: If employee on paid vacation would receive the bonus and employee on FMLA leave substitutes vacation pay, employee on FMLA would also be entitled to the bonus.

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### 825.215(e)(4) Restoration to a Different Position

- FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position.
- However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

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### 825.220 Protection for Employees

- Prohibition against interference includes discrimination and retaliation
- Past FMLA claims may be waived; not prospective claims
- Employee's acceptance of "light duty" is not a waiver of prospective rights
- Employee's right to restoration ceases at the end of the 12-month FMLA year

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### 825.300 Employer Notice Requirements

- Post prominently where employees and applicants can see.
- Information must be in employee handbooks or each new employee receives it upon hire.

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### 825.300 Eligibility Notice & Rights & Responsibilities

- Eligibility Notice within five business days
  - Whether eligible
  - If not, why not, must give reason
    - # months employed
    - # hours worked
    - # employees within 75 miles

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### 825.300(d) Designation Notice

- Within five days of employer having "enough information"
- Paid leave requirement
- If fitness for duty is required – essential job functions
- In writing
- Notification of amount of leave to be counted, if known
  - If unknown, if employee requests, employer must provide an accounting at least once every 30 days if leave is taken in that period
- If changes, notice within five days
  - Exhaustion of leave

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### 825.301 Designation of Leave

- Employer responsibilities
  - Inquire to ascertain whether leave is potentially qualifying
- Employee responsibilities
  - State a qualifying reason
  - Explain the reasons sufficiently to allow the employer to determine whether leave qualifies for FMLA leave

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### 825.301 Designation of Leave cont'd

- Disputes
  - Resolution with employee and employer
  - "Such discussions and the decision must be documented" 825.301(c)
- Retroactive designation
  - With notice to employee if designation does not cause harm or injury
  - Employee and employer can mutually agree
- Eliminates "provisional" designation

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### 825.302 Employee Notice for Foreseeable Leave

- When the employee is absent due to a reason previously qualified as FMLA, the employee must specifically reference the qualifying reason or FMLA
- If more than one condition has previously been certified, employer may ask which condition applies
  - Employee has obligation to respond
  - Failure to respond can result in denial of leave

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### 825.302(d) Complying with Employer Policy

- Employee compliance with usual and customary notice and procedural requirements for requesting leave
  - Absent unusual circumstances

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### 825.302(e) Scheduling Planned Treatment

- Employee must consult and make a reasonable effort to schedule so as not to unduly disrupt operations
  - Subject to approval of HCP
  - If employee does not consult, employer may initiate discussions and require employee to attempt to make such arrangements

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### 825.303 Employee Notice for Unforeseeable Leave

- Notice as soon as practicable
  - Within time prescribed by usual and customary notice requirements
    - Call-in policy
  - By spokesperson if employee is unable
- Sufficient information for employer to determine if a qualifying reason
  - Calling in "sick" is not sufficient
  - Employer expected to inquire
  - Employee has obligation to respond
- 825.304 Appropriate action for failure to give notice in a non-discriminatory manner

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### 825.305(c) Certification – Complete & Sufficient

- Employer must notify in writing what additional information is required
- Certification is "incomplete" if one or more entries is not completed
- Certification is "insufficient" if the information is:
  - Vague
  - Ambiguous
  - Non-responsive
- Employee has 7 calendar days to cure
- Employer must advise employee of the consequences of failure to provide adequate certification

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### 825.305(c) Consequences of Failure to Provide Adequate Certification

- Denial of leave
- Failure to return certification is failure to provide certification

### 825.306 Required Information in Certification

- HCP name, address, telephone number, fax number, and type of practice/specialization
- Approximate date condition commenced and probable duration
- Medical facts for why leave is needed
- Information to establish
  - Employee cannot perform job
  - Any other work restrictions
  - Likely duration
  - or
- Family member is in need of care
  - Estimate of frequency or duration of leave to provide care

### 825.306 Required Information in Certification cont'd

- Intermittent leave for planned treatment
  - Medical necessity
  - Estimate of dates
  - Duration of treatment
  - Periods of recovery
- Intermittent leave for unforeseen periods of incapacity
  - Medical necessity
  - Estimate of frequency and duration

WH 380 E (Employee)  
WH 380 F (Family Member)

### 825.306(e) Employee Authorization

- Voluntary authorization to allow employer to communicate directly with HCP to cure insufficient or incomplete certification

### 825.307 Clarification and Authentication of Certification

- Employer may contact HCP (after opportunity to cure) directly to:
  - Authenticate – provide HCP with a copy of the certification and ask HCP to verify the information was completed and/or authorized by the HCP
  - Clarify – understand handwriting or meaning of response
- Employee who chooses not to authorize employer to make contact is responsible to clarify and the employer may deny leave if the certification is unclear

### 825.307(a) Clarification/Authentication

- Contact by employer
  - Authorized representatives
    - HCP
    - HR professional
    - Leave administrator
    - Management
  - Not authorized
    - Direct Supervisor

### 825.307(b) Second Opinion

- Reason to doubt validity
- Employer designates HCP
- Employer expense
- Employee must authorize release of medical records from first HCP

### 825.307(c) Third Opinion

- Approved jointly
- Must act in good faith to reach agreement
- Failure to act in good faith
  - Employee – 2<sup>nd</sup> opinion stands
  - Employer – 1<sup>st</sup> opinion stands

### 825.307(d) Copies of Opinions

- Employees may request copies of 2<sup>nd</sup> and 3<sup>rd</sup> opinions
- Must be provided within 5 days

### 825.308 Recertification

- 30-day rule – no more often than 30 days + absence
- If minimum duration of leave is more than 30 days then recertification is not available until end of stated time unless:
  - The employee requests extensions of leave
  - Circumstances have changed significantly
  - Employer received information that casts doubt on the reason or continuing validity
  - May request recertification in all circumstances every 6 months in connection with an absence
- Employer may provide a record of absences and ask if the need for leave is consistent with the pattern

### 825.309 Certification for Exigency

- First time a request is made, employer may require a copy of orders
- Required information
  1. A signed statement from employee explaining the facts and documentation
  2. Date of exigency or beginning and end dates
  3. If intermittent, duration and frequency
  4. If meeting with a third party, reason and contact information
    - Employer may contact third party w/o employee's permission to verify meeting

### 825.310 Certification for Military Caregiver Leave

- Required information
  - Name, address, and contact information of HCP
  - Whether injury or illness was incurred in the line of duty on active duty
  - Date injury/illness commenced and duration
  - Medical facts
  - Information to establish needed care and period of time
  - Medical necessity for intermittent leave
  - Confirmation of relationship

WH-385

ITO – Invitational travel orders

ITA – Invitational travel authorization

## 825.312 Fitness-For-Duty Certification

- Uniformly applied policy or practice that requires all similarly situated employees to provide certification
- Certification specifically address essential function
  - List of essential functions must be in the designation notice
- Certification is not available for intermittent or reduced schedule except for reasonable safety concerns
  - A reasonable belief of significant risk of harm to employee or others
  - Consider nature and severity of harm and likelihood of harm

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## 825.500 Recordkeeping Requirements

- No less than 3 years
  - Basic payroll data (secondary employers also)
  - Date of FMLA leave
  - Leave must be designated as FMLA
  - Hours of leave
  - Copies of all notices
  - Documents describing benefits, policies, or practices concerning all types of leave
  - Premium payments of benefits
  - Records of disputes

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## 825.500(g) Confidential Records

- Medical records must be maintained separate from usual personnel files and be kept confidential with the following exceptions:
  - Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
  - First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
  - Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request

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## COBRA

- Workers involuntarily terminated between Sept 1, 2008 – Dec 31, 2009
- Annual incomes less than \$125k (single)
- Government Subsidy of 65% of premiums

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## COBRA

- Credit against payroll taxes for the cost of the subsidy
- Special election period (60 days)
- Effective day of coverage 02/17/09
- Up to nine months subsidized coverage

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## Medical Marijuana

- *Emerald Steel Fabricators, Inc. v. BOLI*
  - OMMA Card and use to treat a disabling condition
  - Reasonable accommodation
  - Interactive Process

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## [ *Lanier v. Woodburn* ]

- Testing every position is unconstitutional
- Pre-employment testing for some still valid
- Must articulate safety or some other "special need" to test

## [ H.B. 2497 ]

- Does not require employers to accommodate medical marijuana use regardless of where the use occurs

## [ S.B. 638 ]

- School Activity Leave/OFLA
- In addition to 12 weeks, up to 35 hours per year
- No more than 5 hours per calendar month
- 7 days advance notice unless emergency or summons from school

## [ S.B. 727 ]

- Unlawful employment practice of subjecting employee to abusive work environment
  - Verbal abuse
  - Threatening physical conduct
  - Sabotage of employee's work performance
  - Exploitation of known vulnerabilities

## [ H.B. 2692 ]

- Amends OFLA to allow reinstatement to an equivalent position

## [ Managing Layoffs ]

- Layoff Trap #1
- Breaking employer commitments

## Managing Layoffs

- Layoff Trap #2
- Nondiscriminatory layoffs that may breach legal obligations
  1. ERISA
    - § 510 claims
    - Purpose to avoid benefits and costs
  2. Leaves of absence
    - FMLA/OFLA
    - Workers compensation
    - Military leaves (USERRA)

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## Managing Layoffs

- Layoff Trap #3
- Discriminatory Layoffs
  1. Disparate treatment
  2. Disparate impact

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## Managing Layoffs

- Disparate Impact Analysis
- 1. Layoff Criteria
  - Job related
  - Consistent with business necessity
- 2. Compare proposed post-layoff group to preexisting workforce

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## Managing Layoffs

- Layoff Trap #4
- Laying off “problem” employees
  - Pitfalls
    - Poor documentation
    - Causation = retaliation
    - Rule of immediacy

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## Managing Layoffs

- Layoff Trap #5
- WARN Act – Events that trigger obligations
  1. Plant closing with 50 or more employees affected
  2. Mass Layoffs
    - At least 1/3 of work force at a single site and 50 employees
    - Or 500 or more employees
  3. Notice Requirements
  4. Dislocated Workers Unit
  5. Attorney/Client Privilege Communication

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## Managing Layoffs

- Layoff Trap #6
- Selection of Employees
- Criteria
  - Objective
  - Subjective
- Evaluation form assess criteria for the post-layoff job
- Past Evaluations
- Disciplinary Record

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## Managing Layoffs

- Layoff Trap #7 – Delivering the Message
- Usually one-on-one
- Benefit Rights
- COBRA
- Process for filing for unemployment
- Classification
- Outplacement Services
- Severance Package

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## Managing Layoffs

- Final Trap
- Documentation to Support Selection

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Thank you

Questions



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Comments

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