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THE NEW ADA REGULATIONS: HOW THEY IMPACT LEAVE OF ABSENCE MANAGEMENT

The ADA made important changes to the definition of the term "disability." In this article we analyze the changes. [read more](#)

ADA LAWSUITS ON THE RISE: EMPLOYERS MUST UTILIZE ACCOMMODATION PROCESS FOLLOWING LEAVE OF ABSENCE

The EEOC is challenging company policies and practices of terminating employees following a leave of absence without going through the accommodation process. This EEOC activity has resulted in consent decrees against several companies. [read more](#)

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THE NEW ADAAA REGULATIONS HOW THEY IMPACT LEAVE OF ABSENCE MANAGEMENT



The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) made important changes to the definition of the term “disability” to make it easier for an individual seeking protection to establish that he or she has a disability within the meaning of the ADA.

The employment law world has been waiting for over two years for the issuance of regulations interpreting the ADAAA. That wait is now over: The final regulations, known as the “Final Rule,” were published in the Federal Register on March 25, 2011.

No doubt, by now you have already seen many newsletter and blog articles summarizing the new regulations. In tandem with the issuance of the Final Rule, the EEOC itself has published interpretive materials that explain the ADAAA and the Final Rule. At the end of this article are links to the EEOC materials. These materials and other websites, newsletters, or blogs effectively explain in general the changes to the ADA wrought by the ADAAA and its new regulations.

Reed Group has analyzed how these changes impact leave of absence management. For simplicity, we will refer to the “ADA” and the “regulations” to encompass both the originals and the recent amendments, unless a distinction is important.

1. Build the ADA Interactive Accommodation Step into All Health-Related Leave of Absence Management Processes

Many employers mistakenly treat their obligations under the ADA separate from and unrelated to their management of health-related leaves of absence under the Family Medical Leave Act (“FMLA”), similar state leaves, company medical or disability leaves and Workers’ Compensation. With the passage of the ADAAA and the Final Rule, it is more important than ever to integrate the ADA accommodation process

WHAT IS THE ADA INTERACTIVE ACCOMMODATION PROCESS?

The ADA requires employers to engage in an “interactive process” with a disabled employee to determine whether there is a reasonable workplace accommodation that would enable the employee to return to work and perform the essential functions of his/her position.

The process includes discussion and exchange of information between the employee and the employer, and sometimes with medical professionals. Pertinent information may include the employee’s job description, medical restrictions on the employee’s performance of essential functions, and analysis of whether a particular accommodation will be suitable due to the employee’s limitations.

Reasonable accommodations may include such things as a modified work schedule, provision of special equipment, workplace accessibility modifications, shifting of non-essential duties of the employee’s position, and even extended leave of absence to allow time for recovery, therapy, training, or other disability-related needs.

into all leave procedures. The “disability” threshold is now lower, which makes it easier for an employee to come under the protection of the Act. According to Congress and the EEOC, what constitutes a disability should not require extensive analysis. The focus is now on *whether the employer attempted to accommodate the employee’s impairment, and whether the employer discriminated against the employee because of his or her disability.*

Accordingly, when administering an employee’s leave of absence, employers must consider the applicability of the ADA when the employee’s leave is exhausted or denied. This may include an extension of a leave previously granted under law or a company policy, or it may mean granting a leave of absence when the employee is not otherwise entitled to one (such as when the employee is not eligible for FMLA leave). An employer’s duty to engage in the interactive process and make a reasonable accommodation is not necessarily fully satisfied upon the employee’s return to work from leave, even if that leave was provided all or in part as an accommodation under the ADA. If the returning employee is disabled or now has a record of a disability, the employee may need – and be entitled to under the ADA – additional accommodations upon return to work, such as time off for doctor’s appointments or therapy sessions, or physical workplace modifications such as accessibility changes or special equipment.

The employer may also have a duty to accommodate an employee no longer impaired but with a record of impairment, for example if follow-up doctors’ appointments, tests, or therapy is needed and related to the past disability. 29 C.F.R. § 1630.2(k)(3).

Reed Group has long encouraged employers to make the interactive accommodation process a part of their leave of absence procedures. See, e.g., articles in Reed Group’s recent newsletters: *§3.2 MILLION DECREE REMINDS EMPLOYERS: LEAVES OF ABSENCE AND ADA ACCOMMODATION GO HAND IN HAND*, 2011 First Quarter, <http://www.reedgroup.com/resources/>

[ReedGroup-Newsletter-0211.pdf](#); and *FOLLOWING FMLA LEAVE, DON’T FORGET THE ADA INTERACTIVE ACCOMMODATION PROCESS!*, September 2010, <http://www.reedgroup.com/resources/ReedGroup-Newsletter-0910.pdf>.

2. “We Don’t Allow That for Other Employees” Doesn’t Avoid ADA Accommodation Obligations

Employers frequently struggle with providing a disabled employee with a workplace or position modification that other employees have requested and been denied. The accommodation obligation under the ADA has always required employers to amend workplace rules or policies or to provide special aid, equipment, or other assistance if necessary to enable an otherwise-qualified disabled employee to perform the essential functions of his position.

The Final Rule has made this clear by specifying that non-disabled employees do not have a reverse discrimination claim for being denied the same treatment afforded to the disabled employee:

Claims of no disability. Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

29 C.F.R. §1630.4(b).

3. Definitions of “Disability” Vary Greatly

The definition of a “disability” for purposes of ADA protection can differ greatly from the definition for other purposes. The ADA employs a “three-pronged” definition:

- A physical or mental impairment that substantially limits one or more major life activities as compared to most people in the general population (an “actual disability”), or

- A record of a physical or mental impairment that substantially limited a major life activity (“record of”), or
- When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor (“regarded as”).

29 C.F.R. § 1630.2(g)

The regulations provide extensive and detailed definitions of “physical or mental impairment,” “major life activity,” “substantially limits,” and other key terms. Specifically, the Final Rule notes that whether an impairment “substantially limits” a major life activity is at a lower threshold than it had been prior to the ADAAA.

Compare the various components of the ADA definition of a “disability” in the Final Rule with a “serious health condition” under the FMLA and similar state leaves or with the definitions of disability under company short- or long-term disability plans, company medical leaves, etc. No two are alike. Thus, for example, a determination that an employee does not qualify for STD benefits does not obviate the need to analyze whether the same employee with the same condition might be entitled to a workplace accommodation or an additional leave of absence under the ADA.

The Final Rule explicitly recognizes the possibility of differing definitions of disability:

Nothing in this part alters the standards for determining eligibility for benefits under State Workers’ Compensation laws or under State and Federal disability benefit programs.

29 C.F.R. § 1630.1(c)(3).

4. The Reduced Threshold for “Disability” May Impact Other Employee Leave Rights

Some legal obligations surrounding leaves of absences are tied to the ADA definition of a “disability.” The change in the definition will make it much easier for individuals to demonstrate that they meet this definition for other purposes.

For example, the FMLA provides a parent with leave of absence to care for an adult child (age 18 or older) only if the adult child is “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence. For this purpose “physical or mental disability” is defined with reference to the ADA regulations, as amended by the Final Rule.

Thus, in determining whether a parent may take leave to care for an adult

MORE ABOUT “REGARDED AS”

“Regarded as” discrimination occurs when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor. 29 C.F.R. § 1630.2(g). The Final Rule elaborates on this kind of discrimination:

- An individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.
- Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.
- Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established only when an individual proves that his employer discriminated on the basis of disability.

child with a serious health condition, the more-easily-satisfied definition of a “disability” will apply.

5. Beware of “Regarding” an Employee as Disabled

In what may seem like a Catch-22, the “regarded as” disability protection may present difficulties to employers assessing an employee’s mental or physical condition for other purposes. “Regarded as” discrimination occurs when an employer takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory (expected to last less than six months) and minor. 29 C.F.R. § 1630.2(g)(1)(iii). An employee who is not “disabled” under the ADA may nonetheless have a physical or mental condition for which he is entitled to consideration for a leave of absence under other laws or benefits, such as the FMLA or a company leave policy. Without using care in how the employee’s condition is assessed, and regardless of whether the employee receives a leave of absence based on other laws or policies, the employer may create ADA liability for itself by taking prohibited actions due to its perception with regard to the employee’s condition, even though the employee is not disabled for the purposes of the ADA.

There is one glimmer of good news for employers in the Final Rule. An employer is not required to provide a reasonable accommodation to an individual whose only ADA claim is that he was “regarded as” disabled. 29 C.F.R. § 1630.2(o)(4).

Conclusion

With the passage of the ADAAA and the Final Rule, employers must be more alert than ever of their duties under the ADA. Conditions not previously considered a disability under the Act are now protected conditions almost automatically. Training of supervisors and incorporation of the interactive accommodation process into all health-related leave of absence policies and procedures are an employer’s best lines of defense and should be undertaken immediately.

Resources available from the [EEOC website](#):

[EEOC Disability page](#)

[EEOC ADAAA page](#)

[Text of the ADAAA](#)

[EEOC’s Notice Concerning The Americans With Disabilities Act \(ADA\) Amendments Act of 2008](#)

[Final Regulations Implementing the ADAAA \(PDF\)](#)

[Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008](#)

[Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008](#)

[Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA](#)

ADA LAWSUITS ON THE RISE EMPLOYERS MUST UTILIZE ACCOMMODATION PROCESS FOLLOWING LEAVE OF ABSENCE

There has been a surge in the filing of charges and lawsuits under the Americans with Disabilities Act (ADA) reported in 2010. Total charges filed with the EEOC in 2010 increased by 7.1% over charges filed in 2009. Of these, charges alleging violations under the ADA showed the biggest increase, up 17% from the number of disability-related claims filed in 2009. This trend is expected to continue, following the issuance of the ADAAA Final Rule effective May 24, 2011.

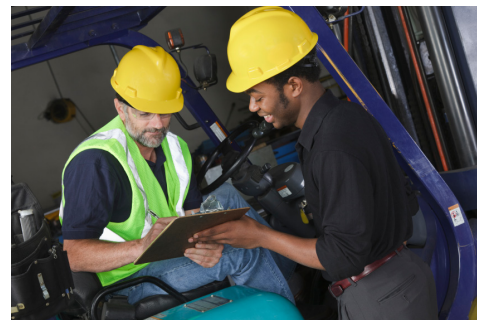
The Equal Employment Opportunity Commission (EEOC) is currently challenging company policies or practices of terminating employees following a leave of absence without going through the accommodation process; that is, without consideration of whether the employee might be entitled to extended leave or some other workplace accommodation under the ADA. This EEOC activity has resulted in consent decrees against several companies in settling the EEOC complaints against them, including the entry of millions of dollars

in judgments against the companies. Some examples follow:

- 1. Supervalu, Inc., Jewel Food Stores, Inc., and related companies (Jewel-Osco):** The EEOC sued Jewel-Osco over its practice of terminating employees with disabilities who were not 100% recovered at the end of medical leaves of absence rather than considering return to work with a reasonable accommodation. The January 2011 consent decree requires Jewel-Osco to:
 - Pay \$3.2 million to 110 former employees
 - Train employees involved in making accommodation decisions on the ADA and possible workplace accommodations
 - Hire consultants to review and recommend changes to current job descriptions and possible accommodations for common disability work restrictions for various positions
 - Report regularly to the EEOC on its efforts to accommodate employees with disabilities who are attempting to return from medical leaves of absence
 - Revise its communications to employees with disabilities to reflect new policies and the availability of possible accommodations
- 2. United Airlines:** United required all reservation sales representatives on disability leave to either retire or go out on extended leave; United then terminated them when their leave ran out. The EEOC contended that United's failure to consider whether reduced hourly schedules was a reasonable accommodation violated the ADA. In a December 2010 consent decree United agreed to:
 - Pay \$600,000 to a group of affected reservations agents
 - End the termination practice
 - Report to the EEOC for the three-year duration of the decree

- 3. Sears, Roebuck and Co.:** The EEOC attacked Sears' alleged practice of terminating employees following exhaustion of Workers' Compensation leave without engaging in the interactive accommodation process, specifically by failing to consider workplace accommodations or even a slight extension of leave as an accommodation. The late 2009 consent decree with the EEOC requires Sears to:
 - Pay \$6.2 million to class claimants
 - Change its policy
 - Provide written reports to the EEOC to verify its compliance with the ADA
 - Train its employees
 - Post a notice of the consent decree at all Sears locations

Individual Cases Pose Risks Also



While the EEOC is actively seeking out employers guilty of "systemic" ADA failures to

accommodate (those occurring company-wide due to inappropriate policies and practices), employers must also beware of individual cases based on end-of-leave claims. In a recent case from California brought under the Fair Employment and Housing Act (which has employer obligations similar to the ADA), the appeals court upheld a \$1.5 million verdict against the employer for failing to engage in the interactive process and provide alternate duty to an injured police officer.

In this case, a Los Angeles Police Department field officer was injured on the job. The officer was assigned by the LAPD to a desk job, consistent with the

department's practice of assigning disabled police officers to "permanent light duty." After the officer started this assignment, the department learned of his 100% disability rating under Worker's Compensation rules. Without any evaluation of his capabilities, the officer was told that he could not continue to work with a 100% rating, even though he performed his new permanent light duty job's essential functions without problem. On appeal, the court found that the LAPD failed to:

- Engage in the interactive process to determine whether there was any reasonable accommodation to get the employee back to his original job
- Consider alternate open positions for which the employee is qualified

The court stated: "In addition to considering... Workers' Compensation issues, the City should have independently evaluated Plaintiff's situation with reference to FEHA. ... [I]f the City had concerns about [the officer's] restrictions, it had an affirmative duty to engage in an interactive process and to make an effort to accommodate Plaintiff, rather than simply take him off the job."

The department's leave of absence process lacked the crucial step of engaging in the FEHA or ADA interactive accommodation process before termination of an employee at the conclusion of a leave. The department's failure to employ this individualized process in favor of an unbending rule that relied on a disability rating proved to be a costly mistake.

Cuiellette v. City of Los Angeles (Cal. Ct. App. Apr. 22, 2011)

Three Steps Employers Should Take

In this atmosphere, it is important for employers to be proactive in order to minimize the risk of ADA-related claims going forward. Here are some suggestions:

1. Analyze each company policy relating to a leave of absence due to the employee's own health condition:

- a. Review end-of-leave practices to ensure that the company does not have a set or inflexible rule that calls for termination when an employee cannot return at the completion of a leave taken.
 - b. Build the interactive accommodation step into all leave of absence management processes.
 - c. Require an individual assessment of the employee's situation at the end of a leave of absence, including consideration of whether the employee is entitled to a reasonable accommodation despite the exhaustion of leave (e.g., an extended leave, return to work with a reduced or modified schedule or duties, a workplace accommodation such as special equipment or accessibility modifications).
 - d. Include in the review all medical-based leave policies: Workers' Compensation, FMLA and similar state leave laws, company leaves, short- and long-term disability leaves, etc.
2. Review and update all job descriptions to ensure they include all of the essential functions of each position.
 3. Provide training to managers and supervisors (and HR personnel if needed) regarding the requirements of the ADA and the ADAAA. They should be the company's front-line issue-spotters and must understand the importance of their attitude and assistance toward disabled employees in avoiding ADA charges.

What is Reed Group Doing About the ADAAA Final Rule?

Reed Group is educating all of its absence management personnel on the issues raised above, as well as other information relating to the ADAAA and the Final Rule. Reed Group offers ADA accommodation as an addition to our absence management services. However, those clients who do not presently use our ADA services still benefit from the knowledge provided to our Leave Specialists on the impact of the

ADA, the recent amendments and new regulations when providing comprehensive, sound advice and services.

If you have any questions about Reed Group's ADA accommodation management services, please contact your Account Executive or services@reedgroup.com.

USERRA & FMLA

CAT'S PAW STRIKES EMPLOYER'S DEFENSES IN USERRA AND FMLA CASES

The "cat's paw" theory of employer liability in employment cases has made headlines following the recent U.S. Supreme Court's decision in *Staub v. Proctor Hospital* on March 1, 2011. Now, a federal court has also applied the cat's paw theory to employees' claims of employer interference with their FMLA rights.

USERRA Supreme Court Case

Vincent Staub was employed by Proctor Hospital and also served in the United States Army Reserve, which required monthly weekend duty and an additional two to three weeks of service per year. The Uniformed Services Employment and Reemployment Rights



Act (USERRA) protects the employment rights of a person who is a member of a uniformed service. An employer violates USERRA if an employee's military service is a motivating factor in the employer's adverse employment action against the employee. 38 U.S.C. §4311(a)and(c).

Two of Staub's supervisors had made statements to others showing hostility toward Staub's military service and the burdens it placed on others in the department. One supervisor issued Staub an adverse corrective action and the other supervisor reported to the vice president of Human Resources, Linda Buck, that Staub had violated the corrective action. Staub denied the allegations.

Buck had shown no animus toward Staub's military duty. She reviewed Staub's file and, based on the

What is the cat's paw theory?

The cat's paw theory is a means of holding an employer liable for the illegal discriminatory motivation of a supervisor who did not make the adverse employment decision but exerted influence over the actual decision maker. The Supreme Court explained that the cat's paw theory is derived from one of Aesop's Fables. In the fable, a monkey induces a cat to extract roasting chestnuts from a fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.

The Supreme Court applied the cat's paw theory to hold that an employer is liable under the applicable employment law:

- if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and
- if that act is a proximate cause of the ultimate adverse employment action.

corrective action and its alleged violation by Staub, decided to terminate him. During the company's grievance procedure Staub alleged that his two supervisors' actions were motivated by their hostility to his military service and that they intended their actions to influence the decision by Buck. Buck failed to investigate this allegation and upheld her termination decision. Staub sued, alleging that his termination was a violation of USERRA. A jury found that Staub's military status was a motivating factor in Proctor's decision to discharge him and awarded over \$57,000 in damages. Although initially overturned on appeal by the Seventh Circuit, the Supreme Court upheld the application of the cat's paw theory to this case.

Staub v. Proctor Hospital, No. 09-400 (S.Ct. March 1, 2011).

FMLA Case

Two employees of Ohio Bell—Blount and Durrah—were terminated for their undisputed failure to meet performance standards. They alleged, however, that their termination was in retaliation for taking FMLA leave, since they were “progressed much more quickly through the disciplinary process than were other workers” who had not taken FMLA leave. The employees' supervisors had said in meetings that they would target individuals who took FMLA leave with increased punishment.

Ohio Bell defended the claims by asserting that the authority to punish or terminate the employees resided higher in the supervisory chain, not with the two antagonistic supervisors. Citing the recent *Staub* decision by the Supreme Court, the district court ruled that even if the two supervisors did not have such authority, the cat's paw theory might apply and their animus could be “inferred upwards where it had the effect of coloring the various adverse employment actions in this suit.”

Blount v. The Ohio Bell Telephone Co., Case No. 1:10-CV-01439 (N.D.Ohio March 10, 2011).

Lessons for Employers

The cat's paw theory has been in existence in employment cases for many years, but the recent attention brought by the Supreme Court decision in *Staub* is likely to cause an increase in the use of this argument by plaintiffs' attorneys. There are steps an employer can take to minimize the risk of improper influence by a non-decisionmaker antagonistic toward the employee who has recently asserted FMLA rights.

- Beware of adverse employment decisions and recommendations by a supervisor whose job is made more difficult by the FMLA absences of workers. Any supervisor recommendation or decision to terminate or otherwise discipline an employee who has recently used FMLA leave should be:
 - Reviewed by Human Resources personnel and
 - Compared to the treatment of other employees with similar—but not FMLA-related—performance or attendance issues.
- Investigate any employee allegations of supervisor bias or animus based on a protected classification, such as use of FMLA leave rights.
 - Although allegations of discrimination or retaliation should always be investigated, this becomes even more important when the employee is about to be terminated. The *Staub* case likely would have come out differently if Buck, the Human Resources vice president, had investigated Staub's allegations of animus toward his military service. She might have found that the corrective action and report of Staub's violation were unfounded and reversed the termination decision. Or, if her investigation showed that the corrective action was warranted Proctor Hospital would have had a defense that the termination would have occurred even without the discriminatory attitude of the supervisors.

Train supervisors of employee rights under the FMLA and other employment laws. Include in that training

the importance of respecting these rights and not “punishing” employees by expressing impatience or intolerance with respect to their leave rights. See Reed Group’s prior article (PDF format): [“An FMLA Lesson: supervisor attitudes can create employer liability”](#)

FMLA

REQUIRING DOCTOR NOTES FOR ABSENCES INTERFERES WITH FMLA RIGHTS

Employers struggle with curbing FMLA abuse, especially when an employee is certified for intermittent leave. However, there are actions an employer can take if it has an “honest suspicion” that an employee is claiming FMLA time for a non-qualifying purpose. Requiring a doctor’s note to support each intermittent absence is NOT a permissible action, however, and constitutes interference with the employee’s FMLA rights.

Jernberg Industries, Inc., a component manufacturer in the automotive industry, had a detailed system to assess points against employees for unexcused absences or late arrivals, culminating in termination of an employee after accumulation of a set number of points. In addition, Jernberg required employees requesting FMLA leave to agree that “for an intermittent leave, documentation must be presented with each absence for the absence to be applied against the FMLA status.” Without such a note, the employee would be assessed attendance points for the absence.

Matthew Jackson was employed by Jernberg to perform physically demanding manual labor. Jackson suffered from wrist problems and had surgery, for which he received approved FMLA time off. He continued to have issues with his wrist and provided Jernberg with another Certification of Health Care Provider (CHCP) form by his doctor for intermittent time off over the next year. Jernberg approved the leave request.

Over the next several months Jackson called in for

numerous days off, either for therapy or due to flare-ups in his wrist. Jernberg sought to enforce its policy, requiring Jackson to provide a doctor’s note for each episode of intermittent leave.



Jackson resisted providing a doctor’s note for each of his absences and was therefore assessed attendance points for intermittent FMLA absences on several

occasions. Ultimately he was terminated for excessive attendance points. Jackson sued Jernberg, alleging that the doctor’s note requirement interfered with his FMLA rights and discouraged him from taking as much FMLA time as he might be entitled to.

The court agreed. First, the court recognized that interpretation of the FMLA requires a careful balance between employees’ medical needs and the legitimate interests of the employer. It acknowledged that in order to protect the employer’s interest in verifying that an employee’s leave is actually necessitated by an FMLA-qualifying reason, the employer is entitled to know the reason why the employee needs the FMLA leave and to support his explanation with a CHCP form. The regulations also provide for recertification in certain circumstances, if the employer questions the validity of the employee’s continued leave.

The court then stated: “Protecting the employee against overzealous employers, though, the FMLA’s regulations limit how often and with what notice an employer may demand certification.”

Jernberg tried to distinguish between the recertification rules and its doctor’s note requirement, arguing that they serve different purposes: “the purpose of recertification is to ascertain the continued

existence of an FMLA-qualifying medical condition, while the doctor's note policy simply verifies that an employee's particular absence is related to his already-certified FMLA-qualifying condition." While the court agreed that the FMLA allows employers to verify that its employees' absences are validly claimed as FMLA-related, it held that the doctor's note requirement went too far. Jernberg's policy was impermissible because it required action not just by the employee, but also by a third party, the employee's doctor. This extra burden could discourage the employee from taking FMLA leave to which he or she is otherwise entitled.

The statute and regulations do not explicitly address a doctor's note policy, but they "do show an intent to limit medical verification to certification and recertification as delineated" in the regulations. "If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. . . Employers may not ask health care providers for additional information beyond that required by the certification form." 29 C.F.R. § 825.307(a).

What Steps Can An Employer Take to Verify the Reason for An Employee's Claimed FMLA Absence?

The court in Jackson recognized that employers can take steps to verify the legitimacy of an employee's absence if it has an "honest suspicion" that the absence is not FMLA-related (such as absences that regularly coincide with the beginning or end of a vacation or holiday). Jernberg, however, did not produce any evidence of a suspicion about Jackson's absences. Rather, it simply tried to enforce its blanket policy of requiring doctors' notes for FMLA intermittent absences.

Steps Employers Can Take to Verify FMLA Absences

An employer with a reasonable suspicion that an employee is falsely reporting FMLA time can take

action to try to verify the absence. Do not use the doctor's note tactic, but try one or more of the following actions:

- Call the employee at home to verify that he or she is in fact at home as claimed, whether for rest, recuperation, incapacity to work, or other reason.
- Speak directly with the employee to verify or clarify any information previously provided by the employee with respect to the questioned absence.
- If the absence was for a medical appointment, call the provider to verify that the employee appeared for the stated appointment. (Note: Do not request any further medical or other information from the provider.)
- Question co-workers who report having seen the employee partaking in activities during the absence that do not fit the employee's claimed FMLA condition or restrictions.
- In extreme cases, the employer can engage surveillance of the employee. This will rarely be justified by the circumstances.

Additional Pointers

- In all cases the employer should undertake any inquiries professionally and with respect to the employee. Undue pressure, accusations, or harassing tactics can result in a claim of interference.
- Ensure communications with the employee are conducted by HR or benefits personnel, not by the employee's supervisor.
- Limit follow-up actions to the minimum appropriate to the circumstances. For example, do not engage surveillance for the employee's next doctor's appointment when the previous one can be verified by calling the doctor's office.

FMLA

EMPLOYERS VICTORIOUS IN FMLA CALL-IN CASES: LESSONS TO BE LEARNED

FMLA regulations allow employers to enforce absence procedure requirements when requesting leave. Nonetheless, employees frequently challenge terminations resulting from these procedures.

A string of decisions from various courts over recent months has brought good news for employers, holding that employees seeking FMLA leave must comply with their employers' procedural call-in or reporting requirements. Employers can take away some significant lessons from the following cases.

Employer Entitled to Length of FMLA Leave Information

SMC Corp. required its employees to obtain prior approval from a supervisor before taking leave. Their policy clearly stated that a failure to report for work for two consecutive days without notifying a supervisor was grounds for termination.

Robert Righi periodically took time off to tend to his mother, who had ongoing health issues. When Righi received word that his mother was in serious condition one day he left work, telling only a co-worker why he was leaving. He turned off his cell phone (his supervisor's usual mode of communication with Righi) and did not pick up messages later left by his supervisor. After two days he sent his supervisor an e-mail message, stating that he needed "the next couple of days off" to make arrangements for his mother. His supervisor tried to reach Righi on his cell phone multiple times over the next several days, but it was still turned off. Righi finally called back after nine days of silence. He was fired the next day.

Righi sued SMC and his supervisor, alleging interference with his FMLA rights. However, Righi's failure to respond to his supervisor's calls or otherwise

to contact his employer doomed his FMLA claim. In upholding summary judgment for SMC, the Seventh Circuit stated:

The FMLA does not authorize employees to keep their employers in the dark about when they will return from leave. Indeed, employers are entitled to the sort of notice that will inform them not only that the FMLA may apply but also when a given employee will return to work. [Case citations omitted.]

Employers are entitled to notice about the "anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c) and 825.303(a). Righi's radio silence regarding the time he expected to be out justified his termination.

Righi v. SMC Corp. of America, No. 09-1775 (7th Cir. 2011).

It's Okay to Require Periodic Call-in During FMLA Leave

Loretta Thompson worked for CenturyTel in its Programming Department. Departmental policies required employees to call their supervisor daily if they were to be absent. If the supervisor was not personally available, they could leave a voice message. Once an absence was approved as an FMLA leave, however,



the policy required employees to call in only weekly.

Over the course of 12 months, Thompson was absent on several occasions, some of which were covered by the FMLA. She failed to follow the department's call-in requirements seven times, including both the daily call-in requirement and the

weekly call-in requirement for FMLA absences. She was terminated by CenturyTel in accordance with its policy that an employee could be terminated for three violations of the call-in procedure in a 12-month period.

CenturyTel prevailed in Thompson's lawsuit alleging FMLA interference. The court recognized that a call-in policy is permissible because FMLA regulations specifically provide that "[a]n employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work." [Former regulation 29 C.F.R. § 825.309(a); now 29 C.F.R. § 825.311(a) (2009).] Thompson's failure to call in as required, along with her other reporting violations, justified her termination.

In addition, Thompson alleged that CenturyTel had an obligation to provide her with written notice of the call-in policy each time she requested FMLA leave. The court rejected this argument. The regulations specifically state that a notice of FMLA rights and responsibilities provided to the employee *may* include other information (such as whether the employer will require periodic reports) but this is not required.

[Former regulation 29 C.F.R. § 825.301(b)(2); now 29 C.F.R. § 825.300(c)(2) (2009).]

Thompson v. CenturyTel of Central Arkansas, LLC, No. 09-3602 (8th Cir. Dec. 2010)

Enforce Company Leave Request Procedures Even for Qualified FMLA Leave

Jordan To was employed by US Bank. Following several weeks at a required National Guard training, To was expected to return to work on August 4, 2007, however, he reported to US Bank management that he was feeling ill (tired, lethargic, and fatigue-ish) and would not be able to return to work that day. On August 5, he called in periodically and had his doctor fax in notes to report that he was still ill and would not be in. He did not return to work or call in between August 18 (his return to work date stated on his last doctor's last note) through August 21. To was terminated for job abandonment on August 22. He sued US Bank for interference with his FMLA rights and for FMLA retaliation.

The bank argued that it did not have notice that To

The Other Side of the Coin

Even though employers can require employees on FMLA leave to report periodically regarding their status and intent to return to work, it appears to be possible for the employer to overdo it.

In *Terwilliger v. Howard Memorial Hospital*, employee Regina Terwilliger took an 11-week FMLA leave for back surgery. During her leave she received weekly calls from her supervisor inquiring when she was going to return to work. When she was fired for suspected theft, she sued the hospital and her supervisor, claiming (along with FMLA retaliation) that the weekly calls by her supervisor had interfered with her FMLA rights by making her feel pressured to return to work. She asked her supervisor if her job was in jeopardy and he told her that she should return to work as soon as she could.

The hospital argued that it did not interfere with her FMLA rights because she was able to take as long of a leave as her doctor advised and she requested. The court rejected this defense, stating:

- An FMLA interference claim includes the "chill theory"
- Interference occurs when an employer's action deters an employee's exercise of FMLA rights
- Terwilliger had a right "not to be discouraged from taking FMLA leave"

Terwilliger v. Howard Memorial Hospital, No. 09-CV-4055 (W.D.Ark. 2011).

needed FMLA leave of absence. It claimed that his statement that he was feeling tired, lethargic, and fatigue-ish and his doctor's statements that he was out due to "illness" did not put the bank on notice that To's illness qualified as a "serious health condition" under the FMLA. According to the court, the appropriate inquiry is "*whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.*" The court observed that although there might be a legitimate question regarding whether US Bank was sufficiently apprised that To's illness constituted a serious health condition, it did not affect the outcome of the case.

As demonstrated in the SMC Corp. case, FMLA regulations allow an employer to enforce its "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." 29 C.F.R. § 825.302(d). Relying on the regulation and an Eighth Circuit case, the court stated that "[e]mployers who enforce such policies by firing employees on FMLA leave for noncompliance do not violate the FMLA." In this case, To admitted that he violated the employer's absence reporting policy by not calling in from August 18 through August 21, and was subject to termination under the company's job abandonment policy. He did not identify any extenuating circumstances that prevented him from reporting in those days. As a result, the court held that To's failure to follow the reporting procedure justified his termination by the bank, even if his absence had qualified for FMLA leave.

To v. USBancorp, No. 08-5979 (D.Minn. 2010).

Violation of Employer's Daily Absence Reporting Process Justifies Termination

Amy Ritenour frequently took time off from her job with the Tennessee Department of Human Services to care for her three children, each of whom had special needs. When she had exhausted her accrued time off, she again needed to be absent from work to care for one of her children whose condition had worsened.

The DHS had a policy that required an employee to contact his or her supervisor personally each day that the employee would be absent to explain the reason for the absence. Failure to do so for three consecutive days was grounds for termination. Although Ritenour claimed she told her supervisors at the outset of her absence that she needed time off to care for her child, it was undisputed that she did not call in as required by DHS policy for four consecutive days. As a result, Ritenour was terminated.

In her lawsuit the court found that, even though her days off might have qualified for FMLA leave, DHS's termination of Ritenour was justified due to her failure to follow the employer's "usual and customary" call-in policy. Thus, her termination was due to her violation of policy, not due to her use of FMLA leave.

Ritenour v. Tennessee Dept of Human Services (M.D.Tenn. 2010).

Employer's Absence Request Form and Call-in Procedure Supported Under FMLA

Leticia Brown provided her employer with a medical certification from her physician supporting time off under the FMLA from August 21 through August 28 due to "stress." Her physician referred Brown to a psychiatrist, but Brown was not able to get an appointment with him until August 29, the date she was scheduled to return to work. Brown asked her physician to send the employer a note that she would need to be out on August 29, but the medical office did not do so and Brown did not follow up. When she saw the psychiatrist on August 29 he diagnosed her with depression. He recommended that she return for a follow-up appointment on September 11 and stay out of work until September 16.

It is undisputed that Brown never completed a form – required by her employer and approved by her union – to request an extension of her original leave. She claims that she spoke with a nurse at her employer's clinic on August 30 and reported that

she would be out until at least September 16, but she still did not complete the required leave request form. It is also undisputed that she did comply with the FMLA's reporting deadline then in effect. She failed to report her absences to her supervisor within two days of learning of her need for more time off, either for her August 29 appointment or for her extended leave through September 16. Under these circumstances, Brown's employer was within its rights to terminate her for failure to comply with the FMLA notice requirements and with her employer's absence procedures.

Regulation Update to Note

The FMLA regulations in effect at the time of the events in Brown required an employee to notify the employer of the need for leave within no more than one or two working days of learning of such need. Effective January 2009, the regulation now provides:

It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

29 C.F.R. § 825.303(a)(2009).

Brown v. Automotive components Holdings, LLC and Ford Motor Co., No. 09-1641 (7th Cir. 2010).

What Employers Should Do

The outcome in all of the preceding cases could have been different had the employers not maintained solid absence reporting procedures. Employers should:

1. Have clear and well-publicized absence reporting procedures, requiring calling in for all attendance issues such as late arrivals as well as full-day absences and foreseeable as well as unanticipated occurrences.

2. Have a policy that requires the employee to report periodically during leave as to his or her status and return-to-work date.
3. Remind the employee of the reporting procedures when he or she applies or is approved for FMLA leave of absence. (Not required by FMLA, but a good practice.)
4. Enforce procedures consistently with all employees and in all absence circumstances, not just for FMLA-related absences.
5. Remember that the employer may have to make exceptions to the policy for unusual circumstances where it is not practicable for the employee to follow call-in procedures.
6. Train supervisors to heighten their awareness of, and adherence to, the policies for all employees.
7. Emphasize the importance of supervisor and HR attitude toward employees requesting or taking FMLA-protected leave. Intolerance or visible frustration with such leaves can create liability even if the employee receives all the leave time requested.
8. Have HR personnel rather than supervisors contact employees on FMLA leave if communication is necessary.
9. Follow up with the employee for more information or remind him/her of the reporting procedure in appropriate cases.

Although these employers all "won" their cases, they incurred significant attorney's fees and disruption of their business operations to do so.