The Leave & Disability Coordination Handbook

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21st Century Workforce

EEOC to Step up Enforcement Of Pregnant Worker Job Rights

True or False? An employer is free to fire a pregnant employee once she has exhausted all her leave under the Family and Medical Leave Act.

The most accurate answer: It depends.

The FMLA requires covered employers to provide up to 12 weeks of job-protected leave for the birth of a child.

On the other hand, the Americans with Disabilities Act Amendments Act increased employers' obligation to accommodate any worker with an impairment that substantially limits one or more life activities. "Leave," says U.S. Equal Employment Opportunity Commission Chair Jacqueline A. Berrien, "is often the reasonable accommodation that permits a person with a disability to remain gainfully employed."

Recently EEOC officials identified pregnancy discrimination under the ADAAA as an "emerging issue" and are making enforcement of job protections for pregnant women a priority. So we decided to take a closer look at how the rules apply.

See *Pregnant Worker*, p. 11

In the HR Trenches

Navigating the Maze of FMLA Certifications and Recertifications

By Dena B. Calo, Esq. and Eileen Fitzgerald Addison, Esq.

Administrating and monitoring Family and Medical Leave Act leave is a complex enough task, but the area of medical certifications can be particularly difficult to grasp, even for seasoned human resources professionals. Not only must an employer protect its own interests and curb FMLA leave abuse, it must also stay within the bounds of the FMLA's medical certification rules to avoid FMLA interference and retaliation claims.

Medical Certifications for Serious Health Conditions

According to FMLA, employees with serious health conditions are entitled to 12 weeks of unpaid leave, with a guaranteed right to return to their jobs. A serious health condition is an illness, injury, impairment

See *FMLA Certifications*, p. 13

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- ¶475 – Added new section, Schedule Adjustments
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Tips and Strategies

Ten Lessons to Be Learned By Employers' FMLA Blunders

Staying in compliance with the Family and Medical Leave Act can be challenging for any employer, and it's not hard to make a mistake in granting leave and administering leave policies. Learning from others' mistakes often is better than having to learn from your own. One way for human resource professionals to keep out of legal hot water is to pay attention to the ill-advised decisions of others.

What follows is a "Do" and "Do Not" list based on the outcome of 10 interference and retaliation claims by aggrieved employees that the courts have permitted to advance in the last five months.

To stay in compliance with FMLA, employers may want to consider steering clear of the actions that landed these companies in court in the first place.

1. **Do provide individual FMLA notices to an employee on FMLA leave.** "Individual notice" must be provided when an employee requests FMLA-related leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason. When an employee gives notice of FMLA-related leave, the employer must provide each of the following FMLA notices: Eligibility Notice, Rights and Responsibilities Notice and Designation Notice. See 29 C.F.R. §825.300(b) and Young v. The Wackenhut Corporation, No. 10-2608 (D. N.J. Feb. 1, 2013).
2. **Do not delay an employee's return to work because of an unclear fitness-for-duty certification.** The employer may contact the employee's health care provider for purposes of clarifying and authenticating fitness-for-duty certification. However, the employer may not delay the employee's return to work while contact with the health care provider is being made. See 29 C.F.R. §825.312(b) and *Chaney v. Providence Health Care*, 2013 WL 633144 (Wash. Feb. 21, 2013).
3. **Do allow intermittent FMLA leave when an employee's serious health condition involves "treatment" on at least the two occasions necessary for it to be deemed "periodic."** While "treatment" does not include "routine physical examinations," it does include "examinations to determine if a serious health condition exists and evaluations of the condition." See 29 C.F.R. §825.115 and *Willmore-Cochran v. Wal-Mart Associates, Inc.*, 2013 WL 245459 (N.D. Ala. Jan. 22, 2013).
4. **Do not interfere with your employee's FMLA rights by discouraging him or her from taking intermittent leave.** FMLA allows an employee to take intermittent leave to care for a spouse with a serious health condition if an intermittent schedule is "medically necessary." Intermittent leave also may be taken to "provide care or psychological comfort to a covered family member with a serious health condition." See 29 C.F.R. §825.202(b), 29 C.F.R. §825.220(b) and *Brock-Chapman v. National Care Network, LLC*, 2013 WL 169177 (N.D.Tex. Jan. 16, 2013).
5. **Do allow FMLA leave in situations in which the employee may need "to make arrangements for changes in care."** When an employee is "needed to care for" a family member, that care can meet both physical and psychological needs. This may include situations in which the family member with the serious health condition is unable to transport himself or herself to the doctor, medical facility or,

See *FMLA Blunders,* p. 5

The Leave & Disability Coordination Handbook

Associate Publisher: **Gwen Cofield**
Senior Managing Editor: **John F. Iekel**
Editor: **Daniel Cafaro**
Senior Production Manager: **Lisa Lang**

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21st Century Workforce

Paid Maternity Leave: Implementing A 'Best Practice' and Family-friendly Policy

With Yahoo's recent decision to enhance its paid leave policy for new parents, now is an opportune time for your company to revisit its own parental leave practices to ensure that they comply with federal and state employment laws and to see how they compare with industry standards.

At Yahoo, mothers who give birth now receive 16 weeks paid leave, and new fathers and mothers who have a child through adoption, surrogacy or foster care receive eight weeks. Google is more generous; it offers nearly five months of paid leave for new mothers, and seven paid weeks off for new fathers.

New parents who work for Yahoo and Google also receive $500 to spend on things like food and child care after a new baby comes home.

Both Yahoo's and Google's policies are considerably more generous than most U.S. companies. According to the Institute for Women's Policy Research, the United States is one of only four countries globally, and the only high-income country, that does not offer a paid leave program.

Only 11 percent of all private-sector workers in the United States have access to paid family leave, according to the U.S. Bureau of Labor Statistics, while 16 percent of state and local government employees have access to some paid family leave. Federal workers do not receive paid family leave, though all employees may be able to use accrued sick leave.

The large majority of *Working Mother* magazine's "100 Best Companies" provides paid maternity leave, and many provide paid leave for adoption or paternity leave, although only a small minority provides pay during the full 12 weeks of FMLA leave, according to the IWPR paper, "Maternity, Paternity, and Adoption Leave in the United States" (May 2013).

Among employers more broadly, just over a third (35 percent) of employees work for an employer offering paid maternity leave, and one fifth (20 percent) paid paternity leave, according to the FMLA 2012 Survey, conducted by Abt Associates and reported by the U.S. Department of Labor.

Lower-paid workers are least likely to have access to paid leave, according to the DOL National Compensation Survey.

Paid Leave by State

Two states, California and New Jersey, have adopted paid parental leave through their unemployment insurance programs, while New York offers paid maternity leave through its temporary disability insurance program.

Under the California program, created in 2002, workers pay 1 percent of their wages to cover both their state disability insurance and paid family leave insurance. It provides 55 percent of an employee's weekly salary, up to about $1,000 a week.

New Jersey's program, which began operating in 2009, typically provides two-thirds of the average of a worker's last eight weeks of pay, to a maximum of $584 a week, according to the National Partnership for Women and Families.

See *Maternity Leave,* p. 4

On the ADA Beat

EEOC Settlements a Reminder ADA May Require Extended Leave as Accommodation

Two employers entered into settlement agreements with the U.S. Equal Employment Opportunity Commission in February 2013 after the federal agency alleged the companies had violated the Americans with Disabilities Act. Both employers, the commission said, fired employees who were entitled to leave as accommodations for their disabilities.

The first involved Doneen King, an employee with the University of Maryland Faculty Physicians, Inc. She missed two weeks of work when she was hospitalized for her Crohn's disease. When she requested an additional day of unpaid leave, she was fired.

The employer's attendance policy violated ADA because it didn't provide for exceptions for individuals with disabilities, EEOC alleged. The commission sued on her behalf and the two parties entered into a settlement agreement. The agreement requires the employer to pay King $92,000 and revise its policies to allow for reasonable accommodation for individuals with disabilities.

Another company, REDC Default Solutions, LLC will pay $50,000 to an employee in a similar situation. Terria Wiley had a stroke and took medical leave from work. She provided her employer with a doctor's note indicating a specific date when she would be able to return to work. Instead of granting an extension of the leave, it fired her.

Refusing to grant a reasonable accommodation to an individual with a disability violates ADA, unless granting that accommodation would create an undue hardship for the employer, EEOC warned in a press release.

"It is not only a good business practice to provide reasonable and inexpensive accommodations that allow employees with disabilities to remain employed, it is required by federal law," Spencer H. Lewis, Jr., an EEOC district director, said in a statement.

Maternity Leave (continued from p. 3)

New York's program is paid for by contributions from both employers and employees and provides up to $170 a week.

Rhode Island and Hawaii are the only other states that have provisions for replacing some income. Otherwise, it is up to the employer to decide whether to provide paid leave.

Unpaid Parental Leave: The Basics

FMLA provides eligible employees with up to 12 weeks of job-protected, unpaid leave — as well as continuation of health benefits — for the birth or adoption of a child (among other family- and health-related reasons).

Leave to care for an employee's healthy newborn or minor child who is adopted or accepted for foster care must be taken within 12 months of the birth or receipt of the child, unless state law or the employer's policies say otherwise (29 C.F.R. §825.120(a)(2)).

Parents who work for the same employer are entitled to take a combined total of 12 weeks of leave, even if they work at separate worksites (29 C.F.R. §825.120). If they work for separate employers, they can take 12 weeks each for a total of 24 weeks.

Intermittent or reduced-schedule leave may be taken for the birth or adoption of a child or placement with the employee of a child for foster care only if the employer agrees. The employer may require the employee to transfer to another equivalent position during the period of intermittent or reduced-schedule leave to better accommodate the employer's business needs (29 C.F.R. §825.120(b) and 825.121(b)). The employer's permission is not required if the intermittent or reduced schedule leave is needed to care for a seriously ill newborn, adopted or foster child.

An employer is entitled to require that an employee provide reasonable documentation of the family relationship, such as a birth certificate, court document, sworn notarized statement, signed tax return or something similar, if an employee requests FMLA leave for the birth or adoption of a child or placement of a foster child. The employer must return the official document to the employee (29 C.F.R. §825.122(j)).

in the case of a developmentally disabled child, a suitable daycare center. See 29 C.F.R. §825.124 and *Wegelin v. Reading Hospital and Medical Center*, 2012 WL 5962444 (E.D. Pa. Nov. 29, 2012).

6. **Do not fail to engage in the ADA interactive process when an employee is unable to return to work after he or she has reached his or her FMLA leave limit.** Once an employee has exhausted FMLA or employer-provided leave, the employer must assess whether the employee is covered under the Americans with Disabilities Act. Leave and reassignment to a vacant position may be reasonable accommodation under ADA. See *Maharaj v. California Bank & Trust*, 2012 WL 5828552 (E.D. Cal., Nov. 15, 2012).

7. **Do recognize that a potentially serious health condition and an "as soon as practicable" notice standard may entitle an employee to FMLA leave protections.** FMLA does not only provide relief for employees who understand and assert their FMLA rights and whose employers may anticipate the need for medical leave. FMLA covers circumstances in which the need for qualifying leave arises unexpectedly. See 29 C.F.R. §825.302(a)(b) and *Clinkscale v. St. Therese of New Hope*, No. 12-1223 (8th Cir. Nov. 13, 2012).

8. **Do not assume that suspecting FMLA abuse alone is enough to justify firing an employee.** An employer may terminate an employee and deny reinstatement when the employment otherwise would have ended. However, *the employer* bears the burden of defending itself against a claim that it interfered with an employee's substantive FMLA rights. See 29 C.F.R. §825.312(g) and *Richey v. AutoNation, Inc.*, No. B234711 (2nd Dis. Cal., Div. 7, Nov. 13, 2012).

9. **Do obtain a second, and potentially third, opinion from an independent medical professional when you have reason to doubt the validity of a medical certification.** Without those opinions, FMLA does not permit an employer to disregard the certification or take adverse action against the employee. See 29 C.F.R. §825.307 and *Hyldahl v. Michigan Bell Telephone Company*, No. 09-2087 (6th Cir. Oct. 31, 2012).

10. **Do not assume that it's safe for you to terminate an employee on FMLA leave due to a reduction in force before reviewing your company's state leave act.** An exception to job reinstatement exists when an employer shows that "an employee would have been laid off during the FMLA leave period," independent of the employee's leave, However, certain state leave acts may not consider a RIF a covered reason if the reinstatement language specifies a "layoff and recall exception" as it does, for example, under the Minnesota Parental Leave Act. See 29 C.F.R. §825.216(a)(1) and *Kersten v. Old Dominion Freight Line, Inc.*, 2012 WL 5351843 (D. Minn., Oct. 30, 2012).

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In the Courts

Court Joins Other Circuits in Finding ADA Amendments Act Is Not Retroactive

There is a growing legal precedent regarding when courts can evaluate an Americans with Disabilities Act claim under a new, broader disability definition: the adverse employment actions at issue must have occurred *after* the Jan. 1, 2009, effective date of the ADA Amendments Act.

For an employee who allegedly was discriminated against in 2008, this meant his ADA claim failed. The 10th U.S. Circuit Court of Appeals affirmed a lower court's dismissal of ADA and Family and Medical Leave Act claims against his employer. The employee, a field claims adjuster, had sued the employer when he lost his job after injuring his knee so badly that he said it prevented him from climbing ladders and performing roof inspections, two essential functions of his job. The case is *Wehrley v. American Family Mutual Insurance Co.*, 2013 WL 1092856 (10th Cir., March 18, 2013).

Because the facts in the case took place before the ADAAA's enactment, the appeals court applied the law as it stood in 2008, when a more-limited definition of disability existed that the employee could not meet. By following the letter of the old statute, the 10th Circuit aligned with its sister circuits in concluding that the ADAAA does not apply retroactively. (See "ADA Amendments Act Is Not Retroactive, 4th Circuit Finds, Agreeing with Other Courts.")

Facts of the Case

Scott Wehrley worked for nine years as a field claims adjuster for American Family Mutual Insurance Co. While investigating a roof claim in June 2007, Wehrley fell from a ladder and injured his knee and back. He filed a workers' compensation claim, and his supervisor assigned him to desk work until he could walk without crutches.

Six months after the fall, a doctor removed all of Wehrley's work restrictions. However, Wehrley challenged the health care assessment and underwent a separate, independent medical examination. This second exam resulted in restrictions that prevented Wehrley from performing field claims that involved roofs or ladders.

In July 2008, a physician determined that Wehrley needed knee surgery, but Wehrley postponed the July 30 knee operation because AFMIC's workers' compensation insurer, Sentry, declined coverage.

Wehrley told his supervisor on Aug. 6 that he planned to apply for FMLA leave once he heard back from his personal insurance company concerning coverage for surgery.

AFMIC informed Wehrley on Aug. 22 that his job would be in jeopardy if he could not return to roof claims. His supervisor told him that "climbing roofs" was an important part of the job and Wehrley's failure to perform roof inspections had increased the work of other adjusters.

One week later, AFMIC fired Wehrley and cited his inability to perform roof inspections as a reason for the termination.

Courts Weigh in

Rather than deciding whether Wehrley was entitled to reassignment, the circuit court said it took the same tack as the district court and considered whether Wehrley was disabled under ADA at the time of his termination.

The pre-2009 U.S. Department of Labor regulation defined "substantially limited" for ADA disability purposes as being:

1) unable to perform a major life activity that the average person in the general population can perform; or

2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity.

Wehrley did not introduce enough evidence to overcome summary judgment on whether he was substantially impaired in a major life activity, the circuit court ruled.

"The medical report said only that prolonged walking or standing caused [Wehrley] knee pain. It does not say the injury restricted [his] ability to walk or stand in the ordinary course of a day," the circuit court said.

Wehrley's assertions did not suggest that AFMIC fired him for asserting his ADA rights. Instead AFMIC fired him for his inability to perform the functions of a field claims adjuster, the circuit court ruled.

See *ADAAA Not Retroactive*, p. 7

In the Courts

Inpatient Treatment for Alcoholism Protected Under ADA, FMLA

Employers need to keep the Family and Medical Leave Act and the Americans with Disabilities Act in mind when they are considering what to do when they have an employee who is an alcoholic. A case the U.S. District Court for the Eastern District of Pennsylvania has allowed to advance, *Diaz v. Saucon Valley Manor, Inc.*, 2013 WL 797713 (E.D. Pa., March 5, 2013), is a good illustration of the importance of remembering what those laws have to say on the matter.

Courts generally agree that an employee suffering from alcoholism has "a physical or mental impairment" — and, hence, a disability protected under ADA. While an employer can deny employment to, discipline or discharge an alcoholic whose use of alcohol adversely affects job performance or conduct, ADA provides that an employee whose poor performance or conduct is attributable to alcoholism may be entitled to a reasonable accommodation if he or she is qualified to perform the essential functions of the job.

FMLA affords similar entitlements and job protections to an employee who suffers from alcoholism — a serious health condition under FMLA — as long as "incapacity [is] caused by treatment and not for incapacity caused by addiction itself." (*Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008))

These employment law interpretations recently helped a cook advance a $150,000 lawsuit (*Diaz v. Saucon Valley Manor*) against her former employer whom she says unfairly fired her for taking a leave of absence to seek treatment for alcoholism.

Facts of the Case

Julie Diaz worked as a cook for Saucon Valley Manor, an assisted living facility in Hellertown, Pa.

In June 2010, Diaz asked her supervisor for one day off to attend a June 22, 2010 court hearing after being cited for public drunkenness. In addition, she requested FMLA leave to attend an inpatient alcohol abuse treatment program that required a 28-day stay at a rehabilitation center.

See *Inpatient Treatment,* p. 8

ADAAA Not Retroactive (continued from p. 6)

The company's failure to reassign Wehrley to a different position and its unwillingness to rehire him did not undermine the company's asserted justification for the firing, the circuit court said.

"These facts might have been relevant to [Wehrley's] ADA discrimination claim if we had concluded [he] was disabled under the ADA," the court said.

With regard to the FMLA retaliation claim, the court determined that none of the evidence suggested that AFMIC was opposed to Wehrley taking FMLA leave.

Employer Takeaways

Under the ADAAA, employers must construe the term "substantially limited" broadly and in favor of expansive coverage, which may have strengthened Wehrley's argument had that language applied to his claim. (See ¶212 Major Life Activities in the *ADA Compliance Guide*.)

Furthermore, mitigating measures may not be taken into account when determining whether an employee has a disability. He or she must be evaluated in an unmitigated state.

Employers have a duty, in certain circumstances, to reassign a disabled employee to a vacant job within the company. But an employer is not required to reassign an employee who is: (1) unable to perform the essential functions of his or her current job; and (2) not disabled as defined by ADA.

To request reassignment, an employee need not use "magic words," but must convey to the employer a desire to remain with the company despite his or her disability and limitations. Because Wehrley was not considered "disabled," it did not matter to the court that he may have been qualified to perform the essential functions of another position.

FMLA requires employees to provide employers "not less than 30 days' notice" before taking leave for foreseeable medical treatment. See 29 U.S.C. §2612(e)(2). This notice of intent to take FMLA leave is considered a "protected activity" for purposes of an FMLA retaliation claim. The *Wehrley* court, however, did not view the proximity of the firing to the leave notice as suspicious because the supervisor not only supported his employee's FMLA leave request, he suggested it.

Inpatient Treatment (continued from p. 7)

Diaz claimed that her supervisor approved her leave via the consent of Saucon Valley Manor President Nemita Atiyeh. She said she was told that she needed only to fax her treatment dates to Saucon.

Atiyeh said in court that she terminated Diaz on or around June 22 after hearing a rumor that Diaz was not at work, had been arrested for public drunkenness and was entering rehabilitation for 28 days.

Atiyeh asserts that Saucon had a legitimate, non-discriminatory reason to fire Diaz because of her: (1) arrest for public drunkenness; (2) failure to show up for work; and (3) flagrant violation of Saucon's policies.

Diaz contends that her public drunkenness was not a legitimate reason for her discharge because Atiyeh testified her arrest was unimportant and that Diaz was not arrested anyway, but was only cited by the Police.

Diaz also pointed to evidence that she lacked a history of being late or calling out of work, and that she received "excellent" scores on a job evaluation six weeks before her discharge.

Diaz sued Saucon Valley Manor and owner Nimita Kapoor-Atiyeh for $150,000 in punitive and compensatory damages. She brought six counts against Saucon, including two counts each for violating ADA and the Pennsylvania Human Relations Act, and one count each for a violation of FMLA and §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) based on Saucon's failure to accommodate her disability.

Court Weighs in

Saucon's assertion that Diaz "flagrantly violated" company policies does not support a motion for summary judgment on Diaz' ADA and PHRA discrimination claims, ruled the court.

Diaz maintained that she followed the company's attendance policy by providing notice and obtaining approval for her June 2010 absences, and Saucon did not present evidence to the court regarding any specific policy that she allegedly violated, U.S Magistrate Judge Timothy R. Rice opined.

Rice also denied summary judgment to Saucon on Diaz' "failure to accommodate" claims under ADA, PHRA and the Rehabilitation Act because Saucon again did not present any argument specifically addressing those claims.

Diaz advanced her FMLA interference claim, the court concluded, because: (1) Atiyeh had supervisory authority over Diaz; (2) Atiyeh was responsible for Diaz' firing; and (3) evidence in the form of a supervisor's alleged comments created an issue of material fact as to whether Atiyeh knew about Diaz' request for a leave of absence.

Employer Takeaways

Courts may generally agree that an employee suffering from alcoholism has "a physical or mental impairment," but they do not always agree that one or more of an employee's major life activities is substantially limited by his or her addiction.

Nevertheless, in many cases, the court will find, or the employer will concede, that an alcoholic employee has a "disability" within the meaning of ADA.

Many ADA lawsuits based on alcoholism lose in court because the plaintiff cannot prove that he or she was qualified to perform the essential functions of his position. For example, attendance and punctuality are essential functions of most positions. If an alcoholic employee cannot meet these requirements, he or she may not been deemed "qualified" for the position; hence, he or she may not be protected under ADA.

ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees. This means that poor job performance or unsatisfactory behavior — such as absenteeism, tardiness, insubordination or on-the-job accidents — related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem.

This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions.

Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program.

In the Courts

'Without Restrictions' Return-from-leave Policies Not Permissible with Disabled Employees

Employers should steer clear of enacting a "without restrictions" return-from-leave policy because it constitutes a *per se* violation of the Americans with Disabilities Act. But if an employee cannot prove that she suffered from a disability of which her employer was aware at the time of her termination, an ADA claim will not hold up in court. Nor will an employee's FMLA claim, and its proximity to firing, be enough to insulate her from a pending dismissal.

These findings, which the U.S. District Court for the Middle District of Tennessee, Columbia Division issued, were enough for the court to award a summary judgment for the employer in *Dunavant v. Frito-Lay*, 2013 WL 816673 (M.D. Tenn., March 5, 2013).

Facts of the Case

Donna Dunavant worked for more than 11 years as an at-will employee at Frito-Lay's food processing and manufacturing plant in Pulaski, Tenn. Frito-Lay fired Dunavant on June 29, 2010, for repeatedly failing to perform her job responsibilities as a carton-packing system operator. Dunavant claimed in court that she was terminated because of her disability.

In her last year of employment, Dunavant received several oral and written warnings about her work performance, including a final notice on Feb. 16, 2010 that any further performance problems could result in either a suspension or termination.

On April 5, 2010, Dunavant took approved FMLA leave and returned to work on June 7, 2010 with her health care provider's written clearance, which said she could work full-time and with no restrictions.

Dunavant claimed that her doctor wrote "without restriction" on the form as an accommodation to her because Frito-Lay has a requirement that employees return to work from a leave of absence "100 percent healed" or "without restriction."

Dunavant also claimed that her doctor told her that she was still "extremely ill," and that if she did not continue to take her prescribed medicine and was subjected to stress, she would have a relapse that would require immediate medical intervention.

During the second shift on June 27, 2010, Frito-Lay discovered that Dunavant failed to properly code cracker boxes. Proper coding is important, Frito-Lay said, because the company uses the codes to track the causes of manufacturing problems if there is a consumer complaint or quality issues arise.

Following a one-day suspension and investigation, Frito-Lay determined that Dunavant failed to properly monitor and change the code dates, which led to the incorrect printing of production information on roughly 144 cases of packaged product. Because Dunavant had already been issued a final warning for poor job performance on two previous occasions in the past year, Frito-Lay fired her.

Court Weighs in

While it is true that "100 percent healed" policies can constitute a *per se* violation of ADA because they do not provide for an individualized assessment, "a 100% rule is impermissible [only] as to a *disabled* person" and "one must first be disabled." *Henderson v. Ardco, Inc.,* 247 F.3d 645, 653 (6th Cir.2001)

The Tennessee district court ruled that Dunavant could not advance her ADA and Tennessee Disability Act claims because she failed to present evidence that (1) she was suffering from a disability at the time of her termination; and (2) her employer was aware of that disability.

Dunavant asserted that her doctor returned her to work without restrictions only because Frito-Lay had a "without restrictions" policy. But the court ruled that Dunavant's "recitation of what her doctor allegedly told her is hearsay…[and] not supported by competent evidence."

The court also dismissed the relevance of a coworker's supportive testimony because it did not indicate when the alleged statements by a human resource representative about a "no restriction" policy were made, or even if they were made at a time close to when Dunavant took FMLA leave.

Finally, it did not persuade the court that Dunavant's termination occurred just 22 days after returning from FMLA leave because her "documented performance issues began well before she used FMLA leave."

Employer Takeaways

Poor performance is an obvious and legitimate nondiscriminatory reason for an employer to take adverse

See *Return-from-leave,* p. 12

In the Courts

In ADA Cases, Courts Continue to Defer To Employers on 'Essential Functions'

The Americans with Disabilities Act's employment protections only extend to individuals with disabilities who can perform the essential functions of their jobs. And when it comes to deciding which functions are "essential," courts continue to defer to employers' judgment.

In *Knutson v. Schwan's Home Service, Inc*. (No. 12-2240, (April 3, 2013)), the 8th U.S. Circuit Court of Appeals accepted the employer's written job description as evidence that it was "essential" for dock managers to receive U.S. Department of Transportation driving certification, even though driving isn't part of a manager's regular duties.

Facts of the Case

Jeffrey D. Knutson worked for Schwan's Home Service, Inc. as a general manager of a delivery truck depot. Schwan's delivers frozen food to homes and offices. Managers' job descriptions require them to "meet the Federal Department of Transportation eligibility requirements, including appropriate driver's license and corresponding medical certification.'

Knutson occasionally drove trucks to train new drivers, but last did so in November 2007.

In March 2008, he suffered an eye injury that required surgery. Upon returning to work, he was required to complete a fitness-for-duty exam. He failed the exam and Schwan's placed him on leave. The employer gave him 30 days to obtain recertification or earn a job at Schwan's that did not require DOT certification. He failed to do either and was fired.

He sued, alleging disability discrimination, but the U.S. District Court for the District of Minnesota granted summary judgment for Schwan's, finding that Knutson was no longer qualified for the manager's position.

Qualified Individual

To succeed on an ADA claim, an employee must show that he is a qualified individual. To do that, Knutson must be able to perform the essential functions of his job with or without accommodation. EEOC regulations define essential functions as "the fundamental job duties of the employment position."

In the 8th Circuit, other factors to consider in the essential function determination include:

1) the employer's judgment as to which functions are essential;
2) written job descriptions prepared before advertising or interviewing applicants for the job;
3) the amount of time spent on the job performing the function;
4) the consequences of not requiring the incumbent to perform the function; and
5) the current work experience of incumbents in similar jobs, the court said, citing *Kammueller v. Loomis, Fargo & Co.,* 383 F.3d 779, 786 (8th Cir. 2004).

On appeal, Knutson argued that being certified to drive a delivery truck was not an essential function of his position because he had managed the depot successfully without driving.

Schwan's countered that managers must be able to drive delivery trucks in case they are needed to deliver products or train new employees.

The court said that the employer's judgment was entitled to deference. Knutson's "specific personal experience is of no consequence in the essential functions equation," the court said. "Instead, it is the written job description, the employer's judgment, and the experience and expectations of all [managers] generally [that] establish the essential functions of the job."

Failure to Accommodate

Knutson also alleged that Schwan's could have removed the certification requirement as a reasonable accommodation, which would have made him qualified for the job.

The court, however, said that "an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job."

Moreover, Schwan's made a good faith effort to engage in the interactive process of finding an accommodation when it suggested he apply for other non-DOT positions within the company, the court said.

The federal courts of appeal remain split about whether ADA requires an employer to reassign an employee to a vacant position as an accommodation without requiring him to compete for it.

See *Essential Functions,* p. 11

Pregnant Worker (continued from p. 1)

No Favorites

Employers become vulnerable to a discrimination claim by treating pregnant workers differently than other, similarly situated employees. The Pregnancy Discrimination Act prohibits such disparate treatment.

For example, an employer that allows an employee with a temporary back injury to take disability leave or leave without pay, or to do less strenuous work, is required under the PDA to allow the same for an employee with temporary lifting restrictions due to pregnancy.

Likewise, the PDA prohibits an employer from requiring a pregnant worker to take leave if the same is not required of another worker with a similar condition. The law applies regardless of whether the mother-to-be has a genuine impairment — for instance if her doctor orders bed rest because of a serious pregnancy-related condition like preeclampsia (a form of high-blood pressure) — or if the employer simply believes a woman is no longer up to the job because she is pregnant.

"I think the thing employers should do is not make judgments that aren't informed judgments about a person's ability to work during pregnancy," said Christopher J. Kuczynski, an EEOC assistant legal counsel, who spoke by phone with Thompson's *HR Compliance Expert.*

In one recent case, a Jackson, Miss., restaurant agreed to pay a server $20,000 and provide other relief to settle a suit in which the EEOC had charged that the worker was removed from the weekly schedule and fired because of her pregnancy.

According to the claim, the restaurant terminated the mother-to-be without warning and without prior disciplinary action, telling her when it took her off the weekly schedule, "the baby is taking its toll on you." The server, who was four months pregnant with her first child, had not cut back on her shifts and was under no medical or working restrictions when she was fired.

Essential Functions (continued from p. 10)

In the 8th Circuit, however, there is no such requirement. ADA "does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate" the court held in *Huber v. Wal-Mart Stores, Inc.*

Because Knutson was not qualified to perform an essential function of his job and there was no reasonable accommodation that would render him qualified, he was not entitled to ADA's protections, the 8th Circuit ruled, upholding summary judgment for Schwan's.

Accommodation Obligation

Employers also can run into problems by failing to accommodate an employee with a serious pregnancy-related impairment, according to Kuczynski.

Pregnancy is not a disability. But under the ADAAA's broadened definition of disability, some pregnancy-related conditions that would not have triggered an employer's obligation to provide an accommodation before 2008 now do.

The number of pregnancy-related discrimination complaints made with the EEOC is growing, despite the broadened protections. Complaints lodged with the EEOC alleging PDA violations have increased by more than 35 percent over the past 10 years. There are no statistics for pregnancy-related disability claims, but EEOC's caseload in this area is expanding.

In an ongoing case filed last fall, the EEOC accused a Laredo, Tex., oil and gas testing firm of illegally firing a worker who requested leave for a pregnancy-related complication. The company bolstered the discrimination charge with a letter to the Texas Workforce Commission mentioning that it hired the worker believing she was unable to conceive. When the employee became pregnant and was absent for several days, the company wrote, "thinking she would have to stay home for some time, she was replaced after five days off or more."

The EEOC also is suing a Las Vegas government services contractor that allegedly repeatedly denied the requests of an administrative worker who wanted to work closer to the restroom because she suffered from severe nausea and vomiting arising from her high-risk pregnancy. The worker already had fallen at least twice while going down two sets of steep stairs to reach the restroom, according to the EEOC.

In another pending case, EEOC is suing a Houston debt collection agency on behalf of an account representative who allegedly was not allowed to return to her job after she had taken less than three months of maternity leave. Although her job had been held open for her, company officials changed their mind upon learning the worker planned to express milk, according to the suit. The EEOC contends that the mother's pregnancy and childbirth, and specifically her status as a lactating female, motivated the employer's decision to fire her.

Compliance Challenge

Employers can unwittingly set themselves up for a disability discrimination lawsuit in various ways, warns Michael Barnsback a partner with LeClairRyan in Alexandria, Va. who advises companies on pregnancy-related claims.

See *Pregnant Worker,* p. 12

Pregnant Worker (continued from p. 11)

Automatically denying additional leave to pregnant workers who run out of FMLA leave is a common pitfall, he said. "HR is focused on FMLA issues. They don't think about the ADA."

A California shipping company learned this lesson the hard way earlier this year when a state appeals court reversed a lower court's ruling in *Sanchez v. Swissport, Inc.,* and concluded that a pregnant employee who was prescribed bed rest for her high-risk pregnancy was illegally denied an accommodation when her employer fired her after she used up all her leave.

The *Sanchez* ruling is based on California law. But the decision is a reminder of the risks faced by any employer that refuses to accommodate a pregnant worker with a disabling condition. The court held that Sanchez was entitled to the protections afforded any other disabled employee: a reasonable accommodation that does not impose an undue hardship on her employer.

Employers also must recognize that, because of the ADAAA's broadened definition of disability, an increasing number of pregnant workers may qualify for accommodations — simply because a far broader spectrum of pregnancy-related impairments may now qualify as disabilities. Among them:

- pregnancy-related sciatica, which could limit how much a mother-to-be can lift;
- pregnancy-related carpal tunnel syndrome, which can cause pain and numbness in the hand, wrist and arm and limit fine motor tasks;
- gestational diabetes, requiring a woman to modify her break schedule so she can eat every few hours to control blood sugar levels; and
- preeclampsia, which might require bed rest.

Congress deliberately made it difficult for employers to prove that an accommodation, including extended leave, is unreasonable or an undue burden. A savvy employer will take into account the fact that an increased number of pregnant workers may qualify for extended leave as an accommodation and take steps to guard against a staffing shortfall. Some employers line up contingent workers and cross-train staff to ensure they can maintain productivity in the event workers take extended leave for any reason.

Timing isn't Everything

The ADAAA stipulates that an impairment lasting fewer than six months can be substantially limiting. Still, many employers stumble when it comes to applying this rule to pregnancy-related impairments.

"Employers are very aware that pregnancy is a protected status," Christine Walters, a human resource and employment law consultant said. "But they are learning that that these short term conditions can be a disability."

A well-drafted position description can help an employer make informed decisions about whether an accommodation is reasonable and may help fend off discrimination claims, says Walters.

Employers also should ask an employee's doctor to review the position description to determine if a disabled employee is up to the job.

"Let the doctor tell you if the employee is able to work," she said. "We're not the medical experts."

She also recommends that employers look at a various accommodations before assuming a worker temporarily disabled during pregnancy is unable to do her job. Technology, and the ability to work from home, has broadened the options for many people with disabilities, including pregnant women.

"Don't assume that just because an employee is limited to bed rest she can't do any work at all," she said. "Let the physician make the decision."

Return-from-leave (continued from p. 9)

employment action regarding an employee. Hence, employers would be wise to document all job performance issues so that there is a recorded history that supports a termination decision.

In *Dunavant*, Frito-Lay practiced what appeared to be patience and fairness in dealing with an employee who was allowed multiple chances to cure her performance woes.

Frito-Lay's "Progressive Coaching Policy" demonstrated to the court that the company attempts to treat all employees equitably by following a discipline system that includes counseling, oral warnings, written warnings, and what it calls "Decision Making Leaves."

Frito-Lay generally issues DMLs as an alternative to discharge after an employee has received a written warning. Those given a DML are sent home so that they can "decide whether they want to commit to changing their behavior and continue working at Frito-Lay." By instituting this type of language in your employee handbook, you would provide a clear message to your employees (and the courts, if necessary) that your company does not take firing an employee lightly.

FMLA Certifications (continued from p. 1)

or physical or mental condition that makes the employee incapable of performing essential job functions, and must also meet one of six benchmarks, including:

1) periodic incapacity;

2) certain chronic conditions that cause episodic incapacity;

3) permanent or long-term incapacity; and

4) conditions that require the employee to be absent to receive multiple treatments.

Although not required by FMLA, an employer may require certification from an employee's health care provider for leave based on a serious health condition. Once requested, the certification must be returned within 15 days. If an employee cannot meet the 15-day deadline, he or she must make a diligent, good faith effort to return the certification as soon as practicable under the circumstances.

If the employee's submitted medical certification form is incomplete or insufficient, the employer first must advise the employee in writing of the additional information that is needed to complete the form before it can contact the doctor directly. The employee has seven calendar days to obtain the necessary information to complete the form (or longer, if the employee can demonstrate diligent good faith efforts).

A certification is considered insufficient if it contains information that is vague, ambiguous or non-responsive. In assessing a medical certification for a serious health condition, an employer may consider information received about an employee's medical condition obtained while trying to determine disability status under the Americans with Disabilities Act, a workers' compensation program or qualification for benefits under a disability plan.

Clarification and Authentication Of Medical Certifications

An employer also has a limited right to contact an employee's health care provider to discuss the medical certification form. Only certain specified agents of the employer, such as the HR professional or leave administrator, may contact the employee's doctor for purposes of authenticating information. Importantly, an employee's direct supervisor is expressly prohibited from contacting the health care provider. The employer may only clarify and authenticate information on the medical certification.

Authentication means verifying that the health care provider actually filled out and signed the form. Clarification means understanding the handwriting on the form or understanding the meaning of a response. An employer may never seek information from a health care provider that the certification form itself does not request.

While employers are sometimes concerned about violating the Health Insurance Portability and Accountability Act of 1996 if they directly contact an employee's health care provider, those concerns are unfounded. The HIPAA obligation is between the doctor and the employee, not with the employer. FMLA specifically requires that the employee and/or health care provider clarify the necessary information, and the employer may deny FMLA leave on grounds that the certification form is unclear. Thus, it is the employee's responsibility to authorize the health care provider to speak with the employer when necessary.

The employer also has the right to obtain second and third opinions, at its own expense, if it has reason to doubt the validity of the certification. To aid in the second/third opinion process, an employee must authorize the release of relevant medical information to the second and third opinion health care providers, if those health care providers request it. Failure to authorize the release of this information also is grounds for denying FMLA leave.

Recertification and the '30 Day Rule'

An employer may not request recertification more than every 30 days and only in connection with an absence. If the medical condition lasts longer than 30 days, then the employer must wait that longer duration to seek recertification. However, in all circumstances, an employer is permitted to request recertification once every six months in connection with an employee's FMLA absence, even if the certification states that the requested leave is for a permanent, lifetime condition.

Recertifications may be requested more frequently than every 30 days in the following circumstances:

- the employee requests an extension of his leave;
- circumstances stated in a previous certification change significantly (for example, duration or frequency of absence or the nature or severity of illness); or

See *FMLA Certifications,* p. 14

FMLA Certifications (continued from p. 13)

- the employer receives information that casts doubt on continuing validity of employee's certification.

In addition, in connection with a recertification, an employer may provide an employee's health care provider with a record of the employee's absence pattern and ask the health care provider if the employee's serious health condition and need for leave is consistent with the employee's pattern of absences.

What Constitutes Diligent, Good Faith Efforts?

Under FMLA regulations, an employee must return a medical certification or recertification within 15 calendar days. If the employee fails to do so, the employer may deny FMLA coverage to the employee until the certification is provided. Therefore, any absences in the interim are unexcused and could subject the employee to discipline under the employer's attendance policy, up to and including termination.

An employee who fails to meet the 15-day deadline can still save an FMLA claim if she can establish that she was engaging in "diligent, good faith efforts" to return the certification on time. But what, precisely, are diligent, good faith efforts?

In its holding in *Brookins v. Staples Contract & Commercial, Inc.*, 2013 U.S. Dist. LEXIS 18590 (D. Mass. Feb. 12, 2013), the U.S. District Court for the District of Massachusetts has finally given employers some direction in this complicated aspect of FMLA administration.

In this case, Brookins called her two primary physicians and asked them to complete the FMLA certification requested by her employer, Staples. When her doctors refused to complete the form, Brookins did absolutely nothing further to obtain the certification, and didn't request an extension to return the certification until *after* the 15 days had passed.

The court dismissed Brookins' FMLA claim, finding that the exception to the 15-day rule did not apply. In doing so, the court listed several things Brookins *could have* done to show that she was engaging in diligent, good faith efforts to obtain complete and sufficient certification.

- When her two primary physicians initially declined to fill out the form, Brookins could have contacted them again to explain the importance of completing the certification.
- Brookins could have asked any one of her three treating specialists to complete the form.
- She could have mailed the form to any of these doctors.
- She could have hand-delivered the form to any of these doctors.
- Most important, Brookins could have contacted Staples to explain her difficulties in obtaining a timely certification, and requested an extension *before* the expiration of the 15-day deadline.

Dena B. Calo is Director of Genova Burns Giantomasi & Webster's Human Resource Practices Group. Calo provides employment law counseling, including preparing and reviewing employee handbooks, establishing and auditing human resources policies and procedures and conducting on-site investigations. Calo also trains organizations on best human resource practices.

Eileen Fitzgerald Addison of Genova Burns Giantomasi & Webster specializes in employment law counseling and human resources best practices training. Addison has represented employers in employment law litigation matters in administrative, state and federal courts involving claims of discrimination, harassment, wrongful termination, whistle-blowing, employment-related torts and violations of restrictive covenants.

What Should Employers Take Away from the *Brookins* Holding?

Under FMLA regulations, employers have the right to request and obtain complete and sufficient medical certification to support an employee's absence due to an alleged serious health condition. Moreover, employees must return a completed certification (or recertification) within 15 days of their employer's request, unless it is not practicable under the particular circumstances for them to do so despite diligent, good faith efforts.

The *Brookins* holding now gives employers a guidebook as to what actions by an employee will constitute diligent, good faith efforts. If an employee fails to return requested medical certifications, and fails to act diligently and in good faith, an employer is well within its rights to:

1) convert absences to unexcused absences;
2) discipline employees under established attendance and vacation/sick policies; and
3) deny FMLA leave.

Brookins is a very useful decision for employers struggling with employees who fail to return their FMLA paperwork, and can be used to support discipline and/or termination of employment.

In the Courts

Call Center 'Complainant' Advances ADA, FMLA Retaliation Claims

Most courts recognize that desperate employees fearful of losing their jobs sometimes make discrimination complaints in order to intimidate their employer and prevent termination. However, many courts also recognize that the Americans with Disabilities Act: (1) protects employees who have reason to believe that their disabled peers have been harassed and subsequently report the infraction to their employer; and (2) permits claims of a hostile work environment based on that harassment under ADA.

As a recent case illustrates, even if the employee's retaliation claim under ADA "hangs by the slenderest of threads," what may pass for "workplace negativity warranting termination" also may constitute protected activity under ADA and other state discrimination laws. So ruled the U.S. District Court for the District of Massachusetts as it allowed a former call center employee's retaliation claims to proceed to jury trial. The case is *Surprise v. The Innovation Group, Inc.*, 2013 WL 59326 (D. Mass., Feb. 14. 2013).

Facts of the Case

Andrew Surprise worked for three years as a customer service representative and quality assurance associate at First Notice Systems, Inc., a clearinghouse for insurance claims, in Springfield, Mass.

According to Surprise, on at least five occasions, he watched two call center managers make unprofessional and discriminatory comments about a speech-impaired security guard. During an April 2010 group meeting, Surprise openly objected to the derogatory treatment of the security guard and told his department manager that he believed the other managers had discriminated against the guard because of her speech impediment.

In August 2010, Surprise complained in an anonymous, online company survey that: (1) his department's understaffing required him to answer phones; (2) he observed mistreatment of a security guard; and (3) he witnessed customer service reps improperly dispose of private health information in regular waste bins (which, if Surprise's allegations are true, violates the HIPAA privacy protections).

One month after taking the survey, Surprise requested a meeting with Terry Ronan, the company's new senior vice president. In the one-on-one discussion, Surprise raised several issues and handed a copy of his survey responses to Ronan, which they together reviewed.

According to Surprise, he also complained to Ronan about not getting time off for chiropractic treatment and informed him that he soon would be applying for leave under the Family and Medical Leave Act. In response to these complaints, Surprise contended in court that Ronan became agitated.

After his discussion with Ronan, Surprise texted with a colleague and told him that Ronan said he would be announcing major departmental changes in a scheduled meeting the next day. The text messages set off a series of internal discussions and what the court called "the creation of disruptive rumors."

In response to the rumor mill "stir" that Surprise had caused, Ronan consulted with Human Resources and inquired about Surprise's personnel file to see if he had lawful grounds for dismissal. Satisfied that Surprise's recent actions would support a cause for termination, he fired Surprise for negativity in the workplace (a violation of company policy) and insubordination.

In turn, Surprise filed charges against First Notice alleging: (1) retaliation for reporting discrimination in violation of both ADA and Massachusetts law; (2) refusal to grant FMLA leave and retaliation for request for FMLA leave; and (3) wrongful termination in violation of public policy for reporting HIPAA violations to First Notice management. He also filed a claim against Ronan for retaliation under Mass. Gen. Laws ch. 151B.

Court Weighs in

Although Surprise had put forth "scant" evidence to suggest his termination was somehow related to his protected ADA complaint, the district court denied summary judgment for First Notice. The court found that the "situation may present a so-called 'mixed-motive' case…where sufficient evidence is presented that an employer considered both a proscribed factor…and one or more legitimate factors…in making an adverse employment decision."

Tellingly, the district court treated the claim of a hostile work environment based on harassment as actionable under ADA and Massachusetts law. The court said that it informed this opinion in concurrence with several circuit court decisions even though the 1st U.S. Circuit Court of Appeals, in which it sits, has not yet weighed in on the issue.

In addition, the district court ruled in favor of First Notice on Surprise's FMLA interference claim, but de-

See *Call Center,* p. 16

Call Center (continued from p. 15)

nied the defendant summary judgment on the plaintiff's FMLA retaliation claim. The company was within its right to deny his FMLA request, the court said, because Surprise had never submitted a medical certification.

Surprise testified, however, that he had informed his direct supervisor that he was ready to submit the completed medical certification only hours before he was suspended. Considering this evidence, the court found that "a reasonable juror could conclude that the proffered reason for plaintiff's termination was pretextual."

Finally, with regard to Surprise's HIPAA-based claims, the court found in favor of First Notice, partly because of evidence that "he had lodged the very same HIPAA complaints months earlier and suffered no adverse action as a consequence."

Employer Takeaways

This case has implications for employers regarding ADA and FMLA compliance.

ADA

ADA's anti-retaliation provision prohibits employers from taking adverse employment action against an individual for engaging in protected conduct; for example, reporting discriminatory actions made against a disabled coworker.

Surprise showed that the plaintiff need only have a "reasonable belief" that the alleged victim of discrimination (in this case, the security guard) was disabled and that the observed treatment (insulting and mocking comments mostly done outside the guard's presence) rose to a level of discrimination as defined by ADA and Massachusetts law.

The company contended that the guard's missing teeth and unusual manner of speaking did not rise to the level of a speech impediment. But that uncertainty (and difference in opinion) of how ADA defines "disability" is what could get a company in trouble, particularly when your employee regards as "disabled" a victimized co-worker because of a physical or mental impairment.

FMLA

An employer has the right under FMLA to require that the employee support his request for leave with medical certification issued by the employee's health care provider. When an employee fails to provide certification, "the employer may deny the taking of FMLA leave." 29 C.F.R. 825.305(a)(d).

However, here's the caveat: When an employee tells you that he or she intends to request FMLA leave, he or she has the right not to suffer adverse action as a result of that disclosure, even if he or she does not submit the necessary certification before the adverse action is taken against him or her.