IF YOU LEAVE ME NOW: ADA, FMLA AND OTHER EMPLOYMENT LAWS --- HISTORY, HAPPENINGS AND HOPES

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DISABIITY RIGHTS TEXAS

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ROADMAP: HISTORY, HAPPENING AND HOPES

- There are two excellent papers in the materials:
  - Brian East: Disability Discrimination in Employment: A Two-Year Review of Cases
  - Tom Kiggans: The Family Medical Leave Act: An Overview and Recent Developments
  - The panel has made a determination that because of the detail in both of these papers, and because we believe that we are speaking to a sophisticated audience who is at least somewhat familiar with these two pieces of legislation we will focus on the:
    - (i) a brief history of ADA and FMLA and how they are implemented,
    - (ii) recent happenings in case law under both of these statutes, including confusion that has resulted when these two powerful pieces of legislation collide, and finally
    - (iii) projecting our hopes for the concepts of protecting the disabled and providing leave for employees when needed.

HISTORY: AMERICANS WITH DISABILITIES ACT

DISABILITY DISCRIMINATION

PURPOSE:

The Americans with Disabilities Act (ADA) was passed in 1990 to enable society to benefit from the skills, talents and purchasing power of individuals with disabilities and leads to fuller, more productive lives for all Americans. It was recognized that barriers to employment, transportation, public accommodations, public services, and telecommunications have imposed staggering economic and social costs on American society and have undermined efforts by people with disabilities to receive an education, become employed, and be contributing members of society.

The ADA was passed for the state purpose of giving civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion.

RESTRICTIVE DEFINITION OF DISABILITY: TWO SUPREME COURT DECISIONS

- **The first decision—by the Supreme Court in *Sutton v. United Airlines, Inc.* —stated that impairments must be considered in their mitigated state. The second decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* stated that the standard for determining whether an individual was eligible for protection under the law must be demanding.**
- **Accordingly, many cases were dead on arrival at the court house. ADA!**

2008 AMENDMENTS

- Restrictive definition of “disability” was one of the greatest barriers to effective enforcement of Title I of the Americans with Disabilities Act.
- This was ostensibly fixed by the passage of the Americans With Disabilities Act as amended in 2008
- Retains three types of disabilities: actual, record of, and regarded as.
- Retains three elements for an actual disability: an impairment that substantantially limits and major life activity.
- Gives news rules of construction so the definition of “disability” is given broad meaning

REGARDED AS DISABLED

- **REGARDED AS DISABILITY**
  - **Only requires evidence that the individual was subjected to an adverse action based on *actual or perceived impairment***
  - **This is true whether or not the impairment limits or is perceived to limit a major life activity**
  - **The perceived severity of impairment or limitation on a major life activity are irrelevant concepts in "regarded as" claims.**

ACTUAL DISABILTY/RECORD OF ACCOMMODATION

- **“Regarded as” disability; it is not enough to support an accommodation claim – those claims require proof of an “actual” or a “record of” disability.**
- **Actual Disability**
  - **Proof of an impairment**
  - **Identifying a major life activity**
  - **Establishing a substantial limitation in at least one such activity**

PROOF OF IMPAIRMENT AND MAJOR LIFE ACTIVITY

- **IMPAIRMENT: Once again, the EEOC regulatory definition remains unchanged, but the statute now requires that the term be construed broadly.**
- **PLAINTIFF SHOULD SPECIFY THE MAJOR LIFE ACTIVITY SUBSTANTIALLY AFFECTED --- FAILURE TO DO SO MAY LEAD TO THE ASSUMPTION THAT THE MAJOR LIFE ACTIVITY IS "WORKING" (ONE THAT REQUIRES EXTRA PROOF) *Tinsley v. Caterpillar Fin. Servs. Corp*. No. 18-5303, F.Appx, 2019 WL 2971 (N.D. Tex. March 6, 2018)**
- **ADA as amended in 2008 LISTS A WHOLE NEW CLASS OF MAJOR LIFE ACTIVITIES, DESCRIBED IN TERMS OF "BODILY FUNCTIONS" 42 U.S.C Section 12102(2)(B)**

REGARDED AS DISABLED – TWO RECURRING PROBLEMS

- **FIRST RECURRING PROBLEM: MANY COURTS CONTINUE TO FOCUS ON WHETHER THE EMPLOYER PERCEIVED THE IMPAIRMENT TO SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY**
- **Remember that these concepts are irrelevant to a regarded as claim**
- **The Fifth Circuit continues to correct lower courts on this issue**
  - ***Williams v. Tarrant City. Coll. Dist*., 717 F. App'x 440, 449 (5th Cir. 2018)**
  - ***Dreschsel v . Liberty Mut. Ins. Co.*, 695 F. App'x 793, 798 (5th Cir. 2017)**

REGARDED AS DISABLED – TWO RECURRING PROBLEMS

- **SECOND RECURRING PROBLEM: PLAINTIFF LEAVES OUT EVIDENCE THAT THE EMPLOYER KNEW OR BELIEVED THAT THE PLAINTIFF HAD A PHYSICAL OR MENTAL *IMPAIRMENT***
  - **EEOC regulatory of definition of "impairment" remains unchanged after the ADAAA, but the statute now requires that the term be construed broadly.**
  - ***EEOC v. BNSF,* 902 F.3d 916, 923 (9th Cir. 2018)**
  - ***Kagarice v. Smatresk,* 2018 WL 3417876 (E.D. Tex. July 13, 2018) citing *Rizzo v. Children's World Learning Centers, Inc.,* 173 F.3d 254, 265 (5th Cir. 1999*) on reh'g en banc, 213 F.3d 209 (5th Cir. 2000)* which stated,**
    - **'"the determination of whether an individual has a disabiltiy is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."**

QUALIFIED EMPLOYEE – DEFINITION

- AN ADA PLAINTIFF IS "QUALIFIED" IF HE OR SHE IS ABLE TO PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB WITH OR WITHOUT REASONABLE ACCOMODATIONS
- ESSENTIAL FUNCTIONS OF THE JOB: "A JOB FUNCTION IS ESSENTIAL IF ITS REMOVAL WOULD FUNDAMENTALLY ALTER THE POSITION. PUT ANOTHER WAY, ESSENTIAL FUNCTIONS OF THE JOB ARE CORE JOB DUTIES NOT MARGINAL ONES" *Hostettler v. Coll of Wooster,* 895 F.3d 844, 854 (6th Cir. 2018), citing C.F.R. Section 1630.2(n)(1)
- FACT INTENSIVE ANALYSIS
  - *Stevens v. Rite Aid Corp*, 851 F.3d 224, 229-30 (2d Cir.), *cert denied,* 138 S.Ct. 359, 2017
  - *Nall v. BNSF Railway Company,* 917 F.3d 335, 343 (5th Cir. 2019) written job description may be open to dispute
  - *Presta v. Omni Hotels Mgmt. Corp,* 2018 WL 1737278 (S.D. Tex April 4, 2018)

AREAS FOR CAUTION UNDER THE ADA AS AMENDED IN 2008

QUALIFIED EMPLOYEE – ACTUAL DISABILTY

- **Most ADA cases are not resolved on the issue of disability under the new act – as disability is now broadly construed. Most cases are now resolved on the question of "whether or not the plaintiff if a qualified employee"**
- **As mentioned earlier, an ADA plaintiff is "qualified" if he or she is able to perform the essential job functions, with or without reasonable accommodations**
- ***Pace v. Miss. Baptist Health Sys.*, 2018 U.S. Dist. LEXIS 36984 (2018 WL 1189918 (S. D. Miss. March 7, 2018)**

REQUEST FOR AN ACCOMMODATION AND THE INTERACTIVE PROCESS

- **Once an accommodation is requested, the parties are supposed to engage in a flexible, interactive process designed to identify a reasonable accommodation**
- ***Cutrera v. Bd. of Sup'rs of Louisiana State University*, 429 F.3d 108, 112 (5th Cir. 2005)**
- **A request for FMLA leave may not equal a request for an accommodation. Split in the circuits, but Fifth Circuit say says no in *Acker v. Gen. Motors, L.L.C.,* 853 F.3d 784-791-92 (5th Cir. 2017). Can *Acker* be distinguished?**
- **After a request is made, the interactive process begins.**
- **The exact obligations of each party may vary, but the outcome of accommodation cases often depends on which party failed to engage in the interactive process in good faith.**
- ***Jackson v Blue Mountain Prod. Co. No*. 18-60361, 2019 WL 927076 *4 (5th Cir. Feb. 21, 2019)**

HAPPENINGS: AMERICANS WITH DISABIITIES ACT

AREAS OF EXPANDED COVERAGE

TRANSIENT/TEMPORARY DISABLING CONDITION

- ***Summers v. Altarum Inst., Corp*, 740 F.3d 325 (4th Cir. 2014).**
- ***Mancini v. City of Providence by and through Lombardi,* 909 F.3d 325, n.1, 333 (4th Cir. 2014)**
- ***Gogos v. AMS Mechanical Systems, Inc.,* 737 F.3d 1170, 1172 (7th Cir. 2013)**
- ***Mullinex v. Eastman Chem. Co.,* 237 F. Supp.3d 695, 705 (E.D. Tenn. 2017)**
- ***Taylor v. FedEx Ground Package Sys., Inc.*, No. 3:16-CV-402, 2018 WL 1363063(JCH) (D. Conn. Feb. 26, 2018).**
- ***Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc.*, CV-15-00665-PHX-DLR, 2017 WL 1326130 (D. Ariz. Apr. 11, 2017).**

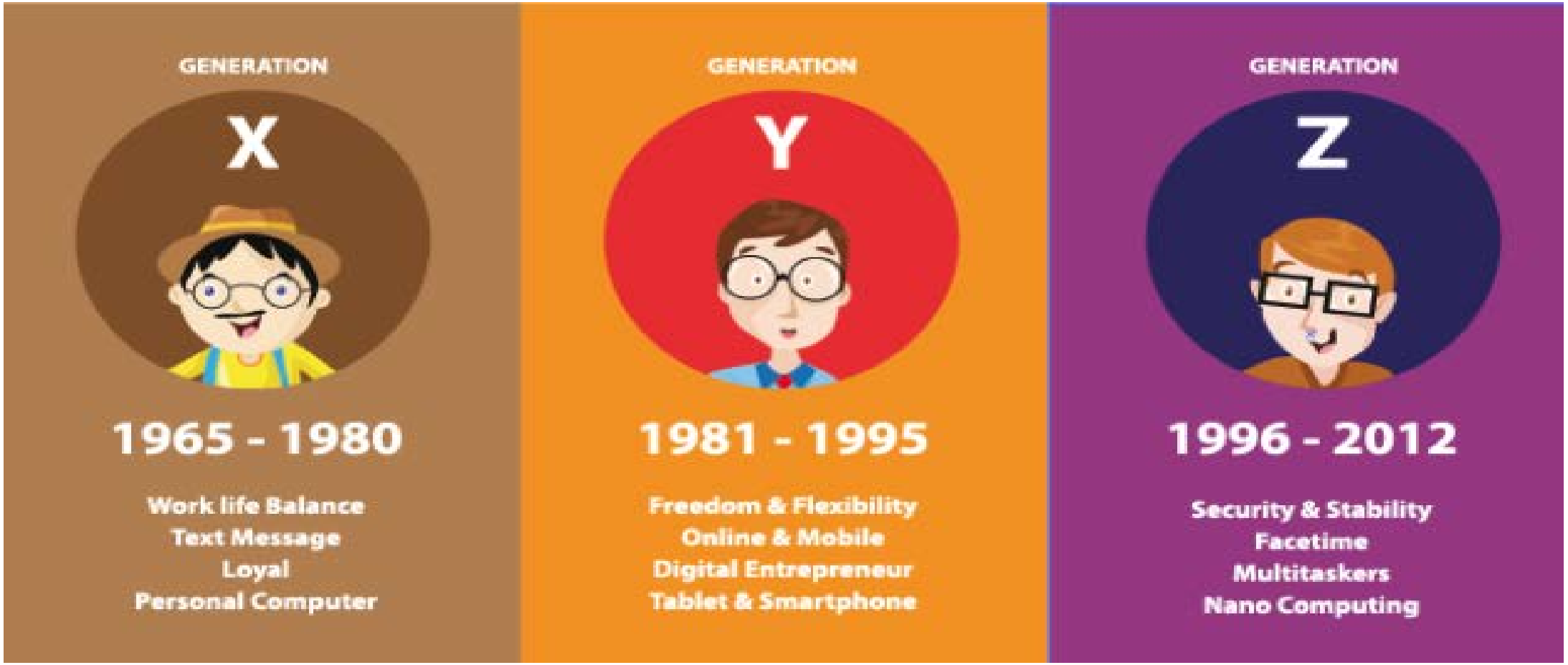
EPISODIC IMPAIRMENTS

- **IMPAIRMENT THAT IS EPISODIC OR IN REMISSION IS A DISABILITY IF IT WOULD SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY WHEN ACTIVE.**
- ***Hostettler v. Coll of Wooster,* 895 F.3d 844, 854 (6th Cir. 2018)**
- ***Cf. Trautman v. Time Warner Cable Texas, LLC,* 2017 WL 5985573 (W.D. Tex. Dec. 1, 2017)**

RELATIONAL OR ASSOCIATIONAL DISCRIMINATION UNDER THE ADA

- **(1) the plaintiff was "qualified" for the job at the time of the adverse employment action;**
- **(2) the plaintiff was subjected to adverse employment action;**
- **(3) the plaintiff was known by his employer at the time to have a relative or associate with a disability;**
- **(4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.**
- ***Hartman v. Lafourche Parish Hosp.*, 262 F. Supp. 3d 391, 398 (E.D. La. 2017).**

ACCOMMODATIONS: NEW MILLENIAL WORK FORCE WITH GENERATION Z COMING SOON



ACCOMMODATIONS: NEW MILLENIAL WORK FORCE WITH GENERATION Z COMING SOON

- ***Credeur v. Louisiana, through Office of Attorney General*, 860 F.3d 785 (5th Cir. 2017).**
- **Telecommuting for unlimited period of time is not reasonable accommodation when employer defines regular office attendance as an essential function of the job. Regulation lists 7 considerations in determining essential functions, and greatest weight is accorded to employer's judgment.**
- **Plaintiff's claim failed because she could not establish that she was a "qualified individual with a disability."**

REMEMBER: STILL MUST BE AN EMPLOYEE AND IN GIG ECONOMY THIS IS REAL ISSUE: DEPARTMENT OF LABOR OPINION LETTER APRIL 29, 2019

- **In Opinion Letter FLSA2019-6, issued on April 29, 2019, U.S. Department of Labor (DOL) has weighed in on the status of gig economy workers under the Fair Labor Standards Act (FLSA). The DOL concluded that the workers reviewed in the letter are independent contractors. This opinion may have a wide effect in jurisdictions that apply the FLSA in making determinations regarding independent contractor classifications and could portend a trend in some areas to extend independent contractor classifications.**
- **The DOL concluded that the company "empowers service providers to provide services to end-market consumers" and merely provides a referral service. According to the DOL, "as a matter of economic reality, they are working for the consumer," not the company providing the platform.**

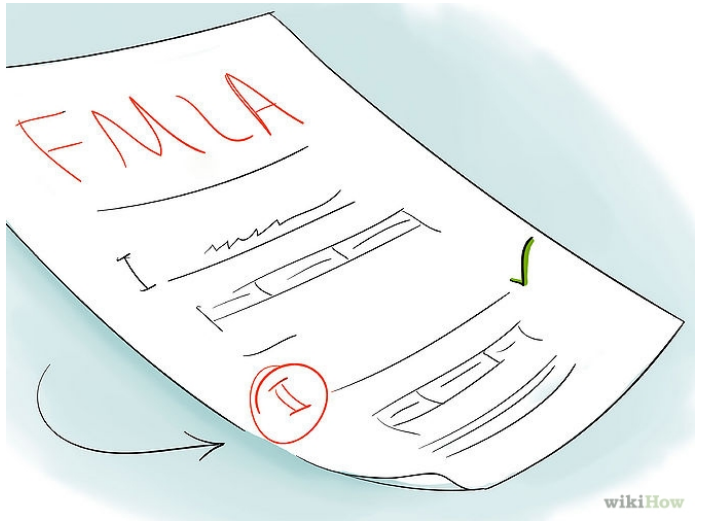
HOPES: FOR AMERICAN WITH DISABILTIES ACT

HISTORY FAMILY MEDICAL LEAVE ACT

WHAT IS THE FMLA?

A federal law that:

- **allows eligible employees of a covered employer to take job-protected, unpaid leave for up to a total of 12 work weeks in any 12 months.**



RATIONALE FOR FMLA

- **It is based in compassion and commonsense: family members should not have to fear losing a job when they have a serious health condition or have to care for a family member who has a serious health condition.**
- **It has been here since 1993, AND IT IS HERE TO STAY.**
- **"I was determined to move beyond the dead-end debate between entitlement and neglect to a policy of empowerment, 'a common sense path that offers more opportunity to families in return for more personal responsibility.' That meant, among other things, supporting initiatives that increased employment and strengthened families." Why I Signed the Family Medical Leave Act," Bill Clinton, Politico, February 13, 2013.**

FMLA ELIGIBILITY

- **COVERED EMPLOYERS: The FMLA only applies to employers that meet certain criteria. A covered employer is a:**
  - **Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;**
  - **Public agency, including a local, state, or Federal government agency, regardless of the number of employees it employs; or**
  - **Public or private elementary or secondary school, regardless of the number of employees it employs.**
- **ELIGIBLE EMPLOYEES: Only eligible employees are entitled to take FMLA leave. An eligible employee is one who:**
  - **Works for a covered employer;**
  - **Has worked for the employer for at least 12 months;**
  - **Has at least 1,250 hours of service for the employer during the 12 month period immediately preceding the leave; and**
  - **Works at a location where the employer has at least 50 employees within 75 miles.**

TYPES OF FMLA 12 WEEK, JOB PROTECTED LEAVE

- Leave for the birth of a son or daughter, and to care for the newborn child; or
- Leave for placement with the employee of a son or daughter for adoption or foster care; or
- Leave to care for the employee's spouse (now expanded definition), son, daughter, or parent with a “serious health condition;” or
- Leave needed because of a serious health condition that makes the employee unable to perform the functions of his or her job.

EMPLOYEE/EMPLOYER RIGHTS AND OBLIGATIONS

- **29 C.F.R. § 825.300 through 313 sets forth various rights and obligations of both employees and employers under the FMLA. Employers have the following four notice requirements:**
  - **General Notice – Employers must give employees notice of their rights under the FMLA, which is required to be both posted in the workplace and contained in the employee handbook or new hire packet. It can be transmitted or made available electronically. 29 C.F.R. § 825.300(a).**
  - **Eligibility Notice – Within five days after a request for leave by the employee or knowledge by the employer of a possible FMLA qualifying event, an employer is required to give eligibility notice to the employee. This basically notifies the employee that his leave may be FMLA qualifying and requests him to provide a medical certification from his doctor. 29 C.F.R. § 825.300(b).**

EMPLOYEE/EMPLOYER RIGHTS AND OBLIGATIONS

- **Rights and Responsibilities Notice – This one should be sent with the eligibility notice. It basically restates to the employee his rights under the FMLA and his responsibility to provide the completed medical certification within 15 days. 29 C.F.R. § 825.300(c).**
- **Designation Notice – Finally, the employer is required to send the employee notice of whether or not his leave is FMLA qualifying. Generally, this must be sent within five days after the employer receives the completed certification form from the doctor.**

EMPLOYEE/EMPLOYER RIGHTS AND OBLIGATIONS

- **The DOL has prepared forms for all of these notices, which can be obtained from the DOL website. The regulations dealing with medical certifications are contained in 29 C.F.R. § 825.305 through 313. These regulations also set forth the rules for obtaining clarifications of medical certifications.**
  - **An employer can generally require a fitness for duty certification as a prerequisite to restoring the employee to work. 29 C.F.R. § 825.312.**

FMLA -- SUCCESS STORY

- **The Department of Labor released findings of a survey titled *Family and Medical Leave Act in 2012: Final Report*, which shows that FMLA continues to make a positive impact on the lives of workers without imposing an undue burden upon employers and that employers and employees alike find it relatively easy to comply with the law (February 4, 2013)**
- **91% of employers report that complying with the FMLA has had either a positive effect or no noticeable effect on employee absenteeism, turnover and morale**
- **85% of employers report that complying with the FMLA is very easy, somewhat easy, or has no noticeable effect.**

FMLA -- SUCCESS STORY

- **Department of Labor released findings of a survey titled *Family and Medical Leave Act in 2012: Final Report*.**
- **Nearly 60% of employees meet all criteria for coverage and eligibility under FMLA.**
- **13% of all employees reported taking leave for a FMLA reason in the past 12 months.**
- **Employers reported the misuse of FMLA is rare.**
  - **Fewer than 2% of covered worksites reported confirmed misuse of FMLA.**
  - **Fewer than 3% of covered worksites reported suspicion of FMLA misuse.**

This remains true today!

AREAS OF CAUTION

- POLL of Society for Human Resource Management, July 2017
  - Inconsistent views of definition of “serious health condition”
  - Challenges with tracking intermittent leave
  - Chronic abuse of intermittent leave by rogue employees and notice requirements
  - Moral problems with employees asked to cover for absent employees
  - Costs associated with loss of productivity due to the absence of employee
  - Vague documentation of medical leave certification by health care professionals
  - Uncertainty about legitimacy of leave requests for employee’s episodic condition
- Post-2008 Amendments to the Americans With Disabilities Act – one can add extended leave as an accommodation under the ADAAA to this list.

DEFINITION OF "SERIOUS HEALTH CONDITION"

- **FMLA allows employees to take leave for "serious health conditions". "Serious health conditions" is a phrase to be interpreted broadly.**
  - **Covers "inpatient care" and "continuing treatment by a healthcare provider" 29CFR Section 825.114**

    "Inpatient care" refers to an overnight stay in a hospital, hospice, or residential medical facility (as well as related subsequent treatment).

    "continuing treatment"

    - **Period of incapacity of more than three consecutive calendar days (where person cannot attend work or school) AND that also involve multiple treatments by health care provider**
    - **OR a single health care provider treatment, plus a "regimen of continuing treatment" under a health care provider's supervision (could be as little as one round of medication that the employee will follow)**
    - **Any periods of incapacity relating to pregnancy or prenatal care**
    - **Chronic serious health conditions**
    - **Multiple treatments in various circumstances and**
    - **Treatments for long term condition in which treatment may not be fully effective.**

NOTICE REQUIREMENTS

- **Acker v. GM, LLLC, 853 F.3d 784 (5th Cir. 2017)**
  - **"an employee must comply with the employer's usual and customary notice and procedural requirement for requesting leave, absent unusual circumstances." 29 C.F.R. Section 825.302(d)**
  - **Plaintiff's failure to call in timely in accordance with the policy barred both his interference claim and retaliation claim under the FMLA**
  - **FMLA is not ADA "an employee seeking FMLA is arguing that he cannot perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he can perform the essential functions of the job" 853 F.3d at 791.**

NOTICE REQUIREMENTS

- ***Devoss v. Southwest Airlines Co.*, 903 F.3d 487 (5th Cir. 2018)**
  - **By failing to submit necessary paperwork within 15 days, the plaintiff lost her rights under the FMLA**

INTERMITTENT LEAVE

- **Block leave of 12 weeks, usually doesn't present too much of a challenge for employers. Intermittent leave, in contrast, presents many challenges for employers.**
- **Intermittent leave is FMLA leave that does not run concurrently or is for a period of less than an entire workday. Leave can be for a few days or a few hours. 29 CFR Section 825.203**
- **An employee may take intermittent or reduced schedule leave if he or a family member is incapacitated because of a serious health condition, because he/she is a military caregiver, or for a qualifying exigency.**
- **The certification must establish that intermittent leave is MEDICALLY NECESSARY.**
- **Intermittent leave is difficult for employers because once an employee gets a physician to certify that intermittent leave is medically necessary, the employee can take time off when needed (with some limitations).**

FMLA INTERMITTENT LEAVE -- KEEP IT IN PERSPECTIVE

- **24% A relatively small portion of leave taken for FMLA reasons is intermittent leave.**
- **Fewer than 2% of employees who take intermittent leave are off for a day or less.**

CONFUSION ABOUT INTERFERENCE AND DISCRIMINATION/RETALIATION CLAIMS

- ***Jackson v. BNSF Ry. Co,*** **2018 U.S. App. LEXIS 29890 (5th Cir. Oct. 23 2018)**
  - **Plaintiff attended a Beyonce' concert at her employer's luxury suite while on leave.**
  - **When contacted by her supervisor about this, plaintiff responded by saying that she had not been released by her doctor, but would answer any questions when she returned to work.**
  - **Employer terminated plaintiff based on belief of abuse of sick leave**
  - **Discussion of Interference v. Discrimination/Retaliation Claims by the Court is interesting.**

RETALIATION PROHIBITED

- **Prima Facie Case (when no direct evidence): Where there is no direct evidence of discrimination, the court applies the McDonnell Douglas framework. *Hunt v. Rapides Healthcare Sys. LLC*, 277 F.3d 757, 768 (5th Cir. 2001). Under this framework, employee must establish a prima facie case of retaliation by showing:**
  - **(1) he was protected under the FMLA; (2) he suffered an adverse employment decision; and either (3a) he was treated less favorably than an employee that had not requested FMLA leave; or (3b) the adverse decision was made because he took FMLA leave.**
- **Because of: Current question as to whether the but-for standard articulated in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013), which is employed in Title VII retaliation cases applies to FMLA cases. The Fifth Circuit has yet to decide whether *Nassar* applies to the FMLA context and is currently applying a motivating factor standard. *Richardson v. Monitronics International, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005); *Ion v. Chevron USA*, Inc. 731 F.3d 379, 390 (5th Cir. 2013); *Vincent v. Coll of the Mainland*, 2016 U.S. Dist. Lexis 135122, n. 31 (S.D. Tex. Sept 30, 2016).**
- **Legitimate Business Reason Articulated**
- **Plaintiff rebuts with preponderance of evidence to show pretext.**

IMPLEMENTATION -- RECENT DECISION

- ***Wilson v. Topre America Corp.*, 2018 WL 6625082 (S.D. Miss. Dec. 18, 2018)**

FMLA OFTEN OVERLAPS WITH ERISA

- ***Ariana M. v Humana Health Plan of Texas, Inc.*, 884 F.3d 246 (5th Cir. 2018) (en banc).**
- **29 U.S.C. Section 1002(1)**
- **29 U.S.C. Section 1132**
- **29 U.S.C. Section 1140**

HAPPENINGS: FMLA

DOL March 14, 2019 Opinion Letter

- On March 14, 2019, the DOL issued an opinion letter which raises some issues under the FMLA. Specifically, the DOL opined that an employer "may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation." This seems to be at odds with 29 C.F.R. § 825.207, which states that the "FMLA permits an eligible employee to substitute accrued paid leave for FMLA leave."
- The DOL attempts to address this apparent inconsistency by explaining in a footnote that "substitute" means that the paid leave runs concurrent with the FMLA leave. If that is correct, it would benefit employers by automatically prevent stacking of leave. However, it takes away the employee's choice.
- What is more troubling for employers is that the opinion letter goes on to state that an employer may also not designate more than 12 weeks of leave as FMLA leave. The EEOC has made it clear that some definitive extension beyond the 12 weeks required by the FMLA may be required as a reasonable accommodation under the ADA. If an employer extends the FMLA leave as part of its duty of reasonable accommodation, is the employer only allowed to count the first 12 for purposes of future leave under the rolling 12-month method?

WHAT HAPPENS WHEN ADA CLASHES WITH FMLA?

LEAVE AS AN ACCOMMODATION

- **Remember that disability is no longer difficult to prove – broadly interpreted.**
- **What does this have to do with employee leave? Leave may be a reasonable accommodation. Even leave in excess of what is required under the FMLA.**

POST 2008: FMLA V. ADA

DIFFERENCES BETWEEN FMLA AND ADA

- **FMLA: provides NO RECOGNITION of any hardship experienced by the employer from the exercise of FMLA leave.**
- **ADA: recognizes and concept of "undue hardship as defense to a claim of failure to "accommodate a qualified individual with a disability."**
- **There is no such defense in the FMLA, and it requires employers to comply with its obligations and protections just as they must comply with minimum wage statutes.**
- **FMLA definition of "employer" (50 or more employees) differs from the definition used by the ADA (15 or more employees).**

DIFFERENCE BETWEEN FMLA AND ADAAA CONTINUED

- The ADA does not impose the same eligibility requirements
  - A qualified employee may be entitled to leave as a reasonable accommodation even if
    - The employer has less than fifty – but at least fifteen – employees
    - The employee has not worked at the company for twelve months
    - The employee has not worked at the company for the requisite 1,250 hours
    - The employee has already exhausted twelve weeks of FMLA leave

"SERIOUS HEALTH CONDITION" V. "DISABILITY"

A "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

- **Inpatient care; or**
- **Continuing treatment by a health care provider, which requires absence for 3 full, consecutive calendar days of incapacity and a regimen of continuing treatment.**

Under the ADA, the term disability" means, with respect to an individual:

- **(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;**
- **(B) a record of such an impairment; or**
- **(C) being regarded as having such an impairment (as described in paragraph (3)).**

BOTH ARE TO BE BROADLY INTERPRETED

ESSENTIAL FUNCTIONS OF THE JOB

- An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's job.
- "Essential functions" in the FMLA context means the same thing as it does under the ADAAA:
  - Whether employees in the position actually are required to perform the function, and whether removing that function would fundamentally change the job.
- It does not mean total incapacitation, and an employee is considered to be unable to perform essential functions of the job when he or she is absent to receive or in preparation to receive treatment.
- The employer should include along with its request for medical certification of a serious health condition a description of the essential functions of the job and a request that the health care provider render an opinion as to whether the employee can perform them. 29 C.F.R. § 825.123.

ESSENTIAL FUNCTIONS OF THE JOB

- This is one area in which the FMLA and the ADA create confusion.
- For example, an employer may seek to accommodate an employee under the ADA by relieving him of certain duties.
- However, the FMLA gives the employee the right to take leave rather than accept the accommodation.

INTERACTION OF FMLA AND ADA

- ***Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1441 (2018).**
- **Whether employer violates ADA by refusing to grant long-term medical leave beyond what is required by FMLA.**
- **No. "The ADA is an anti-discrimination statute, not a medical leave entitlement."**

THE ADAAA: LEAVE AS A REASONABLE ACCOMMODATION

- **If an employee has a disability, an employer may be required to provide leave, even if the employee has exhausted FMLA leave.**
- **Is additional leave beyond the FMLA requirements always required by the ADA? No.**
- **Remember that indefinite leave is not a reasonable accommodation. The employee does not have to give a set return date, but must at least be able to give an estimate. The employee may also revise the return date. ("Reasonable accommodation does not require an employer to wait indefinitely for the employee's medical condition to be concluded" *Rogers v. Int'l Marine Terminals, Inc*. 87 F.3d 755 (5th Cir. 1996); *Reed v. Petroleum Helicopters Inc*., 218 F.3d 477,481 (5th Cir. 2000))**

HOW TO DETERMINE IF LEAVE IS A REASONABLE ACCOMMODATION UNDER THE ADAAA?

- **First, determine if the employee has made a request for a reasonable accommodation. Has the employee expressed a desire to return to work? Has the employee stated that additional leave will allow him/her to return?**
- **Second, conduct the interactive process with the employee. The ADA requires the employer to sit down with the employee and to discuss the possible accommodations that would allow the employee to perform the essential functions of his or her job. Are there any options other than leave? The employer must document this process including any accommodations proposed by the employee and the employer.**

  > ***EEOC v. Chevron Phillips Chem. Co. LP* 570 F.3d 621 (5th Cir. 2009) "[w]hen an employer does not engage in a good faith interactive process, the employer violates the ADA – including when the employer discharges the employee instead of considering the requested accommodations. *Picard v. Tammany Parish Hospital*, 423 Fed. Appx 467m 470 (5th Cir. 2011), failure of employer to engage in interactive process is not a per se violation if there was no reasonable accommodation available.**

- **Third, require the employee's physician to provide employer with responsive and complete verification for the need for leave. Does the physician believe that leave will allow the employee to return?**

HOW TO DETERMINE IF LEAVE IS A REASONABLE ACCOMMODATION UNDER THE ADA? (CONT'D)

- **Fourth, choose a reasonable accommodation and communicate it to the employee. Remember that the employee is entitled to a reasonable accommodation, not any reasonable accommodation he/she chooses. Does the employee's physician believe that employer proposed accommodation will enable the employee to perform the job? Has the employer documented why employer believe the accommodation is reasonable or why one is preferable to the other?**
- **Fifth, if employer is considering denying the request for an accommodation, employer must first analyze whether the accommodation would cause an undue hardship. Ask how the company will be harmed if the accommodation is not granted. What concrete costs will there be? Are the costs hypothetical and uncertain or likely? It is always advisable to discuss the decision to deny an accommodation with counsel prior to communicating it with the employee.**

HOW DOES EMPLOYER KNOW IF LEAVE IS A REASONABLE ACCOMMODATION?

- **Is attendance a required function of the employee's job? Has employer given leave to other employees?**
- **Is the job time-sensitive or are there other factors that make the leave an undue hardship on employer?**
- **Will leave ultimately enable the employee to perform the essential functions of his or her job?**
- **Does the employee's doctor certify that leave of a certain duration will get the employee back to work?**

HOPES: FAMILY MEDICAL LEAVE ACT

PAID LEAVE IS IN THE FUTURE

FMLA IS JUST THE TIP OF THE ICEBERG

- Recently there have been bi-partisanship efforts to provide for PAID FAMILY LEAVE.
- Family Friendly and Workplace Flexibility Act would allow employers and employees in the private sector to come to agreements where hourly workers could put overtime earned toward paid leave rather than extra compensation.
- "Countless Americans face the daily reality of having more to do with less time to do it, and though Congress can't legislate another hour in the day we can provide working Americans with more options for how to organize their time." Majority Leader Mitch McConnell, March 24, 2015.
- Similar legislation proposed by Senator Kirsten Gillibrand D-NY and Representative Rosa DeLauro D-Conn (would create a federal insurance program financed by payroll taxes on both the employer and employee to fund up to 12 weeks a year of paid leave for workers meeting certain family and medical requirements.)
- The Federal Employee Paid Leave Act (FEPLA) introduced in March 2019, House of Representatives by Representatives Steny Hoyer (D-MD), Carolyn Maloney (D-NY), Don Beyer (D-VA), and Jennifer Wexton (D-VA)

QUESTIONS, COMMENTS, DISCUSSION…

THANK YOU!

IT IS TIME FOR US TO LEAVE!