

EMPLOYMENT LAW ISSUES FOR CANCER PATIENTS AND SURVIVORS

By Jason Storck

Approximately 40 percent of the more than one million Americans diagnosed with some form of cancer each year are working-age adults. Nearly 10 million Americans have a history of cancer. These statistics underscore the importance of understanding legal rights and protections that exist in the workplace for cancer patients and survivors.

Highlighted below are the two federal employment statutes most relevant to those who have been diagnosed with cancer: the Family and Medical Leave Act (FMLA)¹ and the Americans with Disabilities Act (ADA).²

THE FAMILY AND MEDICAL LEAVE ACT

The FMLA provides eligible employees with the right to take unpaid family and medical leave under certain circumstances. The act is enforced by the U.S. Department of Labor (DOL) and applies to private employers with 50 or more employees.³

LEAVE ENTITLEMENT UNDER THE FMLA

To be covered by the FMLA, an employee must have been employed: (1) for at least 12 months by the employer from whom the leave is sought; (2) for at least 1,250 hours in the 12-month period immediately preceding the leave request; and (3) at a work site where the employer employs at least 50 employees within a 75-mile radius.⁴

Once an employee has met these basic eligibility requirements, he or she may request FMLA leave: (1) for the birth and care of a child or for the placement of a child for adoption or foster care; (2) for a serious health condition of the employee's spouse, parent, or child that requires the employee to miss work and care for the family member; or (3) for a serious health condition of the employee that prevents the employee from performing one or more of the essential functions of his or her position.⁵

INTERMITTENT AND REDUCED LEAVE SCHEDULE

Typically, employees will take FMLA leave for a specific period of time. However, where medically necessary, a reduced work schedule or intermittent leave is permitted.⁶ A reduced leave schedule may be used in a variety of situations, including where an employee is recovering from a serious health condition and needs to reduce his or her work schedule or hours. Intermittent leave is taken in separate blocks of time for a single qualifying reason and may be taken due to a serious health

condition that requires periodic medical treatments, such as chemotherapy.

During intermittent or reduced leave schedule, the employer may, in some cases, temporarily transfer the employee to an alternate position with equivalent pay and benefits to accommodate periods of leave or limited capacity.⁷ Once the intermittent or reduced leave is no longer needed, the employer must return non-key employees to the same or a substantially similar position.



NOTICE REQUIRED BY AN EMPLOYEE

Federal law does not require an employee to specifically mention the FMLA when requesting leave. However, the employee must give sufficient information to put the employer on notice that the requested leave may qualify as FMLA leave.⁸ Where the need for leave is foreseeable, the employee should give the employer at least 30 days' notice of the leave, including its duration.⁹ Otherwise, an employee must give notice as soon as practicable under the circumstances.

Once notice has been given, it is the employer's responsibility to inform the employee that the requested leave will be counted as FMLA leave within two business days of the request, absent special circumstances.¹⁰ The employer must also provide notice to the employee detailing the employee's obligations under the FMLA and the consequences for failing to meet them.¹¹

EMPLOYERS MAY SEEK MEDICAL CERTIFICATIONS OR EXAMINATIONS

An employer may require a medical certification from the employee's health care provider attesting to the serious health condition of the employee or relevant family member. The employer may not, however, seek more information than is contained in the DOL Form 380, which focuses on the specific condition at issue, including the date it began, its duration, the scope of any intermittent leave, and whether the employee can perform the essential functions of the job.¹²

JOB RESTORATION UNDER THE FMLA

A key aspect of the FMLA is the entitlement to job restoration. The FMLA requires employers to place non-key employees¹³ returning from FMLA leave in the same or a substantially equivalent position.¹⁴ An employee is normally enti-

tled to such restoration even where he or she has been replaced during the employee's absence. The position must have equivalent pay, benefits, and other terms and conditions of employment.

The restoration obligation is not absolute, however. For example, an employee is not entitled to restoration where he or she would not have remained continuously employed during the leave period (for example, where the position has been eliminated), or where he or she is unwilling or unable to return to work after the leave period (although this may qualify as a reasonable accommodation under the ADA).

THE AMERICANS WITH DISABILITIES ACT

Title I of the ADA prohibits employment discrimination against a qualified individual with a disability and offers protection for both current and prospective employees. Title I applies to private employers with 15 or more employees and is enforced by the U.S. Equal Employment Opportunity Commission (EEOC).¹⁵

DISABILITY UNDER THE ADA

The threshold issue in any ADA claim is whether the individual is "disabled" within the meaning of the act. Under the ADA, an individual is disabled if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities;¹⁶ (2) has a record of such impairment; or (3) is regarded as having such an impairment.¹⁷ For example, cancer may be a disability when it, or its side effects, substantially limits one or more major life activities, or where an individual is regarded as disabled due to having cancer, or where the individual is treated differently based on a past history of cancer.

Determining whether an individual is "substantially limited" in a major life activity requires a case-by-case assessment of the condition, including: (1) the nature and severity of the impairment; (2) its duration or expected duration; and (3) its permanent or expected permanent or long-term impact.¹⁸ In making this determination, courts will look at the individual's condition at the time of the alleged discrimination, including any corrective or "mitigating" measures utilized by the individual.

REASONABLE ACCOMMODATION UNDER THE ADA

A covered employer is required to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.¹⁹ A "qualified individual with a disability" is an individual who can perform the essential functions of the position, with or without a reasonable accommodation.²⁰

There are no magic words necessary to request a reasonable accommodation. Rather, the employee need only provide sufficient information to put the employer on notice that he or she needs an accommodation based upon a covered disability. Once the employee has requested an accommodation, an ongoing dialogue begins between the employee and employer focused on the need for and scope of a reasonable accommodation.

An employer is not, however, required to provide any accommodation resulting in an undue hardship, which is defined as an action requiring "significant difficulty or expense."²¹ As with many issues under the ADA, this is a fact-specific analysis focusing on: (1) the nature and cost of the accommodation; (2) the overall impact of such accommodation on operations of the specific facility at issue; (3) the overall financial resources and size of the business of the employer; and (4) the type of operation engaged in by the employer, including the composition, structure, and functions of the workforce.²²

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EXAMPLES OF REASONABLE ACCOMMODATIONS

Reasonable accommodations must be tailored to the specific individual. Indeed, there may be as many possible accommodations as there are individuals requesting them. Examples of such accommodations include: (1) job restructuring; (2) providing time off or a modified schedule (for treatment or other medical needs); (3) modifying a workplace policy; (4) reassigning non-essential functions to others; and (5) transferring the employee to a different (vacant) position.²³ The accommodation selected by the employer need not be the one the employee selects or prefers, as long as it is effective.

EMPLOYER MAY REQUEST REASONABLE MEDICAL DOCUMENTATION

An employer may request reasonable medical documentation in response to an accommodation request, including documents substantiating that the employee has a covered disability under the ADA and that he or she needs an accommodation.²⁴ Where the employee fails to provide sufficient documentation, the employer can request the missing information. The employer should explain why the previous documentation was insufficient and give a reasonable period of time for the employee to provide the information needed.

ENFORCEMENT OF LEGAL RIGHTS UNDER THE FMLA AND ADA

An individual who believes that he or she has been discriminated against and/or the subject of retaliation for asserting rights under the FMLA or ADA can institute litigation against the employer — although it is typically advisable for such individual to first notify and attempt to resolve the matter with the employer, usually through a complaint-reporting procedure.

Under the ADA, an individual (in Texas) will generally have 300 days from the alleged discriminatory incident to file a Charge of Discrimination with the EEOC, which is a mandatory prerequisite to bringing a private civil action.²⁵ Once filed, the EEOC will conduct an investigation and issue a determination as to whether there is “cause” to believe the alleged unlawful conduct took place. Thereafter, unless it elects to bring suit on its own, the EEOC will then issue a Notice of Right to Sue, upon request, allowing the individual to file a lawsuit within 90 days from receipt.²⁶

The FMLA does not have an administrative-exhaustion requirement. Rather, an employee may immediately proceed with a private civil action. However, the action must be filed within two years of the alleged violation (or three years for “willful” violations).²⁷ An individual may also notify the DOL of any potential FMLA violations, in which case the Secretary of Labor may investigate and thereafter bring an action against the employer directly.²⁸

The FMLA and ADA offer cancer patients and survivors a number of potential benefits and protections that span well beyond those discussed above. The key for such individuals (and employers) is awareness of such benefits and protections and how they may apply to any given situation.

NOTES

1. See 29 U.S.C. §§2601, 2611-19.
2. See 42 U.S.C. §§12101-17.
3. See 29 U.S.C. §2611(4)(A).
4. See 29 U.S.C. §§2611(2)(A)(i)-(ii) and (B)(ii); 29 C.F.R. §§825.110(a). It is also noteworthy that state law, collective bargaining agreements, and an employer's own leave policy may offer benefits more generous than those provided by the FMLA.
5. See 29 U.S.C. §2612(a)(1); 29 C.F.R. §825.112(a).
6. See 29 U.S.C. §2612(b); 29 C.F.R. §825.203(a) and (c).
7. See 29 U.S.C. §2612(b)(2); 29 C.F.R. §825.204(a)-(e).
8. See 29 C.F.R. §825.302(c); 29 C.F.R. §825.303(b).
9. See 29 U.S.C. §§2612(e)(1) and (2)(B); 29 C.F.R. §825.302(a)-(c).
10. See 29 C.F.R. §825.208(b)(1).
11. See 29 C.F.R. §825.301(b)(1).
12. See 29 U.S.C. §2613(b); 29 C.F.R. §825.306(a)-(c). A copy of the form is available on the DOL website: www.dol.gov.
13. A “key employee” is defined as a salaried employee who is among the highest paid 10 percent of all employees within a 75-mile radius of the work-site. See 29 U.S.C. §2614(b)(1); 29 C.F.R. §825.216(c); 29 C.F.R. §825.218(a). Key employees are not entitled job restoration if it would cause “substantial and grievous economic injury” to the employer's operations. See 29 U.S.C. §2614(a)(1); 29 C.F.R. §825.216(c); 29 C.F.R. §825.218(a).
14. See 29 U.S.C. §2614; 29 C.F.R. §825.214; see also 29 U.S.C. §2612(b) (intermittent and reduced leave schedule); 29 C.F.R. §825.204 (same).
15. See 42 U.S.C. §12111(5).
16. Major life activities are those activities that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, interacting with others, speaking, hearing, learning, sleeping, walking, breathing, eating, reproducing, and, in some cases, working.
17. See 42 U.S.C. §12102(2); 29 C.F.R. §1630.2(g).
18. See 29 C.F.R. pt. 1630 App., §1630.2(j).
19. See 42 U.S.C. §12112(b)(5)(A).
20. See 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(m).
21. See 42 U.S.C. §12111(10)(A).
22. See 42 U.S.C. §12111(10)(B); 29 C.F.R. §1630.2(p)(2).
23. See 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o)(2).
24. See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations under the Americans with Disabilities Act; 3 EEOC Compliance Manual (BNA) N:2363, N:2370 (2000).
25. See 42 U.S.C. §12117; see also 42 U.S.C. §2000e-5(e) (discussing the 300-day rule).
26. See 29 C.F.R. §1601.28.
27. See 29 U.S.C. §2617; 29 C.F.R. §825.400.
28. See 29 U.S.C. §2617.

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