MANAGING EMPLOYEE MEDICAL ISSUES AND LEAVE RECENT DEVELOPMENTS UNDER THE ADA, FMLA, AND PREGNANCY DISCRIMINATION ACT

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MANAGING EMPLOYEE MEDICAL ISSUES AND LEAVE RECENT DEVELOPMENTS UNDER THE ADA, FMLA, AND PREGNANCY DISCRIMINATION ACT

I. IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008 (ADAAA)

A. Purpose of the Amendments

Congress passed the original Americans with Disabilities Act in 1990. The law was intended to:

- Provide a clear national mandate for the elimination of discrimination against individuals with disabilities;
- Provide enforceable standards regarding discrimination against individuals with disabilities;
- Ensure the federal government plays a central role in enforcing the standards; and
- Invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment.

See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b). Courts originally interpreted the meaning of "disability" strictly, holding that people with a range of substantially limiting impairments were not disabled and did not qualify for protection under the law. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

In 2008, Congress amended the ADA to clarify its intention that "disability" be construed more broadly than the courts' previous interpretations. The revised law became known as the ADA Amendments Act (ADAAA). ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553 (2008). In passing the 2008 amendments, Congress overturned *Toyota Motor* and other decisions that had narrowly interpreted the definition of disability. *Id.*

The ADAAA retained the ADA's original definition of "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. However, it changed the way the definition of "disability" should be interpreted, requiring a lower degree of functional limitation than the standard previously applied by the courts. Under the new standard, the term "substantially limits" is construed broadly, and a particular impairment that limits one major life activity need not restrict other major life activities to be considered "substantially limiting." 42 U.S.C.A. § 12102(4) (2008). A major life activity includes but is not limited to caring for oneself, sitting, standing, walking, reaching, seeing, breathing, hearing, speaking, learning and working, and a long list of other activities.

Employers under ADAAA must conduct individualized assessments to determine whether a particular impairment "substantially limits" a major life activity for a particular employee. For practical purposes, employers should assume that an employee's impairment qualifies as a disability, and then begin identifying reasonable ways to accommodate the employee.

B. Attendance Policies That Violate the ADA

The EEOC is currently targeting employers who have inflexible no-fault attendance policies, which provide for automatic termination of an employee who misses a particular number of days or weeks of work. Under the ADAAA, an employer must engage in an interactive process with a disabled employee in order to determine how the employer can make accommodations, before automatically terminating the employee. 29 C.F.R. § 1630.2(o)(3) (2011) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the disabled individual in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."). In some cases, the accommodations might include allowing a disabled employee additional time off, beyond the days allowed under the attendance policy.

In 2011, a case involving the no-fault attendance policy of telecommunications giant Verizon Communications resulted in the largest disability settlement in EEOC history. *See* Press Release, U.S. Equal Employment Opportunity Commission, Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011). Verizon violated the ADAAA by refusing to make exceptions to its "no-fault" attendance policy and therefore failing to accommodate disabled employees. *Id*. Under the attendance policy, Verizon employees who accumulated a certain number of chargeable absences were placed on a disciplinary step that could ultimately lead to termination. *Id*. The EEOC took the position that Verizon should have made accommodations for people whose chargeable absences were caused by their disabilities, rather than disciplining or terminating them. *Id*. Offering paid or unpaid leave to an employee with a disability is a reasonable accommodation unless doing so would cause the employer significant difficulty or expense. *Id*.

The Verizon settlement underscores the importance for employers of reviewing attendance policies that fail to have reasonable flexibility when providing leave as an accommodation. No-fault attendance policies are still legal, but employers must be prepared to show they are willing to be flexible on a case-by-case basis, where additional absences may be considered a reasonable accommodation. Additional absence may not be a reasonable accommodation when the extra leave is for an unspecified, non-definite amount of time.

C. Learning Disabilities Covered under ADAAA

Learning disabilities are considered disabilities under the ADAAA. Employers should determine whether the disability affects the employee's ability to perform essential functions of the job. If it does, the employer should engage in the interactive process with the employee to determine what reasonable accommodations are available that would assist the employee. *See* EEOC, Informal Discussion Letter, Nov. 17, 2011. Moreover, if an applicant claims that a learning disability resulted in him not getting a high school diploma, but he is otherwise qualified to do the job, it is the EEOC's position that an employer should be flexible with its diploma requirements. *Id*. *But see Weaving v. City of Hillsboro*, 763 F 3d 1106 (9th Cir. 2014) holding that a police officer's ADHD was not an actual disability because he had developed compensatory mechanisms to minimize its effect on his career.

D. Obesity as a Disability

Under the 2008 amendments, obesity can be considered a disability, regardless of whether a person is morbidly obese. Morbid, or severe obesity alone qualifies as a disability under the ADA. *See EEOC v. Resources for Human Development, Inc.*, F. Supp. 2d, 2011 WL 6091560 (E.D. La. Dec. 2011) (holding "severe obesity qualifies as a disability under the ADA"). In *Anderson v. Kohl's Corp.,* 2013 WL 1874812 (W.D. Penn. 2013) the court refused to "definitionally exclude" obesity as a disability under the ADAAA where the obesity was "caused by an underlying physiological condition." However, even slight obesity could qualify as a disability under the 2008 amendments as long as it substantially limits a major life activity. *See* Equal Employment Opportunity Commission, Questions and Answers on the Notice for Proposed Rulemaking for the ADA Amendments Act of 2008, modified Sept. 23, 2009. The analysis is fact-specific, but obesity can be considered a disability because it can limit sleeping, walking, breathing, or other major life activities. *See id.* Summarized below are the *Resources for Human Development, Inc.* case cited above, as well as another recent cases in which the EEOC pursued employers who allegedly discriminated against obese employees.

- In April 2012, a nonprofit treatment facility in Louisiana allegedly fired a severely obese worker even though she was able to perform the essential functions of her job. *See* Press Release, U.S. Equal Employment Opportunity Commission, Resources for Human Development Settles EEOC Disability Suit for $125,000 (April 10, 2012). Lisa Harrison worked at Resources for Human Development, where she was in charge of a daycare where children stayed while their mothers received treatment for chemical dependencies. Ms. Harrison weighed 400 pounds when she was hired in 1999. By the time she was fired in 2007, she weighed 527 pounds. During motions for summary judgment prior to the settlement, a federal judge in Louisiana held that severe obesity itself is an impairment within the meaning of the ADA, regardless of whether it is caused by another physiological impairment. Severe obesity can rise to the level of a disability if it interferes with a major life activity such as breathing or walking, and other health problems resulting from obesity are disabilities themselves.
- In another 2012 obesity case, the EEOC sued BAE Systems Tactical Vehicle Systems, LP. The EEOC alleged that BAE fired an employee, Ronald Kratz II, because of his morbid obesity and because BAE Systems regarded him as disabled. *See* Press Release, U.S. Equal Employment Opportunity Commission, BAE Systems Subsidiary to Pay $55,000 to Settle EEOC Disability Discrimination Suit (July 24, 2012). The company did not engage in the interactive process or have conversations with Mr. Kratz to determine whether it could make reasonable accommodations that would allow him to continue to perform his duties. The EEOC said in an announcement of the settlement that the ADA protects obese employees, who should be allowed to work on the same basis as non-obese employees. *See id*.

E. The ADA Requirement That Employees Must Perform Essential Functions of Their Jobs Remains Intact in the ADAAA

Although the 2008 amendments represented a significant boost to plaintiffs' claims, courts have affirmed that the core tenant of the ADA still applies: an employee must be able to perform the central function of his job. The Tenth Circuit Court of Appeals in 2012 affirmed a motion for summary judgment in favor of the employer, also awarding attorney's fees, against the EEOC for filing a frivolous appeal when it

had not made its prima facie case that the employee could perform the essential functions of the job, with or without accommodation. *See*, *EEOC v. Tricore Reference Labs*, No. 11-2096 (10th Cir. 2012) ("The EEOC continued to litigate the failure-to accommodate and termination claims after it became clear there were no grounds upon which to proceed."). The EEOC claimed at the district court that Tricore violated the ADA when it failed to accommodate, and then fired a clinical lab assistant who had two surgeries on her feet and ankles. Despite numerous accommodations, the employee was unable to perform essential functions of her job, which included standing, climbing, stooping, and kneeling. The EEOC admitted in April 2010 that the employee could not perform the essential functions of her job, and the employer alerted the EEOC in June 2010 of the insufficiency of its claim. Yet the EEOC continued with its claims. By the time the EEOC appealed to the 10th Circuit, it no longer asserted that TriCore failed to accommodate, but only that it discriminated when it terminated her employment.

The Seventh Circuit Court of Appeals recently held that regular attendance remains an essential function of most jobs, even when the employer permits working from home on occasion. *Taylor-Novotny v. Health Alliance Medical Plans, Inc.* 772 F.3d 478 (7th Cir. 2014).

In *Palacios v. Continental Airlines* S.D. Tex. 2013, Plaintiff, an airline ticket sales agent, was fired for violation of the Airline's Friends and Family policy after an investigation into whether he was giving away plane tickets, not collecting fees from friends, and not accompanying passengers on international travel when they used his buddy tickets. He sued for disability discrimination in the termination and failure to accommodate his disability, major depression, during the investigation by allowing him more time to answer questions. The court found that his depression did constitute a disability under the ADA-AA, even though the plaintiff testified that the disease did not adversely affect his job performance, because of the severity of the symptoms, which affected his desire to work, eating, sleeping, and caring about his finances. However, the court held that plaintiff still loses the case, because he was unable to show that a non-disabled person was treated better, and that the company had a legitimate, non-discriminatory reason for the termination, which plaintiff was unable to prove were pretextual. As for the additional time to answer questions in the investigation, Plaintiff was unable to show this was a necessary accommodation, as even at the time of litigation, he was not able to point out any additional flaws in the allegations.

In *Neely v. PSEG Texas*, 5th Cir. 11/6/13, Plaintiff argued that the ADA-AA changes showed a congressional intent to eliminate the requirement that the plaintiff establish he is a "qualified individual with a disability" as a predicate to a discrimination or failure to accommodate claim. The Fifth Circuit Court of Appeals rejected this interpretation, stating that "though the ADA-AA makes it *easier* to prove a disability, it does not *absolve* a party from proving one."

However, under the "regarded as' prong of the statute, we should remember that the plaintiff does not have to prove the impairment is a disability to have a cause of action. As a practical matter, then, it is smart to attempt to accommodate health issues when possible, and not to adversely act on an impairment just because it may not qualify as a disability.

In *Milton v. TDCJ*, 5th Cir. 2013, Milton was a clerical worker responsible for looking for coded gang messages in inmate mail. After her termination for not providing medical documentation verifying FMLA leave, she sued for disability discrimination under the ADA, arguing that she was sensitive to scented candles and wall plug-ins. After plaintiff had returned to work from sinus surgery, plaintiff had requested accommodation informally and formally, that there be no candles or plug-in air fresheners, or other strong odors in her workplace. TDCJ denied her request, and gave her 90 days to find another position that could accommodate her sensitivity. However, she was denied several transfer requests, because the ADA coordinator found there was too much dust there, even though plaintiff had not claimed sensitivity to dust. She was then fired for failing to timely submit FMLA medical documentation. The Fifth Circuit Court of Appeals rejected her claim, however, because her sensitivity to scents was not an impairment that rose to the level of a disability under the ADA. "Milton's sensitivity to perfumed odors certainly caused her discomfort and inconvenience, but this condition was narrowly restricted in time and place and could be avoided in the larger context outside of the particular workplace at a particular employer…her disability could not, in totality, be called severe and . . . it simply did not rise to the level of a substantial impairment of the major life activity…of engaging in…work for which she was qualified." However, it is important to note that the decision was not based on the 2008 ADA Amendments Act, as the court stated the new definitions of disability should not be held retroactive to the events in this case which predated the change.

F. Reasonable Accommodation

The Fifth Circuit also held in 2013 that the duty to accommodate disabilities is not limited to accommodating the essential functions of the job, but also to access and benefits of employment. In *Feist v. State of Louisiana Dept. of Justice*, 5th Cir. 9/16/13, the court held that there need not be a nexus between

plaintiff's requested accommodation of a free on-site parking space to accommodate her osteoarthritis of the knee, and the essential functions of her job as an assistant attorney general. Providing reserved parking spaces may constitute a reasonable accommodation in some cases, even though the employee's essential functions did not include driving or parking.

The following requests are generally NOT considered required reasonable accommodations:

- Removal of essential job functions
- Creation of new jobs
- Providing personal need items such as glasses or canes
- Maintaining same pay and benefits after necessary transfer to part-time as accommodation
- Tolerating violations of conduct rules
- Indefinite leave

But see a recently settled lawsuit in California filed by the EEOC against a convenience store after it fired a diabetic employee who grabbed and ate a bag of chips in the midst of a hypoglycemic attack, without paying for it first. The employer settled for $180,000; the bag of chips sold for $1.37. (*EEOC v. Walgreen Co.* No. CV-11-04470 [N.D. Cal.]; and EEOC settlement press release: www.eeoc.gov/eeoc/newsroom/release/7-2-14b.cfm). The employer had an "anti-grazing" policy that it uniformly applied to all employees. The employer knew of plaintiff's condition and had accommodated her in other ways. The employer showed it suffered enormous yearly losses from employee theft, and that the longstanding and no-exceptions policy was required. The court had held that it was a jury question whether the disability was the cause of her misconduct and required an exception to the rule. Although other jurisdictions might have held differently, the case shows that careful consideration of each situation is a must, and that flexibility may sometimes be considered a reasonable accommodation.

Speaking of diabetes, a 2014 report from CDCP finds that more that 29 million people in the US have diabetes, or 9.3 percent of the population. Approximately 79 million adults in the US are at risk of developing diabetes, and 15 to 30 percent of these prediabetic people will develop type 2 diabetes within five years. Diabetes has been consistently found by courts to be a disability, and accommodating diabetes in the workplace can be a challenge.

G. Duty to Accommodate Extends Beyond Essential Job Functions

The Fifth Circuit Court of Appeals, in *Feist v. State of Louisiana Department of Justice,* (5th Cir. Sept. 2013), held that the state employer had a duty to accommodate a disabled employee's request for free on-site parking, based on her mobility limitations due to osteoarthritis. The employee, an assistant attorney general, did not have as essential job functions either driving or parking, but reasonable accommodation was still required so that she could have access to her office to perform her essential job functions.

H. The Interactive Process under the ADAAA

The ADA requires that the employer and employee engage in the "interactive process" to work together to identify a mutually agreeable accommodation. The employer should consult with the disabled employee to determine the job-related limitations and how those limitations could be overcome with reasonable accommodation. Once potential accommodations are identified, the employer may select the one that is most appropriate. The employer is not required to choose the accommodation that is the employee's first choice, but the employee's preference must be considered.

In *Huffman v. Turner Industries Group,* (E.D. La. 2013) the employer refused to hire the applicant due to a narcotic prescription for diagnosed anxiety, found to be a mental disability. The court denied the employer summary judgment and found a fact issue as to whether the employer failed to engage in the interactive process. The employer did not attempt to discuss with the applicant possible accommodations to the side effects of the medication.

In *Ellis v. Ethicon* (D.N.J. 9/21/10), the employer engaged in the interactive process with the employee and the employee suggested potential reasonable accommodations. In response, however, the employer rejected the suggestions as unreasonable, and did not resume the interactive process until contacted by the employee's attorney. The court held that the employer's concern about the impractibility of the accommodations did not relieve it of the responsibility to discuss other possible accommodations.

I. Stress as a Disability

Although workplace stress may rise to the level of a disabling condition, not all workplace stress meets that standard. Recently, a Texas federal court held that once an employee's FMLA leave had run out, the employer was not under a continuing obligation under the ADA to accommodate the employee at work through a temporary reduced work schedule. The employee claimed she was having trouble concentrating at work because her supervisor was

bullying her. The court concluded that while her anxiety may have been distressing to her, it wasn't disabling, and did not prevent her from performing jobs other than the specific one she had. *Adetimehin v. Healix Infusion Therapy*, No. 4:14-CV (S.D. Tex. 2015).

J. Sign Language as Reasonable Accommodation

The Second Circuit Court of Appeals held in May 2015 that an employer's accommodations for a software engineer's deafness were sufficient, even though the employer wanted a more extensive, alternative accommodation. In *Noll v. IBM* (2d Cir. 5/21/15), the employee sued IBM for refusing to accommodate the deaf employee by captioning all videos and providing transcripts for all audio files hosted on the corporate intranet. IBM had, instead, provided American Sign Language interpreters, in which the employee was fluent. The employee's sole complaint with this accommodation – that he had to look back and forth between the interpreter and his screen – did not, without more, make the accommodation unreasonable. Moreover, there is no duty to explore alternative accommodations with the employee when the accommodations provided were plainly reasonable.

II. NEW MILITARY REGULATIONS UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

In March 2013, revisions to the FMLA officially went into effect. Many employers had long since implemented most of the changes, which Congress first passed in 2010. The new regulations include but are not limited to the following changes:

- "Covered military member" was replaced with "military member" and the definition now includes members of the National Guard and Reserves, as well as the regular Armed Forces;
- "Active duty" now requires deployment to a foreign country;
- The definition of serious injury or illness for a current servicemember is expanded to include injuries or illnesses that existed before active duty and were aggravated by active duty;
- Changes in definitions of covered injury and illness for veterans; and
- Expansion from five to 15 days of qualifying exigency leave.

A complete listing of the changes found in the 2013 regulations can be found at www.dol.gov.

A. Leave Fraud

In a Sixth Circuit Court of Appeals case, an employee took FMLA leave for back pain and she submitted paperwork from her doctor that she would be "completely incapacitated during intermittent flare-ups." During one of these alleged "flare-up" periods, the employee attended a local Polish heritage festival for over eight hours, and she and her friends posted numerous pictures of her enjoying herself. After the employer completed an investigation, during which the employee could give no explanation other than she didn't know she shouldn't go to festivals when claiming complete incapacitation, the employee was terminated. The employee sued her employer for interfering with her right to take FMLA leave and retaliation. *Jaszczyszyn v. Advantage Health Physician Network*, 2012 WL 5416616 (6th Cir. Nov. 7, 2012). The appellate court affirmed summary judgment in favor of the employer, finding the employer conducted a fair investigation and was able to use the "honest belief" defense to the employee's retaliation and interference claim. The court further found there was no causal connection between the termination and the protected FMLA activity.

Be careful, though, when the posted activity is not necessarily inconsistent with the reason for the leave. Suppose an employee is on FMLA leave for depression and severe stress. The health care provider has certified that the employee should not work for several weeks. The employee then posts photographs of himself on vacation at a beach. The doctor will likely testify that the beach vacation was helpful to the employee's recovery, and was not inconsistent with the reason for the need to be off work. The employer could find itself in legal trouble for terminating the employee for FMLA fraud. On the other hand, if the employee is off work for leg pain and is seen on Facebook playing beach volleyball, the employer may have a case for fraud.

In a recent Seventh Circuit Court of Appeals opinion, an employee's retaliation claim was allowed to go forward after her employer discovered she took FMLA leave to take her elderly, dying mother to Las Vegas for one last vacation. The employee used her FMLA time to join her mother for shopping, playing the slots, and dining, but she also administered her mother's medications, bathed her, and cared for her just as she did at home. The court found that caring for her mother's medical needs could legitimately take place on a recreational vacation, even when the purpose of the trip was not to receive medical treatment. *Ballard v. Chicago Park District*, No. 13-1445 (7th Cir., January 28, 2014). The case conflicts somewhat with the holdings of the Fifth and Ninth Circuits, but may be factually distinguished based on the level of medical care provided by the employee to

the traveling family member. *Tellis v. Alaska Airlines, Inc*., 414 F.3d 1045 (9th Cir. 2005) (emphasizing that caring for a family member under the FMLA involves some level of participation in on-going treatment); *Tayag v. Lahey Clinic Hospital., Inc.*, 632 F.3d 788, 791 & n.2 (1st Cir 2011) (denying FMLA coverage for a healing pilgrimage to the Philippines and noting that the employee "properly does not claim that caring for her husband would itself be protected leave" if they traveled "for reasons unrelated to medical treatment of [her husband's] illnesses"). In rejecting the employer's reliance on these cases, the Seventh Circuit surmised that the conclusions in those cases did not follow the plain reading of the FMLA and its regulations which do not require that care for the family member be related to ongoing treatment nor place any geographic limitation on the care. Moreover, the FMLA regulations allow for leave to provide "psychological comfort" to covered family members. *29 C.F.R. §825.124(a)* ("The medical certification provision than an employee is needed to care for a family member. . . encompasses both physical and psychological care, . . . and also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition. . .")

Recent court decisions have strengthened employers' ability to curb FMLA abuse, especially where the employer has a policy that limits travel while on sick leave. In 2012, the Third Circuit Court of Appeals approved enforcement of an employer's policy restricting employees to their home areas during paid sick leave, and affirmed summary judgment in favor of the employer. *Pellegrino v. Communications Workers of America,* No. 11-2639 (3d Cir. 4/19/12). The employee was approved for four weeks of FMLA leave to have a hysterectomy. Her FMLA leave was to run concurrently with paid sick leave. She had the surgery, then two weeks later traveled with friends to Cancun for a week. The employer learned of the trip and terminated her upon her return to work. The employee sued for wrongful termination under FMLA, saying she was still on leave when she took the trip, and had a doctor submit a letter saying the trip was not inconsistent with her recovery. The court didn't buy it, and held the termination was legal because her travel violated the company's paid sick leave policy, which required employees to "remain in the immediate vicinity of their home during the period of such leave." The policy permitted exceptions to this rule if employees made a written request prior to travel, but Pellegrino made no such request.

The *Pellegrino* court cited other appellate court precedent, stating: "'[E]very discharge of an employee while she is taking FMLA leave interferes with an employee's FMLA rights.' *Bacon v. Hennepin Cnty. Med. Ctr*., 550 F.3d 711, 715 (8th Cir. 2008) (quoting *Throneberry v. McGehee Desha Cnty. Hosp*., 403 F.3d 972, 980 (8th Cir. 2005)). However, "an employer generally does not violate the FMLA if it terminates an employee for failing to comply with a policy requiring notice of absences, even if the absences that the employee failed to report were protected by the FMLA." *Twigg v. Hawker Beechcraft Corp*., 659 F.3d 987, 1008-09 (10th Cir. 2011). That is because taking FMLA leave generally does not affect an employee's obligations under non-FMLA company policy."

Having some type of travel-restriction during paid sick leave policy in place is recommended, and may provide an employer with a clear policy violation it can point to when an employee vacations while on leave. Such a policy might include a requirement for employees to remain in the area of their home or medical service provider during leave, to call in every few days while on paid sick leave to report their status, or to call at regular intervals when traveling for approved treatment. The policy should also require employees to check in with HR if out-of-town medically necessary travel is needed. Just be sure to enforce the call-in policies equally with respect to employees using paid sick leave while on FMLA and non-FMLA leave. When an employee is not using paid sick leave concurrently with FMLA, though, such a policy would not help the employer.

Even without a policy, you can still investigate suspected FMLA abuse when you have reason to believe the employee's travels are inconsistent with the reason for leave. Use a similar analysis when an employee is working another job while on unpaid FMLA leave – are the duties of the second job inconsistent with the medical reason leave?

B. Contacting Employees on FMLA

A 2015 Fifth Circuit Court of Appeals case has confirmed that an employer may contact an employee on FMLA leave without illegal interference with the employee's right to take leave, so long as the contact is short, specific and infrequent. In *Bryant v. Texas Department of Aging*, No. 14-20278 (5th Cir. 2015), an employee had taken FMLA leave to care for her husband after his surgery. The employee claimed her supervisor called her several times during her leave, but was unable to recall the subject matter or specific length of each call. She said the calls may have lasted between 5 minutes and 30 minutes each. She was later discharged for reasons unrelated to FMLA, but sued for interference with her rights during her leave. The Fifth Circuit Court of Appeals held that because the calls were brief and did not require the employee to do any substantial work during her leave, only answer a few questions, they did not unlawfully interfere with her right to take FMLA leave.

But see, a recent federal district court case out of Texas, where an employee on full-time FMLA leave to care for her mother alleged her supervisor continued to call and email her, required her to perform substantive work assignments, and to drop off files at the office. The employee estimated being requested to perform a total of 20 to 40 hours of work during her leave. The court found that the work assignments, if true, could constitute illegal interference with the employee's FMLA leave entitlement, stating: "reasonable contact limited to inquiries about the location of files or passing along institutional or status knowledge will not interfere with an employee's [FMLA] rights; however, asking or requiring an employee to perform work while on leave can constitute interference." *Smith-Schrenk v. Genon Energy Systems*, CA H-13-2902 (S.D. Tex. 1/12/15).

C. What's an "Overnight Stay" for Purposes of FMLA Coverage?

The FMLA Regulations (29 CFR 825.114) provides that a health condition is "serious" for FMLA qualification purposes if it requires "an overnight stay in a hospital, hospice, or residential medical care facility." In a recent Third Circuit Court of Appeals case, the court addressed whether a hospital stay qualifies for FMLA protection if the employee is admitted to the hospital on the same "calendar day" as he is discharged. The employee left his worksite in the afternoon with chest pains, and, although he arrived at a hospital before midnight, he was not admitted until after midnight. He was discharge the following evening, on the same calendar day of the admission. The next day, the employee was fired for walking off the job. The trial court had used a "sunrise to sunset" definition of a "day," which the appellate court rejected in favor of the employer's "calendar day" approach, which was not reliant on the time of year and location on the earth. In addition to the requirement that the stay span two calendar days, the stay must also be a minimum of eight hours to be considered a serious health condition under the "overnight stay" definition. Waiting time before admittance is not included in the calculation. *Bonkowski v. Oberg Industries*, (3d. Cir. 5/22/15).

D. ADA, FMLA, and Drug Rehab

In *Shirley v. Precision Castparts Corp.* 5th Cir. 2013, *e*mployee twice entered in-patient rehabilitation programs for prescription drug abuse, and both times left after detox but before completing the treatment phase. The employer terminated him after he prematurely left the program the second time, and Plaintiff sued under ADA and FMLA. The Fifth Circuit affirmed the summary judgment in favor of the employer, and held that merely entering a rehab program does not automatically trigger the safe harbor provision of ADA. Current users in rehab are not absolutely protected from termination. Because of the employee's recent history with drugs (as opposed to long past addiction problems) and the prior incomplete program, the employer had good reason to believe that the illegal drug use would continue after the second failed rehab stint. Moreover, the FMLA did not guarantee reinstatement because the drug abuse provided a justification for termination unrelated to FMLA leave. The employee would have been subject to termination but for his FMLA leave. FMLA leave does not guarantee reinstatement if the employee is not still eligible for the position. Here, eligibility required successfully completing rehab. Finally, the court confirmed that abusing legal prescription drugs qualifies as "illegal" drug use.

III. PREGNANCY RESTRICTIONS AND LIGHT DUTY ACCOMMODATION

In July 2014, the EEOC issued guidance stating that employers must accommodate pregnancy-related conditions at work no different from accommodation of disabilities and workers' compensation injuries. There was much controversy surrounding this guidance, with employer groups arguing that pregnancy is temporary, therefore not a disability, and should not require accommodation such as light duty, unless pregnancy is singled out for exclusion. On March 25, 2015 the United States Supreme Court held that such light-duty policies discriminated against pregnant employees, unless the employer could show that the policy placed no unjustified "significant burden" on pregnant employees compared to others. *Young v. UPS*, 135 S. Ch. 1338 (2015).