FEDERAL LAWS GOVERNING LEAVES OF ABSENCE: FAMILY AND MEDICAL LEAVE ACT, PREGNANCY DISCRIMINATION ACT AND THE AMERICANS WITH DISABILITIES ACT: A PRIMER

By
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Employers facing employee requests for leave from the job confront a confusing array of federal statutes that address somewhat different needs and, therefore, approach the question of leave from radically different perspectives. Employers attempting to fashion leave policies and respond to employee requests for leave need to be aware of the interplay of these laws, as well as the interplay of state leave, disability, pregnancy, and workers’ compensation laws.1 This paper outlines the relevant provisions of the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA).

Basic Statutory Provisions

Pregnancy Discrimination Act

The EEOC, as early as 1972, had taken the position that policies or practices that adversely affect female employees because of pregnancy, childbirth and related medical conditions constitute disparate treatment because of sex in violation of Title VII.2 The EEOC established Guidelines on Discrimination because of Sex.3 These guidelines state that disabilities related to pregnancy, childbirth or related medical conditions “shall be treated the same as disabilities caused or contributed to by other medical conditions” under any insurance or leave plan.4

In 1974, the Supreme Court first rejected a challenge to a state disability plan that excluded pregnancy on constitutional grounds.5 The Court reasoned that legislative

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classifications based on pregnancy were not necessarily sex-based distinctions absent a showing that they were a pretext for such discrimination. In 1976, squarely rejecting the EEOC’s 1972 Guidance, the Supreme Court decided the case of General Electric Co. v. Gilbert, wherein the Court determined that an employer disability benefits plan that excluded pregnancy-related disabilities did not violate Title VII of the Civil Rights Act of 1964 because it did not discriminate because of sex. The Supreme Court refused to infer that excluding pregnancy from the list of covered disabilities was a pretext for discriminating against women.

In 1978, following a barrage of criticism, Congress passed the Pregnancy Discrimination Act (“PDA”), disavowing both the holding and reasoning of Gilbert. It amended Title VII by adding pregnancy to the definition of sex discrimination. The language of the PDA itself requires that women, because of or on the basis of pregnancy, childbirth, or related medical conditions, “be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work . . . .”

The PDA provides that employers of 15 or more employees may not discriminate against employees or applicants who are or may become pregnant. This law is administered by the EEOC which has issued regulations implementing the law.

Under the PDA, discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. An employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she is able to perform the major functions
of her job. An employer cannot refuse to hire her because of its prejudices against pregnant workers or the prejudices of co-workers, clients or customers.

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, an employer may use any procedure used to screen other employees' ability to work. If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer may not have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth. Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.

For purposes of our leave discussion, pregnancy must be treated the same as other short-term disabilities. This means that employers that have sick leave or other leave policies must administer them equally for pregnant women. Unlike the FMLA, the PDA, which was focused on treating pregnancy like any other medical condition needing short-term time off, does not apply to maternity leave for periods unrelated to the pregnancy. So, for example, time off for adoption, care of sick newborns, or time for bonding with newly born children are not protected under this statute.

Americans with Disabilities Act
In 1990, Congress enacted the Americans with Disabilities Act (ADA).\textsuperscript{23} It applies, like other federal civil rights acts, to all employers employing 15 or more.\textsuperscript{24} This law is administered by the EEOC which has issued regulations implementing the law.\textsuperscript{25}

The ADA prohibits covered employers from discriminating against a “qualified individual with a disability” with respect to any term, condition or privilege of employment.\textsuperscript{26} In seeking to apply and interpret the ADA, close attention must be paid to the definitions in order to assess whether the ADA applies and to identify its requirements. The ADA does not prohibit employment discrimination against all disabled individuals. This distinguishes the ADA from other federal discrimination statutes. The ADA prohibits employment discrimination against a “qualified individual with a disability.”\textsuperscript{27}

There are two parts to this definition. First, the individual must fall within the definition of “disability.” A “disability” is defined as a physical or mental impairment that substantially limits one or more of an individual’s major life activities; a record of such an impairment or being “regarded as” having such an impairment.\textsuperscript{28} “Major life activities” include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, or learning.\textsuperscript{29} This list is not exhaustive. An individual is “substantially limited” if she or he is unable to perform a major life activity that the average person in the general population can perform or if she or he is significantly restricted as to the condition, manner, or duration under which she or he can perform the activity.\textsuperscript{30} Temporary conditions, viewed as of short duration, such as a broken leg, bronchitis, or the flu, are not, absent complications, covered.\textsuperscript{31} Pregnancy is not an ADA impairment.\textsuperscript{32} Individuals who currently engage in illegal use of drugs or alcohol also are not considered disabled under the ADA, although alcoholism and drug addiction can be viewed as impairments.\textsuperscript{33}
In addition to falling within the definition of "disability," the individual must also be "qualified." This means that the individual must be able to perform the essential functions of the job, with or without "reasonable accommodation." Title I of the ADA requires employers to provide "reasonable accommodation" to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. In general, an accommodation is any change in the work environment or in the way that things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Reasonable accommodations must be provided to qualified individuals with a disability regardless of whether they work part-time or full-time and regardless of length of service.

As part of a series of cases limiting the scope of the ADA, the Supreme Court has held that the ADA allows employers to consider corrective or mitigating measures when determining whether an employee is disabled, such as eyeglasses, medication, etc. This means that an individual with serious sight problems that are corrected with glasses or an individual with severe depression controlled by medication can fall entirely outside the ADA's prohibition against discrimination, although they may still be protected by the "regarded as" prong of the definition of "individual with a disability." As discussed below, there is a move in Congress to overturn these cases and expand the coverage of the ADA.

The ADA requires that the employer and the employee engage in an informal, interactive process regarding the accommodation. One important fact always to be assessed is what the employer knows. In the first instance, the individual with a disability has to indicate a need for an accommodation. However, that is not always necessary where the employer knows of the disability and sees that there is a problem with the employee's performance. In that instance, the
burden may be on the employer at least to ask the employee if there are any accommodations necessary. It is important to note, however, that if the employer does not know that a disability is present, it cannot assume that there is a disability and ask the employee whether there is a need for reasonable accommodation. Most employers confine their questions to asking whether there is any reason why the employee cannot perform the essential functions of the job and leave it to the employee to respond that he or she may need some accommodation. The purpose of the interactive process is to identify the limitations the employee is facing and the range of reasonable accommodations that could overcome those limitations.  

There are many types of reasonable accommodations. Some involve modifications to the work environment or adjustments in how and when a job is performed. These can include making existing facilities accessible, job restructuring; part-time or modified work schedules, reassignment to a vacant position, acquiring or modifying equipment, changing examinations, training materials or policies, providing qualified readers or interpreters and other similar accommodations. For the purposes of this discussion, it is important to understand that unpaid medical leave is a reasonable accommodation and must be provided to an otherwise qualified individual with a disability. The ADA itself does not set any standards as to the amount of leave that is required for a reasonable accommodation under the ADA.  

A reasonable accommodation should enable the individual to perform the essential functions of the position. An employer does not have to eliminate an essential function or lower production standards. A qualified individual with a disability is not required to accept an accommodation which such individual chooses not to accept. If such individual, however, rejects a reasonable accommodation, and cannot as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual.
with a disability. Further, the accommodation does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated.

The only statutory limitation on an employer’s obligation to provide “reasonable accommodation” is that no such change or modification is required if it would cause “undue hardship” to the employer. The term “undue hardship” means an action requiring significant difficulty or expense. In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include the nature and cost of the accommodation, the overall financial resources of the facility, the overall financial resources of the covered entity, and the type of operations of the covered entity. The concept of the undue hardship is not limited to financial difficulty, and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive or that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would constitute an undue hardship. The ADA’s requirements regarding reasonable accommodation and undue hardship supersede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA.

As indicated earlier, in 1999, the Supreme Court decided three decisions that sharply curtailed the reach of the ADA, Sutton v. United Airlines, Inc., Murphy v. United Parcel Service, Inc., and Albertson’s Inc. v. Kirkingburg. The Court, rejecting Department of Justice and EEOC regulations, held that the question of whether an individual is disabled can only be determined after taking into account remedial measures, such as medication. Thus a diabetic whose disease is controlled by medication or a person who wears glasses may be viewed as not
even having a disability and therefore would not have protection against discrimination. In 2002, the Court decided *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, holding that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled . . . ." It further held that to be substantially limiting an individual must have an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives."

Congress has before it legislation which would expressly overturn these cases. The legislation would reject the mitigation ruling of *Sutton*, along with its limiting view of the third prong of the definition of disability. The legislation seeks to clarify the law, restoring the scope of protection available under the ADA. It would amend the definition of "disability" so that people who Congress originally intended to protect from discrimination are covered under the ADA. It would prevent courts from considering "mitigating measures" such as medication and eyeglasses when determining whether a person qualifies for protection under the law. Additionally, it adopts a new definition of "substantially limits" that would overturn the *Toyota* standard.

**Family and Medical Leave Act.**

Congress enacted the Family and Medical Leave Act (FMLA) in 1993. It is administered by the Department of Labor which has issued regulations implementing the law. Under the FMLA, an eligible employee may take up to twelve workweeks of unpaid leave during any twelve month period for one or more of the following reasons: (1) the birth of a child and in order to care for the newborn child; (2) the placement of a child with the employee through adoption or foster care; (3) to care for the employee’s spouse, son, daughter, or parent with a
serious health condition; or (4) a "serious health condition" that makes the employee unable to perform the functions of his or her job. In order to be eligible for leave, an employee must work at a worksite with fifty or more employees or for an employer who has fifty or more employees within seventy-five miles of that worksite; have worked for that employer at least twelve months; and have worked at least 1250 hours over the previous twelve-month period. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

An eligible employee has a right to an intermittent leave or leave on a reduced schedule for the employee’s own serious health condition or to care for a family member with a serious health condition, if medically necessary. When the leave is foreseeable based on planned medical treatment, an employer may transfer an employee to an alternative position with equivalent pay and benefits that better accommodates the leave schedule.

An eligible employee who takes leave under the FMLA is entitled to be reinstated to the same position the employee had when leave commenced or to an equivalent position, with equivalent benefits, pay and terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee’s absence. However, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. The FMLA guarantees reinstatement of the employee at the conclusion of the leave to the same or an equivalent position, unless the employee is a "key employee." A "key employee" will not be entitled to reinstatement if the employer can show grievous economic harm, although this is a standard that most employers have found extremely difficult to meet.
By statute, FMLA leave is unpaid. Employees may, however, choose to use their employer-provided paid leave to fund all or a part of their FMLA leave. Similarly, employers may require that available paid leave be taken concurrently with the FMLA leave. Under the FMLA, employers may require that employees who have paid leave use the leave simultaneously, so that the paid leave does not extend the twelve weeks of leave. In contrast, some states do not permit the employer to impose that choice. In the District of Columbia, for example, unlike under the FMLA, an employer subject to the DCFMLA generally may not require the employee to use his or her paid leave while on DCFMLA leave. An employee may, at his or her election, take available paid vacation or sick leave while on DCFMLA leave in order to receive pay during the leave. If an employee elects to take paid leave while on DCFMLA leave, the paid leave and the DCFMLA run concurrently and the employee is not allowed to "tack on" a full sixteen weeks of unpaid DCFMLA leave after the employee’s paid leave is exhausted. The FMLA does not supersede any provision of state or local law that provides greater family or medical leave rights than those provided by the FMLA.

An employee must provide the employer at least thirty days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. When the approximate time of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. An employer may require that the need for leave for a serious health condition of the employee or the employee’s immediate family member be supported by a certification issued by a health care provider. The
employer must allow the employee at least fifteen calendar days to obtain the medical certification.  

Under the FMLA, pregnancy constitutes a “serious health condition,” entitling the employee to up to twelve weeks of leave. If, however, the employee has exhausted all of her yearly FMLA leave for other reasons, she will not be allowed to use FMLA leave for the pregnancy. Conversely, if she uses it for pregnancy, no additional leave will be available for other FMLA-qualifying purposes.

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 (NDAA). The NDAA amends the FLMA to allow for “servicemember” family leave. The statute allows “an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member” to take up to “26 workweeks of leave during a 12-month period to care for the service member.” The NDAA also allows an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." By its express terms, this provision of the NDAA is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." The Department of Labor is currently working on such regulations. In the interim, the Department of Labor has indicated that it encourages employers to provide this type of leave to qualifying employees.

The FMLA prohibits using the taking of leave in making employment-related decisions. It prohibits retaliation against employees who exercise their rights under the statute. An employer may not “discharge or in any other manner discriminate against any individual for
opposing any practice made unlawful" by the FMLA. This, of course, includes the act of requesting leave.

**Overlapping Leave Issues**

**Pregnancy v. Bonding or Child Care Leave**

The PDA requires only that pregnancy must be treated like other short-term disabilities. The PDA is a floor not a ceiling and it does not prevent an employer from providing more generous leave for pregnancy. In *California Federal Savings and Loan Association v. Guerra*, the Supreme Court ruled that in passing the PDA, “Congress intended to construct a floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise.”

This does not apply to bonding leave, however. In *Schafer v. Board of Public Education of the School District of Pittsburgh, PA*, the Third Circuit was asked to determine whether a provision in a collective bargaining agreement allowing only female teachers leave for child rearing contravened Title VII. The Third Circuit determined that it did. The Court analyzed the question under the Supreme Court’s holding in *Guerra* and determined that *Guerra* permits favorable treatment when the disability is related to pregnancy but not when the leave is related to bonding or childcare. The EEOC issued policy guidance approving the position in *Schafer*, concluding that Title VII prohibits employers from establishing policies that treat male and female employees differently when requesting leave to care for a newborn. In *Pearlstein v. Fairfax County*, the Court determined that neither the PDA nor Title VII protected an employee on leave to adopt a child because her leave was childcare leave and not related to a period of disability.
Initiating Leave: The Notice Requirement

Under the ADA, the individual employee is generally obligated to seek a reasonable accommodation, including leave. Under certain circumstances, generally where the disability is known, an employer may initiate the process where performance difficulties exist. Under the FMLA, when the leave is foreseeable, the individual is supposed to provide the employer at least 30 days advance notice. When the need to take FMLA leave is not foreseeable, the notice requirement for intermittent leave is that notice be given "as soon as practicable" this typically means at least verbal notice to the employer within one or two business days of learning of the need to take FMLA leave.

Under the FMLA, the individual has no obligation to designate leave as “FMLA” leave when requesting leave. The employee should provide sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons. The employee need not mention the FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed.

In all circumstances, it is the employer's responsibility to designate leave taken for an FMLA reason as FMLA leave. The designation must be based upon information furnished by the employee or the employee's representative. The employer that seeks to limit the FMLA leave to 12 weeks needs to be sure that it follows the designation and certification requirements when leave is requested so as to be able to designate the leave as FMLA leave, thus triggering the 12 week limit. If the employer fails to do so, the leave cannot be designated retroactively as FMLA leave and, thus, will not be counted against the FMLA’s 12 week leave limit. An employer that requires substitution of paid for unpaid leave must advise the employee in writing.
FMLA/ADA Effect on Length of Leave

When an employee seeks leave to care for a seriously ill family member, the only federal statute that needs to be consulted is the FMLA. If the family member is a parent or child, the leave is available to an eligible employee. The situation facing the employer where an employee has a serious health condition is more complicated. The FMLA gives an employee with a "serious health condition" a right to the 12 weeks of leave in a twelve-month period. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a healthcare provider. If the serious health condition also meets the definition of "disability" under the ADA, the employee is entitled to take time off as a matter of reasonable accommodation. There is no statutory time limit or guidance.

Most employers who implement these provisions together give the employee the FMLA-required twelve weeks, but are mindful of their ADA obligations as well. At the end of the 12-week FMLA leave, if the employee is no longer able to return to work or still cannot perform the essential functions of the job, the employee loses the FMLA job restoration right. However, if an employee is not ready to return at the end of the 12 weeks, the employer needs to explore some period of additional leave if they have reason to believe that the serious health condition might qualify as a disability. Among the difficult issues of implementation are whether the individual is a qualified individual with a disability and how much additional leave is necessary to provide a reasonable accommodation.

Not all ADA "disabilities" are FMLA "serious health conditions" and not all FMLA "serious health conditions" are ADA "disabilities." Additionally, there is a logical inconsistency between the two statutes. An employee is entitled to take FMLA leave for a serious health
condition when he or she is “unable to perform the functions” of his or her position. A “qualified individual with a disability” has to be able to perform the functions of the job, with or without accommodation.

Regular Attendance as Part of Being a “Qualified Individual with a Disability”

One recurrent problem faced by employers is employees who take FMLA leave and lack regular attendance. While the employee is entitled to take the leave under the FMLA, in a later analysis of entitlement to more leave under the ADA, the employer is entitled to consider attendance in the determination of whether the individual is a “qualified individual” under the ADA. A recent case discusses the interplay of the two statutes when attendance is an issue. Citing a number of cases from other jurisdictions, in Payne v. Fairfax County, the Fourth Circuit determined that “regular and reliable level of attendance is an essential function of the job” that Payne’s employer considered such attendance to be an essential function of his job, and that the plaintiff was continuously and unpredictably absent due to FMLA leave, and that, therefore, he could not perform the essential functions of the job. Thus, he was not a “qualified individual” under the ADA and because of his requested accommodation, an extended six week absence, would require the elimination of an essential function of the job, the accommodation was unreasonable. The Court further held that FMLA-protected absences could be used against the employee to evaluate the regular attendance requirements under the ADA.

Intermittent Leave under the FMLA

One of the most difficult issues employers face is accommodating the “intermittent leave” or “reduced leave schedule” authorized by the FMLA. Under the FMLA, an employee has a right to intermittent leave or a reduced schedule and it is considered a reasonable accommodation
under the ADA, unless it causes undue hardship. Such leave is available when medically
necessary due to the employee's serious health condition or that of an immediate family member
(parent, spouse, and children). The employer does not have to provide intermittent leave or a
reduced leave schedule for the birth of a child, adoption or foster care placement.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment
must work with their employers to schedule the leave so as not to unduly disrupt the employer's
operations, subject to the approval of the employee's health care provider. In such cases, the
employer may transfer the employee temporarily to an alternate job, with equivalent pay and
benefits, that accommodates recurring periods of leave better than the employee's regular job.

The question for employers often is how long they need to allow the intermittent leave to
continue. Under the FMLA, the question is easy to answer, but hard to manage. The leave can
continue for as many weeks as it takes to exhaust the 12 week requirement, counting only the
hours that the employee is gone. For exempt employees, the employer may make partial day
deductions from pay for FMLA leave without violating the FLSA, although care needs to be
taken if the leave is under state equivalents. Under the ADA, the question is even harder, since
it will depend on being able to demonstrate undue hardship.

Return from Leave

Under the FMLA, job protection is guaranteed. Employees who return from FMLA
leave must be restored to the same or an equivalent job, unless they would have been terminated
during their leave for wholly independent reasons. Under the ADA, when an employee is on
leave, he or she must be returned to the same position unless the employer demonstrates that
holding the position open would impose an undue hardship. The employer also has the option to
place the individual in an equivalent position, but it needs to be virtually identical in terms of pay, benefits, and working conditions, including working hours, distance, and time traveling to work.

Conclusion

Employers faced with leave questions under these statutes, plus workers’ compensation laws and other state statutes, must understand the law and implement policies that take into account the differing statutory requirements. The employer’s practices must include the following:

- It is vitally important that all leave policies are drafted to comply with all applicable statutes in mind. This is especially complicated, of course, for employers that operate in different states.
- Once clear policies are adopted, the employer must have clear implementation procedures.
- Managers must be trained in both the policies and the procedures.
- Employees must get clear communications on the types of leaves that are available, the requirements for different types of leave, and the consequences of overstaying leaves.
- Each leave situation must be individually evaluated to identify the way each applicable statute affects decisions to be made by the employer and the employee.
- The temptation to terminate employees who are absent or otherwise unreliable due to leave or make other changes that affect their employment status must be resisted and, after careful analysis, restricted to situations where the employees have exhausted their rights to statutorily-protected leave.
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1 This paper is focused on the federal laws, but wisely-counseled employers will also understand the need to consider state laws as well.


4 Id.


6 Id.; cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 139 (1977) (striking down the forfeiture of seniority by pregnant women returning to work because it was a burden imposed just on women rather than a refusal to extend a benefit not given to men).


11 29 C.F.R. § 1604.10(a) (2008).


13 Id.

14 Id.

15 Id.

16 Id. “For example, if an employer requires its employees to submit a doctor’s statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.” Id.


18 Id.

19 Id.

20 Id.

21 Id.


42 U.S.C. § 12102(2) (2000). The ADA also prohibits discrimination against any qualified individual, whether or not that individual has a disability, because that person is known to have an association or relationship with an individual who has a known disability. 29 C.F.R. § 1630.8 (2008).


31 29 C.F.R. § 1630.8 (2008).

32 Because pregnancy is not the result of a physiological disorder it is not an impairment. 29 C.F.R. pt. 1630 app., § 1630.2(h); see also Byerly v. Herr Foods, Inc., Civ. A. No. 92-7382, 1993 WL 101196, at *4 (E.D. Pa. Apr. 6, 1993).

33 29 C.F.R. § 1630.3 (2008).

34 29 C.F.R. § 1630.2(m) (2008).


36 See 29 C.F.R. § 1630.2(o) (2008).


40 Id.


45 29 C.F.R. § 1630.9(d) (2008).

46 Id.
53 See 29 C.F.R. § 1630.1(c) (2008).
54 Sutton, 527 U.S. 471.
57 Sutton, 527 U.S. at 472.
59 Id. at 197.
60 Id. at 198.
63 Id.
64 Id.
65 Id.
66 Id.
A "serious health condition" is an illness, injury, impairment, or a physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11) (2000).


29 C.F.R. § 825.216(a) (2008).

29 C.F.R. § 825.216(c) (2008). A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. 29 C.F.R. § 825.217(a) (2008).


29 C.F.R. § 825.302(a) (2008). As soon as practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. 29 C.F.R. § 825.302 (2008). For foreseeable leave where it is not possible to give as much as 30 days notices, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee. Id.


29 C.F.R. § 825.305(b) (2008).
94 A “Covered Servicemember” means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. 29 U.S.C.A. § 2611(16) (2008).
96 Id.
99 Id.
100 Id.
104 Id. at 285.
105 Schafer, 903 F.2d 243.
106 Id. at 247.
107 Id.
108 Id. at 248.
110 Pearlstein, 886 F.Supp. at 265.
112 29 U.S.C. § 2612(a) (2000). Employers also need to consult state statutes. A number of states have conflicting or longer family and medical leave act statutes. The District of Columbia, for example, allows qualified employees to take sixteen weeks of job-guaranteed “medical” leave to employees with a serious health condition every 24 months. D.C. Code § 32-503(a) (2001). An employee is also entitled under the Act to up to sixteen weeks of
“family” leave during a 24-month period (1) for the birth or adoption of a child or (2) to care for a family member with a serious health condition. D.C. Code § 32-502(a) (2001).


114 See 42 U.S.C. § 12112(b)(5)(A) (2000). The legal status of the right to take time off as a reasonable accommodation is a little complicated. The ADA itself does not list time off as a reasonable accommodation.


118 Id. at *9.

119 Id.

120 Id.