

## Episodic Time Off: An Overview

While some workers' needs for flexibility can be addressed by Short Term Time Off (STO) or by a Flexible Work Arrangement (FWA), there are other workers who need time off on a more episodic basis.<sup>1</sup> These workers may have an illness, such as cancer or kidney disease, which requires them to attend numerous medical appointments on a relatively set basis. Or they may have a chronic condition, such as migraine headaches or fibromyalgia, that flares up sporadically. Some workers may care for family members who have recurring medical needs, such as an aging parent who requires regularly scheduled bi-weekly dialysis treatments, or a child with asthma who often must be taken to the emergency room on an unexpected basis.

Workplace Flexibility 2010 has coined the term "Episodic Time Off" or "EPTO" to describe the type of workplace flexibility needed to address these types of needs. Under our definition, the provision of EPTO addresses the *recurring* need for time off – sometimes regular, sometimes sporadic, sometimes foreseeable, sometimes not – for which STO is insufficient and which an FWA cannot resolve. For more background information on the need for EPTO, see Workplace Flexibility 2010's Fact Sheet on Episodic Time Off.<sup>2</sup>

Currently, two federal laws – the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) – address workers' EPTO needs. The FMLA requires employers to provide up to 12 weeks of unpaid leave to individuals with "serious health conditions" or to individuals with family members who have such conditions. The FMLA specifically provides that this leave may be taken "intermittently." The ADA requires employers to provide "reasonable accommodations" – including fluid or "work when able" schedules – to "persons with disabilities."

Each law has specific requirements regarding eligibility, employee responsibilities, and employer responsibilities and defenses. In some instances these requirements overlap; in others they do not. Cases brought under both laws evidence a tension between a worker's legitimate need for EPTO and an employer's legitimate need to have a job done in an adequate and timely fashion.

We describe the EPTO-related requirements of the FMLA and the ADA, as well as pertinent case law, below.

### I. The FMLA

---

The Family and Medical Leave Act of 1993 (FMLA) permits workers who meet certain conditions to take up to 12 weeks per year of unpaid time off for medical or family care reasons.<sup>3</sup> Within this framework, the law explicitly permits workers to take this leave "intermittently."<sup>4</sup> While the statute provides no definition of leave taken intermittently, the Department of Labor regulation defines intermittent leave as "FMLA leave taken in separate blocks of time due to a single qualifying reason."<sup>5</sup>

FMLA intermittent leave currently is used by employees for planned absences (such as doctor's visits) as well as unplanned absences (such as when an employee has a migraine headache or a child has a severe

asthma attack). The examples of intermittent leave in the legislative history address situations in which an employee needs a few hours off to receive a regularly scheduled medical treatment (e.g., chemotherapy or psychotherapy).<sup>6</sup> The statutory provisions relating to foreseeable leave, including intermittent leave (such as scheduling treatments so they do not unduly disrupt the employer's operations) reflect this focus on planned absences.<sup>7</sup> By contrast, the regulatory provisions for intermittent leave add a more significant focus on situations in which intermittent leave is needed for unplanned absences.<sup>8</sup>

## A. Eligibility for FMLA Intermittent Leave

Employees covered under the FMLA may take intermittent leave for EPTO purposes when medically necessary for an employee's own "serious health condition" or for caretaking of certain family members with "serious health conditions."<sup>9</sup> The prior approval of the employer is not required for an employee who takes intermittent leave to care for statutorily covered serious health conditions.<sup>10</sup> An employee may take intermittent leave either to care for a family member whose health condition is intermittent or when the employee is needed only intermittently (e.g., providing respite care for other caregivers).<sup>11</sup>

The FMLA statute and corresponding regulations define the term "serious health condition" using a test, rather than a list of specific illnesses. Under the regulatory test, a "serious health condition" generally refers to an illness that requires either (i) inpatient care or (ii) continuing treatment by a health care provider, defined by regulation as a period of incapacity that lasts at least three days and requires either two visits to a health care provider or one such visit followed by a regimen of continuing treatment.<sup>12</sup>

The regulations also define "serious health conditions" as including periods of incapacity due to pregnancy or prenatal care, chronic conditions, conditions for which treatment may not be effective, or to receive and recover from multiple treatments related to restorative surgery or conditions that would result in more than three days of incapacity in the absence of medical treatment.<sup>13</sup>

Under the regulatory test, the courts have generally construed the definition of "serious health condition" broadly – including severe conditions such as cancer and schizophrenia, and also less severe conditions such as the flu, ear infections, back aches, and migraine headaches, provided the nature of these conditions are sufficiently severe so as to incapacitate the employee (or employee's family member) to the extent that the FMLA regulations require.<sup>14</sup>

An employee (or employee's family member) need not be completely incapacitated in order to have a serious health condition. Courts have found that an employee taking intermittent leave because of a "serious health condition" may participate in other life activities like shopping, eating lunch or visiting bars. As one district court observed, "The FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work."<sup>15</sup>

While employees may take intermittent leave without the prior approval of employers, employees are generally required to give their employer *notice* of their need for *foreseeable* intermittent leave at least 30 days before the time off is to begin.<sup>16</sup> An employee must give such notice only once.<sup>17</sup> When the approximate timing of the

need for leave is not foreseeable, the statute provides that the employee must give notice "as is practicable."<sup>18</sup> The regulatory standard is "as soon as practicable." The regulations explain that such notice is generally expected to be within no more than one or two working days of the employee learning of the need for leave, except in extraordinary circumstances where such notice would not be feasible.<sup>19</sup> Written advance notice under employer policies is not required in the case of medical emergencies.<sup>20</sup> A number of FMLA cases revolve around unscheduled absences and whether the employee has provided sufficient notice that she or he is taking FMLA intermittent leave.<sup>21</sup>

Employees must also obtain a health care provider's certification (and second/third opinions and recertification as appropriate) of their (or their immediate family member's) medical condition, upon request from the employer.<sup>22</sup> Special statutory requirements also apply in the case of intermittent leave that require, depending on the nature of the need for the time off, that the certification specify the dates and duration, and in some cases, the schedule of, treatments, and, in the case of caregiving, the necessity of the employee's care.<sup>23</sup>

Finally, in order to be covered by the FMLA, an employee generally must work for an employer with 50 or more employees, and must have worked for this employer for at least 1,250 hours in the previous 12-month period.<sup>24</sup> The courts have clarified that an employee must establish eligibility only the first time he or she takes an absence within a 12-month FMLA eligibility period pursuant to an intermittent leave plan, not each time he or she is absent, noting that "the employer could not deny the employee continued intermittent FMLA leave based on his failure to work the requisite number of hours if the only reason the employee fell below the minimum-hours requirement was because he took leave to which he was statutorily entitled."<sup>25</sup>

## **B. Tracking Intermittent Leave**

The FMLA specifically provides that employees may not be charged against their FMLA entitlement for intermittent leave beyond the amount of time off they actually take.<sup>26</sup> Neither the statute nor the legislative history, however, offer clear guidance regarding how this requirement should be implemented. The Department of Labor (DOL) regulations provide that there is no limit on the size of an increment of intermittent leave that an employee may take.<sup>27</sup> Employers may limit leave increments to "the shortest increment that the employer's payroll system uses to account for absences or use of leave,"<sup>28</sup> but at the same time, this "shortest increment" must be no more than one hour.<sup>29</sup> For example, if the employer's payroll system accounts for absences by half days or by blocks of two hours, that employer must still allow employees to take intermittent leave in increments of one hour or less.

After DOL issued proposed FMLA regulations in 1993,<sup>30</sup> representatives of businesses requested that DOL set a four-hour minimum increment for intermittent leave.<sup>31</sup> DOL refused, citing "no basis in the statute for limiting the period of time for intermittent leave."<sup>32</sup> Similarly, DOL also refused businesses' request to limit the available time span in which intermittent leave could be taken to six months (to ensure that employees did not extend intermittent leave out over many weeks to create permanent part-time positions, for example).<sup>33</sup> DOL indicated that doing so would be contrary to Congress' intent to provide employees with a 12-month leave eligibility period and to ensure that employees are not charged for more FMLA leave than they actually take.<sup>34</sup>

### C. Scheduling Leave that Does Not "Unduly Disrupt" the Employer

With respect to foreseeable intermittent leave, the FMLA statute places the burden on the employee to make a "reasonable effort" to schedule foreseeable medical treatments (for himself or herself, or for a family member) in a manner that does not "disrupt unduly" the employer's operations.<sup>35</sup> The FMLA also provides that scheduling of such leave is subject to the approval of the employee's (or family member's) health care provider.<sup>36</sup> When it promulgated its regulations in 1993, DOL acknowledged the operational difficulty the "disrupt unduly" provision could pose for employers. Nevertheless, DOL determined that because a health care provider's determination of the medical necessity of the intermittent leave is a *prerequisite* for the leave, an employer's denial or delay of treatment would be inappropriate unless the health care provider agreed to reschedule the medical treatments.<sup>37</sup>

The few courts that have examined the "disrupt unduly" standard have generally found that when the employee acts in bad faith, the employee's act "unduly disrupts" the business. By contrast, courts have found that when circumstances beyond the employee's control have affected the scheduling of medical treatment, the employee has not "unduly disrupted" the employer's business.<sup>38</sup> For example, the Fifth Circuit has held that whether an employee has made a "reasonable effort" to schedule her treatment so as not to unduly disrupt the employer's operations requires an inquiry into the particular facts and circumstances of each case.<sup>39</sup> The court further emphasized that although the FMLA generally requires the employee to give the employer 30 days' notice prior to taking foreseeable intermittent leave, certain circumstances (e.g., a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency) may make the 30-day requirement impossible. In such cases, the employee must give the employer notice "as soon as practicable" in accordance with the FMLA guidelines.<sup>40</sup>

The FMLA "unduly disrupt" standard applies only to foreseeable, scheduled absences, since that is the section of the FMLA statute ("foreseeable leave") in which the "unduly disrupt" standard is set forth. With regard to times when an employee must take unforeseeable, unscheduled intermittent leave, the regulations provide that an employee must give notice of the need for leave as soon as practicable.<sup>41</sup>

### D. Transferring Employees to Alternative Positions

When an employee requests intermittent leave for planned medical treatment, the employer may temporarily transfer the employee to an available alternative position that better accommodates recurring absences or part-time employment.<sup>42</sup> The employee must receive the same pay and benefits in the alternative position that the employee received in the prior position.<sup>43</sup> Under the regulations, the employer must also place the employee in the same or an equivalent job upon return from time off, and must not use transfers to discourage employees from taking time off (e.g., transferring an employee from the day shift to the graveyard shift).<sup>44</sup>

The courts have generally affirmed the right of employers to transfer employees needing intermittent leave in accord with the FMLA's requirements, whether the employee agrees with the transfer or not.<sup>45</sup> The FMLA does not include an explicit provision permitting employers to transfer to alternative positions those employees who request unscheduled intermittent leave for chronic conditions that flare up unexpectedly.<sup>46</sup>

## II. The ADA

---

The Americans with Disabilities Act (ADA) requires employers with 15 or more employees to make a "reasonable accommodation" to the "known physical or mental limitations of an otherwise qualified individual with a disability," unless provision of such an accommodation would pose an "undue hardship" for the employer.<sup>47</sup> The ADA's statutory examples of reasonable accommodations — such as "job restructuring," "part-time or modified work schedules," and other "similar accommodations"<sup>48</sup> — explicitly contemplate accommodations that could address the need for EPTO.

Since passage of the ADA, employees have, with varying degrees of success, brought claims seeking EPTO. These claims have taken various forms, including requests for reduced or part-time schedules, more fluid work schedules (with either later start times or, more relevant to EPTO, "work when able" schedules),<sup>49</sup> and perhaps most notably for EPTO, modifications to employer absenteeism policies.<sup>50</sup>

The practical utility (or lack of utility) of the ADA in providing EPTO to employees with disabilities has been a function of the structure and terms of the statute, the content of the implementing regulations by the Equal Employment Opportunity Commission (EEOC), and judicial interpretation of the statutory terms. Taken together, these variables have resulted in a significant number of people with serious health conditions being excluded from coverage under the ADA because they are held not to meet the statutory definition of "disability," and a significant number of requests for EPTO not being awarded by the courts because they are deemed not to be "reasonable" accommodations or because the person is held not to be "otherwise qualified" because of an inability to satisfy an "essential function" of the job.

### A. Definition of Person with a "Disability"

Under the statute, an employer is required to make an accommodation only to an employee who has a *disability* within the meaning of the ADA.<sup>51</sup> The ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities" of an individual, "a record of such an impairment," or "being regarded as having such an impairment."<sup>52</sup>

Through a series of decisions, the courts have significantly restricted the ADA's definition of "disability."<sup>53</sup> First, the Supreme Court has held that in determining whether an individual has a physical or mental impairment that substantially limits a major life activity, courts should determine whether an individual has a limitation that "substantially limits a major life activity" after taking into account mitigating measures (e.g., medications or corrective devices such as hearing aids or prosthetic limbs) that the individual might use.<sup>54</sup> As a result, courts have found that the ADA often does not cover individuals with diabetes, epilepsy, amputated limbs, and other "mitigated" conditions.<sup>55</sup> In addition, the Court has ruled that a "mere difference" in how a major life activity is performed is not sufficient to make the limitation "substantial."<sup>56</sup> Finally, the Court has added the gloss that in order to substantially limit a major life activity, an impairment must prevent or severely restrict the individual from undertaking activities that are of central importance to most people's daily lives.<sup>57</sup>

Under this analysis, an appellate court recently found that a "mild case" of cerebral palsy was not a disability

under the ADA, because the worker was not "severely restricted" in her ability to perform fine motor tasks or to care for herself.<sup>58</sup> Indeed, many of the chronic conditions that require EPTO — e.g., migraine headaches, arthritis, diabetes, and asthma — may not constitute disabilities under the Supreme Court's interpretation of the term, despite legislative history to the contrary.<sup>59</sup>

## B. Definition of "Essential Functions" of the Job

If an employee has a disability for purposes of the statute, an employer is required to provide a reasonable accommodation only to a "qualified individual" with a disability.<sup>60</sup> A qualified individual with a disability is an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."<sup>61</sup> The employee bears the burden of showing that he or she is a qualified individual.<sup>62</sup>

The statute does not provide a definition of "essential functions." The regulations issued by the EEOC define essential functions as "the fundamental job duties of the employment position the individual with a disability holds or desires."<sup>63</sup> The regulations further instruct that the factors to be considered in determining whether an activity constitutes an essential function include: any written job description, the consequences of not requiring the functions to be performed, the work experience of past incumbents and current incumbents in the job, the amount of time spent performing the function, and the terms of any collective bargaining agreement.<sup>64</sup>

The statute explicitly provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential," and that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."<sup>65</sup> This provision was offered as an alternative to an amendment that would have established absolute deference to the employer's determination of what constitutes essential functions of the job.<sup>66</sup>

In the case law under the ADA, courts have varied in how searching they are in determining what constitutes a fundamental job duty, as required by the regulations. Some courts appear to look at the prevailing norms of the workplace, such as regular attendance, and determine that if an employee cannot meet those norms, the employee cannot perform the essential functions of a job.<sup>67</sup> In the EPTO context, many employees seek a modification of their employers' no-fault absenteeism policy as a reasonable accommodation. Obviously, if regular attendance is deemed an essential job function, the request to modify an employer's absenteeism policy is difficult to sustain.<sup>68</sup>

Other courts have criticized the approach of using the norms of a job to determine what functions are essential and have concluded that judges must go beyond such norms to explore what is really needed to perform a job successfully.<sup>69</sup> As these courts observe, a failure to do so means an employer never bears the burden of proving that an accommodation is unreasonable and/or presents an undue hardship.<sup>70</sup>

In determining what constitutes an essential function, some courts accord the employer's judgment substantial weight.<sup>71</sup> Others contend that the employer's judgment is important but still just one factor among many.<sup>72</sup>

As for the placement of burdens, some courts hold that the employee bears the burden of showing that a function the employee cannot perform is not an essential function.<sup>73</sup> Other courts hold that when the essential functions of a job are contested, the burden shifts to the employer to prove that the function is essential because the employer has better access to relevant information.<sup>74</sup>

### C. Definition of "Reasonable" Accommodation

Assuming an employee has a disability, and is able to perform the essential functions of the job with an accommodation, the question then becomes whether the requested EPTO is a "reasonable accommodation."

The drafters of the ADA intended the term "reasonable" to mean "effective."<sup>75</sup> A few courts, in the early years of ADA implementation, accepted this definition of "reasonable."<sup>76</sup> However, in 2002, the Supreme Court held that "reasonable" does not mean that an employee can perform the essential functions effectively, but, rather, encompasses such concerns as the impact of the accommodation on other employees.<sup>77</sup>

By investing the term "reasonable" with the type of assessments that would ordinarily have been considered under the defense of "undue hardship," it is no surprise that the case law is somewhat confused both on the standard to be applied in determining whether an accommodation is required, as well as who bears what burden of proof. The burden is generally placed on the employee to suggest a reasonable accommodation. Some courts have articulated this burden by saying the employee must propose a "plausible" accommodation,<sup>78</sup> while others have said that the accommodation must be reasonable "on its face."<sup>79</sup> The case law is divided as to what happens once the employee has proposed a sufficiently reasonable accommodation. Some courts have held that the burden then shifts to the employer to show that the accommodation is not reasonable,<sup>80</sup> while others hold that the employer must then go on to show that the accommodation presents an undue hardship.<sup>81</sup> Other courts have held that reasonableness and undue hardship are the same inquiry,<sup>82</sup> although in *Barnett*, the Supreme Court criticized such a conflation as creating redundancy in the ADA.<sup>83</sup>

### D. Definition of Undue Hardship

Assuming an employee has a disability for purposes of the statute, is able to perform the essential functions of the job with a reasonable accommodation, and is able to suggest an accommodation that is held to be a "reasonable accommodation," the employer still has the affirmative defense that the provision of such an accommodation would impose an "undue hardship" on the operation of its business.<sup>84</sup> The statute defines "undue hardship" as an action requiring "significant difficulty or expense" and identifies multiple factors that should be considered in determining undue hardship, including the nature and cost of the accommodation, the financial resources of the employer, and the type of business involved.<sup>85</sup>

Of course, given the judicially created interpretation of the term "reasonable," it is perhaps not surprising that few cases reach the question of whether a requested accommodation poses an undue hardship. Rather, as noted above, most courts conduct some form of hardship analysis in their determination of whether an accommodation is "reasonable," or whether it would undermine an essential function of the job.

To the extent EPTO cases have employed an undue hardship analysis, the majority of courts have found in favor of the employer. For example, in one case involving a housekeeping aide, the court held not only that the employee was not otherwise qualified, but that requiring the employer to accommodate the unpredictable nature of the employee's absences would constitute an undue hardship. As the court observed: "There is no way to accommodate [the unpredictable nature] of [the plaintiff's's] absences. Requiring the VA to accommodate such absences would place upon the agency the burden of making last-minute provisions for [plaintiff's] work to be done by someone else. Such a requirement would place an undue hardship on the agency."<sup>86</sup>

### III. Conclusion

---

As a review of the current statutory law and case law demonstrates, there are laws on the books today designed to deal with some aspects of EPTO. Nevertheless, as such a review demonstrates as well, there is a need for creative thinking on how to provide EPTO in a manner that will work well for both employees and employers.



## (Endnotes)

- <sup>1</sup> See Workplace Flexibility 2010's definition of workplace flexibility. <http://www.law.georgetown.edu/workplaceflexibility2010/definition/index.cfm>
- <sup>2</sup> <http://www.law.georgetown.edu/workplaceflexibility2010/definition/policy.cfm>
- <sup>3</sup> 29 U.S.C. § 2601 et seq.; 29 C.F.R. § 825.100 et seq.
- <sup>4</sup> 29 U.S.C. § 2612(b)(1). This section provides as follows: "Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary." The leave under subparagraphs (C) and (D) refers to leave taken for an employee's serious health condition or for the serious health condition of a qualifying family member of the employee.
- <sup>5</sup> 29 C.F.R. § 825.203.
- <sup>6</sup> See, e.g., H. Rep. 103-8(1)(1993), at 37-41; S. Rep. 103-3(1993), at 26-29. Advocates who were involved in passage of the FMLA informed Workplace Flexibility 2010 staff that they were also thinking about morning sickness during pregnancy, which would require intermittent leave that is not previously scheduled.
- <sup>7</sup> 29 U.S.C. § 2612(e)(2)(A). The relevant section of the FMLA is titled "Foreseeable Leave." There is no separate statutory section in the FMLA for non-foreseeable leave. Rather, in the section under foreseeable leave, the statute provides that an employee "shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable." *Id.* at § 2612(e)(2)(B).
- <sup>8</sup> 29 C.F.R. § 825.303.
- <sup>9</sup> 29 U.S.C. § 2612(a)(1)(C)-(D) and § 2612(b)(1); 29 C.F.R. § 825.203(c).
- <sup>10</sup> FMLA intermittent leave may also be taken for reasons related to the birth/adoption/foster care of a child, but only if the employee receives the prior approval of his or her employer. 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.203(b).
- <sup>11</sup> 29 C.F.R. § 825.116(c).
- <sup>12</sup> 29 C.F.R. § 825.114. The statute defines a "serious health condition as "an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2911(11).
- <sup>13</sup> 29 C.F.R. § 825.114. See also 29 C.F.R. § 825.203(c)(2) ("Intermittent ... leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.").
- <sup>14</sup> See, e.g., *Rankin v. Seagate Technologies, Inc.*, 246 F.3d 1145 (8th Cir. 2001) (finding that employee's sixteen-day absence from work due to influenza-induced vomiting, coughing, congestion, and sleeplessness, combined with multiple medical visits required to treat symptoms, could constitute sufficient incapacity to satisfy FMLA requirements); *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671 (8th Cir. 2000) (holding that fact issues existed as to whether three-year-old child's ear infection incapacitated him for more than three days, and whether he received subsequent treatment for that condition, precluding summary judgment as to whether he had serious health condition entitling his mother to leave under FMLA); *Lubke v. City of Arlington*, --- F.3d ---, 2006 WL 1793268, at \*3 (5th Cir. 2006) (holding that jury could reasonably find that decade-long pattern of employee's wife's chronic, periodically occurring back pain constituted serious medical condition); 29 C.F.R. § 825.114(c) (2000) (specifying "headaches *other than migraine*" in a list of conditions that ordinarily would not merit FMLA leave (emphasis added)); *Rhoads v. FDIC*, 257 F.3d 373, 382 n.7 (4th Cir. 2001) ("[T]he final [FMLA] regulations identify [migraine headaches] as [a condition] that potentially qualify[ies] for FMLA leave."); *Hoffman v. Prof'l Med. Team*, 394 F.3d 414 (6th Cir. 2005) (indicating that employee's migraine headaches could have constituted "serious health condition"). Other courts have refused to find that such conditions constitute "serious health conditions" when no complications have arisen. See, e.g., *Brenneman v. MedCentral Health System*, 366 F.3d 412, 427, n.17 (6th Cir. 2004) (finding that employee's influenza did not constitute serious health condition within meaning of FMLA, noting that 29 C.F.R. § 825.114(c) states that, absent arising complications, flu generally is not an FMLA-qualifying "serious health condition."); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa 1994) (finding no serious health condition where employee's child's ear infection involved fever lasting no more than 24 hours,

where treatment consisted of one 20-minute examination by pediatrician and ten-day regimen of antibiotics, child never complained of ear pain, child was not absent from day-care for more than three days, and evidence failed to show that period of incapacity involved continuing treatment by healthcare provider because at no time did child take medication under continuing supervision of pediatrician.)

<sup>15</sup> *Jennings v. Mid-American Energy Co.*, 282 F. Supp. 2d 954, 961-62 (S.D. Iowa 2003). See also *Brunelle v. Cyro Industries*, 225 F. Supp. 2d 67 (D. Me. 2002).

<sup>16</sup> 29 U.S.C. § 2612(e)(2)(B); 29 C.F.R. § 825.302(a).

<sup>17</sup> The employee must, however, inform the employer as soon as practicable if dates of scheduled time off change or are extended, or were unknown. 29 C.F.R. § 825.302(a).

<sup>18</sup> 29 U.S.C. § 2612(e)(2)(B).

<sup>19</sup> 29 C.F.R. § 825.303(a). See, e.g., *Brenneman v. MedCentral Health System*, 366 F.3d 412, 423-25 (6th Cir. 2004) (finding employee did not give employer notice within the necessary time frame when the employee did not give notice of absence due to hypoglycemia within one to two days of the absence, and no extraordinary circumstances existed to render it unfeasible for employee to have given such notice).

<sup>20</sup> 29 C.F.R. §§ 825.305-308. The FMLA regulations also provide that after receiving employee notice, the employer is responsible for designating leave (intermittent or otherwise) as FMLA leave and for notifying the employee of the designation. 29 C.F.R. § 825.208(a). Only one such notice by the employer is required for intermittent leave unless the circumstances requiring time off have changed. *Id.*

<sup>21</sup> *Garraway v. Solomon R. Guggenheim Foundation*, 415 F. Supp. 2d 377, 383 (S.D.N.Y. 2006) (finding disputed issue of material fact as to whether employee notice was sufficient to give rise to employer duty to ascertain whether further leave was required, where employee told employer following employee's release from hospital that he was seeing the doctor a few days later to obtain a release to return to work; conversation was susceptible of the inference that he had not yet been cleared to return to work and would require leave at least through the date employer terminated him); *McFall v. BASF Corp.*, 406 F. Supp. 2d 763 (E.D. Mich. 2005) (granting summary judgment to employer when employee failed to give employer adequate notice of need for medical leave where employee never once requested leave for her medical conditions, which included diabetes, asthma and an injured Achilles tendon, on the three occasions when she informed employer's medical department why she missed

work, she did so after the fact, and employee never notified employer, or even mentioned her specific ailments when she notified employer that she would be absent); *Henegar v. Daimler-Chrysler Corp.*, 280 F. Supp. 2d 680 (E.D. Mich. 2003) (granting summary judgment to employer when former employee's selection of "ill" option on employer's automated telephone system for notifying employer of need for time off did not provide proper notice of need for leave of absence for serious health condition under FMLA; employee never attempted to contact supervisor or human resources representative concerning nature and severity of his illnesses related to irritable bowel syndrome, ulcers and stress, even though he had no remaining sick days).

<sup>22</sup> 29 U.S.C. § 2613(b)(5) & (6); 29 C.F.R. §§ 825.117, 825.305, 825.306 & 825.308. An employer may not require a "fitness for duty" report when intermittent leave is taken. 29 C.F.R. § 825.310(g). In promulgating its regulations, DOL explained that a description of the treatment regimen provided by a health care provider in a standard medical certification form would "normally" meet the requirement for certification related to intermittent leave. 58 Fed. Reg. 31800 (1993).

<sup>23</sup> 29 U.S.C. § 2613(b)(5), (6) & (7).

<sup>24</sup> 20 U.S.C. § 2611(2).

<sup>25</sup> *Barron v. Runyon*, 11 F. Supp. 2d 676, 681 (E.D. Va. 1998). Although the *Barron* court found that eligibility for intermittent leave does not need to be established more than once *during* a particular 12-month eligibility period, the court also found that the statute requires a new eligibility determination every 12 months (i.e., the FMLA grants an employee 12 weeks of leave *per 12 month period*, not indefinitely). *Id.* at 682-683. In other words, establishing initial eligibility for intermittent leave will not permit an employee to take such leave forever – while an employee may work fewer than 1,250 hours in a given year when taking FMLA leave without losing eligibility for that given 12 month period, the same employee may not be able to meet the FMLA's eligibility requirements for a second consecutive year of FMLA leave if he/she has not met the requirement that he/she works 1,250 hours in the preceding 12 month period, even if the reduction in working hours was at least partially the result of taking FMLA leave. More recently, an Indiana district court reiterated *Barron's* finding that an employee must meet FMLA eligibility requirements annually based, per the statute, on the 12-month period immediate preceding the commencement of FMLA leave, even in the case of intermittent leave taken for an ongoing medical condition. *Sills v. Bendix Commercial Vehicle Systems LLC*,

- No. Civ. 1:04-CV-149, 2005 WL 2674926 (N.D. Ind. Oct. 20, 2005).
- <sup>26</sup> 29 U.S.C. § 2612(b)(1). The statute provides: "The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken." See also H.R. Rep. 103-8(l), at \*37 (Feb. 2, 1993).
- <sup>27</sup> 29 C.F.R. § 825.203 (d). For example, an employee may take two hours off for a medical appointment. *Id.*
- <sup>28</sup> 29 C.F.R. § 825.203(d).
- <sup>29</sup> 29 C.F.R. § 825.203(d).
- <sup>30</sup> See 58 Fed. Reg. 39596-01 (July 23, 1993) (interim regulations with request for comments).
- <sup>31</sup> See, e.g., 60 Fed. Reg. 2236 (1995) (noting that the Small Business Administration sought this four-hour minimum on behalf of small businesses). See also "Real Experiences Administering the FMLA: Why the Regulations Need Reform," U.S. Chamber of Commerce available at [www.uschamber.com/issues/index/labor/fmla.htm](http://www.uschamber.com/issues/index/labor/fmla.htm) (noting that it is a significant administrative challenge for employers to track intermittent leave in increments as small as six minutes).
- <sup>32</sup> 58 Fed. Reg. 31801 (1993).
- <sup>33</sup> 60 Fed. Reg. 2202 (1995).
- <sup>34</sup> *Id.*
- <sup>35</sup> 29 U.S.C. § 2612(e)(2)(A). In addition, the regulations permit the employer to initiate a discussion if an employee neglects to consult with the employer about the scheduling of intermittent absences. 29 C.F.R. § 825.302(e).
- <sup>36</sup> 29 U.S.C. § 2612(e)(2)(A); 29 C.F.R. § 825.302(e)-(f).
- <sup>37</sup> 60 Fed. Reg. 2197-98 ("The ultimate resolution of the leave schedule ... always remains subject to the approval of the health care provider and the schedule established for the planned medical treatments. ... [T]he health care provider ... establish[es] the medical necessity for the intermittent leave schedule; it is a *prerequisite* for the leave. Thus, denial of the leave would be out of the question. Even delay of the leave would be inappropriate unless the health care provider agreed to reschedule the medical treatments. What would be a "reasonable effort" by the employee and an "undue disruption" of the employer's operations are fact-specific in each case. Requesting that an employee attempt to schedule planned medical treatments outside the normal work hours when scheduling them during work hours would not unduly disrupt the employer's operations would not be "reasonable" or consistent with FMLA's requirements.") (emphasis added).
- <sup>38</sup> *Kaylor v. Fannin Regional Hospital, Inc.*, 946 F. Supp. 988 (N.D. Ga. 1996) (finding employee failed to meet FMLA's requirements when employee made no effort to reschedule medical appointment when he learned that hospital employer would be short-staffed without him, and misled employer about whether he would be at work on day of appointment); *Hopson v. Quitman County Hospital and Nursing Home, Inc.*, 119 F.3d 635, 640 (5th Cir. 1997) (finding that a change in the employee's insurance coverage, discontinuing coverage for the procedure she had requested leave for, was a change in circumstances that could "override the thirty-day notice requirement"; employee had requested leave while waiting for approval from insurer for surgery);
- <sup>39</sup> *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 977 (5th Cir. 1998) (citing *Hopson*, 126 F.3d at 640).
- <sup>40</sup> *Hopson*, 126 F.3d at 639 (citing to 29 C.F.R. § 825.302(a)-(b), (e)).
- <sup>41</sup> 29 C.F.R. § 825.303(a) ("When the approximate timing 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.")
- <sup>42</sup> 29 U.S.C. § 2612(b)(2); 29 C.F.R. § 825.204. Such transfers must comply with all applicable federal and state laws and collective bargaining agreements. 29 C.F.R. § 825.204(b). The regulations also provide examples of how an employer may alter existing positions and benefits and pay structures to permit such transfers. 29 C.F.R. § 825.204(c).
- <sup>43</sup> 29 U.S.C. § 2612(b)(2). DOL, when issuing its interim final regulations, reiterated Congress' intent that the temporary transfer provisions offer flexibility to employers without harming employees (i.e., employees were guaranteed equivalent pay and benefits in the alternative position). 58 Fed. Reg. 31801 (1993).
- <sup>44</sup> 29 C.F.R. § 825.204(c)&(d).
- <sup>45</sup> See, e.g., *Covey v. Methodist Hospital of Dyersburg, Inc.*, 56 F. Supp. 2d 965 (W.D. Tenn. 1999) (finding no FMLA violation when employee was permanently restricted by doctor to a four day workweek due to multiple sclerosis and employer transferred her to a position better able to accommodate

reduced schedule, even if employee considered the new job demeaning).

<sup>46</sup> The statutory language is as follows: "If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, *that is foreseeable based on planned medical treatment*, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that - (A) has equivalent pay and benefits; and (B) better accommodates recurring periods of leave than the regular employment position of the employee." 29 U.S.C. § 2612(b)(2). The regulations repeat this formulation. 29 C.F.R. § 825.204.

<sup>47</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>48</sup> *Id.* § 12111(9)(B).

<sup>49</sup> See, e.g., *Pickens v. Soo Line Railroad Co.*, 264 F.3d 773 (8th Cir. 2001) (acknowledging that the ADA cites part-time or modified work schedules as examples of reasonable accommodations, but holding that employee's suggested accommodation – that he should be able to work only when he feels able to work – as unreasonable as a matter of law); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 n.9 (7th Cir. 2000) (rejecting work when able schedule in factory setting); *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir.1994), *cert. denied*, 513 U.S. 1052, (1994) (employee who, in the event of a flare-up of his condition, requested to swap off days with other employees, delay shift start time, or defer more physically demanding and less time sensitive job duties until the next day not otherwise qualified; requiring employer to accommodate the unpredictable nature of employee's absences constitutes an undue hardship); *Hypes v. First Commerce Corp.*, 3 F. Supp. 2d 712 (E.D. La. 1996) (employee's request for an open-ended schedule to let him work when able not a reasonable accommodation because employee cannot perform essential functions of the job).

<sup>50</sup> See, e.g., *Farrell v. Tri-County Metropolitan Transp. Dist. of Oregon*, 2005 WL 1307695 (D. Or. 2005) (unreported) (question of fact as to whether the employer failed to provide reasonable accommodation of allowing occasional absences); *Thompson v. Cendant Corp.*, 130 F. Supp. 2d 1255 (N.D. Okla. 2001) (employee's request to be accommodated by being granted unpredictable absences from work not a reasonable accommodation because regular and reliable attendance is an essential job function); *Hendry v. GTE North*, 896 F. Supp. 816 (N.D. Ind. 1995) (employee's request

to be accommodated by allowing absences in excess of company standard and/or being allowed to use vacation leave as sick leave not a reasonable accommodation because regular attendance is an essential job function and the requested accommodations would have posed an undue hardship).

<sup>51</sup> Discrimination under the ADA includes the failure to provide a "reasonable accommodation" to the "known physical or mental limitations of an otherwise qualified individual *with a disability*." 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

<sup>52</sup> 42 U.S.C. § 12102(2).

<sup>53</sup> See National Council on Disability, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities* (Feb. 25, 2003), available at <http://www.ncd.gov/newsroom/publications/2003/decisionsimpact.htm>; see also Chai R. Feldblum, *The Definition of Disability Under the Americans with Disabilities Act: What Happened, Why, and What Can We Do About It?* 21 Berkeley Journal on Labor and Employment Law 91 (2000).

<sup>54</sup> See *Sutton v. United Airlines*, 527 U.S. 471 (1999).

<sup>55</sup> See, e.g., *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001) (holding that person with epilepsy was not substantially limited in a major life activity and therefore not disabled due to ability to "mitigate" through medications); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (holding same regarding a diabetic who could "mitigate" through insulin shots and a controlled diet).

<sup>56</sup> See *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999).

<sup>57</sup> See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>58</sup> *Holt v. Grand Lake Mental Health Center*, 2006 WL 925667 (10th Cir. 2006).

<sup>59</sup> See, e.g., Report of House Committee on Education and Labor, H. R. Rep. 101-485, Pt. 2, at 52 (1990) ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. ... For example ... persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication."). *But see* *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (person with diabetes not person with disability); *EEOC v Sara Lee*, 237 F.3d 349 (4th Cir. 2001) (person with epilepsy not person with disability); *Rhoads v. FDIC*, 257 F.3d 373

(4th Cir. 2001) (person with asthma and migraine headaches not person with disability); *Muller v. Costello*, 187 F.3d 298, 314 (2nd Cir. 1999) (person with asthma not person with disability).

<sup>60</sup> Discrimination under the ADA includes the failure to provide a "reasonable accommodation" to the "known physical or mental limitations of an *otherwise qualified* individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

<sup>61</sup> 42 U.S.C. § 12111(8).

<sup>62</sup> See, e.g., *Thompson v. Cendant Corp.*, 130 F. Supp. 2d at 1259; *Hendry v. GTE North*, 896 F. Supp. at 823.

<sup>63</sup> 29 C.F.R. § 1630.2(n)(1).

<sup>64</sup> 29 C.F.R. § 1630.2(n)(3).

<sup>65</sup> 42 U.S.C. § 12111(8).

<sup>66</sup> See Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, 20 Mental & Physical Disability L. Rep. 613 (1996) [hereinafter *(R)evolution*] ("In the House Judiciary Committee, a champion for the business community offered an amendment providing that an employer's judgment regarding the functions of a job that are essential was to be 'determinative.' That amendment was successfully parried with a substitute amendment providing that 'consideration' should be given to the employer's judgment. On the House floor, the same business community champion wished to offer an amendment providing that essential functions listed in a *job description* were to be considered determinative. That amendment was met with the parry of a negotiated amendment that provided job descriptions would be 'considered evidence' of essential functions.").

<sup>67</sup> See *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49 (4th Cir. 2002) (stating straightforwardly that regular attendance is an essential function); see also *Buckles v. First Data Res., Inc.*, 176 F.3d 1098 (8th Cir. 1999); *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523 (S.D. Tex. 1997) (holding that regular attendance is generally an essential function and that employee's need for time off therefore renders him unable to perform the job's essential functions); *Aquinas v. Fed. Express Corp.*, 940 F. Supp. 73, 78 (S.D.N.Y. 1996) (stating that "as a general rule, some degree of regular, predictable attendance is fundamental to most jobs").

<sup>68</sup> *Jovanovic*, 201 F.3d at 899-900 ("Common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job. This is especially true in

factory positions ... where the work must be done on the employer's premises; maintenance and production functions cannot be performed if the employee is not at work"); *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999) ("We think it also fair to conclude that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.")

<sup>69</sup> See, e.g., *Carlson v. Inacom Corp.*, 885 F. Supp. 1314 (D. Neb. 1995) (regular and predictable attendance not essential job function because employee's absences did not result in essential business not being completed in a timely and efficient manner; even though employee's co-workers were inconvenienced by her absences and customer correspondence may have been postponed for a day or two, unscheduled absences were not disruptive); see also *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782 (6th Cir. 1998); *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29, 37 (1st Cir. 2000); *Dutton v. Johnson County Bd. of Comm'rs*, 859 F. Supp. 498, 506-507 (D. Kan. 1994).

<sup>70</sup> See, e.g., *Carlson v. Inacom Corp.*, 885 F. Supp. 1314 (D. Neb. 1995). See generally Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 Wash. & Lee L. Rev. 3 (2005) for an excellent survey of interpretations of the ADA in the employment context and the role of norms in these interpretations.

<sup>71</sup> See *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001); *Buckles v. First Data Resources, Inc.* 176 F.3d 1098, 1101 (8th Cir. 1999) (implicitly basing determination of essential function on employer's judgment); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004).

<sup>72</sup> See *Ward*, 209 F.3d at 34; *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 326 (3rd Cir. 2003).

<sup>73</sup> See, e.g., *Laurin v. Providence Hosp.*, 150 F.3d 52, 58-59 (1st Cir. 1998).

<sup>74</sup> See, e.g., *Ward*, 209 F.3d at 35.

<sup>75</sup> See Feldblum, *(R)evolution*, *supra* note 66 ("the 'reasonable' part of 'reasonable accommodation' has nothing at all to do with whether a requested accommodation is unduly burdensome as a matter of finances or operational impact. Those considerations are encompassed under the *defense* of 'undue hardship.' The 'reasonable' part of 'reasonable accommodation' refers to whether a requested accommodation is *effective* in ensuring the person with a

disability can perform the job up to the standards required by the employer.”). The decision not to substitute the word “effective” for the word “reasonable” was made in order to maintain conformity with the regulations implementing Section 504 of the Rehabilitation Act of 1973. *Id.* That decision has since been regretted by, at least, one the drafters of the ADA. *Id.* (“The drafters of the ADA retained the term ‘reasonable accommodation’ and did not substitute the term ‘effective accommodation.’ I agreed with that decision at the time, but believe it to be wrong now. We assumed the ADA’s legislative history would be adequate to inform courts what the term ‘reasonable’ actually meant. Instead, some courts, such as the Seventh Circuit, have interpreted the word ‘reasonable’ as including a form of ‘cost-benefit’ analysis in determining what accommodations are required. This is an unfortunate reading of a critical component of the ADA.”). As we note, *infra*, a broad interpretation of “reasonable” has since been adopted by the Supreme Court in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>76</sup> See, e.g., *Kvorjak*, 259 F.3d at 55; *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000); *Dutton*, 859 F. Supp. at 507.

<sup>77</sup> *Barnett*, 535 U.S. at 400-01.

<sup>78</sup> See, e.g., *Cehrs*, 155 F.3d 781; *Querry v. Messar*, 14 F.Supp.2d 437, 444 (S.D.N.Y. 1998).

<sup>79</sup> See, e.g., *Kvorjak*, 259 F.3d at 55; *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114 (10th Cir. 2004).

<sup>80</sup> See, e.g., *Cehrs*, 155 F.3d 781; *Heaser*, 247 F.3d at 831.

<sup>81</sup> See *Ward*, 209 F.3d at 36.

<sup>82</sup> See *Ward* and *Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995).

<sup>83</sup> See *Barnett*, 535 U.S. at 399-400.

<sup>84</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>85</sup> 42 U.S.C. § 12111(10)(A) and (B).

<sup>86</sup> *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir.1994), *cert. denied*, 513 U.S. 1052 (1994); see also *Hendry v. GTE North*, 896 F. Supp. 816 (N.D. Ind. 1995) (employee’s requested accommodations would have posed undue hardship for employer).