

ESSENTIAL FUNCTIONS **DOL Topic: H¹**

PART ONE OF THIS MEMORANDUM CONTAINS A SUMMARY OF QUESTIONS ASKED IN THE DOL REQUEST FOR INFORMATION ABOUT THE IMPLICATIONS OF PROVIDING ACCOMMODATIONS TO EMPLOYEES WITH SERIOUS HEALTH CONDITIONS TO ENABLE THEM TO PERFORM THEIR JOBS WITH ACCOMMODATIONS, RATHER THAN TAKING FMLA LEAVE.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT AND OTHER RELEVANT MATERIALS.

The DOL requested information about the implications of allowing an employer to adjust job duties to accommodate limitations resulting from an employee's serious health condition, in lieu of the employee taking full-time leave.

The FMLA provides that an employee is eligible for leave when "a serious health condition . . . makes the employee *unable to perform the functions* of the position...."³ The DOL's implementing regulations allow an employee to take full-time FMLA leave if a health care provider determines that, due to a serious health condition, an employee is: 1) unable to work or 2) cannot perform *any one* of the essential functions of the employee's current position, even if the employee is still able to perform all of the other "essential functions" of that position.⁴

The regulations also state that the prohibition against interfering with an employee's rights under the FMLA include the "manipulation by a covered employer to avoid responsibilities under FMLA, for example, by . . . changing the essential functions of the job in order to preclude the taking of leave."⁵

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), *available at* <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, primarily in Chapters VII and VIII.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the "Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act," *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2612(a)(1)(D) (emphasis added).

⁴ 29 C.F.R. § 825.115 (emphasis added).

⁵ 29 C.F.R. § 825.220(b)(2).

ISSUE: Impact of Accommodating Serious Health Conditions

- **The RFI asked: What implications result from allowing employers to accommodate job limitations resulting from employees' serious health conditions by modifying existing job duties?** The DOL's current interpretation of the FMLA grants employees significant flexibility to determine whether to take full-time leave. An employee is entitled to leave if he or she is unable to fulfill even one "essential function" of the job, even if the employee is still able to fulfill the other "essential functions" of the job. Unless the employee requests intermittent or reduced schedule leave,⁶ the employee retains the sole discretion to accept "light duty" or other alternative work arrangements.⁷ Part I of the RFI noted that both private and DOL surveys document that employers rely mainly on their other employees to do the work normally performed by employees who are on FMLA leave. The RFI asked for comments specifically about situations in which it is possible to accommodate employees' medical limitations while allowing employees to keep the "same job, pay, and benefits."

EMPLOYER-SIDE COMMENTS

Only a handful of commenters addressed this topic. The bullets below encapsulate the employer-side comments.

- The National Coalition to Protect Family Leave ("Coalition") states that granting employers and employees with medical restrictions more flexibility to offer and to work alternate work assignments will reduce the likelihood that employees will exhaust their leave and reinstatement rights, while also giving both parties greater ability to reduce absences.
 - The New York Transit Authority notes that collective bargaining agreements often restrict an employer's ability to transfer an employee or modify job duties.
 - Other employer-side commenters, including the National Business Group on Health and the Northern Kentucky Chamber of Commerce, identify certain difficulties that arise when job requirements are modified to accommodate employees who would otherwise need to take FMLA leave. The problems

⁶ If the employee requests intermittent leave or leave on a reduced schedule, the employer may require the employee to temporarily transfer to an alternative position that has equivalent pay and benefits. 29 U.S.C. § 2612(b)(2).

⁷ See *also* Topic G – Light Duty.

EMPLOYER-SIDE COMMENTS

identified include: administrative difficulties; peer dissatisfaction resulting from being asked to perform functions that coworkers with medical restrictions cannot perform; high costs of paying the same salary and benefits to employees who are no longer performing some or all “essential functions” of their jobs; potential conflicts with other workplace laws; the necessity of supervision to ensure that work performed is consistent with medical restrictions; and the opportunity for abuse.

- The Coalition also notes incongruity between the “essential functions” concept in the ADA and FMLA contexts. Under the ADA, employers have no obligations to alter a job’s essential functions to accommodate an employee with a disability. The Coalition states that there may be circumstances under the FMLA in which employers may be able to modify the “essential functions” of a job on a short-term basis because many “serious health conditions” are temporary in nature, while many disabilities are long-term or permanent conditions. The Coalition also notes that unlike the ADA, the FMLA prevents employers from confirming whether an employee returning from FMLA leave can safely perform the job’s essential functions.
- Employers also report that determining which essential functions employees can/cannot perform can be a time-consuming process.
- Employers’ Suggested Changes: (1) Some employers suggest amending 29 C.F.R. § 825.115 to permit, but not require, employers to modify employees’ job duties, including modifying a job’s “essential functions,” rather than permitting employees to take FMLA leave. (2) A handful of other employers support allowing employers to require an employee to accept such a modified position, as long as that position is consistent with the employee’s medical restrictions. (3) “Attendance” and “ability to work overtime” should be included as “essential functions” when overtime is essential to the job. (4) FMLA leave should be permitted only when an employee cannot perform a *majority* of the job’s essential functions. (5) Employers should be permitted to provide job descriptions to health care providers that coordinate with diagnosis codes so certification forms provide more specific descriptions of employees’ job limitations. (6) Provide direction to employers as to what reasonable accommodations employers must make for employees with serious health conditions.

EMPLOYEE-SIDE COMMENTS

The primary comments come from the National Partnership for Women and Families (“Partnership”) and the AFL-CIO. The majority of employee-side comments do not address this issue. The bullets below encapsulate the employee-side comments.

- The Partnership expresses uncertainty about the type of information sought by this part of the RFI, and registers its objection to any proposal that would require an employee to accept an employer’s proposed accommodation, in lieu of leave. The Partnership notes that nothing in the statute, regulations, or legislative history supports denying FMLA leave to employees who are offered accommodations.
- The AFL-CIO expresses the view that an employee who accepts a modified job does not forfeit his or her 12 week leave entitlement if he or she remains unable to perform the essential functions of his or her previous position (without modifications). The AFL-CIO states that FMLA leave may not be denied based on the availability or acceptance of a modified job. The AFL-CIO notes that the consideration of time spent in a modified position when calculating an employee’s 12 week leave entitlement would violate 29 C.F.R. § 825.220(b)(2).
- Concerning the relationship between the “accommodation” requirement in the ADA and the “accommodation” option in the FMLA, the Partnership notes that an employer is obligated to provide reasonable accommodations to an employee if that employee’s “serious health condition” also qualifies as a disability. However, this responsibility is distinct from any obligations or protections under the FMLA.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC H HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTES

29 U.S.C. § 2612(a)

In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: . . .

(D) Because of a serious health condition that **makes the employee unable to perform the functions** of the position of such employee.

29 U.S.C. § 2612(b)

Leave taken intermittently or on reduced leave schedule . . .

(2) Alternative position

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.

REGULATIONS

I. FMLA

29 C.F.R. § 825.115

An employee is "**unable to perform the functions of the position**" where the health care provider finds that the employee is **unable to work at all or is unable to perform any one of the essential functions of the employee's position** within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 et seq., and the regulations at 29 CFR § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of the FMLA, **the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.**

29 C.F.R. § 825.220(b)(2)

Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "**Interfering with" the exercise of an employee's rights would include**, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example: . . .

(2) **changing the essential functions of the job in order to preclude the taking of leave;**

II. ADA

29 C.F.R. § 1630.2(n)

Essential functions--

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI⁸

Cases

- *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006).
- *Watson v. Lithonia Lighting*, 304 F.3d 749 (7th Cir. 2002).

⁸ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.