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The Difference Between a Serious Health Condition under the FMLA and a Disability under the ADA

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It's bad enough that employment laws have such confusing acronyms – FLSA, FMLA, ADEA, ADA – but why do they have to use different terms for the same thing? Don't "serious health condition" and "disability" refer to the same thing? As it turns out, they do not. While both a serious health condition and a disability have the potential to interfere with an employee's attendance and job performance, they are different concepts and the existence of each has very different consequences for both employers and employees.

Background

The federal Family and Medical Leave Act (FMLA) requires employers to grant eligible employees a total of twelve workweeks of job-protected, unpaid leave during any twelve-month period because the employee needs to care for a spouse, child, or parent with a *serious health condition*, or because of the employee's own *serious health condition* where the condition makes the employee unable to perform his or her job (the FMLA also covers leave for birth, adoption or foster placement of a child). Thus, the purpose of the FMLA is to give employees a reasonable, but limited amount of time in which to take care of their own or a family member's health issues without losing their job.

The federal Americans with Disabilities Act (ADA) has an entirely different purpose. Like Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), the ADA is an anti-discrimination statute. It prohibits employers from discriminating *on the basis of disability* against a qualified individual in hiring, promotion and discharge of employees and all other terms and conditions of

employment. Under the ADA, an employer's failure reasonably to accommodate an employee's disability so that she or he may continue to work is itself a form of discrimination.

A Serious Health Condition under the FMLA

The FMLA's definition of a serious health condition (https://www.law.cornell.edu/cfr/text/29/825.113) is a complicated one. A serious health condition means an illness, injury or impairment, or physical or mental condition that involves

- any period of incapacity requiring ***an absence from work of more than three full, consecutive calendar days*** that also involves one in-person visit to a health care provider within the first seven (7) days of illness and either a second visit within the first thirty days or a regimen of continuing treatment (https://www.law.cornell.edu/cfr/text/29/825.115) (such as treatment with prescription drugs) under the supervision of a heath care provider; or
- *any* period of incapacity or treatment connected with inpatient care (https://www.law.cornell.edu/cfr/text/29/825.114); or
- *any* period of incapacity due to pregnancy (https://www.law.cornell.edu/cfr/text/29/825.120); or
- *any* period of incapacity or treatment due to a *chronic health condition* such as asthma, diabetes, epilepsy (the FMLA regulations define a chronic health condition as one that continues over an extended period of time, requires treatment by a health care provider at least twice a year, rather than for one continuous period of time, and may cause episodic rather than continuing periods of incapacity and thus require leave of periods from an hour or more to several weeks rather than a continuous period of time); or
- *any* period of incapacity that is long-term or permanent due to a condition for which treatment may not be effective (cancer, for example, or AIDS); or
- *any* absence to receive multiple treatments (and to recover from the treatments) for a condition that would likely result in an incapacity for more than three consecutive days if left untreated (examples of treatments include physical therapy, chemotherapy, dialysis).

The U.S. Department of Labor's FMLA regulations advise that colds, stomach viruses, the flu and similar conditions do not qualify as serious health conditions unless they require inpatient care or continuing treatment by a healthcare provider (one visit and a regimen of care under a doctor's supervision or two visits within 30 days). Taking over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider does not constitute a regimen of continuing treatment for FMLA purposes.

It is worth noting that only one of the circumstances defined as a serious health condition requires a specific period of incapacity – namely, a period of incapacity that lasts more than three full, consecutive calendar days. This covers many acute illnesses

and infections, as well as medical procedures that require prolonged recovery and that generally result in the employee returning to work at the conclusion of leave. All of the other instances of a serious health condition, whether related to inpatient care, pregnancy, chronic health conditions, incurable conditions or treatments for such conditions, are defined simply as "*any* period of incapacity" or "*any* absence." These cover conditions that are not acute but are instead episodic or require treatments that are episodic. The conditions that fall into this category are numerous and range from the severe morning sickness that sometimes accompanies pregnancy to asthma, arthritis, migraines and diabetes, to name just a few. For conditions such as these, the FMLA makes a provision for intermittent (recurring) job-protected leave and reduced schedule job-protected leave.

The FMLA was enacted in 1993. In 2008, it was amended to add two additional forms of job-protected leave for the family members of American servicemen: qualifying exigency (QE) leave and military caregiver (MCG) leave. MCG leave provides job-protected leave for an employee to care for a family member who is a member of the military and who has a service-related serious illness or injury. Atlhough the definition of a "serious illness or injury" for the purposes of MCG leave is similar to that of a

"serious health condition," the two are not identical. The definition of a "serious illness or injury" for MCG purposes may be found here (https://www.law.cornell.edu/cfr/text/29/825.127).

Disability under the Americans with Disabilities Act

The ADA defines (https://www.law.cornell.edu/uscode/text/42/12102) disability as a "physical or mental impairment that substantially limits one or more major life activities." The ADA provides that the definition of disability is to be construed in favor of broad coverage of individuals.

Impairments

Most medical disorders will qualify as impairments under the ADA. It does not matter how the employee came to have an impairment. For example, lung cancer is an impairment even if the employee was a heavy smoker who continues to smoke after diagnosis. A back injury caused by an automobile accident in which the employee was negligent is still an impairment.

Examples of conditions the courts have recognized as impairments:

- alcoholism
- heart palpitations
- chest pain
- back and knee strains
- hypothyroidism
- abdominal distress
- tennis elbow
- depression
- panic disorder
- erectile dysfunction

Examples of conditions that are not impairments:

- pregnancy (uncomplicated)
- normal deviations in an individuals height, weight or strength
- left-handedness
- being irresponsible
- being overweight

As the statutory definition makes clear, a person must have more than a simple impairment to be covered by the ADA. An impairment rises to the level of a disability only if it substantially limits the ability of an employee to perform a major life activity as compared to most people in the general population. That being said, an impairment does not have to prevent or even significantly or severely restrict a person from a major life activity in order to be considered substantially limiting. "Substantially limits" is something less than "almost completely prevents." And so-called "mitigating

measures" – for example, the use of assistive devices such as wheelchairs or of prescription medications – are not be taken into account in determining whether an impairment is substantially limiting. If the impairment is substantially limiting without the use of mitigating measures, it qualifies as a disability under the ADA (the sole exception to this rule is the use of ordinary eyeglasses or contact lenses).

Similar to their treatment under the FMLA, episodic impairments or conditions that are in remission are disabilities if they substantially limit a major life active when they occur or are active. *Minor* impairments that are expected to last fewer than six months are not disabilities. But an impairment that substantially limits a person in a major life activity for fewer than six months is still a disability.

Exclusions from ADA coverage. The ADA expressly excludes current drug use from coverage, but covers alcoholism.

Major Life Activities

To qualify as a disability under the ADA, an impairment must significantly limit a person's ability to engage in a major life activity. What is a major life activity, anyway? The ADA defines (https://www.law.cornell.edu/uscode/text/42/12102) "major life activities" by examples. They include but are by no means limited to:

- caring for oneself
- performing manual tasks
- walking
- seeing, hearing, speaking
- breathing
- learning
- eating
- thinking
- reading
- working

Major life activities also include major bodily functions. Impairments of these sorts of functions are not usually visible to an employer:

- Functions of the immune system
- Neurological and brain functions
- Normal cellular growth
- Respiratory and circulatory function
- Digestive and bowel functions
- Reproductive functions
- Endocrine functions
- Bowel functions

Per Se Disabilities or "Predictable Assessments"

The guiding principle of disability analysis under the ADA is that each employee's impairment and its effect on one or more major life activities must be evaluated individually. Nevertheless, some conditions will almost always result in a finding that persons affected by them are substantially limited in a major life activity and are protected by the ADA. The EEOC has identified in subsection (iii) of 29 CFR § 1630.2(j) some of those impairments that it considers to result in a "predictable assessment" of disability. Here are some of them:

- deafness (because it substantially limits hearing);
- blindness (because it substantially limits seeing);
- partially or completely missing limbs requiring the use of a wheelchair (because it substantially limit musculoskeletal function);
- autism (because it substantially limits brain function);
- cancer (because it substantially limits normal cell growth);
- diabetes (because it substantially limits endocrine function);
- major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia (because they substantially limit brain function).

You can find the EEOC's full list of predictable assessments of disability in the Appendix to the ADA regulations at the comments to § 1630.2(j)(3) here (https://www.law.cornell.edu/cfr/text/29/appendix-to_part_1630).

Pregnancy as a Disability

Pregnancy is not mentioned in the text of the ADA or in the EEOC's ADA regulations. In the interpretive appendix to the regulations, the EEOC says this about pregnancy:

> . . . [C]onditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability . . . ."

Thus, an employee who is suffering from pregnancy complications that require her to be on bed rest for ten weeks will be a person with a disability, and an employee's preeclampsia has been found to substantially limit the operation of her circulatory and urinary functions, rendering her a person with a disability. In its 2015 Enforcement Guidance on Pregnancy Discrimination and Related Issues

(https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm), the EEOC gave further examples of the ways in which a complication of pregnancy could result in a substantial impairment that gives rise to a disability:

> pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function).

Note, however, that the courts have been clear that periodic nausea, vomiting, dizziness, severe headaches, and fatigue are not disabilities within the meaning of the ADA because they are "part and parcel of a normal pregnancy." Court cases emphasize that morning sickness, stress, nausea, back pain, swelling, and headaches or physiological changes related to a pregnancy are not impairments unless they exceed normal ranges or are attributable to a disorder. For examples of decisions so holding, see here (https://caselaw.findlaw.com/us-8th-circuit/1293109.html) and here (https://law.justia.com/cases/federal/district-courts/FSupp/922/461/1592696/).

The treatment of pregnancy under the ADA thus differs from its treatment under the FMLA. Under the FMLA, normal incidents of pregnancy such as morning sickness, nausea and the like that result in incapacity, even incapacity that lasts only several hours, qualify for job-protected leave. Under the ADA, normal side effects of pregnancy are not protected. Only complications and impairments that go beyond that experienced by the general population would entitle an employee to a reasonable accommodation.

Why the FMLA and the ADA Treat Medical Conditions That Cause Incapacity Differently

The FMLA's purpose is to provide a limited amount of job-protected leave for employees who are not able to work due to a health issue of their own or that of a spouse, child or parent (as well as to provide job-protected leave for those who wish to stay home with a newborn, newly adopted child or child newly placed for foster care). The FMLA's focus is separating short-term illnesses that keep an employee out of work

for only a few days (and which can usually be handled through the use of sick leave) from those whose effects are longer-lasting and require care supervised by a health care provider.

Like the FMLA, the ADA offers protections to employees with medical conditions that leave them unable to work for longer periods than just a few days. But the focus of the ADA is on the effort to find ways to restructure work or provide assistive devices to accommodate employees' medical conditions. What the ADA asks of employers is greater than under the FMLA – and the definition of "disability" under the ADA is therefore more demanding to meet than is the definition of "serious health condition" under the FMLA.

Documenting a Serious Health Condition Versus Documenting a Disability

Evaluating a serious health condition under the FMLA is relatively easy. An employer may require employees to provide medical certification of the need for FMLA leave from the employee's health care provider. The FMLA regulations at 29 CFR § 825.306(a) (https://www.law.cornell.edu/cfr/text/29/825.306) set forth what information an employer is entitled to. It includes:

- the approximate date on which the serious health condition began, and its probable duration;
- a statement or description of appropriate medical facts regarding the patient's health condition sufficient to show the need for leave (the medical facts might include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other course of continuing treatment);
- if the employee is the patient, the certification should include enough information to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability;
- if the patient is a covered family member with a serious health condition, the certification should include enough information to establish that the family member is in need of care from the employee, as well as an estimate of the frequency and duration of the leave needed to care for the family member.

The U.S. Department of Labor, which administers the FMLA, has done employers and health care providers a great favor by developing two forms – one for an employee's own serious health condition (http://www.dol.gov/whd/forms/WH-380-E.pdf) and one for the serious health condition of an employee's family member

(http://www.dol.gov/whd/forms/WH-380-F.pdf) – for employees to give to their health care provider to certify the need for FMLA leave. It asks for no more and no less that the law allows.

There is no such approved form for employers to use when seeking medical information to support an employee's request for a reasonable accommodation on the basis of disability. The Equal Employment Opportunity Commission's (EEOC's) ADA regulations (https://www.law.cornell.edu/cfr/text/29/1630.14), the EEOC's enforcement guidance (https://www.eeoc.gov/policy/docs/qanda-inquiries.html)s and decisions from federal appellate courts (see here (https://caselaw.findlaw.com/us-7th-circuit/1859938.html) and here (https://caselaw.findlaw.com/us-6th-circuit/1471726.html), for example) state clearly that employers have the right to medical information about an employee when the employee has requested a reasonable accommodation and the disability or need for accommodation is not obvious, but there is no officially-provided form to use..

Employers should resist the temptation to use the FMLA employee medical certification form to confirm the existence of a disability and the need for accommodation. The FMLA's definition of a serious health condition is much broader than that of a disability and the mere fact that the employee was out on FMLA leave for the same condition does not by itself mean that the condition is a disability for the purposes of the ADA.

Instead, when employees ask for accommodations under the ADA, employers should specifically ask for documentation of the restrictions that the employee's impairment causes. An employer does not have to accept a healthcare provider's generalized statement that the impairment interferes with the employee's ability to perform his job or a specific job duty. The employer is entitled to know the extent of the interference. The employer should be sure to give the employee's physician a **detailed** description of the employee's actual job duties. Merely printing out the job description is unlikely to elicit the kind of information the employer needs to evaluate the request for accommodation. Still, an employer cannot ask for more information than is necessary to establish the existence of a disability and the scope of the requested accommodation.

Who Chooses the Healthcare Provider?

Under both statutes, the employee has the right to choose the healthcare provider who will document the serious health condition or disability, but beyond that, the rules governing medical examination differ. Under the FMLA regulations (https://www.law.cornell.edu/cfr/text/29/825.307), an employer may always require the

employee to undergo an examination for a second opinion with a health care provider of the *employer's* choice at the employer's cost (and if the employee's and the employer's healthcare provider disagree, the employee must obtain a certification from a third provider, again at the employer's cost; the decision of the third provider is binding). The employee's initial medical certification from his or her personal healthcare provider does not have to be deficient for the employer to have the right to seek a second opinion. It may do so even if the initial certification is complete in all respects.

The rules are a little different under the ADA. The ADA allows an employer to send an employee to a healthcare provider of the employer's choosing only if the employee has not provided enough information from which to determine that a disability exists, what sort of limitations it causes and what accommodations might address them. In contrast to the FMLA, the ADA does **not** permit an employer to send an employee to a healthcare provider of the employer's own choosing for a second opinion if the employee has provided sufficient information for the employer and employee to discuss accommodations. Indeed, in an enforcement guidance (https://www.eeoc.gov/policy/docs/qanda-inquiries.html), the EEOC advises, although it does not require, an employer to ask the employee's provider for more information before sending the employee to its own health care professional because, in its view, "an employee's health care provider frequently is in the best position to provide information about the employee's limitations."

Under the ADA, as with the FMLA, if an employer requires an employee to go to a healthcare provider of the employer's choice, the employer must pay all costs associated with the visit.

Conclusion

While the difference between a FMLA serious health condition and an ADA disability may appear subtle, they must not be confused. Confusing the two will likely interfere with an employee's rights under the respective statutes and may lead to litigation. Using the U.S. Department of Labor's medical certification forms will help keep an employer on the FMLA straight-and-narrow, but complying with its responsibilities under the ADA requires an employer to be proactive and to draft an individualized request for information about an employee's impairment from his or her healthcare provider.