

Employment Roundtable
Managing Chronic and Progressive Illness in the Workplace
(Washington Law)

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I. INTRODUCTION

Chronic and progressive or terminal illness of employees (or their family members) often present significant legal as well as pragmatic problems for employers. Workers with such illnesses may want or need to continue working, even as their deteriorating health conditions place increasing burdens on their ability to perform. Co-workers may be resentful of absences or other accommodations such employees receive, or intolerant of certain health conditions such as hepatitis or HIV. At the same time, employees may at times be reluctant to disclose chronic or terminal conditions or otherwise ask for employer assistance for fear of stigma and/or reprisals.¹

Although many different laws may apply to employees coping with chronic or progressive illness, such as the Americans with Disabilities Act,² the Family Medical Leave Act,³ the Washington Family Leave Act⁴ and state and federal disability laws, the law provides inadequate guidance for clearly and effectively managing the complex issues raised by such conditions. While most employers are familiar with legal obligations pertaining to employees with disabilities, managing chronic and progressive illness is still an evolving issue due, in large part, to the perception that those suffering from such an illness would withdraw from the workforce:

[T]he expected outcome for an employee with an acute condition was either recovery and return to work with largely unimpeded capacity, or a complete withdrawal from the work force due to disability or death. Accordingly, employers perceived chronic illness and disability as problems that existed outside the work place. The fact that elderly and retired persons have always had the highest rates of chronic conditions and disability reinforced that perception.⁵

However, more and more employees with chronic and terminal illnesses are choosing to remain in the workforce. Indeed, the desire to remain productive, as well as the need to retain employer-

¹ See, e.g., Susan G. Goldberg, Mary B. Killeen, Bonnie O'Day, *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, 11 Psychol. Pub. Pol'y & L 463 (2005).

² 42 USC §§ 12101 to 12213.

³ 29 USCA §§ 2601, *et seq.*

⁴ RCW 49.78 (as amended in 2006 to adopt criteria substantially identical to federal law).

⁵ Judith K. Barr & Robert A. Padgug, *Employers and AIDS: Meeting the Health Benefit Needs of People with HIV Disease*, 3 Cornell J.L. & Pub. Pol'y 83, 84 (1993).

sponsored health and disability insurance coverage, provide strong incentives for employees to remain in the workplace as long as possible. Beyond strictly legal obligations, employers seeking to provide a supportive environment for an employee with a progressive illness must engage in a delicate balance between the business and financial needs of the company, what may prove to be substantial physical and emotional needs of the employee, and the impact on the employee's co-workers.

Issues that typically arise for employees who suffer from chronic or progressive illnesses include increased absenteeism, fatigue, decreased concentration, loss of motor coordination and/or control of bodily functions, all of which may have a significant impact on the employee's performance and safety. The law sets limits on what an employer must do to accommodate such employees. Employers who wish to go beyond the parameters of what the law requires may be as creative and generous as they wish, provided their approach is consistent for all employees with similar needs.

This memorandum addresses some common issues that arise in managing the chronic and progressive illnesses of employees. For the purpose of this discussion, readers should assume that the employees discussed, unless otherwise noted, suffer from a disability under the Americans with Disabilities Act (ADA) and Washington law⁶ that is also a "serious health condition" under federal and state family medical leave law.

II. MANAGING ABSENCES FROM THE WORKPLACE: FMLA AND OFLA

Employees with chronic health conditions are often more likely to have sporadic and/or significant attendance problems. Covered employers are required to grant intermittent and/or extended leave to eligible employees under the federal Family Medical Leave Act (FMLA), the state Family Leave Act and state and federal disability laws.⁷ There are limits, however, on the amount of leave that employers must provide.

A. Family Medical Leave

Eligible employees are entitled to up to twelve weeks of leave for their own serious health condition or that of a family member under federal and state family medical leave (FML) laws. In addition, employees who qualify for federal FML are entitled to additional time off for disability due to pregnancy and childbirth under a recent amendment to Washington law.⁸ Finally, as noted above, The Washington Family Care Act allows the use of paid leave to care for a family member.⁹

⁶ The Washington Supreme Court recently announced its adoption of the federal Americans with Disabilities Act definition of "disability." *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.3d 844 (2006); *see also Wimer v. Inflation Systems, Inc.*, 2006 WL 3718004 *5 (E.D. Wash. 2006) (emphasizing that the federal definition was adopted, in part, "to allow courts to consult federal law in construing and applying similar provisions" under Washington law)

⁷ In addition, if an employer provides sick, vacation or other paid-time off to employees, it must allow employees to use such paid leave to care for family members with certain health conditions and/or disabilities.

⁸ *See* SSB 6185 (2006), amending Washington's Family Leave Act, RCW 49.78.390; WAC 162-30-020).

⁹ *See generally* Washington Dept. of Labor and Industries ES.C.10 ("Frequently Asked Questions About The Family Care Rules"). This is not addressed in detail herein because the focus is on coping with employee illness.

1. Notice Requirements

Employers may require that employees wishing to take FML provide at least 30 days' notice of the need for any leave that is foreseeable (*e.g.*, planned treatment).¹⁰ Employees must make a reasonable effort to schedule treatment at times that will minimize disruptions to the employer's business.¹¹

When the need for leave is not foreseeable, the employee must ordinarily provide as much advance notice as is practicable. The employee is expected to give oral or written notice of the need for leave as soon as practicable under the particular facts and circumstances, in most cases no more than one or two working days after learning of the need for leave.¹²

Employers may require employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave. However, in the case of a medical emergency necessitating leave for employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required.¹³

Employees are not required to make a formal request for FML or use any particular jargon. If the employer has reason to believe an absence may be for a condition that qualifies for FMLA, it must investigate further.¹⁴

2. Intermittent Leave

Both continuous and intermittent leave are available to eligible employees under FML law. "Intermittent leave" includes periodic days or blocks of time off due to a single qualifying reason, or a reduction in the number of days or hours the employee is scheduled to work.¹⁵ Intermittent leave

¹⁰ 29 CFR § 825.302; RCW 49.78.250.

¹¹ 29 CFR §§ 825.117, 825.302(f).

¹² 29 CFR §303(a).

¹³ 29 CFR 825.303(a); *see also*, *Mora v. Chem-Tronics, Inc.*, 16 F.Supp.2d 1192, 1216-1217 (whether employee's notice to employer five hours after start of shift, rather than 30 minutes before as required by call-in policy, was timely depended on facts and circumstances under § 825.303).

¹⁴ 29 CFR §303(b), 29 CFR 825.208; *see also* *Hendry v. GTE N. Inc.*, 896 F. Supp. 816 (N.D. Ind. 1995) (where employee reported she had a migraine, employer was sufficiently aware that employee's absence might be FMLA-protected and therefore had duty to inquire further); *Brennon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995) (where employee reported her daughter was sick, employer on notice that leave may have qualified); *but see* *Johnson v. Primerica*, 1996 WL 34148 (S.D.N.Y. 1996) (where employee cited only financial reasons for leave; employer had no duty to inquire further regarding reasons for leave despite knowledge of employee's son's prior illness).

¹⁵ *See* 29 CFR § 825.203. Employers should be mindful that wage laws prohibiting pay docking of exempt employees for partial day absences may be applicable. An employer will jeopardize an employee's exempt status by reducing the employee's salary for any partial-day absence that is not covered by the FMLA. *See* Washington Dept. of Labor and Industries ES.A.9.1 ("Questions and Answers About Salary Basis") ("Deductions from pay for partial day absences are not permitted except for very limited circumstances allowed in the *Federal Family and Medical Leave Act.*")

may be taken for periods of incapacity, treatment, or recovery from treatment, and must be provided when it is medically necessary (as opposed to voluntary treatments and procedures).¹⁶

While providing a continuous or extended leave is a relatively straightforward procedure under an established FML policy, intermittent leave tends to be more difficult to manage, particularly if the need for leave is not foreseeable. Unanticipated absences may place a substantial burden on the employer's ability to ensure that critical workplace functions are performed on a timely and effective basis.

Employees who require unforeseen intermittent leave are not always vigilant about informing their employers of the reason they are absent from work. Employees whose need for intermittent leave is unforeseeable may be required to comply with the employer's reporting policies for absences. For example, if the employer has a requirement that all employees who cannot report to work call in to a designated person prior to or within a set period of time after the start of their shift, the employer may ordinarily require an employee on intermittent leave to adhere to the same procedure. While the employer may not be able to prohibit an employee who fails to comply with its call-in procedures from taking leave, the employer may subject the employee to disciplinary action consistent with a uniformly applied policy.¹⁷ While it is permissible to have a policy to this effect, an employer cannot require strict compliance with a call-in policy in circumstances where the employee's need for leave precludes him/her from providing timely notice under the policy. In addition, employers who are aware that the employee may be eligible for FML are responsible for determining whether an unforeseen absence qualifies and for timely notifying the employee whether the leave will be counted as such.

3. Medical Certification

The employer may require the employee to provide medical certification of the need for, and anticipated duration of leave to obtain treatment, or a reduced work schedule.¹⁸ The employer must notify an employee in writing of any requirement to obtain medical certification.¹⁹ If the employee has provided thirty or more days' notice, the certification must be provided before the leave begins; otherwise the employee must receive at least fifteen days to provide the certification.²⁰ If the leave is not foreseeable, employers should provisionally designate the leave as approved until the medical certification is received.²¹

Employees requesting leave often provide a note from their physician in lieu of a completed medical certification form, or provide a medical certification form that is incomplete. In such circumstances, the employer may not have sufficient information to determine whether the employee's absence qualifies for FML, and may require the employee to obtain written clarification or a completed certification form prior to approving the leave (again, under these circumstances, the leave should be granted provisionally until the additional information is obtained).²² In addition, a health care

¹⁶ See 29 CFR § 825.203; RCW 49.78.230.

¹⁷ See 29 CFR 825.302(d).

¹⁸ See 29 CFR §§ 825.117, 825.306; RCW 49.78.270.

¹⁹ 29 CFR § 825.305.

²⁰ *Id.*

²¹ *Id.*

²² See also RCW 49.78.270 (providing tests for sufficiency of certifications).

provider representing the employer, with the employee's permission, may contact the employee's health care provider to clarify information and confirm the authenticity of the certification. Employers are prohibited from contacting the employee's health provider directly.²³

4. Alternate Duty and Reduced Work Schedules

An employee taking intermittent leave may be assigned to alternate duty or work a reduced work schedule.²⁴ However, employers may not require an employee to take a "light duty" job in lieu of taking leave.²⁵

Only the amount of leave actually taken may be counted toward the employee's FML entitlement. If the employee has no available paid leave, the employer may dock the employee's pay for the amount of leave taken.²⁶

In addition, employees may request reduced hours as a reasonable accommodation.²⁷ Employers, in contrast, often argue that the ability to work a full schedule or overtime is an essential function of the job.²⁸ In a case against Microsoft, for example, the employee argued that an hepatitis C infection prevented him from working more than 8 hours a day and 40 hours a week. While Microsoft successfully argued that the ability to work additional hours was an essential function of his job, the court held that there was a genuine issue of fact as to whether it failed to accommodate the employee by reassigning him to another position requiring only compatible hours.

III. LEAVE AS A REASONABLE ACCOMMODATION UNDER THE ADA

The ADA²⁹ and the Washington Law Against Discrimination (WLAD)³⁰ protect qualified disabled employees who can perform the essential functions of their jobs,³¹ with or without reasonable accommodation. Employees who are ineligible for FML may nevertheless be entitled to leave as a reasonable accommodation under the ADA.³² In addition, employees who exhaust all available FML may be entitled to additional extended or intermittent leave, for many disability related reasons including, but not limited to, the following:

²³ 29 CFR § 825.307(a).

²⁴ 29 CFR § 825.204; RCW 49.78.230(2).

²⁵ 29 CFR § 825.220(d) and §825.702(d)(2).

²⁶ 29 CFR § 825.206.

²⁷ See, e.g., *Fisher v. Sysco Food Serv. of Seattle, Inc.*, 2006 WL 1663680 (W.D. Wash 2006) (employee with multiple sclerosis sought to limit his hours as recommended by physicians); *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 70 P.3d 126 (2003).

²⁸ *Id.*

²⁹ 42 USC §§ 12101 to 12213.

³⁰ RCW §49.60.180; WAC 162-22-010 *et seq.*; see also *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.3d 844 (2006); *Fisher v. Sysco Food Serv. of Seattle*, 2006 WL 1663680 *1 (W.D. Wash. 2006).

³¹ This evaluation of the individual's ability to perform the essential functions of the job must consider the employee's ability at the time the employment decision is made; the employer may not factor into the decision concerns about the employee's future abilities. 29 CFR Pt. 1630, App. §1630.2(m).

³² See generally, EEOC *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) ("EEOC Guidance"), <http://www.eeoc.gov/policy/docs/accommodation.html>.

- To recover from an illness or episodic manifestation of a disability
- To obtain medical treatment
- To avoid temporary adverse conditions in the workplace (*e.g.*, potential reactions to chemical treatments, breakdown in air conditioning, etc.)
- To train a service animal or receive training in the use of a prosthetic device, Braille, or sign language

Whether and how much leave must be provided depends on the facts and circumstances of the particular case. Employers must provide disabled employees the same amount of leave available to other employees under FML and any other extended leave policies (*e.g.*, personal leave).³³ An extended unpaid medical leave of an indefinite duration may be a reasonable accommodation if it does not impose an undue hardship on the employer and could plausibly result in the employee being able to return to work.³⁴ Courts are likely to scrutinize any claim of undue hardship due to a leave of absence to determine whether attendance at work is essential. Of course, as with any other accommodation, granting additional leave is not required if the employer provides an effective alternative accommodation, or if the leave would create an undue hardship for the employer.³⁵

A. Providing Reasonable Accommodations Other Than Leave

Both Title I of the ADA and the WLAD law require employers to provide reasonable accommodations for the known physical or mental limitations of an otherwise qualified employee or applicant with a disability,³⁶ unless doing so would result in an undue hardship.³⁷ A "qualified

³³ *But see Hopkins v. City of Bothell*, 117 Wash. App. 1019, 2003 WL 21326845 *6 (2003) (unpublished) (“Although it probably would have been better policy for Bothell to allow Hopkins to use up all of his paid leave rather than to cash out his remaining paid leave and force him to retire or be terminated, the City’s failure to do so in this case was not a proximate cause of any injury to Hopkins”).

³⁴ *See Bourgo v. Canby School Dist.*, 167 F.Supp.2d 1173, 1183 (D. Or. 2001) (summary judgment denied where employer failed to show undue hardship or that providing extended medical leave could not have plausibly enabled employee to return to position), *citing Humphrey v. Memorial Hospital Ass’n.*, 239 F.3d 1128, 1135 (9th Cir. 2001); *but see Hopkins v. City of Bothell*, 117 Wash. App. 1019, 2003 WL 21326845 *6 (2003) (unpublished) (“While an unpaid leave of absence for medical treatment ‘may’ be a reasonable accommodation *** it is not required when the prognosis is total incapacity from performing any work for an unknown duration”); *Chadwick v. Northwest Airlines*, 100 Wash.2d 221, 667 P.2d 1104 (1983) (no disability discrimination found where employee only worked 43.3 percent of his scheduled workdays, who absences had nothing to do with his alleged disability and whose work performance was otherwise unsatisfactory).

³⁵ *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994); *see also Cripe v. City of San Jose*, 261 F3d 877, 885 (9th Cir. 2001); *Humphrey, supra*, 239 F3d at 1135 (where “regular and predictable job performance” was essential function of medical transcriptionist position but physical attendance at the office was not, court’s analysis focused on whether request was reasonable or imposed an undue hardship on employer). Leave need not be granted as a reasonable accommodation if an alternative accommodation can be provided that eliminates the need for leave. *See EEOC Guidance*; *but see* 29 CFR § 825.702(d)(1) (employer may not require employee who qualifies for Family Medical Leave to accept “reasonable accommodation” in lieu of taking family medical leave).

³⁶ In a trilogy of cases decided in 1999, the U.S. Supreme Court held that the existence of a "disability" must be determined on an individual basis, taking into account any mitigating measures, such as the mitigating

individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position held or sought.³⁸

Where the existence of a disability and the accommodation required are obvious (*e.g.*, the need for leave to obtain cancer treatment), complying with the duty to provide reasonable accommodation is relatively straightforward. However, when the disability is chronic or progressive, or the accommodation required is not obvious, the employer's duty to identify and provide reasonable accommodation can become more complex and challenging.

1. The Interactive Process

The first step in providing a reasonable accommodation is determining what, if any accommodation is appropriate. Federal regulations contemplate a flexible, "interactive process" between the employer and employee or applicant for making this determination.³⁹ The Ninth Circuit Court of Appeals has held that this process is mandatory in most cases.⁴⁰ "Under Washington law, the employer also has an obligation to engage in an interactive process to reasonably accommodate handicapped employees."⁴¹

The "failure to provide reasonable accommodation to 'an otherwise qualified individual with a disability' constitutes discrimination."⁴² Failure to provide reasonable accommodation includes the employer's failure to engage in an interactive process to determine whether accommodation is possible.⁴³ The employer's obligation to provide reasonable accommodation continues even if the first attempt at accommodation fails or the individual's condition changes over time (*e.g.*, an individual with a progressive disease, such as multiple sclerosis, may need multiple accommodations that change over time as the individual's condition deteriorates).

If the employer's good faith participation in the interactive process is disputed, a jury trial is required to resolve the issue. Liability for failure to engage in the interactive process in good faith may be imposed where a jury could "reasonably conclude that the employee would have been able

effects of medication, assistive devices or other factors. *See Sutton v. United Air Lines, Inc.*, 527 US 471 (1999) (twin applicants who were disqualified from employment as global airline pilots based on uncorrected 20/200 vision were not disabled where their corrected vision was 20/20); *Albertson's, Inc. v. Kirkingburg*, 527 US 555 (1999) (truck driver whose vision did not meet Department of Transportation (DOT) standards was not disabled where he had learned to compensate for visual impairment to such a degree that it did not significantly restrict him in performing a major life activity); *Murphy v. United Parcel Service, Inc.*, 527 US 516 (1999) (mechanic with high blood pressure but functioned normally on medication was not substantially limited in working where he was disqualified from only one job requiring DOT health certification).

³⁷ 42 USC § 12112(b)(5)(A); *see also, e.g., Becker v. Cashman*, 128 Wash. App. 79, 84, 114 P.3d 1210 (2005) ("state law requires employers to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer").

³⁸ 42 USC § 12111(8).

³⁹ *See* 29 CFR § 1630, App. 29 CFR §1630.9 (Process of Determining Reasonable Accommodation).

⁴⁰ *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (interactive process mandatory unless appropriate accommodation is easily identifiable). The Ninth Circuit has jurisdiction over cases in Oregon, Washington, California, and several other states.

⁴¹ *Fisher v. Sysco Food Serv. of Seattle*, 2006 WL 1663680 *2 (W.D. Wash. 2006).

⁴² 29 CFR § 1630.9; *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

⁴³ *Barnett v. U.S. Air, Inc.*, 228 F.3d at 1112.

to perform the job with accommodations.”⁴⁴ In making that determination, the jury may consider that there may have been other accommodations available, had the employer participated in good faith.⁴⁵

On the other hand, an employee who refuses to participate in the interactive process by failing or refusing to provide information regarding the nature and scope of his/her precise limitations and any potential accommodations may forfeit any right to reasonable accommodation otherwise available.⁴⁶ Requesting an accommodation that is not possible is not fatal to an employee’s claim.⁴⁷ However, an individual may be faulted for the breakdown in the interactive process if the individual is unwilling to explore other alternatives.

Employers are only obligated to make reasonable accommodation for known disabilities, and it is generally the employee’s responsibility to request accommodation.⁴⁸ However, employers must initiate an interactive process without being asked for an accommodation if they “(1) know the employee has a disability; (2) know, or have reason to know, the employee is experiencing workplace problems because of the disability; or (3) know, or have reason to know, the disability prevents the employee from requesting a reasonable accommodation.”⁴⁹ When the need for an accommodation is not obvious, an employer may require that the individual with a disability provide documentation of the need for accommodation, including information about the individual’s disability and functional limitations. The requested documentation may include only the information needed to establish that a person has a disability, and that the disability necessitates a reasonable accommodation.⁵⁰

Once the employer’s affirmative duty to engage in the interactive process is triggered by a request for accommodation or the employer’s recognition of the need for accommodation, the employer must take the following steps:

- Analyze the particular job and determine its purpose and essential function;
- Consult with the individual with the disability to ascertain the precise job related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation;

⁴⁴ *Barnett v. U.S. Air, Inc.*, 228 F.3d at 1116.

⁴⁵ *Id.*

⁴⁶ *See, e.g., Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278 (7th Cir. 1998) (court rejected claim for failure to provide reasonable accommodation where plaintiff refused to respond to employer’s request for information, employer made reasonable efforts to communicate, and plaintiff caused a breakdown in the interactive process); *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998) (court rejected plaintiff’s claim for failure to accommodate where plaintiff caused breakdown in interactive process by failing to provide employer with doctor’s statement that responded to employer’s reasonable request for information regarding scope of plaintiff’s condition).

⁴⁷ *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 313 (3rd Cir. 1999).

⁴⁸ *See, e.g., Lumper v. Boeing Corp.*, 2006 WL 3691663 * 5 (Wash. App. 2006) (unpublished) (“in Washington, the employee must start the interactive accommodation process by notifying the employer of the physical limitations and suggesting an reasonable accommodation”).

⁴⁹ *Barnett*, 228 F.3d at 1112.

⁵⁰ 29 CFR §1630, App 29 CFR §1630.9.

- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.⁵¹

Both the employee and the employer are obligated to engage in good faith in the interactive process, and the "expressed choice of the applicant [or employee] shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity."⁵²

The *EEOC Guidance* sets forth the EEOC's position on a variety of reasonable accommodation issues, many of which are restated below. Employers should keep in mind that the EEOC interpretations typically favor the broadest possible application of the law. While courts are not bound by the EEOC's position on any particular issue, the EEOC's view represents a conservative approach to compliance issues.

2. Multiple Accommodations

When an employee suffers from a disabling condition that is terminal and/or progressive over time, such as multiple sclerosis or AIDS, employers may face additional challenges as existing accommodations may become inadequate to enable the employee to perform essential functions of the job. Nevertheless, the duty to provide reasonable accommodation is an ongoing one.

Employers are ordinarily under no obligation to ask whether a reasonable accommodation is needed when an employee who has not disclosed the existence of a disability has not asked for one (and an employer should not ask if they wish to avoid a claim that they "regarded" the employee as disabled). However, a disabled employee whose condition is deteriorating may be reluctant, for a variety of reasons, to ask for additional accommodations. An employer may ask an employee with a known disability whether he or she needs a reasonable accommodation when the employer reasonably believes that the employee may need an accommodation (*e.g.*, the employee is experiencing performance or conduct problems). If the employee states that no reasonable accommodation is necessary, the employer has fulfilled its obligation.

An employee who requests multiple accommodations is entitled to those reasonable accommodations that are necessitated by the disability and will enable the employee to perform the essential functions of the job. For each successive accommodation, the employer must consider (1) whether the accommodation is needed; (2) if so, whether the accommodation would be effective; and (3) if effective, whether the accommodation is reasonable or would impose an undue hardship.

If a reasonable accommodation proves ineffective and the employee remains unable to perform an essential job function, the employer must determine whether alternative reasonable accommodations exist. If there is no alternative accommodation, then the employer must attempt to reassign the

⁵¹ See 29 CFR Part 1630 App. § 1630.9.

⁵² *Barnett*, 228 F.3d at 1115.

employee to a vacant position for which he or she is qualified, unless to do so would cause an undue hardship. As with any request for accommodation, the employer should initiate a dialog with the employee to explore what reasonable alternative accommodations are available.

3. Reassignment

Reassignment to a vacant position is a form of reasonable accommodation available to an employee who can no longer perform the essential functions of his/her current position, with or without reasonable accommodation.⁵³ An employer is not required to bump an employee to create a vacancy or create a new position. Even if the employer does not ordinarily permit employees to transfer from one position to another, reassignment is required unless the employer can show that it would cause an "undue hardship."⁵⁴ The employer may also have an obligation to affirmatively look or screen for suitable reassignment possibilities. In *Davis v. Microsoft Corp.*,⁵⁵ for example, the court allowed the issue of reasonableness of Microsoft's accommodation efforts to go forward to the jury despite Microsoft actions in (1) providing the employee with six months to conduct an in-house job search; (2) providing him with office space and immediate access to Microsoft's job databank; (3) assigning an internal resource specialist to provide assistance with his job search; and (4) offering him certain specific jobs as reassignment possibilities. The employee successfully argued that Microsoft's failure to predetermine which suggested job openings would be compatible with his restrictions were enough to take the issue to a jury. Notably, in the absence of an undue hardship, "a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees."⁵⁶

Reassignment must be made to an equivalent position (*i.e.*, one that is most consistent in terms of pay, status, and other relevant factors such as benefits, geographical location, etc.). The duty to reassign does not include giving an employee a promotion or transfer to a position the employee is not qualified to perform. Nor is an employer obligated to assist the employee in becoming qualified by providing necessary training, unless the employer would normally provide training to anyone hired for or transferred to the position.

Reassignment is the reasonable accommodation of last resort. It is required only after the employer has determined there are no effective accommodations that will enable the employee to perform the essential functions of the current position, or that all other accommodations would impose an undue hardship. Therefore, before considering reassignment as a reasonable accommodation, employers should first exhaust the alternatives that would enable an employee to remain in his or her current position (unless, of course, the parties agree that the transfer is preferable).

An employer's unilaterally imposed seniority system is not a *per se* bar to reassignment, but it is a factor to be considered in determining whether the accommodation would result in an undue

⁵³ See 42 USC § 12111(9)(B); see also *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 70 P.3d 126 (2003).

⁵⁴ 42 USC § 12112(b)(5)(A).

⁵⁵ 149 Wash.2d 521, 70 P.3d 126 (2003).

⁵⁶ *Barnett*, 228 F.3d at 1120.

hardship.⁵⁷ Where reassignment would violate a *bona fide* seniority system contained in a collective bargaining agreement, it is not required.⁵⁸

4. Undue Hardship

Whether an accommodation will result in an "undue hardship" requires consideration of the cost of the accommodation, the overall financial resources of the company and the scope of the employer's operations.⁵⁹ Although employers need not provide an accommodation that would result in an undue hardship, employers should be mindful that mere difficulty or inconvenience is not sufficient to establish undue hardship. If challenged, the refusal to grant an accommodation based on undue hardship will be severely scrutinized.

Undue hardship must be based on an individualized assessment of the present circumstances that demonstrate a specific accommodation would cause significant difficulty or expense.⁶⁰ One of the factors the EEOC considers is the net cost to the employer. Therefore, when assessing whether a particular accommodation would be too costly, employers should consider the availability of outside funding sources (*e.g.*, the state rehabilitation agency), the employer's eligibility for tax credits or deductions to offset the cost of the accommodation, and the disabled individual's willingness to incur some of the expense.

An employer cannot claim undue hardship based on employees' or customers' fears or prejudices toward the disabled employee. Nor is undue hardship established where there is a perceived risk that granting a reasonable accommodation might have a negative impact on the morale of other employees. Undue hardship, however, may be shown where providing a reasonable accommodation would unduly disrupt the ability of co-workers to perform their jobs.⁶¹

5. Employees Who Pose a Direct Threat to Themselves or Others

Employers need not accommodate disabled employees who cannot perform the essential functions of their position, with or without accommodation, if doing so would present a "direct threat" to the health or safety of other workers, customers, or to the employee.⁶² "Direct threat" means a "significant risk" of "substantial harm" to the health or safety of the employee or others in the workplace that cannot be eliminated or reduced by reasonable accommodation.⁶³

⁵⁷ *Barnett*, 228 F.3d at 1120; *Willis v. Pacific Maritime Association*, 236 F.3d 1160, 2001 WL 21294 *4 (9th Cir.), *amended on den. of reh'g*, 244 F.3d 675 (9th Cir. 2001).

⁵⁸ *Willis*, 2001 WL 21294, *5 (a *bona fide* seniority system is one that is not created for the purpose of discrimination).

⁵⁹ 42 USC § 12111(10)(B); *see also* WAC 162-22-075.

⁶⁰ 42 USC § 12111(10)(A). Employers would not ordinarily want to rely on expense to prove undue hardship, as this would open for scrutiny all of the employer's financial resources and decisions.

⁶¹ *See, e.g.*, part III(A)(3), *supra* (regarding reassignment as an undue hardship).

⁶² 42 USC § 12113; *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81-84 (2002) (threat to self); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999) (threat to customers).

⁶³ *See* 42 USC § 12111(3). Although the statutory definitions do not address threats to the disabled employee, the Supreme Court in *Chevron, supra*, held that the "direct threat" exception applies to such situations.

Employers may not exclude from employment or refuse to accommodate disabled employees based on a general concern or speculation that they may sustain a new injury, aggravate an existing condition, or endanger themselves or others:

The determination that an individual with a disability poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.⁶⁴

This means that in assessing whether an individual poses a direct threat, employers may consider its employees' input and recent experience, the opinions of qualified physicians, rehabilitation counselors, or physical therapists with expertise in the specific disability at issue, and its own direct knowledge of the disabled employee. The employer's determination of the presence of a "direct threat" may be challenged where it relies on medical opinions that are not "the most current medical knowledge and/or the best available objective evidence."⁶⁵

IV. RECERTIFICATION AND FITNESS FOR DUTY EXAMINATIONS

As discussed in part 1(a), an employee requesting FML may be required to provide medical certification from a qualified health care provider prior to an anticipated leave, or within certain time frames after the start of an unforeseeable leave. When the employee's condition is chronic or progressive, the employer may have additional reasons for monitoring the employee's condition (*e.g.*, to ensure that the condition still exists or that the employee can safely return to work).

Where an employee is absent due to chronic or long term conditions and under the continuing care of a health care provider, federal law permit employers to request medical recertification of a serious health condition, but no more often than every 30 days, and only in connection with an absence unless circumstances have changed significantly (*e.g.*, a change in duration or frequency of absences or severity of the condition, complications have arisen, etc.), or the employer receives information that casts doubt upon the employee's stated reasons for the absence.⁶⁶ If the medical certification sets forth a minimum duration of incapacity of more than 30 days, or specifies a minimum period necessary for intermittent leave or a reduced work schedule, the employer may not request recertification until the stated duration of the incapacity or necessary leave period has passed. Again, this prohibition will not apply if the employee requests an extension of the leave, if

⁶⁴ 29 CFR § 1630.2(r).

⁶⁵ *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1028 (9th Cir. 2003).

⁶⁶ 29 CFR § 825.308(a). The Department of Labor (DOL) has indicated that the employer may attach a record of an employee's absences (*e.g.*, a Monday/Friday absenteeism pattern) to a medical recertification form when a pattern of potential abuse is suspected. See DOL's FMLA Opinion Letter dated May 25, 2004, http://www.dol.gov/esa/whd/opinions/FMLA/2004/2004_05_25_2A_FMLA.htm. See also RCW 49.78.270(5) ("The employer may require that the employee obtain subsequent recertifications on a reasonable basis").

circumstances have changed significantly, or the employer receives information that casts doubt upon the continuing validity of the certification.⁶⁷

Employers may request a second opinion if they have reason to doubt the validity of the certification.⁶⁸ Employers may also request a certification of "fitness for duty" before the employee returns to work from FMLA.⁶⁹ Note, however, that employers may not request a second opinion on a recertification.⁷⁰

Family medical leave, disability, and privacy laws limit the scope of medical information that may be obtained from employees and dictate how it must be maintained by the employer. Employers may ask disability related questions and conduct medical examinations of existing employees when they are job-related and consistent with business necessity (*i.e.*, a reasonable belief based on objective evidence that the employee's ability to perform essential job functions will be impaired by the condition, or the employee may pose a direct threat to himself or others).⁷¹

Employers managing employees with chronic, progressive, or terminal illnesses will want to maintain an open dialog (or interactive process) with such employees to ensure that requested accommodations continue to be effective and safe. However, employers should keep in mind that any medical information sought should be limited to the condition for which the employee is requesting leave or accommodation, or related to the specific tasks and safety issues that concern the employer.

Employers who wish to obtain medical information regarding an employee's disability may not contact the employee's health care provider without first obtaining written authorization from the employee. The FMLA prohibits employers from directly contacting an employee's health care provider under any circumstance (although a health care provider representing the employer, with the employee's permission, may contact the employee's health care provider to clarify information and confirm the authenticity of the certification). Regardless of the purpose for which the medical inquiry or examination is conducted, any information obtained must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that

⁶⁷ 29 CFR § 825.308(b) (c); *see also* DOL FMLA Opinion Letter dated Sept. 14, 2005, http://www.dol.gov/esa/whd/opinions/FMLA/2005/2005_09_14_2A_FMLA.htm ("It is our opinion that an employer may reinstate the medical certification process with the first absence in a *new* 12-month leave year. A second or third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the *new* medical certification. This is the case despite the fact the employer had requested recertification in the previous 12-month leave year.")

⁶⁸ 29 CFR § 825.308(a)(2), (c)(3).

⁶⁹ 29 CFR § 825.310; RCW 49.78.280(1)(d) ("the employer may have a uniformly applied practice or policy that requires each employee to receive certification from the health care provider *** that the employee is able to resume work").

⁷⁰ 29 CFR § 825.308(e); 0270(7).

⁷¹ 29 CFR § 1630.14(c); *see also*, *EEOC, Enforcement Guidance on the ADA and Psychiatric Disabilities* at p. 15; *Yin v. State of Cal.*, 95 F.3d 864 (9th Cir. 1996) (employee with "prolonged and egregious history of absenteeism" who also suffered from fainting spells at work, and was transported from work to the hospital by ambulance, could be required to submit to medical examination to determine if she could perform her job); *EEOC v. Prevo's Family Market, Inc.*, 135 F.3d 1089 (6th Cir. 1998) (grocery store clerk who suffered scrapes, cuts and puncture wounds on the job, and who shared cutting utensils with other employees, could be required to submit to medical examination after disclosing he was HIV positive).

supervisors may be informed of necessary restrictions or accommodations and first aid and safety personnel may be informed of disabilities to facilitate emergency evacuation and/or treatment.⁷²

V. MEDICATIONS AND ASSISTIVE DEVICES

A. Accommodations to Facilitate Medication in the Workplace

Employees suffering from chronic or progressive illnesses may require specific accommodations related to their need for or the effects of medication. For example, an employee who needs to take medication with food may require an exemption from an employer's policy against eating at workstations, or may require permission to take additional breaks. While employers have no obligation to ensure that employees take prescribed medication, they are not relieved of their duty to provide reasonable accommodation to disabled employees who fail to take prescribed medication, obtain medical treatment, or use assistive devices. However, if a disabled employee, with or without accommodation, cannot perform the essential functions of the position or poses a direct threat to others in the absence of medication, treatment, or an assistive device, the employee is not "qualified" for the position.

B. Monitoring Medication

An employer may not conduct medical examinations or make disability related inquiries of employees under the ADA, except when such examinations or inquiries are "job related and consistent with business necessity."⁷³ The EEOC considers questions about medication to be "disability related."⁷⁴

Requiring all employees to reveal the use of prescription medications is not consistent with business necessity, even when the required disclosures are limited to medication that may impair performance. The EEOC has taken the position in informal guidance letters that inquiries about the use of prescription medications "should be tailored to particular medications that raise legitimate concerns about safety, health, or the performance of essential functions in particular positions by particular individuals."⁷⁵ Consequently, it is *not* permissible to require disclosure of medication having a cautionary label regarding the operation of equipment or motor vehicles unless the question is asked only of employees who actually operate such equipment or vehicles.⁷⁶ In its most recent guidance, the EEOC suggests that an inquiry about the effects of medication is job related and consistent with business necessity only in the limited circumstance where the employee works in a position affecting public safety. "Under these limited circumstances, an employer must be able to

⁷² 29 CFR § 1630.14(b)(1); 29 CFR § 1630.14(c), 29 CFR § 1630.14(d).

⁷³ See 42 USC § 12112(d).

⁷⁴ EEOC, *ADA Enforcement Guidance: Preemployment Disability Related Questions & Medical Examinations*, at 9.

⁷⁵ See Informal Guidance Letter from Peggy Mastroianni, EEOC (Dec. 11, 1996).

⁷⁶ See Informal Guidance Letter from Peggy Mastroianni, EEOC (Dec. 17, 1996); see also *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153, 1154 (D. Colo. 1996), *aff'd in part, vacated in part*, 124 F.3d 1221 (10th Cir. 1997) (employer's drug policy requiring employee to disclose all drugs ingested, including legal prescription medications, violated ADA prohibition on disability related inquiries).

demonstrate that an employee's inability or impaired ability to perform essential functions will result in a direct threat."⁷⁷

Employers may ordinarily hold disabled employees to the same performance standards and workplace policies as non-disabled employees. Consequently, disabled employees are subject to drug testing pursuant to the employer's drug policy, even if the employee is taking prescription medication.

A disabled employee who tests positive on a random test for illegal drugs due to the proper use of prescription drugs will ordinarily be screened by a Medical Review Officer (MRO) or other qualified personnel before being reported to the employer as testing positive (employers who do not have a mechanism for excluding such employees should consider modifying their policies and procedures to incorporate such qualified intermediaries). If the test is precipitated by reasonable suspicion of illegal drug use, intermediate screening will also play a significant role in the employer's decision about whether or not to discipline the employee. Assuming an employee is found to be impaired at work, the employer may be required to provide an accommodation by allowing time off or by modifying the employee's duties while he or she is affected by the medication (*e.g.*, if the employee has an adverse reaction to medication or trouble adjusting to a new prescription).

VI. DISCLOSURE OF DISABILITIES OR ACCOMMODATIONS

Employees with chronic or terminal illnesses may have many reasons for not wanting others in the workplace to know about their condition. Disclosure of certain types of diseases, such as HIV and AIDS, may result in stigma and embarrassment (or worse) for the employee. In addition, co-workers may express discomfort about working with an ill co-worker who is exhibiting outward signs of illness (*e.g.*, weight loss, fainting spells, or loss of motor coordination, etc.), or may harbor fears of "catching" the employee's illness. Such concerns by co-workers are not valid reasons for an employer to discuss an employee's medical condition. Nor will co-workers' conduct justify reassignment or other modifications of the terms and conditions of disabled employee's employment. In such circumstances, the employer may wish to refer co-workers to an employee assistance program to deal with their concerns. In addition, employers should be aware that under some circumstances they may be held liable for hostile environment disability claims based upon harassment by co-workers.⁷⁸

⁷⁷ See EEOC Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 8. In recent years, the U.S. Supreme Court has become less willing to defer to the EEOC's regulatory interpretations, particularly where the health and safety of the employee and others are involved. Consequently, the courts may not be willing to follow the EEOC's narrow view that permissible inquiries are limited to employees involved in jobs affecting public safety (*e.g.*, police officers, firefighters, etc.). It is more likely that the courts will permit inquiries relating to medication in any circumstances where the employee would pose a direct threat to the employee or others (*e.g.*, driving or operating machinery). See, David Fram, *Resolving ADA Workplace Questions VI* 23 (National Employment Law Institute ed., 5th ed. 1998) (suggesting that employers "narrow[] the question to medications that could make the employee a danger to himself or others in performing his duties.")

⁷⁸ See, *e.g.*, *Robel v. Roundup Corp.*, 148 Wash.2d 35, 59 P.3d 611 (2003) (recognizing that WLAD supports a disability based hostile work environment claim).

Employers are required to maintain confidentiality of medical records and to refrain from disclosing facts about an employee's physical or mental condition, except as necessary for legitimate business reasons (e.g., to provide emergency medical treatment or to facilitate a reasonable accommodation). Even when the employee has freely disclosed medical information about himself/herself, the employer should never be the source of such information.

Under the ADA, any medical information obtained from a disability related inquiry or medical examination, including any medical information voluntarily disclosed by an employee, must be treated by the employer as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.⁷⁹ The EEOC interprets this rule as permitting employers to disclose medical information to state workers' compensation offices, state injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations.⁸⁰

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits the unauthorized disclosure of information created or received by a covered entity regarding treatment for or statements made regarding the past, present, or future physical or mental condition of an individual without written authorization, subject to certain exceptions such as disclosures required by law:

For example, a covered health care provider must obtain the individual's authorization to disclose the results of a pre-employment physical to the individual's employer. The final rule provides that a covered entity may condition the provision of health care that is solely for the purpose of creating protected health information for disclosure to a third party on the provision of authorization for the disclosure of the information to the third party.⁸¹

While most employers (other than those who self insure and administer their own health plans) will not be directly regulated by these rules, insurers and health care providers will likely be slower to offer information needed for employment determinations.

Employee awareness of a co-worker receiving special treatment, but not the reason for it, can create morale problems and expose the employer to claims of discrimination. Employers are nevertheless prohibited from disclosing that an employee has been provided a reasonable accommodation, as this is tantamount to disclosing that the individual has a disability. The EEOC suggests that employers try to head off such problems by providing all employees with information and/or training about the employer's obligations to meet certain employee needs under FMLA, ADA, and privacy laws. In response to direct questions from co workers about different or special treatment, the EEOC suggests that employers: (1) emphasize their policy of assisting any employee who encounters

⁷⁹ 42 USC §§12112(d)(3)(B), (4)(C); 29 CFR §1630.14; *see also* WAC 162-22-090 (4) ("Employee health care information shall be kept in a confidential manner, separate from the employee's regular personnel files. The employer may share health care information only on a need to know basis. Supervisors and/or safety personnel may be informed of employee needs only if necessary to make appropriate work assignments or develop appropriate emergency response plans.")

⁸⁰ 29 CFR §1630.14(b).

⁸¹ 65 FR 82462, *82514.

difficulties in the workplace; (2) point out that many workplace issues encountered by employees are personal; and (3) stress it is the employer's policy to respect employee privacy.