

**Employment Roundtable
Managing Chronic and Progressive Illness in the Workplace**

By Stacey Mark

*Chair, Labor & Employment Group and
Chair, Sustainable Practice Advisory Group*

February 15, 2007¹

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.²

Although many different laws may apply to employees coping with chronic or progressive illness, such as the Americans with Disabilities Act,³ the Family Medical Leave Act,⁴ 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

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

² 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).

³ 42 USC §§ 12101 to 12213.

⁴ 29 USCA §§ 2601, *et seq.*

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-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 chronic and progressive illnesses. 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 Oregon law that is also a "serious health condition" under state and federal family medical leave laws.

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 Oregon Family Leave Act (OFLA), the federal Family Medical Leave Act (FMLA), and state and federal disability laws. 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 Oregon and federal family medical leave (FML) laws. In some circumstances, Oregon employers must provide leave beyond twelve weeks.⁶

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).

⁶ See OAR 839-009-0240.

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).⁷ Employees must make a reasonable effort to schedule treatment at times that will minimize disruptions to the employer's business.⁸

When the need for leave is not foreseeable, the employee must ordinarily provide as much advance notice as is practicable.⁹ In the event of an emergency, the employee must provide notice within 24 hours of the commencement of the leave under OFLA.¹⁰ Under FMLA, 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.¹¹

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.¹²

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 or OFLA, it must investigate further.¹³ Under OFLA, this also applies to extensions of an approved FML.¹⁴

⁷ 29 CFR § 825.302; OAR 839-009-0250(1).

⁸ 29 CFR §§ 825.117, 825.302(f); OAR 839-009-0260(9).

⁹ 29 CFR § 825.302(a); OAR 839-009-0250(2).

¹⁰ OAR 839-009-0250(3).

¹¹ 29 CFR §303(a).

¹² 29 CFR 825.303(a); *see also*, *Mora v. Chem-Tronics, Inc.*, 16 FSupp2d 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).

¹³ 29 CFR §303(b), 29 CFR 825.208; *see also* *Hendry v. GTE N. Inc.*, 896 F Supp 816 (ND 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 (MD 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 (SDNY 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).

¹⁴ OAR 839-009-0250(1)(d) (amended 2007); *see also*, BOLI Employer Assistance Advice Column, January 2, 2007: *BOLI's Family Leave "Reality" Show*, http://egov.oregon.gov/BOLI/TA/TA_COL_010207_Family_Leave_Laws.pdf ("An employee on OFLA leave who needs to take more leave than originally authorized should give the employer reasonable notice prior to the end of the authorized leave, following the employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification.").

2. Intermittent Leave

Both continuous and intermittent leave are available to eligible employees under FML laws. "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 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 Oregon employers must pay for any medical certification required, to the extent

¹⁵ See 29 CFR § 825.203; OAR 839-009-0210(10). 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 is covered by OFLA but not FMLA. See OAR 839-009-0240(10)(a) and (b).

¹⁶ See 29 CFR § 825.203; OAR 839-009-0210(14).

¹⁷ See 29 CFR 825.302(d); OAR 839-009-0250(4)(a).

¹⁸ See 29 CFR §§ 825.117, 825.306; OAR 839-009-0260(1) and (2).

¹⁹ 29 CFR § 825.305; OAR 839-009-0260(3).

²⁰ 29 CFR § 825.305; OAR 839-009-0260(1) and (2).

the cost is not covered by insurance or other benefit plan.²¹ If the leave is not foreseeable, employers should provisionally designate the leave as approved until the medical certification is received.²²

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 FMLA, 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). In addition, 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. 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

Under OFLA, employers may transfer an employee on intermittent leave to an alternate position only if (1) the employee accepts the transfer voluntarily, (2) the transfer lasts no longer than necessary to accommodate the leave, (3) the position has equivalent pay and benefits, (4) the transfer complies with any applicable collective bargaining agreement, (5) the transfer is used only when no other reasonable option is available, and (6) the transfer is not used to discourage an employee from taking intermittent leave.²⁶ The Oregon rule is more restrictive than the federal rule, which allows an employer in some circumstances to reassign an employee, without the employee's consent, to better accommodate an intermittent leave schedule.²⁷

Only the amount of leave actually taken may be counted toward the employee's FMLA entitlement. If the employee has no available paid leave, the employer may dock the employee's pay for the amount of leave taken.²⁸ The amount of time an employee spends working in an alternate position is not counted against an employee's OFLA entitlement. However, if the amount of leave taken plus the time spent in the alternate position exceed twelve weeks, the employee will lose his or her right to reinstatement.²⁹

²¹ ORS 659A.306; OAR 839-009-0260(1); OAR 839-009-0270(7).

²² 29 CFR § 305; OAR 839-009-0260(4).

²³ 29 CFR § 825.307(a); OAR 839-009-0260(5).

²⁴ 29 CFR § 825.204; OAR 839-009-0245.

²⁵ 29 CFR § 825.220(d) and §825.702(d)(2); OAR 839-009-0245.

²⁶ See OAR 839-009-0245(1).

²⁷ See 29 CFR § 825.204.

²⁸ 29 CFR § 825.206; OAR 839-009-0245(3); see note 153, *supra*.

²⁹ OAR 839-009-0245(6).

III. Leave as a Reasonable Accommodation Under the ADA

The ADA³⁰ and Oregon law³¹ protect qualified disabled employees who can perform the essential functions of their jobs,³² with or without reasonable accommodation. Employees who are ineligible for FML may nevertheless be entitled to leave as a reasonable accommodation under the ADA.³³ 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:

- 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). 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

³⁰ 42 USC §§ 12101 to 12213.

³¹ ORS 659A.112, 659A.118, 659A.121.

³² 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).

³³ 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>. BOLI recently amended its regulations to explicitly state that providing a reasonable accommodation may include a leave of absence. OAR 839-006-0206(2)(f) (adopted February 1, 2007); BOLI Employer Assistance Advice Column, January 2, 2007: *BOLI's Family Leave "Reality" Show*, http://egov.oregon.gov/BOLI/TA/TA_COL_010207_Family_Leave_Laws.pdf.

³⁴ See *Bourgo v. Canby School Dist.*, 167 FSupp2d 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 F3d 1128, 1135 (9th Cir 2001).

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

A. Providing Reasonable Accommodations Other Than Leave

Both Title I of the ADA and Oregon 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 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 Although courts have previously presumed that the same interactive process was required under Oregon law,⁴¹ a regulation was recently amended to explicitly require it.⁴²

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 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). Oregon law follows the same analysis. *Washburn v. Columbia Forest Products, Inc.*, 340 Or 469, 134 P3d 161 (2006).

³⁷ 42 USC § 12112(b)(5)(A); ORS 659A.112(2)(e).

³⁸ 42 USC § 12111(8); ORS 659A.115.

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

⁴⁰ *See Barnett v. U.S. Air, Inc.*, 228 F3d 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 *See Snead v. Metropolitan Property & Cas. Ins. Co.*, 2000 WL 33122829, *13 (9th Cir 2000) (in dissent) (assuming that Oregon disability statute recognizes a good faith interactive process requirement); *Deibele v. USF Reddaway, Inc.*, 2000 WL 968813 (D Or 2000) (applying interactive process requirement to Oregon state disability claim).

⁴² OAR 839-006-0206(4)-(6) (2007).

The “failure to provide reasonable accommodation to ‘an otherwise qualified individual with a disability’ constitutes discrimination.”⁴³ Failure to provide reasonable accommodation includes the employer's failure to engage in an interactive process to determine whether accommodation is possible.⁴⁴ 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 to perform the job with accommodations.”⁴⁵ In making that determination, the jury may consider that there may have been other accommodations available, had the employer participated in good faith.⁴⁶

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.⁴⁷ Requesting an accommodation that is not possible is not fatal to an employee’s

⁴³ 29 CFR § 1630.9; *Kaplan v. City of North Las Vegas*, 323 F3d 1226, 1232 (9th Cir 2003); OAR 839-006-0206(6) (emphasis added):

A meaningful interactive process is a mandatory step in the reasonable accommodation of an otherwise qualified employee or applicant with a disability. Failure of an employer to engage in a meaningful interactive process with an otherwise qualified employee or applicant with a disability who has requested reasonable accommodation or has otherwise disclosed to the employer a disability that may require reasonable accommodation is a failure to reasonably accommodate in violation of ORS 659A.112(2)(e) and:

(a) the employer may be found liable for remedies described in OAR 839-006-0090(6) *regardless of whether reasonable accommodation would have been possible*; and

(b) the employer may also be found liable for any other remedies described in OAR 839-006-0090 if reasonable accommodation would have been possible.

⁴⁴ *Barnett v. U.S. Air, Inc.*, 228 F3d at 1112; *Ounaphom v. United Grocers, Inc.*, 2001 WL 204832 *4 (D Or 2001) (employer’s letter to employee indicating that she was unable to perform an essential function of her job was sufficient to demonstrate that employer was not genuinely interested in exploring accommodation options).

⁴⁵ *Barnett v. U.S. Air, Inc.*, 228 F3d at 1116.

⁴⁶ *Id.*

⁴⁷ *See, e.g., Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F3d 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 F3d 1070 (7th Cir 1998) (court rejected plaintiff’s claim for failure to

claim.⁴⁸ 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. 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;
- 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

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).

⁴⁸ *Taylor v. Phoenixville School Dist.*, 184 F3d 296, 313 (3rd Cir 1999).

⁴⁹ *Barnett*, 228 F3d at 1112.

⁵⁰ 29 CFR §1630, App 29 CFR §1630.9.

⁵¹ See 29 CFR Part 1630 App. § 1630.9.

⁵² *Barnett*, 228 F3d at 1115.

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 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 In the absence of an undue hardship, "a

⁵³ See 42 USC § 12111(9)(B).

⁵⁴ 42 USC § 12112(b)(5)(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."⁵⁵

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 hardship.⁵⁶ Where reassignment would violate a *bona fide* seniority system contained in a collective bargaining agreement, it is not required.⁵⁷

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.⁵⁸ 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.⁵⁹ 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

⁵⁵ *Barnett*, 228 F3d at 1120.

⁵⁶ *Barnett*, 228 F3d at 1120; *Willis v. Pacific Maritime Association*, 236 F3d 1160, 2001 WL 21294 *4 (9th Cir), *amended on den. of reh'g*, 244 F3d 675 (9th Cir 2001).

⁵⁷ *Willis*, 2001 WL 21294, *5 (a *bona fide* seniority system is one that is not created for the purpose of discrimination).

⁵⁸ 42 USC § 12111(10)(B); ORS 659A.121.

⁵⁹ 42 USC § 12111(10)(A); ORS 659A.121. 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.

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.⁶⁰ 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

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

⁶⁰ OAR 839-006-0250.

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 US 73, 81-84 (2002) (threat to self); *Nunes v. Wal-Mart Stores, Inc.*, 164 F3d 1243 (9th Cir 1999) (threat to customers).

⁶³ See 42 USC § 12111(3); OAR 839-006-0244. 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.

⁶⁴ 29 CFR § 1630.2(r).

⁶⁵ *Echazabal v. Chevron USA, Inc.*, 336 F3d 1023, 1028 (9th Cir 2003).

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

Both federal and state law permit employers to 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 FML.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

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, OAR 839-009-0260(6); BOLI's Employer Assistance Advice Column, October 10, 2006: *Avoid Headaches by Requiring Medical Certification for Leave*, http://egov.oregon.gov/BOLI/TA/TA_COL_101006_Require_Medical_Certification.pdf.

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 reinitiate 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); OAR 839-009-0260(7).

⁶⁹ 29 CFR § 825.310; OAR 839-00 9-0270(7).

⁷⁰ 29 CFR § 825.308(e); OAR 839-00 9-0270(7); see also BOLI's Employer Assistance Advice Column, October 10, 2006: *Avoid Headaches by Requiring Medical Certification for Leave*, http://egov.oregon.gov/BOLI/TA/TA_COL_101006_Require_Medical_Certification.pdf.

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 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.

⁷¹ 29 CFR § 1630.14(c); ORS 659A.136; *see also, EEOC, Enforcement Guidance on the ADA and Psychiatric Disabilities* at p. 15; *Yin v. State of Cal.*, 95 F3d 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 F3d 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).

⁷² 29 CFR § 1630.14(b)(1); 29 CFR § 1630.14(c), 29 CFR § 1630.14(d); ORS 659A.133(3)(b); ORS 659A.136; OAR 839-006-0242(5).

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 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

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 F3d 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).

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."

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).

Whether or not employers must accommodate off-duty marijuana use is still up for debate.⁷⁸ The *Oregon Medical Marijuana Act* (OMMA), effective since May 1, 1999, protects the authorized use of marijuana from criminal liability for possession, delivery or production of marijuana, although the use and possession of marijuana remain illegal under federal law. The OMMA provides that Oregonians "should be allowed to use small amounts of marijuana without fear of civil or criminal penalties when their doctors advise that such use may provide a medical benefit to them."⁷⁹ However, the OMMA does not require employers "to accommodate the medical use of marijuana in any workplace."⁸⁰

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.

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

⁷⁸ See *Washburn v. Columbia Forest Products, Inc.*, 197 Or App 104, 104 P3d 609, *rev'd.*, 340 Or 469, 134 P3d 161 (2006) (in finding the plaintiff was not disabled, court failed to reach the question of whether accommodation of off-duty medical marijuana use revealed through a mandatory drug test is required under OMMA and Oregon disability law).

⁷⁹ ORS 475.300 to 475.346; OAR 333-008-0000, *et seq.* To qualify for protection under OMMA, the user must hold a registry and identification card issued by the Health Division of the Oregon Department of Human Resources.

⁸⁰ ORS 475.340.

government officials investigating compliance with the ADA.⁸¹ 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.⁸²

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.⁸³

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 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.

⁸¹ 42 USC §§12112(d)(3)(B), (4)(C); 29 CFR §1630.14; *see also* OAR 839-006-0242 (5) (same requirement under Oregon law).

⁸² 29 CFR §1630.14(b).

⁸³ 65 FR 82462, *82514.