Managing Chronic and Progressive Illness in the Workplace¹

Employment Roundtable

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I. Introduction

Chronic and progressive or terminal illness of employees (or their family members) present significant legal and 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 this time, the law provides little guidance for clearly and effectively managing these complex issues. While most employers are becoming more familiar with their obligations as they pertain to employees with disabilities, managing chronic and terminal illness is still an evolving issue.

\[T\]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.

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). 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.

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.

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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. 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, which is also a “serious health condition” under state and federal family medical leave laws.

II. Managing Absences from the Workplace

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 are required to 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. See OAR 839-009-0240.

1. Notice Requirements

Employees wishing to take family medical leave must provide at least 30 days’ notice of the need for any leave that is foreseeable (e.g., planned treatment). 29 CFR § 825.302; OAR 839-009-0250(1). Employees must make a reasonable effort to schedule treatment at times that will minimize disruptions to the employer’s business. 29 CFR §§ 825.117, 825.302(f); OAR 839-009-0260(7).

When the need for leave is not foreseeable, the employee must ordinarily provide as much advance notice as is practicable. 29 CFR § 825.302; OAR 839-009-0250(2). In the event of an emergency, the employee must provide notice within 24 hours of the commencement of the leave. 29 CFR § 825.302; OAR 839-009-0250(3).
2. **Intermittent Leave**

Both extended and intermittent leave are available to eligible employees. “Intermittent leave” includes separate blocks of time due to a single qualifying reason, or a reduction in the number of days or hours the employee is scheduled to work. See 29 CFR § 825.203; OAR 839-009-0210(10). Employers must provide intermittent leave if there is a medical need for it (as opposed to voluntary treatments and procedures), and leave may be taken for periods of incapacity, treatment, or recovery from treatment. See 29 CFR § 825.203; OAR 839-009-0210(14).

While providing “extended leave” is a relatively straightforward procedure under an established family medical leave 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. See OAR 839-009-0250(4)(a). However, employers who are aware that the employee may be eligible for FML are responsible for determining whether an unforeseen absence qualifies for FML 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. See 29 CFR §§ 825.117, 825.306; OAR 839-009-0260(1) and (2). The employer must notify an employee in writing of any requirement to obtain medical certification and give the employee at least fifteen days to provide the certification. 29 CFR § 825.305; OAR 839-009-0260(5). Oregon employers must pay for any medical certification required, to the extent the cost is not covered by insurance or other benefit plan. ORS 659.330; OAR 839-009-0260(1); OAR 839-009-0270(7). If the leave is not foreseeable, employers should provisionally designate the leave as approved until the medical certification is received. 29 CFR § 305; OAR 839-009-0260(4).

Employees requesting leave often provide a note from their physician in lieu of a completed medical certification form, or provide a medical certification form which is incomplete. In such circumstances, the employer may not have sufficient information to determine whether the

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2 Oregon employers of 25 to 49 employees may require employees who are exempt from overtime under state and federal law to take intermittent leave in increments of a full day so as to preserve their exempt status. See OAR 839-009-0240(10)(a)-(b).
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). In addition, under federal law, a health care provider representing the employer may, with the employee’s permission, contact the employee’s health care provider to clarify information and confirm the authenticity of the certification. However, federal law prohibits employers from contacting the employee’s health provider directly. 29 CFR § 825.307(a). There are no similar provisions under state law.

4. Alternate Duty and Reduced Work Schedules

An employee taking intermittent leave may be assigned to alternate duty or work a reduced work schedule. 29 CFR 825.204; OAR 839-009-0245. However, employers may not require an employee to take a “light duty” job in lieu of taking leave. 29 CFR § 825.220(d); OAR 839-009-0230(2)(b).

Under OFLA, employers may transfer an employee on intermittent leave to an alternate position only if (1) the employee acepts 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. See OAR 839-009-0245(1). 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 schedule. See 29 CFR § 825.204.

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. 29 CFR § 825.206; OAR 839-009-0245(3); see note 2, supra. 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. OAR 839-009-0245(6) (emphasis added).

B. Leave as a Reasonable Accommodation Under the ADA

The ADA protects qualified disabled employees who can perform the essential functions of their jobs, with or without accommodation. Employees who are ineligible for family medical leave (FML) may nevertheless be entitled to leave as a reasonable accommodation under the ADA. See generally EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (1999) (EEOC Guidance), http://www.eeoc.gov/docs/accommodation.html. 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). While extending the leave available may, in some circumstances, be necessary, granting indefinite leave has generally not been required by the courts (note, however, that the EEOC Guidance suggests that providing indefinite leave is required unless it creates an undue hardship). Moreover, 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.

III. Providing Reasonable Accommodations Other Than Leave

Both Title I of the ADA and Oregon law require employers to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee or applicant with a disability, unless the doing so would result in an undue hardship. 42 USC § 12112(b)(5)(A); ORS 659.436(2)(e). 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. 42 USC § 12111(8); ORS 659.437.

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

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3 In a trilogy of cases decided in 1999, the U.S. Supreme Court held that a 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). It is unclear what effect these decisions will have on the interpretation of state disability law. Sources within Oregon’s Bureau of Labor and Industries (BOLI), the agency charged with enforcing Oregon’s discrimination laws, indicate that the agency has no current plans to adopt the Supreme Court’s position in enforcing the State counterpart to the ADA. Thus, for the time being, it appears that BOLI will continue to assess whether an individual is disabled under state law without regard to mitigating measures. The definition of disability under Washington and California law is far broader than under federal and Oregon law, and will likely remain unaffected by the Supreme Court’s decision.
progressive, or the accommodation required is not obvious, the employer’s duty to identify and provide reasonable accommodation can become more complex and challenging.

A. The Interactive Process

The first step in providing a reasonable accommodation is determining what, if any, accommodation is appropriate. The federal regulations contemplate a flexible, “interactive process” between the employer and employee or applicant for making this determination. 29 CFR § 1630.2(o)(3). The Ninth Circuit Court of Appeals has held that this process is mandatory in most cases. The rule is likely the same under Oregon law.

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 such an accommodation, and requires the following steps:

1. Analyze the particular job and determine its purpose and essential function;

2. 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;

3. 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

4. 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.

See 29 CRF Part 1630 App. § 1630.9. 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.”

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4 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.


6 An employer should initiate the interactive process without being asked if the employer (1) knows, or has reason to know, that an employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. Barnett, 228 F3d at 1112.
Employers who fail to engage in the interactive process in good faith are subject to liability under the ADA where a jury could “reasonably conclude that the employee would have been able to perform the job with accommodations.” In making that determination, a jury may consider that there may have been other accommodations possible, had the employer participated in good faith. In addition, if there is a disputed fact as to whether the employer participated in good faith in the interactive process, there must be a jury trial to resolve the issue.  

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.

**B. Multiple Accommodations**

When an employee suffers from a disabling condition that is terminal and/or progressive over time, such as multiple sclerosis or AIDS, the employer must deal with an entirely different set of problems. As the employee’s condition deteriorates, existing accommodations may become inadequate to enable the employee to perform essential functions of the job, making continued accommodation more burdensome. 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, for a variety of reasons, be reluctant 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 will have 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 to be 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.

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7 Barnet, 228 F3d at 1116.
C. 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. See 42 USC § 12111(9)(B). An employer is not required to bump an employee to create a vacancy, nor must a new position be created. 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.” 42 USC § 12112(b)(5)(A). 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.”

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. However, where reassignment would violate a bona fide seniority system contained in a collective bargaining agreement, it is not required.

D. 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. 42 USC § 12111(10)(B); ORS 659.440. Although employers need not provide an accommodation that would result in an undue hardship, employers should be mindful of the fact that mere difficulty or inconvenience is not sufficient to establish that undue hardship would result. If challenged, the refusal to grant an accommodation based on undue hardship will be severely scrutinized.

9 Willis, 2001 WL 21294, *5 (a bona fide seniority system is one that is not created for the purpose of discrimination).
Undue hardship must be based on an individualized assessment of the present circumstances that demonstrate a specific accommodation would cause significant difficulty or expense. 42 USC § 12111(10)(A); ORS 659.440. 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. OAR 839-006-0250. Nor will undue hardship be 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 may, however, be shown where providing a reasonable accommodation would unduly disrupt the ability of co-workers to perform their jobs. See, e.g., part I(c), supra (regarding reassignment as an undue hardship).

E. Employees Who Pose a Direct Threat to Others

Employers need not accommodate disabled employees who cannot perform the essential functions of their position, with or without accommodation, or if doing so would present a direct threat to co-workers. “Direct threat” means a “significant risk” of “substantial harm” to the health or safety of others in the workplace that cannot be eliminated or reduced by reasonable accommodation. See 42 USC § 12111(3).

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.

29 CFR § 1630.2(r) (emphasis added). 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.

In the Ninth Circuit, “direct threat” does not include danger posed to the health or safety of the disabled employee (or prospective employee). As a result, an employer cannot refuse to hire or retain a disabled person because the job is threatening to the person’s own health or safety.

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10 Echazabal v. Chevron USA, Inc., 226 F3d 1063, 1070 (9th Cir. 2000).
11 Echazabal, 226 F3d AT 1072.
The Ninth Circuit’s holding conflicts with the EEOC’s position, which allows employers to consider the danger posed to the employee and others. 29 CFR § 1630.15(b)(2).12

Consistent with the express language of the ADA, Oregon law defines “direct threat” in terms of a danger to others. See OAR 839-006-0244. Although sources within BOLI indicate that its interpretation of state disability law tracks the EEOC’s interpretation of the ADA with respect to the direct threat defense, it is unclear whether the Oregon courts would follow BOLI’s interpretation, given the similarity between the text of Oregon law and the ADA.

F. 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 permits employers to request medical recertification of a serious health condition, but no more often than every 30 days, unless circumstances have changed significantly (e.g., 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. 29 CFR § 825.308(a). 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. 29 CFR § 825.308(b)-(c).

Oregon law has no provision allowing recertification during the leave period. However, both federal and state law permit employers to request a second opinion if they have reason to doubt the validity of the certification. 29 CFR § 825.308(a)(2), (c)(3); OAR 839-009-0260(3). Employers may also request a certification of “fitness for duty” before the employee returns to work from FML. 29 CFR § 825.310; OAR 839-009-0270(7). Note, however, that employers may not request a second opinion on a recertification. 29 CFR § 825.308(e).

Under the ADA, employers may ask disability-related questions and conduct medical examinations when they have a “legitimate” business reason for doing so (i.e., a reasonable

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12 The Ninth Circuit in Echazabal noted that it invited the EEOC to submit an amicus brief commenting on the validity of its regulation, but the EEOC declined to do so. Echazabal, 226 F3d at 1066, 1069, notes 3 and 7.
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.\textsuperscript{15}

Family medical leave, disability and privacy laws affect the scope of medical information that may be obtained from employees and how such information should be maintained by the employer. 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 may, with the employee’s permission, contact the employee’s health care provider to clarify information and confirm the authenticity of the certification).

IV. Problems Associated with 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.” See 42 USC § 12112(d). The EEOC considers questions about medication to be “disability-related.”\textsuperscript{16}

\textsuperscript{13} See, e.g., 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).
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.” 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. David Fram, a well-known former EEOC attorney, suggests “narrowing the question to medications that could make the employee a danger to himself or others in performing his duties.”

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).

It is unclear whether Oregon employers must accommodate the medical use of marijuana, even though the drug is considered a “controlled substance,” the use and possession of which is illegal under federal law. 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. 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.” ORS § 475.300. 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. The Act provides no guidance to employers, and BOLI has no current plans to issue regulations governing the accommodation of medical marijuana.

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14 See Informal Guidance Letter from Peggy Mastroianni, EEOC (Dec. 17, 1996); see also Rowe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1154, aff’d, 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).
V. 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 the 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.

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

Privacy rules implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA), issued on December 20, 2000, become mandatory on February 26, 2003 (implementation delayed an additional year for certain small health plans). The rules prohibit 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.

65 FR 82462, *82514. 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. Nevertheless, employers are 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 FML, 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.