

Coordination of ADA and FMLA

If an employee exhausts Family Medical Leave Act (FMLA) and is still unable to return to work, an employer should assess whether the employee's serious health condition constitutes a disability under the Americans with Disabilities Act (ADA) and requires reasonable accommodation, often in the form of additional leave. The coordination of the two can be challenging for employers. Let's break down the issues:

Eligibility Issues

Employees who were not covered by FMLA—either because they had not met the eligibility requirements or because they work for small employers (less than 50 employees) not subject to FMLA—were sometimes terminated when they became unable to work for a period of time. However, with the broad definition of “disabled” under the ADA, it is likely these individuals will be disabled. The ADA has no length of service eligibility requirement and applies to employers with 15 or more employees. Termination is not an automatic option. Employers are required to seek an accommodation for these employees, which in most cases will be a reasonable extension of time off.

Under federal FMLA, an employee can take leave to care for an adult child if the child meets the ADA definition of “disabled.” For example, employee is not generally entitled to FMLA leave to care for a pregnant adult daughter. However, an employee whose pregnant 25-year old daughter has complications (which turn the pregnancy into a disability under the ADA), may now be eligible for FMLA leave to care for her.

Exhaustion of FMLA Leave

Employers still must consider whether an employee is disabled under the ADA when the employee is unable to return to work upon the exhaustion of his or her 12 weeks of FMLA leave. In the past, employers often concluded the employee was not disabled under the ADA. Now, most employees who exhaust their FMLA leave are entitled to some form of reasonable accommodation.

While the job protection afforded by FMLA ceases when the FMLA leave is exhausted, the ADA provides a measure of job protection beyond FMLA. The employer cannot terminate the employee unless it can show that providing—or continuing to provide—reasonable accommodation is an undue hardship for the company. It continues to be difficult for an employer to prove undue hardship.

Discrimination on the Basis of Association

Except for the adult child situation cited above, these issues apply only when the employee needs FMLA leave for his or her own serious health condition. If the FMLA leave is for the serious health condition of the employee's spouse, parent, or child, or (in the case of the 26-week military FMLA leave) for the serious injury or illness of the employee's covered family member, only the FMLA applies, not the ADA. Although it is illegal to discriminate against an individual because of his “association” with a person with a disability, an employer is not required to provide reasonable accommodation in these circumstances. For example, an employee exhausts his FMLA leave caring for a spouse with a condition that is both a serious health condition and a disability. If the spouse continues to need care after that time, the employer is not required to consider reasonable accommodation for the employee, such as additional leave.

MRA recommends that employers consider these questions:

- Do you have current information from the employee's physician, including any work restrictions?
- Have you engaged in the interactive process with the employee to get his or her suggestions?
- Have you considered all possible reasonable accommodations?
- Have you documented your reasonable accommodation efforts, including the reasons for rejecting accommodations, expert reports, and cost information?

Any termination that affects an employee with physical or mental challenges must be approached with great caution.