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Am I Entitled to Take Medical Leave?

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It is not uncommon for injury victims to need time off from work. Unfortunately, there is no easy answer to the question of whether their employer is required to allow them to take a medical leave. The Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.* ("FMLA"), the Americans with Disabilities Act, as Amended, 42 U.S.C. 12101 *et seq.* ("ADAAA," formerly known as the "ADA"), and its Ohio counterpart, R.C. §4112.02, all require some employers to allow some employees to take medical leave. There is a tremendous body of case law and administrative regulations interpreting these statutes. This article is intended only to provide a brief overview of the law regarding medical leaves in the employment context.

To determine whether an employee is entitled to take a medical leave, the first step is typically to determine whether the FMLA applies. If the answer to any of the following questions is "no," then the FMLA will not apply to your client:

- Did the employer have 50 or more employees for at least 20 workweeks in the current or preceding calendar year?
- Has your client been employed for at least one year with that employer?
- Has your client worked at least 1,250 hours for that employer during the past 12 month period?

If the answer to all of these questions is yes, then the client is entitled to take up to twelve weeks of leave per year for his or her own serious medical condition. FMLA leave is typically unpaid, but the employer must continue to provide benefits. The employer may require the employee to use up accrued vacation and personal days as part of the 12 week period. The use of paid leave does not extend the leave.

The FMLA does not required the employee to take leave in increments of months, weeks or even days. An employee may take "intermittent leave," as needed, for physician appointments, treatment, or as otherwise necessary because of the serious medical condition.

Once the employee returns to work, the FMLA requires that the employee be returned to the same or equivalent position. The leave must not result in the loss of any employment benefit accrued prior to the date on which the leave commenced, except vacation and personal days used during the leave.

The FMLA and its enabling regulations' definition of "serious medical condition" is complex. It includes the following:

- A medical condition that incapacitates an employee for more than three consecutive, full calendar days and requires either two visits to a health care provider within 30 days, where the first visit is within seven days of the first day of incapacity; or a regimen of continuing treatment, with a visit to a health care provider occurring within seven days of the first day of in capacity;
- Any period of incapacity related to pregnancy or for prenatal care;
- Any period of incapacity or treatment for a chronic serious health condition requiring at least two visits to a health care provider per year;
- A period of incapacity for permanent or long term conditions for which treatment may not

be effective;

- Any period of incapacity to receive multiple treatments, including recovery from those treatments, for restorative surgery.

Unfortunately, only approximately sixty percent of all Americans are covered by the FMLA. For those who are not, the ADAAA and R.C. 4112.02 may provide relief. The ADAAA applies to all employees of all employers with fifteen or more employees. R.C. 4112.02 applies to employers with four or more employees in the state of Ohio. Both statutes provide that the employer must "reasonably accommodate" a disabled employee, if the employee is able to perform the essential functions of the job with the accommodation. In interpreting R.C. 4112.02, Ohio courts follow the federal courts' interpretation of the ADAAA. *See, e.g., Little Forest Medical Center v. Ohio Civil Rights Com.*, 61 Ohio St.3d 607, 609-610, 575 N.E.2d 1164, 1167 (1991); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Com.*, 66 Ohio St. 2d 192, 197 (1981).

Not all injured employees are "disabled." An employee is "disabled" if he or she has either a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or is regarded as having such an impairment.

In 1998, the Sixth Circuit Court of Appeals held that time off from work could be a reasonable accommodation under the ADA. *Cehrs v. Northeast Ohio Alzheimer Research Ctr.*, 155 F.3d 775 (6th Cir. 1998). In that case, the Court held that the employee's medical leave could be protected under the ADA even if it exceeded the amount of leave she was permitted under the FMLA. The Sixth Circuit has since noted that a medical leave of nearly six months can be a reasonable accommodation of a disability. *Cleveland v. Fed. Express Corp.*, 83 Fed. Appx. 74, 79 (6th Cir. 2003); *accord EEOC v. Journal Disposition Corp.*, 2011 U.S. Dist. LEXIS 124177, *10-11 (W.D. Mich. Oct. 27, 2011) (leave requests 'are not generally found to be unreasonable as a matter of law unless they are of indefinite duration, or are in excess of one year.").

Thus, whether or not an employee is covered by the FMLA, the employee may be entitled to medical leave under the ADAAA or R.C. 4112.02. Employees who take leave because of a disabling condition, under the ADAAA, may have greater protection and be entitled to longer leave, than those who take medical leave under the FMLA but are not "disabled."

Finally, an employee is not required to specify whether he or she is requesting leave under the FMLA or the ADAAA. Both statutes require only that the employee notify the employer of the employee's need for leave because of a medical condition. Once the employer is aware of that request, the employer is required to either give the employee notice of his or her rights under the FMLA and explain what additional information the employer needs to process the request, or engage in a dialogue with the employee to determine if the employee is disabled and requires accommodation, or both. See, e.g. CFR § 825.300 (describing FMLA notice requirements); *Leeds v. Potter*, 249 Fed. Appx. 442, 449 (6th Cir. 2007) (employee "need not use the magic words 'accommodation' or even 'disability'" to trigger employer's responsibility under the ADAAA. employee need only convey that a request is being made "in order to conform with existing medical restrictions.")