CHAPTER 1
INTRODUCTION

Anyone who purchased this book is probably all too aware of the confusing intersection of various federal sector laws involving employee medical-related leave and the documentation issues attendant to that leave. This book does not attain the impossible by eliminating the confusion. Nor does it attempt to provide comprehensive coverage of each and every aspect of the different laws that have a leave component—to do so would result in a book so voluminous as to be useless. It does, however, provide the basic information from the different laws in one place, and take a close look at how these laws interact with and relate to one another. Its intention is to help the reader spot potential medical-related leave situations that may need to take into account more than one body of law.

There are four major types of medical-related leave addressed in this book:

(1) Leave as a reasonable accommodation under the Americans with Disabilities Act (ADA)/Rehabilitation Act

(2) Continuation of pay and wage-loss compensation for work-related injuries under the Federal Employees' Compensation Act (FECA)

(3) Leave under the Family & Medical Leave Act (FMLA)

(4) Sick leave administered under Office of Personnel Management (OPM) regulations

An overview of each of these topics follows in the ensuing chapters. Because medical-related leave generally implicates medical documents to support leave, this book also covers the relevant rules on medical information confidentiality, storage, and dissemination.

The features and requirements related to each type of leave are compared and contrasted throughout. Undoubtedly, there are areas of intersection the author missed. It is hoped, however, that the most common and salient areas of crossover, which at times involve tension or even conflict, are addressed and explained, if not resolved. Because a period of medical leave often involves a return to work, and the attendant medical issues related to such a return, that topic is also discussed.

To assist the reader, the following is a brief description of each of the leave-related laws, along with the precedent and resources generated by each forum. A more thorough overview for each is provided in the ensuing chapters.

I. AMERICANS WITH DISABILITIES ACT/REHABILITATION ACT

The Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 prohibit employment discrimination against individuals with disabilities, and contain certain provisions restricting medical inquiries and exams. The two statutes are referred to interchangeably throughout this book for two reasons. First, the medical documentation and request provisions of the ADA were incorporated into the Rehabilitation Act by way of amendment in 1992. Therefore, the most relevant provisions come directly from the ADA. Second, on a more practical level, the regulations and enforcement guidance, issued by the Equal Employment Opportunity Commission (EEOC or Commission), discuss only the ADA. This is because these regulatory and guidance documents, while highly useful in the federal sector, apply beyond the federal government. Accordingly, much of the cited reference material addresses the ADA only, as the Rehabilitation Act does not apply to most private sector employers. The ADA is codified at 42 USC § 12101, *et seq*. The employment provisions of the Rehabilitation Act are codified at 29 USC §§ 791, *et seq*. There are other resources that provide guidance, however, as outlined below. Most of these can be accessed on the Commission's website at www.eeoc.gov.

An overview of the ADA/Rehabilitation Act is contained in Chapter 2, while Chapter 6 provides an in-depth look at the ADA's medical exam and inquiry provisions. Other chapters address ADA medical leave and documentation requirements in relation to other laws.

A. THE EEOC REGULATIONS AND OTHER RESOURCES

Enforcement of the ADA, for federal sector employment purposes, lies with the Equal Employment Opportunity Commission. The statutes, regulations, and interpretive case law of the Commission and the courts are the primary sources of law in the field of disability discrimination in employment. The law is complex and dynamic, with several important Supreme Court cases in the mix.

The EEOC has promulgated extensive regulations and guidance under the ADA, applicable to both the private and federal sectors, in the Code of Federal Regulations (CFR) at 29 CFR Part 1630. The Regulations promulgated under the Rehabilitation Act appeared at 29 CFR Part 1614, and were largely superseded by the ADA's regulations after the 1992 amendments. One provision that remains from the Rehabilitation Act regulations is 29 CFR § 1614.203(a), which provides:

> The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with disabilities.

A proposed amendment to 29 CFR § 1614.203 would change the content and citation. The proposed 29 CFR § 1614.203(c) would require federal agencies to take affirmative steps to recruit, hire, and advance qualified individuals with disabilities, stating:

> *Model employer*. The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, advancement, and retention of qualified individuals with disabilities in the federal workforce. Agencies shall also take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of eliminating under-representation of individuals with disabilities in the federal workforce.

82 FR 677, Jan. 3, 2017.

The ADA regulations at Part 1630 are followed by an appendix that explains the regulations and gives further user-friendly guidance on the Commission's interpretation of the ADA. It is referenced herein using the following citation format: 29 CFR pt. 1630, app.

The statute, regulations, appendix, guidance, as well as instructive caselaw from the federal courts and the Commission's Office of Federal Operations (OFO) regarding medical exams and inquiries are set forth and analyzed throughout this book in an effort to assist employees and employers alike in navigating this often confusing topic.

B. ENFORCEMENT GUIDANCE AND SIMILAR DOCUMENTS

From time to time, the Commission issues Enforcement Guidance in the field of disability discrimination. The guidance in these documents is written for the layperson, and generally is very helpful. An important caveat, however, is at the time this *Guide* was published, most of the Enforcement Guidance materials below had not been updated to incorporate the ADA Amendments Act of 2008 (ADAAA), and are therefore not up-to-date on all topics. When accessing the Enforcement Guidance on the EEOC's website, as of June 1, 2017, the reader is met with a disclaimer, stating:

> The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications.

There is a link to the specific changes the ADAAA makes to the ADA. Clearly, updating the Enforcement Guidance is not among the Commission's top priorities. The ADAAA, discussed in Chapter 2, did not change the medical request and documentation provisions of the ADA, however, so the guidance as it relates to those topics is mostly current.

Because the EEOC has issued so many different Enforcement Guidance documents pertaining to disability, to avoid confusion, the long titles of the Guidance documents referenced in this book are summarized throughout as follows:

Enforcement Guidance Full Title	Short Title
Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (October 17, 2002)	*Enforcement Guidance: Reasonable Accommodation*
Policy Guidance on Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation (October 20, 2000)	*Policy Guidance: Reasonable Accommodation*
Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000)	*Enforcement Guidance: Current Employee Inquiries*
Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (March 25, 1997)	*Enforcement Guidance: Psychiatric Disabilities*
Enforcement Guidance: Workers' Compensation and the ADA (September 1996)	*Enforcement Guidance: Workers' Compensation*
ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (October 10, 1995)	*Enforcement Guidance: Preemployment Inquiries*

C. FMLA INFORMATION

The Commission's Office of Legal Counsel has prepared a factsheet entitled *Facts About the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, November 1995, to provide assistance in answering common questions about how the ADA, Family & Medical Leave Act (FMLA), and Title VII relate to one another. It is referred to herein as *FMLA Factsheet*. The Commission's *Enforcement Guidance: Reasonable Accommodation* also addresses the relationship between the FMLA and the ADA.

D. CASELAW

The EEOC's Office of Federal Operations (OFO) has developed extensive caselaw further defining the ADA, and it continues to evolve rapidly. Finally, federal courts have decided some cases that either directly involve federal employees, or are applicable to federal employees because the analysis under these ADA provisions does not change regardless of the implicated employer.

E. REASONABLE ACCOMMODATION ASSISTANCE

In addition to the written guidance provided by the EEOC, there are several agencies that can provide technical assistance with identifying appropriate accommodations in specific situations. Those agencies include:

- *Job Accommodation Network*—The Job Accommodation Network (JAN) is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP), and, among other services, provides information on job accommodations. JAN is a collaborative effort of the ODEP, the International Center for Disability Information at West Virginia University and private industry. www.jan.wvu.edu; 800-526-7234; 877-781-9403 (TTY).
- *ADA Disability and Business Technical Assistance Centers*—There are 10 federally funded DBATC's, broken down by geographical regions, that provide information, training, and technical assistance on issues related to the ADA. www.adata.org; 800-949-4232.
- *Rehabilitation Engineering and Assistive Technology Society of North America*—In addition to referring individuals to services in the 50 states, RESNA provides information on devices to assist disabled persons, regional centers where the devices can be tried, and assistance in obtaining funding for the purchase and repair of assistive devices. www.resna.org; 703-524-6686; 703-524-6639 (TTY).
- *Registry of Interpreters for the Deaf*—The Registry can assist in locating interpretive services through its referral service. www.rid.org; 703-838-0300.

A 200+ page listing federal and state agencies, service providers and disability-related organizations is also provided in the Resource Directory of the Commission's *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*. The manual is not available online, but print copies can be ordered from the Commission.

II. FEDERAL EMPLOYEES' COMPENSATION ACT

The Federal Employees' Compensation Act (FECA), which governs work-related injuries and provides compensation benefits for individuals who sustain job-related impairments, is administered by the Department of Labor's Office of Workers' Compensation Programs (OWCP or Office). The Division of Federal Employees' Compensation (DFEC), which is one of four components of OWCP, administers the FECA. It is codified at 5 USC Chapter 81.

The Employees' Compensation Appeals Board (ECAB or Board) is an appellate body that sits in Washington, D.C. It hears and decides appeals relating to OWCP benefits. Its decisions are precedential and binding on the Office.

A. OWCP REGULATIONS

The Office has promulgated regulations implementing FECA, which are found at 20 CFR Part 10. These regulations are in question-and-answer format, and use plain English. For practitioners accustomed to the regulations in Title 5 of the CFR, the Department of Labor's regulations implementing the FECA are a welcome change.

B. OWCP GUIDANCE DOCUMENTS

The Office has put forth comprehensive guidance to assist employees, employers, and practitioners navigate the workers' compensation process. The DFEC publishes a thorough procedural manual covering all aspects of the workers' compensation process, which can be found at https://www.dol.gov/owcp/dfec/procedure-manual.htm. It is referred to herein as the *DFEC PM*, and is cited by chapter and section (*e.g. DFEC PM*, Ch. 2-0802.5).

The topics addressed in the *DFEC PM* are:

Overview (FECA Part 0)—Describes the organization of the OWCP and the Division of Federal Employees' Compensation.

Mail and Files (FECA Part 1)—Addresses the jurisdiction of cases and the movement of mail and case files within the District Office. It also discusses how to create, maintain, transfer, and retire case files.

Claims (FECA Part 2)—Describes the procedures for adjudicating, paying, and managing claims; it includes appeals process and other specialized topics.

Medical (FECA Part 3)—Addresses medical services and supplies. It describes how medical examinations are arranged, and the kinds of information medical reports should contain.

Special Case Procedures (FECA Part 4)—Describes the procedures for adjudicating, paying, and managing claims of employees who are covered under the FECA by special legislation.

Benefit Payments (FECA Part 5)—Contains the segment of Part 5 which governs adjudication and payment of medical bills under the FECA.

Debt Management (FECA Part 6)—Addresses identification of overpayments under the FECA, issuance of preliminary and final decisions, and collection actions.

Nurse Intervention (FECA Part 7)—Discusses DFEC's Nurse Intervention Program.

Rehabilitation (FECA Part 8)—Discusses DFEC's Vocational Rehabilitation Program.

Parts of the OWCP Procedure Manual, a separate publication, also provide useful information regarding vocational rehabilitation after a work-related injury, as well as how the Office maintains confidentiality of medical records:

Vocational Rehabilitation (OWCP Part 3)—Discusses the vocational rehabilitation services available under the FECA and how these services are provided.

Administration (OWCP Part 1)—Discusses the requirements of the Privacy Act and the Freedom of Information Act as they apply to claims under the jurisdiction of the OWCP. It also addresses how OWCP directives are issued.

In addition, *Injury Compensation for Federal Employees*, Publication CA-810 (1999), provides a user-friendly and less in-depth explanation of benefits and procedures under the FECA. Other resources can be found on the Department of Labor's website, at https://www.dol.gov/general/siteindex. These include necessary forms related to compensation benefits, frequently asked questions, along with general guidance.

C. ECAB DECISIONS

Although the ECAB issues written decisions in all cases, historically it has not reported all such decisions. From 1947 until 1994, the ECAB selected only those decisions it believed were significant or precedential. Those decisions were published in volume form by the U.S. Government Printing Office in a 45 volume set entitled *Digest and Decisions of the Employees' Compensation Appeals Board*. As the title indicates, each volume contains its own digest of the decisions published in that volume. Volume 45, the last volume to which citations are routinely referenced in the book, contains ECAB decisions through September 30, 1994. Later decisions are cited by the docket number and year.

The complete decisions of the ECAB are published on the ECAB website at https://www.dol.gov/ecab/decisions/ and are indexed by year. Decisions also can be searched by keyword, date and/or topical index on Cyberfeds (www.cyberfeds.com) which is operated by LRP Publications, and is a paid subscription service.

The ECAB has undergone some changes to its case citations over time. Starting in mid-2006, case citations no longer contain the claimant's full name. A notice on ECAB's web page explained:

> Effective August 1, 2006, the Employees' Compensation Appeals Board (ECAB) will no longer display the claimant's full name in its decisions. The 1996 e-FOIA amendments required agencies to publish adjudicatory decisions on the Internet. To limit a claimant's exposure on the Internet, the Department of Labor (DOL) will avoid referring directly to the claimant's name in decisions posted on the DOL web site on or after August 1, 2006. The policy applies prospectively only. (DOL's Office of Administrative Law Judges is adopting a similar policy for Black Lung Act and Longshore Act cases on August 1, 2006.) Decisions already on the DOL web site and published elsewhere are already in the public domain and will not be changed. The caption of a decision and/or order issued on or after August 1, 2006, will display only the claimant's initials and those initials should be used in citations to the decision. The initials used in the caption will be the first letter of the first name and the first letter of the last name. Middle initials, middle names and prefixes or suffixes will not be used in the caption. For opinions affected by this policy, two initials rather than the name will be used for citation purposes. (For example: CC, Docket No. 2006-XXX (issued August 2, 2007).)
>
> This policy is intended to protect FECA claimants from unnecessary publicity; it is not based upon a legal requirement. Neither FOIA, nor the Privacy Act, nor any other law compels DOL to take this action. Rather, this policy is based on a desire to address in a responsible way concerns raised by some claimants about the ease of access to their case decisions on the Internet. The policy seeks to comply with legal requirements to make agency decisions available on the Internet, but to do so in a way that limits a claimant's exposure to Internet users.

Citations in this book to cases that pre-date August 2006 remain unchanged, and this is the ECAB's practice as well. For cases after August 2006, the case citation contains the employee's initials as well as the name of the employing agency. Another note on case citations concerns the method by which the reader is directed to find the cases. In cases through September 1994, the citation reads something like, *Peter B. Broida*, 39 ECAB 243 (1988). In cases between October 1994 and August 2006, the citation is to the name and docket number: *Peter B. Broida*, 05-1187 (2005). This is because the docket number is the only reference that appears on cases on the ECAB website, at www.dol.gov/ecab/decisions.htm. In cases after August 2006, the citation will appear in this format: *P.B. and the Department of Labor*, 06-1012 (2009). Hopefully, this will not prove too confusing for the reader.

III. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 provides for up to 12 weeks of leave per 12-month period for employees: (1) to care for a newborn or newly-adopted child, or a child placed with an employee for foster care, (2) to care for specified family members with serious health conditions, (3) for one's own serious health condition. It was amended in 2008 to provide for up to 12 weeks of leave for any "qualifying exigency" related to military service, and for up to 26 weeks to care for a covered servicemember with a serious injury or illness.

A highly complicating aspect of the FMLA is that it has different versions that apply to different agencies, and sometimes even to different employees within an agency. Title I of the FMLA, administered by the Department of Labor, applies to Postal employees and all non-civil service employees, and is codified at 29 USC §§ 260,1 *et seq*. Title I also applies to the private sector and to part-time federal employees who do not have an established regular tour of duty. Title II of the FMLA, administered by the Office of Personnel Management (OPM), applies to civil service employees and is codified at 5 USC §§ 6381, *et seq*.

These two versions apply to the vast majority of federal sector employees. Chapter 4 discusses the specifics of employee coverage under each Title. In addition, certain employees in Congress are covered by the Congressional Accountability Act (CAA) of 1995, codified at 2 USC § 1312. Employees in the Executive Office of the President are covered by the Presidential and Executive Accountability Act (PEOAA) of 1996, codified at 3 USC §§ 402 & 412. This book will focus on Titles I and II.

A. REGULATIONS

Title I's regulations, promulgated by the Department of Labor, are found at 29 CFR §§ 825.100, *et seq*. They are extremely extensive, and provide numerous examples of the FMLA's interaction with other laws. They have been updated to include the 2008 amendments to the FMLA that provide leave for qualifying exigencies arising out of military service and to care for a covered servicemember.

Title II's regulations, promulgated by the Office of Personnel Management, are found at 5 CFR §§ 630.1201, *et seq*. They are far less comprehensive than the Department of Labor's regulations, but have likewise been updated to include the 2008 amendments to the FMLA.

B. OTHER GUIDANCE

The Department of Labor issues some significant guidance on Title II of the FMLA. *Fact Sheet #28A: The Family and Medical Leave Act Military Family Leave Entitlements* is referenced in this book, as it provides useful information on a new area of the law. The Department of Labor also issues Fact Sheets on various other topics, along with a Compliance Guide for the FMLA, frequently asked questions, and other guidance. The medical certification forms are also available on the website, at https://www.dol.gov/whd/forms/WH-380-E.pdf.

The OPM website provides a description of the FMLA, along with links to other FMLA information, at http://opm.gov/oca/leave/html/fmlafac2.asp.

C. CASELAW

Title I employees can either file a complaint with the Secretary of Labor or file a private lawsuit pursuant to section 107 of FMLA. There is no requirement to exhaust administrative remedies by going through an adjudicative process with the Department of Labor or any federal agency. The various federal district courts decide cases alleging violations of the FMLA, subject to review by the Federal Courts of Appeals, and, ultimately, the U.S. Supreme Court.

The enforcement mechanisms for Title II employees are few. Employees who allege noncompliance with the FMLA may file a grievance through their agency's administrative grievance process or, if applicable, though a collective bargaining agreement grievance process. The Federal Labor Relations Authority (FLRA) reviews arbitration awards pursuant to the grievance process. A complaint may also be filed with the Office of Special Counsel.

The Merit Systems Protection Board (MSPB), which adjudicates various federal sector employee claims, does not have jurisdiction over FMLA claims absent an independent basis for MSPB jurisdiction, such as disciplinary action involving discharge. *See, e.g.*, *Toyama v. MSPB*, No. 2006-3281, 2007 U.S. App. LEXIS 5748 (Fed. Cir. March 13, 2007); *Sherwood v. MSPB*, 02-3191 (Fed. Cir. 2002) (Unpublished) (Board has no jurisdiction over the denial of leave requested under FMLA). Where the MSPB does have jurisdiction, it has held that the agency bears the burden of proving that it properly denied FMLA leave in taking an AWOL-based action against an employee eligible for FMLA leave. *See Gross v. Dept. of Justice,* 77 MSPR 83 (1997).

Because there is no one forum for resolving Title II FMLA disputes, the caselaw discussed throughout this book comes from a variety of sources.

IV. OPM MEDICAL LEAVE REGULATIONS

Finally, the United States Office of Personnel Management is charged with "executing, administering, and enforcing" the laws governing the civil service. 5 USC § 1103(a)(5)(A). Accordingly, OPM has promulgated numerous regulations contained in Title V of the Code of Federal Regulations. These regulations, which are extremely voluminous, carry out the Civil Service Reform Act and some other laws applicable to federal employees. Sprinkled throughout this vast set of regulations are a number of provisions that apply to employee leave and medical document requests.

The primary OPM regulations addressed in the book, aside from OPM's FMLA regulations discussed above, are:

- 5 CFR §§ 630.401–408, Subpart D—Sick Leave
- 5 CFR § 630.901–913, Subpart I—Voluntary Leave Transfer Program
- 5 CFR §§ 630.1001–1016, Subpart J—Voluntary Leave Bank Program
- 5 CFR Part 339—Medical Qualification Determinations
- 5 CFR Part 293.501–511, Subpart E—Employee Medical File System Records
- 5 CFR Part 353—Restoration to Duty From Uniformed Service or Compensable Injury

V. REFERENCES IN REGULATIONS AND GUIDANCE TO STATE LAWS

Federal employers are generally not subject to state employment statutes and regulations. Some of the regulations and guidance under the ADA and Title II of the FMLA reference interactions with or applications of state laws. Where there is a corollary federal law, it can usually substitute for the state law. For example, the Commission's *Enforcement Guidance: Workers' Compensation* addressed the interplay between the ADA and state workers' compensation statutes. The FECA can simply be substituted in for the state law. However, this must be done with caution as not all state laws are like their federal counterparts, nor do all state laws even have federal counterparts.

CHAPTER 2
OVERVIEW: REHABILITATION ACT AND AMERICANS WITH DISABILITIES ACT

The first major federal statute prohibiting employment discrimination on the basis of disability in the federal government was the Rehabilitation Act of 1973, which applied primarily to the federal employers and certain federal contractors. In 1990, the Americans with Disabilities Act (ADA) extended the prohibition against disability-based discrimination to the private sector. Two years later, the 1992 amendments to the Rehabilitation Act broadened the base of federal sector protections by incorporating many of the ADA's standards for determining disability discrimination. This book focuses on the Rehabilitation Act and the incorporated provisions of the ADA as they apply to federal sector medical documentation issues. For a full discussion of these statutes as they pertain to federal sector employment discrimination, the reader is referred to *A Guide to Federal Sector Disability Discrimination Law and Practice,* by Ernest C. Hadley (Dewey Publications, Inc.).

Significantly, for purposes of this book, the 1992 amendments to the Rehabilitation Act incorporated Section 102 of the ADA, 42 USC § 12112(d), and made it applicable to the federal sector. This section covers medical exams and inquiries, a topic that is covered in depth in Chapter 6. Also relevant to the issue of medical exams and inquiries is the Rehabilitation Act's requirement that federal employers "reasonably accommodate" qualified disabled individuals unless doing so would impose an undue hardship on the agency's operations. As discussed in Chapter 6, an employee's request for reasonable accommodation may permit an agency to inquire about an employee's or applicant's disability and/or to request medical documentation. Because the Rehabilitation Act's amendments incorporate the provisions of the ADA relevant to medial requests, the two statutes are referenced interchangeably throughout this book.

This chapter refers to numerous EEOC Enforcement Guidance and other documents. They are cited in abbreviated format below; full citations appear in Chapter 1.

I. ENFORCEMENT

Primary responsibility for enforcement of the Rehabilitation Act and the applicable provisions of the ADA in the federal sector lies with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission issues appellate decisions from its Office of Federal Operations (OFO) on federal employees' complaints of disability discrimination, including complaints involving medical requests and records. These decisions are binding in the federal sector and are included in this book where appropriate.

In addition, the federal courts issue decisions on ADA-related medical inquiries and documentation involving employees in all sectors: federal government, state and local government, and private. Although the Commission is not bound by federal court decisions, other than those rendered by the U.S. Supreme Court, these decisions are often instructive. Moreover, the Commission often looks to and cites federal court decisions to develop its caselaw. As a result, some instructive federal court cases are discussed in this book.

Finally, the Merit Systems Protection Board (MSPB or Board) has primary jurisdiction over certain personnel actions involving covered employees even when violations of the Rehabilitation Act/ADA are raised. Accordingly, the MSPB adjudicates many disability discrimination cases. To the extent these cases are instructive on the issue of ADA-related medical documentation and/or are intertwined with other leave issues addressed in this book, they are also included and discussed throughout.

II. REHABILITATION ACT AND ADA EMPLOYMENT PROVISIONS

The employment provisions of the Rehabilitation Act, originally passed as Pub. L. No. 93-112, are codified at 29 USC §§ 791, *et seq*. The sections that apply in employment discrimination cases, Sections 501 and 505, are discussed below. The Rehabilitation Act was most recently amended on December 10, 2015 through Pub. L. 114-95. As noted above, one unique aspect of the Rehabilitation Act as compared with anti-discrimination laws on most other bases such as race, gender, or age, is its requirement that federal employers "reasonably accommodate" qualified disabled individuals unless doing so would impose an "undue hardship" on the agency's operations. This requirement is highly relevant to the issue of medical inquiries because, as discussed in Chapter 6, an employee's request for reasonable accommodation may permit an agency, within some very specific and relatively narrow parameters, to request medical documentation. Overstepping these boundaries, however, can result in agency liability *per se*, regardless of the merits of the underlying accommodation request.

Signed into law by President George H.W. Bush in 1990, the ADA prohibits disability discrimination in employment as well as in the areas of housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. 42 USC § 12101(a)(3). Titles I and V of the ADA are the pertinent provisions for employment. The nonaffirmative action provisions of the ADA, explained below, were incorporated into the Rehabilitation Act and are binding in the federal sector. As originally passed, the ADA specifically excluded the federal government from coverage. 42 USC § 12111(5)(B)(i). As noted above, Title I and certain provisions of Title V of the ADA were subsequently made applicable to the federal government in 1992 by an amendment to the Rehabilitation Act. 29 USC § 791(g).

A. SECTION 501—REHABILITATION ACT

Section 501 of the Rehabilitation Act, 29 USC § 791, has two distinct requirements: (1) It prohibits agencies from discriminating on the basis of disability; and (2) It requires agencies to develop and implement affirmative action plans to promote the hiring, advancement, and placement of individuals with disabilities. The prohibition on discrimination in the Rehabilitation Act is also referred to as its non-affirmative action requirement. Most Rehabilitation Act cases concern the anti-discrimination, non-affirmative action provisions.

1. Prohibition on Discrimination

The Rehabilitation Act does not contain any provisions that explicitly prohibit discrimination. Since its 1992 amendments, at 29 USC § 791(f), however, the prohibitions on discrimination set forth in certain sections of the ADA have been incorporated:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq*.) and the provisions of sections 501 and 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

The relevant sections of the ADA are discussed below.

2. Affirmative Action

The Affirmative Action requirements of the Rehabilitation Act are only relevant for purposes of this book insomuch as they permit an agency to ask applicants for employment to voluntarily disclose disability status for purposes of required affirmative action reporting. Any disclosure of disability may only be used for statistical purposes. The hiring officials may not consider, or even see, any applicant's voluntarily disclosed disability status. The agency's obligations with respect to affirmative action disclosures are discussed in Chapter 6.

3. Prohibition on Retaliation

The Rehabilitation Act incorporates the ADA prohibition against retaliation for the protected activity of asserting one's rights to be free from discrimination on the basis of disability. The ADA specifically prohibits retaliation for participating in the EEO process or for opposing a practice that is discriminatory under the statute. This prohibition, set forth at 42 USC § 12203, provides:

> (a) *Retaliation*. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) *Interference, coercion, or intimidation*. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.
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> (c) *Remedies and procedures*. The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

See also 29 CFR § 1630.12; 29 CFR § 1614.101(b). The remedies and procedures referred to in 12203(c) above are those remedies and procedures available in cases brought under Title VII of the Civil Rights Act of 1964, discussed below.

The theory of discrimination based on reprisal or retaliation does not depend on whether the complainant is a qualified individual with a disability, an individual with a disability, or an individual who has no disability. Instead, coverage under the statute is based on two broad categories of "protected activity": (1) Participation in some manner in the EEO process; or (2) Opposition to an employment practice that is unlawful under the ADA or the Rehabilitation Act. The retaliation provisions of the Rehabilitation Act are relevant to this book because, in some instances, an agency's request for medical documentation on the heels of an employee's protected activity may be construed as retaliation. The caselaw on medical document requests as retaliation is discussed in Chapter 6.

Moreover, the Commission has held that requesting reasonable accommodation is protected activity. *See Keller v. Postmaster General*, 01A03119 (2003). An employee asserting a claim of reprisal based on requesting an accommodation as protected activity, however, must prove that he or she is a qualified individual with a disability.

B. SECTION 505—REHABILITATION ACT

Section 505 of the Rehabilitation Act prescribes the procedures and remedies available to employees. In disability discrimination cases, the remedies and procedures are the same as those set forth in Title VII of the Civil Rights Act of 1964. In relevant part, 29 USC § 794a provides:

> (a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.
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> …
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This provision means that employees or applicants for employment bringing cases of discrimination based on disability must comply with the EEOC's procedures set forth at 29 CFR Part 1614. For a comprehensive discussion of this process, the reader is referred to Hadley's *Guide to Federal Sector Equal Employment Law & Practice*, (Dewey Publications, Inc.).

The remedies adopted under the Rehabilitation Act are the traditional "make whole" remedies of Title VII. The object of such remedies is to put the victim of disability discrimination where he or she would have been but for the prohibited discrimination. *Albemarle Paper Co. v. Moody*, 422

U.S. 405, 95 S. Ct. 2362, 45 L. Ed.2d 280 (1975). The traditional remedies under Title VII include measures such as reinstatement or appointment to a position, back pay awards, and retroactive entitlement to other benefits and privileges of employment. Of course, one of the major make whole remedies under the Rehabilitation Act is to order reasonable accommodation of the employee. The Rehabilitation Act also provides for awards of attorneys' fees for prevailing complainants. 29 USC § 794a(b). Importantly, an employee or applicant who wins an ADA claim involving an unlawful medical request or unlawful dissemination of medical documents is a prevailing party and is entitled to these remedies.

1. Civil Rights Act of 1991

The Rehabilitation Act incorporates the remedies of Title VII. Accordingly Section 505 of the Act was amended by the Civil Rights Act of 1991, Pub. L. No. 102-166 (Nov. 21, 1991). Among other things, the 1991 Civil Rights Act provides for compensatory damages in claims involving intentional discrimination on the basis of disability. 42 USC §§ 1981a(b)(2)–(3). Because any violation of the medical request and documentation provisions of the Act is a form of intentional discrimination, compensatory damages, where proven, are available. Compensatory damages include any out of pocket expenses the complainant incurred because of the discrimination, as well as up to $300,000 to compensate for emotional distress resulting from the discrimination.

C. ADA—FINDINGS AND PURPOSE

While the findings and purposes sections of legislation are often ignored, these sections of the ADA have proved to be extremely important. This is because the ADA was amended significantly in 2008, and Congress specifically relied on the findings and purposes provisions to determine that the Supreme Court had erred in some of its decisions, and had issued precedent that thwarted much of the legislation's purpose. The 2008 amendments are discussed below. The ADA's Findings and Purposes, at 42 USC § 120101, state:

(a) *Findings*.—The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) *Purpose*.—It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities.

This is the current statement of findings and purposes, incorporating the 2008 amendments.

D. TITLE I—ADA

Title I of the ADA, codified at 42 USC §§ 12111, *et seq*., contains most of the provisions related to employment discrimination on the basis of disability. The Rehabilitation Act, at 29 USC § 791(g), specifically incorporates Title I of the ADA in cases of non-affirmative action disability discrimination. Title I contains numerous provisions on medical documentation and inquiries, which are discussed separately in the section entitled "Medical Exams, Inquiries, and Documentation" found later in this chapter.

1. Non-Affirmative Action Requirements

Section 102 of the ADA, codified at 42 USC § 12112, addresses employment discrimination. It prohibits discrimination against qualified individuals with disabilities with regard to "job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." As with the Rehabilitation Act, these anti-discrimination provisions are sometimes referred to as the non-affirmative action requirements of the ADA.

The ADA more specifically defines the types of discrimination from which an employer must abstain. 42 USC § 12112(b), which makes unlawful the following actions:

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
>
> (3) utilizing standards, criteria, or methods of administration—
>
> (A) that have the effect of discrimination on the basis of disability; or
>
> (B) that perpetuate the discrimination of others who are subject to common administrative control;
>
> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
>
> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

These provisions do not specifically address leave or medical inquiries. Many of them, however, implicate documentation issues and may trigger an agency's duty to adhere to the medical request and documentation provisions of the ADA, as discussed below.

2. Title I Defenses

An agency can defend itself against a claim of failure to reasonably accommodate a disability by showing that either: (1) there is no accommodation available to permit the employee or applicant to perform the essential functions of the position at issue and/or enjoy equal benefits or privileges of employment; or (2) any accommodation would impose an undue hardship on the agency's operations.

The ADA defines reasonable accommodation at 42 USC § 12111(9):

> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Undue hardship is defined at 42 USC § 12111(10):

> (A) *In general.*—The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) *Factors to be considered.*—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
>
> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Another defense available to the agency is to show that the employee or applicant poses a direct threat to himself or others in the position. 42 USC § 12113(b) provides:

> *Qualification standards*—The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

A direct threat, defined at 42 USC § 12111(3), is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." The direct threat defense almost always implicates medical documentation requests. To assert this defense successfully, the agency must prove specifically that the manifestations of a complainant's disability actually render him or her a direct threat given the specifics of that employee's job position considered with the particularized manifestations of the disability in that particular employee. The direct threat standard is covered in depth in Chapter 6.

E. TITLE V—ADA

Several provisions of Title V of the ADA are also incorporated by the Rehabilitation Act and are thereby applicable in the federal sector. As relevant here, Section 501, codified at 42 USC § 12201(a), states that no provision of the ADA may be construed as applying a lesser standard than the Rehabilitation Act or any regulations promulgated under it. Where any provision of the Rehabilitation Act offers an individual greater protection than the ADA, the Rehabilitation Act's provision applies. Section 501 likewise provides that the ADA does not "invalidate or limit the remedies, rights, and procedures of any Federal law…." 42 § USC § 12201(b).

Section 510 reiterates that those individuals currently engaged in the illegal use of drugs are not covered by the Act when the employer takes action on the basis of the drug use. Individuals currently using drugs are, however, entitled to health or drug rehabilitation services if they otherwise qualify for those services. 42 USC § 12210(c).

1. Retaliation

Section 503 of the ADA, which was incorporated into the Rehabilitation Act, prohibits retaliation against individuals for exercising their rights under the ADA. It is codified at 42 USC § 12203, and is set forth earlier in the "Prohibition on Retaliation" section of the Rehabilitation Act discussion.

F. ADA AMENDMENTS ACT OF 2008

On September 25, 2008, President George W. Bush signed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The ADAAA received overwhelming support in both the House and Senate, and its passage symbolized a widespread belief that the Supreme Court had restricted ADA coverage far too severely. In fact, the Amendment's stated purpose is "to restore the intent and protections of the Americans with Disabilities Act of 1990." Moreover, the ADAAA's findings state, among other things, that "while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled." The amendments specifically criticize and overturn certain Supreme Court cases, including *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), its two companion cases, as well as *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The final regulations implementing the ADAAA were published in the Federal Register on March 25, 2011, and are incorporated into the ADA's regulations at 29 CFR Part 1630.

The ADAAA significantly broadens the definition of "disability," discussed in the following section, and thereby expands the ADA's scope of coverage. The Commission, in its *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008,* summarizes the ADAAA's most significant provisions noting that the ADAAA:

- directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:
- the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
- the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;
- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of "disability" should be interpreted broadly.

The regulations echo the general breadth of the ADAAA, stating, at 29 CFR § 1630.1(c)(4):