RETURNING TO WORK: FITNESS-FOR-DUTY EXAMS AND RELATED LEGAL ISSUES

by

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I. **MEDICAL LEAVE**. Family and Medical Leave Act of 1993, as amended, 29 U.S.C. §2601, *et seq*. ("FMLA").

A. **Covered Employers**.

1. **Private Sector**. Private sector employers, including successor in interests, engaged in commerce or in any industry or activity affecting commerce, which employ 50 or more employees in 20 or more calendar work weeks in the current or preceding year.

2. **Public Sector**. Public agencies, including but not limited to the federal government, state and local agencies, their political subdivisions and local education agencies.

3. **Sovereign Immunity**. Under the Eleventh Amendment, states enjoy sovereign immunity for FMLA violations when the FMLA leave is for self-care. *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012).

B. **Eligible Employees**. To be eligible for FMLA leave, employees must meet all of the following:

1. The employee worked for a covered employee as outlined above;

2. The employee has worked for the covered employer for more than 12 months (the 12 months of employment do not need to be consecutive if the break in service is no more than seven years or if the break in service is covered by the Uniformed Services Employment and Reemployment Rights Act);

3. The employee worked at least 1,250 hours during the 12 months immediately preceding the leave;[3] and

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2 Thank you to Benjamin S. Briggs, Esquire, and Joshua R. Kersey, Esquire, for their assistance in preparing these materials.

[3] Note that special hours of service eligibility requirements apply to airline flight crew employees.

4. The employee works at a job site where the employer has at least 50 employees within a 75-mile radius.

C. <u>Leave Entitlement</u>. Under the FMLA, an eligible employee is entitled to up to either 12 or 26 weeks of job-protected leave in a 12-month period.

1. **12-Week Leave**. An eligible employee is entitled to up to 12 work weeks of job-protected leave for one or more of the following reasons:

   a. For the birth of an employee's child or the placement with the employee of a child for adoption or foster care;

   b. To care for an immediate family member (spouse, child, or parent – but not a parent "in-law") with a serious health condition;[4]

   c. If the employee is unable to work because of a serious health condition; or

   d. For qualifying exigencies arising out of the employee's spouse, child, or parent being on covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces. A qualifying exigency includes:

      - Addressing issues arising from the service member's short notice deployment (deployment within seven days of notice);

      - Attending military events, such as official ceremonies or family support or assistance programs sponsored by the military that are related to the member's deployment;

      - Certain childcare and related activities arising from the service member's active duty, including arranging for alternative childcare or enrolling in or transferring a child to a new school;

      - Certain activities arising from the service member's active duty related to care of the service member's parent who is incapable of self-care;

      - Making or updating financial and legal arrangements to address a service member's absence while on covered active duty;

      - Attending counseling—for the employee, the service member, or a child of the service member—when the need for counseling arises from the service member's active duty and is provided by someone other than a health care provider;

[4] Some examples of serious health conditions are those requiring overnight stay in a medical care facility, those that prevent an employee or a family member from attending work or school for more than three consecutive days and involve ongoing medical treatment, and pregnancy and related conditions.

- Taking up to 15 calendar days of leave to spend time with a service member who is on short-term, temporary Rest and Recuperation leave during deployment; or

- Certain post-deployment activities within 90 days of the conclusion of the service member's active duty, such as attending arrival ceremonies or reintegration.

2. **26-Week Leave**. An eligible employee is entitled to up to 26 work weeks of job-protected leave to care for a covered service member with a serious injury or illness, if the employee is the service member's spouse, child, parent, or next of kin.

3. **Intermittent Leave**. In some situations, eligible employees may take FMLA leave on an intermittent basis (rather than 12 or 26 straight weeks)—taking separate blocks of time or reducing the time the employee works each day for a qualifying reason such as medical treatment. However, if FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced schedule leave requires the employer's approval.

4. **Calculating FMLA Leave**. Employers may only count time as FMLA leave if the employee would have been working during that time. For instance, most schools cannot count summer months toward teachers' FMLA leave. Moreover, employers may not calculate an employee's FMLA leave using larger increments of time than the smallest increment the employer uses for other forms of leave (i.e., if the employer counts sick leave in 30-minute increments and vacation in leave in one-day increments, it must calculate FMLA leave in 30-minute increments).

5. **Accrued Paid Leave**. Depending on the terms of the employer's leave policy, an employee may be able to substitute accrued paid leave, such as sick or vacation leave, to cover some or all of the employee's FMLA leave.

6. **Department of Labor Final Rule on Sick Leave for Federal Contractors**. On September 30, 2016, the U.S. Department of Labor ("DOL") published its final rule requiring certain federal contractors to provide sick leave to employees. The rule becomes effective November 29, 2016, and generally applies to the following contracts with the federal government entered after January 1, 2017:

   - Procurement contracts for construction covered by the Davis-Bacon Act;
   - Procurement contracts for services covered by the Service Contract Act;
   - Contracts for concessions; and
   - Contracts in connection with federal property or lands and related to offering services.

   Covered employees must accrue at least one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. It also requires that the contractor aggregate the employee's hours worked on or in connection with all covered contracts

for that contractor. The contractor may limit maximum accrued sick time to no less than 56 hours in each accrual year.

7. **Employee Benefits**.

   a. Group Health Insurance Benefits. If an employer offers an employee group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had not taken leave. The employee must continue to make any normal contributions to the cost of insurance premiums while out on leave. If the employee does not return to work at the conclusion of his or her FMLA leave, the employer may require the employee to repay the employer's share of the premium payments while the employee was out on leave. However, the employer may not recoup its premium payments if the employee does not return to work because of circumstances beyond his or her control, such as a qualifying medical condition.

   b. Other Employee Benefits. Other than group health insurance, an employee's entitlement to benefits while on FMLA leave depends on the employer's policies. If the employer would provide benefits to the employee if he or she was on another form of leave, the employer must maintain those benefits while the employee is on FMLA leave.

8. **Requesting FMLA Leave**.

   a. Timing of Employee Request for Leave. Employees generally must request leave 30 days in advance; and when the need for leave is not foreseeable 30 days in advance, employees must provide notice as soon as practicable under the circumstances.

   b. Wording of Employee Request for Leave. Employees seeking FMLA leave for the first time need not expressly assert FMLA rights or even mention the FMLA. However, if an employee later requests additional leave for the same qualifying condition, then he or she must specifically reference the need for FMLA leave or at least the FMLA-qualifying reason for leave.

9. **Verification of Reason for Requested Leave**.

   a. Serious Health Condition. If the requested leave is for the employee's own serious health condition or for that of a covered family member, the employer may require the employee to provide supporting medical certification from a health care provider, generally within 15 calendar days after the request for leave.

      i. *Employer's Request for Medical Certification*. If the employer has required a *Certification of Health Care Provider for Employee's Serious Health Condition* (e.g., Form WH-380-E), the employer may (or may not) list what it believes are the employee's essential job functions.

(1) The health care provider or doctor may be required to indicate whether the employee is unable to perform any of his or her job functions due to the serious health condition and, if so, to identify the job functions the employee is unable to perform.

(2) If the employer's *Certification of Health Care Provider for Employee's Serious Health Condition* form requests this information, the information must be provided or the certification will be deemed "incomplete." If the information is not requested in the employer's form, the employee does not have to provide it.

(3) If the employer's certification form requests the employee's doctor indicate whether the employee is unable to perform any of his or her job functions due to the serious health condition and, if so, to identify the job functions the employee is unable to perform, and the employer has provided information as to what it believes are the employee's essential job functions, then the doctor must use that information.

(4) If the employer has not provided information as to what it believes are the employee's essential job functions, then the doctor should rely on the employee's own description of his or her job functions.

PRACTICE TIPS

- The Employee should be the one who provides the *Certification of Health Care Provider for Employee's Serious Health Condition* to his or her doctor.

- If the employer says it has already provided the form to the employee's doctor, the employee should request the form from his or her doctor.

- The employee should be the one who provides the completed *Certification of Health Care Provider for Employee's Serious Health Condition* to his or her employer.

- Be sure the employee tells his or her doctor not to provide the form back to the employer.

- Check to see whether the employer provided a copy of the employee's job description with the certification form.

- Make sure the employee provides the completed form to the employer within 15 calendar days of the employer's request.

ii. *Employee Responsibilities*. The employee is responsible for paying the cost of the medical certification, and ensuring that a complete and sufficient

certification is provided to the employer. Information on the certification may include:

- contact information for the health care provider;
- the date the serious health condition began and how long it will last;
- appropriate medical facts about the condition;
- information showing that the employee cannot perform the essential functions of the job (for self-care leave);
- a statement of the care needed for a family member; and/or
- information showing the medical necessity for intermittent or reduced schedule leave and either the dates of any planned leave or the estimated frequency and duration of expected incapacity due to the condition.

The FMLA does not require the use of a specific certification form; and employers must accept a complete and sufficient medical certification regardless of the format. The DOL has developed optional certification forms, which are available at www.dol.gov/whd/fmla. If an employer opts to use its own form, it may not require any information beyond what is specified in the FMLA and its regulations. In all instances, the information requested on the certification form must relate only to the serious health condition for which the employee is seeking leave.

iii. *Incomplete or Insufficient Medical Certification.* A certification is incomplete if one or more applicable entries on the form have not been completed. A certification is insufficient if the information provided is vague, unclear, or non-responsive. If the certification is incomplete or insufficient, the employer must give the employee written notice stating what additional information is necessary. The employee generally has seven calendar days to provide the additional information to the employer.

iv. *Second and Third Opinions.*

- **Second Opinion**. If an employer receives a complete and sufficient certification but has a reason to doubt the stated reason for leave, it may require the employee to obtain a second medical certification. The employer may choose the health care provider for the second opinion, but generally may not select a provider who it employs on a regular basis.
- **Third Opinion**. If the second opinion differs from the first medical certification, the employer may require the employee to obtain a third certification from a health care provider selected by both the employee and

employer. The opinion of the third health care provider is final and must be used by the employer.

- **Expense of Second and Third Opinions**. The employer is responsible for payment of the second and third opinions, including any reasonable travel expenses for the employee or family member.

- **Provisional Leave**. The employee is provisionally entitled to FMLA leave while waiting for the second (or third) opinion.

v. *Recertification*. Generally, an employer may not ask the employee to provide a recertification more often than every 30 days; and if a medical certification indicates that the minimum duration of the serious health condition is more than 30 days, the employer must generally wait until that minimum duration expires before requesting recertification. The employer may request a recertification in less than 30 days only if:

- the employee requests an extension of leave;

- the circumstances described by the previous certification have changed significantly; or

- the employer receives information that causes it to doubt the employee's stated reason for the absence or the continuing validity of the existing medical certification.

Employers may not require second or third opinions for a recertification. In most situations, an employer must allow the employee at least 15 calendar days to provide the recertification after the employer's request for same.

b. Childbirth, Adoption and Foster Placement. The employer may not request a certification for leave to care for or bond with a newborn child or a child adopted or placed for foster care.

c. Qualifying Exigencies Regarding Active Duty Service Member. Employers may require that employees support any request for qualifying exigency leave with an appropriate certification, such as a copy of the service member's active duty orders. Employers may also require employees to provide information, such as third-party contact information, to verify the facts regarding the particular qualifying exigency—e.g., contact information for the alternative childcare provider or orders regarding a service member's Rest and Recuperation leave. However, employers may not require second and third opinions or recertification for qualifying exigency leave.

10. **Employer Notice**. Covered employers must take the following actions to notify employees of their rights to FMLA leave:

    a. Post a notice explaining rights and responsibilities under the FMLA—employers may be subject to a civil penalty of up to $110.00 for each separate willful failure to post this notice;

    b. Include information about the FMLA in their employee handbooks or otherwise provide information to new employees upon hire;

    c. Upon learning that an employee has requested FMLA leave or that the employee's leave may be for an FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility, rights, and responsibilities under the FMLA; and

    d. Notify employees whether leave is designated as FMLA leave and specify the amount of leave that will be deducted from the employee's FMLA entitlement.

D. <u>Fitness-for-Duty</u>. For employees returning to work from FMLA leave for self-care, employers may request a fitness-for-duty certification from the employee's health care provider proving that the employee is able to resume work. The fitness-for-duty certification must be limited to the particular health condition that was the basis for the employee's FMLA leave.

1. **Notice**. If an employer requires a fitness-for-duty certification, it must provide notice of that requirement. An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. 29 C.F.R. § 825.312(b) (in part).

2. **Employer Policy**. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. 29 C.F.R. § 825.312(a) (in part).

3. **Delayed Return to Work**. If the employer provided the employee with the necessary notice regarding a required fitness-for-duty certification, the employer may delay the employee's return to work until the fitness-for-duty certification is provided. An

employer may contact an employee's health care provider to clarify or authenticate a fitness-for-duty certification, but cannot delay the employee's return to work while making that contact.

4. **No Second or Third Opinions**. An employer may not require second or third opinions for a fitness-for-duty certification.

PRACTICE TIPS

- Make sure proper notice of the fitness-for-duty certification requirement was given to the employee, as the regulations require that "[i]f the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice." 29 C.F.R. § 825.300(d)(3).

- Make sure the employer's request for a fitness-for-duty certification is pursuant to a uniformly applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. 29 C.F.R. § 825.312(a).

- An employer may not require an employee to present a fitness-for-duty certification to be restored to employment if the employer failed to provide notice of such requirement with the designation notice required by 29 C.F.R. § 825.300(d). Id. § 825.312(d).

- An employer may not require that a fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job unless the employer provides the employee with a list of the essential functions of the employee's job no later than with the designation notice. 29 C.F.R. § 825.312(b).

- In addition, if the employer requests that a fitness-for-duty certification specifically addresses the employee's ability to perform the essential functions of the employee's job, make sure the employer provided the employee with a list of the essential functions of the employee's job no later than with the designation notice. 29 C.F.R. § 825.312(b).

- Unlike a *Certification of Health Care Provider for Employee's Serious Health Condition*, where an employer is permitted to request a second opinion at the employer's expense, an employer is not permitted to request a second opinion on a fitness-for-duty certification. 29 C.F.R. § 825.312(b).

- Make sure the fitness-for-duty requirement is uniformly applied to all employees only "[a]s a condition of restoration ... the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the

health care provider of the employee that the employee is able to resume work." 29 U.S.C. § 2614(a)(4).

E. **<u>Prohibitions</u>**. The FMLA prohibits covered employers from interfering with an eligible employee's right to job-protected medical leave, retaliating or discriminating against employees for exercising their FMLA rights, or retaliating or discriminating against employees for complaining about FMLA interference.

1. **Examples of Illegal FMLA Interference, Discrimination, or Retaliation**:

   - Improperly refusing to authorize FMLA leave for an eligible employee;
   - Discouraging an eligible employee from taking FMLA leave;
   - Manipulating an employee's work schedule to keep him or her from being eligible under the FMLA;
   - Using an employee's request for, or use of, FMLA leave as a negative factor in employment actions, such as hiring, promotions, raises, employee evaluations, or disciplinary actions; and
   - Taking an adverse action—e.g., termination, suspension, demotion—against an employee who filed an FMLA charge against the employer or participates in an FMLA investigation or proceeding.

2. **Job Protection**. Upon completion of leave, if the employee is able to return to work, the employer must return the employee to the same or a similar position with the same rate of pay and benefits. While employees are not guaranteed the actual job held prior to the leave, they are guaranteed at least an equivalent job—meaning one that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location). Failing to reinstate the employee to the same or equivalent position—even, for example, making changes to a work area—may be considered retaliatory.

F. **<u>State Laws</u>**. Many states have "mini" FMLA statutes, which generally comport with the federal statute but are not always identical. Employers should become familiar with any applicable state law.

PRACTICE TIPS

- If an employee provides information indicating there is a serious health condition, the employer should assess whether an employee is entitled to FMLA leave even if he or she does not specifically request it. Remember, employees making initial requests for leave do not need to specifically assert their rights under FMLA, or even mention FMLA, in order to receive FMLA leave.

- Employers should inform employees when their FMLA leave has expired, as firing such employees without that notice may be considered retaliation.

- An employee who is injured or suffers an occupational illness while in the course and scope of employment may be granted temporary total disability or other forms of workers' compensation leave. This type of injury is also likely to constitute a "serious health condition" under the FMLA. Thus, employers may be able to run FMLA leave concurrently with time taken as workers' compensation or disability leave.

- Do not ignore possible accommodations under the Americans with Disabilities Act, also known as the ADA, and more thoroughly discussed below. Employees who qualify for FMLA leave for their own serious health condition may also qualify for an ADA accommodation, such as allowing them more leave or changing some aspect that will enable them to perform their essential job duties. Employers should consider this before terminating an employee whose leave has been exhausted but who has not returned to work.

- When the time comes to return to work, consider whether short- or long-term disability is a better option, by determining whether the employee qualifies for short- or long-term disability benefits. The employee does not want to put himself or herself in a situation where attempting to return to work too soon results in the loss of important disability benefits.

II. **DISABILITY**. Multiple federal and state laws may be implicated when a disabled employee seeks to return to work. Most prominent among the federal provisions are the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.[5]

A. Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008, 42 U.S.C. §12101, *et seq.* ("ADA").

1. **Coverage**.

   a. Applies to federal, state, and local governments and to private employers, labor organizations and employment agencies.

   b. Employers must be engaged in an industry affecting commerce and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

   c. Does not include independent contractors.

2. **Prohibits**. Prohibits discrimination based on disability, record of disability, and/or perceived disability, and prohibits retaliation for complaining about disability discrimination.

[5] *See also* Air Carrier Access Act, 49 U.S.C. § 41705.

3. **Requires**. Title I of the ADA requires covered employers to provide a reasonable accommodation to an employee (or applicant) with a qualifying disability, unless doing so would cause the employer undue hardship.

   a. Qualifying Disability. In general, a qualifying disability is any "physical or mental impairment that substantially limits one or more" of an individual's "major life activities." 29 C.F.R. § 1630.2(o). The ADA also protects an individual with a record of such a disability or is believed to have such a disability. Id.

      i. *Physical or Mental Impairments*. These include, among many other impairments, digestive or skin conditions, learning disabilities, and emotional or mental illnesses. 29 C.F.R. § 1630.2(h).

      ii. *Major Life Activities*. These include, among many other activities, concentrating, interacting with others, performing manual tasks, and the operation of a major bodily function. The term "major" is not to be interpreted strictly, and a "major life activity" need not be "of central importance to daily life." 29 C.F.R. § 1630.2(h).

   b. Reasonable Accommodation. In general, a reasonable accommodation is any change in the work environment, job duties, or position that enables an individual with a disability to enjoy equal employment opportunities. For instance, giving a disabled employee light work duties, a part-time or modified work schedule, or work equipment to accommodate the disability. 29 C.F.R. § 1630.2(o).

   c. Undue Hardship. An accommodation is considered an undue hardship if it requires significant difficulty or expense for the employer in light of various factors:

      i. The nature and cost of the accommodation, considering available outside funding, and tax credits and deductions;

      ii. The overall financial resources of the employer, the number of employees, and the effect the accommodation would have on the employer's expenses and resources; and

      iii. The accommodation's impact on the employer's operation and business, including other employees' ability to perform their job duties. 29 C.F.R. § 1630.2(o).

   d. Liability Under the ADA. An employer is liable for failing to make reasonable accommodations if:

      1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking

accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Capps v. Mondelez Glob., LLC, 147 F. Supp. 3d 327, 340 (E.D. Pa. 2015) (quoting *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504 (3rd Cir. 2010).

4. **Return to Work**. An employee's entitlement to leave and return to work is implicated by the ADA's requirement that covered employers reasonably accommodate disabled workers when doing so does not impose an undue hardship on the employer. In other words, under certain circumstances, the ADA may require job-protected leave as a reasonable accommodation. In May 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") issued new guidelines regarding employers' requirement to provide leave under the ADA.[6] The guidelines provide:

   a. Leave is Not Required if it is an Undue Hardship. No reasonable accommodation—including leave—is required if an employer can show that providing the accommodation would impose an undue hardship on its operations or finances. When assessing what constitutes an undue hardship, employers may consider the following factors:

      i. the amount and/or length of the leave;

      ii. the frequency of the leave (e.g., two days per week, three days per month, every Friday);

      iii. the predictability and flexibility of the days on which intermittent leave is taken; and/or

      iv. the impact the leave would have on co-workers and/or the employer's operations or business.

   b. Paid v. Unpaid Leave. If an employee requests leave related to his or her disability and the leave falls within the employer's existing leave policy, the employer should treat the request the same as a leave request for reasons unrelated to a disability. Thus, if the employee would be entitled to paid general leave under the employer's policy, the employer should grant him or her paid disability leave; otherwise, the employer is not required to grant the disabled employee paid leave. Similarly, if the employer's policy does not require a doctor's note for paid leave requests, the employer may not require its disabled employees to provide such medical documentation.

   c. Employer's Internal Policies or Handbook is Not Dispositive. Although employers are not required to grant ***paid*** leave beyond what their policies provide, employers should not automatically decline disability-related leave requests based on internal

[6] EEOC Guidelines: *Employer-Provided Leave and the Americans with Disabilities Act*, May 9, 2016.

policies—for example, not allowing leave during an employee's initial probationary period, where the employee does not work enough hours per week to be entitled to leave, or where the employee has exhausted his or her allotted FMLA leave or general leave days. Even if an employer's handbook and/or internal policies do not permit granting the requested leave, the employer must analyze whether leave would be a reasonable accommodation for the disability and whether it would create an undue hardship. Failure to do so may subject the employer to liability under the ADA.

EXAMPLES

- On June 16, 2016, the EEOC announced that three integrated car dealerships will pay $50,000 for terminating an employee with multiple sclerosis rather than accommodating her request for medical leave for the treatment of her disability. The EEOC maintained that the employee's leave request was a reasonable accommodation under the ADA. Under the consent decree settling the suit, the companies agreed to pay the employee monetary relief "and also provide annual training on disability discrimination for all employees, revise personnel policies, post notices about the resolution of the lawsuit, revise performance evaluations for managers to include compliance with the ADA, and report over a three-year period to EEOC." EEOC June 6, 2016 Press Release, available at https://www.eeoc.gov/eeoc/newsroom/release/6-16-16a.cfm.

- On May 13, 2016, the EEOC announced an $8.6 million settlement with Lowe's for terminating three disabled employees rather than providing them reasonable accommodations in the form of extended medical leave. Lowe's refused to grant the employees extended medical leave because it exceeded the company's 180-day (and subsequent 240-day) maximum leave policy in place at the time. The EEOC argued that the company's automatic termination of employees who exceeded an arbitrary time limit on medical leaves of absence was unreasonable and a violation of the ADA. According to EEOC General Counsel David Lopez, "This settlement sends a clear message to employers that policies that limit the amount of leave may violate the ADA when they call for the automatic firing of employees with a disability after they reach a rigid, inflexible leave limit. We hope that our efforts here will encourage employers to voluntarily comply with the ADA." "In addition to monetary relief, the four-year consent decree settling the suit requires that Lowe's retain a consultant with ADA experience to review and revise company policies as appropriate; implement effective training for both supervisors and staff on the ADA; develop a centralized tracking system for employee requests for accommodation; maintain an accommodation log; and post documentation related to this settlement." Lowe's is also required to submit regular reports to the EEOC verifying compliance with the decree. EEOC May 13, 2016 Press Release, available at https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm.

- Courts have also held that the ADA may require leave beyond an employer's set policies. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2nd Cir. 2000); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 649 (1st Cir. 2000); *Walton v. Mental Health Ass'n of S.E. Penn.*, 168 F.3d 661, 671 (3rd Cir. 1999).

d. Requests for Medical Leave as Requests for Reasonable Accommodations Under the ADA. According to the EEOC, employers must treat all requests for health-related leave—including FMLA or workers' compensation leave—as requests for a "reasonable accommodation" under the ADA, regardless of whether the employee specifically requests leave as a disability accommodation. Courts are currently split on whether a general request for medical leave, such as FMLA leave, constitutes a request for reasonable accommodation under the ADA. The Third Circuit illustrates the current split on this issue.

i. *A Request for FMLA Leave is NOT Also a Request for Reasonable Accommodation Under the ADA.*

- *Capps v. Mondelez Glob., LLC*, 147 F. Supp. 3d 327, 340 (E.D. Pa. 2015), appeal pending. Dismissing plaintiff's ADA claim because his request for intermittent medical leave under the FMLA was insufficient to create cause of action for failure to accommodate under the ADA.[7]

- *Rutt v. City of Reading, Pa.*, No. CIV.A. 13-4559, 2014 WL 5390428, at *4 (E.D. Pa. Oct. 22, 2014). "[A] request for FMLA leave is not alternatively a request for a reasonable accommodation."

ii. *Request for FMLA Leave May Also be a Request for Reasonable Accommodation under the ADA.*

- *Lambert v. Xpress Global Systems, Inc.*, Civil Action No. 15-1451 (W.D. Pa., Apr. 26, 2016). Where the amended complaint alleged that the employee's request for FMLA was directly related to his post-traumatic stress disorder, dismissal of his ADA claim was improper.

- *Mangel v. Graham Packaging Co., L.P.*, 2016 WL 1266257, *4 (W.D. Pa. April 1, 2016). Observing that a "request for sick leave pursuant to the FMLA may qualify as a request for accommodation under the ADA where, as here, the FMLA leave is requested because of the employee's serious health condition".

[7] The EEOC filed an amicus brief in *Capps*, arguing that a single request for FMLA leave is enough to put an employer on notice of a potential need for an ADA job accommodation. The EEOC has maintained this position for years, including in a 1995 fact sheet posted to its website and its May 2016 Guidelines. The *Capps* plaintiff appealed the dismissal of his claims, which is pending.

- *McCall v. City of Philadelphia*, 629 Fed. App'x 419, 422 (3rd Cir. 2015) (citing 29 C.F.R. § 825.702(c)(2). Recognizing "that a request for FMLA leave may qualify in certain circumstances as a request for an accommodation under the ADA".

5. **Fitness-for-Duty Examination**. The ADA provides that an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity." 29 C.F.R. § 825.312(h).

   - *Kroll v. White Lake Ambul. Auth.*, 763 F.3d 619, 624 (6th Cir. 2014). An employer may request a medical examination when "there [is] significant evidence that could cause a reasonable person to inquire as to whether [the] employee is still capable of performing [her] job." *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999). "An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can 'perform job-related functions.'" *Id.* (quoting 42 U.S.C. § 12112(d)(4)(B)); *accord Wright v. Illinois Dept. of Children and Fam. Services*, 798 F.3d 513, 523 (7th Cir. 2015); *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1311 (11th Cir. 2013); *Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir. 2010); *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007); *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88, 97 (2nd Cir. 2003); *but see Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) (citations omitted).

   - *Blackwell v. SecTek, Inc.*, 61 F. Supp. 3d 149 (D.D.C. 2014). Employer's required medical examination for security guard with heart disease consisting of agility, vision, medical, history, and physical testing did not qualify as adverse employment action under the ADA; because vision, agility, and strength were required to stop and, if possible, detain a criminal or to respond to an emergency, these tests were plausibly related to employee's ability to perform his job duties.

   - An employer bears the burden of establishing that an examination is consistent with business necessity (see *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007)), and that burden is "quite high." *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 97 (2nd Cir. 2003) (internal quotation marks omitted). An employer must "show that the asserted 'business necessity' is vital to the business," as opposed to a "mere expediency." *Id.*; *accord Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014) (noting that an employer cannot rely on a "bare assertion that a medical examination was merely convenient or expedient"). In addition, the examination must "genuinely serve[ ] the asserted business necessity and ... must be a reasonably effective method of achieving the employer's goal." *Conroy*, 333

F.3d at 98. An employer "cannot merely rely on reasons that have been found valid in other cases but must actually show that the ... requirement contributes to the achievement of those business necessities." *Id*. at 101; *accord Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001).

- *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 515 (3rd Cir. 2001). The examination must be limited to "an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."

6. **Mental Evaluation**. An employer may request that an employee undergo a mental evaluation without regarding the employee as disabled. However, post-hiring demands for examinations can only be made where shown to be "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). Thus, for an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can "perform job-related functions." 42 U.S.C. § 12112(d)(4)(B); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999).

PRACTICE TIPS

- Those circuits that have decided the issue have found that unlike most causes of action under the ADA, an individual bringing a claim under 42 U.S.C. § 12112(d) is not required to show he or she is disabled.

  - *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 94 (2nd Cir. 2002)
  - *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 814 (6th Cir. 2012)
  - *Sanders v. Ill. Dep't of Cent. Mgmt. Servs.*, 530 Fed. Appx. 593 (7th Cir. 2013) (though not expressly finding so)
  - *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999)
  - *Fredenburg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176, 1181–82 (9th Cir. 1999)
  - *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 593–95 (10th Cir. 1998)
  - *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1311 (11th Cir. 2013)

- When an employee asks for a reasonable accommodation and his or her employer requests that the employee undergo a fitness-for-duty examination to determine if he or she is disabled, the employee can choose his or her doctor.

- The fitness-for-duty examination must be job-related and consistent with business necessity. The examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

- If the fitness-for-duty examination is requested for a current employee, ask that the employer state whether the fitness-for-duty examination is necessitated by:

  - the employer's perception that the employee's ability to perform an essential job function(s) is impaired by a medical condition; or

  - because the employer feels the employee poses a direct threat due to a medical condition. If it is the former, ask that the employer identify in writing the essential job functions it feels the employee is unable to perform.

- Also, request that the employer provide in writing the tests that the employee will have to undergo, prior to the employee submitting to the fitness-for-duty examination, to make sure the tests are consistent with the employer's stated reason for the fitness-for-duty examination.

- Finally, if the employer requests that the employee see a doctor other than his or her own personal doctor, the employee should make sure the employer bears the costs of the fitness-for-duty examination.

7. **The Intersection of the ADA and the FMLA**. Practitioners commonly confuse and inappropriately intertwine provisions of the FMLA and ADA. Note that there is no provision for a fitness-for-duty examination under the FMLA, but rather only a fitness-for-duty certification. Issues can arise when an employee on FMLA leave is told he or she has to have a fitness-for-duty examination either before returning to work, or upon returning to work. In such a situation, there can be a conflict between the FMLA and ADA.

   a. ADA v. FMLA Requirements. Specifically, the FMLA provides that an employer may not require an employee to present a fitness-for-duty certification to be restored to employment if the employer failed to provide notice of such requirement with the designation notice required by 29 C.F.R. § 825.300(d). Id. § 825.312(d). The FMLA also provides that where an employee who provides a properly requested and completed fitness-for-duty certification, the employee must be returned to work, and that the employer may not request a second opinion. 29 C.F.R. § 825.312(b). However, the ADA provides that an employer may request an employee undergo a medical examination that is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). As a result, requiring an employee out on FMLA leave to undergo a fitness-for-duty examination before he or she is permitted to return to work may be permissible under the ADA, but impermissible under the FMLA (as it would operate as a *de facto* second opinion, and would serve to delay the employee's return to work).

   b. Department of Labor Clarification. To try to bring clarity to this situation, the 2008 comments to the DOL's revision of the regulations state, "An employer may not require that an employee submit to a medical exam by the employer's health care provider as a condition of returning to work. A medical examination at the

employer's expense by an employer's health care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. Thus, if an employer is concerned about the health care provider's fitness-for-duty certification, the employer may, consistent with the ADA, require a medical exam at the employer's expense after the employee has returned to work from FMLA leave as stated in paragraph (h) in the final rule. The employer cannot, however, delay the employee's return to work while arranging for and having the employee undergo a medical examination." 73 Fed. Reg. 67934–01, 68033 (Nov. 17, 2008). *See, e.g., Clink v. Oregon Health and Science Univ.*, No. 3:13-cv-01323-SI, 2014 WL 3850013 (D. Or. Aug. 5, 2014).

PRACTICE TIPS

- Be sure to review the employer's policies to determine whether they comply with the ADA and FMLA. The employee needs to be sure that he or she has not lost important rights due to the employer's failure to give proper notice of those rights or to comply with procedural requirements.

- The employee should also determine as early as possible which avenues are available for remedying any violation of his or her rights under the ADA or FMLA.

- Employees should be sure to review and, if necessary, narrow any medical release their employer asks them to sign. The employer cannot request the employee's complete medical records; the employer may require only the documentation that is needed to establish that the employee has a disability that requires an accommodation. If the employee has more than one disability, the employer may request only documentation related to the disability that requires accommodation. The employee should also communicate to the examining doctor that only the minimum amount of information required to adequately inform the employer should be disclosed.

B. Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.* ("Rehab Act").

1. **Same Disability Protection as the ADA**. Section 501 of the Rehab Act incorporates by reference the ADA's non-discrimination and anti-retaliation provisions.[8]

2. **Coverage**. The Rehab Act applies to federal employees and applicants (whereas the ADA applies to private employers and state and local government employees). Section 503 of the Rehab Act also prohibits federal contractors and subcontractors from discriminating in employment against individuals with disabilities (IWDs), and requires these employers to take affirmative action to recruit, hire, promote, and retain these individuals.

[8] *See also EEOC Guidelines: Employer-Provided Leave and the Americans with Disabilities Act*, May 9, 2016.

C. State Laws. Many states have "mini" ADA statutes, which generally comport with the federal statues but are not always identical. Employers should become familiar with any applicable state disability law.

PRACTICE TIPS

- If an employee requests FMLA leave, employers should consider whether such a request also entitles the employee to a reasonable accommodation under the ADA, including leave beyond the period the FMLA provides.

- To avoid liability under the ADA or similar federal or state statute, employers should consider adopting the steps outlined in recent settlements between employers and the EEOC. These steps include:

  1. Hiring a consultant with ADA experience to review and revise (if necessary) internal policies or handbook provisions that violate the ADA or may otherwise lead to ADA liability.

  2. Training supervisors and staff on the ADA and its requirements.

  3. Developing an effective system for tracking employee requests for accommodations and the employer's responses thereto.

  4. Establishing an accommodations log for employees.

III. GENETIC INFORMATION. Employers must comply with the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which is designed to protect all individuals against discrimination in employment based on their genetic information.

A. Coverage. GINA applies to federal, state and local governments and to private employers, labor organizations and employment agencies with 15 or more employees. Employers must be engaged in an industry affecting commerce and have 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year.

B. Prohibits. Title II of GINA[9] prohibits the use of genetic information in making employment decisions (hiring, firing, pay, job assignments, promotions, etc.), prohibits harassing an employee because of his or her genetic information, and restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information.

1. **Limited Exceptions**. Employers may request, require, or purchase an employee's genetic information in limited circumstances, such as:

[9] The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment); while the Departments of Labor, Health and Human Services, and the Treasury issue regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

a. Compliance with family and medical leave laws;

b. Genetic monitoring of the effects of toxic substances in the workplace;

c. Part of health or genetic services—such as wellness programs—the employer offers on a voluntary basis, if certain specific requirements are met; and

d. DNA analysis for law enforcement purposes.

2. **Genetic Information**. Genetic information includes information about an employee's genetic tests and those of the employee's family members, as well as information regarding the manifestation of a disease or disorder in the employee's family members (i.e., family medical history).[10] Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member, and the genetic information of a fetus carried by an individual or by a pregnant family member and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

C. Non-Disclosure of Employee Genetic Information. GINA also strictly limits an employer's disclosure of employee genetic information. It is unlawful for covered employers to disclose genetic information about applicants or employees and requires them to keep genetic information confidential and in a separate medical file.

1. Genetic information may be kept in the same file as other medical information in compliance with the ADA.

2. There are limited exceptions to GINA's non-disclosure rule, such as the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

IV. RETALIATION. Multiple federal and state laws prohibit retaliation regarding an employee's return to work. Below are some of the most prominent federal statutes prohibiting retaliation in the workplace.

A. Family and Medical Leave Act. As discussed under **Section I** above, the FMLA prohibits an employer from discriminating or retaliating against an employee who has taken protected leave under the FMLA. To establish a prima facie case of retaliation under the FMLA, an employee must show (1) that the employee engaged in protected activity under the FMLA, (2) that the employer took an adverse employment action against the employee, and that (3) there was a causal connection between the employee's protected activity and the employer's adverse employment action. *See Bryson v. Regis Corp.*, 498 F.3d 561 (6th Cir. 2007).

[10] Congress included family medical history in GINA's definition of genetic information because it is often used to determine whether an employee has an increased risk of getting a disease, disorder, or condition in the future.

B. **Americans with Disabilities Act and Rehab Act**. The ADA and Rehab Act have the same anti-retaliation provision, prohibiting employers from retaliating against an employee opposing any act prohibited by the ADA or Rehab Act, respectively. *See* 42 U.S.C. § 12203(a). "To establish a prima facie case of retaliation in violation of the ADA, the plaintiff must first show that the employee is disabled as defined by the ADA, that the employee is qualified to perform the essential functions of the employee's job with or without reasonable accommodation, and that the employee suffered an adverse employment action due to the employee's disability." *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999).

C. **Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000-e, *et seq.* ("Title VII")**.

1. **But-for Causation**. "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, ___U.S.___, 133 S.Ct. 2517, 2528, 186 L.Ed.2d 503 (2013).

2. **Example of Retaliation in Return-to-Work Context: Fitness-For-Duty Examinations**.

   a. Requiring employees returning to work to undergo fitness-for-duty examinations may be retaliatory under Title VII where the employer's true motive for ordering such examinations is retaliatory. *Booth v. Pasco County, Fla.*, 757 F.3d 1198, 1207 (11th Cir. 2014) (The crucial question is not whether there were well-grounded safety concerns to justify fitness-for-duty examinations, but whether those concerns actually motivated the employer).

   b. The EEOC found an employer retaliated against an employee by placed her on administrative leave for four days pending the employer's request for a fitness-for-duty examination. The EEOC found the employee engaged in protected activity by participating in a class action suit, seeking EEO counseling, and requesting sick leave and reasonable accommodation. *Watkins v. U.S. Postal Serv.*, EEOC Appeal No. 0120092749 (June 29, 2012), request for reconsideration denied EEOC Request No. 0520120553 (January 30, 2013).

D. **Genetic Information Nondiscrimination Act**. GINA also prohibits retaliation against employees who oppose discrimination protected by GINA or who participate in the investigation of alleged violations of GINA. *See Conner-Goodgame v. Wells Fargo Bank, N.A.*, No. 2:12-CV-03426-IPJ, 2013 WL 5428448, at *10 (N.D. Ala. Sept. 26, 2013) ("Because GINA's anti-retaliation provision tracks the language of Title VII's anti-retaliation provision, the court has analyzed Plaintiff's retaliation claim under Title VII's framework for retaliation.").

E. **Occupational Safety and Health Administration ("OSHA")**. OSHA enforces the Occupational Safety and Health Act of 1970.

1. **Safety and Reporting Requirements**. OSHA requires many employers with more than 10 employees to keep a record of serious work-related injuries and illnesses.[11] OSHA defines a serious work-related injury or illness as any of the following:

   a. Any work-related fatality.

   b. Any work-related injury or illness that results in loss of consciousness, days away from work, restricted work, or transfer to another job.

   c. Any work-related injury or illness requiring medical treatment beyond first aid.

   d. Any work-related diagnosed case of cancer, chronic irreversible diseases, fractured or cracked bones or teeth, and punctured eardrums.

   Covered employers must maintain the injury and illness records at the worksite for at least five years; and every February through April, they must post a summary of the injuries and illnesses recorded the previous year.

2. **Retaliation and Discrimination**. On May 12, 2016, OSHA published new final rules, including sections prohibiting retaliation and discrimination, 29 C.F.R. §§ 1904.35 and 1904.36. 81 Fed. Reg. 29624. While §§ 1904.35 and 1904.36 became effective in August 2016, OSHA has delayed their enforcement until November 1, 2016.[12] The foregoing subsections prohibit employers from discharging or discriminating against employees for reporting work-related injuries and illnesses. OSHA's Preamble to the Final Rule interprets the prohibition broadly to proscribe any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness," including termination, reduction in pay, or reassignment to a less desirable position. 81 Fed. Reg. 29672.

3. **Return-to-Work Application**. If an employee seeks leave for a work-related injury or illness, an employer could possibly face OSHA liability if it does not permit the employee to return, reduces his or her pay, or reassigns him or her to a less desirable position, etc.—as those action may be construed as retaliation or discrimination for reporting the work-related injury or illness.

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[11] However, employers in low-risk industries, as classified by the North American Industry Classification System ("NAICS"), are not required to keep OSHA injury and illness records, unless they are asked in writing to do so by OSHA, the Bureau of Labor Statistics ("BLS"), or a state agency operating under the authority of OSHA or the BLS. For list of exempted industries, see https://www.osha.gov/recordkeeping/ppt1/RK1exempttable html. All employers, including those partially exempted by reason of company size or industry classification, must report to OSHA any workplace incident that results in a fatality, in-patient hospitalization, amputation, or loss of an eye. *See* 29 C.F.R. § 1904.39.

[12] See https://www.osha.gov/recordkeeping/finalrule/TrackingEnforcementMemo.html.

V. PRIVACY CLAIMS. Protection of employee privacy generally falls into three basic categories:

A. Laws restricting unauthorized access or monitoring of private employee information or communications;

B. Laws protecting an employee's health related information; or

C. Laws protecting an employee's personally identifiable information.

Each of these privacy protections may be implicated where an employee is returning to work after an absence.

A. Unauthorized Access or Monitoring of Private Employee Information or Communications. An employer desiring to verify an employee's stated reason for leave, need for a work accommodation, or ability to perform the given work requirements may seek to access or monitor the employee's private information or communications. However, doing so may implicate any number of statutes restricting unauthorized access to such information or communications.

1. **Unauthorized Access to Employees' Social Media Profiles**. Employers may wish to access an employee's private social media account or profile while the employee is out on leave or after returning to work, in order to determine whether the employee abused the leave policy or to confirm the employee's fitness to return to work or need for an accommodation. However, unauthorized access to private social media profiles—such as Facebook®, MySpace™, Twitter™, or Instagram—may violate federal and/or state law.

    a. The Stored Communications Act, 18 U.S.C. §2701, *et seq.* ("SCA"). The SCA prohibits intentionally accessing stored electronic or wire communications without authorization or in excess of authorization. Congress enacted the SCA "to protect privacy interests in personal and proprietary information from the mounting threat of computer hackers 'deliberately gaining access to, and sometimes tampering with, electronic or wire communications' by means of electronic trespass." *Devine v. Kapasi*, 729 F. Supp. 2d 1024, 1026 (N.D. Ill. 2010).

        i. *Remedies*. The SCA provides both criminal and civil causes of action and remedies. 18 U.S.C. §§2701, 2707. The possible criminal penalties include a fine and imprisonment for up to 10 years. 18 U.S.C. §2701(b). The civil remedies include preliminary and other equitable or declaratory relief as may be appropriate, actual damages suffered by the plaintiff, any profits made by the violator as a result of the violation, punitive damages where appropriate (for willful or intentional violations), reasonable attorneys' fees, and other litigation costs reasonably incurred. 18 U.S.C. §2707(b) and (c). The SCA provides that in no case shall a person entitled to recover under the SCA receive less than the sum of $1,000. 18 U.S.C. §2707(c).

ii. *Only Protects Private Communications*. The SCA does not apply to an electronic communication that is readily accessible to the general public. 18 U.S.C. §2511(2)(g)(i); *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1322 (11th Cir. 2006). For instance, in *Snow*, the Court held that the mere fact that website users had to create a username and password to access and post on the website did not mean that the information posted on the website was not readily available to the general public, because nearly anyone was eligible to create a username and password.

iii. *Authorized User Exception*. "The authorized user exception applies where (1) access to the communication was 'authorized,' (2) 'by a user of that service,' (3) 'with respect to a communication . . . intended for that user.'" *Ehling v. Monmouth-Ocean Hospital Service Corp.*, 961 F. Supp. 2d 659, 669 (D. N.J. 2013) (quoting 18 U.S.C. §2701(c)(2)). "Access is not authorized if the purported authorization was coerced or provided under pressure." *Id*. (internal quotations omitted).

iv. *Gaining Access under False Pretenses*. When accessing an employee's private social media profiles, any "friending" of the person under false pretenses or using someone else's social media profile to gain access to their private information may violate the SCA. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 883-884 (9th Cir. 2002). Moreover, using someone else's credentials (e.g., password) to access the employee's private social media profile may violate the SCA. *See Pietrylo v. Hillstone Restaurant Group*, 2008 WL 6085437 (D. N.J. 2008).

v. *Relevant SCA Cases*.

- *Ehling v. Monmouth-Ocean Hospital Service Corp.*, 961 F. Supp. 2d 659, 662-663, 665, 669-670 (D. N.J. 2013). An employer may violate the SCA by accessing private portions of an employee's Facebook® page to gain evidence that the employee was abusing FMLA leave. In *Ehling*, the plaintiff-employee maintained a non-public Facebook® account that allowed only her Facebook® "friends" to view her wall posts. A co-worker who was plaintiff's Facebook® "friend" took a screenshot of plaintiff's Facebook® wall posts that indicated she was abusing FMLA leave and provided them to management without any prompting by defendant-employer. Employer suspended plaintiff because of the Facebook® posts, and she sued employer for violations of the SCA. The court held that plaintiff's non-public Facebook® wall posts were covered by the SCA because she "chose privacy settings that limited access to her Facebook® wall to only her Facebook® friends." Nevertheless, the authorized user exception applied where employee's co-worker/Facebook® friend provided unsolicited information to employer from employee's Facebook® page.

- *Maremont v. Susan Fredman Design Grp.*, 2011 WL 6101949, at *5-6, Case No. 10 C 7811 (N.D. Ill. Dec. 7, 2011). Plaintiff was defendants-employers' media marketing director and she maintained Twitter™ and Facebook® accounts for her personal use as well as to promote defendants' business. While plaintiff was recuperating from an automobile accident, defendants allegedly accessed her Twitter™ and Facebook® accounts without her permission and posted to these accounts in her absence. The court denied defendants' motion for summary judgment on plaintiff's subsequent claim for violations of SCA.

- *Pietrylo v. Hillstone Restaurant Group*, 2008 WL 6085437 (D. N.J. 2008). Plaintiff-employee created a private MySpace™ page for herself and certain co-workers she invited to join the group. Plaintiff's manager asked one of these co-workers to provide her MySpace™ password so that he could access the group. The employee stated that she gave him the password because she feared she would get in trouble if she did not. The jury found that defendant-employer violated the SCA when the manager accessed the group without authorization.

- *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 883-884 (9th Cir. 2002). A group of Hawaiian Airlines pilots used an online bulletin board to discuss work-related matters. One of the employer's management members falsely posed as a pilot to gain access to the group. The Ninth Circuit held that in gaining access to the group by false pretenses, the employer violated the SCA, the Federal Wiretap Act, and the Railway Labor Act.

- *Rodriguez v. Widener University*, 2013 U.S. Dist. LEXIS 84910, Case No. 13-1336 (E.D. Pa. June 17, 2013). Denying employer's motion to dismiss claims under the SCA and the Electronic Communications Privacy Act where employer allegedly accessed employee's Facebook® images and there was a factual issue as to how employer accessed or obtained the Facebook® images.

b. State Laws Prohibiting Employers from Requesting Social Media Information and Passwords. Since 2012, 25 states have enacted legislation prohibiting employers from requesting or requiring an employee or applicant to disclose a user name or password for a personal social media account—and many other states are currently considering similar legislation.[13]

2. **Accessing or Monitoring Employees' Emails, Instant Messages, Phone Calls, Voicemails, Etc**. As with an employee's social media profiles, employers may wish to access or monitor the employee's emails, phone calls, voicemails, etc. The

[13] National Conference of State Legislators, "Employer Access to Social Media Usernames and Passwords," available at: http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx (last accessed Sept. 19, 2016).

employer's motive may be as simple as accessing needed information while the employee is out on leave (e.g., an important email from a client to the employee); or the employer may have doubts about the employee's stated reason for leave, need for an accommodation, or fitness to return to work. Whatever the reason, accessing or monitoring an employee's emails, phone calls, voicemails, etc., may be an invasion of the employee's right to privacy and violate the law.

a. Phone Conversations and Voicemails. Employers may be tempted to listen to or otherwise monitor private phone conversations or voicemails in order to gain information about an employee's health or medical condition. However, doing so without employee consent likely violates the law.

EXAMPLES

The Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §2510, *et seq.* (a/k/a the Federal Wiretap Act), prohibits employers from listening to employees' personal telephone conversations or voicemail messages in the workplace if the employer knows that the call is a private call and is made with the expectation of privacy. This is true regardless of whether the calls are made or received on a work telephone or an employee's personal cell phone. Employers may also be liable under the ECPA if they delete or prevent an employee's access to personal voicemail messages. However, notwithstanding the ECPA, employers may establish policies limiting an employee's personal phone calls at work and may discipline or terminate employees for violating such policies.

b. Emails, Instant Messages, Etc. An employer who accesses or monitors an employee's email account, instant messages, etc., may violate federal or state privacy laws.

i. *The Stored Communications Act*. The SCA restricts not only employer access to employees' private social media accounts, but also restricts access to employees' personal emails and instant messages.

EXAMPLES

- *Rene v. G.F. Fishers, Inc*., 817 F. Supp. 2d 1090 (S.D. Ind. 2011). Finding that plaintiff sufficiently pled claim under SCA where defendant allegedly used keylogger software to access plaintiff's email and financial accounts.

- *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548 (S.D. N.Y. 2008). Employer's access of employee's personal emails was unauthorized, and thus violated the SCA. Employee did not store any of the email communications on the employer's computers, servers, or systems; did not send or receive such communications through the company's email system or computer; had a reasonable expectation of privacy in his personal, password-protected email accounts; and nothing in

employer's policy suggested that viewing personal emails from a third-party email provider over employer's computers would subject all personal emails on the account to inspection.

- *Snyder v. Fantasy Interactive, Inc.*, 2012 U.S. Dist. LEXIS 23087, Case No. 11 Civ. 3593 (WHP) (S.D. N.Y. Feb. 9, 2012). Holding that plaintiff-employee stated a claim for violation of the SCA where employer accessed plaintiff's private Skype™ instant messages outside of the office.

However, where an employer notifies its employees of its policy of monitoring employee computer and email use on work computers, such notice may remove the employee's reasonable expectation of privacy.

EXAMPLES

- *Sporer v. UAL Corp.*, No. C 08-02835 JSW, 2009 WL 2761329 (N.D. Cal. 2009). Employee had no expectation of privacy in computer usage where employer (1) had a policy of monitoring its employees' computer use; (2) warned employees that they had no expectation of privacy in email transmitted on the company system; and (3) provided its employees with a daily opportunity to consent to such monitoring by having to click through a warning to access the company system.

- *Thygeson v. U.S. Bancorp*, No. CV-03-467, 2004 WL 2066746, at *20 (D. Or. Sept. 15, 2004). No reasonable expectation of privacy in computer files and email where employee handbook explicitly warned of employer's right to monitor files and email.

- *Garrity v. John Hancock Mutual Life Ins. Co.*, No. Civ. A. 00-12143, 2002 WL 974676, at *1-2 (D. Mass. May 7, 2002). No reasonable expectation of privacy where, despite the fact that the employee created a password to limit access, the company periodically reminded employees that the company email policy prohibited certain uses, the email system belonged to the company, although the company did not intentionally inspect email usage, it might do so where there were business or legal reasons to do so, and the plaintiff assumed her emails might be forwarded to others.

- *Kelleher v. City of Reading*, No. Civ. A. 01-3386, 2002 WL 1067442, at *8 (E.D. Pa. May 29, 2002). No reasonable expectation of privacy in workplace email where employer's guidelines "explicitly informed employees that there was no such expectation of privacy."

- *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996). Employee had no reasonable expectation of privacy despite assurances that email sent over the company email system would not be intercepted by management; employee forfeited reasonable expectation of privacy when he

communicated over email system utilized by entire company; and even if employee had a reasonable expectation of privacy, a reasonable person would not have considered employer's interception of communications to be a substantial and highly offensive invasion of privacy.

ii. *State Laws Regarding Electronic Monitoring*. Some states, such as Connecticut and Delaware, have laws requiring employers to notify employees in advance if the employer intends to monitor the employee's emails. *See* Conn. Gen. Stat. § 31-48d(b)(1) (2008) (requiring employers who engage in any type of electronic monitoring to "give prior written notice to all employees who may be affected, informing them of the types of monitoring which may occur."); 19 Del. C. § 705 (2008) (an employer may not "monitor or otherwise intercept any telephone conversation or transmission, electronic mail or transmission, or Internet access or usage of or by a Delaware employee unless the employer" has given the employee adequate notice). Violations of these state laws subjects the employer to a monetary civil penalty.

iii. *The Computer Fraud and Abuse Act, 18 U.S.C. §1030 ("CFAA")*. The CFAA prohibits unauthorized access of a computer or exceeding authorized access of a computer, when done to obtain information to which the person is not entitled. The CFAA may apply when an employer attempts to access an employee's devices to obtain private information of the employee. *See, e.g.*, *Brooks v. AM Resorts, LLC*, 954 F. Supp. 2d 331, 332-333 (E.D. Pa. 2013) (former employee sued former employer for allegedly gained unauthorized access to his computer and email account in violation of the CFAA). The statute focuses on whether the access of the computer was without authorization or exceeded any authorization that was granted. As discussed below, there is disagreement among the circuits as to when an employer acts with the requisite authorization.

- **Narrow Construction**. Most jurisdictions have adopted a narrow construction of the CFAA that interprets "without authorization" or "exceeding authorization" as applying only to the defendant's ***access*** to the information in question, rather than the defendant's ***use*** of that information. *See Power Equip. Maint., Inc.*, 953 F. Supp. 2d at 1295 ("While there has been some disagreement, most federal district courts have adopted a narrow definition of unauthorized access or access exceeding authorization."). This narrow construction obviously results in less liability under the CFAA.

- **Broad Construction**. On the other hand, courts in various jurisdictions have adopted a broad construction of authorized access under the CFAA, which results in expanded liability. The broad construction basically holds that the requisite authorization applies to both the access to and use of the information. *See Power Equip. Maint., Inc.*, 953 F. Supp. 2d at 1296.

- **Remedies**. The CFAA is primarily a criminal statute and provides criminal penalties, including fines and imprisonment for up to 10 years.

Trademotion, LLC v. Marketcliq, Inc., 857 F. Supp. 2d 1285, 1290 (M.D. Fla. 2012); 18 U.S.C. §1030(c). However, the CFAA also "provides a private right of action to '[a]ny person who suffers damage or loss by reason of a violation of this section' who 'may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.'" *Trademotion*, 857 F. Supp. 2d at 1290, quoting 18 U.S.C. §1030(g). In a civil action under the CFAA, the plaintiff must demonstrate actual damages or loss resulting from the violation of the CFAA. *Brooks*, 954 F. Supp. 2d at 337.

B. **Privacy and Employees' Health-Related Information**. When employees go on, and return from, health-related leave, employers generally have an interest in verify the reason for leave, the employee's asserted need for a work accommodation, and the employee's ability to return to work and perform the job functions. Obtaining this health-related information implicates the employee's privacy rights and related federal and state laws.

1. **The Health Insurance Portability and Accountability Act ("HIPAA")**. HIPAA promulgates a number of privacy rules and requirements regarding the personal information of an individual, such as an employee. HIPAA does not prevent an employer from asking an employee for medical information such as a doctor's note if the employer needs the information for administrative purposes such as FMLA leave, ADA accommodations, substantiation of sick leave, or workers' compensation claims. The holder of the medical information is required to meet any applicable HIPAA privacy standards.

   An employer cannot obtain employees' health-related information from their health care provider directly without employee authorization, unless other laws require them to disclose it. However, where state or federal law requires disclosure—e.g., for worker's compensation or FMLA applications—or if disclosure is pursuant to payment for health care provided to an injured or ill employee, the employee's authorization is not required and the employee cannot compel the record holder to withhold the requested information from the employer. 45 C.F.R. §§ 164.502, 512, and 522(a).

2. **The Americans with Disabilities Act**. The ADA prohibits disclosing confidential medical information obtained through an entrance exam, or other inquiry which "is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(3), (4); *see also* 29 C.F.R. § 1630.14(c)(1) ("Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record," subject to limited exceptions.).

   The duty of confidentiality is triggered when an employer gathers information pursuant to § 12112(d). *Heston v. Underwriters Labs., Inc.*, 297 F. Supp. 2d 840, 845 (M.D.N.C. 2003). The confidentiality requirement does not apply to *voluntary* disclosures by an employee, but when the disclosure is in response to an employer's inquiry, the

information is considered confidential. *EEOC v. Thrivent Fin. for Lutherans*, 795 F. Supp. 2d 840, 845 (E.D. Wis. 2011) *aff'd*, 700 F.3d 1044 (7th Cir. 2012).

EXAMPLES

- *Taylor v. City of Shreveport*, 798 F.3d 276, 288 (5th Cir. 2015). "Importantly, § 12112(d) prohibits an employer from disclosing an employee's medical information only if the employer first acquired the information as a result of a medical inquiry or examination as those terms are defined in the ADA. If the employee voluntarily divulges the medical information to the employer without the employer specifically demanding the information first, or if the employer otherwise obtains the medical information outside the context of a medical inquiry or examination, then the employer has no duty under § 12112(d) to keep that information confidential." (footnotes omitted).

- *Gilliard v. Georgia Dept. of Corrections*, 500 Fed. Appx. 860 (11th Cir. 2012) (unpublished).

- *Reynolds v. Am. Nat. Red Cross*, 701 F.3d 143 (4th Cir. 2012).

- *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1031 (10th Cir. 2011).

- *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 247 (6th Cir. 2011).

The protection applies to former employees as well. *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726, 732 (8th Cir. 2007). "The ADA prohibits an employer from disclosing confidential medical information about an ex-employee[.]" (*citing Cossette v. Minn. Power & Light*, 188 F.3d 964 (8th Cir. 1999)).

3. **The Family and Medical Leave Act**. The FMLA requires confidentiality of records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA. 29 C.F.R. § 825.500(g).

EXAMPLES

- *Allen v. Verizon Wireless*, 3:12-CV-00482 JCH, 2015 WL 3868672, at *13 (D. Conn. June 23, 2015), on reconsideration, 3:12-CV-00482 JCH, 2015 WL 4751031 (D. Conn. Aug. 11, 2015), and aff'd, 15-2392-CV, 2016 WL 3435282 (2nd Cir. June 20, 2016). Verizon sought summary judgment on Allen's claim of interference based on the disclosure of confidential information obtained during the FMLA process. Pursuant to 29 C.F.R. § 825.500(g), "records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files." While there is no clear authority as to whether the FMLA creates a private

right of action based on this requirement, at least one district court in this Circuit has found that such a right exists in the context of a motion to dismiss. *See Mahran v. Benderson Development Company, LLC*, 2011 WL 1467368 (W.D. N.Y. April 18, 2011).

- *Holland v. Shinseki*, 3:10-CV-0908-B, 2012 WL 162333, at *13 (N.D. Tex. Jan. 18, 2012). Plaintiff also claims defendant interfered with her rights under the FMLA by releasing confidential medical records in violation of 29 C.F.R. § 825.500(g). In relevant part, the regulation states that "[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records ...." 29 C.F.R. § 825.500(g). "It is not settled whether this provision [825.500(g)] gives rise to a private right of action for disclosure ...." *Walker v. Gambrell*, 647 F. Supp. 2d 529, 539 n. 5 (D. Md. 2009); *see also Ekugwum v. City of Jackson,* No. 3:09–CV–48–DPJ–JCS, 2010 WL 1490247 (S.D. Miss. April 13, 2010) (accepting the existence of a private cause of action without reaching the merits of the issue).

4. **The Rehab Act**. The Rehab Act incorporates the confidentiality provisions of the ADA by reference at 29 U.S.C. §§ 791(f) and 794(d).

5. **State Laws Regarding Medical Information**. The HIPAA privacy rule establishes a national minimum standard. If a state law provides greater privacy protections, the state law must be observed.

6. **Drug Testing**. The permissibility of drug testing is different for public versus private employers. It is well settled that drug testing which utilizes urinalysis is a "search" that falls within the ambit of the Fourth and Fourteenth Amendments. *See, e.g., Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) ("[C]ollection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."). Accordingly, to perform drug testing, a public employer must show a need or interest beyond the normal need for law enforcement or crime detection, that is sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. *Id.* at 619, 624. An employer may subject an employee to drug testing pursuant to an employer drug-testing policy or if the employer reasonably suspects drug use. This may be particularly relevant where an employee is returning to work from health-related leave and may be on significant prescription medications (or may be self-medicating), or where the employee's leave was related to drug or alcohol use.

   a. Health and Safety of Others. The Supreme Court has ruled that while drug testing does infringe on an employee's privacy, it may be necessary in order to protect the health and safety of others. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989). The key for the employer is to show either that the drug testing was required pursuant to an employee-wide (not just the particular employee returning to work) drug-testing policy, or the employer reasonably suspected the employee was under the influence of drugs affecting the health and safety of others.

b. Improperly Administered Drug Test. Even if an employer is well within its rights to require the employee to undergo a drug test, the employer may administer the test in a way that violates the employee's right to privacy. For instance, a number of courts have found it is an unreasonable invasion of privacy for an employer to watch employees provide a urine sample for a drug test. *See Kelly v. Schiumberger Technology Corp.*, 849 F.2d 41 (1st Cir. 1989); *Wilcher v. City of Wilmington*, 139 F.3d 366, 374 (3d Cir. 1998). However, most courts have held that an employer may reasonably use other safeguards that protect against tampering with urine specimens, such as listening to an employee urinate, the dying of toilet water, requiring employees to wear hospital gowns, and checking the temperature of urine.

c. OSHA and Drug Testing. On November 1, 2016, OSHA began enforcing its new final rule on injury and illness reporting and drug testing, 29 C.F.R. 1904.35. 81 Fed. Reg. 29624.

i. *Reporting Work-Related Injuries and Illnesses*. Subsection 1904.35(b)(1) states that to ensure employees report work-related injuries and illness, employers must establish a "reasonable procedure" for reporting such injuries and illnesses that does not "deter or discourage a reasonable employee from accurately reporting a workplace injury or illness." The subsection prohibits employers from discharging or discriminating against an employee who reports a work-related injury or illness. OSHA's Preamble to the Final Rule interprets this subsection broadly to prohibit any "adverse action that could well dissuade a reasonable employee from reporting a work-related injury or illness," including termination, reduction in pay, or reassignment to a less desirable position. 81 Fed. Reg. 29672. OSHA's new reporting rule has a direct effect on employers with accident-related drug testing policies.

ii. *Drug Testing*. While OSHA's new final rule does not ban drug testing of employees, OSHA believes "that blanket post-injury drug testing policies deter proper reporting." 81 Fed. Reg. 29673. The final rule prohibits "employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses." Id. According to OSHA, "drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use." Id.

iii. *Improper Drug Testing*. OSHA explains what drug-testing policies or practices are improper under the new rule:

EXAMPLE

- It would likely not be reasonable to drug test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction. Such a policy is likely only to deter reporting without contributing to the employer's understanding of

why the injury occurred, or in any other way contributing to workplace safety. Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing. In addition, drug testing that is designed in a way that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting. 81 Fed. Reg. 29673.

iv. *Final OSHA Rule Does Not Supersede State or Federal Law*. OSHA stated that the final rule does not supersede or conflict with an employer's drug-testing requirement under workers' compensation laws or any other applicable state or federal law or regulation. 81 Fed. Reg. 29673. "If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the final rule would not prohibit such testing." Id.

PRACTICE TIP

- Employers should always keep any employee medical information separate from personnel records and confidential—sharing it only on a need to know basis.

C. <u>Constitutional or Statutory Invasion of Privacy Claims Against Governmental Employers</u>. The critical inquiry is whether the employee has a reasonable expectation of privacy in his or her medical information.

1. **Cases Involving Invasion of Privacy Claims**.

- *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.")

- *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994) (42 U.S.C. § 1983 invasion of privacy action based on disclosure of medical information.)

- *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994) ("Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.")

- *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 795-98 (7th Cir. 1987).

- *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980) ("The privacy interest asserted in this case falls within the first category referred to in Whalen v. Roe, the right not to have an individual's private affairs made public by the government.")

- *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34 (Minn. App. 2009) A Fairview Clinics employee saw a personal acquaintance at the clinic and read her medical file, learning that she had a sexually transmitted disease and a new sex partner other than her husband. The employee disclosed the information to another employee, who then disclosed it to others, including the patient's estranged husband. Then someone created a MySpace™ page posting the information on the Internet. The patient sued the clinic and the individuals allegedly involved in the disclosure for, among other things, invasion of privacy. The appellate court held that the posting of the information to MySpace™, even for a brief period, and regardless of the number of people who *actually* viewed it, was sufficient to satisfy the "publicity" requirement of a claim for invasion of privacy (which includes the making public of private facts).

2. **Fourth Amendment**. Provides protection from governmental authority engaging in unreasonable search and seizures. It is well settled that drug testing by government employers constitutes a "search" under the Fourth Amendment to the Constitution. Probable cause and a warrant are generally required for government searches. The standard is whether the employee and/or applicant has a "reasonable expectation of privacy" in the thing or matter searched. In determining whether a reasonable expectation of privacy exists, courts apply the two-prong test used in the Fourth Amendment constitutional context:

    - First, an actual subjective expectation of privacy must exist.

    - Second, the expectation of privacy must be one that is objectively reasonable.

3. **State Constitutional Right to Privacy**. Certain state constitutions create an additional right to privacy. Florida's state constitution provides another source of privacy protection. Art. 1, Sect. 23 states: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Further, Florida's constitution construes a right against unreasonable searches and seizure with the Fourth Amendment of the United States Constitution. As a result, monitoring public sector employees in Florida requires balancing the employee's privacy rights with the employer's interests. Additionally, Florida imposes restrictions on surveillance beyond those established by federal law. See §934.03, Fla. Stat.

D. <u>Safeguarding Employees' Personally Identifiable Information</u>. Employers have an obligation to take reasonable measures to safeguard their employees' personally identifiable information—e.g., medical records, social security numbers, dates of birth—and notify them of any data breach.[14] This can be particularly relevant in the context of an employee returning from leave, as the employer may have obtained substantial employee records related to the leave, such as medical records or military identification information.

[14] The EEOC recognizes that an employer's confidentiality obligation extends to all medical information disclosed by an employee including information voluntarily disclosed. *Humphries v. Dep't of Agric.*, EEOC Appeal No. 0120083870 (June 12, 2012).

Employees' privacy rights are implicated whenever the employer fails to adequately safeguard employees' private information in its custody and/or notify the affected employees of any data breach.

1. **Cases Alleging Failure to Safeguard Private Employee Information**.

   a. An affected employee may have a common law tort claim for invasion of privacy and/or negligence. For example, in *Randolph v. ING Life Ins. and Annuity Co.*, 973 A.2d 702 (D.C. 2009), participants in employee deferred compensation plan brought negligence and breach of privacy action against plan administrator after laptop computer containing confidential personal information was stolen from home of administrator's employee. On appeal, the court stated: "In this age of identity theft and other wrongful conduct through the unauthorized use of electronically-stored data, we have little difficulty agreeing that conduct giving rise to unauthorized viewing of personal information such as a plaintiff's Social Security number and other identifying information can constitute an intrusion that is highly offensive to any reasonable person, and may support an action for invasion of privacy (irrespective of whether the plaintiff alleges that economic or other resultant injuries have already come to pass)." The court nonetheless affirmed the dismissal of plaintiffs' invasion-of-privacy claim because the complaint failed to allege that the defendant's invasion of privacy was intentional and that the private information was accessed or publicly disclosed (plaintiffs made no allegations about what happened to the data on the stolen laptop computer and "it is possible that the thief unloaded the computer without ever accessing" plaintiffs' data).

   b. *Storm v. Paytime, Inc.*, ___ F. Supp. 3d ___, 2015 WL 1119724, *5 (M.D. Pa., March 13, 2015). "[T]he Third Circuit requires its district courts to dismiss data breach cases for lack of standing unless plaintiffs allege actual misuse of the hacked data or specifically allege how such misuse is certainly impending. Allegations of increased risk of identity theft are insufficient to allege a harm." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3rd Cir. 2011).

   c. The data breach Sony Pictures Entertainment Inc. suffered in 2014 prompted affected employees to file a class action against Sony, claiming that Sony was liable for the theft of the employees' personal data. *Corona et al v. Sony Pictures Entertainment Inc.*, U.S. District Court, Central District of California, No. 14-09600. After the court allowed the employees to proceed with their claims that Sony was negligent and violated a California confidentiality law, the parties submitted a proposed settlement requiring Sony to pay up to $8 million to compensate the individual employees' identify theft losses, the protective measures they were forced to undertake, and their legal fees and costs.

   d. In December 2013, Adult & Pediatric Dermatology, P.C. paid a penalty of $150,000 and settled a HIPAA violation lawsuit resulting from the loss of an employee's unencrypted thumb drive, which contained information for over 2,200 patients. The thumb drive was stolen from the employee's car.

2. **Breach Notification Laws**. Forty-seven states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands have enacted legislation requiring private or government entities to notify individuals of security breaches of information involving personally identifiable information. The only states with no security breach laws are Alabama, New Mexico, and South Dakota.[15]

PRACTICE TIPS

- While employers may seek and obtain extensive employee information without violating the employee's right to privacy, employers must keep in mind that they are responsible for safeguarding all such private information, and may be liable for unauthorized disclosures or data breaches of the information or for failing to timely notify the affected employees of the same.

- To protect private employee information and avoid liability, employers should keep medical information separate from the employee's general personnel file, should re-evaluate their IT department and update firewall software, and should train its personnel on safeguarding employee information. Employers may also want to purchase cybersecurity insurance.

[15] National Conference of State Legislators (1/04/2016), available at: http://www ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx (last accessed Sept. 19, 2016).

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