

Spring 2016



# TRIAL REPORTER

Journal of the Maryland Association for Justice, Inc.

## Demystifying Brain Injury Cases

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# Employees with Traumatic Brain Injuries: The Challenge of Returning to Work

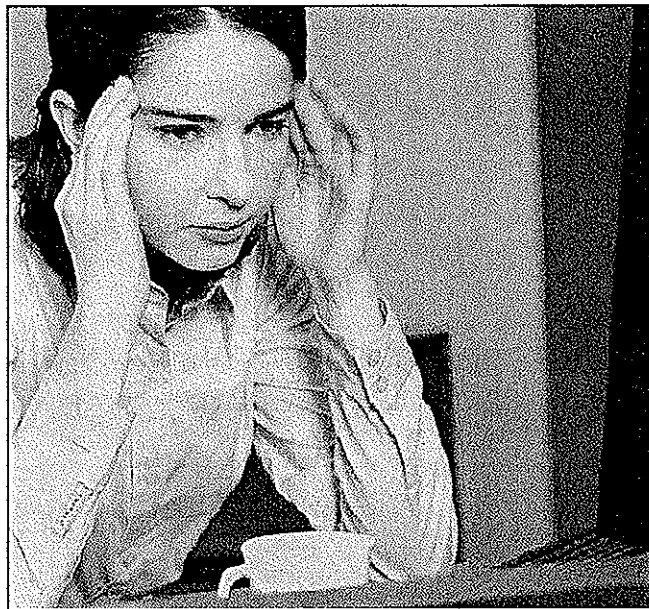
By Liesel J. Schopler and  
Joyce E. Smithey

Approximately every 13 seconds, someone in the United States sustains a traumatic brain injury (TBI).<sup>1</sup> It is estimated that at least 5.3 Americans are currently living with TBI-related disabilities.<sup>2</sup> With a large portion of TBI survivors being young adults that are just starting their careers,<sup>3</sup> many individuals are seeking to enforce rights and protections under the Americans with Disabilities Act (ADA) related to TBI disabilities,<sup>4</sup> as well as seeking leave under the Family Medical Leave Act (FMLA).<sup>5</sup> This article addresses how best to assist clients who have a TBI disability and wish to return to work.

## What is a TBI and what are its symptoms?

A TBI is defined as a disruption to the function of the brain caused by an external force such as a jolt or blow to the head.<sup>6</sup> The leading causes of TBIs are "falls, car accidents, assaults, and, in the case of active military personnel, combat blasts."<sup>7</sup>

There are three categories of TBI symptoms: physical, cognitive and behavioral/emotional.<sup>8</sup> The severity of TBI symptoms can range from mild to severe, and the duration of the symptoms can be short-term or long-term.<sup>9</sup> While no two cases are the same, common functional limitations caused by TBIs include: learning;



social skills; motor and physical skills; personality and emotions; attention and concentration; mental and physical stamina; judgment and problem solving; comprehension and expression; and memory.<sup>10</sup>

## What employment protections are provided under the ADA for my client with a TBI Disability?

The ADA, a federal act that was passed in 1990, is designed to protect individuals with disabilities from discrimination. See 42 U.S.C. § 12101(b). The ADA applies to employers with 15 or more employees, all State and local governments, employment agencies, and labor unions.<sup>11</sup> While the federal government is not considered an "employer" under the ADA, federal employees and applicants are covered by the Rehabilitation Act of 1973, an act with similar protections to the ADA.<sup>12</sup> Maryland has also established laws to eliminate employment discrimination against the disabled in Title 20 of the State Government Article, as have a handful of counties in the state.<sup>13</sup>

Title I of the ADA prohibits employment discrimination based on disabilities. If an individual with a TBI has the required education, experience, credentials or license to qualify for an available job, and that individual is able to perform the essential functions of a job, with or without accommodations, the ADA prohibits the employer from treating that person any differently

from other employees or applicants solely because of the person's TBI disability. 42 U.S.C. § 12112(a).

The ADA requires employers to provide reasonable accommodations to qualified employees with a disability, such as TBIs, at no cost to the employee, unless doing so would impose an undue hardship on the employer.<sup>14</sup> An undue hardship is an action that would require significant difficulty or expense in light of factors such as the employer's size, type of operations, and financial resources.<sup>15</sup> As employers need only accommodate the known physical and/or mental limitations of an individual with a TBI disability, an employee is obligated to initiate the process for an accommodation.<sup>16</sup> See *Adkins v. Peninsula Reg'l Med. Ctr.*, 224 Md. App. 115, 140 (2015) ("To receive an accommodation, the employee must 'communicate[ ] to his employer his disability and his desire for an accommodation for that disability.'" (Citing *Wilson v. Dollar Gen. Corp.*, 111 F.3d 337, 346-47 (4th Cir. 2013)).<sup>17</sup> An interactive process between the employer and employee or applicant must be used to find a reasonable accommodation. *Allen v. Bait. County*, 91 F. Supp. 3d 722, 734 n.17 (D. Md. 2015).

### 1. Are all of my clients with a TBI protected under the ADA?

Diagnosis and disability under the ADA are not synonymous. An individual with a TBI is not automatically a "qualified individual with a disability" under the ADA. Individuals with a TBI will only qualify for ADA protection if they meet two criteria.

First, they must be "qualified individuals," meaning that, with or without an accommodation, they are able to perform the essential functions of the job that they hold or desire.<sup>18</sup> The essential job functions "do not include those considered 'marginal,' but instead compromise the functions integral to the position."<sup>19</sup> A court will look job descriptions originally circulated by the employer as evidence of what a position's essential functions.<sup>20</sup> Pursuant to a recent case, a plaintiff may be a "qualified individual" despite having filed for, and received, Social Security Disability Insurance ("SSDI").<sup>21</sup> *Bingham v. Baltimore County*, 2016 U.S. Dist. LEXIS 18270, at \*9-10 (D. Md. Feb. 16, 2016).

Second, they must have one of three types of disabilities listed in the ADA: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment") 42 U.S.C. § 12102(1). "Substantially

limited" has been interpreted by the EEOC to mean "unable to perform a major life activity that the average person in the general population can perform;" or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.20).

"Major life activities," as interpreted by the Fourth Circuit, include "'activities that are of central importance to daily life' and 'that the average person in the general population can perform with little or no difficulty.'" *Herbig v. Lockheed Martin*, 2013 U.S. Dist. LEXIS 85051, at \*21 (D. Md. June 17, 2013). To assist courts, "the EEOC provides a non-exhaustive list of major life activities, including 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.* (citations omitted). See also 29 C.F.R. § 1630.2(f). Accordingly, plaintiffs need to reference how their TBI substantially limits their abilities to learn, concentrate, think, work and communicate.<sup>22</sup>

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**2. My client triggered the employer's obligation to reasonably accommodate. What accommodations should be considered?**

Accommodations that have helped employees with TBIs to more effectively perform their jobs include schedule reminders (e.g., telephone, pagers, alarm clocks), scheduled rest breaks to prevent stimulus overload and fatigue, work task checklists, tape recorders as memory aids, stop watches for time management, reassignment to another position, job coaching and job sharing.<sup>23</sup> The Job Accommodation Network ("JAN") is a free consulting service that provides individualized worksite accommodation solutions and technical assistance regarding the ADA and other disability-related legislation.<sup>24</sup>

Leave granted as an ADA accommodation may count against an employee's 12-week FMLA entitlement (see below) if the impairment qualifies as a "serious health condition." If the employee with a TBI disability on FMLA leave cannot return to work after 12 weeks, the employee may be entitled to an extended leave as an ADA

accommodation. However, "the ADA do[es] not require an employer to give a disabled employee 'an indefinite period of time to correct [a] disabling condition' that renders him [unable to work]." *Halpern v. Wake Forest Univ. Health Set*, 669 F.3d 454, 466 (4th Cir. 2012). See also *Reed v. Maryland*, 2013 U.S. Dist. LEXIS 17761, at \*62, (D. Md. Feb. 7, 2013) ("A defendant does not violate the ADA by terminating the employment of a plaintiff whose disability would require the defendant 'to wait indefinitely' for the plaintiff to be ready to work again.").

**3. Does my client need to disclose a TBI to an employer or prospective employer?**

Employees only need to disclose a TBI disability if they need an accommodation to perform the essential functions of their job.<sup>25</sup> In addition, job applicants do not need to disclose a TBI disability on a job application or during the interview process unless they need an accommodation to assist them in the application or interview process.<sup>26</sup>

**4. An employer asked my client to undergo a medical examination and answer disability-related questions. Is that permissible under the ADA?**

Yes, if the need for the medical information or examination is job-related and consistent with business necessity, and is conducted after a job offer has been made.<sup>27</sup> People with a TBI do not need to answer medical questions or submit to a medical examination until they have conditionally been offered a job.<sup>28</sup>

Generally, an employer must keep all medical information it learns about an applicant or employee confidential, and must keep this information separate from general personnel files. Under the following circumstances, however, an employer may disclose that an employee has a TBI: (1) to supervisors and managers where necessary to provide a reasonable accommodation or meet an employee's work restrictions; (2) to first aid and safety personnel if an employee would need emergency treatment or require some other assistance in the event of an emergency; and (3) to individuals investigating compliance with the ADA and similar state and local laws. 42 U.S.C. §12112(d)(3)(B).<sup>29</sup>



**5. My client was terminated for misconduct caused by her TBI, does that violate the ADA?**

It is well-settled in the Fourth Circuit "that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct... the ADA does not require an employer to ignore such egregious misconduct by one of its employees." *Williamson v. Bon Secours Richmond Health Sys.*, 34 F. Supp. 3d 607, 614 (E.D. Va. 2014) (citing *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999)). See also *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 n.3 (4th Cir. 1997) ("misconduct - even misconduct related to a disability - is not itself a disability, and an employer is free to fire an employee on that basis" (citations omitted)); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 214-15 (4th Cir. 1994) (finding that dismissal of employee for attendance problems did not constitute discrimination, even if her disability caused the absences). The Fourth Circuit's position is in accordance with the EEOC's 2008 Enforcement Guidance, "The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities."

**6. My client believes that she has been discriminated against due to her TBI disability. What must she establish to state a claim, and where should she file her claim?**

For individuals with a TBI disability to assert a prima facie case of discrimination under the ADA, plaintiffs must demonstrate that they: (1) are "disabled" pursuant to the definition in the ADA; (2) are "qualified" for the job in question; and (3) have experienced an adverse employment action due to their TBI disability. *Hartman v. Univ. of MD*, 2012 U.S. Dist. LEXIS 115009, at \*40-41 (D. Md. Aug. 14, 2012).

Unlawful discrimination under the ADA includes the failure to provide a reasonable accommodation to an otherwise qualified individual with a TBI disability who is a job applicant or employee. *Johnson v. SecTek, Inc.*, 2015 U.S. Dist. LEXIS 13174, at \*8 (D. Md. Feb. 4, 2015). To state a prima facie case of failure to accommodate, a plaintiff must establish that: (1) he or she is "disabled" pursuant to the definition in the ADA; (2) the employer had notice of his or her disability; (3) with a reasonable accommodation, he or she could perform the essential functions of the job; and (4) the employer refused to make such reasonable accommodations. *Williamson*, 34

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F. Supp. 3d at 612 (citing *Haneke v. Mid-Atl. Capital Mgmt.*, 131 F. App'x 399, 400 (4th Cir. 2005)).

A plaintiff with a TBI disability may also have a claim of retaliation under the ADA. See 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter.»). To establish a prima facie retaliation claim, a plaintiff must show that: (1) he or she engaged in a protected activity; (2) the defendant took an adverse employment action against him or her; and (3) there was a causal link between the protected activity and the adverse employment action. *Rhoads v. F.D.I.C.*, 257 F.3d 373, 392 (4th Cir. 2001). A plaintiff need not establish that the conduct he or she opposed actually constituted an ADA violation in order to prove the first element; rather, the complaint need only allege the predicate for a reasonable, good faith belief that the behavior plaintiff is opposing violates the ADA. *Freilich v. Upper Chesapeake Health Inc.*, 313 F.3d 205, 216 (4th Cir. 2001).

If an individual with a TBI disability believes that he or she has been discriminated against or retaliated against due to a TBI disability, that person has 300 days from the date of the discrimination to file a claim under the ADA; 180 days from the date of discrimination to file a claim pursuant to Title 20 under Maryland law; six months from the date of discrimination to file a claim under either the Baltimore County or Howard County antidiscrimination law; one year to file a claim under the Montgomery County

antidiscrimination law; and 180 days to file a claim under the Prince George's County antidiscrimination law. In Maryland, a discrimination claim can be filed with the EEOC and/or the Maryland Commission on Civil Rights ("MCCR"). The two agencies have a "work-sharing agreement," which means that the agencies cooperate with each other to process claims. Filing a claim with both agencies is unnecessary. Likewise, the Baltimore Community Relations Commission, Howard County Office of Human Rights, Montgomery County Human Relations Commission, and Prince George's County Human Relations Commission all have work-sharing agreements with the EEOC, which means that a claimant may also file with one of these local agencies to preserve his or her claim under local, state and federal law. However, if your client's workplace has fewer than 15 employees and, therefore, is only making claims under an applicable county antidiscrimination statute, the claim should be filed with the county agency because the EEOC enforces federal law, which covers only employers with 15 or more employees (as does Maryland law). If your client's workplace has 15 or more employees, you may file with the county agency, state agency, or the EEOC

(except in the case of Baltimore County, as that County's antidiscrimination law does not apply where there are 15 or more employees).

## Seeking leave under the FMLA due to a TBI

The FMLA provides protections for employees with qualifying TBI disabilities. Specifically, it mandates that employers must allow their employees to take sick leave if the employee or the employee's family has a "serious health condition."<sup>30</sup> A serious health condition" includes any "illness, injury, impairment, or physical or mental condition" that involves inpatient care or continuing treatment by a health care provider.<sup>31</sup> An employee may not be discharged for taking FMLA leave; however, that leave is unpaid and capped annually at 1200 hours.<sup>32</sup>

The FMLA only applies to public and private employers who have at least fifty employees.<sup>33</sup> In addition, to invoke the protections provided by the FMLA, an employee must have been employed for at least twelve months by the employer with respect to whom leave is requested, and worked for at least 1,250 hours with such employer during the previous twelvemonth period.<sup>34</sup> Employees who believe that their rights under the FMLA have been violated have the choice of filing a civil lawsuit or filing a complaint with the Secretary of Labor.<sup>35</sup>

## TBI Resources

Below are some resources to assist your TBI clients while you try to secure the necessary accommodations and/or ensure that they receive fair treatment in the workplace:

### *Brain Injury Association of America ("BIAA")*

1608 Spring Hill Road, Suite 110


Vienna, Virginia 22182

Phone: (703) 761-0750; Fax: (703) 761-0755




<http://www.biausa.org/>

BIAA is the country's oldest and largest nationwide brain injury advocacy organization. Its mission is to advance brain injury prevention, research, treatment and education and to improve the quality of life for all individuals impacted by brain injury.

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<http://biamd.org/>

The mission of BIAMD is to be the voice of those affected by brain injury through advocacy, education, and research.

## JOB Accommodation Network ("JAN")

West Virginia University  
P.O. Box 6080  
Morgantown, West Virginia 26506-6080  
Toll-free: (800) 526-7234; TTY: (877) 781-9403; Fax: (304) 293-5407  
<http://askjan.org>

JAN is a free consulting service that provides information about job accommodations, the ADA, and the employability of people with disabilities.

## Maryland Division of Rehabilitation Services ("DORS")

2301 Argonne Drive  
Baltimore, Maryland 21218  
Phone: (410) 554-9442; Toll-free: (888) 554-0334;  
Videophone: (443) 798-2840  
[dors@maryland.gov](mailto:dors@maryland.gov)  
<http://dors.maryland.gov/Pages/default.aspx>

DORS is a state agency that offers programs and services that help people with disabilities go to work and become self-sufficient.

## National Resource Center for Traumatic Brain Injury

Virginia Commonwealth University  
Department of Physical Medicine and Rehabilitation  
Richmond, Virginia 23298-0542  
[jhmarwit@vcu.edu](mailto:jhmarwit@vcu.edu)  
<http://www.tbinc.com/>

The National Resource Center for Traumatic Brain Injury provides relevant, practical information for professionals, persons with brain injury, and family members.

Individuals with a TBI disability face many daily life challenges, and often in the workplace. Frequently, a reasonable accommodation can result in success in the workplace for a person with a TBI disability. The ADA and FMLA protect clients who have TBI disabilities, and are powerful tools to ensure disabled employees receive fair treatment in the workplace.

## Biographies

**Joyce E. Smithey** leads Rifkin, Weiner, Livingston, Levitan & Silver, LLC's labor and employment practice. In 2016, Ms. Smithey was once again selected for inclusion as a Maryland Super Lawyer in the area of Employment and Labor Law. Ms. Smithey was named among Maryland's Top 50 Women Attorneys, as published in Baltimore Magazine. Ms. Smithey regularly advises employees on all matters relating to employment and labor law.

**Liesel J. Schopler** is a partner at Rifkin, Weiner, Livingston, Levitan & Silver, LLC. Her practice focuses on complex commercial, business, and labor and employment litigation. She also represents plaintiffs in class actions.

## (Endnotes)

- 1 Brain Injury Ass'n of Am., Brain Injury Facts and Statistics (2015), available at <http://www.biausa.org/brain-injury-awareness-month.htm#FactSheet>.
- 2 *Id.*
- 3 Satoko Yasuda, Paul Wehman, Pam Targett, David Cifu, Michael West, *Return to Work for Persons with Traumatic Brain Injury*, 80 AM. J. PHYS. MED. REHABIL. 852, 853 (Nov. 2001).
- 4 42 U.S.C. § 12101, *et seq.*
- 5 29 U.S.C. § 2601, *et seq.*
- 6 BRAIN INJURY ASS'N OF AM., ABOUT BRAIN INJURY, available at <http://www.biausa.org/glossary.htm>.
- 7 Michael L. Fessinger, NOTE: *Balancing the Reasonable Requirements of Employers and Veterans Living with Traumatic Brain Injury - The Modern U.S. Military's "Signature Injury" is a Game Changer*, 53 WASHBURN L.J. 327, 330-31 (Spring 2014) [hereinafter "Game Changer"]. See *id.* at 328 (stating that TBI is "the 'signature injury' of the United States's recent military conflicts"). In addition to the ADA, disabled veterans returning to their civilian jobs have civil rights protections under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.* See *id.* at 346 ("USERRA, in effect, requires employers to assist disabled veterans returning to employment who may not qualify for assistance under the ADA." (Citations omitted)).
- 8 *Id.* at 334
- 9 BRAIN INJURY ASS'N OF OR., INC., THE BRAIN INJURY HANDBOOK: AN INTRODUCTORY GUIDE TO UNDERSTANDING BRAIN INJURY FOR EMPLOYERS 2 (2011) [hereinafter "BRAIN INJURY HANDBOOK"], available at <http://www.eocil.org/attach/bihandbk-empl.pdf>.
- 10 *Id.* at 20
- 11 42 U.S.C. §§ 12111(2), (5), (7). However, some employees with TBI disabilities that work for employers with fewer than 15 employees may nevertheless be protected under County antidiscrimination statutes. The Baltimore County antidiscrimination law applies to employers with less than 15 employees; the Howard County antidiscrimination law applies to employers with five or more employees; and the Montgomery County's and Prince George County's antidiscrimination laws apply to employers with one or more employees.

- 12 *Id.* at § 12111(5)(B)(1). To protect federal workers, Congress incorporated the ADA's nondiscriminatory and reasonable accommodation protections into the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*
- 13 See Md. State Gov't Code Ann. § 20-602 (State policy regarding discrimination in employment); *id.* at § 20-1203 (regarding Baltimore County); *id.* at § 20-1202 (regarding Howard, Montgomery, and Prince George Counties); Baltimore County Code § 29-1-101(d); Howard County Code § 12.212; Montgomery County Code § 27-19; Prince George's County Code § 2-222.
- 14 *Id.* at § 12112(b)(5)(A); *id.* at § 12113(a).
- 15 *Id.* at § 12111(10).
- 16 *Id.* at § 12112(b)(5)(A).
- 17 However, an employee does not need to "submit a formal request for an accommodation, nor must the employee use 'magic phrases'; instead, the employee must provide the employer with 'adequate notice' of his disability and need for an accommodation. *Adkins*, 224 Md. App. at 140 (citing cases). A totality of the circumstances test is applied to determine if an employee provided sufficient notice of his or her disability. *Id.* (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999), *abrogated on other grounds as stated in Rocco v. Gordon Food Serv.*, 998 F. Supp. 2d 422, 426 n.1 (2014), for the proposition, "What matters . . . [is] whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.").
- 18 42 U.S.C. § 12111(8).
- 19 *Game Changer*, at 341 (citation omitted).
- 20 *Id.* at 341-42.
- 21 In Bingham, the plaintiff, who was terminated by the defendant on July 3, 2010, allegedly claimed in his SSDI application that the date of his injury was January 27, 2010. 2016 U.S. Dist. LEXIS 18270, at \*9. Thus, the defendant argued that the plaintiff, by virtue of his SSDI application, should be judicially estopped from asserting that he was able to perform his job duties (i.e., that he was a "qualified individual") on the date of his termination. *Id.* The court held, "A party is not judicially estopped from making an ADA claim solely because the claimant filed for, and received, SSDI benefits. [ ] Indeed, 'there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side' for estoppel to be categorical required." *Id.* at 9-10 (citations omitted). However, the court noted that if there are contradictions between a party's statement in an SSDI application and the party's position in a pending case, the party "cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim[ ] [and] must proffer a sufficient explanation." *Id.* at \*10 (citation omitted).
- 22 See *Weston v. Supply Chain Logic, Inc.*, 2004 U.S. Dist. LEXIS 9993, at \*18 (D. Md. Apr. 6, 2004) (finding that the plaintiff failed to allege that a TBI substantially limits one or more major life activities where, "[a]t best, she claims that she suffered 'massive physical trauma as well as traumatic brain injury,' but her allegations go no further to specify the trauma suffered or the effect it had on her ability to function.").
- 23 For a more detailed list of job accommodations that might be useful for employees with a TBI, see JOB ACCOMMODATION NETWORK, FACT SHEET: JOB ACCOMMODATIONS FOR PEOPLE WITH BRAIN INJURIES, available at [http://www.brainline.org/content/2008/10/fact-sheet-series-job-accommodations-people-brain-injuries-0\\_pageall.html](http://www.brainline.org/content/2008/10/fact-sheet-series-job-accommodations-people-brain-injuries-0_pageall.html); JOB ACCOMMODATION NETWORK, ACCOMMODATIONS AND COMPLIANCE SERIES: EMPLOYEES WITH BRAIN INJURIES, available at <https://askjan.org/media/BrainInjury.html> [hereinafter "EMPLOYEES WITH BRAIN INJURIES"].

- 24 <http://askjan.org>
- 25 EMPLOYEES WITH BRAIN INJURIES.
- 26 *Id.*
- 27 42 U.S.C. § 12112(d)(4)(A).
- 28 EEOC INFORMAL DISCUSSION LETTER, ADA: POST-OFFER, PRE-EMPLOYMENT MEDICAL EXAMS (Feb. 26, 2009), available at [http://www.eeoc.gov/eeoc/foia/letters/2009/ada\\_postoffer\\_preemployexams.html](http://www.eeoc.gov/eeoc/foia/letters/2009/ada_postoffer_preemployexams.html) ("In most instances, an employer may not ask applicants disability-related questions or require them to undergo medical examinations before a job offer is made. Once the employer has obtained and evaluated all non-medical information and has made a 'real offer' of employment, it may require all entering employees in the same job category to . . . submit to medical examinations.")
- 29 An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices without violating ADA confidentiality requirements.
- 30 29 U.S.C. § 2612(a)(1)(D).
- 31 *Id.* at § 825.114(a)(2)(i). A "health care provider" can include clinical psychologists and clinical social workers, as well as physicians. *Id.* at § 825.118(b).
- 32 *Id.* at § 2611-12. If the employee has paid leave available, the employee may elect or the employer may require that paid leave be substituted for FMLA leave. *Id.* at § 2612(d)(2)(A).
- 33 *Id.* at § 2611(2)(B)(ii). The FMLA further requires that there be 50 or more employees within a 75-mile radius of the employee seeking to take FMLA leave, thereby making the Act inapplicable to employees at remote offices. *Id.*
- 34 *Id.* at § 2611(2)(A).
- 35 *Id.* at § 2617.

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