I. Introduction.

Three federal statutes often come into play when employers are faced with the issue of how to treat certain absences from work. These federal laws are Title I of the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), and the Pregnancy Discrimination Act ("PDA"). Initially, most employers focused on the basic changes necessary to comply with these statutes. Now that they have been in effect for awhile, attention is turning to the more complex issues employers must address to bring their policies and procedures into compliance with these statutes. This presentation will focus on the impact of the ADA, FMLA, and the PDA on attendance and leaves of absences.

Prior to the enactment of the ADA, FMLA, and the PDA, employers had a great deal more latitude in formulating and enforcing policies regarding absenteeism, with the liberty to determine what level of absenteeism was acceptable and what constituted an excusable absence. Employers also had the discretion to determine whether or not leaves of absence would be granted and, if so, for how long; whether or not benefits would be continued during a leave of absence; and what position the employee would be returned to upon completion of the leave. An employee's attendance could be taken into account in making employment decisions, such as promotions, and also in taking disciplinary action, up to and including termination of employment. As long as the employer's absenteeism and leave policies were consistently, rather than arbitrarily, applied, they could not serve as a basis for a discrimination or wrongful discharge claim. This is, however, no longer the case.

The ADA, FMLA, and the PDA have had a significant impact on how covered employers must handle absences of employees who need to be off work or to obtain modified work schedules for health reasons or for childbirth. Covered employers now must consider not only the impact of the three statutes independently, but also the interrelationship of the ADA, FMLA, and the PDA in designing and administering their absenteeism and leave of absence policies in order to comply with federal law.

II. ADA, Absenteeism, and Leaves of Absence.

In general, the ADA applies to employers with 15 or more employees. It prohibits job discrimination against applicants and employees on the basis of disability. The Act defines disability as a physical or mental impairment which substantially limits one or more of an individual's major life activities, a record of such an impairment, or being regarded as having such an impairment. Under the ADA, employers are required to make "reasonable accommodations" for disabled employees who could, with
reasonable accommodation, do the "essential functions" of their position, unless it would result in undue hardship to the business. This may have a drastic impact on an employer's absenteeism policies.

The EEOC, which is charged with administration of the ADA, has issued a Technical Assistance Manual. There are several significant provisions which, to some extent, provide guidance to employers.

First, the Manual seems to affirm an employer's historical right to promulgate absenteeism policies. Section 7.01 states:

An employer may establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave.

The Manual also provides that a uniformly applied leave policy does not violate the ADA simply because it has a more severe impact on persons with disabilities. At least in the view of the EEOC, an "adverse impact" or "disparate impact" case premised on a leave of absence policy, rather than disparate treatment, would be barred.

On the other hand, the Manual states that:

An employer may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

In addition, the Manual includes several examples of reasonable accommodations: implementing part-time work schedules, permitting use of paid leave or granting unpaid leave for necessary medical treatment, and rearranging schedules to allow employees to make up for lost time due to medical treatments.

Consistent with the language of the ADA, the Manual stresses that reasonable accommodation is required only if it would not result in an undue hardship. However, the Manual also provides that "an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees" and provides the following example:

If restructuring a job to accommodate an individual with a disability creates a heavier workload for other employees, this may constitute an undue hardship. But if other employees complain because an individual with a disability is allowed to take additional unpaid leave or to have a special flexible work schedule as a reasonable accommodation such complaints or other negative reactions would not constitute an undue hardship.

In other words, an employer must be prepared to be flexible in providing leave for employees even if other employees are unhappy about the situation.
III. The FMLA, Leaves of Absences, and Absenteeism.

In general terms, the FMLA requires employers covered by the Act to give covered employees up to 12 weeks of unpaid leave in a 12-month period to employees who need time off for the birth or placement of a child for adoption or foster care, for a serious health condition that prevents the performance of the essential functions of the employees position, or for the serious health condition of a parent, spouse, or child of the employee where the employee is needed to care for the family member. This statute, which is administered by the DOL, has had a major effect on covered employers.

However, not all employers are covered by the FMLA. Only those employers who have employed over 50 employees at a worksite for 20 workweeks in the current or preceding calendar year are covered by the FMLA. Moreover, not all employees of covered employers may be entitled to FMLA leave. To be eligible for FMLA, the employee must have been employed by the employer for 12 months (not necessarily continuously) and for 1250 hours in the 12-month period immediately preceding the request for the leave.

Although an extensive discussion of the FMLA, which is a complex and very detailed statute, is beyond this presentation, several key points are particularly relevant to this discussion:

$ Unless an intermittent or reduced leave schedule is medically necessary, an employer may require that the FMLA leave be taken all at once.

$ During FMLA leave, the employer must continue any employee health insurance coverage under the same terms as before.

$ Except for certain, narrowly defined "key employees," an employee on FMLA leave must be returned to the same or an equivalent position with no loss of pay or benefits accrued at the time the leave began.

$ An employer may require an employee to substitute paid leave for unpaid FMLA leave in order to preclude an employee from combining FMLA leave and paid leave to exceed the FMLA cap of 12 weeks.

$ The anti-retaliation provisions of the FMLA prohibits employers from counting absences resulting from FMLA leave against an employee for
disciplinary purposes under an absenteeism control policy.

All of these factors must be considered in structuring an absenteeism policy which complies with the FMLA.

IV. The PDA, Leaves of Absences and Absenteeism

The PDA is a definitional amendment to Title VII that Congress enacted to include pregnancy-based discrimination in Title VII's prohibition of gender-based employment discrimination. To achieve that end, Congress amended Title VII to define the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related medical conditions. The PDA applies to employers with 15 or more employees.

The PDA essentially requires employers to provide pregnant women with the same work opportunities that it provides to other individuals with a similar capacity to work. In other words, employers must accommodate the needs of pregnant women so as not to treat pregnant employees differently from other employees who are similar in their ability or inability to work. For instance, in *EEOC v. Ackerman, Hoods & McQueen*, 956 F.2d 944, 948 (10th Cir. 1992), a pregnant worker was entitled to be excused from overtime work because the employer had an unwritten policy of granting work schedule requests for personal and medical reasons for other employees.

Thus, with regard to attendance, leaves, and absenteeism, employers must ensure that their policies and procedures are applied to pregnant workers in the same manner as the policies and procedures are applied to other employees with similar needs and restrictions on their ability to work. For instance, if other employees are granted excused absences for personal and medical needs, then pregnant employees must be afforded the same treatment.

V. Interrelationship of the PDA, FMLA and ADA

In many respects, FMLA is an extension of the PDA. In other words, FMLA provides pregnant workers with additional protections and benefits over and above the basic prohibition against pregnancy discrimination in the PDA. Thus, pregnant workers fall under the coverage of FMLA (assuming the requisite number of employees).

FMLA differs in several respects from the ADA, including coverage; impact of essential functions of the job; difference in the benefits provided; whether or not leave may be taken on an "intermittent" or "reduced schedule" basis; continuation of benefits during the leave; and permissible medical inquiries.

A. Coverage

Protected conditions are not necessarily the same under FMLA and the ADA. Some conditions which
are exempt under the ADA are covered by the FMLA (and/or the PDA). For example, pregnancy is not considered a disability under the ADA (see Richards v. City of Topeka, --- F.3d ---, 1999 WL 159962 (10th Cir. 1999)), but is a basis for FMLA leave (and for protection under the PDA). Similarly, an individual needing a brief leave of absence for an appendectomy would be eligible for FMLA leave, but would not be considered "impaired" under the ADA. On the other hand, an individual could be "impaired" under the ADA, but not eligible for FMLA leave if not receiving continuous treatment or in-patient care for his or her condition.

It is, of course, possible for an employee to have a medical condition covered by both the ADA and FMLA. An employee with an ADA-covered disability needing a leave of absence, intermittent leave, or a reduced work schedule in order to perform the essential functions of his or her position would probably have a serious medical condition, as defined by the FMLA.

B. Essential Job Functions.

The FMLA and ADA differ in defining which employees are eligible for coverage based on their ability to perform essential job functions. Under the ADA, the employee is entitled to a reasonable accommodation only if it would enable the employee to perform the essential function of the job. An employer may deny FMLA leave for a serious health condition if an employee cannot provide a health care provider's certification that he cannot perform essential job functions. Also, FMLA leave may not be denied on the ground that the employee will not improve enough to return to work. Although the employer may terminate the employee when advised that the employee does not intend to return to work or when the FMLA leave ends, FMLA leave may not be denied at the outset because the employee is unlikely to return to work.

There has been judicial recognition (under the Rehabilitation Act) of the fact that, in order to perform the essential functions of the job, an employee must work. Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (coding clerk who suffered from an ear condition that caused periodic dizziness, nausea, and vomiting and required her to be absent form work for prolonged periods of time without warning was not qualified for protection under the Rehabilitation Act because regular attendance was an essential function of the position); Dutton v. Johnson County, 859 F. Supp. 498, 508 (D. Kan. 1994) (heavy equipment operator who had migraine headaches not covered by Rehabilitation Act, reasoning "regular attendance is no doubt an essential function of almost every job"); Santiago v. Temple University, 739 F. Supp. 974 (E.D. Pa. 1990), aff'd, 928 F.2d 396 (3d Cir. 1991) ("attendance is necessarily the fundamental prerequisite to job qualification"). Whether the analysis turns on the qualification of the individual or the essential function analysis, employers will not be required to accommodate excessive absenteeism.

C. Benefits Provided.

The benefits under the ADA and FMLA differ considerably. Even though FMLA leave is limited to 12 weeks, an employee who has exhausted FMLA leave may be entitled to additional leave as a reasonable
accommodation under the ADA. However, to qualify for ADA leave, the employee must be able to perform the essential functions of his or her job upon return from leave, in order for the additional leave to be considered a reasonable accommodation under the ADA. Of course, additional leave under the ADA would not be available to a pregnant employee, unless that employee suffers from a condition that otherwise qualifies her as disabled. Also, the employer may deny further leave under the ADA if it creates an undue hardship for the employer.

The FMLA requires that employers maintain health insurance coverage for employees on FMLA leave under the same terms and conditions that existed prior to the employee’s leave. If the employee contributes to health insurance while at work, she must continue to do so while on leave. However, if while on FMLA leave an employee fails to make a contribution within 30 days of the payment due date, the employer is no longer obligated to maintain health insurance coverage. Likewise, if the employee fails to return to work after her FMLA leave has expired, the employer may cease providing health insurance coverage. In fact, under certain circumstances the employer may also seek reimbursement of its share of premium payments made on behalf of the employee while she was on unpaid leave.

In contrast, the ADA does not require employers to maintain health insurance coverage, so an employee remaining on leave for a disability following exhaustion of FMLA leave would not be entitled to continuation of benefits.

**D. Intermittent Leave.**

Although the FMLA and the ADA mandate intermittent leave and reduced schedule for employees with medical problems, the exact nature of entitlement depends on the statute. Under the ADA, the employee must show that the intermittent leave or reduced work schedule would be a reasonable accommodation which would allow the employee to perform the essential functions of the job. The employer also has an undue hardship defense. Under the FMLA, the employee just needs to show that the reason for the leave is a "serious health condition" and that the change in work schedule is "medically necessary." FMLA leave for pregnancy is not, however, required to be intermittent, unless the employer agrees.

The statutes also differ in how they address the employer’s ability to reassign an employee seeking intermittent leave or a reduced schedule to another position. Under the FMLA, the employer may require the employee to transfer to another job which "better accommodates" the change in work schedule; however, the other job must have equivalent pay and benefits. Under the ADA, the employer cannot require a transfer simply because a different position would "better accommodate" intermittent leave or a reduced schedule, but is required to show an undue hardship in accommodating the employee in his or her current position. In contrast to the FMLA, if there are no reasonable accommodations which would permit the employee to perform his or her essential job functions without creating an undue hardship, then the employer can offer a disabled employee reassignment to a lower paying position, provided there is no equivalent job available which the employee is qualified to perform.

**E. Permissible Medical Inquiries.**
The need to inquire about the medical basis for a leave arises under both the ADA and FMLA; however, the statutes differ as to what inquiries are acceptable. The employer may require medical documentation at the beginning of the FMLA leave and also under the ADA if an employee is seeking leave as a reasonable accommodation. In addition, medical documentation may be required at the conclusion of the leave if the employee intends to return to work.

Under the FMLA, the employer is more strictly limited in the nature of inquiries allowable to determine whether or not an employee has a serious medical condition which would qualify him or her for FMLA leave. The FMLA regulations include a medical leave form and inquiries beyond the information specified are not permitted. If the employer doubts the need for leave, it may obtain a second medical opinion from a provider of its choice, at its own expense. If the second opinion is not satisfactory to either the employer or the employee, a third opinion as to the legitimacy of the request for leave, which is binding on both parties, may be sought of a mutually acceptable provider. Under the ADA, however, the employer has more latitude in obtaining medical information as to the employee's need for reasonable accommodation and whether or not reasonable accommodation will permit the employee to perform essential job functions.

Regardless of the type of leave, the employer will likely need medical information to assess the employee's readiness to return to work. A fitness for duty examination is permitted by both statutes, provided the assessment is job-related and limited to the health condition which gave rise to the need for leave. Any employee taking FMLA leave should be advised that a physical examination may be required prior to returning to work and of the consequences for failure to submit to an examination.

V. Controlling Absenteeism Lawfully.

Employers need to review and, if necessary, restructure their policies and procedures concerning absenteeism and leaves of absence to comply with the ADA, FMLA, and the PDA. Although a policy on absenteeism must allow for leaves of absences required by the FMLA, employers wishing to impose attendance requirements and conditions to leaves of absence to control absenteeism under the FMLA should incorporate certain provisions in their policies to protect their legal rights. Moreover, any policies related to leaves or absenteeism should be applied equally to both pregnant employees and to other employees who require time off for personal or medical reasons.

Developing written policies and procedures provides the employer with the opportunity to review compliance with the law. Although there is no requirement that policies be in writing, the FMLA requires that an employee who has a handbook, or written policies regarding leaves and attendance in some other form, must include information regarding the rights and responsibilities under the FMLA. Whether or not there is a written policy, the employer is required to give written notice to an employee when that employee requests FMLA leave.
A. Leaves of Absence.

Although employers are required to grant leaves of absence under the circumstances required by the FMLA, employers still may limit absenteeism by regulating leaves of absence for reasons not covered by the FMLA or in excess of leaves required under the FMLA. The following considerations should be taken into account.

$ Structure a policy on leaves of absence to avoid "tacking" of FMLA leave and other leaves of absence to get time off in excess of the FMLA requirement.

$ The exception to this may be for disabled employees who may want to "tack" leave under the ADA onto FMLA leave. Because of the limitations on medical inquiries for FMLA leave, it is advisable for an employee who is applying for FMLA leave for a reason which also appears to qualify as a disability under the ADA to start with FMLA leave and, when it is exhausted, apply for additional time off as a reasonable accommodation under the ADA. At that point, the FMLA is no longer a factor. As a result, the employer can make more extensive inquiries into the employee's medical condition and take undue hardship into account without violating the FMLA.

$ Under the FMLA, an employer may require the employee to substitute paid leave, such as vacation or accrued sick leave, for unpaid FMLA leave. This is a good strategy for limiting the duration of FMLA leaves. However, if the employer wants to take this approach, it should be spelled out in its policies. The policies should indicate what kind of paid leave can be used to substitute for each type of FMLA leave. They should indicate when the employer will require substitution and when the employee may insist on substitution.

$ Coordination with other types of leave is essential. The requirements of notice to the employer, conditions of eligibility, and benefits available for the paid leave to be substitute for FMLA leave should not be less favorable to the employee than the FMLA requirements.

$ An interesting issue of "tacking" sometimes arises when spouses work for the same employer. Will the 12-week total leave to care for an ill family member, newborn, or newly-placed child apply to each employee or to both?
Consider requiring recertification to determine whether or not an employee on leave due to a serious medical condition qualifies to remain on leave. The employer's right to require this should be reserved. This applies to both ADA and FMLA leaves.

A leave policy should also reference grounds for refusing restoration of the job, such as falsification of medical records or violation of employee rules against obtaining outside employment while on leave (if uniformly applied to all types of leave).

B. Workers' Compensation.

An employee injured on the job may be covered by the ADA and FMLA, as well as workers' compensation. In considering absenteeism policies, the interrelationship of the state and federal statutes should be taken into account. The following factors should be evaluated in structuring a policy.

Workers' compensation leave and FMLA leave can run concurrently. If an on-the-job injury results in three days' lost time from work (or other triggering event under the FMLA), an employer can prevent "tacking" the leave by giving the employee notice that the leave is being designated FMLA leave.

"Light" duty or "transitional" duty is not required by either the FMLA or ADA. If an injured worker is offered light duty and opts for FMLA leave instead, workers' compensation benefits can be terminated, at least under Colorado law. Light duty may be an option under the FMLA, but the employee is entitled to return to the same or an equivalent position originally held at the end of the leave. Job restructuring may also be an appropriate reasonable accommodation under the ADA, but it is not required.

Some employees want to return to their regular job on a part-time basis, following a work-related injury. Under the FMLA, the employer has the right to insist that the employee temporarily transfer to a different position which would better accommodate a reduced schedule. If FMLA leave is not a factor, but the ADA applies, an employee's request to work part-time should be considered a request for a reasonable accommodation and evaluated accordingly.

C. Labor Arbitration.

Arbitrators have traditionally found just cause for dismissal if an employee's physical or mental
condition prevents satisfactory performance, exposes the employee or other employees to a risk of harm, or results in excessive absenteeism, provided the employer's absenteeism policy has been communicated to the employee, it has been consistently applied, and progressive discipline has been used. The ADA and FMLA go beyond this traditional approach.

$ FMLA leave cannot be considered in determining whether or not an employee's absenteeism is excessive.

$ Although the ADA appears to honor an employer's right to make and enforce uniformly-applied absenteeism policies, arbitrators may apply a just cause analysis and conclude that a disparate impact on a disabled employee is unacceptable.

The evolving external law regarding treatment of employee disabilities and leaves of absence is gradually being incorporated into arbitral law, even if there is no contractual obligation to follow the ADA and/or FMLA. The balancing of the relative rights of the employer and employee, as the "reasonable accommodation/undue hardship" analysis, is well suited to the arbitral forum.

D. No-Fault Absenteeism Policies.

A number of employers have absenteeism policies which provide that an employee who exceeds a certain number of absences in a given period of time will be subject to progressive discipline. Because the FMLA does not allow employers to take FMLA absences into account in determining discipline, promotion or raises, employers should ensure that their policies are amended to provide that FMLA absences will not be counted in the no fault policy.

IV. Conclusion.

The ADA, FMLA, and the PDA will apply to many absences and leave requests received by an employer. It is therefore very important that an employer identify and evaluate all potential conflicts among these statutes before making a leave decision, and apply attendance policies in a uniform manner.

**BIOGRAPHICAL INFORMATION**

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Prior to joining Davis, Graham & Stubbs, Ms. Savage was managing partner and shareholder in the Denver office of a large Minneapolis-based law firm. She received her B.A. in 1976 with honors from the State University of New York at Binghamton, and her J.D., cum laude, from Suffolk University Law School in 1981, where she was a member and research editor of the *Suffolk University Law Review*. Following law school, she was a clerk for one year in the Colorado Court of Appeals, and has practiced labor and employment law since that time.