

Federal Employee Disability Law

as presented by

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What is Federal Sector Law?

(Executive, Legislative and
Judicial Branches of US
Government)

- Federal Employees have their own legal system! While many of federal employee legal rights mirror private sector legal right these employees have the benefit of an additional layer of administrative court legal rights and protections which include:
- EEOC - MSPB - FECA/DOL -- FLRA/FMCS Union Grievance



Disability Discrimination/ Reasonable Accommodation under EEO law



- Definition of a Disabled Employee under the Rehabilitation Act of 1973 - ADAAA:
- The term "disability" means:
 - A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - A record of such an impairment; or
 - Being regarded as having such an impairment. [42 USC 12102](#) (1).
- Disability is to be defined broadly. In its introduction to the ADA Amendments Act, Congress stated its intention that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations" and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis. [42 USC 12101](#).

ADAAA/Rehabilitation Act Cont...

Physical or Mental Impairment

- A physical or mental impairment means:
- 1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
- 2. Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities. [29 CFR 1630.2](#) (h).





ADAAA/Rehabilitation Act Cont...

Major Life Activities

- **Major life activities**
 - Major life activities include, but are not limited to:
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. [42 USC 12102](#) (2)(A).



ADAAA/Rehabilitation Act Cont...

Substantially Limits or Significantly Restricted

- In the ADA Amendments Act, Congress directed the EEOC to change the ADA regulations, stating that the section defining the term "substantially limits" as "significantly restricted" was inconsistent with congressional intent. [42 USC 12101](#).
- In the regulations implementing the ADAAA, the EEOC lists nine factors to consider in deciding whether an individual is substantially limited in a major life activity:
 - The term "substantially limits" should be interpreted "broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." "'Substantially limits' is not meant to be a demanding standard." [29 CFR 1630.2 \(j\)\(1\)\(i\)](#).
 - In assessing whether an impairment is a disability, it should be considered whether an impairment "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." An impairment "need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." However, "not every impairment will constitute a disability within the meaning of this section." [29 CFR 1630.2 \(j\)\(1\)\(ii\)](#).
 - Because employers should be concerned primarily with the issues of whether they have complied with their obligations or engaged in discrimination, "the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis." [29 CFR 1630.2 \(j\)\(1\)\(iii\)](#).

ADAAA/Rehabilitation Act Cont...

Substantially Limits or Significantly Restricted

- Because employers should be concerned primarily with the issues of whether they have complied with their obligations or engaged in discrimination, "the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis." [29 CFR 1630.2 \(j\)\(1\)\(iii\)](#).
- "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment." However, the degree of functional limitation required to be substantially limited is lower than the standard applied prior to the ADAAA. [29 CFR 1630.2\(j\)\(1\)\(iv\)](#).
- Determining whether a person's performance of a major life activity is substantially limited as compared to most people in the general population "usually will not require scientific, medical, or statistical analysis." However, the presentation of such evidence to make a comparison is not prohibited if appropriate. [29 CFR 1630.2 \(j\)\(1\)\(v\)](#).
- With the exception of ordinary eyeglasses or contact lenses, the ameliorative effects of mitigating measures are not to be considered in determining whether an individual is substantially limited in a major life activity. [29 CFR 1630.2 \(j\)\(1\)\(vi\)](#).
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. [29 CFR 1630.2 \(j\)\(1\)\(vii\)](#).
- An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment. [29 CFR 1630.2 \(j\)\(1\)\(viii\)](#).
- Impairments with an actual or expected duration of six months or less are only considered transitory under the "regarded as" paragraph of the definition of disability. "The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" under the other paragraphs defining disability. [29 CFR 1630.2 \(j\)\(1\)\(ix\)](#).





ADAAA/Rehabilitation Act Cont... Qualified Individual

- The "term '*qualified*,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." [29 CFR 1630.2](#) (m).

The Federal Employee Disability Continuum



- _____
- FMLA - ADA/EEO -- OPM Disability Retirement/ OWCP Workers Comp -- SSDI
- _____
- Less Stringent -----More Stringent

OPM Disability Retirement

Disability Retirement is a benefit for Federal Employees only that pays 60% of your high-3 salary for the first year and 40% until an employee reaches the age of 62.

You can make up to 80% of your salary at another job and not lose your disability retirement!



Disability Retirement for Federal Employees (OPM Disability Retirement)



- Disability Retirement for Federal Employees takes place when an employee can no longer do the essential functions of his or her job – or perform "useful and efficient service" in his or her position.
- This differs from the EEO Definition and the Social Security definition and falls in between.
- In EEO you can do your job but need an accommodation. When you cannot do your job anymore you cannot provide "useful and efficient service"
- With OPM Disability Retirement you cannot perform the job you are assigned to perform (per your position description).
- Social Security Disability takes it to the extreme you cannot perform any position.

Disability Retirement for Federal Employees (OPM Disability Retirement)



- An employee claiming entitlement to disability retirement under the FERS must meet the following requirements: 1) the employee must have completed 18 months of creditable service under FERS; 2) while employed in a position subject to FERS, the employee must have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance or, if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position; 3) the disabling medical condition must be expected to continue for at least one year from the date the application for disability retirement is filed; 4) accommodation of the disabling condition in the position held must be unreasonable; and 5) the employee must not have declined a reasonable offer of reassignment to a vacant position. See [5 USC 8451\(1\)](#); [5 CFR 844.103\(a\)](#); *Thieman v. Office of Personnel Management*, [98 FMSR 5118](#), [78 MSPR 113](#) (MSPB 1998); *Snow v. Office of Personnel Management*, [97 FMSR 5179](#), [74 MSPR 269](#) (MSPB 1997).

Social Security Disability Insurance for FERS Employees

- **Total Disability or All Occupations**
- For all individuals applying for disability benefits under title II, and for adults applying under title XVI, the definition of disability is the same. The law defines disability as the ***inability to engage in any substantial gainful activity*** (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months.
- <https://www.ssa.gov/disability/professionals/bluebook/general-info.htm>



Federal Employee Compensation Act/ Workers Compensation (FECA)



3. Permanent Total Disability. The FECA provides that loss of both hands, arms, feet, or legs, or the loss of sight of both eyes is *prima facie* evidence of permanent total disability. See 5 U.S.C. 8105(b). It does not mean, however, that a claimant in this medical condition should be automatically declared permanently and totally disabled. Some individuals may be able to work despite such severe medical conditions, and the possibility of rehabilitation and/or reemployment should be explored before any declaration is made.

In very few other cases is it necessary or desirable to make a determination of permanent and total disability. Such a determination confers no additional benefit on the claimant, and it could result in forfeiture of other rights that a claimant may possess under other Federal laws. Therefore, it is usually sufficient to continue payments for temporary total disability (TTD), even where efforts to reemploy and/or rehabilitate the claimant have failed.

In the rare instance where such a determination is appropriate, it should be based on the evaluations of the attending physician or other physicians who have examined the claimant. Such a determination does not supersede any award which may be payable for a schedule impairment. Whenever a case involves both permanent total disability and schedule impairment, the CE should pay the schedule award and then continue compensation for permanent and total disability at the expiration of the schedule award. It may be necessary to first obtain an election if the claimant is also receiving an annuity from the Office of Personnel Management (OPM).

Note - There is no specific case status to differentiate or classify a claimant as permanently, totally disabled as defined by 5 U.S.C. 8105(b).

Family Medical Leave Act (FMLA)



- The **FMLA** was designed to address the impact of societal changes on the workforce, mindful of the needs of those who are dependent upon family members for support and care. Accordingly, the **FMLA** provides eligible employees, in any 12-month period, with up to 12 weeks of unpaid leave for the birth, adoption or foster care placement of a child, or due to the **serious health condition** of the employee or the employee's spouse, child, or parent. Employees taking **FMLA** leave may retain their benefits and seniority and return to their former positions, or to an equivalent one with the same terms and benefits, after the leave period.

FMLA and its Unique Characteristics

- The FMLA is the only law we are discussing today that allows for an employee to take leave based on another person's disability in addition to their own disability. A person can take leave to assist:
- There are two different laws Title I and Title II that apply to different groups of employees based on what agency that employee works with. These Titles have nuanced differences.
- A serious health condition is generally defined as

Family Medical Leave Act (FMLA) - Who and What are Covered – Birth, Adoption and Foster Care

- The FMLA provides eligible employees, in any one-year period, with up to 12 weeks of unpaid leave for the birth, adoption, or foster care placement of a child. [5 USC 6382](#) (a)(1)(A)-(D); [5 CFR 630.1203](#) (a).
- Under the FMLA, federal employees are entitled to a total of up to 12 workweeks of unpaid leave during any 12-month period for one or more of these purposes related to childbirth:
 - The birth of a son or daughter of the employee and the care of such son or daughter.
 - The care of a spouse, son, or daughter, or mother of the employee who has a serious health condition.
 - A serious health condition that makes the employee unable to perform the essential functions of her position.

FMLA – Who is disabled?

Serious Health Condition – Yours or Immediate Family Member

- Title I defines a "serious health condition" as an "illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." [29 USC 2611](#) ; [29 CFR 825.102](#).
- An employee's need to attend CSE/IEP meetings addressing the educational and special medical needs of their children -- who have serious health conditions as certified by a health care provider -- is a qualifying reason for taking intermittent FMLA leave. [DOL, WHD Opinion Letter FMLA2019-2-A](#).
- An organ donation can qualify as an impairment or physical condition that is a serious health condition under the FMLA when it involves either "inpatient care" under [29 CFR 825.114](#) or "continuing treatment" under [29 CFR 825.115](#). An organ donation would qualify as a serious medical condition whenever it results in an overnight stay in a hospital, but that is not the only means for organ donation to involve "inpatient care" or "continuing treatment." [DOL, WHD Opinion Letter FMLA2018-2-A](#).

FMLA and its Relationship with EEO/ADA Laws

- A request for FMLA leave for a serious health condition may also constitute a request for reasonable accommodation and, when it does, the FMLA request is considered protected EEO activity.
- Because an employee may be an individual with a disability under the ADA and have a serious health condition under FMLA, the employee may actually be entitled to leave under both statutes. However, the leave is overlapping. The employee may be entitled to 12 weeks leave under FMLA and, if that is all the leave required by the employee, an agency fulfills its obligation under both statutes by granting FMLA leave. If the employee needs leave beyond the 12 weeks, the agency must then grant the leave if it would not impose an undue hardship on the agency.

Disabled Veteran Leave for Federal Civilian Employees



- On Nov. 9, 2015, President Barack Obama signed into law the Wounded Warriors Federal Leave Act, [PL 114-75](#) (codified at [5 USC 6329](#)). Under the law, federal employees with a service-connected disability rating of 30 percent or greater, as qualified by the Department of Veterans Affairs, will have access to up to 104 hours or 13 days of sick leave for medical treatment related to their disabilities during their first year of civilian employment. The purpose of this benefit is to help newly hired veterans who begin federal service without any sick leave but need medical treatment for their service-connected disabilities.
- The act defines service-connected disability to include noncombat-related injuries. Any leave not used during an employee's first year is forfeited. Individuals using this new type of leave must certify that use of the leave was related to treatment of their disability. Beginning Nov. 5, 2016, agencies must credit newly hired veterans who have a service-connected disability rating of 30 percent from the Veteran Benefits Administration with 104 hours of **disabled veteran** leave for a 12-month period beginning on the "first date of employment."
- The regulations governing [≤ disabled veteran ≥](#) leave are available at 5 CFR Part 630, Subpart M ([5 CFR Part 630.1301-.1308](#)).

CONCLUSION

- The reason I created the program was after over 20 years of practicing Federal Employee law and assisting thousands of disabled federal employees including many Veterans Administration employees, I found that keeping track of the all the different definitions of what makes an employee disabled can get very confusing.
- Hopefully, many of these definitions cross over into other areas of law and this seminar is helpful to even nonfederal employee practitioners and employees.

Thank You!