

## **THE LAW AND ASTHMA PROBLEMS IN THE WORKPLACE: WHAT EMPLOYERS NEED TO KNOW**

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### **ABSTRACT**

Asthma is a growing societal and industrial problem in the United States. Asthmatic employees cause many disruptions and lost productivity in the workplace due to their unexpected and frequent absences. Should the problem persist employers will want to take actions such as progressive discipline to correct the situation. However, companies must be aware of the various legal pitfalls they will encounter along the way. Asthmatic workers are covered by various federal and state disability and family leave laws. This article discusses the ramifications of these laws primarily from a federal legal perspective (Americans with Disabilities Act and Family Medical Leave Act) when dealing with an asthmatic employee.

There are currently about 17 million asthma sufferers in the United States [1]. This represents a 26 percent rise over 1993-1994, and the number is expected to continue to rise [1]. Once thought of as just a childhood disease, asthma is striking adults at an alarming rate [2]. In fact, reported cases among adults have more than doubled over the past 20 years [2], and as many as 15 percent of all asthma cases may be traced to on-the-job irritants [3]. This can lead to many unforeseen absences from work.

Asthma also poses serious problems for employers in terms of having to cover the job, overtime, administrative hassles, loss of job continuity, and even lost production and sales. In fact, annual national treatment for asthma costs on a national basis is over 6 billion dollars [4]. Employers who take affirmative steps

to deal with this problem, including progressive discipline should be cognizant of the various legal pitfalls associated with these cases. Toward that end, this article examines asthma and its related absenteeism under the lenses of current law.

### DISABILITY ACTS

Within the purview of federal law, asthma may qualify as a disability under the Vocational Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) of 1990. The Rehabilitation Act is enforceable when federal agencies and federal contractors (contracts above \$2,500) are involved. The Americans with Disabilities Act, on the other hand, applies to any private employer with more than 15 employees and any temporary employees who work there [5].

Under these federal statutes, an individual is considered to have a “disability” if he has “a physical or mental impairment that substantially limits one or more of the major life activities of an individual, has a record of such impairment, or is regarded as having such an impairment” [5, at 36327]. To qualify as a disability, asthma must be an “impairment,” which is defined as any physiological disorder or condition that affects one or more “major life activities,” which, in turn are defined by Equal Employment Opportunity Commission (EEOC) regulations as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” [5, at 36327].

However, arguments that asthma significantly affects the major life activity of caring for one’s self as evidenced by washing and styling one’s hair and cleaning one’s house have not been upheld [6]. One might think that asthma would normally have a substantial effect on the major life activity of breathing, but in most cases the courts find that it does not [6-10]. For asthma to meet the definition of “substantially limiting,” it must affect breathing to a “considerable” or “to a large degree” [11]. In other words, a great deal of the time.

Failure to meet this test may result from advances in medical technology, which have dramatically reduced asthma’s effects on breathing. In fact, most asthma cases are almost completely 100 percent controllable. If asthma becomes fully controllable no major life activities will be affected, and hence the impairment will not have legal protection [11]. However, individual responses to medical treatment vary as do the environmental conditions that precipitate the disease. As a consequence, many asthmatic employees could still meet the legal definition of disabled.

However, individuals whose asthma is not controllable despite the best medical efforts and who cannot demonstrate that their breathing has been substantially affected, may still be able to show that the major life activity of “working” has been affected. EEOC regulations include working as a major life activity and allow individuals to file under this provision provided the person “is not substantially limited with respect to any other major life activity” [5, p. 36327].

The fact that an asthmatic has a substantial limitation on his/her ability to perform a particular job will not cause him or her to be considered legally disabled [12, 13].

To qualify as an impairment under the ADA with respect to “working,” asthma must prevent the worker from performing not just the jobs he holds or desires but a broad class of jobs as well [10]. For example, a low-level maintenance employee of the city of Ventura California [9], who was suffering from asthma, experienced difficulty in breathing around diesel fumes. However, he admitted that he often performed other jobs outside his regular job such as landscaping, painting, laying ceramic tile, and working as a late-night security officer. Since he could perform a broad range of jobs, he was not considered disabled within the definition of federal law [9]. Similarly, a correction officer who had difficulty breathing in a smoked-filled prison but admitted he was able to perform other outside jobs was not entitled to coverage [7]. In another case, a teacher was having asthma attacks, which affected her ability to teach at one high school [8]. However, after voluntarily transferring to another school, she was able to work as a teacher in the same job with no ill effects [8]. As a result, she did not meet the legal threshold for disability protection, and her disability lawsuit was dismissed [8].

### **Organizational Response**

Asthmatics who are experiencing excessive absences should be evaluated by a qualified physician as to their ability to perform the job with or without reasonable accommodations [14]. As a by-product of this examination, organizations should be able to determine the individual’s legal status under ADA. However, companies should not require a medical examination solely for the purpose of determining whether or not such an employee is an individual with a disability, because this is prohibited under ADA [14]. At no time during and after this process should management refer to the asthmatic employee as being disabled or as having a sickness. Some courts may rely on these statements as evidence that an organization regards the person as handicapped. However, it is acceptable to say the person has an attendance problem.

Under the definition of disability described above, merely regarding someone as disabled can qualify a person as being legally disabled even though there is no record of a disability, or the person does not feel believe he is impaired. If management either “mistakenly believes that a person has a physical impairment that substantially limits one or more life activities or mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities,” that person can be protected by the law [11, at 42]. If the organization then takes an action that adversely affects the person’s actual or potential employment, the organization may be liable. For example, in a case involving obesity, a morbidly obese woman was denied a job in a state institution for the mentally impaired. The manager mistakenly thought she was too obese to perform the work adequately and refused to hire her. The courts found this to be sufficient to qualify

her as handicapped even though she could actually perform the job without accommodation [15].

Similarly, management actions toward an employee can be used as evidence to prove the organization regards him/her as disabled. In at least one instance, when the person's asthma was fully controllable, transferring an asthmatic to another job because the company (mistakenly) did not think the asthma was controllable, was enough for the courts to decide that the company regarded the individual as disabled [16].

Conversely, the employer must have some knowledge of the disability in order to be held liable for any adverse actions taken against the disabled individual [17]. This knowledge may stem from many sources: request for an accommodation; casual conversation; or written material furnished to the company in the form of a job physical, periodic medical examinations, doctor's letter, etc. [17, 18].

### **Is the Individual Qualified?**

If a company discovers that an employee has a disability, the employer then has to determine whether the employee is qualified to do the job with or without a reasonable accommodation. A qualified individual under ADA is someone with a disability who can perform the essential functions of the job with or without a reasonable accommodation.

Work attendance has been ruled to be an essential function of most jobs [19-22]. However, firms must have documentation of a job analysis to demonstrate that attendance is an essential function of the job in question. It is then up to the asthmatic to show that he/she can perform the essential functions of the job with or without reasonable accommodation [23].

Assuming it is an essential function of the job and there is no reasonable accommodation, or such actions have proven unsuccessful and the asthmatic's attendance persists, the organization should follow its policy for dealing with absenteeism. However, before initiating progressive discipline, organizations should first examine their records to determine whether they have allowed similar poor attendance records for others holding comparable jobs. If there are similar cases and no action has been taken, the employer must provide the asthmatic like consideration. Otherwise the organization would be in violation of the ADA if the worker meets the legal definition of disabled and would probably lose any subsequent discrimination case, as did the Federal Deposit Insurance Corporation [24]. Firms must also make a legitimate effort to reasonably accommodate the disability.

### **Reasonable Accommodation**

However, if the employer can remove or reduce the conditions that cause the asthmatic to lose time, it must do so in order to comply with the reasonable accommodation requirement of the act. This compliance effort must involve an

interactive process between the worker and the company. In a union environment, this discussion should involve the union representative as well. Any accommodation requested that violates the union contract is considered an undue hardship on the employer [25]. However, it is at the union's discretion to grant a variance to the collective bargaining agreement.

Asthmatic employees who are undergoing treatment and are experiencing excessive absences could be entitled to a leave of absence under ADA. Federal courts have stated that short unpaid leaves of absences for individuals adjusting to medication or other medical treatment are a reasonable accommodation and must be allowed unless the organization can demonstrate that the action causes an undue hardship on the firm [26]. Undue hardship is based on each firm's financial resources and its own characteristics. However, the courts have concluded that for most organizations a short leave of absence (as long as 30 days) would not be an undue hardship [26]. In deciding whether some other types of accommodations are an undue hardship, the Sixth Circuit Court of Appeals used as a guiding principle that the costs of the accommodation should not exceed its benefits [27].

To accommodate an asthma patient, organizations can be required to monitor air quality in the workplace and if there is a problem, employers may be required to provide appropriate air filters [28], fans [29], and to move workers away from air ducts [30]. Organizations may also be required to provide a smoke-free work environment as a reasonable accommodation [24, 31]. Employers have been forced to transfer affected workers to jobs with purer air, alter their shift schedule and cleaning and maintenance schedules, and allow them to wear prescribed breathing apparatus [32]. Retraining employees for other jobs that would not aggravate the asthmatic condition is also a reasonable accommodation [33]. However, requests for an allergen-free workplace are considered too vague to inform a firm of the type of reasonable accommodation that might be required [32].

### **State Disability Laws**

Often ignored but no less important is the array of disability acts enacted by the various states which cover both the private and public sectors. State law takes on particular significance in light of the Supreme Court's 2001 ruling that State employers are not covered by the Americans with Disabilities Act [34].

While most state laws closely follow ADA requirements, a number do not. For instance, many states cover both the private and public sector; however, some states such as Alabama and Florida protect only individuals in the public sector. More important, at least 20 states (see Table 1) have passed laws protecting the disabled that contain substantially different disability definitions from those of the ADA [35]. While these state laws are too numerous to detail within this article, it is clear that the definition of disability at the state level is often broader

Table 1. States Whose Disability Laws Contain Definitions Varying from Those of the ADA

California	Michigan
Colorado	Montana
Connecticut	Nebraska
District of Columbia	New Jersey
Idaho	New York
Illinois	Ohio
Kansas	Oregon
Kentucky	South Carolina
Maine	Washington
Maryland	Wisconsin

and more inclusive of impairments such as asthma than is federal law. For example, California includes in its definition of disability any health impairment that requires special education or related services. New York allows any condition demonstrable by medically accepted clinical or laboratory diagnostic techniques [35].

### FAMILY MEDICAL LEAVE

The provisions of the Family Medical Leave Act (FMLA) of 1993 also cover asthma patients. This act permits qualified workers to take up to 12 weeks of unpaid leave in a 12-month period for a serious health condition. This leave may be taken in any increment [36].

There are many ways a health condition can be deemed serious. The minimum requirement for a “serious health condition” definition is missing more than three days of work and being under the care of a health-care provider. However, asthma is specifically mentioned in the FMLA regulations as an example of a chronic episodic illness, which is covered by the FMLA regardless of length of the health condition (many asthma-related absences are less than four days). Consequently, businesses should be careful not to deny asthma FMLA claims that are under four days. Otherwise, they are likely to lose the almost inevitable lawsuit [36, 37].

### FMLA Coverage’s and Notice Requirements

To be covered by FMLA, a firm must employ more than 50 employees in a 75-mile radius. Additionally, any worker with asthma must have been employed for at least 12 months and have worked at least 1250 hours in the 12-month period immediately preceding the date of the leave [36].

Upon each absence, the worker must notify the employer of need for leave. For someone with a chronic illness, simply stating, "I am sick today," can sometimes be enough to place the employer on notice for need of leave [31, 36]. However, usually the worker needs to give a qualifying reason, or specifically request FMLA leave. The worker must then be notified of his or her eligibility for FMLA leave and medical certification requirements. If the employer believes that the absence may be a qualifying event, it may also trigger the notice process. Once notified of FMLA rights, a worker must expressly request FMLA leave, otherwise the worker cannot later claim it was denied [38]. From a company perspective, it would be best in these situations for employers to document a waiver of FMLA rights, thereby avoiding potential costly litigation later.

### **Medical Certification**

Since asthma cases frequently lead to sporadic and sometimes lengthy absences with no apparent cause, employers often doubt the validity of these absences. However, a firm cannot terminate the worker just because it believes the employee is not really ill. It must have objective proof, usually in the form of a medical opinion [31]. Companies may require a medical certification for each asthma-related absence, but must then wait until the worker returns to work or is physically able to secure such certification [39]. However, if a worker is out for an extended period of time, the employer may require certification every 30 days for continued qualification.

Should the firm wish to challenge the medical certification, it must then request a second medical opinion (at the company's expense) by a doctor of the company's own choosing. As a rule, employers should question the veracity of the certification or ask for any needed clarification within two business days, or risk losing a legal confrontation [40]. If this opinion is contrary to the employee's doctor's determination, a third opinion must be ordered (at company expense). The company may also select the third physician, whose opinion is controlling.

### **FMLA Protections**

While on FMLA leave, workers are protected from any adverse employment actions such as discipline and termination for taking leave. However, if a termination/layoff is part of a general layoff and is not related to taking FMLA leave, there are no protections. Time off under FMLA cannot affect a worker's compensation or raise. It can affect the timing of an employee's raise if such a raise is based on length of service, and a company can delay giving a merit raise for the length of time an individual is on FMLA leave. This protection extends to perfect attendance award programs as well, since FMLA absences cannot be counted against perfect attendance records.

Workers who return from leave are also guaranteed the same or equivalent job. Simply placing a worker in another job with the same job title and pay is not

enough. One secretary upon return from extended FMLA leave was placed in a comparable position (same job title and compensation). However, the new job required about four hours more a day typing than her previous job. She sued the company for an FMLA violation and won [41].

### State Family Leave Laws

Forty-five states and the District of Columbia also have some version of their own family leave law [36]. Twenty-four states including Alabama, Maryland, and Texas have laws that pertain only to state employees. Twenty-two states and the District of Columbia (see Table 2) have statutes that also deal with the private sector. Again, many of these acts are significantly different from the federal FMLA. Employers should review the relevant law and court interpretations of the family leave law in their respective states to determine eligibility of asthmatic employees.

### NONEMPLOYMENT-AT-WILL EMPLOYERS

Some employers are covered by federal or state civil service regulations or have union contracts with just-cause provisions. Other employers work in states that allow only job-related employment actions (e.g., discipline, etc.) such as Montana [35], or for organizations that have company policies allowing only job-related employment actions (e.g., discipline, etc.). Employees in these work environments can be disciplined or terminated only for job-related reasons. In such situations, asthmatics can be disciplined only for work absences when others have been similarly disciplined for comparable attendance records. Otherwise, firms risk losing an arbitration or wrongful termination lawsuit.

Table 2. States Whose Family Leave Laws Affect Private Employers

Alaska	Minnesota
California	Montana
Colorado	Nebraska
Connecticut	New Jersey
Delaware	Oregon
District of Columbia	Rhode Island
Hawaii	Tennessee
Iowa	Vermont
Kentucky	Washington
Louisiana	West Virginia
Maine	Wisconsin
Massachusetts	



## GENERAL CONSIDERATIONS

Many asthmatic workers will not meet the legal definition of handicap under federal law, or even under the broader protections provided asthmatics under many state laws. However, businesses should not take the expedient course of action by refusing to accommodate the problem or even terminating these individuals. Many asthmatics have proven to be excellent workers until they manifested the debilitating effects of their disease. Finding reasonable ways to accommodate their needs is not only the humane thing to do, it is the smart business decision. These actions should be extended to union environments as well, so long as there is no breach of the collective bargaining agreement.

Moreover, more than 60 percent of asthma sufferers underestimate their condition and also tend to overestimate how well they are managing the disease [1, p. 4]. Proper management can eliminate many asthma-related employment problems. Consequently, company officials need to be sure that affected workers are receiving proper medical attention and following prescribed treatment regimens.

By following these steps, companies will not only retain good workers but will save the attendant replacement and disability costs. In fact, major employers who actively work with employees through integrated disability-management programs to accommodate potentially debilitating problems (legally disabled or not) report reductions in disability-associated expenditures by as much as 15 to 20 percent [43]. Moreover, such foresightedness usually pays off in terms of increased loyalty, commitment, and feelings of fair treatment by both the affected worker and coworkers who observe their employer going the extra mile for an employee.

## CONCLUSIONS

Asthma appears to be a by-product of a sophisticated industrialized society and hence will be an ever-increasing problem for employers in the 21st century. While asthma is a controllable disease, for the most part, many work environments can exacerbate the illness and cause sudden attacks. Moreover, this illness can be as frustrating for the employer as it is for the stricken employee due to its disruptive, perplexing, and often-unpredictable nature.

Consequently, prudent employers will want to move quickly to create a disability policy that addresses chronic illness. In addition, there should be a policy that deals with attendance problems, if one does not already exist. However, employers should be aware of the potential legal requirements regulating their actions in asthma-related cases.

Because of the legal definition of handicap, many asthmatics will not be protected under federal disability statutes. However, they are often covered at the state level and are usually entitled to protection under the various family leave acts and in nonemployment-at-will situations.

Regardless of potential legal restrictions, employers should be sensitive to their employees' needs. In fact, savvy employers have figured out that a can-do attitude for employees with impairments is good for profits and productivity [43].

### ENDNOTES

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