Issues and Considerations Involving the ADA/FMLA and Post-Accident Resignation
An Oasis in the Workers’ Compensation Desert

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Introduction

For injured or seriously ill employee, employers must consider the following:

- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Workers' Compensation Laws.
Considerations may include:

- **Eligibility/Coverage Issues**
- **Confidentiality**
- **Hiring Decisions**
  - Medical-related questions; exams; accommodations
- **Leaves of Absence**
  - Absenteeism; medical certification; accommodation; light duty
- **Return to Work**
  - Fitness for Duty Exams; reasonable accommodation; light duty
Enforcement

The fact that the ADA, FMLA, and workers' compensation laws are enforced by three different branches of state or federal government makes an employer's compliance analysis even more complicated.

Workers' Compensation - Department of Labor, Workers’ Compensation Division

ADA - Equal Employment Opportunity Commission

FMLA - Department of Labor, Wage and Hour Division
Is the Employee Eligible?

FMLA
- employed for 12 months (not required to be consecutive);
- 1,250 hours of service during 12-month period immediately preceding leave; and
- employed at site where 50 or more employees are employed by the employer within 75 miles of that site.
Is the Employee Eligible?

**ADA** - Protects "a qualified individual with a disability." That means one who:

- Is **disabled** within the meaning of the ADA;
- Is qualified for the position; and
- Can perform the essential functions of the job with or without reasonable accommodation.
Is the Employee Eligible?

Workers' Compensation protects employee who:

- Suffers an injury;
- arising out of employment; and,
- in the course of employment.
Distinguishing between "Injury" and/or a "Serious Health Condition" and/or a "Disability?"

• Employers must develop a technique for determining which laws apply to each employee's illness or injury.

• On-the-job injuries are usually easy to determine.
  o Exceptions
    ▪ Idiopathic injuries
    ▪ Gradual injuries

• An on-the-job injury may also be a "serious health condition" under the FMLA and/or "disability" under the ADA.
Serious Health Condition (FMLA)?

Any condition that requires:

1. Inpatient care (i.e. workers' compensation injury where employee is hospitalized overnight);

or
Serious Health Condition (FMLA)?

2. Continuing treatment by a healthcare provider, including:

   (a) incapacity of more than 3 consecutive calendar days that involves:

       (1) Treatment on 2 or more occasions; or

       (2) Treatment on one occasion which results in an extended absence.
Disability (ADA)?

Defined as:
(a) A physical or mental impairment that

(1) substantially limits 1 or more major life activity; or

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.
Example 1

Broken leg at work – tripped over her shoelaces

• compensable under the workers' compensation laws?

• “serious health condition” warranting FMLA leave?

• "disability" under the ADA?
Example 2

Minor & temporary back injury from lifting a patient

- Compensable under workers’ compensation?
- Leave under FMLA?
- Disability under ADA?
  - Is it a “record of impairment”
  - Is he "regarded as" having an impairment.
Example 3

Employee severs arm doing yard work

- Workers’ Compensation?
- FMLA?
- ADA?
Confidentiality

- ADA requires medical information to be kept confidential
- Could result in a slap on the wrist from EEOC
- Could result in discrimination by co-workers/supervisors
Confidentiality

• Disclosure should be “consistent with business necessity”
• Disclose medical information only on need-to-know-basis
• Limit information disclosed to job related information
Confidentiality

Example: Employer obtains medical certification for employee’s leave

The employer should:
• Inform managers and supervisors only,
• that a medical leave has been granted,
• the length of the leave, and
• arrangements to cover the leave
Hiring Concerns

- The ADA limits the type of information an employer can obtain about prior medical conditions or w.c. claims.
- It depends on the stage of the hiring process.
Hiring Concerns

Stages of the hiring process:

• Pre-offer
• Post-offer, pre-placement
• Post-placement
Hiring Concerns
Pre-Offer

• ADA prohibits asking about prior w.c. claims or medical conditions
• Includes the applicant and third parties
Hiring Concerns
Pre-Offer (con’t . . .)

Includes:

- The application
- The interview
- Testing
- Reporting Services (credit reporting services)
- State Agencies (TDOL)
- Friends
- Family
- Former Employers
Hiring Concerns
(Post-Offer, Pre-Placement)

• may inquire about workers' compensation histories in a medical questionnaire or examination.
  o The questionnaires and exams must be required of all new hires in the same job category.
• may require a medical exam if a response to a medical inquiry discloses a previous on-the-job injury.
Permissible use of information, includes:

- to verify employment history,
- screen out applicants with a history of fraudulent workers' compensation claims, and
- screen out individuals who would pose a "direct threat" to the health or safety of themselves or others
Hiring Concerns (Post-Offer, Pre-Placement)

An employer may turn to third parties for medical information about the new hire, including:

- Prior Employers
- Relatives
- Credit Services
- Investigative Services
- Courts
- TDOL
- Medical Providers
Hiring Concerns
(Post-Offer, Pre-Placement)

Limitation: Employer may not withdraw a job offer unless the rejection is based on job-related information and is "consistent with business necessity." Meaning:

- The employee is not qualified,
- The employee will pose a direct and substantial threat to himself or others, or
- It will pose an undue hardship for the employer to accommodate the individual.
Hiring Concerns  
(Post-Offer, Pre-Placement)

- withdrawing an offer is job-related and justified by business necessity when there have been multiple W.C. claims denied in recent years.

- Why? Because an employer might have a legitimate business reason to believe that the person has submitted fraudulent claims.

- Withdrawing a job offer for this reason would not violate the ADA, because the decision is not based on disability.

Note: This is different from speculating that an employee may cause increased W.C. claims in the future, which would likely be a violation of the ADA.
Hiring Concerns
(Post-Placement)

• Once the new hire is placed on the job, that person becomes an employee.

• Employees cannot be singled out for medical exams or questionnaires except under narrow circumstances.
Hiring Concerns (Post-Placement)

No longer “hiring concerns”, just “concerns,” including:

- Leaves of Absence
- Return To Work
Leaves of Absence/Modified Work Schedule

Which laws control leaves of absence or modified work schedules?

• Workers’ Compensation Act?
• ADA?
• FMLA?
Leaves of Absence/Modified Work Schedule (FMLA)

- Medical Certification required
- 12 weeks of leave
- Leave can be intermittent
  - as little as one hour (a doctor's appointment)
Leaves of Absence/Modified Work Schedule (FMLA)

Options include:

• Reduced Work Schedule
  o Reduces hours per day or week

• Temporary transfer of employee to “equivalent” position is permitted if leave is due to planned treatment
  o Must have equivalent pay and benefits
Leaves of Absence/Modified Work Schedule
(FMLA)

• FMLA leave may run concurrently with workers' compensation absence.

• Even if the W.C. leave is paid time-off per employer’s policy
Leaves of Absence/Modified Work Schedule

(ADA)

- Leave could be required as an accommodation if no undue hardship on employer
- Includes modified work schedule

Note: a uniform absenteeism policy does not violate the ADA merely because it has a disproportionate impact on disabled employees.
Leaves of Absence/Modified Work Schedule (ADA)

- First try to accommodate current position
  - Reassignment to another position only permitted if accommodating current position creates an undue hardship
- Second try equivalent position
- Third, try lower-grade position
Leaves of Absence/Modified Work Schedule (ADA)

- An employee who has exhausted his FMLA leave may assert that a "reasonable accommodation" under the ADA for his disability-related occupational injury would be additional unpaid time off in excess of the 12 weeks FMLA allowance.
Return-to-Work Considerations

3 Primary Concerns:

• Fitness for Duty Exams
• Light Duty
• Reinstatement
Return-to-Work
(Fitness for Duty Exams)

- W.C.?: generally permitted to assess inability to work or ability to return to work
- FMLA?: Permitted provided employer has a uniform policy
- ADA?: Permitted if job related and consistent with business necessity
Return-to-Work (Light Duty)

- Under the FMLA, an employer may not force an employee to accept a light duty position in lieu of her FMLA leave.
- This is true even if the light-duty job was created to reduce w.c. benefits.
Return-to-Work
(Light Duty)

• Under the ADA an employer is not required to create light-duty positions to accommodate disabled employees.

• Unless . . .
Return-to-Work
(Light Duty)

Unless . . .

• Employer already has a vacant light-duty position;
• It is reasonable accommodation to temporarily reassign the disabled employee to that position;
• The employee could not be accommodated in his regular position; and,
• That reassignment would not cause an undue hardship on the employer.
Return-to-Work
(Light Duty)

- Care must be taken where an employer has reserved long-term, light-duty positions for employees with workers’ compensation injuries.

- The Employer should clearly state that the positions are temporary, and used to transition workers’ compensation employees back to work; otherwise, an employee covered by the ADA may try to claim the position as a permanent reasonable accommodation.
Return-to-Work
(Reinstatement)

- At the conclusion of FMLA leave, an employee is entitled to be reinstated to his or her original position or to an equivalent position.
Return-to-Work (Reinstatement)

• The FMLA does not require an employer to create a new position for an employee who returns from leave and is unable to perform the functions of his or her former position.
Return-to-Work (Reinstatement)

Under the ADA:

1. An employer cannot refuse to allow an employee to return to work simply because that employee cannot perform the "marginal functions" of the job.

2. May refuse such an employee return to work only if:
   
   (a) He cannot perform the essential functions of the job, with or without accommodations, or
   
   (b) He would pose a direct threat to the health or safety of the employee or others.
Return-to-Work (Reinstatement)

ADA Reasonable accommodation may include:

- Flexible hours,
- Part-time work,
- Intermittent leave,
- Redistributing the marginal functions, or
- Be creative.
Return-to-Work (Reinstatement)

• An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.

• i.e. Under the ADA, an employer may offer the employee a light-duty position in lieu of providing additional leave.

• But, under the FMLA, the employee is not required to accept the light duty assignment.
QUESTIONS?

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