

Navigating Through the Complicated Intersection of ADA, FMLA and Workers' Compensation WASBO Accounting Conference

November 2019

Agenda

- Speakers
- Overview
- Handouts – Decision Tree
- Situations and Discussion

Note: We will be speaking to federal regulations and requirements of ADA, FMLA and WC. We will be looking at situations that occurred in different parts of the country and referring you to look at State regulations that may apply to your state. However, by no means are we experts nor providing any legal advice for employers in the State of Florida.

Connection/Intersection of Three Laws

- Americans with Disabilities Act (ADA) 42 U.S.C. §12101 et seq.
- Family and Medical Leave Act (FMLA) 29 U.S.C. §2601 et seq.
- Workers' Compensation Act [your state's worker's compensation statute]

Note that we will be speaking to federal regulations and requirements of ADA and FMLA. The session will be looking at situations from federal case law where a school district or other local government entity was a defendant in an ADA and/or FMLA employment lawsuit. Worker's compensation and state laws regarding disability discrimination and family/medical leave differ by state. Our presentation will focus on federal law. We will not provide advice or information regarding Florida state law regarding worker's compensation or leave entitlement.

ADA Background

The ADA is a federal law that was enacted by Congress in 1990. Its stated purpose is to provide a clear mandate for the elimination of discrimination against individuals with disabilities. The ADA prohibits discrimination on the basis of disability in employment, public services and accommodations.

Americans with Disabilities Act (ADA)

- Employment Goal: No employer shall discriminate against a qualified individual on the basis of disability in any aspect of employment.
- Main concerns:
 - Is the employee a qualified individual with a disability?
 - What is the employer's reasonable accommodation obligation?

The Americans With Disabilities Act (ADA) Amendments Act of 2008 (ADAA)

- Most significantly, the ADAAA expands the definition of disability:
 - Redefines the term "substantially limits" a major life activity to include any health condition that may affect a major life activity
 - Expands the definition of "major life activity"
- "Major life activity" includes activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating)
- Mitigating measures (e.g., medication that manages the condition shall not be considered in assessing whether an individual has a disability;
- Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

Family Medical Leave Act (FMLA) – Federal

The FMLA is a federal law that was enacted by Congress in 1993. Its stated purpose is to entitle employees to take up to 12 weeks of unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.

FMLA

- Leave entitlement
 - Total of 12 workweeks of leave during a 12-month period
 - Birth or adoption of a child,
 - Care for the employee's spouse, parent or child with a serious health condition or
 - Because the employee has a serious health condition that makes the employee unable to perform the functions of his or her job.
- Right to return
 - Employee Entitled to return to his or her position of employment or an equivalent position.
- Continuation of benefits

Workers' Compensation

The purpose of worker's compensation laws is to enact a compromise between employers and employees regarding compensation for work-related injuries.

Before worker's compensation legislation was passed, a worker's only remedy for a work-related injury was to sue the employer for negligence.

Under a state's Workers' Compensation Act, the employer agrees to compensate an employee for a work-related injury according to a payment schedule. In return, the employee and his/her heirs give up the right to sue the employer for damages associated with the work-related injury or death of the employee.

Workers' Compensation – General Procedures

- Insurance mandated by state law
- Compensation:
 - Employee files a notice of claim (First Report of Injury) with the employer and the employer's workers' compensation insurer.
 - Insurer adjusts the claim.
 - If injury is determined to be work-related, the insurer pays the employee according to the statutory payment schedule.
- Exclusive remedy
 - Workers' compensation – intended to be the exclusive remedy for work-related injuries.

Workers' Compensation Special Circumstances

Leased or loaned Employees.

- Staffing or Temp agency:
 - Leased or loaned employees will be covered by the leasing or on-site employer's policy unless the leased or loaned employee is employed by the staffing or temp agency. When the leased or loaned employee is an employee of the staffing or temp agency, the agency's workers' compensation policy will cover those employees.
 - Should be covered by workers' comp as long as the injury was work-related.
 - Who is responsible for the coverage—the agency or the special employer—can depend on state law and the circumstances.

Relationship Between ADA/FMLA/WC

- An FMLA "serious health condition" is not necessarily an ADA "disability."

- An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
- Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes.
- Other "serious health conditions" may not be ADA disabilities, for example, pregnancy without complications or a routine broken leg or the flu. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting over time (e.g., a routine broken leg or the flu).

Relationship Between ADA/FMLA/WC

What can happen?

- Absenteeism – Major impact on educating students when educators experience extended absences during the school year.
 - Educators are human and school districts want to provide accommodation and support during periods of self or family illness or other health-related situations.
 - Student-teacher relationship is critical, especially at elementary level. How to support this relationship when a health situation occurs.
- Reasonable accommodation – what is reasonable in a K-12 environment?
 - When does a requested accommodation cause an undue hardship requiring denial of the accommodation?
 - Is extended leave a reasonable accommodation for an educator? At what point is extended leave an undue hardship for the school district?

Checking the Intersection

- A work-related injury may be an ADA-qualifying impairment requiring a reasonable accommodation, but an employee cannot sue under the ADA for a work-related injury.
- FMLA leave time can run concurrent with workers' compensation leave if the employer's handbook policy provides for concurrent leave. If the employer's policy does not specify concurrent leave, the employee may be entitled to take FMLA leave after maximum medical improvement is reached.
- FMLA leave time can be a reasonable accommodation under the ADA. Put differently, a qualified individual with a disability may be entitled to take FMLA leave as a reasonable accommodation even when the employee's attendance is otherwise not in compliance with the School District's attendance policy.
- Indefinite leave beyond the employee's FMLA leave entitlement is not a reasonable accommodation in the Seventh Circuit (Wisconsin, Illinois and Indiana) but some extended leave may be a reasonable accommodation.

- An employer may require use of paid leave during FMLA leave or, if the employer does not require it, the employee may choose to substitute paid leave for unpaid time during an FMLA leave.
- However, per a March 14, 2019, DOL Wage and Hour Division Advisory Opinion, neither the employer nor the employee can extend or delay a qualifying FMLA leave with paid leave (i.e., using paid leave first and then applying FMLA).
https://www.dol.gov/whd/opinion/FMLA/2019/2019_03_14_1A_FMLA.pdf

Relationship Between ADA/FMLA/WC

What can happen?

- Transfer request – Is a transfer request a reasonable accommodation (i.e., legally required) when the employee’s relationship with his/her principal or supervisor may have deteriorated?
 - What if the employee has been placed in a performance assessment status?
- Health care provider certification of serious health condition for FMLA
 - What if the certification is inadequate?
 - Can a school district challenge the certification?
 - If so, what are the parameters?
- Retaliation – At what point is the school district at risk for retaliation by enforcing its work rules?

Checking the intersection

- Multiple laws/benefits could apply at the same time
- Example: Employee injures his back on the job. He needs surgery and will be off work for 6 weeks, then he may be able to return for 20 hours a week with a lifting restriction for 4 weeks.
 - WC – Yes. He will get income replacement during the lost time and employer cannot retaliate or unreasonably refuse to rehire
 - FMLA – Yes, assuming threshold eligibility). He has a serious health condition. Time off protected up to 12 weeks.
 - ADA – Yes. He is substantially limited in a major life activity. He is entitled to reasonable accommodations absent undue hardship (leave, modifications).

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On the Horizon

- Medical marijuana,
- Opioid use disorder and
- Other items

Tools to Map Your Course

- Handouts
 - Comparison of major elements of regulations
 - Flowchart / decision chart for determining application of regulations to situations
- Presenters:
 - Lynn Knight, Nekoosa School District, WI
 - Julie Lewis, Lewis Law Office
- Use materials to consider some situations

FMLA Hours in a Week

- John says he cannot work more than 8 hours in a day and your district regularly requires custodians to work a 10-hour shift.
- Must you allow John to leave after 8 hours?

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Late Notice

- Employers can enforce call in procedures*
 - Discipline is not for the absence itself, but for the failure to call in
 - Be sure the policy is reasonable
 - Consider whether the ADA comes into play to excuse the late call-in (is the employee medically unable to call in?)

*Much litigation on this issue. Be careful of these situations!

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FMLA Exhausted

- Jane is approaching the end of her 12 weeks of FMLA.
- You have not heard from her during the leave and her doctor originally said she was not sure if Jane would be able to return at the end of the 12 weeks.
- What do you do?

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FMLA, ADA, WC

Share your challenges

ADA/FMLA/WC

Take the wheel and understand the roadway!

Thank you!

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