WHITEPAPER

FMLA/ADA/WC

NAVIGATING THE BERMUDA TRIANGLE

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Facing situations that involve requirements from more than one law is not new to employers. Employee leave is one such situation. Employees might have leave rights under the federal Family and Medical Leave Act (FMLA), but employers also might need to consider the federal Americans with Disabilities Act (ADA) as well as state workers' compensation (WC) laws.

The various requirements of these laws can include employer coverage, employee eligibility, an array of definitions, employee time away from work, alternative work assignments, and reinstatement rights.

Weaving through the maze of these requirements can be daunting, but by breaking down each situation and seeing how each law applies, it can be less complicated.

BASICS

The basics are familiar to most employers:

- The FMLA provides job-protected, unpaid leave,
- The ADA prohibits discrimination based on disability, and
- WC pays medical bills and provides for a percentage of income replacement.

But these laws also have benefits and protections that overlap. One reason is that the FMLA is enforced by the Department of Labor's Wage and Hour Division and the ADA's employment provisions are enforced by the Equal Employment Opportunity Commission (EEOC) —both federal agencies — while WC is governed by each state.

These agencies don't always communicate with each other, and this can result in different, but overlapping protections.

This paper will focus on the interaction of the requirements for federal FMLA and ADA and state WC.

Many states laws also provide employee rights to leave for various reasons. State leave laws can differ from federal laws by applying to smaller companies, covering additional reasons for leave, including more family members, or applying to situations that the federal law doesn't address, such as domestic abuse.

Employers must comply with the provision of each law that affords the greatest benefit to the employee. This whitepaper will not discuss the state leave laws.

Please note that the laws provide employee entitlements; they are not optional benefits.

EMPLOYER COVERAGE

When it comes to determining whether employers even have to worry about any of these requirements, they need to understand the employer coverage provisions of each law.

- The FMLA applies to private employers with 50 or more employees each working day during 20 or more calendar weeks in the current or preceding year. Public agencies are covered no matter how many employees they have.
- The ADA applies to employers with 15 or more employees who worked for the employer for at least 20 calendar weeks in the current or preceding calendar year.
- Generally, WC is required by nearly every employer.

The FMLA and the ADA cover both work-related and non-work-related conditions, while WC covers only work-related illness and injuries.

Just because a company is covered by the laws, does not mean that employees are entitled to take advantage of each law's benefits and protections. Employees must meet certain criteria.

EMPLOYEE ELIGIBILITY

Each of the three laws have their own employee eligibility criteria – what employees must meet in order to take advantage of the benefits.

Employees are not necessarily eligible for benefits under all three laws, but it is possible. Employers must be careful to analyze the circumstances of each case, under each law, before considering how the benefits might overlap for a particular employee.

THE FMLA

Under the FMLA, employees must meet three eligibility criteria before they may take leave:

1. They must have worked at least 12 months for the company. These months, however, don't have to be consecutive. To help illustrate, let's say Jo Employee

> Employees can claim the protections even if employers fail to apply the law.

worked for the company for the last four months. Two years ago, however, Jo worked for nine months. In this scenario, Jo will meet the 12-month criteria. If Jo had a break in service of seven years or more, the time she worked before the seven years need not be included.

2. They must have worked a minimum of 1,250 hours during the preceding 12-month period to be eligible. All hours worked, including overtime, must be counted. However, things like sick leave, holidays, or previous FMLA leave time don't have to be counted.
3. They must also work at a site with 50 or more company employees within 75 miles. The 75 miles should be measured by surface miles using the most direct route between worksites. Note that the reference to 75 miles is not an issue in determining employer coverage. It is only a factor in determining whether the employee is eligible for leave. For remote employees, their personal residence is not a worksite. Rather, their worksite is the office to which they report and from which assignments are made.

> Please note that this whitepaper does not address airline flight crewmembers.

If an employee meets all three eligibility criteria, the employee is entitled take FMLA leave, but only for a qualifying reason.

Some qualifying reasons will not involve WC or the ADA (such as caring for a newborn or an ill family member). Therefore, we will focus only on situations that qualify as an employee's serious health condition.

THE ADA

The ADA does not have any true employee eligibility criteria like the FMLA. Under the ADA, applicants and employees are eligible for the law's nondiscrimination protections if:

- They have an impairment that substantially limits one or more major life activities,
- They have a record of such an impairment, or
- The employer takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory (lasting six months or less) and minor.

Under the last bullet point, if employers treat employees as disabled, employees are protected even if the condition does not meet the legal definition of a disability.

WC

Each state develops its own rules with regard to WC, but all states follow a general premise, whereby an employee may receive benefits if an injury or illness occurred while the employee was performing some task in the interest of the employer or in the scope of employment.

For each case, the workers' compensation insurance carrier (or other managing agency) should determine if an injury is covered.

Employers should not prevent an employee from filing a claim.

If the injury or illness is not covered, the claim will be denied by the insurer.

If, however, employers fail to file a first report of injury by the deadline, the claim could be denied, but the company could still be held liable for the related medical costs.

Again, the employer's failure to meet its responsibilities does not take away the employee's rights.

QUALIFYING REASONS FOR TIME OFF

Employees are not entitled to time off for any and all reasons under any of the three laws. The reason must be a qualifying one, and each law has its own related provisions.

The FMLA

Under the FMLA, employees may take leave for the following reasons:

- For birth of a son or daughter, and to care for the newborn child;
- For placement with the employee of a son or daughter for adoption or foster care;
- To care for the employee's spouse, son, daughter, or parent with a serious health condition;
- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;
- Because of any qualifying exigency arising out of the fact that the employee's family member is in the military; and
- To care for a family member who is a covered servicemember with a serious injury or illness.

Not all of these FMLA qualifying reasons will intersect with the ADA and WC. Only situations involving the employee's own serious health condition will. Therefore, only the fourth bullet would apply.

The WC provisions will apply only for occupational injuries or illnesses.

FMLA SHC (SERIOUS HEALTH CONDITION)

The FMLA does not have a list of conditions for which employees may take leave. The name of a condition or procedure is not the determining factor. The determining factor is whether the condition meet's the FMLA's definition of a serious health condition.

The FMLA's term "serious health condition" is intended to cover conditions that make an employee unable to perform one or more of the essential functions of his or her job or otherwise live a normal life. It's not intended to cover minor, short-term conditions, since these are normally covered by sick leave policies.

An FMLA "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves **inpatient care** and/or **continuing treatment**.

Inpatient care involves at least an overnight stay in a health care facility.

Continuing treatment, however, is more complicated. It can involve any of the following:

- A period of incapacity of more than three calendar days that also involves continuing treatment by (or under the supervision of) a health care provider;
- Any period of incapacity due to pregnancy, or for prenatal care;
- Any period of incapacity due to a chronic serious health condition (such as asthma, diabetes, or epilepsy) or treatment for it;
- Any period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (such as Alzheimer's, stroke, or terminal disease); and
- Any period absence to receive multiple treatments (including any recovery that follows) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (such as chemotherapy, physical therapy, or dialysis).

To help determine whether or not an employee has a serious health condition, employers may require that employes provide a certification supporting the need for leave. The certification must include such information as:

- A description of the serious health condition,
- The date that the condition began, or treatment became necessary, and
- The expected duration of the condition or treatment

The U.S. Department of Labor has model certification forms to use. Employers need not use the model forms, but may ask only for information that relates to the employee's serious health condition that requires the need for leave.

If the reason for the absence qualifies, employers are obligated to designate the absence as FMLA leave and notify the employee of this.

Employees may can claim the FMLA job protections on the basis that the employer should have designated the leave, even if it failed to do so.

Even if an employee asks not to "use" his or her FMLA leave, employers are still responsible for designating the absence as FMLA leave because the employee is entitled to the job protections either way. It is always up to the employer to designate qualifying leave as FMLA.

An employee on FMLA leave may be entitled to more leave than provided under the FMLA if the serious health condition rises to the level of a disability as defined in the ADA.

> An employer's failure to designate leave does not take away the employee's rights.

The ADA

A disability under the ADA is a physical or mental impairment that substantially limits one or more major life activities. This definition is different than the FMLA's definition of a serious health condition.

A *physical impairment* is any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

A *mental impairment* is any mental or psychological disorder, such as intellectual impairments, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Similar to the FMLA, the ADA has no list of diseases or conditions that make up "physical or mental impairments." It would be impossible to provide a comprehensive list, given the variety of possible impairments.

When determining whether an impairment substantially limits a major life activity, employers should follow these rules of construction:

- Apply the term ("substantially limits") broadly in favor of expansive coverage. Do not spend much effort on it.
- Significant or severe restriction is not required. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, not every impairment is substantially limiting.
- The primary focus should be whether the employer has complied with its obligations and whether discrimination has occurred. The primary focus should not be whether an impairment substantially limits a major life activity. Employers shouldn't need to perform extensive analysis.
- To determine whether an impairment substantially limits a major life activity, employers need to perform an individualized assessment.
- Employers shouldn't need to use scientific, medical, or statistical analysis to determine whether someone can perform a major life activity compared to most people in the general population. Employers may, however, where appropriate.
- Don't consider mitigating measure (other than ordinary eyeglasses or contact lenses) when making a determination. It doesn't matter if an individual chooses to forgo mitigating measures.
- It doesn't matter if the impairment is episodic or in remission.
- Individuals do not need to be substantially limited in more than one major life activity.
- Effects of an impairment lasting fewer than six months can be substantially limiting.
- Impairments that last only a short period of time may be covered if sufficiently severe.

Major life activities include, but are not limited to, the following:

- Caring for oneself
- Walking
- Speaking
- Performing manual tasks
- Sensory functions (like seeing and hearing)
- Working
- Learning
- Breathing

Working does not necessarily mean being able to perform a particular job, but instead refers to the general concept of working. The EEOC expects that most cases involving the major life activity of working will be resolved under the accommodation provision or the "regarded as" provision.

A *major life activity* is also the operation of a major bodily function, including, but not limited to normal cell growth as well as functions of the following systems:

- Immune system
- Bowel
- Neurological
- Respiratory
- Musculoskeletal
- Reproductive
- Digestive
- Bladder
- Brain
- Circulatory
- Endocrine

These lists are by no means all inclusive. The situation will depend upon the specifics of each individual.

To be protected by the ADA, the employee must be qualified for the job; that is, he or she must meet the skill, experience, education, and other job-related requirements of the position held or desired, and must be able to, with or without reasonable accommodations, perform the essential functions of a job.

A word about pregnancy

Pregnancy is an FMLA serious health condition, but pregnancy, by itself, is not a disability under the ADA. Pregnancy-related disabilities, such as preeclampsia and gestational diabetes, however, can be disabilities.

WC, on the other hand, should have nothing to do with pregnancy, as it is not work-related.

WC

With WC, a covered injury or illness could include any work-related accident or health condition, no matter how minor.

A key term is “work-related” which typically means anything that arises from performing job tasks. For example, if an employee develops a skin rash from chemical exposure at work, or suffers from chronic work-related health conditions that develop over time, the condition can be covered. Non-work-related conditions — for example, injuries that occur while playing basketball at home — are not generally covered by WC.

Of course, some work-related injuries will require time away from work for recovery.

An employee on a WC absence could also be entitled to FMLA leave if the illness or injury is a *serious health* condition.

Some employers are unsure if workers’ compensation absences are covered by FMLA. A DOL Opinion Letter from July 1994 states that “Congress clearly intended for the term “serious health condition” to include an injury sustained on the job, like a workers’ compensation injury,” as long as it meets the definition of a serious health condition.

Therefore, leave under the FMLA and WC can concurrently.

LEAVE ENTITLEMENTS

Once an employee is eligible for benefits under any of these laws, employers must establish the employee’s rights for time away from work. An employee might need to take time off for a few hours to visit a doctor, or for several months while recovering from surgery.

The FMLA

Under the FMLA, employers must provide up to 12 weeks of unpaid, job-protected leave in a 12-month leave year period, and maintain group health coverage during the leave.

Employees need to give notice of the need for FMLA leave, but they need not specifically ask for FMLA leave. It is the employer's responsibility to recognize when an employee is providing notice of the need for leave.

When employees provide notice of the need for leave, employers must give them information about their eligibility, rights, and responsibilities.

Once employers have enough information to designate the absence as FMLA leave, they must notify the employee of this designation.

The ADA

Unlike the FMLA, the ADA is not a leave law. It does, however, require employers to provide reasonable accommodations to the known disability of an employee (or applicant). Leave can be a reasonable accommodation when people with disabilities require time off from work because of their disability.

Employers might not be required to provide additional paid leave as an accommodation, depending upon the circumstances, but they should consider allowing use of accrued leave, advanced leave, or leave without pay.

An alcoholic or recovering addict might, for example, need time off work to attend treatment sessions or recovery meetings. Since these conditions are considered disabilities under the ADA, the time off to attend treatment can be a reasonable accommodation. In fact, these conditions can also be covered by the FMLA.

The ADA does not dictate how much leave employees get as an accommodation. Employers need not provide an accommodation that poses an undue hardship, so if a certain amount of leave does not pose such a hardship, it would be considered reasonable.

A uniformly applied leave policy does not violate the ADA because it does not have a more severe effect on an individual with a disability. If, however, an individual with a disability requests modification of such a policy as a reasonable accommodation, employers may be required to provide it. The ADA can require flexibility with such policies. The EEOC frowns upon inflexible leave

policies, including no-fault attendance policies where an employee is terminated for missing a certain number of days of work.

If an employee exhausts FMLA leave and does not qualify for any additional leave, the employee might no longer have rights to job restoration under the FMLA, but extra time off may be a reasonable accommodation under the ADA.

Employers don't need to provide a particular accommodation just because an employee asks for it unless it's medically necessary. Employers may look for alternatives that are less costly or disruptive. However, the accommodation offered must be effective.

Employers are not required to make a reasonable accommodation that would impose an undue hardship on the business. Employers must, however, consider if alternative accommodations would not impose a hardship and still be effective.

An undue hardship is an action that requires significant difficulty or expense in relation to the size of the employer, the resources available, and the nature of the operation. It is a fairly complex determination, since a hardship for a small company might be reasonable for a larger company with greater resources.

WC

Under WC, an employee may need time away from work to recuperate from a work-related injury or illness. WC provides benefits until the employee recovers.

Employers stay in contact with the employee (and the treating physician) to determine how long the employee will be off of work.

ALTERNATIVE WORK ASSIGNMENTS

The goal of all three laws is to have the employee return to work. Ideally, an employee will recover in a short time frame. Unfortunately, some injuries and illnesses require weeks or months of recuperation. Getting employees back to work as soon as possible through alternative work assignments offers many benefits.

Employers won't always have temporary work available, or won't have work available that meets the employee's restrictions. In these cases, the employee would likely stay out until recovered, at least until the condition improves or a new job assignment comes up.

Light duty

While light-duty programs can reduce costs, they aren't required by law, and sometimes employers won't have anything for the injured worker to do.

Under WC, offering "light duty" can reduce the cost of a claim and help the employee recover more quickly. Light-duty work should, however, be transitional. Ideally, light-duty jobs are temporary with the goal of getting the employee back to full duty. Some employees may never fully recover, and might require permanent job modifications.

Because some employees never return to full duty, it's important to create meaningful light duty rather than "make-work" jobs. The reason is that light-duty assignments could inadvertently create new job positions.

If, for example, an employee has been sweeping the floors for over a year, a court could argue that the company must need someone to continue sweeping the floors. Be aware that an extended light-duty job could become a permanent accommodation. A company's "light-duty" assignments must not only be transitional, but also meaningful to avoid this pitfall.

If an employee is off work under WC, but the situation also falls under FMLA, employers may offer a light-duty position, but the employee has the right to refuse it and choose to stay out on unpaid FMLA leave.

Of course, this refusal could result in a loss of certain WC benefits. Since the FMLA provides only for unpaid leave; this provision encourages employees to accept light duty.

When an employee is obtaining income replacement benefits under WC while on FMLA leave, the provisions for substituting accrued paid leave for unpaid FMLA leave do not apply because the employee is not on unpaid FMLA leave.

Q: What if the employee accepts a light-duty job and returns to work?

A: In that case, the time spent working that assignment can NOT be counted against the employee's 12-week s of FMLA leave.

Only the time they are actually not working may be counted as FMLA leave. Employers must also restore the employee to their original position or an equivalent position upon the end of leave or light duty.

If an employee requires intermittent leave, or a reduced leave schedule that is foreseeable under the FMLA, employers may require the employee to transfer to an alternative position which better accommodates any recurring periods of leave.

The alternative position must have equivalent pay and benefits, but it does not need to have equivalent duties. Employers may also alter an employee's existing job to better accommodate their need for intermittent or reduced leave. Note that "alternative" work is not the same as a "light-duty" job offer.

WC does not address wages for light duty, and the FMLA requires the same pay and benefits when the employee returns and can perform the essential functions of the job; or when assigned to an alternative position for foreseeable intermittent leave. Therefore, employers may pay an employee less when performing light-duty work.

Often, the health care provider for a WC injury will certify the employee able to return to work in a "light-duty" position. Under the FMLA, if an employee is on FMLA leave concurrently with WC, and the provisions of the WC law permit employers to have direct contact with the employee's WC health care provider, employers may follow the WC provisions and contact the health care provider.

The ADA

As a reasonable accommodation, employers might offer a light-duty position, even on a more permanent basis. Under the ADA, a reasonable accommodation enables a qualified individual with a disability to be afforded an equal employment opportunity. Much will depend upon the specifics in any situation; there is no one-size-fits-all accommodation under the ADA.

Reasonable accommodations are modifications or adjustments to a job, an employment practice, or the work environment. Examples of reasonable accommodation include:

- Making facilities accessible to and usable by an individual with a disability,
- Restructuring a job by reallocating or redistributing marginal job functions,
- Permitting use of paid or unpaid leave for necessary treatment, or
- Obtaining or modifying equipment or devices.

Again, the goal is to get the employee back to work.

REINSTATEMENT RIGHTS

When employees are ready to return to work, they can have certain benefits and protections.

The FMLA

One of the cornerstones of the FMLA is job protection. Employees returning to work after FMLA leave must be restored to the same or equivalent position. An equivalent position is one that is virtually identical to the former position in terms of pay, benefits, and working conditions, etc., including perks and status.

The only situations in which employers don't have to restore employees to the same or equivalent position is if employees:

- Are a "key employee" whose reinstatement would cause "grievous and substantial economic injury" to the employer — and both of these terms are specifically defined in the regulation,
- Would have been laid-off or terminated had they continued to work instead of taking FMLA leave, or
- Unequivocally indicate that they will not return to work at the end of the leave period.

The FMLA does not offer greater rights to job reinstatement than for other employees who are not on leave. Employers may, for example, apply their discipline policy — including termination — to an employee who is otherwise protected by FMLA, as long as the reason is unrelated to the taking of leave.

The ADA

If, after FMLA leave is exhausted, an employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to restoration to another position under the FMLA.

Employers might, however, have obligations under the ADA in these cases. The employee might need an accommodation.

Accommodations

When an employee requests a workplace change (including time off) due to a medical condition, employer ADA obligations are generally triggered. These obligations include engaging in an interactive process with the employee with a focus on identifying an effective reasonable accommodation.

Which accommodation is effective will depend upon the employee's limitations in relation to the job's essential functions. Employers are to identify the barriers in between and work to break them down or eliminate them.

There is no one-size-fits-all accommodation for all situations. Each situation must be addressed on an individual basis.

Accommodations can, but are not limited to include:

- Restructuring the job,
- Making the workplace readily accessible to and usable by people with disabilities,
- Acquiring or modifying equipment or devices,
- Making schedules adjustments,
- Providing policy exceptions,
- Allowing leave, and,
- Reassignment to a vacant position.

Employers should first consider accommodations that would enable the employee to perform the job's essential functions.

If leave is provided as an accommodation, employees are entitled to return to their position as long as they can perform, with or without reasonable accommodation, the job's essential functions.

Under the ADA, if employers are unable to hold a position open, they must consider reassignment to:

- A vacant, equivalent position; or
- A vacant position at a lower level.

Reassignment is, however, the reasonable accommodation of last resort.

This accommodation is not required if a vacant position at a lower level is also unavailable. Employers don't need to remove another employee from a job in order to create a vacancy, nor do they have to create a new position.

Failure to try to accommodate the employee could be seen as an assumption that the employee can't perform the job because of his or her condition. Remember that the ADA protects employees who are perceived as being impaired, even if they don't actually have an impairment or a disability.

WC

WC benefits continue until the employee recovers. Employers communicate with the employee (and the treating physician) to determine not only when the employee can start working again, but also what restrictions might be involved.

WC prohibits discriminating against employees because they file a claim, but it doesn't usually offer job protection. Employers should, however, check state laws for special requirements.

Oregon law, for example, allows employees to reclaim their former jobs for up to two years, and Oklahoma prohibits terminating an employee simply because the employee is taking extended leave.

If the FMLA does not apply, an employee's refusal to accept light duty could be grounds for dismissal under the assumption that the employee has abandoned the job. Employers should, however, discuss the consequences of refusal with the employee before termination.

If the employee is eligible for FMLA leave, employers must comply with the job protections of that law. Employers may not terminate for job abandonment if an employee is absent because of an FMLA-qualifying reason.

If employers plan to terminate an employee who filed a WC claim and exhausted FMLA leave or who was not eligible for it, they must avoid the appearance that the termination is unlawful retaliation for filing a WC injury claim.

If the company policy is to terminate for stealing, for example, employers may follow the policy — even if the employee is away on a WC claim. In fact, employers should not wait until the claim is closed.

Any employee on a WC absence, who has a "serious health condition" under the FMLA, would be entitled to continue on unpaid leave until able to return to the same or equivalent job, or until the FMLA leave entitlement is exhausted.

If the 12 weeks of FMLA leave is exhausted and the employee is unable to return to work, the employee is generally no longer entitled to job restoration under that law. The fact that the WC claim is still "open" doesn't offer job protection.

The ADA, however, might require a reasonable accommodation.

Conclusion

When an employee is injured or ill and needs time off — whether because of a work-related incident or not — the goal is to get that employee back to work as soon as possible. While WC pays for medical attention and provides a percentage of income replacement, it does not generally protect an employee's job. The FMLA does.

The FMLA, however, does not prohibit discrimination based on a disability or require reasonable accommodations. The ADA does.

Navigating the three laws and their interactions is a challenge for many HR professionals.

Being familiar with the provisions of each law can go a long way in helping to sort through the intersections. For more specific information about employee leave, including tracking it, refer to J. J. Keller's Leave Manager.

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