

# DISABILITY ISSUES, THE AMERICANS WITH DISABILITIES, WORKER'S COMPENSATION STATUTES AND THE FAMILY MEDICAL LEAVE ACT (FMLA)

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**DISABILITY ISSUES, THE AMERICANS WITH DISABILITIES,  
WORKER'S COMPENSATION STATUTES  
AND THE FAMILY MEDICAL LEAVE ACT (FMLA)**

**I. INTRODUCTION**

Employers have historically faced problems regarding the relationship between employee injuries and disabilities and state workers compensation acts. The adoption of the Americans with Disabilities Act of 1990 ("ADA" or "ACT"), 42 U.S.C. 12101 et seq., however has spurred new problems and an ever increasing number of difficulties in handling injured and disabled employees.

The ADA imposes significantly increased burdens, expenses and limitations on employers who are confronted with returning disabled workers to productive positions in the work place. Employers, in attempting to avoid potentially costly litigation, now must consider how, if at all, disabled employees can effectively be accommodated in the work place.

This summary guide through the ADA covers the following:

- \* A general review of the ADA and state workers compensation laws, discussing accommodation requirements under both;
- \* The Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 et seq., which can not be ignored when considering the employers response to an injury or illness of an employee;
- \* The interplay among the ADA, state workers compensation laws and the FMLA as they ultimately apply to situations that may arise in the work place; and

**II. THE AMERICANS WITH DISABILITIES ACT**

**A. GENERAL OVERVIEW**

The ADA was signed into law by President Bush in 1990. The ADA aims to eliminate discrimination in the workplace against qualified individuals with disabilities, irrespective of whether the disability occurred on the job. The ACT broadly prohibits discrimination against individuals with disabilities in the areas of employment, public service, public accommodation and telecommunications.

The employment provisions of the Act (Title I), which went into effect on July 26, 1992, not only prohibit discrimination by employers in all employment related activities, but also imposes additional obligations relating to the manner in which employers treat both their employees and applicants for employment.

The ADA is rooted in civil rights laws and thus concentrates more on the effects of violations rather than their causes. The ADA provides remedies for victims of discrimination, including reinstatement, front and back pay, attorney's fees and compensatory as well as punitive damages. An employee is entitled to be placed in the position she would have been in if the discrimination had not occurred.

## **B. WHO IS COVERED?**

- \* The employment provisions currently apply to:
  1. Private employers, employment agencies, labor organizations, labor management committees and state and local governments.
    - a. Example: A self funded health insurance plan sponsored by a regional business association may be liable (for a plan that reduced lifetime benefits for AIDS related conditions) as an employer under Title I of the Act, even though the association was not the plaintiff's direct employer. The association could also be held liable under Title III, which prohibits discrimination by public accommodations. Carparts Dist. Center, Inc. v. Automotive Wholesaler's Association of New England, 37 F.3d 12 (1st Cir. 1994)
  2. All employers with 15 or more full-time employees. 42 U.S.C. § 12111(5)(a).

- \* The ADA provides protection to two groups of people:

1. Qualified individuals with disabilities.

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- a. What constitutes a disability?

"Disability" is defined in the ADA broadly to include any physical or mental disorder or impairment that prevents an individual from performing a "major life activity", including the ability to work. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002). The ADA specifically excludes the following conditions from its coverage to eliminate or avoid any debate about whether they are disabilities:

- (1) current illegal drug use;
- (2) homosexuality and bi-sexuality;
- (3) sexual behavior and gender identity disorders;
- (4) compulsive gambling, kleptomania and pyromania;
- (5) predisposition to illness;
- (6) temporary non-chronic impairments;
- (7) personality traits;
- (8) environmental, cultural, or economic disadvantages;
- (9) advanced age; and
- (10) pregnancy.

- b. What does it mean to be a "qualified individual"?

In order to be covered by the ADA, an individual with a disability must also be "qualified." That is, the individual must satisfy the prerequisites of the job (skills, education, and other job-related experiences) and must be able to perform, with or without reasonable accommodation, the job's essential functions. 42 U.S.C. § 12111(8).

The ADA identifies and prohibits discrimination against three categories of qualified individuals with disabilities:

- (1) It prohibits discrimination based on the individuals mental or physical disorder;
- (2) It prohibits discrimination based on a record of disability, protecting individuals who have a history of, or have been mis-diagnosed as having, a disability; Gray v. Ameritech Corp., 937 F.Supp. 762 (N.D. Ill. 1996); and
- (3) It prohibits discrimination against individuals who may not actually have a mental or physical disorder but who, based on fear, myth, or stereotypes, are regarded as disabled. Papdopoulos v. Modesto Police Dept., 31 F.Supp. 2d 1209 (E.D. Cal. 1998).

c. Examples of qualified individuals with disabilities:

- (1) An employee, whose doctor informed him that due to an injury to the employee's shoulder and foot he should not return to his job as an order selector in a grocery warehouse, failed to show a significant limitation in his "ability to perform either a class of jobs or a broad range of jobs in various classes," as is required for an unlawful discharge claim under the ADA. Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994) cert. denied, 115 S.Ct. 1104 (1995). Quoting EEOC regulation § 1630.2 (j) (3) (i) the court stated that, "the inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working."
- (2) If an employee has an impairment that substantially limits a major life activity, the employee is protected without regard to mitigating measures, such as medications that can control or correct the impairment.
- (3) An employee does not have an injury that substantially limits a major life activity if the injury is of limited duration and will not have a long term effect; for example, a mechanic who breaks her leg is not protected even though she is temporarily unable to

perform the essential functions of her job because the broken leg will heal.

- (4) Persons with AIDS and HIV diseases are protected from discrimination under the ADA. Bragdon v. Abbott, 524 U.S. 624, 654 (1998).
- (5) The ADA makes it unlawful for an employer to discriminate against a qualified individual with a disability on the basis of the disability, but an employer is not required to hire an applicant with a disability if other qualified applicants apply for the same position. Harris v. Sweetwater County School Dist. No. 2, 1997 U.S. App. LEXIS 12999 (June 3, 1997 10<sup>th</sup> Cir.).

2. Persons with a known relationship or association with a disabled individual

The ADA also protects from discrimination (including harassment) individuals who may not themselves be disabled, but who have a known association or relationship with a disabled individual. However, employers are not required to provide reasonable accommodation to such individuals. 42 U.S.C. § 12112(b)(4).

C. **CAN THE INDIVIDUAL WITH A DISABILITY PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB?**

1. Essential functions of the job

Under the ADA job duties are divided into two basic categories: "essential job functions" and "non essential" (or marginal) job functions.

The term "essential" functions means fundamental job duties. To identify essential job functions the focus should be on the purpose of the function and the result to be accomplished, rather than the manner in which the function is presently or traditionally performed. While consideration may be given to the manner in which a job is currently performed, that method is not determinative and should not be considered an essential function unless there is no other way to perform the function without undue hardship. 42 U.S.C. § 12112(8).

- a. For example: In Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9<sup>th</sup> Cir. 2003), the federal judge held that while "it may seem undesirable and perhaps unpalatable that a totally disabled individual is not entitled to relief," the language of the ADA states that it was "designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek."

2. Identifying Essential job Functions

In determining whether a particular function is essential to the job, certain factors should be considered on a case by case basis:

- a. whether the position exists for the purpose of performing the functions;
- b. time spent performing the functions;
- c. work experience of employees who currently perform similar jobs;
- d. nature of work/employer's organizational structures;
- e. whether it is a highly specialized function;
- f. consequence of not requiring the functions;
- g. terms of a collective bargaining agreement;
- h. employers's judgment; and
- i. written job descriptions.

See, Skerski v. Time Warner Cable Co., 257 F.3d 273 (3<sup>rd</sup> Cir. 2001).

**D. CAN THE INDIVIDUAL WITH A DISABILITY PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB WITH A REASONABLE ACCOMMODATION?**

The ADA requires employers to modify jobs, the work environment, and the manner or circumstances in which jobs are customarily performed to enable qualified individuals with disabilities to enjoy equal employment opportunities as those enjoyed by employees without disabilities. This includes participation in the job application process, performance of essential functions of a job and enjoyment of the benefits and privileges of employment. Such job modifications or adjustments are called "reasonable accommodations." An employer need not provide such accommodations, however, if they would pose undue hardship. 42 U.S.C. § 12111(8)-(10).

1. Important principals relating to reasonable accommodations.

a. Scope of accommodation obligation

An employer's duty to provide accommodation applies to known disabilities and it is generally the responsibility of the applicant or employee with the disability to inform the employer that accommodation is needed. See, Mengine v. Runyon, 114 F.3d 415 (3<sup>rd</sup> Cir. 1997).

- (1) If the disability is obvious, such that an employer would readily know of the disability, then the employee with the disability is not obligated to inform the employer of the disability. See, Dudley v. Hannaford Bros. Co., 2003 U.S. App. LEXIS 12751 (1<sup>st</sup> Cir. 2003).
- (2) An employee who thinks she will need a reasonable accommodation to perform an essential function should request the accommodations from the employer. See, Conneen v. MBNA Am. Bank N.A., 2003 U.S. App. LEXIS 13181 (3<sup>rd</sup> Cir. 2003).

b. Posting requirements

The employer is responsible for notifying job applicants and employees of its obligation to provide accommodation. While the ADA requires employers to post notices containing the provisions of the Act in conspicuous places on their premises, information about the reasonable accommodation obligations can also be included on job application forms, job vacancy notices and personnel notices, or it may be communicated orally. 42 U.S.C. § 12115.

c. Effectiveness of accommodation

While accommodation must be effective in providing equal employment opportunities for persons with disabilities, employers are not obligated to provide the best accommodations available or the specific accommodations proposed by the individual with a disability. The employer has the ultimate discretion to choose between effective accommodations. See, Corrigan v. Perry, 1998 U.S. App. LEXIS 5859 (4<sup>th</sup> Cir. 1998).

- (1) The standard by which accommodations are to be measured is effectiveness; whether the person with the disability will be able to perform the essential functions of the job.

d. Refusal of offered accommodation

If an individual refuses an accommodation necessary to perform essential job function, and as a result, can not perform that function, the individual may be terminated or refused an offer of employment. See, Keever v. City of Middletown, 145 F.3d 809 (6<sup>th</sup> Cir. 1998).

e. Documentation of need for accommodation

An employer may request documentation concerning an individual's disability if the need for accommodation is not obvious or if the employer does not believe that the accommodation is needed. See, Vinson v. Thomas, 288 F.3d 1145 (9<sup>th</sup> Cir. 2002).

## 2. Examples of reasonable accommodation.

### a. Making facilities accessible to and usable by individuals with disabilities

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The ADA requires that access must be made available both to those areas in which an employee with a disability performs job functions and to non-work areas used by other employees for general work-related purposes or benefit, such as break rooms, lunch rooms, training rooms, restrooms, etc.

The employer that is a public accommodation or a governmental unit is also required to make existing facilities accessible to the public. Only when a particular applicant or employee with a disability needs and requests accommodation must modifications be made to meet that individual's work needs. See, Swain v. Hillsborough County School Bd., 146 F.3d 855 (11<sup>th</sup> Cir. 1998).

(1) The ADA requires that employees with disabilities have access to all benefits and privileges of employment that are available to other employees in similar positions. If the necessary accommodations to an existing facility would be too costly, a comparable facility accessible to the disabled individual must be provided.

(2) If an employer arranges for a training course/seminar to be held at a facility other than the workplace, (i.e. at a hotel) that location must be accessible to disabled employees, unless doing so would create an undue hardship.

### b. Job Restructuring

There are basically two ways to restructure a job to provide reasonable accommodations under ADA:

(1) Reallocating or redistributing non-essential functions; and

(2) Altering when/how essential functions are performed.

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See, Scheer v. City of Cedar Rapids, 956 F.Supp. 1496 (N.D. Iowa 1997).

### c. Part-time or modified work schedules

While modification of regular work schedules may be required as reasonable accommodation, employers may also require that an employee on a modified work schedule make up any missed time. The extent to which an employer may adjust the salary of an individual on part-time status is still unclear.

(1) A request by a disabled employee to work from the home is not an unreasonable accommodation in the absence of evidence that the employee's productivity would decrease if he worked at home, and if there was no evidence supervised or teamwork was not an essential part of the job. See, Rauen v. United States Tobacco Mfg. L.P., 319 F.3d 891 (7<sup>th</sup> Cir. 2003) (Noting it is rare when working at home will constitute a reasonable accommodation.)

(2) The request of an employee of the United States Attorney's Office, who suffered from a disease that made her subject to periodic attacks of dizziness and nausea, to have an open-ended schedule where she set her hours herself was found to be an unreasonable request. Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994).

d. Flexible leave policies

The EEOC has suggested that flexible leave policies should be considered as a reasonable accommodation when an employee with a disability requires time off from work on account of his or her disability. Although employers may adhere to pre-existing, uniformly applied leave policies, it is recommended that they attempt to be flexible if at all possible.

(1) Employers need not provide additional paid leave as an accommodation. See, Hudson v. MCI Telcoms. Corp., 87 F.3d 1167 (10<sup>th</sup> Cir. 1996).

(2) It is an unreasonable burden for an employer to hire temporary help for an indefinite period while an employee sought a leave of absence for an indefinite period of time to improve a diabetes condition. See, Shadle v. Cent. Dauphin Sch. Dist., 2003 U.S. Dist. LEXIS 5475 (M.D. Pa. 2003) (citing, Myers v. Hose, 50 F.3d 278 (4<sup>th</sup> Cir. 1995)).

e. Acquisition/Modification of equipment and devices

An employer is obligated to provide equipment that is needed by the employee to perform the job. It also may be a reasonable accommodation to permit an individual with a disability to provide or use his or her own assistive devices. See, Lucas v. W.W. Grainger, 257 F.3d 1249 (11<sup>th</sup> Cir. 2001).

f. Making employer-provided transportation accessible

Although nothing in the ADA requires employers to provide, as a reasonable accommodation, transportation to and from work, if an employer provides such transportation for employees, such transportation must be made available and accessible to individuals with disabilities. See, LaResca v. AT&T, 161 F.Supp. 323 (D.N.J. 2001).

g. Providing qualified assistance

It may be a reasonable accommodation to provide a qualified reader, interpreter, or other personal assistant to an individual with a disability when such assistance is needed. 42 U.S.C. § 12111(9)(B).

h. Reassignments and transfers

Reassignment generally should be considered only when accommodation within the individual's current position is not possible, if the employer and employee agree that reassignment is appropriate, or if the employee with the disability is not capable of performing the job even after reasonable accommodations are made. If the employer is unable to accommodate the individual within his or her current position and the individual declines reassignment to an appropriate alternative position, the individual will lose his or her protected status under the ADA.

(1) Consideration of reassignment is only required for present employees. Thus, an employer is not required to consider a different position for a job applicant if he or she is not able to perform the essential functions of the position of which he or she is applying. See, Daugherty v. City of El Paso, 56 F.3d 695 (5<sup>th</sup> Cir. 1995).

(2) Moreover, employers need not consider reassigning an employee with a disability unless there is a vacant position or position that will be available within a reasonable amount of time for which the employee is qualified. 42 U.S.C. § 12111(9).

(3) While reassignments must be made to an equivalent position in terms of pay and other job status, if such a position is available, an employer is not required to create a new position, bump an employee from another job, or promote an individual with a disability in order to provide reassignment as a reasonable accommodation, unless the employer routinely does so. See, Norville v. Staten Island Univ. Hosp., 196 F.3d 89 (2<sup>nd</sup> Cir. 1999).

(4) An employer may reassign an individual with a disability to a lower grade position if there are not positions vacant or soon to be vacant for which the employee is qualified. See, Hoskins v. Oakland County Sheriff's Dept., 227 F.3d 719 (6<sup>th</sup> Cir. 2000).

The EEOC has warned, however, that employers may not use reassignments to discriminate against individuals with disabilities by, for example, only reassigning employees with disabilities to undesirable positions or only to certain offices or facilities.

i. Applicant's medical history

(1) An employer may ask an applicant questions about ability to perform job-related functions to demonstrate how the applicant will perform the job-related functions, and may require the individual to undergo a medical examination once they are hired (conditioning employment upon the results of the exam) if all people in that position must also undergo the examination. 42 U.S.C. § 12112(d)(4).

(2) An employer may not ask the applicant whether or not she is disabled, ask about the nature or extent of an applicant's disability, or require the applicant to undergo a medical examination before making a job offer. 42 U.S.C. § 12112(d)(4).

See, Karraker v. Rent-A-Center, Inc., 239 F.Supp.2d 828 (D.N. Ill. 2003).

**E. WOULD A REASONABLE ACCOMMODATION POSE AN UNDUE HARDSHIP ON THE EMPLOYER?**

"Undue hardship" refers to an accommodation that would be unduly costly, extensive, or substantial, or that would fundamentally alter the nature of the business. Even if a particular accommodation would impose undue hardship, the employer must consider whether there are alternative accommodations that would not impose such hardship. 42 U.S.C. § 12111(10).

The undue hardship exception is a narrow one. An employer should not refuse accommodation on the basis of undue hardship hastily.

1. Cost-based hardship

The following factors should be considered in determining whether an accommodation would be unduly costly:

- a. Net cost of the accommodation;
- b. Financial resources of the employer; and
- c. Offer to the individual the opportunity to pay for or provide accommodation him or herself.

See, Garza v. Abbott Lab., 940 F.Supp. 1227 (D.N. Ill. 1996).

2. Accommodation that would fundamentally alter the nature or operation of the business

The following factors should be considered in determining whether an employer may refuse to provide an accommodation that would fundamentally alter the nature or operation of the business.

- a. Type, structure and functions of the employer; See, Barnett v. US Air, Inc., 157 F.3d 744 (9<sup>th</sup> Cir. 1998).
  - b. Impact of the accommodation on the employer's operations; See, Morton v. UPS, 272 F.3d 1249 (9<sup>th</sup> Cir. 2002).
  - c. Impact of the accommodation on the other employees; See, Garcia-Ayala v. Lederle Parentals, Inc., 212 F.3d 638 (1<sup>st</sup> Cir. 2000).
  - d. Terms of collective bargaining agreement; See, Virts v. Consol. Freightways Corp., 285 F.3d 508 (6<sup>th</sup> Cir. 2002) and
  - e. Established seniority systems. See, US Airways v. Barnett, 535 U.S. 391 (2002).
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3. Issues surrounding "undue hardship" on an employer

- a. The employer is required to make necessary accommodations unless they create an undue hardship. If the necessary cost of the accommodations do result in an undue hardship the employee must be presented with the option of providing the accommodation or paying for the expenses which created the undue hardship;
- b. An employer may not lower the salary of a disabled employee for whom special accommodations were made; See, Norville v. Staten Island Univ. Hosp., 196 F.3d 89 (2<sup>nd</sup> Cir. 1999) and
- c. An employer's health care plan that excludes coverage for pre-existing conditions is not impacted by the ADA. The ADA only requires that an employer provide the same health insurance coverage to disabled employees as is provided for other employees. See, Krauel v. Iowa Methodist Medical Ctr., 95 F.3d 674 (8<sup>th</sup> Cir. 1996).

**G. WOULD EMPLOYMENT OF AN INDIVIDUAL WITH A DISABILITY POSE A DIRECT THREAT TO THE HEALTH AND SAFETY OF THE INDIVIDUAL OR OTHERS?**

Individuals with disabilities may be excluded from a job on the basis of their disability, without the need for reasonable accommodation, where there is a significant risk of substantial harm if that person is hired or continues with the job. Generally, an employer may not exclude categories of people or illnesses, but must determine on a case by case basis if a disabled individual poses a direct threat. Under the ADA a direct threat exists only under the following circumstances:

1. Specific identifiable nonspeculative and current risk;
2. Risk can not be based on stereotypes, patronizing attitudes or irrational fears;

3. High probability that harm will occur;
4. Potential harm must be severe;
5. Determination must be based on most current medical knowledge/best objective evidence; and
6. Reasonable accommodation will not reduce or eliminate risk.

See, Echazabal v. Chevron United States, 2003 U.S. App. LEXIS 14670 (9<sup>th</sup> Cir. 2003) (citing, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)).

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### III. WORKER'S COMPENSATION LAWS

Workers compensation laws vary from one state to another, but they all include a provision for compensating employees who suffer on-the-job injuries, by way of:

- \* Wage loss compensation; and
- \* Medical benefits

#### The Pennsylvania Worker's Compensation Act (77 P.S. § 1, et seq.): An illustration of the issues surrounding state worker's compensation laws.

1. Who is the employer for purposes of the Act?
  - a. Who selects the employee?
  - b. Who can remove the employee?
  - c. Who directs performance?
  - d. Who has potential to control performance?
  - e. Is there a borrowing employer or statutory employer?
2. Is the injured individual an employee under the terms of the act?

Is the individual an . . .

  - a. Independent contractor?
  - b. Casual employee?
  - c. Homeworker?
  - d. Domestic service worker?
  - e. Agricultural worker?
  - f. Conscientious objector?
3. Has there been an injury?
  - a. The Act is not limited to just accidents anymore.
  - b. Is it physical or mental?
  - c. Includes aggravation, reactivation, acceleration or death.
  - d. Occupational illnesses.

4. Did the injury arise in the course of employment?
  - a. Was the employee engaged in the furtherance of the employer's business or affairs?
  - b. Even if the employee was not engaged in the furtherance of the employer's business affairs:
    - (1) Was the employee on the employer's premises or on premises upon which the employer carries on its business or affairs?  
  
and
    - (2) Was the employee required by the nature of his employment to be present?  
  
and
    - (3) Was the injury caused by the condition of the premises or by the operation of the employer's business or affairs?
5. Is the injury related to employment?
  - a. Was the injury nothing more than the normal progression of a pre-existing condition or was the condition aggravated by work?
6. Does the employer have any viable defenses to coverage?
  - a. Was injury or death self-inflicted?
    - (1) If yes, was suicide precipitated by mental distress arising from workplace injury?
  - b. Was the injury caused by the employee's commission of a felony or misdemeanor?
  - c. Did the employee violate a positive order of the employer?
  - d. Was the injury caused by the act of a third person intending to injure the employee because of reasons personal to the third party and not directed against the employee because of employment?

## **IV. THE FAMILY AND MEDICAL LEAVE ACT**

### **A. GENERAL OVERVIEW**

Generally, under the FMLA an employer is entitled to up to 12 weeks of unpaid leave during a 12 month period while continuing to receive group health benefits and the assurance of job restoration in certain circumstances.

- (1) The FMLA covers an employee for:
  - a. The birth of a child;
  - b. Placement of a child for adoption or foster care;
  - c. To care for a spouse, child or patient with a "serious health condition"; and
  - d. To care for the serious health conditions of an employee. 29 U.S.C.S. § 2612(a)-(d).
- (2) The FMLA, however, covers only employers employing 50 or more employees working within 75 miles of an employee's work site. 29 U.S.C.S. § 2611(4)(A)(i).
- (3) Between August of 1993 and December of 1994 there were approximately 2,000 complaints filed under the ADA and over 61% were found by the labor department to be valid claims. The majority of the complaints centered on the failure of the employer to reinstate an employee to the same or equivalent position. Approximately 89% of those complaints were successfully resolved.

### **B. SERIOUS HEALTH CONDITION**

An illness, injury, impairment, or physical or mental condition that involves:

- \* Any period of incapacity or treatment connected with inpatient care (i.e. an overnight stay) in a hospital, hospice or residential medical care facility.
- \* Continuing treatment by health care provider. This includes:
  - a. A period of incapacity of more than three consecutive calendar days; and any subsequent treatment of period of incapacity relating to the same condition that also involves:
    - (1) Treatment two or more times by health care provider (or by a provider of health care services on order of a health care provider);

or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

a. "Regimen of continuing treatment" may include taking of prescription medication or therapy involving special equipment. The term would not include the taking of over the counter medications, bed rest, drinking fluids, etc.;

or

b. Any period of incapacity due to pregnancy or personal care;

or

c. Any period of incapacity or treatment for incapacity due to a chronic serious health condition such as asthma or diabetes;

or

d. A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective and for which the individual is under continuing supervision of a health care provider, such as alzheimer;

or

e. Any period of absence to receive multiple treatments by health care provider for restorative surgery after an accident or an injury or for condition that would likely result in a period of incapacity for more than three consecutive calendar days if not treated. For example, an employee receiving chemotherapy or radiation for cancer, dialysis for kidney disease, or physical therapy for severe arthritis.

\* Cole v. Sisters of Charity of the Incarnate Word, 79 F.Supp.2d 668 (E.D. Tex. 1999). A hospital was not liable for retaliation claim based on FMLA where plaintiff was able to perform functions of respiratory therapist and there was no indication that her stress caused her any period of incapacity, even though she was ill one day and had to leave work, because she did not meet requirements for having "serious health condition." 29 C.F.R. 825.114.

### **C. SUBSTANCE ABUSE.**

\* The final regulations specify that the FMLA leave is available for the treatment of substance abuse if the above requirements are met. 29 C.F.R. 825.114(d).

\* Even if an employee is entitled to FMLA leave, the employer is not prohibited from taking adverse action against an employee with a substance abuse problem pursuant to an established policy

prohibiting substance abuse, if applied in a non-discriminatory manner.

#### **D. DESIGNATION OF FMLA LEAVE.**

1. The employer is responsible for designating leave as FMLA, and thus, starting the clock on employee's FMLA entitlement. 29 C.F.R. 825.208(a).
2. The employer's responsibility is triggered once the employer acquires the knowledge that the absence is covered under the FMLA. 29 C.F.R. 825.208(a)(2).
3. The employer's responsibility includes designating an employee's leave as FMLA leave and notifying employee of this designation.
  - a. If an employer fails to designate an appropriate leave as FMLA leave, an employee still gets such protection under the law and the absence is not counted against the employee.
  - b. In a limited number of situations and under strict time constraints, an employer may designate FMLA leave after the leave ends and the employee is back to work. 29 C.F.R. 825.208(e)(1) and (2).
4. If the employee wants leave to constitute FMLA leave, the employee must notify the employer immediately after the employee returns to work, after a FMLA covered absence.

#### **VI. THE EFFECTS OF DIFFERING STATUTORY COVERAGES AND DEFINITIONS.**

1. Size of employer.
  - \* Employers with 50 or more employees within a 75 mile radius; FMLA and ADA applicable.
  - \* Employers with less than 50 employees - FMLA is not applicable.
2. Absence of work due to care of others.
  - \* FMLA applicable.
  - \* ADA and workers compensation not applicable.
3. "Serious health condition" v. "disability".
  - \* Not all "disabilities" under the ADA are "serious health conditions" under the FMLA and vice versa, therefore both Acts may not always apply to an injured or ill employee.

- a. Protection of employee under FMLA but not the ADA:
  - (1) Mild hernia not substantially limiting a major life activity;
  - (2) Pregnancy; or

Gabriel v. City of Chicago, 9 F.Supp.2d 974, 980-81 (N.D. Ill. 1998): ("Consistent with the EEOC's Interpretive Guidance, many courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability.")

- (3) Possibly in-patient treatment of pedophilia, pyromania, transvestism and other mental disorders that are expressly excluded from coverage under the ADA. 29 C.F.R. § 1630.3(d) and (e).

- b. Protection of employee under the ADA, but not the FMLA:
  - (1) An employee of whom there is an ill conceived perception that he or she has an impairment that substantially limits a major life activity can be afforded protection under the ADA, but not the FMLA because only the ADA protects individuals regarded or suspected of having a disability, but who do not have a disability. 42 U.S.C. § 12102(2)(C).
  - (2) An employee who has a hearing impairment that substantially limits a major life activity -- hearing -- but does not require inpatient care or an absence of more than three calendar days. Because such an employee would have a "disability" under the ADA, but not a "serious health condition" under the FMLA, coverage would be afforded only under the former statute.

4. All individuals eligible for workers' compensation benefits are, by statutory definition, considered "disabled," at least in certain respects. Such employees, however, may not be eligible for coverage under either or both the ADA and the FMLA.

- a. Many injuries compensable under workers' compensation are temporary in nature and, therefore, not covered by the ADA.
- b. Similarly, a compensable injury may impact on an individual's ability to work, but may not be covered by the ADA because it does not substantially limit the employee's ability to work and may only entail a specific dysfunction on a particular job.
- c. An employee out on workers' compensation may not have a "serious health condition" and, therefore, would not be entitled to FMLA protection.

- d. Example: The Equal Employment Opportunity Commission ("EEOC") has used the following example to explain the interplay between the ADA and workers' compensation coverage:

Suppose a construction worker falls from a ladder and breaks a leg and the leg heals normally within a few months. Although the worker may be awarded workers' compensation benefits for the injury, he would not be considered a person with a disability under the ADA. The impairment suffered from the injury did not "substantially limit" a major life activity, since the injury healed within a short period and had little or no long-term impact. However, if the worker's leg took significantly longer to heal than the usual healing period for this type of injury, and during this period the worker could not walk, he or she would be considered to have a disability. Or, if the injury caused a permanent limp, the worker might be considered disabled under the ADA if the limp substantially limited his walking as compared to the average person in the general population.

EEOC Technical Assistant Manual (BNA) § 9.2. This example does not even take into account the further complicating factor of the FMLA which might have provided leave to the employee if he or she met the definition of "substantial health condition."

## **VI. "REASONABLE ACCOMMODATIONS" AND "LIGHT DUTY" UNDER THE THREE PROVISIONS.**

- A. The ADA** - The accommodation that employers are required to provide under the ADA will depend on the particular needs of the employee.

Reasonable accommodations include: modification of existing facilities, providing special equipment or devices, granting leaves of absence, part-time or modified work schedules, job restructuring (reallocation of marginal job functions), or transfers to vacant or "light duty" positions. 42 U.S.C.S. § 12111(9)(A)-(B).

- B. The FMLA** - The Department of Labor's final regulations state that an employer is not permitted to require an employee entitled to an FMLA leave to take a light duty position in lieu of an FMLA leave of absence. 29 C.F.R. 825.204(d). The FMLA, however, permits an employee in certain circumstances to take leave on an intermittent basis. 29 C.F.R. 825.204(c). In such situations, the employer is permitted to assign an employee to an alternative position with equivalent pay and benefits to better accommodate that type of leave. 29 C.F.R. 825.204(c).

- C. Workers' Compensation Acts** - State workers' compensation acts generally permit termination of wage loss benefits based on an employee's refusal to accept alternative available work, including

"light-duty" work. See, Bush v. Workmen's Compensation Appeal Bd., 63 Pa.Commw. 289 (1981).

D. The ADA and FMLA do not preempt these courses of action of State compensation laws. If an employee does not accept the light duty position, his or her workers' compensation benefits might be terminated, but he or she still will be afforded the protections of the FMLA.

1. Recently employers have therefore established "light-duty" positions to accommodate medical restrictions of workers who are in the process of recovering from job-related injuries. Such a transfer should be determined through the steps of selecting reasonable accommodations and employers should not unilaterally assign disabled employees to a light duty job.

a. For example, where a collective bargaining agreement provides for allocating light-duty positions on a seniority or other basis, the employer's statutory obligations under the National Labor Relations Act are not superseded by the accommodation obligations of the ADA, although the collective bargaining agreement would be relevant in determining whether the employer has offered reasonable accommodations. See, Willis v. Pac. Mar. Ass'n, 244 F.3d 675 (9<sup>th</sup> Cir. Cal. 2001).

2. In circumstances where an injured employee's job can not be restructured to provide effective accommodation, the employer may have to consider the employee for vacant "light-duty" jobs. See, Howell v. Michelin Tire Corp., 860 F.Supp. 1488 (M.D. Ala. 1994).

3. If no such jobs are vacant, the ADA imposes no obligation on the employer to create them. However, an existing light-duty job may have to be made lighter in order to reasonably accommodate a disabled employee. If an employer creates a light-duty position as a temporary job, a reassignment to that position need only be for a temporary period. Id.

(a) The EEOC offers the following example of such a situation:

Suppose a telephone line repair worker broke both legs and fractured her knee joints in a fall. The treating physician states that the worker will not be able to walk, even with crutches, for at least nine months. She therefore has a "disability." Currently using a wheelchair, and unable to do her previous job, she is placed in a "light-duty" position to process paperwork associated with line repairs. However, the office to which she is assigned is not wheelchair accessible. It would be a reasonable accommodation to place the

employee in an office that is accessible. Or, the office could be made acceptable by widening the office door, if this would not be an undue hardship. The employer might also have to modify the employee's work schedule so that she could attend a weekly physical therapy session.

EEOC Technical Assistance Manual (BNA) § 9.4.

## **VII. THE INTERPLAY OF THE ADA, FMLA AND WORKERS' COMPENSATION.**

The following are a sample of the types of complexities that employers may face in the future under the ADA the FMLA and State Workers' Compensation Laws.

### **A. ADA v. FMLA**

#### **1. Greater Protection under the FMLA.**

##### **a. Scope of coverage.**

(1) FMLA - permits employees to take leave to care for the "serious health conditions" of children, spouses and parents, not just the employee. 29 U.S.C.S. § 2612.

(2) ADA - limits an employer's obligations in instances where an accommodation is an "undue hardship." 42 U.S.C. § 12111(10). This creates an exception to the job protection provisions that does not exist under the FMLA.

a. There is, however, a very narrow exception under the FMLA for certain highly paid key employees whose jobs might not be protected where job restoration will cause substantial and grievous economic injury to the employers' operations and the employer complies with certain other procedural requirements. 29 U.S.C.S. 2614(b); 29 C.F.R. 825.216(c).

##### **b. Extent of coverage.**

(1) FMLA - Leave does not require any certification that the leave will lead to a return to work. The employer is only required to request a health care provider's best judgment as to the probable duration of the leave, not a prognosis for return. 29 C.F.R. 825.306 sets forth the information that

may be included in medical certifications for serious health conditions.

- (2) ADA - Permits leave only if such an accommodation may help an employee eventually perform the essential functions of the job. However, the employer is not required to wait for an indefinite period of time. See, Puckett v. Dunlop Tire Corp., 120 F.3d 1222 (11<sup>th</sup> Cir. Ala. 1997).

c. Intermittent leave and reduced schedules.

Both the FMLA and the ADA authorize intermittent leave and reduced schedules as a means to comply with an employer's obligations under both statutes.

- (1) FMLA - Prerequisite to eligibility for intermittent leave or a reduced schedule is a demonstration of a serious health condition and a demonstration of a medical necessity. 29 U.S.C.S. § 2612(b). The FMLA does not permit a reduction of benefits during the first 12 weeks of leave. 29 U.S.C.S. § 2614(c)(1). Once the 12 weeks run, however, benefits can be reduced or the employer can recover the premium paid for maintaining the employee's coverage. 29 U.S.C.S. § 2614(c)(2).
- (2) ADA - An employer need permit intermittent or reduced schedules only after certification that such an accommodation would enable the employee to perform the essential functions of the job in the future. The ADA, however, poses no restrictions on the reductions of an employee's benefits if a reduced work schedule provided as an accommodation results in an employee working less than the threshold number of hours required for plan coverage. 29 C.F.R. 825.702(b).

d. Substance abuse.

- (1) FMLA - Current substance abuse is considered a serious health condition. 29 C.F.R. § 825.114(d). Thus, the FMLA affords leave for the inpatient treatment of substance abuse. See, Sloop v. ABTCO, Inc., 1999 U.S. App. LEXIS 8600 (4<sup>th</sup> Cir. 1999). Remember, however, that the FMLA does not protect substance abusers who do not take leave to seek treatment. Therefore current substance abusers can be

disciplined as long as it is not in retaliation for their having exercised their rights under the FMLA. See, Smith v. Eastman Kodak Co., 1999 U.S. Dist. LEXIS 17506 (D.N.J. 1999) (an unpublished opinion.)

- (2) ADA - Current substance abuse is not considered a disability. 42 U.S.C.S. § 12114.

e. Relationship with an individual with a disability.

- (1) FMLA - Permits employees 12 weeks protected leave to care for a spouse, child or parent with a serious health condition. 29 U.S.C.S. § 12112(b)(4).
- (2) ADA - Protects employees or applicants from discrimination because of a relationship with an individual with a disability, but it does not require an employer to accommodate them.

f. Medical Inquiries.

- (1) FMLA - Permit medical certification only with regard to one matter: whether the employee has a serious health condition that prevents the performance of the essential functions of a job.
- (2) ADA - Permits an employer to ask questions as long as they are "job-related" and consistent with business necessity. 29 C.F.R. 1630.10.

**2. Greater Protections under the ADA.**

a. Length of work.

- (1) FMLA - An employee is not protected by the FMLA unless he or she has worked for the employer for at least 12 months (whether or not consecutive) and has worked at least 1,250 hours over the previous 12 months. 29 U.S.D.C. § 2611(2)(A)(i) and (ii).
- (2) ADA - When leave is granted as an accommodation pursuant to the ADA there is no 12 week cap. Thus, short-term and part-time employees who may not be entitled to a leave under the FMLA may be entitled to leave as an accommodation under the ADA. The only statutory limitation on the length of leave is that imposed by the undue hardship exception. 42 U.S.C.S. § 12111.

b. Reinstatement.

- (1) FMLA - Reinstatement rights under the FMLA are to an equivalent position. 29 U.S.C.S. § 2614(a).
- (2) ADA - Reinstatement rights under the ADA are, in the first instance, to the same position unless the employee can not perform the essential functions of that job with a reasonable accommodation. 29 C.F.R. 825.702(c)(4).

3. Open question.

In a situation where an employee is protected by both the ADA and the FMLA, there is an open question as to whether an employer attempting to make out an undue hardship defense to an extended leave can count the 12 weeks of leave that were attributable to the FMLA leave in arguing that the leave is too long. A strong argument can be made that this time should be counted.

See, Shannon v. City of Philadelphia, 1999 U.S. Dist. LEXIS 18089 (E.D. Pa. 1999) where defendant City of Philadelphia argued that granting plaintiff an additional three months of unpaid leave beyond the twelve weeks of FMLA leave would be an undue hardship rather than a reasonable accommodation for plaintiff's disability. Summary Judgment in the City's favor with regard to this issue was denied.

Another situation arises if an employer requires certifications of an employee's fitness for duty to return to work, as permitted by the FMLA under a uniform policy. It must comply with the ADA requirement that a fitness for duty physical be job related. 29 C.F.R. § 825.702(e) (2003).

**B. FMLA vs. Workers' Compensation**

1. Alternative Work Policies:

- (a) FMLA - Employees who are on FMLA leave may refuse alternative work assignments, even if they are capable of performing them.
- (b) Workers' Compensation - A workers' compensation recipient's refusal, to accept alternative available work may result in a termination of wage-loss compensation benefits.

2. No Fault Leave Policies:

- (a) FMLA - FMLA leave can not be carried against an employee for the purposes of applying an absenteeism policy, even one that is a "no fault" policy. See, Viereck

v. City of Gloucester City, 961 F.Supp. 703 (D.N.J. 1997).

- (b) Workers' Compensation - Many employers have adopted no fault leave policies that result in termination upon the occurrence of a threshold number of absences, without regard to the reason for absence. These policies have withstood challenges under workers' compensation retaliation provisions because they are not directed only to individuals out on workers' compensation.

### **C. ADA v. Workers' Compensation**

#### **1. The ADA as a Tool To Decrease Costs:**

Under all workers' compensation laws if an employee is returned to work, his or her wage loss compensation benefits may be reduced either in part or in whole. Therefore, by complying with the ADA's reasonable accommodation provisions, employers will be able to remove employees from workers' compensation roles, presumably with a reduction in cost. Moreover, if an employee refuses available work within the employees restrictions, the employer may move to terminate or modify wage-loss benefits.

- (a) Under the ADA employers may no longer adopt policies prohibiting a return to work until an employee is released with no restrictions. For example, an employer is not required to find another job for an employee who is no longer qualified to perform the duties of the job previously held, but discontinued by virtue of a disability, unless the employer normally provides such alternative employment under its existing policies. Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F.Supp. 963 (E.D.N.C. 1994); Hong v. Temple Univ., 2000 U.S. Dist. LEXIS 7301 (E.D. Pa. 2000).
- (b) If an employer has a vacant light-duty position or a vacant permanent position for which the disabled employee is qualified, it would be a reasonable accommodation to reassign the employee to that position. Howell v. Michelin Tire Corp., 860 F.Supp. 1488 (M.D. Ala. 1994); Johnson v. Brown, 1999 U.S. Dist. 17947 (D.C. 1999).

#### **2. The ADA may also increase costs:**

- (a) Under the ADA, employers are prohibited from discriminating against persons with pre-existing conditions or disabilities if those persons can perform

the essential functions of their jobs with or without reasonable accommodation.

- (1) An employer may not make pre-offer inquiries as to pre-existing conditions or disabilities. 42 U.S.C.S. § 12112(d)(2) and (3). However, an employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. 29 C.F.R. 1630(a). After making an offer of employment and before the applicant begins employment, a medical examination and/or inquiry may be made. 29 C.F.R. 1630(b).
- (b) Under some state compensation laws, however, if a person aggravates a pre-existing condition at work, the employer can be held fully responsible for compensation for the injury. See, Pittsburgh Steelers Sports, Inc. v. Workers' Comp. Appeal Bd., 814 A.2d 788, 2002 Pa.Comm. LEXIS 1045) (2002).
- (1) The ADA's prohibition against hiring employees with pre-existing conditions exposes employers to greater workers' compensation risks.
- (c) The "Second Injury" Fund Issue: Second injury funds limit the amount an employer must pay in workers' compensation benefits to an employee who suffers an aggravation of a pre-existing condition that is not related to employment with that employer. Some of the funds require that an employer be informed of pre-existing conditions at the time of hire. The ADA does not prohibit asking questions for the purpose of complying with second fund injury requirements. See, Wise v. J.E. Merit Constructors, 707 So. 2d 1214, 1218 n.3., 1998 La. LEXIS 2 (1998). The ADA, however, does not permit inquiries concerning pre-existing conditions until after a conditional offer of employment has been made. 29 C.F.R. 1630(b).
- (1) The ADA has strict confidentiality provisions that require that medical information obtained concerning an employee must be kept separate from other personnel information in confidential medical files. The EEOC has stated, however, that although this information generally must be kept confidential, an employer may disclose it to officials of state second injury funds as required by state compensation laws. EEOC Technical Assistance Manual (BNA) § 9.5.

**D. The ADA and State Workers' Compensation laws can not be read in isolation from each other.**

1. For example, when an employer contests an employee's claim of disability for the purpose of defending against a workers' compensation claim, the employer may limit its ability in the future to concede the existence of a disability, but to argue that there was no means by which to accommodate the disability. Yet, if the employer takes the position for the purposes of the ADA that no accommodation is available that could enable an employee to work, the employer would be hard-pressed to contend in a related workers' compensation proceeding that the employee is not disabled. Therefore, any strategy under one statute must consider possible ramifications under the other statute.
2. There is still a question under the ADA as to whether or not the following approach is permissible; employers who adopt light-duty programs may want to reserve light-duty jobs only for employees injured on the job because of the increased costs associated with those individuals as compared to individuals with non-service related disabilities.

**VII. CONCLUSION**

Because there are so many unsettled areas within the ADA, whenever an employer faces a situation potentially covered by the ADA, it should remember the following:

- (1) Treat every workers' compensation case, at least initially, as a potential ADA and FMLA case;
- (2) An employer should not be satisfied that it has fulfilled all of its obligations with regard to an injured or ill employee simply by reference to any one statute - all statutory obligations should be reviewed; and
- (3) Address every situation on a case-by-case basis.