TICKET TO THE BERMUDA TRIANGLE

> It's Friday afternoon at 4:00PM and the phone rings (great news from a client about an incident-free productive work week, right?)?

> A client’s HR Director needs advice. A long-term EE severely injured his back 6 months ago performing a manual/semi-skilled job. The EE has been out of work (totally disabled) on WC leave receiving disability benefits and medical treatment.

> The EE was just released to return to work subject to: (a) 30 lb. lifting restriction; (b) 10 minute working/sitting breaks 4 times daily; and (c) use of a partner when repositioning/moving bulky items.

> Anticipated these restrictions will be gradually lifted over a few months.
Approaching the Intersection

The dept. spv. told HR “she can’t have a worker who can’t do the full job; even if the lift restriction could be accommodated, the sitting breaks and co-worker help requests will cause too many morale problems.” Spv. hasn’t backfilled job, and “doesn’t need EE back.” Spv. claims “EE is a liability; he’s cost the company enough $$$ already.”

The EE has exhausted all PTO, but the ER has not run FMLA leave concurrently. The EE was never notified of FMLA rights.

EE has asked HR if his job will be held for him? His doctor thinks a full recovery might be 4-6 months out.

Approaching the Intersection

A friend told the EE about an open Shipping Clerk position – there is minimal lifting; sits at a computer work station on the loading dock – EE has never used the shipping software/computer, but in 22 years he’s learned shipping logistics inside out. It would be a “lateral move” in terms of pay, but optically looks like a promotion; the job comes with increased opportunities for advancement.

Test at the End:
- Accommodating the restrictions? ER’s duty to accommodate? “Essential” versus “marginal” job functions? “Reasonable accommodations”? “Undue Burden” on ER?
- Leaves of absence – EE entitled to additional leave under the ADA? FMLA? For how long? What about the uncertainty of return?
- Job transfer - Can the EE demand the shipping clerk job? What if the transfer requires additional training? What about other open positions?

Overview of the Law - ADA

- Protects qualified individuals with disabilities in several areas, including employment, transportation, public accommodation (physical access), communications and access to state and local government programs and services. Private employer coverage = 15 or more EE’s
- Protects applicants and existing employees
- Recruitment, hiring, discipline and firing
- Pay and employment benefits
- Training, promotion, and advancement opportunities
- Leaves of absence
- Prohibits retaliation against one who asserts ADA rights
- Protects “association rights” of non-disabled persons – family, co-worker, social, or business relationships with disabled individuals
Overview of the Law - ADA

• Defining disability – Who is protected?
  • Qualified individual who has a physical or mental impairment that substantially limits a major life activity. Very broad definition.
  • Major life activities (activities): Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating or working.
  • Major life activities (bodily functions): Also include: the operation of a major bodily function, such as functions of the immune system, normal cell growth and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.
  • Protects people who (1) are disabled; (2) have a record of disability; or (3) are regarded as being disabled.
  • Disability can be temporary or permanent

Overview of the Law - ADA

• Defining disability – Who is protected?
  • “Qualified” individuals: meets the requirements for education, experience, skills, licenses, and other job-related standards and can perform the essential functions of the job with or without reasonable accommodation.
  • “Essential functions”: Basic job duties the employee must be able to perform. Consider:
    • Does the job exist to perform the function?
    • Number of EE’s to perform the function? Number of EE’s who can distribute the function?
    • Degree of expertise or skill required to perform the function?
    • Time spent performing the function? Job description defining the function? Consequences of not performing the function?

Overview of the Law - ADA

• What are the obligations – Reasonable accommodation?
  • Any change or adjustment to a job or work environment that the employee (applicant), to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities
  • Common examples:
    • Acquiring or modifying equipment or devices (physical/ergonomic adjustments)
    • Physical access modifications
    • Job restructuring
    • Modifying examinations, training materials, policies, or benefits plans
    • Telecommuting and flexible/modified scheduling
    • Reallocation of non-essential duties
    • *Reassignment/transfer to open position
Overview of the Law - ADA

• Reasonable Accommodation versus Undue Hardship?
  • Undue hardship means extensive, unreasonably costly, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Consider:
    • The employer’s size, financial resources and the nature and structure of its operation
    • "Cost" standing alone often insufficient
    • Employers are obligated to consider and suggest alternatives
    • Reallocation of essential functions = Undue hardship
    • Requiring others to work harder or longer = Undue hardship
  • Direct threat means significant risk of substantial harm to health/safety of the EE or others that cannot be reduced or eliminated by reasonable accommodation

Overview of the Law - ADA

• Communicating with Employees
  • The Interactive Process – formal and informal methods
    • EE specifically requests the accommodation (EE initiated)
    • EE demonstrates difficulty performing essential functions (ER initiated)
    • Consideration of alternatives (not obligated to accept EE suggestion)
    • Use of documentation – ADA discussion form (ER/EE) and ADA accommodation questionnaire (medical or health care provider)
    • No "magic words" required to trigger ER obligations
    • See something, say something

Overview of the Law - FMLA

Family and Medical Leave Act (FMLA): Job-protected, unpaid leave for covered employees who are unable to work because of their own serious health condition, or because of the need to care for a parent, spouse (defined by state law), child (including in loco parentis) who has a serious health condition. Additional protections for covered uniformed service members.

• Serious health condition:
  • Overnight stay in hospital or other medical care facility
  • Conditions resulting in incapacity for more than three consecutive days and require ongoing medical treatment (multiple follow-up appts. or single appt. followed by prescription medication or other follow-up care)
  • Chronic conditions that cause occasional incapacity and require treatment at least twice per year
  • Pregnancy, including prenatal care, incapacity due to morning sickness, complications or medically ordered bed rest.
  • Companion leave to bond with a newborn child or for the placement of a child for adoption or foster care (taken within a year of the birth or placement)

• Twelve (12) weeks of leave in any twelve (12) month period
Overview of the Law - FMLA

Family and Medical Leave Act (FMLA)
• Applies to “covered employees”:
  • work for private employer who employ 50 or more EE’s within 75 miles of EE’s jobsite and
  • have worked for ER for 1250 hours in preceding twelve (12) months
• Generally:
  • Provides twelve (12) weeks of leave in any twelve (12) month period
  • Block and intermittent leave allowed (partial days, hours, etc.)
  • Planned and unplanned medical absences allowed
  • Often runs concurrently with other leaves (WC and PTO)

Overview of the Law - FMLA

Family and Medical Leave Act (FMLA) – Communication with Employees
• How is the 12-month eligibility determined? Calendar year? From first leave date? Employment anniversary?
• Denials for eligibility? (rarely based on lack of “serious health condition”)
• Notice of rights and responsibilities. Typically includes:
  • whether medical certification is required
  • whether paid leave will be required or allowed
  • right to maintain health benefits during leave and employee responsibility for premiums during leave
  • right to return to job upon expiration
• Tracking time, complying with notice requirements and administering intermittent FMLA leave requires careful attention to detail
• Documentation and awareness/adherence to all applicable policies is critically important – Consider FMLA policies, call-in and absence reporting, attendance, supplemental leave policies, and disciplinary policies

Overview of the Law – Workers’ Comp
• Workers’ Compensation: Primarily provides wage replacement benefits and medical compensation for employee injuries and occupational diseases that arise out of and occur during the course and scope of employment. Examples of benefits for compensable injuries include:
  • Temporary total disability benefits (2/3 the EE’s average weekly wage, subject to 500 week cap in most cases)
  • Temporary partial disability benefits (partial wage loss/reduced earning capacity)
  • Permanent partial disability (for permanent loss of use of appendages, organs and bodily functions)
  • Medical compensation for treatment that is reasonably likely to effect a cure, provide relief or lessen the period of disability (can be very broad – procedures, attendant care, vehicle modifications, etc.)
  • Vocational rehabilitation and other return to work assistance
  • Permanent, total disability in “exceptional cases”
  • Death benefits
• Covered Employers: 3 or more regular employees
• Employees can be required to accept “suitable” alternative employment
• WC laws vary by state
Enforcement Agencies

**ADA** – U.S. Equal Employment Opportunity Commission (EEOC)

**FMLA** – U.S. Department of Labor (Wage and Hour Division)

**Workers’ Compensation** – NC Industrial Commission
SC Worker Compensation Commission

Common issues: Medical Certifications

**ADA**

- Pre-employment medical examinations only after offer of employment and prior to start if done for all employees in same category (post-offer, pre-employment; broad disability-related questions allowed – avoid GINA)

- May require medical examinations of existing employees if job-related and consistent with business necessity (post-injury return to work, periodic physical skills tests, etc.)

- Medical certification when ER has reasonable belief of “direct threat” situation

- Generally allowed in “reasonable accommodation” assessments when part of a standard process or when the accommodation need is not obvious

**FMLA**

- Can request medical certifications limited to verification for essential functions of the job regarding a serious health condition.

- Can ask for second opinion at time of initial certification.

- Can ask for binding third opinion at time of initial certification.

- May request recertification every 30 days, but no second or third opinion may be required.

- May request a fitness for duty certification if there is a policy or practice requiring the certification.
**Medical Certifications**

**Workers’ Compensation**
- Generally can ask for medical certification for current condition.
- Options for requiring Independent Medical Examinations (IME) by physician of employer’s choice.
- Process is heavily regulated by statute; often influenced by adversarial/litigated posture.
- Paid leave (WC) versus unpaid (ADA/FMLA) may impact motivation/secondary gain

**Common Issues - Benefits on Leave**

**ADA:**
- Continuation of coverage is not mandated so long as employer does not ordinarily provide benefits to other employees on similar leave status

**FMLA:**
- Group health coverage must be continued throughout leave. Employee may be required to continue to pay/reimburse portion of premium.

**Workers’ Compensation:**
- Workers’ compensation is generally an exclusive benefit and benefits do not have to be maintained unless the employee is FMLA eligible

**Common Issues - Rights at Reinstatement**

**ADA:**
- If job protected leave is reasonable accommodation then reinstatement to same job is required.
- However, “reasonable accommodation” require job transfer; Comparable position / promotion? What about additional training? Accommodation within accommodation?

**FMLA:**
- Required to restore employee to same or substantially equivalent position (pay, seniority, benefits, advancement) if employee can perform functions.
- If employee is unable to perform functions, there is no right under FMLA to restoration to another position.

**Workers’ Compensation:**
- Employee may be obligated to accept a different position, lower paying position or position with new employer as long as deemed “suitable”
**Notable Commonalities**

- **Confidentiality.** All medical information must be maintained in a separate medical file. However, FMLA/ADA/WC documentation may be kept together separate from other personnel file information.
- **Health Coverage.** Employee still must pay his or her portion of insurance premiums, even when on unpaid leave.
- **Medical Certification.** Employers may obtain a medical opinion (except under the ADA when need for accommodation is obvious, e.g. missing limbs, blindness)

**Notable Distinctions**

1) **Use of accumulated paid leave (PTO)**
   - Typically can compel PTO for unpaid FMLA & ADA (if stated in personnel policy)
   - Typically cannot compel PTO for any period of leave supplemented by disability (STD / WC)
   - WC allows for PTO during 7-day waiting period

2) **Intermittent or Sporadic Leave**
   - Protected under the FMLA (subject to “abuse” rules)
   - May be considered unreasonable or present undue burden
   - Generally, EE’s will not be allowed to “make their own schedules.”

3) **COBRA**
   - FMLA does not trigger COBRA
   - ADA and WC may trigger continuation coverage if employees are no longer eligible under group health plan

4) **Employer Designation**
   - Must designate under FMLA
   - Not required under the ADA, but is best practice
   - Not necessarily required for WC
**Light Duty**

**ADA:** Encourages light duty
   - May be considered a reasonable accommodation

**FMLA:** Cannot require an employee to accept a light duty assignment. Likewise, employer cannot be required to provide light duty

**WC:** Allows light duty assignments
   - Can be required to return to work
   - Employees that refuse light duty can be denied benefits

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**Exclusionary Light Duty Programs**

> Exclusionary Light Duty Programs potentially violate the ADA and the PDA according to the USSC and EEOC who is actively pursuing cases in this area

   - **Young v. UPS, USSC 2015:** Exclusionary light duty policy that denied light/modified duty to pregnant worker subject to lifting restriction where non-pregnant workers (i.e., ADA) were allowed light/modified duty

   - **EEOC v. Silverado Menomonee Falls, Aug 22, 2017**
     - The EEOC sued a residential care provider for allegedly depriving a pregnant employee of a light duty accommodation consistently provided to other employees

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**Maximum Leave**

> Many lawsuits arising from the intersection of ADA/FMLA/WC result from employers imposing maximum leave requirements or “no-fault” attendance policies

   - A class action regarding UPS’s “no-fault” 12-month attendance policy settled for 2 million in August 2017

     - According to the EEOC, the Blood Bank of Hawaii maintained a rigid maximum leave policy whereby employees with disabilities were not granted a leave of absence as a reasonable accommodation beyond the required 12 weeks under the FMLA
100% Healed Policies

- An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be "100%" healed or recovered -- if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause an undue hardship.

- Similarly, an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk but it cannot show that the individual is a "direct threat."

- Direct threat is extremely hard to show

Hypothetical # 1

- Jerry has been out for 12 weeks of FMLA. His doctor says he can’t come back to work for 8 more weeks and even then, it is possible that he will be restricted to light duty.
  - Now what?
  - What if you don’t have light duty?

Hypothetical # 2

- Lisa, an FMLA-eligible employee is injured on the job. Your client has a vacant light duty position that meets her restrictions. When the position is offered to Laura, she declines and says she’d rather use her 12-weeks of FMLA so she can recuperate at home.
  - Can you make her accept the light duty position?
  - Is she entitled to go out on FMLA leave?
  - What can you do?
Hypothetical # 3

Randy, a bus driver at a retirement community, is attacked by a resident with dementia. He is severely injured while attempting to restrain the resident, and his injury requires shoulder surgery. His impairment is permanent. At the expiration of his 12 weeks of FMLA leave, Randy’s doctor informs you that he will be able to return to full duty in another 6 weeks, but he will require the use of a special gear shift in order to drive his bus.

- How do you respond?
- Does it matter how much the gear shift costs?
- What if he will no longer be able to defend himself against out of control residents?

Hypothetical # 4

Sylvia has ten days of accrued vacation and plans on going to Graceland in the Spring. This winter, she dislocated her shoulder carrying bankers' boxes of documents which resulted in her filing a workers’ compensation claim.

- Is the FMLA implicated?
- Is Sylvia still going to Graceland?
- Does she keep her 10 paid days?

Navigating the Triangle

Follow three basic steps:
- Evaluate the circumstances under each law separately.
- Revaluate the circumstances as new information becomes available.
- Always remember that the law that provides the most benefit to the employee should control.

Make sure your policy requires leave to run concurrently. If the employee is out on workers’ compensation leave or must be off for surgery, run any FMLA leave concurrently (must be in policy).
Navigating the Triangle

- Implement a protocol to follow when FMLA-eligible employees need to take leave.
- If the employee’s injury has caused temporary/permanent impairments that affect her ability to perform the job, follow the ADA’s reasonable accommodation interactive process
  - Draft a protocol and standard forms such as reasonable accommodation requests and medical certifications
- Always consider that additional leave may be a reasonable accommodation under the ADA.
- BE MINDFUL OF RETALIATION PROVISIONS and always fully vet/document subsequent adverse employment actions against employees who have taken leave or filed a claim.

Summary of ADA/FMLA/WC Provisions

<table>
<thead>
<tr>
<th>Provision</th>
<th>ADA</th>
<th>FMLA</th>
<th>WC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose</td>
<td>Prohibits discrimination</td>
<td>Sets minimum leave standards</td>
<td>Provides for wage replacement benefits and medical coverage</td>
</tr>
<tr>
<td>Who is subject to the law?</td>
<td>Employers with 15 or more employees</td>
<td>Employers with 50 or more employees</td>
<td>Employers with three or more employees</td>
</tr>
<tr>
<td>Who is protected?</td>
<td>Qualified employee or applicant</td>
<td>Employees who have worked 12 months and at least 1,250 hours</td>
<td>All employees</td>
</tr>
<tr>
<td>What triggers protections?</td>
<td>Disability resulting in a substantial limitation that substantially limits major life activities</td>
<td>A serious health condition, birth, adoption, to care for a servicemember with a serious injury or illness, or certain qualifying exigencies</td>
<td>On-the-job injury or occupational disease</td>
</tr>
<tr>
<td>Protections</td>
<td>Reasonable accommodations</td>
<td>12 weeks of leave every 12 months</td>
<td>Medical care and wage replacement benefits</td>
</tr>
<tr>
<td>Medical certification?</td>
<td>May be required if need for accommodation is not obvious</td>
<td>May be required</td>
<td>Independent medical examination may be required to receive benefits</td>
</tr>
<tr>
<td>Time limit</td>
<td>None</td>
<td>12 weeks per year</td>
<td>Depends on circumstances of each case</td>
</tr>
</tbody>
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Questions?

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