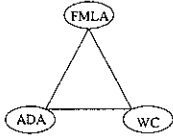


The Bermuda Triangle ~ FMLA, ADA and Workers' Compensation



Angela L. Thomas, Esq.

 LATSHA DAVIS YOHE
& MCKENNA, P.C.
ATTORNEYS AT LAW

Overview

- Basic Requirements of 3 laws
- Overlap areas
- Bottom Line ~ do analysis under each law
every time have sick/injured employee



Family Medical Leave Act ~ Covered Employers

- All private employers that employ at least 50
employees in each workday in 20 or more
work weeks in the current or preceding year
- All public agencies



FMLA ~ Employee Eligibility

- ❑ Must have worked for a covered employer for at least 12 months (months do not need to be consecutive)
- ❑ Must have worked at least 1,250 hours in the last 12 months
- ❑ Must have worked at a location within 75 miles of a location in which the employer employs at least 50 employees

FMLA ~ Leave

- ❑ Eligible employees entitled up to 12 weeks of leave in every 12 month period in which they are deemed eligible for:
 - Birth of a child
 - Placement of a child in adoption or foster care
 - Care for an immediate family member (spouse, child, parent) with serious health condition
 - Employee's own serious health condition that makes employee unable to perform at least one essential function of job

FMLA ~ New Leave Provisions

- ❑ Eligible employees who are spouse, child, parent or nearest blood relative of covered service member entitled to 26 weeks per 12 month period to care for service member who is in "outpatient status" for "serious injury or illness"
- ❑ 26 weeks of leave = total for all types of leave; does not increase 12 weeks for other FMLA reasons.

FMLA ~ New Leave Provisions

(cont'd)

- Eligible employees also entitled to 12 weeks of leave per 12 month period because of “qualifying exigency” arising out of spouse, child or parent’s active duty or notice of impending call to duty in Armed Forces
- Not effective until DOL defines “qualifying exigency”
- DOL encouraging employers to provide now (family or financial affairs)



Workers’ Compensation (“WC”) ~ Covered Employers

- All public and private employers in PA with at least one employee



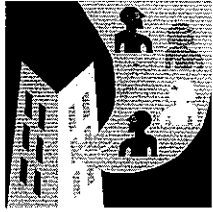
WC ~ Employee Eligibility

- Any employee injured while at the employer’s place of business
 - includes aggravation, reactivation, or acceleration of a previous injury
- Injury must have occurred in the course of employment
- Injury must be more than just the natural progression of a pre-existing condition



Americans With Disabilities Act (“ADA”) ~ Covered Employers

- Private company with 15 or more employees
- State and local governments, employment agencies and labor unions



123117

ADA ~ Eligible Employees



- Has disability = a physical or mental impairment that substantially limits one or more of the major life activities of such individual; regarded as disabled; record of disability
- Is qualified = must be able to perform the job's essential functions with or without reasonable accommodation
- See Tab "A"

123117

ADA ~ Excluded Conditions

- | | |
|--|---|
| <input type="checkbox"/> illegal drug use | <input type="checkbox"/> predisposition to illness |
| <input type="checkbox"/> homosexuality | <input type="checkbox"/> temporary, non-chronic impairments |
| <input type="checkbox"/> bisexuality | <input type="checkbox"/> personality traits |
| <input type="checkbox"/> gender identity disorders | <input type="checkbox"/> environmental, cultural, or economic disadvantages |
| <input type="checkbox"/> compulsive gambling | <input type="checkbox"/> age |
| <input type="checkbox"/> kleptomania | <input type="checkbox"/> pregnancy |
| <input type="checkbox"/> pyromania | |



123117

ADA ~ Reasonable Accommodation

- Under ADA, employers must modify jobs, work environment, or manner or circumstances in which jobs performed to enable ADA employee to benefit from equal opportunity
- Employers not required to provide best accommodation possible; accommodation needs only to be reasonable
- Leave sometimes a type of reasonable accommodation

Differences in Laws ~ Coverage

- Employers with less than 50 employees are not concerned with FMLA overlap
- Employees who have not worked for at least 12 months and 1,250 hours get no FMLA protection, although ADA and WC would still apply

Differences in Law ~ Notice Requirements



- Employer required to notify employees through postings of its ADA obligations
- Employer required to notify employees of WC insurer and general information (new ~ Tab "B") and panel provider info
- Employer must post FMLA summary of rights (must be in handbook, if handbook)

Differences in Law ~ Notice Requirements (cont'd)

- Employee's duty to notify employer needs ADA reasonable accommodation
- Under FMLA, employee must provide sufficient notice to make employers aware employee could be entitled to FMLA
- Under WC, employee has duty to notify of injury/illness occurrence



Differences in Laws ~ Medical Information


- Employers entitled to documented proof of any ADA disability and need for reasonable accommodation
- Under FMLA, can require employee to complete certification but FMLA limits how often can get updated medical information
- Under WC, can monitor treatment/request IME's

Differences in Laws ~ Covered Situations

- If leave concerns relatives or people other than employee, ADA and WC irrelevant and only FMLA applicable
- ADA standard is "qualified disability," while FMLA standard is "serious health condition"


Differences in Laws ~ Covered Situations (cont'd)

- Calef v. Gillete Co.*
 - Plaintiff was granted FMLA leave after emotional outbursts at work
 - Diagnosed with Attention Deficit Hyperactivity Disorder
 - After 40 day FMLA, reinstated
 - Given a warning that no more outbursts would be accepted





Differences in Laws ~ Covered Situations (cont'd)

- After another incident, the employee was terminated
- Held that employee did not meet ADA burden
- No impairment that altered a major life activity - under control most of time
- Employee was unable to show that he could perform essential functions of job, either with or without reasonable accommodation



Differences in Laws ~ Covered Situations (cont'd)

- Employee may have disability without having a serious health condition
- Example - an employee is completely blind, so the major life activity of sight is impaired
- If blindness result of work accident, have WC coverage



Differences in Laws ~ Reasons for Leave

- ADA grants leave only if part of reasonable accommodation; used to accomplish ultimate purpose of getting disabled employee back to work performing essential functions of job



- Does not have time cap as a reasonable accommodation

10/01

Differences in Laws ~ Reasons for Leave (cont'd)

- FMLA grants leave for many different reasons, and does not purport to support goal of getting employee back to work (12 week limit)
- WC = unlimited leave as long as doctor indicating total inability to work

10/01

Differences In Laws ~ Substance Abuse

- Under ADA, substance abuse is not disability (only recovery)
- In *Felix v. Sun Microsystems, Inc.*, plaintiff not considered to have disability as result of episodes of binge drinking
- Intermittent episodes of binge drinking were not frequent or intense enough to limit major life activity

10/01

Differences In Laws ~ Substance Abuse (cont'd)

- Under FMLA, binge drinking could be considered serious health condition, so leave would be granted
 - employees may still be punished for substance abuse, as long as FMLA rights are not restricted

Differences in Laws ~ Relatives


- ADA and WC do not require employers to accommodate employees who have relationship with disabled individual
- ADA does protect employee from discrimination because of relationship with an individual
- FMLA provides leave to employees who have relationship with disabled individual with serious health condition

Differences In Laws ~ Light Duty

- ADA allows for many different options under reasonable accommodation standard
- Employer controls reasonable accommodations and may determine what is/is not reasonable accommodation on case-by-case basis, including light duty
- FMLA does NOT allow employer to force eligible employee into "light duty" assignment; may offer only
- WC allows for termination of workers' compensation benefits if employee refuses to accept light duty assignments


Classifications

- An employer may create problems for itself by attempting to argue inconsistent positions when classifying injury of employee
- Employees can also be bound by their classification of injury status
- Employees cannot argue inconsistent positions





Classifications (cont'd)

- By negotiating a workers' compensation settlement, the employer is, in a way, admitting to a disability
- Recommended that employers obtain a release of future ADA claims when negotiating the workers' compensation settlement with the employee



Interactive Exercise



Contact Information

Angela L. Thomas, Esq.
Latsha Davis Yohe & McKenna, P.C.
1700 Bent Creek Boulevard, Suite 140
Mechanicsburg, PA 17050
(717) 620-2424
athomas@ldylaw.com

Tab A

S. 1881, ADA Restoration Act (H.B. 3195)

- **Amend ADA and change definition of “disability” to “a physical or mental impairment” (eliminate substantially limit major life activities)**
- **Also redefine terms: “mental impairment” and “physical impairment”**
- **Bipartisan support but passage in this form unlikely**

Tab B

WORKERS' COMPENSATION INFORMATION

(1) The workers' compensation law provides wage loss and medical benefits to employees who cannot work, or who need medical care, because of a work-related injury.

(2) Benefits are required to be paid by your employer when self-insured, or through insurance provided by your employer. Your employer is required to post the name of the company responsible for paying workers' compensation benefits at its primary place of business and at its sites of employment in a prominent and easily accessible place, including, without limitation, areas used for the treatment of injured employees or for the administration of first aid.

(3) You should report immediately any injury or work-related illness to your employer.

(4) Your benefits could be delayed or denied if you do not notify your employer immediately.

(5) If your claim is denied by your employer, you have the right to request a hearing before a workers' compensation judge.

(6) The Bureau of Workers' Compensation cannot provide legal advice. However, you may contact the Bureau of Workers' Compensation for additional general information at: Bureau of Workers' Compensation, 1171 South Cameron St., Room 103, Harrisburg, Pennsylvania 17104-2501; telephone number within Pennsylvania (800) 482-2383; telephone number outside of this Commonwealth (717) 772-4447; TTY (800) 362-4228 (for hearing and speech impaired only); Website: www.state.pa.us, PA Keyword: workers comp.

(NOTE (not to be reproduced): The information above must be printed on paper no smaller than 8 ½ x 11 inches and in font no smaller than 11 point.)

Tab C

Case Scenario for Discussion

Jane is an exceptional employee. She's been with the company for ten years and her tenure has been marked by excellent reviews, several promotions, and good attendance; she is Assistant Sales and Banquet Manager. Everyone at the property was glad to have her back from a four-week work-related stress leave. The doctor said she could return to work, but should avoid stress.

On her first day back, she used the company van to go to the main office for a potential client meeting. The meeting unexpectedly lasts three hours and it is lunch time. Jane stops to eat at a restaurant. This is allowed under company policy, but employees are supposed to check with their supervisors ahead of time. Jane did not ask her manager, the Sales Director, but she has done that before without being called on it.

On the way back from lunch, a tractor-trailer hits Jane. The accident is not her fault---the truck driver ran a red light. She is in the hospital, having sustained severe injuries and notifies HR. She requests paperwork to file a workers' compensation claim.

HR visits Jane in the hospital two weeks after the accident and assists her in completing the Initial Report of Injury. She signs a medical release form and HR begins to collect the medical information for the insurance company. HR sees a lab result indicating Jane was barely under the legal blood alcohol content limit at the time of the accident. HR asks Jane about it and Jane says she is an alcoholic and has been attending AA for many years, but recently had a relapse. She reports that for the last two weeks she has been clean and has returned to AA meetings held at the hospital.

What are the issues that need to be resolved in Jane's workers' compensation claim?

Can Jane take FMLA leave?

Does Jane have any rights under the ADA?
