

ADA, FMLA AND WORKERS' COMPENSATION

Lauri A. Kavulich

(215) 640-8527

lkavulich@clarkhill.com

CLARK HILL

FMLA BASICS AND PRACTICAL TIPS
FOR ADMINISTERING FMLA LEAVE
FOR WORK-RELATED INJURIES

CLARK HILL

FAMILY AND MEDICAL LEAVE ACT

A Qualified Employee

- A qualified employee has been employed by the employer for at least one year
- The employee must have worked at least 1,250 hours for the employer in the preceding 12 months
- The employee must have a qualifying condition, such as their own “serious health condition”

FAMILY AND MEDICAL LEAVE ACT

A Covered Employer

- A covered employer under the FMLA is one with 50 or more employees, who have worked at least 20 or more workweeks in the current or prior calendar year
- If an employer has multiple locations, there must be at least 50 employees within a 75-mile radius for that location to be covered
- Public (government) agencies and schools are subject to the FMLA regardless of the number of employees

FAMILY AND MEDICAL LEAVE ACT

If both employer and employee qualify under the FMLA

- The employee has the right to up to 12 workweeks of unpaid leave in a 12-month period, which can be taken in one or more blocks of time or intermittently over the course of a prolonged period
- The employee is entitled to job reinstatement upon return from leave, in the same or equivalent role
- The employee retains group health benefits during the leave period

FAMILY AND MEDICAL LEAVE ACT

Notice and Eligibility Requirements

- Covered employers are also required to take other affirmative steps, such as the following:
 - As soon as the employer reasonably knows that an employee is entitled to FMLA leave, the employer should communicate with the employee
 - Provide the employee with an official eligibility notice and keep track of how much of the total leave allotment will be deducted from the employee's leave bank

FAMILY AND MEDICAL LEAVE ACT

Eligibility Notice

- Must be provided with five (5) business days
- Must state:
 - Whether the employee is eligible for FMLA
 - If employee is not eligible, at least one reason why

Rights and Responsibilities Notice

- Must be included with the Eligibility Notice
- Must detail specific expectations and obligations
- Must explain any consequences for failing to meet expectations and obligations

Designation Notice

- Must be sent within five (5) business days after receiving enough information to determine leave is FMLA-qualifying (i.e. – certification from a health care provider)
- Must state any fitness-for-duty certification requirements

FAMILY AND MEDICAL LEAVE ACT

- FMLA notice requirement
 - Is this a lost time claim?
 - Is the employee receiving intermittent treatment?
- Send FMLA Notice whether eligible or not
- FMLA eligible
 - One year
 - 1,250 hours
 - In most cases, the injured worker has a qualifying condition (serious health condition)
- FMLA should be on a claims checklist
- Forms available at <https://www.dol.gov/whd/fmla/forms.htm>

FAMILY AND MEDICAL LEAVE ACT

If eligible for FMLA – Lost or missing time

- Track days and hours off
 - Calculate based upon the employee's workweek
 - If the employee works 40 hour weeks, 480 hours
 - 37.5 workweek, then 12 x 37.5 hours of eligibility
- Alert claims adjuster and attorney that employee is eligible / ineligible for FMLA (becomes important in RTW)
- When FMLA leave is exhausted, send notice

FAMILY AND MEDICAL LEAVE ACT

Certification of Health Care Provider

- Employee must return a completed and sufficient form within 15 calendar days after written notice of need to return form
- Employer must inform employee in writing of consequences for returning late or failing to turn in
- ****If employee submits a complete and sufficient certification signed by a physician, employer cannot request additional medical information****

An employer can reject the certification submitted by the health care provider if the information is incomplete or insufficient. In such instances, the employer must:

- Advise employee and state, in writing, what additional information is necessary
- Give the employee seven (7) calendar days to cure the deficiency

An employer may also contact the employee's physician for purposes of "authentication" and "clarification"

FAMILY AND MEDICAL LEAVE ACT

Tracking Intermittent Leave

- An employee can take intermittent FMLA in instances where there is a medical need for leave that can best be accommodated through intermittent leave or a reduced schedule:
 - Intermittent leave can be broken down into weeks, days, hours
 - The employer must permit the smallest increment of time otherwise allowed for other forms of leave
 - The employer can require the employee to comply with the established call-in policy
 - The employer can also require that the health care provider certify the “medical necessity”
 - For planned treatments, the employer can ask the employee in advance for his/her schedule and cooperation

ADA BASICS AND PRACTICAL TIPS FOR COMPLYING WITH THE ADA

CLARK HILL

AMERICANS WITH DISABILITIES ACT

- A covered employer under the ADA has 15 or more employees
- Employers are prohibited from discriminating against prospective or actual employees on the basis of disability
- Employers must provide equal opportunities in selecting, testing, and hiring qualified applicants with disabilities
- Employers must also provide job accommodations for applicants and workers with disabilities when such accommodations will not impose "undue hardship"
- Employers must afford employees with disabilities equal opportunity in promotion and benefits

AMERICANS WITH DISABILITIES ACT

- Under the ADA, a disabled employee is one who meets any of the following criteria:
 - Has a physical or mental disability that *substantially limits one or more major life activities*
 - Has a record of having a disability
 - Is regarded as having a disability
- EEOC has embraced a “broad” definition of disability, which has had the practical effect of turning all impairments into disabilities
- There is no exhaustive list of disabilities
- The ADA requires that the employer engage in an individualized assessment of each “disabled” employee or applicant

AMERICANS WITH DISABILITIES ACT

- Covered employers must reasonably accommodate a disabled employee in order to allow them to perform their essential job functions
 - Requires “interactive process”
 - Not obligated to agree to employee’s desired accommodation
 - Administrators must be aware of when an accommodation is being requested
- An employer is not required to provide an accommodation where doing so would cause an undue hardship or a direct threat
 - The burden is on the employer
 - The employer must have specific facts to support the assertion of a threat or undue burden

AMERICANS WITH DISABILITIES ACT

Interactive Process

- The purpose of the “interactive process” is to determine what, if any, accommodation should be provided to an employee
 - Analyze job functions to establish the essential and non-essential job tasks
 - Identify barriers to job performance by consulting with the employee to learn the employee’s precise limitations
 - Explore the types of accommodations that would be most effective

AMERICANS WITH DISABILITIES ACT

Interactive Process

- Good faith employer attempt
 - Meet with the employee
 - Request information about the limitations
 - Consider employee's request
 - Discuss alternatives if a request is burdensome
- There are mutual obligations and the employee also must participate in the interactive process

AMERICANS WITH DISABILITIES ACT

Interactive Process

- The employer determines the reasonable accommodations provided to the employee
- The employee can refuse to accept an offered accommodation
- During the interactive process, the employer may ask the worker relevant questions that will enable it to make an informed decision about the request. This includes asking for information about the desired accommodation, the nature of the problem prompting the request, and how the employee believes a disability has resulted in the need for an accommodation.

AMERICANS WITH DISABILITIES ACT

Interactive Process

- The employee is required to participate in the interactive process
- Although the individual with a disability is not required to identify the exact accommodation necessary, the employee does need to describe the work-related problem he or she is having and why he or she believes it is related to a disability
- When the disability or need for an accommodation is not obvious, an employer may require an employee to provide medical documentation
- Medical documentation obtained in connection with the reasonable accommodation process must be kept confidential and maintained separately from an employee's personnel file. This includes the fact that an accommodation request was made or approved and information about an employee's functional limitations.

PRACTICAL TIPS IN NAVIGATING
THE FMLA AND ADA IN THE
CONTEXT OF A WORKERS'
COMPENSATION CLAIM

CLARK HILL

WORKERS' COMPENSATION "DISABILITY"

- Disability can be total or partial
- "Disabled" for purposes of workers' compensation may be different than ADA or FMLA
- Under WC, disability is injured and unable to work and earn wages
- Unlike ADA and FMLA, workers' compensation is focused on wage loss and payment for medical treatment

INTERPLAY OF QUALIFYING DISABILITIES

- Workers' compensation indemnity benefits are based on a work-related injury that results in actual "disability," such as the loss of earning power resulting from the work injury
- Though all employees receiving such benefits are considered "disabled" in some respect, they may not be eligible for coverage under either the ADA or FMLA
- This incongruity is because most workers' compensation injuries are considered temporary in nature
- A work-related injury will often prevent an employee from performing the essential functions of their job, disqualifying them from ADA protection
- Finally, a compensable injury may not substantially limit the employee's ability to work and may only entail a specific dysfunction on a particular job

MEDICAL INQUIRIES AND EXAMINATIONS

When can an employer lawfully require a medical examination?

- **ADA:** An employer can lawfully require a medical examination before an employee returns from leave if the exam is necessary to assess whether the employee can perform the essential job functions
- **FMLA:** Employer mandated medical examinations are typically prohibited
- **Workers' Compensation:** laws generally allow an employer to ask questions or require an employee to undergo a medical examination

MEDICAL INQUIRIES AND EXAMINATIONS

Intersection of FMLA, ADA and WC

- FMLA and workers' compensation can run concurrently, in which case an employer who requires a medical examination prior to the employee's return to work must make that requirement clear in the FMLA leave notice
- In such instances, the healthcare provider may be required to verify that the employee is capable of performing the essential duties of the job pursuant to the ADA
- If FMLA leave is intermittent, the employer can require a fitness for duty certification every 30 days provided there are reasonable safety concerns about the employee's ability to perform their job

RETURNING TO WORK

What are the risks of refusing to return an injury-prone employee to work?

- The employee may have a viable ADA discrimination claim based on the theory that the employer “regarded” him or her as disabled
- When an employee’s medical report indicates that the employee can perform the essential functions of the job or another job that the employee is qualified to perform, with or without reasonable accommodation, the employer must allow the employee to return unless doing so creates a “direct threat”
- In practical terms, this means that employers should not adopt policies which require employees to be fully healed in order to rejoin the workforce

INTERMITTENT LEAVE FOR TREATMENT

If FMLA leave is not exhausted, an employer must accommodate intermittent leave for treatment up to 12 weeks. However, the employee must make reasonable efforts to schedule treatment so as not to unduly disrupt the employer's operation.

- Count hours towards FMLA
- If FMLA is exhausted, look to the ADA because “additional leave” may be an accommodation if the employee can perform the essential job functions
- Don't have to pay wages under FMLA and ADA for time off, but may have to pay for lost wages under WC depending on State

REQUESTS FOR MODIFIED JOB DUTIES

- **ADA:** Requires employers to engage in an interactive dialogue and consider reasonable accommodations to allow the employee to perform the essential functions of the job
- **FMLA:** Does not explicitly require a covered employer to consider accommodating an employee by way of modifying job duties. As a practical matter, intermittent leave/reduced schedule leave forces employers to modify attendance and other scheduling requirements.
- If an employee is out due to an injury that qualifies for workers' compensation benefits, the employer can offer the employee a light duty position
 - However, if the injury also qualifies for FMLA, the employee is not required to accept the light duty position, even if the refusal to do so results in the discontinuation of workers' compensation benefits

REQUESTS FOR MODIFIED WORK SCHEDULES

- **ADA:** Modified work schedule may be a reasonable accommodation as long as it does not pose an undue hardship for the employer
- **FMLA:** A covered employee may take intermittent leave or work a reduced schedule “where medically necessary”
 - FMLA allows an employer to temporarily transfer an employee to another position to accommodate the leave, but the employee must be returned to their regular or an equivalent job once leave concludes
- **Workers’ Compensation:** Employers have the option to consider light duty, which can include a modified schedule

REQUESTS FOR LEAVES OF ABSENCE

- **FMLA:** An eligible employee is entitled to up to 12-weeks of unpaid leave in a 12-month period
- **ADA:** An employee may be entitled to additional leave as a reasonable accommodation. There is no hard and fast rule with respect to how much leave should be permitted
- **Workers' Compensation:** Leave depends on the laws of the state in which the employee is working

FINAL TIPS FOR THE EMPLOYER TO
AVOID TURNING WORKERS
COMPENSATION CASES INTO AN
EMPLOYMENT CLAIM

CLARK HILL

INTERSECTION BETWEEN FMLA, ADA AND WC

	FMLA	ADA	WC
Coverage	50 or more EEs w/n 75 mile radius	15 or more EEs	Most employers
Eligibility	EEs who worked at least 1250 hours over 12 months with qualifying serious health condition	EEs who are disabled, qualified, and can perform essential functions of the job with or without reasonable accommodation	EEs w/work-related injury
Length of Leave	Up to 12 weeks of unpaid leave in 12 month period	No limit; based on physician's recommendation and EE's job description	No limit or specified time
Medical Documentation	Certification from provider of need for leave	Not required, but may be requested by employer	Information specific to the work-related injury
Light duty or modified work schedule	Cannot be required	Must be allowed if reasonable and does not create undue hardship	Should be offered to eliminate employer's obligation to pay wage benefits
Return to Work; Fitness-for-Duty	Employer must give notice of the requirement to provide a fitness-for-duty certification with the designation notice	May be requested by employer on reasonable belief that ability to perform job may be impaired by medical condition	Typically required

TIPS TO AVOID EMPLOYMENT CLAIMS

- Determine which laws apply
 - Caring for another person (FMLA)
 - Non-work related injury (FMLA and ADA)
 - Work-related injury which substantially limits a major life activity (FMLA, ADA, WC)
- Consider which benefits employee is entitled to under each individual law
- If more than one law applies, employee is afforded all the rights under each applicable law
- Reevaluate the benefits provided when new information is received or a deadline passes under one of the laws

QUESTIONS?



Lauri A. Kavulich

(215) 640-8527

lkavulich@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL