



# **Disability Leave Under the FMLA, ADA and the Illinois Workers' Compensation Act – Navigating Conflicting Laws in the Management of an Employees' Medical Leave**

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# The Bermuda Triangle

Workers' Compensation Act



The Bermuda  
Triangle of  
Employment Law

American's With Disabilities Act (ADA)

Family Medical Leave Act (FMLA)



# Determine If Law Applies to Employer/ Employee

- FMLA (Federal Law):
  - 50 or more employees for each working day during each of 20 or more weeks in the current or preceding calendar
  - Eligible Employee: (1) has been employed by the employer for at least 12 months (need not be consecutive); (2) worked at least 1250 hours for employer during the 12 month period immediately preceding the requested leave; and (3) employed at a worksite where 50 or more employees are employed by the employer within a 75 mile radius
  - Enforced by The U.S. Labor Department's Wage and Hour Division
- ADA (Federal Law):
  - 15 or more employees for each working day in each of 20 or more calendar work weeks during the current or preceding year
  - Enforced by the U.S. Equal Employment Opportunity Commission
- Worker's Compensation (State Law):
  - Worker's Compensation Laws vary from state to state
  - Can apply to business with as few as one employee
  - Covers all employees upon hire



# Be Informed About Each Law's Requirements

- FMLA (Federal Law)
  - Provides for 12 weeks (total) of unpaid leave for an employee's own or family member's "serious health condition," the birth or adoption of a child and for military exigencies
  - Employer must return employee to the same or equivalent position
- ADA (Federal Law)
  - Prohibits employer from discriminating against job applicants and employees on the basis of a disability
  - Protects individuals that (1) have a physical or mental impairment that **substantially limits** one or more of an individual's major life activities (ex: walking, seeing, working, eating, lifting, bending, thinking, using major bodily functions); (2) have a record of such an impairment; and (3) are regarded as having such an impairment
  - Does not explicitly provide payment or leave rights to employee but requires an employer to make reasonable accommodations, such as providing a modified work schedule, period of leave, light duty work, if that accommodation is necessary for the employee to perform the essential functions of the job.
- Worker's compensation (State law)
  - Requires employer to compensate an employee for injuries arising out of and in the course and scope of employment
  - Employer may not retaliate against an employee for filing a workers' compensation claim
  - Provides for health care and income replacement, but does not necessarily provide for job protection
  - In return for workers' compensation benefits, the Act generally indicates that an employee relinquish the right to sue his/her employer for work-related injuries



# “Substantially Limited”

- In March, 2011, the EEOC released new regulations, which became effective in May, 2011, for the ADA which focused on making it easier for an employee or applicant to qualify for the protections of the ADA
- Prior to the new regulations, the Supreme Court held that a person was “substantially limited” in a major life activity only if the impairment prevented or severely restricted the person from engaging in the activity → Congress now rejects this interpretation
- In the new regulations the EEOC declined to provide a new definition of the term “substantially limits” and instead provides rules of construction that are to be applied in determining whether an impairment “substantially limits” a major life activity
  - Determining whether an impairment causes an individual to be “substantially limited” requires an “individualized assessment”
- Prior to the new regulations, most courts held that a temporary condition lasting just a few months did not qualify as a disability under the ADA. The new regulations provide that the effects of an impairment lasting or expecting to last for six months or less can be substantially limiting (if sufficiently severe) and thus qualify as a disability under the ADA.
- Under the new regulations, if an impairment that is in remission or inactive would “substantially limit” an individual from engaging in a major life activity if it were active, it is a disability under the ADA
- Note: Impairments resulting from occupational injuries (worker’s comp. disability) may not be severe enough to substantially limit a major life activity, thus may not trigger the ADA



# Rules Of Construction

Final regulations adopted rules of construction to use when determining if an individual is “substantially limited” in performing a major life activity under the ADA. Rules of Construction include the following:

- ❑ **Rule 1.** The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.
- ❑ **Rule 2.** An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
- ❑ **Rule 3.** The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.
- ❑ **Rule 4.** The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” must be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied previously.
- ❑ **Rule 5.** The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. The regulations, however, do not prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.
- ❑ **Rule 6.** The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.



# Know the Overlap Among the Statutes

- Employees may be eligible for leave under one or more than one of these statutes
- Important for employer to understand how these statutes work together in order to avoid a violation resulting in damages
- Employer's should be aware that the definition of a job-related injury or disability for workers' compensation purposes is different from the ADA's definition of "disability" or the FMLA's definition of "serious health condition"
  - ❑ An FMLA "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves ... [i]npatient care ... Or [c]ontinuing treatment by a health care provider"
  - ❑ ADA "disability" is an impairment that substantially limits one or more major life activity (record of & regarded as)
  - ❑ Some FMLA "serious health conditions" may be ADA disabilities (ex: cancer & strokes vs pregnancy or broken leg)
  - ❑ Temporary conditions can constitute a "serious health condition" under the FMLA, but generally not a "disability" under the ADA unless it is sufficiently severe and "substantially limits" a major life activity
- Work related injury entitling an employee to workers' compensation may result in a disability or serious health condition triggering an employer to have to make reasonable accommodations for any disability under the ADA (such as leave from work or light duty work) or allowing the employee leave time for any serious health condition under the FMLA
  - FMLA and Worker's Compensation Act overlap in that a leave from work under the worker's compensation act can run concurrently with FMLA leave time, if employer properly designate it and notifies the employer
  - Not all occupational injuries qualify as a "disability" within the meaning of the ADA



# Benefits While on Leave & Returning to Work

- FMLA
  - Can be unpaid, but employer must maintain the employee's health care benefits for the entire leave period in the same manner as if the employee were working
  - When the employee returns to work after their leave, employee must be restored to the same or equivalent position with equivalent pay and benefits
- ADA
  - Reasonable accommodations
    - ADA does not require employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a "disability" as defined by the ADA
  - Employer can reduce the benefits provided to employee when employee's reduced work schedule, as a "reasonable accommodation," drops the employee's hours below that required for the applicable benefit plan coverage.
  - Required reinstatement to previous job unless doing so would create an undue hardship on the employer.





# Benefits While on Leave & Returning to Work

- Workers' Compensation
  - Paid Leave
  - No per se leave mandates, leave is impliedly considered part of receiving medical treatment for on the job injuries
  - If an employee suffers a work injury which qualifies them for workers' compensation and as disabled under the ADA, the employee must be allowed to come back to work after a leave of absence unless
    - » The person can't perform, with or without accommodation, the essential functions of the job that a person holds or desires; or
    - » The person would pose a significant risk of substantial harm that could not be reduced to an acceptable level with a reasonable accommodation
- Interaction
  - FMLA and ADA recognize exceptions to an employee's reinstatement right if an injured worker can't do a job's essential functions without posing a risk of harm to one's self or others.
  - An injured worker may lack any right to reinstatement to the job that they held before injury under the worker's compensation law and even the FMLA, but may still have that right und
  - Employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury
    - Employee's rights under the ADA are separate from entitlements under worker's comp law.



# Issues With Leave Policies

- Automatic termination policies
  - Right to reapply/rehire
  - EEOC says such blanket policies violate the ADA
- Random or unpredictable absences
  - Most courts hold that an employer need not modify its attendance or leave policies to allow for sporadic or unpredictable absences where it can show that regular and predictable attendance is an essential function of the particular job.
  - However, the EEOC holds that attendance can't be considered an essential job function, because the ADA itself recognizes that leaves of absence and modified work schedules are reasonable accommodations in certain circumstances
- Replacement of employee while on leave
  - Can employer hire another employee to do the work of the employee on FMLA, ADA, or Workers' Compensation Leave?



# Light Duty Option

- Employers can create light duty work to allow an employee on leave and receiving workers' compensation to return to work in order to reduce worker's compensation liability
  - Light duty work → position created specifically for the purpose of providing work for employees who are unable to perform their normal duties
- Worker's Compensation: Employee risks losing worker's compensation benefits for refusing the light work option
- FMLA: During the 12 week period of FMLA leave, an employee can choose to accept or deny a light work option
- Worker's Compensation & FMLA: If employee is taking a FMLA leave and worker's compensation leave concurrently, employee may lose worker's compensation benefits for refusing the light duty option, but would still be entitled to continue on unpaid FMLA leave until they have exhausted the 12 week time period or they are able to return to the same or an equivalent job.
- ADA: No requirement for an employer to create a light duty position if an acceptable one does not already exist, however, a less demanding job may be considered a reasonable accommodation
- Regulations allow employer to differentiate between occupational and non-occupational disability for creation of light-duty jobs



# Impact on Workers' Compensation Claim Exposure If Permanent Restriction Not Accommodated

- Vocational rehabilitation
- Maintenance
- Increased permanent partial disability
- Wage differential
- Odd lot permanent total disability

➤ Two-Edged Sword



# Medical Examinations

- ADA
  - Prohibited: Pre-employment questions about disabilities, illnesses and past injuries if they have any potential of revealing information concerning the existence, nature, or severity of an applicant's disability
  - Allowed: Medical questions about an applicant that are job-related and consistent with a business necessity (ex: whether an employee can perform the essential functions of the job, with or without a reasonable accommodation)
  - An employer may require a medical examination after a conditional offer of employment provided all employees in the same job category are examined the same and the examination does not single out employees with a disability
- FMLA
  - Employer may require an employee to submit a doctor's certification of a serious health condition prior to approval for leave and can require a 2<sup>nd</sup> and 3<sup>rd</sup> opinion
  - Return to work certification
- Interaction
  - If an employee is on an FMLA leave running concurrently with a workers' compensation absence, and the Worker's Compensation Act allows the employer to have direct contact with the workers' compensation healthcare provider, the employer may follow the workers' compensation provisions
  - Employer must avoid violating the ADA when requiring an employee to submit to a medical examination when requesting FMLA time off
  - Employer should narrowly tailor requests and scope of medical exam to the employee's ability to perform the essential functions of the job, with or without a reasonable accommodation



# Medical Examinations under Illinois Workers' Compensation Act

- Independent Medical Examination (IME) permitted
- Section 12 of the Illinois Workers Compensation Act:
  - "An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act."
- Refusal to submit to IME can result in temporary suspension of compensation payments
- Employer may reasonably rely on IME
- Adverse employment action is a violation of Section 4(h) of the IWCA – prohibition on retaliation



# Disability-Related Questions and Medical Exams in ADA Enforcement

- Employer may ask questions about an applicant's prior worker's compensation claims or occupational injuries **after** they have made a conditional offer of employment, **but before** employment has begun, as long as the employer asks the same questions off all entering employees in the job
- Employer may require a medical exam to obtain information about applicant's prior occupational injuries, **after** it has made a conditional offer of employment, **but before** employment has begun, as long as it requires all entering employees to have a medical exam
- **No information on prior claims or injuries may be obtained by applicant or third parties prior to making a conditional offer of employment**
- Employer may ask disability-related questions or require a medical examination of an employee at the time employee experiences an occupational injury or when employee seeks to return to the job following injury.
  - Questions may not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat



# Important Areas of Interplay Between The Three Laws:

1. Employer Coverage
2. Employee Eligibility
3. Length of Leave
4. Medical Documentation
5. Restricted or Light Duty
6. Fitness-to-Return-to-Work Certification
7. Benefits While on Leave
8. Reinstatement





# Case Example #1

## *Escriba v. Foster Poultry Farms, Inc. (2014)*

- **Facts:** Employee requested a two-week paid vacation to visit her sick father in Guatemala, which was approved by her employer. Employee then requested an additional 1-2 weeks of unpaid time off, which was denied by her employer. Employee told her supervisor that she did not want her time off to be counted as FMLA leave but instead as vacation time. Employee then took her approved two-week time off and remained off work for an additional 16 days after her approved time had ended. Employee was fired as a result due to the employer's "three day no-show, no-call rule." Employee then filed an FMLA retaliation claim. She claimed her underlying reason for her leave—caring for her sick father—leave triggered FMLA protections, so her employer was required to designate her leave as such.
- **Holding:** Ninth Circuit held that an employee can affirmatively decline to use FMLA leave, even if they qualify for it. The Court concluded that under certain circumstances an employee might seek time off but still decline to invoke FMLA leave, in order to preserve their FMLA rights for future use.
- **What this case means for employers:** This ruling conceivably allows an employee to take paid leave and then FMLA leave, instead of taking them concurrently which is standard procedure in most businesses. In order to avoid factual disputes, employers should require employees to declare in writing whether they intend to take FMLA leave when they are eligible to take it.
- **Considerations:** Escriba, did not address whether an employee could decline FMLA leave—thereby saving it for future use—when demanding a leave to accommodate the employee's own disability (as defined by the ADA). An employer in that situation could potentially argue that it is entitled to count the leave against the employee's FMLA time, because a leave to accommodate the employee's disability that did not also exhaust any FMLA leave would not be a reasonable accommodation under the ADA.



# Case Example # 2

## *Attiobge-Tay v. Southeast Rolling Hills LLC (2013)*

- **Facts:** Employee (nurse) returned to work after 12 weeks of FMLA leave related to a knee-replacement surgery. Employee provided employer with a note explaining that she could return to work with restrictions on kneeling, squatting, and lifting. She asked for either additional leave or an accommodation. The employer denied her request and she was terminated. Employee filed an ADA suit against the employer.
- **Holding:** Court held that the employee's requests would present an undue hardship on the employer. Accommodating her lifting restrictions would mean she could not do an essential part of her job (lifting patients) and her request for additional leave would cause an undue hardship because the employer had already spent \$8,000 to replace her during her FMLA leave. In addition, the company showed the employee's continued absence would negatively affect her co-workers' performance.
- **What this case means for employers:** An employer is not under an obligation to reinstate an employee after FMLA leave if they remain unable to perform the essential functions of their job. Additional leave may be a reasonable accommodation under the ADA, but employer's do not have to provide additional leave as an accommodation if they can prove it would present an "undue hardship."



# Case Example #3

*Dotson v. BRP US Incorporated, et al (2008)*

- **Facts:** Employee was terminated after filing a workers' compensation claim. In support of the termination, the employer stated that the employee's absence from work exceeded the amount of time allowed by the FMLA. The employer had an automatic termination policy upon expiration of 12 weeks of FMLA leave, if an employee was unable to return to work. Employee sued the employer alleging that his employer had wrongfully required him to utilize FMLA leave rather than giving him temporary total disability time and that his employer wrongfully terminated him for filing a workers' compensation claim.
- **Holding:** The U.S. Department of Labor regulations specifically permit the running of FMLA leave concurrently with workers' compensation where the employee's on-the-job injury also constitutes an FMLA-covered "serious health condition." The Court further held, "Illinois law does not require an employer to retain an at-will employee who is medically unable to perform the job." "Nor is the employer obliged to reassign the employee to another position rather than terminate the employee. Finally, and most importantly in this case, 'an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury.'"
- **What this means for employers:** FMLA leave and workers' compensation leave can run concurrently if the reason for the employee's absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.



# Case Example #4

*Simpson v. Illinois Workers' Comp. Comm'n*,  
2017 IL App (3d) 160024WC, ¶¶ 4-5, 79 N.E.3d 643, 646

- The claimant was a 33-year veteran of the fire department who suffered a heart attack after becoming Assistant Fire Chief. At the time of his heart attack he was working in an administrative capacity. The Illinois Worker's Compensation Commission found that the City of Peoria overcame the rebuttable presumption that the claimant's heart attack arose out of and in the course of his employment and denied the claim. The City rebutted the presumption "by providing strong evidence through its experts' opinions along with [the claimant's] own health history, work history and [the claimant's] own testimony to show there were other causes of [the claimant's] cardiovascular problems and his condition is not related to his employment as a firefighter."
- The Appellate Court found that even though Claimant was currently serving in an administrative capacity he was still a "firefighter" under section 6(f) because he had served as a front line firefighter for 22 years before serving in managerial capacities for the past 11 years. Regarding the statutory presumption, the Court found that "once the employer introduces some evidence of another potential cause of the claimant's condition, the presumption ceases to exist and the Commission is free to determine the factual question of whether the occupation exposure was a cause of the claimant's condition based on the evidence before it but without the benefit of the presumption to the claimant."



# Case Example #5

*Brown v. Milwaukee Bd. of Sch. Directors*, 855 F.3d 818, 818(7th Cir. 2017)

- Plaintiff was an assistant principal for Milwaukee Public School until she badly injured her knee while restraining a student. When she returned to work after surgery she told her employer she could not be “in the vicinity of potentially unruly students.” The school attempted to find her a new position that did not involve contact with students. She was fired after her 3-year leave of absence expired before a suitable position was found. She sued under the ADA, claiming the school failed to reasonably accommodate her disability.
- The Court noted that, “[i]dentifying reasonable accommodations for a disabled employee requires both employer and employee to engage in a flexible, interactive process. (*Cites Omitted*). Both parties are responsible for that process. If a reasonable accommodation was available but the employer prevented its identification by failing to engage in the interactive process, that failure is actionable. (*Cites Omitted*). On the other hand, if the employee “does not provide sufficient information to the employer to determine the necessary accommodations, the employer cannot be held liable for failing to accommodate the disabled employee.” (*Cites Omitted*).
- The Court found that Plaintiff presented the School with a broad restriction for a school system-avoid potentially unruly students. Essentially all students are “potentially unruly.” The school argued that with or without reasonable accommodation, Plaintiff was not qualified for either the Assistant Principal position or four of the alternative vacant positions because those positions required her to be around potential “unruly” children, which she stated she was unable to do. Plaintiff argued the school misunderstood her ability and limitations, however, the record showed that Plaintiff never told the school this. “The undisputed facts show that Milwaukee Schools acted consistently with the restrictions imposed by Brown’s doctors, which said that Brown simply could not work in the vicinity of potentially unruly students. To the extent Brown is arguing that her restrictions were less severe than Milwaukee Schools believed, the undisputed facts show that Brown “failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions.” Milwaukee Schools accordingly cannot be held liable for failing to put her in a position it believed would exceed those restrictions.”