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Employment Nightmares: The Intersection of Workers' Compensation, FMLA, and the ADA

I. Fundamentals

One smart practitioner referred to the intersection of Workers' Compensation, the Family and Medical Leave Act ("FMLA"), and the Americans with Disabilities Act ("ADA") as the "Bermuda Triangle." The name stuck, but the reality has evolved to include other types of leave, such as state and local paid sick leave laws and family and medical leave laws. As a result, administration has become increasingly complex and a full-time job. Indeed, complying with overlapping and sometimes contradicting federal, state, and local laws; understanding when various types of leave apply; ensuring consistent application of leaves and policies; ensuring proper documentation; protecting privacy; and other unforgiving requirements understandably makes the Bermuda Triangle a true employment nightmare.

FMLA Basic Concepts

The FMLA, 29 U.S.C. §2601, et seq., provides up-to twelve weeks of job-protected unpaid leave to eligible employees. All public agencies are covered by the FMLA and private employers with 50-or-more employees. For an employee to be eligible, he or she must (i) have worked for the company for at least 12 months (within the last seven years, as may be extended by military service breaks), (ii) have worked for the company for 1,250 hours during the last 12 months, and (iii) work at or report to a location where the company has at least 50 employees within 75 miles.

There are, of course, nuances here, such as joint-employer coverage and contractual or voluntary application. This coverage may either be a happy

employee benefit, or another example of the complexity of administering these laws (or just the implementation of an employee handbook found on the internet without being reviewed by qualified legal counsel – oops!).

ADA Basic Concepts

The purpose of the ADA, 42 U.S.C.§ 12101, et seq., is to provide equal employment opportunities to qualified individuals with disabilities, with or without reasonable accommodation. To be clear, the point of the law is to enable employees to work – not specifically to provide them with leave (which is, by its very definition *not* working). However, to the extent leave – including during a workers' compensation claim or after FMLA leave has bene exhausted – assists a worker in healing, such time away from work may be considered a reasonable accommodation. Such leave may be continuous or intermittent, planned or unplanned.

While the ADA applies to employers of 15-or-more employees (a lower threshold than the FMLA), many states and local bodies have their own laws protecting workers with disabilities, meaning that nearly all employers are covered by the ADA or a similar law. Many local laws follow federal jurisprudence as well.

Workers' Compensation Basic Concepts

We probably wouldn't be here today if we didn't already know the basics of workers' compensation. That said, there are fundamentals related to the FMLA and ADA that risk managers, human resources personnel, counsel, and others in the field should know.

All states have a workers' compensation act, even if employers can affirmatively opt-out. Because workers' compensation is a state-specific law, the following are generalities, which should be confirmed in the relevant jurisdiction. Workers' compensation is a no-fault system, replacing tort liability for personal injury, for injuries and illnesses arising out of and in the course of employment. Through the act, injured workers are provided with lost wage, medical treatment, and permanency benefits – though of course there are other benefits that may be provided as well depending on the case.

Unlike the FMLA and ADA, generally, all employers and all employees are covered by the state's workers' compensation act – unless a specific exemption occurs (i.e.., real estate brokers, commission-only sales people). A state's jurisdiction is often conferred by the employer conducting significant business in the state, the

accident occurring in the state, or the contract for hire being consummated in the state. Of course, this can lead to forum shopping.

II. Identifying Areas of Potential Legal Exposure

Failing to understand the hidden traps in these three interrelated laws may result in needless exposure. Be a hero, and not just another cost center. Risk optimization requires that risk management and human resources understand the causes of action and proactively address them through coordinated efforts.

WC Retaliation

In additional to penalties that may be awarded within the workers' compensation case in-chief, retaliation claims are always possible. Typically, this is separate civil cause of action. But these risks can be easily diminished through appropriate claim management and compliance with the FMLA and ADA. One of the largest fallacies in workers' compensation administration is that an employee on leave cannot be terminated. There is no such golden shield. That said, proceed with extreme caution. The employer will need to articulate a *bona fide* basis for discharge other than the workers' compensation claim.

FMLA-related claims

Proper FMLA administration is important. The two main types of claims are retaliation and interference. What should be alarming is that no discriminatory intent is required for a FMLA interference claim. Key areas of potential legal problems arise out of ambiguous policy language, inconsistent policy and benefit implementation, and improper conduct by supervisors and management.

Worse, is that there can be individual liability for improper FMLA administration! Take, for example, the case of a human resources manager that an appellate court found to be individually liable because she exercised control over the employee's schedule and conditions of employment. Specifically, the manager controlled the employee's rights under the FMLA because she reviewed relevant paperwork and determined its adequacy, controlled the employee's ability to and conditions of return to work, sent the employee nearly every communication regarding leave, and instructed supervisors that all communications with the employee were to go through her. Sound familiar?

ADA-related claims

Without a doubt, this is a quickly developing area of law. Claims include discrimination, failure to accommodate, hostile work environment, retaliation, and harassment. Employees simply need to allege that they were treated differently than a similarly situated employee who was disabled. Common areas of potential legal problems arise out of fear and paranoia (e.g., afraid to take adverse employment action to protect the company) , ambiguous policy language and inconsistent implementation, privacy breaches, and failure to exhaust all available leave rights/benefits under other laws.

III. When the FMLA Applies to Workers' Compensation Cases

Relevant to the Bermuda Triangle framework, FMLA may be used for the employee's serious health condition that makes the employee unable to perform the essential functions of his or her job. A FMLA serious health condition must fall into at least one of the following categories: (i) inpatient care, (ii) incapacity for more than three (3) days with continuing treatment by a health care provider, (iii) incapacity relating to pregnancy or prenatal care, (iv) chronic serious health conditions, (v) permanent or long-term incapacity, or(vi) certain conditions requiring multiple treatments.

Looking for a key practice pointer? Begin FMLA paperwork anytime an employee's work injury necessitates absence from work. Use the current U.S. DOL forms: https://www.dol.gov/whd/fmla/2013rule/militaryforms.htm (with the expiration date of 8/31/2021). Indeed, as a result of a workers' compensation injury, it is presumed that the employer has notice of an employee's need for FMLA leave, triggering the employer's obligations – an employee need not specifically request "FMLA" or use magic language here. Further, the healthcare provider's response can provide a wealth of information related to the need for leave, light duty offers, anticipated medical treatment, and even fighting workers' compensation fraud.

Paid leave benefits can also be coordinated. An employee receiving workers' compensation or disability wage replacement benefits cannot be required to use vacation or other paid time off benefits at the same time – though the employer and employee may mutually agree to supplement (get it in writing!). Of course, if the workers' compensation claim is denied and benefits are not being paid, the employee should be required to exhaust any paid leave (as long as the company's policies conform to this).

Following the exhaustion of FMLA leave – or if earlier when the employee is ready to return to work full duty – the employee needs to be returned to an equivalent position virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. Employees are entitled to unconditional pay increases (cost of living, seniority, work performed) and bonuses if given to employees on non-FMLA leave.

Of course, throughout any FMLA leave and especially those where leave is precipitated by a workers' compensation injury, the employer via its risk management and human resources team(s) should close the loop on seemingly noncompliant situations. Communicate with workers where there is any "unusual circumstance" that resulted in a deviation from treatment, leave of absence, failure to follow call-in procedures, and anything else that may give risk managers, adjusters, or human resources pause for concern. Barring any unusual circumstances, employers need not allow employees to fail to follow standard policies.

IV. Application of the ADA to Workers' Compensation Cases

Do two things after reading these materials. First, learn to document the ADA interactive process. Second, destroy any employment policies that have been declared *per se* violations of the ADA.

The ADA Interactive Process

As of January 1, 2009 – over ten years ago – the ADA was amended to clarify that "disability" should be broadly construed, rather than the narrow construction applied by the courts. As a result, employers have been forced to show that despite any disability, the company has adequately engaged in the ADA Interactive Process to determine whether it would be possible to provide a reasonable accommodation to enable the employee to work. The point is to attempt to remove barriers – not provide leave or terminate the employee.

The obligation to engage in the interactive process continues throughout employment (or at least until such time as the disability is completely resolved). There is no one-size-fits-all solution in this individualized process. Doing this right requires meeting with the employee and inquiring about whether there are any limitations on his or her ability to perform the essential functions of the job – those job duties which are fundamental to the position. If so, ask whether there

are any accommodations sought which would enable the employee to perform the work. Review with the employee those essential job functions and the employee's ability to perform them. Then, demonstrate some sign of having considered the employee's request. Whether an accommodation is reasonable will depend on the unique set of facts, but generally will include many factors such as whether it is a job modification, temporary or permanent, essential vs ancillary duties, tools or equipment may assist in performing the job functions, a temporary transfer or reassignment to another open and available position that the worker is qualified to perform would be successful, and whether a leave of absence might further assist the employee in healing. Of course – document, document, document the process to observe any signs of inconsistency and with an eye on litigation. Given the complexities that exist, it may be fruitful to bring in competent counsel versed in FMLA, ADA, and workers' compensation to guide the process and avoid pitfalls.

Employers prudently should also consider risk factors such as whether the employee poses a direct threat or substantial harm to self or others.

(Slip and) Falling Into Legal Traps Under the ADA

Ten years ago, we advised that these policies should be removed from handbooks immediately. So, now is the time to do it because better late than never.

First: "100% healed" policies have been declared *per se* violations of the ADA. These are policies where the employee must be 100% recovered or obtain a "full release" before being returned to work. The underlying theory – the safety and well-being of the injured employee – is sound, but does not comport with the goal of the ADA which is, again, removing barriers to work. Instead, once the employee is able to perform the essential functions, with or without accommodation, return to work is appropriate. Of course, light duty or modified duty return to work may also decrease workers' compensation wage replacement exposure as well as the permanency award/settlement.

Second: Return to Work after "X" Days policies. These are policies devised for administrative simplicity – an employee is on leave and after 365 days (or any other predetermined number), termination is automatic. But, "not so fast!" says the EEOC and related agencies. Here, too, the employer must go through the individualized ADA interactive process – even for the employee that has been missing for a year. It's not so hard to make the inquiry, and determine whether

the employee could be returned to work prior to making an administrative termination.

In addition to these policy traps, common pitfalls include supervisors and managers not being trained in the ADA including providing accommodation or engaging in the interactive process, failing to consider reasonable accommodations during and after FMLA leave, and treating qualified individual with disabilities differently.

V. Improving Your Workers' Compensation Program Will Improve FMLA and ADA Compliance!

There are quick and easy ways to improve your workers' compensation programs. Start with having the right records in place pre-accident to ensure effective documentation. This includes: job descriptions (especially for safety sensitive positions), handbook/reporting policies, investigation procedures, accident report forms, immediate substance testing (subject to OSHA/Occupational Safety and Health Act regulations), obtaining witness statements; and securing closed circuit surveillance.

Common workers' compensation pitfall – often brought on by a bifurcation of the risk management and human resources functions – include issues related to refusing to return employee to work or engage in ADA interactive process, workers' compensation retaliation (which is not covered by the workers' compensation insurance policy!), failing to have workers' compensation insurance as mandated by state law, and failing to exhaust FMLA and other leave rights. Often times, the most successful programs, and the way to avoid these issues is proactive communication and collaboration between human resources, and the workers' compensation insurance adjuster/risk manager.

VI. Compliance Made Easy, Relatively Speaking

Managing the FMLA, ADA, and workers' compensation is a highly specialized niche, dealing with competing laws and regulations under fact-specific inquiries. No wonder many simply throw their hands up and feign ignorance. But the dedicated risk manager, adjuster, human resources personnel, and counsel can do it right.

First, be (or become) familiar with the relevant regulations. At the same time, update existing FMLA, ADA, and health and safety policies – and any other related policies such as mandated and beneficial leaves of absence. While

updating these policies, perform a routine audit of posters, notices, and forms to make sure they are up-to-date. This is a 10 minute compliance step.

Next, ensure that everyone involved in any of these processes is properly trained. That means that front line supervisors – at minimum – need training on how to recognize that an employee needs medical treatment or might be under the influence of drugs and alcohol, and at least report it to human resources. Similarly, managers and risk management/adjusters need to be trained to involve HR in administering leave and making job accommodations.

Getting deeper into the weeds, understand that FMLA and ADA rights can be triggered early on in the process – employees do not need any magical words or phrases to invoke coverage. Once triggered, exhaust any and all available leave rights including those mandated by law (*e.g.*, local family and medical leave laws, paid sick leave ordinances), by contract (*e.g.*, collective bargaining agreements, employment agreement, or job offer letter), and those to which the company has made available as a matter of policy (*e.g.*, paid time off). Throughout, engage the employee, and document, the interactive process – specifically as it relates to the employee's ability to perform the job.

Be consistent in your treatment of employees, mitigating the risks of discrimination, harassment, retaliation, and interference claims, as well as potential individual liability. Administer workers' compensation claims – assist the employee with first aid and medical treatment, and manage any official claim. Do not show any animus towards the injured worker as a result of the accident or injury.

Teamwork. Ensure relevant stakeholders are involved. Human resources, risk managers, and even outside counsel as appropriate. Ensure coordinated claim management, consistent communications with the injured worker, and goals towards ultimate resolution.