

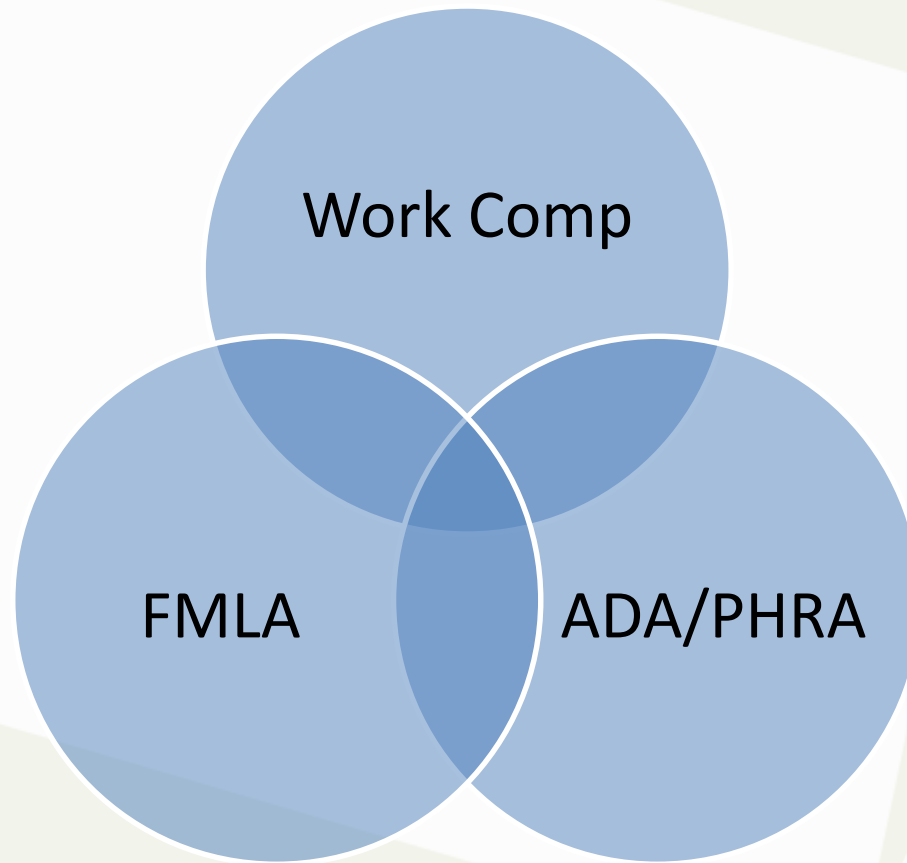
# Solving the ADA, FMLA and Workers' Compensation Conundrum



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# Agenda: How It All Fits Together



# Interplay Between WCA & Other Laws

- Compensable injuries may give rise to issues such as nature & extent of injury, extent of disability resulting from the injury, reasonableness & necessity of medical treatment attributable to the injury.
- Often involves extended absence from work and/or job modification in order to return to work.
- Intersection of Workers' Comp Act, FMLA, ADA



# The Conundrum

- When is an employee out on WC entitled to relief under the FMLA and/or ADA?
- Does the employee have to ask for FMLA or “reasonable accommodation”?
- What happens when the employee on WC is released to return to work with restrictions?



# The Conundrum

- Can light duty programs be exclusively for employees injured on the job?
- What if the employee on WC exhausts his/her FMLA leave and is not released to return to work?
- What constitutes an undue burden?



# What is the Workers' Compensation Act?

- Intended to provide relief to those individuals injured “on the job.”
- A form of insurance that provides wage loss replacement benefits and medical coverage for employees who are injured on the job.



# Who is Covered by Workers' Compensation?

- 77 P.S. §§1 et seq.
- Employees who suffer job-related physical or emotional injuries or illnesses, and death benefits to dependents of workers who have died as a result of their employment.
- The law requires that all employers, not covered by federal programs have coverage.

# Family and Medical Leave Act

- Intended to allow employees with a “serious health condition” time to care for themselves and/or their families
- Most WC injuries would qualify as a “serious health condition”
- Not all “serious health conditions” qualify as a “disability”





# What the FMLA Requires:

- Up to 12 weeks UNPAID leave
  - Can be intermittent
- Continuation of benefits
- Cannot count under “no fault” attendance policy
- No interference, no retaliation



The  
Family  
and  
Medical  
Leave  
Act

# FMLA Leave for Compensable Work Injury – Concurrent Leave

- FMLA leave may run on the basis of absences attributable to disabling effects of compensable work injury provided the employee is notified in advance that such absences will be counted against FMLA leave
- Must state in employee handbook that leave will run concurrent & provide FMLA designation form to employee

# The Americans with Disabilities Act

- Intended to provide protection for “disabled individuals”
  - Physical or mental impairment that substantially limits one or more major life activities (activities of daily living, major bodily function)
  - May be actual, perceived, or have a record of disability
- Requires reasonable accommodation and prohibits discrimination or retaliation



# WC Injury $\neq$ ADA Disability

- Not everyone with an occupational injury has a “disability” under the ADA
- Under WC, injury + wage loss = disability
- Under ADA, actual or perceived physical or mental impairment, regardless of whether it is a work-related injury or there is any wage loss



# Reasonable Accommodation

- Employer must make reasonable accommodations to qualified individuals with disabilities unless poses undue hardship or “direct threat”
- What are the essential functions of the job?
- Restructure job, reallocate or reassign marginal job functions, modify work schedule, modify work equipment, unpaid leave (not indefinite)



# Interactive Process

- Failure to engage may lead to liability
- Employer & Employee should participate in good faith
- Enables employer to obtain relevant information to determine the feasibility of providing a reasonable accommodation without causing an undue hardship or direct threat



# Transitional or Light Duty

- Employer never required to reallocate essential functions of job under ADA
- Employer never required to create a new job under the ADA (but can choose to create a temporary light duty position)
- BUT, if light duty jobs already exist, re-assignment is required as a reasonable accommodation



# Reserving Light Duty Jobs for Work-Related Injuries

- EEOC states an employer may create light duty positions solely for employees injured on the job
- However, EEOC states an employer cannot reserve existing light duty jobs for on-the-job injuries & must consider re-assigning any disabled employee (occupational & non-occupational injuries)





# 100% Healed Policies & the ADA

- EEOC states that an employer will violate the ADA if it requires an employee with a disability to have no medical restrictions – be 100% healed or recovered – if the employee can perform his or her job with or without a reasonable accommodation, unless employer can show the needed accommodations would pose undue hardship or “direct threat”



# Light Duty/Work Restrictions

- Workers' Comp: Offering light duty is a money decision, not a legal requirement. However, it is beneficial to have a return to work program.
- ADA : Can the employee perform the essential functions of the job with or without reasonable accommodations?
- FMLA: Employee may decline light duty and continue on FMLA leave



# Out of Time

- What to do when the FMLA leave is exhausted if it was run concurrent
  - Other paid leave (vacation, sick, PTO)
  - ADA still applies
  - Additional leave as a reasonable accommodation



How much is ENOUGH?

# Benefits

- FMLA requires employers to maintain Group Insurance Benefits on same basis
  - 825.210(f): employee receiving payments as a result of a workers' compensation injury must make arrangements for payment of group health plan when on FMLA



# Best Practices

- Advise employees of their rights under the ADA/FMLA/WC (postings, handbooks)
- Recognize that other statutes may apply
- Maintain communication with employees out on any type of medical leave



# Best Practices

- Maintain communication between Risk Management and Human Resources
- Advise middle management of its reporting obligations
- Confidentiality & keeping separate files



# Mitigating Damages Under Workers' Compensation

- Use of panel providers;
- Light duty program and return to work letters;
- Surveillance.



# Let's Pretend

Joe Carpenter calls out of work for three days and on the third day mentions he thinks he hurt his shoulder on the job.

Now what?



# Let's Pretend

Bob suffered a work-related injury. He has exhausted all his FMLA leave and other paid time off and is still out of work. His doctor says he is continuing treatment, but cannot yet return to full duty.

Now what?

# Let's Pretend

Jane is out of work for 12 weeks and exhausts her FMLA entitlement. She is not released to return to work, and then advises the employer that her disability was due to a work injury. Now what?

# Let's Pretend

Bill undergoes a post-injury drug screening after reporting a work-related injury, and tests positive for marijuana or opioids. Bill is terminated from his job as a result of the positive drug test. Now what?

# Medical Marijuana in PA

- Act 16 – PA’s Medical Marijuana Act passed on April 17, 2016
- Qualifying Conditions
  - ALS/Lou Gehrig’s Disease
  - Autism
  - Cancer
  - Crohn’s Disease
  - **Damage to nervous tissue of spinal cord with objective indication of intractable spasticity**
  - Epilepsy
  - Glaucoma
  - HIV
  - Huntingdon’s Disease
  - Inflammatory Bowel Disease
  - Intractable Seizures
  - MS
  - Neuropathies
  - **PTSD**
  - Parkinson’s Disease
  - **Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective**
  - Sickle Cell Anemia

# Medical Marijuana (Continued)

- Must be prescribed by approved physicians – complete four hour training course on medical marijuana and use of medical marijuana (list available on PA Department of Health)
- Patients are “certified” to use medical marijuana by approved physician
- Marijuana produced by permitted growers/processors
- Obtain medical marijuana products from dispensary
- Products include liquids for vaporizing, concentrates, and capsules – no plants or plant products for smoking

# Medical Marijuana (Continued)

- Insurers: “Nothing in this act shall be construed to require an insurer or a health plan, whether paid for by the Commonwealth funds or private funds, to provide coverage for medical marijuana.”
- Reimbursement – In other jurisdictions with similar medical marijuana laws, judges have ordered reimbursement of out of pocket medical expenses related to medical marijuana (workaround for direct payment prohibition)

# Medical Marijuana (Continued)

- Anti-Discrimination: “No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges **solely on the basis of such employee's status as an individual who is certified to use medical marijuana.**”

# Medical Marijuana Use

- Use in Workplace: “Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in **no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.** “



# Medical Marijuana (Continued)

## Limits on Work Duties:

- Would it constitute negligence, professional malpractice or professional misconduct?
- Chemicals/high voltage/heights
- A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, or could result in a public health or safety risk while under the influence of medical marijuana. **The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.**



*Thank you*

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