

## **The Injured Worker – a Practical Approach to Managing Workers Compensation, ADA and FMLA issues**

One of the most perplexing and treacherous aspects of managing a workforce is the handling of an employee who cannot work because he or she was injured on the job. Most employers are aware that the employee may have rights under state workers compensation laws, the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). However, few truly understand how to apply those laws in a manner that will fairly and consistently protect the company, be fair to the employee and follow the law.

### **BRIEF OVERVIEW OF THE LAWS**

Each of the laws implicated in this discussion are intricate and subject to copious amounts of judicial interpretation. The purpose of these materials is not to educate the reader on the different laws; in fact, entire seminars are devoted to each together with volumes of written materials. Rather, for purposes of this article, these laws are viewed through the very narrow lens of how they impact an employer's treatment of an employee injured on the job. The following is a very general description of each.

#### **Workers Compensation**

Arizona's workers compensation scheme is set forth in statutes passed by the Arizona Legislature (A.R.S. §§ 23-901 through 23-1104) and regulations promulgated by the Industrial Commission (R20-5-101 through R20-5-1136). An employer must display a poster that notifies employees of their rights under this system. Also, you should ensure that your poster notifies employees that they have the right to opt out of the workers compensation system, but that they must do so before an injury.

Workers compensation is a "no fault" system in which injured workers receive medical and compensation benefits no matter who causes the job-related accident. If an illness or injury is job-related, the injured worker receives medical benefits and may receive temporary income-replacement compensation, if eligibility requirements are met. In some cases, a claimant may also receive permanent compensation benefits and "job retraining." The law does not specifically address an employer's obligation to hold the employee's job open during the period of inability to work. It does, however, forbid employers from retaliating against a worker for filing a claim or seeking worker compensation benefits.

## **Americans With Disabilities Act**

The employment aspects of the ADA are set forth in federal statutes passed by Congress (42 U.S.C. §§ 42-12101 through 42-12117) and regulations promulgated by the Equal Employment Opportunity Commission (EEOC) (29 C.F.R. §§ 1630.1 through 1630-16). Arizona also has a law against employment discrimination on the basis of disability, set forth at A.R.S. § 41-1463. The Arizona law generally follows the ADA. Employers are required to display posters notifying employees of these rights.

The employment provisions of the ADA have two specific requirements: (1) employers cannot discriminate against disabled employees and applicants, and (2) employers must reasonably accommodate disabled employees and applicants. Generally speaking, the prohibition against discrimination means both that an employer cannot use disability as a basis for making an employment decision, and that an employer must treat a disabled person no less favorably than any comparable employee. If a non-disabled employee would be entitled to leave, the disabled employee is so entitled.

The reasonable accommodation requirement generally means that an employer must make changes to its facilities, policies and schedules if to do so would allow a disabled person to perform the essential functions of the position held or sought. It is generally held that leave may be a reasonable accommodation under some circumstances. If no reasonable accommodation exists that will allow the employee to perform the essential functions of his or her position, the employer must look to other positions for which the employee may be qualified. If no equivalent position exists, positions that are less than equivalent must be considered.

## **Family and Medical Leave Act**

The FMLA is set forth in federal statutes passed by Congress (29 U.S.C. §§ 2601 – 2619) and regulations promulgated by the Department of Labor (DOL) (29 C.F.R. §§ 825.100 through 825.803). The FMLA generally allows eligible employees to take up to twelve weeks of leave per year for specific, enumerated reasons, including (1) the employee bonding with a child through birth, adoption or foster care, (2) the employee's own serious health condition, (3) the employee's assistance required to care for a family member with a serious health condition, and (4) under certain circumstances an employee's desire to spend time with a family member who is in the military. An employee who sees a doctor and is unable to work for at least three calendar days because of a workplace injury would likely suffer a "serious health condition" for purposes of the FMLA. Employers are required to display a notice informing employees of their rights under the FMLA.

## **HOW LAWS APPLY TO INJURED WORKER**

### **Purpose**

These three laws have different purposes, and an understanding of their desired result assists in an employer's efforts to apply the laws properly.

Workers Compensation. Workers compensation is primarily concerned with providing prompt, fair and "no fault" settlement of employee claims against employers for occupational injury. It generally provides income replacement and paid medical care.

Americans With Disabilities Act. The ADA focuses on an employer's obligation to accommodate a disabled person to allow them to remain in the workforce.

Family and Medical Leave Act. The FMLA provides leave to employees who are temporarily unable to perform their job.

### **Employer Coverage**

The first issue is whether the employer is covered by each law.

Workers Compensation. Arizona law requires every employer to provide workers compensation insurance for its workers (either through a third party insurer or as a self-insurer).

Americans With Disabilities Act. Both the federal and state versions of this law apply to employers with 15 or more employees.

Family and Medical Leave Act. This federal law applies only to employers with 50 or more employees.

### **Employee Coverage**

The second issue is to determine whether the particular employee is eligible for the protection of each law.

Workers Compensation. Except in the unusual situation where the employee opts out, all employees are entitled to coverage under the workers compensation scheme if their injury arose out of and in the course of employment. Coverage starts with the first minute of employment.

Americans With Disabilities Act. Employees are entitled to protection under the ADA if they are "disabled" – a term that is oft litigated. Generally, a person is disabled if they have a physical or mental impairment that substantially limits a major life activity. However, Congress and the EEOC made it clear when the ADA Amendments Act was passed in 2008 that employers should not spend a lot of time evaluating whether a

particular impairment rises to the level of a “disability” but should instead focus on accommodating their employees. In litigation, an employer may wish to argue as part of an overall strategy that the plaintiff-employee was not “disabled” as that term is used under the ADA. However, as a practical matter, a prudent employer will consider the ADA whenever it is faced with an employee who cannot perform the essential functions of their position because of a physical or mental impairment.

Family and Medical Leave Act. To be entitled to the protections of the FMLA, an employee must (1) have been employed by the employer for more than year total, (2) have worked more than 1250 hours during the previous twelve months, and (3) work at a facility with at least 50 employees within a 75-mile radius. That portion of the FMLA that pertains to a workplace injury is the protection afforded to an employee who has a “serious health condition.”

### **Light Duty Implications**

Workers Compensation. Under the workers compensation scheme, an employee may be released to work with restrictions. What this typically means is that the employee can perform some, but not all, of the tasks associated with his pre-injury position. For example, a health care professional may release an employee with a back injury, so long as he does not lift more than 10 pounds. For these people, employers often return them to a “light duty” position. The benefits of such a procedure include (1) the employee is receiving less (or no) lost wage benefits, so the program is less expensive for the employer, and (2) the employee is required to come to work each day, in many cases earning less than he earned in his regular job, thus providing a dis-incentive to unnecessarily prolong the inability to work. If a person refuses to return to light duty, it may have a negative effect on his ability to collect benefits.

Americans With Disabilities Act. Under the ADA, an employee is entitled to return to her same job. However, if the person is unable to perform the essential functions of her position (with or without reasonable accommodation), an employer must look at other positions. First, it must look at equivalent positions that the employee may be qualified for. If none exist, it must consider lower positions that the employee may be qualified for. The employer has no obligation to create a light duty position under the ADA. However, if a light duty position exists, it may be necessary to allow a disabled person to fill it, even if the person was not injured on the job. Therefore, it is typically recommended that light duty positions have a limited duration; otherwise, it is possible that the employer would be required to allow a disabled person to permanently fill the position.

Family and Medical Leave Act. A person on a protected FMLA leave cannot be required to work in a light duty position. So long as they are unable to perform their position, they are entitled to take up to twelve weeks leave. However, the employer can

offer light duty to such a person, who may wish to return voluntarily either out of boredom or a desire to preserve FMLA leave for another occasion.

### **Fitness for Duty Certifications**

Workers Compensation. It is not unusual for an employer to require a certification from the employee's physician when the employee is released to partial duty and/or when the employee is released without restrictions to return his pre-injury position.

Americans With Disabilities Act. A fitness-for-duty certification is considered a "medical inquiry" under the ADA. As such, it is appropriate only if it is "job related" and "consistent with business necessity." If an employee has been unable to perform his job because of a workplace injury, in most cases one could argue that it would be job related to ask for a certification that the restrictions no longer exist.

Family and Medical Leave Act. The FMLA allows fitness-for-duty certifications as a prerequisite to returning to work only under a uniformly-applied policy requiring all similarly-situated employees to comply. For purposes of injured workers, an employer may have a uniformly-applied policy requiring a fitness-for-duty certification from any employee whose job-related injury caused him or her to miss work. However, the employer must notify the employee at the time the FMLA leave is designated that such a certification will be required.

### **Treatment of Medical Insurance**

Workers Compensation. The workers compensation statutes and regulations do not address the treatment of a worker's medical insurance during the period the person is unable to work. The employer should consult their medical insurance policy to determine how long an employee may remain eligible for benefits if they are not "actively employed."

Americans With Disabilities Act. The ADA does not specifically address whether an employee who is on leave as a reasonable accommodation is entitled to benefits such as medical insurance. Again, the employer should consult their insurance professional and policy to determine whether limitations exist. The ADA does, however, require that a disabled person not be discriminated against. This means that if the employee offers coverage to persons on leave who are not disabled, they likely must treat disabled workers the same.

Family and Medical Leave Act. The FMLA specifically addresses benefits such as medical insurance. Under the FMLA, for the twelve weeks a person is on protected FMLA leave, he continues to be eligible for coverage under his employer's group medical policy. Premiums during the leave are typically paid much as they were during

active employment – the employer continues to pay its portion, and the employee continues to pay hers.

## **Reinstatement**

Workers Compensation. The workers compensation scheme does not guarantee an employee that his job will be waiting for him when he is ready to return. However, the law does specifically prohibit an employer from terminating an employee because he filed a workers compensation claim or received workers compensation benefits.

Americans With Disabilities Act. The ADA requires reinstatement to the same position, so long as the employee can perform the essential functions with or without reasonable accommodation. If the employee permanently cannot perform the essential functions of the pre-injury position, then the employer is obligated to consider other positions; first, those that are equivalent in pay and benefits, then those that are not.

Family and Medical Leave Act. If an employee returns within twelve weeks, the FMLA requires the employer to return the employee to the “same or equivalent” position. An equivalent position is one that is virtually identical to the former position in terms of pay, benefits and working conditions (such as privileges, perquisites and status). If the person is unable to perform an essential function of the position because of a physical or mental condition (including a continuation of the serious health condition), the employee has no right to restoration to another position. If challenged, the employer must establish whether the employee can perform the essential functions of the job.

### **MANAGING LEAVE FOR THE INJURED FMLA EMPLOYEE**

So, now that you know the “rules,” how do you compile them into one, comprehensive system?

First, review your policies so that you are fully aware of (1) procedures for reporting workers compensation injuries, (2) procedures for implementing FMLA leave, and (3) other leaves provided by the Company (paid or unpaid). Because an employer cannot discriminate against disabled employees, they should generally be offered all leaves available to other employees.

Then, review your plan documents (and/or confer with your medical insurance professional) to determine an employee’s right to remain on the Company’s group insurance for unpaid leaves outside the FMLA. In many cases, the employee’s right to coverage lapses at some point – even if the Company continues to accept and/or pay premiums. **We’ve all heard horror stories about an employer who accepted and paid premiums for an employee who was on an extended leave.** When the employee ended up in the hospital for a non-occupational reason, the insurance company refused to pay because the employee was not eligible. The employee then argues that the Company is

obligated to pay her medical bills. To avoid this happening to your Company, be sure you understand the specifics of your particular insurance contract.

At each stage, you should consider all three laws. Here is one suggested timeline, which of course should be revised and modified to fit your Company's specific needs.

Time period	Description
Day 1	<u>WC</u> : Employee is injured and evaluated by a doctor, who says that he cannot return to work. Employer fills out and submits a claim form to its workers compensation carrier.
Day 1	Make a file for this particular injury. The records will include "medical records" that must be protected. Therefore, if paper, keep in a locked drawer with limited access; if electronic, keep in a secure location with password access limited to human resource professional.
Day 1	Notify the Employee (preferably in writing) if a paid or unpaid leave bank is being charged for the absence (if true).
Day 3	<u>FMLA</u> : If the employee is not able to return to work within three calendar days, s/he has a "serious health condition" as defined under the FMLA. Send an "Eligibility Notice and Notice of Rights" indicating that the employee is eligible. [A copy of the DOL suggested form may be found on-line at <a href="http://www.dol.gov/whd/forms/WH-381.pdf">http://www.dol.gov/whd/forms/WH-381.pdf</a> .]
Day 3	<u>FMLA</u> : Unless you require further medical information, send the employee an FMLA "Designation Notice." A copy of the DOL suggested form may be found on-line at <a href="http://www.dol.gov/whd/forms/WH-382.pdf">http://www.dol.gov/whd/forms/WH-382.pdf</a> .] Remember to add the requirement for a return-to-work certification, if appropriate.
	<u>WC</u> : Contact the workers compensation adjuster assigned to the claim from time to time to get updates and obtain an expected date of return.
~ Day 10	<u>FMLA</u> : If the employee is expected to be out beyond one pay period, send a letter informing the Employee how his/her medical insurance premiums (and other insurance, if applicable) will be handled, when and how the employee must submit payments, and the anticipated consequence for a failure to pay.
	<u>WC</u> : If the employee is released to light duty, create a temporary position (if appropriate) and notify the employee of its availability. Be sure to include the expected duration of the light-duty position. <u>FMLA</u> : Remember that, for employees on FMLA leave, the position is available at their option and cannot be forced upon them. They may choose to take the full 12 weeks off.

	<p>If the employee reports for light duty as requested:  <u>WC</u>: Notify the workers compensation carrier.  <u>FMLA</u>: Stop the use of FMLA leave time.</p>
	<p>If the employee does not report for light duty:  <u>WC</u>: Notify the workers compensation carrier.  <u>FMLA</u>: Calendar the expected return date (the 12-week FMLA period, or an earlier date designated by the employee's doctor). Do not retaliate in any manner.</p>
	<p>If the employee is cleared for full duty within 12 weeks:  <u>WC</u>: Notify the workers compensation carrier.  <u>FMLA</u>: Return the employee to their pre-injury job.</p>
11th week	<p>If the person is not cleared for full duty within 12 weeks, but the person has been released to light duty:  <u>FMLA</u>: Before the period expires, send a letter to the employee notifying them that their FMLA leave is expiring and instructing the person to report for light duty. Provide instructions for when and where the person should report ready to perform light duty (on a date after the expiration of the 12-week period). Include the expected duration of the light duty position.  <u>WC</u>: Notify the workers compensation carrier if the person does or does not show up.  <u>ADA</u>: Note your records to indicate that temporary light duty is being offered as a reasonable accommodation.</p>
11th week	<p>If the person is not cleared for full or light duty within 12 weeks (or after light duty has expired):  <u>FMLA</u>: Send a letter informing the employee that FMLA leave / light duty position is expiring.  <u>ADA</u>: Review your policies to determine whether additional leave may be offered as a reasonable accommodation. If so, include in your letter a description of the additional leave, including a discussion of what happens to the employee's insurance.</p>
	<p><u>ADA</u>: When the additional leave and light duty expire (or if no additional leave is available), find out from the employee whether a brief, finite, additional leave will allow them to return to their position. If so, do a letter to the employee describing the leave being provided as a reasonable accommodation, the date of expected return, and what happens to the employee's insurance.</p>
	<p>When all leaves (and light duty) have expired:  <u>ADA</u>: Send a letter to the employee informing them that the leave (and</p>

	<p>light duty) is expiring and asking again whether there is any accommodation that the Company can provide that will allow them to return to their pre-injury position.</p> <p>Follow up the letter with a telephone dialog which discusses: (1) whether the employee can perform their pre-injury job without accommodation; (2) if not, whether the employee can perform their pre-injury job with reasonable accommodation(s); (3) if not, whether there is an equivalent position that the person is qualified for and can perform; and, (4) if not, whether there is a non-equivalent position that the person is qualified for and can perform. Let the person know that unless an accommodation can be provided, it is time to take them off the payroll. If appropriate, assure the employee that s/he can apply for re-hire when able to return.</p>
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## **CONCLUSION**

There is no universal, one-size-fits-all scheme for addressing these complex issues. What is offered here is one suggestion that may or may not work for your particular workplace. Armed with a firm knowledge of the law and your Company's policies, however, you should be able to modify this scheme to fit your needs.

If an employee brings claims under these three laws, the Court will analyze each separately.

Remember, when defending a claim under the FMLA, one of the things the Company will need to establish is that it followed every technical aspect of that law. If you are unsure of the processes, you can contact our office for further assistance. If it fails to reinstate the employee to her former position, it must prove that she was unable to perform the essential functions of that job.

When defending a claim under the ADA, the Company will need to establish (1) that it did not discriminate (at a minimum that it offered the employee all leaves and other accommodations offered to non-disabled employees), and (2) that it attempted (repeatedly) to reasonably accommodate the employee's medical limitation. If it terminates an employee, the Company must be able to prove (among other things) that it tried to accommodate the employee's disability and despite those efforts the employee was unable to perform any open position.

To establish these defenses, the Company must document every step of the process. Written communications are preferred to verbal ones, and verbal ones should be documented in a telephone log or other business record. All documents should be kept

under lock and key in a file specific to the injury. If an employee is injured on more than one occasion, there will be a separate file for each injury. Do not keep these records in an employee's personnel file, as they are considered medical records subject to the protection of the ADA.