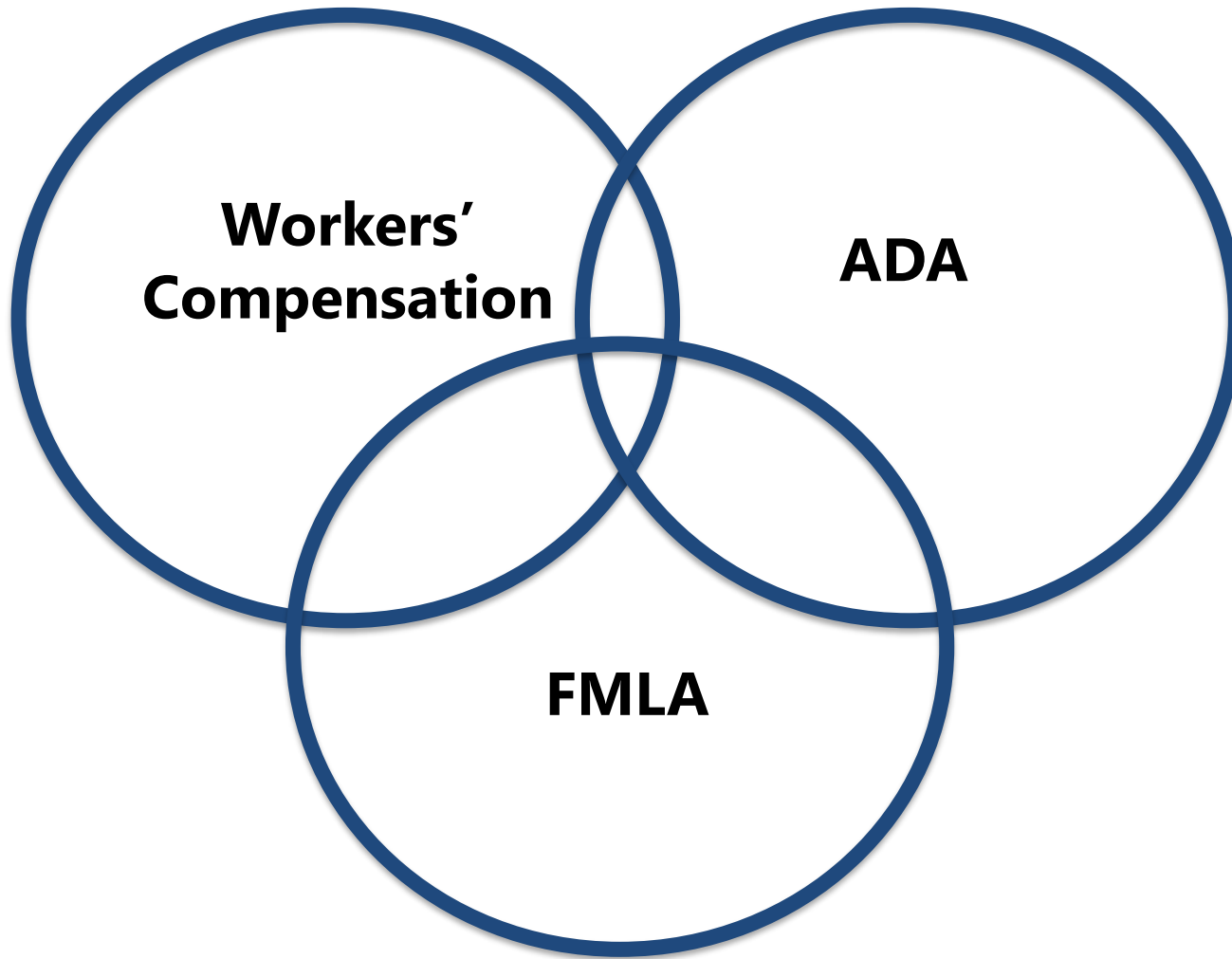


Monitoring the Overlap Between FMLA, ADA and Workers' Compensation

Presented by Stephanie K. Rawitt

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CLARK HILL



OVERVIEW

- Statutory Basics
- Navigating Leave Under the Statutes
- Handling Leave Abuse
- Retaliation Claims
- Best Practices

FAMILY MEDICAL LEAVE ACT (“FMLA”)

- 29 U.S.C. § 2601, *et seq.*
- 29 C.F.R. § 825.100, *et seq.*
- Regulates medical leave from work:
 - 12 work weeks of unpaid leave in a 12 month period.
 - The employee is entitled to job reinstatement upon return.
 - The employee retains group health and disability benefits.
- What employers are covered?
- What employees are covered?

AMERICANS WITH DISABILITIES ACT (“ADA”)

- 42 U.S.C. § 12101, *et seq.*
- Title I of the ADA
 - Prohibits discrimination against “disabled” employees.
 - Requires employers to provide reasonable accommodations to employees.
- What employers are covered?
- What employees are “disabled”?

WORKERS' COMPENSATION

- Compensates employees for on the job injuries for wage loss and medical expenses.
- No blanket law or policy - specifics will vary from state to state.
- Typically most employers are covered.
- Unlike ADA/FMLA, focus for qualification for employees is on wage loss.

INTERPLAY OF QUALIFYING “DISABILITIES”

- Workers’ compensation is 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 WC benefits would be “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.

LEAVE UNDER THE ADA

- FMLA – guaranteed leave under the statute; WC – paid leave while unable to work.
- ADA – leave can be a “reasonable accommodation.”
 - EEOC Enforcement Guidance on “Employer-Provided Leave and the Americans with Disabilities Act,” May 9, 2016.
 - Does not require paid leave.
 - Prevents employers from adopting policies that terminate after 12 weeks of FMLA.
- TREND – employee exhausts statutory FMLA leave and becomes a potential ADA plaintiff.
- No set length for ADA accommodation leave, but an indefinite leave (or leaves) of absence from work is not reasonable. *See Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003).

SUMMARY OF INTERPLAY OF LEAVE PROVISIONS

| | 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 |

HYPOTHETICAL: FACTUAL BACKGROUND

Sally Smith is a nurse in a large, non-unionized hospital. Sally has been employed with the hospital for 10 years and has never taken any type of leave. For the purposes of this hypothetical, it can be assumed that Sally has worked the requisite hours and that the hospital employs more than 50 people. Sally works four 12 hour shifts in the ICU, the maximum number of shifts permitted by state regulation per workweek. Most of the patients are on ventilators and require around the clock care. Each nurse is assigned up to 3 patients during their scheduled shift. While there is a nurse station on the floor, the job requires nurses to be “on their feet” for most of their shift. They are required to lift and move patients so they don’t get bedsores and to give them sponge baths. The ICU nurses also need to lift and move medical equipment, insert IVs, and have the ability to respond and render emergency treatment whenever necessary. The job description contains a lifting requirement of 80 pounds. Sally is diagnosed with stage two breast cancer and is required to undergo surgery and chemotherapy. It is her hope to continue working as she can during her treatment.

HYPOTHETICAL: FMLA LEAVE REQUEST

Sally speaks to Human Resources and obtains the FMLA paperwork on August 15, 2019. The FMLA paperwork contains a medical certification section which seeks information from the treating physician (reason for leave, anticipated duration, the extent to which the condition impacts or prevents Sally from working). Sally turns in the completed FMLA paperwork on September 7, 2019. The medical certification section is partially filled in and signed by her doctor. The doctor notes that the last time he saw Sally in his office was July 15, 2019. He indicates that Sally was diagnosed with breast cancer on August 1, 2019 and that her oncologist, a different physician, created her treatment protocol. It appears that Sally is seeking intermittent leave. The questions concerning dates and/or timing of the requested leave are not filled in. What, if anything, should HR do with reference to Sally's FMLA request?

HYPOTHETICAL: FMLA REQUEST

- A. HR should grant Sally's intermittent leave request. She is a good employee who is going through a terrible time and should be provided with support and understanding.
- B. HR should deny Sally's leave request because she returned the form late and it was incomplete.
- C. HR should ask for clarification and/or for the form to be filled out completely.
- D. HR should deny Sally's leave request because it appears from the doctor's notations that she can still perform the essential functions of the job while she is undergoing treatment.
- E. HR should grant Sally's FMLA intermittent leave request because her doctor signed the form and indicated that she needs intermittent leave for treatment.

HYPOTHETICAL: INTERMITTENT LEAVE

Sally provides HR with the requested clarifications promptly and HR grants Sally's intermittent leave. The paperwork provides that Sally's chemotherapy treatments will be administered on a Wednesday morning every two weeks for six months. During the treatment week Sally can work full shifts Sunday through Tuesday. She cannot work on the day of treatment and the three days after treatment, Friday through Saturday. Sally can then work a full schedule, with no limitations or accommodations until her next treatment day. Accordingly, during treatment weeks, Sally can only work three shifts. Sally can work her full schedule during the off weeks. The hospital's workweek runs from Sunday to Saturday. How does HR track Sally's leave?

- A. Sally will miss five days during each treatment week so HR should count each day she cannot work against her available FMLA.
- B. If Sally is scheduled to work full shifts Sunday, Monday and Tuesday during her treatment weeks, only one day should be designated as a leave day.
- C. Sally can work all days during non-treatment weeks so she can make up the days she misses during treatment weeks and should not have any days designated as FMLA.

HYPOTHETICAL: CALL OUT POLICY

After the first four rounds of treatment (approximately two months), Sally finds that she is not bouncing back after treatment as quickly as she had during the first few rounds. She starts to regularly call out sick for scheduled shifts during her non-treatment week and on a few occasions has failed to show up for scheduled shifts without using the call out procedure. What should HR do?

- A. Count Sally's call out days against her remaining available FMLA leave.
- B. Count Sally's call out days as sick days, but HR should not count the days as FMLA leave because the non-treatment week was not considered as part of the intermittent FMLA.
- C. Count Sally's call out days against her remaining available FMLA and seek a recertification of Sally's FMLA leave. Do not count the days where she ignored the call out policy against her remaining FMLA leave.
- D. Discipline Sally for failing to use the call out procedure.

HYPOTHETICAL: LEAVE ADJUSTED

HR asks Sally to recertify and she complies. Sally's oncologist states that she cannot work for the remainder of her treatment. HR grants the leave on December 7, 2019. Sally has used a total of two weeks leave thus far. How much leave does Sally have left?

- A. Sally has 12 weeks of FMLA leave remaining as of December 7, 2019 because she is now not working at all. She must return by March 1, 2020 or she can be terminated.
- B. Sally has 10 weeks of her 12 weeks FMLA leave remaining and thus must return to work on February 16, 2020 or she can be terminated.
- C. Sally has 12 weeks of FMLA leave remaining as of December 7, 2019 because she is now not working at all. Her leave ends February 29, 2020.
- D. Sally has 10 weeks of her 12 weeks FMLA leave remaining as of December 7, 2019.

ADDRESSING LEAVE ABUSE OR SUSPECTED LEAVE ABUSE

FMLA:

- Certification of health care provider
 - An employer can reject the certification submitted by the health care provider if the information is incomplete or insufficient.
 - An employer may also contact the employee's physician for purposes of "authentication" and "clarification"
 - If FMLA leave is intermittent, the employer can require certification every 30 days provided there are reasonable safety concerns
- "Call-in" policies - 29 CFR 825.303(c)
- Track leave and send notice when its over

ADDRESSING LEAVE ABUSE CONT.

ADA:

- The purpose of the “interactive process” is to determine what, if any, accommodation should be provided to an employee
 - A mutual obligation
 - An employer may require an employee to provide medical documentation
- Failure to engage in interactive process by the employee can release the employer from its obligation to provide a reasonable accommodation
- ADA leave is not indefinite and cannot present an undue hardship

Workers' Compensation:

- Laws generally allow an employer to ask questions or require an employee to undergo a medical examination

HYPOTHETICAL: RETURN TO WORK/POTENTIAL ABUSE

Even though Sally's FMLA leave ended on February 16, 2020, Sally asks for more time. The hospital gives Sally an additional four weeks of leave (after communicating with her to discuss her request) to Monday, March 14, 2020. Sally is asked to keep HR up to date on her treatment and her anticipated return to work date. Sally emails once or twice but then ceases to communicate with the hospital. Through the hospital grapevine, HR hears that Sally is in remission and recuperating, but does not want to return to work because she can't yet do everything that she could before her diagnosis and treatment. What should HR do?

- A. Terminate Sally by letter. The hospital gave her additional time and she did not return.
- B. Call Sally and terminate her over the phone. After 10 years of service to the hospital she deserves that much.
- C. Reach out to Sally to remind her that her extended leave is over. Give her a return date. If she does not report to work on that date, terminate her.
- D. Reach out to Sally to discuss her return. If Sally is ready to return and truly concerned about her job duties, have a discussion about that issue and discuss accommodations if appropriate.

RETALIATION FOR TAKING LEAVE PROHIBITED

FMLA:

- 29 U.S.C.A. § 2615(a), "Interference with rights":

- (1) Exercise of rights

- It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

- (2) Discrimination

- It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

- Also 29 C.F.R. § 825.220

FMLA RETALIATION CONTINUED

- Elements:
 - For a *prima facie* claim plaintiff must show that “(1) he invoked his right to FMLA-qualifying leave, (2) he suffered an adverse employment decision, and (3) the adverse action was causally related to his invocation of rights.” *Ross v. Gilhuly*, 755 F.3d 185, 193 (3d Cir. 2014).
- Causation – not “but for” but rather “negative factor” or “motivating factor”
 - *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 273 (3d Cir. 2017)
 - *Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 168 (2d Cir. 2017)

FMLA RETALIATION: TIMING CONSIDERATIONS

- Timing a critical factor in *prima facie* stage (“inference or retaliation” or “causal nexus”)
- Short periods of time = inference of retaliation
 - While on leave - *Moss v. City of Abbeville*, 740 F.Supp.2d 738 (D. S.C. July 15, 2010)
 - 1 week - *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294 (3d Cir. 2012)
 - **BUT** - day of return - *Cox v. LexisNiexis Claims Solutions, Inc.*, 2019 WL 4804112 (N.D. Ga. July 8, 2019)

FMLA RETALIATION: TIMING CONSIDERATIONS CONTINUED

- Long periods of time = no inference of discrimination
 - 4 months - *Meggison v. Paychex, Inc.*, 679 F.Supp.2d 379 (W.D.N.Y. 2010)
 - 1 year/9 months - *Parrotta v. PECO Energy Co.*, 363 F.Supp.3d 577 (E.D.P.A. 2019).
- IN SUM:
 - Fact sensitive inquiry
 - Timing plays a big role but not dispositive
 - Weeks within leave usually favors an inference; several months or more usually not

RETALIATION FOR TAKING LEAVE UNDER ADA OR WORKERS' COMPENSATION

- ADA – may not retaliate against an employee for requesting or receiving a reasonable accommodation (i.e. leave)
- Workers' Compensation – laws will vary; generally some form of protection
 - Can be in the statute; some states have “public policy” claims for taking employment action against an employee exercising rights protected by statute

HYPOTHETICAL: RETALIATION

After extending Sally's leave by four weeks, hospital administration becomes upset that her position has remained vacant in excess of the protected leave period and, two days before her scheduled return, decides they want to terminate Sally because they are fed up with her extended leave.

Would Sally have a viable FMLA retaliation claim?

- A. Yes, there is no legitimate, non-retaliatory reason to terminate her employment.
- B. No, the hospital satisfied its FMLA obligations by providing 12 weeks of FMLA leave.

HYPOTHETICAL: RETALIATION

The day before Sally is scheduled to return from her leave, the hospital discovers that Sally violated written hospital policy applicable to all nurses regarding tracking medication dispensed to patients under her care on a single occasion six months before she began her leave. The hospital terminates Sally for this reason on the day of her return. Would Sally have a viable FMLA retaliation claim?

- A. Yes
- B. No

Suppose the hospital discovers Sally committed the same policy violation over a dozen times in the six months following her return from leave and thus terminates Sally for that reason. Would she have a viable FMLA retaliation claim?

- A. Yes
- B. No

HYPOTHETICAL: ACCOMMODATIONS/RETALIATION

HR, upon advice of counsel, calls Sally to check in and to see when she thinks she will be able to return to work. Sally explains that she is still very weak, tires easily and has lost a lot of her upper body strength. Sally jokes that she couldn't even hold a small watermelon and that she dropped it on her kitchen floor. Sally and HR laughed about the mess she had to clean up. Nonetheless, Sally, fearful of losing her job if she asked for anything else, agrees to return to work on a modified schedule for the first few weeks and then to full time. Sally does not ask for any other accommodations. The hospital agrees and Sally returns to work on Monday March 21, 2020. Sally has trouble moving the patients into different positions because they are too heavy for her. Sally nonetheless tries and throws out her back. Sally is unable to work as a result of this injury. She has used up her FMLA and does not have any PTO remaining because she used it all when she was treated for breast cancer. The hospital forgets to call counsel and terminates Sally. Does the hospital have any liability exposure?

HYPOTHETICAL: ACCOMMODATIONS CONTINUED

Which of the following statements is correct?

- I. Sally was injured at work and has a workers' compensation claim.
 - II. The hospital did not do anything wrong. Sally did not have any time off remaining.
 - III. Sally might have an ADA claim.
 - IV. Sally has an FMLA claim because she was not given FMLA paperwork when she hurt her back.
 - V. Sally might have an ADA and FMLA retaliation claim.
 - VI. Sally might have other claims.
-
- A. I, IV and VI
 - B. II
 - C. I, III, V, and VI
 - D. III and V

BEST PRACTICES

- Develop policies and apply them consistently
- Document performance issues, misconduct, and the interactive process
 - Use facts
 - Explain how to improve
 - Provide context
 - Follow up
- Delivering the message
 - Clear business reason
 - No personal attacks
 - Practice/keep it short
 - Document

QUESTIONS?



Stephanie K. Rawitt

(215) 640-8515

srawitt@clarkhill.com

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THANK YOU

Legal Disclaimer:

This document is not intended to give legal advice. Employers facing specific issues should seek the assistance of an attorney.

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