

Navigating Through the Complicated Intersection of ADA, FMLA and Workers' Compensation



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Agenda



- Speakers
- Overview
- Handouts - Decision Tree
- Situations and Discussion

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Connection/Intersection of Three Laws

- Americans with Disabilities Act (ADA) 42 U.S.C. §12101 et seq.
- Family and Medical Leave Act (FMLA) 29 U.S.C. §2601 et seq./ Wisconsin FMLA §103.10
- Workers' Compensation Act Wis. Stat. §5102.01 et seq.

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Americans with Disabilities Act (ADA)

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ADA Background



The ADA

- Federal law
- Stated purpose - mandate to eliminate discrimination against individuals with disabilities on the basis of disability in:
 - Employment,
 - Public services and
 - Accommodations

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Americans with Disabilities Act (ADA)

- Employment Goal: No employer shall discriminate against a qualified individual on the basis of disability in any aspect of employment.
 - Qualified individual with a disability
 - Reasonable accommodation

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The Americans With Disabilities Act (ADA) Amendments Act of 2008

- o Modified term "Substantially limits"
- o Expands "Major Life Activities" by including 2 non-exhaustive lists
 - o Activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 - o Major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

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The Americans With Disabilities Act Amendments Act of 2008



- o Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
 - o Example: migraines
- o An applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
 - o Example Stuttering
- o Individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

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Family and Medical Leave Act (FMLA)

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FMLA Background



The FMLA

- Federal law
- Stated purpose: to entitle employees to take reasonable leave for
 - Medical reasons,
 - Birth or adoption of a child, and
 - Care of a child, spouse or parent who has a serious health condition.

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FMLA

- Leave entitlement
 - Total of 12 workweeks of leave during a 12-month period
 - Birth or adoption of a child,
 - Care for the employee's spouse, parent or child with a serious health condition or
 - Because the employee has a serious health condition that makes the employee unable to perform the functions of his or her job.
- Right to return
 - Employee Entitled to return to his or her position of employment or an equivalent position.

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Question on FMLA

- Does 12 weeks of FMLA leave does not necessarily equal 480 hours?
- How do you determine if the individual received 12 weeks?

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FMLA Hours in a Week

- 12 weeks of FMLA leave does not necessarily equal 480 hours.
- Need to examine the employee's usual "workweek"
 - If unpredictable, take the average of the total hours over the preceding 52 weeks.
 - If required over time, that week is longer and employee must use the proper fraction of a week.
 - For example, regular schedule is 40 hours; employee is assigned 10 hours OT and misses them. Employee used 1/5 of a week (10 out of 50 scheduled hours) or 8 hours of FMLA (1/5 x 40 = 8 hours of FMLA).

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Wisconsin FMLA



Wisconsin has its own Family or Medical Leave statute.

- Employers with 50+ permanent employees in WI at least 6 months during the preceding 12 months, and
- Employee worked at least 1000 hours during preceding 52 weeks.
 - Leave is 6 weeks for birth/adoption and
 - 2 weeks for serious health condition of self, child, parent, spouse/domestic partner.
- Runs concurrent with federal FMLA leave.
- Differences – covers key employees, more generous intermittent leave and paid leave substitution requirement

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Question: Late Notice

An employee has approved intermittent FMLA and must call in at least 2 hours before work hours if they will not be in due to the FMLA situation. However, the employee habitually calls in 15 minutes before the schedule work time or calls in after the scheduled work time.

What should the District do if:

- The FMLA situation should not hinder the person from calling in in a timely manner?
- The FMLA situation may be causing the person to be unable to call in a timely manner?

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Question: Late Notice

Employers can enforce call in procedures*

- o Discipline is not for the absence itself, but for the failure to call in
- o Be sure the policy is reasonable
- o Consider whether the ADA comes into play to excuse the late call-in (is the employee medically unable to call in?)

*Much litigation on this issue. Be careful of these situations!

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Question: FMLA Exhausted

Jane is approaching the end of her 12 weeks of FMLA.

You have not heard from her during the leave and her doctor originally said she was not sure if Jane would be able to return at the end of the 12 weeks.

What do you do?

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Workers Compensation

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Workers' Compensation

- o The Wisconsin Workers' Compensation Act was passed by the Wisconsin Legislature in 1911.
- o The purpose of the law was to enact a compromise between employers and employees regarding compensation for work-related injuries.

Before the Workers' Compensation Act was passed, a worker's only remedy for a work-related injury was to sue the employer for negligence.

Under the Workers' Compensation Act, the employer agrees to compensate an employee for a work-related injury according to a payment schedule. In return, the employee and his/her heirs give up the right to sue the employer for damages associated with the work-related injury or death of the employee.



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Workers' Compensation

- o Insurance:
 - Employers of three or more employees or
 - One or two employees who are paid \$500 or more in a calendar quarter
 - Can self-insure under certain circumstances.
- o Compensation:
 - Employee files a notice of claim (First Report of Injury) with the employer and the employer's workers' compensation insurer.
 - Insurer adjusts the claim.
 - If injury is determined to be work-related, the insurer pays the employee according to the statutory payment schedule.
- o Exclusive remedy
 - Workers' compensation - exclusive remedy for work-related injuries.

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Workers' Compensation Special Circumstances

Leased or loaned employees.

- o Staffing or Temp agency:
 - Leased or loaned employees will be covered by the leasing or on-site employer's policy unless the leased or loaned employee is employed by the staffing or temp agency. When the leased or loaned employee is an employee of the staffing or temp agency, the agency's workers' compensation policy will cover those employees.
 - Should be covered by workers' comp as long as the injury was work-related.
 - Who is responsible for the coverage—the agency or the special employer—can depend on state law and the circumstances.

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Workers' Compensation Special Circumstances

Casual or seasonal workers.

- o Some states exclude casual or seasonal workers from workers' comp
- o Exemption may apply only if the work wasn't part of the employer's regular business or profession.

Undocumented workers.

- o Immigrant employees who don't have legal status to work
 - Are covered under workers' comp in most states—including California, Texas, and Florida—whether explicitly in the laws or through court decisions. (Cal. Labor Code §3351, Fla. Stat. Ann. § 440.02, Tex. Labor Code § 406.092 (2018).)
 - Evolving part of the law, as legislators in certain states try to exclude undocumented immigrants from workers' comp protections.

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Relationship Between ADA/FMLA/WC



- o An FMLA "serious health condition" is not necessarily an ADA "disability."
- o An ADA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
- o Some FMLA "serious health conditions" may be ADA disabilities, for example, most cancers and serious strokes.
- o Other "serious health conditions" may not be ADA disabilities, for example, pregnancy without complications or a routine broken leg or the flu. This is because the condition is not an impairment (e.g., pregnancy), or because the impairment is not substantially limiting over time (e.g., a routine broken leg or the flu).

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Relationship Between ADA/FMLA/WC



What can happen?

- o Absenteeism – Major impact on educating students when educators experience extended absences during the school year.
 - Educators are human and school districts want to provide accommodation and support during periods of self or family illness or other health-related situations.
 - Student-teacher relationship is critical, especially at elementary level. How to support this relationship when a health situation occurs.
- o Reasonable accommodation – what is reasonable in a K-12 environment?
 - When does a requested accommodation cause an undue hardship requiring denial of the accommodation?
 - Is extended leave a reasonable accommodation for an educator? At what point is extended leave an undue hardship for the school district?

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Checking the Intersection

- o A work-related injury may be an ADA-qualifying impairment requiring a reasonable accommodation, but an employee cannot sue under the ADA for a work-related injury.
- o FMLA leave time can run concurrent with workers' compensation leave if the employer's handbook policy provides for concurrent leave. If the employer's policy does not specify concurrent leave, the employee may be entitled to take FMLA leave after maximum medical improvement is reached.
- o FMLA leave time can be a reasonable accommodation under the ADA. Put differently, a qualified individual with a disability may be entitled to take FMLA leave as a reasonable accommodation even when the employee's attendance is otherwise not in compliance with the School District's attendance policy.

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Checking the Intersection

- o Indefinite leave beyond the employee's FMLA leave entitlement is not a reasonable accommodation in the Seventh Circuit (Wisconsin, Illinois and Indiana).
- o Wisconsin has its own FMLA statute. Under the Wisconsin FMLA, employees who work 52 weeks and 1000 hours are entitled to six weeks for the birth or adoption of a child and two weeks for self or family serious health condition.

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Relationship Between ADA/FMLA/WC

What can happen?

- o Transfer request – Is a transfer request a reasonable accommodation (i.e., legally required) when the employee's relationship with his/her principal or supervisor may have deteriorated?
 - What if the employee has been placed in a performance assessment status?
- o Health care provider certification of serious health condition for FMLA – What if the certification is inadequate?
 - Can a school district challenge the certification?
 - If so, what are the parameters?
- o Retaliation – At what point is the school district at risk for retaliation by enforcing its work rules?

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Checking the Intersection



- o Multiple laws/benefits could apply at the same time
- o Example: Employee injures his back on the job. He needs surgery and will be off work for 6 weeks, then he may be able to return for 20 hours a week with a lifting restriction for 4 weeks.
 - WC – Yes. He will get income replacement during the lost time and employer cannot retaliate or unreasonably refuse to rehire
 - FMLA – Yes, assuming threshold eligibility). He has a serious health condition. Time off protected up to 12 weeks.
 - ADA – Yes. He is substantially limited in a major life activity. He is entitled to reasonable accommodations absent undue hardship (leave, modifications).

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On the Horizon



- o Medical marijuana,
- o Opioid use disorder and
- o Other items

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Situation #1

- o A special education teacher who has provided instruction at the home of a special needs student has contracted COVID-19 and is put on leave by his physician for a minimum of six weeks. The teacher files a worker's compensation claim stating that the student's sibling and mother tested positive for COVID-19. The teacher's physician provides a report saying that the teacher's condition is work-related to a reasonable degree of medical probability. Over the course of this process, the teacher, until his diagnosis, was conducting "normal" activities including grocery shopping and limited family get-togethers. The teacher's mother-in-law was also diagnosed with COVID-19 around the same time.

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Situation #1

POLL QUESTIONS

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Situation #1

DISCUSSION

- o Worker's compensation claim?
- o District contest claim?
- o Requirement of physician's report

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Situation #2

- o Administrative assistant to the high school principal has severe asthma and other lung conditions that make her high risk for COVID-19. She has been working from home since the school district began offering remote learning. In February 2021, she returned to the office on a Saturday (at her own initiative) to get a file she needed for a work project. She saw three co-workers and nodded hello. Last week one of the co-workers reported a positive COVID-19 test. The Administrative Assistant has filed a claim for worker's compensation due to her exposure. She has, to date, continued to test negative.

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Situation #2

POLL QUESTIONS

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Situation #2

DISCUSSION

- o Contact work related?
- o Leave of absence, receive worker's comp?
- o Work related exposure?

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Situation #3

- o Bus driver experienced a work-related driving accident and incurred a concussion. The driver was placed on light duty due to frequent headaches, memory loss and sleep deprivation. Eight months later, the driver slipped on ice and suffered a knee injury requiring surgery. The driver applied for 12 weeks of post-surgery FMLA leave which she received. After using all of her FMLA time, the driver's doctor extended her medical leave for another eight weeks. The driver took approved sick and vacation leave to cover this time. During the driver's paid time off, she traveled with friends to Nashville as indicated on her Facebook page. The employer's HR director instructed the driver to return to work. When the driver asked to use earned vacation time, her request was denied. She was investigated for rule violations including failure to complete time sheets and taking vacation without prior approval.

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Situation #3

POLL QUESTIONS

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Situation #3

DISCUSSION

- o The investigation resulted in her termination.
- o FMLA?
- o ADA?

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Situation #4

- o Teacher transferred to District high school. After the transfer, she realizes that the school does not have air conditioning and that the temperature would be too difficult for her on hot days due to her condition of diabetes. Teacher asked for an accommodation transfer to a regular teaching position in an air-conditioned building. Her accommodation request is supported by a doctor's report. The District transferred the teacher to the air-conditioned middle school without using the competitive process that usually is applied. Anticipating layoffs, the teacher transferred to a special education position at another air-conditioned school for the following school year. In September, the teacher met with the principal to request a transfer to a regular teaching position as an accommodation. She also asked that her classes be confined to one classroom on the ground level of the school.

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Situation #4 (cont.)

- o The District's Director of Business Services met with the teacher to deny her requests because there were no regular positions available and her classes could not be confined to one classroom without undue hardship. The teacher began a 30 day administrative leave and then a medical leave. The teacher returned to work after eight weeks but continued to request reassignment to a regular teaching position supported by medical documentation. The District denied these requests because the teacher did not have the required certifications and because some of the positions were part-time. The teacher experienced a major depressive incident resulting in hospitalization which she states was due to her continued assignment in a special education position and the District's failure to accommodate her reassignment requests. The District had granted multiple related accommodation requests for the employee, met with her numerous times and offered several alternative reassignment options.

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Situation #4

POLL QUESTIONS

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Situation #4

DISCUSSION

- o Support ADA retaliation claim
- o Accommodation?
- o Lawsuit?

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FMLA, ADA, WC

Share your challenges

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ADA/FMLA/WC

Take the wheel and understand the roadway!



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Contact Us



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