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# **2018 Labor and Employment Seminar**

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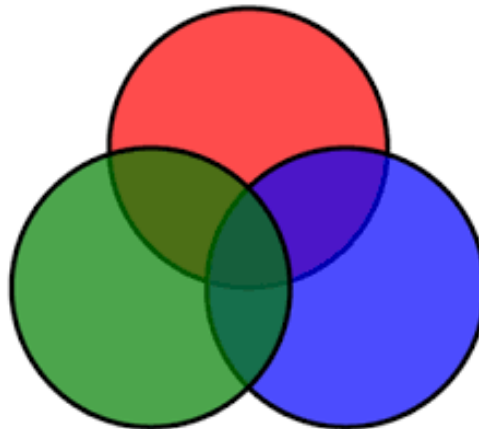
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# **Return to Work**



# Is it a Disability or Serious Health Condition or Workers' Compensation Injury?

Family and Medical Leave Act



Americans with Disabilities Act

Workers' Compensation



# Practice Tips

## **ALWAYS START WITH FMLA**

- Greatest benefits to employees
- Most restrictions upon employers
- Most precise legal obligations



# Practice Tips

**When FMLA ends, the ADA still lives on.**



# Practice Tips

- Light duty and reasonable accommodation are not the same thing.
- An employer is not required under the ADA to create light duty work for an employee.
- Exception: If an employer “reserves” light duty work for employees who have workers’ compensation injuries, the employer cannot refuse to provide a reserved light duty job to an employee who has a non-workers’ compensation injury that is also a disability.



# General Fact Scenario

- Sunset Years has 80 employees.
- Anne Price - CNA for 4 years.
- She works a .8 position.
- This year she has missed 10 days of work.
- Company's "no fault" policy only allows 10 missed days per year (never more than 2 days in a row). One more day and she is subject for termination under the policy.



# The Injury

- Anne scheduled to work Wednesday p.m.
- That morning, calls in with back pain.
- Has a doctor's appointment and will call following the appointment.
- Reports that her doctor has ordered bed rest for the next three days and she is to see the doctor again on Monday morning.





# Part I – Initial Analysis Under Workers' Comp.

- How do you determine coverage:
  - Check # of employees (More than 50)
  - Check how long Anne has worked for Company (More than one year)
  - Check # of hours in the last year (At least 1,250)
  - Look at # of doctor visits (Two)
  - Look at # of days incapacitated (More than three)
- Is Anne covered?



# Part I – Initial Analysis Under ADA

- What if she didn't meet one or more of the FMLA thresholds for coverage?



# Part I – Initial Analysis Under Comp

- How do you determine coverage:
  - Investigate to find out if occurred at work
  - Get report of injury if alleged work related including mechanism of injury and body part(s) injured



# After the Monday A.M. Appt.

- Anne stops by the worksite and provides documentation and back injury is serious.
- Doctor has restricted her ability to stand, walk and lift.
- Work only 4 hours per day and change positions and sit as needed.
- Doctor will see her again in two weeks.
- Anne injured her back while preventing a resident from falling during her last shift.



## Part II – FMLA Considerations

- Is Anne eligible for coverage under FMLA?
- What do you need to do?
- What are you permitted to do?
  - Substitute accrued PTO for any part of leave.
  - Run FMLA leave concurrently with work comp.
  - Greater ability to authenticate & clarify leave.



# Part II – ADA Considerations

- What is your next step under the ADA analysis?



## Part II – Workers’ Comp Considerations

- If eligible for comp. benefits, “light duty” within the given restrictions is permissible.
- However, FMLA does not run concurrently with “light duty”.
- If Anne refused “light duty” within her restrictions, she could still be allowed the FMLA leave, but workers’ comp. benefits would not be paid.



## Part III – Symptoms Continue

- Anne's symptoms continue and off work for 9 weeks.
- She treats regularly and submits updates.
- After 9 weeks, increased workability to 8 hours.
- Still restricted on ability to stand and walk.
- Anne requests return to old job.





## Part III – RTW under FMLA

- If Anne has been released to work full days, although with restrictions, is she eligible to return to work?
  - Under FMLA, she is entitled to reduced leave assuming she is able to return and perform the essential functions of her job
- What happens if Anne can't perform essential functions of her job?
  - Anne still has 3 weeks of FMLA leave
- What happens if Anne has no more time and can't perform essential job functions?
  - This is the critical “hand off” from FMLA to ADA



# Anne Goes Home

- Anne tried to do her Nursing Assistant job, but was unable to do the work.
- You offer her temporary light duty performing office work.
- She declines and goes home for the remaining 3 weeks of FMLA time.
- At the end of 3 weeks she tells you she needs another 4 weeks off and then she “should be fine.”



## Part IV – Failed RTW & FMLA

- Does the fact that you offered the temporary light duty cut off entitlement to any remaining FMLA?
  - No – If she still has a serious medical condition that prevents her from working and has remaining FMLA she is allowed her 12 full weeks of FMLA leave.



## Part IV – Failed RTW & FMLA (cont.)

- Do you have to continue to hold her position open?
  - Not under FMLA – Now ADA really matters
- Can you terminate Anne at the end of her FMLA leave?
  - Yes under FMLA but not under ADA
- Do you have to give Anne additional leave?
  - Probably
- Do you have to consider “reasonable accommodations” under FMLA?
  - Not under FMLA



## Part IV – Failed RTW & ADA

- Was the temporary light duty that you offered an accommodation?
  - No – Light duty was only temporary and it was a different job.
- Does the fact that you offered the temporary light duty and she declined it, alter your obligations under the ADA?
  - No – Not an accommodation to her actual job.



## Part IV – Failed R.T.W. & Comp.

- Does the fact that Anne turned down “light duty” work change her entitlement to ongoing work comp benefits?
  - Yes, if she was released to work with restrictions and the work offered was within those restrictions
  - Still would be protected under FMLA
  - If no remaining FMLA look to ADA



# Facts

- Assume Anne is ready to come back 6 weeks later.
- She returns to work with lifting and bending restrictions.
- The restrictions are for the next 6-9 months.



# RTW under ADA

- What is your next step under the ADA analysis?
  - Look at severity of condition
  - Look at essential functions of job and ability to perform functions
  - Engage in interactive process regarding accommodation
- Given her ongoing restrictions from the doctor, does Anne qualify for ADA coverage?
  - An even stronger probably





## RTW under ADA (cont.)

- Do you return Anne to her old job?
  - If able, engage in interactive process
  - Return to her old job if she can perform essential functions of job with reasonable accommodations
  - Accommodation of last resort
- Anne's job was filled while she was out on leave. Do you have to find her another job within the company?



## Conclusions (cont.)

- When one or both of the federal statutes conflict with state laws, the federal laws take precedence if the federal laws are more restrictive.
- When in doubt over complexities, seeking assistance of counsel on ADA and FMLA issues is wise.



## Conclusions (cont.)

- Because Anne has been out due to a work injury, do you have a greater obligation to return her to her pre-injury job?
  - No greater obligation to return to same job
  - Suitable job (hours, pay, abilities) is generally sufficient under Comp
  - But remember FMLA (if return within 12 weeks) or ADA



# Dueling Doctors

- You decide that you would like to get another opinion on Anne's physical condition and capabilities.
- Independent Medical Exam (IME) takes place.
- IME doctor opines unrestricted work.
- Anne's doctor is still restricting her walking, standing and lifting abilities.



## Part V – Dueling Docs & FMLA

- Can you terminate Anne if she is unwilling to return to work unrestricted
  - Not if she still has FMLA leave and her doctor is providing documentation that she has a serious medical condition that prevents her from working
  - What if she doesn't have any more leave?
- Do you have to give Anne additional leave?
  - Not under FMLA, but probably under ADA



## Part V – Dueling Docs & FMLA

- Which doctor opinion and restrictions govern? Do you have to consider both in making decisions?
  - Yes – Interactive process must begin
- How do you proceed if Anne insists on following her doctor's restrictions?
  - Do you have to discuss accommodations even though the IME doctor for the work comp case gives full return to work?



## Part V – Dueling Docs & Comp

- Under Comp can you tell Anne that you are following IME doctor's recommendations, offer her pre-injury job and advise her that temporary light duty no longer available?
- Yes; however, could spark an ADA issue relating to a disability and a failure on part of Employer to engage in interactive process and failure to accommodate a disability



## Part V – Dueling Docs & Comp (Cont.)

- Do you have to continue to provide work within treating doc's restrictions or pay wage loss benefits if Anne refuses?
  - No; however, likely results in comp litigation to be decided by ALJ
  - ADA would require interactive process





## Part VI – Request for Accommodation

- Anne returns after using up her 12 weeks of FMLA leave.
- Wants to go back to her old job.
- She tells you that she can do the job with following accommodations:
  - Sit for 5-10 minutes every hour.
  - Assistance on lifts.
  - Allowed to report to work a half-hour late one day a week to allow medical treatment.



## Part VI – FMLA

- What does Anne have to provide to you to allow her return to work?
  - If told in advance Fitness for Duty
  - If serious doubts about abilities IME may be permissible



## Part VI – Request for Accommodation under ADA

- Do you have to accommodate Anne's requests under the ADA?
  - Possibly – Engage in interactive process
- What do you consider in arriving at your decision?
  - Essential functions
  - Reasonableness of request
  - Cost should not be primary consideration



## **Part VI – Request for Accommodation under Comp**

- Does the IME doctor's opinion change your decision on the issue of accommodating Anne's requests?
  - Under Comp, you do not need to accommodate but ADA would require interactive process and consideration of request to accommodate
- If you do not accommodate Anne's requests, is she entitled to ongoing wage loss benefits?
  - Not automatically – If ALJ says yes, then yes



# Conclusions

- The statutory and common-law areas of the ADA (ADAAA), FMLA and Workers' Compensation overlap and sometimes conflict in some way with one another.
- Consequently, there are a few general rules to consider when trying to determine the correct action to take under the laws:



## Conclusions (cont.)

- Try to comply with all of the restrictions if possible.
- In situations where the restrictions imposed by the laws appear to be in conflict compliance with the strictest restrictions is best bet.



# Questions?