

# Coordinating Compliance with ADA/FMLA/WFEA/WC in Dealing with Injured Employees

October 4-5, 2017  
Country Springs Hotel

**Presented By:**

Laurie A. Petersen  
Jenna K. Leslie  
Lindner & Marsack, S.C.  
411 E. Wisconsin Avenue, Suite 1800  
Milwaukee, Wisconsin 53202-4498  
(414) 273-3910  
www.lindner-marsack.com



2

## FMLA, ADAAA, and Worker's Compensation Interactions

### The Bermuda Triangle

- Given the complex interplay between FMLA, ADAAA, and Worker's Compensation, it is easy for employers to get lost. Hence, the three are ominously referred to as The Bermuda Triangle.
- Employers cannot assume that an employee qualifies for protection under one law only or each law simply because the employee qualifies under one.

3

## The Laws

- ADAAA: prohibits discrimination against employee's who are considered "qualified individuals" with a disability
- FMLA: provides leave standards for employees who have a "serious health condition" or a family member with a serious health condition, plus for the birth of a child and postpartum care
  - Also provides leave standards for Military caregiver leave and qualifying exigency leave.
- Worker's Compensation: provides for treatment, rehabilitation and compensation for employees who suffer "work-related" injuries

4

## Covered Employers

- ADAAA – Employers with 15 or more employees for each of 20 or more calendar weeks in current or preceding year
- FMLA – 50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year
- Worker's Compensation – coverage varies by state

5

## Covered Employees

- ADAAA – employee with a disability must be qualified and able to perform essential functions of the job with or without reasonable accommodations
- FMLA – employee with a “serious health condition” must have worked at least 12 months and 1,250 hours to be eligible
- Worker’s Compensation – employee must have suffered an injury arising out of the course and scope of employment

6

## Enforcement Authorities

- ADAAA – Equal Employment Opportunity Commission
  - Federal court litigation.
- FMLA – Department of Labor. Be aware of state leave laws as well
  - 14 states currently have state leave laws
  - Wisconsin is one of them
- Worker’s Compensation – State Departments of Labor or the equivalent
  - Generally state administrative actions

7

## Obligations

- ADAAA/WFEA – for disabled employees, Wisconsin employers obligated to address disabilities and reasonably accommodate unless undue hardship
- FMLA/WFMLA – 12 weeks/2 weeks of job-protected leave
- Worker’s Compensation – unlimited leave during recovery from work-related injury

8

## Obligations

- However, Wisconsin employers are **not** obligated to:
- ADAAA/WFEA: Give preference, create a position or permit otherwise unacceptable/unsafe conduct or permit unacceptable safety risks
  - FMLA/WFMLA: provide any more than 12 weeks under FMLA/2 weeks under WFMLA
  - Worker’s Compensation: not required to provide light duty or return employee not fit for duty

9

## Leave Limitations

- ADAAA – No limitation. Reasonable accommodation can be permanently in place
  - Recent case law re: leave as reasonable accommodation
- FMLA – qualifying employee receives up to 12 weeks of leave in a 12-month period
- Workers' Compensation – no specific limit on leave

10

## Reinstatement Requirements

- ADAAA – Reinstatement to previous job is required unless employer establishes undue hardship
- FMLA – Reinstatement to the same or equivalent job is required
- Worker's Compensation – most states do not require reinstatement, but some do. Retaliatory discharge/unreasonable refusal to rehire may apply as well.

11

## Establishing Employee Eligibility

- ADAA – job-related medical examinations or inquiries regarding an employee's asserted disability to determine the employee's ability to perform the essential functions of the job
  - Also determines whether accommodation is needed and would be effective.
- FMLA – medical certification of the need for leave establishing employee's "serious health condition" or that of a family member
- Worker's Compensation – medical documentation that establishes the employee's injury and its work-relatedness

12

## Restrictions and Light Duty

- ADAAA – employers are required to reasonably accommodate employees' disabilities absent undue hardship
- FMLA – employers cannot require employees to return to work with restrictions or on light duty
- Worker's Compensation – light duty is not required, but employers are encouraged to bring employees back to work in some capacity, if possible

13

## Contacting the Physician

- ADAAA – employers may interact with physicians to facilitate the reasonable accommodation process
- FMLA – employers may not directly contact the physician
- Worker's Compensation – employee ordinarily waives physician-patient privilege when filing a WC claim; therefore, employer has access to patient records reasonably related to injury

14

## Fitness for Duty

- ADAAA – employers can require examination so long as it is job-related and necessary to determine employee's capability for the job and whether accommodation will be needed
- FMLA – can only be required if such examinations are consistently required of all employees on similar leaves of absence
- Worker's Compensation – typically is required; possibly in the form of an Independent Medical Evaluation

15

## Employee Benefits while on Leave

- ADAAA – no specific requirements but cannot discriminate
  - Same benefits must be provided for all leaves of absence, whether ADAAA or otherwise.
- FMLA – health coverage must be continued. Other benefits are established by the employers' policies related to continuation of benefits while on leave.
- Worker's Compensation – not required in most states, but be careful of leave that is concurrent with FMLA leave

16

## Termination of Employment

- ADAAA – termination of employment is legal if no reasonable accommodation can be made and available leave is exhausted
- FMLA – Employee cannot be terminated while covered under the FMLA
- Worker's Compensation – employer may terminate the employee's employment, but must be wary of unreasonable refusals to rehire and discrimination

## Concurrent Leave

- FMLA leave and worker's compensation leave may run concurrently as long as the employee's work-related injury constitutes a "serious medical condition."
- Employee receives worker's compensation benefits, i.e., replacement of lost wages, and the employer is required to continue health insurance benefits under FMLA.

## Drafting Consistent Policies

- Policies should acknowledge that they contemplate ADAAA, FMLA, and Worker's Compensation.
- Crucial to effective policy drafting is a thorough review of the laws, both state and federal.
- Employees should be notified that state and federal leave will run concurrently so long as allowed by law.
- Employees should also be made aware that leave under these laws will also run concurrently with other leave allowed by the employer.

## Policy Drafting continued...

- Leave policies should provide the specific situations in which leave applies under each law.
  - Include the requirement of "disability" under the ADAAA, "serious health condition" under the FMLA, and "work-related" injury under WC.
- Policies should inform employees of manner in which paid leave can be taken.
  - Worker's compensation leave is considered paid leave.
  - Employers can run FMLA leave concurrently with WC and substitute other paid leave, such as vacation; however state laws may differ in this respect.
  - Make sure that WC injury qualifies as "serious health condition."

## Policy Drafting continued...

- Employers should review all job descriptions to assure that "essential functions" of each job are accurate and reflect actual functions of the position.
- Uniform job qualification requirements are effective only if the requirements are actually necessary for the job.
- Leave policies should be flexible.
- Under the ADAAA, restrictive, inflexible leave policies are under considerable scrutiny.

## Troubleshooting Complex Leave of Absence Issues

- Even though an employee may have exhausted FMLA and other company-offered leave, employers must be willing to consider additional leave.
- Must be aware, however, that just because a condition qualifies an employee for FMLA leave, the employee is not necessarily "disabled" under the ADAAA.
  - In those instances, additional leave may not be required.

## Termination Of Employees On Leave

- ADA – must give consideration to reasonable accommodation. There is no bright line test for when an employee may be terminated.
- FMLA – even if permanent restrictions, must allow to exhaust FMLA. Does not mean super-seniority however.
- Worker's Compensation: if terminated during a "healing period," or immediately following a return from WC, employers face a potential wrongful discharge claim

## QUESTIONS

Laurie A. Petersen  
 Jenna K. Leslie  
 Lindner & Marsack, S.C.  
 411 E. Wisconsin Avenue, Suite 1800  
 Milwaukee, WI 53202-4498  
 (414) 273-3910  
[lpetersen@lindner-marsack.com](mailto:lpetersen@lindner-marsack.com)  
[jleslie@lindner-marsack.com](mailto:jleslie@lindner-marsack.com)

