

NORTHERN WESTMORELAND CAREER & TECHNOLOGY CENTER

ADMINISTRATIVE
REGULATION

347-AR-3. INTERRELATIONSHIP AMONG ADA/FMLA/WORKERS'
COMPENSATION/HIPAA PRIVACY RULE

A work-related injury has implications for Workers' Compensation, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the Privacy Rule under the Health Insurance Portability and Accountability Act (HIPAA). Unless each of these laws is considered and properly evaluated when dealing with an individual who has been injured on the job, the center may increase its exposure to legal liability. Consequently, it is necessary to have an understanding of the scope and applicability of each law.

The Workers' Compensation Act requires payment of certain benefits to employees who are injured on the job. Benefits generally include disability payments; specific loss benefits for such "specific losses" as loss of an eye, loss of an arm, etc.; medical expense payments; and death benefits. Workers' compensation provides no job protection nor any mandate for the continuation of employer provided fringe benefits. In Pennsylvania, where an employee is injured after June 24, 1996, if the employer has a specific job vacancy the employee is capable of performing, the employer must offer the job to the employee.

The Americans with Disabilities Act does not apply to all employers, but governs only those employers who engage in interstate commerce and employ fifteen (15) or more employees. Public school entities, including vocational technical schools and centers, are generally covered. The ADA generally prohibits discrimination against qualified individuals with disabilities and requires covered employers to provide reasonable accommodations necessary to enable qualified disabled individuals to perform the essential functions of their job.

The Family and Medical Leave Act applies to private employers engaged in interstate commerce who employ fifty (50) or more employees and to governmental employers, regardless of the number of employees. It covers employees who have been employed by the employer for at least twelve (12) months and for at least 1,250 hours of service during the twelve-month period preceding the requested leave. FMLA requires employers to grant up to twelve (12) weeks of unpaid leave per year to covered employees for one or more of the following reasons:

1. Birth or placement of a son or daughter.
2. To care for a spouse, parent, or child who has a serious health condition.
3. An employee's own serious health condition that makes the employee unable to perform the functions of his/her position.

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The FMLA permits a spouse, son, daughter, parent, or next of kin to take up to twenty-six (26) workweeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. An employee is also permitted to take FMLA leave for any qualifying exigency stated in federal regulations arising from the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call or order to active duty, in the National Guard or Reserves in support of a contingency operation.

Employers must continue group health care coverage to the employee during the leave to the same extent as if s/he were not on leave. The employee has a right to return to work at the conclusion of the leave.

Workers' Compensation, ADA and FMLA intersect where a work-related injury renders the injured individual a qualified disabled individual protected by the ADA and an individual with a serious health condition as defined in the FMLA. However, not all injured workers will meet the definition of an individual with a disability under the ADA. Not all injured employees will be covered by the FMLA if they do not meet the definition of having a serious health condition or the other criteria for establishing eligibility under that Act. As a result, an independent analysis will have to be undertaken under the criteria of each of the statutes to determine whether each statute applies to a particular individual. Moreover, once it is determined that a particular statute applies to an individual, an employer's obligations under each of the statutes are different

Finally, the implementation of each of these laws is impacted, perhaps significantly, by the HIPAA Privacy Rules. Under the HIPAA Privacy Rule, virtually all health care providers (i.e., doctors, nurses, therapists, etc.) must keep health records private and may not disclose health records to employers except under limited circumstances. These regulations will impair the ability of insurers and employers to obtain quickly – if at all – medical information necessary to determine compensability, treatment and disability benefits.

Disability Definitions

Under workers' compensation, disability is generally defined in context of the employee's pre-injury occupation. If an individual is unable to perform his/her pre-injury occupation as the result of an occupational injury, the employee is generally considered to be disabled for purposes of workers' compensation.

Under the ADA, an individual will be considered to be disabled if s/he has a physical or mental impairment that substantially limits one or more major life activity; a record of such a physical or mental impairment; or is regarded as having such an impairment. In order to be considered disabled under the ADA, an individual must have an impairment that prevents or severely restricts him/her from doing activities that are of central importance to most people's lives, and the impairment's impact must be permanent or long-term.

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Consequently, a work injury that renders an individual incapable of performing his/her pre-injury occupation but does not severely restrict the worker from doing activities that are of central importance to most people's lives would not generally result in the individual being considered disabled under the ADA.

Because the definition of a disability under the ADA includes having a record of a disability, those individuals who are no longer disabled but have previously had a disability are protected by the Act. Employers may not take adverse action against an individual because of that record. Employers who genuinely fear that injury will recur and avoid hiring individuals who previously were on workers' compensation, or who refuse to reinstate injured workers because they had been on workers' compensation, could be violating the ADA.

In order to be considered disabled under the ADA, an individual must have a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or be regarded as having such an impairment by the individual's employer. These core requirements have not changed. However, the definition of substantially limits and what constitutes a major life activity have been amended in order to expand the number of individuals covered under the ADA.

The definition of major life activities includes but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Almost anything except perfect health will be considered to substantially limit a major life activity. The determination of whether a specific impairment substantially limits a major life activity cannot be made taking into consideration measures utilized to lessen the effect of the impairment. For example, mitigating measures, such as medication, medical supplies, equipment or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aides and cochlear implants or other implantable hearing devices, mobility devices and oxygen therapy equipment or supplies, cannot be factored into the substantially limits determination. In addition, impairments that are episodic or in remission will be considered disabilities if they substantially limit a major life activity when active.

Under these provisions, virtually anyone who is on maintenance medication - anti-depressants, blood pressure medication, etc. - is probably covered by the ADA as an individual with a disability. Individuals who have a hearing impairment that is corrected through the use of a hearing aide or cochlear implant are also considered to be disabled, despite the extent to which the device restores or corrects their hearing loss.

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Employees who suffer adverse employment actions and believe they were “regarded as” disabled because of an actual or perceived impairment are not covered by the ADA if their impairment is transitory and minor. A transitory impairment is defined as an impairment with an actual or expected duration of six (6) months or less. Employers are not required to provide reasonable accommodations to those employees who are regarded as disabled.

The center may be faced with the prospect of many more employees claiming to be disabled and requesting accommodations for their alleged disabilities. Under the ADA, the center is required to engage in the interactive process with employees who claim to be disabled and/or who request accommodations to determine if the employees are disabled and what accommodations are reasonable under the circumstances. During the interactive process, mitigating measures used by employees to deal with their impairments (e.g. hearing aides, prosthetics, medications, etc.) may not be considered for purposes of determining whether the employee is disabled. However, such mitigating factors may be considered when determining what accommodations might be necessary, if the employee is considered to be disabled under the law.

Supervisory staff and/or human resources staff must be trained on how to: appropriately deal with employees who claim to be disabled and/or request accommodations; identify situations that trigger the need for the interactive process; conduct the interactive process; determine what accommodations are reasonable and when it is necessary to consult or involve legal counsel. Accommodations for disabled employees must be considered in a manner consistent with law.

If an injured worker has not been disabled severely enough or long enough to be considered having had a disability, the worker may nonetheless be protected by the ADA if the employer “perceives” or “regards” the individual as having a disability. This essentially governs the attitude that some employers have with respect to injured workers. The center cannot maintain the attitude that all injured workers are poor employees, that all injured workers will reinjure themselves, or that injured workers should not be brought back to work until they are recovered 100%. Center staff should avoid harboring such notions and must make employment decisions based upon the abilities of the employee and fact, not stereotype.

In contrast to the concepts of disability under the ADA, the FMLA speaks in terms of a “serious health condition.” A serious health condition is an illness, injury, impairment or physical or mental condition that involves:

1. Any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice or residential medical care facility.
2. Any period of incapacity requiring absence from work, school or other regular daily activities of more than three (3) calendar days, that also involves continuing treatment by or under the supervision of a health care provider.

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3. Continuing treatment by or under the supervision of a health care provider for a chronic or long-term health care condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three (3) calendar days.

Continuing treatment by a health care provider can be satisfied in several ways, such as the employee being treated two (2) or more times for the injury or illness or being treated for the injury or illness by a health care provider on at least one (1) occasion which results in a regimen of continuing treatment under his/her supervision.

Under these criteria, a worker who incurs a minor injury who either is not incapacitated for more than three (3) days or who does not need continuing treatment would not have a serious health condition for purposes of the FMLA and would not be entitled to any of its benefits or protections.

Duty To Accommodate

There is generally no duty to accommodate under the Workers' Compensation Act, except for the duty to offer a vacancy to an employee injured after June 24, 1996. In contrast, under the ADA, covered employers have an affirmative obligation to provide reasonable accommodations to individuals with known disabilities in order to eliminate discrimination and enable disabled individuals to perform the essential functions of the job, unless the accommodation would constitute undue hardship. Reasonable accommodations under the ADA may include making existing facilities accessible, allowing a leave of absence, restructuring jobs, acquiring or modifying equipment that would enable the individual to perform the essential functions of the job, provision of readers or interpreters, or reassigning employees.

The duty to accommodate under the ADA is not unlimited. An employer can refuse to provide an accommodation if the individual is not disabled and otherwise qualified, the accommodation would eliminate an essential function of the job, or the accommodation would impose an undue hardship. An undue hardship would exist where there is a threat to the health or safety of an individual with disabilities or others; the accommodation would involve excessive cost; the accommodation would involve providing personal items such as hearing aids and eyeglasses; or the accommodation could be achieved only with significant difficulty.

Reasonable accommodations that do not constitute an undue hardship must be provided only to enable a disabled (ADA definition) worker to perform the essential functions of the job. The employer initially decides what functions are essential to any job, but functions are legally essential only if they are job related and consistent with business necessity. Courts will review the essential functions of the job in context of the entire work environment and will determine the essential functions of the job in context of the function and not the manner in which the function is performed.

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Under these rules, if an employee injured on the job is disabled and seeks to return to work, the employer cannot insist on requiring the employee to obtain a full and complete medical release before returning. The employee, if his/her job remains open and available to the employee, has the right to return as soon as s/he is capable of performing the essential functions of the job with or without reasonable accommodations; and the employer has the obligation of providing reasonable accommodations that are necessary to allow the individual to perform the essential functions of the job. The employer may not require the injured employee to be able to perform the non-essential functions of any job that an employee may not be able to perform because of his/her disability.

With respect to the duty to accommodate under the ADA, certain procedures must be followed when a request for an accommodation is made. Employers must engage in an interactive process with the employee. The interactive process requires the employer to talk to the employee to determine the relevant facts pertaining to the nature of the disability, the reasons for the need for the accommodations and the nature of accommodations that may be effective.

Under the FMLA, the only duty to accommodate relates to the injured employee's ability to take intermittent and reduced schedule leave when such leave is medically necessary. In order to qualify for intermittent or reduced schedule leave, there must be a medical need for the leave, as distinguished from voluntary treatments and procedures, and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. Employees needing intermittent or reduced schedule leave must attempt to schedule their leave so as not to disrupt the employer's operations. An employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent and reduced leave schedule. In view of these criteria, if an individual injured on the job is eligible for FMLA leave, the employee will be entitled to take intermittent or reduced schedule leave when medically necessary to care for his/her injury.

Medical Examinations, Inquiries And Reports

Under workers' compensation, treating physicians are generally required to file periodic reports; and employers or their insurance carriers are generally entitled to independent medical examinations.

Under the FMLA, employers have the right to require a physician's certificate to support a leave request for a serious health condition; but the employer may not require more information on a certificate than the date on which the serious health condition commenced, the probable duration of the condition, medical facts, and a statement that the employee is unable to perform the functions of the position. The employer can obtain a second opinion, provided that the doctor is not employed on a regular basis by the employer. If the employee's doctor and the employer's designated doctor disagree, the employer can obtain a third opinion from a physician designated jointly by the employer and the employee.

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Under the ADA, employers may not ask questions about the existence, nature or severity of a disability and may not conduct medical examinations of job applicants until after a conditional job offer is made to the applicant, even if the employer would be able to exclude the applicant because of the disability. After a conditional job offer is made, employers may make medical inquiries and require the individual to undergo a medical examination if it does so for all entering employees in the job category and keeps the information confidential. School entities are required by the School Code to give pre-employment medical examinations to new employees. Examinations of employees are otherwise permitted when job related and consistent with business necessity. It would appear that it is permissible to obtain medical information that is necessary to process and manage a workers' compensation claim.

Under the ADA, medical information must be kept confidential. While employers have a right to medical information that may be necessary to process and manage a workers' compensation claim, the ADA limits disclosure of such information to those persons who have a need for it. For example, when an injured employee is brought back to the job with restrictions, the supervisor may have a need to know the nature of the restrictions and reasonable accommodations to be provided, but not necessarily the medical diagnosis nor information about conditions unrelated to work limitations or the need for a reasonable accommodation. Although the HIPAA Privacy Rule will affect the transfer of health records and reports from the doctor to the employer, once in the hands of the employer, the records are employment records not subject to HIPAA; but are confidential records under the ADA.

Reinstatement Rights

The Workers' Compensation Act requires employers to offer to fill vacancies to individuals injured after June 24, 1996.

Under the FMLA, except for certain situations with respect to highly compensated employees, injured employees have the right to be restored to the position of employment the employee held prior to the leave or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. Accrued rights may not be taken away from an individual who qualifies for a leave under the FMLA. If an employer has a uniformly applied practice that employees must provide a fitness-for-duty certificate prior to returning to work, such a practice may be continued. There is no requirement to restore highly compensated employees if necessary to prevent substantial and grievous economic injury to the employer, and the employer notifies the employee of its intent to deny restoration and the employee fails to return. Special rules apply to public school employees. Specifically, if an instructional employee begins a leave under the FMLA more than five (5) weeks before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last three (3) weeks and the employee would return to work during the three-week period before the end of the term. Similarly, if the employee begins a leave for purposes other than the employee's own serious health condition or a qualifying exigency during the five-week period before the end of the term, the employer may require the employee to continue taking the leave until the end of the term if

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the leave will last more than two (2) weeks and the employee would return to work during the two-week period before the end of the term. If the employee begins leave for a purpose other than the employee's own serious health condition or a qualifying exigency during the three-week period before the end of the term and the leave will last more than five (5) working days, the employer may require the employee to continue taking leave until the end of the term. Under the ADA, reinstatement rights must be evaluated in relationship to the duty to accommodate. Employers are generally not required to create special lighter-duty jobs for injured workers where essential functions of the job are eliminated.

Maintenance Of Employment Benefits

Under the Workers' Compensation Act, employers are not required to maintain fringe benefits while an injured worker is out of work. Under the ADA, there are no requirements to maintain fringe benefits while an individual is unable to work because of a work-related injury or other disability. Under the FMLA, the employer must maintain group health benefits for the duration of the leave under the same terms and conditions coverage would have been provided if the employee had continued in employment. An employer may recover premiums paid during the leave if the employee fails to return at the conclusion of the leave, unless the reason for the failure to return is because of the continuation of the serious health condition or other circumstances beyond the control of the employee. If the employee was required to pay a part of the cost of the premiums, the employer may continue to require the employee to pay part of the costs of the premiums on the same basis that existed prior to the start of the leave. The employer must provide the employee with a 30-day grace period within which to pay. In the absence of payment by the employee, the employer is free to discontinue the continued provision of health care benefits, provided that benefits can be restored upon the employee's return to employment without adverse consequences to the employee. If benefits are terminated due to the employee's failure to pay premiums, an employee may not be required to meet any new qualification requirements imposed by the plan, including any new pre-existing condition waiting period, to wait for an enrollment open season, or to pass a medical examination to obtain reinstatement of coverage.

Illegal Drug Use/Alcoholism

Under many workers' compensation laws, injuries caused by illegal drug use are generally not compensable. Work-related injuries caused by alcoholism or an alcohol-induced impairment may be compensable. Treatment for alcoholism or drug abuse is generally not contemplated under workers' compensation laws.

Under the FMLA, treatment of substance abuse may qualify as a serious health condition where there is inpatient care or a period of incapacity of more than three (3) calendar days involving continuing treatment by a health care provider. Absence because of the employee's use of the substance, without treatment, does not qualify for leave. The employer is not prevented from taking action against an employee who fails to perform up to standards, provided the employer

complies with the ADA and does not take action because the employee has exercised his/her right to take FMLA leave for treatment of that condition.

Under the ADA, individuals who are current users of illegal drugs are not protected. Qualified disabled individuals who do not currently use illegal drugs and who are participating in a rehabilitation program or who have successfully completed a drug rehabilitation program are protected. Alcoholics are not excluded from protection under the ADA, but employers may hold alcoholics to the same performance standards as other employees, subject to the duty of reasonable accommodation.