



Employment Law Update

Session 1

Charting a Safe Course Through the Bermuda Triangle of the FMLA, ADA, and Workers' Compensation

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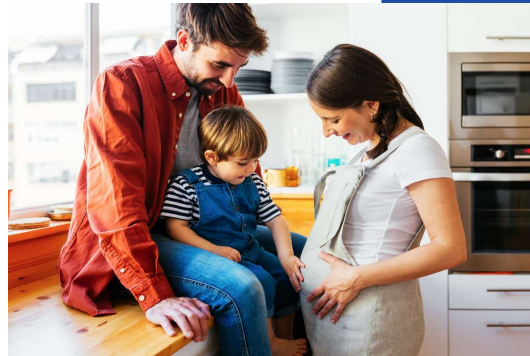
1. THE FAMILY MEDICAL LEAVE ACT (FMLA)
2. AMERICANS WITH DISABILITIES ACT (ADA)
3. WORKERS' COMPENSATION
4. NAVIGATING THE BERMUDA TRIANGLE



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1. THE FAMILY MEDICAL LEAVE ACT (FMLA)



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THE FAMILY MEDICAL LEAVE ACT (FMLA)

Congress sought to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."



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WHAT DOES IT ENTITLE EMPLOYEES TO?

- Unpaid leave for up to twelve weeks in a twelve-month period as calculated by the employer (four ways to calculate) OR
- Unpaid leave for up to 26 weeks in a twelve-month period to care for a covered servicemember with a serious illness or injury.



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WHAT EMPLOYERS ARE COVERED UNDER THE FMLA?

- All public employers are “covered employers.”
- For private employees, their employer must employ fifty or more employees in twenty or more workweeks for the current or preceding calendar year.
- “Employees” includes part-time and full-time employees and those on leave of absence or suspension if you reasonably believe the employee will return to work.

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DOES THE EMPLOYEE QUALIFY?

- Employee must work 1250 hours in the twelve months immediately prior to requesting leave; AND
- Employee has been employed by the employer for 12 months (need not be consecutive, but must be within the seven years prior to the date the leave is set to begin); AND
- Works at a location where the employer has at least 50 employees within 75 miles.

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DOES THE EMPLOYEE HAVE A QUALIFYING REASON FOR LEAVE?

- Birth or placement of a child with employee (up to twelve weeks total for both parents);
- Employee's own serious health condition;
- Serious health condition of employee's spouse, child, or parent requiring employee's care;
- Employee caring for service member who incurred serious injury or illness while on active duty with U.S. Armed Forces (up to 26 weeks); OR
- Employee has a qualifying exigency due to their spouse, parent, or child being called for active duty service in the U.S. Armed Forces (up to 12 weeks).

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WHAT IS A SERIOUS HEALTH CONDITION?

1. An illness, injury, impairment, physical or mental condition;
2. that involves inpatient care OR involves continuing treatment by a health care provider; and
3. prevents employees from performing the functions of their jobs or prevents the qualified family member from participating in school or other daily activities.

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WHAT IS CONTINUING TREATMENT?

1. Incapacity of more than three (3) consecutive calendar days involving two or more treatments, by orders of a health care provider, or treatment by a health care provider on that results in a supervised regimen of continuing treatment;
2. Pregnancy (including severe morning sickness) and time needed for prenatal visits; and don't forget PWFA!
3. A chronic condition, such as asthma, diabetes, or epilepsy;
4. Long-term conditions such as Alzheimer's, a severe stroke, or a terminal illness
5. Restorative surgery following an accident or injury, or conditions likely to cause more than (3) consecutive calendar days of incapacity if left untreated.

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NOTICE OF RIGHTS AND RESPONSIBILITIES FORM

What do I communicate on the Form?

- That the form must be returned in 15 days, otherwise leave may not be protected.
- Whether certification/other documentation is or is not required.
- How to pay employee share of health insurance premiums during leave.
- Whether leave is running concurrent to sick/vacation/other paid leave. (**SIDEBAR ILLINOIS PLAWA**)
- How you calculate the 12-month period the employee can use their 12 weeks of leave in. Four ways to calculate:
 - Calendar year;
 - A fixed leave year (fiscal year, etc.);
 - The 12-month period measured forward from the date of your first FMLA use;
 - A “rolling” 12-month period measured backward from the date of any FMLA leave usage.

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WHAT HAPPENS NEXT?

Employee returns certification forms within 15 days.

- Review certification form
 - Is it complete? Is it sufficient?
 - If it is incomplete or insufficient, notice to employee in writing to correct the deficiencies.

Key Things to Look for on Certification Form:

- Block leave?
- Is there a return-to-work date (look at “Probable Duration of Condition” line)?
- Reduced Schedule leave? (Scope and Duration?)
- Intermittent leave? (Scope and Duration?)
- Does the health care provider believe the employee can perform essential job functions upon return to work?
- Does information indicate that the employee will pose a direct threat to himself/herself or others when performing essential job functions upon return to work?
- These items will indicate that an ADA analysis is also required.

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2. AMERICANS WITH DISABILITIES ACT (ADA)



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AMERICAN WITH DISABILITIES ACT (ADA)

The Americans with Disabilities Act of 1990 (ADA) broadly prohibits discrimination on the basis of disability by providing that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) as amended in 2008.

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REASONABLE ACCOMMODATIONS

In addition to prohibiting discrimination, the ADA imposes upon covered employers the affirmative obligation to “make reasonable accommodations to the known physical or mental limitations of a qualified individual” that will allow the individual to perform the essential functions of the job they hold or desire unless doing so “would impose an undue hardship on the operation of the business of the covered entity” 42 U.S.C. § 12112(5)(A).



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PRIMA FACIE CASE

To establish a prima facie case of disability discrimination under the ADA, a Plaintiff must show that (1) he or she is a qualified individual with a disability or regarded as disabled; (2) he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) he or she has suffered an adverse employment action because of his/her disability. Benson v. Nw. Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995).

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WHAT IS A “QUALIFIED INDIVIDUAL WITH A DISABILITY?”

“[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003).

For an individual to be considered "disabled" under the ADAAA, the person need only satisfy one of the following:

- (1) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (2) a record of such an impairment; or
- (3) being regarded as having such an impairment.

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WHAT ABOUT PSYCHOLOGICAL DISABILITIES?

- The Amended ADA defines “mental impairment” to include “[a]ny mental or psychological disorder, such as . . . emotional or mental illness.” Examples of emotional or mental illnesses include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, DSM-IV, has been recognized as an important reference by courts and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes.
- This does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.

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WHAT IS AN “ESSENTIAL JOB FUNCTION?”

- The ADA provides that essential functions include "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). An essential function may be established by evidence that includes: (1) "the employer's judgment as to which functions are essential"; (2) "written job descriptions prepared before advertising or interviewing applicants for the job"; (3) "the amount of time spent on the job performing the function"; (4) "the consequences of not requiring the incumbent to perform the function"; and (5) "the current work experience of incumbents in similar jobs." 29 C.F.R. § 1630.2(n)(3).
- If you do not have written job descriptions, get them.

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WHAT IS A “REASONABLE ACCOMMODATION?”

- Examples include:
 - Providing or modifying equipment or devices, job restructuring, part-time or modified work schedules, reassignment to a vacant position, adjusting or modifying examinations, training materials, or policies.
 - Providing readers and interpreters.
 - Making the workplace readily accessible to and usable by people with disabilities.
 - Indefinite leave is not a reasonable accommodation.
 - Removing essential job functions from employee's job is not a reasonable accommodation.

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REQUEST FOR A REASONABLE ACCOMMODATION:

- No Magic Words!
- Then, the interactive process...
- Prompt, not formal.
- Conversation, burden on both parties to participate and identify reasonable accommodations.
- Employer can require further medical documentation.
- Breakdown of the interactive process can be assigned to either party.
- Communication is imperative, but document it!



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WHAT IS AN “ADVERSE EMPLOYMENT ACTION?”

“An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage.” Franks v. Nebraska, No. 4:10CV3145, 2012 U.S. Dist. LEXIS 2829 (D.C. Neb. Jan. 10, 2012).

- What is included?
 - Termination, cuts in pay and/or benefits, changes that affect future career prospects, circumstances that amount to constructive discharge.
- What is not included?
 - Job reassignment without a change in salary/benefits/prestige, minor changes in duties or working conditions (even if the changes are unwelcome).
- What should I remember?
 - It is acceptable to change an employee’s job that might make the employee unhappy, however, it is not acceptable if such change will result in a materially significant disadvantage to the employee.

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WHAT ABOUT EMPLOYEES REGARDED AS HAVING DISABILITIES?

In order to establish coverage under the “regarded as prong”:

- Employer must believe an employee had an impairment that substantially limited a major life activity for the employee to be “regarded as” disabled.
- The ADAAA now provides that an employee is “regarded as” disabled if the employer believed the employee had any physical or mental impairment, regardless of whether the employer believes the impairment limits a major life activity at all. 42 U.S.C. § 12102(3)(A).
- Employers need not accommodate a disability covered solely under the “regarded as” prong but may not discriminate⁴ based on a perceived impairment; transitory and minor impairments are excluded.

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DIRECT THREAT

- A direct threat is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- EEOC provides four factors for analysis of whether an individual with a disability poses a direct threat:
 - the duration of the risk;
 - the nature and severity of the potential harm;
 - the likelihood that the potential harm will occur; and
 - the imminence of the potential harm.

The harm must be likely to occur and cannot be remote or speculative.

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3. WORKERS' COMPENSATION



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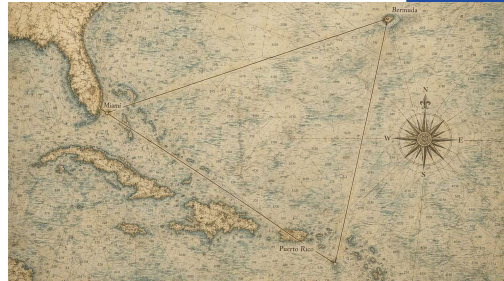


WORKERS' COMPENSATION

- Iowa Code Chapter 85 provides the exclusive remedy for Iowa workers who are injured on the job.
- Workers' compensation laws only apply to employees—they do not apply to vendors, independent contractors, etc.
- Requires prompt notice by the employee.
- Requires employee to use employer's health care provider (per written policy)
- Notify the carrier!

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4. NAVIGATING THE BERMUDA TRIANGLE



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WORKERS' COMPENSATION AND THE FMLA

- Worker's compensation leave may be run concurrently with unpaid FMLA leave and may count toward an employee's FMLA leave entitlement, provided the reason for the workers' compensation leave is due to a qualifying "serious health condition" as defined by 29 CFR 825.1141. United States Department of Labor, Wage and Hour Division Opinion Letter no. FMLA2002-3 (July 19, 2002).
- "However, an employee's receipt of workers' compensation payments precludes the employee from electing, and prohibits the employer from requiring, substitution of any form of accrued paid leave for any part of the absence covered by such payments." *Id.*
- Public employers cannot supplement workers' compensation benefits with sick/vacation/compensatory leave unless the employer notifies the employee of the option to supplement in writing and the employee elects to so supplement (also advisable to get in writing). Iowa Code § 85.38 (2018).

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WORKERS' COMPENSATION AND THE FMLA

- An employee eligible for both workers' compensation benefits and FMLA leave is never required to accept an offer of light duty in lieu of unpaid FMLA time. 29 C.F.R. § 825.207(e). Even if declining light duty disqualifies an employee from workers' compensation benefits, the employee is entitled to take unpaid FMLA leave until such leave is exhausted.

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WORKERS' COMPENSATION AND THE ADA

- Can't require a "full release" for RTW.
- No "automatic termination" at the end of FMLA. Disability analysis (is it one, reasonable accommodation?)
- Same for Work comp: MMI? Retaliation claim?
- Employers cannot have separate light duty policies for employees injured on the job and employees injured elsewhere.
- Use "first come first serve" rule.
- If you *create* light duty for one employee, create it for everyone.

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WORKERS' COMPENSATION AND THE ADA

Case in point:

Millard v. City of Clinton, Iowa (N.D. Iowa 2016) Summary Judgment to employer where the employer engaged in the interactive process; where the employer and employee could not identify any reasonable accommodations which would permit the employee to perform the essential functions of his position or any other open and available position for which he was qualified.

- An employer is only responsible for creating a reasonable accommodation to allow the employee to perform the essential functions of their position.

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QUESTIONS?



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