

FPHRA 79th Annual Conference

Solving the ADA/FMLA Compliance Mystery (and related legal issues concerning employee health)

August 4, 2015

Brett J. Schneider, Esq.

Weiss Serota Helfman Cole & Bierman

The Americans with Disabilities Act (ADA)

❖ Who is covered?

- All employers with 15 or more employees.
- All state and local governments.



The ADA

❖ Prohibited Conduct

- The ADA prohibits discrimination against persons with disabilities in the areas of:
 - employment;
 - government programs and services;
 - public accommodation; and
 - telecommunication.



The ADA

❖ Who is Protected?

– The ADA protects:

- Any “qualified individual with a disability,” which means an individual with a disability who, with or without reasonable accommodation, can perform the “essential functions” of the employment held or desired; and
- Any individual known to be associated with disabled people (i.e., “associational discrimination”).

The ADA

❖ What is a disability under the ADA?

- An impairment that substantially limits a major life activity.
- A record of such an impairment.
- Being regarded as having such an impairment.



The ADA Amendments Act (ADAAA)

- ❖ In the 15-20 years after the ADA was enacted, the U.S. Supreme Court issued various decisions that appeared to narrow the scope of the ADA.
 - Sutton v. United Air Lines, Inc. & Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: held that: (1) mitigating factors could be considered in determining whether an impairment substantially limited a major life activity; and (2) the terms “substantially” and “major” were strictly interpreted to create a demanding standard for being disabled.

The ADAAA

- ❖ As a result, Congress enacted the ADAAA of 2008 on September 25, 2008, which became effective on January 1, 2009.
 - The law was created because Congress was concerned that courts were narrowly interpreting the term “disability” and, as a result, Congress determined that disabled persons were not being properly afforded the protections of the ADA.

The ADAAA

- Purpose of ADAAA: to expand protection to persons with a disability.
- The focus is no longer on whether an employee is disabled. Instead, the focus is on whether the employer has met its obligation of providing a reasonable accommodation or whether there was discrimination.
- Further, the focus has shifted from how long a condition is expected to last to whether the condition substantially impairs a major life activity.

Scope of ADAAA

- Expands definition of “major life activities” by including non-exhaustive list of activities including reading, bending and communicating and major bodily functions (cell growth, digestion, bowel, circulatory, etc.)
- EEOC has provided a list of impairments that “virtually always” constitute a disability:
 - **deafness; blindness; intellectual disabilities; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair; autism; cerebral palsy; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; muscular dystrophy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; and schizophrenia.**

The ADA v. ADAAA

- Substantially *Limiting*:

- *Pre-ADAAA*:

- Under the ADA, a person was substantially limited if that person was: (1) unable to perform a major life activity that a person in the general population could perform; or (2) significantly restricted in the manner or duration of the performance of that activity as opposed to the performance of that activity by the general population.
 - This was a demanding standard.

The ADA v. ADAAA

- Post-ADAAA (much lower standard):
 - No demanding standard or assessment is required to establish that a condition substantially limits a major life activity.
 - Although it may be helpful, no scientific, medical, or statistical information or evidence is *required* to determine if a condition or impairment substantially limits a major life activity.
 - An individual does not have to establish that an impairment prevents or severely limits a major life activity in order to establish that a condition is substantially limiting.

The ADA v. ADAAA

- Episodic or temporary conditions can qualify as a disability *if* they would substantially limit a major life activity when active.
- Note that brief or transitory conditions or illnesses such as the flu would not likely qualify as a disability.
- Mitigating measures other than “ordinary eyeglasses or contact lenses” not considered in determining whether individual has disability.

The ADA v. ADAAA

– “Regarded As” Prong:

- This prong pertains to an employee who is alleging that the employer treated him/her as though he/she was disabled.
- These employees are not requesting a reasonable accommodation (i.e., they have suffered an adverse job action because they were perceived as having a disability).

Impact of ADAAA

- Significantly expands the scope of what constitutes a “disability.”
- Employers should virtually always assume that an individual has a disability and focus on determining whether the employee can be accommodated.

The ADA

❖ Reasonable Accommodation

- Once it is determined that a qualified individual has a disability, an employer is obligated to engage in an interactive process to determine what reasonable accommodation would enable the employee to perform the essential functions of the job.



What is a Reasonable Accommodation?

❖ “Reasonable accommodation” defined as:

- “making existing facilities used by employees readily accessible to and usable by individuals with disabilities;” and
- “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”

Reasonable Accommodation Guidelines

- ❖ An accommodation is not unreasonable simply because it allows a disabled employee to violate a neutral rule that others must obey.
- ❖ Where an accommodation involves a job transfer that would require the employer to disregard collectively bargained seniority rules, it is generally not reasonable.
- ❖ An employer need NOT provide the employee's preferred accommodation.

Reasonable Accommodation

❖ Interactive Process

- Employer required to engage in discussions with employee to determine whether an accommodation exists that would permit the employee to perform essential functions of job.
- But accommodation not necessarily required.

Undue Hardship

- ❖ Even if a reasonable accommodation exists, an employer is not required to provide said accommodation if it poses an **undue hardship** to the employer.
 - Cost
 - Fundamental change to nature of job or composition of workforce

What is an Undue Hardship

❖ Factors include:

- Nature and cost of accommodation;
- Financial resources of employer;
- Number of persons employed;
- Impact on employer's expenses, resources or operation;
- Type of operation of employer.

❖ Burden or proof rests with employer.

Types of Accommodations

- ❖ Work schedule adjustments.
- ❖ Telecommuting.
- ❖ Medication breaks.
- ❖ Reassignment.
- ❖ Leave.

Pre-Employment Medical Exams

❖ ADA contains rules regarding medicals:

- Pre-offer: exam prohibited (drug test okay);
- After conditional offer:
 - exam permitted so long as done for all employees entering that class.
 - Denial of employment based on exam results must be job related and consistent with business necessity.

Post-Employment Medical Exams

- Must be job related and consistent with business necessity.
 - Employee requests accommodation where need for accommodation is not known or obvious;
 - Employee poses “direct threat;”
 - Employee is unable to perform essential functions; and
 - Sick leave/Return to work.

The Family and Medical Leave Act (FMLA)

❖ What is it?

- Federal law that generally requires covered private employers to provide protected leave to eligible employees for a qualifying event.

FMLA Coverage

- ❖ Applies to all private employers with 50 or more employees in 20 or more work weeks in the current or preceding year
- ❖ Public agencies, including state, local and federal employers, are covered.

FMLA Protection

- ❖ FMLA protects employees who have been employed for at least 1 year and who have worked at least 1,250 hours in the preceding year.
 - Not including leave, whether paid or unpaid.

FMLA Protection

- FMLA requires employers to allow employees up to 12 weeks of unpaid job-protected leave in any 12 month period for any of the following:
 - Birth of a child (within one year of birth).
 - The placement with the employee of a child for adoption or foster care (within one year of placement).
 - A serious health condition that makes the employee unable to perform the functions of his or her job.

FMLA Protection

- To care for the employee's spouse, son, daughter, or parent who has a serious health condition.
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty.

FMLA Extended Leave

- An eligible employee may also take up to 26 workweeks of FLMA leave in a single 12-month period:
 - To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (military caregiver leave).

Serious Health Condition

❖ Serious Health Condition

- An illness, injury, impairment, or a physical or mental condition that falls into one or more of the following:
 - Inpatient care
 - Absence plus treatment by a health care provider
 - Treatment two or more times within 7 days of the incapacity by a health care provider, nurse or physician's assistant or provider of health care services under orders from, or on referral by a health care provider; or
 - Treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.

Serious Health Condition

❖ Serious Health Condition

- Pregnancy
- Chronic conditions requiring treatment
- Permanent/long term conditions requiring supervision
- Multiple treatments for non-chronic conditions



FMLA Notice

❖ Employee's Notice

- 30 days notice if leave foreseeable
- ASAP if leave not foreseeable

❖ May require medical certification and periodic reports.

Job Protection

❖ Job Protection

- When the employee returns from FMLA leave, the employee is entitled to be restored to the same or an equivalent job (pay, benefits & responsibilities).
 - Books a Million Case



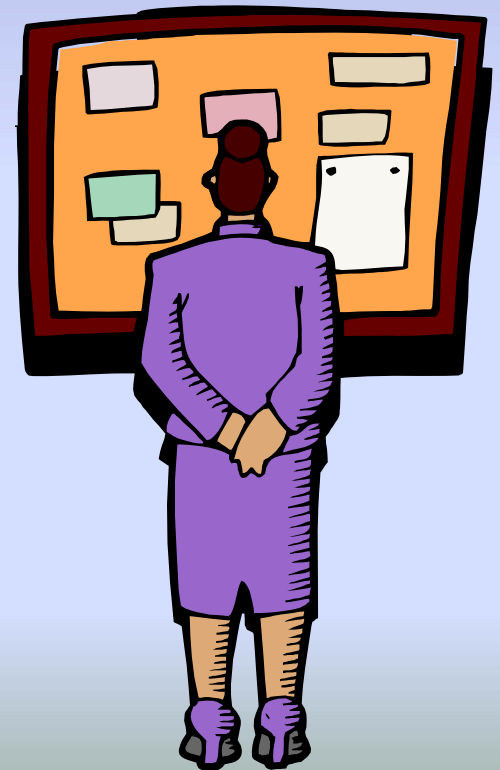
- The employee is not entitled to accrue benefits during periods of unpaid FMLA leave, but must be returned to employment with the same benefits at the same levels as existed when leave commenced.

FMLA Notice Requirements

❖ Employer Notification Requirements

– General Notice.

- Employers are required to post a notice that outlines the basic provisions of the FMLA.
- Employers are prohibited from discriminating against or interfering with employees who take FMLA leave.



The FMLA

❖ Employer Notification Requirements

– **Eligibility Notice and Rights and Responsibilities Notice.**

After receiving notice of an employee's request for leave, employers have **five business days** to notify the employee of his or her eligibility for leave.

- The employer must inform the employee of his or her eligibility status and also provide a notice of rights and responsibilities. If the employee is determined not to be eligible for FMLA leave, the employer must state at least one reason why.

The FMLA

❖ Employer Notification Requirements

- **Designation Notice.** Once the employer has enough information to determine if the leave is FMLA-qualifying, it must notify the employee of the designation, which must:
 - Include the employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements; and
 - Provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known. If the amount of leave is known at the time of designation, the employer must provide the information to the employee upon request.

Workers' Compensation

❖ Coverage

- Workers' compensation programs are run on a statewide basis.
- Generally, municipal employers are covered.
- An employee who incurs an injury that arises out of and in the course of the employment relationship is protected.

Workers' Compensation

❖ Coverage

- An employee who has a pre-existing condition that is aggravated or accelerated by the workplace is also protected.
- State workers' compensation statute provides benefits to employees but not to independent contractors.



Workers' Compensation

❖ Employer Obligation and Intended Protection

- The intent of the workers' compensation system is to obligate the employer to provide compensation and medical expenses for injured employees, regardless of fault, when they become disabled because of work-related injuries or illness.
- In exchange, the employer is given immunity from common-law suits brought by employees for work-related injuries, so called negligence tort claims.



Workers' Compensation

❖ Compensable Injuries

- To be compensable, an injury or illness “must arise out of and in the course of employment.”

Workers' Compensation

❖ Notice of Injury

- Employees are obligated to report all work-related injuries to their employer.
- The employer's mere knowledge of an employee's sickness or that he is suffering from symptoms of an injury is not enough to meet notice requirements.
- The employee's failure to provide timely notice of injury is generally not a defense unless the employer's accident investigation was harmed as a result of the late notice or the condition was made worse by the employer's inability to provide early diagnosis and treatment.

Dealing with Excessive Absenteeism

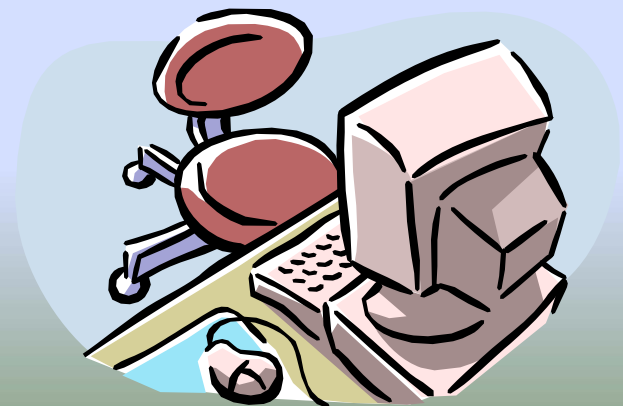
❖ FMLA Considerations

- An employer cannot penalize an employee under an absenteeism policy for time missed due to FMLA leave.
- The FMLA regulations provide that employers cannot count FMLA leave negatively in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted against an employee under “no fault” attendance policies.
- Additionally, the regulations state that if the employer pays bonuses for perfect attendance or safety (absence of injuries or accidents on the job), it may not take an employee’s FMLA leave into consideration, provided the employee otherwise met all the requirements for the bonuses before FMLA leave began.

Dealing with Excessive Absenteeism

❖ ADA Considerations

- “Modifying workplace policies, including leave policies, is a [required] form of reasonable accommodation.”
- However, an employer may be permitted to discipline or even discharge an employee under an absenteeism policy for time missed due to an ADA disability.
- A number of “attendance as an essential function” cases hold that showing up for work is an essential function of the job and that a chronically absent employee is not “qualified.”



Managing Light Duty, Part-Time Employment and Reassignment

- ❖ With the overlay of the ADA and FMLA, employers have to be concerned about their policies and procedures which “encourage” a return to work.
- ❖ When an employer chooses to return temporarily disabled employees to their regular jobs by modifying those jobs to remove the offending restrictions, it may inadvertently be creating a new reasonable accommodation standard under the ADA.

Managing Light Duty, Part-Time Employment and Reassignment

❖ Work at Home

– EEOC Reasonable Accommodation Guidance

- Working at home may be a required accommodation, depending on the essential job functions of a particular position and the supervision of that position.



- An employer denying a home work request must show that another accommodation would be effective, or that working at home would cause undue hardship.

Managing Light Duty, Part-Time Employment and Reassignment

- ❖ Whenever an employer modifies an employee's job, the employer should place those offers in writing and should place definite time restraints on the availability of that job.
- ❖ The employer should make clear that the modified job (where the offending restrictions have been removed) can only be accommodated on a temporary basis and will end at a definite time.
- ❖ Employers should be careful when creating light duty work in order to return an injured employee to work and minimize its workers' compensation exposure.

Managing Light Duty, Part-Time Employment and Reassignment

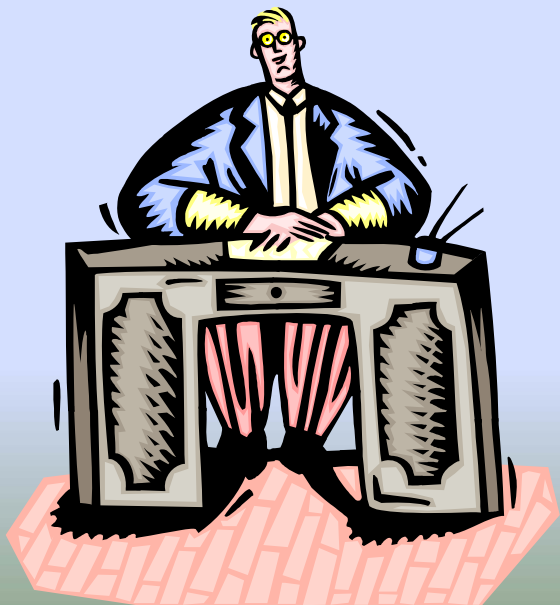
- ❖ The terms and conditions of that light duty position should be clear.
- ❖ The fact that jobs are being created on a special basis and are available for only a specific time should be put in writing so that the position cannot be interpreted as a permanent or regular position.



Managing Light Duty, Part-Time Employment and Reassignment

❖ Managers should also understand the following basic rules:

- Under the FMLA, an employer cannot require light duty or reassignment instead of leave.
- Under the ADA, the employer must first attempt to accommodate the employee in his/her current position.
- Light duty must be considered as a reasonable accommodation only if an employer has light duty jobs in general or if an employer reserves light duty jobs for those employees with occupational injuries.
- Reassignment must be considered as an accommodation of last resort.



Managing Light Duty, Part-Time Employment and Reassignment

- ❖ EEOC Guidance on Reasonable Accommodation provides:
 - An employer does not have to bump an employee from a job in order to create a vacancy, nor does the employer have to create a new position or give the employee a promotion.

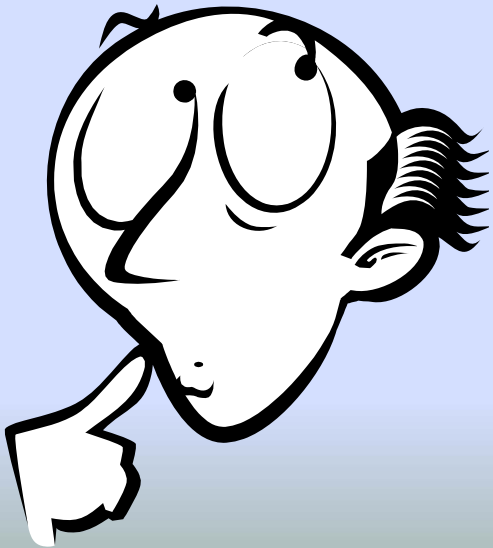
Managing Light Duty, Part-Time Employment and Reassignment

❖ EEOC Guidance on Reasonable Accommodation provides:

- An employee is not expected to compete for a vacant position but must get the vacant position if he or she is qualified for it (contrary to a number of court decisions).
- An employer has to consider reassignment to other branches, departments, and geographical areas.

Managing Returns to Work and Medical Exams

- ❖ An employer's legal rights and duties with regard to returns to work and medical examinations vary dramatically depending on the statute involved.



- ❖ What might be allowable under the ADA might be prohibited under the FMLA, and the key is understanding how to manage situations where the statutes overlap.

Managing Returns to Work and Medical Exams

❖ Returns to Work

– FMLA

- Job protection is guaranteed. An employee who returns from FMLA leave must be restored to same or equivalent position, UNLESS:
 - the employee is a key employee; or
 - the job would have been lost even if the employee had not been on leave.

Managing Returns to Work and Medical Exams

❖ Returns to Work

– ADA

- Under the ADA, job protection is not guaranteed, but to the extent an employer must satisfy reasonable accommodation requirements, an employee's job may receive some protection.
- The EEOC's position is that an employee's job cannot be filled while the employee is on leave absent undue hardship.

Managing Returns to Work and Medical Exams

❖ Workers Compensation

- Job protection is not guaranteed, but it is unlawful for an employer to impose an adverse action on an employee for exercising rights under the workers compensation statute.



Managing Returns to Work and Medical Exams

❖ Fitness for Duty Certifications Following Leave

– FMLA

- An employer needs

- a uniformly applied practice or policy applicable to all employees;
- notice of a fitness for duty requirement (either oral if notice also included in employee handbook or written); and
- certification only with regard to the particular health condition that caused the FMLA leave.

Managing Returns to Work and Medical Exams

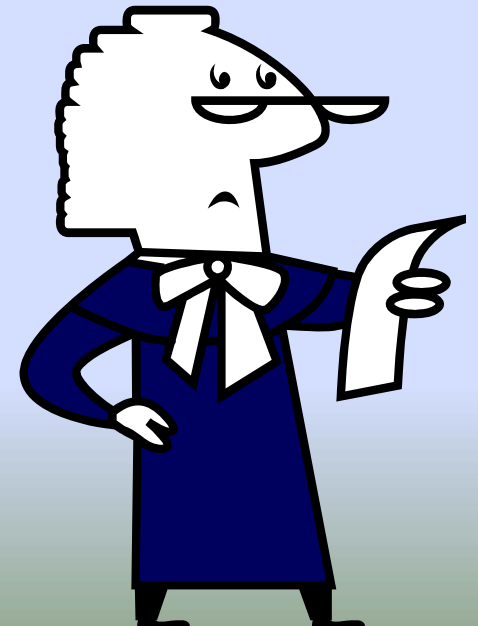
❖ Fitness for Duty Certifications Following Leave

– ADA

- Fitness for duty certifications can be required only when: (1) there is a need to determine whether an employee is still able to perform the essential functions of the job; (2) it is necessary to the reasonable accommodation process; or (3) it is required by applicable law and is job related and consistent with business necessity.
- In all circumstances, the fitness for duty certification must be job-related and consistent with business necessity.

Leave as a Reasonable Accommodation

- ❖ According to the EEOC Reasonable Accommodation Guidance, an indefinite leave of absence may be a required form of accommodation, unless the employer can show undue hardship.
- ❖ The EEOC's position in this regard is contrary to several court decisions holding that a prolonged or unpredictable absence means an employee is not a "qualified individual with a disability," or that the requested accommodation is not reasonable.



Need to Coordinate Leave Policies

- ❖ If an employer fails to coordinate workers' compensation, ADA and Family and Medical Leave Act (FMLA) policies, then an employee could potentially be off work for much more than 12 weeks and still be entitled to 12 weeks of FMLA protected absences.
- ❖ DOL Regulations state that if an employer knows that time off is for an FMLA leave qualifying reason and fails to designate the time off as FMLA leave, then the time off may not be counted against the employee's 12 week entitlement.

Need to Coordinate Leave Policies

❖ Addressing the Issue

- Implement administrative procedures that ensure that FMLA notice and health care provider certification forms are sent at appropriate times - including to any FMLA eligible employee with a work-related injury that results in an absence of 3 days or longer.



Employee Notice of the Need for Leave or Accommodation

❖ The Issue

- An employee calls in and says he is “feeling ill” and will be unable to come to work for an estimated ten days. What information may and must the employer obtain from the employee?



Employee Notice of the Need for Leave or Accommodation

❖ FMLA

- Notice is sufficient if the employee states that a potentially qualifying leave is needed. It is then up to the employer to further determine if the leave is for an FMLA qualifying reason, usually by requesting a medical certification.

Employee Notice of the Need for Leave or Accommodation

❖ ADA

- Employees do not need to mention the phrase “reasonable accommodation” or the ADA. In certain cases an employee's statement that he is “feeling ill” and needs to take leave may be a request for a reasonable accommodation. In such a case, the employer has a duty to engage in an open dialogue with the employee regarding accommodation.

Questions?

Thank You

Brett J. Schneider, Esq.

Weiss Serota Helfman Cole & Bierman

954 763-4242

bschneider@wsh-law.com