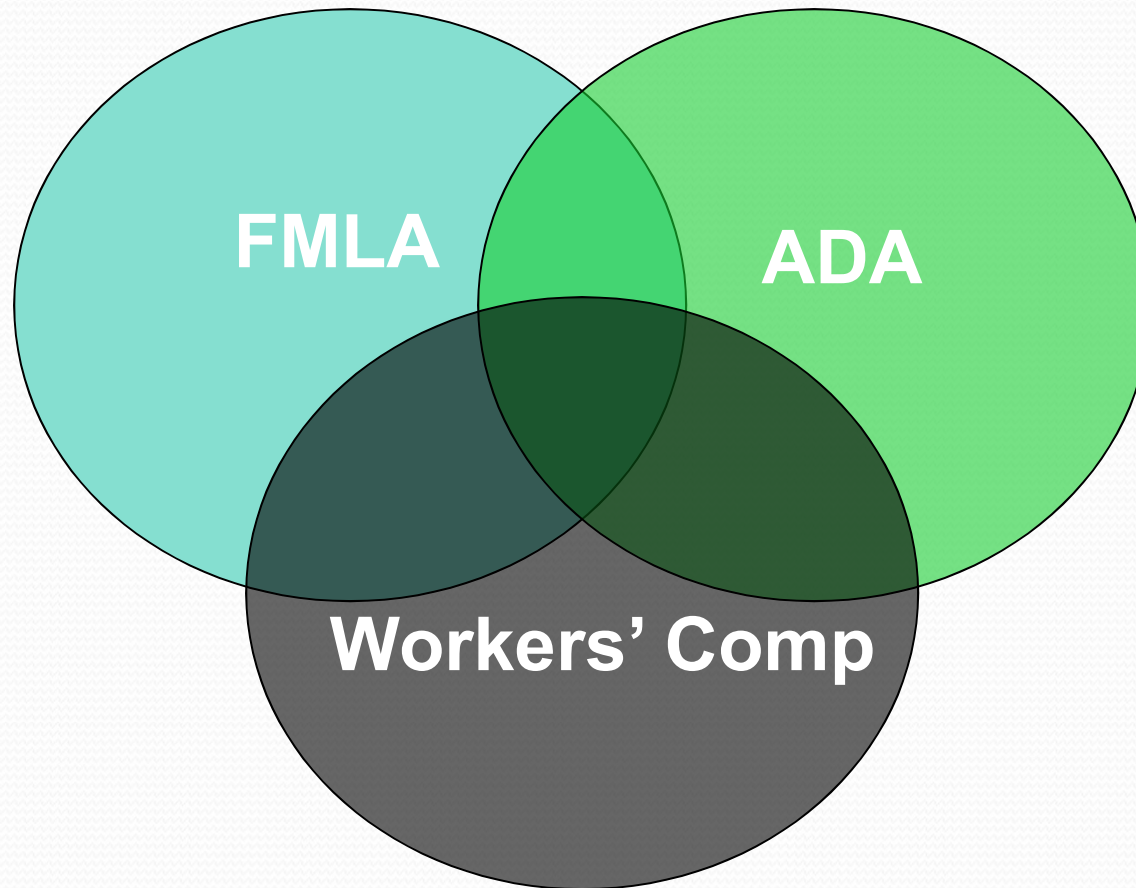


Navigating Overlapping and Conflicting Leave Laws: FMLA, ADA and Workers' Comp

THE ADA, FMLA & WORKERS' COMP OVERLAP



Legal Framework

FMLA

Unpaid time off with job and benefit protection for specified family and medical leave reasons

12 weeks of leave in a 12 month period / 26 weeks in a 12 month period to care for injured service member

ADA

Prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform essential functions of the job

WC

Reasonable and necessary medical treatment and temporary total or permanent disability benefits for a work related injury or illness

Who is Eligible?

FMLA

12 months, 1250
hours in last 12
months,
at facility with 50
employees in 75
miles

ADA

Applicants,
“one second”
employee

WC

“one second”
employee

Critical Definitions

FMLA

Serious health
condition

ADA

Disability (greatly
broadened by
ADAAA)

WC

Arising out of and
in course of
employment

Employer Notice Requirements

FMLA

Extensive notice requirements, employer is obligated to designate as FMLA qualifying leave

ADA

Posting of EEO poster

WC

Posting of WC poster

Employee Notice Requirements

FMLA

30 days if foreseeable;
as soon as practicable if
not foreseeable

Believe FMLA reason?
Ask more questions?

ADA

Employee's obligation
to request a
reasonable
accommodation

BEWARE!

WC

Employee must report
injury promptly;
however, failure to do
so doesn't necessarily
disqualify

Medical Certification

FMLA

**Medical certification
can be required**

**15 days to return
documentation**

**Employer can contact
employee's HCP to
authenticate and
clarify medical
certification**

ADA

**Medical exams
permitted for current
employees if job-
related and consistent
with business
necessity (but
generally best
practice is to request
information from
employee's HCP first)**

WC

**Medical exams
permitted**

**No restrictions on
selection of first,
second or third
opinions**

Employee Cooperation

FMLA

Duty to cooperate in providing medical certification and other requested medical information (i.e., recertification)

Failure to cooperate can lead to delay/denial of leave

ADA

Duty to engage in interactive process with employer

Failure to cooperate can lead to denial of reasonable accommodation

WC

Duty to cooperate

Failure to cooperate can lead to denial of benefits

The Interactive Process

- Engage in an **interactive process**
 - Case by case analysis
- When?
 - ✓ An applicant or employee requests an accommodation (no magic words required); or
 - ✓ An employer:
 - (i) knows that the employee has a disability, and
 - (ii) knows, or has reason to know, that the employee is having difficulty performing job functions because of an impairment
 - The safest approach is to consider any notification that a job modification is needed because of a medical condition as a request for reasonable accommodation

Determining “Undue Hardship”

- Individualized assessment showing specific accommodation would cause significant operational difficulty or expense
- Generalized conclusions will not suffice
- Based on several factors:
 - ✓ Nature and cost of the accommodation needed
 - ✓ Overall financial resources; size, number of employees, and type and location of facilities of the employer, the effect on expenses and resources of facility
 - ✓ Type of operation of the employer
 - ✓ Impact of the accommodation on operations
 - ✓ **Generally, cost alone will not be sufficient**

Examples of Operational Impact

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Lower quality and less accountability for quality
- Lost sales
- Less responsive customer service and increased customer dissatisfaction
- Deferred projects
- Increased burden on management staff required to find replacement workers, or readjust work flow or priorities in light of absent employees
- Increased stress on overburdened co-workers

Job Protection

FMLA

Return to same or
equivalent position for
12 weeks

Exception: what would
have happened to
employee had he/she
not gone on leave?

ADA

Same position unless
undue hardship to keep
position open – need not
keep it open indefinitely

WC

Not guaranteed

Fitness For Duty Certifications

FMLA

Employee may be required to present a certification from his/her healthcare provider that he/she is able to resume work

ADA

Permitted to determine if employee can perform essential functions with or without accommodation

WC

Permitted

Attendance

FMLA

Absence due to a FMLA qualifying reason cannot count as occurrence under any attendance policy

ADA

Frequent unplanned absences may make an employee “not qualified” BUT often accommodated unless undue hardship

WC

Disciplining/terminating an employee for absences due to a workers’ compensation injury can be risky

Intermittent/Reduced Leave

FMLA

Absolute right for employee's serious health condition or to care for a family member with a serious health condition, if medically necessary

ADA

Reasonable accommodation unless employer can establish undue hardship

WC

Not guaranteed

Managing Intermittent FMLA

- Complete certification forms annually when leave lasts beyond leave year
- Schedule treatments so as not to disrupt employer's operations
- Consider temporary transfers to alternate positions for employees needing **foreseeable** leave → pay/benefits must be the same but duties can differ
 - However, cannot require light duty to avoid permitting employees' FMLA leave
- Authenticate questionable certifications or clarify unclear information on certification
- Second opinions
- Compliance with call-in requirements
 - But consider whether the FMLA condition prevents a call-in

Transfer to an Alternative Position

FMLA

If leave is foreseeable based on planned medical treatment or intermittent, can require transfer.
Can't require light duty

Must be similar job and maintain wages and benefits

ADA

Accommodation of last resort if unable to accommodate in current job

Can change wages/benefits to those of new position

WC

Refusal of light duty position can affect receipt of benefits

Light Duty & Work Restrictions

- Following a work-related injury, there is often a period of convalescence where the injured worker has a medical limitation/work restrictions
- Once the employee returns to work, supervisors must ensure that the work performed complies with medical limitations
- Seek clarification from doctor
- If no work injury but the employee may be disabled, must determine whether he/she can perform the essential functions with or without an accommodation

Managing the Interplay: ADA, FMLA and WC

- Analyze each law and situation separately
 - WC injuries often are serious health conditions under the FMLA
 - WC or FMLA conditions often are not disabilities under the ADA
- Avoid regarding an individual as disabled
- Know your leave policies
- Train supervisors to spot issues
- HR should manage difficult situations
- Rely on medical documentation
- Encourage communication
- Document everything
- Maintain consistency in decision-making

QUESTIONS?

