A Systematic Approach and Analysis

Navigating the Intersection of the FMLA, ADA, and Workers' Compensation

By Scott H. Casher and George C. Morrison

A separate analysis of each law's requirements under each situation will avoid committing violations and ultimately avoid potential expensive and disruptive litigation.

It is three o'clock on a Friday afternoon. You are in your office and a client calls seeking advice regarding an employment matter. The client explains that a long-term employee, who sustained an on the job injury several months ago, has yet to return to work due to ongoing medical treatment related to her injury and she is receiving workers' compensation benefits. The employee, who has a physically demanding job in the client's warehouse, indicated to her supervisor a few days ago that she might be able to return to work if she is given an accommodation of no lifting of more than 25 pounds, no bending, or no twisting. Alternatively, she requests a further leave of absence beyond her allotted Family Medical Leave Act (FMLA) leave entitlement. The client is frustrated. She is tired of waiting for the employee to return to work, she cannot accommodate the employee's restrictions, and she has started to interview candidates to fill the position. The client asks you, "What am I supposed to do with this employee?" After you finish your call with the client, you begin to realize that to resolve the client's problem you will have to navigate through the difficult intersection of the FMLA, the Americans with Disabilities Act (ADA), and the workers' compensation law.

This article explores the basic legal and analytical principles implicated by your client's problem. The article then applies those basic legal and analytical principles to your client's problem through a sample decision tree model. The article concludes by reviewing the related issue of medical examinations and retaliation claims.

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Three Basic Rules

Three basic rules will help attorneys and employers begin to navigate through the intersection of the FMLA, the ADA, and workers' compensation laws successfully.

1. **Evaluate the situation under each law separately.** It does not matter which law is applied first, but employers must apply each law separately to determine the outcome under that statute.
2. **The law that provides the most benefit to an employee trumps.** In some situations, one of the laws may dictate that an employer has no obligation to an employee, while another law may require a significant obligation. As a general rule, an employer must follow the law that is most favorable to an employee.
3. **Reevaluate the situation under each law when new information regarding the employee's condition is received or a deadline passes under one of the laws.** This task requires excellent coordination. Supervisors are usually the first to receive new information on an employee's condition, while the office of human resources typically monitors deadlines under laws such as the FMLA. In addition, legal counsel may need to review proposed actions before the supervisor can proceed.

Application of the Statutes

Keeping the above three rules in mind, the next step involved in navigating the intersection is to determine if and when each law applies.

FMLA

The FMLA applies to any employer with 50 or more employees for each working day during each of 20 or more work weeks in the current or preceding calendar year. 42 U.S.C. §12111(5)(A). The underlying purpose of the FMLA is to prevent employees from having to choose between the jobs that they need and the families who need them. An eligible employee is one who (1) has worked for the employer for at least 12 months, though not necessarily consecutive months; (2) has worked for the employer for at least 1250 hours during the 12-month period immediately preceding the requested leave; and (3) is employed at a worksite where 50 or more employees work for the employer within a 75-mile radius of that worksite. 29 U.S.C. §2611(2)(A); 29 C.F.R. §825.110(a). Any individual is counted as an employee for each day of the work week for the required 20 work weeks if his or her name appears on the payroll, whether or not compensation is received, including periods of paid or unpaid leave during which benefits are provided by the employer. 29 C.F.R. §825.110(b).

ADA

The ADA is ambitious legislation that seeks to make American society more accessible to individuals with disabilities. The ADA applies to employers with 15 or more employees for each working day in each of 20 or more calendar work weeks during the current or preceding year. 42 U.S.C. §12111(5)(A). Title I of the ADA, which is enforced by the Equal Employment Opportunity Commission, prohibits discrimination against job applicants and employees on the basis of a disability. The ADA protects an individual who (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. §1630.2(g).

The ADA Amendments Act of 2008 (ADAAA), P.L. 110-325, 122 Stat. 3553, substantially expanded the coverage afforded by the ADA by expanding the definition of disability by

1. Expanding the definition of "major life activities" to include a variety of activities of daily living, including "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," and major bodily functions, including, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions";
2. Instructing that the term "substantially limits" should be construed broadly in favor of expansive coverage;
3. Clarifying that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
4. Making clear that the positive effects of mitigating measures, other than ordinary eyeglasses or contact lenses, shall not be considered in assessing whether an individual suffers from a disability;

The ADAAA also specifically provided that the changes to the ADA did not alter the standards for determining eligibility for benefits under state workers' compensation laws.

Workers' Compensation

The basic purpose of state workers' compensation laws is to provide an employee with wage-loss replacement benefits and medical coverage resulting from a work-related injury. These laws are typically triggered when an employee is injured during the course of his or her employment or contracts an illness caused by his or her job.

When Bells Should Ring

There are common situations under which the proverbial bells should ring under each law. Employers should be on alert for potential FMLA issues if an employee (1) calls in sick for three or more days in a row; (2) must miss work because he or she has intermittent doctor's appointments for a chronic condition; (3) needs to care for a spouse, parent, or child (typically under 18) due to a serious health condition; (4) becomes pregnant or expects a newborn child; or (5) adopts a child or accepts a foster child. Employers should be on alert for potential ADA issues when (1) a job candidate requests an adjustment to the application or interview process due to a medical condition; (2) an employee requests an adjustment to job duties due to a medical condition; or (3) an employee is performing poorly and indicates that the performance deficiency is due to a medical condition. And, of course, an employee's injury at work triggers workers' compensation laws.

Leave Rights

After determining which laws may apply, another step that is helpful in navigating the intersection is to master an employee's basic leave rights under each law. The FMLA requires employers to allow eligible employees to take up to 12 weeks of unpaid leave during a 12-month period to care for a newborn or newly placed adopted or foster

child, or for the "serious health condition" of the employee's child, parent, spouse, or the employee's own health condition. 29 U.S.C. §2612(a)(1). The employer must designate any relevant leave as FMLA leave.

Under the FMLA, a "serious health condition" is a physical or mental illness or injury that involves either inpatient hospital care or continuing treatment by a health-care provider. 29 C.F.R. §825.113. Continuing treatment includes a period of incapacity lasting more than three consecutive, full calendar days and any subsequent treatment or period of incapacity that involves (1) treatment two or more times within 30 days of the first date of incapacity, or (2) treatment by a provider on at least one occasion which results in a regimen of continuing treatment under the provider's supervision. *Id*. §825.115(a). In either case, the first treatment, which must involve an in-person visit to the provider, must occur within seven days of the first day of incapacity. *Id*. These conditions include chronic conditions, which are defined as those that require periodic treatment, continue for an extended period of time, and may cause episodic rather than continuous problems. *Id*. §825.115(c). Such conditions also include periods of incapacity resulting from pregnancy or prenatal care, and multiple treatments by a health care provider for conditions such as cancer, severe arthritis, or kidney disease. *Id*. §825.115(b), (e). In all cases, however, a health-care provider must be monitoring an employee's health condition, even if the employee is not receiving active treatment.

The FMLA also provides protected leave for military families, including (1) up to 26 weeks of unpaid leave for an employee to provide care to a son, daughter, spouse, parent, or some other next of kin who is a member of the armed forces wounded in the line of duty; and (2) up to 12 weeks of unpaid leave for any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or has been notified of an impending call or order to active duty in the armed forces in support of a contingency operation. 29 U.S.C. §2612.

While there is no specific leave clause under the ADA, leave may be a reasonable accommodation. Under the ADA, an employer must make reasonable accommodations to enable qualified individuals with disabilities to perform the essential functions of a particular position, unless the accommodation would cause undue hardship to the employer's business. 42 U.S.C. §12112(b)(5)(a). An employee who has exhausted the 12 weeks of FMLA leave time may be entitled to additional leave under the ADA. *McCall v. City of Philadelphia*, 2013 WL 5823873 (E.D. Pa.) ("once [an employee] exhausts FMLA leave, a request for extended leave of absence is a request for 'reasonable accommodation' pursuant to the ADA."). If after 12 weeks, a disabled employee is still medically unable to perform the job, the ADA requires the employer to make a reasonable accommodation for that employee that would enable him to perform the essential functions of the employment position. *Id*. Specifically, the ADA provides that a reasonable accommodation may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, accrued paid leave, or additional unpaid leave. 42 U.S.C. §12111(9)(B).

The overlap among the statutes results primarily from the definition of illness, injury, or disability in each statute. The ADA definition of "disability" differs from the FMLA definition of "serious health condition." Thus, it is possible for one statute to apply and not the other. A temporary condition can constitute a serious health condition under the FMLA, but it generally will not be a disability under the ADA. An employee may have a long-term disability without undergoing hospital care or continuing treatment. Without such treatment, the employee is not entitled to FMLA protection. Furthermore, a work-related injury entitling an employee to workers' compensation may result in a disability or serious health condition. In such situations, an employer may have to consider making reasonable accommodations for any disability under the ADA or allowing an employee leave time for any serious health condition under the FMLA. The FMLA and workers' compensation acts also overlap in that a workers' compensation absence can run concurrently with FMLA leave time as long as an employer properly designates the time as such and notifies the employee.

A Decision Tree Approach

An FMLA, ADA, and workers' compensation "decision tree" can serve as an excellent tool to navigate the FMLA, ADA, and workers' compensation laws. In essence, a decision tree is a systematic way to analyze and evaluate differing employment situations fully under each law. The following is a sample decision tree analysis that you could use to resolve the situation presented in this article's opening paragraph.

Three basic rules will help attorneys and employers begin to navigate through the intersection of the FMLA, the ADA, and workers' compensation laws successfully.

Workers' Compensation

According to basic rule number 1 addressed above, the first step to navigating the intersection of these laws is to address each law separately under the facts and circumstances presented. For workers' compensation, the only question is whether there is a work-related injury or occupational disease. Based on the information provided by your client, the state's workers' compensation laws apply and a full review of the law must be conducted to ensure compliance with its provisions.

FMLA

Next, you should determine whether the FMLA applies, and if so, whether your client has properly designated the leave under FMLA, and whether any FMLA leave entitlement has been exhausted. The first step under the FMLA analysis is to determine whether an employee is "eligible." To do this, you need to answer three questions:

1. Has an employee worked for the company for at least 12 months, remembering that the 12 months do not need to be continuous?
2. Has an employee worked at least 1,250 hours during the 12-month period preceding the requested leave? and
3. Does a company have at least 50 employees within a 75-mile radius of an employee's worksite?

If the answer is "yes" to all three questions, the person is "eligible."

Based upon the information provided by your client, we know that a long-term employee is involved. The client has also advised that the employee has met the 1,250 hour requirement and that the company employs 50 employees within a 75-mile radius.

After we determine that the employee is in fact "eligible," the next inquiry is whether the employee suffers from a "serious health condition" that requires inpatient care or continuing care from a health care provider. Continuing care could include

- A period of incapacity requiring absence of more than three calendar days that involves continuing treatment by a health-care provider;
- Pregnancy and time for prenatal visits;
- A chronic health condition, such as asthma or diabetes;
- A long-term condition such as Alzheimer's; or
- Multiple treatments by a health-care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated.

If an employee's condition falls into any one of these categories, the employee likely suffers from a serious health condition.

It is important to recognize that an employee does not have to ask specifically for FMLA leave. The burden is on the employer to recognize situations in which the FMLA may apply and to start the FMLA clock.

The next logical inquiry then is whether the employer has designated any time off as FMLA leave. If "yes," then the 12-week FMLA clock has started. If "no," a more detailed analysis is required to determine whether you can designate the leave retroactively.

Finally, your client indicated that the employee seeks to return to work. At the end of FMLA leave, an employer must return an employee to the same or an equivalent job unless one of the following circumstances occur: (1) the employee unequivocally states an intention not to return to work; (2) the employer hired the employee for a limited term project that has ended; (3) the employer eliminated the employee's job as part of a layoff or reduction in force; or (4) the employee originally obtained leave fraudulently. Unless one of these has occurred, an employer must generally return an employee to the same or an equivalent job if the employee is able to perform the job without accommodation. In your case, the employee seeks to return to work with a modification to her work duties or an extended leave of absence beyond her FMLA leave entitlement and, therefore, an analysis under the ADA is required.

ADA

The first step under the ADA is to determine whether an employee suffers from a "disability." An actual physical or mental impairment that substantially limits one or more major life activities constitutes a disability. To make a determination, you should analyze the following:

- What is the nature and severity of the impairment?
- What is the expected duration of the impairment?
- What will be the long-term impact or expected effect of the impairment on the individual?
- In which major life activity is the individual substantially limited (*e.g.,* walking, speaking, thinking, seeing, breathing, hearing, or some other area)?

In addition to an actual impairment, employers must inquire whether an employee has a record of disability, such as medical records, school records, employment records, or false test results, regardless of whether the individual is currently disabled. Finally, employers must determine a whether an employee is "regarded as" having an impairment. An employee may be regarded as having an impairment if he or she

- Does not have a physical or mental impairment but is treated as if he or she has such a condition, such as a person who is suspected of having cancer but does not have cancer;
- Has a physical or mental impairment that substantially limits major life activities only because of the attitudes of others, such as a person with asymptomatic HIV who is limited by irrational fears of co-workers; or
- Has a physical or mental impairment that does not substantially limit major life activities but is treated as if that impairment substantially limited a major life activity.

If the answer is "no" to the above questions, then your client's employee does not have a disability under the ADA and the organization is not obligated to provide an accommodation. If the answer is "yes" to one or more of the above inquiries, the individual suffers from a disability under the ADA and, therefore, may be entitled to an accommodation.

At this point, you realize that you have enough information to indicate that your client's employee is "disabled." You must next determine whether your client should provide an accommodation.

Employers must provide reasonable accommodations to qualified individuals with disabilities unless providing the accommodation would impose an undue hardship on the employer. Initially, an employer should determine whether the employee deemed disabled poses a direct threat to his or her own safety or to the safety of others. If the answer is "yes," then the employee probably does not have the right to accommodation under the ADA. If the answer is "no," further inquiry is required.

Given that the employee in your case does not pose a safety risk to herself or to others, the next inquiry is to determine whether the employee can perform all the essential functions of her job. If the employee is not able to perform the essential functions of the job, then you should inquire whether the employee could perform the essential functions with a reasonable accommodation such as

- Changes in the physical work environment;
- Job restructuring;
- A modified work schedule;
- Flexible leave policies; or
- Other accommodations.

If the answer is "no" to all five accommodation scenarios listed above, then there are no reasonable accommodations that would

allow the employee to perform all essential job functions. If the answer is "yes," you should advise your client to engage in further dialogue with the employee to assess the effectiveness of each potential accommodation. For instance, the employee in your case already requested to return to work, but with a lifting, bending, and twisting restriction. Her job in the warehouse is physically demanding. Since it appears that she cannot perform the essential functions of her job with or without reasonable accommodation, you should further advise your client to explore whether the requested extended leave of absence could serve as a reasonable accommodation when the employee's FMLA leave entitlement expires. If not, the employer must consider whether it has a vacant position for which the employee is qualified that she can perform with or without a reasonable accommodation.

By following the above decision tree, you will have greatly assisted your client to undertake the necessary steps to begin to navigate all three laws.

Medical Examinations

Under the ADA and the Health Insurance Portability and Accountability Act (HIPAA), an employer's right to inquire about an applicant's medical history is severely limited. Under the ADA, pre-employment questions about disabilities, illnesses, and past injuries are generally not allowed because they have the potential to reveal information concerning the existence, nature, or severity of an applicant's disability. 42 U.S.C. §12112(d). Permissible questions include whether an applicant can perform the essential functions of the job, with or without a reasonable accommodation. *Id.*

An employer may lawfully acquire the necessary information only after making a conditional offer of employment, although the employer still may not use the results of medical exams and responses for discriminatory purposes. *Id.* After a conditional offer of employment but before employment begins, an employer may require a medical examination or inquiry as long as all employees in the same job category are subject to the same examination, and the medical examination does not tend to single out individuals with disabilities. *Id.* Employers can make medical inquiries to an employee only if the inquiry is job related and consistent with business necessity. *Id.* Regardless of when an employer obtains it, the employer must maintain the medical information separately and confidentially.

Under the FMLA, an employer may require an employee to submit a doctor's certification of his or her serious health condition, and in the case of a family member, a certification that the employee is needed to care for the family member. 29 C.F.R. §825.305. If the employer doubts the validity of the certification, it may require a second opinion from a doctor that it chooses. If the two doctor opinions conflict, the employer and the employee can jointly choose a third doctor who would render the final, binding, third opinion.

An employer must be careful not to violate the ADA when requiring an employee to submit to a medical examination when requesting FMLA leave. The medical questions and examination cannot be overly broad. To avoid violating the ADA, an employer should narrowly tailor the requests for information and restrict the scope of the medical exam concerning an employee's ability to perform the essential job functions. These examinations are also subject to the confidentiality requirements of the ADA.

Discipline and Retaliation

Finally, attorneys and employers should always be cognizant of the risk of potential retaliation claims. The FMLA, the ADA, and many workers' compensation statutes have provisions that prohibit employers from retaliating against employees who have taken advantage of the protection and benefits of these statutes. Multiple states' workers' compensation laws provide specific affirmative defenses for employers in retaliation actions, such as an employee's willful or habitual tardiness, absence from work, the destruction of any of the employer's property, or the employee's failure to meet the employer's standards and company policies. The ADA and the FMLA focus more on the causal connection and temporal proximity between the employee's exercise of his or her rights under the statutes and the alleged retaliatory action. 42 U.S.C. §12203(a); 29 U.S.C. §2601 *et seq.* To protect against claims of retaliation, employers should be sure to base any employee discipline on performance issues or other reasons not related to or protected by the ADA, the FMLA, or workers' compensation.

In the situation presented to you by your client, a noteworthy factual development is that the employer apparently started interviewing candidates to replace the injured employee shortly after the employee requested an accommodation and used FMLA leave. It would be prudent for you to at least discuss with your client how this could potentially result in a retaliation claim if one of the candidates is ultimately chosen to replace the employee.

Under the ADA, pre-employment questions about disabilities, illnesses, and past injuries are generally not allowed because they have the potential to reveal information concerning the existence, nature, or severity of an applicant's disability.

Conclusion

While navigating through the intersection of the FMLA, ADA, and workers' compensation laws may seem challenging at first, when approached and analyzed in a systematic way, resolving the issues becomes more manageable. A separate analysis of each law's requirements under each situation will avoid committing violations and ultimately avoid potential expensive and disruptive litigation. As should happen with every other complex area of the law, as soon as a situation develops, an employer is highly encouraged to consult an attorney who is well versed in these matters.