

PRESENTATION

ADA, FMLA and Workers' Comp: Navigating the Bermuda Triangle and Coming Out Alive

Presented by:

Imad Abdullah

iabdullah@bakerdonelson.com

Direct Dial: 901.577.8169



BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Workers' Comp/FMLA/ADAAA Roadmap

- Basic Statutory Frameworks.
- Triggering Events.
- Documentation Requirements.
- Areas Of Overlap.
- When Light Duty Is Required.
- Leaves Of Absence, Intermittent Leave, Or Reduced Work Schedules.
- Maintenance Of Benefits.
- Reinstatement.

ADA & ADAAA

- Enforcement by the EEOC.
- 15 or more employees for each of 20 or more calendar weeks in current or preceding year.
- Coverage begins on the first day of employment.
- Employee must be a qualified individual with a disability and able to perform essential functions with or without reasonable accommodations.

FMLA

- Enforcement by the DOL.
- 50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year.
- Employee (or family member) with a SHC, who has worked at least 12 months and 1250 hours and works at worksite where 50 or more employees within 75-mile radius.

Workers' Compensation

- Enforcement by the Tennessee Department of Labor and Department of Workforce Development (or equivalent state agency).
- Applies to employers with 5 or more full or part-time employees.
- Coverage begins on the first day of employment.
- Employee who has an injury arising out of or in the course and scope of employment. (but not during breaks or commute to/from work).

Triggering Events:

- **ADAAA:** According to the EEOC, an employee must let the employer know that s/he needs an adjustment or change concerning some aspect of his or her job duties for a reason related to a medical condition. The request does not have to include any special words, such as “reasonable accommodation” or “disability.” The employer should ask the employee whether s/he is requesting a reasonable accommodation if the nature of the initial communication is unclear. Request can also be made “on behalf of” employee (doctor, family member, etc.)
- **FMLA:** According to the DOL, an employee must provide *at least* verbal notice sufficient to make the employer aware of the need for FMLA-qualifying leave and the anticipated timing and duration of the leave. The first time an employee seeks leave for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave for an FMLA-qualifying reason for which the employer has previously provided FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. “Constructive Notice” may also trigger employer’s obligations.
- **Worker’s Compensation:** On the job injury or notification within 30 days by employee.

“Constructive Notice” Under FMLA & ADAAA:

Constructive notice under the FMLA and the ADAAA generally means that the employer has “reason to believe” that leave or an accommodation may be warranted.

- Employers must look for inconsistent behavior that could be attributable to a serious health condition, and when appropriate, have to inquire delicately if this inconsistent behavior is impacting performance.
 - Employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to leave or a job accommodation- **even if the employee is unaware that he or she suffers from a specific qualifying serious health condition or that he or she is entitled to an accommodation.**
- Constructive notice clues:
 - Changes in production
 - Changes in attitude
 - Requests for assistance
 - Requests for changes in responsibilities
 - Recurring leave requests.

Documentation Requirements:

- **ADAAA:** Employer may request medical certification regarding the nature, severity, and duration of the condition, and request an opinion on whether employee can perform the essential functions or his or her job, with or without an accommodation. If an accommodation is needed, the employer can seek recommendations on the types of accommodations that would suffice. Additional correspondence with the physician is allowed for clarification purposes.
- **FMLA:** Employer provides employee with FMLA Certification Paperwork. Employee has 15 days to return paperwork. If further clarification is needed, employee has 7 days to provide requested follow-up documentation. Employer may also request a 2nd medical opinion, or a 3rd medical opinion if the 1st and 2nd opinions differ.
- **Worker's Compensation:** Generally handled through worker's compensation provider. Employer must designate a panel of 3 approved medical providers.

The most common problem is that employers fail to force the physicians to provide clear information.

Basic Workers' Comp Leave Requirements

Worker's Compensation Leave: There are no *per se* leave requirements under Tennessee workers' compensation statute. However, leave impliedly considered part and parcel of receiving medical treatment for injuries arising out of and in the course and scope of the employment relationship.

ADDITIONAL WORKER'S COMP RIGHTS:

- Payment of authorized doctor's bills, rehabilitation, physical therapy, prescriptions, and necessary travel expenses.
- Additional compensation in the form of weekly benefits, depending on severity of the injury, and ability of the employee to work.
- In some cases, lump-sum settlement payment when employee reaches maximum medical improvement and continues to be "disabled."

Basic FMLA Leave Requirements

FMLA Leave: Under the FMLA, an “eligible” employee of a covered employer may take up to 12 workweeks* of leave during any 12-month period for one or more of the following reasons:

1. An employee’s "Serious Health Condition" or subsequent treatments;
2. The birth of a child, and to care for the newborn child;
3. To care for the employee’s spouse, child, or parent with a "Serious Health Condition";
4. The placement of a child with the employee through adoption or foster care, and to care for the child; or
5. For qualifying exigencies arising out of active duty status.

**26 weeks of leave for injured or ill service member.*

Additional FMLA Rights

- 1) The employer must maintain the employee's existing level of coverage under a group health plan during the leave period.
- 2) At the end of FMLA leave, an employer must allow the employee to return to the same or an equivalent job (unless he/she is a key employee or other minor exceptions).

Basic ADAAA Leave Requirements

ADAAA Leave: Like worker's compensation, there are no automatic leave rights under the ADAAA. However, leave may be one reasonable accommodation that an employer can provide unless the leave causes an undue hardship on the employer.* There is no limit on the amount of leave that may be taken; however, the leave usually cannot be for an "indefinite period."

*An undue hardship is any action that is too costly, substantial or disruptive, or that fundamentally alters the nature of the employer's business.

FMLA "Serious Health Condition" v. ADAAA "Disability"

Question: *Is FMLA "Serious Health Condition" the same as an ADAAA "disability"?*

Answer: No. An ADAAA "disability" is an impairment that substantially limits one or more major life activities.

An FMLA "Serious Health Condition" can be, but is not necessarily, an ADAAA "disability." An FMLA "Serious Health Condition" is an illness, injury, impairment, or physical or mental condition that requires either: (i) Inpatient care in a hospital or other health care facility; or (ii) Continuing treatment by a health care provider, resulting in: (a) a period of incapacity of more than 3 consecutive days absence from work plus any subsequent treatments or periods of incapacity relating to the same condition...

When FMLA & ADAAA Coverage Overlap

Question: *Are all employees who are protected by the ADAAA also entitled to leave under the FMLA?*

Answer: No.

1) The eligibility requirements under the two statutes are different, and the employee must separately qualify for coverage under each statute. Employees protected by the ADAAA must be a “qualified individual with a disability.” Employees “eligible” for FMLA leave must have a “Serious Health Condition”.

2) Unlike the FMLA, the ADAAA has no length of service requirements.

ADAAA Compliance When FMLA Also Applies

Question: *If an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and ADAAA reasonable accommodation?*

Answer: Maybe. If an employee requests time off for a reason related or arguably related to a disability (e.g., “I need 10 weeks off to get treatment for a back problem”), the employer should consider this a request for ADAAA reasonable accommodation.

If the request is for a condition that could qualify as a SHC (construe this liberally!), then FMLA paperwork should also be given to the employee.

ADAAA Compliance When FMLA Also Applies

Question: *As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?*

Answer: An employer may offer an employee a reasonable accommodation other than leave, as long as it is effective. However, if the individual is “eligible” for leave under the FMLA and has a SHC that prevents her from performing an essential job function, she has the right to take a leave of absence up to 12 workweeks (assuming the presence of an appropriate FMLA certification), even if she could continue working with an effective reasonable accommodation (although presumably there will be intermittent LOAs based on a SHC).

Occupational Injury triggering Worker's Comp or ADAAA "disability"

Question: *Does an occupational injury always result in an ADAAA "disability"?*

Answer: No. Again, look to the statutory guidance of the ADAAA: Does the employee have an impairment that substantially limits a major life activity? If the injury results in a present condition that qualifies as a disability, employers are required to make reasonable accommodation.

Medical Certifications, Inquiries and Confidentiality

Question: *Is there a conflict between the FMLA provision allowing employers to ask for certification that an employee has a "Serious Health Condition" and ADAAA restrictions on disability-related inquiries of employees?*

Answer: No. When an employee requests leave under the FMLA for a Serious Health Condition ("SHC"), employers do not violate the ADAAA by asking for the information specified in the FMLA certification form. The FMLA form only requests information relating to the particular SHC, as defined in the FMLA, for which the employee is seeking leave.

Light Duty Assignments Under Workers' Comp, FMLA & ADAAA

Question: *What are an employer's rights and obligations under the three statutes in situations involving light duty assignments?*

Answer: Assuming a particular work-related injury causes a condition that qualifies as a disability, under the ADAAA, an employer may provide an accommodation that requires the employee to remain on the job instead of or in addition to providing leave. However, if an employee is FMLA eligible, the employee can reject the light duty work, and his/her leave request must be granted. If an employee is offered and rejects light duty work, he/she generally will not receive "temporary total disability" benefits under workers' comp.

Comparison of ADAAA and FMLA Limitations on Leave

Question: *Does the FMLA's limit of 12 workweeks of leave in a 12-month period mean that the ADAAA also limits employees to 12 weeks of leave per year?*

Answer: No. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business. The EEOC has said there can be no "bright line" cut off.

Comparison of ADAAA and FMLA Intermittent Leave

Question: *How do the ADAAA and the FMLA requirements compare regarding intermittent or reduced schedule leave?*

Answer: Under the ADAAA, a qualified individual with a disability may work part-time in his current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an unreasonable hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without unreasonable hardship while working a reduced schedule. If no equivalent position, look for a vacant position at a lower level.

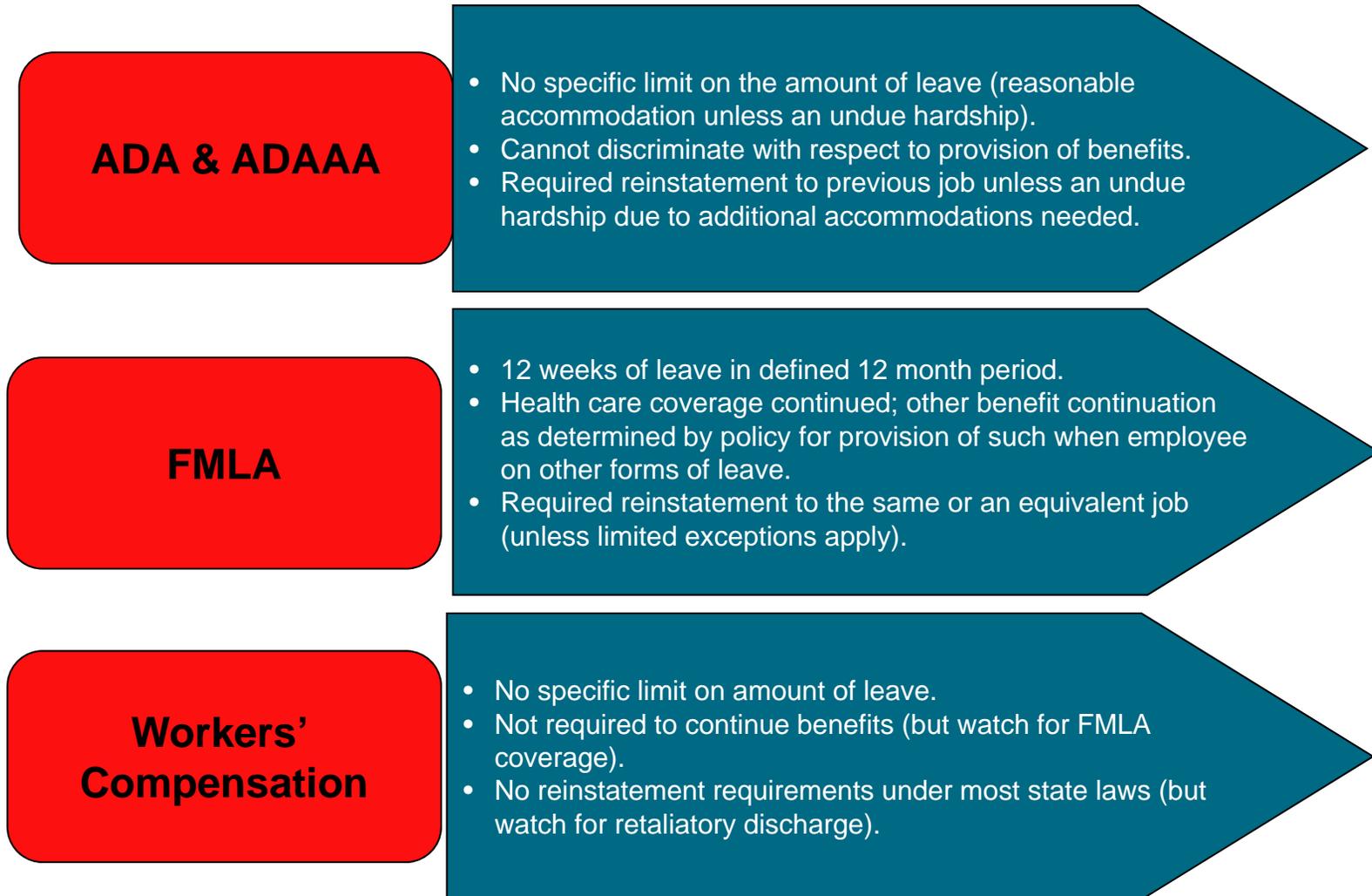
Under the FMLA, employers may require employees to transfer temporarily to an available position with equivalent pay and benefits if needed to better accommodate intermittent leave.

Comparison of Reinstatement Protocol Under ADAAA, FMLA and Workers' Comp

Question: *What are the employee's reinstatement rights under the ADAAA, the FMLA and Workers' Comp?*

Answer: Under the ADAAA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship, or that the employee can no longer perform the essential functions of that job, with or without a reasonable accommodation. Under the FMLA (with a few minor exceptions), an employee must be reinstated to the same position or to an equivalent position. Under workers' comp, there is no automatic right of return, but it is usually of benefit to get the employee working at his original job as quickly as possible and reduce lost wage payments. Failing to return an employee to work can result in the removal of the caps. However, this is less punitive under the 2013 Workers Compensation Reform Law passed by Governor Haslam.

ADAAA/FMLA/WORKER'S COMP RECAP



CASE STUDIES



ADA, FMLA and Workers' Comp: Navigating the Bermuda Triangle and Coming Out Alive

Imad Abdullah
iabdullah@bakerdonelson.com

ADAAA/FMLA/Worker's Comp Case Studies

Case Study #1

Chad works in the company's Information Technology department. He is a non-exempt employee who has been with the company for six years. Chad is, at best, an average employee. Over the past year, he has used all of his paid time off. In addition, last October, he was placed on intermittent FMLA leave due to a severe shoulder injury that he sustained while playing football. Also, last December, his physician sent a letter to the company indicating that Chad suffered from an ongoing health condition that flares up once or twice a year due to carpal tunnel syndrome caused by his work on the computer. This requires Chad to be absent from work for a period of 1 to 2 days each time. However, Chad has never asked for leave due to this condition.

In April of this year, Chad was late in arriving to work, had to leave early from work or was completely absent from work on fourteen separate occasions. Each time that one of these situations occurred, Chad would send you a long rambling text message offering his explanation for his absence, tardiness or early departure and begging you not to fire him. These explanations included the following: "just not feeling well;" depressed because of marriage issues with his wife; his child becoming sick while at school and no one else available to pick her up; and going to see his father who is ill.

Also, in these long, rambling text messages, Chad would throw in an occasional reference to his health condition, but in doing so, he never offered it as a reason for his attendance issues. Chad has also asked if he can work from home when needed, However, he has not indicated that his request to do so is related to his health condition.

With the recent string of attendance issues, Chad has now exceeded and surpassed his available time off. In addition, Chad's attendance problems are beginning to be noticed by others in the department. This has begun to affect morale, as everyone has been forced to pick up the slack.

Case Study #2

Stan is a Customer Sales Representative who has been with the company for a year and a half. For the first year, Stan's performance was excellent. However, over the past six months, Stan has had several customers complain that he is rude on the phone. He has also had several arguments with his co-workers.

As Stan's manager, you schedule a meeting with Stan to discuss these issues. During this meeting, Stan reveals to you that he has "anger management issues" for which he is undergoing counseling. According to Stan, this is the reason for his recent outbursts. You provide him with both ADAAA and FMLA paperwork for his health care providers to complete. The medical documentation received reiterates that Stan does have a mental health issue with "anger management," but states that Stan does not need leave other than the occasional doctor's visit, and that Stan can perform the essential functions of his customer sales job without any accommodation.

Case Study #3

Steve works for the company as a Service Technician. His job description requires him to be available after-hours and on-call. His typical work schedule is from 9 a.m. to 5 p.m. weekdays.

In 2008, he was diagnosed with Stage III Renal Carcinoma and underwent surgery to remove his left kidney. After taking time off for the surgery and recovery, he returned to work with no restrictions or limitations, and his cancer is in remission. Since his return to work, Steve has worked his regular schedule and has not missed any significant time from work, other than for regular doctor visits.

In order to meet customer service and business needs, the company decides that the technicians are going to have to work significant amounts of overtime, including a night shift once a week and be on-call on weekends.

You meet with Steve to inform him of the company's decision and the schedule changes. Steve tells you that he is concerned that the schedule will "put him in the grave," and he obtains a note from his doctor limiting him to eight hours per day, five days per week.

Can the company make him work the new schedule?

Additional Facts:

The company informs Steve that he will not have to work under the new schedule, but rather, he will need to work out of another office location, which involves a two hours commute. At the new office location, Steve's schedule will be a 40 hour work week.

Steve refuses to do so based on the two additional hours of commuting time.

At this point, Steve has, in effect, refused two assignments. Can the company terminate his employment?