2013 Civil Rights Conference

Interplay Between FMLA, ADA and Workers' Compensation

BY: Gregory H. Perry and Joshua Schauer
Perry, Guthery, Haase & Gessford, P.C., L.L.O.
gperry@perrylawfirm.com; jschauer@perrylawfirm.com

I. FMLA

1. Employee Eligibility. To be eligible for FMLA leave an employee must:
   - have been employed with the employer for 12 months[1];
   - have worked at least 1,250 hours for the employer during the previous 12 month periods; and
   - work at a location where the employer has at least 50 employees within a 50 mile radius.

2. Leave Entitlement. The FMLA gives eligible employees the right to take 12 work weeks of unpaid leave during the 12 month FMLA leave year:
   1. for the birth and care of a newborn child of the employee;
   2. for placement with the employee of a child for adoption or foster care;
   3. because of the need to care for the employee's spouse, son or daughter,[2] or parent[3] with a "serious health condition" (the need to care for a family member encompasses both physical and psychological care);
   4. because of a "serious health condition" that makes the employee unable to perform the essential functions of the employee's job;
   5. because of a "qualifying exigency" arising out of the fact that the employee's spouse, son or daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation;

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[1] The 12 months of employment need not be consecutive. Periods of employment within the last seven years are to be counted. If the break in service was because the employee was fulfilling a military obligation, the time prior to such break in service counts without limit.

[2] The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. The child must be under 18 years of age, unless the child is incapable of self-care because of a mental or physical disability.

[3] The term "parent" includes not only a biological parent, but also an adoptive, step or foster parent and an individual who stood in loco parentis to the employee.

6. to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son or daughter, parent, or next of kin of the servicemember (Note: the leave entitlement for this reason is 26 workweeks during a single 12-month period).

3. Details on FMLA Leave Entitlement.

a. FMLA leave year: The employer can designate the FMLA leave year as either the calendar year; a 12-month fixed period (such as the employer's fiscal year); the 12-month period measured forward from the date of the employee's first FMLA leave usage, or a "rolling" 12-month period measured backward from the date of an employee's FMLA leave usage. If the employer does not designate the FMLA leave year, employees are entitled to use whichever FMLA leave year is best for them.

Use of a "rolling" year avoids "leave stacking." To illustrate leave stacking, take an employer that uses the fiscal year as its FMLA leave year. A 12-month custodian has a health condition that makes him eligible for an FMLA leave beginning in the months of June, July and August. Because the custodian gets a fresh 12-weeks of FMLA leave entitlement as of September 1st, if otherwise eligible he can continue on FMLA leave in the months of September, October and November. The school has thus been without a custodian for 24 consecutive weeks. The same stacking can occur with a calendar year FMLA leave year. The custodian could take an FMLA leave in October, November and December; get a fresh 12-weeks of FMLA leave entitlement as of January 1, and then continue on FMLA leave in January, February and March. The custodian has thus stacked 24 uninterrupted weeks of leave.

Many employers choose to use a rolling FMLA leave year to avoid leave stacking. To understand the rolling year, it is important to keep in mind that the year is measured backwards from the date of the leave request, and therefore is constantly changing (or rolling). For each day the employee requests leave, the employer looks back 12 months and total the amount of FMLA leave the employee has taken to determine whether the employee has leave available.

There is a process for employers to change their designated FMLA leave year. The process includes giving a 45 day advance notice before implementing the change.

b. Time within which to take birth or adopted child leave: Leave for birth of a child or adoption must conclude within 12 months of the birth or adoption placement.

c. Spouses with same employer: Spouses employed by the same employer are limited in the amount of leave they can take for reason Nos. 1, 2 and 3 (birth of a child, adoption, or care for a family member) to a combined total of 12 weeks. Their combined leave entitlement for reason No. 6 (care for injured servicemember) is 26 weeks.

d. Intermittent leaves: Leave may be taken in separate blocks of time or on a reduced daily work schedule for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as to not unduly disrupt the employer's operations.

Intermittent leave for reason Nos. 1 or 2 (birth of a child or adoption) may not be used without the employer's approval.

4. "Serious health condition". In general, a "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves "inpatient care" or "continuing treatment" by a health care provider. Those terms incorporate the term "incapacity." Incapacity "means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom."

"Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave."

The terms "inpatient care" or "continuing treatment" are defined as including one of five circumstances:

a. Inpatient care: An overnight stay in a hospital, hospice, or residential medical-care facility, including any period of incapacity or subsequent treatment in connection with such inpatient care; or

b. Continuing treatment by a health care provider: The treatment must include either:

i. Incapacitated for 3 days: A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes either:

- treatment two or more times by or under the supervision of a health care provider (in-person visits) the first within 7 days and both within 30 days of the first day of incapacity; or

- one treatment by a health care provider (in-person visit) within 7 days, with a continuing regimen of treatment (e.g., prescription medication or physical therapy); or

ii. Pregnancy: Any period of incapacity related to pregnancy or for prenatal care. A visit to a health care provider is not necessary; or

iii. Chronic condition: Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time,

requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or

iv. Permanent or long-term: A period of incapacity that is permanent or long-term due to a condition for which treatment may be not be effective. Only supervision by a health care provider is required, rather than active treatment; or

v. Multiple treatments: Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

5. Maintenance of health benefits. The employer is required to maintain group health insurance coverage for an employee on FMLA leave on the same terms as if the employee had continued to work. Arrangements need to be made for employees to pay their share of health insurance premiums (if any) while on leave. In some instances, employers may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

6. Job Restoration. Upon return from the FMLA leave the employee must be restored to the employee's position or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

An exception exists for "key employees." A key employee is a salaried employee who is among the highest paid 10% paid of the employer's employees. A key employee can be denied the right to reinstatement if "substantial and grievous economic injury" will occur to the employer if the employee is reinstated from an FMLA leave. Notice must be provided at the time of the FMLA leave of the fact that the key employee will not be allowed to return from the FMLA leave.

An employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a "no fault" attendance policy. If, however, a bonus or other payment is based on the achievement of a specified goal such as hours worked or perfect attendance, and the employee has not met the goal due to the FMLA leave, payment may be denied unless employees on equivalent leave status other than FMLA leave are paid the benefit.

Employees have no greater right to job restoration or other benefits than if the employee had not taken the leave.

7. General Notices.

a. Poster. The DOL issued a new prototype FMLA poster in February 2013.[4] "Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the

[4] The new poster is available at http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf.

procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text."

b. Employee Handbooks. Employers that have any FMLA eligible employees must "provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically."

8. Specific Notices.

a. Employee's notice of need for FMLA leave: Employees must give provide 30-days advance notice of the need to take an FMLA leave when the need is foreseeable and such notice is practicable. If the leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable—generally, either the same or next business day.

When the need for leave is not foreseeable, the employee must give notice as soon as practicable under the circumstances of the particular case.

Absent unusual circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must give sufficient information for the employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include the fact that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, or that the employee or the employee's family member is under the continuing care of a health care provider.

When an employee seeks leave for an FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When the employee thereafter seeks leave for the same FMLA-qualifying reason, the employee must specifically reference either the qualifying reason for the leave or the need to take an FMLA leave.

b. Employer's notice of eligibility and rights and responsibilities: "When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances." Each time an eligibility notice is given, employers must also "provide written notice detailing the specific

expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations."

The eligibility notice involves the questions of whether: (1) the employee has been employed with the employer for 12 months; (2) the employee has worked 1,250-hours in the previous 12 months; and (3) the employer has 50 or more employees.

The rights and responsibilities notice involves giving information about FMLA rights, as well as responsibilities that the employer may impose. The rights notice must tell the employee, among other things: (1) whether the employee will be required to provide medical certification to establish that the employee has a right to take the leave, and if so, be accompanied by the medical certification form; and (2) whether the employer will require the substitution of paid leave.

c. Employer's designation notice. "When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances." "If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time."

The designation notice is to state one of the following: (1) FMLA leave is approved; (2) more information is required to approve the FMLA leave because the medical certification was insufficient; or (3) FMLA leave is denied, because the FMLA does not apply to the leave request or because the employee has exhausted the 12-week FMLA leave entitlement.

If the FMLA leave is approved, the designation notice must tell the employee, among other things: (1) the number of hours, days, or weeks that will be counted against the employee's leave-entitlement based on this particular leave; (2) whether paid leave will be substituted during the FMLA leave and (3) whether the employee will be required to provide a fitness-for-duty certification to be return from the leave.

If a fitness-for-duty certification will be required, the designation notice must include a list of the essential functions of the employee's position. Typically, an employer would list the essential functions by attaching the employee's job description.

9. Effect of failure to give employee a timely designation notice. Where an employer has failed to timely designate leave as FMLA leave, it may nonetheless notify the employee that the leave will be retroactively designated as an FMLA leave, provided the failure to give the designation notice on a timely basis has not caused harm or injury to the employee.

An employer can be held liable for failing to give a timely designation notice. An example: "if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely."

10. Medical Certifications. Employers may require that an employee's request for leave due to a serious health condition (the employee's or a family member's) be supported by a certification from a health care provider. Different certification forms are to be used for a leave for reason of the employee's serious health condition than for a leave to care for a family member. Second and third medical opinions may be required—at the employer's expense.

Periodic recertifications may be required. For conditions of relatively short duration, recertification may be required to be provided every 30 days. If the initial medical certification says that an absence will last longer than 30 days, recertification can be requested when the initial certification says the absence will end or at the end of six months, whichever is shorter.

When there is a need to authenticate or clarify a medical certification, the employee's supervisor may not ask the follow-up questions. Follow-up questions can only be asked by a professional in the employer's human resources department, a management official or a health care provider. Follow-up questions must be limited to information required in the certification form and must specify in writing what information is lacking. The employee must be given 7 calendar days to cure the deficiency in the medical certification.

The employer may require the employee to provide a "fitness-for-duty" certificate upon return to work that establishes that the employee has the ability to perform the essential functions of the employee's job. This can only be required, however, if the employer has a uniformly-applied policy requiring employees returning from leave for a health condition to submit such a certificate. Employees taking FMLA leave on an intermittent basis may be required to submit a fitness-for-duty certificate if reasonable safety concerns exist.

11. Declining FMLA leave. Michael Kobus was employed by a college as a painter. He was issued a written warning for excessive absenteeism. Kobus had been diagnosed with depression, but did not inform the College of this fact. He asked for "mental health leave," and was told about the possibility of taking an FMLA leave. Kobus asked if there were other options and was told that he could resign and get two weeks' severance pay "and I wouldn't have to work for it." Kobus took the deal, but later filed a lawsuit claiming that "his forced resignation interfered with

or denied his rights under the Family Medical Leave Act." The court disposed of his claims as follows:

"During the first January 18 phone call, Kobus told Orlowski that he needed a "mental health leave" to deal with head and neck pain caused by stress and anxiety. "Like depression, 'stress and anxiety' are conditions with many variations. Complaining of stress and anxiety is not enough to put an employer on notice of a serious health condition. Kobus admits that Orlowski then prudently asked whether Kobus was requesting FMLA leave. Kobus asked what was involved. Orlowski said, "you'd have to get a doctor to sign some piece of paper to apply for the leave." Kobus replied, "I don't have a doctor. Is there any other way I can go?" When Orlowski called back to advise that no other leave was available, Kobus submitted his resignation instead of an FMLA leave application. Viewing these facts in the light most favorable to Kobus, the district court concluded that he "failed to adequately state an intent to take FMLA leave." We agree. Kobus did not pursue FMLA leave and in fact expressly rejected it. When an employee is made aware of the procedures necessary to obtain FMLA leave and chooses not to seek FMLA protection, the employer does not violate the FMLA by terminating the employee for excessive absenteeism. *Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034, 1037 (8th Cir. 2010)

12. Unlawful acts. Generally, there are two types of claims under the FMLA: (1) interference claims, in which the employee alleges that an employer denied or interfered with his substantive rights under the FMLA and (2) retaliation claims, in which the employee alleges that the employer discriminated against him for exercising his FMLA rights. The difference between the two is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while a retaliation claim requires proof of retaliatory intent. *Wisbey v. City of Lincoln*, 612 F. 3d 667 (8th Cir. 2010).

a. Interference. An employer is prohibited from interfering with, restraining, or denying an employee's exercise of or attempted exercise of any FMLA right. 29 USC § 2615(a)(1). This includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employee to avoid responsibilities under the FMLA."[5] 29 CFR § 825.220(b). In an interference claim, an employee must show only that he or she was entitled to the benefit that was denied.

b. Retaliation. Basing an adverse employment action on an employee's use of FMLA leave is actionable. *Smith v. Allen Health Sys., Inc.*, 302 F. 3d 827 (8th Cir. 2002). To establish a retaliation claim, an employee must show (1) that he exercised rights afforded by the FMLA, (2) that he suffered an adverse employment action, and (3) that there was a causal connection between the

[5] One means of interfering with FMLA rights is to terminate the employee during the FMLA leave. In a recent Nebraska federal case, the court held that termination for reason of reduction in force in not unlawful if the RIF did not occur because of the FMLA leave: "A plaintiff cannot recover under an interference theory where, as here, Ag Valley discharged him for reasons wholly unrelated to his FMLA leave. [O]nce Ag Valley proves that Plaintiff would have been laid off during the RIF, even if he had not been off work on FMLA leave, Ag Valley can successfully establish that it had no obligation to re-employ Plaintiff following his leave. *Bodfield v. AG Valley Coop.*, 2011 U.S. Dist. LEXIS 44456 (D. Neb. Apr. 25, 2011).

exercise of rights and the adverse action. *Id*. The kind of causal connection required is not "but for" causation, but rather, a showing that an employer's retaliatory motive played a part in the adverse employment action. *Kipp v. Missouri Highway and Transp. Comm'n*, 280 F. 3d 893 (8th Cir. 2002).

c. Liability. When an employer violates the FMLA, the employee may recover damages equal to lost wages and benefits, and if no wages were lost, "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks." Liquidated damages equal to the lost wages may also be awarded unless the employer proves that it had acted in good faith. Finally, the court may award equitable relief, such as reinstatement or promotion of the employee.

As an example, a truck driver who was terminated for excessive absenteeism despite having informed her employer that she had depression that caused her to absent, was awarded:

Back pay and loss of health care contributions:	$80,793
Liquidated damages	$80,793
Front pay	$134,526
Total damages	$296,112

*Dollar v. Smithway Motor Xpress, In*c., 787 F. Supp. 2d 896, 917 (N.D. Iowa 2011). Interest was added on.

II. ADA and Employees

A. Guidance for determining which employees are to be considered as having an ADA disability.

1. Physical or Mental Impairments

The term "physical or mental impairment" is defined as follows:

> Physical or mental impairment means
> (A) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito urinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Transitory or minor impairments, however, are excluded. A transitory impairment is defined as one that lasts or is expected to last six (6) months or less.

2. Substantially Limits

The EEOC regulations define "substantially limits" as follows: "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population."[6] The regulations state that it is "not meant to be a demanding standard."

3. Major Life Activities

The ADAAA expanded the list of "major life activities." The underlined items in the ADAAA's definition were not listed in the previous ADA regulations:

> (2) MAJOR LIFE ACTIVITIES.—
> (A) IN GENERAL.—. . . "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."
> (B) MAJOR BODILY FUNCTIONS.—. . . a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[7]

4. Mitigating Measures

Under the ADAAA, no mitigating measures are to be considered:

> The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
> (II) use of assistive technology;
> (III) reasonable accommodations or auxiliary aids or services; or
> (IV) learned behavioral or adaptive neurological modifications.[8]

Take the example of an employee with diabetes. Under prevoius law, a court would "examine [the employee's] present condition with reference to the mitigating measures taken, i.e., insulin injections and diet."[9] With the mitigating measures of insulin and diet, the employee was not substantially limited in a major life activity, and thus not protected by the ADA.

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[6] 29 CFR 1630.2(j).
[7] 42 U.S.C. § 12102 (2).
[8] 42 U.S.C. § 12102(4)(E).
[9] *Orr v. Wal-Mart Stores*, 297 F.3d 720, 724 (8th Cir. Neb. 2002).

The Act says we now are to consider how the employee with diabetes would fare without the mitigating measures of insulin and diet restrictions. Without insulin and diet restrictions, the employee would be substantially limited in many major life activities. He may even die. Under the new test, the employee would therefore qualify as having an ADA disability.

Diabetes is just one example. Consider the many employees who have conditions that are managed (or their disabling effects controlled) by medication and other medical treatments--such as heart conditions, high blood pressure, multiple sclerosis, and mental conditions such as bipolar disorder, depression, and anxiety disorders. The question now is: how would those employees function if they did not take their medications? If the employees would be substantially limited in a major life activity without their medications, the employees are to be considered as disabled under the ADA.

5. Episodic or in Remission

The ADAAA provides: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[10]

Many health conditions are episodic in nature yet may be substantially limiting when active—for example, epilepsy and gastrointestinal disorders such as Crohn's disease, ulcerative colitis, and irritable bowel syndrome. Other health conditions, such as cancer, sometimes go into remission.

Under the Act, employers are to engage in a hypothetical assessment: would the employee be substantially limited in a major life activity if their condition were now active? If so, the employee is disabled under the ADA.

6. Regarded As

Many employees will also now be protected even though they do not have an impairment that substantially limits them in a major life activity. This results from the provision of the Act that amends the definition of the third prong of the definition of "disability"—individuals who are "regarded as" having an ADA disability.

The "regarded as" prong was discussed by the United States Supreme Court in *Nassau County* (1987). This was a Section 504 case involving an elementary teacher. The teacher, Gene Arline, had contracted and recovered from tuberculosis 20 years earlier. Arline suffered a series of relapses. The school board terminated Arline after her third relapse "not because she had done anything wrong," but because of the "continued reoccurrence of tuberculosis."

The Court ruled that Arline was protected as an individual with a disability. With regard to the "regarded as" prong, the Court stated:

[10] 42 U.S.C. § 12102(4)(D).

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By . . . [protecting] not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

In *Sutton* (1999), an ADA case involving airline pilots with vision impairments, the Court established boundaries for the "regarded as" prong. The Court held that an individual is not "regarded as" having a disability unless the employer "entertain[ed] misperceptions about the individual -- it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." The Court explained: "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment -- such as one's height, build, or singing voice -- are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."

One of the purposes of the ADAAA was "to reject the Supreme Court's reasoning in *Sutton* . . . with regard to coverage under the third prong of the definition of disability ["regarded as"] and to reinstate the reasoning of the Supreme Court in *Nassau County* . . . which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973."

The Act does this by providing that: "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." The focus is thus now on the employer's motivation, not the severity of the impairment.

Read literally, this provision gives ADA protection to individuals who do not get hired, or are terminated from employment, because the employer mistakenly thought the individual had a physical or mental impairment when he did not, mistakenly thought the individual's impairment was worse than it really was.

7. <u>Broad Coverage</u>

Finally, more employees may be covered by the ADA based on the statement in the ADAAA that the definition of disability should "be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[11]

[11] Section 2 of the ADAAA (Findings and Purposes).

B. Actions to take under the ADA.

1. Reasonable Accommodations

Compliance with the ADA primarily involves not discriminating on the basis of disability[12] and providing reasonable accommodations.[13] "The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the 'benefits and privileges of employment' equal to those enjoyed by similarly-situated employees without disabilities."[14]

Consider again the example of an employee with diabetes. Now that the employee is protected by the ADA, he must be provided reasonable accommodations. The EEOC suggests the following accommodations for an employee with diabetics:

- a private area to test blood sugar levels or to take insulin
- a place to rest until blood sugar levels become normal
- breaks to eat or drink, take medication, or test blood sugar levels
- leave for treatment, recuperation, or training on managing diabetes
- modified work schedule or shift change.[15]

These are examples only. Each circumstance must be considered individually based on the needs of the employee and the employee's job duties.

In determining what reasonable accommodations may be required, one must first understand the nature of the health condition and the types of accommodations that may be appropriate for that health condition. The "Job Accommodation Network" is a good resource for this type of information.

The Job Accommodation Network is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy. Its website—http://www.jan.wvu.edu/media/atoz.htm—provides overview information on a number of impairments and accommodation ideas for those impairments.

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[12] The ADA makes it unlawful for employers to "discriminate against a qualified individual on the basis of 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).

[13] An employer commits a violation of the ADA by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]." 42 U.S.C. § 12112 (b)(5)(A).

[14] EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act. http://www.eeoc.gov/policy/docs/accommodation.html#general.

[15] EEOC's Questions and Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA). http://www.eeoc.gov/facts/diabetes.html.

2. Interactive Process

The individualized accommodation decisions are required to be made using what is referred to as the "interactive process." The interactive process involves talking with the employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[16]

3. Essential Functions and Job Descriptions

Not all limitations need be accommodated, however, because the ADA protects only "qualified individuals" with a disability. A qualified individual is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[17]

The focus is on "essential functions." "[W]ritten job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in determining whether a particular function is essential."[18] Thus, job descriptions continue to be an important component of ADA compliance.

Employees with disabilities will frequently request time off work as a reasonable accommodation. Extensive or unpredictable absences typically create significant problems for schools. Our federal court has recognized that "regular and reliable attendance is a necessary element of most jobs."[19] Job descriptions should include a statement to this effect.

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[16] EEOC's ADA regulations, 29 C.F.R. § 1630.2(o)(3).

A failure to engage in the interactive process usually means that an ADA lawsuit will go to trial rather than be dismissed because: "summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations." *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999).

[17] 42 U.S.C. § 12111(8).

[18] EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act. *See* ADA regulations, 29 C.F.R. § 1630.2.

[19] *Rask v. Fresenius Medical Care North America*, 509 F.3d 466 (8th Cir. 2007). The Nebraska federal court has also held: "It is well established that consistent and dependable attendance is an essential function of most types of employment." *Estes v. Omaha School Foundation*, 2007 U.S. Dist. LEXIS 33641 (D. Neb. 2007).

III. Workers' Compensation

"An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under the FMLA. The . . . absence and FMLA leave may run concurrently . . . 29 CFR § 825.702(d)(2).

An employer may not simply assign someone with a work injury to a different job without first assessing whether the employee can perform the essential functions of the pre-injury job, with or without accommodation.[20]

Is someone with a workers' compensation injury disabled? Probably. As noted by one commenter, "Unless the employee is claiming the flu or a common cold as the alleged disability, forget about nit-picking whether the condition is a "disability" within the meaning of the ADA. In all likelihood, it is."[21]

When does a person with a work-related injury have a disability under the "regarded as" portion of the ADA definition? A person with a work-related injury has a disability under the "regarded as" portion of the ADA definition if s/he: (1) has an impairment that does not substantially limit a major life activity but is treated by an employer as if it were substantially limiting, (2) has an impairment that substantially limits a major life activity because of the attitude of others towards the impairment, or (3) has no impairment but is treated as having a substantially limiting impairment.

May an employer require that an employee with a disability-related occupational injury be able to return to "full duty" before allowing him/her to return to work? No. The term "full duty" may include marginal as well as essential job functions or may mean performing job functions without any accommodation. An employer may not require that an employee with a disability-related occupational injury who can perform essential functions be able to return to "full duty" if, because of the disability, s/he is unable to perform marginal functions of the position or requires a reasonable accommodation that would not impose an undue hardship.

May an employer refuse to return to work an employee with a disability-related occupational injury simply because it assumes, correctly or incorrectly, that s/he poses some increased risk of re-injury and increased workers' compensation costs? No, unless an employer can show that employment of the person in the position poses a "direct threat." The employer may not refuse to return to work an employee who is able to perform the essential functions of the job, with or without a reasonable accommodation, unless it can show that returning the person to the position poses a "direct threat."

May an employer refuse to return to work an employee with a disability-related occupational injury simply because of a workers' compensation determination that s/he has a "permanent disability" or is "totally disabled"? No. Workers' compensation laws are different in purpose from the ADA and may utilize different standards for evaluating whether an individual

[20] See *EEOC Enforcement Guidance: Workers' Compensation and the ADA.* Many of the following questions and answers are provided in this EEOC enforcement guide.

[21] http://www.employmentandlaborinsider.com/discrimination/how-to-survive-the-adaaa-employer-best-practices/

has a "disability" or whether s/he is capable of working. A workers' compensation determination also may relate to a different time period. Such a determination is never dispositive regarding an individual's ability to return to work, although it may provide relevant evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a direct threat.

If there is no vacancy for an employee who can no longer perform his/her original position because of a disability-related occupational injury, must an employer create a new position or "bump" another employee from his/her position? No. The ADA does not require an employer to create a new position or to bump another employee from his/her position in order to reassign an employee who can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation.

When an employee requests leave as a reasonable accommodation under the ADA because of a disability-related occupational injury, may an employer provide an accommodation that requires him/her to remain on the job instead? Yes. An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.

Does the ADA prohibit an employer from creating a light duty position for an employee when s/he is injured on the job? Generally, no. An employer may recognize a special obligation arising out of the employment relationship to create a light duty position for an employee when s/he has been injured while performing work for the employer and, as a consequence, is unable to perform his/her regular job duties. Such a policy, on its face, does not treat an individual with a disability less favorably than an individual without a disability; nor does it screen out an individual on the basis of disability.

If an employer reserves light duty positions for employees with occupational injuries, does the ADA require it to consider reassigning an employee with a disability who is not occupationally injured to such positions as a reasonable accommodation? Yes. If an employee with a disability who is not occupationally injured becomes unable to perform the essential functions of his/her job, and there is no other effective accommodation available, the employer must reassign him/her to a vacant reserved light duty position as a reasonable accommodation if (1) s/he can perform its essential functions, with or without a reasonable accommodation; and (2) the reassignment would not impose an undue hardship.

gperry@perrylawfirm.com
jschauer@perrylawfirm.com