Track 2 – Session 3

The Intersection of the ADA, FMLA and Worker's Compensation Laws|

About the Presenters...

Stephanie M. Brown is an administrative law judge for the Wisconsin Department of Workforce Development, Equal Rights Division. Prior to joining the Equal Rights Division, she counseled and represented employees in various employment matters, including unemployment insurance cases and discrimination cases before the Equal Rights Division, Equal Employment Opportunity Commission and federal courts. Stephanie received her Bachelor of Arts and law degrees from Marquette University.

Douglas M. Feldman is a shareholder and a member of the Board of Directors, with the Law Firm of Lindner & Marsack, S.C. and has practiced with the firm since 1989. Mr. Feldman is licensed in both Wisconsin and Michigan and his current practice is primarily focused upon representing insurance companies and self-insured employers in worker's compensation matters. Mr. Feldman is a frequent lecturer and speaker on topics such as worker's compensation, handicap discrimination, and the ADA. He also provides training to employers in these same areas. He is one of the founding members and on the Board of Directors of the National Worker's Compensation Defense Network, an association of worker's compensation defense firms throughout the country dedicated to the pursuit of worker's compensation reform on a national basis. He has been elected as a Fellow in the ABA College of Worker's Compensation Lawyers, and is currently recognized in both "Best Lawyers in America" and "Super Lawyers" in the field of worker's compensation law. Mr. Feldman is also President of the Board of Directors of Kids' Chance of Wisconsin. Mr. Feldman received his undergraduate degree in Business Administration from the University of Wisconsin - Milwaukee and his law degree from Marquette University. He is a member of both the Wisconsin and Michigan Bar, as well as both ABA-Labor and Employment Law and Worker's Compensation sections.

James Walcheske is a Partner and Managing Member of Walcheske & Luzi, LLC, where he represents, counsels, and advises clients in all aspects of employment law. He received his B.A. from UW- La Crosse in Political Science and his J.D. from Marquette Law School. He has dedicated his entire practicing career to employment law and employment law issues. He was rated as a Rising Star by Super Lawyers for 2012, 2013, 2014, 2015 and a "Leading Lawyer" in Employment Law by M Magazine in 2014 and 2015.

THE INTERSECTION OF THE ADA, FMLA AND WORKER'S COMPENSATION LAWS

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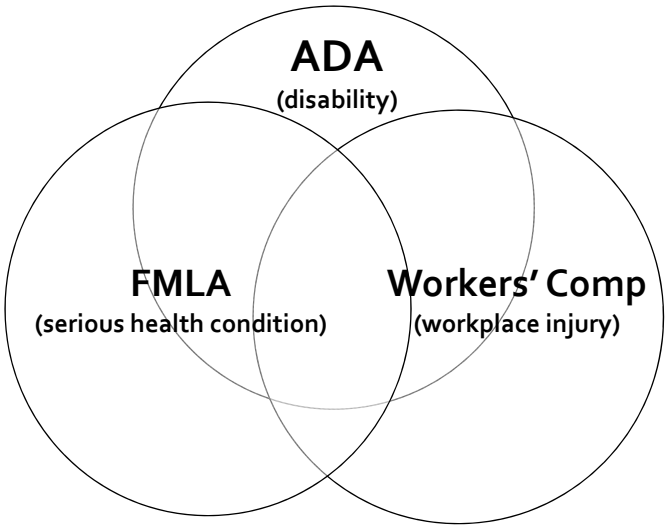
The Bermuda Triangle of Leave



Why is it Important to Recognize the Interaction of ADA, FMLA, and Workers' Compensation Laws?

- Employees being out of work has a huge impact on your business.
- When evaluating an employee's need for leave, it is possible that one, both, or all three of these laws may be involved, each of which has its own rules, responsibilities, regulations and rights.
- It is the Employer's responsibility to ensure employees receive the benefits to which they are legally entitled.

Family and Medical Leave Act

Coverage under FMLA

- *Employer Eligibility*:
  - Applies to all state and local government employees regardless of size
  - Private employers with *at least* 50 employees within a 75-mile radius

- *Employee Eligibility*:
  - Worked for employer for *at least* 12 months (whether or not consecutive); and,
  - Has at least 1,250 hours of service in the 12 months preceding the leave; and,
  - Works at a site where there are 50+ employees in a 75-mile radius

Benefits under FMLA

- Twelve (12) weeks of unpaid leave in a 12-month period;
- Continuation of health care benefits;
- Restoration to the same or equivalent job; and

Americans with Disabilities Act

Coverage under ADA

- *Employer Eligibility* –
  - 15+ employees
- *Employee Eligibility* –
  - *Must have a disability* –
    - *a physical or mental impairment that substantially limits one or more major life activities;*
    - *A record of such impairment; or*
    - *Be regarded as such*
  - Must be "qualified" –
    - able to perform the essential functions of the job with or without reasonable accommodation.

Summers v. Alatarum Inst. Corp. (4th Cir. 2014)

- Employee suffered fractures to both legs, requiring two surgeries on his left leg. The Employee was restricted from putting any weight on his left leg for six weeks and doctors estimated that he would not walk normally for seven months *at the earliest*.
- Fourth Circuit held that the employee was disabled because even "**temporary**" impairments may be substantially limiting.
- **What does this mean**?
  - Even a ***broken bone*** can be a disability.
  - Much easier for employees to meet threshold for bringing an ADA case.

The ADA's Interactive Process

- Once an employee notifies the employer of a disability or the need for accommodation, you must engage the employee in the interactive process to identify a "reasonable accommodation", i.e., one that will enable the employee to perform the essential functions of his/her job.

Leave under the ADA

- Leave may be a form of reasonable accommodation if:
  - It is for a definite period of time; and
  - The leave will allow the employee to perform the essential functions of their position.
- Just because the employee requests leave as a reasonable accommodation does not mean it must be granted.
  - Employees are not entitled to their preferred accommodation.

"Disability" under the WFEA

- A physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- A record of such an impairment; or
- Being perceived as having such an impairment.

"Disability" under ADA
v.
"Disability" under WFEA

- Biggest difference is permanence. Under the ADA, as amended, permanence is not the hurdle it once was. Impairments that are not permanent can now constitute "disabilities" under the ADA. While the WFEA generally mirrors the ADA, it has not adopted that change. Thus, conditions that are transitory (not permanent) in nature generally will not constitute "disabilities" under the WFEA.

Disability Discrimination under the WFEA

- Forms of disability discrimination are statutorily provided at Wis. Stat. § 111.34(1):
  - Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employee because of the employee's disability; or
  - Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship to the employer's program, enterprise, or business

Worker's Compensation

Leave Under Worker's Compensation

- No specific limit for the amount of leave an injured worker may have for an on-the-job injury.
  - Concurrent running of FMLA and Workers' Comp is *permitted*.
    - Impact: Workers' Compensation benefits will replace lost wages, but FMLA will obligate the employer to maintain other health benefits.
    - Cannot force the employee to use their accrued paid leave (permitted under FMLA) because workers' compensation is considered paid leave.
    - FMLA will protect the employee's job, which might not otherwise be the case, absent an employment contract or a CBA. In some states, the employee may sue for retaliation for an adverse employment action taken because of an on the job injury.
  - On the job injury may constitute disability under the ADA

Return to Work / Light Duty

- If an employee has a doctor's note releasing them to return to work, do NOT demand they get a note from another physician and/or prevent them from returning to work.
- Light Duty: if an employee is released for light duty work, the FMLA-qualifying employee may reject the light duty work, but may forfeit workers' compensation benefits.
- Employer is not required to create a light duty position when the employee is released at light or restricted duty and a position is not available. If condition constitutes a disability, interactive process is required.

Interplay of ADA, FMLA and Worker's Compensation Laws

Medical Documentation

- **ADA –**
  - You may require sufficient documentation to establish that the employee has a disability if the disability is not obvious.
  - Documentation must be reasonable and must relate to the specific condition for which accommodation has been requested.
- **FMLA** –
  - You may require medical certification. (Use the DOL Forms)
  - You may require second or third medical opinions (at your expense) and periodic recertification of a serious health condition.
- **Workers' Compensation –**
  - You are entitled to medical information that pertains to the employee's on-the-job injury, i.e. return to work notes, medical work restrictions

Benefits While on Leave

- **ADA** –No specific requirements but cannot discriminate and must provide same benefits as those provided to employees on non-ADA leave of absence.
- **FMLA** – Health coverage must be continued at same level as prior to the leave; other benefits are determined by the employer's established policy for providing such benefits when the employee is on other forms of leave.
- **Workers' Compensation** – Not required to be continued unless run concurrently with FMLA leave.

Light (Restricted) Duty

- **ADA** – requires consideration of light duty as a reasonable accommodation.
- **FMLA –** does **not** require employee to accept light duty if employee prefers FMLA leave and has it available.
- **Workers' Compensation –** requires employee to accept available light duty ("suitable employment") or forfeit compensation benefits.

Scenarios for Discussion

Fact Scenario One

IMA Hurt has worked on the assembly line at Widgets, Inc. for the past 15 years. Her job requires repetitive use of her upper extremities. In June 2015, Widgets, Inc. re-tooled the line to allow it to run larger widgets through the assembly process. After performing her duties on the assembly line for approximately 30 days after the re-tool occurred, IMA Hurt developed the insidious onset of bilateral elbow pain.

Ms. Hurt reports her medical condition to the nursing station who sets up an evaluation at the local occupational health clinic. The physician at the clinic, Dr. Healemhup, advises Ms. Hurt that he believes her elbow problems simply represent a non-work-related degenerative condition and that she may return to work immediately, but should use a splint. Ms. Hurt, not being enamored with Dr. Healemhup's opinion, immediately goes to her own primary care physician, Dr. Compassionate, who advises her that he believes her condition is indeed work-related and that her work duties were a material contributory causative factor in the progression of her bilateral elbow symptoms. He advised her that she could only go back to work with temporary restrictions requiring no lifting greater than 10 pounds and no repetitive use of the upper extremities.

Ms. Hurt presents these alternative opinions to the Human Resources Department of Widgets, Inc. Widgets, Inc. advises her that they will not provide accommodated duty for her since Dr. Healemhup believes that her condition is not work-related and advises her to take FMLA leave.

Twelve weeks later, Ms. Hurt continues to treat for her elbow condition. She undergoes bilateral epicondylitis surgery and continues to be subject to temporary restrictions. Widgets, Inc. sends her a letter indicating she must return to work at the expiration of her FMLA leave, or risk being terminated from employment. Ms. Hurt advises that Dr. Compassionate believes that she will be able to return to work to her regular duties in approximately an additional 8 weeks.

The company's HR Department huddles together to determine Ms. Hurt's fate!

Eight weeks later, Ms. Hurt is returned to work, but not full duty. Rather, she has permanent restrictions placed upon her which prohibit her from performing repetitive tasks with her upper extremity which is a significant portion of her job on the assembly line. The company elects to have an independent medical examination with Dr. Yourcured who opines that she can return to work without restriction. Both medical opinions are provided to the company for their consideration.

The company concludes that if the treating physician's opinions are followed, Ms. Hurt cannot return to her assembly position. However, there is an alternative position available in a manufacturing cell in another area of the plant. In this manufacturing cell, there are 7 workstations that the employees rotate through on a weekly basis. Five of those workstations do not require repetitive use of the upper extremities, but the other 2 do. Ms. Hurt requests that she be allowed to return to work in the manufacturing cell and that the company provide her with reasonable accommodation by allowing her to avoid the 2 positions which require repetitive use of the upper extremities.

What's a company to do?

Fact Scenario Two

The Company and Ms. Hurt engage in the interactive process and determine that Ms. Hurt can be returned to work in the manufacturing cell position. She will not be required to perform the repetitive portions of job. Instead, her co-workers, Missy Nosey and Bubba Whiney will perform the repetitive functions of the job. Ms. Hurt then returned to work the week of July 4. She immediately requested that her supervisor allow her to take Friday off so she could have a longer holiday weekend. Her request was denied.

Two days into her new job, Ms. Hurt claimed an inability to perform the job, though she is not required to perform the repetitive parts of the job. She told her supervisor that the manufacturing cell job was killing her elbows and she could not perform the job. Her supervisor tells her to quit complaining and get back to work, as the job is well within her restrictions.

Ms. Nosey and Mr. Whiney then begin complaining to the supervisor that it is unfair that they are having to perform the repetitive parts of Ms. Hurt's job. They tell the supervisor that they too will have injuries if they are required to continue performing the repetitive parts of the job for Ms. Hurt.

What is a company to do?

Fact Scenario Three

W.G. Employee was diagnosed with severe depression and anxiety in 2009, while she was in college. Initially, W.G. Employee was treated with prescription medications such as Wellbutrin and Lorazepam. Ms. Employee also regularly met with a licensed therapist. Medication and therapy helped Ms. Employee with the symptoms associated with depression and anxiety. Ms. Employee was able to complete college, earning a degree in Accounting. After college, Ms. Employee worked for Numbers, Inc., a local accounting firm. Ms. Employee missed work at times when she experienced symptoms associated with depression or anxiety. However, she never disclosed to anyone at Numbers, Inc., the reasons for her absences from work, other than informing her supervisor that she was not feeling well that day. Ms. Employee is currently taking Cymbalta for depression and Ativan for anxiety. She also sees her therapist 2 to 3 times a year.

In December 2014, Ms. Employee applied for a position with Accounting Brothers, LLP. After two interviews with Human Resources and the partners for Accounting Brothers, Ms. Employee was offered and accepted a position with the Brothers as an Accountant. During her interviews for the position, Ms. Employee was not asked about her health. Nor did Ms. Employee disclose during the interview process that she had been diagnosed with depression and anxiety and was receiving treatment for those conditions.

After accepting the Accounting position at Accounting Brothers, Human Resources requested Ms. Employee complete various documents relating to employee rules and personal contact information. Human Resources also presented Ms. Employee with a document that included the definition of an individual with a disability under Wisconsin law. This document asked individuals to check a box, identifying whether the individual was considered to be an individual with a disability. If the individual checked "yes", the individual was then asked to identify any accommodations that the individual may need in order to complete his or her job duties. Ms. Employee checked the "no" box, meaning she did not consider herself to be an individual with a disability under Wisconsin law.

When Ms. Employee began working for Accounting Brothers, she was informed that she would need to work at least 40 hours per week. She understood that she may need to work more hours during the tax season, as that is one of the busiest times of the year for the Company. From December 2014 to February 2015, Ms. Employee typically worked 40-45 hours per week. Beginning in March 2015, Ms. Employee began working 50-55 hours per week. By March 13, 2015, Ms. Employee was working 60 hours per week. Ms. Employee began experiencing symptoms associated with anxiety. She missed work on March 23, 24 and 25, calling Matt Supervision, her supervisor, and telling him that she was not feeling well. On March 25, 2015, Ms. Employee saw her therapist, who increased the dosage for Ativan. Her therapist also informed Ms. Employee that she needed to decrease the number of hours she was working to no more than 45 hours per week.

When Ms. Employee returned to work on March 26, 2015, she did not disclose to Human Resources or Mr. Supervision that she was suffering from anxiety or depression. Ms. Employee did not inform Human Resources or Mr. Supervision that her therapist recommended that she work no more than 45 hours per week.

On March 27, 2015, Ms. Employee was called into a meeting with Mr. Supervision. Ms. Employee was informed that she needed to come into work over the weekend because she had been absent during the week. When Ms. Employee learned of her need to work the weekend, she became upset. She yelled at Mr. Supervision, "I can't take this job anymore. I'm working so many hours, I'm going to kill myself. I'm not working this weekend." Mr. Supervision than replied, "If you don't work this weekend, you're employment will be terminated." Ms. Employee screamed at Mr. Supervision, "That's just great. With all the work I've done for this Company for the past few months, you're going to fire me because I can't work this weekend. Go ahead and fire the person with anxiety. My doctor told me I can't work more than 45 hours per week, and you're going to fire me for not working this weekend. This job is making me crazy. And you're going to fire me because I'm going crazy and need to take a break from this place!"

At that point, Mr. Supervision told Ms. Employee to calm down. He further told Ms. Employee that she needed to leave the premises. He told Ms. Employee that she did not need to report to work over the weekend. He said she should report to work on Monday at her normal start time.

Still upset, Ms. Employee went to her office, grabbed her purse, and walked towards the exit of the building. As Ms. Employee was approaching the door, she saw her co-worker, Beth Friendly. Ms. Friendly asked Ms. Employee what was wrong. Ms. Employee yelled at Ms. Friendly to "mind your business" and "don't worry about what's wrong with me." Rather than walk away from Ms. Employee, Ms. Friendly continued to follow Ms. Employee towards the door. Ms. Friendly asked Ms. Employee if she was leaving work, and if so, if she needed a ride home. Ms. Employee again told Ms. Friendly to mind her business. She also said she didn't need a ride home. Ms. Friendly asked Ms. Employee if she was sure she was okay. At that point, Ms. Employee turned towards Ms. Friendly, told Ms. Friendly to leave her alone and shoved Ms. Friendly away from her. Ms. Friendly lost her balance, falling down and hitting her head on the floor. When Ms. Friendly got up, she yelled at Ms. Employee, "you better leave. I was just trying to help you. The next time I see you, I'll knock you down on the ground." Ms. Employee left the building.

Ms. Friendly declined medical attention after hitting her head on the floor.

Over the weekend, Ms. Employee called Mr. Supervision and left a message for him at his work telephone number. Ms. Employee informed Mr. Supervision that she was going to see her therapist on Monday, March 30th and would not be at work.

On March 30th, Ms. Employee's therapist sent Human Resources a fax that provided the following:

> Ms. Employee has been under my care since 2009 for treatment of severe depression and anxiety. Recently, Ms. Employee has informed me that her medical conditions are becoming more symptomatic. I believe Ms. Employee's symptoms have been exacerbated by recent increases to the hours Ms. Employee is expected to work. I recently increased Ms. Employee's dosage for Ativan to treat those symptoms. However, I believe that it is best for Ms. Employee to try another medication to treat her symptoms. I am going to prescribe Ms. Employee Prozac. Because it will take Ms. Employee some time to adjust to this medication, I ask that she be allowed time off work until April 16, 2015.
>
> I believe that with some time off work and continued medical treatment, Ms. Employee will be able to control her anxiety and depression, and will be able to continue employment with your Company.
>
> Additionally, it has come to my attention that Ms. Employee had an incident at work on March 27, 2015, involving her supervisor and a co-worker. I believe that Ms. Employee's conduct on that day was due to her medical conditions and the increased stress she has been experiencing due to her work environment.

> Further, the incident with Ms. Employee's co-worker on March 27th has exacerbated the symptoms Ms. Employee experiences relating to anxiety and has caused Ms. Employee much mental harm. I would recommend that Ms. Employee have no further contact with her co-worker, Ms. Friendly.
>
> When Ms. Employee returns to work on April 16, 2015, I recommend that she work no more than 40 hours per week. This restriction should be followed for the next three months, at which time I will re-evaluate Ms. Employee's conditions and determine if that accommodation can be modified.
>
> I would ask that you contact me to discuss any questions you have about Ms. Employee's medical condition and reasonable accommodations that Ms. Employee will need when she returns to work.

The incident on March 27th was the first time that Ms. Employee had any problems at work. Ms. Employee was not previously disciplined by Accounting Brothers for work performance or work rule violations. Mr. Supervision was happy with Ms. Employee's work performance before March 27th. He was even discussing with Human Resources providing Ms. Employee with a pay raise after the tax season was over.

Accounting Brothers has a work rule/policy prohibiting violence in the workplace. Employees engaging in any violent conduct are subject to immediate termination of employment. Violent conduct is defined as any intentional use of force against another individual. Ms. Employee received a copy of that policy when beginning employment with the Company.

What is a company to do?

Thank you!