

SPECIAL REPORT

The Leave Maze

Managing FMLA, ADA, and
workers' compensation issues



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Interplay of FMLA, ADA, and workers' compensation laws

The Family and Medical Leave Act (FMLA) is by no means the only law that can affect employee leave issues. A variety of other laws can also have an impact, including the Americans with Disabilities Act as amended (ADA), state workers' compensation laws, and state family and medical leave laws. The FMLA and the ADA regulations specify that they do not override other applicable laws, and where multiple laws apply to a leave situation, the FMLA and the ADA should be coordinated with those other laws. Understanding which laws apply in a given situation, and how they interact with one another, can be complex and confusing for employers.

In order to understand the ways in which the FMLA, the ADA, and workers' compensation laws interact, it is important first to understand the legal basics of each law.

The Family and Medical Leave Act (FMLA)

Employers covered under FMLA

The FMLA affects private employers with 50 or more employees. All public employers are covered, regardless of size. A private employer meets the 50-employee threshold if it had 50 or more employees for each working day during each of 20 or more weeks in the current or preceding year. There are also special provisions for teachers and other instructional employees of public and private elementary and secondary schools.

The FMLA was enacted in 1993 for the purpose of allowing employees to take up to 12 workweeks of unpaid leave for certain family events and medical reasons. In 2008, amendments were made to the FMLA by the National Defense Authorization Act (NDAA), which became effective in January 2009. The NDAA expanded the FMLA to allow eligible employees to take up to 12 weeks of job-protected leave in the applicable 12-month period because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty, or has been called to covered active duty status (or has been notified of an impending call or order to covered active duty).

Also, the NDAA amended the FMLA to allow eligible employees to take up to 26 weeks of job-protected leave in a "single 12-month period" if the employee

is the spouse, son, daughter, parent, or next of kin caring for a covered service-member or veteran recovering from a serious injury or illness incurred in the line of duty on active duty in the armed forces, or that existed before the beginning of the member's active duty and was aggravated by, or that manifested itself before or after the member became a veteran. The two new types of FMLA leave are known as "military family leave." Final FMLA regulations implementing the military family leave provisions took effect in 2013.

FMLA leave available

The law allows eligible employees to take up to 12 workweeks of leave during any 12-month period for the following reasons:

- ◆ The birth of a child or the placement of a child with the employee for adoption or foster care,
- ◆ To care for a spouse, son, daughter, or parent with a serious health condition,
- ◆ The employee's own serious health condition, or
- ◆ Any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.

As mentioned, the law also allows eligible employees to take up to 26 weeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember or veteran recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

Note that the 26 workweeks are available only during one, single 12-month period. Eligible employees are entitled to a combined total of 26 workweeks of leave in the 12-month period for leave to care for a military servicemember and any other FMLA-qualified leave (e.g., serious health condition, birth of a child).

Serious health condition under FMLA

The definition of a "serious health condition" includes an illness, injury, impairment, or physical or mental condition that involves either inpatient care (i.e., an overnight stay in a hospital, hospice, or residential care facility) or continuing treatment by a healthcare provider. An individual with a serious health condition might also be considered to have a disability as that term is defined under the ADA. However, leave provided for a serious health condition under the FMLA does not necessarily satisfy the requirements for reasonable accommodation under the ADA. Additional leave or different accommodation may also be necessary under the ADA.

Benefits during FMLA leave and return to work

In addition to 12 or 26 weeks of unpaid leave during a 12-month period, employees out of work on FMLA leave are entitled to the following:

- ◆ A guarantee of continued medical insurance benefits while the employee is on leave, provided the employee continues to pay any portion of the premium for which the employee would ordinarily be responsible.
- ◆ The employee may elect or the employer may require that paid leave be substituted for unpaid FMLA leave pursuant to the organization's policies related to the use of paid leave.
- ◆ A guarantee that they may return to the position held before leave, or an equivalent position, at the same or an equivalent rate of pay and benefits.

FMLA employee eligibility requirements

Full-time, part-time, temporary, or even seasonal workers may be eligible for FMLA leave as long as they are on the payroll and satisfy a three-prong test that includes a minimum service requirement, a minimum hours requirement, and a minimum worksite requirement.

Three-Prong Test

To be eligible for a leave, an employee must satisfy all three tests:

1. He or she has worked for the employer for at least 12 months at the time the leave is to commence. (These 12 months do not have to be consecutive months, but if an employee has a break in service of 7 years or more, except in limited circumstances, service before the break is not included in this calculation.)
2. He or she has worked for the employer for at least 1,250 hours during the 12-month period before the leave begins. (These months are consecutive.)
3. He or she works at a worksite that employs at least 50 employees at or within a 75-mile radius of that worksite.

The minimum service requirement

The first prong of the three-prong test for employee eligibility under FMLA is the minimum service requirement, which specifies that an employee must have worked for the employer for at least 12 months.

The minimum service requirement is calculated as of the date leave begins, not the date leave is requested. If an employee requests leave before the eligibility criteria have been met, the employer may have to project to when the date of eligibility begins to see whether the employee will be eligible by the proposed leave date.

An employee may be on non-FMLA leave at the time he or she meets the eligibility requirements and, in that event, any portion of the leave taken for a qualifying reason after the employee meets the eligibility requirement would be FMLA leave.

The 12-month service requirement does not require consecutive months of service. However, employment periods before a break in service of 7 years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months. The exception to this rule in the final regulations states that employers must "count" service beyond the 7-year cap if

the employee's break in service is caused by his or her USERRA-covered military service, or if the employee and employer have a written agreement concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

The minimum hours requirement

The second prong of the three-prong test for FMLA eligibility is the minimum hours requirement, which specifies that an employee must have worked for the employer for at least 1,250 hours during the 12-month period before the leave begins.

The number of hours an employee has worked is determined in accordance with principles established under the Fair Labor Standards Act (FLSA). The FLSA requires that nonexempt employees be paid for the hours they actually worked.

Hours an employee was on vacation or on leave, even if the vacation or leave is paid, do not count as time actually worked and, therefore, are not included in determining if an employee satisfies the 1,250-hour threshold. This is different from the minimum service requirement, where time on sick leave or vacation may be included in determining if the employee satisfies the 12-month requirement.

As with the 12-month service requirement, when determining whether the employee worked the 1,250 hours of service, an employee returning from fulfilling his or her National Guard or military reserve obligation must be credited with the hours of service that would have been performed but for the period of military service.

The minimum employee-count worksite requirement

The third part of the three-prong test for FMLA employee eligibility has nothing to do with the individual employee, but relates to the total number of employees at or close to the worksite of the employee requesting leave. To satisfy this portion of the test, an employee must work at a worksite that has at least 50 employees at that site or within 75 miles of that worksite. The 75 miles are measured along surface roads by the shortest route, not "as the crow flies."

Military family leave eligibility requirements

The FMLA provides two types of military family leave: leave for a qualifying exigency and military caregiver leave.

Qualifying exigency leave. The FMLA provision for "qualifying exigency" leave grants up to 12 weeks of FMLA leave to qualified employees for any "qualifying exigency" arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.

Covered active duty. "Covered active duty" means duty during deployment with the armed forces to a foreign country (for a member of a regular component of the armed forces); and duty during deployment with the armed forces to a foreign country under a call or order to active duty (for a member of a reserve component of the armed forces).

The U.S. Department of Labor (DOL) has developed an optional form, *Certification of Qualifying Exigency for Military Family Leave* (Form WH-384), for employers' use in obtaining proper certification.

The first time an employee requests leave because of a qualifying exigency, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on covered active duty or call to covered active duty status and the dates of the covered military member's active duty service.

This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military must be provided to the employer if the need for leave because of a qualifying exigency arises out of a *different* active duty or call to active duty status of the same or a different covered military member.

Qualifying exigencies may include:

- ◆ Short-notice deployment (up to 7 days of leave)
- ◆ Attending certain military events
- ◆ Arranging for alternative child care
- ◆ Addressing certain financial and legal arrangements
- ◆ Periods of rest and recuperation for the servicemember (up to 15 days of leave)
- ◆ Attending certain counseling sessions
- ◆ Attending postdeployment activities (available for up to 90 days after the termination of the covered servicemember's covered active duty status)
- ◆ Leave time for the employee to care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent
- ◆ Other activities arising out of the servicemember's covered active duty or call to active duty and agreed on by the company and the employee

Military caregiver leave. Under the FMLA, eligible employees are entitled to up to 26 weeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember recovering from a serious injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

Note: Some states provide family military leave to care for a seriously injured or ill servicemember. State laws often apply to smaller employers and to employees who would not otherwise meet the FMLA eligibility criteria or provide leave in addition to that provided under the FMLA. Check your state law for details.

For military caregiver leave, a “covered servicemember” is:

1. A current member of the armed forces, including a member of the National Guard or reserves, who is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness; *or*
2. A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. The veteran must be an individual who was a member of the armed forces (including a member of the National Guard or reserves) and was discharged or released under conditions other than dishonorable at any time during the 5-year period before the first date the eligible employee takes FMLA leave to care for the covered veteran.

Note: An eligible employee must begin leave to care for a covered veteran within 5 years of the veteran’s active duty service, but the “single 12-month period” may extend beyond the 5-year period.

Serious injury or illness. A “serious injury or illness” means:

1. In the case of a current member of the armed forces, including a member of the National Guard or reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the armed forces, or that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the armed forces, and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating; *or*
2. In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the armed forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the armed forces) and manifested itself before or after the member became a veteran, **and is:**
 - A. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the armed forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; *or*
 - B. A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability (VASRD) rating of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; *or*
 - C. A physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; *or*
 - D. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the U.S. Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Notice of eligibility—The ‘5-Day Rule’

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 5 business days of the request for leave, absent extenuating circumstances. The DOL has developed a prototype eligibility notice (Part A of Form WH-381) or an employer can develop its own form as long as it contains, at a minimum, all information contained on Part A of the WH-381.

Employee eligibility is determined (and notice must be provided) at the start of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave, and employee eligibility for that reason for leave does not change during the applicable 12-month period.

If, at the time an employee provides notice of a subsequent need for FMLA leave due to a different FMLA-qualifying reason (during the applicable 12-month period), and the employee’s eligibility status has not changed, no additional eligibility notice is required.

If, however, the employee’s eligibility status has changed (e.g., if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within 5 business days, absent extenuating circumstances.

Failure to provide timely eligibility notice to the employee may constitute an “interference with, restraint, or denial of the exercise of an employee’s FMLA rights” for which an employer may be liable for compensation and benefits lost, monetary losses, and other equitable relief.

Medical certification

Under the FMLA, employers are permitted to request medical certification of the need to take leave for the employee’s own serious health condition or the serious health condition or serious illness or injury of a covered family member or servicemember. The DOL created forms to serve the medical certification process:

- ◆ *Certification of Health Care Provider for Employee’s Serious Condition* (WH-380-E)
- ◆ *Certification of Health Care Provider for Family Member’s Serious Health Condition* (WH-380-F)
- ◆ *Certification of Serious Injury or Illness of Current Servicemember for Military Family Leave* (Form WH-385), and
- ◆ *Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave* (WH-385-V).

An employer may utilize DOL certification forms designed for this purpose, or the employer may use its own form, as long as that form does not violate the regulatory requirements (e.g., require additional information beyond that required in forms WH-380-E or -F; or the WH-385 or 385-V). The employee may also choose to

comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the employee's or the family member's healthcare provider. The authorization/release must satisfy the requirements of the **Health Insurance Portability and Accountability Act (HIPAA)**.

The **Genetic Information Nondiscrimination Act of 2008 (GINA)** states that a "request for genetic information" *includes making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information*. For this reason, employers requiring FMLA medical certification of an employee's serious health condition should include a copy of DOL's "safe harbor" statement with the certification request. The model safe harbor statement includes the following language:

Model Safe Harbor Statement (GINA)

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

Prior notice of medical certification requirement. If an employer is going to require medical certifications, it is required to provide the employee with written notice of such a requirement and the consequences of failing to provide requested medical certification. This notice may be given in the form of DOL's *Notice of Eligibility and Rights & Responsibilities* (Form WH-381, Part B) or a similar document provided by the employer.

Subsequent requests for medical certifications (recertifications) for the same condition during the same FMLA leave year may be oral.

Timing. In most cases, requests for medical certification of the need for FMLA leave should be made immediately after the employee gives notice of the need for leave or *within 5 business days* thereafter or, in the case of unforeseen leave, within 5 business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

Essential functions. The final FMLA rule provides that an employer has the option to provide a statement of the essential functions of the employee's position for the healthcare provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can determine whether the employee is unable to perform one or more essential functions of the position.

Employee return of certification. The employee must provide the requested medical certification or recertification to the employer *within 15 calendar days* after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good-faith efforts, or unless the employer allows more than 15 calendar days to return the requested certification.

Duration of certification. Medical certification for a particular condition is in effect for duration of leave as specified on the certification. If the certification indicates that employee needs leave for that condition beyond a single leave year (e.g., intermittent or reduced schedule leave), a new certification may be required.

Under FMLA's final regulations, employers are entitled to authenticate or clarify information received on a medical certification form. It is important to note that the definitions of what constitutes permissible authentication and clarification are very limited.

Insufficient certification. FMLA's regulations require that an employer advise an employee whenever the employer finds a certification incomplete or insufficient. The employer must state in writing what additional information is necessary to make the certification complete and sufficient. "Incomplete" means one or more of the applicable entries has not been completed. "Insufficient" means the information provided is vague, ambiguous, or nonresponsive.

Timing. If certification or recertification is returned but is incomplete or insufficient, the employer must provide written notice of what specific information is still needed and give employee *7 calendar days* to cure the deficiencies (unless 7 days is not practicable under the particular circumstances despite the employee's diligent, good-faith efforts). DOL's *Designation Notice* (Form WH-382) may be used to inform the employee that the medical certification is incomplete or insufficient (or both).

Failure to cure. If the deficiencies specified by the employer are not fixed in the resubmitted certification within 7 calendar days, and the employee has provided no information regarding his or her good-faith efforts to cure, or if the certification is returned but not cured, the employer may *deny* the FMLA leave.

It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the healthcare provider, and does not otherwise clarify the certification, the employer may deny the FMLA leave.

Recertification. An employer may request recertification of an employee's serious health condition no more often than every 30 days, unless:

1. The employee requests an extension of leave;
2. Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications); *or*
3. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

If the medical condition is a chronic or long-term condition certified to last more than 30 days, an employer must wait for the minimum duration of the condition

(appearing in the certification) to expire before requesting a recertification, unless one of the specific exceptions listed above applies.

Medical certification for military caregiver leave. In order to facilitate medical certification for military caregiver leave, the DOL created its forms *Certification for Serious Injury or Illness of Current Servicemember for Military Family Leave* (Form WH-385); and *Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave* (WH-385-V).

DOL's FMLA general rules for employee notice, certification deadlines, and designation also apply to military caregiver leave (see general FMLA certification and notice discussions, above, for details). However, in order to obtain proper medical certification, an employer must request such certification from any one of the following healthcare providers:

1. A DOD healthcare provider;
2. A U.S. Department of Veterans Affairs (VA) healthcare provider;
3. A DOD TRICARE network authorized private healthcare provider;
4. A DOD non-network TRICARE authorized private healthcare provider; *or*
5. Any private healthcare providers outside of the DOD, VA, or the TRICARE healthcare network authorized to certify other forms of FMLA leave (as defined in 29 CFR 825.125).

The ADA, workers' compensation, and the FMLA. Under FMLA's final regulations, employers may follow procedures for requesting medical information under the ADA, paid leave, or workers' compensation programs without violating the FMLA. Any information received under those laws or benefit programs may be used by employers in determining an employee's entitlement to FMLA-protected leave.

Pay

Leave provided under the FMLA is unpaid. However, the employee may elect or the employer may require that paid leave be substituted for unpaid FMLA leave under the following circumstances.

Accrued paid leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses or an employer requires substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy in order to be paid.

Disability leave. Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted against the leave entitlement permitted under the FMLA. Because leave taken under a disability benefit plan is paid (at least in part), an employer may not require the employee to substitute accrued paid leave during such disability leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan provides only replacement income for two-thirds of an employee's salary.

Workers' compensation. Time taken off from work due to an injury covered under a state workers' compensation program may be counted against the employee's FMLA leave entitlement if the employer designates the leave as FMLA leave. Because the workers' compensation absence is paid (at least in part), the employer may not require the substitution of accrued paid leave during workers' compensation leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits. When workers' compensation benefits end, the employee may elect or the employer may require the use of accrued paid leave.

Benefits and reinstatement

The FMLA provides specific protections for covered employees on leave. Those protections include:

Return to same or equivalent position

With some exceptions, the law requires that employers provide each returning employee with the same position or an equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

The employee must be reinstated to the same or a geographically proximate work-site (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. The returning employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and nondiscretionary payments.

An employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave.

Health insurance protection

Employers are required to maintain coverage for employees during leave under a group health plan at the same level and conditions of coverage that would have been provided had the employees not taken leave. During the leave period, the employer and employee continue to pay their usual respective portions of the premium.

Note: Employers may require employees to repay the employer's share of the premium if the employee does not return from a leave for reasons other than a continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control.

Light duty

If the healthcare provider treating the employee for the workers' compensation injury certifies that the employee is able to return to a light-duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted.

The FMLA regulations make it clear that time spent working in a light-duty assignment may not be counted against the employee's FMLA leave allotment. An employee's acceptance of the light-duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held when the FMLA leave commenced or an equivalent position.

The employee's right to restoration is essentially held in abeyance during the period of time an employee performs a light-duty assignment pursuant to a voluntary agreement between the employee and the employer. Note, however, that an employee who voluntarily returns to a light-duty position retains the right to job restoration to the same or equivalent position only until the end of the 12-month period that the employer uses to calculate FMLA leave.

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) was enacted in 1991 and was most recently amended by the Amendments to the Americans with Disabilities Act (ADAAA), effective January 1, 2009. The EEOC issued final regulations implementing the ADAAA in 2011.

What practices are covered by ADA?

Title I of the ADA prohibits private employers with 15 or more employees from discriminating against a qualified individual with a disability. The ADA prohibits disability discrimination in the full range of employment and personnel practices, such as recruitment, hiring, rates of pay, upgrading, and selection for training (42 USC 12102 *et seq.*).

To be protected by Title I, an individual must have a "disability" and the individual must be qualified to perform the essential functions of the position, with or without a reasonable accommodation by the employer. The ADA does not interfere with an employer's right to hire the best-qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA prohibits an employer from discriminating against a qualified applicant or employee on the basis of disability and requires an employer to provide reasonable accommodation for an employee or applicant with a disability.

‘Disability’ defined

Under the ADA, a “disability” is defined as:

1. A physical or mental impairment that substantially limits one or more of the individual’s major life activities;
2. A record of such impairment; *or*
3. Being regarded as having such an impairment (42 USC 12102(2)(B) and (C)).

Major life activity

With the ADAAA, the definition of “major life activity” was expanded and now includes:

- ◆ Caring for oneself
- ◆ Performing manual tasks
- ◆ Eating
- ◆ Sleeping
- ◆ Reading
- ◆ Concentrating
- ◆ Thinking
- ◆ Communicating
- ◆ Working
- ◆ The operation of a major bodily function, such as immune, digestive, and reproductive system functions, cell growth, and neurological and brain functions

By broadening the definition of major life activity, the amendments to the ADA make protection available to a larger group of employees, as a wider range of physical and mental impairments will now meet this definition.

Mitigating measures. The ADAAA rejected court decisions that required consideration of mitigating measures—that is, any relief or improvement an individual obtains from medication or a device used to treat an impairment. Therefore, when determining whether an impairment substantially limits a major life activity, employers must not consider any relief or improvement an individual obtains from mitigating measures. Examples of mitigating measures include medication, medical equipment, prosthetics, hearing aids, mobility devices, learned or adaptive behavior, and psychotherapy. Ordinary eyeglasses or contact lenses are not included.

Substantially limits

“Substantially limits.” Under the ADA, the definition of disability must be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA (42 USC 12102(4)).

The ADAAA mandates broad interpretation of the ADA’s terms and rejects court rulings that have narrowly interpreted the term “substantially limits” (42 USC

12102(4)(B)). The ADAAA expressly rejected the U.S. Supreme Court's ruling that an impairment must "prevent or severely restrict" a major life activity (*Toyota Manufacturing Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002)). These changes are reflected in regulations issued by the Equal Employment Opportunity Commission (EEOC), which list nine rules of construction that must be applied when determining whether an impairment substantially limits a major life activity:

1. The term "substantially limits" must be construed broadly, in favor of expansive coverage.
2. An impairment need not prevent, or significantly or severely restrict, an individual to be substantially limiting. Multiple impairments can combine to create a substantial limitation.
3. The primary focus in ADA cases should be on compliance with the law and whether discrimination has occurred, not on whether an individual has a covered disability.
4. An individualized assessment is required under the ADA, but the degree of functional limitation is much lower than the standard applied before the ADAAA became effective.
5. The comparison of an individual to most people in the general population usually will not require scientific, medical, or statistical analysis.
6. The ameliorative effects of a mitigating measure cannot be taken into account when evaluating whether an impairment is substantially limiting. There is an exception for ordinary eyeglasses or contact lenses. The adverse effects of mitigating measures may be considered (e.g., negative side effects of medicine).
7. An impairment that is episodic or in remission is substantially limiting if it would substantially limit a major life activity when active.
8. An impairment needs to substantially limit one major life activity only. For example, a person with diabetes is substantially limited in endocrine function and thus is not required to prove that he or she is also limited in the major life activity of eating.
9. The definition of "transitory" as a 6-month period applies only to the "regarded as" prong. The effects of an impairment lasting or expected to last fewer than 6 months can be substantially limiting.

Predictable assessments

According to the final regulations, some impairments, given their inherent nature, will "virtually always" be actual disabilities (29 CFR Sec. 1630.2(j)). Although the individualized assessment required under the ADA may be used for analysis, these impairments should require only a "simple and straightforward" assessment to determine whether they are covered disabilities. The regulations include the following examples of impairments that should easily qualify as "actual" or "record of" disabilities:

- ◆ Deafness substantially limits hearing.
- ◆ An intellectual disability (formerly termed mental retardation) substantially limits brain function.

- ◆ Autism substantially limits brain function.
- ◆ Cancer substantially limits normal cell growth.
- ◆ Diabetes substantially limits endocrine function.
- ◆ Epilepsy substantially limits neurological function.
- ◆ HIV infection substantially limits immune function.
- ◆ Major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.

Record of impairment

The second prong of the definition of a disability under the ADA is having a record of such impairment (42 USC 12102(2)(B)).

“Record of” an impairment. This is defined as a record of a physical or mental impairment that substantially limits a major life activity. This generally includes two groups of people: those who have a history of such an impairment, and those who have been misclassified as having such an impairment. Individuals who have recovered from mental or emotional illness, heart disease, or cancer are common examples of the first group; those who have been misclassified as having mental illness are a common example of the second group. There are many types of records that potentially contain this information (e.g., education, medical, or employment records).

‘Regarded as’ disabled

The definition of a disability also includes being regarded as having an impairment (42 USC 12102(2)(B)). **Note:** The ADAAA significantly changed the definition of the phrase “regarded as having an impairment.”

“Regarded as” having an impairment. Under the ADAAA, an individual is “regarded as” having a disability if he or she is subjected to an action prohibited under the ADA because of an actual or perceived impairment—whether or not the impairment actually limits or is perceived to limit a major life activity.

Before the ADA was amended, an individual was required to show that the employer believed the impairment substantially limited a major life activity (i.e., the employer believed the individual had a disability). Under the amended ADA, evidence that an employer believed an individual had an impairment, along with evidence of an adverse employment action based on that belief, are sufficient to establish that the individual was regarded as having a disability.

A physical or mental impairment does *not* include impairments that are *both* transitory and minor. “Transitory” is defined as an actual or expected duration of 6 months or less.

A determination that an impairment is “minor” must be based on objective evidence, not on the employer’s belief. For example, an employer cannot rely on its belief that an employee’s bipolar disorder was a minor impairment because the impairment is not actually (objectively) a minor impairment. EEOC has indicated that the “transitory and minor” limitation on coverage will be construed

narrowly because it is an exception to the general rule for broad coverage under this prong.

EEOC's Interpretive Guidance notes that a "regarded as" disability should not be difficult to establish and will be "the primary means of establishing coverage in ADA cases that do not involve reasonable accommodation."

No accommodation required. The ADAAA specifies that no accommodation is required if an individual meets the definition of disability solely on the basis of a regarded as disability. This clears up an area of the law that had become unsettled because of differing court opinions on an employer's responsibility for providing reasonable accommodation for a regarded as disability.

Reasonable accommodation

The ADA requires that employers provide reasonable accommodation for the known disability of a qualified individual, unless to do so would impose an undue hardship on the operation of the employer's business (42 USC 12102 *et seq.*). An employer is not required to provide reasonable accommodation to an individual who meets the definition of "disability" under the law only because he or she is "regarded as" having a disability (42 USC 12201(h)).

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

Forms of reasonable accommodation

Reasonable accommodation may include acquiring or modifying equipment or devices; offering job restructuring; including part-time or modified work schedules; reassigning to a vacant position; adjusting or modifying examinations, training materials, or policies; providing readers and interpreters; and making the workplace readily accessible to and usable by people with disabilities.

What is "reasonable"? Accommodations must be made on a case-by-case basis because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of effectiveness (i.e., whether the accommodation will enable the person with a disability to perform the essential functions of the job). According to EEOC, allowing an individual with a disability to perform the work at home may be a form of reasonable accommodation.

Telecommuting is another example of a reasonable accommodation. The ADA does not require an employer to allow the employee to work at home or to offer a telecommuting program. However, if an employer does offer a work-at-home program or telecommuting, it must allow employees with disabilities an equal opportunity to participate in such a program. Each job should be scrutinized for essential job functions before making a determination.

Flexible leave policies

Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability. Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation (29 CFR 1630.2(o)).

According to EEOC, an employer does not have to provide paid leave beyond what is provided to similarly situated employees. However, employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.

Light duty. Reassignment to an existing light-duty position may be a form of reasonable accommodation for current or returning employees. However, since an employer is not required to reallocate essential functions of a job under the ADA, the employer is not required to create a light-duty position in which the employee is no longer performing the essential functions of the job. If the heavy-duty functions of the job are only marginal functions that can be reallocated to other employees, the employer may be required to do so. An employer may require the employee with a disability to take on other marginal functions that he or she can perform.

Addressing a request for reasonable accommodation

An individual's request for an accommodation does not necessarily mean that the employer is required to provide the accommodation. Instead, a request for reasonable accommodation is the first step in an interactive process between the individual and the employer to determine whether the individual's condition meets the ADA definition of "disability" (i.e., an impairment that substantially limits a major life activity)—and whether the individual is "qualified" (i.e., whether he or she satisfies the prerequisites for the position and can perform the "essential functions" of the job). Both are prerequisites for the individual to be entitled to a reasonable accommodation under the ADA.

If the employee has a disability and is qualified, the employer should address the issue of reasonable accommodation by considering the following issues.

Employee's request for reasonable accommodation. An applicant or employee does not have to specifically request a "reasonable accommodation" but must only let the employer know that some adjustment or change is needed to do a job because of the limitations caused by a disability. When an individual decides to request accommodation, the individual (or his or her representative) must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain-English" and need not mention the ADA or use the phrase "reasonable accommodation."

If an employee with a known disability has not requested an accommodation, but is not performing well or is having difficulty in performing a job, the employer

should assess whether this is because of a disability by addressing the performance problem with the employee.

What should an employer ask? If an applicant or employee requests an accommodation and the need for the accommodation is not obvious, or if the employer does not believe that the accommodation is needed, the employer may request reasonable documentation of the individual’s functional limitations to support the request.

Reasonable documentation. “Reasonable documentation” means that the employer is only entitled to documentation that is needed to establish that a person has a disability and that the disability necessitates a reasonable accommodation. An employer cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. Therefore, a request for complete medical records is unreasonable.

An employer may require that the documentation about the disability be provided by a healthcare or rehabilitation professional. The appropriate type of healthcare professional will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals (*EEOC Enforcement Guidance*).

What information must the employee provide? While the individual with a disability does not have to be able to specify the precise accommodation, he or she does need to describe the problems posed by the workplace barrier. Suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. When the individual or the employer is not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained. For example, the Job Accommodation Network (JAN), a service of DOL’s Office of Disability Employment, provides free confidential advice to employers contemplating reasonable accommodations. JAN may be reached by telephone at 800-ADA-WORK or online at <http://askjan.org/>.

What if the disability is not obvious?

If a job applicant or employee has a “hidden” disability—one that is not obvious—it is up to that individual to make the need for an accommodation known.

Job applicant. If an applicant has a known or visible disability that appears to limit, interfere with, or prevent the individual from performing job-related functions, the employer may ask the applicant to describe or demonstrate how he or she would perform the job function with or without a reasonable accommodation.

Employee. As previously discussed, if an employee with a known disability has not requested an accommodation, but is not performing well or is having difficulty in performing a job, the employer should assess whether this is due to a disability by addressing the performance problem with the employee.

What if the employee refuses a reasonable accommodation?

The EEOC's *Enforcement Guidance on Reasonable Accommodation* allows that an employer may choose among reasonable accommodations as long as the chosen accommodation is effective (*EEOC Enforcement Guidance on Reasonable Accommodation*, Question 9). In fact, the 10th Circuit has held that the employee has an obligation to suggest a reasonable accommodation to the employer and then conduct the interactive process in good faith with the employer (*Wells v. Shalala*, 228 F3d 1137). According to the EEOC, the employer has the final discretion to choose between effective accommodations and may select an accommodation that is less expensive or easier to provide.

Undue hardship

Undue hardship is an exception to the employer's obligation to provide reasonable accommodation. "Undue hardship" means that an accommodation would be unduly costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation and the employer's size, financial resources, and the nature and structure of its operation (29 CFR 1630.15(d), 42 USC 12111(10)(B)).

The EEOC requires that if a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, the employer must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. The employer must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.

Fear or prejudice is not an undue hardship. An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability (*EEOC Enforcement Guidance*, citing 29 CFR 1630.15(d)). In addition, undue hardship cannot be based on the fact that a reasonable accommodation might have a negative impact on the morale of other employees. However, employers may be able to show undue hardship where a reasonable accommodation would be unduly disruptive to other employees' ability to work.

State workers' compensation laws

Workers' compensation law is a compromise between business and labor, a compromise that has benefits for both. The key consideration is to make sure an employee who suffers a work-related injury or illness receives necessary medical treatment and wage replacement benefits quickly, without a long, drawn-out legal battle in court. It sets standards for employer liability and requires financial reserves for such liability, thus cushioning the economic effect of work-related injuries and illness for the employer. It delivers no-fault benefits, at least theoretically allowing for a straightforward administrative and litigation-free system.

Of course, there are drawbacks. In some cases, an individual worker may receive less than he or she would receive at common law—that is, if the worker went to court, alleged negligence, and won. On the other side, employers have to cope with increasing premiums for workers' compensation insurance, skyrocketing medical costs, and lawyers representing employees in workers' compensation matters. Nonetheless, the work accident insurance system has been a great boon to society, reducing worker/employer conflict, improving work safety, helping the survivors of fatal work accidents, and protecting the public coffers from the needs of destitute and disabled workers.

Federal workers' compensation programs

Most workers' compensation programs are established and governed by state law. However, there are a few federal programs:

- ◆ **The Federal Employees' Compensation Act (FECA)** provides workers' compensation for nonmilitary, federal employees. Most of its provisions are similar to state workers' compensation programs.
- ◆ **The Federal Employment Liability Act (FELA)**, while not a workers' compensation statute, provides that railroads engaged in interstate commerce are liable for injuries to their employees if they have been negligent. The Merchant Marine Act (the Jones Act) provides seamen with the same protection from employer negligence as the FELA provides railroad workers.
- ◆ **The Longshore and Harbor Workers' Compensation Act** provides workers' compensation to specified employees of private maritime employers.
- ◆ **The Black Lung Benefits Act** provides compensation from mine operators or the Secretary of Labor for miners suffering from "black lung" (pneumoconiosis).

State law controls

Workers' compensation is regulated at the state level. Except for federal employees and certain maritime and railroad workers, there is no national system for compensating people injured on the job. State laws define the types of injuries that are compensable, set the levels of cash benefits, establish waiting periods before benefits

begin, and detail procedures for filing, contesting, and settling claims. While there are many common elements in terms of coverage, benefits, and administration, each state has its own system of insurance to cover employee claims arising from occupational injury and illness.

Workers' compensation coverage is compulsory in every state except Texas and New Jersey, and even these states have detailed procedures for electing not to be covered and strong incentives for employers to provide it. In all other states, employers that do not carry workers' compensation insurance are violating the law and will be hit with a variety of penalties, ranging from substantial fines to prison time or both. Beyond that, an employee who is hurt on the job and whose employer does not have workers' compensation insurance may sue at common law. If this happens, the typical defenses—assumption of risk, contributory negligence, reckless behavior, and/or failure to use provided safety equipment or techniques—are closed to the employer. Also, the claims and awards at common law, such as negligent infliction of emotional distress and punitive damages, may go much beyond the benefits that workers' compensation provides.

The 'no-fault' concept

Workers' compensation is a no-fault system. This simply means that negligence or fault in the accident's cause is not at issue, and that in almost all cases, a covered employee who is hurt or diseased merely has to show that the injury arose as a result of the employment (in some states, partially as a result of the employment, or aggravated by the employment) and during work time. The official phrase for this is "out of and in the course of employment."

Exceptions to workers' compensation coverage

Who is not covered. Categories of covered employees differ from state to state. Generally, however, workers covered by federal workers' compensation laws are not covered by state law. In most (but not all) states, domestic workers, casual employees, farm workers, the clergy, and independent contractors are not covered.

What is not covered. In most (but not all) states, injuries resulting from a worker's intoxication, intention to harm himself or another, the worker's "coming and going" (i.e., commuting) injuries, and injuries resulting from recreational activities are not covered.

Disability plans

Many private employers provide short- and long-term disability income replacement benefits to their employees. These benefits cover any type of injury or illness, not just those incurred on the job. Unlike workers' compensation payments, company disability benefits are taxable.

Employers that offer disability plans generally coordinate them with workers' compensation to ensure that an employee receives appropriate, but not double, compensation. Company disability plans usually compensate disabled employees

for full or partial pay for a certain period of time. That amount is generally reduced by the amount of any payments received from workers' compensation.

Another source of disability benefits is Social Security. After a waiting period, Social Security will provide compensation to workers under age 65 whose disabilities are expected to last more than 12 months or to result in death.

Company health and pension plans

While workers' compensation covers all medical costs relating to the work-related illness or injury, employees and their dependents may also have other medical needs and expenses. If the company has a healthcare plan for employees, the employee who is collecting workers' compensation payments also generally qualifies to continue receiving benefits from the healthcare plan. The employee and his or her family can receive benefits for medical expenses unrelated to the workers' compensation disability.

Workers' compensation payments may also be tied to company pension plans. A pension plan may specifically state that payments to retirees can be reduced by the amount of workers' compensation disability payments received by that retiree.

Workers compensation and FMLA

Time taken off from work due to an injury covered under a state workers' compensation program may be counted against the employee's FMLA leave entitlement if the injury is a "serious health condition" and the employer designates the leave as FMLA leave.

Because the workers' compensation absence is paid (at least in part), the employer may not require the substitution of accrued paid leave during workers' compensation leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits. When workers' compensation benefits end, the employee may elect or the employer may require the use of accrued paid leave.

If the healthcare provider treating the employee for the workers' compensation injury certifies that the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result, the employee may lose workers' compensation payments but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted.

Interaction of ADA, FMLA, and workers' compensation

In the following section, we will discuss the interaction and potential conflicts among the leave provisions of the ADA, the FMLA, and state workers' compensation statutes. Both the FMLA and workers' compensation laws interact with the ADA frequently, and understanding the interplay of these three laws is crucial to an effective leave compliance program. Employers who feel confused about coordinating workers' compensation leave with leave for the FMLA and/or the ADA are not alone. These three statutory schemes overlap in many areas and sometimes appear to conflict. The key is to analyze a situation under each of the laws separately to see what the employer's obligation is under each law in the specific situation.

The following example illustrates the difficulty (and the importance) of understanding how the FMLA, the ADA, and workers' compensation interact.

Example

Joe, a factory line worker at ABC, Inc., suffers a serious back injury at work that requires surgery and a lengthy recovery period. His doctor certifies that he will need at least 8 weeks to recover from the surgery, and then he should be able to resume his job. However, the surgery is not as successful as had been hoped, and Joe is left with a permanent, significant decrease in his range of motion, which prevents him from doing any bending or heavy lifting. Joe's doctor certifies that the decreased range of motion substantially limits Joe's ability to perform a major life activity. Joe's old job requires that he bend down to lift large parts and place them on an assembly line. These activities constitute a significant part of Joe's overall responsibility and are regarded by ABC as essential functions of the job.

What are ABC's obligations to Joe, from the day of the injury onward?

Under the ADA: Joe has been left with a permanently diminished range of motion that substantially limits a major life activity. Therefore, Joe is protected under the ADA if his employer meets the size requirement. In that case, Joe's employer needs to accommodate Joe if his old position can be modified to enable his performance (without undue hardship to ABC) or if a vacant position in the company can be found (again without undue hardship to ABC). ABC determines that it cannot modify Joe's old job in any way that would enable Joe to perform it. However, ABC has an opening for a parts sorter, a job that is performed standing and that does not require bending or lifting. This job is at a slightly lower rate of pay than Joe's old job, but all of the jobs at Joe's old rate of pay require bending and lifting. ABC may have an obligation to offer Joe the parts sorter job, but does not have an obligation to give Joe his old rate of pay. Rather, he will receive the normal parts sorter's rate of pay. (Note: The employee must be qualified for the new job. The employer has no obligation to train the employee for the necessary skills of the new job, but is required to provide the training that is normally provided to anyone hired or transferred to the position.)

Under the FMLA: Joe's condition constitutes a serious health condition for purposes of FMLA. Therefore, if ABC is large enough to be covered by the FMLA and if Joe has met the FMLA eligibility requirements, Joe is entitled to 8 weeks of job-protected leave and continued medical benefits, per his doctor's certification. At the end of those 8 weeks, when it becomes clear that Joe is not yet able to resume his old duties, and Joe's doctor certifies the need for additional leave, ABC would be obligated to grant Joe another 4 weeks' leave, with continued medical benefits. Should the leave be paid or unpaid? The FMLA does not require paid leave, but in this case, workers' compensation might pay (see next paragraph). At the end of the 12 weeks, the FMLA leave would be exhausted, and Joe would have a right to be reinstated to his old job at his old rate of pay if he were able to resume his old duties. However, that does not appear to be the case. Can ABC terminate Joe? Probably not because of ADA requirements (see previous paragraph).

Under workers' compensation: Joe's injury occurred at work and was work-related. The exact workers' compensation obligation would depend on the state where ABC is located. However, Joe is likely entitled to payment of all expenses related to the treatment of his injury and wage replacement benefits while he is out of work. Note that the employer may not require the substitution of accrued paid leave during workers' compensation leave. However, ABC and Joe may agree, where state law permits, to have paid leave supplement his workers' compensation benefits. If Joe is able to return to work in a light-duty capacity, and the company has light-duty work available, the company may be required to place him in such a position until he has reached maximum medical improvement (MMI). If Joe declines a light-duty job, he might lose workers' compensation wage replacement benefits. But if he has not exhausted his FMLA leave, the company will not be able to terminate his employment. Once Joe has reached MMI, he may be entitled to benefits for his permanent partial disability even if he can't return to his previous job.

As you can see, ABC could not have fully understood or complied with its obligations to Joe without understanding the requirements of all three laws. For instance, if ABC had only known about its FMLA obligations, it might have terminated Joe when he was unable to resume his old job at the end of the leave. This would probably have been a violation of the ADA and might have exposed ABC to time consuming and costly litigation. In addition, if Joe had not reached MMI by the end of the 12 weeks of FMLA leave, termination might have violated state workers' compensation requirements.

ADA, FMLA, and workers' compensation interplay questions and answers

The following discussion contains answers to some of the most commonly asked questions regarding how the three laws interact.

What are the qualification criteria for workers' compensation and the FMLA and the ADA?

If a worker is on leave because of a work-related injury that qualifies for workers' compensation, the leave may also qualify as an FMLA leave. Employers will generally want to designate qualified workers' compensation leaves as FMLA leaves in order to begin exhausting the 12-week leave allotment. The work-related injury may also qualify the employee for protections under the ADA (e.g., if it substantially limits a major life activity), in which case, an accommodation may be needed.

The criteria are:

- ◆ **Workers' compensation:** The employer must have between one and five employees, depending on the state. The injury must occur at work and be a result of work. Workers' compensation coverage begins on an employee's first day of work activity.
- ◆ **The FMLA:** A covered employer must have employed more than 50 employees for 20 workweeks in the current or preceding calendar year. The injury is not required to have happened at work, but must constitute a "serious medical condition." Leave may be given for up to 12 weeks (some state laws may give more time). A worker must have been employed for 12 months, not necessarily continuously, and have worked at least 1,250 hours in the 12-month period immediately preceding the leave request.
- ◆ **The ADA:** The employer must have 15 or more employees for 20 workweeks in the current or preceding calendar year. The disability need not have happened at work; it must be a physical or mental impairment that substantially limits one or more of an individual's major life activities.

Does a workers' compensation injury necessarily always qualify for the FMLA?

No. In order to constitute a serious health condition under the FMLA, the injury must meet FMLA criteria (i.e., it must require continuing medical treatment for a period of 3 or more days). An employee could conceivably sustain an injury at work that requires a single medical visit—for example, a minor sprain. Workers' compensation would probably apply and cover the employee's medical expenses, but, unless the sprain was severe enough to require continued medical treatment and to require that the employee be away from work for 3 or more days, it would not qualify for the FMLA.

Does a workers' compensation injury or illness or an FMLA serious health condition necessarily constitute an ADA disability?

No. An ADA disability is an impairment that “substantially limits one or more major life activities” (caring for oneself, performing manual tasks, walking, seeing, hearing, sitting, standing, bending, lifting, speaking, breathing, learning, and working). It also includes cognitive skills and the capacity to concentrate, remember, and reason, or a record of such an impairment or being regarded as having such an impairment.

In most cases, the definition of disability under state workers' compensation laws differs from that under the ADA because the state laws serve a different purpose. Workers' compensation laws are designed to provide needed assistance to workers who suffer many kinds of injuries, whereas the ADA's purpose is to protect people from discrimination on the basis of disability.

Many workers' compensation injuries are not “disabilities” under the ADA, meaning that they may not substantially limit a worker's ability to perform a major life activity (see *Bolton v. Scrivner, Inc.*, 36 F3d 939 (10th Cir. 1994)). However, it is also possible that an impairment that is not “substantially limiting” in one circumstance could be a disability covered by the ADA in other circumstances. For example, suppose a construction worker falls and breaks a leg and the leg heals normally within a few months. Although this worker may be awarded workers' compensation benefits for the injury, he or she would not be considered a person with a disability under the ADA.

However, if the worker's leg took significantly longer than usual to heal and, if during this period, the worker could not walk, he or she would be considered to have a disability. Or, if the injury caused a permanent and limiting limp, the worker might be considered disabled under the ADA.

An employee who was seriously injured while working for an employer, and therefore was unable to work for a year, would have a record of a substantially limiting impairment. If an impairment or condition caused by an on-the-job injury does not substantially limit an employee's ability to work, but the employer takes an adverse employment action against the employee based on an actual or perceived impairment, the person would be regarded by the employer as having a disability. In both cases, the employer may be violating the ADA.

Should the employer recognize a work-injury situation as FMLA- or ADA-qualifying simply from the symptoms?

If the employee tells the employer that he or she requires medical treatment and is under a doctor's care because of a work injury and will be taking workers' compensation leave, the employer should investigate the possibility of it being an FMLA or ADA claim as well. If the employer considers the employee's condition or injury to be serious and/or substantially limiting, it is probably an FMLA and/or ADA claim. If the employer does not recognize this and notifies the employee of it, the employer may be missing a legitimate opportunity to “start the clock” and begin exhausting the 12-week leave allotment.

If an employer asks an employee requesting FMLA leave for medical certification, does that violate the ADA?

No. However, the inquiries should be very specific as to why the employee is requesting leave. The safest way to ensure that you are asking only permissible questions is to use the medical certification form drafted and recommended by the DOL.

What does it mean that workers' compensation and FMLA leave run concurrently?

If the employer designates a workers' compensation leave as an FMLA leave as well, it means that the normally unpaid FMLA leave will probably be paid to some degree because wage replacement will be paid by workers' compensation. It also means that a person who is out on workers' compensation leave and FMLA leave concurrently may not be fired for absence, even if the person is out of work well beyond the employer's cut-off absence day.

When a worker is out of work because of a job injury and the employer believes it to be an FMLA leave as well, the employer should so notify the employee in writing, and tell the person that he or she is entitled to FMLA rights and is responsible for its obligations. Employer failure to inform the employee of this will preclude the employer from counting the workers' compensation leave as part of the worker's 12-week-per-year FMLA entitlement, thus extending the amount of leave the employee will have (i.e., the worker will have workers' compensation leave in addition to up to 12 weeks of FMLA leave).

Might FMLA leave be an accommodation under the ADA?

Yes. FMLA leave may be considered a reasonable accommodation under the ADA if the FMLA "serious health condition" is also an impairment that "substantially limits a major life activity" under the ADA.

How long a leave may an employee take?

Workers' compensation: Under workers' compensation there is generally no duty to keep a worker's job open for any period of time. However, unless it presents a true hardship, it's usually best for the employer to make such a decision when the healthcare provider says the employee has reached MMI, because at that point, it is possible to determine whether the employee has a major impairment and would be covered under the ADA.

The FMLA: Allows up to 12 weeks' job-protected leave, normally without pay, and up to 26 weeks in a single 12-month period for servicemember caregiver leave. If the worker is simultaneously on workers' compensation leave, the person will be paid wage-replacement benefits through workers' compensation for FMLA leave and the job or equivalent must be held.

The ADA: The 12-week FMLA cap does not limit the amount of leave an employer may be required to give as a reasonable accommodation under the ADA. The amount of leave allowed depends on what constitutes a reasonable accommodation under the circumstances. In general, an unlimited leave of

absence is not a reasonable accommodation, but if an extended leave of absence will enable the employee to seek treatment and then return to work, it will likely be a reasonable accommodation.

Must health insurance benefits be continued during leave?

Workers' compensation: Workers' compensation insurance provides benefits that include coverage of medical treatment for the work-related injury. But in most states, an employer is not required by workers' compensation laws to continue the employee's group healthcare insurance. A few states mandate such continuation by statute; but in *District of Columbia v. Greater Washington Board of Trade* (61 U.S.L.W. 4039, (1992)), the U.S. Supreme Court said that these state statutes are preempted by the federal Employee Retirement Income Security Act (ERISA); therefore, private employers are not required to provide health benefits. An employer, of course, may continue to provide health benefits if it so wishes. Public employees are eligible for such benefits.

The FMLA: FMLA requires continuation of medical benefits during an FMLA leave under the same healthcare plan as afforded other employees, with the same level of coverage, for the duration of the leave. The employee must pay his or her share of premiums. If an employee does not pay the premium share, the employer may discontinue coverage after the required notice to the employee.

The ADA: Under the ADA an employer must continue health insurance coverage for an employee out on leave or working part-time as a reasonable accommodation only if coverage is provided for other employees in the same leave or part-time circumstances.

Do other benefits accrue during leave?

Workers' compensation: Accrual of benefits during workers' compensation leave depends on the state.

The FMLA: The employer is not required to allow employees to accrue vacation, sick, or personal leave time during the period of FMLA leave. However, the employee may not be penalized in compensation because he or she takes FMLA leave. This has been interpreted to mean that for purposes of most benefit and incentive programs, the employer should treat time on FMLA leave as though the employee had been at work. For example, time on FMLA leave counts as time served for accrual and vesting of retirement benefits and certain other programs. However, effective January 2009, FMLA regulations were amended and now provide that time out of work on FMLA leave may be considered when determining eligibility for perfect attendance awards and other similar types of bonus programs. In addition, any benefit that an employer ordinarily continues for employees out on other types of leave should also be continued for employees out on FMLA leave.

The ADA: Under the ADA, an employer must continue benefits for an employee out on leave or working part-time as accommodation only if the same benefits are provided for other employees in the same leave or part-time circumstances (e.g., if employees on short-term disability leave accrue vacation leave, an ADA disabled employee must also accrue vacation leave).

Can the employer fire the worker out on leave?

Workers' compensation: In almost all states, it is illegal to fire an employee expressly for filing for or using workers' compensation benefits. On the other hand, employers may fire an employee out on workers' compensation for violating a neutral and consistently enforced employee absence program (*Chiaia v. Pepperidge Farm, Inc.*, 24 Conn.App.362, (1991)) or if the employee is not able to do his or her job. A few states require that the employer make every effort to reinstate the employee to his or her former job or an equivalent job if possible. Employers should check the law in their own state.

The FMLA: An employee out on FMLA leave should not be terminated during FMLA leave. FMLA guarantees the employee's right to restoration to the same job or an equivalent job when the employee returns to work. Additionally and importantly, time out on FMLA leave may not be counted as absence at all. The FMLA also prohibits employers from retaliating against employees for taking an FMLA leave. Therefore, if an employer terminates an employee during or shortly after an FMLA leave, the employer runs the risk that the termination will be perceived to be retaliatory, exposing the employer to potential liability.

The ADA: A qualified individual with a disability is entitled to return to the same or an equivalent position unless the employer demonstrates that holding the position open would impose an undue hardship. An employer may not apply a "no-fault" leave policy (under which employees are automatically terminated after they have been on leave for a certain period of time) to an employee with a disability who needs leave beyond the set period. Instead, if the disabled employee requires additional unpaid leave as a reasonable accommodation, the employer must modify its no-fault leave policy to provide the employee with the additional leave, unless it can show that an undue hardship would result.

May the employer mandate medical exams?

Workers' compensation: When a worker has a workers' compensation injury, the employer is allowed to request that the employee be examined regarding the injury by the employer's doctor or the employee's own doctor. (It depends on the state as to whether the employee or employer chooses the healthcare provider.) Also, the employer may require that the employee have an independent medical examination at the employer's expense.

The FMLA: Under the FMLA, employers are permitted to require medical exams and medical certifications:

1. For the need to take leave for the employee's own serious health condition or the serious health condition or serious illness or injury of a covered family member or servicemember;
2. For a second and third medical opinion, under appropriate circumstances;
3. For recertification of a serious health condition; *and*
4. For return to work fitness-for-duty certification.

If an employer is going to require medical certifications, it is required to provide the employee with written notice of such a requirement and the consequences of failing to provide requested medical certification. Under FMLA's final regulations,

employers are entitled to authenticate or clarify information received on a medical certification form. It is important to note that the definitions of what constitutes permissible authentication and clarification are very limited.

Authentication of information provided on a medical certification form means providing the healthcare provider with a copy of the medical certification and requesting verification that the information contained on the certification form was completed and/or authorized by the healthcare provider who signed the document. No additional medical information may be requested. No employee or Health Insurance Portability and Accountability Act (HIPAA) consent is required for authentication.

Clarification means contacting the employee's healthcare provider in order to understand the handwriting or to understand the meaning of the responses contained within the certification. Employers may not ask healthcare providers for additional information beyond that required by the certification form. The employee's healthcare provider may require HIPAA consent for such clarification, and the employee must provide such consent or FMLA leave may be denied.

Note: An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of medical certification, "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member who must travel to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA.

If the employer has reason to doubt the validity of an employee's medical certification, it may require the employee to obtain a second opinion at the employer's expense. Employers may require the employee to obtain a third opinion—at the expense of the employer—when the second opinion differs from the first. Second and third opinions are not permitted for a family member's medical certification or for leave to care for a covered servicemember.

An employer may request recertification of an employee's serious health condition no more often than every 30 days, unless one of the specific exceptions discussed below applies. If the medical condition is a chronic or long-term condition certified to last more than 30 days, an employer must wait for the minimum duration of the condition (appearing in the certification) to expire before requesting a recertification, unless one of the specific exceptions discussed below applies. Recertifications are not permitted for leave to care for a covered servicemember.

Fitness-for-duty certification requirements must be made as part of a "uniformly applied policy or practice" that requires all similarly situated employees who take leave for certain medical conditions to obtain fitness-for-duty certification. If the employer will require a fitness-for-duty certification, the employer must notify the employee of this fact no later than the FMLA designation notice. The notice must also specify whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

The ADA: An employer may require a medical examination only after making an offer of employment to the applicant and only if all entering employees in the same job category are subject to the examination, regardless of disability. The offer

may be conditioned on the successful completion of the examination before the commencement of job duties. Note: If an individual is not hired because of a disability, the employer must show that the screening criterion is job-related and consistent with business necessity.

If an employee has disclosed a disability and provides insufficient medical documentation of the disability or need for accommodation, the ADA allows employers to require a medical exam to obtain sufficient documentation. The employer may also require that the employee go to an appropriate healthcare or rehabilitation professional of the employer's choice—at the employer's expense. A worker who wants to return to work after an injury or illness may be required to have only a "job-related" medical exam, but not a full physical exam, as a condition of returning to work. An exam may be required only if an employer has a reasonable belief that the employee's current ability to perform essential job functions will be impaired by the injury or illness, or that the employee will pose a direct threat due to the medical condition. The examination must be limited in scope to what is needed to make an assessment of the employee's ability to work.

What are the rules regarding intermittent leave?

Workers' compensation: Specific leave requirements vary from state to state, but intermittent leave is generally permissible if it is necessary to appropriate care and treatment of the employee's injury.

The FMLA: Intermittent leave is permitted where it is medically necessary for a qualifying exigency, care and treatment of the employee's own serious health condition or that of a family member. Intermittent leave may not generally be taken for "bonding" leaves—leaves related to the birth or adoption of a newborn. However, intermittent leave may occasionally be permissible in adoption cases where the employee requires leave to attend to issues related to the adoption placement, and the availability of the adoptive child for placement is on short notice, precluding the employee from giving advance notice and/or scheduling adoption-related activities around the work schedule.

The ADA: Intermittent leave may be a reasonable accommodation under the ADA as long as it is effective in accommodating the employee and does not impose an undue hardship on the employer.

Can a workers' compensation claim for total disability benefits bar an ADA claim?

The issue of whether statements made in the application for disability insurance benefits (i.e., claiming total disability) disqualify an individual from asserting that he or she is a "qualified individual with a disability" under the ADA has been decided by the U.S. Supreme Court in the case of *Cleveland v. Policy Management Systems Corp.*, No. 97-1008.

In *Cleveland*, the Court held that an individual's statement in her application for Social Security Disability Insurance (SSDI) that she was "unable to work" does not bar her from later claiming that she was a "qualified individual with a disability" under the ADA who could perform her job with reasonable accommodation. The Court reasoned that the two claims (for SSDI and ADA) can exist simultaneously

because, unlike the ADA, the test for SSDI does not take into account the possibility of reasonable accommodation.

The implication of the Court's decision is that a workers' compensation claim for total disability benefits will not bar an ADA claim unless the state's workers' compensation laws provide the same or highly similar inquiries into disability, qualification, and reasonable accommodation as the ADA.

Does an employer have to offer light-duty or alternate work?

Workers' compensation: In some states, employers are required to offer light-duty assignments to workers' compensation claimants who are recovered to some extent, but are not well enough to be able to perform their regular duties, if it is possible and does not cause unreasonable hardship. In other states, offering light-duty or alternate work is not required. Many employers offer light or alternate duty in order to get the employee back to work in some capacity.

The FMLA: Generally, no, although in any situation where an employee coming off FMLA leave is physically unable to perform the essential functions of his or her old job, the employer should look very carefully to see whether the employee is entitled to some sort of accommodation (including, but not limited to, light duty) under the ADA. Employers can transfer employees on intermittent leave to a light-duty position in order to better accommodate the need for leave. However, in such a case, the employer must offer the employee on light duty his or her normal rate of pay. Time on light duty does not count against the 12-week leave requirement. (In other words, an employee on light duty is not on leave from his or her regular job during any days or hours he or she is working at the light-duty job.)

If the healthcare provider treating the employee for a workers' compensation injury certifies that the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result, the employee may lose workers' compensation payments but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted.

The ADA: An employer may provide an existing light-duty assignment to an employee as a form of reasonable accommodation as long as it does not impose an undue hardship on the employer. The ADA does not require that an employer create a light-duty position that did not exist before the request for accommodation. In the alternative, an employer may reallocate marginal job functions that the employee cannot perform because of a disability. The employer may also assign additional marginal job functions to a disabled employee to compensate for marginal job functions that were taken away.

Does the employee have to accept light duty?

Because the FMLA requires that a worker be restored to the same or equivalent position (identical in terms of salary, benefits, privileges, status, and working conditions) upon return from leave, an employer may not compel a worker out on both workers' compensation and FMLA to accept light-duty work, or fire the person because he or she will not do so.

If an employee is covered by the ADA and is not covered by the FMLA or workers' compensation (i.e., he or she has a non-work-related disability and has not worked the requisite 1,250 hours for FMLA leave), the employee must accept light duty as long as it is a reasonable accommodation and is effective in allowing the disabled employee to return to work or to continue working. If the employee refuses a reasonable accommodation, he or she may not be "qualified" to stay on the job and may not have the protection of the ADA.

In most states, the employee who refuses medically appropriate light-duty work will lose his or her workers' compensation benefits unless, in the opinion of the workers' compensation commission, the refusal was justified.

If an employer creates light-duty positions for employees injured on the job, such a light-duty policy must be applied on a nondiscriminatory basis.

What may the employer ask about the applicant's health during a preemployment interview?

Workers' compensation: Workers' compensation generally does not forbid an employer from inquiring about past injuries and illnesses. However, this is forbidden under the ADA under any circumstances. Therefore, the employer may not do so.

The FMLA: FMLA rules forbid inquiring about past FMLA leaves. The employer may ask about absences during a set period of time, but FMLA time off would not be counted as absence in any case.

The ADA: Direct inquiries about disabilities—"Do you have AIDS?" or "Are you an alcoholic?"—are specifically prohibited by the ADA. An employer may not make such inquiries at the pre-offer stage, even if the employer legitimately would be able to exclude the applicant because of the disability.

However, an employer may ask about an applicant's ability to perform job-related functions, with or without reasonable accommodation. This can be accomplished by describing a particular job duty and then asking whether the applicant can perform that function. Such questions may be about both marginal and essential functions of the job. An employer may also ask an applicant to describe or demonstrate how he or she would perform essential and marginal job functions.

What about post-offer medical inquiries?

These are not forbidden under the FMLA or workers' compensation. However, persons may not be discriminated against because of health revelations at this time. They may be denied the job if they reveal they can't do it (e.g., job requires heavy lifting and they have back problems).

The ADA: After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question.

Alternatively, an employer may ask a specific applicant if he or she needs a reasonable accommodation if the employer knows that this applicant has a disability—either because it is obvious or the applicant has voluntarily disclosed the information—and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant says that he or she needs a reasonable accommodation, the employer may inquire as to what type.

Must employees be reinstated when their leave is over?

Workers' compensation: In most states (but not all) workers' compensation does not require an employee be reinstated to his or her old job, or, for that matter, to any job.

The FMLA: Requires returning the employee to the same position he or she had before, or to an equivalent position. But if the employee cannot perform an essential function of the job because of the health condition, FMLA does not require the employer to reinstate the employee to another job. In those instances, the employer should look carefully to see whether the ADA applies before taking adverse employment action against the employee.

The ADA: Requires the employer to hold the same job for the employee unless the employer shows that this would impose an undue hardship. If there is undue hardship, the employer must see if it has a vacant, equivalent position for which the employee is qualified. If not, the employer must look for a lower-level position. If there is no position open, the employer does not have to offer continued accommodation.

What confidentiality is required for medical records?

Workers' compensation records are not necessarily required to be kept confidential. FMLA medical records must be maintained separately from the usual personnel files and are confidential. Access to these files is strictly limited to people with a "need to know," which may not necessarily include supervisors or managers. Employers may give supervisors and managers information concerning necessary work restrictions and accommodations.

The ADA: Information regarding the medical condition or medical history of an employee must be collected on separate forms, maintained in separate medical files, and treated as confidential medical records. This information may be disclosed only to: supervisors and managers who must be advised of work restrictions and accommodations for the employee; first-aid and safety personnel who must be informed if the disability requires emergency treatment; and government officials investigating compliance with the ADA, state workers' compensation offices, or second-injury funds pursuant to state workers' compensation laws that do not conflict with the ADA.

What medical documentation is required for an employee's return to work?

Although an employer's access to medical documentation is limited for purposes of the FMLA, it is not restricted in the case of workers' compensation laws. Under the FMLA, the employer must accept a statement from the employee's physician

that the employee is released to return to work, but in some states, the employer can require submission of a return to work certificate from the employer's physician as a condition of job restoration. Workers' compensation requires the employee's healthcare provider to certify that the person may return to work, whether at light duty or at the regular job.

The ADA: Medical information may be very useful to an employer who must decide whether an injured worker can come back to work, in what job, and, if necessary, with what accommodations. A doctor may provide an employer with relevant information about an employee's functional abilities, limitations, and work restrictions. This information will be useful in determining how to return the employee to productive work, but the employer bears the ultimate responsibility for deciding whether the individual is qualified, with or without reasonable accommodation. Therefore, an employer cannot avoid liability if it relies on a doctor's advice that is not consistent with the ADA requirements.

Tips for sorting it all out

When sorting out the various laws that may apply to situations in your workplace, remember these practical tips:

- ◆ Whenever an employee requests leave under one of these statutes, conduct a quick review to see whether either (or both) of the others might also apply. Analyze how each law applies to the situation to make sure all requirements are met.
- ◆ Whenever a requested ADA leave accommodation or FMLA leave relates to a work-related injury, be alert to the potential of overlap among the ADA, the FMLA, and workers' compensation. Remember that ADA leave, FMLA leave, and workers' compensation leave can run concurrently. ADA leave may be paid or unpaid, depending on whether the employee is substituting leave. Although FMLA leave is normally unpaid, a person on FMLA leave for a work injury may be entitled to workers' compensation payments and may substitute paid leave as well, depending on the employer's policies.
- ◆ Whenever an employee who has exhausted FMLA leave states that he or she is physically unable to return to work, be alert to the potential that his or her condition might be a disability protected by the ADA. Never terminate an employee for failure to return to work at the end of a health-condition-related FMLA leave without first considering the possibility that the ADA might require additional leave as a reasonable accommodation.
- ◆ Remember that if an employee sues for adverse employment action taken with respect to a leave request, the employee can "stack" claims under the various statutes. In other words, if an employee sues for violation of the FMLA and the alleged act may also constitute a violation of the ADA or workers' compensation law, the employee may sue under each law that potentially applies in an effort to maximize the chances of recovery. Therefore, employers must be very careful to ensure that all of their actions are taken with an eye toward compliance with all of the laws. A comprehensive compliance program that takes all relevant laws into account is the best defense against potential claims of wrongdoing.

We hope that you found the information contained in this special report useful. BLR strives to provide human resources professionals with practical and easy-to-use information on a wide variety of topics. If you would like to see the complete library of publications available through BLR, please visit our website at www.blr.com or call our Customer Service Department at 800-727-5257.

Interplay Chart: ADA, FMLA, and workers' compensation laws

The following chart further outlines the basic interactions among ADA, FMLA, and workers' compensation laws. For more detail on a particular issue, refer to the text discussion on the preceding pages.

Interplay Chart: ADA, FMLA, and workers' compensation laws

	ADA	FMLA	WORKERS' COMPENSATION
COVERED EMPLOYERS	Private employers and employment agencies with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Employment agencies and labor unions.	Private employers with 50 or more employees within a 75-mile radius for 20 or more weeks in the current or preceding calendar year. All state and local government employees. Most federal employees. All instructional employees of public and private elementary and secondary schools.	Coverage varies from state to state. In most states all employees are covered from the first day of work. The number of employees is irrelevant with the exception of a few states that require between three and five employees for coverage. In most states, domestics, farm laborers, casual employees, real estate agents, and independent contractors are not covered.
BASIC OBLIGATIONS	Employers may not discriminate on the basis of a disability. If an employee or applicant for employment is a qualified individual with a disability, the employer must provide the employee with a "reasonable accommodation" that enables the employee to perform essential job functions or the applicant to participate in the application process. A reasonable accommodation is not required if it would cause the employer an "undue hardship."	Employers must give eligible employees up to 12 weeks of job-protected leave to care for a newborn or adopted child, to care for a spouse, child, or parent with a serious health condition, to attend the employee's own serious health condition, or for a qualifying exigency. Employers must also give eligible employees up to 26 weeks of job-protected leave in a 12-month period to care for a spouse, son, daughter, parent, or next of kin who is a covered servicemember or veteran recovering from a serious injury or illness incurred in the line of duty on active duty in the armed forces, or that existed before the beginning of the member's active duty and was aggravated by or that manifested itself before or after the member became a veteran.	Benefits generally include payment of medical expenses, wage replacement benefits when the employee is unable to work, funeral benefits, the cost of physical or vocational rehabilitation, and dependent support.
NOTICE POSTING REQUIREMENTS	Every employer must post notices in an accessible format to applicants and employees describing the applicable provisions of the ADA.	Employees must be informed in writing of the employer's leave policies. This is usually done through posters and employee handbooks. Employers must post a notice in the workplace explaining rights and obligations under the FMLA. Employees must also be given written notice each time an employer determines eligibility, rights, and responsibilities; designates leave as FMLA leave; and each time an employer requests a medical certification.	Notice of compliance required in almost all states. Each state has a form of notice that must be posted in an area accessible by all employees.

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
PREEMPLOYMENT INQUIRIES	<p>An employer may tell applicants what the hiring process involves (e.g., a written test) and may ask them whether they will need an accommodation for this process. If this question is asked, it should be asked of all applicants.</p> <p>An employer may ask applicants with obvious disabilities to describe or demonstrate how they would perform the job with or without reasonable accommodation.</p> <p>Before a conditional offer is made, an employer may not ask applicants whether they need reasonable accommodation for the job unless the employer knows that an applicant has a disability (because it is obvious or the applicant has voluntarily disclosed the information).</p> <p>If the applicant states that he or she needs a reasonable accommodation, the employer may inquire as to what type of accommodation.</p>	<p>It is not wise to ask about an employee's past absences and/or any prior use of FMLA leave. Employers should not ask applicants about future plans that might result in FMLA leave.</p>	<p>Generally, employers are not, by law, prohibited from asking about previous workers' compensation claims. However, it is unlawful in most states to discriminate against someone for filing a claim for benefits. In addition, these inquiries are prohibited by the ADA. All medical information must be kept separately and confidentially.</p>
POST-OFFER INQUIRIES AND EXAMINATIONS	<p>After a conditional offer has been made, the employer may ask all individuals disability-related questions, whether they need reasonable accommodation to perform the job, and for documentation of any disability.</p> <p>After a conditional offer, an employer may require a medical exam (a pre-employment physical) as long as all entering employees in the same job category are subject to examination regardless of disability.</p> <p>An employee who is returning to work after an injury may be asked job-related questions consistent with business necessity.</p>	N/A	<p>Generally, examination is permitted if done for all other employees and the examination is job related.</p>

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
VESTING REQUIREMENTS	None.	The employee must have worked for the employer for a total of 12 months (which need not be consecutive) and for a total of 1,250 hours in the most recent 12 months counting backward from the date of the leave request.	First day of employment but there is a waiting period for wage replacement benefits (usually between 3 days and 2 weeks after injury) in all states.
QUALIFYING EVENTS	Person must be a "qualified individual with a disability." A qualified individual meets the requirements for the job in question (e.g., education, experience). A disability is defined as having a physical or mental impairment that substantially limits a major life activity; a record of such impairment; or being regarded by others as having an impairment.	The birth, adoption, or foster care placement of a minor child, the employee's own serious health condition, or a serious health condition of the employee's spouse, child, or parent. In addition, a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty, or has been called to covered active duty status (or has been notified of an impending call or order to covered active duty). Military caregiver leave if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered servicemember or veteran recovering from a serious injury or illness incurred in the line of duty on active duty in the armed forces, or that existed before the beginning of the member's active duty and was aggravated by or that manifested itself before or after the member became a veteran.	Work-related injury or illness "arising out of" and "in the course of employment."
EMPLOYEE NOTICE	For a disability that is not immediately apparent to the employer, the employee must self-identify his or her disability. An eligible employee and his or her employer must discuss reasonable accommodations that will enable the employee to perform essential job functions.	In cases where the need for leave is foreseeable, the employee must give at least 30-days' advance notice before FMLA leave is to begin. If the employee gives less than 30-days' notice when the leave is foreseeable, he or she may be required to explain why a longer notice period is not practicable under the circumstances. If the need for leave is not foreseeable, the employee must provide notice in accordance with the employer's policies for such leave. The 30-day advance notice rule is relaxed when leave is needed for a qualifying exigency.	Notice to employer must be given immediately or as soon as possible after an injury or the onset of a work-related illness. Claims must be filed from 2 to 5 years after injury or the "last injurious exposure to" or from the time an employee knows of illness that is work-related. Certain illnesses (that take longer to manifest) have a longer notice period.

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
MEDICAL CERTIFICATION	<p>After an offer has been made, the employer may require an applicant to undergo a medical exam as long as the same exam is required of all other prospective employees in the same or similar job categories. The employer may require an employee to undergo a medical exam to determine the existence of an ADA disability and the functional limitations that require reasonable accommodation.</p>	<p>When leave is for a serious health condition (the employee's own or a family member's), the employer must, on request from the employer, provide a certification from a healthcare provider stating the medical facts making FMLA leave necessary, the anticipated duration of the condition, and the proposed treatment. Employers may obtain certification of a servicemember's serious injury or illness from doctors within the military healthcare network (DOD, VA, or TRICARE), as well as authorized FMLA healthcare providers allowed for nonservice-members outside of the DOD.</p>	<p>Physician or other healthcare provider must send report to or otherwise contact the employer.</p>
INDEPENDENT MEDICAL EXAMINATION	<p>If an individual provides insufficient medical documentation of a disability and need for reasonable accommodation, an employer may require the individual to go to an appropriate health professional of the employer's choice. Such exams are conducted at the employer's expense.</p>	<p>If an employer has reason to doubt the validity of a medical certification for nonmilitary caregiver leave, it may require the employee to obtain a second (or third) opinion at the employer's expense, subject to specific rules. Employers are permitted to contact the employee's healthcare provider for clarification and authentication of a medical certification (after employee has had a chance to cure any deficiencies). No second or third opinions are permitted for military caregiver medical certification unless the certifying healthcare provider is an authorized provider outside of the military healthcare network.</p>	<p>Permitted if employer requests and at employer's expense.</p>
DISQUALIFYING EVENTS	<p>Employee's failure to provide necessary medical information to support a requested accommodation; refusal of a reasonable accommodation.</p>	<p>When an employee fails or refuses to return a completed medical certification the employer can delay designation of the leave as FMLA leave until the certification is returned. If the certification is never returned, the leave is not FMLA leave.</p>	<p>Injury is not related to or arising out of work; "coming and going injury" in some cases; injuries caused by the worker's misconduct, intoxication with alcohol or drugs, efforts to harm another (depending on the state), or self, or "horseplay"; employee's refusal to undergo independent medical evaluation, or refusal to accept work after physician's release. In some cases, employee is exempt from law (e.g., domestics earning less than a certain amount in a quarter).</p>

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
UNDUE HARDSHIP	Accommodation is not required when it would require an "undue hardship" on the employer. Whether the accommodation is an "undue hardship" depends on the nature and cost of the accommodation, the overall financial resources of the facility, the number of people employed at the facility, the effect on expenses and resources, or the operation of the facility, the employer's size, resources, and operations as a whole.	There is a very limited "key employee" exception for salaried employees who are paid among the top 10% of employees in an organization (within a 75-mile radius). For those employees the company may deny restoration to their prior position if restoration would cause the employer to suffer substantial and grievous economic injury. If an individual is designated as a "key employee," he or she must be informed of this status at the commencement of leave or as soon as practicable.	N/A
SUBSTANCE ABUSE	Current illegal drug use is not a disability covered by the ADA. A test to determine the illegal use of drugs is not a medical examination and is permissible under the ADA. Alcoholism may be a disability, but it does not prevent an employer from disciplining or terminating an employee for misconduct or absences due to alcohol abuse.	Current drug or alcohol abuse may be a serious health condition if one of the tests for establishing a "serious health condition" is met. FMLA leave may be taken only for treatment by a healthcare provider or on referral by a healthcare provider. Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.	In some states no benefits or limited benefits are due if the injury or illness is solely or partially caused by alcohol or substance abuse.
OTHER	If an applicant or employee with a disability poses a direct threat to safety in the workplace (e.g., a significant risk that cannot be eliminated by a reasonable accommodation), the employer may need not accommodate the disabled employee.	When both spouses of a married couple are employed by the same employer, the employer can limit the couple to a total of 12 weeks FMLA leave (split between them in any proportion they choose) for birth or adoption, or for 26 weeks for a servicemember.	See "disqualifying events."

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
ATTENDANCE POLICIES	An employer may not apply a "no-fault" leave policy to terminate a disabled employee after he or she has been on leave for a certain period of time. Instead, the employer must modify its no-fault leave policy to provide the employee with additional leave, unless: (1) there is another effective accommodation that would enable the person to perform the essential functions of the position or (2) granting additional leave would cause an undue hardship.	Employees may not be terminated or otherwise penalized for absences sanctioned under FMLA. Adverse employment action for FMLA leave under a "no-fault" attendance policy is not permitted.	Most states do not allow termination based solely on an employee's claim for WC benefits. But if the WC leave exceeds the time permitted by a consistent, neutral attendance policy, the employee may be terminated.
LEAVE REQUIREMENTS	There is no established paid or unpaid leave requirement under the ADA. The employer may use accrued paid leave pursuant to the organization's policies.	Leave is generally unpaid. However, an employer can choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave pursuant to the employer's established policies for use of paid leave. The employee's job must be protected during the leave.	Leave is granted for a covered injury until a healthcare provider releases the employee to return to work (for light duty, if offered to employee, or regular duties).
AMOUNT	The amount of leave will vary depending on what constitutes "reasonable accommodation" under the circumstances.	Up to 12 weeks in any 12-month period whether calculated by a calendar method, a fiscal year method, or a rolling method (counting backward from the date of the leave request). For military caregiver leave, up to 26 weeks in a single 12-month period beginning on the first day of leave.	Depends on state law.
BENEFIT ISSUES	Unpaid leave may be a form of reasonable accommodation. However, unpaid leave does not entitle the employer to modify or restrict the benefits to which an employee would otherwise be entitled.	The employee's medical benefits must be maintained during the leave (the employee may be required to pay a portion of the premiums). Other benefits ordinarily offered must also be maintained.	Employers are not required by the workers' compensation laws in most states to continue an employee's group health care coverage during a workers' compensation leave of absence. However, employers should make sure these employees are treated similarly to those out on other types of medical leave to avoid claims of discrimination.

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
INTERMITTENT LEAVE	Intermittent leave may be available as a form of reasonable accommodation.	Available for serious health conditions of the employee or the employee's family member, qualifying exigency and military caregiver leave. Available for bonding, adoption, and placement in foster care if both employer and employee agree.	If needed for treatment or rehabilitation.
PART-TIME EMPLOYEES	Part-time employees are covered by the ADA.	Part-time employees are covered if they have worked the requisite 1,250 hours in the last 12 months.	Workers' compensation benefits are prorated.
REINSTATEMENT	A disabled employee returning to work must be given the same or equivalent position, if the employee's former position is no longer available (e.g., if holding the former position open would have posed an undue hardship on the employer). If an equivalent position is not available, the employer must accommodate by providing a vacant position at a lower level. The employer is not required to "bump" another employee in order to make a position available.	Employees returning from an FMLA leave are entitled to reinstatement to the same or an equivalent position at the same salary and benefit level the employee received prior to the leave. Returning employees may be required to provide a fitness for duty certificate.	A few states require reinstatement unless holding the job causes "undue hardship" to the employer.
REHABILITATION/LIGHT DUTY	An employer may provide a light-duty position as an accommodation. However, the employer is not required to create a light-duty position if one does not exist.	Employers cannot insist on light duty, although employees can opt for it. Light-duty hours do not count as FMLA leave. Only hours in which the employee was off duty altogether count against the 12-week allotment. An employee who voluntarily returns to a light duty position retains the right to job restoration to the same or equivalent position <i>only until the end of the 12-month period that the employer uses to calculate FMLA leave.</i>	Most states require physical rehabilitation benefits if appropriate; many states require vocational rehabilitation if injury or illness disqualifies the worker from his or her original job.

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
TERMINATION	<p>An employer may terminate an employee with a disability if the employee is not able to perform the essential job functions with or without a reasonable accommodation. If no reasonable accommodation is available, employers should first consider a different position in the organization if one is available.</p>	<p>If an employee fails to return to work after FMLA leave and if the ADA or the employer's policies do not offer additional protection, the employer may terminate employment.</p>	<p>Some states bar termination; must allow it as long as it is not done because the worker has a workers' compensation claim and the termination is pursuant to a neutral policy such as an attendance policy.</p>
RECORDKEEPING AND REPORTING	<p>Employer must retain résumés, application forms, notes on interviews, and notes on reference checks; records of promotion, demotion, transfer, layoff, termination, rate of pay or other compensation; selection for training or apprenticeship, including application forms and test papers; applications for disability benefits; and requests for reasonable job accommodation. Note that information from medical exams is confidential, must be maintained separately, and access must be limited to the employee's supervisors and managers; safety workers; and workers' compensation or other insurance carrier.</p> <p>It is advised that employers keep a detailed record of any requests for accommodation, medical certifications, the employer's attempt(s) to accommodate an employee, and any reason(s) why attempts to accommodate were not successful.</p>	<p>Employers must retain payroll information, dates and hours of leave taken, all notices and correspondence exchanged regarding leave, copies of all employer policies regarding benefits and leave, records of benefit premiums paid, and records of any disputes regarding leave, for at least 3 years.</p> <p>Applicable records and documents created for purposes of the FMLA containing family medical history or genetic information as defined in The Genetic Information Nondiscrimination Act of 2008 (GINA) must be maintained in accordance with the confidentiality requirements of Title II of GINA.</p>	<p>All states require accident reporting to the workers' compensation commission.</p>

Interplay Chart: ADA, FMLA, and workers' compensation laws (continued)

	ADA	FMLA	WORKERS' COMPENSATION
RETALIATION	<p>Employers are prohibited from discriminating or retaliating against any person (disabled or not) who has opposed any practice forbidden by the ADA, or has made a charge, testified or assisted in any manner, in any investigation, proceeding, or hearing under the ADA.</p>	<p>Employers are prohibited from retaliating against any employee who meets the 12-month/1,250-hour requirement, has requested leave, or has opposed a practice forbidden by the FMLA, or has made a charge, testified or assisted in any manner, in any investigation, proceeding, or hearing under the FMLA.</p>	<p>Almost all states bar discrimination against employees in any conditions of employment solely because the employee has claimed workers' compensation or has been out on workers' compensation leave.</p>
EMPLOYER LIABILITY	<p>An employer is liable for discrimination by its supervisors or agents whether or not the employer actually knew of the discrimination. An employer is liable for discrimination by co-workers if the employer knew of the discrimination and failed to take reasonable steps to prevent or stop it. An employer may be liable for discrimination by third party, nonemployees in the workplace if the employer knew of the discrimination and failed to take reasonable steps to prevent or stop it.</p>	<p>An employer is liable for interference with, restraint, or denial of the exercise of employee's FMLA rights. This includes discriminating or retaliating against an employee or perspective employee for having exercised or attempted to exercise FMLA rights. An employer may be liable for compensation and benefits lost, or for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, or promotion.</p>	