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**ISSUES TO CONSIDER REGARDING THE ADA AND FMLA  
WHILE PURSUING OR DEFENDING A WORKER'S COMPENSATION CLAIM**

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***The Family and Medical Leave Act of 1993 – Public Law 103-3***

***Enacted February 5, 1993***

**WEBSITE SOURCE OF LAW: <http://www.dol.gov/whd/regs/statutes/fmla.htm> (FMLA)**

With certain exceptions, an employee with one year or more service working for a public or private employer of 50 or more employees is entitled to 12 weeks of unpaid leave time for his/her own serious health condition provided the employee gives the employer proper notice and has worked at least 1250 hours preceding the start of the leave. Health insurance must be maintained during the leave. The leave may be continuous in nature or it may be intermittent. At the conclusion of the leave the employee must be restored to his/her former position or an equivalent position with similar pay and benefits. If the employee is unable to return to his/her former job within the 12 weeks, the employee loses the protection of the FMLA and, in the absence of other legal or contractual protections, may be terminated.

A "serious health condition" is an occupational or non-occupational mental or physical illness, injury or impairment that involves either inpatient care at a medical facility or continuing treatment by a health care provider. The most common situation involving continuing treatment is where the employee establishes a period of incapacity requiring an absence from work for more than three consecutive days, provided this absence also involves two or more visits to a healthcare provider or one visit to a health care provider that results in a regimen of continuing treatment supervised by the health care provider.

What constitutes "proper notice" is a complex issue. For purposes of our discussion today, you should know that common sense prevails: the sooner the notice is given the better. The employee does not have to use any magic words like "I have a serious health condition requiring a FMLA." As soon as the employee identifies a qualifying event, the employer is obligated to inquire further and grant the leave if warranted. An employee can lose his/her FMLA protection by not adhering to the employer's official notice rules. FMLA cases are often decided on the issue of whether there has been proper notice for a FMLA-qualifying leave.

A "fitness for duty" certification from the employee's health care provider may be required before an employee is allowed to return to work. The 2009 amendments to the FMLA Regulations allow for employer arranged "fitness for duty" examinations but only if that is a requirement for all employees returning from a medical leave per the employer's official policy or applicable collective bargaining agreements.

There are two types of legal claims under the FMLA. Entitlement claims are based upon the employee's assertion that the employer deprived the employee of a substantive FMLA right such as failing to reinstate the employee to his/her former or equivalent position. Discrimination or retaliation claims mean that the employer takes adverse employment action against the employee for exercising FMLA rights such as terminating an employee for requesting FMLA. The employer's motive is irrelevant when an employee pursues an entitlement case. In discrimination or retaliation cases, the employer's improper motive is a necessary element of the case.

There are no pre-lawsuit agency filing requirements under the FMLA. Federal courts have jurisdiction over FMLA claims. There is a 2 year statute of limitations with a one year extension if the violation was willful. Past and future economic damages, liquidated damages (2x economic losses), reinstatement and attorney fees/costs are available remedies. An employee cannot recover emotional distress type damages under the FMLA.

***Americans With Disabilities Act of 1990 and  
Persons With Disabilities Civil Rights Act of 1976***

**WEBSITE SOURCE OF LAW: [www.ada.gov/pubs/adastatute08.htm](http://www.ada.gov/pubs/adastatute08.htm) (ADA)  
[www.michigan.gov/documents/act-220-of-1976\\_8771\\_7.pdf](http://www.michigan.gov/documents/act-220-of-1976_8771_7.pdf) (PDCRA)**

A qualified individual with a disability working for a private and public employer is protected by the ADA from discrimination based on the employee's actual or perceived disability. The ADA also requires the employer to reasonably accommodate an employee who is protected by the ADA.

In order to be "qualified" the individual must be able to perform the essential functions of his or her job, with or without accommodations. The individual must also meet the definition of disability in order to be eligible for the ADA's protections.

Under the ADA, a disability is a physical or mental impairment that substantially limits one or more major life activities of the employee. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working. "Working" as a major life activity is a problematic designation because the regulations and courts have said that, in order to qualify under the "working" designation, the employee must prove he is unable to perform all jobs within this broad job classification, not just the job he was performing. The 2008 Amendments added functions of the immune system (HIV and AIDS), normal cell growth (cancer), digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. The 2008 Amendments also provide that impairments that are episodic or in remission are protected if there is proof that when active the condition meets the substantial impairment of a major life activity standard.

If the employer "regards" the employee as having a disability, the employee is covered. The 2008 Amendments eliminate the need to prove that the employer took adverse action knowing that the physical or mental impairment substantially limits a major life activity.

If the employee is a qualified individual with a disability then the employer's duty to provide reasonable accommodations is triggered. Reasonable accommodations include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment, readers and interpreters and other similar accommodations. The employer must treat each request for accommodation on the merits and may not adopt blanket policies which do not permit a case by case assessment. The employer is required to engage in the interactive process with the employee or his/her advocate.

With certain notable distinctions, the Michigan Persons with Disabilities Civil Rights ACT (PDCRA) follows a similar model.

Under the ADA and PDCRA, an employee can claim economic and non-economic damages, seek reinstatement, imposition of an accommodation, reinstatement, attorney fees/costs and other equitable relief. Punitive damages are available under the ADA. There is a \$300,000 cap on the combination of non-economic and punitive damages under the ADA. There is no cap on economic damages.

The PDCRA does not have any caps. Punitive damages are not recoverable under the PDCRA.

There is no pre-lawsuit agency filing requirement for pursuing a PDCRA claim. PDCRA claims are governed by a three-year statute of limitations. Claims under the ADA must be pursued in the Equal Employment Opportunity Commission. Agency claims must be filed within 300 days of the discriminatory act.

### ***Relevant Provisions of the Worker's Compensation Act***

MCL 418.301(11) provides that:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

Employees pursuing this claim in Circuit Court can recover economic and non-economic damages both past and future. Reinstatement and attorney fees/cost are not recoverable. There is no pre-lawsuit agency filing requirement.

MCL 418.301(5)(a) provides that:

If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

MCL 418.301(9) provides that:

“Reasonable employment” as used in this section, means work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.

### **Accommodations/Light Duty Crossroads Issues**

#### **HYPOTHETICAL:**

John works for Acme as an outside janitor doing heavy lifting. John has worked for Acme more than one year and Acme has more than 50 employees. John ruptures a disc at work and requires back surgery. He is placed on worker's compensation and begins receiving wage benefits. Acme's policy is to run an employee's FMLA time concurrently with any paid time off including worker's compensation. After 8 weeks off of work, Acme asks John's health provider if he will certify John that John is able to return to work in a “light duty” assignment known as an

inside janitor earning 15% less pay than he earned as an outside janitor. The inside janitor positions are created for employees who have occupational illnesses or injuries and are restricted in their regular work activities. Acme has a light-duty program which is limited to employees with occupational injuries. John's doctor certifies that John is unable to do the duties of an outside janitor for another 4 weeks but can do the duties of the inside janitor now. Acme offers the inside janitor position to John to work until he is able to return to his regular job in four weeks. John does not want to take the "light-duty" job because he would prefer to spend the next month resting and healing up.

**John wants to know what will happen to him if he refuses the offer. What advice do you give John? What advice should be given to Acme?**

29 C.F.R. § 825.702(d)(1) provides that :

If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position (see §825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See §825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

*The regulations make it clear that John may lose his worker's compensation benefits by refusing an offer of "reasonable employment" under MCL 418.301(9) but he will not be in jeopardy of losing his job because he qualifies under FMLA and has substantial job restoration benefits.*

**Let's assume that John takes the temporary inside janitor position. John wants to know if, by taking the "light duty "assignment, will he have waived his right to insist on returning to his outside janitor job? What advice do you give John? What advice should be given Acme?**

29 C.F.R. § 825.220(d) provides that:

Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see §825.702(d)). An employee's acceptance of such "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 at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

*The advice to John is that he will not waive his right to claim his higher paid regular position provided he can return to it within the 12 week FMLA period and the FMLA 12 month leave year has not expired. The advice to Acme is that it should not assume that John has given up his right to be restored to his former position.*

**John wants to know what will happen to him if he cannot return to his outside janitor position by the end of the 12 week FMLA leave. He wants to know what his legal options are. What advice do you give him? What advice should be given to Acme?**

29 C.F.R. § 825.216(c) provides that:

If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. See §825.702, state leave laws, or workers' compensation laws.

In some cases, the only effective reasonable accommodation available for an individual with a disability may be similar or equivalent to a light-duty position. The employer would have to provide that reasonable accommodation unless the employer can demonstrate that doing so would impose an undue hardship.

The Equal Employment Opportunity Commission ("EEOC"), the agency charged with implementing the ADA, explains an employer's duty of reassignment in its Enforcement Guidance:

Where an employee can no longer perform the essential functions of his/her original position, with or without reasonable accommodation, because of a disability-related occupational injury, an employer must reassign him/her to an equivalent position for which s/he is qualified, absent undue hardship. If no equivalent position (in terms of pay, status, etc.) exists, then the employee must be reassigned to a lower graded position for which s/he is qualified, absent undue hardship. EEOC Enforcement Guidance: "Workers' Compensation and the ADA," ADA Manual No. 57 at 70:1220 para. 22(BNA).

**WARNING: The PDCRA deviates substantially from the ADA on whether the employer has a duty to reassign an employee who becomes impaired after hire. The Michigan Supreme Court has said no employer has a duty to reassign in that situation. *Rourk v. Oakwood Hosp. Corp.*, 458 Mich 25 (1998).**

*John should be advised that he may be properly terminated under the FMLA because he was unable to return to his outside janitor position within 12 weeks provided he cannot be further accommodated under the ADA and PDCRA. If the employer does not wish to continue John in the "light duty" assignment there is nothing in the FMLA or Michigan Worker's Compensation Statute that will require Acme to do so unless continuation of John in the inside janitor position is a reasonable accommodation under the ADA or PDCRA. Assuming continuation of John in the inside janitor position is not required, John would be restored to his weekly worker's compensation benefit as soon as he is removed from the light-duty assignment. Acme should proceed very cautiously here if it removes John from the inside janitor position after the expiration of John's job restoration benefits under FMLA.*

**John is unable to return to his outside janitor job within the 12 weeks provided for under FMLA. However, you are successful in convincing Acme to employ John in the inside janitor job as a reasonable accommodation under the ADA and PDCRA. Acme, without legal advice, informs John that Joe, who has more years of service but with a non-occupational injury will be placed in the inside janitor job and John may be bumped out. John wants advice: Can Acme do that?**

See EEOC Enforcement Guidance: Workers' Compensation and the ADA, 8 FEP Manual (BNA) at 405:7401 (1996) which provides that:

An employer may recognize a special obligation arising out of the employment relationship to create a light duty position for an employee when s/he has been injured while performing work for the employer and, as a consequence, is unable to perform his/her regular job duties.

See the EEOC's Technical Assistance Manual on Title I of ADA, 8 FEP Manual (BNA) § 9.4 at 405:7057-58 (1992). specific guidance on light-duty jobs:

[I]f an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

When an employer places an injured worker in a temporary "light duty" position, that worker is "otherwise qualified" for that position for the term of that position; a worker's qualifications must be gauged in relation to the position occupied, not in relation to the job held prior to the injury. It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential functions of that position.

See EEOC Enforcement Guidance, 8 FEP Manual at 405:7402 which provides that:

In some cases, the only effective reasonable accommodation available for an individual with a disability may be similar or equivalent to a light-duty position. The employer would have to provide that reasonable accommodation unless the employer can demonstrate that doing so would impose an undue hardship.

*Acme could legally designate its light-duty program available only to employees with occupational injuries. Acme could legally reject Joe's request for the inside janitor position. Moreover, by continuing John in the inside janitor position for some period of time, John has a credible argument that the definition of his "essential job function" has permanently changed.*

**John is legally removed from the inside janitor position and his job restoration benefits under the FMLA have expired. His doctor says that John needs another 90 days to return to work. John asks Acme for an accommodation in the nature of an ADA/PDCRA leave of absence for another 90 days. What advice should be given John and Acme?**

The ADA administrative guidelines indicate that a possible form of accommodation is permitting use of accrued paid leave or providing additional unpaid leave for necessary treatment. ADA Interpretative Guidance §1630.2. A growing number of courts have held that although unpaid leave for medical care and treatment may be appropriate under certain circumstances, leave of an indefinite duration is not a reasonable accommodation.

*Prudent advice to John and Acme is that given the definite duration of John's additional leave (another 90 days), John should be permitted to use any accrued vacation, sick or personal time or permitted to remain off of work on an unpaid status.*

**John returns to his regular outside janitor position and shortly thereafter asks for intermittent FMLA time to visit his physical therapist. Is John entitled to intermittent leave and what advice should be given to John and Acme?**

FMLA leaves may be taken on an intermittent basis or in the form of a reduced- schedule. 29 USC 2612(b); 29 C.F.R. §825.202. An employee is entitled to an intermittent leave or a reduced-schedule leave when it is medically necessary due to the employee's serious health condition. The employee must have worked 1,250 hours preceding the start of the intermittent or reduced- schedule leave.

*Acme will not be required to grant John intermittent leave if he did not work 1,250 in the 12 months before the request for intermittent leave was made. Moreover, is he has used up his allotment 12 weeks unpaid leave during the 12month leave period, John will not be eligible for intermittent leave. John will be required to see his physical therapist on his own time.*

### **PRACTICAL ADVICE**

Where overlapping statutory rights are evident, the employer should be guided by the statute which is most favorable to the employee.

Employer and employee worker compensation advocates should take a holistic view of their client's legal problem. In handling a worker compensation matter, an overriding consideration should always be: What are the ADA/PDCRA and FMLA implications of what I am advising the client?

The evaluation of ADA/PDCRA and FMLA issues should be done early and continuously. The night before the redemption of a big case is not the time to start weighing the employers/employees legal claims and defenses to FMLA or ADA/PDCRA issues.

If you are not comfortable analyzing these issues in the context of handling a worker compensation matter, associate with a firm which regularly handles these types of case. Our experience has been that most issues can be resolved quickly with a phone call or email to someone knowledgeable in this area of employment law.

Use available legal and web based resources to familiarize yourself with the general principles of ADA/PDCRA and FMLA matters. Understanding the general principals will usually protect you from errors. In more complex situations, ask the experts!