

The Interplay of the ADAAA, FMLA, and Workers' Compensation: The Bermuda Triangle of Employment Law

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Agenda

- A practical system for approaching the interplay of the ADAAA, FMLA, and workers' compensation.
- Tricky traps.
- Best practices to reduce legal risks.

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GET ONE

The Bottom Line

- The ADAAA, FMLA, and Workers' Compensation statutes confer different rights on employees, and different obligations on employers.
- Compliance with one statute does not guarantee compliance with the others.
- This means you have to work through the application of all three statutes.
- Every time.



The Order

- Workers' compensation
- FMLA/State leave laws
- ADAAA
- Company leave policies
- Past practice



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Purpose of these laws

- **Workers' Compensation Laws** – provide for compensation and payment for treatment/rehabilitation for workplace injuries/illnesses.
- **FMLA** – sets minimum leave standards for eligible employees under certain circumstances.
- **ADAAA** – prohibits discrimination against employees with disabilities and requires reasonable accommodations absent undue hardship.

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Tricky Traps



Tricky Trap No. 1

- Two employees need frequent breaks beyond their normal break times for serious health conditions.
- One to use the restroom and the other to get something to eat and do stretching exercises.
- What laws are implicated?

Mauder v. MTA (5th Cir. 2006)

- "Because Mauder's illness did not render him incapacitated or absent from work, his medical condition does not fall within the FMLA definition of a serious health condition," the Court wrote. Thus, "Mauder was not entitled to leave under the FMLA."



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Collins v. U.S. Playing Card Co., 466 F. Supp. 2d 954, 15 (S.D. Ohio 2006)

- First, "[t]here is no limit on the size of an increment of leave when an employee takes intermittent leave" under the FMLA. 29 C.F.R. § 825.203(d). The Company has not directed this Court to any truly analogous binding authority that holds that the Act does not protect intermittent leaves of only a few minutes in duration. Thus, the Court cannot conclude that Collins' leaves of only a few minutes are per se excluded from the Act's protection.
- **NOTE:** Court found persuasive the fact that HR gave Collins FMLA forms when he asked for restroom breaks beyond his normal break times.

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Tricky Trap No. 2

- Suppose your employee who needs frequent restroom breaks begins to have other issues like not being able to make it to the bathroom and soiling herself?
- Could you offer to move the employee's cubicle work space closer to the restroom and have her bring a second set of clothes to work?
- What if she wants to telecommute or "work from home?"

"When we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous. However, as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location."

EEOC v. Ford Motor Credit Co. (6th Cir. 2014)

“Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the “workplace” is anywhere that an employee can perform her job duties. ***Thus, the vital question in this case is not whether “attendance” was an essential job function for a resale buyer, but whether physical presence at the Ford facilities was truly essential.***”

“Determining whether physical presence is essential to a particular job is a “highly fact specific” question. *Hoskins*, 227 F.3d at 726. Accordingly, we consider several factors to guide our inquiry, including written job descriptions, the business judgment of the employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions.” See 29 C.F.R. § 1630.2(n)(2).

What if the job requires teamwork?



"As we have discussed, advancing technology has diminished the necessity of in-person contact to facilitate group conversations. The world has changed since the foundational opinions regarding physical presence in the workplace were issued: teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace. Indeed, Judge Posner presciently observed in *Vande Zande* that his conclusion that "team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance" would "no doubt change as communications technology advances." 44 F.3d at 544. **Therefore, we are not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements.**

Tricky Trap No. 3

- Your employee has been certified for intermittent leave based on migraine headaches. She has taken two weeks of time off on an intermittent basis for this reason.
- The employee is injured on the job and takes ten weeks off to recover. HR has the employee complete FMLA paperwork in addition to an internal accident report and First Report of Injury form for workers' compensation purposes.

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Tricky Trap No. 3 (cont'd)

- The employee returns to work and after a week calls in to say she has a migraine and will be taking FMLA.
- HR informs the employee she has used all of her FMLA because it ran at the same time as her workers' compensation leave. The employee objects saying there is nothing in writing about the two leaves running at the same time.
- What if I told you HR did not send a second designation notice for the continuous ten week leave since they had already sent her one for the intermittent leave?

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The Act provides that a serious health condition may result from injury to the employee on or off the job. ***If the employer designates the leave as FMLA leave*** in accordance with §825.300(d), the leave counts against the employee's FMLA leave entitlement.

29 C.F.R. Section 825.207(e)

Tricky Trap No. 4

- Your employee brings in a medical certification form indicating he is needed to care for his seriously ill wife for 12 weeks.
- You properly designate the time as FMLA.
- Ten weeks into the leave a coworker brings you pictures of the employee in Miami watching a Miami Heat NBA game with a bunch a male friends and later partying at a bar in South Beach.
- Can you terminate the employee for misusing FMLA?
- Does the ADA apply to this situation?

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Baham, Jr. v. McLane Foodservice, Inc. **(5th Circuit 2011) Case No. 10-10944**

- “Caring for a family member under the FMLA involves a particular activity that is conducted ‘in close and continuing proximity to the ill family member.’”
- “Caring for a family member with a serious health condition ‘involves some level of participation in ongoing treatment of that condition.’”
- To invoke the FMLA’s protections, “some actual care” is required.

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Tricky Trap No. 5

- An employee injures his back on the job and takes 12 weeks of leave for back surgery, physical therapy and recuperation.
- You properly designate the time as FMLA and your policy states that FMLA runs concurrently with workers' compensation leave.
- The employee does not return to work at the end of the 12 weeks of FMLA.
- You know from speaking with your workers' compensation claims adjuster that the employee had a second surgery and will not be cleared for work for another month.
- Can you terminate the employee?

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Analysis

- Start with workers' compensation and applicable state law. Consider the impact termination could have on any workers' compensation settlement and the potential for a workers' compensation retaliation lawsuit.
- If FMLA/state leave has truly been exhausted (check how the 12 month period applies at your organization), then look at other Company policies that require leave. Make sure you are not discriminating/retaliating by denying Company leave generally allowed to others.
- Examine obligations under the ADA. It may be a reasonable accommodation to extend leave beyond the time provided by other laws (like the FMLA) and your typical company policies.

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What length of leave is reasonable as an accommodation?

- No bright line test as all jobs are different and all employers are different. What might be reasonable in one job for one employer may not be reasonable for another.
- The EEOC has not issued its long awaited guidance on this issue and we are not likely to see it any time soon.
- EEOC Commissioner says employers need to "STOP, THINK, AND JUSTIFY."

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Questions for consideration include, but are not limited to:

- Has the employee provided sufficient documentation supporting the medical need for a leave of absence?
- How much leave is available pursuant to the employer's leave of absence policy? Is the requested leave close to that permitted by the employer's policy?
- What is the anticipated impact on business operations if the requested leave of absence is approved?
- What are the employee's essential job functions, and who will perform those functions during the employee's leave?

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Questions for consideration include, but are not limited to:

- How have business operations been impacted during the employee's leave of absence to date?
- What costs have been incurred in covering the employee's essential job responsibilities during the employee's leave of absence to date (overtime, training of temporary employees, agency fees, etc.)?
- How have the employee's essential job functions been covered to date, and is it reasonable to continue using that same method of coverage for the requested extension? If not, why not?

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Questions for consideration include, but are not limited to:

- What is the anticipated impact on the employer's business operations if the requested extension is granted?
- What additional costs are anticipated if the requested extension is granted?
- How do those costs compare to the costs that will be incurred if the leave is denied?
- Other than the fact that the employee has already been on a leave of absence, what additional issues or concerns will result from the employee remaining on leave for an additional time period (i.e., what is different now)?

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Questions for consideration include, but are not limited to:

- Is a leave of absence the only effective accommodation? Can any other workplace changes be made that would permit the employee to perform his or her essential job functions with or without accommodations?
- Is attendance integral to the employee's job function?
- Can the employee perform any of his or her essential job functions (or those of a vacant position for which he or she is qualified) from home?
- Is there a vacant position for which the employee is qualified that would enable the employee to continue working rather than taking a leave?

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Best Practices

- Do you have a system for analyzing workers' compensation, FMLA, ADAAA, and similar state laws?
- Does your system take into account your Company's specific leave policies that may be more generous than what the law requires?

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Best Practices

- Do you have a disability discrimination/reasonable accommodation policy?
- Do you have an FMLA policy?
- Does your FMLA policy state that workers' compensation illnesses/injuries that meet the FMLA's definition of a serious health condition will result in leave running concurrently?

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Best Practices

- Does your FMLA policy coordinate with and incorporate all of the Company's leave policies?
- Do you have a practice of opening the door to an interactive process for assessing additional leave time under ADAAA when FMLA or other approved leaves are exhausted?

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Best Practices

- Is your HR staff trained in the legal and practical application of workers' compensation, FMLA, and ADAAA?
- Does your HR staff work closely with risk management when workers' compensation claims overlap with FMLA/ADAAA?
- Do you provide management training to help reduce legal risks?

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