The Family and Medical Leave Act,
The Americans with Disabilities Act, and
Workers’ Compensation:
An Employer’s Survival Guide

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Synopsis

§ 1.01. Introduction ................................................................. 2

§ 1.02. Overview of the Americans with Disabilities Act .......... 3
[1] — Coverage ................................................................. 3

§ 1.03. A Practical Guide to an ADA Compliance Plan ............. 7
[1] — The Hiring Process ................................................... 8
[2] — Accessibility ............................................................ 9

§ 1.04. EEOC Enforcement of the ADA .................................. 10
[6] — Acquisition or Modification of Equipment and Devices .......................................................... 14
[7] — Undue Hardship ...................................................... 15

§ 1.05. Overview of the Family and Medical Leave Act .......... 16
[1] — Coverage .............................................................. 16
[2] — Counting Employees ............................................. 17
[7] — Employee Rights Upon Return from FMLA Leave .. 30
[8] — Employers’ Notice Requirements ............................ 33
[9] — Employees’ Notice Requirements ............................ 34
[10] — Medical Certification ............................................... 36
§ 1.01. **Introduction.**

Congress’ enactment of the Americans With Disabilities Act\(^1\) (ADA) and the Family and Medical Leave Act\(^2\) (FMLA) have added new corridors to the legal maze through which employers must maneuver to deal properly with injured employees. These new laws and the regulations which implement them are complicated and sometimes enigmatic; additionally, the interplay of these laws with workers’ compensation law can complicate their application.

As volumes have been written about both the ADA and the FMLA, comprehensive coverage of these laws is not intended in this chapter. This chapter contains narrowly focused, basic information intended to enable employers to better understand the fundamental requirements of the ADA and the FMLA, and how those requirements interact with workers’ compensation law.

Because both Acts are still relatively new, there is much uncertainty involved in determining their precise requirements. Legitimate differences of opinion exist on many issues regarding compliance with the Acts. As courts resolve ADA and FMLA disputes and the public debate concerning the policies underlying the Acts progresses, employers’ duties will become

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more focused. For now, determination of many issues under the Acts requires educated guesswork. Employers confronting ADA or FMLA issues should act carefully, based only on informed decisions, and after consultation with counsel experienced in employment law.

§ 1.02. Overview of the Americans with Disabilities Act.

The ADA covers nearly all employers with 15 or more employees. It applies as well to temporary employment agencies, labor organizations, and similar entities.3

The ADA protects four groups of workers:

a) those with a disability;
b) those with a record of a disability;
c) those who are perceived as having a disability; and
d) those who are associated with a person having a disability.4

“Disability” is a term of art. The Act defines “disability” as a physical or mental impairment that substantially limits one or more of a person’s major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.5 The regulations contain the following factors for use in analyzing whether an impairment is “substantially limiting”:

a) the nature and severity of the impairment;
b) the duration or expected duration of the impairment; and

c) the permanent or long-term impact, or the expected permanent or long-term impact, of or resulting from the impairment.6

In addition to having a bona fide disability and belonging to one of the four groups referred to above, in order to receive the protection from

3 29 C.F.R § 1630.2(e)(1).
4 29 C.F.R. § 1630.2(g).
5 2 U.S.C. § 12102(2).
6 29 C.F.R. § 1630.2(j)(2).
discrimination conferred by the Act, an individual must also be qualified for the job or position at issue. To be “qualified,” a person must (1) meet the prerequisite criteria for the job (i.e. educational background, experience, licensures, etc.), and (2) be able to perform the essential functions of the job, either with or without reasonable accommodation.\textsuperscript{7} An employer cannot be held liable under the ADA where it can prove that a particular individual would pose a direct threat to his or her own safety or the safety of others.\textsuperscript{8} “Essential functions” and “reasonable accommodation” are key concepts under the ADA, and will be addressed in greater detail below.


Although the term “disability” may be defined in an extremely broad, inclusive manner, there are some groups explicitly excluded from the coverage of the Act, including:

a) current substance abusers. Recovering addicts/abusers are protected by the Act, but those engaging in current use are not;

b) homosexuals and bisexuals. But, victims of Acquired Immune Deficiency Syndrome (AIDS), those perceived as having AIDS, and those having an association with a victim of AIDS, are protected; and

c) persons suffering from compulsive gambling, pyromania, kleptomania, etc.\textsuperscript{9}

[4] — What Are the “Essential Functions” of a Job?

The term “essential functions” is obviously critical to an understanding of an employer’s obligations under the ADA, as a person is not considered a “qualified individual” — and hence protected by the Act — unless that person can perform the essential functions of the job, with or without reasonable accommodation. The fact that a person cannot perform marginal, peripheral or ancillary functions of a job is no defense to a charge of discrimination under the Act.

\textsuperscript{7} 29 C.F.R. § 1630.2(m).
\textsuperscript{8} 42 U.S.C. § 12113(b).
\textsuperscript{9} 29 C.F.R. § 1630.3.
The term “essential functions” is defined as follows:
a) In general, the term “essential functions” means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.
b) A job function may be considered essential for any of several reasons, including but not limited to the following:
   (i) the function may be essential because the reason the position exists is to perform that function;
   (ii) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
   (iii) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.\(^{10}\)
c) Evidence of whether a particular function is essential includes, but is not limited to the following:
   (i) the employer’s judgment as to which functions are essential;
   (ii) written job descriptions prepared before advertising or interviewing applicants for the job;
   (iii) the amount of time spent on the job performing the function;
   (iv) the consequences of not requiring the incumbent to perform the function;
   (v) the terms of a collective bargaining agreement;
   (vi) the work experience of past incumbents in the job; and/or
   (vii) the current work experience of incumbents in similar jobs.\(^{11}\)

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\(^{10}\) 29 C.F.R. § 1630.2(n).
\(^{11}\) 29 C.F.R. § 1630.2(n).
Note the open-endedness of the Act. There is no formula that will allow an employer to categorize a job function as essential. Time spent performing a function may not be determinative in and of itself. A careful reading of the regulations reveals the following principles as being particularly important:

a) Job descriptions are very useful from both a practical and an evidentiary perspective, especially if they are prepared before the fact. Again, they must be accurate. Also, they should describe the result to be achieved, not a particular manner of achieving the objective, unless the manner of accomplishing the task is integral to its performance.

b) If an employer is faced with proving that a function is essential, employee testimony will constitute compelling evidence on this point. Again, this fact demonstrates the need for accurate job descriptions and periodic revisions to reflect any changes in the composition of the job.

c) Larger employers will be held to a stricter standard than smaller employers. The EEOC’s Interpretive Guidance recognizes that “if an employer has a relatively small number of available employees for the work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited.”

[5] — Who Is a “Qualified Employee”?

In addition to being able to perform the essential functions of the job, individuals must fulfill two other criteria in order to be considered “qualified” under the Act. First, they must satisfy any prerequisites attached to the job. Second, they must meet any production or performance standards required of all job incumbents.

The Act does not attempt to abolish meaningful occupational qualifications. For example, a law firm can require any applicant to be a licensed member of the bar, and a hospital can require nurses to be licensed.

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12 56 F.R. 35726, at 35743.
13 29 C.F.R. § 1630.2(q).
and in good standing. An organization like the Cancer Society or the Lung Association can refuse to hire an individual who smokes, because part of such an organization’s mission is to eliminate smoking. Having a disability does not exempt an individual from legitimate selection criteria.

Productivity standards are permissible so long as they are bona fide \((i.e.,\) actually imposed on all employees) and are not intended to exclude disabled individuals. An employee who cannot meet a bona fide production quota or performance standard is not a qualified individual with a disability and may be discharged, unless there are reasonable accommodations that could be made to enable the employee to perform at an acceptable rate.

As the Interpretive Guidance to 29 C.F.R. §1630.2(a) states:

It is important to note that the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See section 1630.10 Qualification Standards, Tests and Other Selection Criteria). If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement. However, if an employer does require accurate 75 word per minute typing or the thorough cleaning of 16 rooms, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.

§ 1.03. A Practical Guide to an ADA Compliance Plan.

Successful compliance with the ADA requires implementation of procedures to effectively meet obligations in three areas: hiring,
accessibility and job accommodation. Moreover, ADA compliance requires training to ensure that all supervisors and employees with hiring and job placement responsibility understand their obligations, and periodic audits to monitor compliance.


The ADA impacts the hiring process in several respects. First, an employer can no longer administer pre-employment physical examinations. This includes questionnaires that ask applicants to describe their medical histories, check-off diseases and/or health problems they may have had, or list any workers’ compensation claims they may have filed in the past.14

In certain instances, an employer may administer a physical examination or inquire into prior compensation claims after making a conditional offer of employment. These limited circumstances are subject to the following conditions:

a) all persons applying for the position at issue must be subjected to the same examination, regardless of whether they are disabled;

b) the results of the examination must be treated as confidential, and all medical information must be maintained in separate, confidential files; and

c) the job offer can be withdrawn only if

   (i) The applicant fails to meet a health criterion that is job-related, consistent with business necessity, and cannot be reasonably accommodated; or

   (ii) The applicant’s hire would create a direct threat to the safety of the applicant or to others, and no reasonable accommodation will eliminate that threat.15

A second major change in hiring practices necessitated by the ADA is that an employer can no longer ask the applicant about disabilities or physical or mental limitations, even if these disabilities or limitations are apparent. Instead, the employer must phrase its questions in terms of the

14 29 C.F.R. § 1630.13.
applicant’s ability to perform the essential functions of the job. Permissible inquiries accomplish three objectives: they describe the job; they avoid health-related references; and they invite discussion as to whether a disability can be reasonably accommodated, if one exists.\textsuperscript{16}

The ADA does not require employers to have job descriptions. However, there are distinct and compelling advantages to having accurate, well-designed job descriptions in effect. In the first place, if a job description is implemented prior to a hiring or placement decision, the description will be regarded as substantial — although not conclusive — evidence of the job’s essential functions. Also, an accurate job description provides those with hiring or job placement responsibility a sound basis for developing permissible inquiries.

Conversely, poorly developed or inaccurate job descriptions may work to an employer’s detriment, particularly if they are exaggerated. An employer’s credibility can be seriously undermined if its employees testify that their job descriptions do not fairly reflect their work. Even worse, a factfinder may surmise that a job description was deliberately designed to screen out persons with disabilities and avoid the duties imposed by the ADA.


Because the goal of the ADA is to ensure full participation in society by the disabled, it is not enough for employers simply to hire or promote qualified, disabled individuals. The regulations further require that all facilities used by employees, including non-work areas, be made accessible to the disabled. Generally, however, a preexisting work site or non-work area need not be retrofitted until a specific individual requests an accommodation.\textsuperscript{17}

The regulations also provide that discrimination with respect to the application process is unlawful. Employers must make reasonable accommodations for the administration of employment tests and other selection criteria.\textsuperscript{18} Therefore, any facility that is used routinely by

\textsuperscript{16} 29 C.F.R. § 1630.13.
\textsuperscript{17} 42 U.S.C. § 12182-83.
\textsuperscript{18} 29 C.F.R. § 1630.11.
applicants, such as a restroom, a cafeteria or the office where interviews occur, should be accessible to the disabled.

§ 1.04. EEOC Enforcement of the ADA.

The Equal Employment Opportunity Commission’s (EEOC) enforcement strategies for the ADA are directed in large measure to employers’ duty to provide reasonable accommodation to employees with disabilities.

[1] — What Is a “Reasonable Accommodation”?

The term “reasonable accommodation” means the following:

a) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

b) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

c) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Reasonable accommodation may include but is not limited to:

a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

b) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.19

19 29 C.F.R. § 1630.2(o).
To determine an appropriate reasonable accommodation, it may be necessary for the employer to initiate an “informal, interactive process” with the qualified individual with a disability in need of the accommodation. In other words, talk to the individual and ask what accommodation is needed. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Note the use of the phrase “informal, interactive process” in the last paragraph. It is strongly recommended that employers not make attempts at reasonable accommodation unilaterally, i.e., without the employee’s participation. For one thing, such an approach may be perceived as paternalistic or demeaning. Additionally, a person who has lived with a disability may be able to suggest an accommodation that is much simpler or less expensive than someone who is not used to managing the limitations resulting from a particular disability. Employers should also be aware that (a) an employee may not be asked to finance the cost of a reasonable accommodation, and (b) in the case of alternative accommodations, the employer does not have to adopt the reasonable accommodation most desired by an employee, but may “select the accommodation that best serves the needs of the employee and the employer.” Thus, an “employer is free to choose among effective accommodations, and may choose one that is less expensive or easier to provide.”


If a disabled employee can perform the essential functions of the job, an employer may be required to reallocate the marginal functions of the job. Further, an employer may be required to modify when or how an essential function is performed. For the most part, it is not considered reasonable for an employer to insist on an employee’s performing an essential function in a certain manner if the employee can accomplish the task in an alternative fashion. For example, if a storeroom clerk is expected to deliver 24 reams of paper to offices on several floors, an employer could not require that the employee deliver two boxes of 12 reams of paper, if the employee could make an adequate number of deliveries by opening the boxes and stacking the reams of paper in smaller portions.

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20 Technical Assistance Manual (TAM), § III-10 (on file with author).

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In many cases, an employer will be required to accommodate an employee by modifying that person’s work schedule. Schedule modifications may encompass the following:

a) frequent and longer breaks, with the time lost to be made up at the beginning or end of the work day or work week;
b) assignment to a steady shift as opposed to rotating shifts;
c) allowing the person to work at home;
d) transfer to part-time status; and
e) modified starting and ending times to accommodate special transportation needs.

Some jobs and work environments will be amenable to such arrangements without constituting an undue hardship; some will not. As is true of most questions under the ADA, such determinations must be made on a case-by-case basis.

Under previous handicap discrimination statutes (e.g., the Rehabilitation Act of 1973 and the West Virginia Human Rights Act), a disabled employee was generally entitled to reasonable accommodation only on his or her own job. The ADA has changed that; employers are now required to consider reassignment if an employee cannot be reasonably accommodated on his/her usual job.

The rules with respect to reassignment are these:

a) the duty extends only to employees, not to applicants;
b) there must be a vacancy — that is, an employer does not have to create a new position or dislodge an incumbent in order to effect a reassignment; and
c) while an employee need not be promoted to effect a reassignment, the appearance of a demotion should also be avoided if possible. The reassignment should be to a comparable position, i.e., one similar in pay, status, working conditions and the like, although there may be circumstances in which a lower-graded position is the only option. If a demotion is the only feasible alternative, the employer need not continue paying the higher salary or wage rate.

Some employers have attempted to accommodate their restricted employees by creating a class of job positions requiring little, if any, physical demands. The Technical Assistance Manual addresses such positions as follows:

The ADA does not require an employer to create a “light duty” position unless the “heavy duty” tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring. In most cases however, “light duty” positions involve a totally different job from the job that a worker performed before the injury. Creating such positions by job restructuring is not required by the ADA.21

The EEOC does say, however, that in the event a “light duty” position is already vacant and a worker qualified for that position gets injured, reassignment to the position might be a reasonable accommodation even if the position is only temporary. When a worker is placed in a “light duty” position, he or she becomes “otherwise qualified” for that position for ADA purposes, and the worker’s qualifications are determined in relation to that position, not his or her former job.22 The employer therefore may have to provide additional reasonable accommodation for the “light duty” employee.

Despite the language in the ADA indicating that there is no requirement that light-duty positions be created, the Department of Labor has held that blanket refusals by a federal contractor to reassign an injured employee to light-duty tasks violates the Rehabilitation Act of 1973.23 An employer may violate the ADA if it refuses to assign a disabled employee to an available light-duty position despite a history of accommodating other employees in this manner. Such action may be evidence that reassignment to light-duty is not an undue burden. Unionized employers subject to a collective bargaining agreement which does not contain a clause

21 Technical Assistance Manual (TAM), § 9.4.
22 Id.
authorizing the employer to make reasonable accommodations as required by the ADA have a duty to bargain with the union over the creation of “light duty” policies.


Employers are required to provide reasonable accommodation through the purchase or lease of adaptive equipment as long as (a) the equipment is needed to perform a job function as opposed to meeting a personal need (e.g., an employer need not provide glasses or hearing aids); (b) the expense associated with acquiring or modifying the equipment does not constitute an undue hardship; and (c) the equipment does not pose a health or safety threat to other employees.

The TAM identifies the following examples of assistive equipment and devices:

   a) TDDs (Telecommunication Devices for the Deaf) make it possible for people with hearing and/or speech impairments to communicate over the telephone;
   b) telephone amplifiers are useful for people with hearing impairments;
   c) special software for standard computers and other equipment can enlarge print or convert print documents to spoken words for people with vision and/or reading disabilities;
   d) tactile markings on equipment in Braille or raised print are helpful to people with visual impairments;
   e) telephone headsets and adaptive light switches can be used by people with cerebral palsy or other manual disabilities;
   f) talking calculators can be used by people with visual or reading disabilities;
   g) speakers phones may be effective for people who are amputees or have other mobility impairments.

While some adaptive equipment is fairly expensive, there are tax credits and deductions (as well as other sources of financing, such as vocational rehabilitation agencies) that can help defray these costs, especially where the employer is a small business.
If an employer finds that the cost of an accommodation would impose an undue hardship and no funding is available from another source, an applicant or employee with a disability should be offered the option of paying for the portion of the cost that constitutes an undue hardship, or of providing the accommodation.

For example — if the cost of an assistive device is $2,000, and an employer believes that it can demonstrate that spending more than $1,500 would be an undue hardship, the individual with a disability should be offered the option of paying the additional $500. Or, if it would be an undue hardship for an employer to purchase Brailleing equipment for a blind applicant, the applicant should be offered the option of providing his own equipment (if there is no other effective accommodation that would not impose an undue hardship).24


An accommodation is not reasonable, and therefore, the employer is not required to make the accommodation, if it results in undue hardship on the employer. Note, however, that even if a requested accommodation does result in undue hardship, the employer may nonetheless be obligated to make a different accommodation if there is a workable alternative that is not unduly burdensome.

Undue hardship arises when an accommodation requires “significant difficulty or expense.”25 Employers are required to make a more than minimal attempt to provide reasonable accommodation, and cannot claim significant expense or difficulty unless the proposed accommodation is unduly costly, extensive, substantial, disruptive, or fundamentally alters the nature of the operation or business.

The ADA drafters decided early on that what is reasonable for one employer may not be reasonable for another, and resisted attempts to enact finite floors or ceilings on the term “undue hardship.” The ADA truly requires a case-by-case analysis in this regard, because the key factor in determining reasonableness is the employer’s resources.

24 TAM, § III-16.
Factors to be considered include:
a) the nature and net cost of the accommodation needed;
b) the financial resources of the facility making the accommodation, the number of employees at this facility, and the effect on the resources and expenses of the facility;
c) the overall resources, size, number of employees, and type and location of facilities of the entity covered by the ADA;
d) the type of operation of the covered entity, including the structure and functions of the work force, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the larger entity; and
e) the impact of the accommodation on the operation of the facility that is making the accommodation.26

As the TAM states, “[i]n general, a larger employer would be expected to make accommodation requiring greater effort or expense than would be required of a smaller employer.”27 Thus, a business’ profits, size and configuration are likely to be the focus in determining whether an accommodation is reasonable. Moreover, even if an employer cannot itself reasonably afford a particular accommodation, that accommodation might still be required if subsidies are available from an external source, such as a vocational rehabilitation agency.

§ 1.05. Overview of the Family and Medical Leave Act.
The FMLA, which is now fully effective, covers all private employers who employ at least 50 workers for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.28 The calendar work weeks need not be consecutive.29 However, the FMLA applies to all public agencies, regardless of their tally of employees.30 Employers not originally covered by the FMLA have a continuing duty

26 29 C.F.R. § 1630.2(p).
27 See § III-12.
28 29 C.F.R. § 825.104(a).
29 29 C.F.R. § 825.105(e).
30 29 C.F.R. § 825.104(a).
to monitor their weekly employment levels to determine whether they are covered by the FMLA.\(^\text{31}\)

Once an employer is covered by the FMLA, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 work weeks in both the current and preceding calendar years.\(^\text{32}\)

\[\text{[2]} — \text{Counting Employees.}\]

To determine whether it meets the 50-employee threshold for a particular calendar week, a private employer must count any employee whose name appeared on its payroll for the week.\(^\text{33}\) Employees who appear on an employer’s payroll are considered employed each working day of the calendar week, regardless of whether they are paid for the week.\(^\text{34}\) An employee who begins work after the first working day of a calendar week, or quits before the last working day of the week, is not included in the count of employees employed in that week.\(^\text{35}\) Only employees who work in the United States or its territories and possessions are counted.\(^\text{36}\)

Part-time employees, like full-time employees, are considered to be employed each workday of a calendar week, as long as they remain on the payroll.\(^\text{37}\) An employer must include in its count any employees who are on paid or unpaid leave, including FMLA leave, leave of absence, or disciplinary suspension, provided the employer has a reasonable expectation that the employee will later return to active employment.\(^\text{38}\) Where no such expectation exists, as in the case of an employee who is permanently disabled from work and therefore not expected to return, the employee may be excluded from the count.\(^\text{39}\) Also, laid-off employees

\(^{31}\) 29 C.F.R. § 825.102(b).
\(^{32}\) 29 C.F.R. § 825.105(f).
\(^{33}\) 29 C.F.R. § 825.105(b).
\(^{34}\) Id.
\(^{35}\) 29 C.F.R. § 825.105(d).
\(^{36}\) 29 C.F.R. § 105(b).
\(^{37}\) 29 C.F.R. § 825.105(c).
\(^{38}\) Id.
\(^{39}\) Comments to 29 C.F.R. § 825.105, at 2182.
need not be counted, no matter whether their layoff is temporary, indefinite, or long-term.40

Employees shared by two or more businesses, such as workers leased from a temporary employment agency, are counted by both employers, even if they are only on the payroll of one of the employers.41 In a joint employment arrangement, the “primary” employer — that with hiring/firing authority, placement authority, and payroll and benefits responsibilities — is charged with giving required FMLA notices to employees, providing FMLA leave, and maintaining health benefits.42 The “secondary” employer is responsible for accepting the employee returning from leave in place of any replacement employee, provided that the secondary employer continues to use an employee leased from the primary employer, and that the primary employer chooses to place the employee with the secondary employer.43

[3] — Which Employees Are Covered?

Just because an employee works for a covered employer does not mean that he or she is eligible for FMLA protection. To be eligible for FMLA leave, an employee must:

a) work for a covered employer;

b) have worked for the covered employer for at least 12 months by time the leave commences;

c) have worked at least 1,250 hours during the 12-months immediately preceding the start of the leave period; and

d) be employed at a worksite where the employer employs 50 or more employees within 75 miles of the worksite (as measured by the shortest route between worksites) as of the time the employee requests FMLA leave.44

40 Id.
41 29 C.F.R. § 825.106(d).
42 29 C.F.R. § 825.106(c).
43 29 C.F.R. § 826.106(c).
44 29 C.F.R. §§ 825.110(a) & 825.111(b).
[4] — For What Purpose May an Employee Take FMLA Leave?

Employees of either sex who meet the eligibility requirements are entitled to FMLA leave in any of the following qualifying circumstances:

a) Childbirth and Care of the Newborn. An expectant mother may take FMLA leave prior to giving birth if her condition renders her unable to work. The father has an equal right to FMLA leave for the birth of a child and its subsequent care. New parents’ right to FMLA leave for childbirth and subsequent care of the newborn expires 12 months after the child’s birth. FMLA leave must therefore be concluded during the 12-month period.

b) Placement of a Child with the Employee for Adoption or Foster Care. The child must be under 18, unless he or she is incapable of self-care because of a mental or physical disability. FMLA leave may commence before the child is actually placed in the employee’s home. Although the source of an adoption has no bearing on an employee’s eligibility for FMLA leave, “state action,” in the form of either a voluntary agreement between the child’s parent or guardian and the state or by judicial determination, is required to create a qualifying foster-care relationship. An employee’s right to FMLA leave for adoption or foster care expires 12 months after the child is actually placed in the employee’s home.

c) Care for an Employee’s Spouse, Child, or Parent with a Serious Health Condition. An employer may require an employee who is requesting FMLA leave to care for an ill spouse, child, or parent, to provide reasonable documentation.

45 29 C.F.R. § 825.112(c).
46 29 C.F.R. § 825.112(b).
47 29 C.F.R. § 825.201.
48 29 C.F.R. § 825.113(c).
49 29 C.F.R. § 825.112(d).
50 29 C.F.R. § 825.112(d)-(e).
51 29 C.F.R. § 825.201.
or statements confirming the familial relationship. Although the term “parent” does not include parents-in-law, it does extend beyond legal or biological parents to include persons who provide or provided daily care and financial support to the employee. Similarly, an employee’s child includes not only biological children, but adopted children, foster children, step-children, legal wards, and other children with whom the employee is charged with responsibility for daily care and financial support. The child must either be under 18, or be incapable of self-care because of a physical or a mental disability.

d) A Serious Health Condition That Makes the Employee Unable to Perform the Functions of the Employee’s Job. If a health care provider determines that an employee is unable to work at all or is unable to perform any one of the essential functions of the employee’s position, the employee is entitled to FMLA leave. An employee who must miss work to receive medical treatment for a serious health condition also qualifies for this category of FMLA leave. An employer may supply for review by the employee’s physician a statement of the job’s essential functions as of the time when notice was given or when leave commenced, whichever is earlier.

[5] — What Is a “Serious Health Condition”? FMLA regulations define a “serious health condition” as an illness, injury, impairment, or physical or mental condition that involves either in-patient care or continuing treatment by a health care provider. To qualify for FMLA leave, the condition must involve:

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52 29 C.F.R. § 825.113(d).
53 29 C.F.R. § 825.113(c)(3).
54 29 C.F.R. § 825.113(c).
55 Id.
56 29 C.F.R. § 825.115.
57 Id.
58 Id.
59 29 C.F.R. § 825.114.
a) A period of incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical care facility;\(^{60}\)

b) Any period of incapacity (i.e. inability to work or attend school or perform other daily activities) lasting more than three consecutive calendar days, and any subsequent treatment or period of incapacity resulting from the same condition, which also involves:
   (i) Two or more visits to a health care provider or medical personnel directly supervised by a health care provider; or
   (ii) At least one visit to a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider.\(^{61}\)

c) Any period of incapacity due to pregnancy, or for prenatal care, regardless of whether the employee receives medical treatment or is absent for more than three days.\(^{62}\)

d) Any period of incapacity or treatment for such incapacity due to a “chronic” serious health condition. A “chronic” serious health condition is one which:
   i. Requires periodic visits for treatment by a health care provider or by medical personnel under a health care provider’s direct supervision;
   ii. Continues or recurs over an extended period of time; and
   iii. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).\(^{63}\)

A person with a “chronic” serious health condition need not receive treatment from a health care provider during the absence, and need not be absent for more than three days to qualify for FMLA leave.

e) A condition like Alzheimer’s, a severe stroke, or the terminal stages of a disease, which results in a period of incapacity which

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\(^{60}\) 29 C.F.R. § 825.114(a)(1).
\(^{61}\) 29 C.F.R. § 825.114(a)(2)(i).
\(^{63}\) 29 C.F.R. § 825.114(a)(2)(iii).
is permanent or long-term and for which treatment may be ineffective. The employee or family member need not be receiving active treatment by a health care provider, but must be under a health care provider’s continuing supervision. 64

f) An absence for multiple treatments for a condition like cancer, severe arthritis, or kidney disease which requires multiple treatments, and which would likely cause an absence of more than three days for such treatments, or for restorative surgery after an accident or other injury. 65

Conditions requiring cosmetic treatments, like acne or plastic surgery are not “serious health conditions” under the FMLA, unless complications develop or inpatient hospital care is required. 66 Likewise, unless complications are present, the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontic problems, and periodontal disease do not constitute “serious health conditions” and do not qualify for FMLA leave. 67 Routine physical, dental, or optical examinations are not covered by the FMLA; however, examinations conducted to determine whether a serious health condition exists are covered. 68

Restorative dental or plastic surgery after an injury or removal of cancerous growths are “serious health conditions,” provided that all of the other enumerated conditions are met. Likewise, mental illness resulting from stress or allergies may be serious health conditions, but only if all other conditions are met. 69

If the other listed conditions are met, absences for substance abuse treatment by a health care provider or on referral by a health care provider are covered by the FMLA. Likewise covered are an employee’s absences to tend to a spouse, child, or parent who is receiving treatment for substance abuse. But absences because of the employee’s use of the substance, rather

64 29 C.F.R. § 825.114(a)(2)(iv).
65 29 C.F.R. § 825.114(a)(2)(v).
66 29 C.F.R. § 825.114(c).
67 Id.
68 29 C.F.R. § 825.114(b).
69 Id.
than for treatment, do not qualify for FMLA leave. Moreover, treatment for substance abuse does not prevent an employer from taking employment action against an employee for violation of an established, non-discriminatory policy against substance abuse which has been communicated to all employees. If an employer has such an established policy which provides that under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy whether or not the employee is presently taking FMLA leave.

  
  [a] — Duration.

An eligible employee is entitled to a total of 12 work weeks of leave during any 12-month period. An employer may choose from one of four methods of calculating the “12-month period”:

a) the calendar year;

b) any fixed 12-month “leave year,” such as a fiscal year, a year required by state law, or a year starting on the employee’s anniversary date;

c) the 12-month period measured forward from the date when any employee’s first FMLA leave begins; or

d) a “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

Although an employer may choose any of these four options it prefers, it must apply the chosen option consistently and uniformly to all employees, and must give employees at least 60 days’ notice of a change in options. Any change of options must be implemented in a way which preserves employees’ 12 weeks of leave under whichever option affords the most beneficial outcome to the employee.
Under the first two methods, an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could therefore take 12 weeks of FMLA leave at the end of the first year, and then a consecutive 12 weeks of leave at the beginning of the second year. Under the third method, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the fourth method, the “rolling” 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to four weeks of leave; on June 1, the employee would be entitled to an additional four weeks, etc. 77

The fact that a holiday occurs during a work week in which an employee is on FMLA leave is of no moment. The week counts as a full work week of FMLA leave. However, if an employer’s business closes temporarily, and employees are not expected to report for one or more weeks, i.e., for a Christmas holiday, this extended period is excluded from an employee’s FMLA leave. 78

Spouses employed by the same employer are limited in the total amount of FMLA leave that they can take for (a) the birth of a child; (b) the placement of a son or daughter for adoption; or (c) the care of a parent with a serious health condition. 79 The spouses may take a total of 12 weeks combined in any 12-month period. 80 But if only one spouse is eligible for FMLA leave, that spouse is entitled to the full 12-week leave

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77 29 C.F.R. § 825.200(c).
78 29 C.F.R. § 825.200(f).
80 Id.
Moreover, if a husband and wife use only a portion of their combined leave entitlement for one of the above reasons, the remainder is available to either spouse. For example, if a husband and wife each use six weeks of leave for the placement of a child for adoption, each may use his or her remaining six weeks of FMLA leave to care for a sick child or spouse or to deal with his or her own illness.

[b] — Compensation.

Generally, FMLA leave is unpaid. But under certain circumstances, the FMLA permits an eligible employee to choose, or an employer to require substitution of, paid leave for FMLA leave. If paid leave is not substituted for FMLA leave, the employee retains all paid leave he or she has accrued. Alternatively, if paid leave is substituted for FMLA leave, the leave does not reduce the employee’s entitlement to 12 weeks of FMLA leave.

1. Vacation or Personal Leave. Where an employee has earned or accrued paid vacation or personal leave, that paid leave may be substituted for all or any part of FMLA leave.

2. Family Leave. Where an employee seeks leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child, or parent with a serious health condition, and the employer has a family leave policy which covers the circumstance for which the employee seeks leave, any earned or accrued family leave may be substituted for FMLA leave.

3. Medical/Sick Leave. Where an employee seeks leave to care for a family member or for the employee’s own serious health condition, and the employer has a medical or sick leave policy which would allow paid leave in the circumstance for which the employee seeks leave, the employer may substitute accrued medical or sick leave for FMLA leave.

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81 Id.
82 Id.
83 29 C.F.R. § 825.207(a).
84 29 C.F.R. § 825.207(f).
85 29 C.F.R. § 825.207(g).
86 29 C.F.R. § 825.207(c).
87 29 C.F.R. § 825.207(b).
88 29 C.F.R. § 825.207(c).
4. "Comp time". Compensatory leave is not a form of accrued paid leave which an employer may require an employee to substitute for unpaid FMLA leave. If the employee requests to use compensatory time for an FMLA reason, the leave does not reduce the employee’s 12-week entitlement to FMLA leave.89

5. Disability Leave. An employer may designate certain leave periods taken pursuant to the employer’s temporary disability benefit plan as FMLA leave, and count the leave as running concurrently for purposes of both the benefit plan and the 12-week FMLA leave period. For instance, the regulations explain that “[d]isability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA.”90 If the qualifications for paid leave under the employer’s temporary disability plan are more stringent than those of the FMLA, the employee must meet the employer’s more stringent requirements to obtain paid leave under the plan. If an employee fails or chooses not to satisfy the disability plan’s requirements, he or she may take the FMLA leave as unpaid, or may substitute accrued paid leave, if any.

6. Workers’ Compensation Leave. Either an employee or employer may choose to have the employee’s 12-week FMLA leave period run concurrently with a workers’ compensation absence when the injury is one that meets the criteria for a serious health condition. If the employee loses workers’ compensation benefits — i.e., by refusing reinstatement to a “light duty” job — he or she is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted.91

[c] —Benefits.

During any FMLA leave, an employer must maintain the employee’s coverage under any group health plan on the same conditions as coverage would have been provided had the employee been continuously employed during the entire leave period.92 Any share of group health premiums which had been paid by the employee prior to FMLA leave must continue

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89 29 C.F.R. § 825.207(i).
90 29 C.F.R. § 825.207(d)(1).
91 29 C.F.R. § 825.207(d)(2).
92 29 C.F.R. § 825.209(a).
to be paid by the employee during the FMLA leave period.\textsuperscript{93} If an employer provides new or altered benefits during an employee’s FMLA leave, the employee on leave is subject to the new or changed benefits, and entitled to an opportunity to change benefits or plans, just as if he or she had not been on leave.\textsuperscript{94} An employee may choose not to retain group health plan coverage during FMLA leave; however, upon his or her return from leave, the employee must be reinstated on the same terms as prior to taking the leave, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc.\textsuperscript{95} An employee’s entitlement to benefits other than group health benefits during a period of FMLA leave (\textit{e.g.}, holiday pay) is to be determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave.\textsuperscript{96}

The regulations enumerate three situations in which an employer’s duty to maintain the benefits of an employee on FMLA leave ceases:

a) when the employment relationship would have terminated if the employee had not taken FMLA leave;

b) when the employee informs the employer that he or she does not intend to return to work following FMLA leave; and

c) when the employee exhausts his or her FMLA leave entitlement and does not return to work.\textsuperscript{97}

\textbf{[d] — Duty to Designate Type of Leave.}

An employer must, on the basis of information provided by the employee, or the employee’s spokesperson if the employee is incapacitated, designate all leave as FMLA-qualifying leave or not, and notify the employee of the designation. If an employer lacks sufficient information about an employee’s reason for taking paid leave, it should inquire of the employee or the employee’s spokesperson to ascertain whether the paid leave is a FMLA-qualifying leave.

\textsuperscript{93} 29 C.F.R. § 825.210(a).

\textsuperscript{94} 29 C.F.R. § 825.209(c) & (d).

\textsuperscript{95} 29 C.F.R. §825.209(e).

\textsuperscript{96} 29 C.F.R. § 825.209(h).

\textsuperscript{97} 29 C.F.R. § 825.209(f).
The prudent employer should pursue the following line of conversation when an employee calls to report his absence:

Are you requesting time off under the FMLA? The FMLA covers absences for the birth of a child; adoption of a child or placement of a foster child; care of a spouse, parent, or child with a serious health condition; or recovery from an employee’s own serious health condition. A serious health condition may include an illness, injury, or mental condition requiring inpatient care or an absence of more than three consecutive days plus treatment; pregnancy-related conditions; chronic conditions requiring treatments; permanent long term conditions requiring supervision; or a non-chronic condition requiring multiple treatments.

If the employee says “no,” the employer need not designate the leave as FMLA leave unless it possesses information reflecting that the leave qualifies for FMLA coverage. If the employee answers “yes,” the employer may send the medical certification forms to obtain confirmation that the leave qualifies.

The employer must indicate whether it will allow the substitution of paid leave and whether paid leave qualifies as FMLA leave either at the time the employee requests or gives notice of the leave, or, if the employer initially lacks sufficient information to make a determination, as soon as the employer later determines that the leave qualifies as FMLA leave.\footnote{29 C.F.R. § 825.208.}

Generally, the employer must designate the leave as FMLA leave prior to its commencement or prior to granting an extension of the leave.

Once an employer ascertains that an employee is taking paid leave for an FMLA-qualifying reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.\footnote{29 C.F.R. § 825.208(b)(1).}

The employer must notify an employee of its designation of leave as FMLA leave either orally or in writing. If the employer chooses oral notification, it must confirm that notification in writing no later than the
following payday, or if the following payday falls less than one week from the date of the oral notification, the subsequent payday.  

If an employer has sufficient information to designate the paid leave as FMLA-qualifying leave at the time the employee gives notice, but fails to do so, it may not later retroactively designate the leave as FMLA leave. The employer may only designate the leave as FMLA leave prospectively from the date it notified the employee of such designation. Only the leave following notice to the employee of the designation counts against the employee’s 12-week entitlement.

However, if an employee supplements paid leave with a period of unpaid leave, the employer may retroactively designate a portion of the paid leave period as FMLA leave to the extent that it was due to a qualifying circumstance under the FMLA.

The employer may not, however, retroactively designate leave as FMLA leave after that leave period has concluded, with two exceptions:

a) If an employee was absent for a FMLA reason and the employer did not learn the reason for the absence until the employee returned from leave, the employer may, upon the employee’s return to work, designate the leave retroactively, within two business days of the employee’s return to work. The employer also must give the employee appropriate notice of the designation. Likewise, if an employee took leave for an FMLA qualifying reason but the leave was not designated as FMLA, the employee, if he or she desires the leave to count against his or her FMLA leave entitlement, must notify the employer within two business days of returning to work that the leave was for an FMLA-qualifying reason. If the employee does not provide such timely notification, he or she may not later assert FMLA protection for the absence.

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100 29 C.F.R. § 825.208(b)(2).
101 29 C.F.R. § 825.208(c).
102 29 C.F.R. § 825.208(a)(2).
103 29 C.F.R. § 825.208(a)(2).
104 Id.
b) If the employer knows the reason for the leave, but has been unable to confirm that the leave qualifies under the FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee at the commencement of leave, or as soon as the reason for the leave becomes known. When the employer receives the confirming information, the preliminary designation becomes final. If the information fails to confirm that the leave is FMLA-qualifying, the employer must withdraw the designation and provide written notice to the employee.\textsuperscript{105}

On returning from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment, even if the employee has been replaced or his or her position has been restructured to accommodate his or her absence.\textsuperscript{106} The employee is entitled to be assigned to the same or approximate worksite and the same or equivalent work schedule, including the same average amount of overtime.\textsuperscript{107}

If an employer awards its employees bonuses for matters which do not require performance by the employees but rather contemplate the absence of occurrences, like perfect attendance and safety bonuses, and the employee qualified for these benefits before taking FMLA leave, the leave period will not disqualify the employee for these bonuses.\textsuperscript{108} On the other hand, employees must meet requirements for bonuses which do require performance, like production bonuses. If an employee who takes FMLA leave nonetheless meets his or her employer’s requirements for award of a production bonus, he or she is entitled to receive the bonus.\textsuperscript{109}

\textsuperscript{105} 29 C.F.R. § 825.208(e)(2).
\textsuperscript{106} 29 C.F.R. § 825.214(a).
\textsuperscript{107} 29 C.F.R. §§ 825.215(c)(1) & 825.215(e).
\textsuperscript{108} 29 C.F.R. § 825.215(c)(2).
\textsuperscript{109} Id.
An employee is not entitled to accrue any additional benefits or seniority during unpaid FMLA leave. But the employee is entitled to retain benefits he or she had accrued when leave commenced (e.g., paid vacation, sick, or personal leave, to the extent not substituted for FMLA leave).\textsuperscript{110} A period of FMLA leave cannot be treated as a break in service for purposes of vesting and eligibility to participate in pension and other retirement plans.\textsuperscript{111} But the employer need not count unpaid FMLA leave periods as credited service for purposes of benefits accrual, vesting, and eligibility to participate.\textsuperscript{112}

An employer must give an employee returning to work from FMLA leave a reasonable opportunity to requalify for a job position (e.g., take a course, renew a license).\textsuperscript{113} If, upon his or her return, an employee is unable to perform an essential function of the position because of a physical or a mental condition, including the continuation of a serious health condition, the employee has no right to be restored to another position under the FMLA. However, the employer’s obligations to the employee may be governed by the ADA.\textsuperscript{114}

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.\textsuperscript{115} If an employer can show that a returning employee would not otherwise have been employed at the time of reinstatement, the employee need not be restored.\textsuperscript{116} The regulations list examples of situations in which an employer need not restore an employee:

a) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer’s obligations under FMLA cease at the time the employee is laid off. The employer must be prepared to prove that the

\textsuperscript{110} 29 C.F.R. § 825.215(d)(2).
\textsuperscript{111} 29 C.F.R. § 825.215(d)(4).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} 29 C.F.R. § 825.215(b)
\textsuperscript{115} 29 C.F.R. § 825.214(b).
\textsuperscript{116} Id.
employee would have been laid off during the FMLA period, and that the lay-off is not connected to the employee’s taking FMLA leave.\textsuperscript{117}

b) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. But if a position on a particular shift has been filled by a replacement employee, the returning employee is entitled to return to that shift upon restoration.\textsuperscript{118}

c) If an employee was hired for a specific term or only to perform work on a discreet project, the employer has no obligation to restore the employee if the employment term or project has concluded. On the other hand, if an employee was hired to perform work on a contract, and after that contract period, the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer.\textsuperscript{119}

d) An employer may deny restoration to “key employees”—salaried employees who are among the highest-paid 10 percent of all employees employed by the employer within 75 miles of the employee’s worksite—if such denial is necessary to prevent “substantial and grievous economic injury” to the employer’s operations.\textsuperscript{120} If an employer believes that it may deny restoration to a “key employee,” it must supply the employee with written notice of that fact and its consequences at the time the employee notifies the employer of the need for leave or at commencement of the leave, whichever is earlier.\textsuperscript{121}

e) An employer may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work.\textsuperscript{122}

\textsuperscript{117} 29 C.F.R. § 825.216(a)(1).
\textsuperscript{118} 29 C.F.R. § 825.216(a)(2).
\textsuperscript{119} 29 C.F.R. §§ 825.107 & 825.216(b).
\textsuperscript{120} 29 C.F.R. § 825.216(c).
\textsuperscript{121} 29 C.F.R. § 825.219(a).
\textsuperscript{122} 29 C.F.R. §§ 825.216(c) & 825.310.
f) An employee who has been on concurrent workers’ compensation and FMLA leave, and is unable to return to work after his or her 12 weeks of FMLA leave have lapsed, loses FMLA protection, and must rely on the workers’ compensation statute or the ADA for relief or protection.¹²³

[8]—Employers’ Notice Requirements.

[a] — Posting Requirements.

Every employer covered by the FMLA must post conspicuously on its premises a notice explaining the FMLA’s provisions and providing information concerning the procedures for filing complaints of violations of the Act.¹²⁴ Copies of the required notice are available from local offices of the Wage and Hour Division of the Department of Labor. Violations of the posting requirement are punishable by a $100 fine for each offense; moreover, an employer who violates the posting requirement cannot act against an employee who fails to furnish the employer with advance notice of a need to take FMLA leave.¹²⁵ The employer is responsible for providing the required notice in a language its employees can understand.¹²⁶

[b] — Additional Notice Requirements.

Employers who provide employees with employee handbooks or other such publications which describe employee benefits or leave rights must include in the publications information concerning the FMLA entitlements and employee obligations under the FMLA.¹²⁷ If no such written policies, manuals, or handbooks exist, the employer must provide written guidance to employees concerning the employee’s rights and obligations under the FMLA.¹²⁸

Whenever an employee notifies an employer for the first time in any six-month period of intent to take FMLA leave, the employer must supply

¹²³ 29 C.F.R. § 825.216(d).
¹²⁴ 29 C.F.R. § 825.300(a).
¹²⁵ Id.
¹²⁶ 29 C.F.R. § 825.300(c).
¹²⁷ 29 C.F.R. § 825.301(a)(1).
¹²⁸ 29 C.F.R. § 825.301(a)(2).
that employee with a written notice detailing the specific expectations and obligations of the employee and explaining any consequence of a failure to meet these obligations. If the employee takes FMLA leave on subsequent occasions during the six-month period, the employer must notify the employee in writing of any changes in the information provided by the former notice. Publications which meet the Act’s requirements are available from the Wage and Hour Division of the United States Department of Labor.

The employer must notify the employee in writing that it will require a medical certification or a fitness-for-duty report each time the employee notifies the employer of the need for leave. Oral notice will suffice if the initial notice in the six-month period and the employer handbook (or other written material) clearly provide that a medical certificate or fitness-for-duty report will be required. In addition to these notice requirements, employers also have a duty under the Act to responsively answer employees’ questions concerning rights and responsibilities under the FMLA.


If the need for FMLA leave is foreseeable, the FMLA generally requires an employee to provide his or her employer with 30 days’ notice prior to the commencement of leave. Foreseeable leave includes leave for an expected birth or the placement of a child for adoption or foster care, or for a planned medical treatment for an employee’s or a family member’s serious health condition. If a 30-day notice is impracticable, the employee must give notice as soon as possible and practicable, given the employee’s individual circumstances — usually within one or two business days of when the employee recognizes the need for leave.

An employee must give the employer at least oral notice that he or she needs FMLA leave, and how long he or she anticipates the leave will last. But the employee need not mention the FMLA expressly. Rather, the

129 29 C.F.R. § 825.301(b)(1) & 825.301(c).
130 29 C.F.R. § 825.301(c)(2).
131 29 C.F.R. § 825.301(d).
132 29 C.F.R. § 825.302.
133 Id.
134 Id.
employer is charged with asking the purpose for the leave, and determining whether it qualifies under the FMLA. Although an employer may require an employee to comply with its in-house procedural requirements for taking leave, an employee’s failure to do so will not permit the employer to deny the employee FMLA leave.

When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave in a manner which will not unduly disrupt the employer’s operations. If an employee gives the employer notice, but fails to consult with the employer in an effort to schedule leave without unduly disrupting the employer’s operations, the regulations allow an employer to initiate such discussions and require the employee to make such arrangements, subject to the health care provider’s approval.

If an employee requests intermittent leave or leave on a reduced leave schedule due to “medical necessity,” the employee must advise the employer, upon request, of the reasons why the intermittent or reduced leave schedule is necessary and of the schedule for treatment. The regulations provide that the employee and employer must attempt to work out a schedule which meets both of their needs subject to the health care provider’s approval.

If an employee does not provide the employer with 30 days of advance notice for foreseeable FMLA leave and offers no reasonable excuse for the delay, the employer may delay the leave and is not required to grant the leave until at least 30 days after the date the employee provided notice, so long as:

a) it is clear that the employee had actual notice of the FMLA notice requirements (this requirement is satisfied if the employer has posted the required notice at the workplace); and

b) both the need for leave and the approximate leave date were clearly foreseeable to the employee 30 days in advance of the leave.

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135 29 C.F.R. § 825.302(c).
136 29 C.F.R. § 825.302(d).
137 29 C.F.R. § 825.302(e).
138 29 C.F.R. § 825.302(f).
139 29 C.F.R. § 825.304(b)-(c).
[10] — Medical Certification.

If an employee requests FMLA leave for his or her own serious illness, or to care for a spouse, child, or parent with a serious health condition, the employer may require that the employee provide medical certification from a health care provider.\textsuperscript{140} If the employee never produces the requested medical certification, the leave will not qualify as FMLA leave.\textsuperscript{141} The employer must notify the employee in writing that medical certification is required.\textsuperscript{142} After the written notice, subsequent requests for the certification may be oral.\textsuperscript{143}

The employee should provide the requested medical certification before leave commences and within the time frame set by the employer, provided that the employer’s time frame allows the employee at least 15 days to comply. Strictly complying with this time frame is not required where the employee has made a good faith effort to comply, but has failed to do so.\textsuperscript{144}

An employer who wishes to request medical certification generally should do so when the employee requests FMLA leave, or within two business days afterward. If the leave is unforeseeable, the employer should request certification within two business days after the leave commences. If an employer has reason to question the appropriateness of leave or its duration later, it may request certification at the later time.\textsuperscript{145}

An employer who requests medical certification must advise the employee of the consequences of failing to provide the certification. If the employee’s certification is incomplete, the employer must give him or her a reasonable opportunity to cure its deficiencies.\textsuperscript{146}

The Department of Labor has developed a form for use by employers who request medical certification. Although the form is optional, employers may not require more information than is covered on the basic form.\textsuperscript{147}

\textsuperscript{140} 29 C.F.R. § 825.305(a).
\textsuperscript{141} 29 C.F.R. § 825.311(b).
\textsuperscript{142} 29 C.F.R. § 825.305(a).
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} 29 C.F.R. § 825.305(b).
\textsuperscript{145} 29 C.F.R. § 825.305(c).
\textsuperscript{146} 29 C.F.R. § 825.305(d).
\textsuperscript{147} 29 C.F.R. § 825.306(a)-(b).
An employer may not request additional information from a health care provider who has already completed and signed a medical certification submitted to the employer by an employee, except for recertifications specifically allowed. The regulations do allow subsequent contact with the employee’s health care provider to clarify and authenticate the medical certification. Such contact may only be made by a health care provider representing the employer, and only after the employee has given permission for such contact to occur.148

If the employer questions the validity of a certification, it may, at its own expense, require the employee to obtain a second opinion.149 In such a circumstance, the employee is provisionally entitled to benefits until the second examination can take place. But if the second examination does not substantiate the employee’s FMLA claims, the leave will not be considered FMLA leave.150 Although the employer may designate a physician within the employee’s normal commuting distance to furnish the second opinion, it may not select a health care provider it employs on a regular basis.151 Moreover, the employer cannot regularly contract with or use the health care provider it selects to provide the second opinion, except in rural areas where access to health care is extremely limited.152

If the first and second medical opinions differ, an employer may require an employee to obtain a third opinion, again at the employer’s expense. The third certification is final and binding.153 Both the employer and employee must jointly approve the third health care provider to examine the employee.154 The parties must negotiate in good faith to choose the provider for the third examination.155 If the employee requests, the employer must provide him or her with copies of the second and third medical opinions within two business days of the request.156

148 29 C.F.R. § 825.307(a).
149 29 C.F.R. § 825.307(a)(2).
150 Id.
151 Id.
152 29 C.F.R. § 825.307(b)
153 29 C.F.R. § 825.307(c).
154 Id.
155 Id.
156 29 C.F.R. § 825.307(d).
Although ordinarily an employer may not request additional information from a health care provider who has already completed and signed a medical certification, under certain circumstances an employer may require subsequent recertifications. For example, for pregnancy, chronic, permanent, or long-term conditions, an employer may request recertification every 30 days. The employer may demand recertification more often than every 30 days if the circumstances described by the original certification have changed significantly (e.g., the duration of the illness, the nature of the illness, or complications), or if the employer receives information which casts doubt upon the employee’s stated reason for absence.\footnote{29 C.F.R. § 825.308(a)(1)-(2).}

If the minimum stated duration for incapacity furnished by the health care provider is more than 30 days, or if an employee is taking intermittent or reduced hours FMLA leave, the employer may not request recertification until the stated minimum duration has passed, unless the employee requests an extension of leave, the circumstances described by the certification have significantly changed, or the employer receives information casting doubt on the validity of the certification.\footnote{29 C.F.R. § 825.308(b)(1)-(2).}

In all other circumstances, the employer may request recertification at any reasonable interval, but not more than every 30 days, unless the employee requests an extension of leave, the circumstances described by the previous certification have changed significantly, or the employer receives information which casts doubt on the validity of the certification.\footnote{29 C.F.R. § 825.308(c).}


An employer can require an employee on FMLA leave to report at reasonable intervals on his or her status and intent to return to work.\footnote{29 C.F.R. § 825.309(a).} As long as the employee expresses a desire to return to work, the employer’s FMLA obligations continue. This is true even if the employee
expresses doubt about his or her ability to return to work. Only if the
employee expresses an unequivocal intent not to return do an employer’s
FMLA obligations cease. If an employee discovers that he or she needs
more or less FMLA leave than originally anticipated, the employer may
require that the employee notify the employer within two business days
of the changed circumstances necessitating the altered leave period, where
foreseeable.

The FMLA requires employers to “make, keep and preserve” records
that pertain to their obligations under the Act. The Act restricts the
authority of the Department of Labor to require an employer to submit
books or records more than once during any 12-month period, unless the
Department has reasonable cause to believe a FMLA violation has
occurred, or it is investigating a complaint.

Records need not be kept in any particular order, but must be preserved
for at least three years. Covered employers who have eligible employees
must maintain records containing the following information:

a) basic payroll and identifying employee data, including
   name, address, and occupation; rate or basis of pay and terms
   of compensation; daily and weekly hours worked per pay
   period; additions to or deductions from wages; and total
   compensation paid. (Covered employers with no eligible
   employees must maintain this information, as well);

b) dates FMLA leave is taken by FMLA-eligible
   employees;

c) if FMLA leave is taken in increments of less than one
   full day, the hours of the leave;

d) copies of employee notices of leave furnished to the
   employer under the FMLA, if in writing, and copies of all

161 29 C.F.R. § 825.309(b).
162 29 C.F.R. § 825.309(c).
163 29 C.F.R. § 825.309(c).
164 Id.
165 29 C.F.R. § 825.500(b).
general and specific written notices given to employees as required by the FMLA;
e) any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;
f) premium payments of employee benefits; and
g) records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement.\textsuperscript{166}

An employer must maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees’ family members, created for purposes of the FMLA. These records must be maintained as confidential medical records in separate files or records from the usual personnel files.\textsuperscript{167} The records should remain confidential (and if subject to the ADA, must be kept in a manner conforming to ADA confidentiality requirements) except that:

a) supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
b) first aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
c) government officials investigating compliance with the FMLA or any other pertinent law shall be provided relevant information upon request.\textsuperscript{168}

\section*{\textsection 1.06. Overview of Workers’ Compensation Law.}
State Workers’ Compensation Acts were created by statute and vary among the different states. All Acts provide for wage loss compensation and payment of medical benefits to employees sustaining on-the-job injuries.\textsuperscript{166}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{166} 29 C.F.R. \textsection 825.500(c).
\item \textsuperscript{167} 29 C.F.R. \textsection 825.500(g).
\item \textsuperscript{168} 29 C.F.R. \textsection 825.500(g)(1)-(3).
\end{itemize}
\end{footnotesize}
injuries. Employers either purchase workers’ compensation through private insurers or pay directly into a State fund. Although each state law has its own peculiar nuances, workers’ compensation claims in most states require consideration of the following issues:

a) who is an employer as defined in the Act?
b) who is an employee under the Act?
c) the three elements requiring an injury, sustained in the course of and resulting from employment must be satisfied in order for a compensable injury to exist.
d) what are the employer’s defenses to a claim?

Using the West Virginia Workers’ Compensation Act as a model, the four considerations are now addressed in greater detail.


West Virginia Workers’ Compensation law requires employers to provide compensation coverage for their employees. The law defines an “employer,” in part as, “all persons, firms, associations and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.”

Therefore, with a few exceptions, most every business is an employer within the meaning of the Act. The Act provides that those employers failing to subscribe or defaulting on the payment of premiums are civilly liable to their employees for injuries sustained while at work. Employers cannot avail themselves of the common law defenses of the fellow servant rule, assumption of risk and contributory or comparative negligence.

In addition, only those individuals defined as “employees” may receive benefits for work-related injuries. “Employees” are defined as “all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged . . . .” The test applied to determine whether an individual is an employee or an independent contractor in West Virginia is the “right to control” test. If the employer possesses the right to control the details or manner of the work performed, the worker is determined an “employee.”

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Importantly, it is the possession of the right to control, not the exercise of such right, which governs the determination.\textsuperscript{171}

Factors which may be considered in determining the “right to control” include the following:

a) the right to determine the manner or details of completion of the job;

b) the right to supervise the job;

c) the parties’ characterization of the relationship;

d) the existence and terms of a written contract;

e) the right of the hiring party to terminate employment without contractual liability;

f) the method of payment (\textit{i.e.}, payment by the hour as opposed to by the job is strong evidence of employment status;

g) the ownership of equipment;

h) the right to dictate hours worked;

i) the deduction from payment for social security, taxes or hospitalization;

j) the performance of services exclusively and continuously for the hiring party, rather than working for several different parties;

k) the right of the worker to hire employees to do his or her work; and

l) the possession of business licenses and compliance with other business practices by the worker, including bookkeeping and advertising.

\section*{[2] — The Elements of an Injury.}

Apart from a determination of the employment status, a prospective claimant must also prove a personal injury sustained in the course of and resulting from employment. The law requires that both elements of “in the course” and “resulting from” be satisfied. The first phrase, “in the course of” relates to the time, place and circumstances of the injury. In other words, “in the course of” relates primarily to when and where the

injury occurred. The second phrase of the requirement, “resulting from,” relates to the origin of the injury.

In his treatise on workers’ compensation, Professor Arthur Larson sets forth five interpretations that courts have historically used in determining whether an injury “arises” (i.e., results) from employment. The earliest test which Larson cites the courts as employing was known as the “peculiar risk” doctrine. Under this doctrine, the claimant had to show that the source of the harm was, in its nature, “peculiar” to the occupation. The next test, known as the “increased risk” doctrine, only requires that the employment increase the risk of injury quantitatively and not qualitatively as was required by the peculiar risk doctrine. Under the “actual risk” doctrine, the determination is not whether there was a peculiar or increased risk, but only whether the employment subjected the claimant to the actual risk that injured him/her.

The “positional risk” doctrine holds that an injury arises out of employment if it would not have occurred “but for” the fact that the conditions and obligations of the employment place the claimant in a position where he or she was injured. According to Professor Larson, the positional risk doctrine supports compensation in cases where the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by a “neutral force.” Larson defines neutral force as being neither personal to the claimant nor distinctly associated with employment. Finally, Larson notes that courts have, from time to time, utilized a proximate cause test which requires that the harms be foreseeable as a hazard of this type of employment and that the chain of causation not be broken by an independent intervening cause. There have also been several doctrines developed to analyze whether injuries were sustained “in the course of” employment. For example, the “Going and Coming Rule” holds that injuries sustained going to and coming from work are

173 *Id.*
174 *Id.* at Section 6.4.
175 *Id.* at Section 6.5.
176 *Id.* at Section 6.6.
not incurred in the course of employment. An exception exists in situations where the claimant is in the “zone of employment” when the injury is sustained. These situations arise where the injury is sustained on the employer’s premises or within a reasonable proximity. Examples of zone-of-employment injuries include falling in a company-owned parking lot or being injured in the cafeteria. Another exception to the so-called going and coming rule is when an employee, in furtherance of the employer’s business, is sent on a special errand. If that employee is injured while on the special errand, the injury is normally compensable. For example, if a runner was injured while going to a post office or while going to get lunch for others, the runner’s injuries are probably compensable. Furthermore, employees who are injured while traveling on a highway as part of their job requirement will usually satisfy the causal requirement. The most common example of that situation is the traveling salesperson.

Situations have also arisen where an employee is injured during a dual purpose trip (i.e., a trip made for both personal and business reasons). In that situation, compensability rests upon whether the trip was made primarily for business or for personal reasons. In a similar vein, a deviation from a business trip for personal reasons takes the employee out of the course of employment until he returns to the business route. An exception exists in situations where the deviation is so small as to be insubstantial.

The “Personal Comfort Doctrine” has also developed as a branch of the “in the course of” requirement. Under this doctrine, acts by employees while at their place of employment that minister to their personal comfort are generally considered to be “in the course of employment.” Therefore, injuries incurred on the premises during lunch, while getting coffee or while going to the bathroom have been held to have arisen in the course of employment. 177

Lastly, recreational or social activities may be within the course of employment when

a) they occur on the premises during a lunch or during the recreation period as a regular incident of employment, or

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b) the employer by expressly or impliedly requiring participation brings the conduct within the “course of employment.”


The most logical way to defend a claim is to prove that one of the above-mentioned elements has not occurred. Thus, where it can be shown that an individual was actually an independent contractor and not an employee, coverage will be denied. Furthermore, when a claimant cannot prove that he or she sustained a personal injury in the course of and resulting from employment, workers’ compensation coverage will also be denied.

The West Virginia Code also sets forth specific instances where benefits will not be paid. Therefore, where it can be proven that the injury or death was self-inflicted or that the individual was intoxicated, the employees or their dependents are not entitled to receive workers’ compensation. An illustration is when an employee is injured at work and later commits suicide as a result of the work related injury. Even though the claimant did commit suicide, such action would be compensable provided (a) that the claimant sustained an injury arising in the course of and resulting from employment, (b) that the employee had not developed a mental disorder of such a degree as to impair his or her normal and rational judgment, and (c) that without the mental disorder, the employee would not have committed suicide.

Employers should be cognizant of West Virginia Code § 23-4-20 which provides the Workers’ Compensation Division with authority to conduct postmortem examinations. These examinations are conducted after notice to the employer and the claimant’s estate and can be used to determine the basis for the claimant’s death.

Some states have explicitly determined either through judicial opinions or legislative enactments that certain types of alleged injuries are not to be considered compensable under state workers’ compensation law. In

West Virginia, claims alleging a mental condition brought on by mental stress have been determined to be non-compensable.181


Most workers’ compensation statutes provide that wage loss benefits are terminated when an employee reaches maximum medical improvement and/or returns to work. This is the case under the West Virginia Workers’ Compensation Act. When an injured employee is incapable of returning to his or her former position, an employer may provide an alternative or light duty program.

Providing an alternative or light duty program is normally done after the employer’s physician obtains information concerning the claimant’s physical capabilities and then structures a program to fit those capabilities. When the claimant refuses to return to a modified or light duty program, the employer may petition the Workers’ Compensation Division for a suspension of temporary total disability benefits.

Although the workers’ compensation benefits may be terminated, the employee may still be afforded the protections of the FMLA.

There is no obligation under the ADA to create light duty jobs; however, if light duty jobs have been created, a light duty job may need to have further accommodations made in order to assist a disabled employee in handling the job’s essential functions.

§ 1.07. Interaction and Conflicts Among the ADA, the FMLA, and Workers’ Compensation Laws.

Because of the short period of time the ADA and the FMLA have been in existence, the issues arising from the interaction among the ADA, the FMLA, and State Workers’ Compensation laws are only beginning to surface. Future workplace problems will no doubt serve to bring forth further complexities.

Nonetheless, employers cannot assume that, just because the employment is complying with one of these Acts, the employer is complying with them all. Indeed, the Acts overlap on many issues and, because they are designed for different purposes, they are not always

consistent. Accordingly, the prudent employer will analyze each set of pertinent circumstances under each statutory scheme.


The ADA, the FMLA, and the workers’ compensation laws differ in how they define certain common terms, impacting which of the statutes applies in a particular circumstance.

a) An employer must have at least fifty employees within a 75-mile radius before a concern about the interplay between the FMLA and ADA exists.

b) Individuals with a “disability” under the ADA may not have a “serious health condition” under the FMLA. Likewise, what constitutes a “serious health condition” under the FMLA may not be a “disability” under the ADA. Therefore, both Acts may not always apply to an employee.

c) An employee who sustains a disability within the meaning of the workers’ compensation law may not necessarily have a disability under the ADA or a “serious health condition” under the FMLA.


Notable divergences between the substantive protections provided by the ADA and the FMLA include the following:

a) Unlike the FMLA, the ADA allows employers to show an “undue hardship” exception in order to avoid the job protection provisions.

b) There is an exception under the FMLA for “key employees” whose loss will cause substantial and grievous economic injury; however, “key employees” are not to be treated any differently than regular employees under the ADA.

c) There is no requirement under the FMLA that an employee’s leave will assist the employee to eventually return to work. On the other hand, the ADA permits leave as an accommodation only if the leave may help an employee eventually perform the essential functions of the job.

d) Current substance abuse is considered a “serious health condition” under the FMLA; but, under the ADA, current substance abuse is not a disability.

e) The ADA permits an employer to ask questions only if they are “job related” and “consistent with business necessity.” The FMLA permits
an employer to require certain medical documentation when an employee requests FMLA leave.

f) Short-term, part-time employees who are not covered under the FMLA may still be entitled to leave as an accommodation under the ADA.

g) Unlike the FMLA, the ADA has no 12-week cap on leave granted as an accommodation.

h) Under the ADA, a person who is given leave as an accommodation to a disability must be reinstated to the same position; however, under the FMLA, the person who takes leave is only entitled to reinstatement to an equivalent position.


There is greater protection afforded by the FMLA to employees who refuse alternative work assignments. Similarly, there is greater protection provided to employees under the FMLA when the employer has a no-fault absenteeism (disciplinary) policy.

Several states, including West Virginia, have statutory prohibitions against terminating employees who are on workers’ compensation leave. In some of these states, employers can defend termination of an employee by adopting a “no fault” leave policy that results in termination after a threshold number of absences has been reached, without regard to the reason. Employers cannot use the “no fault” policy against an employee on FMLA leave.


The ADA can reduce workers’ compensation costs by facilitating an early return to work of an injured employee by making reasonable accommodations. Some employers utilize light duty programs only for employees injured on the job. A question exists as to whether this approach is permitted under the ADA. For example, may an employer use a light duty program for employees injured on the job, but deny such a program to other disabled employees?

The ADA prohibits discrimination against persons with pre-existing conditions or disabilities if they can perform the essential functions of the job with or without reasonable accommodation.
Aggravation of the pre-existing condition while at work may cause problems for the employer responsible for workers’ compensation coverage, but increasing the cost of workers’ compensation. However, application of a state’s workers’ compensation second injury fund limits the amount an employer is ultimately responsible for paying to an employee disabled from a combination of a pre-existing condition and a work related injury.


Employers may be bound by statements regarding an employee’s disability status. Employers should be cognizant that taking a position for purposes of the ADA may result in ramifications under the applicable workers’ compensation statutes.

Employees may lose the protection of the ADA by applying for workers’ compensation disability benefits. Once again, statements made by employees in one context may be used against them in the other.

§ 1.08. Conclusion.

Because there is scant caselaw on the FMLA, and no cases yet interpreting the interplay between the FMLA, the ADA, and the state workers’ compensation statutes, this chapter merely scratches the surface of the problems employers will face when attempting to comply with these conflicting statutes. Although each Act is probably a good idea, it is a shame that Congress did not give more consideration to how the statutes would fit together. Employers should be aware that they must provide a separate ADA, FMLA, and workers’ compensation analysis to each employment situation implicating these statutes. Otherwise, employers may pay a price for assuming that, if an action complies with one of these Acts, it will comply with the others.