Employee Leave and Return to Work Issues:  
The Interplay of the ADA, FMLA, and Workers’ Compensation

Debra H. Dawahare  
Charles D. Webb, Jr.  
Wyatt, Tarrant & Combs  
Lexington, Kentucky

Synopsis

§ 1.01. Purpose .......................................................................................... 2
[1] — Workers’ Compensation Laws ...................................................... 2
[2] — The ADA .................................................................................. 3
[3] — The FMLA .................................................................................. 4

§ 1.02. Scope .............................................................................................. 4
[1] — Workers’ Compensation Laws ...................................................... 4
[2] — The ADA .................................................................................. 5
[3] — The FMLA .................................................................................. 5

§ 1.03. Definitions of “Disability” ............................................................... 6
[1] — Workers’ Compensation Laws ...................................................... 6
[2] — The ADA .................................................................................. 6
[3] — The FMLA .................................................................................. 11

§ 1.04. Application and Hypothetical ....................................................... 13

§ 1.05. Conclusion ................................................................................... 34

Most employers affected by the Americans with Disabilities Act (ADA), the Family Medical Leave Act (FMLA), and workers’ compensation laws have learned how difficult it is to track employees’ requests and reasons for leave and to make decisions that are both practical and legally correct when employees request leave, return from leave, or fail to return after leave. All three of these statutory schemes protect employees and place obligations upon employers, but because they differ in their respective scopes and aims, their application sometimes causes confusion. An employer scrupulously obeying one of these statutes may inadvertently violate another. When analyzing employees leave, employers should be conscious of all of the statutes that may apply to particular situations.
§ 1.01. Purpose.


Workers’ compensation laws, to which employers became accustomed long before Congress passed the ADA and the FMLA, are intended to diminish economic losses to employees injured on the job by requiring employers to replace a percentage of lost wages, to pay medical treatment arising from work-related injuries, and to compensate employees for any permanent loss of earning power if the work-related injury totally or partially disables the employee.1 Under workers’ compensation laws, an employer generally has the right to communicate directly with an injured employee’s health care provider, since the employer is liable for the medical bills.2 An employee claiming a work-related injury must “execute a waiver and consent of any physician-patient, psychiatrist-patient, or chiropractic-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation.”3 Health care providers must provide the employee or the employer or workers’ compensation carrier with any information or written material reasonably related to the injury or disease for which the employee is claiming compensation, upon written request.4 The employer may provide medical services through a managed health care plan, but the injured employee may nevertheless continue to treat with the physician who provided emergency treatment. Even if the employer chooses a managed health care plan, no copayments or deductibles can be required, there can be no restrictions on the employee’s choice of emergency health care providers, and the employee is entitled to a second opinion at the employer’s expense if the managed health care physician recommends surgery.5

---

1 K.R.S. 342.020(1); K.R.S. 342.040; K.R.S. 342.730; K.R.S. 342.001(11); Hillman v. American Mutual Liability Insurance Co., 631 S.W.2d 848, 859 (Ky. 1982). Throughout this chapter, references to workers’ compensation laws will be based upon Kentucky law, which is similar to that of most other states with respect to the issues cited. Obviously, other states’ laws may vary on certain issues.
2 K.R.S. 342.020(8).
3 Id.
4 K.R.S. 342.020(1).
5 K.R.S. 342.020(2) and (4).
An employer may require an employee to return to light duty or alternative work rather than continuing to receive temporary total disability benefits. Workers’ compensation laws do not generally preclude employers from simply terminating injured workers because they are not available to work, although employees may challenge such termination as illegal retaliation. Exclusivity provisions in workers’ compensation laws may be a complete defense to tort or employment law claims from employees who accept benefits under workers’ compensation system. Workers’ compensation laws are classic labor-protection statutes designed to eliminate ambiguity from issues confronting workers hurt on the job and their employers. In general, these laws prescribe rigid procedures which both parties must honor.

[2] — The ADA.

Contrary to the purpose of workers’ compensation laws, the ADA’s purpose is to place and keep disabled workers in the workforce while eliminating discrimination against them. The ADA, like Title VII, the Pregnancy Discrimination Act, or the Age Discrimination in Employment Act, is a broadly written civil rights statute designed to eliminate discrimination against the disabled. A worker with a temporary total disability or a permanent partial disability under the workers’ compensation system may be, but is not necessarily, a “qualified individual with a disability” under the ADA’s definitions. Not everyone with an occupational injury has a “disability” under the ADA, nor does a person who has filed a workers’ compensation claim necessarily have a “record of disability” triggering ADA protection.

---

6 K.R.S. 342.197.
8 42 U.S.C. § 12101(b).
10 Id.
[3] —The FMLA.
In contrast to the ADA, the FMLA is a labor statute intended “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity”, regardless of whether disability is an issue. Recognizing that “the primary responsibility for family caretaking often falls on women” and affects their working lives, the FMLA seeks “to promote the goal of equal employment opportunity for women and men.” The FMLA requires employers to provide up to 12 weeks of annual leave to eligible employees who need to attend to their own serious health conditions or those of family members, or who require leave because of the birth or adoption of a son or daughter, or the placement of a child with the employee for foster care. Under the FMLA’s implementing regulations, employers must “provide leave under whichever statutory provision provides the greater rights to employees.” This means that if state family leave laws or the ADA would afford longer leave, the employer must provide it.

§ 1.02. Scope.
With limited exceptions, state workers’ compensation laws govern all employment relationships.

15 29 C.F.R. § 825.702.
16 For example, K.R.S. 342.630 makes any person other than one engaged solely in agriculture who has one or more employees mandatorily subject to workers’ compensation law. Domestic servants in private homes with less than two such servants, workers repairing or maintaining private homes, or persons working for aid or subsistence only are not covered. K.R.S. 342.650.
[2] — The ADA.

The ADA applies to employers with 15 or more employees for each working day for 20 or more weeks per year.¹⁷ Neither the ADA nor workers’ compensation laws require that the employee work for the employer for any minimum length of time before qualifying for those statutes’ protections. In fact, the ADA protects job applicants as well as employees.

[3] — The FMLA.

The FMLA is somewhat narrower in scope than either workers’ compensation laws or the ADA. Only employees with 12 months and 1250 hours of service with the employer in the year preceding the date the leave begins are eligible to be considered for FMLA leave.¹⁸ Employees need not meet these requirements on the day leave is requested, but rather, on the day leave begins.¹⁹ Only employers with 50 or more employees within a 75-mile radius must provide leave for employees otherwise qualified for FMLA leave.²⁰ If an employer does not have the requisite number of employees or if the employee in question has not satisfied the time and hours of service requirements, the employer is free to disregard the requirements of the FMLA, even if leave has been granted mistakenly.²¹

¹⁷ 42 U.S.C. § 12111(5); 29 C.F.R. 1630.2(e). Many states have adopted laws against disability discrimination which provide lower thresholds for coverage or which otherwise grant employees additional rights. Employers should be mindful of those thresholds in all states in which they have employees.

¹⁸ 29 C.F.R. § 825.104(a).

¹⁹ 29 C.F.R. § 825.110(d). As with disability discrimination statutes, some states have passed employee leave statutes that are more generous than the FMLA. Employers should be mindful of the existence and requirements of those state statutes.

²⁰ 29 C.F.R. § 825.110(a).

²¹ Dimond v. J.C. Penney Co., 1997 U.S. App. LEXIS 14856 (10th Cir. 1997)(ineligible employee allowed FMLA leave by mistake; court held that since employee did not qualify for FMLA leave, the employer was under no duty to reinstate the employee following the leave granted); accord Haywood v. Schwan’s Sales Enter., Inc., 1997 U.S. App. LEXIS 7719 (6th Cir. 1997)(employee properly denied FMLA leave by small employer, despite FMLA policy in employment handbook); see also Coleman v. Prudential Relocation, 975 F.Supp. 234 (W.D.N.Y. 1997)(decision to terminate employee’s position...
§ 1.03. **Definitions of “Disability”**.

**[1] — Workers’ Compensation Law.**

Kentucky’s workers’ compensation statute defines “disability” as a “decrease of wage-earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee’s general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement.” The statute also defines “temporary total disability” (“the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment”); “permanent partial disability” (“the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work”); and “permanent total disability” (“the condition of an employee who, due to an injury has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury”). “Permanent total disability” is irrebuttably presumed in cases of injuries that result in permanent, total blindness in both eyes, loss of both feet at or above the ankle, loss of one foot at or above the ankle and loss of one hand at or above the wrist, permanent, complete paralysis of both arms, both legs, or one arm and one leg, incurable “insanity or imbecility” or total hearing loss.

**[2] — The ADA.**

Under the ADA, total disability is never presumed, since the statute’s aim is to bring disabled workers into the workplace and facilitate their productivity there rather than to provide them with financial support while they are away from the workplace. A blind or deaf worker or an amputee, could not be retaliatory if made prior to FMLA eligibility, despite the fact that actual termination occurred subsequent to eligibility and exercise of rights.

22 K.R.S. 342.0011(11).
26 Id.
while “disabled” for ADA purposes, would be presumed employable until the employer demonstrated that the person could not be reasonably accommodated without undue hardship.

The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such impairment.\textsuperscript{27} The ADA’s regulations define a “physical or mental impairment” as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting any of the following systems: neurological, musculo-skeletal, special sense organs, respiratory and speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine or any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and special learning disabilities.”\textsuperscript{28}

“Disabilities” under the ADA do not include voyeurism, pedophilia, or other disorders in sexual identity or behavior, compulsive gambling, kleptomania or pyromania, substance use disorders resulting from current use of illegal drugs, homosexuality or bisexuality.\textsuperscript{29} Also excluded as disabilities are psychological, environmental, or economic characteristics such as eye color, hair color, left-handedness, height, weight (except morbid obesity), predisposition to disease or illness, personality traits such as poor judgment or a quick temper, pregnancy, poverty, lack of education, a prison record, or advanced age (although conditions characteristic of advanced age, such as deafness, osteoporosis, or arthritis may be covered).\textsuperscript{30}

Temporary non-chronic conditions of short duration are usually not disabilities if they do not have any long term or permanent impact. With the onset of complications, however, such conditions may ripen into disabilities. For example, broken bones, sprained joints, concussions, appendicitis or the flu are not disabilities under the ADA, if damaged bones or joints result in a permanent limp, or if a concussion results in brain damage, the impairment may become a disability under the ADA.\textsuperscript{31}

\textsuperscript{27} 42 U.S.C. § 12102(2).
\textsuperscript{28} 29 C.F.R. 1630.2(h).
\textsuperscript{29} 42 U.S.C. § 12211.
\textsuperscript{30} 29 C.F.R. Part 1630, Appendix, § 1630.2(h).
\textsuperscript{31} 29 C.F.R. Part 1630, Appendix § 1630(j); Roush v. Weastec, Inc., 96 F.3d 840 (6th Cir. 1996).
An “impairment” for ADA purposes may exist even if the condition is completely controlled by medication (for example, seizure disorder or manic depressive disorder), or corrected in other ways (for example, by the use of hearing aids, glasses, or prosthetic devices). However, the impairment is not a protected disability unless it interferes with a major life activity. The impairment may be a “serious health condition” for FMLA purposes even if it is not an ADA-protected disability.

The ADA’s regulations define “major life activities” as activities that “an average person can perform with little or no difficulty,” listing as examples walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, working, sitting, standing, lifting, or reaching. To determine whether a person is “substantially limited” in such activities, an employer must consider the nature and severity of the person’s impairment, how long it is expected to last, and its permanent or long-term impact or expected impact.

The ADA does not provide a list of impairments or conditions that constitute disabilities. Rather, it requires employers to assess the existence or extent of disability based on the effect of an impairment on someone’s life. Employers must necessarily make this analysis on a case-by-case basis, without the benefit of any clear guidance. As recent judicial decisions illustrate, reasonable minds may disagree in their conclusions.

For example, in EEOC v. Joslyn Manufacturing Co., the court allowed the claimant to proceed with his ADA claim that an employer refused to hire him because of his history carpal tunnel syndrome and therefore violated the ADA’s “perceived disability” provision. In Smith v. Kitterman, Inc. the court refused to enter summary judgment for the employer on the issue on whether a plaintiff with carpal tunnel syndrome was substantially limited in the major life activity of working. The United

32 Id.
33 Id.
34 29 C.F.R. Part 1630, Appendix § 1630(i).
35 29 C.F.R. § 16302(j)(2).
States Court of Appeals for the Sixth Circuit, however, in *McKay v. Toyota Motor Manufacturing U.S.A., Inc.* upheld the district court’s summary judgment in the defendant’s favor, holding among other things that carpal tunnel syndrome did not “substantial[ly] limit” the plaintiff’s major life activity of working. The court noted that the plaintiff’s impairment did not significantly restrict her ability to perform manufacturing jobs generally, the broad class of jobs at issue in the case. Rather, the impairment disqualified are only from certain assembly-line jobs requiring repetitive motion and heavy lifting. The court therefore reasoned that McKay’s “limited impairment would not significantly restrict her ability to perform a broad range of jobs in various classes.”

Employees seeking ADA protection, like the employee in *McKay*, often claim that they are substantially limited in the major life activity of working because they cannot perform a particular task or work in a specific environment. To be substantially limited in working, a disabled employee must be significantly restricted in performing a class of jobs or a broad range of jobs in various classes, as compared to the average employee. To determine whether a person is substantially limited in working, an employer must consider the type of job from which a person has been disqualified because of the impairment, the geographical area in which the person may reasonably expect to find a job, the number and types of jobs using similar training, knowledge, skill, or abilities from which the person is disqualified within the geographical area, and the number and types of other jobs in the area that no not involved similar training, knowledge, skill, or abilities.

Courts also disagree as to what constitutes a “major life activity.” In *Krauel v. Iowa Methodist Medical Center*, the plaintiff claimed that her employer’s refusal to pay for her infertility treatments under its written medical benefits plan violated the ADA. The court, granting summary...
judgment for the employer, concluded that reproduction is not a major life activity. However, in *Abbott v. Bragdon*,43 a public accommodation case, the court found against a dentist who refused to treat an HIV-positive patient in his office. The dentist had agreed to provide the needed treatment in a hospital so long as the plaintiff would pay the extra expense. The court granted summary judgment for the plaintiff, holding that reproduction is a major life activity, in which plaintiff was substantially limited because of her HIV infection. In *Lowe v. Angelos Italian Foods*,44 the appellate court overturned the trial court’s summary judgment in favor of the employer, who had terminated the plaintiff after she requested light duty based on a lifting restriction. The employer reasoned that plaintiff could no longer do the essential functions of her job with this restriction, and terminated her. At the time, neither the plaintiff nor the employer knew of her undiagnosed multiples sclerosis. The appellate court concluded that the trial court had improperly granted summary judgment because lifting is a major life activity. On the other hand, in *Williams v. Channel Master Satellite Systems*,45 the appellate court affirmed summary judgment for the defendant, concluding that as a matter of law a 25 pound lifting restriction is not a substantial limitation on any major life activity.

In addition to preventing discrimination against disabled persons themselves, the ADA also prohibits associational discrimination, forbidding employers from discriminating against applicants or workers because of their known relationship or association with a disabled person.46 For example, if an employee discloses that his wife has cancer, the employer violates the ADA by acting against the employee based upon assumptions that the spouse will run up the company’s insurance costs, or that the applicant will miss too much work taking care of the spouse, or that the disabled spouse might cause awkwardness at company functions or project a bad image for the company.47 Likewise, the employer may not discriminate against an employee who works with AIDS patients, out

43 Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).
44 Lowe v. Angelos Italian Foods, 87 F.3d 1170 (10th Cir. 1996).
45 Williams v. Channel Master Satellite Systems 87 F.3d 1170 (10th Cir. 1996).
47 See 29 C.F.R. Part 1630, Appendix § 1630.8.
of moral disapproval or fear that the employee may contract the disease.\textsuperscript{48} The ADA does not require an employer to accommodate either the employee or the employee’s disabled companion or associate in this situation, since the duty to reasonably accommodate applies only to applicants or employees who themselves are disabled.\textsuperscript{49}

\[3\] —The FMLA.

The FMLA, on the other hand, requires employers to provide leave for qualified employees who need to take care of spouses, parents, or offspring who have “a serious health condition,” as well as to tend to the employee’s own serious health condition or for the birth or adoption of a son or daughter or the placement of a child with the employee for foster care.\textsuperscript{50} Note, however, that should the family member for whom the employee is caring die, the FMLA does not permit additional leave for bereavement or for handling that family member’s affairs.\textsuperscript{51} The FMLA’s regulations define a “serious health condition” as “illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a health care provider.”\textsuperscript{52} This illness, injury, impairment, or physical or mental condition must result in an incapacity\textsuperscript{53} that requires an overnight stay in a hospital or similar facility or requires absence from work, school, or regular activities for more than three consecutive calendar days. The FMLA also covers periods of incapacity requiring two or more visits to a health care provider or at least one visit to a health care provider resulting in a regimen of supervised continuing treatment to resolve the condition.\textsuperscript{54}

An employee who is not “disabled” under workers’ compensation laws’ definitions or under the ADA may nevertheless have a “serious health

\begin{itemize}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} 29 C.F.R. § 825.112(a).
\item \textsuperscript{52} 29 C.F.R. § 825.114(a)(1).
\item \textsuperscript{53} “Incapacity” in this context means inability to work, go to school or perform other daily activities because of the serious health condition itself, or treatment for it, or recovery from it. 29 C.F.R. § 825.114(a)(2)(i).
\item \textsuperscript{54} 29 C.F.R. § 825.114(a),(b).
\end{itemize}
condition” under the FMLA, triggering the employer’s obligation to grant leave. The FMLA covers some conditions the ADA specifically excludes. For example, the ADA does not cover uncomplicated pregnancy as a “disability.”

The FMLA expressly includes pregnancy as a “serious health condition,” and covers prenatal care and any period of incapacity due to pregnancy.

The FMLA also recognizes chronic health conditions such as asthma, diabetes, or epilepsy as “serious health conditions,” just as the ADA recognizes them as disabilities. The FMLA also covers periods of long-term incapacity due to conditions that cannot be cured but only supervised, such as Alzheimer’s or other terminal illnesses, and conditions requiring multiple, debilitating treatments, such as restorative surgery, chemotherapy, or dialysis.

Like the ADA, the FMLA excludes from protection uncomplicated colds, flu, earaches, upset stomach, minor ulcers, headaches other than migraine, and ordinary dental problems. Of course, if a cold, flu, or other condition incapacitates the employee for more than three consecutive days and the employee receives continuing treatment, it may qualify as a serious health condition for FMLA purposes. Conditions for which cosmetic

---

55 The ADA’s regulations plainly say that uncomplicated pregnancy with its usual accompanying limitations is not a disability, but rather a temporary non-chronic condition of limited duration. 29 C.F.R. Part 1630, App. 1630.2(h). The court followed this guidance in Jessie v. Carter Healthcare Center, Inc., 926 F. Supp. 613 (E.D. Ky. 1996). However, in Garrett v. Chicago School Bd. of Trustees, 6 AD Cases (BNA) 147 (N.D. Ill. 1996), the court concluded a pregnant student with morning sickness had sufficiently alleged an ADA protected disability to pursue her claim.

56 29 C.F.R. § 825.114(a)(2)(ii); 825.114(d).

57 29 C.F.R. § 825.114(a)(2)(iii).

58 29 C.F.R. § 825.114(a)(2)(iv), (v).

59 Opinion FMLA-87, Wage and Hour Manual (BNA), 99:3092 (Dec. 12, 1996); see also Thorson v. Gemini, Inc., 123 F.3d 1190 (8th Cir. 1997)(ulcer rose to level of serious health condition due to treatment required and employee’s incapacitation); Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997)(question of fact whether multitude of minor health problems rose to level of serious health condition in the aggregate). For purposes of this rule, “treatment” must include a physical examination; telephone conferences with a doctor will not suffice. Opinion FMLA-87, Wage and Hour Manual (BNA), 99:3092 (Dec. 12, 1996).
treatments are administered do not qualify for FMLA coverage.\textsuperscript{60} The ADA protects cosmetic disfigurements, however.\textsuperscript{61}

Both the ADA and the FMLA provide limited protection for substance abusers. While the FMLA does not require employers to provide leave to employees whose absences are caused by their substance abuse, or to refrain from disciplining substance-abusing employees who cannot perform their essential job functions because of their substance abuse, the statute does require employers to provide FMLA leave for a health care provider’s treatment of the substance abuse, or the health care provider’s referral for treatment.\textsuperscript{62}

The ADA offers no protection to persons currently engaging in illegal drug use. The statute does protect persons who have successfully completed supervised drug rehabilitation programs or have otherwise been rehabilitated, and who are no longer illegally using drugs or who are participating in a supervised rehabilitation program and not using illegal drugs, or who are mistakenly regarded as using illegal drugs but not doing so.\textsuperscript{63} Alcoholism is a covered impairment under the ADA; however, the employer may force an alcoholic to comply with the same workplace standards as everybody else, and discipline him for unsatisfactory performance even if the unsatisfactory performance is related to the alcoholism.\textsuperscript{64}

§ 1.04. Application and Hypothetical.

Whenever an employee is hurt on the job, needs leave, or is repeatedly absent from work, or seeks to return to work with restrictions, an employer must analyze each situation on a case by case basis, with all applicable laws in mind.

Consider the following situation, in light of all three of the above-described statutory schemes:

\textsuperscript{60} 29 C.F.R. § 825.114(c).
\textsuperscript{61} 29 C.F.R. § 1630.2(h).
\textsuperscript{62} 29 C.F.R. § 825.112(g); 29 C.F.R. § 825.114(d).
\textsuperscript{63} 29 C.F.R. § 1630.3.
\textsuperscript{64} 42 U.S.C. § 12114(c).
While installing bolts in a mine roof, John Miner catches his left hand between the bolt plate and the roof, fracturing the thumb and forefinger of his left hand, and severely lacerating the skin and muscle between the broken bones. After performing emergency orthopedic surgery requiring Miner to stay overnight in the hospital, his doctor sends him home with pain medication, a schedule of follow-up visits, and orders that he not perform his roof bolting job for eight weeks while his hand heals.

How should Miner’s employer respond?

Assuming that there is no question that Miner’s injury occurred on the employer’s premises and arose out of his employment, the employer must pay Miner’s medical bills and owes him workers’ compensation benefits while he is unable to work.65 Miner’s employer should report the injury to the Department of Workers’ Claims within one week,66 establish contact with Miner’s doctor, and promptly assume responsibility for Miner’s hospital and other medical bills related to the injury. Since Miner’s expected period of disability is more than two weeks, he is entitled to income benefits from the date of the accident forward.67

The employer should next analyze Miner’s eligibility for FMLA leave, since he is expected to be away from work for several weeks. If Miner worked the required 12 months and 1250 hours before the accident, he is eligible for FMLA leave, and if the employer has 50 or more employees within a 75-mile radius, the employer must grant the leave, provided Miner has “a serious medical condition.” Since Miner’s injury required an overnight stay in the hospital and an ongoing regimen of medical care, it qualifies as “a serious health condition,” entitling Miner to leave so long as the condition incapacitates him. During Miner’s leave, the FMLA requires Miner’s employer to maintain his health care benefits on the same terms as when he was employed, and to provide him with up to 12 weeks of continuous or intermittent leave to attend to his serious medical

---

65 Kentucky’s workers’ compensation statute is presumed to apply to this hypothetical.
66 K.R.S. § 342.038.
67 K.R.S. 342.040.
condition. The employer must return Miner to the same or substantially similar employment at the conclusion of his leave. During Miner’s absence however, the employer may substitute someone else in Miner’s position, but must restore Miner to substantially similar duties upon his return, if his health care provider certifies he can perform them.

Within two days of learning of Miner’s accident, the employer should send him written notification that the employer is placing him on FMLA leave. If Miner knows his rights under the FMLA, he may have already requested FMLA leave, which is his option but not his obligation. Regardless of whether an absent employee requests FMLA leave, the employer should designate it immediately upon learning that the employee is or will be away from work for any reason that qualifies for FMLA leave. The statute’s regulations provide that if the employer fails to designate leave appropriately, the 12-week period will not begin to run, leaving the employee with his full entitlement remaining and the employer no option but to grant 12 weeks’ FMLA leave in addition to such leave as the employee may already have taken before the employer designated the leave as FMLA-qualifying.

---

68 29 C.F.R. § 825.209.
69 29 C.F.R. § 825.214(a).
72 29 C.F.R. §825.208(a); § 825.208(b)(1).
73 29 C.F.R. § 825.302(c).
74 There is a small split of authority as to whether the employee or employer should bear the burden of designating leave as FMLA leave. Compare Cummings v. Circus Mississippi, Inc., 1997 U.S. Dist. LEXIS 13517 (N.D. Miss. 1997)(employee must request benefits under the FMLA explicitly in order to assert a claim for violation of the Act) with Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995)(employees not required to expressly invoke FMLA in requesting leave) and Peters v. Community Action Committee, Inc., 977 F. Supp. 1428 (M.D. Ala. 1997)(notice of qualifying condition is constructive notice that leave is being taken under the FMLA); see also Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997)(employer’s responsibility to inquire if employee notice indicates potential FMLA situation). The weight of authority is decidedly in favor of requiring the employer to make the appropriate designation.
75 29 C.F.R. 825.700(a).
When notifying Miner that his leave is FMLA-qualifying, the employer should also send him FMLA certification forms for his doctor to fill out, describing his serious health condition and his prognosis.\textsuperscript{77} The employer should simultaneously advise Miner of the anticipated consequences should he fail to provide proper certification.\textsuperscript{78} If Miner provides inadequate certification, the employer must provide him with notice of the inadequacy and an opportunity to cure it.\textsuperscript{79}

Before sending certification requirements to an employee on FMLA-qualifying leave, the employer should review any existing leave policies which have not been specifically amended to conform to the FMLA. If such policies exist, and if they have less stringent certification requirements than the FMLA, the less stringent standards apply if the employee elects to substitute paid sick, vacation, or other leave for unpaid FMLA leave.\textsuperscript{80}

FMLA leave is unpaid leave, and in this case, Miner will be receiving workers’ compensation benefits. Because Miner qualifies for workers’ compensation benefits, the employer need not determine how much paid leave he had accrued as of the date of the accident so as to apply it against his total leave. Had Miner commenced FMLA-qualifying leave for a reason other than a work-related injury, the employer should have included in its notification to him that his accrued paid leave would be applied against his FMLA leave.\textsuperscript{81} This would be to both Miner’s and the employer’s advantage. It provides Miner with income during his leave. It also forces him to exhaust his paid leave concurrently with his FMLA leave, rather than reserving it for later use or tacking it on to his FMLA leave. In Miner’s case, since paid leave cannot be substituted, it must be reserved for his use when he returns to work, or to extend his leave once his FMLA leave

\begin{itemize}
\item \textsuperscript{77} 29 C.F.R. § 825.305.
\item \textsuperscript{78} 29 C.F.R. § 825.305(d).
\item \textsuperscript{79} \textit{Id}.
\item \textsuperscript{80} 29 C.F.R. § 825.305(e).
\item \textsuperscript{81} Workers’ compensation leave is not “unpaid leave.” Therefore, neither employees nor employers can substitute paid leave for it. 29 C.F.R. § 825.207(d)(2). In other circumstances, the employee may request or the employer may require that paid leave be substituted for unpaid FMLA leave. 29 C.F.R. § 825.305(e).
\end{itemize}
is exhausted. Neither seniority nor additional leave accrue while an employee is on FMLA leave.

After Miner has been off work for eight weeks, his doctor pronounces that while he is not at maximum medical improvement, his hand is well enough healed that he can return to light duty, if it is available, with the restrictions that he not lift with the left hand and that he avoid repetitive movement or use of vibrating equipment. He continues to take prescribed medication for pain, and undergoes a regimen of physical therapy three days a week to restore strength and function to the hand.

How should the employer respond?

Miner’s employer may want to consider returning him to work within his restrictions, if possible. This will get Miner back on the job, increasing the chances that he will remain in the work force. It will also reduce the employer’s workers’ compensation payments because Miner will be earning wages again.

Under the FMLA, the employer should be mindful, however, that Miner still has “a serious health condition” because he is still undergoing supervised medical treatment. If Miner does not want to return to work while his serious medical condition persists, the employer cannot force him to return without violating the FMLA.

The employer can, at reasonable intervals, request medical recertification from Miner pertaining to his serious health condition. The employer must allow Miner at least 15 days to respond to its request for recertification. “If the employee never produces certification, the leave is not FMLA leave.” Like the original request for certification, the request for re-certification should describe the consequences of failure to provide timely, adequate information. If the employer offers Miner a

82 29 C.F.R. § 825.215(d)(2).
83 Id.
84 29 C.F.R. § 825.308.
85 29 C.F.R. § 825.311(a).
86 Id.
chance to return to work within his restrictions and Miner declines it, the employer may be justified in stopping his workers’ compensation benefits, although Miner might respond by claiming retaliation, either under the FMLA or applicable workers’ compensation law.

If the employer has no light duty available, it is not required to create light duty under the FMLA, the ADA, or workers’ compensation law. If there are no vacant jobs that Miner can perform within his restrictions, the employer is not required to create such a job, or to bump someone else in order to make such a job available to Miner. The employer has the right to make all light-duty jobs temporary.

The employer offers Miner a temporary light duty job in a clerical position after determining that he has the requisite computer skills and can perform the job within the restrictions his doctor has imposed.

What if Miner refuses to take the clerical job because the wages are not significantly higher than his workers’ compensation payments?

Miner still has “a serious health condition” and has not exhausted his 12 weeks of FMLA leave. His employer cannot force him to return to the proffered light duty job in lieu of exhausting his FMLA leave. By declining the alternative position, however, Miner may have cut off his entitlement to workers’ compensation benefits. At this point, the employer may notify him that because of his refusal to accept available work within his restrictions, his workers’ compensation benefits will stop, but that he is still entitled to four more weeks of FMLA leave, assuming he continues to document his “serious health condition properly.” The employer should further notify him that any accrued unpaid leave he has will now be applied to his remaining FMLA leave. The employer may not count any of Miner’s FMLA-qualifying leave against him under any attendance policy the employer may have in place.

87 29 C.F.R. § 825.208(d)(2).
88 29 C.F.R. § 825.207(e).
89 29 C.F.R. §825.220(c). The employer may not even use such leave to disqualify the employee from eligibility under a “perfect attendance” policy. Opinion FMLA-79, Wage and Hours Manual (BNA), 99:3082 (Feb. 23, 1996).
After four more weeks pass, the employer expects Miner to return to work. On the day his FMLA leave expires, the employer receives a letter from Miner’s doctor saying that he has developed reflex sympathetic dystrophy as a complication to his original work-related injury, that he cannot perform any work at all due to severe pain, and that his prognosis is uncertain.

How should employer respond?

Miner has exhausted his FMLA leave and is not entitled to have it extended under that statute, regardless of the reason for his continued absence from work.90 Generally, if an employee exhausts all entitlement to leave, whether under the FMLA, the employer’s policies, or a collective bargaining agreement, and gives notice that he is not returning to work, the employer has no continuing obligation to provide health care benefits.91 Under such circumstances, the employer can also seek repayment of any health insurance premiums or other benefits paid on the employee’s behalf during his leave.92 The employee sacrifices his right to return to his regular job or a substantially similar job by failing to timely return to work.

In this situation, however, Miner’s doctor has alerted the employer that Miner has a continued serious health condition. This means that the employer cannot recover the costs of benefits paid during Miner’s leave.93 The employer may, however, request medical certification of Miner’s continued serious health condition.94 Still, because Miner has failed to return to work and cannot perform the essential functions of his job, he is no longer entitled to reinstatement under the FMLA.95

Miner’s doctor has also alerted the employer to the possibility that Miner has an ADA-defined disability. The employer is now on dangerous

---

90 This is true even if Miner has multiple reasons for taking leave, all of which otherwise would qualify for FMLA designation. Opinion FMLA-88, Wage and Hour Manual (BNA), 99:3096 (Dec. 13, 1996).
91 29 C.F.R. § 825.309.
92 29 C.F.R. § 825.213.
93 29 C.F.R. § 825.213(a)(1).
94 29 C.F.R. §825.213(a)(3).
95 29 C.F.R. § 825.214(b).
ground. If the employer automatically assumes that Miner is now disabled and offers continued leave as an accommodation, Miner may later use this as “proof” that the employer “regarded him as being disabled”. If the employer does not offer additional leave as an accommodation, Miner may use this as evidence to bolster a “failure to accommodate” claim.

To avoid both results, Miner’s employer should immediately commence communication with Miner and his doctor to determine whether Miner has a condition that substantially limits a major life activity and is not temporary. Although Miner’s doctor has said that he cannot presently perform any work, the employer should strongly consider extending his leave as an accommodation under the ADA, and inquiring whether Miner can someday return to his regular job or a vacant alternative position, with or without reasonable accommodation.

Three more months pass. Miner has now been away from work for six months. In response to the employer’s inquiry about whether he expects to return to work, and if so, when, Miner refuses to offer a prognosis or a date when he expects to return to work. In correspondence relating to his treatment for reflex sympathetic dystrophy, Miner’s doctor mentions that Miner is now receiving Social Security Disability benefits.

What should the employer do now?

Absent a company policy or collective bargaining agreement requiring employees absent because of medical problems to remain on the company’s rosters for a particular length of time, the employer is now in a position to terminate Miner’s employment if it wishes. Although extended leave can be a reasonable accommodation under the ADA, employers are not required to offer indefinite leave, particularly when the employee offers no clarification as to whether the leave will ever end or when.

Courts addressing this issue have held that indefinite leave is not a reasonable accommodation under the ADA. For example, in Monette v. Electronic Data Systems Corp., a disabled customer service

representative sued his employer for terminating him after he had been on medical leave for eight months. The employee claimed that the employer should have left his position open or at most filled it temporarily. The employer persuaded the court that it needed to have a customer service representative available, that Monette had never expressed any desire to return to work but had instead applied for permanent disability benefits, and that he had done nothing to keep the employer apprised of his expectations about returning to work, but had simply appeared unannounced to reclaim his job.

The Monette court concluded that “employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available sometime in the future . . . [or to] create new positions for disabled employees in order to reasonably accommodate the disabled individual.”97 While granting summary judgment on the issue of indefinite leave, the court nevertheless remanded the case after deciding that the district court had erred in refusing to permit Monette to amend his complaint to claim retaliatory discharge because of his disability.98

In Watkins v. J & S Oil Co.,99 the court followed the Sixth Circuit’s analysis in Monette in granting summary judgment for an employer. In Watkins, the plaintiff sued for FMLA and ADA violations as well as negligent infliction of emotional distress when he fell into conflict with his employer following two heart attacks. While Watkins was on medical leave, his employer’s human resources manager notified him that the company was replacing him in his regular position, but retaining him on employment rosters and continuing his insurance benefits. The company offered him several other positions that he declined.

The court concluded that Watkins’ ADA claim failed, stating:

Reasonable accommodation does not require leaving a position open or filling it temporarily when an employer offers uncontradicted evidence of the importance of such a position

97 Id. at 1187.
98 Id. at 1189.
100 Id. at 525.
to its business, especially when the employer has no way of knowing when or even if the employee will return to work.\textsuperscript{100}

The court recognized, however, that “reasonable accommodation, in some circumstances, may include holding a position open while an employee takes medical leave so long as such leave does not pose an undue burden on the employer.”\textsuperscript{101}

While disposing of the ADA claim with summary judgment for the employer, the \textit{Watkins} court nevertheless concluded that triable issues existed as to Watkins’ FMLA claim, particularly as to whether the employer had offered Watkins his regular position or one equivalent to it when his FMLA entitlement ended. The court noted that from the record, it was unclear whether Watkins was capable of performing the essential functions of his position when his FMLA leave expired. The court noted in dictum that “if after 12 weeks of leave plaintiff was unable to return to work, defendant was thereafter under no duty to provide him with equivalent employment.”\textsuperscript{102}

In Miner’s situation, his FMLA leave has expired, and even though his absence is a result of the continuation of his serious health condition, the employer has no duty to continue holding his position open for him.\textsuperscript{103} Miner has expressed no desire to return to work, and given no projection as to when he might do so. Moreover, he is now receiving social security disability benefits.\textsuperscript{104} According to the Social Security Act, “disability” means: “[The] inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”\textsuperscript{105} The statute further provides:

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are

\textsuperscript{101} \textit{Id}. at 526.
\textsuperscript{102} \textit{Id}. at 523.
\textsuperscript{103} 29 C.F.R. § 825.214(b).
\textsuperscript{104} Social security disability benefits are governed by Title II of the Social Security Act, 42 U.S.C. § 401 \textit{et seq}.
of such severity that he is not only unable to do his previous work but cannot considering his age, education, and work experience engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives or whether a specific job vacancy exists for him or whether he would be hired if he applied for work.\textsuperscript{106}

To obtain benefits, the applicant must furnish medical and other evidence of his disability.\textsuperscript{107}

Some courts have concluded that an employee who receives disability benefits such as those provided by the Social Security Administration, workers’ compensation systems, or long term disability insurance plans is not a “qualified individual with a disability” entitled to protection under the ADA, or that such a person is judicially estopped from maintaining ADA claims while simultaneously maintaining that they are totally disabled for the purpose of receiving social security disability benefits.

In one of the first such decisions,\textit{Reigel v. Kaiser Foundation Health Plan of N.C.},\textsuperscript{108} the United States District Court for the Eastern District of North Carolina granted summary judgment to the employer of a doctor who claimed to have been fired in violation of the ADA. After injuring her shoulder, the doctor was off work for a year. During that time, she applied for social security disability benefits on the grounds that she was unable to do her usual work. The court concluded that she could not “speak out of both sides of her mouth with equal vigor and credibility before this court” and dismissed her claim.

The United States Court of Appeals for the Third Circuit was the first federal appellate court to rule on this issue in\textit{McNemar v. The Disney Store, Inc.}\textsuperscript{109} In that case, plaintiff McNemar based his ADA claim upon allegations that Disney had fired him because he had AIDS instead of for the stated reason of stealing from the cash register. At the same time,\textsuperscript{106,107,108,109}

\begin{flushright}
\textsuperscript{107}42 U.S.C. §423(d)(5)(A).
\textsuperscript{109}McNemar v. The Disney Store, Inc., 91 F.3d 610 (3rd Cir. 1996).
\end{flushright}
McNemar had claimed in his application for social security disability benefits that he was totally and permanently disabled when the company terminated him. Basing its holding upon a judicial estoppel theory, the court dismissed McNemar’s claim, saying that he could not maintain two contradictory assertions in two judicial forums at the same time.

The Equal Opportunity Commission filed an amicus curiae brief on McNemar’s behalf, arguing that a social security application should not bar an ADA claim. The EEOC’s Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a Qualified Individual With a Disability under the Americans with Disabilities Act of 1990 attacks the McNemar decision and others like it on the grounds that the ADA has a different definition of disability than does the social security system or other disability benefits providers, and that persons should not have to choose between applying for disability benefits and maintaining ADA claims.

Since the EEOC issued its guidance, some courts have issued decisions in conformity with the EEOC’s guidelines.

Even in the wake of these decisions, which allow disability claimants broader latitude for self-contradiction, courts may still take a dim view of “miracle cures”. For example, in McNeill v. Atchison Topeka & Sante Fe Railway Co., plaintiff filed a claim under the Federal Employers Liability Act after hurting his back at work. He and his doctors testified

---

110 EEOC Enforcement Guidance No. 915.002 (February 12, 1997).
111 Swanks v. Washington Metropolitan Area Transit Authority, 116 F.3d 582 (D.C. Cir. 1997)(police officer with congenital spinal abnormality was not precluded from seeking ADA relief despite receiving social security disability benefits); Whitbeck v. Vital Signs, Inc., 116 F.3d 588 (D.C. Cir. 1997)(equipment sales representative whose employer denied her an accommodation after spinal surgery forced her to use a wheelchair was not barred from prosecuting ADA claims because she had received disability benefits); Blanton v. Enco Alloys Int’l, Inc., 108 F.3d 104 (6th Cir. 1997), 123 F.3d 916 (6th Cir. 1997)(in two decisions, the court ultimately concluded that while plaintiff’s receipt of social security benefits does not automatically estop him from pursuing an ADA claim, his prior sworn statements to the Social Security Administration are material evidence as to whether he is a qualified individual with a disability).
113 45 U.S.C. § 51 et seq.
vividly about his permanent disability and complete incapacity to work. Only eight days after receiving a jury verdict for over a quarter of a million dollars, the plaintiff returned to Atchison & Topeka, claiming that he was rehabilitated and demanding reinstatement to his former position as a brakeman. In rejecting this blatant attempt at litigation extortion, the court railed:

[T]his court is astonished by the audacity of the Plaintiff in asserting that he was ‘rehabilitated’ from a ‘permanent disability’ within eight days. Indeed, absent a representation of outright Divine Intervention, which has not been proffered, the court is left with an uncomfortable inference of outright fraud . . . absent Plaintiff’s contention that he sought, invoked, and benefitted from the services of a bona fide faith healer, this court cannot even begin to imagine attributing any semblance of legitimacy to Plaintiff’s claim of rehabilitation only eight days after a $305,000 verdict was delivered. Conversely, plaintiff is further advised that if he is willing to forfeit the jury verdict and return the $305,000, this court would eagerly direct its attention to any injustice he may have suffered.\[114\]

The court goes on at some length to discuss the ADA’s lofty ideals and how the plaintiff and his counsel have perverted them.

Miner’s employer terminates his employment by means of a letter stating that the termination is based upon his continued inability to perform any work and his failure to provide requested confirmation of his condition or any prospect for when he might be able to return to work. The letter invites Miner to reapply to the company should his condition change so that he is able to work, and assures him that in that event, the company will consider him for any vacant position for which he is qualified. Miner promptly sues the employer and its Human Resources

\[114\] Id. at 990-91.
Manager, claiming he did not receive appropriate notice of his rights under the FMLA because the employer did not make appropriate postings in the workplace, and that he was a victim of discrimination under the ADA.

What are the employer’s and the Human Resources Manager’s defenses?

Both defendants should first determine whether Miner has brought his claims within the applicable statutes of limitations. The Human Resources Manager should move to dismiss the ADA claim against him, because the ADA does not allow for individual liability. Courts are split as to whether the FMLA allows for individual liability. This is contrary to the reasoning in Frizzell v. Southwest Motor Freight, Inc., in which the court concluded that just as Title VII does not permit individual liability, the FMLA does not permit individual liability either. This is doubtless the better-reasoned position. Otherwise, an individual could be liable regardless of his employer’s size, while an employer with

115 The statute of limitations for an FMLA claim is two years from the date of the last event constituting the alleged violation. In cases of willful violation, the statute of limitations is extended to three years. 29 U.S.C. § 2617(4)(c). Because the ADA is a civil rights statute, a plaintiff must preserve his rights under it the same way as he would under a Title VII claim; i.e., by filing the claim with the EEOC within 180 days of the alleged violation (300 days in deferral states) and then bringing suit in court within 90 days after the EEOC issues a right to sue letter. E.g., Whitekiller v. Campbell Soup, Inc., 925 F. Supp. 614 (W.D. Ark. 1996); Stafford v. Radford Community Hosp., Inc., 908 F. Supp. 1369 (W.D. Va. 1995).


117 In Beyer v. Elkay Mfg. Co., 1997 U.S. Dist. LEXIS 14459 (N.D. Ill. September 1997)(court held that supervisors may have individual liability under the FMLA if the supervisor has some control over the employee’s ability to take a leave of absence or to return to work).


49 or fewer employees would not be within the FMLA’s scope. However, several courts have adopted the Beyer position.119 Both the employer and the Human Resources Manager should seek to dismiss Miner’s FMLA on the grounds that there is no private right of action for failure to give notice under the FMLA.120

The defendants are in a good position to argue that after exhausting his FMLA leave, Miner was at no time “a qualified individual with a disability,” because his doctor stated that he could not perform any work and because Miner doubtless told the Social Security Administration the same thing. Even if the court determines that Miner was a qualified individual with a disability, the employer tried to accommodate him by extending his leave for a reasonable time, terminating him only after he failed to provide any prognosis or expected date of return from leave. If the defendants are unable to persuade the court to dismiss the case before substantial discovery begins, they should obtain Miner’s social security record to determine what representations he may have made to the Social Security Administration to support his application for disability benefits. Although his application for benefits, even if successful, may not automatically bar his ADA claim, his statements to the Social Security Administration are relevant evidence as to whether he was a “qualified individual with a disability” whom the company had a duty to accommodate. His workers’ compensation records, medical records, and any other applications for disability benefits should be closely examined for inconsistencies.

What if Miner had not developed complications and had asked to return to work with no restrictions after eight weeks of leave?

Miner’s employer would have a right to determine whether he could do his job, even though the employer is obligated to reinstate him. When an employee who is on FMLA-qualifying leave for his own serious medical condition asks to return to work, the employer may require the employee

121 29 C.F.R. § 825.310(a).
to provide a certificate of fitness to return to work.\textsuperscript{121} This fitness for duty certification, however, may address \textit{only} the health condition that qualified the employer for FMLA leave in the first place.\textsuperscript{122} The health care provider’s simple statement that the employee is fit to return to work is sufficient, and while the employer may request clarification, it may not delay the employee’s return to work while attempting to obtain that clarification from the health care provider.\textsuperscript{123} Generally, the employer may ask for similar certification under workers’ compensation laws.

If the employer requires all employees returning to work after leave to submit to a physical, it may require one of Miner, as well. The physical must meet the ADA’s requirements that it be job related and consistent with business necessity.\textsuperscript{124}

\textbf{Assume that after eight week’s leave Miner’s doctor vaguely says he can return to work if he wants to, so long as he can work without pain, but that he cannot currently use his left hand. Miner says that he can perform his roof bolter’s job without the use of his left hand, if the employer will assign another worker to help him with the two-handed parts of the job.}

\textbf{How should the employer respond?}

Under the FMLA and the ADA, the employer has no duty to return Miner to the roof bolter’s job work under these circumstances, assuming that some essential functions of the job require the use of two hands. His doctor has not certified that he can return to his regular job or one substantially equivalent to it. The employer is not required to find him another job, or to create one for him, but if there are vacant positions for which Miner is qualified, the employer should consider offering him reassignment as an accommodation. The employer must continue to provide leave and to hold Miner’s regular job open for four more weeks under the FMLA.

\begin{footnotesize}
\begin{footnotes}
\item[121] 29 C.F.R. § 825.310(c).
\item[122] \textit{Id}.
\item[123] 29 C.F.R. § 825.310(b); 42 U.S.C. § 12112(d)(4). \textit{See} Porter v. United States Alumoweld Co., 1125 F.3d 243 (4th Cir. 1997)(employee may be required to meet the fitness requirements of both the ADA and FMLA).
\end{footnotes}
\end{footnotesize}
The employer should analyze this situation under the ADA before making a final decision. If Miner’s impairment is only temporary and not chronic, he is not “disabled” for ADA purposes. Even though the impairment substantially limits his major life activities at the moment, the employer need not accommodate him. The employer should recognize, however, that temporary conditions that last long enough may ripen into disabilities.

To curtail payment of workers’ compensation benefits, the employer may want to consider bringing Miner back to work in an available light duty position for the short term. The employer is not required to return Miner to the workforce on a trial basis, to see how much pain the employee can take, nor is the employer required to hire an assistant to perform the essential functions of Miner’s job. Neither the ADA nor the FMLA requires an employer to return an unqualified person to his usual work on the strength of a claim that the worker may be able to perform essential job functions in the future, or to provide such a person with alternative employment.126

While attempting to determine the expected nature and duration of Miner’s impairment, the employer learns that Miner has suddenly developed further complications that are expected to result in permanent paralysis to his left hand.

How does this affect the analysis?

If Miner develops complications that render his impairment serious and permanent, an ADA analysis is mandated. With the complete permanent loss of use of his left hand, Miner is doubtless “disabled” for ADA purposes, in that his impairment is no longer temporary, and is of such severity that it potentially excludes him from a wide variety of jobs.

The employer may immediately perceive that Miner can never do his roof bolter’s job safely or at all with only one hand. Before refusing to permit Miner to resume the roof bolter’s job, the employer must be prepared to establish, if challenged, that the use of both hands is required for Miner to perform the essential functions of roof bolter’s job, so that

125 Derbis v. United States Shoe, 65 FEP 1328 (D. Maryland 1994).
Miner is now no longer qualified for that job. In the alternative, the employer must be prepared to establish that Miner could not perform the essential functions of his job without posing a direct threat to himself or his coworkers.\textsuperscript{127} An assessment of direct threat “shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” The employer is not free to simply assume that Miner will pose a direct threat, nor may the employer deny Miner the job because it has unfounded fears that he will reinjure himself.

If Miner confirms or the employer determines conclusively that Miner can no longer perform the essential functions of his regular job as a roof bolter with or without reasonable accommodation, the employer now has the additional responsibility of determining whether it has any vacant positions available for which Miner is qualified. If so, the employer is required to offer such positions to Miner as a reasonable accommodation to his disability. The employer is not required to bump other employees from their positions in order to open a position for Miner.

Miner agrees that with the use of only one hand, he cannot safely perform the essential functions of his former job as a roof bolter. He therefore accepts a vacant, available clerical position. He can perform the essential functions of that job with the accommodation that he not be held to the same standards of speed that the employer expects of other clerical workers. He also must miss two hours each week to attend physical therapy sessions, in the hope that he may eventually regain some use of his left hand.

What should the employer do?

\textsuperscript{126} See Cheatwood v. Roanoke Industries, 891 F. Supp. 1528, 1537 (N.D. Ala. 1995)(summary judgment for employer against ADA claimant who testified at workers’ compensation trial that he could not work without significant pain. The court noted that persons accepting workers’ compensation benefits are not generally “otherwise qualified” for their jobs at the same time. \textit{Id.} at 1538 fn 13.

\textsuperscript{127} 29 C.F.R. § 1630.2(r).
An employer may be required to “reasonably accommodate” a disabled employee in a vacant alternative or light duty position that itself is a reasonable accommodation to the employee’s condition. Unless Miner’s employer can show that it would be an undue hardship to permit Miner to perform his clerical job more slowly due to his having the use of only one hand, waiving the standard for speed is a reasonable accommodation. Modifying Miner’s work schedule so that he can attend his physical therapy sessions is also a reasonable accommodation, unless the employer can show that such modification poses an undue hardship.

If Miner has not used up all of his FMLA leave, or is now entitled to further FMLA leave because he has re-qualified for it by working 12 months and 1250 hours in the year preceding the request for leave, the FMLA would also entitle him to intermittent leave for physical therapy.\textsuperscript{128} The employer may count only the actual leave Miner takes against his FMLA allotment\textsuperscript{129} and may dock his pay for the time taken as leave, unless paid leave is substituted.\textsuperscript{130}

After two years of physical therapy and medical treatments including experimental surgery, specialists have restored 90 percent of the function in Miner’s hand and his reflex sympathetic dystrophy has resolved. During this period, his workers’ compensation claim for permanent partial disability benefits has been settled following the administrative law judge’s finding that the injury to Miner’s hand resulted in a permanent partial impairment of 25 percent. Now that his hand has healed from surgery, Miner asks to have his old job as a roof bolter back.

Is Miner still “disabled” under the ADA?

Regardless of whether Miner is still substantially limited in any major life activity, the ADA still protects him because he has a history of an ADA-protected disability. That the administrative law judge in his workers’

\footnotesize{128} 29 C.F.R. § 825.117. \\
\footnotesize{129} 29 C.F.R. § 825.205(a). \\
\footnotesize{130} 29 C.F.R. § 825.206(a).
compensation case has assigned him a 25 percent permanent partial impairment rating does not mean that he has a “disability” as the ADA defines that term.

As to Miner’s request that he be returned to his former job as a roof bolter, the employer’s inquiry will be the same as it would be for any other applicant: whether Miner can perform the essential functions of the job, with or without reasonable accommodations. If Miner represents that he can perform the essential functions of the job, with or without reasonable accommodations, and the employer has offered him the position, the employer may require him to submit to a medical examination to determine his fitness for the position, and may make the job offer contingent upon the outcome of the medical examination. The employer should not require Miner to submit to the medical examination unless it requires other applicants for the same position to undergo such an examination. The examination must be limited in scope, calculated only to determine whether Miner can perform the essential functions of the job he seeks. An overly intrusive examination may itself violate the ADA, and as a collateral matter, it could disclose to the employer conditions it would be better off not knowing about, since the employer cannot be required to accommodate conditions of which it has no knowledge.

The employer may be in a position to seek reopening of Miner’s workers’ compensation claim. Claims can be reopened in cases of fraud, newly discovered evidence, mistake, or change of disability as shown by objection medical evidence.131 If Miner had received a permanent total disability award and then returned to work at a weekly wage equal to or greater than the average weekly wage at the time of his injury, his weekly benefit for permanent partial disability would be reduced by half.132 However, during any period that that employment ceases, whether temporarily or permanently, with or without cause, the original workers’ compensation benefit payment is to be reinstated until employment resumes.133

---
131 K.R.S. 342.125(1).
132 K.R.S. 342.730(c)(2).
133 Id.
Miner passes the medical examination and gets an available roof bolter’s job on first shift. He must still leave work for two hours twice each week to attend physical therapy.

Can Miner’s employer assign him to a different shift to avoid a conflict between his working hours and his attendance at therapy?

The first issue to consider here is whether permitting Miner to take off work for therapy is a “reasonable accommodation” under the ADA. If Miner is no longer substantially limited in any major life activity, there is no duty to accommodate him. If, however, he has qualified again for FMLA leave, he may still have “a serious medical condition” for which the employer is required to provide intermittent leave.

The employer may assign Miner to another shift or to another position to better accommodate his need for intermittent leave, so long as the assignment does not result in loss of pay or benefits. The position need not have similar duties, but the employer must be prepared to demonstrate that assigning the employee to different duties was not intended to discourage him from exercising his rights under the FMLA.

If reassignment is not an option, the employer may require Miner to schedule his absences for medical treatment in advance of taking them, since those absences are foreseeable. The employer may also require medical certification that the absences are necessary, that they are necessary at the times Miner claims they are, and what the estimated duration and schedule for the intermittent leave will be. If Miner fails to cooperate in obtaining this information, the employer need not provide the leave requested and may discipline him in accordance with its attendance policies.

Despite the employer’s best efforts to provide Miner with appropriate intermittent leave so that he can receive medical treatment, his attendance becomes erratic and he is often late for work. When his supervisor reprimands

---

13429 C.F.R. § 825.204.
13529 C.F.R. § 825.100(d); 29 C.F.R. § 825.117.
him for tardiness and absenteeism, Miner reveals that he is an alcoholic and claims that since his attendance problems result from his ADA-protected alcoholism, he is entitled to accommodation.

**Can the employer discipline him?**

Although alcoholism is a recognized disability under the ADA, the statute says that an employer may prohibit drinking and illegal drug use in the workplace and require employees not work under the influence of alcohol or illegal drugs.\(^\text{136}\) Persons currently using illegal drugs are disqualified from ADA protection.\(^\text{137}\) Persons currently using alcohol are not disqualified from protection, but may still be disciplined or terminated for violating company rules concerning reporting for work under the influence of alcohol.\(^\text{138}\) Employers can hold alcoholics to the same standards for performance and attendance as anyone else, even if alcoholism accounts for defects in the employee’s performance or attendance.\(^\text{139}\) Despite Miner’s assertions, the employer may still discipline him for his attendance problems without violating the ADA.

Substance abuse, including alcohol use, may be a “serious health condition” entitling an employee to FMLA leave, but only if the leave is taken for treatment.\(^\text{140}\) Absences caused by the substance abuse itself are not FMLA-qualifying.\(^\text{141}\)

§ 1.05. **Conclusion.**

Employers covered by the ADA and the FMLA must learn new habits in evaluating employees’ requests to take leave, remain on leave, or return to work after leave. Employers should modify their leave of absence policies to conform to the FMLA, since they violate that statute by not

\(^{136}\) 42 U.S.C. § 12114(c).
\(^{137}\) Mararri v. WCI Steel, Inc., 130 F.3d 1180 (6th Cir. 1997).
\(^{138}\) See Mararri, 130 F.3d at 1184-85.
\(^{139}\) 42 U.S.C. § 12114(c).
\(^{140}\) 29 C.F.R. § 825.114(d).
\(^{141}\) Id.
providing employees with required leave, and may hurt themselves by retaining pre-FMLA leave policies that are too lenient. Employers should adequately train their human resources personnel in FMLA and ADA issues, to ensure proper tracking of employees’ leave, and the reasons for leave. Employers should have standard notices and certifications on file, and insist that human resources personnel strictly comply with FMLA notice requirements. Finally, employers should ensure that they have a defensible, documented basis for all the employment decisions they make, particularly when dealing with leave and disability issues.