The Alphabet Soup:
FMLA, ADAAA, GINA,
HIPAA, PDA,
AND WORKER’S COMPENSATION

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Laws that Have Potential to Interact

- Americans with Disabilities Amendments Act
- Family and Medical Leave Act
- Fair Labor Standards Act
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- COBRA
- State laws on leaves of absences
- Workers’ compensation laws
- Disability laws
- Collective bargaining agreements
- Employer’s own policies and practices
Keep in Mind Purposes of Each Act

• The FMLA *is* a job protection statute.
• The ADAAA *is a partial* job protection statute.
• Workers’ compensation *is not* a job protection statute.
• GINA and HIPAA regulate what knowledge you are entitled to know.
• The PDA *generally* gives pregnancy no greater rights than an individual suffering from a temporary disability.
“Disability” Defined

- Physical or mental impairment that substantially limits one or more major life activities.
- Having a record of having such an impairment.
- Being regarded as having such an impairment.
Regulatory Definition

• Individual must be substantially limited in performing a major life activity as compared to most people in the general population.
• The determination of whether an individual is experiencing a substantial limitation in performing a major life activity is a common-sense assessment based on comparing an individual’s ability to perform a specific major life activity with that of most people in the general population.
“New” Mitigating Measures

- Whether an impairment substantially limits a major life activity SHALL be determined without regard to the ameliorative effects of mitigating measures – except ordinary eyeglasses and contact lenses.
What Are Mitigating Measures?

• Mitigating measures eliminate or reduce the symptoms or impact of an impairment.

• Non-exhaustive list:
  • Medication
  • Medical equipment and devices
  • Prosthetic limbs
  • Low vision devices
  • Reasonable accommodations
  • Behavioral modifications
  • Surgical interventions that do not permanently eliminate an impairment.
“New” Episodic Conditions

- An impairment that is episodic or in remission is a disability if it substantially limits a major life activity *when it is active*.
- Examples are: epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, and schizophrenia.
Text of ADAAA – Major Life Activities

• Included list from old regulations, adding:
  • Eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

• A major life activity will also include:
  • “Operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”
Comparisons b/t FMLA, ADA, and Workers’ Compensation

<table>
<thead>
<tr>
<th>Issue</th>
<th>FMLA</th>
<th>ADA</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Ees</td>
<td>50 or more within 75 mile radius</td>
<td>15 or more</td>
<td>5 or more</td>
</tr>
<tr>
<td>Application to Applicants</td>
<td>No</td>
<td>Yes</td>
<td>Generally, no.</td>
</tr>
<tr>
<td>To whom is Act applicable?</td>
<td>May include absences for EE or family member</td>
<td>Only the worker</td>
<td>Only the worker, except survivors may receive indemnity benefits</td>
</tr>
<tr>
<td>Who is covered?</td>
<td>Ees with serious health conditions, those who need to care for family members, and for birth of child</td>
<td>Qualified EES and job applicants who suffer from, have a history of, or are regarded as having a disability</td>
<td>Ees who suffer an injury or contract an occupational disease arising out of and in the course of their employment</td>
</tr>
</tbody>
</table>
Comparisons Cont.

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<th>ADA</th>
<th>Compensation</th>
</tr>
</thead>
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<tr>
<td>Which EEs of a covered ER are covered?</td>
<td>Those who have worked 12 months and worked 1250 hrs prior to qualifying event</td>
<td>All employees</td>
<td>All employees</td>
</tr>
<tr>
<td>Disability defined</td>
<td>A “serious health condition”</td>
<td>A physical or mental impairment that “substantially limits” a major life activity</td>
<td>Physical or mental illnesses or injuries caused by employment</td>
</tr>
<tr>
<td>ER’s primary obligation</td>
<td>Grant 12 weeks of unpaid leave</td>
<td>Provide reasonable accommodation</td>
<td>Pay statutory indemnity benefits and medical expenses</td>
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<tr>
<td>Return to Work after Leave</td>
<td>Required unless job eliminated or EE was “key” EE</td>
<td>May reject if EE’s request would cause “undue hardship”</td>
<td>Generally no requirement</td>
</tr>
<tr>
<td>Continuances of Benefits</td>
<td>Must be continued throughout leave</td>
<td>No mandated unless ER ordinarily provides cont of benefits for other types of leave</td>
<td>No</td>
</tr>
<tr>
<td>Types of Medical Inquiries that Can Be Made</td>
<td>Verification of the need may be obtained and must be limited to the serious health condition for which leave is sought</td>
<td>May inquire as to conditions so long as the inquiries are job –related and consistent with business necessity</td>
<td>Medical Privilege typically waived</td>
</tr>
</tbody>
</table>
Pregnancy Discrimination Act

- Normal pregnancies are treated as any other temporary disability.
- Difficult pregnancies related to reproductive problems, however, may be considered a disability under the ADA.
Pregnancy and the ADA

- The ADA does not apply to normal pregnancies.
- Because reproduction is a major life function, some courts are now finding that the ADA provides protection to individuals who may be undergoing fertility treatments or may be suffering from complicated pregnancies due to problems associated with the reproductive area of the body.
The term “serious health condition” is an injury, illness, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential care facility, or continuing treatment by a health care provider.
SERIOUS HEALTH CONDITION
-- DOL DEFINITION

- A “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition which involves:
  - Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility; or
  - Continuing treatment by (or under the supervision of) a health care provider.
CONTINUING TREATMENT

• A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:
  • Treatment two or more times by a health care provider;
  • Treatment by a health care provider on at least one occasion which results in a “regimen of continuing treatment” under the supervision of a health care provider.
CONTINUING TREATMENT

• Any period of incapacity due to pregnancy or for prenatal care;
• Any period of incapacity or treatment for such incapacity due to a “chronic serious health condition.”
The FMLA and the PDA

- PDA does not require employers to provide any leave to a pregnant worker except to the extent the employer provides leave to other individuals suffering from temporary disabilities.
- The FMLA provides protected leave for all conditions associated with pregnancy – prenatal visits, morning sickness, complications from pregnancy, etc.
CONTINUING TREATMENT – CONT.

- A period of incapacity that is permanent or long term due to a condition for which treatment may not be effective.
- Any period of absence to receive multiple treatments by a health care provider for restorative surgery, or for a condition that would likely result in a period of incapacity of more than three calendar days in the absence of medical intervention or treatment.
CHRONIC SERIOUS HEALTH CONDITION

- Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under the direct supervision of a health care provider;
- Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
Light Duty – Should You? Must You?

- Many workers’ compensation carriers will encourage you to find a light duty position for your injured worker who is unable to return to his/her former position due to a work related injury.
- The advantage to light duty positions is that it will decrease your workers compensation exposure.
Light Duty – Should You? Must You?

- A disadvantage to light duty positions is that it can create morale issues.
- Another disadvantage is bringing back an injured worker too soon can lead to another injury.
Light Duty – Should You? Must You?

- Turner v. Hershey Chocolate USA, 440 F.3d 604 (3rd Cir. 2006) –
  - Plaintiff worked for ER in several production capacities and as a custodian.
  - Plaintiff diagnosed with medical problems that required multiple surgeries and restrictions of no bending, stooping, or lifting of more than 20 pounds.
  - ER reassigns her to position as “shaker table inspector.” Some stations are considered more demanding than others.
Light Duty – Should You? Must You?

• Turner, cont.
  • Due to increase in repetitive stress injuries, employer institutes a rotation requirement.
  • Employer refused to exempt employee from the rotation requirement.
  • Court said that it was a jury question of whether rotation requirement could be considered an essential function of the job.
Light Duty – Should You? Must You?

- Wilburn v. Lucent Technologies, Inc., 2000 WL 1772670 (N.D. Tex. 11/30/00)
  - Employer employed plaintiff as a production specialist. Due to medical issues, she was issued restrictions regarding lifting, pushing, pulling more than 5 lbs, bending, or stooping.
  - Employer allowed her to seek assistance from a co-worker if necessary.
Light Duty – Should You? Must You?

- Wilburn, cont.
  - Plaintiff applied for promotion to machine setter.
  - Refused promotion after employer determined she could not perform the essential functions of her job without violating her work restrictions.

- Court holding:
  - Unreasonable accommodation for employer to exempt employee from essential functions of job.
  - Law does not require employer to require others to perform essential functions.
  - Employer is not required to offer light duty jobs to accommodate.
Alastra v. National City Corp. (E.D. Mich.)

- Alastra worked for defendant as a part time bank teller.
- She had the typical duties of a bank teller but was also required to fill in for full time tellers who might be absent from work.
- Due to her low seniority, she was required to work on Saturdays which required her to work in the mornings.
Alastra cont.

- Alastra suffered from epilepsy which caused unpredictable seizures.
- Seizures were typically brought on by early waking or sleep deprivation.
- Alastra requested a later start time of 10:00 a.m. to prevent or reduce her seizures.
Alastra’s Termination

- Her supervisors merely told Alastra that they would have to check with upper management.
- Ultimately terminated for excessive absenteeism.
- Court Holding: The need for Alastra to fill in for other tellers was a “typical” but not “essential” function of her job. Her request to have a later start time could be considered a “reasonable accommodation.”
Terminating the Employee Out on Worker’s Comp

- La. Rev. Stat. 23:1361(B): “No person shall discharge an employee from employment because of said employee having asserted a claim for benefits . . . . Nothing in this Chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.”

• Two interpretations:
  • Employer can terminate an injured employee as soon as employee is injured because of inability to perform job duties; or
  • Employer can terminate once it is established that the employee will be unable to perform duties after reaching maximum medical recovery.
• Holding: Question of fact as to whether employer violated statute after termination due to exhaustion of 90 day leave of absence allowed under employer policies.
Hansford v. St. Francis Med. Center

• ER technician injured back in August and requested leave under the FMLA eight months later.
• Physician ultimately placed lifting and other restrictions on her and authorized her to return to work on April 29, 2006.
• Employee could not perform functions of ER technician and was lawfully terminated for job abandonment after employer was unable to locate her to discuss available alternative positions.
Leave as Accommodation

• If FMLA leave is exhausted, consider extension as ADA reasonable accommodation
• No time limit on ADA leave if no undue hardship
• Courts: Anywhere from six months to a year can be “reasonable period off from work” unless employer can show undue hardship.
• EEOC: No bright line.
• Be consistent with extended leaves.
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Maximum Leave Policies

• Generally speaking, attendance is considered to be an essential job element.

• “Maximum leave” policies may/may not be legal.

  • EEOC – Maximum leave policies cannot be applied universally under the ADA – case by case analysis must be performed to determine if additional leave constitutes a reasonable accommodation.
Covered Injuries

• The definition of the workers’ compensation injury or impairment may not necessarily qualify as a “serious health condition” under the FMLA or a “disability” under the ADA.

• HOWEVER, almost all workers’ comp injuries resulting in wage payments will qualify as FMLA if the employee is otherwise qualified for FMLA.
Light Duty

- The FMLA permits, but does not require, employers to offer light duty assignments to employees on FMLA leave.
- However, an employee can refuse a light duty position and remain on FMLA leave, provided the leave continues to meet FMLA requirements.
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Substitution of Paid Leave

- FMLA permits an eligible employee to choose (or the employer may require) the substitution of accrued paid leave for unpaid FMLA leave.
- “Substitute” means paid leave provided by the employer.
- Does not include disability leave plans or workers compensation benefits – can supplement, however.
Legal Termination

- If state law permits termination of WC claimants, employer must determine the following:
  - Is claimant an at-will employee or must employer demonstrate cause?
  - Is the employee entitled to FMLA protections?
  - Is the employee covered under the ADA?
  - Is the employee being terminated for a discriminatory reason?
  - Is the employee being terminated for a reason contrary to public policy?
Excessive Absenteeism

• *Gagnon v. Foster Med. Supply*, 647 N.Y.S.2d 876 (N.Y. 1996) – employer can terminate for excessive absenteeism even if some of those absences were the result of a work-related injury.

Fraudulent Claims

- *Porch v. Potter*, 367 Fed.Appx. 669 (7th Cir. 2010) – termination for filing a fraudulent claim was not retaliation (employer had employee under surveillance).

- *Concha v. Fordham Univ.*, 738 N.Y.S.2d (N.Y. 2002) – employer unable to prove fraud where there was conflicting medical evidence and, therefore, liable for retaliatory discharge.
HIPAA

• HIPAA applies to:
  • Healthcare providers;
  • Healthcare clearing houses; and
  • Group health plans

• HIPAA does not apply to:
  • Employers;
  • Workers’ compensation claims.
Medical Inquiries and HIPAA

- HIPAA does not apply to workers’ compensation claims.
- Typically, the physician/patient privilege is waived upon the filing of a claim.
- You are likely to still find resistance from health care providers in providing health information on a workers’ compensation claim.
Genetic Information Non-Discrimination Act

- Passed into law in 2008; EEOC’s final regs effective January 10, 2011.
- Makes it unlawful for an employer to:
  - Discriminate on the basis of an individual’s genetic information in hiring, discharge, or any terms or conditions of employment;
  - Segregate or limit any individual because of genetic information except as part of a genetic monitoring program required by law;
  - Retaliate against anyone engaged in protected activity; or
  - Request, require or purchase genetic info of an individual or family member.
Genetic Information
Nondiscrimination Act

• On November 9, 2010, the EEOC published its regulations implementing those portions of GINA that apply to employers.

• GINA prohibits employers from:
  • Discriminating on the basis of genetic information;
  • Acquiring or disclosing genetic information

• Genetic Information
  • Not simply genetic test results
  • Includes family history and is very broadly defined.
Definitions

• Family member: a spouse, children (natural and adopted), siblings, half siblings, aunts, uncles, nieces, nephews, grandparents, grandchildren, first cousins, and first cousins once removed.

• Medical history: Information concerning any disease or disorder that any of these individuals have suffered (even if not hereditary) as long as there is a diagnosis.
Inadvertent Disclosures

- Requests for reasonable accommodations
- Workers compensation injuries
- FMLA certifications
- Fitness for duty examinations
Inadvertent Disclosures

• “Overheard” Conversations
• “Casual” Conversations
  • Permissible Inquiries: “How are you? Did they catch it early?”
  • Impermissible “probing” inquiries: “Does it run in your family?”
• Other unsolicited receipt of information
• Social Media platforms
What is Unlawfully Requesting?

- Searching the internet in a way that is likely to result in obtaining genetic information;
- Actively listening to third party conversations or searching an individual’s personal effects for the purpose of obtaining genetic information; and
- Asking for information about an individual’s current health status in a way likely to result in obtaining genetic information.
GINA Inadvertent Receipt of Info

• Employer may receive genetic info inadvertently when requesting medical info to support a ADA, FMLA, or workers’ comp claim, etc.
• Employer must take appropriate steps to avoid receipt of such inadvertent info.
Safe Harbor Provision

• Add the following language to all forms requesting medical information:

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

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