

Disabilities Management – An Integrated Approach to ADA, FMLA and Workers’ Compensation Issue

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Often referred to as the “Bermuda Triangle” of employee health-related statutes, the Americans With Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and state workers’ compensation (WC) statutes routinely create time-consuming, vexing and costly problems for employers.

While each of these laws was implemented to address a different issue, it is common for at least two of the three to come into play simultaneously. For example, a work-related injury requiring a leave of absence could also trigger FMLA rights. On the other hand, a non-work-related injury could have both FMLA and ADA implications. And, if an employee who is eligible for FMLA has a work-related injury that qualifies both as a serious health condition and a disability, all three statutes are applicable.

A typical scenario

For example, an FMLA-eligible employee suffers a work-related accident and, as a result, needs time off for back surgery and recovery. The employee is entitled to take up to 12 weeks of FMLA leave and is eligible for WC wage loss benefits during that time. If the employee needs additional time to recover after FMLA leave is exhausted, the injury could also qualify as an ADA disability.

As a result, the employer might need to accommodate the injured employee under the ADA by granting additional leave beyond the 12 weeks provided by the FMLA. Alternatively, if the employee can return to work but needs a reasonable accommodation to perform the essential functions of the job, an employer might need to adjust the employee’s duties, work schedule, equipment or work station

Throw into the mix an employer’s leave of absence policies and procedures, short- and long-term disability benefits, doubts about the existence, causation or extent of the condition – not to mention the fact that these sticky situations often involve an employee with performance problems – and an employer needs more than Mapquest to navigate this potentially costly, sensitive terrain.

The strategic approach

To adequately protect business interests, an employer should adopt an all-inclusive, integrated approach to disability management that encompasses work place safety and injury prevention programs, employee wellness strategies, an effective absence control policy, an early-return-to-work policy, and an aggressive, comprehensive, proactive legal strategy. Strategies for ADA claims include (1) obtaining the medical information necessary to determine whether an employee's condition qualifies as a disability under the ADA, (2) if so, engaging in a meaningful dialogue with the employee to determine whether there is a reasonable accommodation that will allow the employee to perform his/her essential job duties without causing the employer undue hardship, and (3) determining whether the employee's condition poses a direct threat to his/her own safety or the safety of others.

For FMLA issues, it is critical for an employer to, among other things, (1) adopt and consistently apply a comprehensive FMLA policy, (2) require an employee who requests FMLA leave to provide a medical certification so as to be able to determine whether the employee has a serious health condition, (3) require an employee to provide an explanation for sick leave to determine whether the time off can and should be counted toward the employee's FMLA allotment, (4) require re-certification for intermittent leave as often as allowed under the law, (5) obtain a return to work certification to ensure the employee can perform his/her duties, (6) ensure the strict statutory return-to-work requirements are met if the employee is able to return to work, and (7) determine if the employee is entitled to additional leave under company policy or as an ADA accommodation if the employee is not able to return to work after exhausting his/her FMLA leave.

For workers' compensation claims, the first decision an employer must make is whether to contest an employee's claim of disability as a result of a work-related injury or illness. In voluntary-pay cases, an employer should ensure that the employee receives immediate medical attention, followed where applicable by physical, and perhaps vocational, rehabilitation. An early return to favored or light-duty work should always be a consideration.

On challenged claims, it is imperative for an employer to conduct a thorough investigation of the circumstances giving rise to the claim, ensure that the employee is given an independent medical examination by a recognized specialist (based on the nature of the claim), and take steps to minimize future exposure, either by attempting to expedite the employee's return to work, aggressively positioning the case for litigation, or entering into a settlement of the disputed claim.

Possible damaging consequences

One serious issue common to the three statutes is the potential for claims of discrimination or retaliation. When an employee takes time off, whether for a work-related or non-work-related medical condition, an employer must be sure the employee does not suffer any adverse employment action as a result of the leave of absence or the condition necessitating the leave.

All too often, employers become frustrated with an employee on a lengthy absence – particularly if the employee was a poor performer to begin with – and look for reasons to justify a decision not to allow the employee to return to work, to deny him/her additional time off or to terminate the employee shortly after a return to work. These actions often raise red flags from a legal perspective and should be carefully scrutinized by legal counsel to minimize the risk of claims of discrimination or retaliation.

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