The Hallowed “Bermuda Triangle” of Employment Law

How to safely navigate the FMLA, ADA, and Worker’s Comp Laws to Avoid Sinking Your School District

Christine V. Hamiel chamiel@vonbriesen.com

The Bermuda Triangle

Worker’s Comp

The Bermuda Triangle of Employment Law

ADA

FMLA

A Triangular Analysis

Focus: How these three areas of the law interact and what employers need know in order to manage issues involving the overlap between the three.

Common Questions:
1. Do I need to provide leave?
2. How long of leave must I provide?
3. Must I pay for this leave?
4. Must I provide benefits during the leave?
5. May I terminate the employee because she can no longer do the job?
6. Do I need to provide time off so the employee can go to the doctor?
7. Can the employee be penalized for time off?
Employee Leave

- All three laws require a school district to provide leave in certain circumstances
- Question: Can all three apply to one particular situation?
  - If so, which statute applies?
  - When does more than one apply?
  - Do any of the statutory provisions preempt one another?

Navigating the Rough Waters

- Determine which of the laws apply
- Apply the laws to define employee and employer rights and obligations
- Determine if employer policies or contracts change the approach
- Implement the decision (and be consistent)
The First Step - Application of Law

- Always the hardest step
- Dramatically different application of the laws based on unique circumstances of each situation
  - Purpose of the law
  - Federal/state law applicability
  - Penalties/remedies
  - Employer coverage
  - Employee eligibility - hours of service
  - Injury or illness necessary for protection
  - Amount of leave allowed
  - Reinstatement rights after leave
  - Workplace accommodations?
  - Intermittent leave availability
  - Protection against discrimination/retaliation/other interference

The Basics: Americans with Disabilities Act (“ADA”)

- Parallel State Law: WFEA
- Prohibited ADA Discrimination:
  - Unlawful to discriminate against a “qualified individual” on the basis of a disability in regard to:
    - Recruitment, advertising, application procedures, hiring/rehiring, promotion/demotion, transfer, layoff & recall, termination
  - Also unlawful:
    - To fail to make a reasonable accommodation to the known limitations of a disabled person unless the employer can prove the accommodation would impose an undue hardship on the operations of its business.
    - To deny a disabled person any employment opportunity because a reasonable accommodation is required.

The Basics: ADA, con’t.

- What does it mean to be qualified?
  - Has the requisite skill, experience, and education to perform the essential job functions with or without reasonable accommodation.
- DAY ONE ELIGIBILITY
- What is an essential function?
  - The job exists to perform that function.
  - The function can be done only by a few people.
  - The function is highly specialized.
- Evidence of essential functions:
  - Employer’s judgment.
  - Written pre-interview job descriptions.
  - Time spent performing the function.
  - The consequences of having someone else perform the function.
  - The work experiences of past or present incumbents.
The Basics: ADA - Definition of Disability

• A physical or mental impairment that substantially limits or restricts the ability of the individual to perform one or more major life activities.
• Having a record of an impairment.  
  - e.g., employee has eye surgery that corrects vision, etc.
• Being regarded as having such an impairment.  
  - e.g., employer perceives the employee has a back disability severe enough to make him ineligible for a job, etc.

CAUTION! Remember that an individual may be disabled but not qualified or protected by the ADA.

The Basics: ADA, con’t

Major Life Activities
- Caring for oneself
- Performing manual tasks
- Walking
- Seeing
- Running
- Eating
- Hearing
- Speaking
- Learning
- Working
- Concentrating
- Breathing
- Standing
- Bending/Sitting

When Does the Duty to Accommodate Arise?

• Person must have a “qualified disability.”
• Employer must have knowledge of the disability.
• Person seeks accommodation.
• Accommodation is necessary for the employee to perform the essential functions of the job.
• Accommodation is reasonable and does not create an undue hardship.
• Employee must cooperate.
Process to Follow When a Request for Reasonable Accommodation is Made

How Does A Request for Accommodation Happen?

- Employee asks for accommodation.
  - Individual need only use plain English.
  - Does not need to mention any magic words.
- Administrator says performance problems are occurring and links performance problems to mental or physical problem.
- Administrator complains about abuse of sick leave.
- Employee returns to work from leave with restrictions.

This triggers the duty for an interactive process of determining what, if any, accommodation must be made.
Questions to Ask:
#1 - Is the Employee Disabled?

Part A: Does the employee have a physical or mental impairment?
- Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:
  - neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine, or
  - Any mental or physiological disorder, such as a mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- Existence of impairment is to be determined without regard to mitigating measures such as medicines or assistive devices.

Part B: Does the impairment substantially limit a major life activity or make achievement unusually difficult?
- Major life activity = caring for oneself, performing manual tasks, walking, seeing, hearing, eating, sleeping, speaking, breathing, lifting, standing, sitting, bending, learning, reading, concentrating, thinking, communicating, and working at a particular job.
- Note: except for eyeglasses, mitigating measures should not be considered to determine if an impairment substantially affects a major life activity (Wisconsin & ADA).

Part C: Is the impairment permanent?
- Temporary non-chronic impairments of short duration, with little or no long term or permanent impact, are not usually disabilities.
Questions to Ask:
#1 - Is the Employee Disabled?
- Part D: Does the employee have a record of an impairment?
  - A medical record of having a physical or mental impairment equates to a
disability under the ADA
- Part E: Is the employee “regarded as” having an impairment?
  - Must be careful here!!!
  - A “perception” test
    - If an employer perceives you as having a physical or mental impairment
      and discriminates against you because of that perception, then you likely
      have a disability under the ADA.
    - If you have an actual physical or mental impairment that is
      obvious/noticeable and your employer discriminates against you because
      if it, then you likely have a disability under the ADA.

Questions to Ask:
#2 - Can the Employee Do the Job
Without Posing Undue Threat/Hazard to
Co-workers or Students?
- Employer must prove “reasonable probability” that employee poses hazard.
- Is there a special duty of care to students?
- Nature and severity of potential harm and likelihood of harm.
- Do not rely on perceptions or assumptions
  - Demonstrate that there is a significant risk of substantial harm.
  - Identify the specific risk.
  - Demonstrate that there is a current risk, as opposed to a speculative/future risk.
  - Support the risk assessment with objective medical evidence related to the
    employee.

Questions to Ask:
#3 - Does the Employee Need An
Accommodation?
- An accommodation is:
  - Adjustment to job...
  - Adjustment to work environment....
  - Change in the way things are usually done...
  - ...that enables a person with a disability to enjoy an equal employment
    opportunity.
Questions to Ask:
#4 - What Medical Information Do We Need?
- May need information from doctor.
- Inquiry must be consistent with business necessity.
- Cannot ask for all medical records.
- Carefully worded questionnaire.
- Independent medical evaluation if we do not agree with employee’s doctor.
- Medical exam may be needed:
  - If there is evidence of problems related to job performance or safety; or
  - To determine whether employees in physically demanding jobs continue to be fit for duty.
- Must be kept confidential and separate from other personnel records.

Questions to Ask:
#5 - What Accommodation is Needed?
- Determine job functions and duties.
- Engage in interactive process: discuss with individual the job-related limitations and how they could be overcome.
- With employee, identify potential accommodations and how effective they would be in enabling the employee to perform job.
- Consider the preference of the employee and decide on an accommodation that is appropriate.

Remember: Employee is not entitled to preferred accommodation. Only reasonable.
Example*: Choir teacher who doesn’t want to teach choir.

What Are Reasonable Accommodations?
- Modifications to job application process, work environment, and/or benefits and privileges of employment.
- Making existing facilities physically accessible
- Job restructuring
- Modification of work schedules
- Reassignment to vacant positions
- Modification of equipment
- Using alternative means of testing (applicants).
- Provision of readers or interpreters or computers that talk.
- Unpaid leave of absence
- Transportation
- Reserved parking spaces
- Modification of non-essential job duties
- Light Duty
- Working from home
Leave as an Accommodation?

- Leave may be a reasonable accommodation unless the leave will cause an undue hardship on the employer.
  - Undue Hardship: Any action that is too costly, substantial or disruptive, or that fundamentally alters the nature of the employer’s business.
- Ask: Is the leave to allow active treatment or recovery? When does employee intend to return?
  - Temporary leave to permit medical treatment or recovery may be a reasonable accommodation (even after FMLA leave has been exhausted).
- There is no limit on the amount of leave that may be taken
  - Caveat: Leave usually may not be for an indefinite period

Creative Accommodations

- Ask employee his/her ideas/suggestions for accommodations that would help the employee perform his/her job duties
- Provide the employee the opportunity to perform with the accommodations requested.
  - Implement the recommended accommodation - even if you believe it will not allow the employee to perform
  - Chances are, the employee will continue to be a problematic employee.

What is NOT Reasonable?

- Not required to provide what the employee requests.
- No obligation to eliminate the essential functions of the job.
- Not required to create a new position.
- Not required to violate a bona fide seniority system at the expense of other employees in order to provide a reasonable accommodation.

CAUTION!! To be decided only after legal analysis and on case-by-case basis!
Attendance Problems Related to Disability

- Under Federal Law, attendance is an essential function of the job. Erratic absence can form basis for discipline.
- However, lenience as to attendance policy may be considered a reasonable accommodation.
  - If you exercise discretion in other cases, refusal to exercise that discretion for someone with a disability may be seen as discrimination.

Important Pointers for Districts!

- Employer must initiate interactive process.
- Employee must also cooperate.
- Failure to return medical questionnaires or comply with independent medical evaluation = breakdown in process.
- Document all attempts at interactive process.

The Basics: Entitlement to Leave Under the FMLA

- An “eligible” employee
  - Employed for at least 12 months
  - Worked for at least 1,250 hours of service during the previous 12 months; and
    - Note that hours of service are based on hours actually worked - does not include leave hours for vacation, sick leave, etc.
  - Employed at a site where 50 or more employees are employed by employer within 75 miles.
- Up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:
  - Birth or adoption of employee’s child
  - Care for spouse, child, or parent of employee with serious health condition
  - Employee’s own serious health condition
  - Any qualifying exigency due to spouse’s, child’s, or parent’s active duty in the Armed Forces.
The Basics: Entitlement to Leave Under the WFMLA

• An “eligible” employee
  - Worked for at least 1,000 hours of service during the preceding 52 weeks and for at least 52 consecutive weeks; and
  - Note that hours of service are based on all hours (includes paid leave hours for vacation, sick leave, or other leave)
• Leave Entitlements:
  - Six weeks of leave in a calendar year for birth or adoption of employee’s child that begins within 16 weeks of the birth/adoption
  - Two weeks of leave in a calendar year to care for spouse, child, parent, or domestic partner of employee with serious health condition
  - Two weeks of leave in a calendar year for the employee’s own serious health condition

Protections of the FMLA

• Designated # of weeks of unpaid leave.
• Job protection and reinstatement rights.
  - Must be restored to same or equivalent position in all terms and conditions.
  - Continuation of existing level of coverage under a group health plan while on leave.
• Leave can’t be held against the employee (promotion, attendance, etc.).

FMLA – Employee Notice Obligations

• If need for leave is foreseeable and for birth or placement of child, employee must provide at least 30 days’ notice.
• If need for leave is due to medical treatment of a serious health condition.
  - Employee must make a “reasonable effort” to schedule the treatment so that it does not “unduly disrupt the operations of the employer.”
  - Provide 30 days notice or notice as soon as practicable.
• Employee does not need to use the term “FMLA.”
• Only notice required under Wisconsin law is advanced notice in a reasonable and practicable manner
FMLA – Employer Notice Requirements

• Within 5 days of employee notice, employer must notify employee whether they are eligible for FMLA leave (Eligibility and Summary of Rights Notice).
• Contemporaneous with eligibility notice, employer should also submit to employee a medical certification form (in cases of serious health condition).
• Once employer has enough information to determine requested leave is FMLA qualifying, employer must send employee the Designation Notice designating the leave as FMLA qualifying (or not).

FMLA – What if Information is Insufficient?

• Employee must provide a complete and sufficient medical certification, generally within 15 days after the employer’s request.
• If the certification is incomplete or insufficient, employer must give employee a written notice stating what additional information is necessary to make the certification complete and sufficient.
• Employee must provide the additional information within 7 calendar days.
  • A certification is considered “incomplete” if one or more of the applicable entries on the form have not been completed.
  • A certification is considered “insufficient” if the information provided is vague, unclear, or nonresponsive.
• Consequences - If employee does not provide the requested certification within the time required or fails to provide a complete and sufficient certification despite the opportunity to cure any deficiencies, the employer may deny the request for FMLA leave.

Substitution of Paid Leave

• Employee can choose to substitute accrued paid leave for FMLA leave.
• If employee does not choose to substitute, employer can require it.
• Whether paid leave qualifies for substitution is up to employer’s policy.
• Paid leave should run concurrently.

• CAUTION!! Under WFMLA, an employee may elect to substitute accrued paid leave, but the employer may NOT require substitution if the employee does not elect substitution.
Intermittent Leave

- Leave may be taken intermittently if it relates to a serious health condition and medically necessary or for a qualifying exigency.
- Intermittent leave is not permitted for birth or adoption unless the employer agrees to intermittent use.
- Leave is calculated on a workweek basis from hours expected to be worked.
- Employer may temporarily transfer employee during period that intermittent leave is necessary.
- CAUTION!! WFMLA permits intermittent leave for all leaves in increments equal to the shortest increment permitted by the employer for any other non-emergency leave.

Definition of Health Provider

- Varies under federal and state law.
- Both laws include several different types of health care providers.
  - Doctor of medicine or osteopathy.
  - "Others capable of providing health care services" (who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law):
    - Podiatrists, dentists, clinical psychologists, optometrists, chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist), nurse practitioners, nurse midwives, clinical social workers, physician assistants, Christian Science practitioners listed with the First Church of Christ Scientist in Boston, any HCP accepted by district’s group health plan.
- If an employee provides documentation from a questionable source, ensure the individual is defined as a “health care provider” under the requisite law.

The Basics: Worker’s Compensation Act

- Trade-off: No-fault system for loss of right to sue employer.
- Coverage for accidental injuries and occupational illnesses arising out of or occurring in the course of employment.
- DAY ONE COVERAGE for employees.
- Provides for health care and income replacement. State specific and does not necessarily provide for job protection.
- Job protection? In Wisconsin...
  - The Worker’s Compensation Act (“WCA”) does provide for a level of job protection.
  - Refusal to Rehire Provision
- In return for worker’s comp benefits, the WCA generally indicates that an employee relinquish his right to sue his employer for work-related injuries.
Refusal to Rehire - Wis. Stat. § 102.35(2) & (3)

- (2) Any employer who, without reasonable cause,
  - refuses to rehire an employee injured in the course of employment, or
  - because of a claim or attempt to claim compensation benefits from such employer, discriminates or threatens to discriminate against an employee as to the employee's employment,
  shall forfeit to the state not less than $50 nor more than $500 for each offense.

- (3) Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, when suitable employment is available within the employee's physical and mental limitations, has exclusive liability to pay to the employee wages and benefits lost during the period of such refusal, not exceeding one year's wages.

Refusal to Rehire

- Wis. Stat. § 102.35(3) is a “little disability discrimination” statute that exists within the Wisconsin WCA.
- If an employee suffers a worker's compensation compensable injury, the employer must return him/her to work.
- If the employer does not return the employee to work, the employer bears the burden of proving that it would not have been “reasonable” to return the employee to work.
- Predictably, litigation over Section 102.35(3) cases focuses on the question: What is “reasonable”? 

The Basics: Worker’s Comp

- Employee Entitlement to Leave Under Workers’ Comp
  - No per se leave mandates under workers’ comp, leave is impliedly considered part and parcel of receiving medical treatment for injuries arising out of and sustained in the course and scope of the employment relationship
  - Leave is governed by the worker’s comp policy
  - Unlike ADA and FMLA, which are essentially unpaid leave (except where paid leave is substituted), WCA leave is paid leave.
- Leave under WCA runs concurrently with the FMLA and ADA
  - However, turning down light duty under the WCA may deprive an employee of WCA benefits, but an employee would still be entitled to continuation of job protected leave under the FMLA.
Intersection of FMLA & ADA

• Not all employees protected by the ADA are covered under the FMLA.
  - Employees must be independently eligible for leave under the FMLA - even if “protected” by the ADA

Intersection of FMLA & ADA, con’t.

• FMLA “Serious Health Condition” versus ADA “disability”
  - “Serious Health Condition” is an illness, injury, impairment, or physical or mental condition that requires either an overnight stay in a hospital or other health care facility, or continuing treatment by a health care provider
  - “Disability” is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

Intersection of FMLA & ADA, con’t.

• FMLA/ADA Overlap
  - Some FMLA “serious health conditions” may be ADA disabilities
    - e.g., most cancers, serious strokes
  - Some FMLA “serious health conditions” may not be ADA disabilities
    - e.g., pregnancy, routine broken leg, hernia
      - This is because the condition is not an impairment (pregnancy) or because the impairment is not substantially limiting (broken leg, hernia)
    - A record of a “serious health condition” does not equate to a record of an ADA “disability.”
    - That an individual has a “serious health condition” does not mean an employer “regards” her as having an ADA “disability”
Intersection of FMLA and WCA

- Employer may pay employee a lower wage under the WCA if employee returns to work in a light duty capacity.
  - This is because there is no such thing as "FMLA light duty."
  - Under the FMLA, if an employee is transferred to an alternate position which better accommodates recurring periods of leave than does the employee’s regular position, such a position must have equivalent pay and benefits.
  - However, light duty is generally not considered an alternative position.
- Transfer to an alternative position is reserved for intermittent/reduced schedule leave, and only for leave that is foreseeable based on planned medical treatment.
  - If an employee is not taking leave on an intermittent/reduced schedule basis, the transfer provision to an alternative position does not apply.
  - Thus, if an employee returns to light duty work on a regular schedule, the employer may pay the employee less than the employee’s regular position paid.

Interaction of WCA & FMLA

- Exhaustion of paid leave while an employee is receiving Workers’ Comp benefits on FMLA leave
  - The FMLA does not allow an employer to exhaust/substitute paid leave while an employee is receiving workers’ comp payments.
  - An employer and employee can agree to use paid leave to supplement workers’ comp since workers’ comp generally only provides a percentage of the employee’s salary. Employer and employee can agree to supplement the PTO benefits payments to 100% of the employee’s regular wages.

Interaction of ADA & WCA

- Occupational injury does not always result in ADA disability
  - Must consider definition of ADA disability
Interaction of WCA, FMLA, & ADA

- **Light Duty**
  - ADA: Employer may provide an accommodation that requires the employee to remain on the job instead of providing leave. An employee that turns down a reasonable accommodation risks a loss of job protection under the ADA.
  - FMLA: If an employee is FMLA eligible, employee can reject light duty work and the FMLA leave request must be granted.
  - WCA: If employee is certified to return and is offered and rejects light duty work, s/he may not receive “temporary total disability” benefits.

Interaction of WCA, FMLA, & ADA

- **Medical Certifications, Inquiries, and Confidentiality**
  - ADA: Only allows job-related questions consistent with business necessity. Allows for certification of fitness-for-duty.
  - FMLA: Provides for the least access to medical information. Only inquire into whether employee has a “serious health condition” that prevents performance of essential job functions (information relating to the particular serious health condition for which employee is seeking leave). May require a doctor’s certification. May require fitness-for-duty certification. Employer does not violate the ADA by asking for the information specified in the FMLA certification form.
  - WCA: Provides greatest access to medical information. Medical inquiries relating to all aspects of the employee’s injury, including history, treatment progress, etc.

Interaction of FMLA & ADA

- **Intermittent/Reduced Schedule Leave**
  - ADA: Qualified individual may work part-time in his/her current position or occasionally take time off, as a reasonable accommodation, if it would not impose an undue hardship on the employer.
    - If the reduced schedule creates an undue hardship, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without unreasonable hardship while working a reduced schedule. If no equivalent position, look for a vacant position at a lower level.
  - FMLA: Intermittent leave should be granted in accordance with state or federal law.
Interaction of FMLA & ADA

- Health Insurance Coverage
  - ADA: Continue coverage to the extent the employer provides such coverage for other employees in the same leave or part-time status.
  - FMLA: Must always maintain the employee’s existing level of coverage under a group health plan, provided the employee paid his or her share of the premiums.

Interaction of WCA, FMLA, & ADA

- Reinstatement Rights
  - ADA: Return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship.
  - FMLA: Within three minor exceptions, an employee must be reinstated to the same position or to an equivalent position.
  - WCA: Refusal to rehire potential claim lurking

For more information, visit our website: www.vonbriesen.com

Christine V. Hamiel chamiel@vonbriesen.com