

Navigating the ADA, FMLA & Workers' Compensation Maze

Regulatory Compliance & Legal Liability
Issues

Presented by

Philip Erickson

Laura Dinon

Today's Speakers



Laura Dinon



Philip Erickson

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Family & Medical Leave Act

- Scope and purpose
 - Provides for up to 12 weeks of unpaid leave
 - On Jan. 28, 2008, the FMLA was amended by the National Defense Authorization Act (NDAA) 2008 to provide for up to 26 weeks of job protected family leave

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Family & Medical Leave Act

- NDAA for Fiscal Year 2009 and NDAA for Fiscal Year 2010 each expanded both of these types of leave
 - Exigency leave
 - Caregiver leave

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Covered Employers

- Defined as a private employer with 50 or more employees during 20 or more weeks in current or previous calendar year and any public employer regardless of number of employees

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Eligible Employees

- An individual must:
 - Work for employer for at least 12 months, which don't have to be consecutive, just in the last seven years
 - Worked at least 1,250 hours during year preceding start of leave; and
 - Employed at worksite where employer employs at least 50 employees within 75-mile radius.

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Eligible Conditions

- Employee's own serious health condition:
 - Any illness, injury, impairment or physical or mental condition that involves any period of incapacity involving inpatient care, if it includes overnight stay
 - Requires continuing treatment by a healthcare provider.
 - "treatment" requires an in-person visit to healthcare provider, which must take place within seven days of first day of incapacity.

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Eligible Conditions

- "Continuing" treatment includes an illness, injury, or impairment that causes incapacitation for over three consecutive days and requires continuing treatment
- It includes a period of incapacity or treatment for a chronic condition that requires at least two visits for treatment in a year, continues over an extended period of time and causes episodic periods of incapacity.

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Serious Health Conditions

- Parent, spouse, or child
 - Only where employee is actively involved in relative's care which can include both physical and psychological care.

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Birth or Adoption of Child

- Can take leave before birth or placement of child.
- Can't take on an intermittent basis and must take within 12 months of the birth or placement of child.

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Eligible Condition

- Exigency leave and leave also available to care for an injured service member, but neither overlaps with ADA

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Duty to Grant Leave

- Employee only has to provide employer with sufficient information to determine that leave is protected by FMLA.
- If need for leave is foreseeable, employee must give 30 days notice.
- If need not foreseeable, notice must be given as soon as practicable.

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Duty to Grant Leave

- When leave is for medical treatment, employee must consult with employer and make a reasonable effort to schedule treatment
- Employer can require employee to comply with employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

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Medical Certification

- Employers may require employees to furnish medical certification of applicability of their illness.
- Failure to provide means employee is not on FMLA nor protected by Act.
- Within five business days of learning of need for leave, employer must advise employee of duty to provide medical certification and time frame for providing it, as well as consequences of providing inadequate medical certification.

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Medical Certification

- Employer can require employee to obtain second medical opinion at employer's expense, from a healthcare provider designated by employer. If disagreement between two healthcare providers exists, a opinion from a third, mutually agreed upon healthcare provider will be final and binding.
- Employee's FMLA protection ceases when medical certification expires, even if employee has not used all 12 weeks of leave.

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Continuation of Benefits

- Employer must maintain employee's health benefits under any group health plan. Benefits may be terminated (subject to COBRA) when:
 - Employee informs employer of intent not to return to work at conclusion of leave
 - Employee fails to return from leave

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Continuation of Benefits

- Employee exhausts his or her FMLA leave; or
- Employment relationship would have ended even if employee had not taken FMLA leave.

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Continuation of Benefits

- Employer must also provide other benefits while employee takes FMLA leave if employer has an established policy.
- In the case of paid leave, employee's share of premiums may be paid by method normally used during any paid leave.

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Continuation of Benefits

- If FMLA leave is not being coordinated with other paid leave, employer may require that payment be made to employer or to insurance carrier in several different ways set forth in Act.
- Other benefits do not need to continue while employee is on FMLA but employee can't lose those benefits already earned as a result of taking FMLA.

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Continuation of Benefits

- If bonus or other payment is based on achievement of specified goals, and employee has not met goal due to FMLA leave, then payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify for FMLA leave.

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Americans With Disabilities Act

- Scope and purpose
 - Prohibits discrimination against "qualified individual on the basis of a disability" in all aspects of employment
 - Congress indicated that purpose of ADA Amendments Act of 2008 was to reinstate "a broad scope of protection" under ADA.

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Americans With Disabilities Act

- In the ADAAA, Congress specifically rejected U.S. Supreme Court decisions:
 - Whether impairment that substantially limits major life activity is determined with reference to ameliorative effects of mitigating measures
 - "Regarded as" definition of disability

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Americans With Disabilities Act

- Person must have substantial limitation on abilities that are central to daily life, not just central to life in workplace.

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Americans With Disabilities Act

- Disputes in workplace and in litigation are moving toward issues relating to reasonable accommodation, interactive process, what constitutes an essential function and undue hardship.
- *Milholland v Sumner County Bd of Ed*, 569 F3d 562 (2009) held that ADAAA amendments do not apply retroactively

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Prohibited Practices

- ADA prohibits discriminating against qualified individual on basis of disability in regard to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions and privileges of employment.
- Courts have recognized a cause of action analogous to claims for harassment under Title VII.

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Prohibited Practices

- Medical Examinations
 - Not allowed until after a job offer is made
 - Offer may be contingent on medical examination in sense that offer may be withdrawn if examination discloses a condition preventing applicant from performing essential functions of job
 - All entering employees are subjected to examination process.

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Elements of ADA Claim

- *Prima facie* case:
 - Disabled person within meaning of ADA
 - Otherwise qualified for position with or without reasonable accommodation
 - Suffered an adverse employment action
 - Employer had reason to know of his or her disability.
 - Position remained open

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Elements of ADA Claim

- If employee can establish *prima facie* case, burden then shifts to employer to articulate legitimate, nondiscriminatory reason for adverse employment action.
- If employer does so, plaintiff has burden of demonstrating that employer's reason or reasons is pretext for discrimination.

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Elements of ADA Claim

- If there is direct evidence, then burden shifting analysis is not necessary.
- Plaintiff must show:
 - he or she is disabled
 - he or she is otherwise qualified

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Elements of ADA Claim

- Plaintiffs may not use mixed motive theories for ADA claims.
- Reverse discrimination claims not authorized by ADA

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ADA Coverage Issues

- Who must comply?
 - "Covered entity"
 - A covered employer
 - Exception where employer is religious institution and employee is ministerial employee

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Who is Protected?

- "Qualified individual" with disability
- Disability defined to include:
 - Physical or mental impairment that substantially limits one or more life activities
 - Record of such an impairment
 - "Regarded as" having such an impairment

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Drugs & Alcohol

- Individual "currently engaging" in illegal use of drugs is not protected under ADA and is not considered a disabled individual.
- Terms "individual with a disability" and "qualified individual with a disability" include individual who:

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Drugs & Alcohol

- Successfully completed supervised drug rehabilitation program and is no longer engaging in illegal use of drugs
- Successfully rehabilitated and is no longer engaging in illegal use of drugs
- Participating in a supervised rehabilitation program and is no longer engaging in illegal use of drugs or
- Erroneously regarded as engaging in such use, but is in fact not doing so

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Drugs & Alcohol

- Past addiction rather than just past use required
- Alcoholics not disqualified from protection under ADA because of current use
- Courts do not generally recognize alcoholism as a per se disability, and plaintiff must prove that he comes within one of the statutory definitions.

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Drugs & Alcohol

- Employer may promulgate work rules prohibiting employees from consuming or being under the influence of drugs and alcohol on job.
- Employer may also discipline, discharge or deny employment to alcoholic whose alcohol use adversely affects job performance in same manner as employer would discipline other workers.

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Definition of “Disability”

- Covers persons who actually and currently have:
 - Physical or mental impairment
 - Substantially limits
 - One or more major life activities

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Toyota Motor Mfg v Williams, 534 US 184 (2002)

- Impairment must be permanent or long term.
- Major life activities referred to "those activities that are of central importance to daily life" such as walking, seeing, hearing, and performing simple manual tasks.
- ADAAA rejects *Toyota Motor Mfg* and states that definition of disability should be construed in favor of broad coverage.

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Braydon v Abbott, **524 US 624 (1998)**

- Three-step analysis
 - Is condition an impairment?
 - Identify major life activity
 - Does impairment substantially limit major life activity?

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Definition of 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 (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic or lymphatic, skin, and endocrine, or

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Definition of Physical or Mental Impairment

- Any mental or physiologic disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

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Conditions not Impairments

- Certain psychological impairments
- Homosexuality and bisexuality
- Cultural, environmental and economic disadvantages
- Aging

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Conditions not Impairments

- Simple physical conditions
- Pregnancy and pregnancy related conditions
- Morbid obesity
- Temporary, nonchronic conditions

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Major Life Activities

- Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

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Major Life Activities

- Includes the 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." 42 USC 12102(2)

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Major Life Activities

- Note that broad definition and inclusion of "working" as major life activity expressly overrules *Toyota Motor Mfg.*

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Substantially Limits

- Statute does not define "substantially limits."
- EEOC regulations used "significantly restricted" language.
- In *Toyota Motor Mfg*, court held that "substantially limits" means "considerable" or "to a large degree."

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Substantially Limits

- In ADAAA, Congress stated that EEOC regulations expressed "too high a standard" and *Toyota Motor* analysis created "an inappropriately high level of limitation necessary to obtain coverage under ADA."
- Congress called upon EEOC to promulgate new regulations consistent with ADAAA.

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Substantially Limits

- Congress stated primary focus in ADA cases should be upon whether covered entities complied with their statutory obligations and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

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Substantially Limits

- ADAAA rejected several decisions of U.S. Supreme Court which held that whether an impairment substantially limits major life activity must be determined with reference to ameliorative effects of mitigating measures.
- Instead Congress stated that only ameliorative effects of ordinary glasses or contact lenses can be considered.

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Substantially Limits

- Note that analysis will be very different for claims arising prior to, as opposed to after, Jan. 1, 2009

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Record of Disability

- Individual "has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities."
- "History of" example: a former cancer patient in remission
- "Misclassified" example: person wrongly classified as having learning disability but in fact did not.

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Regarded as Having a Disability

- In *Sutton v United Air Lines*, 527 US 471 (1999), court held that to be "regarded as" having a disability, plaintiff must believe that he or she was disabled.
- Does not apply to impairments which are transitory or minor
 - Transitory defined to mean less than six months in duration

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Regarded as Having a Disability

- Congress rejected this holding in ADAAA – an individual meets definition of being regarded as having such an impairment if person establishes that he or she has been subjected to an action prohibited under ADA because of an actual or perceived physical or mental impairment, regardless of whether that impairment limits or is perceived to limit a major life activity.

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Regarded as Having a Disability

- Does not apply to impairments which are transitory or minor
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Regarded as Having a Disability

- Employer does not have to provide accommodations to employees, who are merely regarded as having impairments, which substantially limited a major life activity but must not discriminate.

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Qualified Individual With a Disability

- Employee must show that he or she is able to perform job's essential functions with or without reasonable accommodation.
- Employee must also show that he or she meets prerequisites for position.

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Qualified Individual With a Disability

- Determining whether job functions are essential:
 - Essential job functions include:
"the fundamental job duties of the employment position the individual with a disability holds or desires,"
29 CFR 1630.2(n)(1)

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Qualified Individual With a Disability

- Job function may be considered essential if:
 - Reason position exists is to perform that function;
 - Limited number of employees available among whom the performance of that job function can be distributed; or
 - Function is highly specialized and employee is hired for his or her expertise or ability to perform particular function.

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Qualified Individual With a Disability

- Evidence of whether a particular function is essential may include:
 - Employer's judgment as to which functions are essential
 - Written job descriptions
 - Amount of time on job performing that function

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Qualified Individual With a Disability

- Consequences of not requiring incumbent to perform function
- Terms of a CBA
- Work experience of past incumbents in job
- Current work experience of incumbents in similar jobs

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Qualified Individual With a Disability

- In Sixth Circuit, employer has burden of establishing that job functions are essential.
- Fact that function is rarely required does not by itself indicate that it is not essential (i.e., prison guard restraining inmate).
- In appropriate case, employer may want to retain occupational expert to opine on whether particular job functions are essential.

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Attendance as an Essential Function

- Regular and predictable attendance is generally found to be an essential function.
- No presumption arises that uninterrupted attendance is an essential job function.

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Attendance as an Essential Function

- Employer must consider whether accommodation requested by employee constitutes undue hardship.
- Counsel should examine employer leave policies and otherwise work to ascertain how similarly situated non-disabled personnel are treated with respect to leaves of absence.

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Prior Representations Regarding Disability

- Employees with disabilities may have made representations in context of social security, workers' compensation and disability insurance that they are totally and permanently disabled or similar representations.

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Cleveland v Policy Management Systems Corp, 526 US 795 (1999)

- Pursuit or receipt of social security disability benefits does not automatically disqualify recipient from maintaining an ADA claim.
- Employee must offer a sufficient explanation to allow a jury finding that he or she is a qualified individual with a disability.

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Prior Representations Regarding Disability

- Employee may assert “disabled” without accommodation, but may be able to perform essential function with accommodation.
- Employee may assert condition has changed.

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Reasonable Accommodation

- Employer has duty to provide reasonable accommodation to qualified individual with a disability upon request unless doing so would constitute undue hardship for employer.
- EEOC regulations state that reasonable accommodation includes, but is not limited to:

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Reasonable Accommodation

- "Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- Job restructuring; part-time or modified work schedules; reassignment to vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities."

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Reasonable Accommodation

- Duty to accommodate arises only with respect to actual disabilities – proposed EEOC regulation would expressly state that duty does not apply where employee is "regarded as" having disability.
- Employer may conduct medical examinations for purpose of ascertaining whether employee, who has requested accommodation, is in fact disabled.

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Reasonable Accommodation

- “Interactive process” for determining reasonable accommodation:
 - Once employee with disability has requested an accommodation, employer is required to engage in “interactive process” to determine reasonable accommodation.
 - Employer does not have to select accommodation requested by employee and may provide other reasonable accommodation.

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Examples

- Job restructuring
 - ADA does not require restructuring which would eliminate essential functions of job.
 - ADA does not require creation of new jobs.
 - ADA does not require employers to allow employees to work at home.
 - ADA does not require an employer to transfer employee to new supervisor.

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Examples

- Reassignment to vacant position
 - Employee bears burden of showing that vacancy exists and that he or she is qualified for position.
 - Accommodation is not available to applicants.
 - Not required to bump other employees to create vacancy

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Examples

- Reassignment is unreasonable if it would violate seniority provisions of a CBA.
- Employer not required to create light duty positions
- Emerging issue: What range or class of jobs must employer consider?

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Examples

- Paid and Unpaid Leaves
 - Request for leave of indefinite duration is not a reasonable accommodation
 - Interplay between ADA and FMLA and WC with respect to leave requests is discussed in next section of presentation.

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Performance Problems & Accommodation

- Evidence that an employee has disability is not sufficient to demonstrate that he or she was terminated for that reason.
- To prove that an employer's proffered justification is pretextual, employee must prove that proffered reason had no basis in fact, did not actually motivate its decision, or that similarly situated, non-disabled persons were treated disparately.

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Performance Problems & Accommodation

- *Maddox v Univ of Tennessee*, 62 F3d 843 (CA 6, 1995)--Difference between "discharging someone for unacceptable conduct and discharging someone because of a disability Employers subject to ADA must be permitted to take appropriate action with respect to employee on account of egregious or criminal conduct, regardless of whether employee is disabled."

Continued

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Performance Problems and Accommodation

- *Brohm v JH Props*, 149 F3d 517, 522 (CA 6, 1998) – Anesthesiologist fired for falling asleep on job, not for chronic sleep deprivation
- Employers entitled to rely upon results of workplace investigations undertaken in good faith

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Employer Defenses

- Employee not qualified individual with disability:
 - Note that defenses that an individual is not disabled will be much more difficult with respect to claims arising after Jan. 1, 2009
- Accommodation employee is seeking is not reasonable.
- Reasonable accommodation was offered and refused.

Continued

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Employer Defenses

- Although reasonable, proposed accommodation would constitute undue hardship.
 - ADA states that an undue hardship is "an action requiring significant difficulty or expense" when considered with following factors:

Continued

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Employer Defenses

- Nature and cost of accommodation needed
- Overall financial resources of facility or facilities involved in provision of reasonable accommodation; number of persons employed at such facility; effect on expenses and resources, or impact otherwise of such accommodation upon operation of facility

Continued

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Employer Defenses

- Overall financial resources of covered entity; overall size of business of a covered entity with respect to number of its employees; number, type and location of facilities
- Type of operation or operations of covered entity; geographic separateness, administrative or fiscal relationship of facility or facilities in question to covered entity." 42 USC 12111(10)(B)

Continued

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Employer Defenses

- Employer has burden of demonstrating undue hardship with real evidence

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Direct Threat Defense

- Employer may require as standard for employment that employee will not pose "a direct threat to the health or safety of other individuals in the workplace," 42 USC 12113(b).
- Employer may consider whether employee constitutes direct threat to himself.
- Employer likely will have the burden of establishing the existence of the threat.
- Individualized assessment required

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Michigan Workers' Disability Compensation Act

- Michigan's Worker's Compensation Act provides for payment of worker's compensation benefits to employee who receives personal injury arising out of and in course of employment.
- Private employer, who regularly employs three or more employees at any one time or employed one worker for 13 or more of preceding 52 weeks, is subject to Act.

Continued

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Michigan Workers' Disability Compensation Act

- Employee must return to "light duty" job if they are capable of performing job or risk losing workers' comp benefits.
 - While employer can't force an employee to take light duty work if they are on FMLA leave, employee can have their workers' compensation benefits discontinued if they do not accept light duty work.

Continued

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Michigan Workers' Disability Compensation Act

- Employer can require medical certification of work comp injuries and disabilities.
- Employer must pay for treatment of compensable injuries.
- Employer has right to choose treating physician in first 10 days after an injury.
- After that, employee may choose physician, but must give employer notice.

Continued

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Michigan Workers' Disability Compensation Act

- Employer must either continue to pay benefits for an employee on work comp leave or pay value of those discontinued benefits to employee.
- Employer can create a light duty job just for employees with work comp injuries and put a time limit on duration of created positions.
- Employer can refuse to return employee with restrictions to work.

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FMLA, ADA & Workers' Comp Overlap Issues

- Employee notice issues
 - Under ADA, can an employer require written notice from employee for need for accommodation?
 - What about under FMLA?
 - Under ADA, can employer require that employees provide notice for need for accommodation to a specific individual?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- What about under FMLA?
- Under ADA, can employer have "constructive notice" of need for accommodation?
- Does concept of "constructive notice" apply under FMLA?
- Does employee need to provide notice of restrictions under Worker's Compensation Act?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- Employer policies and best practices
 - Is employer required to have FMLA policy?
 - Is employer required to have ADA or reasonable accommodation policy?
 - What benefits are there to having accurate job descriptions under ADA and FMLA?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- Can you require employee to cooperate in interactive process under ADA?
- How about with respect to leave process under FMLA?
- Should employer have a policy stating procedures in work comp situations?

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FMLA, ADA & Workers' Comp Overlap Issues

- Job transfer requirements
 - If employer transfers or reassigns employee to different position as part of reasonable accommodation process, can employer reduce employee's pay and benefits commensurate with new position?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- If employer temporarily transfers employee to a different position under FMLA, in order to better accommodate employee's intermittent/reduced leave schedule, can employer reduce employee's pay and benefits commensurate with temporary position?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- If employer transfers employee with work comp injury to light duty or different position, does employer have to maintain same level of pay and benefit?

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FMLA, ADA & Workers' Comp Overlap Issues

- Medical information
 - Can employer use medical or other information learned as part of ADA accommodation process in determining whether employee has serious health condition under FMLA?
 - What are best practices for keeping FMLA documentation relating to employee's leave?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- What about under ADA?
- Can employer ask for medical information beyond either disability (ADA) or serious health condition (FMLA)?
- What is difference between ADA's direct threat analysis and FMLA's new option that employer can require physician's certification of ability to work once every 30 days if there is a reasonable safety concern?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- Can employer require employee, who is on ADA leave, to provide periodic updates on their status and intent to return to work?
- What about under FMLA?
- What about under Work Comp?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- Reinstatement/restoration issues
 - Can employer require medical exam upon return to work from leave under FMLA?
 - What about under ADA?
 - What about under Work Comp?
 - Are job restoration standards under FMLA and ADA the same or different?

Continued

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FMLA, ADA & Workers' Comp Overlap Issues

- What obligations do employers have if employee returns to work from ADA leave but is unable to perform essential functions of job, with or without an accommodation?
- What about under FMLA?
- What about under Workers' Compensation Act?

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ATTORNEYS & COUNSELORS AT LAW

Contact Information



- **Laura M. Dinon**
Petoskey
(231) 348-6417
ldinon@plunkettcooney.com



- **Philip A. Erickson**
East Lansing
(517) 324-5608
perickson@plunkettcooney.com

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