

**WORKERS' COMPENSATION, THE ADA, AND FMLA  
-- RECENT DEVELOPMENTS --**

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**I. INTRODUCTION**

Workers' Compensation laws require employers to compensate employees for personal injury, occupational disease, or death arising out of and in the course of their employment. The Americans with Disabilities Act protects "qualified" employees or applicants with "disabilities" or who are perceived as disabled. The Family and Medical Leave Act requires employers to grant eligible employees with "serious health conditions" twelve weeks of unpaid leave in any twelve month period. These three sources of employment-related disability rights frequently intersect and sometimes collide. The key to making defensible personnel decisions is an independent analysis of each law in light of the facts of any given case.

**II. OVERVIEW**

**A. Workers' Compensation**

Workers' Compensation is a no-fault system of compensation for injured workers. If an injury or occupational disease arises out of and in the course of employment, and the very limited defenses available (for example, no accidental injury or absence of causal relationship) are found not to apply, benefits are payable in accordance with a statutory schedule. In Maryland, employees who miss work on account of a work-related injury or occupational disease are generally entitled to two thirds of their average weekly wage (subject to a statutory cap and floor), calculated on the basis of the thirteen weeks preceding the injury or the last injurious exposure to the hazards of the disease. But the workers' compensation system assumes a quid pro quo. In exchange for no-fault compensation, statutory benefits, with few exceptions, are the employee's exclusive remedy against the employer.

## B. The Americans With Disabilities Act

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., prohibits discrimination against qualified applicants or employees with disabilities and also requires reasonable accommodation of known disabilities. A disability within the meaning of the Act is 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 an impairment.<sup>1</sup> Only qualified individuals with disabilities are protected and, to be qualified, the employee or applicant must be able to perform the essential functions of the position with or without reasonable accommodation.<sup>2</sup> For example, the ADA does not require employers to alter their

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<sup>1</sup> A work-related injury is not a disability under the Act unless it substantially limits one or more major life activities, such as caring for one self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In this context, many injuries or conditions frequently encountered in the workers' compensation system simply do not rise to the level of a disability under the ADA. See, e.g., Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997) (employee with general lifting restriction imposed by physician not disabled within meaning of ADA where she was not precluded from performing a class or broad range of jobs as compared to the average person in the general population); Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998) (lifting restriction of 45 pounds occasionally and 20 pounds frequently insufficient to demonstrate a substantial limitation on major life activity); Baulos v. Roadway Express, Inc., 139 F.3d 1147 (7th Cir. 1998) (sleep disorders did not substantially limit major life activity of working); Vulcu v. Trionics Research Laboratory, 993 F. Supp. 623 (N.D. Ohio 1998) (work-related back injury requiring continuing treatment in the form of cortisone injections not ADA disability); Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996) (impairment of asbestosis did not substantially limit his major life activity and was not a disability under ADA); Martin v. Lockheed Martin, 7 AD Cases 1861 (N.D. Cal. 1998) (clerk with carpal tunnel syndrome barred from 122 of 235 jobs was not disabled within meaning of ADA); Wilmarth v. City of Santa Rosa, 945 F. Supp. 1271 (N.D. Cal. 1996) (carpal tunnel syndrome was not disability because it was temporary (two years) in duration and could have been cured sooner with reasonable treatment).

<sup>2</sup> Accommodations that would impose an undue hardship on the operation of the employer's business are, by definition, not reasonable. The reasonable accommodation requirement always applies unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. The term "undue hardship" is defined in the Act to mean an action requiring significant difficulty or expense, i.e., an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program. In determining whether a particular accommodation would impose an undue hardship on the operation of the covered entity's business, the factors to be considered are as follows: 1) the overall size of the covered entity's business with respect to the number of employees, the number and

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production standards if compliance with those standards is an essential function of the job. See Milton v. Scrivner, Inc., 53 F.3d 1118, 1124-1125 (10th Cir. 1995) (no duty to reduce workload or slow production schedule). Nor must the employer restructure a position by removing an essential function from the scope of the employee's required duties. Carrozza v. Howard County, Maryland, 45 F.3d 425 (4th Cir. 1995). Finally, the obligation to provide reasonable accommodation does not arise unless and until the person claiming to be a qualified person with a disability requests reasonable accommodation.<sup>3</sup>

### C. The Family And Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., requires covered employers to provide eligible employees with a total of twelve weeks of leave in any twelve month period due to "serious health conditions." A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves

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type of facilities, and size of the budget; 2) the type of operation maintained by the covered entity, including the composition and structure of the entity's workforce; and 3) the nature and cost of the accommodation needed.

<sup>3</sup> In Hedberg v. Bell Telephone Co., 47 F.3d 928 (7th Cir. 1995) the employee argued that actual knowledge of the disability is irrelevant; firing someone "because of" the symptoms of a disability is the same as firing someone "because of" the disability itself. The symptoms there were tardiness and perceived laziness. The Seventh Circuit rejected that position out of hand, stating:

Allowing liability when an employer indisputably had no knowledge of the disability, but knew of the disability's effects, far removed from the disability itself and with no obvious link to the disability, would create an enormous sphere of potential liability . . . The ADA hardly requires that merely because some perceived tardiness and laziness is rooted in a disability, an employer who has not been informed of the disability and who has no reason to know of the disability, is bound to retain all apparently tardy and lazy employees on the chance that they may have a disability that causes their behavior. The ADA does not require clairvoyance. . . . The ADA is not a job insurance policy, but rather a congressional scheme for correcting illegitimate inequities the disabled face.

Similarly, if an employee seeks no accommodation but is unable to perform essential functions of the job, the employer is not obligated to provide an accommodation. Derbis v. United States Shoe Corporation, 67 F.3d 294 (4th Cir. 1995).

1. an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with such medical care; or
2. a period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves
  - a. treatment two or more times by a health care provider or a provider of health care services (*e.g.* a physical therapist) under the supervision of or referral by a health care provider; or
  - b. treatment by a health care provider at least once which results in a regimen of continuing treatment under the health care providers' supervision.

29 C.F.R. § 825.114(a).<sup>4</sup> The employee may choose, or the employer may require, substitution of accrued paid leave (such as sick or vacation leave) for unpaid leave under the Act.<sup>5</sup> Under Department of Labor (DOL) regulations, if the employer does not properly and timely designate qualifying leave as FMLA leave, the employer loses its right to count the leave against the employee's twelve week statutory allotment, but the employee retains the protections of the FMLA during the leave. 29 CFR § 825.208. With very limited exceptions, upon return from FMLA leave, the employee must be restored to the same position held prior to the leave or to an equivalent position.

### **III. INTERPLAY AMONG THE THREE LAWS**

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<sup>4</sup> Courts have concluded that relatively common afflictions likely to occur in most persons' lifetimes are not serious health conditions within the meaning of the FMLA. For example, in Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994), a child's ear infection was not. Similarly, intermittent rectal bleeding causing only a day or two of absence and one medical consultation "falls far short of the sort of chronic serious health problems such as diabetes and epilepsy within the purview of the FMLA." Bauer v. Dayton-Walther Corp., 910 F. Supp. 306, 309 (E.D. Ky. 1996). See also Manuel v. Westlake Polymers Corp., 1994 WL 809934 (W.D. La. 1994) (ingrown toenail not an "obvious" serious health condition that would trigger employer inquiry into possibility of FMLA leave); Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp 1028 (M.D. Tenn. 1995) (undiagnosed "upper respiratory infection" not serious health condition where employee not actually incapacitated); Sakellarion v. Judge & Dolph, Ltd., 893 F. Supp. 800, 807 (N.D. Ill. 1995) (asthma requiring hospital visit, but no overnight admission, not serious health condition); Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995), aff'd., 74 F.3d 91, 92 (5th Cir. 1996) (food poisoning requiring neither inpatient care nor continued medical treatment not serious health condition).

<sup>5</sup> During an FMLA leave, the employer also must maintain the employee's coverage under any group health plan at the level and under the same conditions as coverage would have been provided absent the leave. 29 U.S.C. § 2614(c).

Injured employees entitled to workers' compensation may or may not have ADA or FMLA rights. Many injured employees simply do not have "disabilities" within the meaning of the ADA notwithstanding so-called "disability ratings" under the applicable workers' compensation statute. The two are not synonymous. The key inquiry is whether the mental or physical condition substantially limits a major life activity. In this context, the inability to perform a single, particular job is not a substantial limitation on the major life activity of working. Rather, the employee or applicant must be substantially restricted in the ability to perform either an entire class of jobs or a broad range of jobs in various classes. Similarly, an entitlement to workers' compensation does not automatically lead to the conclusion of a "serious health condition" under the FMLA, although that is likely when compensable injuries cause multiple day absences. On the other hand, to the extent that state law, including workers' compensation statutes, provides injured employees with greater rights or benefits, it is not preempted or superseded by the ADA or FMLA. But the opposite is not true -- state laws are preempted by the federal statutes insofar as they interfere with or give lesser rights. See, e.g. Wood v. County of Alameda, 875 F. Supp. 659 (N.D. Cal. 1995).

#### **IV. RECENT DEVELOPMENTS**

##### **A. Narrowing The Definition Of Disability**

Employers should never assume that a disabling medical condition also qualifies as a disability under the ADA. In that context, many courts have held that an ADA plaintiff must demonstrate that his or her condition poses a "significant barrier to employment in general," thus requiring him or her to prove exclusion from numerous jobs on account of the alleged disability. See, e.g., Martin v. Lockheed Martin, 7 AD Cases 1861 (N. D. Cal. 1998) (document control clerk with carpal tunnel syndrome barred from 122 of 235 jobs is not significantly restricted from working an entire class of jobs and therefore is not disabled); Mustafa v. Clark County School District, 876 F. Supp. 1177 (D. Nev. 1995) (teacher who was substantially limited in teaching in the classroom failed to prove "significant barrier to employment"); McKay v. Toyota, 878 F. Supp. 1012 (D. Ky. 1995) (carpal tunnel syndrome not a substantial limitation on major life activity of working where employee, by virtue of education, was qualified for numerous positions not utilizing the skills she learned on

defendant's assembly line); Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995) (employee who was restricted by a physician to light-duty work not substantially limited because restriction only prevented performance of a narrow range of meat-packing jobs).

Again, the employer should never assume the existence of an ADA-protected disability. In that respect, the Supreme Court, in two recent cases, further narrowed the definition of disability under the ADA. Sutton v. United Air Lines, Inc., \_\_\_ U.S. \_\_\_ (1999); Murphy v. United Parcel Service, Inc., \_\_\_ U.S. \_\_\_ (1999). In Sutton and Murphy, the Court held that any determination of disability under the ADA must include consideration and analysis of measures that mitigate the condition or impairment, such as eyeglasses or medication. Thus, in those cases, two nearsighted pilots whose vision is normal when wearing glasses and a mechanic whose high blood pressure may be controlled by medication are not disabled within the meaning of the ADA. In other words, to claim the protection of the ADA, an individual must be “presently” substantially limited in a major life activity.

**B. Reasonable Accommodation – The Interactive Process**

Generally, the obligation to provide reasonable accommodation does not arise unless and until the person claiming to be a qualified person with a disability requests reasonable accommodation. An employer is only obligated to make reasonable accommodation for known disabilities. There is no duty to be clairvoyant, or to risk a claim of discrimination by assuming that an individual with an impairment needs to be treated differently than other applicants or employees. However, once a request for accommodation is made, the ADA contemplates an interactive process between employer and employee whereby an effective accommodation that best serves the needs of both parties is put into place. A vexing problem frequently encountered by even the most sensitive employers is the employee who demands unreasonable accommodation or who demands accommodation and then simply refuses to cooperate in the process.

Recent developments in the caselaw indicate that the belligerent, uncooperative employee need not be accommodated at all. In Loulseged v. Akzo Nobel Inc., \_\_\_ F.3d \_\_\_ (1999), for example, the Fifth Circuit recently emphasized this point with the wonderful observation that “one cannot negotiate with a brick wall.” There, the employee

suffered a work-related back injury. After she returned from medical leave for surgery, her doctor imposed lifting restrictions of 10 pounds, and she was not allowed to perform repetitive bending or stooping. At a meeting where the employer suggested possible accommodations, the employee remained silent and never spoke to anybody about the need for accommodation thereafter. Instead, she quit and filed suit under the ADA, claiming that the employer had failed to engage in an interactive process. In holding that the plaintiff's "stony silence" barred her lawsuit, the Fifth Circuit cited EEOC guidelines that identify the so-called "interactive" process, and stressed that this process requires the input of the employee as well as the employer.

### C. Disability-Related Inquiries And Medical Exams

As is generally the case, the Maryland Workers' Compensation Act does not prohibit inquiries into a job applicant's or employee's medical or compensation claim history. However, under the ADA, an employer is strictly proscribed in conducting disability-related inquiries and medical examinations of employees and applicants. The most significant recent development in this area involves inquiries and exams after the employment relationship commences. Under the ADA, disability-related inquiries and medical examinations of employees must be "job-related and consistent with business necessity." On July 27, 2000, EEOC issued a comprehensive Enforcement Guidance setting forth the agency's position on the complex issues raised by this seemingly simple language. EEOC Enforcement Guidance, No. 915.002 (July 27, 2000).

General analysis of the permissibility of medical examinations and inquiries proceeds in three stages. At the first stage, prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations.<sup>6</sup> At the second stage, after a conditional offer of employment has been extended, the employer may make disability-related

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<sup>6</sup> Therefore, an employer cannot inquire at the pre-offer stage about an applicant's medical or claims history. 29 CFR § 1630.13. While pre-employment inquiries about ability to perform job-related functions are not improper, the ADA prohibits questions designed to solicit disability-related information. Medical exams may be required only after a conditional offer of hire and only if required of all entering employees in the same classification of jobs.

inquiries and conduct medical examinations, regardless of any relation to the essential functions or requirements of the job, *provided that it does so for all entering employees in the same job category.*<sup>7</sup> At the final stage, after employment commences, disability-related inquiries and medical examinations may be conducted *only if* they are job-related and consistent with business necessity.<sup>8</sup>

EEOC's July 27, 2000 Enforcement Guidance sets forth the agency's position on disability-related inquiries and medical examinations after the employment relationship commences. As an initial matter, however, it must be determined which inquiries are "disability-related" and which tests or procedures are "medical" in nature.

According to EEOC, a "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. Impermissible inquiries include the following:

- ! Asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability.
- ! Asking an employee to provide medical documentation regarding his/her disability.
- ! Asking an employee's co-worker, family member, doctor, or another person about an employee's disability.
- ! Asking about an employee's genetic information.
- ! Asking about an employee's prior workers' compensation history.

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<sup>7</sup> If certain criteria tend to screen out employees with disabilities, the exclusionary criteria must be job-related and consistent with business necessity. For example, inquiries about an applicant's workers' compensation claims history may be made after a conditional job offer, but it would be discriminatory to rescind the conditional offer merely because of speculation about increased workers' compensation costs. The ADA permits denial of a position based on disability-related information only if performance of the job's essential functions cannot be accomplished with reasonable accommodation.

<sup>8</sup> Any medical information collected by the employer must be kept in a separate file and maintained as confidential. 42 U.S.C. § 12112(d)(C). The ADA does permit sharing the information with concerned parties under certain circumstances. For example, when necessary, employers may provide collected medical information to state workers' compensation offices, insurance carriers, and second injury funds. See 42 U.S.C. § 12201(b); 29 CFR § 1630.14(b).

- ! Asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications.
- ! Asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).

Questions that are not likely to elicit information about a disability are not disability-related inquiries and, therefore, are permissible under the ADA. Examples include:

- ! Asking generally about an employee's well being (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship.
- ! Asking an employee about nondisability-related impairments (e.g., How did you break your leg?).
- ! Asking an employee whether s/he can perform job functions.
- ! Asking an employee whether s/he has been drinking.
- ! Asking an employee about his/her current illegal use of drugs.
- ! Asking a pregnant employee how she is feeling or when her baby is due.
- ! Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. According to EEOC, the following factors should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task ; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used. Medical examinations include the following:

- ! Vision tests conducted and analyzed by an ophthalmologist or optometrist.

- ! Blood, urine, and breath analyses to check for alcohol use.
- ! Blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease).
- ! Blood pressure screening and cholesterol testing.
- ! Nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome).
- ! Range-of-motion tests that measure muscle strength and motor function.
- ! Pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out).
- ! Psychological tests that are designed to identify a mental disorder or impairment.
- ! Diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

There are a number of procedures and tests employers may require that generally are not considered medical examinations, including:

- ! Tests to determine the current illegal use of drugs.
- ! Physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure).
- ! Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions.
- ! Psychological tests that measure personality traits such as honesty, preferences, and habits.
- ! Polygraph examinations.<sup>9</sup>

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<sup>9</sup> It should be noted that tests and procedures that are permissible under the ADA are not necessarily permissible under state employment laws. For example, Maryland employers, with limited exceptions, are prohibited by statute from requiring applicants to submit to polygraph examinations as a condition of employment, and indeed, every employment application in Maryland must so indicate in bold-faced type.

It may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination when there is a legitimate question as to the ability of an employee to perform the essential functions of his/her job or to question whether the employee can do the job without posing a direct threat due to a medical condition. Inquiries and examinations in response to a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity.

Furthermore, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity. For example, when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition an examination may be appropriate. Similarly, a medical exam or disability-related inquiry may be permissible when the employer receives information from a credible third party that an employee has a medical condition, or when the employer observes symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.

**D. No Fault Attendance Policies**

Termination or discipline on account of excessive absenteeism arising from work-related injuries is not actionable under most workers' compensation laws. See, e.g., Kern v. South Baltimore General Hosp., 66 Md. App. 441 (1986). However, where a serious health condition is involved and the other conditions for coverage are met, the FMLA requires employers to permit up to twelve weeks of leave per year irrespective of any hardship imposed. And, under the ADA (at least according to EEOC) employers may have some duty to tolerate even longer absences because of work-related disabilities where the time off would not impose an undue hardship on operations.<sup>10</sup>

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<sup>10</sup> See EEOC Enforcement Guidance: Workers' Compensation and the ADA, EEOC Notice No. N-915.002, at 15 (Sep. 3, 1996). However, EEOC's position must be understood in light of substantial caselaw indicating that regular and predictable attendance is an essential function of most

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## **E. Employee Leave Benefits**

A workers' compensation absence and FMLA leave can run concurrently if the employer properly and timely designates the FMLA leave. But workers' compensation is not "unpaid leave," so designating concurrent FMLA leave does not permit the employer or the employee to apply (and thus exhaust) other accrued paid leave (which would otherwise be true for the FMLA leave period). Thus, if an employee goes out on workers' compensation, and the employer designates the absence as FMLA leave, neither the employer nor the employee can apply accrued paid sick or vacation leave to that same period of absence. In this sense, workers' compensation "protects" the other accrued paid leave, and allows employee to save it for some future period. See 29 CFR § 825.207(d)(2).<sup>11</sup> An employee on concurrent workers' compensation/FMLA leave also is entitled to continued group health care benefits for up to 12 weeks, at the same cost and terms as if not on leave.<sup>12</sup>

The most pressing current issue with respect to FMLA leave is a controversial Department of Labor (DOL) regulation that requires an employer to designate a paid medical or sick leave as FMLA leave at or near the commencement of the absence. Under the regulations, the draconian consequence of failing to give the employee advance notice that a paid absence will be counted as FMLA leave is that the absence may not be counted against the 12 week statutory leave entitlement. Thus, according to the Department of Labor, failure to properly designate leave as FMLA-qualifying may

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<sup>10</sup>(...continued)

jobs. See, e.g., Tyndall v. National Education Centers, 31 F.3d 209, 213 (4th Cir. 1994); Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ind. 1995); Walders v. Garrett, 765 F. Supp. 303, 313 (E.D. Va.), aff'd, 956 F.2d 1163 (4th Cir. 1992); Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994).

<sup>11</sup> The same result obtains for non-statutory disability benefits provided voluntarily by employers. Thus, if an employee goes out on long-term paid disability, neither the employee nor the employer can apply (exhaust) other accrued paid leave during that period. 29 CFR Sec. 825.207(d)(1).

<sup>12</sup> But since many employees have health care benefit costs deducted from regular paychecks, some other arrangement must be made during a workers' compensation absence if paychecks temporarily cease. And the FMLA expressly limits employers to certain options in collecting such health care payments from employees as set forth in 29 CFR § 825.210(c).

prevent the employer from terminating the employee under the employer's no fault attendance policy once the employee is out for twelve or more weeks.

The federal courts are now split on whether the controversial DOL regulation is valid and enforceable. Compare McGregor v. Autozone, Inc., 180 F.3d 1305 (11<sup>th</sup> Cir. 1999) (striking down the regulations because they improperly expand the substantive guarantees of the statute); Schloer v. Lucent Tech., Inc., 2000 WL 12898, 6 WH Cases2d 344 (D. Md. 2000) (same); Neal v. Children's Habilitation Ctr., 1999 WL 706117, 5 WH Cases2d 1278 (N.D. Ill. 1999) (same); Donnellan v. New York City Transit Auth., 1999 WL 527901, 5 WH Cases2d 942 (S.D.N.Y. 1999) (criticizing the regulations but finding for the employer on narrower ground) with Plant v. Morton Int'l, Inc., 2000 WL 572458, 6 WH Cases2d 70 (6<sup>th</sup> Cir. 2000) (distinguishing between notice requirements for paid as opposed to unpaid leave but appearing to uphold both 29 C.F.R. §§82255.208(c) and 825.700(a) as valid exercises of regulatory power); Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878, 6 WH Cases2d 337 (S.D. Miss. 1999) (holding that the DOL's regulations appropriately "filled the gaps" of the FMLA); Chan v. Loyola Univ. Med. Ctr., 1999 WL 1080372, 6 WH Cases2d 328 (N.D. Ill. 1999) (same).

Most recently, on July 11, 2000, the Eighth Circuit held that the regulation is invalid, and rejected the claim of an employee who was fired after she had been out on sick leave for more than 30 weeks. According to the Court, the FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Twelve weeks is both the minimum that an employer must provide and the maximum that the FMLA requires, and the statute's provisions are noticeably bereft of any purpose to interfere with the employer's leave policies, which in that case are more generous than required by the FMLA, or to require more generous leave plans than the minimum 12 weeks of unpaid leave mandated by the Act. Ragsdale v. Wolverine Worldwide Inc., 6 WH Cases2d 298 (8<sup>th</sup> Cir. 2000). Although this plainly seems the better view, until the Supreme Court puts to rest the split in authority, prudent employers will follow the DOL regulations with respect to timely designation and in all other respects.

#### **F. Light Duty Programs**

An employer cannot force an employee to accept a "light-duty" position if FMLA leave is running concurrently with workers' compensation. Thus, an employee unilaterally can choose to remain out on FMLA leave (and apply other accrued paid leave) and reject the light duty position. Or the employee can take the light duty job and compensation benefits, in which case the employer can designate FMLA leave but cannot require the employee to exhaust other accrued paid leave. Of some solace is the employer's entitlement to deny workers' compensation benefits where the employee refuses a light duty position.

Once 12 weeks pass, the employee on concurrent workers' compensation and FMLA leave loses FMLA protection. Only the ADA or a workers' compensation light duty program remain to protect the employee, if at all. Thus, once FMLA leave expires, an employee has no right to reinstatement to an "equivalent" job upon return. But he or she might have a right to a light-duty position under the workers' compensation system, or to job modifications as a "reasonable accommodation" under the ADA. The ADA, however, does not require an employer to grant the employee unlimited time off.<sup>13</sup> Nor is there any obligation to create a permanent light duty position for a disabled employee who cannot perform the essential functions of his or her job. Champ v. Baltimore County, Md., \_\_\_ F.3d \_\_\_, No. 95-2061 (4th Cir. 1996).

#### **G. Wrongful Termination**

It is unlawful to fire an employee for filing a workers compensation claim. Ewing v. Koppers Co., 312 Md. 45 (1988). That is the rule in Maryland and most other states, whether by statute or as a matter of judicially recognized public policy. However, terminations based on excessive absenteeism are not actionable under state workers' compensation statutes. See, e.g., Kern v. South Baltimore General Hosp., 66 Md. App. 441 (1986). That is not the case under the FMLA, and perhaps, under some circumstances, the ADA. Further, both the ADA and the FMLA prohibit reprisal, including

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<sup>13</sup> In Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) the Fourth Circuit explained that "[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question."

termination or other discipline, against employees who exercise their rights under the respective statutes. It thus is conceivable that an employee could assert wrongful termination or retaliatory discharge claims under the workers' compensation statute and under both the ADA and FMLA all in one litigation.

#### **H. The Effect Of Representations Made During Benefit Claims Proceedings**

In Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999), the Supreme Court finally addressed an important issue that had pitted EEOC against the holdings of many federal courts. These courts held that representations by a claimant that he or she is unable to work, in whole or in part, made for the purpose of obtaining disability benefits (including workers' compensation, disability insurance, and Social Security benefits) bar an ADA claim in subsequent litigation.<sup>14</sup> In February 1997, EEOC issued an enforcement guidance stating that "a person's representations that s/he is 'totally disabled' or 'unable to work' for purposes of disability benefits are never an absolute bar to an ADA claim" and that summary judgment is "inappropriate" merely because the charging party made such representations. EEOC Enforcement Guidance, No. 915.002 (Feb. 12, 1997).

The caselaw focused on an essential element of a prima facie case under the ADA -- the ADA only protects qualified employees or applicants with a disability, and to be qualified the employee must be able to perform the essential

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<sup>14</sup> See, e.g., Baker v. Asarco, Inc., 1995 U.S. Dist. LEXIS 16852 (D.C. Ariz. 1995) (employee who applied for and received benefits from both disability insurance and Social Security Administration estopped on account of certifications of total disability); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994) (numerous insurance claim forms and letters signed by plaintiff barred ADA claim); August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) (plaintiff who applied for and received disability benefits could not claim to be qualified individual with disability); Fussell v. Georgia Ports Authority, 1995 U.S. Dist. LEXIS 16124 (S.D. Ga. 1995) (individual who applied for and received disability benefits estopped from making claim under ADA); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547 (D. Kan. 1995) (plaintiff who applied for total disability benefits estopped from bringing an ADA claim); Nguyen v. IBP, Inc., 1995 U.S. Dist. LEXIS 16535 (D. Kan. 1995) (certification of total disability on benefit application bars plaintiff from litigating that issue); Smith v. Midland Brake, Inc., 1995 U.S. Dist. LEXIS 19467 (D. Kan. 1995) (application for and receipt of Social Security disability benefits barred ADA claim); Lewis v. Zilog, 908 F. Supp. 931 (N.D. Ga. 1995) (LTD application barred ADA claim); Harden v. Delta Air Lines, 900 F. Supp. 493 (S.D. Ga. 1995) (same).

functions of the job with or without accommodation. The operative principle was in the nature of judicial estoppel. Indeed, it seems a matter of simple common sense and fairness that the employee cannot assert for one purpose (to obtain disability benefits) an inability to work, and then turn around and assert the opposite in an attempt to obtain damages under the ADA.

The Supreme Court in Cleveland took the middle ground. On the one hand, the Court held that statements made for the purpose of securing disability benefits, claiming that or describing why the claimant is too disabled to work, do not necessarily bar the disabled individual from claiming in an ADA action that s/he can perform the essential functions of the job at issue. At the same time, however, the burden is on the employee to offer an explanation for the inconsistency “sufficient to warrant a reasonable juror’s concluding that, assuming the truth of, or the plaintiff’s good faith belief in, [the statements made to obtain benefits,] the plaintiff could nonetheless perform the essential functions of her job with or without reasonable accommodation.”

Cases following Cleveland indicate that common sense will prevail. For example, in a recent case, the Second Circuit rejected the plaintiff’s claim and set aside a jury verdict, where the employee testified at trial that he could work with accommodation, but offered no credible explanation for his statement to the Social Security Administration that he had been “unable to work” for 10 months prior to the date that his employer terminated him purportedly on account of his disability. DiSanto v. McGraw-Hill, Inc., 2000 WL 955557 (2d Cir. 07/11/00). Indeed, it should go without saying that an ability to work is an essential function of every job. Thus, the ADA claim will go forward in close cases where plaintiffs can point out some ambiguity in the representations at issue, for example, where the representations are ambiguous as to future ability to work or where the representations do not preclude a determination that the claimant could work with accommodation.

#### **IV. CONCLUSION**

Recent developments emphasize the importance of undertaking an independent analysis of each potentially applicable law under the facts of any given case. For example, if the employee or an examining physician certifies an inability to work, in whole or in part, management should consider whether termination is warranted under existing

personnel policies and defensible under the ADA and FMLA. Similarly, if in response to discipline for failure to abide by legitimate work rules -- such as attendance policies or production requirements, the employee claims "my disability made me do it," management should consider whether the employee is, in fact, disabled under the ADA. If the answers to these or similar questions are unclear, develop additional information through permissible avenues, such as medical examinations or other inquiries designed to solicit information relative to an ability to perform essential job functions. Again, the key to making defensible personnel decisions is an independent analysis of each law in light of the facts of any given case.

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