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I INTERPLAY OF STATE WORKERS' COMPENSATION STATUTES, THE AMERICANS WITH DISABILITIES ACT AND THE FAMILY AND MEDICAL LEAVE ACT (8/2002 - updated)

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A. State Workers' Compensation Benefits

Workers' compensation benefits are often the exclusive recovery available for work-related injuries. They typically consist of authorized medical treatment, total temporary disability ("TTD"), partial [or total] permanent disability and in some States, compensation for loss of earnings capacity. In New Jersey, TTD is payable at 70% of an employee's wages while the injured worker is unable to work and in need of medical treatment. Once a plateau of medical recovery is reached, entitlement to TTD ends although the employee may continue to have medical restrictions that preclude her return to past work.²

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² Under Williams v. Topps Appliance City, 239 N.J. Super. 528 (App. Div. 1989), TTD payments must continue where the employer has no light duty positions available for a recovering worker. The plaintiff in Williams had not yet reached a plateau of medical recovery when released to perform light duty. Such an incomplete recovery may be a prerequisite for continuing TTD where no light duty work is available. See Id. at 532-33.

Most state workers' compensation acts do not protect an employee's right to return to the same or equivalent position after a work related injury. Although the majority of state statutes (and public policy) prohibit retaliation against employees for filing a claim or seeking compensation benefits, there is no requirement under workers' compensation laws to hold a position open for a disabled worker.³ In contrast, the Family and Medical Leave Act ("FMLA") and Americans With Disabilities Act ("ADA") provide limited job reinstatement rights following a period of disability. Thus, an employee who is absent from work due to a work-related injury qualifying as a "serious health condition," may be eligible for FMLA leave with job reinstatement protection. If the injury resulted in a qualifying disability, the employee may also have job protection arising from the ADA and state anti-discrimination laws.⁴

B. FMLA

³ See Duncan v. New York State Developmental Center, 63 N.Y.2d 128, 481 N.Y.S. 2d 22 (App. Ct. 1984). The Court criticized a "broad interpretation" of New York's workers' compensation anti-retaliation statute which would "condemn any action triggered by the employee's work-related injury regardless of whether it was a retaliatory tactic." The Court required a "causal nexus between the employee's activities in obtaining compensation and the employer's adverse conduct toward the employee." Id. at 24-25. Accord: Malone v. Aramark Services, Inc., 334 N.J. Super. 669, 677-678 (L. 2000); Wurst v. Nestle Foods Corp., 791 F. Supp. 123, 125 (W.D. Pa. 1991); Finnerty v. Personnel Board of City of Chicago, 303 Ill. App. 3d 1 (Ill. App. Dist. 1999). See generally Swearingen v. Owens Corning Fiberglass Corp., 968 F.2d 559, 563 n. 3 (5th Cir. 1992) (citing cases).

⁴ See 29 C.F.R. 825.702(d)(2).

1. Entitlement and leave of absence.

The FMLA provides that eligible employees are entitled to a total of 12 work weeks of unpaid leave during any 12-month period for any of four reasons: 1) to care for the employee's new-born child; 2) to care for a newly-placed child through adoption or foster care; 3) to care for the employee's spouse, son, daughter or parent if that individual has a "serious health condition"; and 4) on account of the employee's own serious health condition, if that condition renders the employee unable to perform the functions of her position. The FMLA protects employees who have worked a required minimum number of hours during the past 12 months⁵ and were employed for a total of 12 months (not necessarily consecutively) for an eligible employer.⁶ The time an employee spends on paid or unpaid leave does not accumulate toward the requirement of a minimum number of hours worked.⁷ Whether time spent on leave accrues toward the 12 months of employment required for eligibility is an issue not yet resolved.⁸

A serious health condition" is defined as any illness, injury, impairment or physical or mental condition that involves:

⁵ 29 C.F.R. § 825.110(a)(2).

⁶ 29 C.F.R. § 825.110(a)(1).

⁷ See Robbins v. Bureau of Natl. Affairs, 1995 WL 490916 (D.D.C., Aug. 15, 1995); Clark v. Allegheny Univ. Hosp., 4 Wage & Hour Cas. 2d (BNA)744 (E.D.Pa. 1998).

⁸ See e.g. Jessie v. Carter Health Care Center, 3 Wage and Hour Cas. 2d. (BNA)549 (E.D. Ky. 1996)(finding that a plaintiff on pregnancy leave after six months with the employer, was not wrongfully discharged because she was not an "eligible employee" under the FMLA at the time of discharge.)

- (1) **Inpatient care** (i.e., an overnight stay) in a hospital, hospice, or residential medical facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such in-patient care; or
- (2) **Continuing treatment by a health care provider.** A serious health condition involving continuing treatment by a health care provider includes . . . the following:
 - (i) A period of incapacity [defined supra] of more than three consecutive calendar days, and 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, . . .
 - (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider.
 - (ii) Any period of incapacity due to pregnancy or prenatal care.
 - (iii) Any period of incapacity for a chronic serious health condition.

The issue of what constitutes a serious medical condition has been highly litigated. The final DOL rule enacted in 1995 allows greater latitude to qualifying conditions. Chronic serious health conditions are episodic and recurring conditions which may not result in a "continuing period of incapacity."⁹ "Ordinarily, unless complications arise, the common cold, the flu, ear aches, minor ulcers, headaches other than migraine" do not qualify as serious medical conditions.¹⁰ However, conditions such as allergies, asthma, ulcers, and morning sickness which are

⁹ See 29 U.S.C. §2611(11) (1993) ; Department of Labor's Final Rule at 29 C.F.R. §825.114(a) (1)-(2) (1995)

¹⁰ See 29 C.F.R.825.114

routinely controlled by medication or continuing medical care, may qualify as serious medical conditions during periods of "flare up" if they prevent the employee from satisfying the essential functions of his job.¹¹

Federal regulations for intermittent leave and reduced leave (part time work schedule) are flexible and allow for leave to be taken in hourly increments. An employer's agreement is required if a parent requests a reduced leave schedule after the birth or adoption of a child. However, no employer agreement is required for intermittent leave when the employee has a serious health condition or must care for a dependent with a serious health condition.¹²

The employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave. The employer may not require an employee to take more leave than they require under the circumstances that caused the need for the leave.¹³

The employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

¹¹ Victorelli v. Shadyside Hospital, 128 F.3d 184, 190 n. 7 (3^d Cir. 1997) (citing 60 Fed. Reg. 2180 at 2195).

¹² 29 C.F.R. 825.203 (b), (c)

¹³ 29 C.F.R. 825.203(d)

The alternative position must have equivalent pay and benefits...but does not have to have equivalent duties.¹⁴

When the need for FMLA leave is foreseeable, as with the birth or adoption of a child, or scheduled medical treatments, an employee must notify her employer 30 days in advance. When the need for leave is unforeseeable, notice is required as soon "as practicable."¹⁵ Emergency leave raises the issue of how soon notice is practicable. Generally, the employee must notify the employer within one or two days after the need for leave arises.¹⁶

An employee is not required to use "magic words" to request FMLA leave.¹⁷ The employee need only request leave and state a valid medical or family-related reason for the leave. The employer is advised to make informal inquiries to determine the applicability of FMLA leave under the circumstances.¹⁸ The employer will not violate the ADA or FMLA if its inquiries are limited to the particular health condition for which the employee requests leave.¹⁹

The FMLA provides for 12 weeks of unpaid leave, but the "employee may elect, or an employer may require the employee to

¹⁴ 29 C.F.R. 825.204 (c)
¹⁵ See 29 C.F.R. § 825.302(a), (b)
¹⁶ See 29 C.F.R. § 303(a)
¹⁷ See 29 C.F.R. § 825.208 (a)
¹⁸ See 29 C.F.R. § 825.303(b)
¹⁹ See 29 C.F.R. § 1630.14 (c)

substitute any of [his or her] accrued paid vacation leave, personal leave, or ... sick leave" for unpaid FMLA leave.²⁰ The designation of leave as FMLA should be made at the time of the request to avoid possible litigation. Department of Labor Regulations state that an employer must make the designation of FMLA leave within two days of the employee's request for leave.²¹ In Ragsdale v. Wolverine World Wide, Inc., U.S., 122 S. Ct. 1155 (2002) the Supreme Court struck the DOL's categorical penalty provision of 29 C.F.R. § 825.700 (a): "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement". This categorical penalty was deemed incompatible with the FMLA's comprehensive remedial mechanism since it "establishes as an irrebuttable presumption that the employee's exercise of FMLA rights was impaired - and that the employee deserves 12 additional weeks of FMLA leave. The Court held that this alters the FMLA's cause of action in a fundamental way. "It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice".²²

2. Reinstatement After FMLA Leave

²⁰ U.S. Code Title 29, Section 2612(d)(2)

²¹ 29 C.F.R. § 825.208(c)

²² Justice O'Connor was joined by three other justices dissenting in Ragsdale. She would uphold § 825.700 as within the Secretary's discretion to require individualized notice of FMLA rights and as a reasonable means to secure compliance with the individualized notice requirement.

At the conclusion of an employee's leave period, the FMLA entitles her to be restored to the position she held when the leave commenced or to an otherwise "equivalent position."²³ An "equivalent position" has the same pay, benefits and working conditions, the same or substantially similar duties, responsibilities and working schedule, and the same or a geographically proximate work site. There is no obligation, however, to restore the employee to any position if the employer can show that the employee would not otherwise have been employed at the time of requested reinstatement. For example: 1) if the employee is "laid off during the course of taking FMLA leave and employment is terminated;" 2) if a shift has been eliminated, or overtime has been decreased; 3) if the employee is a "key" employee; 4) if the 12 weeks of FMLA leave expires and employee is still unable to work."²⁴

Employers are required to maintain health insurance coverage for employees while on FMLA leave. The insurance must be maintained at the level and under condition of coverage that would have been provided if the employee had not taken the leave.²⁵ Further, taking FMLA leave may not cause an employee to lose any employment benefits which accrued before the date on which leave

²³ See 29 U.S.C. § 2614(a)(1)(A).

²⁴ 29 C.F.R. §825.216(a) (c) (d)

²⁵ See 29 U.S.C. §2614(a)(2)

began.²⁶

3. Interference with FMLA Rights

29 U.S.C. § 2615 makes it unlawful for "any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" under the FMLA. Discriminating against or discharging an individual for exercising their rights or for opposing an employer's unlawful acts is prohibited.

29 C.F.R. §825.220 (b) provides that "[a]ny violation of the Act or of these regulations constitute interfering with ...the exercise of rights provided by the Act." Denying a requested leave is certainly a violation of the Act as is discouraging an employee from taking leave. An employer who manipulates the location of work sites or allocation of employee-hours to avoid coverage under FMLA, also interferes with employees' FMLA rights. An employer may interfere with employees' FMLA rights if it 1) counts FMLA leave under a no-fault attendance policy;²⁷ 2) relies upon a health care provider, "employed on a regular basis by the employer," to verify an employee's medical need for leave;²⁸ or 3) fails to "give notice of a requirement for medical certification

²⁶ 29 U.S.C. §2614(c) (1)

²⁷ 29 C.F.R. 825.220 (c); See also Manuel v. Westlake Polymers Corp., 66 F.3d 758, (5th Cir. 1995)

²⁸ 29 U.S.C. §2613(c)(2); Price v. City of Fort Wayne, 117 F.3d 1022, 1026-27 (7th Cir. 1997).

each time a certification is required" by the employer.²⁹

The purpose of the FMLA is to "balance the demands of the workplace with the needs of families [and] to promote the stability and economic security of families."³⁰ Disabled employees are equally eligible for FMLA leave. The ADA's purpose is to prevent discrimination against disabled persons in the workplace, hiring and in all aspects of employment.³¹

C. Americans with Disabilities Act

1. Leave as a Reasonable Accommodation

While the ADA does not require employers to grant disabled employees more paid leave than non-disabled employees, it may require an employer to provide unpaid leave to a disabled individual as a reasonable accommodation designed to enable the worker to carry out the essential functions of his job.

"Disability" means that the individual: 1) has a physical or mental impairment that substantially limits a major life activity³²; 2) has a record of such an impairment; or 3) is regarded as having such an impairment.³³ Major life functions include caring for oneself, performing manual tasks, walking,

²⁹ 29 C.F.R. §825.305(a); Henderson v. Whirlpool Corp., 1998 WL 66463, at * 9 (N.D.Okla. 1998)

³⁰ 29 U.S.C. § 2601(b).

³¹ 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4.

³² See Albertson's, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999) (stressing that the existence of disabilities should be determined on a case-by-case basis).

³³ See 42 U.S.C. § 12102(2) (1993), 29 C.F.R. § 16302 (g).

seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting and reaching;³⁴ as well as thinking,³⁵ interacting with others, and sleeping.³⁶

A protected handicap condition under the New Jersey Law Against Discrimination ("LAD") need not be severe. "[T]his remedial legislation [is not limited] to the halt, the maimed or the blind. The LAD prohibits unlawful discrimination against those suffering from a physical or non-physical handicap.³⁷ There is simply no basis for limiting its coverage to so-called severe disabilities."³⁸

Leave extended beyond the 12 week FMLA allowance, or intermittent leave as allowed by FMLA, can be an effective means of accommodating an individual with a disability.³⁹ The significant issue in cases of extended leave is whether the

³⁴ 29 C.F.R. § 1630.2(i).

³⁵ See Taylor v. Phoenixville School District, 184 F.3d 296, 306 (3d Cir. 1999)(distinguishing the undisputed mental impairment from the issue of "whether the impairment substantially limits a major life activity.")

³⁶ See Bennett v. Unisys Corp, 2000 U.S. Dist. LEXIS 18143 at n.16 (E.D. Pa. 2000) ("Although interacting with others has not been expressly found by this Circuit to qualify as a major life activity, this Circuit is solicitous of the EEOC guideline and generally unwilling to take a narrow view of what constitutes a 'major life activity.'").

³⁷ Viscik v. Fowler Equipment Co., 173 N.J. 1, 15 (2002).

³⁸ Seiden v. Marina Associates, 315 N.J. Super. 451, 466 n.2 (L. 1998) (quoting Andersen v. Exxon Co., 89 N.J. 483, 492-932 (1982)); Accord: Viscik, 173 N.J. at 16.

³⁹ See Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243,1247 (9th Cir. 1999) (Where the employer's personnel policy allowed up to one year for medical leave, request for extended leave was not per se an unreasonable accommodation under the ADA without demonstration of undue hardship); Ralph v. Lucent Technologies., 135 F.3d 166, 172 (1st Cir. 1997) (Employer may be required to grant additional accommodations beyond a 52-week leave with pay for employee who suffered a mental breakdown.)

accommodation will render the disabled employee qualified to perform the essential functions of her job.⁴⁰ An employer must make "all reasonable accommodations to an employee returning from disability leave and allow the employee a reasonable time to recover from his injuries."⁴¹

2. ADA Return-to-Work Protections

A disabled employee is entitled to return to the same job unless the employee requests more leave than allowed by the FMLA, and the employer demonstrates that holding the job open would create an undue hardship. Under those circumstances, the employer is required to identify any vacant, equivalent positions for which the employee is qualified and which the employer, without undue hardship, can hold open until the employee returns. An employer must look for a position at a lower level if an equivalent position is not available.⁴² If neither an equivalent nor a lower

⁴⁰ See 29 C.F.R. pt. 32, App. A(b) (Department of Labor regulations announcing that a reasonable accommodation may require an employer "to grant liberal time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment or hospitalization); Shannon v. City of Philadelphia, 1999 U.S. Dist. LEXIS 18089 (E.D. Pa. 1999) (Whether extended leave is a reasonable accommodation is a question of fact to be determined by a jury where the disabled employee's physician opined that with treatment she would be "fully fit" to return to work within three to six months.)

⁴¹ Muller v. Exxon Research Co., 345 N.J. Super 595, 608 (App. Div. 2001). (Yet, the LAD does not require an employer to create a permanent part time position for a handicapped employee.)

⁴² A union member is not guaranteed a union job as a reasonable accommodation or a benefit of employment preserved after leave or by the "interactive process". See Jones v. Aluminium Shapes, Inc., 339 N.J. Super. 412, 422-23 (App. Div. 2001) (The Court recognized the applicability of engaging in a good faith "interactive process" under LAD.)

level position can be held open until the employee returns, the employer is not required to make further accommodation.⁴³

When an employee seeks to return to work, the employer's legitimate concern is whether she can perform essential job functions with or without reasonable accommodation. Essential job functions are those functions that are fundamental, not marginal, to the employee's position.⁴⁴ If the employee cannot perform the essential job functions with or without reasonable accommodations, the employer must attempt to identify an equivalent or lower position which the employee can perform. Id.

To assist in the determination required by the ADA, an employer may request that a returning employee undergo a "fitness for duty" medical examination, provided that this is consistent with business necessity and is job related.⁴⁵ The employer may ask the employee for documentation of his or her disability to determine whether the employee is entitled to "reasonable accommodation" because she has a covered disability.⁴⁶ If an employee desires to return to work and can do so with an

⁴³ 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o) (2) (ii); "A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act," at III-24 to III-25

⁴⁴ 29 U.S.C. § 1630.2(n)(1)

⁴⁵ 42 U.S.C. § 12112 (b)(95)(B)

⁴⁶ EEOC Enforcement Guidance: Workers' Compensation and the ADA (1996) at 6. Under the FMLA, an employer ordinarily seeks clarification of work capability from an employee's doctor. One court permitted the employer to require an independent medical examination where the treating doctor's opinion was unclear and was permitted by union agreement. See Conroy v. Twp. of Lower Merion, No. 00-3528 (E.D. Pa., Nov. 30, 2001).

accommodation, the employee has the option of paying any additional cost necessary to prevent undue hardship to the employer, thus preserving her job.⁴⁷

Under the ADA, an employer must maintain health insurance on the same terms and coverage for the disabled employee on leave or working part-time as it provides for other employees on leave or working part time.

3. ADA Accommodations for Reinstated Employees

The reasonable accommodation provisions of the ADA and LAD require employers to undertake reasonable, affirmative measures to accommodate an individual's known disability. The concept of reasonable accommodation must be considered in determining whether a particular employee's job is protected by the ADA.

An employer's duty to provide reasonable accommodation applies to individuals who meet the employer's job-related selection criteria except those criteria which they cannot meet because of their disabilities. Such individuals must be "otherwise qualified" for the position in question. Unless the necessary accommodations would result in an "undue hardship,"⁴⁸ an

⁴⁷ See EEOC Tech. Assistance Manual ("EEOC TAM") § 3-1 at p.III-1.
⁴⁸ The ADA defines "undue hardship" as requiring significant difficulty or expense, when considered in light of the following factors: 1) the nature and cost of the accommodation; 2) the overall financial resources of the facility or facilities at which reasonable accommodations would be necessary; 3) the number of employees at the facilities in question; 4) the effect on expenses and resources or the impact otherwise on the facilities involved; 5) the overall financial resources of the employer; 6) the overall size of the employer's business with respect to the number of its employees and the

employer's failure to provide, upon request, reasonable accommodations to an otherwise qualified individual constitutes a violation of the ADA.⁴⁹ Moreover, an employer may not discriminate against an otherwise qualified individual because of the need to make reasonable accommodations.

The ADA lists possible reasonable accommodations which can include additional leave if not an "undue hardship."⁵⁰ The EEOC interpretive guidance states:

There are a number of other specific accommodations that may be appropriate for particular situation but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment...⁵¹

The following accommodations and employer policies are

number, type and location of its facilities; 7) and the type of operations conducted by the employer, including the composition, structure and functions of the workforce and the geographic, administrative or fiscal relationship of the facilities in question to the employer. See 42 U.S.C. § 12111 (10).

The determination of whether an accommodation would result in undue hardship must be made on a case-by-case basis. See 29 C.F.R. § 1630.15(d). The statutory definition of "undue hardship" expresses Congress's intent that the duty of reasonable accommodation shall impose a significant obligation on employers. See H.R. Rep. No. 485, 101 St. Cong. 2d Sess. pt. 2 at 68 (1990); and pt. 3 at 40. See S. Rep. No. 116, 101 St. Cong., 1 St. Sess. 31 (1989); H.R. Rep. No. 485, 101 St. Cong., 2d Sess. Pt. 2 at 63 (1990); 42 U.S.C. § 12111(9), § 12112 (b) (5) (1993); 29 C.F.R. §1630.2(o), § 1630.9.

⁴⁹ 42 U.S.C. § 12112(b) (5)(A) (1999)

⁵⁰ See 42 U.S.C. §12112(b)(5) (1999); 29 C.F.R. § 1630.9; The Family Medical Leave Act and the Americans with Disabilities Act; Areas of Contrast and Overlap, The Labor Lawyer 553 (1993)

⁵¹ Appendix to Regulations, 29 C.F.R. at §1630.2(a)

relevant to employees resuming work following an on-the-job injury. Those which reflect "reasonable accommodations" are discussed below.

Enablers

- Extended medical/disability leave
- Job restructuring
- Assignment to light-duty work
- Part-time or modified work schedules
- Reassignment to vacant positions
- Other equipment and facilities modifications
- Preferential light duty for employees with work-related injuries

Barriers

- Across-the-board time frames to return following medical disability leave
- Full-duty or 100% "no restrictions" return to work policies
- Broad designation of "essential functions" in job descriptions
- Limited duration for light duty positions
- Attendance control policies

1. Assignment to Light-Duty Work

The ADA does not require an employer to institute a light duty program to help disabled employees return to work. Rather, this type of work is often created in an effort to assist employees suffering from work-related injuries to return to work and avoid the cost of continuing TTD. Employers sometimes limit rotating light duty to employees recovering from work-related injuries. These rotating positions often have a prescribed time

limit. The EEOC's TAM states, with respect to this type of job restructuring:

The ADA does not require an employer to create a "light duty position" unless the "heavy duty" tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodation of job restructuring. In most cases, however, "light duty" positions involve a totally different job than the job that the worker performed before injury. Creating such positions by job restructuring is not required by the ADA. However, if an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period.

TAM SIX-5. It may be necessary to provide additional reasonable accommodations to permit an injured worker to perform the essential functions of a light-duty job.

**D. Permissible Inquiries Under ADA, FMLA
and Workers' Compensation**

The scope of permissible medical questions is strictly limited to the disability or serious medical condition qualifying the employee or applicant for a leave or accommodation. Prior to an offer of employment, a "covered entity [an employer of 15 or more persons] shall not conduct a medical examination or make inquiries of a job applicant as to whether" the applicant has a

disability or about "the nature or severity" of a disability.⁵²

When an employer is prohibited from asking an applicant or employee particular medical questions, it may not ask third parties to supply that same information.⁵³

Only after making a conditional offer of employment, may an employer ask an applicant about prior workers' compensation claims, occupational injuries or require a medical examination of the applicant. In that circumstance, the employer may "require a medical examination and may condition employment" on the results of the exam if all potential employees are subject to a medical exam regardless of any disability.⁵⁴

An employee with a job-related injury may be questioned at the time of the injury and when he seeks to return to work after the injury. The inquiries must be related to a business necessity, e.g. the ability of the employee to perform the essential functions of his job or to determine whether the injury will pose a direct threat to the safety of the employee or

⁵² 42 U.S.C. § 12112(d)(2)(A); See Griffin v. Steeltek, 160 F. 3d 591, 594 (10th Cir. 1999) (a non-disabled applicant may recover damages for an adverse employment action resulting from an unlawful pre-employment medical examination); Mack v. Johnstown America Corp., 1999 U.S. Dist. LEXIS 66917, *16-17 (W.D. Pa. 1999)(finding that even a non-discriminatory use of pre-employment medical exams serves to identify individuals with disabilities and could be used for a discriminatory purpose.)

⁵³ EEOC Enforcement Guidance: Workers' Compensation and the ADA, Number 915.002 (1996) at 5.

⁵⁴ 42 U.S.C. § 1211(d).

others.⁵⁵ An employer may require a medical examination to determine the extent of its workers' compensation liability. Finally, an employer may require an injured worker with a disability to document his need for accommodation.⁵⁶

When an employee requests leave for a serious health condition, the employer may require her to complete an FMLA certification form. The DOL has an optional form, WH-380, for the employer to use. If the employer chooses to devise its own certification form, the information sought may not exceed the scope of questions presented on the DOL form. The questions must be limited to the serious health condition for which leave is requested.

The employee must have his health care provider complete the form giving details of the condition, its limiting effects, the expected duration, whether extended or intermittent leave is required, and an array of questions which track the statute. An employee can be required to be evaluated for a second and a third opinion by the employer's chosen health care provider, who is not on the payroll of the employer. Similar certifications may be required to document the employee's need to care for a family

⁵⁵ Porter v. United States Alumoweld Co., 125 F. 3d 243, 246 (4th Cir. 1997)(citing First and Sixth Circuit cases endorsing the "plain language" of EEOC regulations); 42 U.S.C. § 12112(d)(4); 29 C.F.R. Part 1630, App. § 1630.14(c).

⁵⁶ EEOC Enforcement Guidance: Workers' Compensation and the ADA, Number 915.002 at 4-6 (1996)

member.⁵⁷

Permissible inquiries made to a disabled job applicant or employee are focused on her disability, functional limitations and the need for reasonable accommodation. During the hiring process, an employer may not ask the candidate if he needs accommodation unless the disability is obvious or the candidate brings it to the employer's attention. After a conditional offer of employment is made, the employer may inquire about necessary accommodations.

If after the offer is made or employment is started, the disabled individual requests a reasonable accommodation, the employer may require documentation concerning the employee's disability and functional limitations. The employer is prohibited from further inquiry when the disability is obvious and/or documentation has already been supplied.⁵⁸ An employer may not make inquiries of employees generally in a manner calculated to reveal the employees' medical condition or diagnosis.⁵⁹

E. Intertwining of FMLA, ADA, and

⁵⁷ 29 C.F.R. 825.306

⁵⁸ EEOC Enforcement Guidance: Workers' Compensation and the ADA, Number 915.002 at 4-6 (1996); EEOC Technical Assistance Factsheet, (2000).

⁵⁹ Fountain v. New York State Dept. of Corrections, No. 99-cv-389 (N.D.N.Y., Mar. 11, 2002) invalidated an employer policy which demanded a brief diagnosis from employees returning from any medical absence. "Even a diagnosis in general terms [i.e.] 'received chemotherapy' could cause an employee...to divulge a disability or perceived disability." See Roe v. Cheyenne Mt. Conf. Resort, 124 F. 3d 1221, 1237 (10th Cir. 1997) (finding that requiring employees to disclose their prescription drug medication is a prohibited inquiry under ADA as it would likely force employees to reveal disabilities or perceived disabilities).

Workers' Compensation Rights

The Congressional purposes in enacting the FMLA and ADA coincide with workers' compensation statutes to promote stable families, stable employer-employee relationships and stable income for employees injured in a work-related accident. Stability saves time and money and makes the most efficient use of the workforce. Because these statutes may overlap and intertwine, Congress provides that these statutes are to be administered so as to afford an employee the maximum protection available.

Both the ADA and FMLA recognize the potential need for medical leave. Where the statutes intersect, "an employer must...provide leave under whichever statutory provision provides the greater rights to employees."⁶⁰ An ADA-qualified employee with available FMLA leave has the greatest range of options and job protections under the laws. However, an employee must ultimately demonstrate that he is able to perform the "essential functions" of his job with or without reasonable accommodation.

For example, an individual might "request 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer may advise the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's 12

⁶⁰ 29 C.F.R. 825.702 (a)

week FMLA leave entitlement. This designation of leave does not prevent the parties from also treating the leave as a reasonable accommodation. Under ADA protections, the employee will have the right to return to the same job he had before taking leave rather than risk transfer to an equivalent position as permitted under the FMLA.⁶¹ At the same time the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee."

If, after taking the 10 weeks leave, the employee returned to work on a reduced work schedule, he could return to his same job and take the remaining 2 weeks of FMLA leave on a part time schedule. In this way the employee could extend his recovery time by an additional two weeks and remain covered by health insurance even though an employer does not cover part time employees. Additionally, the employee taking leave as a reasonable accommodation will be protected from transfers, which are allowed by FMLA but prohibited by the ADA.⁶² If after all FMLA leave is exhausted, and the ADA-qualified employee remains unable to resume his full-time duties, the employer may allow him to continue on a part-time schedule as a reasonable accommodation. However, he

⁶¹ 29 C.F.R. 825.702 (c)(2)

⁶² 29 C.F.R. 825.702 (c)(3)

will no longer have the added protections of the FMLA, i.e. medical coverage and guaranteed reinstatement to the same or equivalent position.

1. Light Duty Work Assignments

Workers' compensation laws are distinguished from the FMLA and the ADA by paying the employee a percentage of wages during her recovery period. They are also distinguished by the concept of "light duty." If the workers' compensation medical provider certifies that the employee is fit to return to "light duty" work, disability payments are typically stopped.⁶³ The employee ends up between Charybdis and Scylla if he is not fit for regular duty and the employer has no light duty work to offer. The injured employee, at this point without FMLA or ADA protection, is apt to be discharged for "being unavailable for work."⁶⁴ However, workers' compensation laws do not dictate the degree of fitness required before an employee may return to work. Ultimately, the employer makes those decisions consonant with the ADA and state handicap laws if the employee is considered "disabled" or "handicapped".

If an employer does make light duty assignments available, it must do so in a non-discriminatory way. It may not deny "light

⁶³ 29 C.F.R. 825.702(d) (2).. But see n.2, supra.

⁶⁴ See e.g. Ramer v. New Jersey Transit Bus Operations, Inc., 335 N.J. Super. 304 (App. Div. 2000).

duty" assignments as retaliation against occupationally-injured employees.

Although the employer is not required to create "light duty" assignments for a disabled employee, reassignment to existing light duty positions is a reasonable accommodation under the ADA. If an employer has a vacant "light duty" position for which the employee is qualified with or without accommodation, an employer can be required to offer it as a reasonable accommodation unless doing so would create an undue burden. A claim that filling a "light duty" position with a permanent employee eliminates an employer's ability to accommodate other occupationally-injured employees, is not sufficient justification of an undue burden.⁶⁵

2. ADA Reasonable Accommodations: "Interactive Process"

The ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "An accommodation is any change in the environment or in the way things are customarily done that enables an individual with a disability to enjoy employment opportunities."⁶⁶ Accommodations are intended to remove barriers to the application process, the work environment, and the benefits

⁶⁵ EEOC Enforcement Guidance: Workers' Compensation and the ADA, at 22.

⁶⁶ 29 C.F.R. pt. 1630 app. 1630.2(o)(1997).

and privileges of employment. Reasonable accommodations include, but are not limited to :1) making existing facilities accessible; 2) job restructuring; 3) part-time or modified work schedules; 4) acquiring or modifying equipment; 5) changing tests, training materials, or policies; 6) providing qualified readers or interpreters; and 7) reassignment to a vacant position.⁶⁷

An employer and employee arrive at a reasonable accommodation through an "interactive process" which requires a good faith, proactive effort by both parties.⁶⁸ It is the employee's responsibility to initiate the process by putting her employer on notice that she has a disability and requires an accommodation to perform the essential functions of her job. The employee's request can be verbal, it can be made by a family member, friend or health care professional,⁶⁹ and it need not mention of the statute or statutory language such as " reasonable accommodations." "A request as straightforward as asking for continued employment can be a sufficient request for accommodation."⁷⁰ When the employee's impairment is psychological

⁶⁷ 42 U.S.C. § 12111(9)(1994).

⁶⁸ See Mengine v. Runyon, 114 F.3d 415, 419-20 (3^d Cir. 1997); Deane v. Pocono Medical Center, 142 F.3d 138, 149 n.5 (3^d Cir. 1998) (en banc); Taylor v. Phoenixville School District, 184 F.3d 296, 311-13; 1999 (3^d Cir. 1999). This "interactive process" requirement has been incorporated into the NJ LAD by Jones, supra. at n. 42, 339 N.J. Super. at 422-23; Tynan v. Vicinage 13, 351 N.J. Super. 385,400 (App. Div. 2002).

⁶⁹ 2 EEOC Compliance Manual, Enforcement Guidance for Psychiatric Disabilities, at 20-21.

⁷⁰ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 8 (1999).

or mental, the employer may not avoid a duty to participate in the interactive process by claiming that the employee made no clear request for accommodation.⁷¹

The employee is charged with identifying an accommodation that will allow him to perform the essential functions of his job.⁷² However, the "EEOC's interpretive guidelines squarely place part of the burden on the employer to "make a reasonable effort to determine the appropriate accommodation."⁷³

Employers can show their good faith...[by] Taking such steps like the following: meet with the employee,... request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome.

Taylor, 184 F.3d at 315. See also Skerski v. Time Warner Cable, Co., 257 F.3d 273, 275 (3d Cir. 2001)(stating a preference for the employee's preferred accommodation, where reasonable).

⁷¹ See Bultmeyer v. Fort Wayne Community Schools, 10 F.3d 128 (7th Cir. 1996)(recognizing that an employee with a mental disability may have difficulty effectively relaying medical information about his condition); Criado v. IBM Corp., 145 F. 3d 437,444 (1st Cir. 1998)(When an employer terminated an employee with a mental illness due to an alleged miscommunication over a leave of absence, a jury could find that the employer failed to live up to its responsibility to help find accommodation.); Taylor, 184 F.3d at 314 (where the employer knew the employee had been hospitalized, had received notice from her doctor, and was aware of her continued medication and treatment, "it was incumbent on the school district to ask" for "further information...needed to justify an accommodation.")

⁷² Walton v. Mental Health Ass'n., 168 F.3d 661, 670 (3d Cir. 1999).

⁷³ Taylor, 184 F.3d at 316 (citing 29 C.F.R. Pt. 1630, App. 1630.9 at 359).

2. ADA Reasonable Accommodations

Reasonable accommodations are determined on a case-by-case basis as to the individual, the disability and the workplace. Physical disabilities may require special equipment or re-organization of the work area whereas mental disabilities may entail accommodations in workplace policies and procedures.⁷⁴

a. Job Restructuring

Reasonable accommodations are designed to enable an employee to perform the essential functions of her job. Therefore, an employer is never required to restructure a job to relieve a disabled employee of the essential functions of their job or to allocate essential functions to other employees. However, the employer may voluntarily make those changes. Reallocation of marginal functions is reasonable, and an employer can be required to make such an accommodation.⁷⁵

b. Leave and Scheduling

It is a reasonable accommodation to grant a request for leave when it is related to the disability for things such as medical treatments or appointments, disability related training or repairs or fittings for devices and equipment. Further, the employee may

⁷⁴ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, No. 915.002 (1997)(recommending that mental health professionals "may be able to make suggestions about particular accommodations" as well as aid in the communication process between the employer and employee).

⁷⁵ Id at 13.

not be penalized, punished or terminated for breach of an employer's attendance control policy as a result of taking leave. Retaliation against an employee for exercising their rights under the ADA is a violation of the statute.⁷⁶

The EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities suggests that a schedule change could accommodate the individual whose "psychiatric medication causes grogginess and lack of concentration in the morning." A change in the shift from night to day work may be a reasonable accommodation for an individual with a sleep disorder and anxiety.⁷⁷

c. Modification of Policies

For certain disabilities, it may be reasonable to modify existing workplace policies. A diabetic could be allowed to eat in the workplace without changing a workplace policy that prohibits eating on the job for other non-diabetic employees.⁷⁸ An

⁷⁶ Id. at 15.; See Ranscon v. U.S. West Communications, Inc., 143 F.3d 1324,1334 (10th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F. 3d 775, 782 (6th Cir. 1998) cf. Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995)(stating that reasonable accommodation does not require employer to wait indefinite period); Hudson v. MCI Telecommunications Corp., 87 F.3d 1167, 1169 (10th Cir. 1996)(stating that indefinite leave with no indication of favorable prognosis was not reasonable accommodation).

⁷⁷ See Gile v. United Airlines, Inc., 213 F.3d 365, 372-373 (where employee presented credible evidence of her condition and the expected effect of a transfer to a daytime shift, the employer failed its obligations under the ADA to grant her request for a "modest accommodation..") Accord: Seiden v. Marina Associates, 315 N.J. Super 451 (L. 1998).

⁷⁸ EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Number 915.002 (1997) at 19.

employee with a back injury who needs a five minute break every hour could be reasonably accommodated unless it was unduly burdensome or interfered with accomplishing an essential function of the job.⁷⁹

d. Changes in Supervision

Adjusting the level of supervision or structure "can aid individuals with psychiatric disabilities". "More detailed day to day guidance, feedback or structure" could aid an employee with difficulty with concentration.⁸⁰ "Supervisors may be able to adjust their methods...by...communicating assignments, instructions, or training by the medium that is most effective for a particular individual".⁸¹ However, "[a]n employee is not entitled to a supervisor ideally suited to his or her needs."⁸²

d. Reassignment

The ADA has stated a preference for maintaining an employee in her current position. The relevant regulations provide that reassignment should be considered only where there are no feasible accommodations that would enable the employee to perform the

⁷⁹ See Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 18-19 (1st Cir. 1998) (Where the data entry clerk's job required that she enter large quantities of data within a limited time frame, 10 minute breaks each hour were not a reasonable accommodations because it would prevent her accomplishing the essential function of her job.)

⁸⁰ Bennett v. Unisys Corp., 2000 U.S. Dist. LEXIS 18143, *32-32 (E.D. Pa. 2000) (citing EEOC Compliance Manual).

⁸¹ Taylor, 184 F.3d at 319 n.10 (quoting EEOC Compliance Manual, Enforcement Guidance for Psychiatric Disabilities, at 26)

⁸² Id.

essential functions of her job without causing the employer an undue burden.^{83, 84, 85}

When all other accommodations fail, the employee has a right to be reassigned to an available position for which he is qualified by education, skill, and/or experience. The employer is not required to create a new position or to remove an employee from a job to create a vacancy for the ADA-qualified employee.⁸⁶ The employer, however, is expected to participate in identifying an appropriate vacant position. Indeed, "[t]he employer is obligated to 'identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites'."⁸⁷

The employer is in the best position to know which

⁸³ EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o).

⁸⁴ The ADA defines "undue hardship" as requiring significant difficulty or expense, when considered in light of the following factors: 1) the nature and cost of the accommodation; 2) the overall financial resources of the facility or facilities at which reasonable accommodations would be necessary; 3) the number of employees at the facilities in question; 4) the effect on expenses and resources or the impact otherwise on the facilities involved; 5) the overall financial resources of the employer; 6) the overall size of the employer's business with respect to the number of its employees and the number, type and location of its facilities; 7) and the type of operations conducted by the employer, including the composition, structure and functions of the workforce and the geographic, administrative or fiscal relationship of the facilities in question to the employer. See 42 U.S.C. § 12111 (10).

⁸⁵ See Skerski v. Time Warner Cable Co., 257 F.3d 273, 275 (3rd Cir. 2001) ("[T]he ADA was enacted to compel employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability")

⁸⁶ See Whitfield v. Pathmark Stores, Inc., 1999 U.S. Dist. LEXIS 7096 (D. Del. 1999) (Where employee union member has the right to "bump" less senior employees from jobs, the court allowed that this aspect of the collective bargaining agreement arguably created a vacancy.)

⁸⁷ Gile v. United Airlines, Inc., 213 F.3d 365, 378 (7th Cir. 2000) (quoting Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998); Whitfield v. Pathmark Stores, Inc. supra.

jobs are vacant or will become vacant within a reasonable period of time. In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications . . . [and] [b]ased on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment.

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act(March 1999).

The employer is not required to promote an employee as a reasonable accommodation, and if no appropriate lateral positions exist, the employer may offer a demotion. However, a "right to reassignment" should not require an employee to compete for the position.⁸⁸ "Reassignment" means that an employee receives the vacant position if s/he is qualified for it.⁸⁹ Yet, the U.S. Supreme Court recently held that this right will be trumped in the "run of cases" by an employee who is entitled to the position under a valid, uniform seniority system.⁹⁰

⁸⁸ Smith v. Midland Brake, Inc., 1999 U.S. App. LEXIS 13185, *57-*59 (10th Cir. 1998);

⁸⁹ U.S. Airways v. Barnett, ____ U.S.____, 122 S. Ct. 1516 (2002).

⁹⁰ EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at No. 28 (March 1999); Cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05 (D.C. Cir. 1998)(Stating that "[a]n employee who is merely permitted to compete like any other applicant has not been reassigned.")

CONCLUSION

The delicate balance between employee rights and employer prerogatives is placed under tension when employees seek to exercise their rights to return from medical leaves. This circumstance presents sometimes conflicting standards and protections that both employers and employees must approach with caution. As the Supreme Court continues to construe the ADA and begins to review FMLA cases and DOL regulations, the interplay of these statutes will become increasingly important.

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