

**SOME LEGAL CHALLENGES INVOLVING THE TROUBLED EMPLOYEE:
ADA, FMLA, WORKERS' COMPENSATION, AND RELATED ISSUES**

By John F. Burton, Jr.
Professor
School of Management and Labor Relations
Rutgers: The State University of New Jersey

**A Presentation to the Ohio-Michigan Labor-Management Conference
Managing and Representing the Troubled Employee**

Huron, Ohio
April 27, 2001

Sponsored *inter alia* by the Cincinnati, Cleveland, and Detroit Chapters of the
Industrial Relations Research Association

**And A Presentation to the New Brunswick Chapter of the
Industrial Relations Research Association**

October 1, 2001

**And A Handout for the Law of Employment Relations
A Course in the Masters in Human Resource Management Program
School of Management and Labor Relations
Rutgers: The State University of New Jersey**

April 16, 2002

© 2002 John F. Burton, Jr.
Preliminary Version: Do not quote without permission.
This version will be added to the Web Site: www.workerscompresources.com
And will be revised based on comments and questions
submitted to the Web Site.

I. **Workers' Compensation**

A. Introduction

Program for employees who experience work-related injuries and diseases.

State programs with no federal standards, and there are considerable variations among states in provisions of workers' compensation (WC) statutes.

Complicates discussion of WC since, e.g., Ohio and Michigan laws differ.

B. Coverage of Employers and Employees

Most employers covered in most states regardless of number of employees

A few states exempt employers with only a few employees—e.g. employers with three or fewer employees.

Workers' compensation coverage is mandatory for employers in all states but Texas.

New Jersey law technically is not mandatory, but effectively all employers are covered.

C. Coverage of Injuries and Diseases

Limited to work-related injuries and diseases

Fault of employer and (in most instances) of employee are irrelevant

Employee must, however, meet certain legal tests (e.g., injury must result from an accident that arose out of (AOE) and during the course of employment (COE) to qualify for benefits

D. Benefits to Injured Workers

1. Medical Benefits

From date of injury for as long as necessary

First dollar coverage

No deductibles or co-insurance

2. Cash Benefits (Simplified)

1. Temporary Total Disability (TTD) Benefits

Waiting period (3-7 days)

Replacement Rate typically 66 2/3% of gross preinjury wages

NJ 70% of gross preinjury wages

MI 80% of net (spendable) preinjury wage

2. Permanent Partial Disability (PPD) Benefits

Paid after date of maximum medical improvement (MMI)

Worker must have permanent impairment that is not totally disabling

PPD Benefits based on extent of Permanent Impairment (PI), or loss of earning capacity (LEC), or actual wage loss

Approach used varies among states

Even terminology varies among

states - e.g., MI does not use term "Permanent Partial Disability"

3. Permanent Total Disability (PTD) Benefits

Worker has permanent impairment that is totally disabling

4. Death Benefits

For survivors of deceased workers

E. Categories of Workers' Compensation Claims that will help with Discussion of FMLA and ADA

1. Fatal Benefits: are irrelevant

2. Modest Injuries: medical only

No time lost or lost time less than waiting period

Account for about 80% of all WC claims (i.e., about 20% of all WC claims pay some cash benefits)

3. Moderate Injuries: TTD or TTD with small PPD award

Rough estimate: 50% to 60% of WC cases with cash benefits

4. Relatively Serious Injuries: TTD with substantial PPD award
Rough estimate: 30% to 40% of WC cases with cash benefits
5. Severe Injuries: PPD of 50% or more plus PTD
Rough estimate: 5% to 10% of cases with cash benefits

- F. A Few Other Salient Features of Workers' Compensation
1. Employers cannot retaliate against employees for filing for WC benefits
 2. Anti-discrimination provisions of some WC statutes
 3. Tort suits for unlawful discharge
Public policy exception to Employment-at-will Doctrine

II. The Family and Medical Leave Act of 1993

A. Introduction

1. Federal Law
2. Applies to employees who need leave because of
 1. Birth, adoption, or foster care placement of a child
 2. Case of child, spouse, or parent with serious health condition
 3. Serious health condition of employee
I only consider (3) serious health condition of employee

B. Coverage of Employers and Employees

1. Employers with 50 or more employees
2. Employee must:
 1. Have worked at least 12 months for current employer (or predecessor)
 2. Have worked at least 1,250 hours during 12 months prior to request
 3. Work within 75 miles of at least 49 other employees of this employer

Observation: FMLA coverage of employers and employees less than WC coverage

C. Coverage of Injuries and Diseases

1. Must be a serious health condition - physical or mental - that requires:
 1. Inpatient care (e.g. overnight stay in a hospital); or
 2. Continuing treatment by a health care provider, which means any of the following:
 - (1) incapacity for more than 3 calendar days and subsequent treatment or incapacity, plus either
 - (a) two or more treatments by, under the supervision of, or on referral from a health care provider, or
 - (b) one treatment by a health care provider resulting in continuing treatment under the health care provider's supervision
 - (2) (3) etc. [other examples of continuing treatment, such as a period of incapacity due to pregnancy, that are unlikely to overlap WC cases

Observation: In some ways, FMLA coverage broader than WC coverage, e.g. nonwork related injuries covered by FMLA

Observation: In some ways, FMLA coverage more narrow than WC coverage, e.g., many or most (?) modest injuries under WC are not serious enough to qualify as serious health conditions under FMLA

D. Benefits to Injured Workers Under FMLA

1. Employers are required to allow employees a total of 12 weeks of leave during any 12 month period
 1. Health benefits
 - (1) During FMLA leave, employer must maintain coverage of the employee on any group health plan on the same basis as any other employee
 - (2) If employee does not return after FMLA leave, employer may recover the health

insurance premium paid to the employee during the leave unless:

- (a) the continuation, reoccurrence, or onset of a serious health condition, or
- (b) other circumstances beyond the employee's control

2. Cash benefits

- (1) Employer does not have to continue wages
- (2) There are no cash benefits provided by the FMLA
- (3) Under certain circumstances, employer may require or employee with a serious health problem may elect, to have missing wages during the leave to be replaced with accrued paid vacation time, personal or family leave time, or medical or sick leave benefits.
- (4) If paid leave is substituted for unpaid FMLA leave, time will count towards 12 weeks of FMLA leave
- (5) Employer can also require, and employee can request, that period of workers' compensation benefits be treated as an FMLA leave

One advantage to the employee of counting WC benefits as FMLA leave is that group health benefits are continued

3. Return to Work

- (1) Upon return to work (RTW) following an FMLA leave, the employee is entitled to be restored to the same job employee previously held or to a position with equivalent pay, benefits, and terms and conditions of employment.
- (2) If employer offers the employee a light duty job during the 12 weeks of FMLA, employer is not required to accept job under FMLA but may lose WC benefits.
- (3) If employer offers employee a light duty job during recovery period and employee accepts, those weeks of light duty employment do **not** count towards 12 weeks of protection provided by FMLA
- (4) The RTW entitlement under FMLA expires after the 12 weeks. If the worker is not able to (or decides not to) accept the old job (or an equivalent job), the employer is no longer required by the FMLA to offer the employee a job.

Observation: The RTW provision in the FMLA is unlikely to help workers with relatively serious injuries (substantial PPD cases) or severe injuries (PTD cases) because those workers are unlikely to be able to return to work within 12 weeks.

III. Americans with Disabilities Act (ADA)

A. Introduction

- 1. Federal Law
- 2. Some states also have anti-discrimination, e.g. Michigan Handicappers Civil Rights Act
- 3. Applies to RS and other for a wide range of discrimination, e.g. access to public facilities
- 4. I will primarily discuss portions applicable to employers for employment discrimination
- 5. Controversial
 - 1. Court decisions have limited coverage
 - 2. RS express concern
 - 3. Disabled workers have not done well

B. Coverage of Employers and Employees

- 1. Employers with ≥ 15 employees
 - So WC > ADA > FMLA in coverage of employer
- 2. Covers ES and job applicants
 - So ADA > WC > FMLA

C. Coverage of Injuries or Diseases

- 1. Three classes of individuals covered
 - 1. Individuals with a disability
 - 2. Individuals with record of disability

3. Individuals regarded as disabled
I will focus on (1)
2. What is a disability?
 1. ADA defines a person with a disability as someone with a “physical or mental impairment that substantially limits a major life activity”
 2. Disability does not have to result from work-related injury or disease, so ADA > WC
 3. Short-term, temporary, and minor disabilities are not covered. Thus, modest and moderate WC cases do not qualify. Even relatively severe and severe WC cases may not qualify. Thus, ADA will not apply to most WC cases.
 4. Examples of recent cases defining disability
 - (1) *Bragdon v. Abbott* (Supreme Court 1998)
 - (a) Involved patient requesting services from a dentist
 - (b) HIV infection is a disability
 - (c) Major life activity that is threatened is reproduction
 - (2) *Sutton v. United Airlines* (Supreme Court 1999)
 - (a) Involved corrective lenses
 - (b) Disability to be assessed after considering mitigating measures such as glasses
 - (c) Also, even though United would not consider applicants for global airline pilot, nonetheless, applicants could find positions utilizing their skills as pilots, e.g. regional airline pilot or pilot instructors. Eye problems did not “substantially limit” them in a major life activity (“work”) since only a narrow range of jobs were precluded.
- D. If workers are disabled under ADA, what are employer’s responsibilities (and limit on responsibilities?)
 1. Reasonable accommodation required: Reasonable means benefits of accommodation must bear some relationship to costs to employer of accommodation
 2. Undue hardship exception
 1. Employer not required to make reasonable accommodation if it would cause undue hardship
 2. So, accommodation that has benefits of \$20k and costs \$15k (reasonable) not required if \$15k would bankrupt employer.
 3. Comparisons of FMLA v. ADA: suppose employee requires recovery period after operation
 1. ADA does not require employer to provide this accommodation if it would result in undue hardship for employer, but FMLA does not have this exception.
 2. However, FMLA requirement only lasts 12 weeks, while ADA would require employer to provide an indefinite LDA if this accommodation was reasonable and would not cause undue hardship.
- E. Other aspects of ADA
 1. With or without accommodations, employee must be able to perform essential functions of job
employee must be “otherwise qualified” to perform job.
 2. *Davis* (Supreme Court 1997?): Hearing disorder—partially corrected with hearing aid—but she could still not make out what others were saying without lip reading. Wanted to nurse where she would have to deal with emergencies. *Davis* held not otherwise qualified.

IV. Troubled Workers under WC, FMLA & ADA

- A. Employee Addicted to Drugs or Alcohol
 1. WC
 1. Worker injured because of influence of drugs or alcohol
 2. Ohio R.C.4123.54(b). If intoxication or being under the influence of any controlled substance not prescribed by a physician is proximate cause of injury, claimant is prohibited from receiving compensation.
 3. Most states have similar provisions, although more or less inconsistent with no fault basis

of workers' compensation

2. FMLA: I am unaware of any exclusion for a serious health condition resulting from alcohol or drugs.
 3. ADA
 1. Current drug users are not protected by ADA
 2. Reformed or former drug users are protected
 3. 6-7 weeks off drugs is not enough (district court decisions)
 4. Current and former alcoholics are covered and current alcoholics must be treated the same as any other employee with regard to attendance and discipline.
- B. Employee with Mental Illness (Behavioral Problems)
1. WC: Mental Disorder Resulting from Stress (Mental-Mental): Larson's Workers' Compensation §56.06 identifies four approaches
 1. Over a dozen states in Group 4 - never compensable
 2. About half a dozen states in Group 3 - sudden stimulus
 3. About a dozen states in Group 2 - unusual stimulus
 4. Eight states in Group 1 - compensable whether or not stimulus is unusual (NJ)
 2. FMLA: I am unaware of any exclusions of coverage for a serious health condition resulting from a mental condition
 3. ADA: See Spiegler chapter in ABA volume. Courts have generally granted summary judgments to employers on cases involving stress-related mental disorder - various theories
 1. Plaintiff not substantially impaired
 2. Plaintiff could not perform essential features of job with or without reasonable accommodations
 3. Employer not required to provide reasonable accommodations
 4. Plaintiff engaged in behavior justifying discharge (violent confrontation with another employee)

For additional coverage of these topics, please refer to Steven L. Willbom, Stewart J. Schwab, and John F. Burton, Jr., *Employment Law: Cases and Materials* (Third Edition) (Newark: LexisNexis. 2002) (ISBN 0-8205-5358-1)