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The Employer's Bermuda Triangle: An Analysis of the Intersection between Workers' Compensation, ADA, and FMLA

Gregory G. Pinski

Angela L. Rud

THE EMPLOYER'S "BERMUDA TRIANGLE": AN ANALYSIS OF THE INTERSECTION BETWEEN WORKERS' COMPENSATION, ADA, AND FMLA

GREGORY G. PINSKI
ANGELA L. RUD*

"Wouldst thou," so the helmsman answered,
"Know the secret of the sea?"
Only those who brave its dangers,
Comprehend its mystery.

Henry Wadsworth Longfellow

The Bermuda Triangle, the expanse of ocean bounded by the island of Bermuda, the southern tip of Florida, and Puerto Rico, has long been a mysterious place of danger for sea navigators.[1] Employers today face their own Bermuda Triangle[2]: the area of law bounded by the Americans with Disabilities Act ("ADA"),[3] the Family and Medical Leave Act ("FMLA"),[4] and state workers' compensation statutes. Employers who brave the dangers of this sea must understand when and how each law applies.

The trichotomy created by these three laws is clear from the purposes of the laws. Specifically, as this analysis illustrates, each law has a purpose distinct from that of the other two: the FMLA provides an entitlement not to work; the ADA promotes continued work; and workers' compensation laws compensate employees who cannot work.

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* The authors are labor and employment attorneys with the firm of Gray, Plant, Mooty, Mooty & Bennett, P.A. in Minneapolis, Minnesota. Both represent and advise employers in all areas of employment law, including discrimination, sexual harassment, ADA and FMLA compliance, and workers' compensation. Angela Rud is a 1993 graduate of the University of Kansas School of Law. Gregory G. Pinski is a 1999 graduate of the University of North Dakota School of Law. Special thanks to the firm of Gray, Plant, Mooty for the resources to publish this article.

1. *See* Howard L. Rosenberg, *Exorcizing the Devil's Triangle* (visited Mar. 6, 2000) <http://www.history.navy.mil/faqs/faq8-3.htm>. In just the past 50 years, more than 50 ships and 20 planes have mysteriously disappeared in this area. *Id.*

2. *See generally* Myron B. Charfoos, *Workers' Compensation and the ADA/FMLA: Issues and Solutions*, ABA INSTITUTE ON THE AMERICANS WITH DISABILITIES ACT, Feb. 1998, at 1 (referring to the interrelationship of workers' compensation, FMLA and ADA as a "Bermuda Triangle").

3. Americans with Disabilities Act, 42 U.S.C. § 12101 (1994) [hereinafter "ADA"].

4. Family and Medical Leave Act, 29 U.S.C. § 2601 (1994) [hereinafter "FMLA"].

Despite these differences, however, all three laws also have a central purpose: to allow sick, disabled, or injured employees to take time away from work without fear of losing their jobs. To this end, an employer must not only determine if an injured worker is entitled to workers' compensation benefits, but it must also determine if the employee is "disabled" as defined by the ADA or suffers from a "serious health condition" under the FMLA.[5] This analysis will examine how both the coverage provisions and the benefits requirements of the ADA, FMLA, and workers' compensation statutes put employers in a difficult position because of the tension between the overall goals of the laws.

I. INTRODUCTION AND PURPOSES OF THE THREE LAWS

Each of the regulatory schemes discussed in this Article has its own purpose, which differs from that of the other two. It is necessary to understand the purpose of each law to understand how they fit together, which this Article addresses.

First, the ADA was enacted in 1990 as a comprehensive federal social policy to prevent disability discrimination and to integrate disabled citizens into the workplace.[6] The law prohibits discrimination against a qualified disabled individual in connection with a job application; hiring, advancement, or discharge of an employee; employee compensation; job training; and other terms, conditions, and privileges of employment.[7]

The FMLA, contrarily, was enacted by Congress in 1993 in response to the increasing number of single-parent households and two-parent households in which both parents are employed.[8] The FMLA permits an employee to take leave for a serious health condition or for compelling family reasons; in this way, Congress attempted to strike a balance between the family's needs and the demands of the workplace.[9]

Finally, workers' compensation is a "non-fault mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on

5. Joan T.A. Gabel et al., *The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 AM. BUS. L. J. 403, 404 (1998).
6. *See* ADA, 42 U.S.C. § 12101(b)(4) (1994).
7. *See* ADA, 42 U.S.C. § 12112(a) (1994).
8. *See* FMLA, 29 U.S.C. § 2601(a)(1) (1994).
9. *See* Gabel et al., *supra* note 5, at 423.

in the cost of the product."[10] Unlike the ADA and FMLA, workers' compensation is controlled by the law of individual states.

II. EMPLOYER COVERAGE PROVISIONS

Not all employers are covered by the ADA, FMLA, and workers' compensation statutes at the same time. The requirements for employers' coverage under each of the statutes are different and depend on the size of the employers' workforce.[11]

The ADA, for example, applies to private employers with fifteen or more employees each working day for twenty weeks in the current or preceding calendar year.[12] Additionally, state and local government units are covered regardless of their size. However, the United States government, corporations wholly owned by the United States, Indian tribes, and bona fide private membership clubs are not covered.[13]

The FMLA applies to employers who employ fifty or more employees each working day for twenty or more calendar work weeks in the current or preceding calendar year.[14] The statute also applies to public agencies, including state and local governments, regardless of the number of employees.[15]

As mentioned, workers' compensation coverage is determined by individual state law. For purposes of this analysis, the state of Minnesota will be used as an example. In that state, an employer who employs one employee must follow the state's Workers' Compensation Act.[16]

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10. ARTHUR LARSON, WORKERS' COMPENSATION LAW: CASES, MATERIALS AND TEXT, § 1, at 1 (2d ed. 1997).

11. If an employer is covered by more than one statute, the employer is obligated to follow the law that provides the most protection to its employees. 29 C.F.R. § 825.702(a) (1999).

12. 29 C.F.R. § 1630.2(e)(1) (1999).

13. *See* 42 U.S.C. § 12111; 29 C.F.R. § 1630.2(e)(2).

14. 29 C.F.R. §§ 825.104(a), 825.600 (1999). The number of employees includes those who are part time and those on leave, if they are still on the payroll. *See* 29 C.F.R. § 825.105 (1999). On the other hand, those employees who are on layoff, whether temporary or permanent, do not count toward the minimum of 50. *See* 29 C.F.R. § 825.105(c) (1999).

15. *See* 29 C.F.R. § 825.104(a) (1999).

16. MINN. STAT. ANN. § 176.021, subd. 1 (Supp. 2000). 'Employer' is defined by Minnesota law to include: corporations; partnerships; limited liability companies; associations; groups of persons; state, county, town, or city governments; school districts; or other governmental subdivisions. *See* MINN. STAT. ANN. § 176.011, subd. 10 (Supp. 2000).

III. EMPLOYEE COVERAGE PROVISIONS

Under certain circumstances, the fact that an employer is subject to one of the laws discussed herein does not necessarily mean that its employees will also be subject to that law. Each law has its own requirements to determine if an employee is covered, which is a different inquiry than determining if an employer is covered.

First, the ADA protects qualified individuals with a disability from discrimination as to all terms, conditions, and privileges of employment.[17] The legislation requires that the employee be able to perform the essential functions of his or her job, with or without reasonable accommodation.[18] Reasonable accommodations for qualified individuals with a disability can include granting unpaid leave, making changes to the employer's existing facilities, or some type of change in the job itself.[19] Nevertheless, an employer is not required to offer a reasonable accommodation if it would impose an undue hardship on the business, such as significant difficulty or expense.[20]

In order to be eligible for FMLA coverage, an employee must have 1) worked for the employer for at least twelve months, although not necessarily twelve consecutive months; 2) worked at least 1,250 hours during the twelve-month period preceding the beginning of leave; and

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17. *See* ADA, 42 U.S.C. § 12112(a) (1994). Disability is defined by the law to include: 1) a physical or mental impairment that substantially limits one or more major life activities; 2) a record of such an impairment; or 3) being regarded as having such an impairment. *See* 29 C.F.R. § 1630.2(g) (1999). Major life activities include, but are not limited to, such tasks as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 29 C.F.R. § 1630.2(i) (1999). Factors used to determine whether an individual is substantially limited include the nature and severity of the impairment, the duration or expected duration of the impairment, and the expected long-term impact resulting from the impairment. *See* 29 C.F.R. § 1630.2(j)(2) (1999). Finally, the inability to perform a single, particular job, or even a narrow range of jobs, is not a substantial limitation to the major life activity of working. *See* 29 C.F.R. § 1630.2(j)(3) (1999).

18. *See* ADA, 42 U.S.C. § 12111(8) (1994). Essential functions of a job are the fundamental job duties, not including marginal functions, of the employment position the individual with a disability holds or desires. *See* 29 C.F.R. § 1630.2(n) (1999). When determining whether a job function is essential, the following factors may be considered: 1) the employer's judgment as to which functions are essential; 2) written job descriptions; 3) the amount of time required to perform the job function; 4) the consequences of not performing the particular job function; 5) terms of a collective bargaining agreement; and 6) the past and current work experience of those in the same or similar positions. *See* 29 C.F.R. § 1630.2(n)(3) (1999).

19. *See* 29 C.F.R. § 1630.2(o)(2) (1999). Such job changes could include, but are not limited to, shifting marginal job functions to other employees, a part-time or modified work schedule, modifying equipment, reassigning the employee to a vacant position, or providing qualified readers or interpreters. *Id.*

20. *See* ADA, 42 U.S.C. § 12112(b); *see also* ADA, 42 U.S.C. § 12111(10)(A) & (B) (1994).

3) worked at a worksite where fifty or more employees are employed by the employer within seventy-five miles of the worksite.[21] For such employees, the law provides up to twelve weeks of leave during any twelve month period in four circumstances: 1) for the birth of a child or to care for the newborn child; 2) for placement of a child with the employee for adoption or foster care; 3) to care for the employee's spouse, child, or parent who has a serious health condition; or 4) because the employee's own serious health condition[22] makes the employee unable to perform the functions of the employee's job.[23]

Finally, workers' compensation laws simply require that an individual was employed at the time of the work-related injury and that the injury arose out of and was within, the course of employment.[24] The provisions apply to full-time employees as well as to part-time and temporary workers.[25] The employee bears the burden of proving that employment was the major cause of the injury in order to obtain coverage.[26]

IV. SPECIFIC AREAS OF CONFLICT BETWEEN THE ADA, FMLA, AND WORKERS' COMPENSATION

There are several areas of employment law in which these three statutes conflict. These conflicts are considered in the following sections, beginning with the different leave requirements imposed by the laws. This review is followed by a series of suggestions for avoiding such conflicts.

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21. *See* 29 C.F.R. § 825.110(a) & (b) (1999).

22. Federal regulations define "serious health condition" as any illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. 29 C.F.R. § 825.114(a) (1999). This does not include routine preventative examinations, most cosmetic treatments, or short-term or common illnesses requiring limited treatment. *See id.* The law defines "continuing treatment by a health care provider" to be met by a period of incapacity of more than three consecutive days during which the individual with the health condition is treated at least two times by a health care provider, or one time if a continuing regiment of treatment is established. *See* 29 C.F.R. § 825.114 (1999). A "regimen of treatment" may include taking over-the-counter or prescription medication at a health care provider's direction, but simply taking over-the-counter medication without a visit to a doctor is not adequate to constitute a regimen of treatment. *See* 29 C.F.R. § 825.114(b) (1999). Some conditions are covered regardless of the length of time of incapacity, such as pregnancy or prenatal care or a chronic condition such as cancer. *See* 29 C.F.R. § 825.114(a)(2)(ii), (iii) (1999).

23. *See* 29 C.F.R. § 825.112(a) (1999).

24. *See* MINN. STAT. ANN. § 176.021, subd. 1 (West 1993 & Supp. 2000).

25. *Id.*

26. *See* Fox v. Micro Mach., 462 N.W.2d 592, 593 (Minn. 1990) (explaining that an employee must prove by a fair preponderance that his or her injury was compensable).

A. VARYING LEAVE REQUIREMENTS

Under the ADA, an employer is not required to grant leave to an employee, but interpretations of the statute address leave as a possible reasonable accommodation.[27] Thus, in certain situations, flexible or intermittent leave may be considered a reasonable accommodation when employees with disabilities require time off from work due to disability.[28] As such, if the aforementioned requirements of the FMLA are met, an employer may count such leave under the twelve weeks granted by that statute. While leave as a reasonable accommodation may need to extend beyond the twelve-week FMLA entitlement, employers are not required to extend the leave if doing so would pose an undue hardship to the business.[29]

FMLA leave requirements often intersect with leave under workers' compensation laws. Under the FMLA, employers must provide eligible employees up to twelve weeks of leave in a twelve-month period.[30] Before designating such leave under the FMLA, however, an employer must give notice to the employee that it will be counted against the twelve-week entitlement.[31] Conflicts and problems arise, however, when an on-the-job injury qualifies as a serious health condition. In such a situation, federal regulations permit FMLA leave to run concurrent with workers' compensation leave.[32] However, this is not an easy task for employers. As one commentator acknowledged,

> In practice . . . , employers report heavy administrative burdens. Large employers, who can have hundreds or thousands of employees off at any given time, strain under the requirements that an on-the-job injury be medically certified as a

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27. 29 C.F.R. § 1630.2(o) (1999).

28. *See, e.g.*, Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996) (stating that the employer's decision to grant short-term and extended leave was a reasonable accommodation); Hawkins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1995) (affirming a summary judgment decision holding that an employee who was granted leave was reasonably accommodated).

29. *See* 29 C.F.R. § 1630.2(p) (1999). Under the ADA, an employee has no absolute right to additional leave beyond the 12 weeks guaranteed by the FMLA. *Id.*

30. *See* FMLA, 29 U.S.C. § 2612(a)(1)(D) (1994).

31. *See* 29 C.F.R. § 825.208(a) (1999). Employers are required to provide notice in three ways: 1) by posting a notice; 2) by providing FMLA information in a written handbook or similar document; and 3) by giving notice of the specific obligations of an employee when FMLA leave begins. *See* 29 C.F.R. §§ 825.300, 825.301 (1999).

32. *See* 29 C.F.R. § 825.208 (1999) (regulating when an employer may require that paid leave be counted as FMLA leave).

serious health condition and that employees receive advance notice that their workers' compensation absences will count as FMLA leave.[33]

Thus, there are significant differences between the leave requirements of the ADA as the one hand, and the FMLA and workers' compensation statutes on the other.

B. EMPLOYER ACCESS TO MEDICAL EXAMINATIONS AND RELATED INFORMATION

Another area of conflict between the three laws concerns medical information. Each of the statutes differs as to the amount of information an employer may request to verify the physical or mental condition that triggered the employee's absence from work.[34]

Under the ADA, employers are not permitted to require an applicant for work to undergo a medical examination to determine if he or she is an individual with a disability or to assess the severity or nature of a disability.[35] An employer may, however, require an applicant to demonstrate or describe how he or she would perform the essential functions of the job, assuming that all applicants must make the same demonstration regardless of disability.[36] Further, after an employment offer has been made, but before the individual has started work, an employer may require a medical examination to identify the nature and severity of a disability.[37] However, once an employee begins work, any medical examination must be job-related and consistent with business necessity.[38]

Contrarily, the FMLA permits an employer to require certification of an employee's serious health condition.[39] However, the employer must pay for such an examination by the employee's health care provider, and it may only request information contained in the Department of Labor's Medical Certification Statement.[40]

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33. Joan T.A. Gabel & Nancy R. Mansfield, *Practicing in the Evolving Landscape of Workers' Compensation Law*, THE LAB. LAW., Summer 1998, at 87.

34. Despite the conflict, the statute that provides the most generous protection is the one an employer must follow in any particular case. *See* 29 C.F.R. § 825.702(a) (1999).

35. 29 C.F.R. § 1630.13(a) (1999).

36. *See* 29 C.F.R. § 1630.14(a) (1999).

37. *See* 29 C.F.R. § 1630.14(b) (1999).

38. *See* ADA, 42 U.S.C. § 12112(d)(4) (1994).

39. *See* 29 C.F.R. § 825.305(a) (1999).

40. *See* 29 C.F.R. § 825.306(a) (1999). If an employer has doubts concerning the original

Finally, under most workers' compensation laws, an employer has the right to require one or more independent medical examinations of an employee.[41] Similar to FMLA examinations, workers' compensation exams are paid for by the employer and can only be used to determine whether the employee is entitled to benefits, should continue receiving benefits, or has reached maximum medical improvement.[42]

Given these general rules regarding the administration of medical examinations, conflicts between the laws arise most often when both the ADA and FMLA apply and an employer attempts to discern information about an employee's workers' compensation history.

First, when both the ADA and FMLA apply, there is a conflict over the choice of physician. Under the ADA, medical examinations must be administered by the employer's physician.[43] In contrast, the FMLA limits medical certifications to those by the employee's health care provider.[44] Complicating matters further is the fact that an FMLA certification exam is a health verification distinct from the ADA-prescribed exam.[45] In such a dual coverage situation, the FMLA implies that an employee may be required to meet the fitness requirements of both the FMLA and ADA, and the employer must comply with the "requirements under the [ADA] . . . that any return-to-work-physical be job-related."[46]

Finally, conflicts often arise when an employer seeks a pre-employment-offer examination—permitted, as previously discussed, under the ADA—and the employer attempts to ascertain information about an employee's workers' compensation history.[47]

Such inquiries inherently conflict with the ADA, which only allows "inquiries into the ability of an applicant to perform job-related functions."[48] If such questions are asked, however, and an employee is subsequently not hired, a retaliation claim under the relevant workers'

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certification, the regulations permit two additional certifications at the employer's expense. *See* 29 C.F.R. § 825.307(a)(2), (c) (1999).

41. *See* MINN. STAT. ANN. § 176.155 (West 1993).
42. *See id.*
43. ADA, 42 U.S.C. § 12112(d)(3)-(4) (1994).
44. 29 C.F.R. § 825.305(a) (1999).
45. *See* Porter v. United States Alumoweld Co., 125 F.3d 243, 246 (4th Cir. 1997).
46. *Id.* (quoting 29 C.F.R. § 825.310(c) (1999)).
47. *See* Downs v. Massachusetts Bay Transp. Auth., 13 F. Supp. 2d 130, 138 (D. Mass. 1998).
48. ADA, 42 U.S.C. § 12112(d)(2)(B) (1994).

compensation statute often follows.[49] Thus, inquiries into workers' compensation may trigger ADA claims.[50]

C. RETURN TO WORK CONFLICTS BETWEEN THE LAWS

Another common area of conflict between the ADA, FMLA, and workers' compensation arises when an employee who is covered under one or all three laws returns to work. Each of the laws imposes different duties for considering reinstatement, reassignment, and light duty work.

As previously discussed, leave is not, in and of itself, a requirement under the ADA, but it may be required as an accommodation.[51] If leave was taken as an accommodation, reinstatement to the employee's former position is only required if the employee is qualified to perform the essential functions of the job with or without reasonable accommodation.[52] Further, the ADA does not require reinstatement if it would pose an undue hardship to the employer.[53]

Employers also may wish to reassign a returning employee to a vacant position. The EEOC has declared that such reassignment may be considered a reasonable accommodation of the type required by the ADA if both the employer and employee agree that reassignment is more appropriate than accommodation in the present position.[54]

Light duty work may also be offered as a possible accommodation, but the creation of light duty positions and permanent light duty assignments are not required as a reasonable accommodation.[55] Nevertheless, if an employee requests light duty work, at least one court has held that an employer's failure to determine whether any light duty assignments were available can be an indication of bad faith.[56]

FMLA regulations require that upon returning from FMLA leave, an employee is entitled to be returned either to the same position the employee held when leave commenced or to an equivalent position with

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49. *See Downs*, 13 F. Supp. 2d at 142.

50. *Id.*

51. *See supra* notes 27-29 and accompanying text.

52. *See* 29 C.F.R. § 825.702(c)(1) (1999).

53. *See* 29 C.F.R. § 825.702(b) (1999) (providing that a reasonable accommodation need not impose an undue hardship on the employer's business).

54. *See* 29 C.F.R. § 1630.2(o) (1999).

55. *See* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996).

56. *See* Harrison v. Landis Plastics, Inc., No. 97-C7094, 1998 U.S. Dist. LEXIS 11311, at *22 (N.D. Ill. July 23, 1998).

equivalent pay, benefits, and other terms and conditions of employment.[57] Employers can accommodate this reinstatement requirement in a variety of ways if the employee's job is no longer vacant or available. For instance, the employer may create a new position for either the returning employee or the employee who filled the job during FMLA leave.[58] The employer could also promote the employee who is returning from leave or transfer another employee to create a vacancy in the same or an equivalent position.[59]

The FMLA permits only three situations in which an employer can deny reinstatement to a returning employee: 1) if the employer can show that the employee would not have been employed at the time of the reinstatement due to elimination of the job; 2) if the employee is a highly compensated key employee who received appropriate notice of key employee status and whose reinstatement is being denied in order to prevent "substantial and grievous economic injury" to the company;[60] and 3) if the employee is unable to perform the essential functions of the job.[61]

In contrast, under most workers' compensation statutes, an employee is not entitled to reinstatement to his or her former position; rather, workers' compensation laws focus on the return to "suitable" work.[62] As with the ADA, this may include light duty work. Under Minnesota law, for example, light duty work is not required, but an employee who unreasonably refuses an offer of suitable work, including light duty

57. 29 C.F.R. § 825.214(a) (1999). An employee is entitled to such reinstatement even if the employer has hired someone else to fill the job or changed the job to accommodate the employee's absence. *See id.* Likewise, there is no provision of the FMLA that conditions a plaintiff's right to restoration to his or her job on the ability to perform the essential duties of a position without a reasonable accommodation, as might be possible under the ADA. *See Harrison*, 1998 U.S. Dist. LEXIS 11311, at *27 n.3.

58. *See* 29 C.F.R. § 825.204 (1999).

59. *See id.*

60. The regulations define a "key employee" as one who is in the highest-paid 10% of the employer's workforce within 75 miles of the employee's work location. 29 C.F.R. § 825.217(c) (1999). Despite the possible denial of reinstatement, a key employee is entitled to take FMLA leave and is entitled to all of the benefits of leave, including continued health coverage. *See* 29 C.F.R. § 825.219(c) (1999).

61. *See* 29 C.F.R. § 825.312 (1999). The FMLA utilizes the ADA's analytical framework to determine an employee's ability to perform the essential functions of the job. 29 C.F.R. § 825.115 (1999).

62. *See* Karst v. F.C. Hayer Co., 447 N.W.2d 180, 186 (Minn. 1989) (noting that, unlike Wisconsin, Minnesota does not have a statutory provision guaranteeing reinstatement to an employee on workers' compensation-related leave).

assignments, risks losing workers' compensation benefits.[63] When such a situation arises, and the employee is covered by the FMLA, an employer cannot require that the worker take a modified job.[64] While the employer may suspend workers' compensation benefits, the employer may still face an impending FMLA claim.[65]

D. TERMINATION OF A COVERED EMPLOYEE

Termination of an employee covered by one or more of the laws poses additional problems for employers. Although the laws encourage employers to assist an employee who has suffered a serious illness, disability, or injury, business necessity sometimes dictates that an employee who can no longer work should be terminated.[66]

Under the ADA, an employee may be terminated because he or she cannot perform the essential functions of the job with or without reasonable accommodation.[67] An employee may also be terminated under the ADA for violations of workplace conduct or performance standards if those standards are job-related and consistent with business necessity.[68]

Conflicts between the laws often arise when an employee is habitually absent from work. If such an absence meets the FMLA requirements, then the employee is entitled to twelve weeks of leave and reinstatement to the position.[69] Under the ADA, however, a disabled employee who is unable to have reasonably consistent attendance may not be considered a qualified individual with a disability. Most courts recognize that regular attendance is an essential job function, and that accommodating a disabled employee's irregular attendance may impose an undue hardship.[70]

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63. *See* MINN. STAT. ANN. § 176.101, subd. 3e(b) (West 1993).

64. Gabel & Mansfield, *supra* note 33, at 88.

65. Gabel & Mansfield, *supra* note 33, at 88 (citing 29 C.F.R. § 825.207(d)(2) (1996)).

66. Business necessity cannot serve as a proxy for retaliation. All three laws prohibit retaliation against employees who exercise their rights. *See* FMLA, 29 U.S.C. § 2615 (1994) (prohibiting retaliation against, and interference with, an employee's exercise of FMLA rights); 29 C.F.R. § 1630.12 (1999) (prohibiting retaliation under the ADA against employees who make a charge or otherwise participate in any investigation or proceeding or hearing to enforce the ADA); MINN. STAT. ANN. § 176.82 (Supp. 2000) (prohibiting retaliation or interference with an employee who exercises their rights under the Minnesota Workers' Compensation Act).

67. See ADA, 42 U.S.C. § 12111(8) (1994). Factors that may be considered in determining whether a particular job function is "essential" include: written job descriptions; work experiences of others in the same job in the past; current work experience of those in similar jobs; and the terms of a collective bargaining agreement, if applicable. *See* 29 C.F.R. § 1630.2(n)(3) (1999).

68. *See* 29 C.F.R. §§ 1630.10, 1630.15(c) (1999).

69. *See* FMLA, 29 U.S.C. § 2614(a) (1994); *see also* FMLA, 29 U.S.C. § 2612(a) (1994).

70. *See, e.g.*, Halperin v. Abacus Tech. Corp., 128 F.3d 191, 197 (4th Cir. 1997) (holding that the

Nevertheless, an employer must still engage in the reasonable accommodation dialogue with the employee.[71] For example, in *Haschmann v. Time Warner Entertainment Company*,[72] the plaintiff, who suffered from lupus, took several weeks of medical leave.[73] When she returned to work, her performance began to suffer and she requested another two to four weeks of leave.[74] The employer denied the request and terminated the plaintiff for poor attendance.[75] Although the court acknowledged that an employer is not obligated to tolerate erratic, unreliable attendance, it must make a good faith effort reasonably to accommodate the plaintiff's disability.[76] In holding the employer liable, the court set forth the basic test for determining whether an individual may be discharged for excessive absences under the ADA: "[I]t is not the absence itself, but rather the frequency of an employee's absences in relation to that employee's job responsibilities that may lead to a finding that an employee is unable to perform the duties of his job."[77]

Under workers' compensation statutes, if an employee's injury is such that he or she cannot return to work at all, permanent total disability benefits will be paid until the employee reaches age sixty-seven even if the employee is terminated because of habitual absences or inability to work.[78]

When the laws conflict in this manner, employers must be increasingly cautious in terminating covered employees. When work injuries lead to any cognizable form of discrimination under the ADA, the law provides for backpay, reinstatement, frontpay, injunctive relief, attorney's fees, damages for emotional distress, punitive damages, and liquidated damages.[79] Thus, as the EEOC Guidance provides,

> Because the ADA enables an injured worker to sue for workers' compensation benefits, along with tort damages and equitable relief, employers are no longer insulated as envisioned in

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inability to work on a regular basis meant that the plaintiff could not perform any functions of the job); Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1284 (7th Cir. 1996) (stating that the ability to report to work is an essential job function).

71. *See* Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601 (7th Cir. 1998).

72. 151 F.3d 591 (7th Cir. 1998).

73. *See* Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 595 (7th Cir. 1998).

74. *See id.*

75. *See id.*

76. *See id.*

77. *Id.* at 602.

78. *See* MINN. STAT. ANN. § 176.101(4) (Supp. 2000).

79. *See* EEOC Compliance Manual (BNA), Americans with Disabilities Act No. 236, at 0:2402-03 (1998) (citing ADA, 42 U.S.C. § 12117).

> the original workers' compensation concept . . . . The 'value' of a claim is increased by the threat of ADA litigation, regardless of whether any discrimination has taken place.[80]

Thus, employers must be especially cautious when considering termination of a covered employee.[81]

E. ABROGATION OF THE EXCLUSIVE REMEDY DOCTRINE

One of the typical hallmarks of workers' compensation law is the exclusiveness of the compensation remedy. As Arthur Larson explains,

> Once a workers' compensation act has become applicable . . . it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.[82]

When an injured employee receives workers compensation benefits and also happens to be covered by the ADA or FMLA, however, the traditional exclusive remedy doctrine may not apply, for several reasons.

A federal district court in *Wood v. County of Alameda*[83] considered this precise question when an employer attempted to argue that the exclusive remedy provision of California's workers compensation law prevented recovery under the ADA. In determining whether the ADA could preempt this provision, the court relied on the two-part test employed by the United States Supreme Court in *Adams Fruit Co. v. Barrett*.[84] Accordingly, the court in *Wood* considered two questions:[85] First, the court considered whether the ADA explicitly or implicitly indicates that Congress intended to defer to state law in situations like the

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80. Gabel & Mansfield, *supra* note 33, at 85.

81. Gabel & Mansfield, *supra* note 33, at 85.

82. LARSON, *supra* note 10, § 69.10, at 557.

83. 875 F. Supp. 659 (N.D. Cal. 1995).

84. Wood v. County of Alameda, 875 F. Supp. 659, 662 (N.D. Cal. 1995) (citing Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)). In *Adams Fruit*, the Supreme Court considered whether an exclusive remedy provision in a state workers' compensation case precluded an action under the federal Migrant and Seasonal Agricultural Worker Protection Act. *Id.* (citing *Adam's Fruit*, 494 U.S. at 638). In that case, the Court held that federal law preempts state law to the limited extent that it does not permit states to supplant, rather than to supplement, the federal statute's remedial scheme. *Id.* (quoting *Adams Fruit*, 494 U.S. at 648-49).

85. *Id.* at 662 (citing *Adams Fruit*, 494 U.S. at 642).

one at issue.[86] After answering this question negatively, the court considered whether preemption principles mandated that all or part of the state law be denied effect in light of Congress' intent in enacting the federal law.[87]

First, the court found that Congress did not intend for the ADA to defer to state workers' compensation law.[88] In looking at Congress' intent, the court concluded that the ADA seeks to "ensure that plaintiffs are not denied the benefits of compatible state statutes on the ground that the ADA precludes any cause of action under the state law."[89] Thus, it concluded that Congress did not intend to defer to state law.

Then, despite finding that dual compensation could be allowed under both laws, the court also examined the effect of preemption principles on the issue.[90] In finding that the ADA preempts the exclusive remedy provision, the court found that the state provision would be an obstacle to the congressional objective behind the ADA, primarily the elimination of discrimination against disabled persons.[91] The court concluded that the objectives of the ADA would be further weakened if each state were allowed effectively to supersede the ADA by placing exclusivity provisions in its statutes.[92]

Finally, at least one commentator has suggested a further reason why the workers' compensation exclusive remedy structure does not preclude an ADA claim: Exclusive remedy provisions in state workers' compensation laws apply only to civil actions against the employer for employment-related injuries.[93] A charge of disability discrimination, on the other hand, would not be inconsistent because it would not be seeking additional recovery for an injury.[94] Rather, it would be seeking recovery for an employer's alleged failure to comply with the requirements of the ADA.[95] Thus, recovery could be permitted under both statutes despite the exclusive remedy provision.

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86. *Id.*
87. *Id.*
88. *Id.* at 664.
89. *Id.*
90. *See id.* at 665.
91. *See id.*
92. *Id.*
93. Ranko Shiraki Oliver, *The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law*, 16 U. ARK. LITTLE ROCK L. J. 327, 370 (1994).
94. *Id.* at 370-71.
95. *Id.* at 371.

F. JUDICIAL ESTOPPEL: IS IT INCONSISTENT TO SEEK TOTAL DISABILITY BENEFITS AND CLAIM PROTECTION UNDER THE ADA?

A final conflict between the ADA and workers' compensation is found in the competing goals of these two laws. Under workers' compensation, and other disability programs such as social security, an injured employee represents that he or she is unable to work.[96] In contrast, when the same employee seeks a remedy under the ADA, he or she represents that he or she is an individual with a disability that could work with or without reasonable accommodation.[97] Such an apparent contradiction often leads employers to argue the doctrine of judicial estoppel.[98] This doctrine is based on the equitable principle that "if a party wins a suit on one ground, it can't turn around and in further litigation with the same opponent repudiate the ground in order to win a further victory."[99]

1. Cleveland v. Policy Management Systems Corporation

This question of whether the receipt of disability benefits precludes ADA relief was recently before the United States Supreme Court.[100] In *Cleveland v. Policy Management Systems Corporation,*[101] the Court considered "whether an application for, or receipt of, disability insurance benefits under the Social Security Act creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a 'qualified individual with a disability' under the Americans with Disabilities Act."[102]

In *Cleveland*, the plaintiff suffered a stroke while on the job and took a leave of absence.[103] She was unable to return to work immediately, so she filed an application for social security disability benefits.[104] Eight months later, the plaintiff's doctor released her to return to work

96. *See* Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 603 (7th Cir. 1998).
97. *See id.*
98. *See id.*
99. *Id.*
100. *See* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999).
101. 119 S. Ct. 1597 (1999).
102. Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1601 (1999).
103. *See id.* at 1600.
104. *See id.*

and anticipated an eventual recovery of nearly 100 percent.[105] Following her return to work, the plaintiff had performance problems and requested several accommodations, including computer training, permission to take work home in the evenings, a transfer of position, and a counselor.[106] The employer denied each of these requests, and terminated the plaintiff three months later.[107] The plaintiff filed a discrimination claim under the ADA, and the employer argued that the plaintiff was judicially estopped from claiming she was "totally disabled" to the Social Security Administration, while at the same time claiming she was a "qualified individual with a disability" under the ADA.[108] The Fifth Circuit Court of Appeals agreed with the employer, holding that application for, or receipt of, social security disability benefits creates a rebuttable presumption that the claimant or recipient is judicially estopped from asserting that she is a qualified individual with a disability.[109]

In vacating the Fifth Circuit's decision, the Supreme Court held that there is no automatic judicial estoppel by asserting that one is totally disabled for social security benefits, and then asserting that he or she is a qualified individual with a disability.[110] To support its decision, the Court advanced several possibilities in which claims can co-exist under the competing statutes. For instance, the Court noted that an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it.[111] Finally, the Court noted that it is perfectly acceptable under the Federal Rules of Civil Procedure to advance alternative legal theories, regardless of consistency, upon which recovery may be premised.[112]

However, despite recognizing the ability to plead both claims, the Court further held that to survive a motion for summary judgment, a claimant "cannot simply ignore the apparent contradiction that arises" and therefore must proffer a sufficient explanation.[113] Therefore, the

105. *See id.*
106. *See id.*
107. *Id.*
108. *See id.*
109. *Id.* at 1600-01.
110. *See id.* at 1602 (stating that the two claims do not inherently conflict to an extent requiring courts to apply a special negative presumption).
111. *Id.*
112. *Id.* at 1603 (citing FED. R. CIV. P. 8(e)(2)).
113. *Id.*

Court vacated the opinion of the Fifth Circuit Court of Appeals and remanded the case to the trial court for further proceedings consistent with its opinion.[114]

In light of the Court's decision, the majority of circuits have declined to hold that an ADA plaintiff is judicially estopped from proving her ADA claim simply because she has sought or received disability benefits.[115] Nevertheless, the judicial estoppel argument logically applies to workers' compensation and ADA cases, given the inherent tension between the two laws. On the one hand, workers' compensation focuses on the extent to which an injured worker cannot perform his or her job as a result of an on-the-job accident.[116] On the other hand, the ADA is designed to obtain the highest possible productivity a disabled individual can offer.[117] Thus, "[t]he conflict in the system is obvious: an [injured worker] receives maximum workers' compensation benefits by proving that he or she is totally disabled, but receives maximum protection under the ADA by establishing that he or she can perform the essential functions of his or her job."[118]

2. *EEOC Guidance*

In an effort to resolve this tension, the EEOC issued its "Guidance on the Effect of Disability Representations in Benefits Applications on ADA Coverage" in February 1997. In that guidance, the EEOC set forth its position that representations made in applications for social security, workers' compensation, disability insurance and other disability benefits should not be an automatic bar to ADA claims.[119]

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114. *Id.* at 1604.

115. *See, e.g.*, Haschmann v. Time Warner Entertainment Co.,151 F.3d 591, 605 (7th Cir. 1998) (declining to adopt a per se rule that a plaintiff is judicially estopped from asserting an ADA claim if she received disability payments); Rascon v. U.S. West Communications, 143 F.2d 1324, 1332 (10th Cir. 1998); Johnson v. Oregon, 141 F.3d 1361, 1367 (9th Cir. 1998); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1212 (8th Cir. 1998); Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 383 (6th Cir. 1998); Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586-87 (D.C. Cir. 1997). *But see* McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996) (holding that an individual's statement to the SSA that he was disabled and unable to work barred his subsequent ADA claim).

116. Gabel et al., *supra* note 5, at 415.

117. Gabel et al., *supra* note 5, at 415.

118. Gabel et al., *supra* note 5, at 415 (quoting William C. Martucci & Daniel B. Boatright, *Conflict Between the Americans with Disabilities Act and State Workers' Compensation Law and Possible Legislative Response*, 20 EMPLOYMENT REL. TODAY 461, 462 n.4 (1993-94)).

119. Jules L. Smith, *At the Crossroads of the FMLA, the ADA and Workers' Compensation:*

The EEOC advanced several reasons for this guidance. First, it is possible for an individual to meet the eligibility requirements for receipt of disability benefits and still be a "qualified individual with a disability" for ADA purposes.[120] Specifically, in terms of workers' compensation, the definition of "disability" is distinct from the ADA's definition.[121] For example, as one commentator has argued, most workers' compensation laws define disability more generally. These more general definitions:

> (a) permit generalized presumptions about an individual's ability to work; (b) do not distinguish between marginal and essential functions; (c) [look to] whether an individual is unable to do any kind of work for which there is a reasonably stable employment market rather than whether s/he can perform the essential functions of a particular position; and (d) do not consider whether an individual can work with a reasonable accommodation.[122]

Thus, they are distinguishable from the more rigid ADA definition of disability.

Second, the EEOC Guidance rests on a strong public policy argument that individuals should not have to choose between applying for disability benefits and vindicating their rights under the ADA.[123] Moreover, according to the EEOC, the ADA's purposes and standards are fundamentally different from the purposes and standards of other statutory schemes.[124] To that end, the EEOC concluded in its guidance that a determination of what, if any, weight to give to representations made in support of applications for disability benefits depends on the context and timing of the representations.[125] Nevertheless, this remains an area of potential conflict between the ADA, FMLA, and workers' compensation laws.

Issues and Answers About Employee Leaves of Absence, A.B.A. CENTER FOR CONTINUING LEGAL EDUCATION, May 7, 1998, at 22 (Westlaw, T98ELAB ABA-LGLED 31).

120. *See id.*
121. *See id.*
122. *Id.*
123. *See id.*
124. *Id.*
125. *Id.*

V. PRACTICAL GUIDANCE FOR EMPLOYERS

As demonstrated, the ADA, FMLA, and workers' compensation laws conspire to form a "Bermuda Triangle" for employers. However, employers can minimize the headaches involved with employee leave by integrating the following guidance into their personnel practices.

(1) Always request FMLA certification from an employee within two working days of the beginning of an unforeseen leave or a leave request.[126] In the case of planned leave, the employee should provide the certification prior to commencement of the leave period.

(2) Any policy of requiring fitness to return to work must be uniformly applied, job-related, and consistent with business necessity to comply with the ADA.[127]

(3) Maintain separate confidential medical examination files from regular personnel files.[128]

(4) Remember that FMLA leave is distinct from the reasonable accommodation requirement under the ADA. An employer cannot reduce or diminish the twelve-week FMLA entitlement and it must be provided without regard to the impact on business or operations. Beyond those twelve weeks, however, an employee may or may not be entitled to additional leave under the ADA. At that time, an employer may consider whether the accommodation imposes an undue hardship on its business.

(5) Remember that other federal and state discrimination laws continue to apply when employees are on leave. This is particularly important to remember when applied to pregnancy since that is routine leave under the FMLA, while also protected by federal and state law.

(6) Create a leave policy that effectively integrates the FMLA, ADA, and Workers' Compensation. Such a policy should include:

(a) Notice requirements
(b) Rights and responsibilities of employees
(c) Sample documentation
(d) Benefits and wages
(e) Return to work programs

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126. *See* 29 C.F.R. § 825.305(c) (1999).
127. *See* 29 C.F.R. § 825.310(a) (1999).
128. *See* 29 C.F.R. § 825.500 (1999).

(f) Terminable events

(g) Any applicable collective bargaining agreement provisions

(7) Administer leave policies consistently and maintain appropriate record keeping to demonstrate compliance.

VI. CONCLUSION

While the waters surrounding this area of employment law may be murky, employers can reduce the risk of turning a $20,000 workers' compensation claim into a $200,000 ADA or FMLA claim by becoming familiar with each of the laws and knowing when they apply. This can be accomplished in several ways.

Primarily, integrating all three areas into an effective leave policy will allow an employer not only to provide notice to employees, but it will also establish a policy that can be flexible to employee leave that may be susceptible to multiple coverage under the various leave entitlement laws. In addition to implementing such a policy, employing trained benefits coordinators to administer leave consistently and maintain appropriate records will also serve to lessen an employer's liability.