

Into the Vortex:

Managing the Injured or Ill Employee under Workers' Compensation, Family Leave and Disability Laws

S. Lynn Erwin

Kemppel, Huffman & Ellis, P.C.

September 20, 2018

Kemppel, Huffman & Ellis, P.C.

Agenda

- HR Bermuda Triangle?
- Navigating the Vortex
- The Laws in the Vortex
- Light Duty/Transitional Work
- The Big One – Additional Leave
- What Would You Do?
- Other Updates

Navigating the Vortex

1. Which laws apply to the employer?
2. Which laws apply to the employee?
 - Does a CBA and/or Employer Leave Policy apply?
3. Does the employee have the qualifying condition?
 - Work-related injury, serious health condition, disability
4. What does each law/provision require the employer do?
 - Separately evaluate
 - Leave requirements
 - Pay/benefit issues
 - Performance issues

Agenda

- HR Bermuda Triangle?
- Navigating the Vortex
- **The Laws in the Vortex**
- Light Duty/Transitional Work
- The Big One – Additional Leave
- What Would You Do?
- Other Updates

The Laws of the Vortex

➤ Workers' Compensation

➤ Family Leave Laws

➤ Disability Laws

- Different Purposes
- Employee Eligibility
- Employer Obligations

Workers' Compensation

- Alaska Workers' Compensation Act –Alaska Statutes 23.30.
- Alaska Administrative Code Title 8
 - With few exceptions, any employer with 1 or more employees is required to offer Workers' Compensation benefits.
 - Employers generally carry insurance to meet this obligation
 - Employers cost is therefore insurance premiums and the injured employee's lost time.
 - The employer's workers compensation insurer pays the injured employee, not the employer.

Family Leave Laws

- FMLA - Family Medical Leave Act of 1993, as amended
 - Private Employers at worksites with 50 or more employees within a 75-mile radius in current or previous calendar year.
 - All Public Employers
 - Also allows other leaves –parental, military caregiver, etc.
- AFLA - Alaska Family Leave Act of 1992 (A.S.39.20.500)
 - Public Employers with 21 or more employees for 20 consecutive workweeks in the last 2 years
 - Employee eligibility is different than FMLA (more lenient)
 - Allow more protected leave 18 weeks in a 24 month period

Disability Laws

- ADA-Americans with Disabilities Act of 1990
 - Public and Private Employers with 15 or more employees
 - Prohibits discrimination against employees who are:
 - Qualified individuals with a disability
 - Have a record of a disability, or
 - Are “regarded as” having a disability
- ADA Amendments Act of 2008
 - Expanded the definition of the term “disability” to broaden protections
 - Sought to eliminate extensive analysis over whether an individual’s condition qualified as a disability

Disability Laws

- Alaska State Human Rights Act (Alaska Statutes 18.80.220)
 - Unlawful to discriminate in compensation or a term, condition, privilege of employment because of the person's *physical or mental disability*.
 - Public and Private employers with 1 or more employees
 - Specific types of private non-profits not covered
- Anchorage Equal Rights Ordinance (Title 5)
 - Illegal to discriminate against an employee with a physical disability or mental disability, unless the reason is a bona fide occupational qualification
 - Public and Private employers with 1 or more employees

But Wait – There’s So Much More

- Collective Bargaining Agreements
 - Leave banks
 - Rehire provisions
- Employer Leave Policies
 - Sick Leave - Vacation (PTO) – Leave Donation
 - Rehire Provisions
- Short Term and Long Term Disability Benefits (Pay)
- Current Trend: City and State Paid Leave Laws
 - Alaska 2018 HB 30 on Paid Sick Leave – did not pass last legislative session
 - Would require employers to provide paid sick leave:
 - Leave would accrue at least 1 hour for every 40 hours of work.

The Laws of the Vortex

- Workers' Compensation
 - Family Leave Laws
 - Disability Laws
-
- Different Purposes
 - Employee Eligibility
 - Employer Obligations

The Laws - Different Purposes

Workers' Compensation:

- Ensure injured employee is kept substantially whole while recovering
- Limit actions against the employer for on-the-job injuries
- Encourage an injured employee to return to the workforce

Family Leave Laws:

- Help employees balance work and family responsibilities
- Set minimum leave standards for employees to take unpaid leave from work while medical benefits continue
- Ensure the employee's job is protected while on leave

Disability Laws:

- Enforcing a civil right -- Not a leave law.
- Make the workplace more accessible to individuals with disabilities
- Prohibit discrimination against the disabled in the workplace

Kemppel, Huffman & Ellis, P.C.

The Laws -Employee Eligibility

Workers' Compensation:

- Employee's injury/illness arises out of or in the course of employment
- Employer is aware (Injury is reported or is known to management)

Family Leave Laws (FMLA):

- Employee worked 52 weeks in last 7 years
- Employee worked 1,250 hours in the last 12 months
- Employee has a serious health condition

Disability Laws:

- Employee is an individual who is qualified for the job
- Has a disability, and
- Can perform the essential functions of the job with or without a reasonable accommodation

The Laws - Employee Eligibility

Definitions:

Serious Health Condition (FMLA):

- Illness, injury, impairment, physical or mental impairment
 - Requires an overnight hospital stay OR
 - Absence/incapacity of 4 or more calendar days + Treatment by a healthcare provider.
- No need to be work-related
- A Workers' Compensation injury will almost always trigger FMLA
- A serious health condition prevents the employee working

The Laws -Employee Eligibility

Definitions:

Disability (ADA/ADAAA)-

- A physical or mental impairment that *substantially limits* one or more *major life activities* of such individual
- A record of such an impairment
- Being regarded as having such an impairment

Major life activities include-

- caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, seeing, concentrating, thinking, working etc., and
- operation of a major bodily function, including the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory systems, etc.

The Laws - Employer Obligations

Workers' Compensation:

- Time-off Work (often called injury leave)
 - Unknown duration –depends on injury
- Time-Loss Payments (80% of weekly spendable wage)
- Medical Expenses (related to injury)
- Job Retraining (if can't return to line of work)

The Laws - Employer Obligations

Family Leave Laws (FMLA):

- 12 weeks of unpaid leave in a year
- Health benefits continued at same level
- Job Protection (return to same job or equivalent)

The Laws - Employer Obligations

Disability Laws:

- For an injured employee whose serious health condition has become a disability:
- Engage in the Interactive Process
- Reasonable Accommodation
 - Light duty/transitional work may be a reasonable accommodation
 - Additional leave may be a reasonable accommodation
 - More to come

Agenda

- HR Bermuda Triangle?
- Navigating the Vortex
- The Laws in the Vortex
- **Light Duty/Transitional Work**
- The Big One – Additional Leave
- What Would You Do?
- Other Updates

Light Duty/Transitional Work

What is it?

- Alternative work offered to an injured employee that meets the employee's medical restrictions while the employee recovers.
- Usually the position is less mentally or physically demanding than the employee's prior position.
- The position may be a modification of earlier duties, temporary elimination of some duties, or a new set of duties for a limited time period.

Light Duty/Transitional Work

Workers' Compensation:

- Not required to offer it, but employers usually want to
- Workers' Comp insurer may have expectations in this area
- If offered it, have a written policy, make it for a limited time (temporary)

Family Leave

- Can offer it, but cannot require employee to take it
- Cannot run FMLA time for hours employee works Light Duty

Disability Leave:

- Employer not required to offer light duty, but if offered to others (injured employees), must be offered equitably including to disabled employees

Agenda

- HR Bermuda Triangle?
- Navigating the Vortex
- The Laws in the Vortex
- Light Duty/Transitional Work
- **The Big One – Additional Leave**
- What Would You Do?
- Other Updates

The Big One – Additional Leave

The Situation:

- Injured employee's FMLA/AFLA entitlements and other protections end.
- Employer knows it can't automatically terminate the employee, so ask if employee is returning to work.
- Employee is not medically ready to return to work and requests extra leave as a reasonable accommodation
- Employer wants to know how much additional leave has to be granted as a reasonable accommodation

The Big One – Additional Leave

- How much Additional Leave is required?
 - EEOC states extra leave qualifies as a reasonable accommodation “when it enables an employee to return to work following the period of leave.”
 - Generally accepted that intermittent time off or short-term additional leave can be a reasonable accommodation (extra days to 2-3 weeks)
 - Open-ended or “infinite” additional leave is generally not considered a reasonable accommodation, but an undue burden.
 - Employee should provide expected return date and medical prognosis
 - Employer is entitled to evaluate request and seek additional information

The Big One – Additional Leave

- In the 9th Circuit (covering Alaska) employers must consider granting extended leaves of absence as a possible a reasonable accommodation.
- In a recent case, the Court found that employer denial of a 5th request for leave after granting 4 other requests may be a failure to provide a reasonable accommodation. *Villalobos v. TWC Administration LLC*
- Employer had already provided a total of 5 months additional leave

The Big One – Additional Leave

- Other Courts have found differently:
- 7th Circuit recently held, contrary to the EEOC's position, that request for 2-3 month additional leave was not a reasonable accommodation. *Severson v. Heartland Woodcraft, Inc.* (cert. denied)
 - Extra leave did not allow employee to work – it keeps him away longer
 - If employee can't return to the job, then employee is not qualified for the job and no longer covered by the ADA
 - Requiring extended extra leave turns the ADA into a medical leave statute and never-ending extension of FMLA
- STAY TUNED – and continue using the interactive process

Agenda

- HR Bermuda Triangle?
- Navigating the Vortex
- The Laws in the Vortex
- Light Duty/Transitional Work
- The Big One – Additional Leave
- **What Would You Do?**
- Other Updates

What Would You Do?

The case of Ralph:

- You handle HR for the 100 employees at Busy Co. that work out of its Anchorage office.
- Ralph is a 5 year full-time non-represented employee who was recently injured on the job.
- Ralph's injury required a hospital overnight and 3 weeks at home. Ralph's doctor recently cleared Ralph to return to work but with a number of restrictions.

What Would You Do?

The Case of Ralph – Navigating the Laws in the Vortex

1. Which laws apply to Busy Co with 100 employees?
 - Workers' Comp, FMLA, Disability Laws
2. Under which laws is Ralph an eligible employee?
 - Workers' Comp, FMLA Disability laws – don't know yet
3. Does Ralph have a qualifying condition?
 - Yes: workplace injury + serious health condition
4. What does each law/provision require the Busy Co to do?
 - (Leave requirements Pay/benefit issues Performance issues)

What Would You Do?

The case of Ralph:

- You found Ralph an appropriate temporary light duty position that is within his doctor's limitations.
- You offer Ralph the position, but he declines it. He says he "would rather stay out on his FMLA leave."

What would you do?

What Would You Do?

The case of Ralph - What are your options?

- A. Fire Ralph for refusing an appropriate light duty position.
- B. Allow Ralph to take FMLA leave, but then request that his worker's compensation benefits be cut-off since he refused an appropriate light duty position.
- C. Let him go out on FMLA leave, but also count each day he is out against your employer's attendance policy and terminate him when he reaches the limit.
- D. Nothing. You have to let Ralph turn down the light duty, take FMLA leave and collect worker's compensation benefits if he wants to.

Other Updates

- New FMLA notices and certification forms issued by U.S. Department of Labor on Sept 4, 2018
 - New forms now expire August 31, 2021
 - No substantive changes, but employers should update forms
 - <https://www.dol.gov/whd/fmla/forms.htm>

The End

Kemppel, Huffman & Ellis, P.C.

Alaska Society of Human Resource Management 2018 Conference