EMPLOYEES WITH DISABILITIES: 
THE ADA, FMLA, AND WORKERS’ COMPENSATION

INTRODUCTION

When accidents occur in the workplace resulting in temporary or permanent disabilities to employees, employers have long understood their responsibility to pay for all necessary medical expenses and to provide income replacement benefits pursuant to state or federal workers’ compensation laws. The Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et. seq., the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 et seq. and 29 C.F.R. § 825.100 et seq., and state workers’ compensation laws mandate employers to comply with myriad obligations. These obligations are comprehensive and complicated even when considered in isolation. Since each of these diverse laws govern in different ways what employers must do in particular workplace situations involving injured or ailing employees, employers must examine the requirements of each individual statute, and how the statutory schemes interrelate.

Since these state and federal laws have different objectives, apply different standards in defining the scope of coverage, and provide different remedial schemes, complying with the array of laws and regulations governing work-related injuries can be complicated for employers and their counsel. While workers’ compensation laws condition benefit entitlement for employees injured on the job upon the extent to which an injured worker cannot perform his or her job, the ADA requires employers to hire and accommodate disabled individuals. There is an inherent conflict between legislation that, in the case of workers’ compensation, awards maximum benefits upon proof of total disability, and in the case of the ADA, extends maximum protection when evidence exists that an individual can perform the essential functions of the job. Employers must analyze compliance obligations (1) when workers’
compensation covers an employee’s injury, (2) when the employee’s condition constitutes a “disability” under the ADA, and (3) when the employee’s malady qualifies as a “serious health condition” under the FMLA.

**BASIC ELEMENTS OF THE LAWS**

**Americans with Disabilities Act**

1. The ADA prohibits discrimination on the basis of physical or mental disabilities, and requires reasonable accommodations that enable qualified individuals with a disability to work.
2. The ADA applies to employers with 15 or more employees.
3. The ADA provides that it shall not “be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.” 42 U.S.C. 12201(b).

**Family and Medical Leave Act**

1. The FMLA establishes minimum leave standards for eligible employees upon the birth of a child, the placement of a child for adoption or foster care, the need to provide care for an employee’s spouse, child, or parent for a serious health condition, and the serious health condition of employees who suffer from serious medical conditions, and guarantees such employees the right to return to work following leave protected by the law. See 29 U.S.C. 2612(a)(1).
2. The FMLA explicitly preserves all employee rights beyond those created by the FMLA: “the leave provisions of the [FMLA] are wholly distinct from reasonable accommodation obligations of employers covered by the [ADA].” 29 C.F.R. § 825.702(a). Employers must grant employee leave requests under whatever federal or state law provides the greatest benefit. 29 C.F.R. § 825.701(a).
3. The FMLA applies to employers with 50 or more employees within 75 miles.
4. FMLA leave can be taken intermittently or on a reduced leave schedule – i.e., converting full-time to part-time employment. See 29 U.S.C. § 2612(b); 29 C.F.R. § 825.203. The intent of the FMLA is not only to protect employees suffering from conditions that require prolonged periods of incapacity, but also to protect those whose on-going medical problems incapacitate them episodically. Victorelli v. Shadyside Hospital, 128 F.3d 184 (3rd Cir. 1997).
5. Employees who take intermittent leave often work only partial days. Under the Fair Labor Standards Act, employers risk loss of an exempt employee’s salaried status if pay is docked when the employee works less than a full day. FMLA leave is unpaid, so in the usual situation, an employer would be precluded from docking the employee’s pay for hours not worked. The FMLA, however, specifically permits an employer to reduce an exempt employee’s salary for all FMLA leave taken, including partial days, without jeopardizing the employee’s exempt status. §825.206.

**COVERAGE**

6. A covered employer under the FMLA is (a) any public employer, or (b) any private employer engaged in “commerce” with 50 or more employees within a 75-mile radius of the principal place of business for at least 20 weeks during the current or preceding calendar year. 29 U.S.C. § 2611(4).

7. To be eligible under the FMLA, an employee must be employed by an eligible employer for at least 12 months and have worked for at least 1250 hours during those 12 months. 29 U.S.C. § 2611(2)(a).

   a. *Rhoads v. FDIC*, 956 F. Supp. 1239 (D. Md. 1997), held that service with a predecessor company must be counted in determining whether an employee has been employed by the employer for 12 months before requesting for leave.


   c. An employee who worked less than 1,250 hours may nevertheless be an “eligible employee” if evidence shows that the employee would have worked sufficient hours to be eligible for leave if the employer had issued the mandated notice of rights and obligations. *Lacoparra v. Pergament Home Centers, Inc.*, 1997 U.S. Dist. LEXIS 15787 (S.D.N.Y. 1997).

8. The 12-month period in which 12 weeks of leave can be taken may be defined by the calendar year; any fixed 12-month “leave year;” or a “rolling” 12-month period measured forward from the date an employee’s FMLA leave begins. See 29 C.F.R. § 825.200(b), (c).
EMPLOYER NOTICE OF RIGHTS

9. Every employer covered by the FMLA is required to post and keep posted in conspicuous places where employees are employed, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act.

10. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances. 29 C.F.R. § 825.300(b).

11. When the employer has enough information to determine that leave is being taken for a FMLA-qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave. Employers may use the optional forms WH-381 and WH-382 prepared by the U.S. Department of Labor to meet these notification requirements.


EMPLOYEE OBLIGATIONS

13. An employee who is unable to return to work and perform all essential function of the job at end of twelve weeks loses reinstatement rights under FMLA, though the employee might have returned to work shortly thereafter. Beckendorf v. Schwegmann Giant Supermarkets, Inc., 4 WH Cases2d 315 (E.D. La. 1997).

14. In order to obtain the rights and protections provided by the FMLA, an employee need not explicitly invoke the FMLA. Rather, the employee must only give notice of the need for leave that is protected by the FMLA. See 29 C.F.R. §§ 825.302(c), 825.303(b). Instead, where an employer has reason to believe that an employee may be absent for an FMLA qualifying reason, the employer must inquire further to determine whether the employee is seeking FMLA-protected leave. See Price v. City
of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997). This kind of notice is given when the employee requests leave for a covered reason. Thus, an employee’s letter stating that he was taking a leave for reasons related to his health adequately put an employer on notice that the leave might be covered by the FMLA, and the obligation then shifted to the employer to request any further information it might have required. 


15. Financial, rather than medical reasons, may constitute a “changed circumstance” justifying an employee’s shortened notice of FMLA leave. Hopson v. Quitman County Hospital and Nursing Home Inc., 119 F.3d 363 (5th Cir. 1997).

16. Employee’s absence after a medical release to return to work is not protected by the FMLA. Murray v. Red Kap Industries, Inc., 124 F.3d 695 (5th Cir. 1997).

17. Lack of candor about the reasons an employee is taking leave may preclude FMLA coverage. Gay v. Gilman Paper Co., 125 F.3d 1432 (11th Cir. 10/29/97).

18. An employer’s duty to inquire further into a leave request is triggered when an employee notifies the company of a medical need for the requested leave. Johnson v. Primerica, 1996 U.S. Dist. LEXIS 869, *17 (S.D.N.Y 1996). Another court ruled, however, that “[r]equring an employer to undertake to investigate whether FMLA leave is appropriate each time an employee, who has been absent without excuse three times in the preceding three weeks, informs the employer that she will not be at work ‘that day’ because she is having ‘a lot of pain in her side’ or is ‘sick’ is quite inconsistent with the purposes of the FMLA, because it is not necessary for the protection of employees who suffer from ‘serious health conditions’ and would be unduly burdensome to employers, to say the least.” Satterfield V. Wal-Mart Stores, 1998 U.S. App. LEXIS 2960 (5th Cir. 1998).

20. Employers must provide employees written notice of their specific obligations, including the consequences of an employee’s noncompliance. 29 C.F.R. § 825.300(c). Employers that do not provide the required notice may be precluded from taking adverse action against employees who fail to comply with their statutory obligations.

21. The Secretary of Labor had promulgated a regulation requiring that leave taken by an employee would not count against an employee’s FMLA entitlement if the employer had not designated the leave as FMLA leave, but the Supreme Court ruled that the regulation was contrary to the language of the FMLA and beyond the authority of the Secretary. *Ragsdale v. Wolverine World Wide*, 122 S. Ct. 1155, 1162 (2002).

**COVERED CONDITIONS**

22. Workers’ compensation injuries involving serious health conditions qualify for intermittent leave under the FMLA. Periodic treatment or therapy could count as intermittent FMLA leave.


24. Violations of the FMLA are remedied by awards of damages for lost wages, benefits, and other losses up to the equivalent of twelve weeks of wages, and upon a finding of bad faith, double damages may be awarded. See 29 U.S.C. § 2617(a)(1). A prevailing plaintiff may also receive reasonable attorney’s fees, witness fees, and other litigation costs.

25. An employee can state a claim for violation of the FMLA by alleging that he or she was assigned to a more demanding position than a former position following return from leave. *Peterson v. Slidell Memorial Hospital*, 1996 U.S. Dist. LEXIS 18944, 3 WH 2d 1131 (E.D. La. 1996).


27. Courts have applied a *McDonnell Douglas* mode of analysis to claims of retaliation or discrimination based on exercise of FMLA rights under 29 U.S.C. § 2615(a)(2). *Stubl v. T.A. Systems*,


31. Arbitration of FMLA claims may be required when an employee signs an agreement to arbitrate any disputes arising out of employment or termination of employment. *O’Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). *Smith v. CPC Foodservice*, 955 F.Supp. 84 (N.D.Ill. 1997) (duty to arbitrate FMLA claim pursuant to collective bargaining agreement).

32. Liquidated damages may be available for FMLA violations unless an employer can show both good faith and reasonable grounds for its actions. Decisions under the FLSA are treated as analogous

33. Employee’s absence after a medical release to return to work is not protected by the FMLA. *Murray v. Red Kap Industries, Inc.*, 124 F.3d 695 (5th Cir. 1997).

34. Although cosmetic surgery is not normally covered, there may be circumstances in which the benefits of the surgery allow an absence to be treated as FMLA leave. *Miller v. Galen of Florida*, 1997 U.S. Dist. LEXIS 17901 (M.D. Fla. 1997).

35. Flu-like conditions are not covered under the FMLA unless complications arise.

36. The FMLA “is not intended to cover short-term conditions for which treatment and recovery are very brief.” *Mell v. Weyburn-Bartel, Inc.*, 4 WH Cases2d 274 (W.D. Mich. 1997); *Rhoads v. F.D.I.C.*, 956 F.Supp. 1239 (D.Md. 1997) (migraine headaches may be severe enough to warrant coverage); *Dillon v. Carlton*, 977 F.Supp. 1155 (M.D. Fla. 1997) (ADD/hyperactivity disorder not serious health condition); *Martyszzenko v. Safeway Inc.*, 120 F.3d 120 (8th Cir. 1997) (psychological condition not incapacitating); *Price v. Marathon Cheese Corp.*, 119 F.3d 330 (5th Cir. 1997) (Carpal tunnel syndrome not a disability); *Bauer v. Variety Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997) (rectal bleeding not serious health condition absent evidence of incapacity or in-patient care); *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 6/27/97); (combination of several ailments may taken together be a serious health condition).

37. When rights to leave under the FMLA and ADA apply simultaneously, the statute providing greater protection to the employee controls. There is always a question about which statute provides more protection in a particular situation, and which is more protective depends on the facts of the specific case, not on any generally applicable rule.

**State Workers’ Compensation Laws**

Workers’ compensation statutes require employers, as a condition of doing business, to provide no fault income replacement benefits and medical expense coverage when accidental injuries to workers arise out of and in the course of employment.

1. Workers’ comp laws typically apply to all employers in the state.
2. Generally, workers’ comp laws require that employers treat claimants under those laws no worse than other employees who miss work because they are unable to work.

3. The “exclusive remedy doctrine” establishes workers’ compensation benefits as an injured worker’s only remedy against their employer, presumably assuring employers of immunity from litigation and other types of damages.


5. Likewise, the ADA does not preempt any existing state law that is consistent with the ADA. 42 U.S.C. § 12201(e). The ADA does not alter the standards for determining eligibility for benefits under workers’ compensation laws or under state and federal disability benefit programs. 29 CFR §1630.1(c)(3).

DEFINING CONDITIONS COVERED BY THE LAWS

The ADA and workers’ compensation laws define “disability” differently.

1. The ADA does not apply to acute impairments of only short duration that do not have any long-term impact, but does cover disabilities not caused by the job. See EEOC TECH. ASSIST. MANUAL, § 9.2. Workers’ compensation laws require benefits for employees who sustain relatively minor, temporary job-related injuries, as well as for permanently disabling serious injuries, and of course provide no benefits for disabilities not caused by the job.

2. Although a claimant may be pursuing a permanent or total disability workers’ compensation claim, an employer may violate ADA non-discrimination requirements by automatically refusing to allow the employee to return to work according to EEOC because workers’ compensation and the ADA define disability and ability to work differently. “Such a determination is never dispositive regarding an individual’s ability to return to work, although it may provide relevant evidence regarding an employee’s ability to perform the essential functions of the position in question or to return to work without posing a direct threat.” EEOC GUIDANCE,

**ADA**

1. The ADA defines “disability” as: (1) a physical or mental impairment that substantially limits a major life activity, (2) a record of such an impairment, or (3) being regarded as having such an impairment. Impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity, or they may be only temporary, non-chronic, and have little or no long term impact. See EEOC ENFORCEMENT GUIDANCE: WORKERS’ COMPENSATION AND THE ADA (“EEOC GUIDANCE”).

2. The ADA Amendments Act of 2008 expanded the physical and mental conditions eligible for coverage and shifted the focus of disability claims from coverage to whether discrimination occurred.

3. The definition of “disability” under the ADA is no different in the workers’ compensation context than in any other context.

4. The term “disability-related occupational injury” refers to cases where the ADA and workers’ compensation statutes simultaneously apply, such as where the occupational injury and the disability are linked. EEOC GUIDANCE at Q. 9.

5. The ADA prohibits discrimination in hiring or in returning an employee to work following an occupational injury because the employer believes the employee poses an “increased risk of occupational injury and increased workers’ compensation costs” unless there is evidence that hiring or returning the person would pose a “direct threat.” EEOC GUIDANCE, at Q. 12. Merely because a person with a disability was previously injured on-the-job does not mean that employment in the position in question poses a direct threat.

**FMLA**

1. Under the FMLA, a “serious health condition” includes illness, injury, impairment, and physical or mental conditions involving inpatient care in a hospital, hospice, or residential medical care facility; any period of incapacity requiring absence from work, school, or other regular daily activities for more
than three calendar days, that also involve continuing treatment by (or under the supervision of) a 
health-care provider; and continuing treatment by a health-care provider. 29 U.S.C. § 2611(11).
2. While certain conditions do not ordinarily constitute “serious health conditions,” if in a particular 
case the conditions meet the regulatory criteria for incapacity and qualifying treatment, they would be 
covered by the FMLA. Thorson v. Gemini, Inc. 123 F.3d 140 (7th Cir. 1997).
3. If an individual suffers from several conditions, no one of which would be deemed a serious 
health condition, in combination they might be a serious health condition. Price v. City of Fort Wayne, 
117 F.3d 1022 (7th Cir. 1997).
4. A worker’s compensation injury can qualify as a serious health condition, entitling a worker up 
to twelve weeks of leave in any twelve-month period and reinstatement. 29 C.F.R. § 825.200(a).
5. An “employee’s FMLA twelve-week leave may run concurrently with a workers’ compensation 
absence when the injury is one that meets the criteria for a serious health condition.”
6. A disabled employee who seeks restoration to her former position may seek a reasonable 
accommodation in connection with restoration, such as additional leave, part-time work, or job 
restructuring.
7. The 2008 National Defense Authorization Act amended the FMLA to provide eligible employees 
military-related leave for any “qualifying exigency” arising out of active duty service of a member of a 
regular component of the U.S. Armed Forces of a spouse, son, daughter, or parent related to deployment 
to a foreign country sometime within five years preceding the date on which the leave is needed; and for 
a covered service member with a serious injury or illness incurred in the line of duty on active duty, or 
that were aggravated by active duty.

Workers’ Compensation
1. Workers’ compensation laws are different in purpose from the ADA and utilize different 
standards for evaluating whether an individual has a “disability” or whether he is capable of working. A 
workers’ compensation determination of permanent total disability is never dispositive regarding an 
individual’s ability to return to work. Thus, even if an employee with an occupational injury has a
“disability” as defined by a workers’ compensation statute, a “disability” for ADA purposes may not exist.
2. Under most workers’ compensation laws, disability is typically defined in terms of the degree of physical impairment caused by an injury, and in certain cases, as the inability to perform certain jobs.

**INQUIRIES ABOUT MEDICAL CONDITIONS AND MEDICAL EXAMINATIONS**

**ADA**

1. An employer may not ask questions about an applicant’s prior workers’ compensation claims or occupational injuries until after it has made a conditional offer of employment, as long as it asks the same questions of all entering employees in the same job category.
2. An employer also may not obtain from third parties any information that it could not lawfully obtain directly from the applicant.
3. Likewise, an employer may require a medical examination to obtain information about an applicant’s prior occupational injuries only after it has made a conditional offer of employment, as long as it requires all entering employees in the same job category to have a medical examination.
4. An employer may require a medical examination and/or make an inquiry of an employee that is job-related and consistent with business necessity, relating to the ability of an employee to perform job-related functions.
5. Any information obtained by an employer regarding the medical condition or history of any employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). See Porter v. U.S. Alumoweld Co., 125 F.3d 243, 246 (4th Cir. 1997).
6. In order to comply with the obligations of the Genetic Information Nondiscrimination Act of 2008 (GINA), any request for information should include the following statement:

   The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To
comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

7. When an employee returns to work after an occupational injury an employer may ask the employee disability-related questions and/or require medical examinations that are job-related and consistent with business necessity, if the employer “reasonably believes that the occupational injury will impair the employee’s ability to perform essential job functions or raises legitimate concerns about direct threat.” EEOC GUIDANCE at Q. 7. Employers must focus their questions and exams upon the specific occupational injury and “its effect on the employee’s ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat” and “the extent of its workers’ compensation liability.” Id., at Q. 7-8.

8. When necessary to ascertain the extent of its workers’ compensation liability, the ADA does not preclude an employer or its insurance carrier from asking disability-related questions or requiring medical examinations that are consistent with the intended purpose of state law to determine an employee’s eligibility for workers’ compensation benefits. Examinations and questions must be limited to the specific occupational injury and may not be required more often than is necessary to determine an individual’s initial or continued eligibility for workers’ compensation benefits.

9. An employer must keep medical information confidential even if someone is no longer an applicant or an employee.
FMLA

1. Under the FMLA, employers may require a doctor’s certification in support of a leave request. 29 U.S.C. § 2613(a).
2. An employer that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer’s expense. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer, or regularly contract with or otherwise regularly provide services to the employer. 29 C.F.R. § 825.307. An employer’s right to a second opinion regarding fitness for duty has been recognized. Porter v. U.S. Alumoweld Co., 125 F.3d 243 (4th Cir. 1997).

Workers’ Compensation

1. Under some state laws, limitation of workers’ compensation liability for aggravation of pre-existing conditions – i.e., second injury fund relief – requires that the employer have knowledge of the employee’s medical condition at the time of hire.
2. Before enactment of the ADA, employers often explored in the hiring process an applicant’s medical and workers’ and compensation history.
3. Due to the ADA’s restrictions on the collection of medical and prior injury data, employers cannot identify applicants with serious pre-existing conditions who present a significant potential for aggravating workers’ compensation injuries, and the ability of employers to demonstrate their pre-hire knowledge of pre-existing conditions, as mandated by applicable state law, is effectively eliminated.

Reasonable Accommodations

1. The ADA requires an employer to provide reasonable accommodation to disabled employees or applicants for employment, unless doing so would cause undue hardship. See generally EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (March 1999).
2. An accommodation is any change in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities. Congress defined the term “reasonable accommodation” only through examples of changes or
modifications to be made, or items to be provided, to a qualified individual with a disability. The statutory definition of “reasonable accommodation” does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment. See 29 C.F.R. pt. 1630 app. § 1630.9.

3. The duty under the ADA to offer a reasonable accommodation to a disabled individual may complement certain employer obligations and strategies for stemming the rising costs of workers’ compensation claims: although most state workers’ compensation laws do not require employers to reinstate an injured worker who has any residual disability, employers frequently offer injured workers “light duty” – i.e., a modified job – while a worker is recovering from an injury.

4. Some accommodations require changes to job duties or the work environment. In other situations, the needed accommodation is a temporary absence during which no work is performed.

5. The term “light duty” generally refers to temporary or permanent work that is physically less demanding than normal job duties, which is often created specifically for the purpose of providing work for employees injured on-the-job who are unable to perform some or all of their normal duties.

6. If an employee with a disability-related occupational injury requests reasonable accommodation and the need for accommodation is not obvious, the employer may require reasonable documentation of the employee’s entitlement to reasonable accommodation.

7. An employee with a disabling occupational injury is entitled to return to the same position unless holding open the position would impose an undue hardship.

6. Under the ADA, an employer may provide an accommodation that meets the employee’s job-related needs and requires an employee to remain at work, (e.g., reallocating marginal functions, or providing temporary reassignment) in lieu of providing leave. An employer may not, however, require an employee to remain on the job where the employee qualifies for leave under the FMLA. 29 U.S.C. §
2612(a)(1). Employees who insist on taking leave in such circumstances, would have no right to continue receiving workers’ compensation disability benefits. EEOC GUIDANCE, at Q. 24.

7. Such a determination does not expand or contract the individual’s FMLA leave and restoration rights to a position equivalent to the one that he or she left. The Department of Labor has indicated that an employee may refuse a light duty assignment and insist on FMLA leave instead. In those circumstances, under workers’ compensation laws that cut off benefits once a claimant is deemed medically able to accept a light duty assignment, the employee would not be entitled to continued benefits. U.S. DEP’T LABOR, Opinion Letter, (Apr. 19, 1994).

8. An employer need not provide an employee’s preferred accommodation as long as the employer provides an effective accommodation – one that is sufficient to meet the employee’s job-related needs.

9. When an employee is unable to perform essential functions of the job due to medical restrictions, an employer may designate the employee’s absence as FMLA leave. Harvender v. Norton Co., 4 WH Cases2d 560 (N.D.N.Y. 12/15/97).

10. A doctor’s opinion that his patient could return to work may preclude further protection under the FMLA. Murray v. Red Kap Industries, Inc., 124 F.3d 695 (5th Cir. 1997).

11. The EEOC’s ADA regulations and Technical Assistance Manual contemplate time off from work as an ADA reasonable accommodation. Some employees seek acceptance of erratic attendance attributed to a disability. Other employees request indefinite leave as an accommodation.

12. An employee who is temporarily unable to work due to a disability-related occupational injury may be entitled to leave as a reasonable accommodation unless it would impose an undue hardship on the employer. EEOC Guidance, at Q. 18. Thus, employees who are not eligible for FMLA leave may nevertheless be entitled to leave as a reasonable accommodation under the ADA.

13. Courts have rejected indefinite leave requests as a form of accommodation. See EEOC v. Yellow Freight System, 253 F.3d 943, 948 (7th Cir. 2002) (en banc), (request for unlimited sick days was not a reasonable accommodation request – “every circuit that has addressed this issue has held that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability. The fact is that in most cases, attendance at the job site is a basic
requirement of most jobs.”). See also Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998); Nesser v. TWA, 160 F.3d 442, 225-46 (8th Cir. 1998); Nowak v. St. Rita High Sch., 142 F.3d 999, 1004 (7th Cir. 1998); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213, (8th Cir. 1998); Halperin v. Abacus Tech Corp., 128 F.3d 191, 198 (4th Cir. 1997); Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995).

14. More moderate leave requests have not met with judicial rejection, especially where there is evidence that uninterrupted attendance is not critical. Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998) (six months to fill job after plaintiff's discharge); Criado v. IBM, 145 F.3d 437 (1st Cir. 1998) (several week extension of one-month leave); Cehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155 F.3d 775 (6th Cir. 1998) (uninterrupted attendance not always an essential function).

15. Under the ADA, absent a direct threat, an employee who can perform the essential functions of the job, with or without reasonable accommodation, must be returned to work. EEOC GUIDANCE, at Qs. 14 & 16. Workers’ compensation vocational rehabilitation programs do not satisfy reasonable accommodation obligations. Id., at Q. 25. Employers and employees may agree to use vocational rehabilitation instead of returning to work. Id. at Q. 27.

16. An employee’s rights under the ADA are separate from his/her entitlements under a workers’ compensation law. The ADA requires employers to accommodate an employee in his current position through job restructuring or some other modification, absent undue hardship. The first question is whether an employee can “perform the essential functions” of the original position, “with or without reasonable accommodation,” even if the job must be restructured, the work schedule revised, etc. EEOC GUIDANCE, at Q. 21.

17. Only if a disabled employee cannot perform the essential functions of the original position, does reassignment come into play. A new position need not be created, nor must another employee be removed to enable a reassignment. EEOC GUIDANCE, at Q. 22. If it would impose an undue hardship to accommodate an employee in his current position, then the ADA requires that an employer reassign the employee to a vacant position he can perform, absent undue hardship. Cf. Malabarba v. Chicago Tribune Co., 149 F.3d 690, 697 (7th Cir. 1998) (“Although the ADA provides that reassignment to a
vacant position may constitute a reasonable accommodation, it does not require that employers convert temporary ‘light-duty’ jobs into permanent ones.”).

18. An employer may recognize a special obligation or seek to reduce workers’ compensation costs by creating a light duty position for an employee disabled by an injury at work. The fact that an employer provides such “light duty” positions does not impose a reciprocal obligation to create positions for non-occupationally injured employees. The ADA does require, however, that employers reassign employees with non-job-related disabilities to vacant light-duty positions for which they are qualified. EEOC Guidance, at Q. 28.

19. If an employee with a disability who is not occupationally injured becomes unable to perform the essential functions of his job, and there is no other effective accommodation available, the employer must reassign him/her to a vacant light duty position reserved for employees injured at work because reassignment to a vacant position and modification of an employer’s policies are forms of reasonable accommodation required by the ADA. An employer cannot establish that the reassignment to a vacant reserved light duty position imposes an undue hardship simply by showing that it would have no other vacant light duty positions available if an employee became injured on the job and needed light duty.

20. If an employer provides light duty positions only on a temporary basis, it need only provide a temporary light duty position for an employee with a disability-related occupational injury.