WHAT LABOR AND EMPLOYMENT LAWYERS SHOULD KNOW ABOUT WORKERS' COMPENSATION

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When injuries occur in the workplace, every American jurisdiction requires employers to provide insured protection of the lost income and medical needs of injured workers. Employers and employees are subject to a complicated array of rights and responsibilities relating to the insurance coverage employers must maintain; the duty of injured workers to provide notice of injuries; benefits to which injured employees are entitled; how disputes arising from workplace injuries are resolved; the impact of claims against third parties on the right to workers' compensation benefits; and how these rights and obligations under workers' compensation laws relate to federal laws governing individuals with disabilities and serious medical conditions.

The following discussion introduces lawyers whose practice is not focused on these types of cases to the essential features of the workers' compensation system, and examines the interface between the issues raised in workers' compensation cases and other workplace issues.

A. WORKERS' COMPENSATION BENEFITS

Workers' compensation benefits generally fall into two categories: indemnity benefits and medical benefits.

INDEMNITY BENEFITS

1. Indemnity benefits consist of periodic cash payments to the injured worker to replace either total loss of income or reduced earning capacity – whether temporary or permanent – resulting from work injuries and occupational diseases. In many jurisdictions, an additional cash benefit is available to compensate for permanent loss of use of certain "scheduled" body parts. In cases where a work injury or occupational disease has resulted in the death of the worker, indemnity benefits include periodic cash payments to spouses, children and certain other dependents of the deceased worker.

2. The starting point for the calculation of indemnity benefits is the injured or deceased worker's pre-injury average weekly wage (AWW), most frequently the average of gross wages earned during the 52-week period immediately prior to the work accident or disease diagnosis and communication.

a. Most states have statutory minimum and maximum compensation rates, set annually and usually based on the average wage of that jurisdiction's entire labor force. Because of the maximum rate limitations, injured workers with high AWWs may receive far less than their pre-injury wage while disabled.

b. A number of states provide for automatic annual cost-of-living adjustments to weekly indemnity benefits.

3. Workers' compensation benefits typically are paid on a weekly basis in an amount that is a percentage of the worker's AWW, commonly referred to as the "compensation rate." The percentage varies by jurisdiction, with the majority of jurisdictions, including Virginia, using 66 ⅔ as the applicable percentage. *See* Va. Code Sec. 65.2-500(A).

4. Temporary total disability (TTD) is compensation for lost wages paid during the period when an injured worker is unable to perform any work because of a work-related injury or disease.

a. A mandatory waiting period applies in some jurisdictions before TTD benefits are payable, but in such jurisdictions there typically is also a retroactivity period, after which benefits for the waiting period become due. In Virginia, no compensation is payable for the first seven days of disability, but if total disability continues for more than three weeks, compensation becomes payable for the initial seven day waiting period. *See* Va. Code Sec. 65.2-509.

b. Many states limit the total number of weeks of TTD benefit eligibility. In Virginia payment of compensation for temporary disability is limited to 500 weeks. *See* Va. Code Sec. 65.2-519.

5. Permanent and total disability (PTD), also called "catastrophic loss" in some states, extends wage loss benefits beyond the maximum limit of TTD benefits in cases of severe injuries that render the worker permanently and totally disabled from all forms of gainful employment.

6. Temporary partial disability (TPD) is compensation for wage loss payable to injured workers who cannot yet return to full duty because of the injury, but have residual work capacity, and during their recovery have returned to some limited form of employment earning less than pre-injury wage.

a. The amount of such benefits is a percentage, typically 66⅔ of the difference between the worker's pre-injury average wage and the wage that the worker is able to earn while working in a limited light duty capacity.

7. In many jurisdictions, a partially disabled worker has an affirmative duty to "market" their post-injury residual work capacity by seeking light duty employment commensurate with their medical restrictions and physical limitations in order to be eligible for weekly indemnity payments. The adequacy of an injured worker's marketing efforts is frequently the subject of litigation.

a. Another frequent subject of litigation is an alleged refusal of "selective employment," which is light duty work offered to or procured for a partially disabled injured worker. In many jurisdictions, a refusal of selective employment may result in a termination or forfeiture of wage-loss benefits.

8. Permanent partial disability (PPD) is compensation for loss of use of a specific body part and is usually paid in addition to wage loss compensation, whether TTD or TPD.

a. In most jurisdictions, the amount of PPD that is payable for a particular loss is a specific number of weeks based on the body part involved, as set forth in a statutory schedule, multiplied by the weekly compensation rate.

b. A total loss or loss of use of that body part would result in payment for the total number of weeks specified in the schedule. A partial loss or loss of use would result in payment of a percentage of that amount. For example, in Virginia the total amputation of an arm would entitle an injured worker to a PPD benefit equal to 200 weeks multiplied by the worker's compensation rate. *See* Va Code. Sec. 65.2-503(B). An injury that resulted in a 50% permanent loss of use of the arm would entitle the worker to a PPD benefit of 100 weeks (50% of the 200 week scheduled benefit) multiplied by the compensation rate.

c. The determination of the appropriate percentage partial loss of use of a scheduled body part is the subject of frequent litigation and debate. Different jurisdictions have adopted different editions of the AMA GUIDE TO PERMANENT IMPAIRMENT as the required basis of a permanency rating, while others have not adopted any particular standard, leaving the litigants free to submit medical opinions based on the edition that best supports their case.

9. When a work accident or occupational disease results in the death of the worker, death benefits are payable to surviving spouses, minor children and other statutory dependents. The benefit varies significantly from jurisdiction to jurisdiction but often includes or is based on some variation of the TTD benefit the worker could have received had he survived the accident. Burial benefits of some limited amount ($10,000 in Virginia. *See* Va. Code Sec. 65.2-512(B)) are also provided.

MEDICAL BENEFITS

1. Medical benefits comprise the economically most significant portion of workers' compensation benefits paid to or on behalf of injured workers.

2. Generally all reasonable and necessary medical care required to treat the worker's injuries or resulting consequences thereof are included. The duration of such benefits varies by jurisdiction. In Virginia, for example, such benefits are awarded for the worker's lifetime. *See* Va. Code. Sec. 65.2-603. By contrast, in Arkansas medical benefits may stop six months after the injury if no time is lost from work, six months after a return to work or when a maximum of $10,000 has been paid. *See* U.S. Chamber of Commerce, *2017 Analysis of Workers' Compensation Laws, Chart IX*.

3. The degree of physician choice and medical management by the parties varies across jurisdictions. In Virginia, the injured worker's choice of initial physician is limited to a panel of at least three physicians selected by the employer. *See* Va. Code Sec. 65.2-603(A).

4. In most states, fee schedules adopted by statute or regulation limit provider charges for medical care rendered in the workers' compensation context. At the direction of the state legislature, Virginia will implement fee schedules beginning January 1, 2018. *See* Va. Code Sec. 65.2-605.

5. Medical benefits also include prescription medications, prosthetics, home modifications and reimbursement of travel expenses associated with physician visits and other medical care.

6. The reasonableness of particular treatment has become an increasing basis for litigation as new treatments are developed and technologies advance.

a. Workers' compensation adjudicators have wrestled with questions such as whether an injured worker who has suffered a leg amputation is entitled to the very best prosthetic leg available or merely an adequate one.

b. The appropriateness of medical marijuana in the workers' compensation context is currently an issue of great debate in many state legislatures and workers' compensation regulatory agencies.

VOCATIONAL REHABILITATION

1. Vocational rehabilitation is another benefit available in most jurisdictions. Intended as a benefit to assist injured, partially disabled workers return to gainful and appropriate employment commensurate with their physical restrictions, vocational rehabilitation sometimes is also used as a defense tool.

2. In many jurisdictions, an injured worker's failure to cooperate with vocational rehabilitation efforts may result in the termination of indemnity benefits. Much litigation arises out of such alleged failures as well as the appropriateness of the efforts made by the vocational rehabilitation counselor.

B. WORKERS' COMPENSATION PROCEDURES AND PROCEEDINGS

1. Workers' Compensation statutes establish a system of medical coverage and other compensation for workers who are injured while in the course and scope of their employment, regardless of fault. All fifty states in the United States have a workers' compensation statute that is regulated and adjudicated by a Division of Workers' Compensation, typically within the State's Department of Labor.

2. Although it differs from state to state, the number of employees typically determines whether an employer must have workers' compensation insurance. Some states require all employers to have coverage. Others range from 1 to as high as 5 employees before the employer is required to have coverage.

3. In contested cases, the issue often becomes: who is defined as an employee. States differ on whether they include executive officers, directors, working partners, independent contractors, domestic servants, etc.

4. If an employer fails to insure when it should, severe fines, lawsuits and even criminal charges can be the consequence. In addition, the employer could be exposed to risk of a civil lawsuit.

5. Most states allow employers to be self-insured if their plan is approved by the state. In these scenarios, the employer assumes the financial risk of providing workers' compensation benefits to its employees. Not many self-insured employers handle their own claims. Rather, they hire claims service companies, also known as third party administrators (TPA) that specialize in handling workers' compensation claims administration and loss control. Injured workers and employers have obligations to each other, and to the State, when an injury occurs at work. An injured worker is required to report an injury either in writing, verbally, or both, as soon as practical after the injury. Most states have a time limit attached to the notice requirement, such as no later than 30 days after the incident. Failure to do so has different ramifications in each state.

6. Giving notice of an injury and filing a formal workers' compensation claim are two distinct actions. The filing of a claim preserves the injured workers' ability to get benefits and has a statute of limitations in each state. This deadline for filing a claim tends to be shorter in workers' compensation claims than it is for other general tort claims. Some states have as short as a 30-90 day statute of limitations to file claims. Others have two to three years. The time limit typically starts on the date of the accident and can be extended for such things as payment of medical bills or lost time benefits.

7. In response to a claim, the employer/insurer is required to file an answer within the time prescribed by each state statute. Most states generate forms for both the claims and the answers, which are mandatory.

8. Once an answer is filed, most statutes encourage liberal and open discovery to facilitate the efficient and expeditious handling of a claim in order to avoid delay in medical treatment and receipt of compensation for lost time at work. This often includes exchange of medical records, reports and disclosure of statements without the need for subpoenas or formal depositions.

9. Claims can be denied by the employer or its insurer. Denial may be based upon failure to provide proper notice; disputes over whether the accident was in the course and scope of employment; disputes over medical causation between the accident; injury and medical condition or diagnosis; and suspicion of fraud. All state statutes have expedited remedies to address hardship situations.

10. After notification of work-related injuries, under the terms of their insurance policies employers must provide notice to their carriers. In addition, all states require reports of injury to the division of workers' compensation. Failure to comply with reporting requirements of the insurance company or the state can result in penalties, such as complete denial of insurance coverage by the insurance company, or extension of the statute of limitations for the claimant to file the claim by the state.

11. If a claim can be settled, the compromise settlement must be approved by an administrative law judge. In the event that a claim cannot be resolved by agreement, the parties have a right to a hearing. Prior to a hearing, some states require pre-hearing or pre-trial conferences and mediations before a hearing will be set. Proceedings may be informal, though administrative judges may request opening statements, and hearings are on the record.

12. All states have an appeals process. The appeals typically go through another level of the administrative process within the state's department of labor, and eventually to the state's court of appeals or supreme court, depending upon the scope of review in the state.

13. Within workers' compensation procedures and proceedings, labor and employment lawyers may uncover facts and information that could impact their disputes involving such actions as wrongful termination, discrimination cases, or similar causes of action. Being aware of your state's workers' compensation procedure can provide an advantage in preparing for other disputes.

C. THIRD PARTY ISSUES AS THEY RELATE TO WORKERS' COMPENSATION CLAIMS

1. Workers' compensation claims and personal injury claims often intersect. This occurs whether they arise out of the same incident or whether subsequent to the work incident an injury aggravates the work injury. Third party claims that might arise include product liability claims, medical malpractice claims, and wrongful death claims. Personal injury and workers' compensation lawyers need to understand the manner in which these bodies of law interrelate.

RIGHT OF SUBROGATION AND LIEN

2. As in many jurisdictions, in Virginia, when an injured worker makes a claim under the Workers' Compensation Act, the law creates a lien in favor of the employer / insurer. Employers have a right of subrogation against "any verdict or settlement arising from any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury, occupational disease or death." Va. Code § 65.2-309. Whether the right of subrogation or lien is created by operation of law, or whether other pre-requisites must be met varies according to state law.

3. The lien or right of subrogation applies against any medical, wage loss, or permanent partial impairment benefits paid to or for the benefit of the claimant. Va. Code § 65.2-310. Other expenses, such as legal fees for defense attorneys, vocational rehabilitation managers, or nurse case managers might also be incurred by an employer but such benefits not paid to or for the benefit of the claimant are not included within the lien in Virginia. *Lockwood v Automatic Control of Tidewater,* 63 O.I.C. 219 (1984); *Washington v Miller & Rhodes,* 68 O.I.C. 250 (1984). This also may vary by state, but in any state it would make sense for counsel to scrutinize the alleged lien against the third party recovery.

CONSENT OF EMPLOYER/CARRIER TO ANY THIRD PARTY SETTLEMENT

1. Among the most important matters to be addressed is how and to what extent a personal injury case may be settled when there is a related workers' compensation claim. In Virginia, if a personal injury or third party claim is settled without the knowledge and permission of the workers' compensation carrier / employer, the claimant will forfeit future indemnity and medical benefits . *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, 397, 444 S.E.2d 3, 7 (1994); *Safety-Kleen Corp. v. Van Hoy,* 225 Va. 64, 70, 300 S.E.2d 750, 754 (1983). In addition, the claimant will forfeit the right to a reduction in the gross lien which would normally impose the statutory reimbursement of pro rata share of third party attorney's fees and costs against the employer under Va. Code § 65.2-311. *Skelly v. Hertz Equipment Rental Corp,* 35 Va. App. 689, 547 S.E.2d 551 (2001). If the carrier refuses to consent to settlement, the claimant can request a Virginia Circuit Court to approve the settlement, which if successful, results in a finding that the employer/carrier is deemed to have consented. Va. Code § 8.01-424.1.

EMPLOYER'S CREDIT OR OFFSET AGAINST FUTURE CLAIMS

1. Assuming that the claimant and counsel obtain permission to settle the third party case, future workers' compensation benefits are impacted. Upon receipt of third party funds, a "recovery is effected," and the cost of recovery will be prorated between the employer and the employee. Va. Code § 65.2-311. Subsequently, the employer will receive a credit against its obligations to pay future benefits. The offset or credit works as follows:

> The employer shall pay to the employee a percentage of each further entitlement as it is submitted equal to the ratio the total attorney's fees and costs bear to the total third party recovery and until such time as the accrued post-recovery entitlement equals the sum which is the difference between the gross recovery and the employer's compensation lien.

Va. Code § 65.2-313.

2. After receiving third party monies, the claimant only has a workers' compensation claim on an ongoing basis equal to the ratio that the attorney's fees and expenses in the third party case bear to the overall recovery – normally approximately 35 percent. In Virginia, claimants must then pay all of their own medical bills and incur all of their lost wages. Claimants have the option of filing quarterly requests with their carriers for receipt of the recoverable portion (*e.g.*, 35%) which is the *recovery ratio* allotted amount of future medical and wage loss incurred. A "recovery ratio award order" can be entered for the protection of claimants to clarify this process for the post third party recovery. *See* Stephen Harper, *Impact of Third Party Personal Injury Case on Workers' Compensation*, VTLA JOURNAL, Vol. 18, No 4 (2007).

3. There may come a point in time when the post third party future benefit entitlement reaches the difference between the gross recovery and the lien (*i.e.*, the employer / carrier has been fully reimbursed). At that point, the claimant is entitled to 100% of future workers' compensation benefits. This point is called "exhaustion." Claimants have the burden of proving they have reached exhaustion, which requires detailed records of entitlements, expenses incurred, losses, etc. A professional bill payer or administrator may assist with this process.

4. The interconnection between personal injury and workers' compensation cases can drastically effect the settlement value of a workers' compensation claim. The theory behind this process is that a workers' compensation claimant who also has a personal injury case should only be allowed "one full recovery." *Dale v. City of Newport News*, 18 Va. App. 800, 447 S.E.2d 878 (1994). Claimants' counsel objective is to maximize claimants' recovery.

> a. In addition to a workers' compensation claim, claimants may have an opportunity to pursue claims for Social Security Disability, Medicare, Supplemental Security Income, Medicaid, long term disability, retirement disability, unemployment claims, FMLA claims, ADA claims, wrongful termination claims, discrimination claims, medical malpractice claims, legal malpractice claims, product liability claims, etc. Lawyers handling such claims should coordinate with workers' compensation counsel.

CHOICE OF FORUM

1. Counsel needs to be aware of the law not only in their own state, but also of the interplay between the state's law where the claimant resides and the law in other jurisdictions that might be relevant. With respect to the workers' compensation claim, the injured worker may have the option of filing claims in multiple states. *See* Andrew Reinhardt, *Conflicts of Law: Maximizing*

your Recovery When Handling Workers' Compensation Cases Involving Multiple Jurisdictions, WORKERS' FIRST WATCH (Fall 2007). The venue for filing the workers' compensation claim might impact the "total recovery," allowing a maximum recovery not possible by a poor choice of forum.

2. Occasionally, workers' compensation claims may be filed in more than one state—at the same time or consecutively. Generally, states allow this practice as long as there is not a duplication of benefits or receipt of more in total benefits that the state hearing the case might allow. *See* Andrew Reinhardt, *Multi-State Workers' Compensation Claims: How to Maximize your Recovery with Consideration of Subrogation Laws when there is a Third Party Case Arising out of the Work Accident,* AMERICAN ASSOCIATION OF JUSTICE CONVENTION (July 2009).

3. Choice of a forum should also take into consideration how each state's workers' compensation laws impact the total recovery between workers' compensation and third party personal injury cases. States have varying rules as to the extent to which the third party lien on the personal injury recovery is reduced by third party attorney's fees and case expenses.

a. In North Dakota the employer is entitled to recover up to the amount of its workers' compensation liability, but the employer is entitled to no more than 50% of the total third party recovery. N.D. Cent. Code § 65-01-09 (2009).

b. In some states, the employer's entitlement to reimbursement or lien payback varies depending on whether the employer had fault. In Delaware, the amount due to the employer under the subrogation statute can be reduced by the percentage of the jury's finding of the employer's negligence in causing the incident. *Delaware v Foley,* 2007 WL 4577626 (Del. Super. Ct. 2007).

c. In Georgia, if the third party recovery does not fully and completely compensate the claimant for all losses, the employer is not entitled to any lien recovery against the third party case. *CGU Insurance Co. v Sabel Industries, Inc.*, 564 S.E.2d 836, 838, 255 Ga. App. 236, 239 (Ga. Ct. of App. 2002).

d. States also vary on whether the lien attaches to pain and suffering or consortium against an uninsured or uninsured motorist policy or against a medical malpractice or wrongful death claim, etc.

D. WORKPLACE ISSUES

1. When accidents occur in the workplace resulting in temporary or permanent disabilities to employees, employers must pay for all necessary medical expenses and provide income replacement benefits pursuant to workers' compensation laws. In the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 *et seq.* and 29 C.F.R. § 1630 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* and 29 C.F.R. § 825.100 *et seq.*, employers have additional obligations relating to employees who suffer from serious medical conditions and disabilities, including those resulting from occupational injuries.

2. Since workers' compensation laws, the ADA and FMLA have different objectives, apply different standards in defining the scope of coverage, and provide different remedial schemes, responding to work-related injuries can be complicated.

a. 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,

while 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 his or her job.

b. Employers must determine (1) whether workers' compensation covers an employee's injury, (2) whether the employee's condition constitutes a "disability" under the ADA, and (3) whether the employee suffers from a "serious health condition" under the FMLA.

BASIC ELEMENTS - AMERICANS WITH DISABILITIES ACT

1. The ADA applies to employers with 15 or more employees. It prohibits discrimination on the basis of physical or mental disabilities, and requires reasonable accommodations that enable qualified individuals with a disability to work. 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).

2. A qualified individual with a disability is one who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and can perform the 'essential functions' of such position with or without reasonable accommodation. 29 C.F.R. §1630.2 (m).

BASIC ELEMENTS - FAMILY AND MEDICAL LEAVE ACT

1. The FMLA applies to employers with 50 or more employees. Employees who have worked for a covered employer for at least 12 months; logged at least 1,250 hours during the 12 months preceding the leave; and work at a location where there are at least 50 employees within 75 miles, are eligible for up to 12 weeks of leave in a 12-month period 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 The FMLA guarantees employees the right to return to work following protected leave. 29 U.S.C. 2612(a)(1). (The FMLA's military family leave provisions entitle employees to leave for qualifying exigencies arising from foreign deployment of a servicemember, and up to 26 weeks of leave to care for a seriously injured servicemember who is the spouse, son, daughter, parent or next of kin of an employee.)

2. The 12-month period in which 12 weeks of leave can be taken may be defined by the calendar year; any fixed 12-month period; 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). Under certain conditions, employees may choose, or employers may require employees, to use accrued paid leave to cover the FMLA leave period. *See* 29 U.S.C. § 2612(b); 29 C.F.R. § 825.207.

3. The FMLA protects not only employees suffering from prolonged periods of incapacity, but also those whose medical problems occasionally incapacitate them. *Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3rd Cir. 1997). Employees may take FMLA leave on an intermittent or reduced schedule basis, reducing working time each day or week. 29 C.F.R. § 825.202. When leave is needed for planned medical treatment, employees must attempt to schedule treatment to avoid unduly disrupting employer operations.

4. Upon return from FMLA leave, employees must be restored to their original or an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. 29 C.F.R. § 825.214. Employers are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave. 29 C.F.R. § 825.209. Under a "no-fault" leave policy, an employer cannot discipline an employee for excessive absenteeism if the missed time includes FMLA-covered absences. 29 C.F.R. § 825.220(c). *See Sahadi v. Per-Se Techs., Inc.*, 280 F. Supp. 2d 689, 699 (E.D. Mich. 2003) (FMLA leave cannot be counted under 'no fault' attendance policies or used as negative factor in employment).

BASIC ELEMENTS - STATE WORKERS' COMPENSATION LAWS

1. Generally, workers' comp laws require that employers treat claimants no worse than other employees who miss work because they are unable to work.

2. The "exclusive remedy doctrine" establishes workers' compensation benefits as an injured worker's only remedy against the employer, presumably assuring employers of immunity from litigation and other types of damages.

3. The ADA and FMLA preempt state workers' compensation laws, and hence the exclusive remedy doctrine does not bar claims under those laws. EEOC Workers' Compensation Guidance, Q&A No. 30. *See Steiner v. Verizon Wireless*, No. 2:13-CV-1457-KJN PS, 2014 WL 1922734, at *4 (E.D. Cal. May 14, 2014), *aff'd* (Apr. 13, 2015) (courts hold that ADA claims are not subject to exclusive remedy provision of California's workers' compensation scheme).

DEFINING CONDITIONS COVERED BY THE LAWS - ADA

1. Under the ADA, an "individual with a disability" is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.

2. Unless employment of a person poses a "direct threat" – *i.e.*, a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation, based upon a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability – an employer cannot refuse to employ a person because it assumes, correctly or incorrectly, that a disability poses an increased risk of occupational injury and increased workers' compensation costs.

DEFINING CONDITIONS COVERED BY THE LAWS - FMLA

1. A "serious health condition" is an 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)(1), (2). Continuing treatment includes a period of incapacity of more than three consecutive days, and subsequent treatment involving two or more visits within 30 days, or a regimen of continuing treatment. 29 C.F.R. § 825.115(a).

2. A chronic serious health condition must continue over an extended period of time. 29 C.F.R. § 825.115(c)(2). A three-year duration for a condition clearly constitutes an extended period of time, but chronic illnesses must continue for more than a few weeks, and a condition lasting for one month does not satisfy the "extended period of time" requirement. *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149, 154 (3d Cir. 2015).

DEFINING CONDITIONS COVERED BY THE LAWS - 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 they are 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. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 1.

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.

3. Not every worker who files a workers' compensation claim necessarily is has a disability under the "record of" portion of the ADA, unless the worker has a history of, or has been misclassified as having, a mental or physical impairment that qualifies as a disability under the ADA.

4. A worker's compensation injury can qualify as a serious health condition under the FMLA, entitling a worker up to twelve weeks of leave in any twelve-month period and reinstatement. 29 C.F.R. § 825.200(a). An employee's FMLA leave may run concurrently with a workers' compensation absence when the injury is one that meets the FMLA criteria for a serious health condition. 29 C.F.R. § 825.207(d)(2).

NOTICE OF RIGHTS - FMLA

1. Employers must notify employees if workers' compensation absences will count against the 12-week leave period provided under the FMLA. 29 C.F.R. § 825.300(b). Employers must post a mandated notice of FMLA rights. 29 C.F.R. § 825.300(a). An employer that fails to post the notice cannot deny FMLA leave based on an employee's failure to furnish advance notice of the need for FMLA leave. *See Tornberg v. Bus. Interlink Servs., Inc.*, 237 F. Supp. 2d 778, 785 (E.D. Mich. 2002) (regulations estop non-posting employer from taking adverse action against employee who fails to notify employer of need for leave).

2. Employees need not expressly mention the FMLA to comply with their obligation to provide notice of their covered leave. 29 C.F.R. § 825.301(b). *See Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 816 (7th Cir. 2015). A request for leave for a covered reason, shifts to employer obligation to request information it might require. *Robinson v. Overnite Transportation Co.*, 1997 U.S. App. LEXIS 6574 (4th Cir. 1997) (employer's duty to provide employee with specific notice of rights and obligations triggered when employee provides notice of need for leave). *But see Lanier v. Univ. of Texas Sw. Med. Ctr.*, 527 F. App'x 312, 316 (5th Cir. 2013), *citing Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998) (employer may have duty to inquire further if employee statements warrant, but employer is not required to be clairvoyant).

INQUIRIES ABOUT MEDICAL CONDITIONS AND MEDICAL EXAMINATIONS - ADA

1. Employers may not ask questions about applicants' prior workers' compensation claims or occupational injuries until after making a conditional offer of employment, and then only as long as the same questions are asked of all applicants in the same job category. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 4. Nor may information be obtained from third

parties that could not be asked of applicants. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 6.

2. Employers may require medical examinations to obtain information about applicants' prior occupational injuries only after conditional offers of employment, as long as required of all applicants in the same job category. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 5.

3. Medical examinations and/or inquiries are permitted only when job-related, consistent with business necessity, and related to employees' ability to perform job-related functions. 29 C.F.R. § 1630.10

4. Information relating to medical conditions or history 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), even if someone is no longer an applicant or employee. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 10.

5. If an employer reasonably believes an occupational injury might impair an employee's ability to perform essential job functions or pose a direct threat to the employee or others, inquiry about the occupational injury and its effect on the employee's ability may be made after a work-related injury. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 7.

6. When necessary to ascertain the extent of workers' compensation liability, the ADA does not prohibit an employer or its insurance carrier from asking disability-related questions or requiring medical examinations that are consistent with the state law's intended purpose of determining 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. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 8.

INQUIRIES ABOUT MEDICAL CONDITIONS AND MEDICAL EXAMINATIONS - 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 who 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(b), (c).

REASONABLE ACCOMMODATIONS - ADA

1. Reasonable accommodations generally involve changes in the work environment, or in the way things are customarily done. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002). Reasonable accommodations may involve: restructuring a position by redistributing marginal functions that an individual cannot perform because of a disability; changes to the work environment; providing modified scheduling (including part time work); temporary absence; or reassignment to a vacant position.

2. If an employee cannot perform the essential functions of a given position, with or without the aid of an accommodation, and there is no vacant position available for reassignment, the employee is not qualified. *See Patty S. Saul, Complainant*, EEOC DOC 01970693, 2001 WL

528730, at *5 (May 10, 2001) (Rehabilitation Act: employer not required to create position to fit disabled individual's medical restrictions, or to consider part-time work where such an accommodation required employer to create position consisting of the duties complainant sought to perform; only requirement is to offer reassignment to vacant position for which individual qualifies). *Gratzl v. Office of Chief Judges of 12th, 18th, 19th & 22nd Judicial Circuits*, 601 F.3d 674, 680 (7th Cir. 2010) ((employer not required to strip a job of its principal duties to accommodate disabled employee).

3. An employer may provide an accommodation that requires an employee to remain at work, (*e.g.*, reallocating marginal functions, or providing temporary reassignment) in lieu of providing leave.

4. 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. An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation – *i.e.*, one that is sufficient to meet the employee's job-related needs.

5. Since the ADA covers only qualified individuals with a disability – and defines such persons as those able to perform essential job functions with or without a reasonable accommodation – individuals who require leave because they cannot perform their duties may not be covered by the ADA at all.

6. Some federal courts have rejected claims demanding leave as an accommodation, reasoning that regular attendance is an essential job function, and a person who cannot meet attendance requirements is not a qualified individual with a disability. Courts have also rejected ADA claims involving absenteeism because imposing lenient absenteeism standards would create an undue hardship. *See, e.g., Severson v. Heartland Woodcraft, Inc.*, No. 15-3754, 2017 WL 4160849, at *1–5 (7th Cir. Sept. 20, 2017) ("If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term "reasonable accommodation."); *Kazmierski v. Bonafide Safe & Lock, Inc.*, 223 F. Supp. 3d 838, 849–50 (E.D. Wis. 2016) (jury could not reasonably conclude that up to five unanticipated absences per month was reasonable).

7. More moderate leave requests have not been rejected, 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).

8. An employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 25.

9. 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. 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.

10. An employer may not refuse to return disabled employees to work because of workers' compensation determinations that they have permanent or total disabilities because workers' compensation laws use different standards for evaluating whether an individual has a disability or is capable of working. Workers' compensation determinations are never dispositive regarding ability to return to work, but may provide relevant evidence regarding ability to perform essential functions or to return to work without posing a direct threat. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 15.

LIGHT DUTY - ADA

1. The obligation under the ADA to offer a reasonable accommodation to a disabled individual may complement employer obligations and strategies for stemming workers' compensation costs: 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" while a worker is recovering from an injury.

2. Light duty work is less demanding than normal job duties and generally serves as a temporary transition for employees recovering from an occupational injury. Light duty assignments might excuse employees from performing job functions they are disabled from doing, or might involve specific, sedentary job classifications that require less in the way of physical abilities. Employers are not required to offer light duty work, but offers of light duty must be equitably made. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 27. *See Wade v. Brennan*, 647 Fed. Appx. 412. (May 2, 2016) (for requested accommodation of reassignment to be reasonable, position must exist and be vacant; ADA does not require employer to create a position, including a permanent position involving only light duty). *Delgado v. Certified Grocers Midwest, Inc.* 282 Fed. Appx. 457 (7th Cir. June 23, 2008)(employer not required to create permanent light-duty position to accommodate employee).

3. Employers do not have to create a new position to provide a reasonable accommodation, but if a disabled employee requests to return to work in a light-duty capacity as an accommodation, EEOC maintains the employer may need to consider such a request. According to EEOC, if an employer routinely offers light duty positions to employees on workers' compensation, and there is such a position vacant, the employee needing the accommodation might have to be considered since in some cases, the only effective reasonable accommodation available for an individual with a disability may be a light duty position, unless providing light duty would impose an undue hardship. EEOC WORKERS' COMPENSATION GUIDANCE, Q&A No. 28. *But see Dalton v. Subaru-Isuzu*, 141 F.3d 667 (7th Cir. 1998) (employer may reserve light-duty positions for temporarily disabled employees, rejecting claim that ADA compels employer to reduce number of temporary jobs it has set aside to provide permanent light duty as accommodation).

LIGHT DUTY - FMLA

1. If an employee qualifies for leave under the FMLA, an employer may not require him to remain on the job with an adjustment in lieu of taking a leave of absence. 29 C.F.R. § 825.702(d)(1). 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. 29 C.F.R. § 825.702(d)(2). *See also* 29 C.F.R. 825.207(e). But 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).